"Marine Insurance - is the doctrine of 'Utmost Good Faith' out of date?"

Comité Maritime International 35th International Conference.

001163

COMITÉ MARITIME INTERNATIONAL
35th INTERNATIONAL CONFERENCE

SYDNEY, AUSTRALIA 1994

MARINE INSURANCE - IS THE DOCTRINE OF "UTMOST GOOD FAITH" OUT OF DATE?

The Hon Justice M D Kirby AC CMG *

From coffee house to global industry

Let us start with a little history. It is always enlightening in the law, but especially in the field of marine insurance which is of ancient origin. The systems of indemnity known as "bottomry", "respondentia" and general average are the forebears to modern marine insurance.[1] The modern form of that insurance originates, as legend has it, from the practices of the 12th Century Lombard merchants. By the 15th Century, those merchants, to the irritation of locals, controlled much of the overseas trade of England, and hence of insurance over it. But by the reign of Queen Elizabeth I, the practice of marine insurance in England was becoming well developed. The Lombard merchants had begun to pack their parchments and to leave England.[2] Just as Mr Scott's untimely passage beneath a loading crane from which six bags of sugar rained down upon him,[3] Mrs Donoghue's adverse consumption of a cocktail of aerated ginger-beer and snail[4] and Mrs Miller's summertime fear of soaring cricket balls

---

* President of the Court of Appeal of New South Wales, Sydney, Australia. Formerly, Chairman of the Australian Law Reform Commission (1975-1983). The author acknowledges the assistance given by Mr Eugene Romaniuk, Research Officer to the Court of Appeal, in the preparation of this paper.

1 *Bottomry* was a system whereby a loan, secured by the vessel, taken out by a ship owner for the purposes of a seafaring venture would be forgiven if the vessel was lost. Repayment of the loan was conditional on the vessel's safe arrival. *Respondentia* was a system like bottomry, but the loan had as its security the cargo of the vessel. *Average* was a system of indemnity whereby various parties to a venture contribute rateably to indemnify another party to the same venture upon principles of common equity. See A L Parks, *The Law and Practice of Marine Insurance and Average*, Steven & Sons, 1988, Vol. 1, p.4.

2 *ibid*, pp.1-6.

3 *Scott v The London and St. Katherine Docks Company* (1865) 3 H&C 596; 159 ER 665.

4 *Donoghue v Stevenson* [1932] AC 562 (HL).

plummeting down into her garden[5] have become legal folklore, so too has the 17th Century London coffee-house of Mr Edward Lloyd.

Very little is known either about Mr Lloyd or his Tower Street coffee house. But it appears that he took no personal part in the practice of underwriting, "contenting himself with providing congenial surroundings and facilities for his patrons to do business until his death in 1713. Lloyd's chief bequest to posterity was his name and the coffee house which bore it."[6]

Then, as now, willing parties for fee, individually or collectively, took risks for other merchants against loss at sea: ever a peril of marine adventures. The decision to accept that risk, and for what price, rested upon the participant underwriters' evaluation of the chance of loss having regard to the details of the voyage provided to them. In those infant days of marine insurance the knowledge of factors pertaining to the risk lay almost entirely with the person seeking the insurance. In *Carter v Boehm* Lord Mansfield said:[7]

> *"Insurance is a contract based upon speculation. The special facts, upon which the contingent chance is to be computed, lie most commonly in the knowledge of the insured only: the underwriter trusts to his representation and proceeds upon the confidence that he does not keep back any circumstance in his knowledge, to mislead the underwriter into a belief that the circumstance does not exist, and to induce him to estimate the risqué as if it did not exist."*

Proper assessment of such "contingent chance" necessitated the full and complete disclosure of all factors material to the risk. The common law responded to this need by holding that all contracts of insurance were contracts *uberrimae fidei*.

---

5 *Miller v Jackson* [1977] 1 QB 966 (CA).
6 Parks, *The Law and Practice of Marine Insurance and Average*, above, p.8.
7 (1766) 3 Burr 1905 at 1909; 97 ER 1162 at 1164

Each party to the contract must act with the "utmost good faith" in his or her dealings with the other.[8] This was to be in contrast to the common law's general *laissez-faire* theory to bargains in the general law of contract.[9] There the theoretical underpinning was the doctrine of *caveat emptor*.[10]

In the time which has passed since Mr Edward Lloyd provided his customers with fragrant coffee many things have changed. The relative bargaining position of marine underwriters and assureds has changed. In those early days it lay almost solely with the insured. The purpose of the rule was to rectify that imbalance.[11] Today prudent underwriters have largely redressed this information imbalance.[12] The law has moved a great distance from the values which it embraced in the 18th and 19th Centuries. The perceptions of contemporary society concerning conduct appropriate to a bargain have also changed since the infant days of marine insurance. Against the background of these changes it is timely to ask whether, having regard both to theory and practice, the circumstances of modern times are such that duty of utmost good faith in marine insurance has become out of date?

---

8 See, for example, *Seaton v Heath* [1899] 1 QB 782 (CA) at 792 per Romer LJ; *Southern Cross Assurance Company Ltd v Australian Provincial Assurance Association Ltd* (1939) 39 SR(NSW) 174 (FC), at 187; *Halsbury's Laws of England* (4th ed), Vol 25, para 221. Note however that Lord Mansfield in *Carter v Boehm* (1766) 3 Burr 1905 at 1909; 97 ER 1162 at 1164 was of the view that the doctrine of "good faith" was applicable to all contracts, not only contracts of insurance. The common law of contract has not since *Carter v Boehm* so far developed in that way: see *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1994] 3 WLR 677 (HL), at 700 per Lord Mustill, despite some lingering indications to that effect. See, for example, the discussion of Priestley JA in *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234 (CA), at 263f. See also J Carter "Good faith in Failed Contract Negotiations", unpublished, a paper delivered to the University of Sydney Faculty of Law Continuing Legal Education program, 17 February 1994.

9 See generally D W Greig and J L R Davis, *The Law of Contract*, LBC, 1987, pp.22-32.

10 See generally W H Hamilton, "The Ancient Maxim of *Caveat Emptor*" (1931) 40 *Yale Law Journal* 1133, esp. pp.1135-1136. See also A G Guest (ed), *Benjamin's Sale of Goods* (3rd Ed), Sweet & Maxwell, 1987, at para 777.

11 *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1994] 3 WLR 677 (HL), at 717 per Lord Lloyd of Berwick.

12 The Law Reform Commission, *Insurance Contracts* (ALRC 20), AGPS, 1982, at para 175.

The law of utmost good faith in Australian marine insurance

Like many other aspects of Australian law, both common and statute law, what may be described as "Australian marine insurance law" owes its origins to the law of England. Indeed, the High Court of Australia recently commented, in a rather different context, that "Australian law is not only the historical successor of, but is an organic development from, the law of England".[13] While it had been established that the common law of Australia could develop independently of English precedent,[14] as regards the general law of contract the English law remains particularly persuasive.[15] This is especially so in the present case as the *Marine Insurance* Act 1909 (Cth)[16] is, in substance, identical to the English *Marine Insurance Act* 1906, which represented a "partial codification of the common law."[17]

The duty of utmost good faith - s 23 of the *Marine Insurance Act*

Division 4 (ss 23-27) of the *Marine Insurance Act* 1909 (the Act) deals with disclosure and representations. Section 23 of the Act[18] expressly imposes upon the parties to the bargain a duty of utmost good faith. That section makes it clear that:

(1) the duty of utmost good faith applies to *both* the underwriter and the assured;[19] and

---

13 *Mabo v The State of Queensland (No.2)* (1992) 175 CLR 1, at 29 per Brennan J; Mason CJ and McHugh J agreeing.

