CHAPTER 2

OTHER CONTRACTS OF THE UTMOST GOOD FAITH

2.01 It is instructive to consider other contracts which have been marked with the brand of *uberrima fides*, either with a view to discovering the essence or purpose of the duty as applied to insurance contracts or to provide a source for comparison as we analyse insurance law in this respect. While the purpose of the duty is fairly settled, albeit not universally convincing with respect to all shades of the duty, it is difficult to find a single thread which runs its way through all the other contracts of the same ilk. It seems that the various contracts which we shall discuss have developed the notion of the utmost good faith for their own purposes and not with any adherence to a grander design.[1]

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ORDINARY CONTRACTS AND CONTRACTS UBERRIMAE FIDEI COMPARED

2.02 This work is dedicated to a discussion of the effect of the duty of good faith on the relationship created during the negotiations leading to and by the issuance of an insurance policy. The duty in this context has received substantial judicial attention and, consequently, the law surrounding the obligation to employ good faith has developed to an extent achieving some sophistication. This is particularly so in recent years, where the circulation of information has been increased exponentially by the improvement in and innovation of computer and electronic exchange systems.

2.03 However, one should not neglect the fact that the notion of good faith is relevant, to some degree or other, to all contracts; at the very least, the parties will be obliged to refrain from fraudulent conduct. However, it is now well established that parties cannot bind themselves with an obligation to negotiate a contract in good faith,[2] except by entering into a contract of the utmost good faith. There are other classes of contracts where the duty of good faith, or at least manifestations of it (notably, the duty of full disclosure), is applicable, moulded to fit the circumstances of the relationship created by the contract.[3]

2.04 Good faith insists on fair and open dealing between all contracting parties. As misrepresentation is proscribed in relation to all contracts, it is not surprising that the issue

1. Spencer Bower, Turner and Sutton, *The Law Relating to Actionable Non-Disclosure*, 2nd edn (1990, Butterworths), para 5.05.

2. *Walford* v *Miles* [1992] AC 128; distinguished in *Lambert* v *HTV Cymru (Wales) Ltd* [1998] EMLR 629. See also Beatson and Friedmann (ed.), *Good Faith and Fault in Contract Law* (1995).

3. In respect of contracts for the sale of land, while *caveat emptor* occasionally is brutally applied, the vendor is subject to a duty to disclose all defects in title to the property being sold. It is submitted however that this is not a duty of good faith as such, but merely an exigency created by the contract itself, by which the vendor agrees to sell his title without any defects. See, for example, *Rignall Developments Ltd* v *Halil* [1988] Ch 190. See also Spencer Bower, Turner and Sutton, *The Law Relating to Actionable Non-Disclosure*, 2nd edn (1990, Butterworths), ch. VII.

of *uberrima fides* most commonly arises in connection with mere lapses in disclosure by one of the parties to a contract. If a contract can be said to be one of the utmost good faith, the law will demand a higher degree of candour for such a contract than an ordinary commercial contract. Conventional contracts[4] will respect the principle of *caveat emptor*, whereby each party may negotiate with one another and may play their cards[5] close to their chest by carefully selecting what is and what is not revealed to his counterpart.[6] That is, there is no general duty of disclosure shouldered by a contracting party, even though holding back the ace may seem to be morally blameworthy.[7] However, when a card is played, it should be openly played for all at the table to see. No part of the card should be concealed or used to misrepresent the hand. It is at this point that the divisions of the law become blurred, when even in the realm of ordinary commercial contracts, the concealment of a fact coupled with a positive representation or misleading conduct may give rise to an actionable misrepresentation.[8] Similarly, a representation which is true at the time of its utterance may cease to be true; the failure to disclose this change may give rise to a misrepresentation.[9] It is an open question whether there is a cause of action, where a party is aware that the other party is labouring under a misapprehension as to a material fact.[10] It appears that, under an ordinary contract, a party will comply with his duty merely by not being dishonest, as opposed to being open and candid.

2.05 Contracts of the utmost good faith, on the other hand, require honesty and full disclosure. Relief is obtainable from the courts in the event of a non-disclosure occasioned by fraud, negligence or ordinarily excusable absent-mindedness. It is therefore important to be able to classify a contract as one of the utmost good faith or at least displaying some

4. Such as contracts for the sale of goods: *Jewson & Sons Ltd* v *Arcos Ltd* (1932) 39 Com Cas 59. Sales contracts, however, import obligations and rights which depend on the exercise of good faith. See also Beatson and Friedmann (ed.), *Good Faith and Fault in Contract Law* (1995); Harrison, *Good Faith in Sales* (1997), ch. 1.

5. As to this metaphor, see *The Litsion Pride* [1985] 1 Lloyd's Rep 437, 511 (*per* Hirst, J); Gilman (ed.), *Arnould's Law of Marine Insurance and Average*, 17th edn (2008), para 18-11, continued by M A Clarke, *The Law of Insurance Contracts*, 6th edn (2009), para 30-6A.

6. *North British Insurance Company* v *Lloyd* (1854) 10 Exch 523; 156 ER 545; *Walters* v *Morgan* (1861) 3 De G F & J 718; *Lee* v *Jones* (1864) 17 CB (NS) 482, 509–510; 144 ER 194, 205 (*per* Crompton, J); *Ionides* v *Pender* (1874) LR 9 QB 531, 537 (*per* Blackburn, J); *Davies* v *London and Provincial Marine Insurance Company* (1878) 8 Ch D 469, 474 (*per* Fry, J); *Brownlie* v *Campbell* (1880) 5 App Cas 925, 954 (*per* Lord Blackburn); *Piper* v *Royal Exchange Assurance* (1932) 44 Ll L Rep 103, 117 (*per* Roche, J); *Bell* v *Lever Bros Ltd* [1932] AC 161, 224, 227 (*per* Lord Atkin); *Haase* v *Evans* (1934) 48 Ll L Rep 131, 146 (*per* Avory, J); *Banque Financière de la Cité* v *Westgate Insurance Co Ltd (sub nom Banque Keyser Ullman SA* v *Skandia (UK) Insurance Co Ltd)* [1987] 1 Lloyd's Rep 69, 93 (*per* Steyn, J); [1989] 2 All ER 952, 988–990, 1010 (*per* Slade, LJ); *Yona International Ltd* v *La Réunion Française Société Anonyme d'Assurances et de Réassurances* [1996] 2 Lloyd's Rep 84, 106–107 (*per* Moore-Bick, J).

7. *Fox* v *Mackreth* (1791) 2 Cox Eq Cas 320; *Smith* v *Hughes* (1871) LR 6 QB 597.

8. *Walters* v *Morgan* (1861) 3 De G F & J 718; *Tradax Export SA* v *Dorada Cia Naviera SA; The Lutetian* [1982] 2 Lloyd's Rep 140, 158 (*per* Bingham, J). *Cf Banque Financière de la Cité* v *Westgate Insurance Co Ltd (sub nom Banque Keyser Ullman SA* v *Skandia (UK) Insurance Co Ltd)* [1989] 2 All ER 952, 1000–1003 (*per* Slade LJ). See below 7.24–7.36.

9. *Traill* v *Baring* (1864) 4 De G J & S 318, 329–330; 46 ER 941, 946; *Davies* v *London and Provincial Marine Insurance Company* (1878) 8 Ch D 469, 475 (*per* Fry, J); *Brownlie* v *Campbell* (1880) 5 App Cas 925, 950 (*per* Lord Blackburn); *With* v *O'Flanagan* [1936] Ch 575.

10. *Hill* v *Gray* (1816) 1 Stark NPC 434; *Pilmore* v *Hood* (1838) 5 Bing NC 97; 132 ER 1042; *contra Keates* v *Earl Cadogan* (1851) 10 CB 591, 600 (*per* Jervis, CJ); *Peek* v *Gurney* (1873) LR 6 HL 377, 390–391 (*per* Lord Chelmsford). *Hill* v *Gray* was referred to without comment in *Said* v *Butt* [1920] 3 KB 497, 503. In such a case, there may have to be resort to the doctrine of mistake, rather than misrepresentation (see Beale (ed.), *Chitty on Contracts*, 30th edn (2008), para 5-074). Where there has been a misapprehension of the identity of a contracting party, and his identity is material, the doctrine of mistake often is invoked to set aside the contract: *Smith* v *Wheatcroft* (1878) 9 Ch D 223, 230 (*per* Fry, J); *Said* v *Butt* [1920] 3 KB 497.

attributes of such a contract.[11] Whether the contract in question may be so classified depends upon the "substantial character" of the contract and "how it came to be effected".[12]

2.06 The rationale of the duty of the utmost good faith in insurance contracts will be discussed presently.[13] For present purposes, it is sufficient to note that the traditionally acknowledged inequality of the knowledge of the assured and the insurer justified the introduction of the duty of full disclosure.[14] In *In re Denton's Estate*,[15] the court looked at the sources of information concerning the contractual risk available to both parties to decide that the contract before it was not one of insurance, but rather a guarantee. However, such an approach ignores that there have been other bases for imposing a duty of disclosure on the parties to a particular contract. For example, the law requires full disclosure from persons who are in a position of trust or in a fiduciary relationship *vis-à-vis* another person, such as partners or trustees or solicitors.[16] Further, an obligation of disclosure may arise when the circumstances are such that the presumed or expected basis of the relationship or contract does not exist or is altered.[17]

2.07 These have been the principles underlying the imposition of a duty of disclosure in particular instances of unfairness and the law has responded accordingly but has not overstretched itself to introduce any all-embracing principle calling for "fair and open dealing".[18] In fact, the law now seems opposed to the introduction of any extension of the common law duty of disclosure outside the traditional categories.[19] It is therefore of consequence that a contract is properly classified to determine whether the contract attracts a duty of disclosure and the extent of that duty.[20]

11. We have considered the importance of classifying a contract as one of insurance: See above 1.18–1.28.

12. *Seaton* v *Heath* [1899] 1 QB 782, 792 (*per* Romer, LJ). See also *In re Denton's Estate* [1904] 2 Ch 178, 188–190 (*per* Vaughan Williams, LJ), 193 (*per* Stirling, LJ), 195 (*per* Cozens-Hardy, LJ).

13. See below 3.31–3.40.

14. *London General Omnibus Company Limited* v *Holloway* [1912] 2 KB 72, 86 (*per* Kennedy, LJ); *Banque Financière de la Cité* v *Westgate Insurance Co Ltd (sub nom Banque Keyser Ullman SA* v *Skandia (UK) Insurance Co Ltd)* [1987] 1 Lloyd's Rep 69, 93 (*per* Steyn, J); [1989] 2 All ER 952, 988–990 (*per* Slade, LJ); *Bank of Nova Scotia* v *Hellenic Mutual War Risks Association (Bermuda) Ltd; Good Luck* [1988] 1 Lloyd's Rep 514, 547 (*per* Hobhouse, J); [1989] 2 Lloyd's Rep 238, 264 (*per* May, LJ).

15. [1904] 2 Ch 178, 188 (*per* Vaughan Williams, LJ).

16. It is interesting to note that partnership contracts are considered as contracts *uberrimae fidei*, whilst trust deeds, agency agreements and solicitors' retainers are not so classified: *Davies* v *London and Provincial Marine Insurance Company* (1878) 8 Ch D 469, 474 (*per* Fry, J); *Bell* v *Lever Bros Ltd* [1932] AC 161, 227–228 (*per* Lord Atkin), 232 (*per* Lord Thankerton). The latter attract duties of disclosure as an incident of the fiduciary duty.

17. This is so in the case of guarantees and sureties: *Hamilton* v *Watson* (1845) 12 Cl & Fin 109, 119 (*per* Lord Campbell); *Lee* v *Jones* (1864) 17 CB (NS) 482, 501; 144 ER 194, 202 (*per* Shee, J), 503–504, 203 (*per* Blackburn, J); *London General Omnibus Company Limited* v *Holloway* [1912] 2 KB 72, 77–79 (*per* Vaughan Williams, LJ); *Bell* v *Lever Bros Ltd* [1932] AC 161, 225 (*per* Lord Atkin); *Crédit Lyonnais Bank Nederland* v *Export Credit Guarantee Department* [1996] 1 Lloyd's Rep 200, 226–227 (*per* Longmore, J); affd [1998] 1 Lloyd's Rep 19. This basis also has been relied upon to extend the duty of disclosure to binding authorities granted to insurance brokers: *Pryke* v *Gibbs Hartley Cooper Ltd* [1991] 1 Lloyd's Rep 602, 616 (*per* Waller, J); *cf L'Alsacienne Première Société* v *Unistorebrand International Insurance AS* [1995] LRLR 333, 349 (*per* Rix, J); *cf Geest plc* v *Fyffes plc* [1999] 1 All ER (Comm) 672.

18. *Cf Interfoto Picture Library Ltd* v *Stiletto Visual Programmes Ltd* [1989] 1 QB 433, 439 (*per* Bingham, LJ); *Agnew* v *Länsförskäkringsbolagens AB* [2001] AC 223, 265 (*per* Lord Millett); *Director General of Fair Trading* v *First National Bank plc* [2001] UKHL 52; [2002] 1 AC 481, [17] (*per* Lord Bingham), [31–32] (*per* Lord Steyn); *Dymocks Franchise Systems (NSW) Pty Ltd* v *Todd* [2002] UKPC 50; [2002] 2 All ER (Comm), 849, [54].

19. *Bank of Nova Scotia* v *Hellenic Mutual War Risks Association (Bermuda) Ltd; Good Luck* [1988] 1 Lloyd's Rep 514, 546–550 (*per* Hobhouse, J); [1989] 2 Lloyd's Rep 238, 271–273; *Banque Financière de la Cité* v *Westgate Insurance Co Ltd (sub nom Banque Keyser Ullman SA* v *Skandia (UK) Insurance Co Ltd)* [1989] 2 All ER 952; [1990] 2 All ER 947; *L'Alsacienne Première Société* v *Unistorebrand International Insurance AS* [1995] LRLR 333, 349 (*per* Rix, J); *cf Pryke* v *Gibbs Hartley Cooper Ltd* [1991] 1 Lloyd's Rep 602, 616 (*per* Waller, J).

20. For example, the duty of disclosure in insurance contracts has been said to extend to extrinsic circumstances concerning the commercial or external background to the contract, whereas the duty of disclosure in respect of

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2.08 At this juncture, we shall examine the particular categories of contracts which are said to require a positive duty of disclosure of the parties, and not just a duty to refrain from misrepresentation.

GUARANTEE/SURETY

2.09 Contracts of surety or guarantee[21] are not strictly contracts of the utmost good faith in the manner of insurance contracts,[22] because both parties are regarded as being generally aware of the facts which give rise to the need for the guarantee, the creditor for whose benefit the surety is provided does not himself usually seek out the guarantor[23] and the surety may often be said to be put on inquiry as to the factors affecting the transaction,[24] such as the credit, state and history of the debtor's account with the creditor,[25] and previous defaults and dishonours by the debtor.[26] The general position is often stated to be that the creditor bears no duty of disclosure to the surety.[27] It is certainly the case that the creditor must answer truthfully any questions put to him by the surety[28] and must correct any misunderstanding under which he knows the surety is labouring.[29]

2.10 Nevertheless, there is a duty of disclosure (of some facts) which is incumbent upon the parties to such contracts, particularly the recipient or beneficiary of the guarantee. The disclosure required is not as extensive as the disclosure necessary in the context of insurance. Whilst the contract is not said to be *uberrimae fidei*, the fact that disclosure of certain facts

sureties is said to extend only to intrinsic cirumstances which envelop the "ingredients" of the contract, namely the expected or anticipated nature of the contract: *London General Omnibus Company Limited* v *Holloway* [1912] 2 KB 72, 85–6 (*per* Kennedy, LJ); *Bell* v *Lever Bros Ltd* [1932] AC 161, 221 (*per* Lord Atkin).

21. Here, the terms are used interchangeably. As to the position under Scots law as regards contracts of caution, see *Smith* v *Governor and Company of the Bank of Scotland*, *The Times*, 23 June 1997.

22. See *North British Insurance Company* v *Lloyd* (1854) 10 Exch 523; 156 ER 545; *Wythes* v *Labouchere* (1859) 3 De G & J 593, 609–610; 44 ER 1397, 1404 (*per* Lord Chelmsford, LC). See also *Davies* v *London and Provincial Marine Insurance Company* (1878) 8 Ch D 469, 475 (*per* Fry, J); *Seaton* v *Heath* [1899] 1 QB 782, 792–793 (*per* Romer, LJ); *Bank of Nova Scotia* v *Hellenic Mutual War Risks Association (Bermuda) Ltd; Good Luck* [1988] 1 Lloyd's Rep 514, 549 (*per* Hobhouse, J); *Pryke* v *Gibbs Hartley Cooper Ltd* [1991] 1 Lloyd's Rep 602, 616 (*per* Waller, J); *L'Alsacienne Première Société* v *Unistorebrand International Insurance AS* [1995] LRLR 333, 349 (*per* Rix, J). Surprisingly, the question was left open by the Privy Council in *Mackenzie* v *Royal Bank of Canada* [1934] AC 468, 475 (*per* Lord Atkin). Even more surprising are the authorities which suggest that the contract of suretyship are *uberrimae fidei* on a footing level with insurance contracts: *March Cabaret Club & Casino Ltd* v *The London Assurance* [1975] 1 Lloyd's Rep 169, 175 (*per* May, J) and *Wales* v *Wadham* [1977] 2 All ER 125, 139 (*per* Tudor Evans, J); *Banque Financière de la Cité* v *Westgate Insurance Co Ltd (sub nom Banque Keyser Ullman SA* v *Skandia (UK) Insurance Co Ltd)* [1987] 1 Lloyd's Rep 69, 93 (*per* Steyn, J). As to the distinction between contracts of insurance and guarantee (which are often underwritten by insurance contracts), see, for example, *Anglo-Californian Bank Ltd* v *London and Provincial Marine and General Insurance Co Ltd* (1904) 10 Com Cas 1. Legh-Jones (ed.), *MacGillivray on Insurance Law*, 11th edn (2008), paras 17-94–17-96, suggests that the distinction lay in the fact that the insurance policy is procured by the creditor without the intervention of the debtor, whereas the contract of guarantee is "engaged by the debtor". This, however, is not always the case and does not explain the character of policies arranged by the debtor at the request of the creditor, such as mortgage indemnity policies.

