This article explores the current state of the law in the United Kingdom concerning the duty of good faith in insurance contracts. Recent case law provides that the duty of disclosure by insureds is constantly being refined. It argues that due to the current fragmentation of the law, future reform should be focused on creating a consistent regime for insurance contracts. Such regime should be flexible enough to encompass both consumer and commercial insurance, while demonstrating certain and clear objectives.

The first part examines the duty of disclosure by an insured as formulated by Lord Mansfield CJ. The second part analyzes the case law that followed Carter v. Bohem, which developed the notion of good faith and expanded it into a duty of utmost good faith. Third, the discomfort of the UK courts and UK law reform agencies over the severity of the insured’s duty along with the injustices that result when insurers avoid a policy for non-disclosure is explored. Fourth, recent judicial opinions that attempt to alleviate the position of the insured are assessed. The fifth and concluding part of this article briefly examines the 2009 [UK] Consumer Insurance (Disclosure and Representations) Bill published by the English and Scottish Law Commissions in December 2009. It constructs an alternative model which takes account of recent developments in Australian law. It is argued that the focus should be on balancing the economic costs of reform with the benefits of a more balanced regime which does not create a distinction between consumer and business insureds.

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* Professor of Law and Vice Dean of the Faculty of Laws, UCL. I owe a debt of gratitude to the anonymous referees for their helpful comments. Liability for any errors, however, is mine alone. I would also like to thank the editors of the Journal for affording me the opportunity to amend the article immediately prior to its publication so as to include reference to UK reform proposals published in December 2009.
Insurance contracts are highly unusual in that they are founded upon the doctrine of *uberrimae fidei.* The consequence is that the general contractual duty borne by parties to avoid misrepresentation is extended and reinforced by the additional obligation to disclose all material facts that would induce the insurers to underwrite the risk. This was first laid down by Lord Mansfield C.J. in *Carter v. Boehm,* and his formulation of the disclosure duty is partially codified in the Marine Insurance Act 1906. Lord Mansfield was at the time attempting to import into English commercial law the civil law notion of good faith, but this ultimately proved unsuccessful and only survived for a very limited class of transactions, including insurance.

The effect of non-disclosure by the insured entitles the insurer to avoid the contract *ab initio,* notwithstanding the absence of any fraudulent intent. The economic consequences are severe and disproportionately harsh. The policy becomes valueless so that the insured loses the financial safeguard that the policy was designed to provide should the losses caused by the insured risks come to pass. This is not to say that the rationale underlying the disclosure duty and the remedy for its breach is in any way obscure. The role of underwriters is to assess risk and if there are material factors known only to the insured, then the insured must disclose them. The reason for the duty is clear where the underwriter is not in a position to

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3 See Marine Insurance Act, 1906, 6 Edw. 7, c. 41, §§ 17-20 (Eng.).


discover for himself or herself the circumstances that may impact upon the risk. For example, one case would be where the insured seeks to take out a life policy having received a death threat. Or a vessel the underwriter is asked to insure may be on the high seas and, therefore, not available for inspection. In such circumstances there can be no quarrel with the fairness of the insured’s duty of good faith. But in the case law subsequent to Carter v. Boehm, the boundaries of the insured’s duty were expanded beyond, it is suggested, what Lord Mansfield originally envisaged. For example, it has been held that the failure of an insured to disclose criminal convictions and his precarious financial position when applying for fire insurance will enable the insurer to avoid the policy following a fire caused by an electrical fault.

In practical terms, the issue which pervades the duty of good faith can be reduced to the following question: how can the ordinary insured, whether acting in a private or commercial capacity, untutored in the niceties of insurance law, be expected to know what particular circumstances are material and would, therefore, influence the prudent underwriter? The sheer breadth of the insured’s duty together with the all-or-nothing consequence of avoidance, therefore, rightly gives rise to legitimate concern. In a series of recent cases, decided over the last ten years or so, the English courts have been steadily refining the disclosure duty while, at the same time, laying considerable emphasis on the mutuality of the requirement of good faith by giving content to that borne by insurers. This process is a rebalancing exercise. As such, it involves a tacit

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8 See Lord Mansfield’s formulation of the duty and the Marine Insurance Act, 1906, 6 Edw. 7, c.41, § 18.
9 Indeed, this is in line with various calls for reform which have long gone unheeded by the legislature. See infra note 15. That said, the UK Financial Ombudsman Service (FOS) has sought to mitigate the harshness of the duty, at least in so far as it applies to consumer insureds and small businesses with a group annual turnover of less than £1 million. For commercial insureds, however, who
unraveling of case law spanning over a century in which the courts had adopted an unequivocal stance in permitting avoidance for non-disclosure across the range of insurance, both consumer and commercial, without regard to notions of fairness, proportionality, or whether there was actual inducement. Admittedly the anxiety of modern judges has generally been directed towards relieving the position of the consumer or private insured, but the limits of this shift of emphasis are not entirely clear. It begs the question whether commercial insurance is also being targeted. Such doubt carries the danger of undermining the very certainty that should represent the cornerstone of commercial law in this respect and the economic implications are potentially significant.

Taken in the round, it is possible to distill several strands of reasoning from the modern case law. First, focusing solely upon the content of the insured’s pre-contractual duty of disclosure, the courts have sought to limit its scope by refining the conditions, most notably the requirement of inducement, that must be met before the insurer may justifiably avoid the policy for non-disclosure. Further, in relation to avoidance, it is noteworthy that in recent times some judges have had recourse to notions of good faith, conscience, and fairness when assessing whether insurers may exercise the remedy. But judicial thinking in this respect is not entirely consistent for it has been suggested that, as with the remedy of rescission for misrepresentation, the rights of insurers are unfettered by such considerations. Another strand of reasoning that has emerged has been directed towards the contours of waiver. An insurer has every opportunity to ask specific questions of the applicant for insurance in the proposal form. Typically, those questions will be directed towards claims history or health where the application relates to life or sickness insurance. Nonetheless, even where such questions are raised, the insured is not relieved from his or her duty to volunteer any further material circumstances that fall outside the scope of them. Any defense that an insured might seek to raise based on waiver is, in the orthodox view, doomed to failure. However, this has been challenged recently in a

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powerful dissent delivered by Rix L.J., whose reasoning may portend future developments. In this regard, considerable emphasis is now being paid to the importance of the presentation of risk. The modern view is that insurers should not be content to play a passive role during the disclosure process but should be prepared to make necessary enquiries about the risk to be underwritten. Finally, the question of whether or not the insured’s duty of good faith continues post-contractually and again triggers at the claims stage has also attracted considerable judicial scrutiny of late.

This article is in five parts. It first examines the scope of the insured’s duty of disclosure originally formulated by Lord Mansfield C.J.. Secondly, it considers the case law subsequent to *Carter v. Boehm* in which the notion of good faith was developed and expanded into a duty of so-called *utmost* good faith. The third part will outline the unease expressed by the courts and by the law reform agencies, over the harshness of the insured’s duty and the injustices that result when insurers avoid a policy for non-disclosure. The fourth part will assess recent judicial inroads into the orthodox position that appear to be aimed at alleviating the position of the insured. In this respect, the starting point will be *Pan Atlantic Insurance Co. v. Pine Top Insurance Co.* Although the House of Lords took the opportunity to settle the legal position relating to the insured’s duty of disclosure, it did not quell the debate surrounding the perceived iniquities of the insurer’s remedy. Finally, against the backdrop of modern English case law, together with key developments in Australia, a model will be

14 This is not a novel development but reflects the view expressed by Lord Mansfield C.J. in *Carter v. Boehm*, (1766) 97 Eng. Rep. 1162. However, by the mid-nineteenth century, the point seems have faded from judicial thinking when addressing the scope of the disclosure duty.
15 See, e.g., LAW REFORM COMMITTEE, CONDITIONS AND EXCEPTIONS IN INSURANCE POLICIES, 1957, Cmnd. 62; THE LAW COMMISSION, INSURANCE LAW – NON-DISCLOSURE AND BREACH OF WARRANTY, 1980, Cmnd. 8064; JOHN BIRDS, NAT’L CONSUMER COUNCIL, INSURANCE LAW REFORM: THE CONSUMER CASE FOR A REVIEW OF INSURANCE LAW (1997). Although the UK Department of Trade and Industry (now renamed the Department for Business, Innovation and Skills (DBIS)) issued a draft Insurance Bill following the Law Commission’s report in 1980, nothing came of it, the government of the day being satisfied that the industry’s response via the Association of British Insurers’ Statement of Practice struck the appropriate balance for the consumer-insured.
proposed that might serve to inform the English and Scottish Law Commissions’ current re-examinations of insurance law that identifies non-disclosure as a key issue.17 It will be seen that the current state of the law is fragmented and complicated and that future reform should be directed towards constructing a coherent regime for insurance contracts that meets the objectives of certainty and clarity, while being sufficiently flexible to encompass both consumer and commercial insurance.

I. THE ORIGINS OF THE DISCLOSURE DUTY AND ITS STATUTORY CODIFICATION

A. CARTER V. BOEHM

An enduring legacy of the Seven Years War is that it left us with a landmark decision which contains the most quoted passage in U.K. insurance law. In Carter v. Boehm, the issue of non-disclosure came to court as a result of the Governor of Sumatra, George Carter, effecting a policy of insurance on Fort Marlborough, a trading fort, against the likelihood of a French attack.18 His decision to insure was vindicated when, in April 1760, the fort was seized by the French.19 The Governor’s claim was disputed by the underwriter and in 1766, Lord Mansfield C.J.,

17 The English and Scottish Law Commissions are statutory independent bodies created by the [UK] Law Commissions Act 1965 c. 22, to keep the law under review and to recommend reform where it is needed. The insurance contract law reform project was announced on 14 October 2005, the first “issues paper” on misrepresentation and non-disclosure was published at the end of September 2006. See The Law Commission, Insurance Contract Law, Misrepresentation and Non-Disclosure (Sept. 2006), available at http://www.lawcom.gov.uk/docs/insurance_contact_law_issues_paper_1. See infra notes 305-11. On December 15 2009 the Law Commissions published their joint report and draft Bill to reform the law on what a consumer-insured must disclose to the insurers prior to the conclusion of the policy; see CONSUMER INSURANCE LAW: PRE-CONTRACT DISCLOSURE AND REPRESENTATION, 2009, Cm 7758, discussed infra note 307 et seq.

18 Carter, 97 Eng. Rep. at 1163. Park notes that Carter is a seminal case (“. . . from it may be collected all the general principles which the doctrine of concealments, in matters of insurance, is founded, as well as all the exceptions. . . .”). JAMES ALLAN PARK, A SYSTEM OF THE LAW OF MARINE INSURANCES 193 (Thomas & Andrews 1800) (1787).

presiding at Guildhall, heard the consequent action.20 The underwriters had sought to avoid the contract on the basis that the Governor had failed to disclose the fort’s weakness and its vulnerability to an attack by the French.21 Their defence failed, but Lord Mansfield took the opportunity to formulate the duty of good faith which has come to represent a cornerstone of English insurance law:

The special facts, upon which the contingent chance is to be computed, lie most commonly in the knowledge of the insured only; the under-writer trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge, to mislead the under-writer into a belief that the circumstance does not exist, and to induce him to estimate the risqué, as if it did not exist.

The keeping back such circumstance is a fraud, and therefore the policy is void. Although the suppression should happen through mistake, without any fraudulent intention; yet still the under-writer is deceived, and the policy is void; because the \textit{risque} run is really different from the \textit{risque} understood and intended to be run at the time of the agreement.

. . . .

Good faith forbids either party by concealing what he privately knows, to draw the other into a bargain, from his ignorance of that fact, and his believing the contrary.

But either party may be innocently silent, as to grounds open to both, to exercise their judgment upon. \textit{Aliud est celare; aliud, tacere; neque enim id est celare quicquid reticeas; sed cum quod tuscias, id ignorare emolumenti tui causa velis eos, quorum intersit id scire.}22

This formulation begs the question as to why insurance contracts are exceptional in requiring a positive duty of disclosure. Although the disparity of knowledge between the parties has been proffered as the explanation, this is hardly a satisfactory rationale in itself given that in

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20 \textit{Id.} at 1162-63.
21 \textit{Id.} at 1163.
other common contracting situations, the parties similarly lack equality of information. The explanation for this exceptional feature of insurance must, therefore, lie elsewhere. The investigation begins by considering Lord Mansfield’s reasoning. It then goes on to review the jurisprudence surrounding the good faith requirement and how it evolved into a duty of so-called utmost good faith.

B. THE RATIONALE

Lord Mansfield explained that the policy considerations underlying the duty are the prevention of fraud and the furtherance of good faith: it therefore fulfils a prophylactic role.\textsuperscript{23} He based it upon the concept of “concealment,” but over time this developed beyond deliberate concealment so as to encompass all non-disclosure, however innocent, of a material fact. In \textit{Carter v. Boehm}, the underwriter had argued that the insured had been fraudulent in failing to disclose the fort’s vulnerability to attack.\textsuperscript{24} This contention was unsuccessful, it being held that the underwriter must be taken to have realised that the Governor, by insuring, obviously apprehended the possibility of an attack.\textsuperscript{25} By underwriting the risk, the insurer thereby assumed knowledge of the state of the fort.\textsuperscript{26} It was stressed that the underwriter, sitting in London, was in a better position than the Governor to stay informed about the fortunes of the war and so it was not a matter within the private knowledge of the Governor only, but was, in fact, in the public domain.\textsuperscript{27} Lord Mansfield concluded that a verdict in favour of the underwriters would have had the effect of turning a rule against fraud into an instrument of fraud.\textsuperscript{28} He proceeded on the basis that good faith was a mutual duty, not an obligation borne solely by

\textsuperscript{23} This is a narrower view than that expressed over a century later by Channell J in \textit{Re Yager & Guardian Assurance Co.}, [1912] 108 L.T. 38 (K.B.), to the effect that the rationale underlying the disclosure duty is not the need to prevent harm to the insurer as such, but the need for a true and fair agreement whereby risk is transferred. \textit{Id.} at 44-45.

