Does the Marine Insurance Act 1906 serve justice between insurer and insured?

The need for certainty: background to the MIA 1906

The principal purpose of the Marine Insurance Act 1906 was to introduce certainty into the legal relationship between the insurer and the insured. The Memorandum attached to the Bill stated as follows:[1]

> *"In dealing with rules of law, which may be modified by the stipulations of the parties, it is to be borne in mind that the certainty of the rule laid down is of more importance than its theoretical perfection."*

This aim is reflected in the fact that the Act was not intended to reform the law of marine insurance, but was instead a codification of the common law as it stood at the turn of the nineteenth-century. However imperfect the common law was at this time, it was thought that the interests of mercantile men were best served by the codification of the mass of common law decisions, which would thereby create a clear set of rules. A detailed analysis of the merits of the common law rules and the difficult problem of balancing the interests of the insurer and the insured in order to serve justice between them was therefore not foremost in the minds of those drafting the Bill.

This emphasis was partly born out of a respect for the abilities of insurers and insured. As the parties are free to negotiate the terms of the insurance contract, recourse is to be made to the Act only where "the parties have either formed no intention or have failed to express it clearly"[2]. Much then depends upon the commercial acumen of the individual. Professionals working in the field of insurance are thought to require, and for that matter desire, less protection in bargaining with each other and forming a contract than, for instance, a private individual purchasing house insurance. This view persists. The Law Commission excluded from its recommendations for reform of the law relating to non-disclosure and breach of warranty contracts of Marine, Aviation and Transport Insurance (MAT), on the grounds that:[3]

> *"The contracts falling within MAT are generally effected by "professionals" – that is to say, persons whose everyday business dealings involve the making and carrying out of insurance contracts. Thus, in the vast majority of cases it is merchants, shipowners, aircraft operators etc. and not private individuals who seek insurance in the field of MAT. They operate in a market governed by long-standing and well-known rules of law and practice and can reasonably be expected to be aware of the niceties of insurance law."*

While the majority of insurers are no doubt well-versed in these legal niceties, it is unrealistic to expect a similar level of legal acumen from the insured, not least

---

[1] E.R. Hardy Ivamy, *Chalmer's Marine Insurance Act 1906*, 10th edn. (1993), viii.
[2] Ibid., ix.
[3] The Law Commission, *Insurance Law: Non-disclosure and breach of warranty* (Cmnd 8064, No. 104), para. 2.8.

because insurance is just one aspect of the responsibilities a shipowner, for instance, can expect to undertake. For the small ship-owning company, it is unduly arduous to expect them to seek legal advice on every occasion a contract of insurance is entered into.

While the post-contractual application of the doctrine of utmost good faith has greatly exercised judges and academics for the last two decades, a greater practical concern for the honest insured is their pre-contractual duties, and in particular their duties relating to disclosure and representations. The problem is not so much that the rules are unduly harsh to the insured, but rather that in the event of an honest mistake, the court has no latitude in the remedies available to it.

The law relating to non-disclosure and misrepresentation

The duty of disclosure is set out in ss. 18-21 of the MIA. These more detailed provisions are governed by s. 17, which places on both parties to the contract a duty to observe the "utmost good faith". S. 18(1) provides that the insured "must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured" and that "if the assured fails to make such a disclosure, the insurer may avoid the contract". S. 20(1) provides that "every material representation made by the assured or his agent to the insurer during the negotiations for the contract, and before the contract is concluded, must be true. If it be untrue the insurer may avoid the contract".

The duty of the insurer

While the doctrine of utmost good faith binds both parties, the burdens and duties placed upon the respective parties do not fall evenly. There are no pre-contractual duties similar to ss. 18 and 20 which bind the insurer, despite the fact that the insurer's role at the pre-contractual stage is much greater than that of the passive observer. He may guide the insured by asking questions and requesting documentation. Yet in all this his duty is single: to observe the "utmost good faith"[4]. While this entails "not only to abstain from bad faith but to observe in a positive sense the utmost good faith"[5], it will in practice be discharged if the insurer does not mislead the insured.

The pre-contractual duties of the insured and the case for reform of ss. 18 and 20

The insured's duties are more onerous, and the penalties for failure to observe them severe (the avoidance of the contract at the option of the insurer). The justification for this is that the insured and the insurer do not share equality of information[6]. Prior to contract the insured will possess most, if not all, of the knowledge and the onus is therefore upon him to disclose that which is material to the insurer in accordance with

[4] The Act also expects the insurer 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" (s. 18(3)(b)), and to exercise discretion in waiving disclosure of information (s. 18(3)(c)). These do not form any specific duties, but are presumptions affecting the circumstances to be disclosed by the insured.

