The Duty of Utmost Good Faith in Insurance Law: Where Is It in the 21st Century?

The historical background of good and bad faith continues to develop in English law, especially in two recent maritime cases

By Jan Woloniecki

THE duty of good faith in insurance law, first enunciated by Lord Mansfield in 1766 in *Carter v. Boehm*, predates the coming into existence of the United States. Yet, more than 200 years of English legal history have not solved all the problems that arise from the lack of good faith of insureds and sometimes of insurers and the ingenuity of their legal advisers. As recently as 1996, the House of Lords were split 3-2 over fundamental questions on the duty of disclosure.

Two important recent English decisions—*The "Star Sea"*[1] and *The "Mercandian Continent,"*[2] which concern marine insurance but are of general application to all forms of insurance and reinsurance—address this issue: Does the duty of good faith continue after the making of the contract of insurance, and if so what are the consequences if it is breached?

A LOOK AT HISTORY

In *Carter v. Boehm,* Lord Mansfield said:

> Insurance is a contract of speculation. The special facts upon which the contingent chance is to be computed lie most commonly in the knowledge of the assured only; the underwriter trusts to his representation and proceeds upon confidence that he does not keep back any circumstance in his knowledge to mislead the underwriter into a belief that the circumstances do not exist. The keeping back of such circumstances is fraud, and therefore the policy is void.
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> Although the suppression should happen through mistake, without any fraudulent intention, yet still the underwriter is deceived and the policy is void; because the risque run is really different from the risque understood and intended to be run at the time of agreement. . . . The policy would be equally void against the underwriter if he concealed. . . . Good faith forbids either party, by concealing what he privately knows to draw the other into a bargain from his ignorance of the fact, and his believing the contrary.[3]

Carter v. Boehm concerned the pre-contractual duty of disclosure. Lord Mansfield did not consider the duties of the parties to one another after the contract had been made. Most of the 19th century cases concern breaches of the duty of good faith by reason of non-disclosure or misrepresentation at the time of the making of the contract. It was understood to be the law, however, that there was no obligation on an assured to disclose to the underwriter facts material to the risk that came to the assured's knowledge after the contract was made.[4]

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1. [2001] 1 Lloyd's Rep. 389, House of Lords.
2. [2001] EWCA CIV 1275, Court of Appeal (31 July 2001).
3. (1766) 3 Burr 1905.
4. *See* Cory v. Patton, (1872) L.R. 7 Q.B. 304; Lishman v. Northern Marine Ins. Co., (1875) L.R. 10 C.P. 179.

MARINE INSURANCE ACT 1906

The Marine Insurance Act 1906 (MIA), as its name suggests, is generally confined to marine insurance. However, the House of Lords has held that Sections 17 to 20 of the MIA codify the common law and apply to all forms of insurance and reinsurance.[5] Section 17 of the MIA provides:

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

Sections 18-20 of the MIA address the pre-contractual duty of good faith at more length. Section 18 deals with disclosure by the assured, Section 19 with disclosure by agents to insure, and Section 20 deals with misrepresentation.

CONTINUING DUTY?

Does the duty of utmost good faith continue after the contract is made? Sections 18 and 20 of the MIA both refer to the situation "continuing before the contract is concluded." Section 17 contains no such limiting language.

A. The "Litsion Pride"

In *Black King Shipping Corp. v. Massie (The "Litsion Pride")*, Hirst J. said that "the duty of utmost good faith applied with its full rigour" in relation to the giving of information by the assured to the underwriter about the voyage of a vessel under a policy that required the giving of such information.[6]

In this case, the assured ship owners failed to disclose to the underwriters that the vessel was about to enter a dangerous part of the Persian Gulf so as to avoid having to pay a higher war risks premium. The vessel was struck by an Iraqi missile, and the owners then presented a fraudulent claim by lying to the underwriters about the vessel's position at the time of the casualty.

