3. UPDATE ON PROPERTY INSURANCE LAW
by Andrew Longmore, Q.C.

It may be convenient to deal with recent developments under six headings.

I. Theft and Forgery.

(1) Does a theft by a driver of goods on board his lorry occur when he forms the intention of stealing the goods (in his employers' depot) or when he deviates from his proper route? Insurers covered theft of goods in the assured's "yard".

Answer. It depends when and where the act of "appropriation" takes place. Assured would have to show the decision to steal was made in the yard, otherwise his claim fails. A conditional intention to steal, if events are favourable, is not enough. Theft has the same meaning in an insurance policy as in the criminal law, Grundy v. Fulton (1983) 1 Lloyd's Rep. 16.

(2) If cash in transit policy has a limit of £20,000 for any one loss of cash "between vehicles and premises" and the cash is lost in a post office yard after leaving the vehicle but before arrival in the post office building, is the cash lost between the vehicle and the premises or on the premises?

Answer. "Premises" means buildings and the cash was lost between vehicles and premises so that the limit applies, Mint Security v. Blair (1982) 1 Lloyd's Rep. 189.

(3) Limits in goods in transit policies for non-ferrous metals such as aluminium strips apply whether or not the liability of the assured to the goods-owner is a common law or C.M.R. liability Avandero v. National Transit (1984) 2 Lloyd's Rep. 613.

(4) If policy provides cover for losses sustained by the Assured for losses sustained on account of forgery or fabrication of documents, can the assured recover not merely the sums lost but also sums for loss of use of the money and extra overdraft interest?

Answer. Loss of interest on the money was not caused by the forgery or fabrication since the Assured had been put in funds by their holding company and the holding company (although itself also an assured) had done so because they assumed that the need for money was a genuine and proper need Courtaulds v. Lissenden (1986) 1 Lloyd's Rep. 368.

II. **Fire.**

The burden on an insurer to prove arson or deliberate act by the insured has been confirmed as being a heavy burden on proof.
Watkins & Davis v. Legal and General (1981) 1 Lloyd's Rep. 674.
S. and M. Carpets v. Cornhill Insurance (1982) 1 Lloyd's 423.
If a judge at trial reaches a conclusion which is unsupportable on the evidence, the Court of Appeal will not "do its best" on the written evidence but will usually feel that there is no alternative to a new trial.
Exchange Theatre v. Iron Trade Insurance (1984) 2 Lloyd's Rep. 169.

III. **Explosion.**

If a piece of machinery such as an impeller, required to blow air into a furnace, fractures into several pieces some of which strike and break through the inner brick layer of the building in which it is housed, is there an "explosion"?.

Answer. The failure and fracture of the impeller is not an explosion; the predominant cause of the damage was centrifugal disintegration. For the meaning of an ordinary English word, it is better not to get too immersed in dictionary definitions, Commonwealth Smelting v. Guardian Royal Exchange Assurance (1986) 1 Lloyd's Rep. 121.

IV. **Joint Interests in Property.**

(1) If there is contractors all risks insurance on a site at an oil refinery and damage is caused by sub-sub-contractors during dismantling of equipment but all the parties are covered by the same insurance policy, can the insurers pay off the main contractors for damage to the property and then use their name to sue the sub-sub-contractors at fault?

Answer. If, as is usual, the insurance is an insurance on property not on liability, all the contractors are insured for loss in respect of that property and one co-insured could not sue another co-insured under the same policy Petrofina v. Magnaload (1984) Q.B. 127.

(2) If landlord leases property to tenant and tenant agrees to pay insurance rent as a proportion of cost of insuring the whole building and landlord agrees to keep building insured and lay out insurance money in rebuilding and building is destroyed by tenant's negligence, can the insurer (in the name of the landlord) recover damages from the tenant?

Answer. The insurance was for the joint benefit of both parties and the landlord would have no right of suit to which the insurer could be subrogated. Rowlands v. Berni Inns (1986) QB 211.

V. Alterations in the Risk.

Any alteration in the risk after negotiations begin but before the contract of insurance is made must be notified to underwriters, otherwise the police may be voidable for misrepresentation. It is much less clear whether a material alteration after the contract is made will discharge the underwriter from liability. The better view is that:-

(1) If there is an alteration to the identity of the subject-matter of the insurance, the insurer is not liable;

(2) If the risk is defined in the policy and the alteration does not come within the risk as so defined, the insurer is not liable;

(3) If the risk is defined so as to include a description of the purpose for which the subject-matter of the insurance is used, it must be being used for that purpose at the time of loss; if it is not being so used, the insurance does not apply during that period.