[5] *Banque Keyser Ullman v. Skandia* [1987] 1 Lloyd's Rep. 69 at 93.

[6] *Carter v. Boehm* (1766) 3 Burr 1905 (per Lord Mansfield): "The special facts upon which the contingent chance is to be computed lie most commonly in the knowledge of the assured only".

s. 18. If adherence to the disclosure requirements of the MIA are strictly enforced, this is because there is a strong public policy argument for maintaining an obligation on the assured of communicating to the underwriter every material fact. This in itself is not unjust.

The problem is that it is the insured alone who has ultimate responsibility for deciding that which is material and should be disclosed, and that which is irrelevant and may be put to one side. As the party who stands to lose most from any non-disclosure, and the party with control of the greatest share of the information, it may be argued that it is the insured who is in the weakest position, as he does not necessarily know what information the insurer wishes to have[7]. It is unfortunate that the MIA does not provide for a simple test to enable the insured to assess the materiality of the information in his possession. It is also unfortunate that the MIA does not encourage a more active role on the part of the insurer in compiling the proposal and making disclosure. More active participation by the insurer (for instance through greater questioning of the insured) is in part discouraged by the risk that this would define the limits of materiality, and relieve the insured from the duty of disclosing facts which were nevertheless not known to the insurer[8].

As it is, the insured must decide that which is material under s. 18(2), which provides that "every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk". Any uncertainty as to the meaning of the test of materiality has been settled by the House of Lords in *Pan Atlantic Insurance Co. Ltd. and Another v. Pine Top Insurance Co. Ltd.*[9].. The House of Lords held that the insured must disclose every circumstance that the insurer would have wanted to know and take into account (the objective test). It was also held that for the matter to be material, the particular insurer concerned would have taken it into account when assessing the risk had it been disclosed (the subjective test). The uncertainty arises in the application of this test by the insured. The insured is probably neither a lawyer nor an underwriter, yet the MIA expects him to make an assessment of materiality based on an objective standard outside his own experience. Equally the courts cannot determine what a prudent insurer would have done, without asking one. This allows the insurer to adduce evidence from other insurers as to their views, with the likely effect that they will support the insurer[10]. Any insured, understandably anxious not to breach s. 18(1), will be tempted to conclude, "Give them everything". This will result in a great deal of unnecessary paperwork being placed in the hands of an underwriter, as well as the disclosure of confidential information that is not material. The underwriter's reaction is unlikely to be one of gratitude.

An even greater concern for the honest assured is the fact that he may breach ss. 18(1) and 20(1) innocently. Despite the fact that such 'concealment' does not constitute a breach of s. 17 and the duty of utmost good faith, the penalty remains equally severe. Innocent non-disclosure can occur in a number of ways. The most likely form of innocent non-disclosure is when the insured makes an honest mistake

---

[7] See R.A. Hassan, "The Doctrine of Uberrima Fides in Insurance Law – A Critical Evaluation" (1969) 32 M.L.R. 615, although here it is argued that any reform should not include marine insurance.
[8] *Newsholme Bros. v. Road Transport and General Insurance Co. Ltd.* [1929] 2 K.B. 356 at 363.
[9] [1994] 2 Lloyd's Rep. 427, HL.
[10] R. Merkin, "Uberrimae Fidei Strikes Again" (1976) 39 M.L.R. 478, 480.

in assessing the materiality of information in his possession. The insured (unless he obtains legal advice on every occasion a contract of insurance is entered into) has little guidance as to what is material. A commonsense view might lead an insured to disclose only that which is material to the risk[11]. Similarly, the insured may decide not to disclose rumours or communications that he believes to be untrue[12]. He may answer a question from the insurer entirely honestly, yet mistakenly, and his answer may not be material to the contract[13]. The insured may be uncertain about the materiality of certain information and decide to disclose some of it, assuming that should it prove significant further questions will be asked[14]. He may even be unaware of that information which he is under a duty to disclose, as it is in the hands of his servant and has not been communicated to him[15]. In each of these instances the insurer may be entitled to avoid the contract of insurance. The diligent insured may look to precedent for guidance, yet that which is material in one instance may not be material in another[16].