The court held that the underwriters were entitled either to avoid the policy for fraud or deny the particular claim. Hirst J. said:

> *So far as claims are concerned, I consider that the general principle requiring utmost good faith must apply also. . . .* In contrast to the pre-contract situation, the precise ambit of the duty in the claims context has not been developed by the authorities; indeed no case has been cited to me where it was considered outside the fraud context in relation to claims. *It must be right, I think . . . to hold that the duty in claims sphere extends to culpable misrepresentation or non-disclosure.* Further than that there is no need to go on the facts of the present case. . . . I hold that any fraudulent statement which would influence a prudent underwriter's decision to accept reject or compromise the claim, is material.[7]

In *Bucks Printing Press Ltd. v. Prudential Assurance Co.*, Saville J. was prepared to extend the concept of "culpable misrepresentation or non-disclosure" by an assured seeking to obtain payment of a claim to recklessness.[8] However, the suggestion that the making of an exaggerated, but not fraudulent, claim entitled underwriters to avoid did not find favour with the Court of Appeal.[9]

B. The "Star Sea"

In *Manifest Shipping Co. Ltd. v. Uni-Polaris Insurance Co. Ltd. (The "Star Sea")*,[10] Greek shipowners sued underwriters under a marine policy following the constructive total loss of their vessel as a result of a fire. The underwriters raised two defences.

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5. *See* Pan Atlantic Co. Ltd. v. Pine Top Insurance Co. Ltd., [1995] 1 A.C. 501, [1994] 2 Lloyd's Rep 427.
6. [1985] 1 Lloyd's Rep. 437.
7. *Id.* at 512-13 (emphasis added).
8. [1994] 3 Reins. L.R. 196.
9. *See* Orakpo v. Barclays Ins. Servs., [1995] L.R.L.R 443; Galloway v. Guardian Royal Exch., [1999] Lloyd's Rep. I.R. 209; Manifest Shipping Co. Ltd. v. Uni-Polaris Ins. Co. Ltd. (The "Star Sea"), [1997] 1 Lloyd's Rep 651. For a detailed discussion of the state of the authorities prior to the decision of the House of Lords in *The "Star Sea," see* O'Neill & Woloniecki, *The Law of Reinsurance* 214-43 (1st ed.) and 36-37 (first supp).
10. [1995] 1 Lloyd's Rep. 651.

First, they relied on Section 39(5) of the MIA, which provides a defence to liability where, "with the privity of the assured, the ship is sent to sea in an unseaworthy state." The underwriters alleged that the owners had "blind-eye knowledge" of the unseaworthy condition of the vessel—namely, defective funnel dampers—which meant that the engine room could not be sealed, and the fact that the fire extinguishing system had been poorly maintained and was not working properly.

Second, they relied on Section 17 of the MIA, alleging that the owners were in breach of the duty of utmost good faith by failing to disclose the facts relating to an earlier fire aboard another vessel, *Kastora*, at the time the underwriters' solicitors were investigating the *Star Sea* claim.

Tuckey J. found in favour of the underwriters on the unseaworthiness point but concluded that the Section 17 point failed both on the law and the facts. Both sides appealed. The Court of Appeal reversed certain of Tuckey J.'s findings of fact on the unseaworthiness point, dismissed the underwriters' cross-appeal on the section 17 point, and entered judgment for the owners.[11] The House of Lords upheld the decision of the Court of Appeal.[12]

Lord Hobhouse, who gave the leading speech in *The "Star Sea,"* noted that there was common ground between counsel with regard to the duty of utmost good faith in three respects. First, that the principle of utmost good faith is not confined to marine insurance; it is applicable to all forms of insurance and is mutual, as section 17 confirms by using the phrase "if the utmost good faith be not observed by either party." Second, utmost good faith is a principle of fair dealing which does not come to an end when the contract has been made. Third, the decision of the Court of Appeal in the *Gemstones* case[13] is good law and that there is no remedy in damages for any want of good faith. "It follows from this," Lord Hobhouse stated, "that the principle relied upon by the defendants is not an implied term but is a principle of law which is sufficient to avoid the contract retrospectively."

