Possible Reforms to Insurance Contract Law :

(2) Summary of Provisional Findings of BILA Sub-Group Addressing Utmost Good Faith

Pre-Contract Duty

- ***Proposals/questionnaires***

It was agreed that insurers should ask for all relevant information on risks, preferably in a question and answer format for most risks. It was thought desirable for there to be the following reform, namely that insurers should avoid asking questions requiring expert knowledge beyond that which the proposer could reasonably be expected to possess or obtain.

Similarly, an insured's duty should be to give answers according to what he could *reasonably* be expected to know. At the start of a proposal form or similar document, insurers should place a clear warning to the proposer to reveal all material facts which he could reasonably be expected to know.

- ***How far is there a duty on insurer to inquire/or be taken to have waived inquiry?***

It was agreed that if a question posed by insurers was not answered or was plainly answered inadequately, then insurers should be taken to have waived their right to avoid if they did not investigate the position further.

- ***How much information has to be disclosed?***

There should be a fair presentation and all material information should be disclosed. There was much debate as to the appropriate test for materiality and whether the *Pan Atlantic* test should continue to apply?

After some discussion it was agreed that the *Pan Atlantic* test of materiality should continue to apply, save that there should be some reform which would result in an insurer not being able to avoid a policy on grounds of non-disclosure of a material fact which an insured could not reasonably have been expected to have disclosed. It was thought that this should apply in the case of consumer and commercial insureds, although what would be regarded as *reasonable* would vary according to the size, resources and type of insured.

- ***What should be the remedy for material non-disclosure/misrepresentation? Avoidance? Damages? Repudiation of relevant claim or prospective repudiation of insurance? Proportionate remedy – how would this work?***

It was agreed that insurers should retain the right to avoid where there had been fraudulent non-disclosure or misrepresentation. After some lengthy discussion, it was considered desirable to explore the possibility of reform which would envisage judges applying principles of proportionality in the case of innocent, negligent and reckless non-disclosure/ misrepresentation. Judges could deal with this in a similar way to their approach to contributory negligence.

- ***Duty of good faith on renewals***

It was agreed that that there should be an explicit warning by insurers at the start of the renewal documentation about the importance of the insured disclosing any changes. It was thought that the obligation on the insured should be to inform insurers of any material changes of which he was aware or could reasonably be expected to be aware. It was thought desirable for insurers to send the insured a copy of his original proposal form on renewal, so he could be reminded of what he had stated previously.

- ***Duty of good faith on claims presentation & beyond***

There was a lengthy discussion about the decision of the Lords in *The Star Sea* and the implications thereof. It was agreed that at the claims stage there was a duty not to act fraudulently and that insurers should not have to pay a fraudulent claim. Where there had been a certain amount of exaggeration, it was felt that an insured should still be able to recover provided there was no fraud. Once litigation was on foot, the Court's procedural rules should apply (see Lord Hobhouse, paras 73 to 77 of his speech).

- ***Warranties***

It was agreed that an insurer should not repudiate liability for breach of warranty where the circumstances of the loss were unconnected with the breach unless fraud was involved. There should be reform to the effect that breach of warranty has to be an effective cause of the loss.

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September 2001
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