14 *Australian Consolidated Press Ltd v Uren* (1967) 117 CLR 221; [1969] AC 590 (PC). See also the *Australia Act* 1986 (Cth).

15 Greig and Davis, *The Law of Contract*, above, p.1.

16 There are constitutional limitations upon the Australian Federal Parliament's legislative power to pass laws in respect of insurance. See generally J Quick and R R Garran, *The Annotated Constitution of the Australian Commonwealth*, The Australian Book Company, 1901 at §§160 and 185. Section 6(1) of the *Marine Insurance Act* 1909 (Cth) provides:

> *"This Act shall apply to marine insurance other than State marine insurance and to State marine insurance extending beyond the limits of the State concerned".*

This paper focuses exclusively on the operation of the Federal legislation in Australia, it, by virtue of s 6(1), being applicable to international transactions.

17 *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1994] 3 WLR 677 (HL), at 683.

18 Section 23 of the *Marine Insurance Act* 1909 (Cth) 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 be avoided by the other party."*

19 See also *Carter v Boehm* (1766) 3 Burr 1905, at 1909; 97 ER 1162, 1164 per Lord Mansfield; *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1994] 3 WLR 677 (HL), at 717-718 per Lord

(2) if the duty of utmost good faith is breached the innocent party may avoid entirely the contract.[20]

Disclosure of material circumstances - s 24 of the *Marine Insurance Act*

Section 24(1) of the Act[21] requires that (subject to circumstances which need not be disclosed)[22] the assured (or his or her agent)[23] must disclose to the underwriter "every material circumstance[24] which is known to the assured." By s 24(1) of the Act, the assured is deemed to know "every circumstance which, in the ordinary course of

---

Lloyd of Berwick. Similarly, the duty of utmost good faith may extend to those "who are necessarily involved in the insurance", not just the actual parties to the contract of insurance: *CE Heath Casualty & General Insurance Ltd v Grey* (1993) 32 NSWLR 25 (CA), at 37 per Mahoney JA. See also K C T Sutton, "The Duty of Utmost Good Faith" (1994) 22 *Australian Business Law Review* 302.

20 R J Lambeth, *Templeman on Marine Insurance* (6th ed), Pitman, 1986, p.21 makes the point that:

> *"...despite the words used in some of the older judgments the policy is not automatically void in the event of non-disclosure or misrepresentation but may be avoided by the aggrieved party."* (emphasis supplied)

"Avoided", therefore, in the elective context of s 23 of the *Marine Insurance Act* 1909 (Cth) refers to avoidance *ab initio*. See The Law Commission of England and Wales, *Insurance Law: Non-Disclosure and Breach of Warranty* (No. 104), 1980, at para 3.9; CCH, *Australian & New Zealand Insurance Reporter*, at ¶6-045.

21 Section 24(1) of the *Marine Insurance Act* 1909 (Cth) provides:

> *Subject to the provisions of this section, the assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him. If the assured fails to make such disclosure, the insurer may avoid the contract.*

22 Subject to inquiry by the insurer, s 24(3) of the *Marine Insurance Act* 1909 (Cth) provides that the assured need not disclose:

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

23 Where the contract of insurance is effected by an agent for the assured, then subject to the provisions of s 24(3) of the *Marine Insurance Act* 1909 (Cth) (circumstances which need not be disclosed), s 25 of the *Marine Insurance Act* 1909 (Cth) provides that the agent must disclose to the insurer:

> *"(a) every material circumstance which is known to himself, and an agent to insure is deemed to know every circumstance which in the ordinary course of business ought to be known by, or to have been communicated to, him; and*
> *(b) every material circumstance which the assured is bound to disclose, unless it come to his knowledge too late to communicate it to the agent."*

24 For the purposes of Division 4 of the *Marine Insurance Act* 1909 (Cth), the term "circumstance" includes "any communication made to, or information received by, the assured": s 24(5) of the *Marine Insurance Act* 1909 (Cth).

business, ought to be known by him" or her. Hence, the assured is required to disclose both actual and constructive knowledge of facts affecting the risk.[25] Section 24(1) of the Act also provides:

(a) that the disclosure by the assured must be made before the contract of insurance is concluded;[26] and

(b) that failure by the assured to make the necessary disclosure allows the insurer to "avoid the contract."[27]

The test of materiality - the "prudent insurer"

Section 24(2) of the Act[28] makes the "prudent insurer" the applicable test of "materiality." By that test, a material circumstance is one "which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk".[29] These words suggest that a material circumstance is one which would

---

25 See generally Lambeth, *Templeman on Marine Insurance*, above, pp.26-27. See also *Proudfoot v Montefiore* (1867) LR 2 QB 511, at 521-522.

26 For the purposes of Division 4 of the *Marine Insurance Act* 1909 (Cth), s 27 of the *Marine Insurance Act* 1909 (Cth) deems a contract of marine insurance to be "concluded" when:

> *"...the proposal of the assured is accepted by the insurer, whether the policy be then issued or not; and for the purpose of showing when the proposal was accepted, reference may be made to the slip or covering note or other customary memorandum of the contract."*

27 Provision by s 24(1) of the *Marine Insurance Act* 1909 (Cth) that failure to disclosure a material circumstance by the assured allows the insurer to avoid the contract appears somewhat unnecessary having regard to s 23 of the *Marine Insurance Act* 1909 (Cth); full disclosure of material facts and circumstances being the cornerstone of the duty of utmost good faith. But it underlines the consequence of non-disclosure.

28 Section 24(2) of the *Marine Insurance Act* 1909 (Cth) provides:

> *"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."*

29 At present the weight of judicial opinion favours the "prudent insurer" test of materiality. Other tests of materiality include the "reasonable insured" (see, for example, *Joel v Law Union and Crown Insurance Co* [1908] 2 KB 863 (CA), at 885; *Horne v Poland* [1922] 2 KB 364, at 366-367; *The Guardian Assurance Co Ltd v Condongianis* (1919) 26 CLR 231, at 246-247), the "reasonable insurer" (see, for example, *Southern Cross Assurance Co Ltd v Australian Provincial Assurance Association Ltd* (1939) 39 SR(NSW) 174 (FC), at 187-188; *Club Development & Finance Corp Pty Ltd v Bankers & Traders Insurance Co Ltd* [1971] 2 NSWLR 541 (SC), at 545; *March Cabaret Club & Casino Ltd v The London Assurance* [1975] 1 Lloyd's Rep 169 (QB), at 176) and the "reasonable or prudent insurer" (see, for example, *Woolcott v Sun Alliance and London Insurance Ltd* [1978] 1 All ER 1253 (QB), at 1257; *Reynolds v Phoenix Assurance Co Ltd* [1978] 2 Lloyd's Rep 440 (QB), at 459). It may be that the differences between these formulations are merely semantic, the substance of all being substantially the same. See *Lambert v Co-operative Insurance Society Ltd* [1975] 2 Lloyd's Rep 485 (CA), at 489; *Marene Knitting Mills Pty Ltd v Greater Pacific General Insurance Ltd* [1976] 2 Lloyd's Rep 631 (PC), at 642. See also *Barclay Holdings (Aust) Pty Ltd v British National*

have an effect on the mind of a prudent insurer in determining whether it will undertake the risk and, if so, for what price and upon what conditions. Such a broad test places an onerous task on the assured if it is to comply with the duty.[30] Most recently the English House of Lords in *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd*[31] endorsed such a broad approach. It held that it is not necessary (indeed, it would be contrary to the ordinary meaning of the words of the provision), that a material circumstance be one that has a "decisive" effect on the insurers acceptance of the risk, or the price or conditions of that acceptance.