23. *Seaton* v *Heath* [1899] 1 QB 782, 792–793 (*per* Romer, LJ).

24. *Wythes* v *Labouchere* (1859) 3 De G & J 593, 610; 44 ER 1397, 1404 (*per* Lord Chelmsford, LC).

25. *Hamilton* v *Watson* (1845) 12 Clark & Fin 109; *National Provincial Bank* v *Glanusk* [1913] 3 KB 335; *Levett* v *Barclays Bank plc* [1995] 1 WLR 1260, 1272; *Cooper* v *National Provincial Bank Limited* [1946] KB 1.

26. *National Provincial Bank* v *Glanusk* [1913] 3 KB 335.

27. *Dunbar Bank plc* v *Nadeem* [1997] 2 All ER 253, 268; *Geest plc* v *Fyffes plc* [1999] 1 All ER (Comm) 672, 683. See also Andrews and Millett, *Law of Guarantees*, 5th edn (2008), para 5.15.

28. *Westminster Bank Ltd* v *Cond* (1940) 46 Com Cas 60, 69.

29. *Davies* v *London and Provincial Marine Insurance Company* (1878) 8 Ch D 469, 475–476 (*per* Fry, J); *Royal Bank of Scotland* v *Greenshields* 1914 SC 259.

may be obligatory is symptomatic of good faith, in the same way that the law of misrepresentation as applied to ordinary contracts may be said to be indicative of good faith.[30] The fact that disclosure is positively required, rather than just a duty not to voice misrepresentations, suggests that the duty is one of the *utmost* good faith, although the designation is not particularly helpful in this regard.

2.11 The duty of disclosure appears to have its firmest foundation in the decision of the House of Lords in *Hamilton* v *Watson*,[31] where the court contemplated the disclosure of facts which normally would not be expected to exist by the surety, although in this case it was held that the pre-existing indebtedness of the debtor to his banker was not unexpected. This decision recognised that there may be an action for non-disclosure in the context of guarantees, even though the non-disclosure was innocent.[32] It has also been held that the creditor need not disclose any matter which concerns the debtor's credit or the manner in which the debtor's account with the creditor has been operated or any matter which is unconnected with the transaction but which renders the transaction more risky.[33]

2.12 The duty of disclosure was put to good use in *Lee* v *Jones*,[34] where the plaintiffs' agent procured a guarantee to the plaintiffs in respect of the agent's dealing with them in the sale of coal on commission. The fact that the agent was indebted to the plaintiffs was held to be a matter which was not naturally expected in the relations created by the suretyship in these circumstances, that is in circumstances not involving a banker's cash credit. Consequently the innocent concealment of that fact was held (in a divided Exchequer Chamber) to have afforded a defence to the surety. It therefore seems to be the case that there are less unexpected aspects of a debtor's account with a bank, than with other types of creditors.[35]

2.13 The duty falls upon the creditor in his dealings with the surety.[36] Where there is no direct communication between the surety and the creditor, the question arises whether the surety might avoid the contract if he is the victim of misrepresentation at the hands of the debtor.[37] The issue appears unresolved, although there is no conceptual reason why the surety should be permitted to dissolve the contract[38] unless the subject-matter of the misrepresentation is such that it should have been disclosed by the creditor in accordance with his duty or if the surety was or ought to have been aware of the misrepresentation.[39]

2.14 Where the line must be drawn between facts which must be disclosed and facts which need not be disclosed is uncertain. It seems that the contract of guarantee is of some delicacy

30. See, for example, the reference to the words of Lord Eldon in *London General Omnibus Company Limited* v *Holloway* [1912] 2 KB 72, 81 (*per* Farwell, LJ). See also *Hutton* v *Rossiter* (1855) 7 De G M & G 9, 23; 44 ER 4, 9 (*per* Turner, LJ).

31. (1845) 12 Clark & Fin 109. See also *Owen* v *Homan* (1851) 3 Mac & G 378, 396–397; 42 ER 307, 314–315 (*per* Lord Truro, LC).

32. Deliberate non-disclosure in respect of a guarantee will constitute fraud, for which an action will lie at law: *Railton* v *Matthews* (1844) 10 Clark & Fin 935; 8 ER 993.

33. See generally *Hamilton* v *Watson* (1845) 12 Clark & Fin 109, 119 (*per* Lord Campbell); *Wythes* v *Labouchere* (1859) 3 De G & J 593, 609–610; 44 ER 1397, 1404 (*per* Lord Chelmsford, LC); *National Provincial Bank* v *Glanusk* [1913] 3 KB 335.

34. (1864) 17 CB (NS) 482; 144 ER 194.

35. Andrews and Millett, *Law of Guarantees*, 5th edn (2008), para 5.19.

36. *Owen* v *Homan* (1851) 3 Mac & G 378, 396–397; 42 ER 307, 314–315 (*per* Lord Truro, LC).

37. *Pidcock* v *Bishop* (1825) 3 B & C 605; 107 ER 857; *Stone* v *Compton* (1838) 5 Bing NC 142; 132 ER 1059; *Owen* v *Homan* (1851) 3 Mac & G 378, 398; 42 ER 307, 315 (*per* Lord Truro, LC). Of course, the contract of suretyship may be upset by a misrepresentation or mistake in accordance with the ordinary law of contract: see Andrews and Millett, *Law of Guarantees*, 5th edn (2008), ch. 5.

38. Andrews and Millett, *Law of Guarantees*, 5th edn (2008), paras 5.9-5.10.

39. *Small* v *Currie* (1854) 2 Drew 102; *Barclays Bank plc* v *O'Brien* [1994] 1 AC 180, 191 (*per* Lord Browne-Wilkinson). *Cf Pilmore* v *Hood* (1838) 5 Bing NC 97; 132 ER 1042. If the circumstances are such that both the surety and creditor have been deceived, then the contract might be set aside on the grounds of mutual mistake,

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in that it will not take much by way of pressure or influence or misrepresentation to upset the surety.[40] The suggested boundary may be found where the non-disclosed fact is one whose existence is inconsistent with the "presumed basis" or normal expectations of the suretyship.[41] In *Levett* v *Barclays Bank plc*,[42] it was held that the fact that the debtor and the creditor had agreed that the debt would be repaid from the proceeds of realising the Treasury stock which the surety had posted by way of security, was a matter which rendered the contract creating the principal debt materially different from that which the surety was entitled to expect and so should have been disclosed.

2.15 In *London General Omnibus Company Limited* v *Holloway*,[43] the failure to reveal the known dishonesty of a servant to whose probity the guarantor was to stand surety was contrary to the very foundation of the contract of guarantee itself; indeed in this case it was regarded of such enormity as to amount to a misrepresentation.[44] The court considered that matters which are not concerned directly with the nature of the relationship between the creditor and debtor, but which bear upon the commercial risks attaching to the surety, need not be disclosed to the surety. Kennedy, LJ summarised the position and the dividing line best:

> "There is apparent, at the outset of the comparison, according to Story's useful discrimination (see Story's Equity Jurisprudence, § 210), the difference between intrinsic and extrinsic circumstances, the first forming the very ingredients of the contract, and the latter forming no part of it, but only accidentally connected with it, or rather bearing upon it, so as to enhance or diminish the price of the subject-matter, or to operate as a motive to make or decline the contract. In regard to such extrinsic circumstances, no class of case occurs to my mind in which our law regards mere non-disclosure as a ground for invalidating the contract, except in the case of insurance."[45]

This perhaps is not the happiest description of the distinction, but it at least promotes the beginning of an understanding of what must be disclosed.[46]

2.16 The question which was not resolved was whether the "intrinsic circumstances" which must be disclosed include unusual aspects of the contract of suretyship which do not lie within the creditor–debtor relationship. In *Crédit Lyonnais Bank Nederland* v *Export Credit Guarantee Department*,[47] Longmore, J relied upon the authority of the High Court of Australia[48] in rejecting the *obiter* remark of Vaughan Williams, LJ in *London General Omnibus Company Limited* v *Holloway*[49] that "every fact which . . . the surety would expect not to exist" should be disclosed. His Lordship held that the creditor is under no duty to disclose facts outside the creditor–debtor relationship, even those matters about which the creditor entertains any suspicions.[50]

depending on the subject-matter of the deceit: see, for example, *Associated Japanese Bank (International) Ltd* v *Crédit du Nord SA* [1989] 1 WLR 255.

40. *Davies* v *London and Provincial Marine Insurance Company* (1878) 8 Ch D 469, 475–476 (*per* Fry, J).

41. *London General Omnibus Company Limited* v *Holloway* [1912] 2 KB 72, 77–79 (*per* Vaughan Williams, LJ), 83 (*per* Farwell, LJ).

42. [1995] 1 WLR 1260.

43. [1912] 2 KB 72.

44. The fidelity of a servant was regarded as a very serious matter: *id.*, 82 (*per* Farwell, LJ). See also *Phillips* v *Foxall* (1872) LR 7 QB 666.

45. *Ibid.*, 85–86.

46. See also *Smith* v *Hughes* (1871) LR 6 QB 597, 604, 606 (*per* Cockburn, CJ), cited in *Bell* v *Lever Brothers Limited* [1932] AC 161, 220–221 (*per* Lord Atkin).

47. [1996] 1 Lloyd's Rep 200, 226–227; affd [1998] 1 Lloyd's Rep 19.

48. *Commercial Bank of Australia Ltd* v *Amadio* (1983) 151 CLR 447, 456 (*per* Gibbs, CJ).

49. [1912] 2 KB 72, 78.

50. *Crédit Lyonnais Bank Nederland* v *Export Credit Guarantee Department* [1996] 1 Lloyd's Rep 200, 227; affd [1998] 1 Lloyd's Rep 19. See also *Hamilton* v *Watson* (1845) 12 Clark & Fin 109, 118–119 (*per* Lord Lyndhurst, LC).

2.17 It therefore seems that the creditor will be bound to disclose to the surety all facts which pertain to the creditor–debtor relationship, and which are materially different from the expected basis of that relationship. The learned judge in *Levett* v *Barclays Bank plc*[51] suggested a further refinement that the duty required disclosure only of those matters "which make the terms of the principal contract something materially different in a potentially disadvantageous respect from those which the surety might naturally expect". In theory, there is no objection to this formulation in that there would be no need for a duty to disclose matters which rendered the arrangement less risky than the surety might suppose. Applying these considerations, the types of matters which should be disclosed might include agreements made between the creditor and the debtor or indeed any third party, such as another creditor, which would render the surety's undertaking more likely to be called upon.[52]

2.18 The House of Lords enunciated the duty in straightforward terms, but without encapsulating the refinements referred to above. In *Royal Bank of Scotland plc* v *Etridge (No. 2)*,[53] Lord Nicholls said "It is a well-established principle that, stated shortly, a creditor is obliged to disclose to a guarantor any unusual feature of the contract between the creditor and the debtor which makes it materially different in a potentially disadvantageous respect from what the guarantor might naturally expect. The precise ambit of this disclosure obligation remains unclear."[54] Lord Scott endorsed the existence of this duty by stating that "the obligation should extend to unusual features of the contractual relationship between the creditor and the principal debtor, or between the creditor and other creditors of the principal debtor, that would or might affect the rights of the surety".[55] Lord Scott also noted that the "would-be surety is . . . expected to acquaint himself with the risk he is undertaking".[56] In *Geest plc* v *Fyffes plc*,[57] Colman, J, however, held that there was no duty of disclosure generally applicable to contracts of guarantee or indemnity and that there was no representation to be implied as to the non-existence of unusual features of the transaction. The judge held that, as in the case of any other type of contract, whether or not there has been an implied representation is a question of fact dependent on an analysis of the contract, the express representations and the conduct of the alleged representor.[58] In the case before Colman, J involving a guarantee agreed as part of a complex transaction following due diligence investigations, the learned judge held that there was no reasonable prospect of an implied representation being found and said: "Once the due diligence had been completed, this was . . . essentially the environment of *caveat emptor*."[59] This suggests that where the beneficiary of the duty of disclosure, such as it is, undertakes a review of the transaction, the necessary consequence may be to reduce the scope of the duty, if not to extinguish it.

2.19 What the surety might expect from a duty of disclosure in any given case will depend on both what he is told and the nature of the transaction before him. For example, it has been said that there is greater scope for the duty of disclosure in respect of fidelity guarantees,

51. [1995] 1 WLR 1260, 1275.

52. For example, see *Pidcock* v *Bishop* (1825) 3 B & C 605; 107 ER 857; *Stone* v *Compton* (1838) 5 Bing NC 142; 132 ER 1059; *Burke* v *Rogerson* (1866) 14 LT 780; *Levett* v *Barclays Bank plc* [1995] 1 WLR 1260.

53. [2001] UKHL 44; [2001] 2 AC 773.

54. *Ibid.*, [81]. Lord Hobhouse noted ([114]) that "contracts of suretyship are not contracts of the utmost good faith. There is no general duty of disclosure".

55. *Ibid.*, [188]. Lord Scott commented that the scope of the duty propounded by King CJ in *Pooraka Holdings Pty Ltd* v *Participation Nominees Pty Ltd* (1991) 58 SASR 184 might be too wide.

56. *Ibid.*, [186].

57. [1999] 1 All ER (Comm) 672, 683.

58. *L'Alsacienne Première Société v Unistorebrand International Insurance AS* [1995] LRLR 333, 349 (*per* Rix, J).

59. [1999] 1 All ER (Comm) 672, 685.

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whereby the surety guarantees the conduct of an individual.[60] The duty is more constrained where the nature of the surety is to guarantee the repayment of cash,[61] especially as regards guarantees given to banks.[62]

2.20 These authorities concentrate on the duties of disclosure which may fall on the shoulders of the creditor prior to the acceptance of the contract of guarantee. There appears to be no support for the proposition that there is a continuing duty of good faith throughout the suretyship; indeed, it is probably correct to say that the duty of disclosure, such as it is, comes to an end when the contract of guarantee is made.

PARTNERSHIPS

2.21 Apart from insurance contracts, the most common contracts of the utmost good faith are partnership agreements.[63] This requires fair dealing by each partner and the observance of the law and honour.[64] A partner is bound to make full disclosure of all facts material to the carrying on of the partnership business[65] during negotiations leading to the formation of or entering the partnership and during the currency of the partnership.[66] Such material facts include matters which arise by virtue of any conflict of interest. Indeed, the obligation is such that a partner must avoid positions which involve such conflicts. This perhaps is not surprising, because at least during the currency of the partnership, partners stand in a fiduciary relationship with each other.[67] The duty of good faith also carries through to the departure of a partner and the dissolution of the partnership.[68]

2.22 The duty of good faith, and indeed the fiduciary duties, in so far as they can be distinguished, permeate the entire relationship and are mutual as between each of the individual partners.[69] Any breach of the duty may result in rescission of the agreement, certainly where there has been a lapse of disclosure at the time of the contract; further, damages may be recoverable for breach of the broader duty, although there is a question whether a failure to disclose will be remediable by damages.[70]

60. *London General Omnibus Company Limited* v *Holloway* [1912] 2 KB 72; *National Provincial Bank* v *Glanusk* [1913] 3 KB 335.
61. *Levett* v *Barclays Bank plc* [1995] 1 WLR 1260. At 1273, Mr Michael Burton, QC (as he was then) suggested that a distinction may also be made in respect of performance guarantees.
62. Andrews and Millett, *Law of Guarantees*, 5th edn (2008), para 5.19.
63. *Bell* v *Lever Brothers Limited* [1932] AC 161, 227 (*per* Lord Atkin); *March Cabaret Club & Casino Ltd* v *The London Assurance* [1975] 1 Lloyd's Rep 169, 175 (*per* May, J) and *Wales* v *Wadham* [1977] 2 All ER 125, 139 (*per* Tudor Evans, J); *Banque Financière de la Cité* v *Westgate Insurance Co Ltd (sub nom Banque Keyser Ullman SA* v *Skandia (UK) Insurance Co Ltd)* [1987] 1 Lloyd's Rep 69, 93 (*per* Steyn, J). See generally R C I'Anson Banks, *Lindley & Banks on Partnership*, 17th edn (2002), paras 16-01–16-11.
64. *Blisset* v *Daniel* (1853) 10 Hare 493.
65. See, for example, *Aas* v *Benham* [1891] 2 Ch 244; *In re Bell's Indenture* [1980] 1 WLR 1217.
66. *Hichens* v *Congreve* (1828) 1 Russ & M 150; *Law* v *Law* [1905] 1 Ch 140; *Conlon* v *Simms* [2006] EWCA Civ 1749; [2008] 1 WLR 484, [127] (*per* Jonathan Parker, LJ): "*there can be no doubt that the principle of caveat emptor does not apply to the making of a partnership agreement, and that in negotiating such an agreement a party owes a duty to the other negotiating parties to disclose all material facts of which he has knowledge and of which the other negotiating parties may not be aware*".
67. *Helmore* v *Smith* (1887) 35 Ch D 436, 444 (*per* Bacon, V-C); *Cassells* v *Stewart* (1881) 6 App Cas 64, 79 (*per* Lord Blackburn); *Thompson's Trustee in Bankruptcy* v *Heaton* [1974] 1 All ER 1239, 1249 (*per* Pennycuick, V-C). Halsbury, *Laws of England*, appears to cast a pall of uncertainty over this proposition: 5th edn (2008), vol 79, para 106.
68. *Clements* v *Hall* (1858) 2 de G & J 173; *Law* v *Law* [1905] 1 Ch 140.
69. R C I'Anson Banks, *Lindley & Banks on Partnership*, 17th edn (2002), para 16-04.
70. *Ibid.*, para 16-05. See *Trimble* v *Goldberg* [1906] AC 494, 500; *cf Uphoff* v *International Energy Trading*, The Times, 4 February 1989.

