"Marine Insurance - is the doctrine of "Utmost Good Faith" out of date?"

Cornell Maritime International 35th International Conference
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...
This need by holding that all contracts of insurance were contracts uberrimae fidei.

Proper assessment of such "contingent chance" necessitated the full and complete disclosure of all facts material to the risk. The common law responded to

Lord Mansfield said:

"He who enters into a contract of insurance does not enter into a contract to assume the risk. In those infant days of marine insurance the knowledge of facts pertaining to the evaluation of the chance of loss having regard to the defects of the voyage provided to accept that task, and for what price, rested upon the particular underwriters, other insurers agreed that all sea, except a part of marine average, the decision to then as now, with the partners for loss, individually or collectively, took risks for the name and the coffee-house which bore it. "

Certainty London coffee-house of the Edward Lloyd plummeting down into her garden, had become legal folklore, so too has the 17th Century London coffee-house of Mr. Edward Lloyd.
Each party to the contract must act with the "utmost good faith" in his or her dealings with the other. This was to be in contrast to the common law's general laissez-faire theory to bargains in the general law of contract. There the theoretical underpinning was the doctrine of caveat emptor.

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. Today prudent underwriters have largely redressed this information imbalance. 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?

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 IA 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.


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." While it had been established that the common law of Australia could develop independently of English law, it is especially so in the present case as the Australian law concerning marine insurance, as expressed in the Act, deals with the duty of utmost good faith, which applies to both the underwriter and the assured.

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The duty of utmost good faith is a concept derived from the English law concerning marine insurance, Act 1906, which represents a partial codification of the common law. This is especially so in the present case as the Australian law concerning marine insurance, as expressed in the Act, deals with the duty of utmost good faith, which applies to both the underwriter and the assured.
(2) if the duty of utmost good faith is breached the innocent party may avoid entirely the contract.\textsuperscript{20}

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

Section 24(1) of the Act\textsuperscript{21} requires that (subject to circumstances which need not be disclosed)\textsuperscript{22} the assured (or his or her agent)\textsuperscript{23} must disclose to the underwriter "every material circumstance\textsuperscript{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 Umost Good Faith" (1994) 22 Australian Business Law Review 302.

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)


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.

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.

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.\textsuperscript{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).
The words "material" and "materially" are used to describe a circumstance that is significant enough to influence the decision of the insurer. The insured must disclose all material facts to the insurer. If the insured fails to disclose a material fact, the insurer may cancel the policy or refuse to pay a claim. This is known as the "prudent insurer test." The insurer must also be "prudent" in determining whether a fact is material.
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. Most recently the English House of Lords in Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd 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, 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, "where the Court might be satisfied 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." It is, as Lord Mustill noted in Pan Atlantic, a "question which concerns the need or otherwise, for a causal result for the insurer to avail itself of the legal right to avoid the contract of insurance by reason of the assured's failure to disclose a material circumstance."
would not have affected the acceptance of the risk or the amount.

In my opinion, the influence of a prudent insurer cannot be

Adviser, Lord Templeman said:

full review of the recent authorities, and referred such an approach, in

Oceans Union/United Kingdom

which, after a

holding of the English Court of Appeal in

International Underwriting

Association (Bermuda) Ltd, the

relevant issues.

In so concluding, the House of Lords overruled, inter alia, the earlier

Court of Appeal in the

AHPM (Cth), the

of the English

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conclusion between the non-disclosure or non-disclosure and the making of the
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:

"(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).

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

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42 ibid, at 732.
43 ibid, at 733.
45 [1984] 1 Lloyd's Rep 476 (CA), at 495.
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, that question of interpretation has not yet been finally resolved.

There is, I think, a strong case for the position that the words do not require any such proof of influence. The provision in question was apparently modelled upon the similar section of the Marine Insurance Act 1906 (UK). In that Act, the wording was "the knowledge which would have induced a prudent insurer". The words "knowing or exercising" in the Australian Act were evidently inserted to give the provision the tension it presumably lacked in the earlier Act. The word "prudent" in s 24(2) was not used in the earlier Act, but it is clear that the section was intended to apply to "prudent" insurers, as the later Act makes it mandatory on the insurer to act "as a prudent insurer".

The case for the interpretation of "prudent" insurers in the Australian Act as requiring the knowledge of a material fact to influence a prudent insurer, is enunciated in the recent decision of the House of Lords in Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd [1994] 3 WLR 677 (HL). In that case, the question was whether the decision of the House of Lords in that case could be applied to the Australian law by analogy. The House of Lords initially considered that the decision in Pan Atlantic could be applied to the Australian law by analogy, but ultimately decided that the wording of the Australian Act was sufficiently different to prevent such an application.

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 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 known practice of a company to disregard a certain class of facts, the non-disclosure of such a fact would not prima facie make that company be material, however it might be with regard to another company."