\textsuperscript{24} \textit{Carter}, 97 Eng. Rep. at 1163.

\textsuperscript{25} \textit{Id.} at 1167.

\textsuperscript{26} \textit{Id.}

\textsuperscript{27} \textit{Id.}

\textsuperscript{28} \textit{Id.} at 1169.
insureds, and being mutual the problem of unfairness was shared between the parties. 29

Lord Mansfield also placed emphasis on the need for insurers to demonstrate reliance. He explained that the underwriter “proceeds upon confidence that [the insured] does not keep back any circumstance in his knowledge, to mislead the under-writer into a belief that the circumstance does not exist, and to induce him to estimate the risque, as if it did not exist.” 30 Herein we see the assimilation of non-disclosure with misrepresentation. The good faith duty converts non-disclosure into misrepresentation because an insured who fails to disclose a material fact is effectively misrepresenting the true state of affairs. Lord Mansfield’s choice of language is critical: it traverses the two vitiating factors and reliance and inducement lies at the heart of both. For misrepresentation, the consequence is therefore the same as with pure non-disclosure, namely avoidance of the contract ab initio. 31

Both in *Carter v. Boehm*, and in subsequent cases, Lord Mansfield sought to limit the scope of the insured’s duty by, for example, stressing the need for underwriters to be proactive in ascertaining facts material to the

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29 Indeed, Lord Mansfield was scathing in his condemnation of the underwriter’s defense:

The underwriter, here, knowing the governor to be acquainted with the state of the place; knowing that he apprehended danger, and must have some ground for his apprehension; being told nothing of neither; signed this policy, without asking a question. If the objection ‘that he was not told’ is sufficient to vacate it, he took the premium, knowing the policy to be void; in order to gain, if the alternative turned out one way; and to make no satisfaction, if it turned out the other: he drew the governor into a false confidence . . .

. . . If he thought that omission an objection at the time, he ought not to have signed the policy with a secret reserve in his own mind to make it void; if he dispensed with the information, and did not think this silence an objection then; he cannot take it up now, after the event.

*Id.* at 1169.


31 The insurers remedy in this respect is codified by the Marine Insurance Act, 1906, 6 Edw. 7, c. 41, § 20 (Eng.).
risk. In Noble v. Kennoway, the insured vessel had arrived safely at Labrador but prior to being unloaded, it was used for fishing. Subsequently, the vessel was taken by privateers while it was unmanned. The owners’ claim for the value of the cargo was met with the defence by the underwriters that they were not liable because of the delay in unloading. The insured argued that this was a trade usage in this particular port because of the lack of warehousing. Lord Mansfield, finding for the insured, reasoned that every underwriter was presumed to know the practices of the trade he insures and if he does not know then it is his duty to inform himself of it. He returned to the point in Mayne v. Walter, where the insured’s claim for the loss of supercargo seized by the French was met with the defence that he should have disclosed the existence of a French ordinance prohibiting Dutch ships carrying the supercargo of any country at war with France on pain of it being taken as prize. Lord Mansfield said that if both parties were ignorant of the relevant fact, “the underwriter must run all risks: and if the [underwriter] knew of such an edict, it was his duty to inquire, if such supercargo were on board.” He went on to note that “[i]t must be a fraudulent concealment of circumstances, that will vitiate a policy.” This has been termed the narrow Mansfield rule. Reflecting upon his original formulation, Lord Mansfield appears to have come around to the view that the duty is limited insofar as it must strike a balance between the parties so as to achieve some symmetry between them. Indeed, by the early nineteenth century, emphasis was being placed on Lord Mansfield’s clear admonition that underwriters have a distinct investigative role to play in the disclosure process. For example, in Friere v. Woodhouse, a marine insurance case, Burrough J. said, “what is exclusively known to the assured ought to be communicated; but what the underwriter, by fair inquiry and due diligence, may learn from ordinary sources of information need not be

33 Id. at 326.
34 Id.
35 Id.
36 Id. at 327.
38 PARK, supra note 18, at 196.
39 Id.
disclosed." The material information could have been discovered by the underwriter from Lloyd’s List.

It is striking that throughout his judgments on the issue of non-disclosure Lord Mansfield avoided the terminology of “utmost” good faith. Yet section 17 of the Marine Insurance Act 1906, the preamble of which declares it to be a codifying statute, states that insurance is uberrimae fidei. It goes on to provide that a contract of insurance is a contract based upon the duty of utmost good faith which, if broken, entitles the other party to avoid the contract. Section 17 does not, therefore, precisely mirror the language of Lord Mansfield’s formulation which, as seen above, draws the distinction between deliberate concealment and misrepresentation (bad faith) and innocent (good faith) mistaken non-disclosure. The provision must, therefore, be seen as synthesising not Lord Mansfield’s views, but rather the dominant view emerging from the case law decided during the latter half of the nineteenth century to the effect that the underwriter is a passive recipient of information supplied by the insured when presenting the risk. As such, this loses sight of the more restrictive views expressed not only in Carter v. Boehm, but which was also in the judgments found in Noble v. Kennoway, Mayne v. Walter, and Friere v. Woodhouse. It was certainly not within the mandate of Sir Mackenzie Chalmers, who drafted the Digest upon which the 1906 Act was based, to correct the significant body of case law he sought to codify. The question that arises, therefore,

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44 Marine Insurance Act, 1906, 6 Edw. 7, c. 41, § 17 (emphasis supplied).
46 See note 45 infra for conflicting case law.
is when did the disclosure duty metamorphose into something requiring *utmost* good faith?

II. THE EVOLUTION OF UBERRIMAE FIDEI

In broad terms, a hallmark of much of the case law subsequent to *Carter v. Boehm* is the expansive approach that was taken towards Lord Mansfield’s formulation of the disclosure duty. It is not proposed to examine the merits of this case law in terms of whether the scope of Lord Mansfield’s judgments were misconstrued, but, as commented above, it was such that by the end of the nineteenth century, synthesising it required section 17 of the 1906 Act to declare insurance contracts to be of “*utmost*” good faith. Perhaps surprisingly, the suggestion that an insured must be of *utmost* honesty (as if there may be lower degrees of honesty) as represented in this statutory declaration was not seen as being particularly controversial or novel. As Lord Herschell, who originally took charge of the Bill when it was introduced in the House of Lords in 1894, explained, its purpose was to reproduce as exactly as possible the state of the existing law.

Tracing the antecedents of “*utmost*” good faith is an intriguing exercise, for it has no equivalent in the civil law. Indeed, in *Mutual and Federal Insurance Co. Ltd. v. Oudtshoorn Municipality*, the Supreme Court of Appeal of South Africa, expressing the view that the effect of the Pre-Union Statute Revision Act 43 of 1977 was to make South African insurance law governed by Roman-Dutch law, was moved to observe that “*uberrimare fides* is an alien, vague, useless expression without any meaning in law…our law of insurance has no need for *uberrimae fides* and the time has come to jettison it.” Its origins can, however, be discerned in U.K. case law decided during the latter half of the nineteenth century. For example, in *Bates v. Hewitt*, the court paid little heed to Lord

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51 *Id.* at 433F.
Mansfield’s views expressed over a century earlier.\textsuperscript{53} The claimant had not informed the insurer that the insured vessel, the \textit{Georgia}, had been a Confederate cruiser.\textsuperscript{54} The \textit{Georgia} was well known to the British public, and when the ship came to Liverpool for breaking she attracted considerable interest in both the press and in the House of Commons.\textsuperscript{55} The defendant underwriter admitted he had known of the ship’s history but that at the time of underwriting it was not present in his mind.\textsuperscript{56} The jury found that the underwriter was ignorant of the vessel’s notoriety at that particular time, although they did go on to express the view that when the risk was presented, he did have the means available for identifying the ship.\textsuperscript{57} The court held that the claimant was in breach of his duty of disclosure.\textsuperscript{58} Curiously, the judges in the case went to considerable lengths to explain that they were merely applying a long established principle. Lord Cockburn CJ stated that a proposer of insurance “is bound to communicate to the insurer all matters which will enable him to determine the extent of the risk against which he undertakes to guarantee the assured.”\textsuperscript{59} Shee J., while admitting that the underwriter might through his own investigations have discovered the material fact about the \textit{Georgia}’s history, concluded, however, that he was under no duty to make such enquiries.\textsuperscript{60} This fails to sit with Lord Mansfield’s notion of an insurer’s constructive knowledge - a critical factor in his finding in \textit{Carter v. Boehm}. It also fails to sit with \textit{Friere v. Woodhouse}, in which it will be recalled, the court, applying Lord Mansfield’s formulation of the duty, had no hesitation in finding that underwriters had a pro-active role to play during the disclosure process.\textsuperscript{61} Nonetheless, towards the close of the nineteenth century, the consensus of judicial opinion was such that determining if the duty of disclosure has been discharged requires something more than merely exacting a duty of honesty from the insured. This came to the fore in \textit{Life Association of Scotland v. Foster}, in which the term “utmost good faith” is adopted by Lord President Inglis: “Contracts of Insurance are in

\textsuperscript{54} Id. at 604.
\textsuperscript{55} Id. at 595.
\textsuperscript{56} Id. at 604.
\textsuperscript{57} Id.
\textsuperscript{58} Id. at 599.
\textsuperscript{59} Bates, 2 L.R.Q.B. at 604-05.
\textsuperscript{60} Id. at 611.
this, among other particulars, exceptional, in that they require on both sides uberrima fides. Hence, without fraudulent intent, and even bona fides, the insured may fail in the duty of disclosure.”62

This decision is followed soon after by Ionides v. Pender, in which Blackburn J. was moved to assimilate the prevailing view into the so-called “prudent insurer” test.63 While the judge accepted that “it would be too much to put on the assured the duty of disclosing everything which might influence the mind of an underwriter,” he nevertheless conceded that “a concealment of a material fact, though made without any fraudulent intention, vitiates the policy.”64 Blackburn J. concluded by stating that “all should be disclosed which would affect the judgment of a rational underwriter governing himself by the principles and calculations on which underwriters do in practice act.”65

62 (1873) 11 M. 351, 359. It might be the case that this generation of judges was perhaps placing too much reliance on Park’s Law of Marine Insurance published in 1787, rather than tracing Lord Mansfield’s reasoning first hand. For example, chapter 10 of Park’s treatise states that “the learned judges of our courts of law, feeling that the very essence of insurance consists in a rigid attention to the purest good faith, and the strictest integrity, have constantly held that it is vacated and annulled by any the least shadow of fraud or undue concealment.” PARK, supra note 18, at 174 (emphasis supplied).

63 (1874) 9 L.R.Q.B. 531. This was incorporated by Chalmers into § 18(2) of the Marine Insurance Act, 1906, 6 Edw. 7, c.41 (Eng.), which provides, “[e]very circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk.”

64 Ionides, 9 L.R.Q.B. at 537, 539.

65 Id. at 539. A further opportunity to put forward his view on the scope of the duty of disclosure was taken by him, now Lord Blackburn, in Brownlie v. Campbell, (1880) 5 App. Cas. 925, in which he noted:

… [i]n policies of insurance, whether marine insurance or life insurance, there is an understanding that the contract is uberrima fides, that if you know any circumstance at all that may influence the underwriter’s opinion as to the risk he is incurring, and consequently as to whether he will take it, or what premium he will charge if he does take it, you will state what you know. There is an obligation there to disclose what you know; and the concealment of a material circumstance known to you, whether you thought it material or not, avoids the policy.

Id. at 954. Material facts are typically categorised as either those relating to
Blackburn J.’s formulation is encapsulated in sections 17 and 18(1) and (2) of the 1906 Marine Insurance Act. More particularly, section 18(1) lays down the overriding pre-contractual duty of disclosure while section 18(2), which provides that “every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk,” gives content to the governing principle of utmost good faith declared by section 17.66 The view that insurance required nothing less than utmost good faith, or the idea of comparative degrees of honesty, thus became firmly entrenched in English insurance law.

Shortly after the 1906 Act received Royal Assent, the opportunity to explore the insured’s duty of disclosure came before the Court of Appeal in *Joel v. Law Union and Crown Insurance Company*.67 As a means of overcoming the practical difficulties of proof which a duty based solely upon utmost good faith could give rise to,68 Fletcher Moulton L.J. superimposed a requirement of reasonableness. The judge explained that:

> There is, therefore, something more than an obligation to treat the insurer honestly and frankly… There is the further duty that he should do it to the extent that a *reasonable man* would have done it; and, if he has fallen short of that by reason of his bona fide considering the matter not material, whereas the jury, as representing what a reasonable man would think, hold that it was material, he has failed in his duty, and the policy is avoided. This further duty is analogous to a duty to do an act which you undertake with reasonable care and skill, a failure to do which amounts to negligence, which is not atoned for by any amount of honesty or good intention. The disclosure must be of all you ought to have realized to be material, not of that only which you did in fact realize to be so.69

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66  Marine Insurance Act, 1906, 6 Edw. 7, c. 41, § 18 (Eng.).
67  *Joel*, [1908] 2 K.B. 863.
68  See *Joel*, [1908] 2 K.B. at 883-84 (emphasis added). This passage occurs in a reserved judgment, and there is no indication that Vaughan Williams or Buckley
The insured is thus under a duty to disclose material facts, irrespective of whether he or she appreciated their materiality.\textsuperscript{70} This combined test can, and does give rise to unjust results. For example, in \textit{Horne v. Poland}, the insured’s policy was voidable due to his failure to disclose that he was an alien having come to this country at the age of twelve, and that he had changed his name from that of Euda Gedale to Harry Horne.\textsuperscript{71} Lush J., having noted that the applicable principle of law had been stated by Fletcher Moulton L.J. in \textit{Joel}, added:

If a reasonable person would know that underwriters would naturally be influenced, in deciding whether to accept the risk and what premiums to charge, by those circumstances [i.e., that he came from a country where his countrymen were not as careful and trustworthy as Englishmen], the fact that they were kept in ignorance of them and indeed were misled, is fatal to the plaintiff's claim.\textsuperscript{72}

Similarly, in \textit{Becker v. Marshall}, Salter J., also applying the test laid down by Fletcher Moulton L.J., held on an issue of concealment as to foreign origin and change of name, that while the claimant:

\ldots in good faith did not realise that these were things material to be disclosed…the average business man, the average reasonable man, would not have taken that view, and…that a reasonable man, the average reasonable man, would have disclosed and would have known that it was necessary to disclose.\textsuperscript{73}

L.J.J. dissented, although they base their concurring judgments on different grounds.