The courts have made an effort to ameliorate some of the worst excesses of the law relating to innocent non-disclosure. In particular the *Pine Top* decision, which required the insurer to pass an objective test (the prudent insurer test) and a subjective test (the actual inducement test) made the test for the materiality of non-disclosed information slightly less favourable to the insurer. Lord Templeman stated[17]:

> *"The law is already sufficiently tender to insurers who seek to avoid contracts for innocent non-disclosure and it is not unfair to require insurers to show that they have suffered as a result of non-disclosure."*

While this undoubtedly places the careless insurer in a more difficult position, the fact remains that the court must make an assessment based upon whether or not the insurer was in fact induced into the contract on the relevant terms by the misrepresentation or non-disclosure. As well as requiring the courts to exercise almost clairvoyant powers, it is likely that, unless the particular insurer can be demonstrated to be particularly foolhardy, that which is material according to the subjective test is identical to that under the objective test. The two-part test laid down in *The Pine Top* decision also represents something of a retrenchment for insurers from the 'decisive influence test' advanced in *Container Transport International Inc. v. Oceanus Mutual Underwriting Association (Bermuda)*[18]. Indeed in the latter decision, it was noted by Steyn J. how "remarkably unpopular"[19] the *CTI* decision had been with the insurance market. A cynic might suggest that in *The Pine Top* they got their way.

---

[11] Falling foul of *Rivaz v. Gerussi* (1880) 6 Q.B.D. 222 CA, a case involving a fraud which laid down generally that a circumstance may be material, though it had no bearing on the particular risk.
[12] Breaching s. 18(5).
[13] Breaching s. 20(1). *Graham v. Western Australia Insurance Co. Ltd.* (1931) 40 Ll. L. Rep 64 at 66, Roche J, "If there is information given, be it quite innocent, which is not a matter of contract, and never becomes a matter of contract, yet nevertheless, if it is inaccurate, it can be used to avoid the policy or policies in question".
[14] *Kirby v. Smith* (1818) 1 B&Ald 672; *Westbury v. Aberdein* (1837) 2 M&W 267.
[15] *Berger and Light Diffusers Pty. Ltd. v. Pollock* [1973] 2 Lloyd's Rep. 442 at 461. The clausing of the bill of lading was deemed to be known to the claimants under s. 18 because it was known by their shipping agents.
[16] E.R. Hardy Ivamy, *Marine Insurance*, 4th edn. (1985), 54.
[17] *The Pine Top* [1994] 2 Lloyd's Rep 427 at 430.
[18] [1984] 1 Lloyd's Rep 476.
[19] *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1993] 1 Lloyd's Rep. 496 at 505.

The courts have also sought to limit the principle of constructive knowledge in relation to non-disclosure, although not to the extent that one might conclude that "you cannot disclose what you do not know"[20]. Certainly the imputation that the insured is aware of that which his servants are aware is consistent with the broad principles of agency[21]. However, to apply the principle too widely is to ignore the special nature of a contract of insurance, the very purpose of which is to protect the insured from the unknown. Indeed, should the insured undertake to discover absolutely everything relating to the risk, including information of which he is unaware, yet in the possession of his servants, he might conclude that, having considered every potential contingency, he has protected himself as far as possible and that as a result insurance is not required (except to cover the genuinely unforeseeable). Thankfully, there are limits to what inquiries should be made. Indeed this is implicit in the wording in s. 18(1): "every circumstance which *ought* to be known to him". The courts have usefully limited the effect of this provision, so that insured are not expected to conduct exhaustive inquiries prior to entering into a contract of insurance. McNair J. stated[22]:

> *"To impose such an obligation upon the proposer is tantamount to holding that insurers only insure persons who conduct their business prudently, whereas it is a commonplace that one of the purposes of insurance is to cover yourself against your own negligence or the negligence of your servant."*

There are strong public policy grounds for maintaining constructive knowledge in relation to s. 18(1). Should the principle be too heavily diluted or even removed, the potential for wilful blindness on the part of the insured as well as the intentional withholding of information by servants or agents increases.