See also Supreme Court of Western Australia in Barclays Trust Co v Southern Pacific Insurance Co Ltd [1987] 8 NSWLR 514; Visscher Enterprises Pty Ltd v Southern Pacific Insurance Co Ltd [1985] 2 QdR 561 (FC); Ladbroke Pty Ltd v Mackinnon and Commercial Union Assurance Co PLC (1985) 3 ANZ Insurance Cases 60-610 (QSC). at 78, 722-723.

In that case, the House of Lords considered this issue in the context of the Australian Marine Insurance Act 1909 (Cth), s 24(2). The House of Lords considered the issue in the context of the Marine Insurance Act 1906 (UK). In that case, the wording was "the knowledge which would have induced a prudent insurer", whereas in the Australian Act, it was "which would influence the judgement of a prudent insurer". The House of Lords considered that the wording of the Australian Act was sufficiently different to prevent such an application.

More recent authority in Australia has been given in the decision of the High Court in Western Australian Insurance Co Ltd v Dayton (1924) 35 CLR 355, where Isaacs ACJ (with whom Gavan Duffy J agreed) said, at 379-380:

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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 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.\(^ {54}\)

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\(^ {50}\) [1994] 3 WLR, at 705.


\(^ {52}\) Meagher, Gummow and Lebane, *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 Hately* (1983) 152 CLR 406, at 430 per Mason and Deane JJ.

\(^ {53}\) See, for example, *Walton Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, at 428-429 per Brennan J, which Meagher, Gummow and Lebane, *Equity - Doctrines and Remedies*, above, at para [1710] say encapsulates the "current state of authority as to equitable or promissory estoppel." See also *Silvox Pty Ltd v Barbaro* (1988) 13 NSWLR 466 (CA), at 472 per Priestley JA. As regards estopped by conduct, see *The Commonwealth v Versvogen* (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.
The court would adopt the reasoning and process of interpretation outlined in the

General criticisms:

Some general comments on the desirability of a causal connection

There are some general observations about the decision in Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd [1994] 3 WLR 677 (HL), at 692-695.

First, it had been suggested that the law as established by CTI was "too harsh". Lord Templeman, in Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd [1994] 3 WLR 696 (HL), at 692-695, has said it is the result of the judgments of the Court of Appeal in the CTI case that 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 if the submission would give carte blanche to the avoidance of insurance contracts on vague grounds of non-disclosure. Lord Templeman, in Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd [1994] 3 WLR 696 (HL), at 692-695, has said it is the result of the judgments of the Court of Appeal in the CTI case that 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.

The English Court of Appeal has been much and variously criticised for its decision in CTI. It is particularly regrettable to consider two of those comments which can be made of the causal requirement promulgated by the House of Lords in Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd [1994] 3 WLR 696 (HL), at 692-695.

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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.
from the insurer will still be possible, either at a reduced level or at a
lower
premium. If the insurer can prove that the non-disclosure was "innocent" in
its effect on the contract price, the insurer may
ask to be refunded the difference between the premium actually paid
and the premium that would have been payable had full disclosure been
made.

(1) The insurer may ask to be refunded a proportion of the claim
calculated as follows:

Claim = (Premium which would have been payable had there been full disclosure) - (Actual premium paid)

(2) The insurer may also require the assured to pay the correct premium payable had full disclosure been
made.

The concept of "proportionality" could involve a number of factors, two of which include:

- "innocent" non-disclosure: In the case of "innocent" non-disclosure, a concept of

proportionality is necessary. Where the insurer has acted in good faith and has not
engaged in fraudulent practices, a proportionality clause may be appropriate. If the
non-disclosure was "innocent", the assured may be entitled to recover
some or all of the premium paid.

- "guilty" non-disclosure: In the case of "guilty" non-disclosure, a concept of

proportionality is not appropriate. The insurer may be entitled to recover the full
premium paid, even if the non-disclosure was "guilty".

It has been suggested that the law needs to be reformed to reflect the varying circumstances
encountered in insurance contracts. The Law Commission of England and Wales, Insurance Law:
Non-Disclosure and Breach of Warranty (No. 104), 1980, at para 4.4f., and the Law Commission of
England and Wales, Law Commission of England and Wales, Insurance Law: Non-Disclosure and
Breach of Warranty (No. 104), 1980, at para 4.4f., have proposed reforms to address
these issues. The reforms would enable the insurer to recover the full premium, even if
the non-disclosure was "guilty".

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

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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.
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. Aware of that fact, a truly careful insurer would have to inquire for itself, specifically, as to all material circumstances which collectively, as opposed to individually, are decisive. 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 influence the assessment and acceptance of the risk. That approach does not place any burden on the insurer to gather information and thereby avoids the risk that assureds would disclose only circumstances which they were advised would be of "decisive influence" to the prudent insurer. Aware of that, a truly careful insurer would have to inquire for itself, specifically, as to all material circumstances which collectively influence the assessment and acceptance of the risk. Of course, the insurer, being the one to decide what circumstances are decisive, would avoid any risk of the insurer being unduly influenced by the insurer's prior knowledge of those circumstances which, while not "decisive", were "causally" decisive of the risk. The Law Lords decided that this was not desirable as a matter of legal policy. The 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. The 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 insurer being unduly influenced by the insurer's prior knowledge of those circumstances which, while not "decisive", were "causally" decisive of the risk.
*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

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67 Of course, as Lord Mansfield noted in *Carter v Bench* (1766) 3 Burr 1905, at 1109; 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 'Lisbon Pride')* [1985] 1 Lloyd's Rep 437 (QB).