\textsuperscript{70} See EGGERS ET AL., \textit{supra} note 68, \textit{\&} 3.10-3.11.

\textsuperscript{71} [1922] 2 K.B. 364, 364.

\textsuperscript{72} \textit{Id.} at 367. The decision must now be viewed as running counter to the Race Relations Act, 1976, c.74 (Eng.).

Curiously, for McNair J. in *Roselodge v. Castle*, Fletcher Moulton L.J.’s formulation represents nothing less than a pure application of Lord Mansfield’s rule. The dispute arose out of the rejection by the insurers of the insured’s claim who, as diamond merchants, had insured diamonds against all risks. The insurers’ defence was founded upon the non-disclosure of two alleged material facts. First, that the principal director of the insured company had been convicted of bribing a police officer in 1946 and second, that the insured’s sales manager had been convicted of smuggling diamonds into the United States in 1956. According to one of the expert witnesses called by the insurer, a person who stole apples when aged 17 is much more likely to steal diamonds at the age of 67 even if he had led a blameless life for 50 years, than someone

[T]here is a point here which often is not sufficiently kept in mind. The duty is a duty to disclose, and you cannot disclose what you do not know. The obligation to disclose, therefore, necessarily depends on the knowledge you possess. I must not be misunderstood. Your opinion of the materiality of that knowledge is of no moment. If a reasonable man would have recognized that it was material to disclose the knowledge in question, it is no excuse that you did not recognize it to be so. But the question always is, Was the knowledge you possessed such that you ought to have disclosed it?

Such was the momentum of this approach that the 2nd (Hailsham) edition of the Laws of England, Volume 18, prepared by Scott L.J., stated that:

Materiality is a question of fact, not of belief or opinion. The assured does not therefore discharge his duty by a full and frank disclosure of what he honestly thinks to be material; he must go further and disclose every fact which a reasonable man would have thought material… If, however, the fact, though material, is one which he did not and could not in the particular circumstances have been expected to know, or if its materiality would not have been apparent to a reasonable man, his failure to disclose it is not a breach of duty.

*Id.* at 586(3). This passage is repeated in the 3rd (Simonds) ed., vol. 22, 360.


*Id.* at 113.

*Id.*
who had led a totally blameless life. This did not convince McNair J. who held that the 1946 conviction was not a material fact, having “no direct relation to trading as a diamond merchant.” Having examined the authorities, with particular emphasis being given to *Horne v. Poland*, the judge concluded:

> In my judgment, on this review of the authorities the judgment of Lord Justice Fletcher Moulton in *Joel's case* contains, if I may respectfully say so, a correct statement of the law on the topic. It has the merit...of emphasizing that even under the present practice of admitting expert evidence from underwriters as to materiality, the issue as to disclosability is one which has to be determined as it was in Lord Mansfield's day by the view of the Jury of reasonable men.

As conceded by Fletcher Moulton L.J., the duty does not require the insured to disclose that of which he or she is ignorant, unless the insured ought to have known of such circumstances in the ordinary course of business. But, nevertheless, from the insured’s perspective the disclosure duty laid down by the Marine Insurance Act of 1906, as explained by the subsequent case law, is particularly harsh and, it is suggested, represents an overly expanded view of Lord Mansfield’s original formulation which was premised upon the notion of “concealment.” From a contemporary standpoint, it is hardly surprising that by the second half of the twentieth century both the courts and the law reform bodies were questioning whether such a strict approach was necessarily appropriate for all classes of insurance.

77 *Id.* at 132.
78 *Id.*
79 *Id.* at 131.
III. CRITICISMS OF THE DUTY OF DISCLOSURE AND THE REMEDY FOR BREACH

Although modern judges inevitably follow the substantial line of case law on the Marine Insurance Act of 1906 §§ 17 and 18, they have not been timid in expressing their unease over the rigours of the disclosure duty. For example, in *Anglo-African Merchants Ltd. v. Bayley*, Megaw J. queried whether the insured should be bound to disclose that which he does not appreciate to be material.\(^81\) Further, in *Lambert v. Co-operative Insurance Society, Ltd.*, all three judges in the Court of Appeal took the opportunity to criticise the prudent insurer test.\(^82\) Lawton and Cairns L.J.J. went so far as to call for Parliamentary intervention to address the injustices caused by the harshness of the duty.\(^83\) Briefly, the facts concerned an insured, Mrs. Lambert, who claimed under a household “all risks” policy that she and her husband had held for some nine years.\(^84\) Neither at the commencement of the policy nor on its subsequent renewals had the insurers asked whether they had any criminal convictions.\(^85\) When a claim was made for £311.00, representing the value of items of jewellery that had been lost, the insurers avoided liability on the basis that the criminal convictions of Mr. Lambert for, amongst other things, handling stolen cigarettes and stealing shirts, had not been disclosed.\(^86\) In fact he was in prison at the time of the claim and could not, therefore, have been responsible for the loss.\(^87\)

In the event, Mrs. Lambert’s appeal against the decision of the trial judge who found in favour of the insurers failed.\(^88\) MacKenna J., delivering the leading judgment in the Court of Appeal, took the law to be that stated by the Law Reform Committee in its 1957 report,\(^89\) namely that the “question in every case is whether the fact not disclosed was material to the risk, and not whether the insured, whether reasonably or otherwise,..
believed or understood it to be so."\(^{90}\) Nevertheless, the judge went on to express considerable sympathy for Mrs. Lambert and stated that he hoped the insurers “would act decently if, having established the point of principle, they were to pay her. It might be thought a heartless thing if they did not, but that is their business, not mine.”\(^{91}\) As a matter of principle, the decision in Lambert is, of course, correct, although nowadays a consumer-insured would be able to refer the issue to the UK Financial Ombudsman Service rather than the courts, which, as will be seen, does not follow the strict law.

Considerable anxiety has also been expressed over the need for an insured to disclose allegations of dishonesty which, in fact, are false. The conundrum which arises here was identified by Forbes J. in Reynolds and Anderson v. Phoenix Assurance Co. Ltd., who explained that the rule applied only to unfounded allegations.\(^{92}\) If the allegation was true, the insured was bound to disclose that he had committed the fraud and disclosure of the allegation added nothing.\(^{93}\) Forbes J. noted that “the only occasion on which the allegation as an allegation must be disclosed is when it is not true. This appears to me to be a conclusion so devoid of any merit that I do not consider that a responsible insurer would adopt it and nor do I.”\(^{94}\)

However, against this, the view of Colman J. in Strive Shipping Corp. v. Hellenic Mutual War Risks Association (Bermuda) Ltd.,\(^{95}\) reflects the orthodox approach taken towards the disclosure duty:

If an allegation of criminal conduct has been made against an assured but is as yet unresolved at the time of placing the risk and the evidence is that the allegation would have influenced the judgment of a prudent insurer, the fact the

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\(^{90}\) Lambert, [1975] 2 Lloyd’s Rep. at 489. MacKenna J. was particularly influenced by the opinion of the Privy Council in Mutual Life Insurance Co. of New York v. Ontario Metal Products Co. Ltd., [1925] A.C. 344, 351-52, to the effect that the test, as laid down in the Marine Insurance Act, 1906, 6 Edw. 7, c. 41, § 18, is whether the non-disclosed fact would have influenced a reasonable insurer to decline the risk or to have stipulated for a higher premium.


\(^{93}\) Id.

\(^{94}\) Id.

\(^{95}\) [2002] EWHC 203.
allegation is unfounded cannot divest the circumstances of
the allegation of the attribute of materiality. 96

But, having held that the allegation was material, Colman J. nevertheless
mitigated his finding by holding that for the insurers to persist at trial in
taking the point, in the face of evidence that pointed to the suggested facts
being totally false, would be contrary to their obligation of good faith. 97 It
is noteworthy that recently, the Court of Appeal in North Star Shipping Ltd.
v. Sphere Drake Ins. plc expressed sympathy for Forbes J.’s views and
urged the insured to argue that allegations of dishonesty which were
unrelated to the risk were immaterial. 98 Ultimately though, it felt
constrained by authority to reject the contention which Waller L.J. stated he
otherwise “might be tempted to follow.” 99 However, on the issue of
whether the impecuniosity of the insured was a material fact, Waller L.J.
stated that, “the non-payment of premium is either material on its own or
not, and since it seems to go to the owner’s credit risk, and not to the risk
insured, I would have thought it was not material.” 100 In so finding, Waller
L.J. admitted that he was placing a significant limitation on section 18(2) of
the 1906 Marine Insurance Act given that this was plainly a material fact
which went to the decision of a prudent underwriter whether or not to
underwrite the risk. 101

With respect to the insurers right of avoidance, the judiciary has
also displayed considerable tenacity in its condemnation of the results
which necessarily flow from the exercise of the remedy. To take just one
recent example, in Kausar v. Eagle Star Ins. Co. Ltd., Staughton L.J.
stated:

96  Id. In North Star Shipping Ltd. v. Sphere Drake Insurance plc. [2005]
      EWHC 665, Colman J. again took this view. See also Brotherton v. Aseguradora
      Colseguros S.A. (No. 2) [2003] EWCA Civ. 705 (Mance, L.J.) (discussed infra
      notes 105 and 132); The Dora, [1989] 1 Lloyd’s Rep. 69, 93-94 (Q.B.D.) (Phillips,
      J.); March Cabaret Club & Casino Ltd. v. London Assurance, [1975] 1 Lloyd’s
      2811 (Q.B.) (taking a narrower view of materiality).
98  Id.
99  Id.
100 Id.
101 Id.
Avoidance for non-disclosure is a drastic remedy. It enables the insurer to disclaim liability after, and not before, he has discovered that the risk turns out to be a bad one; it leaves the insured without the protection which he thought he had contracted and paid for...I do consider there should be some restraint in the operation of the doctrine. Avoidance for honest non-disclosure should be confined to plain cases. 102

However, the weight of the case law and the force of the 1906 Marine Insurance Act inevitably present considerable hurdles to judicial intervention. Nevertheless, the subject of non-disclosure and the insurers’ remedy has not escaped the attention of law reform agencies.

A. LEGISLATIVE REFORM: A FALSE DAWN

In 1978, the Law Commission was given the opportunity to review non-disclosure. 103 This was to be carried out in the light of a proposed EEC Directive on the Co-ordination of Legislative, Statutory and Administrative Provisions relating to Insurance Contracts, the object of which was to harmonise the law in the Community. 104 Of particular concern to the U.K. was the recommendation that the proportionality principle should be adopted. Under French law, for example, an insurer is obliged to pay the proportion of the claim which the actual premium paid bears to the premium which would have been payable if the material facts had been disclosed. 105 In this way, any additional risk and the loss attributable to that additional risk is, in effect, borne by the insured. A more complex set of provisions was adopted in the proposed EEC Directive. Article 3.3(c) of the Proposed Directive dealt with the insurer's right in respect of innocent non-disclosure. 106 It adopted the principle of proportionality only where non-disclosure is due to fault (short of fraud) on the part of the insured. 107

103 See THE LAW COMMISSION, supra note 15, § 1.1.
104 Id. § 1.2. In fact, the Directive did not materialise.
105 CODE DES ASSURANCES, art. L113-9.
106 See THE LAW COMMISSION, supra note 15, § 4.2.
107 Id. § 4.3.
In a case where the non-disclosure is not due to fault, the insurer would remain liable for any loss.\(^{108}\)

The Law Commission concluded that proportionality was unworkable in England and Wales.\(^{109}\) It stated that the principle gives no guidance as to how the insured’s entitlement is to be computed if the insurer would have either declined the risk, imposed additional terms on the insured, narrowed the risk via exclusion clauses or imposed or increased “an excess.”\(^{110}\) Further, the Commission found that proportionality provides no solution where knowledge of the undisclosed facts would have led the insurer to decline the risk altogether.\(^{111}\) Whatever the merits of this strident dismissal, such hurdles have not prevented the Ombudsman importing the principle into the range of his remedies.\(^{112}\) That aside, the Law Commission did endorse the views expressed by way of obiter in Lambert to the effect that the law should be changed.\(^{113}\) It found that the insured’s duty of disclosure can give rise to grave injustice and there was, notwithstanding the protestations of the insurance industry, “a formidable case for reform.”\(^{114}\) In essence, the Commission recommended a substantially revised duty of disclosure that, had it been implemented, would have resulted in shifting the focus away from the “prudent insurer” as the determinative test of materiality.\(^{115}\) It proposed a modified duty of disclosure for both consumers and businesses whereby an insured would be required to disclose those facts that a reasonable person in the position of the applicant would disclose.\(^{116}\) However, an insured’s individual personal characteristics would not be taken into account.\(^{117}\)

Despite early optimism that legislative reform would follow the Law Commission’s recommendations, this soon petered out. While there was an initial flurry of activity by the DTI (now DBIS), the impetus for

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\(^{108}\) Id.