The courts have also attempted to militate against the strict rule that material 'facts' (and this includes rumours and suspicions where they are not "mere speculations, vague rumours or unreasoned fears"[23]) must be disclosed even when they are untrue, and in doing so they have disturbed the principle that underwriters have a right to be told *all* material facts when considering a proposal. The high-water mark for these changes was *The Grecia Express*[24]. In that case Colman J. held that where an insured had failed to disclose a material 'fact' and can also prove to a court that that 'fact' was untrue, the insurer may not avoid the policy as to allow him to do so would be unconscionable. Colman J. held that if the insurer had known the truth at the time of placement he would have written the risk, and the attempt by the insurer to avoid for the non-disclosure of a false suspicion of dishonesty amounted to,

> *"…utilizing loss of the opportunity of forming an unfounded suspicion of non-existent facts in order to avoid paying a loss under a policy which, had the truth been made known to them when they wrote the risk, they would have not*

---

[20] *Joel v. Law Union and Crown Insurance* [1908] 2 K.B. 863 (CA) (per Fletcher Moulton L.J.).
[21] *Berger and Light Diffusers Pty Ltd v Pollock* [1973] 2 Lloyd's Rep. 442 at 461.
[22] *Australia and New Zealand Bank Ltd. v. Colonial and Eagle Wharves Ltd.* [1960] 2 Lloyd's Rep 241 at 252.
[23] *Decorum Investments Ltd v Atkin (The Elena G)* [2001] 2 Lloyd's Rep. 378 at 382.
[24] *Strive Shipping Corp v Hellenic Mutual War Risks Association (Bermuda) Ltd (The Grecia Express)* [2002] 2 Lloyd's Rep. 88

hesitated to underwrite. To persist in such a course in the fact of evidence before the Court that the suggested facts never existed would, in my judgment, be quite contrary to their duty of the utmost good faith."[25]

He concluded that to allow the insurers to succeed on this point would be "starkly unjust" and "unconscionable"[26]. This argument has much to commend it, particularly where the insured is certain that the rumour was untrue.

The decision in *The Grecia Express* did not survive a year, and was rejected in *Drake Insurance Plc. v Provident Insurance Plc*.[27]. The primary concern with *The Grecia Express* was that it gave the insured an incentive for withholding material about which he is suspicious, thereby paying lower premiums. Providing that his suspicions are borne out in court, he will not be penalised for the non-disclosure. This is contrary to ss.18(1) which requires that the insured place before the insurer all the material facts. It is the underwriter who is entitled to determine the veracity of the information, not the insured[28]. *The Grecia Express* also threatens certainty. Midwinter argues[29]:

"How can insurers know whether they are entitled to avoid a policy for non-disclosure if it is open to the insured to turn up at court with information of which the insurer cannot have been aware and upon which he can make little comment, to launch into an examination of the truth of the undisclosed facts?"

It is submitted that certainty is prized over justice between the parties. Moore-Bick J expressed "unease"[30] at the severity of the rule to innocent insured. While certainty in the rules is useful in the insurance market, where the rules act in favour of the insurer affording the insured little protection, there is a clear need for reform. If the Act does not serve justice, its certainty is a doubtful virtue.

The post-contractual duties - disclosure

It is in many respects odd that the Act has a strict regime of pre-contractual disclosure and is silent with regard to post-contractual duties. The scope of ss. 18(1) and 20(1) is clear: "before the contract is concluded", which is defined by s. 21 as being when "the proposal of the assured is accepted by the insurer". If there are any supervening duties of disclosure, these must stem from s. 17 and the duty of utmost good faith. In *Niger Co. Ltd. v. Guardian Assurance Co. Ltd.*[31] it was held that the insured is under no duty to disclose a material circumstance which comes to light after the contract was concluded. Lord Jauncey has set out the limited circumstances in which post-contractual disclosure will be required of the insured:[32]

---

[25] Ibid., at 132, 133.
[26] Ibid., at 133.
[27] 1 All E.R. (Comm) 759.
[28] MacGillivray, *Insurance Law*, 10th edn (2002), para. 17-45.
[29] S.B. Midwinter, 'The Duty of Disclosure and Material Rumours' L.M.C.L.Q. [2003] 158, 162
[30] *Drake Insurance Plc. v Provident Insurance Plc*. 1 All E.R. (Comm) 759, at para. 31.
[31] (1922) 13 Ll. L. Rep. 75, HL.
[32] *Banque Financiere de la Cite SA (formerly Banque Keyser Ullmann SA) v Westgate Insurance Co (formerly Hodge General & Mercantile Co Ltd)* [1990] 2 Lloyd's Rep. 377.