Non-disclosure and causality - recent developments in the House of Lords

While it is clear that the opinion of a particular insured as to the materiality of a fact is not determinative,[32] debate persists as to whether a particular insurer who would not have *actually* been influenced by the assured's full and proper disclosure ought to be entitled, in the event of non-disclosure by the assured to avoid entirely the contract of insurance where such disclosure would have influenced a prudent insurer. Arguably, to ignore the insurer's actual response leads to the "absurd position", to use the words of Kerr J said in *Berger v Pollock*,[33] "where the Court might be satisfied that the insurer in question would in fact not have been so influenced even though other prudent insurers would have been. It would then be a very odd result if the defendant insurer could nevertheless avoid the policy."[34] It is, as Lord Mustill noted in *Pan Atlantic*,[35] a "question which concerns the need or otherwise, for a *causal*

Insurance Co Ltd (1987) 8 NSWLR 514 (CA), at 526. Contrast *March Cabaret Club & Casino Ltd v The London Assurance* [1975] 1 Lloyd's Rep 169 (QB), at 176.

30 *Barclay Holdings (Australia) Pty Ltd v British National Insurance Co Ltd* (1987) 8 NSWLR 514 (CA), at 518.

31 [1994] 3 WLR 677 (HL), at 682-683, 695-696, 705, 713 and 714.

32 See, for example, *The Guardian Assurance Co Ltd v Condongianis* (1919) 26 CLR 231, at 246; *Saunders v Queensland Insurance Co Ltd* (1931) 45 CLR 557, at 563.

33 [1973] 2 Lloyd's Rep 442 (QB), at 463.

34 See also *Viola v Mercantile Mutual Insurance Co Ltd* (1985) 3 ANZ Insurance Cases ¶60-620 (NSWSC), at 78,794.

35 [1994] 3 WLR 677 (HL), at 705.

connection between the misrepresentation or non-disclosure and the making of the contract of insurance." (emphasis added)

Most recently, the House of Lords in *Pan Atlantic* has given effect to such an approach. Considering s 18(2) of the English *Marine Insurance Act* 1906 (identical to s 24(2) of the *Marine Insurance Act* 1909 (Cth)),[36] the Law Lords held that, before an underwriter could avoid a contract for non-disclosure, the underwriter had to show that it had actually been induced by the non-disclosure to enter into the policy on the relevant terms.[37] In so concluding, the House of Lords overruled, in part, the earlier holding of the English Court of Appeal in *Container Transport International Inc v Oceanus Mutual Underwriting Association (Bermuda) Ltd*[38] ("*CTI*") which, after a full review of the relevant authorities, had rejected such an approach.[39] In *Pan Atlantic*[40] Lord Templeman said:

> *"In my opinion "the judgment of a prudent insurer" cannot be said to be "influenced" by a circumstance which, if disclosed, would not have affected the acceptance of the risk or the amount*

---

36 Lord Mustill (*ibid*, at 713) expressed the view that the requirement of a causal connection between the non-disclosure and entering of the contract of insurance applied also to non-marine insurance. Earlier in *Lambert v Co-operative Insurance Society Ltd* [1975] 2 Lloyd's Rep 485 (CA), at 487, 492 and 493 the English Court of Appeal held that the "prudent insurer" test of materiality contained in s 18(2) of the English *Marine Insurance Act* 1906 was applicable to non-marine insurance. In Australia, the "prudent insurer" test of materiality in the context of non-marine insurance differs slightly. The formulation of Samuels J in *Mayne Nickless Ltd v Pegler* [1974] 1 NSWLR 228 (SC), at 239, makes a fact material if it would have "reasonably affected" the mind of a prudent insurer in determining whether he will accept the risk and, if so, for what price and upon what conditions. The formulation laid down in the English and Commonwealth marine insurance Acts refers to a fact which would have "influenced" the mind of a prudent insurer. In the Australian non-marine context, the formulation of Samuels J has been approved or adopted in subsequent cases. See, for example, *Marene Knitting Mills Pty Ltd v Greater Pacific General Insurance Ltd* [1976] 2 Lloyd's Rep 631 (PC), at 642; *National & General Insurance Co Ltd v Chick* [1984] 2 NSWLR 86 (CA), at 108; *Barclay Holdings (Aust) Pty Ltd v British National Insurance Co Ltd* (1987) 8 NSWLR 514 (CA), at 520, 523 and 526.

37 [1994] 3 WLR, at 680-681, 681-682, 712, 713, 714 and 732-733.

38 [1984] 1 Lloyd's Rep 476 (CA), at 492, 510-511 and 529.

39 See also *Mayne Nickless v Pegler* [1974] 1 NSWLR 228 (SC), at 239 per Samuels J; *Zurich General Accident & Liability Insurance Co Ltd v Morrison* [1942] 2 KB 53 (CA), at 60; *Glasgow Assurance Corp Ltd v William Symondson & Co* (1911) 16 Com Cas 109, at 119; *Babatsikos v Car Owners' Mutual Insurance Co Ltd* [1970] VR 297 (SC), at 306-307; *Avon House Ltd v Cornhill Insurance Co Ltd* (1980) 1 ANZ Insurance Cases ¶60-429 (NZHC), at 77,227-72,228; *Elston v Phoenix Prudential Australia Ltd* (1987) 4 ANZ Insurance Cases ¶60-765 (QSC).

40 [1994] 3 WLR, at 680-681.

> *of the premium. On behalf of the underwriters, [it was] submitted that a circumstance was material if a prudent insurer would have "wanted to know" or would have "taken into account" that circumstance even though it would have made no difference to his acceptance of the risk of the amount of the premium."*

Lord Lloyd - so far as is known, no descendant of the aromatic Edward - presented "two separate but closely related questions" to be asked of an insurer who seeks to avoid a contract of insurance for non-disclosure or misrepresentation:[41]

> *"(1) Did the misrepresentation or non-disclosure induce the actual insurer to enter into the contract on those terms? (2) Would the prudent insurer have entered into the contract on the same terms if he had known of the misrepresentation of the misrepresentation or non-disclosure immediately before the contract was concluded? If both questions are answered in favour of the insurer, he will be entitled to avoid the contract, but not otherwise."*

"Normally", evidence of the actual insurer him or herself will be required to satisfy the court in respect of question (1). Evidence of an independent broker or insurer will ordinarily be given to satisfy the court in respect of question (2).[42]

The effect of the decision of the House of Lords in *Pan Atlantic* was to approve[43] the approach of Kerr J in *Berger v Pollock.*[44] This was one which as Kerr LJ, as his Lordship had become, he recanted in *CTI.*[45] Judicial first thoughts are usually the best.[46]

---

41 *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1994] 3 WLR 677 (HL), at 732-733.
42 *ibid*, at 733.
43 *ibid*, at 732.
44 [1973] 2 Lloyd's Rep 442 (QB), at 463.
45 [1984] 1 Lloyd's Rep 476 (CA), at 495.
46 *Barclay Holdings (Aust) Pty Ltd v British National Insurance Co Ltd* (1987) 8 NSWLR 514 (CA), at 520.