\(^{109}\) Id.

\(^{110}\) Id.

\(^{111}\) Id. § 4.5–4.6.

\(^{112}\) The Ombudsman has adopted proportionality for cases of unintentional non-disclosure and misrepresentation. See the Ombudsman Report for 1989, para 2.16-7) and the Annual Report for 1994, para 2.10. See infra text accompanying note 121.

\(^{113}\) THE LAW COMMISSION, supra note 15, § 4.44.

\(^{114}\) See id. § 3.23.

\(^{115}\) Id. § 6.2.3.

\(^{116}\) Id. § 4.47

\(^{117}\) Id.
reform ground to a halt no doubt because of the intense lobbying by the insurance industry. Some six years after the Report was laid before Parliament, the Secretary of State for Trade and Industry, Mr. Channon, said, by way of a written response to a question asking for a progress report on the reforms, that he was convinced that self-regulation, through the Statements of Practice issued by the Association of British Insurers, would meet the need of protecting private insureds from the harsher aspects of the disclosure duty.\(^\text{118}\)

\(^{118}\) Paul Channon, Secretary of State, Written Answers (Commons) of 21 February 1986, Insurance Contracts (Feb. 21, 1986) (transcript available at http://hansard.millbanksystems.com/written_answers/1986/feb/21/insurance-contracts). The Secretary of State said,

The insurers have informed me that they are willing to strengthen the non-life and long-term statements of insurance practice on certain aspects proposed by the Department. These concern the limitation of the duty of disclosure, warranties, disputes procedures and, in the case of the long-term statements, the payment of interest on life insurance claims. The statements apply to insurance taken out by private consumers...These changes are in the right direction. I am well aware of the arguments, advanced amongst others by the representatives of consumers, in favour of legislation on non-disclosure and breach of warranty. But I consider that on balance the case for legislation is out-weighed by the advantages of self-regulation so long as this is effective. I look to all insurers, whether or not they belong to the Association of British Insurers which has promulgated the statements, to observe both their spirit and their letter. In the light of the insurers’ undertakings I do not consider there is any need for the moment to proceed with earlier proposals for a change in the law....

The Statements of Practice, first issued in 1977 (revised in 1986), covered General and Long Term Insurance. The General Statement came to an end in January 2005 when it was incorporated into the Code of Business Conduct Rules (ICOB) by the Financial Services Authority. The ICOB adopts the language of the ABI’s Statements. In essence, rule 7.3.6 provides that except where there is evidence of fraud, an insurer should not avoid a claim by a retail customer on the ground of non-disclosure of a fact material to the risk that the customer could not reasonably be expected to have disclosed. It is also noteworthy that in the field of motor insurance the right of insurers to avoid liability to a third party is substantially restricted by section 152 of the Road Traffic Act 1988. The Long
The move towards self-regulation was reinforced by the industry establishing and financing the Insurance Ombudsman in 1981. Rather than following the common law rules relating to avoidance, the Ombudsman seeks to reach a decision that he considers to be a “fair and reasonable” solution to a dispute.\textsuperscript{119} In reaching this objective, the criteria taken into account include whether the non-disclosure was deliberate or innocent.\textsuperscript{120} He has also sought to mitigate the draconian consequences of “inadvertent” non-disclosure by, for example, requiring insurers to pay a proportion of a claim that the premium actually fixed bears to the premium that would have been charged had the fact been disclosed.\textsuperscript{121} The question remains, however, whether the general law should adopt the same approach, and if so, should the position of the consumer be separated out from that of the commercial insured.

Subsequent investigations have arrived at conclusions very similar to those of the Law Commission. For example, in 1997 the National Consumer Council embarked on a thorough review of the disclosure duty among other areas of insurance law. Its report, \textit{Insurance Law Reform: The Consumer Case for a Review of Insurance Law}, written by Professor Birds, recommended that the consumer-insured’s duty of disclosure should be restricted to facts within his or her knowledge which either he or she knows to be relevant to the insurer’s decision or which a reasonable person

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\textsuperscript{120} Financial Ombudsman Service, \textit{supra} note 119, at 8.

More recently, in January 2001, the British Insurance Law Association established a sub-committee to examine contentious areas of insurance law and to make recommendations to the Law Commission “as to the desirability of drafting a new Insurance Contracts Act.” Its report, *Insurance Contract Law Reform*, published in September 2002, also endorsed the reasonable insured test, for example, whether a reasonable insured would have considered the undisclosed matter to be material to a prudent insurer. As will be seen, the most recent report by the English and Scottish Law Commissions broadly follows this proposal.

Although the legislature has not responded to these calls for reform, the issue has not escaped the attention of the courts. Recent case law suggests that there is a distinct shift in the judicial focus and that the attention of the judges is being channelled along several lines of investigation. For example, particular attention is being directed towards the requirement of inducement as a determinant of non-disclosure together with a wider-visioned approach being adopted towards the role of the insurer during the disclosure process. As commented above, this may be seen as adding content to the insurers’ duty of good faith and in this regard, attention is now also being directed towards the exercise of the remedy of avoidance.

IV. JUDICIAL INTERVENTION: REDRESSING THE BALANCE

The opportunity for an authoritative review of the insured’s duty of disclosure came before the House of Lords just over ten years ago in *Pan Atlantic Insurance Co. Ltd. v. Pine Top Insurance Co.* The defendant

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123 Id.


125 See *THE LAW COMMISSION, supra* note 17.


127 *Pan Atl. Ins. Co. Ltd. v. Pine Top Ins. Co. Ltd.*, [1995] 1 A.C. 501, 505. Both parties were insolvent by the time the case reached the appellate courts. Id. However, it proceeded as a friendly action because of the perceived loss of business being suffered by the UK, and London in particular, as a result of the overly insurer-friendly approach being adopted in relation to non-disclosure. Id. It was hoped that the House of Lords would redress the balance. Id.
reinsurers had written excess of loss policies for three years.\footnote{128} Their defence to a claim arising out of losses suffered in the third year was based on the inadvertent failure to disclose the extent of losses occurring in the first two years.\footnote{129} The issues were first, should materiality be measured by reference to whether its ‘influence’ on the prudent insurer's judgment was ‘decisive’, or should some lesser degree of impact be sufficient?\footnote{130} Second, where there has been non-disclosure of a material fact, must it induce the actual insurer to enter into the contract?\footnote{131}

With respect to the first issue Lord Mustill, with whom Lords Goff and Slynn concurred, could see no good reason for departing from the principle which had guided insurance law for more than 200 years.\footnote{132} Lord Mustill stated that disclosure was not limited to matters which would have caused the prudent insurer to decline the risk or increase the premium but rather the insured’s duty to disclose “all matters which would have been taken into account by the underwriter when assessing the risk . . . which he was consenting to assume.”\footnote{133} On the question of statutory interpretation, the majority view was that since Parliament had left the word “influence” in section 18(2) unadorned by phrases such as “decisively” or “conclusively,” it must bear its ordinary meaning.\footnote{134} His Lordship stated that “. . . this expression clearly denotes an effect on the thought processes of the insurer in weighing up the risk, quite different from words which might have been used but were not, such as ‘influencing the insurer to take the risk.’”\footnote{135} The majority decision therefore was to reject the “decisive influence” test. The position remains that a circumstance is material and must be disclosed even though the prudent insurer, had he known of the fact, would have insured the risk on the same terms.\footnote{136}

\footnote{128} Id. at 519.  
\footnote{129} Id. at 520.  
\footnote{130} Id. at 516-17  
\footnote{131} Id. at 517-18.  
\footnote{132} Id. at 536.  
\footnote{133} Pan Atl. Ins. Co. Ltd., [1995] 1 A.C. at 538. Lord Mustill thus rejected a test based upon the decisive influence of the non-disclosed/misrepresented fact: “I can see no room within [the principle] for a more lenient test expressed solely by reference to the decisive effect which the circumstance would have on the mind of the prudent underwriter.” Id. at 536.  
\footnote{134} Id. at 531.  
\footnote{135} Id. See also id. at 517 (speech of Lord Goff).  
\footnote{136} It is noteworthy that Lord Lloyd, in a powerful dissent, agreed with the appellants' submission that there should be a twofold test under which the insurer
In relation to the second issue, however, the House of Lords unanimously held that in Pan Atlantic Insurance Company v. Pine Top Limited, the non-disclosure of a material fact, as with misrepresentation, must induce the particular insurer to enter into the contract. In reaching this conclusion, their Lordships were clearly influenced by the argument that the 1906 Act codified the common law, and given that inducement was a requirement under the general law which provides for rescission of a contract, the Act must be taken as having the same effect. In language that resonates with that of Lord Mansfield’s in so far as it traverses the terrain of misrepresentation and non-disclosure (and in so doing aligns the requirement of inducement with both vitiating factors), Lord Mustill stated that:

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

must show that a prudent insurer, if aware of the undisclosed fact, would either have declined the risk or charged a higher premium and that the actual insurer would have declined the risk or required a higher premium. See also John Birds & Norma J. Hird, Misrepresentation and Non-Disclosure in Insurance Law - Identical Twins or Separate Issues, 59 M.L.R. 285, 285 (1996).

137 Pan Atl. Ins. Co., [1995] 1 A.C. at 551. In essence, the House of Lords were injecting into the law on non-disclosure a requirement of causation analogous to the “but for” test familiar to tort lawyers. See id. at 551 (Lord Mustill’s reference to causative effect). In his reasoning, Lord Mustill gave prominence to the decision of Kerr J. in Berger v. Pollock, [1973] 2 Lloyd’s Rep. 442, in which the judge stated the principles in a way that suggested that the insurer could avoid the policy only if he had in fact been influenced by the non-disclosure. Id. at 463.


139 Id. Where there is a material misrepresentation, there is a rebuttable presumption of inducement. See Redgrave v. Hurd, (1881) 20 Ch.D. 1, 21; Smith v. Chadwick, (1884) 9 App. Cas. 187, 196. Lord Mustill went on to add that, “As a matter of common sense however even where the underwriter is shown to have been careless in other respects the assured will have an uphill task in persuading the court that the withholding or mistatement of circumstances satifying the test of materiality has made no difference.” Pan Atl. Ins. Co., [1995] 1 A.C. at 551. See also Svenska Handelsbanken v. Sun Alliance & London Ins. plc, [1996] 1 Lloyd’s Rep. 519.
Lord Goff, concurring, thought that the need to show inducement on the part of the actual insurer addresses the criticisms directed against the harshness of the duty.\textsuperscript{140} He reasoned that it was the absence of this requirement that prompted the call for the test of materiality to “be hardened into the decisive influence test.”\textsuperscript{141} However, this concession must be measured against the view of Lord Mustill, vigorously opposed by Lord Lloyd, that there should be a presumption of inducement.\textsuperscript{142} In essence once objective materiality is established a presumption that the actual insurer was induced triggers. On the facts, the House of Lords held that the non-disclosed losses were so obviously material that inducement could be inferred.\textsuperscript{143}

The presumption of inducement has had a chequered reception in the case law following \textit{Pan Atlantic}.\textsuperscript{144} From the perspective of the insured, modern case law has sought to preserve the benefit of the requirement by limiting the scope of its presumption to exceptional cases only. For example, in \textit{Marc Rich & Co. A.G. v. Portman}, Longmore J. suggested that unless there was good reason for the underwriter not to give evidence, the presumption would simply not arise.\textsuperscript{145} The judge stressed

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.} at 518.
\item \textit{Id.} at 542, 571.
\item \textit{Id.} at 562.
\item [1996] 1 Lloyd’s Rep. 430. \textit{See also} Sirius Int’l Ins. Group Corp., [1999] 1 All E.R. (Comm.) 699, where, in relation to misrepresentation, Longmore J. also stressed that it is for the insurer to prove inducement. The judge did, however, recognize that the onus of proof is difficult to discharge. \textit{Id.} In his Pat Saxton Memorial Lecture, “An Insurance Contracts Act for a New Century”, delivered on 5 March 2001 to the British Insurance Law Association, Longmore J gave death as an example of a good reason for failing to give evidence. Sir Andrew Longmore, Pat Saxton Memorial Lecture at the British Insurance Law Association: An
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\end{footnotesize}
that in cases where the court is in doubt, the defence of non-disclosure should fail because “[a]t the end of the day it is for the insurer to prove that the non-disclosure did induce the writing of the risk....”

Further, in Assicurazioni Generali SpA v. Arab Ins. Group, the Court of Appeal took the view that although the non-disclosed (or misrepresented) fact need not be the sole inducement operating on the insurer, it must cause the actual insurer to enter into the contract. 

Significantly, the majority of the court followed earlier decisions to the effect that the insurer must give evidence as to his state of mind. This, therefore, gives the insured the opportunity to cross-examine the insurer with a view to demonstrating that he was not induced by the non-disclosed fact but would have entered into the contract on the same terms had there had been full disclosure of all material facts.

If the underwriter fails to give evidence, without "good reason", inducement will not be made out. Clarke L.J. summarised the position as follows:

1. In order to be entitled to avoid a contract of insurance or reinsurance, an insurer... must prove on the balance of probabilities that he was induced to enter into the contract by a material non-disclosure or by a material misrepresentation.

2. There is no presumption of law that an insurer... is induced to enter in the contract by a material non-disclosure or misrepresentation.