> *"There is, in general, no obligation to disclose supervening facts which come to the knowledge of either party after conclusion of the contract (*Lishman v. Northern Maritime Insurance Co., *(1875) L.R. 10 C.P. 179), subject always to such exceptional cases as a ship entering a war zone or an insured failing to disclose all facts relevant to a claim."*

If, as is submitted, there is considerable potential for the honest insured to wrongly assess the materiality of information, it is unduly harsh that there are no means whereby the insured can attempt to rectify the error. Should the insured discover that he has failed to disclose material information of which he was aware prior to contract, and that the risk is in the process of being run, he gains little from informing his insurers, who will be entitled to avoid the contract of insurance, unless he is able to obtain replacement insurance[33]. There are therefore considerable penalties for observing 'utmost good faith' in this situation, and dishonesty and concealment are positively rewarded. This is not only of considerable disadvantage to the insured, the insurer also suffers as a result. Should additional information come to light after the contract has been concluded (information which could not and therefore need not have been disclosed prior to the contract), and this information suggests that the risk insured is considerably greater than the underwriter originally assessed, it would be of considerable advantage to the insurer to weigh up this information and if necessary obtain reinsurance.

The remedy

The need for the statutory reform of the MIA has become increasingly apparent, in the interests of justice between the insured and insurer. Attempts by the courts to afford the insured greater protection (by adding the subjective test, limiting constructive knowledge and requiring that material rumours be proved true in court) are by their nature stop-gaps. A coherent reform of the Act through legislation would certainly be in the interests of certainty. The most significant obstacle to reform in the area of non-disclosure and misrepresentation is a reluctance to see the emphasis placed by the Act on the duties of the insured to share with the insurer material information diminished. One alternative, the 'reasonable assured test' (which has been recommended by the Law Reform Committee[34] and the Law Commission[35] in relation to non-MAT insurance) has been rejected by the courts for precisely this reason. Scrutton L.J. stated that[36]:

> *"In my view it is very important to maintain the obligation on the assured of communicating to the underwriter every material fact, and I understand, and have always understood the definition of material fact to be that contained in the MIA."*

---

[33] At which point he will be required to disclose to the new insurers the fact that the original policy was avoided.
[34] Law Reform Committee, *Conditions and Exceptions in Insurance Policies*, 1957 (Cmnd. 62), para. 14.
[35] The Law Commission, *Insurance Law: Non-disclosure and breach of warranty* (Cmnd 8064, No. 104), para. 4.47.
[36] *Becker v Marshall* (1922) 12 Ll. L. Rep. 413 at 414.

It is submitted that these concerns are quite justified. It is an inevitable consequence of any reform of the disclosure requirements contained in ss. 17 to 21, such as to make the test of materiality that of the reasonable insured, that less information will be placed before underwriters prior to contract. The insurer is effectively dependent upon the insured, and the insured should therefore be expected to meet high standards.

It is suggested that the problem lies, not with the requirements placed upon the insured by ss. 17-21, but rather the remedies available to the courts in the event that these provisions are breached. Generally, the penalties imposed for breaching a duty should be proportional to the severity of the transgression. The MIA imposes a single remedy: avoidance (although certain judgments refer to the remedy of 'forfeiting all benefit under the policy', this would appear to be the outcome of avoidance rather than a second discrete remedy[37]). Fraud is treated as severely as an honest mistake, and this lack of flexibility is rightly decried as "draconian"[38]. The remedy itself is of considerably more benefit to the insurer rather than the insured. The insurer is effectively placed in the same position as if the misrepresentation or non-disclosure had never occurred. The most practical solution would appear to be that the insured (or for that matter the insurer who has breached his s. 17 duty) should be liable in damages in the event of innocent non-disclosure. These damages should be assessed on the basis of the difference between the premium paid and the premium that the policyholder would have paid if he had disclosed the information. Avoidance should be retained as a remedy in instances where the insured or insurer have acted fraudulently, so as to act as a strong disincentive for the intentional withholding of information. The availability of the remedy of damages in cases of innocent non-disclosure or misrepresentation would not disturb the principle contained in s. 17. The courts have resisted any suggestion that there are degrees of utmost good faith[39]. In cases of fraud however, the award of damages proportional to the severity of the breach would effectively do away with this absolute standard.