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2.23 The duties of good faith which are an incident of partnership are now regulated by the Partnership Act 1890, sections 28–30.

CONTRACTS BETWEEN SPOUSES AND SETTLEMENTS BETWEEN FAMILY MEMBERS

2.24 The particular rules which govern any division or grant of property as between spouses or members of the same family have their origin in an era when society, and no less the law, held firm views as to the position of a man, woman and child within its fabric. Tales of legitimacy[71] and adultery[72] pepper the cases where the rules were developed. There appears to be a duty of full disclosure before any agreement or settlement is reached between spouses or family members. Indeed, the duty has been said to exist at the time of "negotiating"[73] the contract to marry.[74]

2.25 The law presumes that legal relations will not be created between family members unless the contract itself makes it plain that the intention does exist.[75] Therefore, once this presumptive hurdle is crossed, it is not surprising that the law expects the contracting parties to reveal all that is material to the arrangement, lest a dispute arises.

2.26 The status of such contracts was cast into some doubt by Tudor Evans, J in *Wales* v *Wadham*,[76] who rightly failed to see any analogy between a maintenance agreement between a husband and wife and insurance contracts and concluded that because, unlike insurance contracts, no one party had knowledge of all matters to the exclusion of the other, the contract could not be one of *uberrima fides* in the manner of insurance contracts. The learned judge reviewed the authorities and was able to distinguish each on the grounds that the cases dealt with pure misrepresentation, the surrender of rights or matters of procedure before the court.[77] The judge acknowledged that where the jurisdiction of the court was invoked, under the Matrimonial Causes Act 1973,[78] for making orders concerning settlements and financial provision, there was a duty of disclosure when affidavits were to be filed,[79] but decided that the agreement before him imposed no such duty of disclosure because the time for affidavits had not arrived.

2.27 The House of Lords in *Livesey* v *Jenkins*[80] disagreed with this conclusion, holding that there was such a duty of disclosure because the agreement between the spouses was embodied in a consent order made under the 1973 Act. It is clear that when the court's jurisdiction is invoked in this regard, there is a duty, at least to the court, to place all relevant

71. *Gordon* v *Gordon* (1816–1819) 3 Swans 400; *Fane* v *Fane* (1875) LR 20 Eq 698.
72. *Evans* v *Edmonds* (1853) 13 CB 777; 138 ER 1407; *Evans* v *Carrington* (1860) 2 De GF & J 481; 45 ER 707; *Brown* v *Brown* (1868) LR 7 Eq 185.
73. For want of a better word.
74. *Beachey* v *Brown* (1860) El Bl & El 796; 120 ER 706, although in this case there is a suggestion that fraud must be pleaded to make the defence of non-disclosure good (*per* Crompton, J). In this case, Cockburn, CJ held (802, 709) that while one intended spouse should disclose matters affecting his/her financial position, temper and disposition, there was no need to disclose the existence of an existing agreement to marry another!
75. *Balfour* v *Balfour* [1919] 2 KB 571.
76. [1977] 2 All ER 125.
77. *Id.*, 139–143.
78. As amended by Matrimonial and Family Proceedings Act 1984.
79. *Id.*, 140–142. See also *March Cabaret Club & Casino Ltd* v *The London Assurance* [1975] 1 Lloyd's Rep 169, 175 (*per* May, J); *Livesey* v *Jenkins* [1985] AC 424, 439 (*per* Lord Brandon of Oakbrook); *Bank of Credit and Commerce International SA* v *Ali* [1999] 2 All ER 1005, [11–13] (*per* Lightman, J); [2000] 3 All ER 51, [32–33]; [2001] UKHL 8; [2002] 1 AC 251, [69–70] (*per* Lord Hoffmann).
80. [1985] AC 424, 439–440 (*per* Lord Brandon of Oakbrook).

CHAPTER 8

THE EXCEPTIONS TO THE DUTY OF DISCLOSURE AT PLACING

8.01 Even though a circumstance may be material and its concealment may induce the insurer to enter into a contract of insurance, there are occasions where the assured will not be held responsible for the lack of disclosure. These occasions or exceptions are largely encapsulated by section 18(3) of the Marine Insurance Act 1906, which may be taken to represent the state of both marine and non-marine insurance law. The exceptions relate to the assured's duty of disclosure laid down in section 18(1) and are repeated by reference in respect of the broker's duty in section 19(1). The exceptions exist because the non-disclosure of material facts in such cases is not seen as detracting from the purpose of the duty of disclosure,[1] namely to redress the imbalance of knowledge available to the assured and the insurer when they are negotiating terms, which imbalance itself might increase the risk of financial loss to the insurer.

8.02 The fact that an exception is applicable does not render the fact in question immaterial[2]; it is merely an excuse not to disclose the fact to the insurer, effectively because its disclosure is not required to fulfil the purpose of the duty of disclosure at placing. As Lord Mustill said in *Pan Atlantic Insurance Co Ltd* v *Pine Top Insurance Co Ltd*[3]:

> "The significance of these exceptions [in section 18(3)] is that they were not written back by Lord Mansfield into his definition of materiality, but were aimed at the duty of disclosure and the consequences of failing to perform it. This is what one would expect. 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."

8.03 The exceptions which will be discussed below are those set out in section 18(3) of the 1906 Act, namely:

(a) any circumstance which diminishes the risk;
(b) any circumstance which is known or presumed to be known to the insurer. The insurer is presumed to know matters of common notoriety or knowledge, and matters which an insurer in the ordinary course of his business, as such, ought to know;
(c) any circumstance as to which information is waived by the insurer;
(d) any circumstance which it is superfluous to disclose by reason of any express or implied warranty.

In addition, other possible exceptions will be considered, namely:

1. See above 3.31–3.40.
2. *Container Transport International Inc* v *Oceanus Mutual Underwriting Association (Bermuda) Ltd* [1984] 1 Lloyd's Rep 476, 511 (*per* Parker, LJ).
3. [1994] 2 Lloyd's Rep 427, 442.

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(e) where the non-disclosure of the fact might be excused on the grounds of a duty which is inconsistent with the duty of disclosure; and
(f) where the assured is statutorily excused from disclosing the information; and
(g) where the material information comes too late to be communicated to the broker.

8.04 Before embarking upon an examination of these exceptions, it should be noted that in their pure form, they represent exemptions from the obligation to disclose to the insurer material facts. Accordingly, before the exceptions are relevant, there must be a duty to disclose. Further, these exceptions[4] do not grant the assured a licence to misrepresent material facts. The existence of the exception may reduce the scope of the duty not to misrepresent material facts; but they will not excuse material misstatements. For example, if the assured is guilty of a misrepresentation, which induced the making of a contract, the assured will not be permitted to defend his action by arguing that the insurer had the means of knowledge available to rectify the misconception created by the assured's misstatement.[5] On the other hand, if the insurer possessed knowledge of a fact which was contrary to the representation falsely made by the assured, it does not sit well with the insurer to say that he has been induced by the misrepresentation to contract with the assured,[6] unless it might be said that the fact was "half-known" to the insurer and its utterance by the assured confirmed to the insurer the existence of that fact or that the assured's presentation was such as to put the insurer *off*, rather than *on*, enquiry.[7] In such cases, the question is not whether there has operated an exception, but rather whether the insurer may be said to have been induced by the misrepresentation. Where the misrepresentation creates any uncertainty in the mind of the insurer as to the accuracy of his own knowledge, the possibility of inducement arises. Similarly, inducement may arise where the insurer might draw an inference from his own knowledge, but is persuaded not to so infer where the assured misrepresents the position.[8] Further, if the insurer is protected by a warranty, an otherwise material misrepresentation may have no effect as a misrepresentation, because the insurer will be able to rely on the breach of warranty,[9] unless the insurer specifically calls for the information concerned.[10]

8.05 The Marine Insurance Act 1906, by the opening words of section 18(3), "in the absence of inquiry", indicates that the exceptions are not applicable where there has been an

4. *Moore Large & Co Ltd* v *Hermes Credit and Guarantee plc* [2003] EWHC 26 (Comm); [2003] Lloyd's Rep IR 315, [55]–[57] (*per* Colman, J); *Brotherton* v *Aseguradora Colseguros SA* [2003] EWHC 1741 (Comm); [2003] Lloyd's Rep IR 762, [35] (*per* Morison, J).
5. *Redgrave* v *Hurd* (1881) 20 Ch D 1, 13 (*per* Jessel, MR); *Nocton* v *Lord Ashburton* [1914] AC 932, 962 (*per* Lord Dunedin). See, for example, *Mackintosh* v *Marshall* (1843) 11 M & W 116; *Broad & Montague Ltd* v *South East Lancashire Insurance Company Ltd* (1931) 40 Ll L Rep 328, 331 (*per* Rowlatt, J); *Neue Fischmehl* v *Yorkshire Insurance Company Ltd* (1934) 50 Ll L Rep 151, 153; *Aiken* v *Stewart Wrightson Members Agency Ltd* [1995] 2 Lloyd's Rep 618, 644 (*per* Potter, J); [1996] 2 Lloyd's Rep 577. *Cf Pasley* v *Freeman* (1789) 3 TR 51; 100 ER 450. See also *Reynell* v *Sprye* (1852) 1 De G M & G 660, 710 (*per* Lord Cranworth, LJ), where the court said that the assured could not excuse his misrepresentation by reliance on the failure of the insurer to enquire into the means of discovering the truth which had been put into his hands by the assured or to take separate advice as recommended by the assured; *Barings Plc* v *Coopers & Lybrand* [2002] EWHC 461 (Ch); [2003] Lloyd's Rep IR 566, [731–733], [775] (*per* Evans-Lombe, J).
6. See, for example, *Bonney* v *Cornhill Insurance Company Ltd* (1931) 40 Ll L Rep 39, 44. See also *Pasley* v *Freeman* (1789) 3 TR 51; 100 ER 450; *Cooper* v *Tamms* [1988] 1 EGLR 257. *Cf Simner* v *New India Assurance Co Ltd* [1995] LRLR 240.
7. *Aiken* v *Stewart Wrightson Members Agency Ltd* [1995] 2 Lloyd's Rep 618, 645 (*per* Potter, J); [1996] 2 Lloyd's Rep 577.
8. *Mackintosh* v *Marshall* (1843) 11 M & W 116; *Svenska Handelsbanken* v *Sun Alliance and London Insurance plc* [1996] 1 Lloyd's Rep 519, 562 (*per* Rix, J).
9. *De Maurier (Jewels) Ltd* v *Bastion Insurance Company Ltd* [1967] 2 Lloyd's Rep 550; *cf Svenska Handelsbanken* v *Sun Alliance and London Insurance plc* [1996] 1 Lloyd's Rep 519, 553–554 (*per* Rix, J).
10. *Haywood* v *Rodgers* (1804) 4 East 590; 102 ER 957.

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enquiry or question from the insurer concerning the subject-matter of one of the specified exceptions.[11] If the assured answers such a question, he must not misrepresent the fact which constitutes or underlies his answer. Further, it seems that the mere asking of the question may render the fact material, although this is a proposition open to doubt.[12]

DIMINUTION OF RISK

8.06 The rule that the assured is not bound to disclose any fact, whether objectively material or not,[13] which diminishes the risk of loss which may have to be indemnified by the insurer, serves an obvious purpose. The duty of disclosure is burdensome enough without the assured being obliged to disclose all information pertaining to a risk, whatever its effect on the risk. If a fact diminishes the risk, the concealment of such a fact will not disadvantage, indeed may benefit the insurer, as he may have reduced the premium charged or more readily accepted the risk if had been fully informed.

8.07 This principle has a well established pedigree, although there have been few cases which have concerned such facts, probably because it will often be plain where a fact will serve to reduce the risk. Lord Mansfield, CJ in *Carter* v *Boehm* expressed the rule that the assured need not disclose any circumstance which "lessens the risque agreed and understood to be run by the express terms of the policy".[14] In this case, the insured fort was attacked by a French force which had acted without premeditation but which had capitalised on an opportunity which had presented itself. The Chief Justice, in responding to the insurer's contention that the policy was vitiated by the non-disclosure of a letter which revealed a prior design by the French to raid the fort a year beforehand, said that if the evidence was that the design had been laid aside by the French, such a fact would lessen the risk and would not require disclosure.[15] The Chief Justice expressed the same view in *Pawson* v *Watson*[16] in connection with the number of guns and men declared to exist on board the insured vessel, which was captured by an American privateer in July 1776. The evidence suggested that the vessel in fact had a greater force and it was said that "the underwriters, therefore, had the advantage by the difference".

8.08 In *Johnson and Perrott Ltd* v *Holmes*,[17] the plaintiffs insured a motor vehicle which was housed in their garage in County Cork, Ireland. The car was stolen by armed men during the disturbances in Ireland in 1922; it was not possible to identify the thieves. The insurer argued that the plaintiffs failed to disclose a material fact, namely that the garage had been patronised by the IRA; in fact, this was tolerated by the plaintiffs under compulsion. It appears that the terms of the policy would have excluded the loss if the vehicle had been taken by the IRA. Rowlatt, J held that the plaintiffs' position was better than that of a person who had a private vehicle of which the IRA was not aware or in which the IRA had no interest, as the IRA "would not tolerate . . . independent people poaching on their preserves

11. *Doheny* v *New India Assurance Co Ltd* [2004] EWCA Civ 1705; [2005] Lloyd's Rep IR 251, [16] (*per* Longmore, LJ).
12. See below 9.23–9.32.
13. *Container Transport International Inc* v *Oceanus Mutual Underwriting Association (Bermuda) Ltd* [1984] 1 Lloyd's Rep 476, 510 (*per* Parker, LJ).
14. (1766) 3 Burr 1905, 1910; 97 ER 1162, 1165 (*per* Lord Mansfield, CJ).
15. *Ibid.*, 1917, 1168.
16. (1778) 2 Cowp 785, 789–790; 98 ER 1361, 1363.
17. (1925) 21 Ll L Rep 330.

of cars for a moment".[18] The judge then held that this fact was not material. While it is questionable whether the fact was itself material, this case serves as an example of the assured not being required to disclose a fact which diminishes the risk of loss.

8.09 The 1906 Act does not make clear how one is to identify whether the risk would be reduced by the disclosure of a particular fact. It must be assumed that the court should look at the matter objectively, possibly with the assistance of expert evidence. In *Inversiones Manria SA* v *Sphere Drake Insurance Co plc; The Dora*,[19] the insured yacht was imported from Taiwan, having been built there. The assureds intended to improve and refit the yacht in a yard in Italy. The yacht was insured against navigating risks. It was alleged by the insurer that the assured failed to disclose that the vessel was still in the Italian yard, as its refitting had not yet been completed, and so constituted a building risk rather than a navigation risk. Phillips, J (as he then was) held that this was a diminished risk within the meaning of section 18(3)(a) of the 1906 Act, as the underwriter could argue that the vessel was not yet on risk, the vessel potentially benefited from the yard's insurance and as the vessel's cover was reduced when the vessel was not in commission. The judge held that this fact need not be disclosed and was supported in this conclusion by expert evidence that the fact was not material.[20]

8.10 The issue with which the evidence will be concerned is the effect of the fact in question on the risk of loss under the policy. The effect may be diverse, both good and bad. It should be simply a question whether the *net* effect of the fact will be to diminish the risk; if the risk is increased, notwithstanding in some respects the risk might be diminished, the fact may still require disclosure. In *Fraser Shipping Ltd* v *Colton; The Shakir III*,[21] a vessel under tow was insured against total loss for a voyage from Jebel Ali to Shanghai. The vessel was towed to Huang Pu as her destination, which had been nominated by the buyers of the vessel a month beforehand. The vessel anchored at an outer anchorage, because the port was congested, and the assured contemplated a further river passage. The day after the arrival, the insurers were advised of this change of destination, at which time the insurers agreed to the change. The insurers sought to avoid the insurance contract on the ground that the assured failed to disclose *inter alia* the fact that the vessel had already arrived at her destination, that the vessel was unsafe at the anchorage because of the approach of a typhoon and that the master considered the vessel to be in danger. The assured put forward expert evidence that these facts diminished the risk insured because of the reduction in time remaining for the insured voyage. The judge rejected this evidence, stating that the risk to the vessel was increased.[22]

8.11 By contrast, in *Decorum Investments Ltd* v *Atkin; The Elena G*,[23] the underwriters who insured a yacht argued that the assured owner should have disclosed his unusual security arrangements, which would have revealed that the assured personally, as opposed to his yacht, might attract security risks, because he was a Russian media magnate with a high profile. David Steel, J held that the existence of such security arrangements were either immaterial being irrelevant to the risk to which the vessel was exposed, or diminished the risk.

18. *Ibid.*, 332.
19. [1989] 1 Lloyd's Rep 69.
20. *Ibid.*, 89–90.
21. [1997] 1 Lloyd's Rep 586.
22. *Ibid.*, 595 (*per* Potter, J).
23. [2001] 2 Lloyd's Rep 378, [97]–[111].