3. The facts may, however, be such that it is to be inferred that the particular insurer... was so induced even in the absence from evidence from him.


149 Id.
150 Marc Rich & Co. AG, 1 Lloyd’s Rep. at 442.
4. In order to prove inducement the insurer or reinsurer must show that the non-disclosure or misrepresentation was an effective cause of his entering into the contract on the terms on which he did. He must therefore show at least that, but for the relevant non-disclosure or misrepresentation, he would not have entered into the contract on those terms. On the other hand, he does not have to show that it was the sole effective cause of his doing so.\footnote{151}{[2003] 1 W.L.R. 577.}

Insurers must, therefore, establish that the non-disclosed or misrepresented fact was an effective cause, although not necessarily the only cause, of their agreement to underwrite the risk. The link between materiality and inducement has thus been severed. Where the underwriter does give evidence, he will need to demonstrate a causal link between the presentation of the risk and its acceptance.

Further inroads have recently been made into the notion of utmost good faith. This has been done by first adopting a narrow, insured friendly approach towards the requirement of inducement, one incident of which has led to the courts to re-examine the defence of waiver; and second, by aligning the exercise of the remedy of avoidance for non-disclosure with the insurers’ duty of good faith. In tandem with this process, the courts have also been examining the role of insurers as recipients of information during the disclosure process. The effect is that the burden imposed by the duty is being recalibrated so as to strike some balance between the respective obligations of the parties especially at the stage when the risk is being presented for underwriting. A further and significant recent development relates to the vexed question of whether the insured’s duty of good faith continues after the insurance contract has been concluded so that it again triggers when a claim is made under the policy.

A. REFINING INDUCEMENT

The emphasis now being placed on the need to demonstrate inducement has been bolstered by the radical step taken by the court in \textit{Drake Insurance plc v. Provident Insurance plc}, to the effect that, in deciding whether the non-disclosed fact had induced the insurer to enter the contract, it is necessary to examine what would have happened had full
disclosure been made.\textsuperscript{152} In this case, the insurer sought to avoid the motor policy on the basis that it would have charged a higher premium had a speeding conviction been disclosed.\textsuperscript{153} The insured had disclosed an earlier fault accident, but failed to disclose before the present policy was concluded that it had been reclassified as a no-fault accident.\textsuperscript{154} The majority of the Court of Appeal held that, even if the conviction had been disclosed, information would have come to light that the earlier accident had not been the insured’s fault and this would have resulted in the proposal being accepted at a normal rate of premium.\textsuperscript{155}

Rix L.J., delivering the leading judgment,\textsuperscript{156} stated that the issue is not what actually happened, but what would have happened had the speeding conviction been declared. To prove inducement, the insurer, Provident, would need to show that a higher premium would have resulted.\textsuperscript{157} This it could not do because it was common ground that it would not have increased the premium if the earlier accident had been no-fault: “So the question resolves itself into this: if the conviction had been mentioned, would the question of the status of the accident have been discussed? It seems to me to be very likely that it would have been….\textsuperscript{158}"

It is noteworthy that Rix L.J. went on to express the view that he could see no reason in principle why an insured should not be able to rely on facts which would have been material in his favour had they been disclosed.\textsuperscript{159} This, after all, is the case with insurers and the logic is, therefore, compelling. Further, this reasoning marks a clear departure from the view expressed by Mance L.J. in 	extit{Brotherton v. Aseguradora Colseguros SA},\textsuperscript{160} to the effect that an insured is not entitled to prove what the true position was at the time the contract was concluded as a means of proving that a particular fact was immaterial.\textsuperscript{161}

\textsuperscript{153} Id.
\textsuperscript{154} Id.
\textsuperscript{155} Id.
\textsuperscript{156} Id. Clarke L.J. agreeing and Pill L.J. dissenting.
\textsuperscript{157} Id.
\textsuperscript{158} Drake Ins. [2003] EWCA Civ. 1834.
\textsuperscript{159} Id.
Overall, the approach taken towards inducement by Rix L.J. has the effect of the court placing itself in the position of the underwriter. The result is that the court is prepared to reopen the negotiations between the parties, certainly in relation to disclosure, and to speculate on their likely responses. In effect, the court is assessing what the underwriter’s most likely course of action would have been with full disclosure. The onus is on the underwriter to prove that it would not have accepted the risk either at all or on the premium actually charged. Given this proactive position being taken towards the issue, there seems no reason in principle why the judges should not also be able to apply the proportionality doctrine, long harnessed by the Ombudsman, rather than continue with the all or nothing approach of avoidance. The approach adopted by Rix L.J. towards the determination of the particular risk in question thus renders the Law Commission’s reasoning, in its 1980 report rejecting the proportionality doctrine as "unworkable," less than compelling.

B. THE PRESENTATION OF THE RISK: A PRO-ACTIVE ROLE FOR INSURERS?

This renewed focus on the requirement of inducement can be seen as part of the overarching anxiety that the presentation of the risk should be fair. Here, the mutuality of the good faith duty has come to the fore and the judges have been directing their attention towards the content of the insurers’ obligation. It will be recalled that in Carter v. Boehm, Lord Mansfield laid particular emphasis on both the need for a fair presentation of risk and the limits of the insured’s disclosure duty. In this respect, he excluded from the realms of the duty those facts which the insurer “waives being informed of” together with facts the insurer is presumed to know.

164 Id. at 1165. Lord Mansfield explained that the insured need not disclose... what the underwriter knows ...what way soever he came to the knowledge. The insured need not mention what the underwriter ought to know; what he takes upon himself the knowledge of; or what he waives being informed of. The underwriter needs...
It will be recalled that Lord Mansfield returned to the role expected of underwriters during the disclosure process in *Noble v. Kennoway*, in which he held that the insurer was under a duty to inform himself of the practices of the trade he insures. Further, in *Court v. Martineau*, he was prepared to draw the inference that the insurer had waived the disclosure of certain facts by the large premium he charged for underwriting the risk in question.

Opportunities to consider the insurers’ duty of utmost good faith have been rare in modern times. However, in *Banque Keyser Ullman S.A. v. Skandia (U.K.) Insurance (C.A.)*, Slade L.J. said that the insurers’ duty of disclosure should

... extend to disclosing facts known to him which are material either to the nature of the risk sought to be covered or the recoverability of a claim under the policy which a prudent insured would take into account in deciding whether to place the risk for which he seeks cover with that insurer.

The House of Lords approved Slade L.J.’s reasoning in this respect. The only remedy available to the insured where the insurer is in breach of duty is avoidance *ab initio*. In practice, this affords little or no benefit to insureds. An insurer’s breach will come to light when the loss has been suffered – a time when an insured will want full recovery rather than a return of the premium.

More recently, however, the issue has come to the fore in the context of determining the insurer’s role during the disclosure process.

*Id.* This particular element of the judgment was later codified, virtually verbatim, in the Marine Insurance Act, 1906, 6 Edw. 7, c. 41, § 18(3) (Eng.).


where the insured has raised the defence of waiver. Of significance in this respect are the views expressed by the Court of Appeal in *WISE Ltd. v. Grupo Nacional Provincial SA.*\(^{168}\) The issue arose in the context of commercial insurance. The defendant, Mexican insurer GNP, appealed to the Court of Appeal against a decision of Simon J. that the claimants-reinsurers WISE were entitled to avoid a reinsurance contract on the basis that the presence of high-value Rolex watches in the insured consignment of goods was not disclosed.\(^{169}\) This occurred as a result of a translation error in which the watches were described as clocks.\(^{170}\) It was held, by a majority, that GNP was entitled to recover.\(^{171}\) Although it was unanimously held that WISE had been induced by the presentation of the risk, Rix and Peter Gibson L.J.J. held that the reinsurers had affirmed the policy, notwithstanding the breach of the duty of disclosure, by giving notice of its cancellation.\(^{172}\) Such notice was inconsistent with any claim to avoid the policy *ab initio.*\(^{173}\) Both judges took the view that the trial judge had overlooked a vital email which showed that WISE were unequivocal in cancelling the policy.\(^{174}\)

With respect to the issue of waiver, the parties agreed that the law was accurately set out in *MacGillivray on Insurance Law,*\(^{175}\) which, citing *CTI v. Oceanus Mutual Underwriting Association (Bermuda) Ltd.*\(^{176}\) states:

> The assured must perform his duty of disclosure properly by making a fair presentation of the risk proposed for insurance. If the insurers thereby receive information from the assured or his agent which, taken into conjunction with other facts known to them or which they are presumed to know, would naturally prompt a reasonably careful insurer to make further inquiries, then, if they omit to make the appropriate check or inquiry, assuming it can be made

\(^{168}\) [2004] EWCA Civ. 962.

\(^{169}\) Id.

\(^{170}\) Id.

\(^{171}\) Id.

\(^{172}\) Id.

\(^{173}\) Id.

\(^{174}\) *WISE Ltd.* [2004] EWCA Civ. 962. Longmore L.J. dissented on the basis that the judge’s findings of fact could not be reversed. *Id.*


simply, they will be held to have waived disclosure of the material fact which that inquiry would necessarily have revealed. Waiver is not established by showing merely that the insurers were aware of the possibility of the existence of other material facts; they must be put fairly on inquiry about them.177

Longmore L.J., with whom Peter Gibson L.J. agreed, took the view that since the carriage of Rolex watches was a material fact which was not disclosed, the presentation of the risk was unfair.178 The issue was, therefore, whether the facts that were disclosed would prompt a reasonably careful insurer to enquire whether watches were included in the shipment. As Longmore L.J explained, the issue came down to whether or not the insurer was “put on inquiry by the disclosure of facts which would raise in the mind of the reasonable insurer at least the suspicion that there were other circumstances which would or might vitiate the presentation.”179 On the facts he held that there was nothing in the presentation of the risk that could be said to have raised the suspicion that Rolex watches were to be included in the consignment.180

Of particular interest for present purposes is Rix L.J.’s dissenting judgment on this issue. In finding that there had been waiver, he placed particular emphasis on the mutuality of the duty of utmost good faith, and stated that the only relevant question was whether the presentation was fair.181 This could not be judged in isolation, although an obviously unfair presentation would rarely leave room for waiver to operate.182 The insurers’ reaction and the issue of possible waiver had to be taken into account.183 The question is not whether an “unfair” presentation had been waived but whether, taking both sides into account, the presentation was unfair or, alternatively, it would be unfair of the insurers to avoid the contract on a ground on which they were put on inquiry and should have satisfied themselves by making appropriate enquiries.184

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177 LEIGH-JONES ET AL., supra note 175, ¶¶ 17-83.
179 Id.
180 Id.
181 Id.
182 Id.
183 Id.
184 WISE Ltd. [2004] EWCA Civ. 962.
Ultimately, it seems, the question is: Has the insurer been put fairly on inquiry about the existence of other material facts, which such inquiry would necessarily have revealed? The test has to be applied by reference to a reasonably careful insurer rather than the actual insurer, and not merely by reference to what such an insurer is told in the assured's actual presentation but also by reference to what he knows or ought to know, i.e., his s 18(3)(b) [of the 1906 Act] knowledge… Overriding all, however, is the notion of fairness, and that applies mutually to both parties, even if the presentation starts with the would-be assured.  

Rix L.J. therefore concluded that a reasonably careful insurer would have been fairly put on inquiry given what he knew from GNP's presentation and his general, presumed knowledge. The question as to what types of clocks were being transported was one that should have been asked by the reinsurers. He went on to state that:

If the question is instead the overriding question: Is the ultimate assessment of GNP's presentation that it is unfair, or would it be unfair to allow the reinsurers a remedy of avoidance in such a case? I would answer that the presentation was fair, and that it would be unfair to allow reinsurers to take advantage of an error of translation in a case where, on the evidence, an exclusion of watches would seem to have been the obvious solution.  

For Rix L.J., the duty of utmost good faith and, more particularly, its content insofar as it applies to insurers or reinsurers, requires them to play a pro-active role in the disclosure process rather than relying solely upon the insured’s presentation. In this respect, his approach resonates with that taken by Lord Mansfield in *Noble v. Kennoway*, and *Court v.*
Further, the clear implication seems to be that given that the insurers or reinsurers draft the policy terms; there is more than adequate opportunity for them to take the necessary steps to protect themselves in relation to the risks to be underwritten.