There is often an express term prohibiting alterations by which the risk is increased.

Recent authorities.

(1) If a prospective vendor of property takes out insurance against the risk that the purchaser will not pay the instalments of the purchase price and if the vendor informs the insurer before the contract of insurance is completed that the price is to be paid in 77 instalments but he later agrees with the purchaser that the price can be paid in 154 instalments, can the insurer disclaim liability for the purchaser's default?

Answer by Lloyd J:- the insurer can say that there is no liability because there is no liabiliaty because there has been a material variation of the risk, Hadenfayre v. British National (1984) 2 Lloyd's Rep. 393. If the variation should have been disclosed if the contract of insurance had not been concluded, it was sufficiently material to discharge the contract after it had been made.

But it is most doubtful if there is any such general doctrine of discharge by material alteration. The question should have been decided by

reference to the policy terms and if there was no term as to the number of instalments, the underwriter should not have been able to escape. In fact he was held to have affirmed the contract.

(2) If a crane is insured during construction and commissioning at a site at Loch Kishorn in Wester Ross and the policy provides that, if there is any material change in the risk insured, the insurers are to be notified, is the commercial use of the crane something of which insurers should be notified?

Answer: Yes. Construction and commissioning are different from commercial use, Linden Alimak v. British Engine Insurance (1984) 1 Lloyd's 416.

(3) If a proposal for cash in transit insurance sets out various operating procedures e.g. as to the maximum amount in any one container or as to the experience and training of the guards in vehicles and the assured warrants that there will be no variation or alteration of such procedures, a casual non-observance by the assured's employees does not amount to a variation Mint Security v. Blair (1982) 1 Lloyd's Rep. 188, 197.

(4) If a policy provides for its avoidance in the event of "any item in regard to which there be any alteration whereby the risk of damage is increased", this refers to the subject-matter of the insurance and does not apply to an additional hazard such as a petrol generator which does not, of itself, alter the building where it is. Exchange Theatre v. Iron Trades (1984) 1 Lloyd's 149.

VI. **General.**

The most important development in the general common law of insurance is in relation to the doctrine of non-disclosure and misrepresentation, as exemplified by C.T.I. v. Oceanus (1984) 1 Lloyd's Rep. 476. Although it was a marine case, it applies to property insurance as well as other forms of insurance. For present purposes it is sufficient to note that the Court of Appeal have held

(i) that the question of materiality is for an expert (not the particular) insurer to answer;

(ii) that it is sufficient for the expert (hypothetically) "prudent" insurer to say that he *might* have taken a different course if he had known the true facts; he need not go so far as to say that he *would* have done;

(iii) that the insurer does not waive any right to avoid the insurance contract for non-disclosure or misrepresentation, unless he acts with *full actual* knowledge of the facts and matters giving rise to his right to avoid.

4. UPDATE ON REGULATION INCLUDING FINANCIAL SERVICES

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Overall, there are a number of different trends in regulation:

Consumer legislation, a major form of regulation, has, I suspect, peaked: the present level of regulation may be expected to continue for some time.

Regulation of business and employment is now clearly in decline, and may well continue to be so under any government, save perhaps where monopolies and mergers are concerned.

In the financial field, two superficially conflicting but actually complimentary forces are at work: regulation and deregulation.

Deregulation aims to create greater competition and consumer choice. It is being applied in two ways. First, the ending of some restrictive practices concerning: the Stock Exchange (including single capacity limitations, recently imposed, however, at Lloyd's); advertising and promotion by the professions, charging agreements within them, and the Office of Fair Trading's enquiry into their partnership structures; and charges on unit trusts.

Secondly, the ending of legal and regulatory limits on competition between institutions together with changes in taxation, has enabled the extension of the range of sources for personal portable pensions, consumer mortgages, other financial services to Building Societies and to Unit Trust Groups etc. These formidable changes are producing greater competition and consumer choice whilst bringing a number of industries to one market place.

The changing financial world of one global securities market, developing with the UK well-positioned, gives us the need for both competition and regulation to international standards.

There is more competition betwen equity-based and fixed-interest products, leading to greater diversity, and the intermediary's position as adviser has developed. The present regulatory system does not cover all activities, life and pensions in particular.