Lord Hobhouse proceeded to distinguish between a contractual obligation of good faith in the performance of a contract, the primary remedy for breach of which was damages, and the legal duty imposed by Section 17. He said:

> The right to avoid referred to in Section 17 is different. It applies retrospectively. It enables the aggrieved party to rescind the contract *ab initio.* Thus he totally nullifies the contract. Everything done under the contract is liable to be undone. If any adjustment of the parties' financial positions is to take place, it is done under the law of restitution not under the law of contract. This is appropriate where the cause, the want of good faith, has preceded and been material to the making of the contract. But, where the want of good faith first occurs later, it becomes anomalous and disproportionate that it should be so categorised and entitle the aggrieved party to such an outcome. But this will be the effect of accepting the defendants' argument. The result is effectively penal. Where a fully enforceable contract has been entered into insuring the assured, say, for a period of a year, the premium has been paid, a claim for a loss covered by the insurance has arisen and been paid, but later, towards the end of the period, the assured fails in some respect fully to discharge his duty of complete good faith, the insurer is able not only to treat himself as discharged from further liability but can also undo all that has perfectly properly gone before. This cannot be reconciled with principle. No principle of this breadth is supported by any authority whether before or after the act. It would be possible to draft a contractual term which would have such an effect but it would be an improbable term for the parties to agree to and difficult if not impossible to justify as an implied term. The failure may well be wholly immaterial to anything that has gone before or will happen subsequently.[14]

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11. [1997] 1 Lloyd's Rep. 360.
12. [2001] 1 Lloyd's Rep. 389.
13. Banque Keyser Ullmann SA v. Skandia (UK) Ins. Co. Ltd., [1990] 1 Q.B. 665.
14. [2001] 1 Lloyd's Rep. at 400 (para. 50).

Lord Hobhouse considered the authorities[15] and continued:

> These 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, as the defendants submitted that your Lordships should, 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. 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. Save possibly for some types of reinsurance treaty, it is hard to think of circumstances where an assured will stand to benefit from the avoidance of the policy for something that has occurred after the contract has been entered into; the hypothesis of continuing dealings with each other will normally postulate some claim having been made by the assured under the policy.[16]

Lord Hobhouse concluded:

> For the defendants to succeed under this part of the case the defendants have to show that the claim was made fraudulently. They have failed to obtain a finding of fraud. It is not enough that until part of the way through the trial the owners (without fraudulent intent) failed to disclose to the defendants all the documents and information which the defendants would have wished to see in order to provide them with some, albeit inadequate, evidential support for their alleged defence under Section 39(5). The defence under Section 17 fails.[17]

Two further important points regarding the post-contractual duty of good faith arise from Lord Hobhouse's speech in *The "Star Sea."* First, the decision of Hirst J. in *The "Litsion Pride,"* which, he said, "has been used in a number of cases to support a general view of the post-contractual duty of good faith,"[18] was no longer good law.

The second point is, in his words, "whether the obligation of good faith and disclosure continues to apply unqualified once the parties are engaged in hostile litigation before the courts." Lord Hobhouse concluded that it did not, saying that he was, "strongly of the view that once the parties are in litigation it is the procedural rules which govern the extent of the disclosure which should be given in litigation, not Section 17 as such, though section 17 may influence the court in the exercise of its discretion."[19]

C. The "Mercandian Continent"

In *K/S Merc-Scandia XXXXII v Lloyd's Underwriters (The "Mercandian Continent")*,[20] the claimants were the owners of a vessel which had been repaired in a Trinidadian shipyard in 1988. Repairs to the engine were negligently performed so that the engine exploded, causing damage to the vessel and loss of use. The claimants made a claim against the shipyard. In 1989 the shipyard agreed to subject the dispute to English jurisdiction.

The shipyard's liability insurers (the underwriters) took over the defence of the claim and received advice, which subsequently turned out to be wrong, that the shipyard's statutory right to limit its liability was more favourable under the law of Trinidad. The underwriters' loss adjusters

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15. Lishman v. Northern Maritime Ins. Co., [1875] L.R. 10 C.P. 179; Cory v. Patton, [1872] L.R. 7 Q.B. 304; Niger Co v. Guardian Assurance Co., [1922] 13 Ll. L.R. 75.
16. [2001] 1 Lloyd's Rep. at 401 (para. 57).
17. *Id.* at 405-06 (para. 72).
18. *See* O'Neill & Woloniecki, *supra* note 9 at 240-43 (1st ed.).
19. [2001] 1 Lloyd's Rep. at 406 (paras. 73 and 76).
20. [2001] EWCA CIV 1275 (Court of Appeal, 31 July 2001).

had advised that the claim would be covered by the policy. The claimants issued English proceedings. The underwriters challenged English jurisdiction on the basis of a July 1, 1988, letter from the shipyard-assured to the claimants, which appeared to show that the 1989 jurisdiction agreement was made without authority.