The House of Lords decision and Australian law

In the context of the Australian *Marine Insurance Act*, whether an insurer need actually be influenced by the non-disclosure depends upon the meaning to be attributed to the words: "which would influence the judgement of a prudent insurer", in s 24(2) of the Act. While there is Australian authority tending toward the requirement that the insurer should actually have been induced by the non-disclosure of a material fact,[47] that question of interpretation[48] has not yet been finally determined by Australian law. There are, I think, two substantive matters of legal principle which would favour the adoption in Australia of the holding established by the House of Lords in *Pan Atlantic*.

First, the identical wording of the provisions concerned[49] and the legislative history of the Australian *Marine Insurance Act* make the decision of the House of Lords extremely persuasive. As has been said many times, this is an area of the law where judges must be willing to subordinate their own fancies to the needs of common international legal principles understood throughout a global industry.

---

47 In *Western Australian Insurance Co Ltd v Dayton* (1924) 35 CLR 355, Isaacs ACJ (with whom Gavan Duffy J agreed) said, at 379-380:

> *"The test of materiality is whether in view of "all the circumstances at the time", which include of course, the full circumstances of the fact undisclosed, that fact would have influenced the Company as a prudent insurer in fixing the premium or in determining to accept the risk. But it must not be forgotten that "the circumstances" include the knowledge, the practice and the proved conduct of the insurer. If, for instance, it were the know practice of a company to disregard a certain class of facts, the non-disclosure of such a fact would not prima facie qua that company be material, however it might be with regard to another company."* (emphasis added).

See also *Barclay Holdings (Aust) Pty Ltd v British National Insurance Co Ltd* (1987) 8 NSWLR 514 (CA), at 517, 520 and 525; *Visscher Enterprises Pty Ltd v Southern Pacific Insurance Co Ltd* [1981] QdR 561 (FC), at 587-588; *Itobar Pty Ltd v Mackinnon and Commercial Union Assurance Co PLC* (1985) 3 ANZ Insurance Cases ¶60-610 (QSC), at 78,722-78,723.

48 In *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1994] 3 WLR 677 (HL) the House of Lords considered this issue in the context of the *Marine Insurance Act* 1906 (UK). In that case the resolution of the issue was considered to be a matter of *interpretation* of the provisions of the Act. See esp. at 681-682 per Lord Goff of Chieveley and at 712 per Lord Mustill.

49 *Marine Insurance Act* 1906 (UK), s 18(2) and *Marine Insurance Act* 1909 (Cth), 24(2).

Secondly, the law has generally required that, before an aggrieved party can seek redress for a wrong suffered by him or her, as the result of another's statement or omission, the aggrieved party must have been induced by, and therefore actually relied upon, that statement or omission. Lord Mustill in *Pan Atlantic* said[50] of the general law of misrepresentation:

> *"...it is beyond doubt that even a fraudulent misrepresentation must be shown to have induced the contract before the promisor has a right to avoid, although the task of proof may be made more easy by a presumption of inducement. The case of innocent misrepresentation should surely be a fortiori, and yet it is urged that so long as the representation is material no inducement need be shown."*[51]

Similarly, the various[52] doctrines of estoppel have, as a fundamental precondition to the granting of relief, required that the aggrieved party should have reasonably relied upon (and therefore been induced to act to his or her detriment by) the representation of, or assumption or expectation encouraged by, the other party.[53] Legislation protecting the rights of consumers similarly requires a causal connection between, for example, a misleading or deceptive representation or conduct and the contract by which loss or damage is suffered.[54]

---

50 [1994] 3 WLR, at 705.

51 See also Spencer Bower and Turner, *The Law of Actionable Misrepresentation* (3rd ed), Butterworths, 1974, pp.130f.

52 Meagher, Gummow and Lehane, *Equity - Doctrines and Remedies* (3rd ed), Butterworths, 1992, at para [1701] make the point that the term ""estoppel" has been used in various senses in the law. But there has never been agreement as to the doctrinal significance of the various senses of the term or as to their relationship, each to the others." See also *Discount and Finance Ltd v Gehrig's New South Wales Wines Ltd* (1940) 40 SR(NSW) 598 (FC), at 602-603 per Jordan CJ; *Legione v Hateley* (1983) 152 CLR 406, at 430 per Mason and Deane JJ.

53 See, for example, *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, at 428-429 per Brennan J, which Meagher, Gummow and Lehane, *Equity - Doctrines and Remedies*, above, at para [1710] say encapsulates the "current state of authority as to equitable or promissory estoppel." See also *Silovi Pty Ltd v Barbaro* (1988) 13 NSWLR 466 (CA), at 472 per Priestley JA. As regards estoppel by conduct, see *The Commonwealth v Verwayen* (1990) 170 CLR 394, at 444 per Deane J.

54 See, for example, s 52 of the *Trade Practices Act* 1974 (Cth) and the commentary by R V Miller, *Annotated Trade Practices Act* (15th ed), LBC, 1994, pp.231-233.

that the court would adopt the reasoning and process of interpretation outlined in the *Pan Atlantic*. But I will say no more in case the issue falls to be determined by me judicially. I should hate to be disqualified from exercising an independent mind on the matter.

Some general comments on the desirability of a causal connection

Leaving aside the two questions just dealt with, there are some general comments which can be made of the causal requirement propounded by the House of Lords in *Pan Atlantic*. The English Court of Appeal has been much and variously criticised[55] for its decision in *CTI*. It is particularly relevant to consider two of those general criticisms.

First, it had been suggested that the law as established by *CTI* was "too harsh" in that it deprived "the assured of recovery for a genuine loss by perils insured against even if the misrepresentation or non-disclosure had no bearing on the risk which brought about the loss."[56] Lord Templeman in *Pan Atlantic* said,[57] in emphatic terms:

> *"If this is the result of the judgments of the Court of Appeal in the [CTI] case then I must disapprove of that case. If accepted, this submission would give carte blanche to the avoidance of insurance contracts on vague grounds of non-disclosure supported by vague evidence even though disclosure would not have made any difference."*

---

55 In *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1994] 3 WLR 677 (HL), at 692-695, Lord Mustill outlines nine of the "principal" complaints made against the Court of Appeal's decision in *Container Transport International Inc v Oceanus Mutual Underwriting Association (Bermuda) Ltd* [1984] 1 Lloyd's Rep 476 (CA).

56 *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1994] 3 WLR 677 (HL), at 692 per Lord Mustill.

57 *ibid*, at 680-681.

Having reached the conclusion they did, it is implicit that the Law Lords in *Pan Atlantic* accepted, or at least approved the substance of, this criticism. It is not hard to see why it is entirely inappropriate that an insurer, commonly possessed of great knowledge and resources, should be able to avoid a contract of insurance upon the flimsy basis that although it was not itself actually induced or influenced by the non-disclosure to enter into the contract upon the terms that it did (and full disclosure would not have altered its acceptance of the risk upon those terms), such disclosure would have influenced the acceptance of the risk or its terms by a "prudent" insurer. Indeed, Lord Mustill in *Pan Atlantic* suggested that, but for the absence of express words of causal connection in the provisions concerned:[58]

> *"...I doubt whether it would nowadays occur to anyone that it would be possible for the underwriter to escape liability even if the matter complained of had no effect on his processes of thought."*

The import of the requirement of a causal connection is consistent with the "vice" which the doctrines of misrepresentation and non-disclosure have long sought to deter.[59] That vice is not that the insurer has underwritten a risk which has resulted in a loss, but that a breach of the duty of utmost good faith "has led the underwriter to approach the proposal on a false basis."[60] As a matter of logic, it ought not be said that an insurer's intention to create legal relations, nor the *consensus ad idem*, could be vitiated by circumstances which would not influence the insurer's decision to enter into the contract. Similarly, where the insurer has impliedly waived reliance upon some of the terms of the assured's offer, by the fact that those terms would not actually influence the judgment of the insurer, then that contract ought not be vitiated by a later

---

58 *ibid*, at 705.