THE ACTUAL AND PRESUMED KNOWLEDGE OF THE INSURER

8.12 The knowledge of the insurer shall be considered in three respects, namely the actual knowledge of the insurer, his presumed knowledge, which section 18(3) of the Marine Insurance Act 1906 sub-divides into two classes, matters of common notoriety or knowledge and matters which the insurer ought to know in the ordinary course of his business.

Actual knowledge

8.13 It is commonplace to repeat that the assured bears no duty to disclose to the insurer that which the insurer already knows. If the insurer's knowledge of material facts is incomplete, the assured is bound, subject to justified reliance on the exceptions, to improve the insurer's state of knowledge. Where the fact required to be disclosed pursuant to the requirements of the utmost good faith is known to the insurer, there is no duty to disclose that fact. It might be argued that the duty obliges the assured to confirm the fact already known to the insurer; however, this duty to confirm would not fall within any established duty within the parameters of the notion *uberrima fides* and would fall squarely within the exception which has been established by the common law. In any event, what constitutes a material fact and the knowledge of the insurer are both questions of fact; if a material fact is known to the insurer, it requires no confirmation.

8.14 If the material fact lies within the actual knowledge of the insurer, it need not be disclosed[24]; it does not matter from what source this knowledge was acquired by the insurer.[25] To allow the insurer to avoid an insurance contract on the grounds of non-disclosure in such circumstances would be contrary to the notion of good faith which is the essence of the parties' relationship. To be within the actual knowledge of the insurer, the material fact must of course be known to the insurer, but additionally it must be present to the insurer's mind at the time the insurance contract is agreed.[26] If the insurer is a corporate entity and has much data within its files or computer memories, it may not be fair to treat a particular item of information as known to the insurer, because given the sheer size of this repository of data, not all such data can be said to be present to the mind of the insurer at all times. For this purpose, the "insurer" may be regarded as the individual who has the authority to accept the risk on behalf of the insurance company.[27] It cannot seriously be suggested that that which is known to an underwriting clerk in a non-marine department may also be known actually to a claims clerk in a marine department, particularly if there is no cross-reference which might link the two sources of data. For example, if one department of an insurance company has paid a claim in respect of a vessel which has been damaged in the course of a casualty suffered by a vessel, and after the casualty the cargo on board the vessel is purchased in a distressed condition and insured with another department of the same insurer, there may be nothing which associates these two records in the files or computers of the insurer.[28] It may be that such data known to each of these departments ought to be known

24. *Kingscroft Insurance Co Ltd* v *Nissan Fire & Marine Insurance Co Ltd (No. 2)* [1999] Lloyd's Rep IR 603, 631 (*per* Moore-Bick, J).
25. *Carter* v *Boehm* (1766) 3 Burr 1905, 1910; 97 ER 1162, 1165 (*per* Lord Mansfield, CJ); *Pimm* v *Lewis* (1862) 2 F & F 778; 175 ER 1281. See also Clarke, *The Law of Insurance Contracts*, 6th edn (2009), para 23-9A1; Legh-Jones (ed.), *MacGillivray on Insurance Law*, 11th edn (2008), para 17-72.
26. *Bates* v *Hewitt* (1867) LR 2 QB 595, 605 (*per* Cockburn, CJ). See also *Winter* v *Irish Life Assurance plc* [1995] 2 Lloyd's Rep 274, 280–281 (*per* Sir Peter Webster).
27. M A Clarke, *The Law of Insurance Contracts*, 6th edn (2009), para 23-9A2.
28. *Cf Malhi* v *Abbey Life Assurance Co Ltd* [1996] LRLR 237.

to the other department.[29] The knowledge of a particular servant or agent of the insurer may be imputed to the insurer, if the knowledge was acquired in the course of his employment, and within the scope of his authority.[30]

8.15 If the insurer does not in fact know the material fact, but has ready access to the knowledge and, aware of such access, wilfully closes his eyes to ascertaining the fact, it may be said that he actually knows that fact,[31] or at least he ought to have known the fact in the ordinary course of business. If, however, the insurer genuinely forgets a material fact, he will not be taken to know it, unless he ought to know it in the ordinary course of business.[32] Similarly, it makes no difference that the assured has told the truth on an earlier application if the insurer has forgotten that application and has relied solely on what he has been told on the later application.[33]

Common knowledge

8.16 The world in which insurers and assureds live provides a changing and varied backdrop to the risks that the insurer underwrites. It is this transitory nature of the world which creates the commercial necessity for insurance. It is not surprising therefore that the law assumes that the insurer will be aware of global events. Whether or not a fact may be said to be a matter of common notoriety will depend on the public availability of such information and on whether such information would be known to a reasonably competent underwriter.[34]

8.17 There are two main types of global affairs, natural and political.[35] The former concerns weather patterns and aberrations, such as storms, earthquakes, mudslides, lightning, hurricanes, volcanic eruptions, etc. Political affairs encompass matters such as war,[36] anticipated hostilities,[37] the course of commerce,[38] trade sanctions,[39] peace negotiations, naval sorties, gunboat diplomacy, terrorism,[40] hijackings, health risks,[41] disease epidemics, etc. In *Carter* v *Boehm*,[42] an insurance was taken out over Fort Marlborough, a trading settlement on the island of Sumatra. A French expedition headed by Count d'Estaigne attacked the fort and the Governor of the fort, a merchant, presented a claim under the policy. The insurer sought to argue that the assured fraudulently concealed the susceptibility of the fort to attack by the French. Lord Mansfield, CJ rejected the insurer's defence and held that the relations between the English and the French, their respective naval presence in the East Indies and the conduct of the war in Europe at that time (the Seven Years' War[43]) were all matters in the common knowledge of the insurers at the time of the insurance contract. If there was a fact which was peculiarly applicable to the fort and which could not be said to be within the presumed knowledge of the insurer, then that ought to be disclosed; that was not the case before the Lord Chief Justice.

8.18 Matters of common notoriety are not limited to such global affairs. They will extend to all that is a matter of common knowledge or common public record, such as the business of Hollywood, the location of the Thames, the functions of a medical practitioner, the traffic at the world's busiest port,[44] airport or highway, or the widespread practices of a multinational company,[45] and, indeed, the operation of the insurance market in which the insurer participates.[46] Of course, with the advent of electronic communications, computer networks and the internet, the information available to the insurer is very much increased, sometimes to avalanche proportions. This inevitably will have the effect of increasing the bounds of the insurer's common knowledge.[47]

Matters which the insurer in the ordinary course of business ought to know

8.19 The insurer conducts his business by insuring risks which arise in respect of certain areas of trade or ordinary life. A marine underwriter will be concerned with the movement of vessels from one part of the world to another carrying various cargoes and undergoing the risks which are common to the trade in question. A burglary insurer will be acquainted with the predilections of thieves. A reinsurer will be concerned with and taken to know the practices of insurers and insurance markets.[48] Therefore, if the insurer ought to possess knowledge of a fact in the ordinary course of business,[49] the assured will not be obliged to disclose it.

Normal and unusual risks

8.20 If an insurer provides insurance with respect to specific fields of human activity, it is not unreasonable to assume that the insurer will be aware of the risks normally associated with those activities. How else can an insurer undertake an actuarial examination of the risks which might arise and the premium which he ought to charge? The "normal" risks will not require disclosure by the assured. The unusual exposure to risk should be disclosed by an

29. *Cf P. Samuel & Company Limited* v *Dumas* [1924] AC 431, 477 (*per* Lord Sumner). See below 8.26–8.33.

30. *Pimm* v *Lewis* (1862) 2 F & F 778; 175 ER 1281; *Joel* v *Law Union and Crown Insurance Company* [1908] 2 KB 863; *Holdsworth* v *Lancashire and Yorkshire Insurance Co* (1907) 23 TLR 521; *Thornton-Smith* v *Motor Union Insurance Co Ltd* (1913) 30 TLR 139; *Golding* v *Royal London Auxiliary Insurance Co Ltd* (1914) 30 TLR 350; *Ayrey* v *British Legal and United Provident Assurance Company Limited* [1918] 1 KB 136; *Versicherungs und Transport A/G Daugava* v *Henderson* (1934) 48 Ll L Rep 54; (1934) 49 Ll L Rep 252; *Evans* v *Employers' Mutual Insurance Association Ltd* (1936) 52 Ll L Rep 51; *Hadenfayre Ltd* v *British National Insurance Society Ltd* [1984] 2 Lloyd's Rep 393, 400–402 (*per* Lloyd, J). See below 13.48–13.50.

31. *Economides* v *Commercial Union Assurance Co plc* [1997] 3 All ER 636, 648 (*per* Simon Brown, LJ), 653 (*per* Peter Gibson, LJ).

32. *Cf Bates* v *Hewitt* (1867) LR 2 QB 595.

33. *Certain Underwriters at Lloyd's* v *Montford* [1995] 4 ReLR 321 (US Ninth Circuit).

34. *Canadian Indemnity Co* v *Canadian Johns-Manville Co* [1990] 2 SCR 549.

35. *Carter* v *Boehm* (1766) 3 Burr 1905, 1910; 97 ER 1162, 1165 (*per* Lord Mansfield, CJ).

36. *Bates* v *Hewitt* (1867) LR 2 QB 595, 605 (*per* Cockburn, CJ).

37. *Planche* v *Fletcher* (1779) 1 Dougl 251; 99 ER 164; *Republic of Bolivia* v *Indemnity Mutual Marine Assurance Co* (1909) 14 Com Cas 156, 166 (*per* Pickford, J).

38. *Simeon* v *Bazett* (1813) 2 M & S 94, 98–99; 105 ER 317, 319 (*per* Lord Ellenborough, CJ).

39. *Simeon* v *Bazett* (1813) 2 M & S 94, 98–99; 105 ER 317, 319 (*per* Lord Ellenborough, CJ). See the commentaries cited in *Harrower* v *Hutchinson* (1870) LR 5 QB 584, 591–592 (*per* Kelly, CB).

40. *Leen* v *Hall* (1923) 16 Ll L Rep 100, 103 (*per* Avory, J).

41. *Canadian Indemnity Co* v *Canadian johns-manville co* [1990] 2 SCR 549.

42. *Ibid.*

43. And presumably the conduct of the third Carnatic War in India and Asia.

44. *Cf Fraser Shipping Ltd* v *Colton; The Shakir III* [1997] 1 Lloyd's Rep 586, 595 (*per* Potter, J).

45. *Cf Salvador* v *Hopkins* (1765) 3 Burr 1707; 97 ER 1057.

46. *Glasgow Assurance Corporation Ltd* v *William Symondson and Co* (1911) 16 Com Cas 109, 120 (*per* Scrutton, J).

47. *Brotherton* v *Aseguradora Colseguros SA* [2003] EWHC 1741 (Comm); [2003] Lloyd's Rep IR 762, [35] (*per* Morison, J): "In a most general sense a London Underwriter ought to know the market in which he is writing business. With modern methods of communication, he can be expected to know more things than 50 or more years ago."

48. *Glasgow Assurance Corporation Ltd* v *William Symondson and Co* (1911) 16 Com Cas 109, 120 (*per* Scrutton, J); *Property Insurance Co Ltd* v *National Protector Insurance Co Ltd* (1913) 108 LT 104, 106 (*per* Scrutton, J); *cf Hill* v *Citadel Insurance Co Ltd* [1995] LRLR 218; affd [1997] LRLR 167.

49. As to the meaning of "in the ordinary course of business", see above 7.118–7.124. It is submitted that there is no difference between the meaning of this phrase in ss. 18(1) and 19 and s. 18(3)(b) of the Marine Insurance Act 1906.

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assured, if it lies within his particular knowledge. Accordingly, a general knowledge of the commercial focus of the insurance will be attributed to the insurer, unless there is an aspect of the risk to be insured which is unusual or is contrary to the assumptions or inferences which normally may be drawn from such general knowledge.[50]

8.21 This distinction found early expression in *North British Fishing Boat Insurance Co Ltd* v *Starr*.[51] In this case, Rowlatt, J said[52] that the insurer must know in the ordinary course of his business the course of losses which affect particular classes of vessels, but will not be presumed to know the particular circumstances affecting specific vessels or lines of vessels, especially when they comprise a limited number of ships.[53] The case before the judge concerned the activities of motor fishing vessels which traded around the coast of England. Similarly, in *Greenhill* v *Federal Insurance Co Ltd*,[54] the Court of Appeal held that the disclosure of the nature of an insured cargo (here, celluloid) was sufficient to put the insurer on enquiry concerning the properties of that cargo, but would not put the insurer on enquiry of any unusual circumstance affecting that cargo, such as damage sustained to the cargo during an earlier voyage and the manner of its carriage.

8.22 Earlier, in the context of reinsurance contracts which incorporate the same terms and conditions as the original policy, it has been held that it will be material for the reinsurer to know any unusual clauses included in the original policy, but that he is taken to know the clauses usually included in such policies so that he is on enquiry and if he wishes to know the terms of the original policy, he should ask.[55]

8.23 In *Aldridge Estates Investments Co Ltd* v *McCarthy*,[56] a portfolio of properties in London was insured under a household comprehensive block policy. A claim was made for an indemnity in respect of the assured's liability to a third party who suffered injury at one of the insured properties, 37 Belgrave Gardens. The insurers alleged that the assured failed to disclose to them when the contract was made that a Housing Act Notice had been issued in respect of 37 Belgrave Gardens, that the assured was aware of the presence of squatters in that building and that the unoccupancy levels extending across the insured portfolio increased during the 1980s pursuant to the assured's policy of refurbishment. It was common ground that unoccupied houses were at increased risk of loss. Astill, J held that, while an insurer should be aware, within the meaning of section 18(3)(b) of the 1906 Act, of the existence of squatting as a social urban phenomenon and that Housing Act notices are issued for this type of property, the fact that these particular properties were so afflicted required disclosure. The former represented general knowledge presumed to be possessed by an insurer; the latter was within the particular knowledge of the assured. As to unoccupancy levels, while the judge considered that they ought to have been known by the insurer, the fact

50. *Uzielli* v *Commercial Union Insurance Co* (1865) 12 LT 399, 401 (*per* Mellor, J); *Harrower* v *Hutchinson* (1870) LR 5 QB 584, 594, 596; *Cantiere Meccanico Brindisino* v *Janson* [1912] 3 KB 452; *T Cheshire & Co* v *WA Thompson* (1918) 24 Com Cas 114, 198; *Thomas Cheshire and Company* v *Vaughan Brothers & Company* [1920] 3 KB 240, 242; *Alluvials Mining Machinery Company* v *Stowe* (1922) 10 Ll L Rep 96, 98 (*per* Greer, J); *Container Transport International Inc* v *Oceanus Mutual Underwriting Association (Bermuda) Ltd* [1984] 1 Lloyd's Rep 476, 529–530 (*per* Stephenson, LJ); *Marc Rich & Co AG* v *Portman* [1997] 1 Lloyd's Rep 225, 234 (*per* Leggatt, LJ).

51. (1922) 13 Ll L Rep 206.

52. *Ibid.*, 210. See also *Greenhill* v *Federal Insurance Co Ltd* [1927] 1 KB 65, 84 (*per* Scrutton, LJ); *cf Carter* v *Boehm* (1766) 3 Burr 1905, 1915–1918; 97 ER 1162, 1167–1168 (*per* Lord Mansfield, CJ).

53. See, for example, *Sharp* v *Sphere Drake Insurance plc; The Moonacre* [1992] 2 Lloyd's Rep 501, 518 (*per* Mr Colman, QC).

54. [1927] 1 KB 65, 73 (*per* Lord Hanworth, MR), 84–87 (*per* Scrutton, LJ), 89 (*per* Sargant, LJ).

55. *Charlesworth* v *Faber* (1900) 5 Com Cas 408; *Property Insurance Co Ltd* v *National Protector Insurance Co Ltd* (1913) 108 LT 104, 106 (*per* Scrutton, J).

56. [1996] EGCS 167.

that the lack of occupancy resulted from a deliberate tactic of the assured should have been disclosed by the assured.

8.24 *Marc Rich & Co AG* v *Portman*[57] provides a similar example of this distinction between general and particular knowledge. In this case, the assureds were insured against their liabilities, including demurrage, as charterers of vessels used in their oil trading activities. The particular focus of this insurance was oil lifted at Kharg Island, Iran and carried to the port of Ain Sukhna, south of Suez, for transportation by pipeline to a Mediterranean port. Similar insurance was taken out for the carriage of oil from Constantza, Romania to the Americas. The insurer sought to avoid these insurance contracts *inter alia* on the grounds that the assureds had omitted to disclose their previous loss experience, the features of the port of Ain Sukhna, such as bad weather, tides and congestion, which would be likely to occasion demurrage liabilities and claims, and the loading and discharge times at the ports of Ain Sukhna and Kharg Island. The Court of Appeal rejected the assureds' contention that the insurer should have known about such matters, holding that, while insurers should be aware that charterers are exposed to the risk of delay, they cannot be taken to know of the particular loss experience of the assureds, being peculiar to the assureds.[58]

8.25 Similarly, Moore-Bick, J, in *Glencore International AG* v *Alpina Insurance Co Ltd*,[59] considered that an insurer who insures a commodity trader should be taken to know the whole range of circumstances which may arise in the course of the business of a commodity trader. This would presumably include the fact that market prices can go up and down, that commodities (in this case, oil) are transported and stored, often for long periods of time and often exposed to the forces of nature, and that some commodities can be inherently dangerous. The learned judge added:

> "when an insurer is asked to write an open cover in favour of a commodity trader he must be taken to be aware of the whole range of circumstances that may arise in the course of carrying on a business of that kind. In the context of worldwide trading the range of circumstances likely to be encountered is inevitably very wide. That does not mean that the insured is under no duty of disclosure, of course, but it does mean that the range of circumstances that the prudent underwriter can be presumed to have in mind is very broad and that the insured's duty of disclosure, which extends only to matters which are unusual in the sense that they fall outside the contemplation of the reasonable underwriter familiar with the business of oil trading, is correspondingly limited. It also means that the insured is not bound to disclose matters which tend to increase the risk unless they are unusual in the sense just described."