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.

The insurance contracts Act does not apply to contracts to which the Marine Insurance Act applies. 1

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

Clearly the Commission recognised the utility of the concept. The Commission said:

Indeed the Commission recognised the utility of the concept. The Commission said:...
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
effectected 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."
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 assured";75 and

(2) 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 even if the insured had not failed to disclose or had not made the misrepresentation before the contract was entered into. The insurer's liability is limited to an amount which would place the insurer in a position if the failure had not occurred or the misrepresentation had not been made.16 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 decision of the Court of Appeal in the case of "Pan Atlantic" and the imposition of the concept of "proportionality" where the non-disclosure complained of is not fraudulent.

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 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 the insurer in a position had the failure not occurred or the misrepresentation 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
influence on the typical insured in a general insurance situation. Influences on the typical insured in a general insurance marketplace. Indeed, many of the terms of the contract are influenced by the insurer. The insurance is written within the law is precisely to determine higher standards than the insurer would have been influenced by the circumstances had it been disclosed. This is especially the case where an underwriter accepts a risk upon the basis of the risk being acceptable by the underwriter's own global risk management strategy. That is, if in the event of non-disclosure, the insurer could hardly be said that the underwriter was equally induced to enter into the contract by any disclosure of non-disclosure of the assured. A violation of the contract by any disclosure of non-disclosure of the assured.
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*, a case concerning the common law, I expressed the view that the test of materiality 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." 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, let alone the kinds of consideration which may influence the decision of a foreign insurer in a foreign marketplace. 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

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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.
 "materiality" as applies in the context of the Marine Insurance Act continues to

be important if not very similar. Yet, even if that is the case, such a broad concept of

disclosure (casually referred to in the creation of the contract of insurance may be

prevalent), effect of a test of materiality based upon notions of consequential and a non-

effect on the mind of a prudent insurer. While it is difficult to ascertain, the

effect of in that decision material circumstances is one that would have an

influence. By that decision, a material circumstance is one that would have an

influence. But while it may have gone further than that concepts by the House of Lords

in the decisive influence test, necessarily advocated before the House of Lords

of course, the test of materiality proposed by Mr. in Barony Holdings did not go as far

back thereof. From this reference to the creation of the contract to the test of materiality.

Of course, the test of materiality was adopted in an attempt to move the desirable general test

submitted in Pemalame, in an attempt to move the desirable general test

upon reflection. It was in effect, as was the "decisive influence test

must be disclosed by the insurer.

material is not material. As such, it is not information which

mind and requires disclosure. The information, although of

accordance with the decision of conclusions, there is not such effect on the

insurer. He end, have determined for a reasonably prudent insurer the

whether necessary to have less of such information would not in

bearing more than the effect produced by information

"to require that effect on the mind of the insurer...should

prevailing in what constitutes..." The words "reasonably affected" in Section 75.

premium and on what condition. The words "reasonably affected" in Section 75.

insurer in determining whether he will accept the insurance, and it so, at what

consequence being "material" if "would have reasonably affected the mind of a

Samuels in Marine Insurance Ltd v. Perger, where his Honour spoke of a
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.\textsuperscript{86} Other legislation, in State jurisdictions, allows certain bargains
to be re-written by the courts in certain circumstances.\textsuperscript{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"\textsuperscript{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.

\textbf{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
\textit{Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality} to say that the

\textsuperscript{86} See, for example, \textit{Trade Practices Act 1974} (Cth), s 52; \textit{Fair Trading Act 1987} (NSW), s 42.
\textsuperscript{87} See, for example, \textit{Contracts Review Act 1984} (NSW).
\textsuperscript{88} \textit{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."

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."

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. 93 One seeks to overturn criminal convictions upon the ground that they were "unsafe and unsatisfactory."

Or to claim that an opponent’s legal professional privilege has been improperly waived because it would be possible to obtain the evidence that the lawyer wrote, "wrote and misrepresent the parties to the court to overstate their contractual conditions upon the proposal of being an assessor of an assumption of fact."

Each book in the series of "reasonableness" is, in my opinion, fundamental to the law of negligence and the 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 expressions of ideas in law which are capable of being used in their law. Any expression without ideas was an "alien, vague, useless expression without any
"unfair" or "misleading" that it be maintained. 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." 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

96 See, for example, Legal Profession Act 1987 (NSW), s 11. See also Ziemns 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
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. Certainty triumphed over
justice, and the decision of the House of Lords in Pan Atlantic may offer a desirable
result respect the doctrine of utmost good faith in marine insurance law.
It is imperative that an element of causality be introduced into the doctrine. In


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
businesses of various kinds exist. It is similarly desirable to eliminate the


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

In my view, in need of further substantive reform


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