In order to introduce a remedy in damages it has been suggested that legislation is not necessary, and that "the injustice may be redressed on a juridical basis open to the higher courts"[40]. Aside from the fact that the courts will be understandably reluctant to legislate in this way, legislation is required as the wording of the Act leaves little room for the exercise of such discretion. The only remedy mentioned in the MIA is avoidance, and to find that non-disclosure may also sound in damages is simply not consonant with the Act. Reform in this area is less ambitious than a complete redrafting of the MIA and the law relating to marine insurance and it might be hoped that it could be undertaken relatively quickly.

---

[37] See further P. Eggers, 'Remedies for the failure to observe the utmost good faith' [2003] L.M.C.L.Q. 249, 271.

[38] MacGillivray, *Insurance Law*, 10th edn (2002), para. 17-101.

[39] *Container Transport International Inc. v. Oceanus Mutual Underwriting Association (Bermuda)* [1984] 1 Lloyd's Rep. 476 at 525 (per Lord Stephenson). Utmost good faith was not defined exhaustively, "it is enough that much more than an absence of bad faith is required of both parties to all contracts of insurance". It is nevertheless clear, however, that the court was not prepared to countenance arguments that there were shades of utmost good faith. Similarly, in *Banque Keyser Ullman SA v. Skandia (UK) Insurance Co.* [1987] 1 Lloyd's Rep. 69 at 93 (per Steyn J.): the duty is "not only to abstain from bad faith but to observe in a positive sense the utmost good faith".

[40] P. Eggers, 'Remedies for the failure to observe the utmost good faith' [2003] L.M.C.L.Q. 249, 250.

It is also suggested that it would be advantageous for the insured to disclose information after the conclusion of the contract. This is likely to happen in two ways. Firstly, the insured may wish to disclose information which was mistakenly withheld prior to the contract. At present such honesty is penalised with avoidance. It is submitted that the contract should subsist, and that an order for damages should be made along the lines mentioned previously. The second situation is where there has been non-culpable non-disclosure. Here the information has come to light after the conclusion of the contract. The insured is presently under no duty to disclose this to the insurer, despite the fact that the information may have a significant bearing on the risk as it was originally assessed. Here, the insured should be required to disclose the new information within a reasonable period of its discovery. Both these recommendations represent a significant extension of the duty of utmost good faith to post-contractual disclosure, and the courts have so far been reluctant to countenance such a change[41]. It would be sensible for any such reform to be in shape of new legislation as there is no suggestion in the Act that there is any post-contract duty of disclosure (indeed, s. 18 is explicitly limited to pre-contractual negotiations).

Conclusion

The principal weakness of the MIA is that as a codified set of rules it is overly prescriptive. Thus where the common law might afford the courts a degree of flexibility in order to reach a just resolution, where the rules are laid down in statute the courts have little or no leeway in the remedy awarded. Indeed, avoidance is a remedy that functions at the insurer's option without the need for endorsement by the court.

It is unfortunate that calls for reform of the MIA are invariably phrased in terms of the insured versus insurer. This is in part inevitable, as the Act functions to balance the interests of the respective parties to a contract of insurance. Such a balancing act is made all the more difficult because in many respects the interests of the insured and the insurer are opposed. In one important respect, however, they do coincide: the law relating to marine insurance contracts should be perceived as just. This requirement is poorly served by the availability of a single remedy of avoidance at the option of the insurer in all cases of non-disclosure. The advantage of reform from the point-of-view of the insured is obvious: continued cover in the event of an honest mistake. There would be two advantages to the insurer. Post-contractual disclosure would allow the insurer to obtain reinsurance in the event that the risk was incorrectly assessed at the time of contract. More importantly, by continuing to insist on the enforcement of their strict rights in the event of innocent breach of the MIA by the insured, the British insurance market loses out to other markets (particularly the Norwegian and German markets where the law is less stringent and provides greater protection to the insured[42]). It matters little that in cases of innocent non-disclosure insurers frequently waive the right to avoid the contract voluntarily. As long as the insurer retains the option the insured has grounds for concern, and will be less likely to enter an insurance contract governed by the MIA.

DANIEL LEWIS

---

[41] *Banque Financiere de la Cite SA (formerly Banque Keyser Ullmann SA) v Westgate Insurance Co (formerly Hodge General & Mercantile Co Ltd)* [1990] 2 Lloyd's Rep. 377 at 389 (per Lord Jauncey).
[42] B. Soyer, *Warranties in Marine Insurance*, 1st edn. (2001), 300.