59 Contrast Lord Mustill in *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1994] 3 WLR 677 (HL), at 692, who says that while the requirement of a causal connection has "practical force... it is not consistent with general principle".

60 *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1994] 3 WLR 677 (HL), at 692 per Lord Mustill.

assertion by the insurer that those impliedly waived terms are in fact applicable to entitle it to escape the obligations otherwise assumed.

It had been suggested that the law was "too harsh" in that it deprived "the assured of his recovery even if full and accurate disclosure would have done no more than cause the actual underwriter, or the hypothetical prudent underwriter to insist on one rate of premium rather than another."[61] I would agree with Lord Mustill[62] that there is an element of *prima facie* attractiveness about a solution which involves an element of "proportionality". In the case of "innocent" non-disclosure, a concept of "proportionality" could take a number of forms, two of which include:

(1) that the insurer pay to the assured a proportion of the claim, calculated by reference to the difference between the premium which was in fact paid and the premium which would have been payable had there been full disclosure; and

(2) that the assured be required to pay the correct premium payable had there initially been full disclosure before the insurer will be required to pay the claim.[63]

Assuming the insurer to be unable to show that the non-disclosure was anything but "innocent", a number of possibilities arise which detract from the initial attractiveness of a concept of "proportionality". The concept involves an element of self-insurance: tacitly encouraging assureds not to make full disclosure in an attempt to benefit from a lower premium. Those assureds so inclined are invited by the concept of "proportionality" to chance a non-disclosure upon the basis that, should that non-disclosure be catalogued, by a court or otherwise, to be "innocent", recovery from the insurer will still be possible, either at a reduced level or after further

---

61 *ibid*, at 693 per Lord Mustill.

62 *Id.*

63 Law Commission of England and Wales, *Insurance Law: Non-Disclosure and Breach of Warranty* (No. 104), 1980, at para 4.4f. See also s 28(3) of the *Insurance Contract Act* 1984 (Cth), extracted at n.76 below.

payment. The premium being the driving factor in such an invitation, it is likely that those who can least afford the premium, and therefore the total failure to recover, are placed in a situation where such temptation can be least afforded. Indeed, the second formulation offers a positive incentive to withhold material circumstances, the full amount being recoverable after the payment of an additional amount to the insurer. A lifetime in the law has demonstrated to me (and doubtless others even less *naïf*) that some people are not as honest and noble as we would like to think they are. People otherwise honest and noble may be driven by adverse circumstances to act in a manner contrary to their usual conduct. Thus, while the concept of proportionality has real merit, it also presents problems which need to be considered, apart from practical issues such as the difficulty involved in assessing claims.[64]

Closely related is the suggestion that the "prudent insurer" test of materiality should be sharpened by the introduction of a "decisive influence test". After *CTI*, the test of materiality became all important as the sole ground for allowing the insurer to avoid the contract of insurance for non-disclosure. Implicit in the "decisive influence test" was the assumption that an insurer should not be able to avoid the contract in circumstances where full disclosure would not have altered the insurer's acceptance of the risk. That is, a circumstance would be "material" only if it would have had a decisive effect on the insurer's acceptance or otherwise of the risk, adjudged by the standard of the objective prudent insurer.[65] By that test of materiality, an attempt had been made to move the actual inducement requirement from the creation of the contract to the materiality of circumstances to be disclosed. The House of Lords in *Pan Atlantic* rejected the "decisive influence test" as capable of implication into s 18(2) of the *English Marine Insurance Act* 1906.[66] While the "decisive influence" test

---

64 The Law Commission of England and Wales ultimately rejected the concept of proportionality upon the basis that it would be too difficult to assess claims. See Law Commission of England and Wales, *Insurance Law: Non-Disclosure and Breach of Warranty* (No. 104), 1980, at paras 4.2-4.31 and 10.6.

65 *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1994] 3 WLR 677 (HL), at 683 per Lord Goff of Chieveley.

66 *ibid*, at 682-683, 695-696, 705, 713 and 714.

of materiality and the imposition of a requirement for causal connection between the non-disclosure of a material circumstance and the entering into of a contract of insurance are both concerned with the requirement of actual inducement, the practical effect of the "decisive influence" test may be the encouragement of an unduly restrictive passage of information between the assured and the insurer. The Law Lords decided that this was not desirable as a matter of legal policy. A risk of the "decisive influence" test was that assureds would disclose only circumstances which they were advised would be of "decisive influence" to the prudent insurer. Aware of that fact, a truly careful insurer would have to inquire for itself, specifically, as to all those circumstances which, while not "decisive", would collectively influence the assessment and acceptance of the risk. Of course, the insurer's gathering of such information would have a price. It is not unreasonable to suppose that, ultimately, the consumers of goods which had been the subject of some form of marine insurance would pay that price.

Leaving aside the merits of the extent of the disclosure presently required, the approach adopted by the House of Lords in *Pan Atlantic* encourages full disclosure of all material circumstances which collectively, as opposed to individually, are decisive upon the assessment and acceptance of the risk. That approach does not place any burden extra to that already upon insurers to gather information and thereby avoids the potential of that extra cost. Given the desirability of the need for actual inducement, the approach of the House of Lords in *Pan Atlantic* appears to achieve this object in a more cost appropriate manner than that offered by the "decisive influence" test of materiality. However, as will be discussed below, the present test of materiality as endorsed by *Pan Atlantic* is itself open to criticism upon the different basis that it places too onerous a task on an assured seeking to comply with the disclosure obligation.

Australian reforms in the field of general insurance

As the preceding discussion suggests, at least in the context of marine insurance the duty of utmost good faith remains an onerous one, basically as it has been since Edward Lloyd's day. Reality suggests that the stringent obligations imposed by that duty are felt more by the assureds than the insurers. Indeed, it is difficult to contemplate the situation where an assured, having suffered loss against which it was insured, would seek to avoid the contract of insurance upon the breach of the duty of good faith.[67] Arguably, however, as the duty of good faith applies also to the manner of performance of the contract,[68] the assured, under a marine insurance policy, ought to be able, in principle, to seek some degree of redress where the insurer unjustifiably asserts that the assured's conduct is such that the insurer ought be able to avoid the contract or otherwise performs its obligations under the contract in a manner contrary to the sense of mutuality and fair dealing imported into the contract by the duty of utmost good faith.[69] But is the doctrine of utmost good faith in its present manifestation still necessary? Could its purposes be achieved by other methods?

As a result of recommendations by the Australian Law Reform Commission,[70] made at a time when I was its Chairman, substantive reforms were introduced to the Australian law of general insurance by the *Insurance Contracts Act* 1984 (Cth). Those reforms included reforms to the duty of utmost good faith. By express

---

67 Of course, as Lord Mansfield noted in *Carter v Boehm* (1766) 3 Burr 1905, at 1909; 97 ER 1162, at 1164, if an underwriter insured a risk he already knew to have been completed without loss, the assured could avoid the contract of insurance and the underwriter be liable to return the premium.