Means of knowledge

8.26 If the insurer has actual knowledge of a material circumstance, there is no duty of disclosure on the part of the assured. In this sense, actual knowledge refers to a fact being present to the mind of the insurer at the time of the presentation of the risk. That is, when the insurance is proposed, if the insurer mentally refers to the material fact in connection with the risk presented, he may be said actually to know it. However, there are occasions where the individual underwriter will not have the fact present to his mind, because:

(1) he had known the fact but the fact did not impose itself on the underwriter's consideration of the risk; or

57. [1996] 1 Lloyd's Rep 430; [1997] 1 Lloyd's Rep 225.

58. *Ibid.*, 232 (*per* Leggatt, LJ). See also *Fraser Shipping Ltd* v *Colton*; *The Shakir III* [1997] 1 Lloyd's Rep 586, 595–596 (*per* Potter, J).

59. [2003] EWHC 2792 (Comm); [2004] 1 Lloyd's Rep 111, [34], [41].

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(2) the fact is known to another department or individual of the same insurer, assuming that the insurer is other than an individual (such as a syndicate at Lloyd's or a company or a society); or

(3) the fact is merely accessible by the underwriter since it is located in the records of the insurer (such as computer or written files) or a public record (such as Lloyd's List or Lloyd's casualty lists).

8.27 In any of the above cases, the underwriter has the means of knowing the material fact. In such cases, it may be that the fact is presumed to be known to the insurer within the meaning of section 18(3)(b) of the Marine Insurance Act 1906.[60] The fact that the insurer has such means available does not automatically mean that the insurer is presumed to know the material circumstance. In some cases, he will not be obliged to initiate enquiries in order to ascertain the fact.[61] Ultimately, if such means are obtainable by the insurer, it is a question of degree whether the insurer may be presumed to know the fact which will lie like the proverbial pot of gold if the rainbow of enquiry is pursued. Implicit in this question is the ease of enquiry by the insurer and the likelihood that the enquiry reasonably would be pursued by an insurer if presented with the risk. Where it may be presumed that the insurer ought to be aware of such information, the insurer cannot plead ignorance of the fact merely because he has failed or refused to make enquiries.[62] Further, any information obtained by the insurer's agent by such means will be imputed to the insurer,[63] provided that the agent has sufficient authority and capacity.[64]

8.28 A paradigm example of the first means referred to above is *Bates* v *Hewitt*.[65] In this case, the insured vessel *Georgia* had been notorious as a Confederate cruiser, having been dismantled in Liverpool in 1864. The vessel had then been bought by the assured, who converted it into a merchant ship. After the vessel was insured under the same name, she was captured by a US frigate (the American Civil War continuing) and a claim was made against the insurer. The underwriter had been aware of the vessel's past and her dismantling in Liverpool, although these facts were not present to his mind when he underwrote the risk. The jury found that if the insurer had exercised reasonable skill, intelligence and care, he would have drawn a connection between his past knowledge and the risk as presented. The Court of Appeal held that the insurer could not be presumed to know of these facts, because it was not present to the underwriter's mind at the time of the insurance contract[66] and because it was not sufficient to attribute this knowledge to the insurer if the underwriter is given information from which, by course of reasoning and effort of memory, he may suspect that the vessel poses a dangerous risk.[67] The *ratio* of this decision was stated subsequently by the Court of Appeal to be that past knowledge is relevant only if the insurer has an interest in the information at the time of its receipt.[68] That is, if the underwriter in *Bates* v *Hewitt* had

60. *Foley* v *Tabor* (1861) 2 F & F 663, 672; 175 ER 1231, 1235 (*per* Erle, CJ).
61. *Bates* v *Hewitt* (1867) LR 2 QB 595, 611 (*per* Shee, J).
62. *Foley* v *Tabor* (1861) 2 F & F 663, 672; 175 ER 1231, 1235 (*per* Erle, CJ); *Bates* v *Hewitt* (1867) LR 2 QB 595, 605 (*per* Cockburn, CJ). *Cf Broad & Montague Ltd* v *South East Lancashire Insurance Company Ltd* (1931) 40 Ll L Rep 328, 331 (*per* Rowlatt, J).
63. *Pimm* v *Lewis* (1862) 2 F & F 778; 175 ER 1281; *P. Samuel & Company Limited* v *Dumas* [1924] AC 431, 477 (*per* Lord Sumner); *cf Broad & Montague Ltd* v *South East Lancashire Insurance Company Ltd* (1931) 40 Ll L Rep 328, 331 (*per* Rowlatt, J).
64. See below 13.48–13.59.
65. (1867) LR 2 QB 595.
66. *Ibid.*, 606 (*per* Cockburn, CJ).
67. *Ibid.*, 610 (*per* Mellor, J).
68. *London General Insurance Company* v *General Marine Underwriters' Association* [1921] 1 KB 104, 111 (*per* Lord Sterndale, MR), 112 (*per* Warrington, LJ).

been interested in the vessel when he first learned of the history and dismantling of the *Georgia*, then he may be presumed to have known her history and thus such matters would require no disclosure by the assured.

8.29 The problems associated with one arm (of an insurer) not knowing what the other arm is doing were highlighted in *London General Insurance Company* v *General Marine Underwriters' Association*.[69] In this case, casualty slips from Lloyd's were distributed to the reassureds and reinsurers prior to the subject reinsurance being agreed. These slips indicated that the cargo carried on the vessel insured by the reassureds had been destroyed in part by fire. This fact was not disclosed to the reinsurers by the reassureds. The fact was not known to the reassureds because the slips had been handed to the underwriter on the morning of the day that the reinsurance contract was made and he put them in his drawer without reading them; in the afternoon, the underwriter gave them to the claims department, which was supposed to give them to the reinsurance department, but did not do so. The Court of Appeal held that the fact ought to have been known by the reassureds in the ordinary course of business. However, the court held that the reinsurers had no interest in the information when they received the slips and so could not be presumed to know the information subsequently when the reinsurance was agreed.[70] The distinction between the positions of the reassureds and the reinsurers was justified on the basis that in the former case the reassureds' negligence was prejudicial to both the reassureds themselves and the reinsurers, whereas in the latter case the omission of the reinsurers was detrimental only to the reinsurers.[71]

8.30 An odd result was achieved in *Malhi* v *Abbey Life Assurance Co Ltd*,[72] where a claim was made under a life policy and the insurer sought to avoid the contract on the grounds of non-disclosure of prior alcoholic dependence and malaria. There was an issue of the knowledge of the insurer in respect of an allegation that the insurer had waived the assured's non-disclosure. The knowledge of the non-disclosure was alleged to have been available to the insurer, when subsequent to the avoided contract there was an application for another policy, at which time a medical examination was undertaken and access could be had to the previous insurance records of the deceased. This latter application was declined. The majority of the Court of Appeal held that the mere fact that one department of the insurer had received information in respect of a risk did not mean that another department of the insurer could have knowledge of that fact. It depended on the circumstances of receipt of the information and how it was dealt with thereafter. The evidence had been that it would have been impracticable for the insurer to correlate and access these prior records at the time of the subsequent application,[73] even though the fact that the earlier policy had been issued was known to the insurer. The curious aspect of this decision is that in the modern age one would have thought it would only require the input of the assured's or life insured's name into a central computer database in order to retrieve the relevant records. It is one thing that the

69. [1921] 1 KB 104.
70. *Ibid.*, 111 (*per* Lord Sterndale, MR), 112 (*per* Warrington, LJ). *Cf Piper* v *Royal Exchange Assurance* (1932) 44 Ll L Rep 103, 120–121 (*per* Roche, J). See also *Société Anonyme d'Intermédiaires Luxembourgeois* v *Farex Gie* [1995] LRLR 116, 156, where Saville, LJ said that a reinsurer should know the state of his own retrocession, and *Malhi* v *Abbey Life Assurance Co Ltd* [1996] LRLR 237. See also *Kingscroft Insurance Co Ltd* v *Nissan Fire & Marine Insurance Co Ltd (No. 2)* [1999] Lloyd's Rep IR 603, 629–631 (*per* Moore-Bick, J).
71. *Ibid.*, 113 (*per* Younger, LJ).
72. [1996] LRLR 237. *Cf Evans* v *Employers' Mutual Insurance Association Ltd* (1936) 52 Ll L Rep 51; *Gunns* v *Par Insurance Brokers* [1997] 1 Lloyd's Rep 173.
73. [1996] LRLR 237, 239, 242 (*per* Rose, LJ).

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insurer would not appreciate the significance of the information in its records; it is another thing altogether if the insurer, knowing its significance, could have obtained this information in the ordinary course by accessing its records (depending of course on the adequacy of the database and search facilities in the first place). This consideration appears to have prompted the dissent of McCowan, LJ.[74] It is submitted that the majority's reasoning is wrong and that if the infrastructure of the insurer's organisation allows the various departments of the insurer to correlate the data they receive into a central database, the insurer should be presumed to know this data for the purposes of a risk, assuming that the connection between the risk and the information in the database can be made.[75]

8.31 The consequences of the insurer's access to public records which contain material information upon the duty of disclosure have been tested most often by reference to the data contained in Lloyd's List and the Lloyd's casualty lists. The posting of information concerning an adventure was in the past often the means by which data was circulated to insurers; however, the early cases do not appear to treat the dissemination of information in the coffee houses as determinative of the state of the insurer's knowledge,[76] although there were exhortations to the insurance community to refer to Lloyd's List.[77]

8.32 The effect of access to Lloyd's List and the like appears first to have been considered in *Friere* v *Woodhouse*,[78] where it was said that information contained in Lloyd's List need not be disclosed to insurers if the insurer could have ascertained that information by fair enquiry and due diligence in the course of his business. The next case was *Mackintosh* v *Marshall*,[79] where it was said that, while the contents of Lloyd's List was *prima facie* presumed to be within the knowledge of the insurer, its availability to an insurer would not rectify a misrepresentation made to that insurer.[80] In *Foley* v *Tabor*,[81] the court held that if an insurer could have discovered the exact nature of a cargo to be carried on board a vessel by consulting a record kept at Lloyd's and chose not to refer to it, such information is within the insurer's knowledge.

8.33 It is submitted that such information as that contained in Lloyd's List or an equivalent source should not be readily attributed to insurers, unless there is expeditious access to such information from the underwriter's desk, as will be the case where there is information recorded in databases which the insurer can access via his computer, and the information will have some significance for the insurer as regards the risk and would be consulted by him in the ordinary course of his business. The degree of effort to be expended by the insurer will vary according to the nature of the presentation of the risk, the exposures concerned and the ease of access to, comprehensiveness and reliability[82] of the information. For example, in

74. *Ibid.*, 245. *Cf Columbia National Life Insurance Co* v *Rodgers* 116 F 2d 705 (1940).
75. See M A Clarke, *The Law of Insurance Contracts*, 6th edn (2009), para 23-9B2, where the use of such databases is discussed.
76. See, for example, *Salvador* v *Hopkins* (1765) 3 Burr 1707; 97 ER 1057; *Shepherd* v *Chewter* (1808) 1 Camp 274; 170 ER 955; *London General Insurance Company* v *General Marine Underwriters' Association* [1921] 1 KB 104. *Cf Nicholson* v *Power* (1869) 20 LT 580. *Cf Elton* v *Larkins* (1831) 5 C & P 86; (1832) 8 Bing 198.
77. *Brine* v *Featherstone* (1813) 4 Taunt 869, 873; 128 ER 574, 575 (*per* Mansfield, CJ).
78. (1817) Holt NP 572. See also *Mackintosh* v *Marshall* (1843) 11 M & W 116.
79. (1843) 11 M & W 116.
80. This is not a surprising decision: See above 8.04–8.05.
81. (1861) 2 F & F 663, 672–673; 175 ER 1231, 1235 (*per* Erle, CJ). *Cf Lynch* v *Hamilton* (1810) 3 Taunt 37; 128 ER 15; *General Shipping & Forwarding Co* v *British General Insurance Co Ltd* (1923) 15 Ll L Rep 175, 176 (*per* Bailhache, J).
82. *Cf Fraser Shipping Ltd* v *Colton*; *The Shakir III* [1997] 1 Lloyd's Rep 586, 596 (*per* Potter, J).

Nicholson v *Power*,[83] the court held that the insurer should not be taken to know about a report of the condition of a vessel carrying copper ore at Iragua, which happened to be the insured vessel, when the insurer could not have known that the insured vessel was the only vessel which had loaded copper ore in the vicinity. Taking such matters into account, it is suggested that information which may be extracted from the Internet or contained in the press, including Lloyd's List should not be treated as lying within the insurer's knowledge, unless when the information is received, the insurer already has an interest in it[84] and can and should draw a connection between such data and the risk in the ordinary course of his business. It may become incumbent on the insurer to exercise a greater degree of effort in obtaining relevant information where the insurer chooses to take active steps to review the risk by, for example, undertaking a survey of the vessel,[85] or because the insurance he is writing is required as part of a regulatory regime which contemplates the insurer undertaking more extensive inquiries into the risk.[86]

Characteristics and usage of the insured trade

8.34 The presumed knowledge possessed by an insurer and associated with the trade he insures has long been recognised. In *Noble* v *Kennoway*,[87] two vessels which were engaged in carrying fish were insured; the delay they suffered at the Labrador coast led to their capture by American privateers. The question was whether that delay was normal in the trade and so covered by the insurers. Lord Mansfield, CJ held that such delay had been customary for the previous three years. The Chief Justice said that an insurer is presumed to be acquainted with the trade he insures and if he is not so aware, he ought to inform himself; it does not matter that the trade practice has existed only for a short time such as a year.[88] Similarly, in the earlier case of *Salvador* v *Hopkins*,[89] where the insurance of an East India ship was in issue, the charterparty of that vessel provided that if the vessel was detained beyond 11 February 1764, demurrage would accrue. On 28 March 1763, the master agreed a new charter with the President and Council of Bengal, extending the vessel's stay for another year. The master wrote to the assured recording this agreement; this letter was read in a coffee house in April 1764. The insurers alleged that the assured failed to disclose to them the new agreement. Lord Mansfield held that the policy should be taken to cover this risk of an extension of the detention period, being a usage of the East India Company's trade which was so notorious and so well known to the parties that they must be taken to have been aware of it.[90]

83. (1869) 20 LT 580. See also *Lynch* v *Dunsford* (1811) 14 East 494; 104 ER 691; *Leigh* v *Adams* (1871) 25 LT 566, 569 (*per* Cockburn, CJ), where an anonymous letter concerning a named vessel was posted at Lloyd's, but at the time of the insurance contract the insurer was not aware of the identity of the vessel which would be carrying the insured cargo.
84. *Morrison* v *The Universal Marine Insurance Company* (1872) LR 8 Ex 40, 54 (*per* Bramwell, B); (1873) LR 8 Ex 197, 202. In *Strive Shipping Corp* v *Hellenic Mutual War Risks Association; The Grecia Express* [2002] EWHC 203 (Comm); [2002] 2 Lloyd's Rep 88, 136, Colman, J said: "The proposer for insurance is thus not entitled to assume that the underwriter will carry in his mind previous casualties of vessels not insured by him and be in a position to relate that information to the new risk proposed."
85. *Geest plc* v *Fyffes plc* [1999] 1 All ER (Comm) 672, 683, 685.
86. *Coronation Insurance Co* v *Taku Air Transport Ltd* [1991] 3 SCR 622.
87. (1780) 2 Dougl 510; 99 ER 326.
88. See also *Ougier* v *Jennings* (1800) 1 Camp 505n; 170 ER 1037; *Vallance* v *Dewar* (1808) 1 Camp 503. *Cf Winter* v *Irish Life Assurance plc* [1995] 2 Lloyd's Rep 274, 280–281 (*per* Sir Peter Webster).
89. (1765) 3 Burr 1707; 97 ER 1057. *Cf Grant* v *Paxton* (1809) 1 Taunt 463; 127 ER 914.
90. *Ibid.*, 1714–1715, 1061. *Cf Middlewood* v *Blakes* (1797) 7 TR 162, 167; 101 ER 911, 913.