In 1993 it was discovered that the July 1, 1988, letter was a forgery and that the limitation regime was the same in Trinidad and England. The challenge to English jurisdiction was abandoned. The underwriters purported to avoid the insurance contract on the ground that the forged letter was a breach of the assured's duty of utmost good faith. The claimants obtained judgment against the shipyard. Liability was not contested.

The shipyard went into insolvent liquidation and the claimants pursued the shipyard's liability insurance claim against the underwriters pursuant to the Third Parties (Rights Against Insurers) Act 1930. The underwriters relied on two defences: avoidance for breach of the duty of utmost good faith; alternatively, breach of one of the general conditions of the policy, which required the assured to keep the insurers "fully advised" in the event of any occurrence which might result in a claim.

Aikens J., following the decision of Rix J. in *Royal Boskalis Westminster NV v Mountain*[21] and of the Court of Appeal in *The "Star Sea,"* held that the post-contractual duty of good faith did not apply unless (1) the insurer was being invited to renew his "speculation" or "risque" or (2) the assured was prosecuting or pursuing a claim on the policy.[22]

The assured, the court stated, was under a duty not to present or pursue a fraudulent claim and any fraud had to be material to the insurer's ultimate liability on a claim on the policy. The forged letter had been produced to "assist" the solicitors appointed by underwriters on an interlocutory point concerning the defence of a third party's claim against the assured which was otherwise covered under the liability policy. The forged letter was legally irrelevant to the merits of the claim under the liability policy. On that basis, there being no fraud in relation to the presentation of the claim by the assured and no defence to the substantive claim, Aikens J. held that the duty of utmost good faith did not operate and the insurers were not entitled to avoid under Section 17 of the MIA.

Aikens J. also held that the condition requiring the assured to keep underwriters fully advised was an innominate term, with the result that in order to reject the claim for breach of that term, the underwriters had to show that the consequences of the breach were serious,[23] and they had failed to do so. Accordingly, Aikens J. gave judgment for the ship owners.

On appeal, the underwriters argued that the lower court was wrong, as a matter of principle, to have identified post-contract "good-faith occasions" and to have held that no such occasion arose on the facts of the case. The duty of utmost good faith as expressed in Section 17 of the MIA applied in general terms throughout the contract, and any breach of good faith, certainly any fraudulent conduct by the assured, entitled underwriters to avoid.

Longmore L.J., who gave the judgment of the Court of Appeal, said that in *The "Star Sea"* the House of Lords, "held that culpable non-disclosure was insufficient to attract the drastic consequence of avoidance provided by Section 17." He noted that the present case differed from *The "Star Sea"* in two important respects. First, the contract was not a property insurance contract but a liability insurance contract. Second, the conduct of the assured about which the underwriters complained was fraudulent instead of merely culpable.

Longmore L.J. remarked:

> The scope of good faith obligations, once the contract has been concluded has been a matter of controversy. . . . Insurers' enthusiasm for the doctrine appears to have begun in *Piernay Shipping v. Chester (The*

21. [1997] LRLR 523.
22. [2000] 2 Lloyd's Rep. 357
23. Following Alfred McAlpine plc v. BAI (Run-Off) Ltd., [2000] 1 Lloyds Rep 437.

> *"Michael"),* [1979] 2 Lloyd's Rep. 1, and the doctrine of itself reached a high point in *Black Sea Shipping v. Massie ("The Litsion Pride"),* [1985] 1 Lloyd's Rep. 437, since when there has been something of a retreat.[24]

The correct starting point, in his view, was to analyse the relevant contractual provisions first.

> One can readily understand that in the more usual case of pre-contract lack of good faith, the contract subsequently made between the parties cannot be a satisfactory starting-point; where, however, a contract has been made, it is somewhat perverse to apply to it principles of good faith which are traditionally applicable mainly in pre-contract situations.[25]

He concluded that the contractual defence failed, approving the decision of Aikens J., and went on to consider the "good faith defence."