68 The duty of utmost good faith at least extends to the making of claims by the assured him or herself or by his or her agent or broker on his or her behalf. See *Black King Shipping Corporation v Massie (The 'Litsion Pride')* [1985] 1 Lloyd's Rep 437 (QB).

69 For example, circumstances may arise where general damages will be available to the assured for the insurer's breach of the insurance contract. See, for example, *Stuart v Guardian Royal Exchange Assurance of New Zealand Ltd [No.2]* (1988) 5 ANZ Insurance Cases ¶60-844 (NZHC); *Davidson v Guardian Royal Exchange Assurance* [1979] 1 Lloyd's Rep 406 (Sc.Ct); *Edwards v A A Mutual Insurance Co* (1985) 3 ANZ Insurance Cases ¶60-668 (NZHC); *Harris v The New Zealand Insurance Co Ltd* (1987) 4 ANZ Insurance Cases ¶60-817 (NZHC); *Kerr v The State Insurance General Manager* (1987) 4 ANZ Insurance Cases ¶60-781 (NZHC); *Dome v The State Insurance General Manager* (1988) 5 ANZ Insurance Cases ¶60-835 (NZHC); *Moss & Anor v Sun Alliance Australia Ltd* (1990) 6 ANZ Insurance Cases ¶60-967 (SASC).

70 See The Law Reform Commission, *Insurance Contracts* (ALRC 20), AGPS, 1982.

provision, the *Insurance Contracts Act* does not apply to contracts to which the *Marine Insurance Act* applies.[71]

The Australian Law Reform Commission did not propose that the duty of utmost good faith should be abandoned entirely, in favour of some new concept. Indeed the Commission recognised the utility of the concept. The Commission said:[72]

> *"The origin of the duty of disclosure lay in the superior knowledge of factors relevant to the risk which the insured possessed in early marine insurance, when underwriting expertise was in its infancy. It is often said that position has, in most cases of insurance, now been reversed: insurers have available to them sophisticated statistical data and obtain information on many aspects of the risk which they undertake. It is true that the insurer has superior, even exclusive, knowledge of statistical matters relevant to numerous categories and subcategories of risk. But it does not have superior knowledge of factors peculiar to the particular risk. It does not know that the life to be insured has been the subject to death threats, that a house proposed for insurance has been rewired by its inexpert owner rather than a qualified electrician, or that the insured under a houseowner's/householder's policy has been convicted of theft on three separate occasions. Factors such as these are likely to be in the exclusive knowledge of the insured. There are economic reasons which prevent insurers from making an independent investigation of each and every proposal, particularly in respect of such classes as houseowner's/householder's and motor vehicle insurance. Prime reliance in these areas must be placed on the insured's answers to the questions asked of him by the insurer."*

Clearly the Commission recognised the importance of the duty of utmost good faith and the potential cost of abandoning the doctrine. However, the Commission

---

71 Section 9 (1) of *Insurance Contracts Act* 1974 (Cth) provides:

"Except as otherwise provided by this Act, this Act does not apply to or in relation to contract and proposed contracts -

...

(d) to or in relation to which the Marine Insurance Act 1909 applies..."

72 The Law Reform Commission, *Insurance Contracts* (ALRC 20), AGPS, 1982, at para 175.

disagreed with the then exposition of the duty of utmost good faith as it applied to general insurance. The Commission said:[73]

> *"Even so, there is little doubt that the principle of disclosure requires modification. The doctrine of uberrima fides does not justify a rule which requires the insured to show more than the utmost good faith. Under the existing test, the insured is required to disclose not only those facts whose relevance to the contract he does or should, as a reasonable man, appreciate, but also facts of whose relevance he is quite ignorant. It has been argued that the existing duty is justified on the basis of the underwriters' need for full information for detailed assessment of risks. Nobody, underwriters included, would suggest that the insured be under an absolute duty of disclosure, even in respect of the facts of which he is quite ignorant. Yet facts of that type are also relevant to assessment of the risk. It is widely recognised that a new balance should be struck between the underwriter's need for information and the insured's need for security in relying upon insurance." (emphasis supplied; citations omitted)*

In essence, the Australian Law Reform Commission took issue with the "prudent insurer" test of materiality for general insurance. Against the nature of the duty of utmost good faith in the context of marine insurance, the substantive reforms effected by the *Insurance Contracts Act* are:

(1) A matter will be "material" in the context of general insurance if the insured knows (or a reasonable person in the insured circumstances could be expected to know) that a matter would be relevant to the decision of the particular insurer to accept the risk and if so upon what terms.[74] Hence, the law adopts a

---

73 *id.*

74 Section 21(1) of the *Insurance Contracts Act* 1984 (Cth) provides:

> *"Subject to this Act, an insured has a duty to disclose to the insurer, before the relevant contract of insurance is entered into, every matter that is known to the insured, being a matter that -*
>
> *(a) the insured knows to be a matter relevant to the decision of the insurer whether to accept the risk and, if so, on what terms; or*
>
> *(b) a reasonable person in the circumstances could be expected to know to be a matter so relevant."*

"particular insurer" and "actual or reasonable insured" test of materiality. Similarly, in contrast to the situation in marine insurance, the assured in general insurance is not deemed to have constructive knowledge of material facts, materiality in general insurance concerning itself only with "every matter that is known to the insured";[75] and

(2) In contrast to the insurer's ability to avoid entirely the contract of insurance for a breach of the duty of disclosure in the context of marine insurance, an insurer in the context of general insurance can only avoid entirely the contract of insurance for non-disclosure where that non-disclosure is fraudulent, but not where the insurer would have entered into the contract of insurance upon the same terms had there been full disclosure. Where the non-disclosure is not fraudulent then the insurer's liability is limited to an amount which would place the insurer in a position had there been full disclosure.[76] Clearly, the remedies of the insurer for non-disclosure are significantly restricted. Significant also is the imposition of a causality requirement in a manner similar to that now implied by the House of Lords in *Pan Atlantic* and the imposition of concept of "proportionality" where the non-disclosure complained of is not fraudulent.

---

75 *Insurance Contracts Act* 1984 (Cth), s 21(1).

76 Section 28 of the *Insurance Contracts Act* 1984 (Cth) provides:

> *"(1). This section applies where the person who became the insured under a contract of general insurance upon the contract being entered into -*
> *(a) failed to comply with the duty of disclosure; or*
> *(b) made a misrepresentation to the insurer before the contract was entered into,*
> *but does not apply where the insurer would have entered into the contract for the same premium and on the same terms and conditions even if the insured had not failed to comply the duty of disclosure or had not failed to comply with the duty of disclosure or had not made the misrepresentation before the contract was entered into.*
> *(2). If the failure was fraudulent or the misrepresentation was made fraudulently, the insurer may avoid the contract.*
> *(3). If the insurer is not entitled to avoid the contract or, being entitled to avoid the contract (whether under sub-section (2) or otherwise has not done so, the liability of the insurer in respect of a claim is reduced to the amount that would place him in a position in which he would have been if the failure had not occured or the misrepresentation had not been made."*

Do these developments in the field of the Australian law of general insurance demonstrate, or suggest, that the doctrine of utmost good faith in marine insurance is out of date? In principle, No. A contract of insurance remains a contract based upon speculation. The underwriting of that speculation is very largely dependent upon the underwriter's ability to properly assess the risk. It remains the case that despite the ever increasing general information held by the insurers, the assured normally has the particular and peculiar knowledge of its venture. Normally the assured knows the facts which are ultimately determinative for the acceptance of the risk and, if so, upon what conditions and for what price. Nevertheless, it is my view that the present manifestation of that duty of utmost good faith in the field of marine insurance is in need of reform.