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12.51 The House of Lords has confirmed that the duty of utmost good faith will not survive beyond the commencement of litigation, because the rationale of the duty no longer applies and because the procedural rules of court will govern the parties' relations in respect of the claim in question once litigation has begun.[118] Of course, that does not mean that the duty of utmost good faith will cease to be relevant in respect of the other aspects of the insurer's and assured's relationship. However, once the insurance contract has been validly avoided, the duty of utmost good faith (which arose by reason of that contract) will cease to survive *in toto*.[119]

12.52 Often, the parties' responsibilities in the presentation and handling of a claim are set out in the insurance contract. Further, the insurer's approach to a claim presented by a private assured resident in the United Kingdom is provided for in the Statement of Long-Term Insurance Practice 1986[120] and had been provided for in the Statement of General Insurance Practice 1986[121] issued voluntarily by the Association of British Insurers and Lloyd's. However, since January 2005, the self-regulatory Statement of General Insurance Practice was replaced by the Financial Services Authority regulation, ICOBS,[122] which currently provides that insurers must handle claims promptly and fairly, provide reasonable guidance to policyholders, not unreasonably reject a claim and pay claims promptly after agreeing to a settlement.[123] The regulation further provides that the rejection of a consumer policyholder's claim is unreasonable where, in the absence of any evidence of fraud, the ground relied on by the insurer is the non-disclosure of a material fact which the policyholder could not reasonably be expected to disclose or non-negligent misrepresentation.[124]

12.53 The Law Commission is currently considering whether insurers stand to be liable in damages for the late payment of claims to assureds.[125]

118. *Manifest Shipping Co Ltd* v *Uni-Polaris Shipping Co Ltd; The Star Sea* [2001] UKHL 1; [2001] 2 WLR 170, [4] (*per* Lord Clyde); [74]–[77] (*per* Lord Hobhouse); *K/S Merc-Scandia XXXXII* v *Certain Lloyd's Underwriters; The Mercandian Continent* [2001] EWCA Civ 1275; [2001] 2 Lloyd's Rep 563, [22(8)] (*per* Longmore, LJ); *Agapitos* v *Agnew; The Aegeon* [2002] EWCA Civ 247; [2002] 3 WLR 616, [51–53] (*per* Mance, LJ). See also *Bhaghbadrani* v *Commercial Union Assurance Co plc* [2000] Lloyd's Rep IR 94, 122.
119. *Drake Insurance plc* v *Provident Insurance plc* [2003] EWHC 109 (Comm); [2003] 1 All ER (Comm) 759, [33]; [2003] EWCA Civ 1834; [2004] 1 Lloyd's Rep 268, [81].
120. Clause 3(a)–(b), (d)–(e).
121. Clause 2(b)–(c). See above 5.20–5.24.
122. See http://fsahandbook.info/FSA/html/handbook/ICOBS.
123. ICOBS, para 8.1.1.
124. ICOBS, para 8.1.2.
125. See paras 5.20 *et seq.* above.

CHAPTER 13

THIRD PARTIES

13.01 The courts classically have examined the duties of good faith within the surrounds of the bilateral relationship between an assured and an insurer. The principal questions thrown up in such cases are whether good faith dictates that the one party owes a duty of some sort to the other party and whether the duty found to exist has in some way been contravened. The scrutiny paid to this enquiry rightly has led to an involved and evolved exposition of *uberrima fides* as between assured and insurer.

13.02 It would be short-sighted, however, to confine one's consideration of the duty of good faith to this two-way street. There will also be the occasional intersection, slip-road and roundabout in that the duty may affect the position of a third party, who himself is not a party to the insurance contract. The obvious third party, without whom the insurance world would be much deprived, is the insurance broker. The broker is a person who brings the assured and insurer together and brings about the contract of insurance. Given this pivotal role, the law has developed unique duties attaching to the broker, even though he is a stranger to the contract. There are, however, other third parties who may influence or be influenced by the insurance contract, such as other agents, co-insurers, assignees, and co-assureds. This chapter will look at the position of these third parties.

13.03 Before embarking upon these slip-roads, some general comments should be made. The duty of good faith is owed by each party to the contract of insurance and by the agents of each of these parties. There are other persons who become involved in this relationship willingly or without their wish or knowledge. The parties to the insurance contract will not owe a duty of good faith to any third party, except an assignee of the entire contract,[1] even though that third party may be entitled to enforce certain terms of the insurance contract pursuant to the Contracts (Rights of Third Parties) Act 1999.[2] Such strangers, except brokers, do not owe any greater duties to the contracting parties than those to which they are subject at law.[3] Therefore, a third party, such as a life to be insured, a loss payee, beneficiary or a referee, will owe no duty of disclosure to the insurer, and so any material non-disclosure by that third party will not alter the position of the assured, unless the policy provides otherwise.[4] Such third parties may be liable in negligence or fraud if their representations are

1. See below 13.21–13.24.
2. This is so, because the duty of good faith is not generally a term of the contract, but a duty imposed as a matter of law. See also the recently enacted Third Parties (Rights against Insurers) Act 2010.
3. For example, they are under a duty to refrain from fraud; if fraudulent, the parties involved may be liable in deceit or for a conspiracy to defraud: *cf Boulton* v *Houlder Brothers & Co* [1904] 1 KB 784.
4. *Wheelton* v *Hardisty* (1858) 8 El & Bl 232, 260; 120 ER 86, 97 (*per* Erle, J), 268–274, 100–102 (*per* Lord Campbell, CJ), 301, 112 (*per* Bramwell, B); *Towle* v *National Guardian Assurance Society* (1861) 30 LJ Ch 900. *Cf Everett* v *Desborough* (1829) 5 Bing 503; 130 ER 1155. See also *Simner* v *New India Assurance Co Ltd* [1995] LRLR 240, 255–256 (*per* HHJ Diamond, QC) and *Sumitomo Bank Ltd* v *Banque Bruxelles Lambert SA* [1997] 1 Lloyd's Rep 487, 495 (*per* Langley, J). See *Cazenove* v *British Equitable Assurance Co* (1859) 6 CB (NS) 437; affd (1860) 29 LJ

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false and induce the insurer to enter into the insurance contract with the assured.[5] However, the third party's representation or lack of disclosure will not affect or bind the assured, unless they are or act as agents for the assured.[6] It is possible that the assured may use a third party, even another insurer, to influence the judgement of the contracting insurer to enter into a contract,[7] in which case the assured's actions or failings will be considered in light of his obligation of good faith. Where the assured is aware that the insurer has been the recipient of a misrepresentation or misinformation as to a material matter, then the assured should take it upon himself to correct any misunderstanding.[8] In *Pilmore* v *Hood*,[9] the vendor of a business informed a potential purchaser, one Bowmer, that the business's income was at a certain level, whereas in fact the takings of the business were substantially less. With the knowledge of the vendor, Bowmer passed this information on to the plaintiff, who ultimately agreed to purchase the business. The court held that this fraudulent representation was actionable at the suit of the plaintiff. Indeed, in the earlier case of *Hill* v *Gray*,[10] it was held that a contracting party may avoid the contract if he suffers under a delusion materially affecting that contract, where the other party is aware of the delusion and its falsity. This decision has been disapproved, albeit not overruled, in the context of ordinary contracts.[11] As regards insurance contracts, such a decision would not be surprising as any falsehood to which the insurer has fallen prey to the knowledge of the assured should oblige the assured to rectify the delusion, consistently with the assured's duty of the utmost good faith.

13.04 Further, the material which must be provided to the insurer will often be thrust upon the assured by the actions of another party with whom the assured had been negotiating. In this way, the duty of the assured may be influenced or prompted by a third party. For example, where a possible insurer refuses to insure a risk, the assured may have to disclose this fact to the contracting insurer, depending upon the custom of the relevant market.[12] Similarly, where an insurer obtains from his assured information pertinent to the risk which he intends to reinsure or has reinsured, he may be obliged to pass that information to his reinsurer.[13]

CP 160, where the policy provided otherwise. The impact of representations made by "lifes" insured and referees is discussed at length in Legh-Jones (ed.), *MacGillivray on Insurance Law*, 11th edn (2008), paras 18-17–18-19.

5. *McInerny* v *Lloyds Bank Ltd* [1974] 1 Lloyd's Rep 246, 253 (*per* Lord Denning, MR). *Cf Pulsford* v *Richards* (1853) 17 Beav 87, 95–96; 51 ER 965, 968 (*per* Sir John Romilly, MR); *Rashdall* v *Ford* (1866) LR 2 Eq 750.

6. *Everett* v *Desborough* (1829) 5 Bing 503; 130 ER 1155. *Cf Swete* v *Fairlie* (1833) 6 Car & P 1; 172 ER 1120. See below 13.60–13.69.

7. See, for example, *Whittingham* v *Thornburgh* (1690) 2 Vern 206; 23 ER 734; *De Costa* v *Scandret* (1723) 2 P Wms 170; 24 ER 686; *Sibbald* v *Hill* (1814) 2 Dow 263; 3 ER 859. *Cf Société Anonyme d'Intermédiaires Luxembourgeois* v *Farex Gie* [1995] LRLR 116. This technique is often referred to as a "decoy" policy: see Legh-Jones (ed.), *MacGillivray on Insurance Law*, 11th edn (2008), para 16-52.

8. See above paras 7.19–7.24.

9. (1838) 5 Bing NC 97; 132 ER 1042. See also *Pidcock* v *Bishop* (1825) 3 B & C 605; *Stone* v *Compton* (1838) 5 Bing NC 142; *Owen* v *Homan* (1851) 3 Mac & G 378, 398; 42 ER 307, 315 (*per* Lord Truro, LC).

10. (1816) 1 Stark NPC 434.

11. *Keates* v *Earl Cadogan* (1851) 10 CB 591, 600 (*per* Jervis, CJ); *Peek* v *Gurney* (1873) LR 6 HL 377, 390–391 (*per* Lord Chelmsford). *Hill* v *Gray* was referred to without comment in *Said* v *Butt* [1920] 3 KB 497, 503. It may be that the case can be explained on the grounds of mistake: Beale (ed.), *Chitty on Contracts*, 30th edn (2008), para 5-074.

12. See, for example, *Glicksman* v *Lancashire and General Assurance Company Limited* [1925] 2 KB 593; [1927] AC 139; *Rozanes* v *Bowen* (1928) 32 Ll L Rep 98; *Broad & Montague Ltd* v *South East Lancashire Insurance Company Ltd* (1931) 40 Ll L Rep 328; *Container Transport International Inc* v *Oceanus Mutual Underwriting Association (Bermuda) Ltd* [1984] 1 Lloyd's Rep 476. See below 15.102–15.104.

13. *China Traders' Insurance Company Limited* v *Royal Exchange Assurance Corporation* [1898] 2 QB 187, 193–194 (*per* Vaughan Williams, LJ); *London General Insurance Company* v *General Marine Underwriters' Association* [1920] 3 KB 23; [1921] 1 KB 104. The reassured may also find himself guilty of a misrepresentation in circumstances where he receives a misrepresentation from the assured and passes it on to the reinsurer: see *Meadows Indemnity Co Ltd* v *The Insurance Corporation of Ireland plc* [1989] 2 Lloyd's Rep 298. See also *Highlands Insurance Co* v *Continental Insurance Co* [1987] 1 Lloyd's Rep 109, 111–112 (*per* Steyn, J); *Sirius*

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Furthermore, the assured will have imputed to him the knowledge of his agents, which he generally will be obliged to pass on to his insurer.[14]

13.05 If it is alleged or proved that the assured has acted or omitted to act in breach of good faith, that may pose consequences for him in his relations with third parties. Where an assured has failed to make a material disclosure to his insurer, that breach may itself render him in breach of contract as regards another party who has relied on the validity of the policy, such as a CIF buyer,[15] or may prejudice the policy which he assigned to a third party.[16]

13.06 As a final prefatory remark, the character of the insurance policy is such that it may encompass the contracts of many parties, whether they be co-assureds or co-insurers. One policy may signify many tens of contracts. The effect of the duty of the utmost good faith or its breach on one of those contracts may be felt as a tremor throughout the other contracts embodied by the policy.[17]

ASSIGNEES

Assignee or co-assured?

13.07 When the court is faced with the argument that an assignee cannot succeed in his claim under the policy, the court must first determine whether the claimant may properly be labelled an assignee or whether it is more accurate to look upon the claimant as a co-assured.[18] Often, the assignee will have an interest in the subject matter of the insurance which is different to that of the original assured. For example, the owner of a ship may insure the vessel and either may include in the same policy the interest of the mortgagee who has advanced funds to the owner for the purposes of the vessel's purchase or subsequently assign the policy to the mortgagee. If the former, the mortgagee will be a co-assured and therefore a party to the contract.[19] If the latter, the mortgagee will be an assignee. This is a question of fact. In *Bank of New South Wales* v *South British Insurance Company Ltd*,[20] the plaintiffs claimed under a cargo policy insuring copper ingot bars which had been shipped from New South Wales to Germany. The consignees who had effected the insurance were German nationals and upon the outbreak of the 1914–1918 war became "alien enemies" with the consequence that the policy in so far as it insured the consignees' interest was void. The plaintiffs, however, were Australian and claimed that the policy also insured their interests as pledgees. The Court of Appeal held that if the German assured had placed the insurance on their own behalf and on behalf of the plaintiffs, then the insurance of the pledgees' interest was not void; however, if the policy had been assigned to the plaintiffs, their interest or title was derivative and they could occupy no more advantageous position than that of the assignor. In this case, the court held that the plaintiffs were assignees only, because when the insurance was placed, the

International Insurance Corp v *Oriental International Assurance Corp* [1999] 1 All ER (Comm) 699, 708–709 (*per* Longmore, J).

14. See above 7.102–7.117.

15. *A C Harper & Co Ltd* v *R D Mackechnie & Co* (1925) 22 Ll L Rep 514.

16. See below 13.07–13.24.

17. See below 13.25–13.45.

18. See *William Pickersgill & Sons Limited* v *London and Provincial Marine and General Insurance Company Limited* [1912] 3 KB 614, 619–620 (*per* Hamilton, J); 18 Com Cas 1; *Bank of New South Wales* v *South British Insurance Company Ltd* (1920) 4 Ll L Rep 384; *Samuel & Company Limited* v *Dumas* [1924] AC 431, 444–445 (*per* Viscount Cave), 450–451 (*per* Lord Finlay); 460 (*per* Lord Sumner).

19. See below 13.25–13.32.

20. (1920) 4 Ll L Rep 384.

plaintiffs had no interest in the property insured.[21] The touchstone lies within the parties' contemplation: if the party in question was intended to be a co-assured or assignee, then the parties' intention should be heeded.[22]

The assignment is subject to equities

13.08 The rights which exist by virtue of an insurance policy essentially are rights of action (or choses in action). Choses in action were not assignable at common law, but assignments of choses in action were recognised as valid in equity subject to prior equities.[23] Accordingly, if the assignee of a policy from an assured wished to pursue an action against the insurer, the assignor would have to bring an action at law against the insurer as trustee for the assignee and accordingly account to the assignee.[24] However, the courts do now recognise an equitable assignee's title to sue, although there is a rule of practice that the assignor (who retains the legal title) should be joined if there is a risk that the assignor might bring his or her own claim.[25] The Policies of Assurance Act 1867 allowed life insurance policies to be fully assignable, the Policies of Marine Assurance Act 1868[26] allowed the assignment of marine policies and the Law of Property Act 1925 (section 136) extended the same courtesy to all policies. The assignment of marine policies is now permitted by section 50 of the Marine Insurance Act 1906. Insurance policies are often assigned as security for a debt owed by the assured to the assignee or because of the sale of the subject-matter insured. Accordingly, mortgagees, pledgees, chargees and purchasers of the property insured may become assignees of an insurance policy. There may, of course, be other circumstances which give rise to an assignment of a policy.

13.09 Section 50(1) of the Marine Insurance Act 1906 regulates the assignment of marine policies and provides that a marine insurance policy is assignable before or after the occurrence of a loss which is indemnifiable under the policy.[27] The assured's interest in a marine policy may be assigned without the express consent of the insurer, unless the policy itself expressly (not impliedly) provides that an assignment is not permitted or not permitted without consent.[28] Section 50 allows the assignee to bring an action on the policy against the insurer in his own name,[29] provided that the whole of the assured's beneficial interest in the policy is assigned.[30] By section 50(2), in an action by the assignee, the defendant is entitled

21. See also *Samuel & Company Limited* v *Dumas* [1924] AC 431, 444–445 (*per* Viscount Cave), 450–451 (*per* Lord Finlay), 460 (*per* Lord Sumner), where it was held that the mortgagee in this case was a co-assured.

22. *Colonia Versicherung AG* v *Amoco Oil Co* [1997] 1 Lloyd's Rep 261, 271–272 (*per* Hirst, LJ, citing *Boston Fruit Co* v *British and Foreign Marine Insurance Co Ltd* [1906] AC 336, 339).

23. *Raiffeisen Zentralbank Österreich AG* v *Five Star Trading LLC* [2001] EWCA Civ 68; [2001] QB 825, [76–83] (*per* Mance, LJ).

24. *Gibson* v *Winter* (1833) 5 B & A 96; *Williams* v *Atlantic Assurance Company Ltd* (1932) 43 Ll L Rep 177, 188–189 (*per* Slesser, LJ).

25. *Three Rivers District Council* v *Bank of England* [1996] QB 292, 304, 313, 315; *Raiffeisen Zentralbank Österreich AG* v *Five Star Trading LLC* [2001] EWCA Civ 68; [2001] QB 825, [60] (*per* Mance, LJ).

26. Replaced by Marine Insurance Act 1906, s. 50(1).

27. *Raiffeisen Zentralbank Österreich AG* v *Five Star Trading LLC* [2001] EWCA Civ 68; [2001] QB 825, [63–73] (*per* Mance, LJ).

28. Section 50 is careful not to identify the assured as the assignor in all cases (*cf* ss. 15 and 51). So, the insurer equally may assign his interest in the policy, such as his right to receive premium, without the assured's consent.

29. At common law, the assignee had no title to sue; the assignor had to bring proceedings against the insurer as trustee for the assignee: *Gibson* v *Winter* (1833) 5 B & A 96; *Williams* v *Atlantic Assurance Company Ltd* (1932) 43 Ll L Rep 177, 188–189 (*per* Slesser, LJ). Law of Property Act 1925, s. 136 effects a similar change to the common law, provided the notice requirements of the statute are complied with: *id.*, 189.