C. ALIGNING THE INSURER’S REMEDY OF AVOIDANCE WITH THE DUTY OF UTMOST GOOD FAITH

We have seen that the consequence of non-disclosure is to render the insurance contract voidable, thereby entitling the insurer to avoid it ab initio. Any premium paid is returnable to the insured except in cases of fraud (unless the policy otherwise provides). Not surprisingly, as with the requirements of inducement and waiver, the conditions governing the exercise of the avoidance remedy have also attracted considerable judicial attention of late. Again, the views expressed have not been entirely consistent. In The Grecia Express, Colman J. suggested that the right to avoid is conditional upon the insurer acting with “duty of the utmost good faith.” He also reasoned, as commented above, that an insured is entitled to litigate the issue of the truth or falsity of material circumstances in order to argue that, if it is shown to be incorrect, the insurer would be acting in bad faith or unconscionably in avoiding the policy. In a similar vein, in Manifest Shipping Co. Ltd. v. Uni-Polaris Shipping Co. Ltd., Lord Hobhouse, delivering the leading speech, identifies the need for some balance to be struck between the parties in the post-contract situation and suggests, as did Lord Mansfield in Carter v. Boehm, that the courts should guard against the danger of the good faith duty being turned into an

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191 Abram Steamship Co. v. Westville Shipping Co., [1923] A.C. 773, 781. See also Glasgow Assurance Corp. v. Symondson & Co., (1911) 16 Com. Cas. 109, 121 (Scrutton J., suggesting that the only remedy available for non-disclosure is avoidance of the contract).
192 PARK, supra note 18, at 218. The Marine Insurance Act, 1906, 6 Edw. 7, c. 41, § 83(3)(a) (Eng.) provides, “Where the policy is void, or is avoided by the insurer, as from the commencement of the risk, the premium is returnable, provided that there has been no fraud or illegality on the part of the assured . . . .”
194 Id.
instrument permitting unconscionable behaviour on the part of underwriters. He wrote:

The courts have consistently set their face against allowing the assured's duty of good faith to be used by the insurer as an instrument for enabling the insurer himself to act in bad faith. An inevitable consequence in the post-contract situation is that the remedy of avoidance of the contract is in practical terms wholly one-sided. It is a remedy of value to the insurer and, if the defendants’ argument is accepted, of disproportionate benefit to him; it enables him to escape retrospectively the liability to indemnify which he has previously and (on this hypothesis) validly undertaken.196

Against this, a rather more rigid view was taken towards the exercise of the remedy in Brotherton v. Aseguradora Colseguros SA (No. 2).197 Mance L.J. explained that the right to avoid is a self-help remedy that is exercised without the court’s authorisation.198 He stated that avoidance for non-disclosure is to be treated in the same way as rescission for misrepresentation under the general law of contract, which is “by act of the innocent party operating independently of the court.”199 In short, the court at trial cannot reverse a valid avoidance. This affirms the orthodoxy that holds that an insurer has an unfettered discretion to avoid the contract in cases where there has been a breach of the duty of disclosure even where the facts relied on, which in this case concerned allegations going as to moral hazard, turn out to be unfounded.

Notwithstanding this strict stance, the courts have continued to subject the conditions governing the right of avoidance to scrutiny and have suggested that the good faith duty triggers whenever underwriters seek to exercise the remedy. In his far reaching judgment delivered in Drake Insurance plc v. Provident Insurance plc, Rix L.J. observed that the doctrine of good faith should be capable of limiting the insurer's right to

196 Id. at 497.
197 [2003] EWCA Civ. 705.
198 Id.
avoid in circumstances where that remedy, “which has been described in recent years as draconian,” would operate unfairly.\textsuperscript{200} He went on to note that in recent years, there has been a realisation that in certain respects English insurance law has developed too stringently.\textsuperscript{201} Citing \textit{Pan Atlantic}, Rix L.J. stated that leading modern cases show that the courts are prepared to introduce safeguards and flexibility.\textsuperscript{202} Importantly, he said that it would not be in good faith to avoid a policy without first allowing the insured an opportunity to address the reason for the avoidance.\textsuperscript{203} He concluded by stressing that not all insurance contracts are made by those engaged in commerce and the widespread nature of consumer insurance presented new problems.\textsuperscript{204} “It may be necessary to give wider effect to the doctrine of good faith and recognize that its impact may demand that ultimately regard must be had to a concept of proportionality implicit in fair dealing.”\textsuperscript{205}

Turning to the mutuality of the duty of utmost good faith, the Court of Appeal sought to refine the insurer’s duty further. Rix and Clarke L.J.J. took the view that if the insurer had actual knowledge or blind-eye knowledge of the fact that the accident was “no-fault,” it would have been a matter of bad faith had the insurer avoided the policy.\textsuperscript{206} Rix L.J. left the question open whether “something less than such knowledge would have been enough to qualify an unrestricted right to avoid.”\textsuperscript{207} Pill L.J., however, discusses blind-eye knowledge and points out that there must be a suspicion that relevant facts exist and a deliberate decision not to make an

\textsuperscript{200} [2003] EWCA Civ. 1834, [2004] Q.B. 601, 628. For criticism of the court’s finding that the insurer’s right of avoidance was subject to good faith, see Neil Campbell, \textit{Good Faith: Lessons from Insurance Law}, 11 N.Z. BUS. L.Q. 479 (2005). It was, of course, inevitable that the Court of Appeal in \textit{North Star Shipping Ltd. v. Sphere Drake Ins. plc}, [2006] EWCA Civ. 378, did not permit the amendment to the notice of appeal and, therefore, did not have the opportunity to comment on this aspect of \textit{Drake}.

\textsuperscript{201} Drake Ins. [2003] EWCA Civ. 1834.

\textsuperscript{202} \textit{Id}.

\textsuperscript{203} \textit{Id}., [2004] Q.B. at 628, 630.

\textsuperscript{204} \textit{Id} at 629.

\textsuperscript{205} \textit{Id}.

\textsuperscript{206} \textit{Id}.

\textsuperscript{207} Drake Ins., [2004] Q.B. at 630. Clarke L.J., denied the existence of “a general principle that insurers must always give the insured an opportunity to address the reason why they are considering avoidance.” \textit{Id} at 642.
enquiry.\textsuperscript{208} He goes on to state, “failure to make any enquiry of the insured before taking the drastic step of avoiding the policy was in my judgment a breach by the insurer of the duty of good faith.”\textsuperscript{209} While he concluded that they did not have blind-eye knowledge, nevertheless, he took the view that they were under a duty of good faith to inform the insured of their intention to avoid the policy and to give him an opportunity to update them with respect to the accident.\textsuperscript{210}

It is noteworthy that the issue of the (re)insurer’s good faith duty has recently been considered in relation to express terms contained in the insurance policy. In \textit{Gan Insurance Co. Ltd. v. Tai Ping Insurance Co. Ltd.}, it was held that claims co-operation clauses are subject to a rationality test which owes its origins to the insurers’ duty of good faith.\textsuperscript{211} Although there was no implied term that approval of a settlement could not be unreasonably withheld, the right to withhold approval was not unqualified.\textsuperscript{212} It must be exercised in good faith.\textsuperscript{213} Thus, (re)insurers are under a duty of good faith in exercising their rights under a claims co-operation clause, and must not, therefore, arbitrarily refuse to approve a settlement.

IV. REINING IN THE NOTION OF THE INSURED’S POST-CONTRACTUAL GOOD FAITH DUTY

The move away from the position permitting an unfettered right of avoidance must also be viewed against the wider landscape in which the nature and scope of the insured’s post-contractual duty of good faith has similarly been tested by the courts. Until recently, the judicial consensus was that the insured’s duty of good faith revived in appropriate circumstances during the currency of the contract.\textsuperscript{214} In this regard the

\begin{footnotesize}
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\item \textsuperscript{208} \textit{Id.} at 649.
\item \textsuperscript{209} \textit{Id.}
\item \textsuperscript{210} \textit{Id.}
\item \textsuperscript{212} \textit{Gan Ins. Co. Ltd.} [2001] EWCA 1047.
\item \textsuperscript{213} \textit{Id.}
\end{itemize}
\end{footnotesize}
position was stated Mathew L.J. in Boulton v. Houlder Bros. & Co., that it “is an essential condition of the policy of insurance that the underwriters shall be treated with good faith, not merely in reference to the inception of the risk, but in the steps taken to carry out the contract.”

The underlying rationale for this view was explained by Hoffmann L.J. in Orakpo v. Barclays Ins. Services Co. Ltd.

I do not see why the duty of good faith on the part of the assured should expire when the contract has been made. The reasons for requiring good faith continue to exist. Just as the nature of the risk will usually be within the peculiar knowledge of the insured, so will the circumstances of the casualty; it will rarely be within the knowledge of the insurance company. I think that the insurance company should be able to trust the assured to put forward a claim in good faith.

Sir Roger Parker agreed with Hoffmann L.J.. There the Court of Appeal held that a claim which is fraudulent entitles the insurer to avoid the contract ab initio irrespective of whether there is a term in the policy to that effect. However, Staughton L.J. differed. While he thought this

As regards insurance contracts, the duty of good faith continues throughout the contractual relationship at a level appropriate to the moment. In particular, the duty of disclosure, most prominent prior to contract formation, revives whenever the insured has an express or implied duty to supply information to enable the insurer to make a decision. Hence, it applies if cover is extended or renewed. It also applies when the insured claims insurance money: he must make ‘full disclosure of the circumstances of the case’ [citing Shepherd v. Chewter, (1808) 1 Camp. 274, 275 (Lord Ellenborough)].

Id. at 383.
Id. at 384.
See generally Id.
Id.
should certainly be the case where the policy so provided, he was not convinced this should necessarily be the case in the absence of such term:

I do not know of any other corner of the law where the plaintiff who has made a fraudulent claim is deprived even of that which he is lawfully entitled to... True, there is distinguished support for such a doctrine... But we were not told of any authority which binds us to teach that conclusion.

It is settled that if the insured makes a fraudulent claim, he or she will not be able to recover. The consequence is that the insured will forfeit all rights under the policy. However, the question whether the policy can be avoided ab initio so that the insurer can recover any payments made with respect to an earlier loss, or whether the insurer should be restricted to recovering only from the date of the fraudulent claim, has received inconsistent responses by the courts. For example, in Black King Shipping Corp. v. Massie (The Litsion Pride), it was held that a fraudulent claim could amount to breach of section 17 of the 1906 Act, thereby entitling the insurer to avoid the contract ab initio. However, the courts have recently been retreating from this position by placing limits on the insureds’ post-contractual good faith duty. In Orakpo, the majority of the Court of Appeal was of the view that where an insured’s claim is fraudulent to a “substantial extent,” it must fail. The meaning of “substantial” was considered by the Court of Appeal in Galloway v.

221 Albeit, subject to the Unfair Terms in Consumer Contracts Regulations.
224 Id.
226 The Litsion Pride, 1 Lloyd’s Rep. at 438.
227 Orakpo, [1994] C.L.C. at 385 (Hoffman L.J., Sir Roger Parker). This is merely the application of the de minimis rule.
Guardian Royal Exchange (U.K.) Ltd. The claimant’s premises were burgled and he claimed under a home contents policy some £16,133.94 (the probable true value of the loss) and an additional £2,000 for a computer. In fact, there had been no loss of a computer and a receipt which the claimant produced as evidence of purchase was a forgery. Further, when completing the proposal form for this insurance some five months prior to the claim, he had failed to disclose a conviction for obtaining property by deception. Lord Woolf M.R., stressing that the policy of the law must be to deter the making of fraudulent claims, stated that the phrase “substantial:”

is to be understood as indicating that, if there is some immaterial non-disclosure, then of course, even though that material non-disclosure was fraudulent dire consequences do not follow in relation to the claim as a whole; but if the fraud is material, it does have the effect that it taints the whole.

For Lord Woolf M.R., the whole of the claim must be looked at in order to determine whether the fraud is material. On the facts of the case, the claim for £2,000 amounted to some 10 per cent of the whole. This was an amount that was thought substantial and it therefore tainted the whole claim.

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228 Id. at 210.
229 Id. at 213.
230 Id.
231 Id. at 213.
232 Id.
233 Id. at 214.
235 Id. Millett L.J., however, disagreed with this reasoning. He said that the determination of whether or not a claim is “substantially” fraudulent should not be tested by reference to the proportion it bears to the entire claim. Id. at 214. To do so “would lead to the absurd conclusion that the greater the genuine loss, the larger the fraudulent claim which may be made at the same time without penalty.” Id. In Millett L.J.’s view, the size of the genuine claim should not be taken into account. Id. All that matters is that the insured is in breach of the duty of good faith which leaves him without cover. As a matter of policy, he added that he would not support any dilution of the insured’s duty of good faith. Id.
The need for certainty was finally addressed by the House of Lords decision in *Manifest Shipping Co. Ltd. v. Uni-Polaris Ins. Co. Ltd. (The Star Sea)*.\(^{236}\) While the trial judge had doubted the independent application of utmost good faith to the claims process, the Court of Appeal, took the view that the duty of good faith binds both the insured and the insurer when a claim is made.\(^{237}\) Leggatt L.J. observed that “[i]t is less clear from the cases whether there is a duty to disclose co-extensive with that which exists before the contract of insurance is entered into, as opposed to a rather different obligation to make full disclosure of the circumstances of the claim. But that distinction matters not.”\(^{238}\) Leggatt L.J. went on to state that that the insured’s duty of good faith requires that the claim should not be made fraudulently and that the duty “is coincident with the term to be implied by law, as forming part of a contract of insurance, that where fraud is proved in the making of a claim the insurer is discharged from all liability.”\(^{239}\) In conclusion, the judge stressed that given the draconian remedy available to insurers where a claim is made fraudulently, there should be no enlargement of the insured’s duty so as to encompass claims made “culpably.”\(^{240}\)

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\(^{237}\) Manifest Shipping Co. Ltd. v. Uni-Polaris Ins. Co. Ltd., [1995] 1 Lloyd’s Rep. 651, 667; *aff’d*, [1997] 1 Lloyd’s Rep. 360. The judge held that even if it did operate there had to be at the very least recklessness by the insured and that the duty came to an end once legal proceedings had been commenced as after that date false statements were to be dealt with as part of the court’s processes rather than as part of the claim. *Id.*


\(^{239}\) *Id.* See also Orakpo v. Barclays Ins. Servs., [1999] C.L.C. 373, 383 (Hoffmann L.J. stated “[a]ny fraud in making the claim goes to the root of the contract and entitles the insurer to be discharged.”) As has been seen in *Galloway*, the Court of Appeal held that the absence of an express condition providing that where there was a fraudulent claim the policy would be void made no difference for the duty of good faith continued long after the policy was effected and applied to the claims process. *Galloway*, [1999] Lloyd’s Rep. I. R. at 211.