The underwriters relied on an "overarching principle of good faith" and a literal reading of Section 17 of the MIA. Counsel for the underwriters submitted that, following *The "Star Sea,"* the only application of Section 17 post contract was to cases of dishonesty but that in such cases the full apparent rigour of Section 17 should be applied."

Longmore L.J. reviewed the authorities on the post-contractual duty of good faith and, referring to Lord Hobhouse's approach to the law on fraudulent claims in *The "Star Sea"* as an "admonition" to be kept in mind when construing Section 17, said:

> It is well recognised that, before a contract can be avoided for pre-contract non-disclosure or misrepresentation, the fact not disclosed or misrepresented must have been material for a prudent underwriter to know when he was assessing the risk and must have induced the actual underwriter to write the risk. The requirement of materiality is emphasised in all three of the following sections of the 1906 act and the requirement of inducement is part of the general law which, though not adverted to specifically in the act, is understood to apply to insurance law generally and marine insurance in particular, see *Pan-Atlantic v. Pine Top Insurance* [1995], 1 A.C. 501. *In my judgment these requirements which must exist before an underwriter can avoid for lack of good faith pre-contract must also apply, making due allowance for the change of context, where an underwriter seeks to avoid for lack of good faith or fraud in relation to post-contractual matters. In particular the requirement of inducement which exists for pre-contract lack of good faith must exist in an appropriate form before an underwriter can avoid the entire contract for post-contract lack of good faith.* It is in this context that Lord Hobhouse's admonition is particularly relevant because, as he points out, the insurer already has his contractual remedies for breach of contract and repudiation. The insurer can treat the insured as being in repudiation of what will normally be an innominate term of the contract if there is a serious breach or there is a breach with serious consequences for the insurer. Avoidance *ab initio* is an even more extreme form of contractual termination than an acceptance of repudiatory conduct and, for the extreme remedy of avoidance to be available, there must, in my view, be at least the same quality of conduct as would justify the insurer in accepting the insured's conduct as a repudiation of the contract. It is only in this way that the requirement of inducement for pre-contract conduct resulting in avoidance can be made to tally with post-contract conduct said to entitle the insurer to avoid the contract. *It would not be just to the insured to enable the insurer to by-pass the rights and duties imposed on the parties by the contract in order to enable him to claim the disproportionate remedy of avoidance, with the result that he can avoid liability for all other claims under the policy as well as the instant claim, without requiring that the conduct relied on be as serious as conduct which would be viewed as repudiatory.* In this way the operation of section 17 post-contract has the appropriate symmetry to the operation of the section pre-contract.[26]

Longmore L.J. noted that "some authorities have concluded that the law is (or

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24. [2001] EWCA CIV 1275 (Court of Appeal) (31 July 2001) at 10 (para. 9).
25. *Id.*
26. *Id.* at 18 (para. 26) (emphasis added).

ought to be) that the duty of utmost good faith is only applicable pre-contract and has no application once the contract is concluded outside the context of fraudulent claims."[27] However, he did not, "consider it open to this court to decide that Section 17 of the act has no application after the formation of the contract (according to Lord Clyde this solution is 'past praying for,' para. 6 of *The 'Star Sea'*); nor do I think, in the light of the law set out in Paragraph 22 above, that the operation of the section can be artificially limited to the two categories for which Mr. Rainey [counsel for the claimants] contends and which Aikens J. accepted viz (1) cases analogous to the pre-contract context and (2) fraudulent claims."