30. *Williams* v *Atlantic Assurance Company Ltd* (1932) 43 Ll L Rep 177, 189 (*per* Slesser, LJ).

to "make any defence arising out of the contract which he would have been entitled to make if the action had been brought in the name of the person by or on behalf of whom the policy was effected".[31]

13.10 Rights arising under all policies, marine and non-marine, may be assigned under section 136(1) of the Law of Property Act 1925.[32] By section 136, the chose in action under a policy (namely, the right to claim under the policy or the right to premium) may be assigned—"subject to equities having priority over the right of the assignee"—in writing, provided that written notice is given to the debtor.

13.11 When a right of action under the policy is assigned, the assignee will receive that right subject to the equities and defects[33] which attached to the right when it was vested in the assignor. Therefore, if the assignor's right under an insurance policy is defective for the lack of an insurable interest in the property or interest insured or breach of warranty, the assignee will take no better or more effective right, as the assignee's title draws its validity from the assignor's interest. This is equally so where there has been a breach of the duty of the utmost good faith, whether it be a material non-disclosure or misrepresentation[34] or the making of a fraudulent claim by the assignor.[35]

13.12 This position is confirmed by section 136 of the Law of Property Act 1925, but *appears* to have been qualified as regards marine policies by section 50(2) of the Marine Insurance Act 1906, which allows the debtor, in most cases the insurer, to raise any defence "arising out of the contract" against any action brought by the assignee which may have been raised had the action been brought by the assignor. It may be questioned whether this provision prevents the insurer from establishing any defence against the assignee, which he could have raised against the assignor, if the defence does not arise "out of the contract". This phrase was not included in the predecessor to section 50, namely section 1 of the Policies of Marine Assurance Act 1868, which is identical to section 50(2) but for the words "arising out of the contract". The 1868 Act was repealed by the 1906 Act. However, section 50 was expressed in the manner adopted in *Pellas* v *Neptune Marine Insurance*[36] in construing the 1868 Act, where the court added as a constructive gloss to the statute the words "arising out of the contract". Accordingly, there is or should be no difference between the two statutory incarnations.

13.13 The import of the phrase "any defence arising out of the contract" was put to the test in the context of the duty of good faith in *William Pickersgill & Sons Limited* v *London and Provincial Marine and General Insurance Company Limited*.[37] In this case, a time policy was executed by the defendant underwriters over a vessel which was assigned to the plaintiffs

31. *Cf* Insurance Contracts Act 1984 (Cth), s. 48(3) (Australia): *C E Heath Casualty & General Insurance Ltd* v *Grey* (1993) 32 NSWLR 25.

32. See *Raiffeisen Zentralbank Österreich AG* v *Five Star Trading LLC* [2001] EWCA Civ 68; [2001] QB 825, [74–75] (*per* Mance, LJ). The Policies of Assurance Act 1867 still applies, providing for the assignment of life insurance policies.

33. *E Pfeiffer Weinkellerei-Weineinkauf GmbH & Co* v *Arbuthnot Factors Ltd* [1988] 1 WLR 150.

34. *William Pickersgill & Sons Limited* v *London and Provincial Marine and General Insurance Company Limited* [1912] 3 KB 614; *Bank of New South Wales* v *South British Insurance Company Ltd* (1920) 4 Ll L Rep 384; *Samuel & Company Limited* v *Dumas* [1924] AC 431, 444–445 (*per* Viscount Cave), 450 (*per* Lord Finlay); *A C Harper & Co Ltd* v *R D Mackechnie & Co* (1925) 22 Ll L Rep 514 (where the failure of the assignor to disclose material facts to an insurer rendering the contract voidable justified an action by the assignee against the assignor under the CIF contract of sale); *Black King Shipping Corporation* v *Massie; The Litsion Pride* [1985] 1 Lloyd's Rep 437, 517–519 (*per* Hirst, J); *Continental Illinois National Bank & Trust Co of Chicago* v *Alliance Insurance Co Ltd; The Captain Panagos DP* [1986] 2 Lloyd's Rep 470, 472 (*per* Evans, J).

35. *Re Carr and Sun Fire Insurance Co* (1897) 13 TLR 186.

36. (1879) 5 CPD 34.

37. [1912] 3 KB 614.

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as security for debts owed by the shipowners pursuant to a shipbuilding contract agreed between the plaintiffs and the owners. When the insurance contract was agreed, the owners failed to disclose to the defendants the fact that they had taken out an excessively overvalued disbursements policy. The defendants sought to avoid the contract on the grounds of the owners' (the assignors') material non-disclosure. Hamilton, J held that the defendants could rely upon the owners' breach of the duty of good faith against the assignees' claim because section 50(2) applied and because the duty of disclosure, being an implied contractual duty, arose "out of the contract".[38] As has been discussed,[39] the duty of good faith as applied to insurance contracts is now recognised to exist as a principle of the common law and not as an implied term or condition of the contract. Can the judicial shift in opinion concerning the status of the duty have any effect upon the application of section 50(2) to allegations of a want of good faith against an assignee? It is unlikely: first, the words "arising out of the contract" are wide in their scope and not limited to any reference to defences based on the terms of the contract, but extend to defences which arise as an incident or consequence of the contract[40]; secondly, even if the section did not apply, as a matter of principle the assignee should not be placed in any better position than the position of the assignor, because the subject-matter of the assignment is an interest in a voidable contract so that if any defence is predicated on the nature and extent of the assigned interest, that defence should be available against the claim of the assignee just as much as that of the assignor.[41]

13.14 Additionally, the plaintiff assignees argued that avoidance would impose an unnecessary hardship upon them if the policy could be assigned only subject to the same defects which existed when the policy was in the hands of the assignor; the assignees said that a marine insurance policy should be able to be assigned to a purchaser for value without notice of the policy's voidability in the same way as certain negotiable instruments may be so assigned.[42] The court held that there was no principle or mercantile practice to place insurance policies in the same category as such negotiable instruments. The hardship argument was rejected, because its acceptance "would involve upsetting the business of insurance and inflicting unwarrantable hardship upon underwriters".[43]

13.15 Sections 50(2) and 136 effectively provide no greater or lesser scope of defence to a claim by an assignee than was the position at common law: as the assignee's claim had to be brought by the assignor as trustee for the assignee, the defendant could defeat the claim by relying upon the assignor's breach of duty. This derivative nature of the assignee's interest in the chose in action assigned is recognised by the fact that his interest is subject by statute to "any defence arising out of the contract" or "equities having priority".[44]

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38. *Ibid.*, 621. See also *Brooking* v *Maudslay, Son & Field* (1888) 38 Ch D 636, 643 (*per* Stirling, J) and *Taylor* v *Eagle Star Insurance Company Ltd* (1940) 67 Ll L Rep 136.
39. See above ch. 4.
40. *Black King Shipping Corporation* v *Massie; The Litsion Pride* [1985] 1 Lloyd's Rep 437, 519 (*per* Hirst, J).
41. *Cf Bank of Nova Scotia* v *Hellenic Mutual War Risks Association (Bermuda) Ltd; The Good Luck* [1988] 1 Lloyd's Rep 514, 546–547 (*per* Hobhouse, J).
42. *Cf Thames and Mersey Marine Insurance Company Limited* v *Gunford Ship Company Limited* [1911] AC 529, 544 (*per* Lord Shaw of Dumfermline, dissenting). Contrast the position concerning the sale of goods (see, for example, *Phillips* v *Brooks Ltd* [1919] 2 KB 243) between the assignment of a right arising out of the contract of sale and the property sold.
43. [1912] 3 KB 614, 622 (*per* Hamilton, J).
44. *Mangles* v *Dixon* (1852) 3 HLC 702, 731; *Scottish Amicable Life Assurance Society* v *Fuller* (1867) IR 2 Eq 53, 56; *Bank of New South Wales* v *South British Insurance Company Ltd* (1920) 4 Ll L Rep 384, 385 (*per* Bankes, LJ).

13.16 The insurer can rely upon the assured's original failure to observe good faith in avoiding a contract which has been transferred to an assignee, if the statutory requirements are satisfied. In other cases, where there has not been an effective legal or statutory assignment, the assured may have to bring any claim against the insurer as trustee for the assignee or the assignee may be able to sue in his own name; in such actions, the insurer can of course rely upon the assured's transgression of good faith to defeat any claim which may belong beneficially to the assignee. The assignment of the chose of action in such cases, which is recognised in equity, must of course defer to the defects in merits of the assignor's cause of action.

13.17 Similarly, if the insurer violates the duty of utmost good faith and subsequently assigns the policy to another insurer, the assured will be able to rely upon such a breach of duty as against the assignee. There have been almost no cases on the effect of a breach of duty on an assignee insurer. The matter, however, was touched upon in *Banque Financière de la Cité* v *Westgate Insurance Co Ltd (sub nom Banque Keyser Ullman SA* v *Skandia (UK) Insurance Co Ltd).*[45]

When must the equities exist?

13.18 In cases where there is an assignment of a chose in action arising in respect of the policy valid only in equity, the assignor's breach of duty will plague the assignee's interest both before and after the assignment, as the law recognises only or principally the assignor's title. Similarly, where there is an assignment of a chose of action under the Law of Property Act 1925, any breach of the duty of good faith by the assignor after the assignment will affect the assignee, even though the chose in action assigned is wholly assigned.[46] While the assignor retains any interest in the insurance contract, as the contracting party, the assignor's breach of duty will pose consequences for the assignee. When only a chose in action in the contract has been assigned, the duty, however, is a duty which is owed mutually between the original contracting parties.[47] However, where the entire contract is assigned, the assignor will cease to bear a duty of utmost good faith so that the assignor's conduct after that date becomes irrelevant to the assignee's right of recovery under the policy.[48]

13.19 A question arises whether the insurer may establish a defence of the breach of the duty of good faith against the claim of the assignee if the breach of duty occurs after the insured loss. The argument states that the assignee's right against the insurer exists or is vested in the assignee when the loss occurs and that any breach of duty which occurs afterwards, say in the assured's presentation of a claim, can have no effect upon the assignee. Such an argument is misguided because the assignee's interest is merely the interest in the

45. [1987] 1 Lloyd's Rep 69, 80, 95 (*per* Steyn, J).
46. Clarke, *The Law of Insurance Contracts*, 6th edn (2009), para 6-6(d). See also *Black King Shipping Corporation* v *Massie; The Litsion Pride* [1985] 1 Lloyd's Rep 437, 517–519 (*per* Hirst, J).
47. *Bank of Nova Scotia* v *Hellenic Mutual War Risks Association (Bermuda) Ltd; The Good Luck* [1988] 1 Lloyd's Rep 514, 546–547 (*per* Hobhouse, J).
48. Section 50 of the Marine Insurance Act 1906 provides for the assignment of the policy, as opposed to any one claim under the policy, and therefore if a policy is assigned pursuant to s. 50, any post-assignment conduct of the assignor should not affect the assignee's rights under the policy. This is so notwithstanding that the section contemplates that the insurer can raise any defence which could have been raised had the action been brought by the assignor. Such defences, it is suggested, are limited to those which arise prior to the assignment.

contract of insurance and if the assignor acts so as to render the contract voidable, the insurer should be able in principle to avoid the contract against the assignee.[49]

13.20 While the assignor's breach may destroy the value of the right assigned, this does not mean that the assignee will become liable for the assignor's breach. In *Banque Financière de la Cité* v *Westgate Insurance Co Ltd (sub nom Banque Keyser Ullman SA* v *Skandia (UK) Insurance Co Ltd)*,[50] on 1 October 1980, the underwriter (Mr Dungate), who was treated at first instance as being in breach of the duty of good faith, ceased employment with one insurer (Hodge) and obtained a position with another insurer (Skandia). Steyn, J (as he then was) found that Mr Dungate had been in breach of the duty of good faith in respect of insurance he underwrote both before and after 1 October 1980.[51] Together with this change of employment, rights and obligations under the policy underwritten by Mr Dungate on behalf of Hodge were assigned to Skandia. A further insurance contract was agreed by Mr Dungate on behalf of Skandia after 1 October 1980. On the facts of this case, the learned judge held that Hodge's vicarious liability for the breach of duty of Mr Dungate was not transferred by the assignment to Skandia. At first sight, one may wonder whether the judge's statement is in fact correct. However, on closer scrutiny, it must be treated as justified. The assignment of the policy will operate to transfer to an assignee the assignor's interest in the policy; if the interest is defective or subject to equities, then only a defective interest will pass. Accordingly, if the contract could be avoided by the assured, who then seeks restitution of the premiums he has paid, the assignee must accept that the contract will be avoided; however, he will not be liable to effect restitution, because he has nothing to restore to the assured, unless by the assignment he has accepted such liability. In the present case, it appears that such liability was not assigned. Therefore, Hodge retained any liability for breach of the duty of utmost good faith perpetrated by Mr Dungate before he terminated his employment with them, even after the policy was assigned.[52]

When will the assignee be subject to the duty of the utmost good faith?

13.21 The duty of good faith is owed as between the original parties to the insurance contract, the assured and insurer. The position will be different when the assured or insurer assigns all of his rights and obligations in the contract to a third party, so that the assignee becomes a party to the contract in his own right. In such a case, if the assured has assigned the policy completely, the insurer will owe a duty of good faith to the assignee, and not the assignor, in respect of the policy which has been assigned. The matter arose for consideration in *Bank of Nova Scotia* v *Hellenic Mutual War Risks Association (Bermuda) Ltd; The Good Luck*.[53] The issue at hand was whether the club insurer was obliged to disclose to the plaintiff bank, an assignee of the subject policy, the fact that the insurance had ceased because of a breach of warranty which occurred after inception. The obligation of disclosure was alleged to have existed by reason of the policy and independently by reason of a letter of undertaking

49. *Black King Shipping Corporation* v *Massie; The Litsion Pride* [1985] 1 Lloyd's Rep 437, 517–519 (*per* Hirst, J); *cf Central Bank of India* v *Guardian Assurance Co Ltd* (1936) 54 Ll L Rep 247, 259. There are also questions of agency and set-off which might affect the assignee's claim.

50. [1987] 1 Lloyd's Rep 69, 80, 95 (*per* Steyn, J).

51. By the the time the matter reached the House of Lords, it was held that there had been no breach of the duty of utmost good faith.

52. In this case, Steyn, J (95) also mentioned that the mere fact that the underwriter acquired knowledge, the possession of which led to a breach of the duty of good faith, prior to 1 October 1980 did not prevent a breach of duty occurring afterwards if there had been a failure to disclose such information after 1 October 1980.

53. [1988] 1 Lloyd's Rep 514 (*per* Hobhouse, J); [1989] 2 Lloyd's Rep 238 (Court of Appeal).

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given by the club to the plaintiff bank. The letter of undertaking recorded the assignment as follows:

"It is noted that by assignment in writing . . . the shipowners . . . have assigned to The Bank of Nova Scotia in their capacity as first preferred mortgagees all the ship owners' interest in this policy with all benefits thereof including all claims of whatsoever nature hereunder . . . "[54]

13.22 In resisting the argument that they owed any duty of disclosure, the club contended that under the policy, the duty of good faith which the insurer owed remained a duty owing to the shipowners (the assignors) and not the bank; the mere fact that the benefit of the insurance has been assigned does not mean that the benefit of the duty of good faith has also been assigned to the assignee bank. Both Hobhouse, J (as he then was) and the Court of Appeal favoured this contention. The importance of the courts' judgment in this respect demands a strict quotation. The trial judge said:

"The duty of the utmost good faith is an incident of the contract of insurance. It is mutual. The assignee of a benefit of such a contract does not initially owe any duty of the utmost good faith to the insurer, nor on the basis of mutuality is there, initially, any duty owed by the insurer to the assignee. The insurers' duty is to the shipowner, and if that duty is broken as against the shipowner, the assignee can have the benefit of the rights and remedies that arise from such a breach. The rights of the assignee can only arise from obligations to the assignor . . . A different situation may arise where the assignee steps into the shoes of the assignor and takes over the conduct of the contract. Under those circumstances, where the assignor ceases to be the person dealing with the insurer, the duty of the utmost good faith has to be discharged by reference to the assignee. However, that was not the case here. In respect of all the contracts of insurance, the conduct of those contracts was left in the hands of the shipowners, and it was the shipowners who dealt with the club. To accept the plaintiffs' argument would be to impose upon the club an additional and different obligation to that which had arisen in connection with the contract. If one views the obligation of the utmost good faith at the time of the performance of the contract as arising from an implied term of the contract, which is the view that I prefer, this conclusion is obvious. If one views the duty of the utmost good faith as being a duty which arises from a general law independently of any contractual obligations, and regardless of whether the contract has been entered into or not, then again one has to be prepared to identify the fact which brings into existence the duty of the utmost good faith owed by the insurer to the assignee. On the plaintiffs' present argument, it has to be said that this fact is the mere fact of the assignment itself. For the reasons already given, I consider that the mere assignment was not enough to create such a duty."[55]

The Court of Appeal approved this judgment, although the court preferred to treat the duty of good faith as one arising at common law and not as a term of the contract.[56]

13.23 Therefore, as long as the assignor remains interested in any respect (or at least in those respects which appertain to the mutual duty of good faith) in the contract of insurance, the duty of good faith is owed to and by the assignor and not the assignee. The assignee may benefit or suffer, by virtue of the assignment, from the remedies which are available for a breach of the duty, but the assignee cannot demand the performance of such a duty for his direct benefit, nor can the assignee be made to bear the burden of such a duty, except indirectly by suffering the consequences of any breach on the part of the assignor. However, if the entire contract is assigned or novated to the assignee so that the assignor ceases to be interested in the policy, then the duty may be owed by and to the assignee from the time of the assignment.[57] This duty will not be the same as that owed at placing, unless of course the

54. *Ibid.*, 244.