The House of Lords, doubting the reasoning of Hirst J. in *The Litsion Pride*,241 accepted that the duty of good faith continued to apply after the conclusion of the insurance contract but held that the claim of fraud had not been proved. As seen above, Lord Hobhouse, noting that the right to avoid under the Marine Insurance Act 1906, section 17 entitles the insurer to rescind the contract *ab initio*, thought that were this remedy to apply where the breach of duty occurs post-contractually, the effect would be effectively penal.242 In his reasoning in this regard, Lord Hobhouse could find no authority to support the notion that the duty of utmost good faith declared by section 17 continued to bind the insured post-contractually:

[The] authorities show that there is a clear distinction to be made between the pre-contract duty of disclosure and any duty of disclosure which may exist after the contract has been made. It is not right to reason, . . . from the existence of an extensive duty pre-contract positively to disclose all material facts to the conclusion that post-contract there is a similarly extensive obligation to disclose all facts which the insurer has an interest in knowing and which might affect his conduct.243

With respect to the majority view in *Orakpo*, Lord Hobhouse observed that the decision “cannot be treated as fully authoritative in view of the contractual analysis there adopted” with respect to the duty of good faith.244 His Lordship, stressing that the duty of utmost good faith applies only up until the conclusion of the contract, noted that a duty to disclose information can nevertheless arise later, during the currency of the policy, as a result of an express or implied term.245

Recently the issue again arose in *K/S Merc-Scandia XXXII v. Lloyd's Underwriters (The Mercandian Continent)*.246 The insured

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244 *Id.* at 501.

245 *Id.* at 495.

submitted a forged letter to his liability insurers to assist them in defending a claim that had been brought against the insured by a third party.  The purpose was to show that the insured had not entered into a contract with the claimant third party conferring exclusive jurisdiction on the English courts. The letter was found to be immaterial and the insurers were therefore held liable. The Court of Appeal, aligning the duty of disclosure during the claims process with its pre-contract counterpart, took the view that the non-disclosed or misrepresented fact must be material and it must induce the insurer to pay the claim. With respect to the remedy available to the innocent party, Longmore L.J. explained that the right to avoid the contract with retrospective effect is only exercisable in circumstances where the innocent party would, in any event, be entitled to terminate the contract for breach. He went on to state that:

[T]he giving of information, pursuant to an express or implied obligation to do so in the contract of insurance, is an occasion when good faith should be exercised. Since, . . . the giving of information is essentially an obligation stemming from contract, the remedy for the insured fraudulently misinforming the insurer must be commensurate with the insurer's remedies for breach of contract. The insurer will not, therefore, be able to avoid the contract of insurance with retrospective effect unless he can show that the fraud was relevant to his ultimate liability under the policy and was such as would entitle him to terminate the insurance contract.

Not surprisingly, the issue continued to be litigated and the Court of Appeal was soon afforded another opportunity to settle the point, at least with some measure of clarity. In Agapitos v. Agnew (The Aegeon), the question which Mance L.J. focused upon was whether a genuine claim could become fraudulent because it was made fraudulently and whether, in

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248 Id. at 566-67.
249 Id. at 576.
250 Id. at 573.
251 Id. at 575.
consequence, the duty of utmost good faith was broken. Holding that the
duty did not apply to fraudulent claims so that the policy could not be
avoided *ab initio*, Mance L.J. went on to state the position with respect to
fraudulent devices. He thought that an acceptable solution would be to "treat the use of a fraudulent device as a sub-species of making a fraudulent
claim" and to treat as relevant for this purpose

any lie, directly related to the claim to which the fraudulent
device relates, which is intended to improve the insured's
prospects of obtaining a settlement or winning the case,
and which would, if believed, tend, objectively, prior to
any final determination at trial of the parties' rights, to
yield a not insignificant improvement in the insured's
prospects - whether they be prospects of obtaining a
settlement, or a better settlement, or of winning at trial.

The insurer is therefore discharged from liability in respect of such a
claim. Concluding the point, it was held that the common law rules
governing the making of a fraudulent claim (including the use of fraudulent
device) fell outside the scope of section 17 of the 1906 Act. Further, the

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255 *Id.* at 575. In *Stemson v. AMP Gen. Ins. (NZ) Ltd.* [2006] UKPC 30, the
Privy Council endorsed this approach.
256 The reasoning of Mance L.J. has recently been applied by Simon J. in
Lloyd's Rep I.R. 690.
257 See also *Goshawk Dedicated Ltd. v. Tyser & Co.* [2006] EWCA Civ. 54,
[2006] 1 All E.R. (Comm.) 501, which held that any notion that the insured’s duty
of good faith continues post-contractually cannot be divorced from the terms of the
policy. The way in which such a continuing duty can arise is by implying a term
into the contract, on the basis that it is necessary for business efficacy, which
requires the insured to provide information in appropriate circumstances. It
therefore follows that there is no independent post-contractual good faith duty. All
post-contract issues are to be determined according to the terms of the policy and
in this respect, the decision appears to accord with Staughton L.J.’s minority view in
Cox Dedicated Corporate Member Ltd. [2004] EWHC 2963 (Comm.) (Morison
Court of Appeal also went on to hold that once litigation between the insurers and the insured has commenced, the consequences of making a fraudulent claim or promoting a claim with fraudulent devices are superseded by the procedural rules governing civil litigation. Mance L.J. was again given the opportunity to revisit the issue in *AXA General Insurance Ltd. v. Gottlieb.* The issue was whether under the common law rule relating to fraudulent claims, an insurer could recover interim payments made prior to any fraud in respect of genuine losses incurred on the claim to which the subsequent fraud related. The judge rejected the submission of the insureds’ counsel to the effect that where a genuine right to indemnity has both arisen and been subject of a payment made prior to any fraud committed in respect of the same claim, there can be no conceptual basis for requiring the insured to repay the sums received. Mance L.J. stated that:

> If a later fraud forfeits a genuine claim which has already accrued but not been paid, the obvious conceptual basis is that the *whole* claim is forfeit… If the whole claim is forfeit, then the fact that sums have been advanced towards it is of itself no answer to their recovery.

The effect of counsel’s argument would be to result in the anomaly that forfeiture of the whole claim should be restricted to the whole of the outstanding claim only; in other words, to any part that remains unpaid as of the date of the fraud. Mance L.J. explained that the rationale of the rule relating to fraudulent claims is that an insured should not expect that, Co. [2005] EWCA Civ. 601, it will probably never be the case that breach of such a term is repudatory of the policy as a whole. Waller L.J. expressed the unconvincing view that perhaps a series of breaches might be repudatory so that, in effect, the notion of a continuing duty is dead and buried. Id. See also *Manifest Shipping Co. Ltd. v. Uni-Polaris Shipping Co. Ltd.,* [2001] UKHL 1, 481. But see *Eagle Star Ins. Co. Ltd. [2004] EWHC 15.* Simon J. explained that this could give rise to anomalous consequences: “After litigation has commenced an insured may advance false documentation and lie without the drastic consequences which follow if the deployment of false documentation and lies are less well timed.” Id. [2005] EWCA Civ. 112 (Keene and Pill L.J.J., concurring).
should the fraud fail, he or she will lose nothing.263 The court should not, therefore, undermine the prophylactic policy of the common law rule by holding that forfeiture should not apply to a part of a claim that is otherwise honest.264 Accordingly, it was held that the effect of the common law is to forfeit the whole of the fraudulent claim so that the consideration for any interim payments made on that claim fails.265 Such sums are thus recoverable by the insurers irrespective of whether they were paid prior to the fraud.266

The issue of fraudulent claims again came to the fore in Danepoint Ltd. v. Allied Underwriting Insurance Ltd., in which a block of some thirteen flats was damaged by a fire.267 The insured lodged a number of exaggerated claims together with a fraudulent claim relating to loss of rent.268 Coulson J. subjected the authorities to thorough review. He concluded that the duty of utmost good faith declared by section 17 of the 1906 Act does not trigger during the claims process.269 An insurer cannot, therefore, avoid the policy ab initio on the ground of fraud.270 Where all or part of the claim is fraudulent, or where fraudulent devices are enlisted to promote a genuine claim, the insured will not be permitted to recover in respect of any part of the claim.271 Mere exaggeration will not, in itself, suffice to substantiate an allegation of fraud.272 But if the exaggeration is wilful, or is allies to misrepresentation or concealment, it will, in the judge’s view, probably be held to be fraudulent. In this regard, an exaggeration is more excusable where the value of the particular claim or head of loss in question is unclear or is a matter of opinion.273

263 Id.
264 Id.
266 Id.
268 Danepoint Ltd. [2005] EWHC 2318.
269 Id.
270 Id.
271 Id. at 432.
272 Id. at 438.
V. THE FUTURE

The reasoning expressed in the modern cases demonstrates a significant shift in the way the courts approach the good faith duty. The process of recalibrating the insured’s pre-contractual duty of good faith seen in the case law over the last decade or so is not being done in isolation from other aspects of the insurance contract for the courts are also adding content to the duty of good faith which the insurer owes to the insured at the time the risk is presented, at the time when the remedy of avoidance is exercised and at the time when insurers assert the benefit of claims clauses. With respect to consumer insurance there is a considerable body of Ombudsman jurisprudence to be added to the burgeoning case law. The result is that we now have two parallel regimes governing insurance contracts: one relating to commercial insurance and one relating to consumer insurance. In terms of coherence, this is not satisfactory. However, the Scottish and English Law Commissions current re-examination of insurance offers the potential for a thorough overhaul of the law, and in this regard it will be recalled that non-disclosure is identified as a key issue. It was to be hoped that the exercise would seek to assimilate the developments seen in the modern decisions into a single scheme for both consumer and commercial insurance. Admittedly, for other types of contracts the legislature has seen fit to distinguish between consumer and commercial transactions, but, as is pointed out by Professor Clarke, for insurance the distinction necessarily results in the adoption of arbitrary tests based on turnover. In any case, English judges have shown some reluctance in recognising such a dichotomy. For example, in *Cook v. Financial Insurance Co.*, Lord Lloyd, considering the effect of a term contained in a policy for disability insurance effected by a self-employed builder, took the view that it “must be construed in the sense in which it would have been reasonably understood by him as the consumer….”

In framing a suitable model for the duty of good faith, an appropriate balance needs to be struck between the economic costs of reform and the benefits, including social benefits, which a more balanced regime will bring. Such considerations must also be weighed against the

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274 For example, in the realms of sales law and credit transactions.
277 Both Lord Steyn and Lord Hope agreed.
objective of improving the competitiveness of the insurance market.\textsuperscript{279} This is not to under-estimate the difficulties of framing a solution. Any such reform needs to avoid excessive interference with commercial practices and avoid introducing uncertainty into the law.\textsuperscript{280} Over twenty years ago, the Australian Law Reform Commission (hereafter, the ALRC) published its wide-ranging report on insurance law,\textsuperscript{281} which unlike the 1980 report of its English counterpart, led to statutory reform by way of the Australian Insurance Contracts Act 1984 (hereafter, ICA 1984).\textsuperscript{282} The ALRC recommended a new test for the determination of the insured’s duty of disclosure, namely that the duty should be tested by what the insured knew, or what a reasonable person in the insured’s circumstances would have known, to be relevant to the assessment of the risk.\textsuperscript{283} The ALRC considered that this formulation of the duty was more consistent with the limits of the insured’s duty to exercise utmost good faith.\textsuperscript{284} It also thought that the formulation would achieve a fairer balance between insured and insurer than would the more objective test recommended by the English Law Commission in 1980.\textsuperscript{285}

In reaching its conclusions, the ALRC took into account a number of factors which offer important lessons for the investigation now underway in the UK. It found that fairness to the insured can only be achieved if both insurers and the law which regulates the insurance relationship are sensitive to the literacy, knowledge, experience, and

\textsuperscript{279} This objective informed the deliberations and recommendations put forward by the Australian Law Reform Commission. \textit{Australian Law Reform Commission, Insurance Contracts, Rep. No. 20}, at xxi (1982).

\textsuperscript{280} See report of the \textit{New Zealand Law Commission, supra} note 6, ¶ 10.

\textsuperscript{281} See \textit{Australian Law Reform Commission, supra} note 279. The Report is regarded as authoritative in the interpretation of the Insurance Contracts Act, 1984 (Austl.). See Ferrcom Pty. Ltd. v. Commercial Union Assurance Co. of Austl. Ltd., (1993) 176 C.L.R. 332, 340. By virtue of §§ 13-14 of the 1984 Act, utmost good faith is an implied term that applies to both parties to the contract. Thus, breach of the duty is a breach of contract giving rise to damages or to an estoppel and not to avoidance \textit{ab initio}.

\textsuperscript{282} Most of the 1984 Act’s provisions came into operation on 1 January 1986.

\textsuperscript{283} See \textit{Australian Law Reform Commission, supra} note 279, ¶ 24, at xxix. See also ICA 1984, \textit{supra} note 281, §§ 21 and 21A (as amended).

\textsuperscript{284} \textit{Australian Law Reform Commission, supra} note 279, ¶ 328, at 202.