He continued:

> It seems to me that the solution to the problem must be found in the somewhat broader context of the appropriate remedy, as I have indicated in Paragraph 26 above. Section 17 states that the remedy is the remedy of avoidance but does not lay down the situations in which avoidance is appropriate. *It is, in my judgment, only appropriate to invoke the remedy of avoidance in a post-contractual context in situations analogous to situations where the insurer has a right to terminate for breach.* For this purpose (A) the fraud must be material in the sense that the fraud would have an effect on underwriters' ultimate liability as Rix J. held in *Royal Boskalis* and (B) the gravity of the fraud or its consequences must be such as would enable the underwriters, if they wished to do so, to terminate for breach of contract. Often these considerations will amount to the same thing; a materially fraudulent breach of good faith, once the contract has been made, will usually entitle the insurers to terminate the contract. Conversely, fraudulent conduct entitling insurers to bring the contract to an end could only be material fraud. *It is in this way that the law of post-contract good faith can be aligned with the insurers' contractual remedies. The right to avoid the contract with retrospective effect is, therefore, only exercisable in circumstances where the innocent party would, in any event, be entitled to terminate the contract for breach.*[28]

Thus, Longmore L.J. rejected the analysis of Aikens J. that there are only some occasions when the requirement of good faith exists post-contract and concluded that the duty of utmost good faith imposed by Section 17 is a continuing one. He added the following caveat:

> If, however, I am wrong about that and there are defined categories of good faith arising post-contract, I would conclude that the 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, however, 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."[29]

Longmore L.J. considered that "the fraud was not relevant, ultimately, or at all, to insurers' liability." While he emphasised that he did not "condone or belittle" the fraud perpetrated by the assured, he nonetheless concluded that the underwriters defence of reliance on Section 17 failed and upheld the result arrived at by Aikens J. He said:

> It would, in my judgment, be absurdly disproportionate that insurers should be entitled to avoid the insurance policy and thus be able to avoid a liability to their assured which they always had and to which there could never have been any defence, if the insured had not been so over-enthusiastic in trying to assist the insurers to defeat the shipowners' claim.[30]

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27. *See* Royal Boskalis v. Mountain, [1997] L.R.L.R. 523, 587 (col. 1) per Rix J; Howard Bennett, *Mapping the Doctrine of Good Faith in Insurance Contract Law*, [1999] L.M.C.L.Q. 165.

28. [2001] EWCA CIV 1275 at pg.18 (para. 35) (emphasis added).

29. *Id.* at pg.24 (para. 40).

30. *Id.* at pg.24 (para. 43).

SUMMARY OF THE LAW

The current state of English law, following *The "Star Sea"* and *The "Mercandian Continent,"* may be summarised in the following propositions:

- The common law imposes a reciprocal duty of good faith on the parties to insurance and reinsurance contracts (1) at the time the contract is made (pre-contractual duty) and (2) following the making the contract (post-contractual duty). The nature and extent of the pre-contractual duty and the post-contractual duties are, however, different.
- At the pre-contractual stage, there is a positive obligation on the parties[31] to disclose all facts material to the risk and to refrain from material misrepresentation. The only remedy the common law allows for breach of the duty of good faith is avoidance of the contract of insurance or reinsurance. Damages for breach of the duty of good faith are not available.
- There does not appear to be a general duty that the parties perform the contract of insurance or reinsurance in good faith. Thus there is no basis under English law for awarding damages against an insurer or a reinsurer for "bad faith" in relation to the handling of claims.
- However, there does appear to be a continuing duty on the parties not to be materially fraudulent in relation to the performance of the contract. After the contract has been made, the duty of good faith includes but is not confined to (1) cases analogous to the pre-contractual context, such as variation of the risk, and (2) a requirement that the assured refrain from making fraudulent claims.
- In a post-contractual case, the underwriter is entitled only to avoid the contract with retrospective effect if he can show (1) that the fraudulent conduct of the assured was relevant to the underwriter's ultimate liability under the contract and (2) was such that it would entitle him to terminate the contract for breach. *Quaere* whether the underwriter can elect to deny claim as opposed to avoiding.
- When a claim is made, the assured is, as a matter of principle, under an obligation to disclose all material facts to the underwriter's agents investigating the claim. However the failure to make full disclosure, unless it was materially fraudulent, does not entitle the underwriter to deny an otherwise valid claim. Once a writ is issued, the obligation of disclosure is governed by the relevant procedural rules and the consequences of a failure to disclose relevant documents are also determined by reference those rules.

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31. It is, of course, usually the assured who bears the obligation of disclosure, but the duty is reciprocal. A classic example is the underwriter who agrees to insure or reinsure an overdue ship when he knows that the ship has arrived safely.