55. *Ibid.*, 546–547.

56. *Ibid.*, 264–265 (*per* May, LJ).

57. The Court of Appeal left this aspect of the question open: 264.

insurer's consent is required to the assignment or the policy is to be renewed or amended.[58]

13.24 Such a situation will arise commonly in the sphere of international trade, when a certificate or policy of insurance is assigned in respect of goods transported by sea. In such cases, when the cargo receiver accepts the assignment of the policy or certificate, he will thereafter owe a duty of good faith to the insurer (and will be entitled to expect the observance of good faith by the insurer), for example in the presentation of a claim. However, if the shipper of the goods who placed the insurance failed to comply with the duty by withholding a material fact from the insurer, the insurer may avoid the contract even when it is in the hands of the assignee receiver, because such an assignee still will take the policy subject to equities existing at the time of the assignment.

CO-ASSUREDS

13.25 The question arises whether the sins or indiscretions of an assured can affect the policy as regards his co-assured. It is not difficult to understand why such a fear may be justified. If either co-assured failed to make a full disclosure of material circumstances to the insurer, the insurer might not have accepted the risk and no policy would have eventuated. If there has been a breach of the duty of the utmost good faith, surely the insurer should be permitted to avoid the whole policy? On the other hand, such a result may seem unduly harsh, especially if the innocent co-assured has demonstrated good faith.

13.26 To understand the position carved out by the law as regards co-assureds, one must ask the fundamental question: what is an insurance policy and what does the policy purport to insure? The policy is the physical embodiment of a contract of insurance or multiple contracts of insurance, which are encased in one policy for the sake of convenience.[59] The insurance contract is a creature of the law; the policy is a physical document. Given the capacity of the policy to combine a number of contracts, a policy may seek to cover the joint interests of two or more co-assureds in the subject matter insured (in which case it is described as a "joint" insurance) or it may seek to insure the differing or various interests of the various co-assureds in the subject-matter of the insurance (described as a "composite" or "several" insurance). It is evident, therefore, that the distinction between a "joint" and a "composite" insurance policy depends on the nature of the insured interests of the co-assureds. This distinction was explained by Lord Greene, MR in *General Accident Fire & Life Assurance Corp Ltd* v *Midland Bank Ltd*.[60] If the interests are "inseparably connected so that a loss or gain necessarily affects" all co-assureds, the insurance covering those interests may be described as "joint".[61] The interests of joint owners of property are typical of such interests. However, if the interests may be exposed to different risks or suffer different types or measures of loss, then the interests are several and any insurance, even if secured by the one policy document, is more truly a composite policy.[62] Such composite policies are typified

58. See, for example, *Royal Exchange Assurance* v *Hope* [1927] 1 Ch 179.
59. *Cf General Accident Fire & Life Assurance Corp Ltd* v *Midland Bank Ltd* [1940] 2 KB 388, 404–406 (*per* Sir Wilfrid Greene, MR). See also Lloyd's Act 1982, s. 8, as regards business at Lloyd's.
60. [1940] 2 KB 388, 404–406.
61. *Cf Deaves* v *CML Fire and General Insurance Co Ltd* (1979) 143 CLR 24, 40–41 (HCA).
62. [1940] 2 KB 388. See also *New Hampshire Insurance Company* v *MGN Ltd* [1997] LRLR 24, 41–42 (*per* Potter, J), 56–57 (*per* Staughton, LJ); *The State of the Netherlands* v *Youell* [1997] 2 Lloyd's Rep 440, 446–450 (*per* Rix, J); affd [1998] 1 Lloyd's Rep 236. There is a sub-set of such composite interests, occasionally described as "pervasive" interests, where the interests are such as to allow one, any or all of the co-assureds to recover completely for a loss and thereafter to account to his other co-assureds: *Tomlinson (Hauliers) Ltd* v *Hepburn* [1966]

by the insurance of interests of the owners and bailees of property,[63] the owners and mortgagees[64] or chargees[65] of property, landlords and tenants,[66] the owners, contractors and sub-contractors in respect of property under construction,[67] and partners and corporate groups.[68] Similarly, if a policy insures more than one item of property (such as a marine fleet policy, but not a household contents policy), it may be that, depending on the construction of the policy, that the insurance in respect of each item is a separate contract.[69]

13.27 In effect, therefore, the policy which insures compositely insures different and distinguishable interests and it may be considered no more than a matter of convenience that there is one policy covering these interests. Whereas the joint interests, properly so called, of co-assureds are indistinguishable and each relate to all of the subject-matter of the insurance sounding in the same nature and extent of loss at the hands of an insured peril. Bearing in mind the nature of such interests, the rights, duties and consequences which pertain to "joint" co-assureds and "several" co-assureds are different.

13.28 If one co-assured is in breach of the duty of the utmost good faith, the breach will prejudice the other co-assured if their interests are joint.[70] (Such a breach may relate to a breach of the pre-contractual duty of disclosure[71] or of a post-contractual duty, such as the presentation of a fraudulent claim.[72]) The innocent co-assured will be prejudicially affected by the breach of duty either because the breach will be treated as a breach of the duty of good faith by the innocent co-assured or, as is more likely, because the insurer's right of avoidance will extend to the whole of the policy,[73] because their interests are so intertwined that they cannot be separated for the purposes of avoidance. However, a breach of the duty will not affect the other co-assured if their interests are several.[74]

AC 451 (*per* Lord Pearce); *Petrofina (UK) Ltd* v *Magnaload Ltd* [1983] 2 Lloyd's Rep 91, 95–96 (*per* Lloyd, J); *The State of the Netherlands* v *Youell* [1997] 2 Lloyd's Rep 440, 448–450 (*per* Rix, J); affd [1998] 1 Lloyd's Rep 236. *Cf Cox* v *Bankside Members Agency Ltd* [1995] 2 Lloyd's Rep 437, 441, 443 (*per* Phillips, J).
63. See *Tomlinson (Hauliers) Ltd* v *Hepburn* [1966] AC 451.
64. See *Samuel & Company Limited* v *Dumas* [1924] AC 431; *Woolcott* v *Sun Alliance and London Insurance Ltd* [1978] 1 Lloyd's Rep 629; *FNCB Ltd* v *Barnet Devanney (Harrow) Ltd* [1999] Lloyd's Rep IR 459.
65. See *General Accident Fire & Life Assurance Corp Ltd* v *Midland Bank Ltd* [1940] 2 KB 388.
66. *Ibid.*
67. See *Petrofina (UK) Ltd* v *Magnaload Ltd* [1983] 2 Lloyd's Rep 91; *The State of the Netherlands* v *Youell* [1997] 2 Lloyd's Rep 440, 446–450 (*per* Rix, J); affd [1998] 1 Lloyd's Rep 236.
68. *Brit Syndicates Ltd* v *Grant Thornton International* [2008] UKHL 18; [2008] 2 All ER 1140; *HLB Kidsons* v *Lloyd's Underwriters* [2007] EWHC 1951 (Comm); [2008] 1 All ER (Comm) 769, [80]–[97] (Gloster, J); [2008] EWCA Civ 1206; [2009] 1 Lloyd's Rep 8.
69. If *P&C Insurance Ltd* v *Silversea Cruises Ltd* [2003] EWHC 473 (Comm); [2004] Lloyd's Rep IR 217, [54]–[55] (*per* Tomlinson, J).
70. *Direct Line Insurance plc* v *Khan* [2001] EWCA Civ 1794; [2002] Lloyd's Rep IR 364 (joint tenants); *MMI General Insurance Ltd* v *Baktoo* [2000] NSWCA 70; (2000) 48 NSWLR 605 (partners).
71. For example, see *Woolcott* v *Sun Alliance and London Insurance Ltd* [1978] 1 Lloyd's Rep 629; *New Hampshire Insurance Company* v *MGN Ltd* [1997] LRLR 24, 42 (*per* Potter, J), 58 (*per* Staughton, LJ); *DSG Limited* v *QBE International Insurance Limited*, [1999] Lloyd's Rep IR 283.
72. See, for example, *Central Bank of India Ltd* v *Guardian Assurance Co Ltd* (1936) 54 Ll L Rep 247; *General Accident Fire & Life Assurance Corp Ltd* v *Midland Bank Ltd* [1940] 2 KB 388.
73. See *New Hampshire Insurance Company* v *MGN Ltd* [1997] LRLR 24, 42 (*per* Potter, J), 58 (*per* Staughton, LJ).
74. As to the effect of wilful misconduct by one co-assured upon the other, see *Samuel & Company Limited* v *Dumas* [1924] AC 431, 444–445 (*per* Viscount Cave), 450–451 (*per* Lord Finlay), 460 (*per* Lord Sumner); *The State of the Netherlands* v *Youell* [1997] 2 Lloyd's Rep 440, 446–450 (*per* Rix, J); affd [1998] 1 Lloyd's Rep 236. As to co-assureds and subrogation, see *Petrofina (UK) Ltd* v *Magnaload Ltd* [1983] 2 Lloyd's Rep 91; *National Oilwell (UK) Ltd* v *Davy Offshore Ltd* [1993] 2 Lloyd's Rep 582; *The State of the Netherlands* v *Youell* [1997] 2 Lloyd's Rep 440, 450–451 (*per* Rix, J); affd [1998] 1 Lloyd's Rep 236; *Bass Brewers Ltd* v *Independent Insurance Co Ltd* 2002 SLT 512.

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13.29 As we shall discuss,[75] if the insurer is entitled to avoid a contract of insurance as a result of a breach of the duty of the utmost good faith, the entire contract is avoided.[76] There have been suggestions that the breach of duty might affect an entire composite policy, because a composite policy is such that, on its proper interpretation, there is only one contract.[77] It is submitted that the preferable analysis is that where there are several interests insured by the one policy, the insurance of each interest should be regarded as encapsulated by one separate contract, whereas such an analysis does not lend itself to a joint policy, because it is not possible to identify and segregate each interest insured.[78] Indeed, in *New Hampshire Insurance Company* v *MGN Ltd*,[79] the court appears to have adopted this distinction.[80]

13.30 Accordingly, in *General Accident Fire & Life Assurance Corp Ltd* v *Midland Bank Ltd*,[81] the insurer was held not to be entitled to sue two co-assureds for the recovery of the proceeds of an over-valued claim made by a third co-assured. In *Woolcott* v *Sun Alliance and London Insurance Ltd*,[82] a policy was issued to insure the interests of a mortgagor and mortgagee of property through the medium of the mortgagees who were also the holders of a binding authority on behalf of the insurers. The court held that the insurer was not permitted to avoid the policy covering the interests of the mortgagee because of a failure by the mortgagor to disclose to the insurer and the mortgagee a prior criminal conviction. This effect (or lack of it) of bad faith on co-assureds was further clarified in *New Hampshire Insurance Company* v *MGN Ltd*,[83] where the issue was addressed as a preliminary issue in respect of a breach of duty by one co-assured company within a corporate group, upon the other insured companies within the group. In *Arab Bank plc* v *Zurich Insurance Co*,[84] Rix, J was concerned with a policy of professional indemnity insurance, under which the insured company and each of its directors were separately insured. The provisions of the policy, as construed by the court, were designed to ensure that the fraud or breach of duty of one assured would not affect another co-assured, except in the case of the latter's own fraud. One of the company's directors completed and signed the proposal form, which contained fraudulent misrepresentations, the director concerned (but not his co-directors) being guilty of fraud. The question arose whether or not the misrepresentation perpetrated by that director was to be attributed

75. See below 16.50–16.57.
76. *United Shoe Machinery Company of Canada* v *Brunet* [1909] AC 330, 340 (*per* Lord Atkinson).
77. See *Deaves* v *CML Fire and General Insurance Co Ltd* (1979) 143 CLR 24, 41 (HCA); *Advance (NSW) Insurance Agencies Pty Ltd* v *Matthews* (1988) 12 NSWLR 250, 261, 265–266; *Federation Insurance Ltd* v *Wasson* [1987] HCA 34; (1987) 163 CLR 303, 314, 319. *Cf Advance (NSW) Insurance Agencies Pty Ltd* v *Matthews* (1989) 166 CLR 606, [28–31] (HCA). See also *Central Bank of India Ltd* v *Guardian Assurance Co Ltd* (1936) 54 Ll L Rep 247, 259–260 (*per* Lord Maugham).
78. It is suggested that this approach holds true also in respect of the insurance of "pervasive interests", as their "pervasiveness" is a quality which has its genesis in the extent of loss which each interest insured might suffer, and not in the identity of each interest, unless one innocent co-assured seeks to recover on behalf of a guilty co-assured, in which case the claim might "well be affected by defences available to insurers by reason of the wilful misconduct of a co-assured" (*The State of the Netherlands* v *Youell* [1997] 2 Lloyd's Rep 440, 450 (*per* Rix, J); affd [1998] CLC 44).
79. [1997] LRLR 24, 42 (*per* Potter, J), 58 (*per* Staughton, LJ). Note also the use of the word "contract" in Marine Insurance Act 1906, s. 17, whereas the word "policy" is used elsewhere in the Act; the distinction is clarified in ss. 21 and 22. *Cf Eide UK Ltd* v *Lowndes Lambert Group Ltd* [1999] QB 199, 211–214.
80. See also *Lombard Australia Ltd* v *NRMA Insurance Ltd* (1968) 72 SR (NSW) 45; *Gilmore* v *AMP General Insurance Co Ltd* (1996) 67 SASR 387.
81. [1940] 2 KB 388.
82. [1978] 1 Lloyd's Rep 629, 631–632 (*per* Caulfield, J).
83. [1997] LRLR 24, 42–43 (*per* Potter, J); 58 (*per* Staughton, LJ).
84. [1999] 1 Lloyd's Rep 262, 276–277. See also *Brit Syndicates Ltd* v *Italaudit SpA* [2008] UKHL 18; [2008] 2 All ER 1140, [23] (*per* Lord Mance).

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to the company as a co-assured. Rix, J had little difficulty in holding that the provisions of the contract made it clear that there should not be such attribution.[85]

13.31 It has been noted[86] that the assignee owes no independent duty of good faith to the other party to the insurance contract (usually the insurer), at least unless the assignee assumes responsibility for the performance of the contract and then only as from the time of the transfer of responsibility. Therefore, the assignee of an insurance policy may suffer at the hands of the assured who has been guilty of bad faith. The assignee may have accepted the transfer of the policy to satisfy a debt or claim he has against an assured and may subsequently discover that the policy is rendered valueless because of the failure of the assured to disclose all material facts to the insurer. The assignee's title is a derivative title, which means that it is only as good as the title of the assignor. A co-assured, however, is a party to the contract in his own right and his title is not dependent on that of his co-assured, unless the insurance is "joint". The co-assured is subject to the duty of the utmost good faith[87] and so must ensure that he discloses those facts requiring disclosure and complies with the post-contractual obligations imposed on a party to the contract.

13.32 Of course, while the interests of co-assureds may be described as different or several, the relationship between the co-assureds might be such that material facts within the knowledge of one co-assured reasonably should be within the knowledge of another co-assured, in which case the latter co-assured will be obliged to observe good faith in his dealings with the insurer by disclosing such facts,[88] if they were actually aware of them or ought to have been aware of them in the ordinary course of business. Further, there may be occasions when the insurer will ask questions of an assured which relate to his co-assured or predecessor in title, which questions the assured must exercise good faith (including compliance with his duty of reasonable disclosure) in answering.[89]

CO-INSURERS; LEADING AND FOLLOWING UNDERWRITERS

13.33 In many cases of insurance, particularly household and consumer insurance, the contract of insurance is made between two parties—the assured and the insurer. However, in numerous other cases, particularly in the realm of higher value commercial insurance, there is a demand for the financial capacity, not to mention the need for liquidity and solvency, of multiple insurers to undertake the risks in question. Accordingly, very often more than one insurer will contract with the assured; usually, one insurer will take a particular percentage or proportion of the offered risk, another insurer will take another proportion (in an amount

85. *Cf Murphy* v *Swinbank* [1999] NSWSC 934, [479–488] (NSW Sup Ct).
86. See above 13.07–13.24.
87. Indeed, in the context of marine insurance claims, there may be occasions when the co-assured should exercise his reasonable endeavours to ensure full disclosure is forthcoming from others interested in the insured adventure in the guise of "ship's papers" orders of the court: *Graham Joint Stock Shipping Company Limited* v *Motor Union Insurance Company Limited* [1922] 1 KB 563, 580–581 (*per* Scrutton, LJ). This obligation extends to procuring disclosure from others interested not only in the policy (as co-assured or assignee) but also in the underlying adventure: *Teneria Moderna Franco Española* v *New Zealand Insurance Company* [1924] 1 KB 79; *Leon* v *Casey* [1932] 2 KB 576; (1932) 43 Ll L Rep 69, 73 (*per* Scrutton, LJ). In *Manifest Shipping & Co Ltd* v *Uni-Polaris Insurance Co Ltd; The Star Sea* [2001] UKHL 1; [2001] 2 WLR 170; [58–60], the House of Lords held that ship's papers disclosure is not an expression of the duty of the utmost good faith: *cf Rayner* v *Ritson* (1865) 6 B & S 888, 891; 122 ER 1421, 1422 (*per* Cockburn, CJ).
88. See *New Hampshire Insurance Company* v *MGN Ltd* [1997] LRLR 24, 43 (*per* Potter, J), 58 (*per* Staughton, LJ); *DSG Limited* v *QBE International Insurance Limited*, [1999] Lloyd's Rep IR 283.
89. *Glicksman* v *Lancashire and General Assurance Company Limited* [1925] 2 KB 593, 610 (*per* Sargant, LJ).