Developments of the common law in Australia

I will assume that, in the absence of specific legislative enactment on the point, the Australian courts would follow the lead of the House of Lords in *Pan Atlantic*. They will imply into the *Marine Insurance Act* that redress for non-disclosure, or indeed misrepresentation, must be conditional upon that non-disclosure having actually induced the insurer to enter into the contract of insurance upon the terms and conditions it did. Such an approach resolves, at least to some degree, two difficulties which might otherwise require reform: First, it avoids the situation which existed before *Pan Atlantic*, by which the law, in England at least, allowed an insurer to avoid a contract entirely where full disclosure would not have made any difference to its accepting the risk in fact. Secondly, it adds a reference to the "particular insurer" as well as the "prudent insurer". That is, although the standard of materiality remains objectively that of the "prudent insurer", the subjective effect of the non-disclosure on the particular insurer is ultimately determinative. Both of these developments have the effect of curtailing imprudent underwriting practices by particular underwriters. It would no longer be open to such underwriters to seek the court's assistance to avoid such an imprudently struck bargain upon the basis that a hypothetical "prudent

insurer" would have been influenced by the circumstance had it been disclosed. This is especially the case where an underwriter accepts a risk upon the basis of the risks' acceptability within the underwriter's own global risk management strategy. That is, if it could be shown that an underwriter accepted the risk upon the predominant or sole basis that its information and information systems deem the risk acceptable, then it could hardly be said that the underwriter was actually induced to enter into the contract by any disclosure or non-disclosure of the assured. Avoidance of the contract of insurance for non-disclosure in those circumstances will be seriously challenged by the requirement of actual inducement. It seems likely that the principles established by the House of Lords in *Pan Atlantic* in this respect would be adopted by the Australian courts. But is this enough?

There is a rather draconian element in the present law which allows the total avoidance of the contract of insurance for the assured's non-disclosure, fraudulent or otherwise. This is especially the case in marine insurance where materiality, in theory, can be so remote from the actual assured as a circumstance constructively known by the assured and influential to the mind of prudent insurer, but actually unknown and irrelevant to the assured.[77] Of course, one must take into account that ordinarily the players in a bargain of marine insurance are not consumer and highly resourced insurance company, as is the case ordinarily in general insurance. Parties to a marine insurance contract tend toward greater, although rarely equal, equality of bargaining power. They ordinarily engage in contracts of marine insurance as a matter of course, not exceptionally. If these are the circumstances in which the marine insurance is written then the law is perhaps right to demand higher standards than those expected in the general insurance marketplace. Indeed, many of the reforms implemented by the *Insurance Contracts Act* were aimed at redressing this perceived imbalance apt for the typical insured in a general insurance situation.

---

77 *Marine Insurance Act* 1909 (Cth), ss 24(1) and 24(2).

Be that as it may, such a blanket remedy for non-disclosure, regardless of the nature of the parties to the contract, in my view, could involve a risk of injustice. While I would welcome reform in this area of marine insurance, one can perceive considerable difficulties in the evolution of an appropriate system of remedies. As discussed above, a concept of "proportionality" would be attractive. However, it does seem to involve an arguably unacceptable element of self-insurance and temptation inappropriate to marine insurance. Before such evolution is complete, the need for causality as laid down by the House of Lords in *Pan Atlantic* provides a partially effective method of stemming inappropriate access by non-induced insurers to this rather draconian blanket remedy. However, it does nothing for the plight of the assured who falls before the actually induced prudent insurer.

In *Barclay Holdings (Australia) Pty Ltd v British National Insurance Co Ltd*,[78] a case concerning the common law, I expressed the view that the test of materiality[79] as endorsed by the English Court of Appeal in *CTI*, was too broad in scope "because the latter may impose an obligation on an insured to disclose virtually endless material about the insured's past."[80] I expressed concerns that it was unreasonable to expect an insured to know, in any detail, the kinds of considerations which may influence the decisions of insurers,[81] let alone the kinds of consideration which may influence the decision of a foreign insurer in a foreign marketplace.[82] Yet that was the extent of disclosure required by the test of materiality laid down in the *CTI* case, and therefore by the English *Marine Insurance Act*. I preferred the local test, expressed by

---

78 (1987) 8 NSWLR 514 (CA).

79 Kerr LJ in *Container Transport International Inc v Oceanus Mutual Underwriting Association (Bermuda) Ltd* [1984] 1 Lloyd's Rep 476 (CA), at 492, said the word "influenced" in the test, "which would influence the judgment of a prudent insurer" meant "that the disclosure is one which would have had an impact on the formation of his opinion and on his decision-making process..."

80 (1987) 8 NSWLR, at 518.

81 *ibid*, at 517.

82 *ibid*, at 518.

Samuels J in *Mayne Nickless Ltd v Pegler*,[83] where his Honour spoke of a circumstance being "material" if it "would have reasonably affected the mind of a prudent insurer in determining whether he will accept the insurance, and if so, at what premium and on what conditions." The words "reasonably affected" in Samuels J's test, I considered:[84]

> *"...to require that the effect on the mind of the insurer... should be something more than the effect produced by information which the insurer would have been generally interested to have. If, though interested to have it, such information would not, in the end, have determined for a reasonably prudent insurer the acceptance or rejection of insurance, the setting of the premium or the attachment of conditions, there is not such effect on the mind as requires disclosure. The information, although of interest, is not material. As such it is not information which must be disclosed by the insured."*

Upon reflection, this was in effect, as was the "decisive" influence test submitted in *Pan Atlantic*, an attempt to move the desirable causal requirement, or lack thereof, from relevance to the creation of the contract to the test of materiality. Of course, the test of materiality favoured by me in *Barclay Holdings* did not go as far as the "decisive influence" test unsuccessfully advocated before the House of Lords in *Pan Atlantic*. But it may have gone further than that endorsed by the House of Lords in *Pan Atlantic*. By that decision, a material circumstance is one that would have an effect on the mind of a prudent insurer.[85] While it is difficult to ascertain, the practical effect of a test of materiality based upon notions of causality and a non-disclosure causality requirement in the creation of the contract of insurance may be identical, if not very similar. Yet, even if that is the case, such a broad concept of "materiality" as applies in the context of the *Marine Insurance Act* continues to

---

83 [1974] 1 NSWLR 228 (SC), at 239.
84 (1987) 8 NSWLR, at 517.
85 *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1994] 3 WLR 677 (HL), at 682-683, 695-696, 705, 713 and 714.

impose an indisputably burdensome responsibility on the assured. The assured must disclose all that would influence the judgment of a prudent insurer, having regard to all material circumstances. No relief offered to the assured. For the reasons which I expressed in *Barclay Holdings* I consider that it is desirable that the duty of disclosure be made somewhat more narrow than that which is presently the case.

I return to the question posed by my title. Is the doctrine of utmost good faith so out of date that it should be entirely abandoned? The answer is no. In Australia, there is remedial legislation designed to protect those who bargain from misrepresentations.[86] Other legislation, in State jurisdictions, allows certain bargains to be re-written by the courts in certain circumstances.[87] Nevertheless, the remedies and redress presently available, by the common law or otherwise, would not adequately or appropriately fill the high gaps which would be left by the abandonment of the duty of utmost good faith, in any field of insurance. Indeed, if the doctrine were to be abandoned I have no doubt "the common law, being the creation of reason"[88] would ultimately arrive again at a substantially similar doctrine purely because the essential nature of insurance has not changed since its early days, nor is there reason to suppose that it will so change in the future. In some way, the law would have to oblige assureds to supply insurers with vital, relevant information to permit insurers to assess the risk and, if accepted, to fix the premium.