\textsuperscript{285} \textit{Id.} ¶ 182, at 110.
More particularly, it was emphasised that the law should recognise the modern conditions in which insurance is marketed. Nowadays, insurance contracts are concluded with a minimum of formality and so, subject only to the principle of good faith, insurers should take individual members of the relevant market as they find them. The ALRC found that the existing duty of disclosure imposes obligations which many prospective insureds, acting in the utmost good faith, are unable to discharge. Indeed, in the current market place marketing methods are adopted which increase the risk of non-disclosure, and where intermediaries are not involved, there is no one to bring to the insured's attention the breadth of the disclosure obligation. For reasons of cost and competition, proposal forms are often kept to a minimum, especially so where direct marketing of insurance products is used whereby policies are purchased by means of computer-based communications systems. Taken in the round, these developments increase the risk of innocent non-disclosure. A modern regime should therefore take account not only of the various subjective factors affecting insureds, but also of the diverse methods enlisted by insurers to transact with their prospective customers. A test of disclosure based on the twin attributes of the actual insured together with the reasonable insured strikes the optimum balance in maintaining a single test, albeit dual-limbed, for both consumer and

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286 Perhaps surprisingly, these factors were specifically excluded by the Law Commission’s final report in 1980. That said, it should be noted that the ICA 1984 differs from the ALRC’s formulation of the duty. Section 21(1)(b) refers to matters that “a reasonable person in the circumstances” could be expected to know (emphasis added). Notwithstanding the pure objectivity of this statutory formulation, it has received positive endorsement beyond the shores of Australia. See, e.g., INSURANCE LAW REFORM: THE CONSUMER CASE FOR A REVIEW OF INSURANCE LAW, supra note 15; BRITISH INSURANCE LAW ASSOCIATION, REFORM OF INSURANCE CONTRACT LAW (2006); and more recently it has received broad support from the English and Scottish Law Commissions, supra note 17. It has also been welcomed by the New Zealand courts. For example, in State Insurance v. McHale, [1992] 2 N.Z.L.R. 399, 415, Richardson and Hardie Boys J.J. concluded that: “[t]he law in New Zealand as to materiality and the duty of disclosure is not satisfactory. It can lead to uncertainty and injustice…. The test of the reasonable assured has much to commend it. The Australian legislation adopting that test … could well be followed in this country.” See also the remarks of Cooke P, [1992] 2 N.Z.L.R. at 404. See also Quinby Enter. Ltd. v. Gen. Accident Ltd., [1995] 1 N.Z.L.R. 736, 740.

287 AUSTRALIAN LAW REFORM COMMISSION, supra note 279, ¶ 183, at 111.

288 Id.
commercial insurance. Although insurers often have exclusive recourse to data relevant to particular types of risks, they do not possess superior knowledge in relation to factors peculiar to the particular risk sought to be insured for this generally lies within the province of the insured. Therefore, an insured under this test would be required to prove the existence of any circumstances which he or she relies on to reduce the scope of the duty of disclosure.

As seen above, a particular feature of the modern English case law is the emphasis now being placed on the way in which insurers seek to exercise the remedy of avoidance. It will be recalled that while insurers are entitled to avoid the contract ab initio, the judges have expressed considerable unease over the draconian consequences suffered by insureds. In *Drake Insurance*, Rix L.J. addressed the issue in wider terms than most in calling for regard to be had to the concept of proportionality. As noted above, the Law Commission’s 1980 report expressly rejected the proportionality doctrine on the basis that it was unworkable. It also rejected a “nexus test” whereby the insurers would be required to demonstrate that the undisclosed fact is in some way connected to the loss. In reaching this conclusion the Law Commission reasoned that:

all considerations relating to non-disclosure must focus on the moment when a proposal for insurance is put forward and either accepted on certain terms or rejected, in either event by reference to what the insurer judges to be the quality of the risk. The technique - one might almost say the art - of good underwriting is to judge all the factors affecting an offered risk at this moment, when the underwriter must then and there assess its quality on the basis of his experience, as though he were considering the

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289 Such a subjective/objective form is now the accepted test for determining the appropriate standard of care for directors. See, e.g., Norman & Anor. v. Theodore Goddard & Ors., [1992] B.C.C. 14. This appears in the statutory statement of directors’ duties contained in the Companies Act, 2006, c.46, § 174 (Eng.).


291 For the Law Commission’s reasoning in this regard, see supra text accompanying note 15.

292 See THE LAW COMMISSION, supra note 15, ¶¶ 4.91-4.97.
overall impression given by a “still photograph” of the risk at this point.293

While the ALRC had some sympathy for the misgivings expressed by the Law Commission over the difficulties of proof in relation to proportionality and causation, it did not think these were insurmountable. The ALRC saw no reason why in most cases insurers would not be able to establish, “whether from rating guides, from its instructions to its agents or staff or from its prior conduct, the nature and extent of the loss which it had suffered.”294 While conceding that it would sometimes be difficult to establish how it would have reacted to additional moral, as distinct from statistical, risks the ALRC concluded, in a robust statement of principle, that:

difficulties of proof cannot be avoided if a proper balance is to be reached between the interests of the insurer and those of the insured. It is quite plainly contrary to the true principle of uberrima fides to impose on the insured a burden which far exceeds the harm which he has done. The insurer should not be entitled to any redress which exceeds the loss which it has in fact suffered. That is the basic principle which lies behind the law of damages, both in contract and in tort.295

It therefore recommended that the nature and extent of the insurer’s redress should depend on the nature and extent of the loss which it has suffered as a result of the insured’s conduct and that it should no longer be entitled to avoid a contract, and a heavy claim under that contract, merely because it has suffered a small loss as a result of non-disclosure.296 This certainly

293 Id. ¶ 4.94.
294 AUSTRALIAN LAW REFORM COMMISSION, supra note 279, ¶ 194.
295 Id.
aligns the position in insurance with fundamental principles underpinning the law of damages both in contract and tort. More particularly, it also reflects the approach taken in the general law of contract towards restricting the right to rescind a contract for innocent misrepresentation.297 Accordingly, the ALRC took the view that the right of insurers to avoid a contract from its inception should be abolished except for cases of fraudulent non-disclosure on the basis that avoidance ab initio was wholly disproportionate to the harm caused by an insured’s non-fraudulent non-disclosure.298 Rather, the insurer should be able to cancel the contract prospectively and be entitled to adjust a claim to take into account the loss actually suffered by it as a result of the insured’s breach of the disclosure duty.299 As to the question of assessing damages, the ALRC favoured the approach taken by the common law in claims for misrepresentation whereby damages for a breach of duty would depend upon what the insurer would have done had it known of the true facts.300 Any other remedies available to the insurer would depend on the response it would have made if it had known of the undisclosed material facts. For example, if it would have declined the risk outright, the insurer’s loss is equivalent to the amount claimed against it. If it would have accepted the risk albeit at a higher premium, its loss is the difference between the actual and notional premiums. If it would have accepted the risk but on different terms, whether at the same premium or not, its loss is the difference between its liabilities under the actual and notional contracts.

Not surprisingly, modern English decisions such as Drake Insurance and Rix L.J.’s dissent in WISE Ltd. illustrate the anxiety of the modern judges to address unfair dealings, certainly with respect to the

pay some or all of a claim consistently with what is just and equitable in the circumstances. It should be noted that the case law on sections 28-31 of the 1984 Act is confusing. The courts have developed their own principles on the assessment of damages.

297 See Misrepresentation Act, 1967, c. 7, § 2(2) (Eng.). It should be noted, however, that the Australian courts have frequently questioned whether the analogy between damages for breach of contract and damages for misrepresentation/non-disclosure is strictly correct.

298 AUSTRALIAN LAW REFORM COMMISSION, supra note 279, § 194.

299 Id. The Australian Law Reform Commission recommended reforms along similar lines for the law relating to misrepresentation.

300 Id.
exercise of avoidance by insurers.\textsuperscript{301} From the pre-contractual standpoint, we have also seen the courts aligning insurance law with general contract law in terms of the assimilation of non-disclosure with misrepresentation whereby the insurers must have been induced by the non-disclosed fact.\textsuperscript{302} This process, an objective of which appears to be a rebalancing of the respective rights and obligations of the parties, is not restricted to the modern case law. It should be viewed in tandem with the regulatory approach now being adopted by the UK’s Financial Services Authority through its Insurance: Conduct of Business (ICOB). The ICOB, while less prescriptive in relation to commercial policies than it is for consumer contracts, nevertheless requires insurers to treat commercial customers “fairly” and not to unreasonably reject claims.\textsuperscript{303}

From the European perspective it is of interest to view these developments against the background of the Directive on Unfair Commercial Practices which was approved on 11 May 2005.\textsuperscript{304} The Directive is aimed at providing a uniform and comprehensive standard for prohibiting unfair commercial practices. Although it is aimed at the position of consumers, including those affected by unfair commercial practices of insurers, there seems no reason in principle why the objective of the Directive (taken with the emphasis placed on ‘fairness’ in the ICOB) together with the current judicial thinking on the content of the duty of good faith borne by both parties, should not underpin the Law Commissions’ current review of insurance law. Indeed, in this respect, a degree of optimism is warranted. In September 2006, the English and Scottish Law Commissions published an Issues Paper on Misrepresentation and Non-Disclosure which was intended to promote discussion and


\textsuperscript{302} Whether this is particularly novel is another question. Certainly, in \textit{Carter v. Boehm}, (1766) 97 Eng. Rep. 1162, 1165, Lord Mansfield did not draw any sharp distinction between them. As Professor Clarke has observed, “If I describe the shandy that I have just bought you as lemonade, is that non-disclosure of part, the beer, or misrepresentation of the whole?” Clarke, \textit{supra} note 199, at 288.


feedback.\textsuperscript{305} The current system is criticised as “incoherent and flawed” on the basis that insurers can avoid policies inappropriately; that consumers are “deprived of a genuine choice between the FOS and the courts;” and that it “requires the FOS to exercise undue discretion.”\textsuperscript{306}

The initial recommendation was that the duty of disclosure in consumer insurance should be abolished. This proposal survived the various consultation exercises carried out by the Law Commissions and now forms the central plank of their proposals and draft Bill which was published in December 2009.\textsuperscript{307} Clause 2 of the Bill replaces the consumer-insured’s duty of disclosure with the duty “to take reasonable care not to make a misrepresentation.” This therefore removes the consumer’s duty to volunteer information to the insurer. Instead, consumers will be required to answer insurers’ questions honestly and to take reasonable care that their replies are accurate and complete. If consumers do, however, provide insurers with information which was not asked for, they must also do so honestly and carefully. The thinking here is that abolition of the disclosure duty would force insurers to ask the right questions in proposal forms. The draft Bill does not require the insurer to ask specific questions. However, clause 3(2) provides that in assessing the reasonableness of the consumer’s answer to a question, the court (or ombudsman) will take account “how clear, and how specific, the insurer’s questions were.” Clause 10, amongst other things, goes on to prevent insurers from contracting out of the provisions of the Bill. Thus, a policy term, or a term in any other contract, is rendered void to the extent that it would put the consumer in a worse position than under the draft Bill.

The prudent underwriter test is thus replaced with a reasonable insured test. Schedule 1 of the draft Bill goes on to lay down the insurers’ remedies for misrepresentation. The applicable remedy should depend on the insured’s state of mind. Where a consumer acts honestly and reasonably the insurer will be required to pay the claim. In cases of fraud (termed a “deliberate or reckless” misrepresentation), the insurer will be entitled to refuse to pay the claim. In such a case the insurer will need to prove on the balance of probabilities that the consumer knew (a) that the statement was untrue or misleading, or did not care whether it was or not, and (b) that the matter was relevant to the insurer, or did not care whether it

\textsuperscript{305} See The Law Commission, \textit{supra} note 17.

\textsuperscript{306} \textit{Id.} § 5.24.

\textsuperscript{307} \textit{Consumer Insurance Law: Pre-Contract Disclosure and Representation, supra} note 17.
However, with respect to negligent misrepresentation, a scheme of apportionment will apply in that both parties should be put into the position they would have been in had the insurer known the true facts. For example, if the insurers would have charged a higher premium, the insured will be able to recover that proportion of his loss which corresponds to the proportion of the proper premium actually paid. For innocent misrepresentation, i.e. where the insured had reasonable grounds for believing the truth of what is stated, the insurer will have no remedy.

The Law Commissions thus draw a distinction between consumer and non-consumer insurance contracts. The received wisdom is that businesses require less protection in part because businesses use expert brokers, but also because the market for commercial insurance is competitive and businesses can generally negotiate with insurers in a way not available to consumers. Overall, it is provisionally recommended that the duty of disclosure should continue to apply to non-consumer insurance but subject to a “reasonable insured” test for materiality. This would also apply to misrepresentation. It is also proposed that the same remedies as recommended for consumer policies should be available for fraudulent, negligent and innocent misrepresentation, although a range of questions concerning negligent misrepresentation are put forward for discussion. A policy statement on pre-contract disclosure and misrepresentation in business insurance is expected to be issued in 2010.

It would be churlish not to welcome the Law Commissions’ proposals for reforming insurance contracts. More particularly, a positive feature is that a number of their proposals resonate with those originally put forward by the ALRC in 1982. However, perpetrating the distinction between consumer and business insureds is open to question. Maintaining the division between the two does little to further the objective

308 For example, if an insurer only charged a premium of £1,000 but should have charged £1,500, the consumer will receive two thirds of the claim. See the Explanatory Notes to the draft Bill, A.17(3), CONSUMER INSURANCE LAW: PRE-CONTRACT DISCLOSURE AND REPRESENTATION, supra note 17.


310 Regrettably, the Australian ICA 1984, § 21A also draws the distinction between private and business insureds.
of constructing a coherent regime for insurance. On a more positive note, the recommendations relating to remedies are to be welcomed especially in so far as the Law Commissions now embrace a form of apportionment. Other issues still remain to be addressed, not least the question of whether or not the good faith duty continues to operate post-contractually. As seen above, the case law has at last settled the point and no doubt the Law Commissions will assimilate this position in their final proposals. Their work on this is expected to begin in 2010.311 Finally, in relation to claims there remains a significant question which the authorities have thus far failed to address. Will a fraudulent claim bring the insurance contract to an end so that insurers can refuse to pay a legitimate claim that is made subsequent to that which is held to be fraudulent? Although the issue has so far evaded judicial determination, the English and Scottish Law Commissions now have the opportunity to grasp the nettle.