Lunch-time address by Sir Michael Kerr on "Insurance law - non-disclosure and breach of warranty"

Following a well attended lunch in the Elizabethan suite of Barrington House, the President (The Rt. Hon. Sir John Donaldson) who was in the chair, introduced the Hon. Mr. Justice Kerr. Sir John jocularly referred to him as a kind of "double agent" since he was not only Chairman of the Law Commission but also of the London Commercial Court (from which position Sir John himself had recently been promoted).

Sir Michael began by sketching the background of developments. In May 1978, the Lord Chancellor had requested the Commission to consider various aspects of the insurance contract and in January, 1979, they produced a Working Paper specifically directed to cancellation, non-disclosure and breach of warranty. The Commission was currently in the process of drafting its report which would shortly be submitted to the Chancellor who would proceed with preparation of an appropriate Bill. But the task was complicated and in some respects puzzling, because of the various Directives which had been and were likely to emerge from Brussels. For example, there was already a Directive on rights and liabilities arising out of non-disclosure with its proportional rule and the draft on the co-ordination of insurance law which affected the Services Directive. The views of all insurance parties on these had to be considered.

The speaker recalled that as long ago as 1955, a Commission had been set up under the Rt. Hon. Lord Justice Jenkins to report on legal aspects of "Conditions and Exceptions in insurance policies". In their report (issued in 1957) they recommended that in the area of non-disclosure regard should be paid to the reasonable insured and not the prudent insurer. They also recommended that a mis-statement in a proposal should not provide an insurer with a defence unless it was qualified by "To the best of my knowledge and belief". This view was highlighted by the Court of Appeal in the recent Lambert case where a claim for loss of jewellery was repudiated because the insured's husband had served a term of imprisonment years previously. "It was high time for changes" they had said. The proposed Directive on Insurance Contracts, however, was the subject of opposition from the BIA and Lloyd's and the CEA did not relish it. Was it not therefore perhaps logical for the Commission to make their own proposals for changes in English law

outwith any EEC considerations? While there was an urgent need to eliminate repetition of cases like that of Lambert it would perhaps be a mistake to pre-empt a Directive however unsatisfactory. It therefore appeared that two alternative courses were open to the Commission - either to voice criticism of the Directive or to dissent from it entirely and recommend independent action. There was also a need to anticipate expansion of the EEC itself and even a kind of world-wide application. The recommendations would not apply to MAT business.

Sir Michael said that in practice the proportional rule (relating to non-disclosure) was not working well, although theoretically it could be applied in any territory where a tariff existed. However, Sweden had abolished it and in France it was used with discretion.

The 1957 Committee had contemplated the need to legislate for actual insurance situations and the same problem now confronted his team. The Directive contained complex provisions about non-disclosure and the time-table was unworkable. A fundamental point of difference between EEC thinking and that of the Commission was the "long-term" attitude of Europe compared with the British accent on continuing duty of disclosure - at all events on an annual basis.

In the ultimate what should the Commission do? They were directing their thoughts back to those of the Jenkins commission. The duty of disclosure should be modified - not abolished - and the proposer should be safeguarded by well understood warnings. There might even be a case for bringing in MAT business to its recommendations: the 1906 Act had been the result of efforts by the Commission and non-commercial interests. Insurance had been exempted from the Unfair Contract Terms Act in exchange for the code of conduct advocated by the market but this was unsatisfactory. The answer was to legislate so that no one abused their rights in respect of non-disclosure or warranties. On this latter aspect Sir Michael cited the injustice of a company refusing to pay a claim for a stolen car on the grounds that it was in an unroadworthy condition. He concluded by saying how unfortunate it had been that the Jenkins proposals had been left on the shelf for 22 years.

In reply to a suggestion that innocent representation under a personal insurance should cease to be effective one year after inception, the speaker commented that his Committee had been very exercised on the question of renewals, especially because of their very frequency. Although a representation could not be regarded as a warranty, their idea was to provide the insured at renewal with a photocopy of his proposal with a request for a supplementary declaration. Another questioner pointed out that concern over personal insurances in the international field seemed quite irrelevant because no one was likely to seek to insure in another country. However, Sir Michael explained that Brussels was oblivious to the distinction between the large industrial and the individual insured and also to the concept that the bulk of the British non-life business was transacted abroad. This misconception stemmed from the long and intimate association between the Benelux countries which all had common frontiers and in many cases similar laws. In reply to a question on reinsurance, Sir Michael remarked that his terms of reference specifically excluded reinsurance. A spokesman for the CBI Industrial Users Panel said they had little fault to find with the EEC Insurance Contracts Directive but Sir Michael suggested that they might have further thoughts when the Commission had reported.

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