The requirement of utmost good faith and the judicial method

A concept such as "utmost good faith" will often draw criticism upon the basis that, by its vague wording, it is uncertain and without concrete or at least clear meaning. This drove the Appellate Division of the Supreme Court of South Africa in *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality* to say that the

---

86 See, for example, *Trade Practices Act* 1974 (Cth), s 52; *Fair Trading Act* 1987 (NSW), s 42.

87 See, for example, *Contracts Review Act* 1984 (NSW).

88 *Mason v Tritton* (New South Wales Court of Appeal, unreported, 30 August 1994), at 23 of the author's judgment.

expression *uberrima fides* was an "alien, vague, useless expression without any particular meaning in law", not being capable of being used in their law "for the purpose of explaining the juristic basis of the duty to disclose a material fact". That being so, the Appellate Division was of the firm view that "our law of insurance has no need for *uberrima fides* and the time has come to jettison it."[89]

Yet, the juristic base of much of the common law of Australia rests upon concepts and doctrines which, when considered in the abstract, are both uncertain and without meaning. For, example, fundamental to the law of negligence are the concepts of the "reasonable person", "reasonable foreseeability" and "proximity."[90] Equity looks to concepts such as "unconscionable dealing"[91] and the "unconscientious departure" from the subject matter of an assumption.[92] Contract permits recovery of damages in the event of breach if such loss "may reasonably be supposed to have been in the contemplation of both parties" at the time they made the contract, as the probable result of the breach of it.[93] One seeks to overturn criminal convictions upon the ground that they were "unsafe and unsatisfactory."[94] Or to claim that an opponent's legal professional privilege has been impliedly waived because it would be

---

89 1985 (1) AD 419 (SASC(App.Div)), at 433. The Court held, after a review of the manner of reception of law into South Africa and the juristic development of the law relating marine insurance, that the law of South Africa did not recognise *uberrima fides* as category of good faith. Rather, the Roman-Dutch juristic base of South African law recognised only *bona fides* and *mala fides* as categories of good faith. An Ordinance of 1570 made a contract of insurance "indisputably a contract *bonae fidei*": *ibid*, at 432. Upon that basis the Court held that materiality was to be tested by deciding, upon consideration of the relevant facts of the particular case, whether or not the undisclosed information or facts were reasonably relative to the risk or the assessment of the premiums, adjudged by the reasonable man: *ibid*, at 435.

90 See, for example, *Jaensch v Coffey* (1984) 155 CLR 549, per Gibbs CJ and Deane J.

91 See, for example, *The Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447.

92 See, for example, in the context of estoppel by conduct, *The Commonwealth v Verwayen* (1990) 170 CLR 394, at 444-445 per Deane J.

93 *Hadley v Baxendale* (1854) 9 Ex 341, at 355; 156 ER 145, at 151. Although the operation of that rule does not require that the parties have actually subjectively contemplated such a loss. It is enough that a reasonable person in the position of the parties would have realised that the damage was not an unlikely consequence of the breach. See *Czarnikow Ltd v Koufos* [1969] 1 AC 350 (HL).

94 See, for example, *Morris v The Queen* (1987) 163 CLR 454; *Chidiac v The Queen* (1991) 171 CLR 432.

"unfair" or "misleading" that it be maintained.[95] Before a lawyer can even begin to imagine the uncertainty of these concepts he or she must become the subject matter of another one: that is, they must be of "good fame and character."[96] The point to be made is that our law is often founded upon doctrines of wide and varied import. This is not by accident. We should respect and be thankful for their breadth. They may indeed introduce elements of uncertainty. But they permit courts - judges and juries - on behalf of the community to continue the never-ending search for justice in the particular case.

The judicial method in common law countries is assisted by concepts such as the doctrine of utmost good faith. Only when the courts are armed with such concepts can they fairly resolve the particular circumstances of the many and varied cases coming before them, doing so in a just and fair manner. Inflexible *formulae* and precise rules, whilst they may achieve certainty in the marketplace, lend themselves to injustices; the applicable doctrines having no inherent flexibility to deal with the nuances of differing fact situations. At the risk of Denning-like recitation of my dissenting opinions, I can instance a recent example in my own Court. The New South Wales Court of Appeal considered the rule which prohibits a beneficiary to a will from benefiting under that will if they killed the testator. The particular circumstances of the case were that a woman had, after years of abuse from her husband, finally killed him. Under the husband's will the wife was to benefit. In criminal proceedings the defence of "diminished responsibility" had been established. The majority of the Court of Appeal, holding themselves bound by the inflexible forfeiture rule, decided that the woman was prohibited from benefiting under the will. Not a cent could she recover, although the evidence disclosed that by her work and

---

95 *Attorney-General for the Northern Territory v Maurice* (1986) 161 CLR 475, at 487-488, 483, 492-493 and 497. See also *Goldberg v Ng* (New South Wales Court of Appeal, unreported, 11 July 1994).

96 See, for example, *Legal Profession Act* 1987 (NSW), s 11. See also *Ziems v The Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 279; *The Council of the Law Society of New South Wales v Foreman* (New South Wales Court of Appeal, unreported, 5 August 1994).

efforts in the jointly owned business over many years, she had contributed most materially to the husband's property and estate. It was, in my view, an unjust result. But it was one which the inflexible rule of law demanded.[97] Certainty triumphed over justice in the particular case, which suggested a more finely tuned outcome.

It is therefore not a proper criticism, in itself, that the doctrine of utmost good faith in marine insurance and other insurance law is of wide import and of wide potential and sometimes unjust application. In theory, a doctrine of such a nature is desirable as it provides the courts with a legitimate means of achieving just and fair results in each particular case. It encourages disclosure of relevant information by assureds to insurers. It reduces the business costs of interrogation which may otherwise be based on ignorance of material circumstances. It has endured in insurance for a very long time. It is a feature of the rules of a global industry in which Australia's share is modest indeed.

Conclusion - the doctrine is not out of date; but requires more treatment

The nature of the insurance contract having remained basically the same through the ages, perpetuating the need for substantial disclosure, it cannot be properly said that the doctrine of utmost good faith is out of date. However, the contemporary manifestation of this doctrine in the context of marine insurance is, in my view, in need of further substantive reform.

It is imperative that an element of causality be introduced into the doctrine. In that respect the decision of the House of Lords in *Pan Atlantic* may offer a desirable judicial reform of the pre-existing understanding of the law. It is similarly desirable that the test of materiality should be modified so as to control somewhat the onerous burden which it now presents to the assured who seeks faithfully and honestly to

97 *Troja v Troja* (1994) 33 NSWLR 269 (CA).

comply with it. However, that modification should not go so far as to encourage an unduly restrictive flow of information between the parties.

Finally, consideration needs to be given to the evolution of a system of remedies for non-disclosure whereby certain types of non-disclosure will not automatically entitle the insurer to avoid the contract entirely. This has been achieved in Australia in the field of general insurance. A like reform should be considered in the international business of marine insurance. But the lead will have to come from those countries which are most heavily involved in writing marine insurance. That is why international conferences such as this provide a useful forum for the exchange of experience and the discussion of desirable reform which may catch the ear of a legislator or, more likely, a judge having power to do something to secure reform.
