exclusion contained no terms for the rounding up of the 480 hours that the pilot had nor did it contain any suggestion that the hours would be "approximately 500 hours". The Defendants' argument of "substantial compliance" was rejected. Alternatively there was a misrepresentation which was materially false and detrimentally relied upon by the insurers who had another basis for denial in this. The Court did not address a second exclusion arising from the fact that the aircraft was certificated for two persons but carried three at the time of the accident.

In conclusion, some comfort can be drawn from the example which has been set recently in the settlement of claims arising from the Manchester disaster. Arrangements between prospective Defendants which will enable prompt speedy and comprehensive settlements to be paid to passengers while reserving the rights of the parties against one another, serve well not only the interests of the aviation industry and those carried on their products but also reflect well on the legal system and the insurers. It is to be hoped that this example can be followed in future cases and that we in U.K. and Europe will be able to demonstrate to those across the Atlantic that the lessons we taught them centuries ago still hold good and are worth achieving.

3. UPDATE ON PROPERTY INSURANCE LAW AND PRACTICE: by John Thomas, Q.C.

The past year has seen only a few cases on property insurance and related subjects and some of those reported are of no importance and add nothing to existing authority.

On fire insurance, there is one case of interest – the decision of Staughton J. in *McLean Enterprises Ltd.* v. *Ecclesiastical Insurance Office* (1986) 2 Lloyd's Rep 416 on the question of reinstatement. The insured premises was a small country house hotel that had been insured for £375,000; that sum had been agreed following a visit from the underwriters' surveyor about eight months before the fire that seriously damaged the premises. Between the date of the visit of the underwriters' surveyor and the fire the premises had been valued at £300,000. Underwriters' primary case was that the fire had been deliberately caused; in this they were unsuccessful, but were successful in their contention that the insured was not entitled to recover on the basis of the reinstatement value, but only on the basis of the lower market value. Two points were taken on reinstatement:

The first was a point of construction. The policy (which covered both the premises and the contents) provided that underwriters would pay:

> "the value of the property at the time of the happening of its destruction or the amount of such damage or at its option replace such property or any part thereof"

The policy went on to provide, as usual, that the underwriters' liability was not to exceed the sum insured. This provision was, however, modified by two extension clauses of the policy. One of these headed "reinstatement" extended the policy so that recovery was to be on a reinstatement basis for the insured items covered by the extension. The items covered by the extension were defined as:

> "property designated contents (and specific items of contents but not personal effects)..."

Underwriters contended that this extension only covered that part of the property insured which was "designated contents" and not the buildings. The assured contended that as it referred to "property" and "designated contents" (though without the use of the word "and") it covered both the buildings and the contents. The Judge observed that:

> "The problem would not have arisen if the draughtsman had been in the habit of using commas; but his punctuation was confined to full stops, brackets, inverted commas, apostrophes and the occasional colon. (Quite why punctuation should be so restricted in a document that is meant to be read by ordinary people, as opposed to deeds and wills which are intended to be read by lawyers, I do not understand)"

Taking that clause alone the Judge was inclined to the view underwriters were correct, but the second clause extending the cover lead him to the opposite conclusion; that clause headed "Local authorities clause" provided that the cost of reinstatement was to include the cost of complying with regulations made under Acts of Parliament and Local Authority bye laws. As the Judge observed it would have been absurd if that clause applied to the reinstatement of contents and not buildings and equally absurd if the basic cost of reinstatement was not covered but the cost of meeting regulatory requirements was. He concluded that the policy was ambiguous and that it should therefore be construed against underwriters.

However, although underwriters were thus unsuccessful on the point of construction, they were successful on their other point on reinstatement. The extension clauses of the policy provided that no sums were payable for reinstatement until the cost of reinstatement was actually incurred. The property had not been reinstated but sold. The assured answered this by contending that they had not reinstated because the underwriters in breach of the policy had declined to pay; to allow underwriters to escape payment therefore would be to allow them to take advantage of their own wrong. Although leaving the correctness of this argument open for decision in a future case, the Judge decided on the facts of the present case that the argument failed because even if the underwriters had paid, the assured because of their financial condition would not have reinstated anyway.

If the point that the Judge left undecided were to arise in a future case, I would anticipate that these days the assured would succeed provided he could show that he would have reinstated, if underwriters had paid. It is difficult to see how underwriters could complain of such a result as they would merely be paying what they had agreed and is to be contrasted with what would have happened to them in such circumstances in many jurisdictions on the other side of the Atlantic.

Another decision of Straughton J. is of considerable interest and importance on the question of how illegal conduct can affect the assured's right of recovery under a policy. In *Euro-Diam Ltd* v. *Bathurst* (1987) 1 Lloyd's Rep 178, the assured were a UK company dealing in diamonds. They were insured in respect of the sending of diamonds on a worldwide basis under a non-marine contract of insurance. A consignment exported to West Germany on a sale or return basis was stolen when covered by the policy. The consignment had been sent under an invoice which substantially understated the price at which the diamonds were in fact to be sold. The Judge found that the assured had issued the invoice at the request of a middleman who was working in Germany without a residence permit; he accepted the evidence of the assured that this had been done foolishly but that the assured must have realised (as it was obvious) that the purpose of the invoice was to deceive someone, most probably the West German Customs. The Judge also found that the invoice was in fact used by the West German importer to deceive the West German Customs, as it had been presented as evidence of the value of the consignment on which tax was to be paid. He therefore found that various offences had been committed under German Law – tax evasion by the importer, endangerment of tax by the assured and working in breach of German regulations by the middleman. The Judge found that the assured must have known of only one of these offences – the evasion of tax by the importer.

None of the offences in any way caused the loss, but underwriters resisted liability on the basis of these offences, putting their case in two ways: (1) it was an implied term of the contract that, as far as the assured could control the matter, the adventure was to be carried out lawfully and (2) the claims were tainted with illegality. They failed on both points.

Implied term argument: The implied term argument was put in two ways – that the term should be implied either as a matter of business efficacy or that it should be implied from s.41 of the Marine Insurance Act which provides that it is a warranty that the adventure is lawful and that, as far as the assured can control the matter, the adventure be carried out in a lawful manner. The Judge rejected the first way in which the argument was put with little difficulty. As to the second, the policy was not a marine one and thus the provisions of s.41 could only be implied if they set out a principle of law applicable to all insurance. The Judge held that a non marine policy did not insure an adventure and that therefore s.41 which dealt with the legality of adventures only applied to marine insurance. To have held otherwise would, he observed, have created absurditities in non marine insurance. Because the effect of a breach of warranty is to discharge the underwriters from the time of the breach, could it really be suggested by motor underwriters that they did not have to pay for the theft of a car in June when it had been used for speeding in January?

In view of his conclusion that s.41 did not apply at all, he did not have to decide whether the section applied to an adventure that was only illegal by foreign law. He however expressed the view that he doubted whether it did.

The point on s.41 is interesting as showing that despite observations that in many respects the rules between marine and non marine insurance are the same (for example the decision of Steyn J. in *Highlands* v. *Continental* (1987) 1 Lloyd's Reports 109 that the principles in s.18 of the Act relating to non disclosure applied to non marine insurance), there are some crucial differences.

Argument that the claim was tainted with illegality: The first question on this argument that the Judge considered was whether if the acts concerned had been illegal by English law the assured would nonetheless have been entitled to recover. In holding that he would have been entitled to recover, the Judge concluded that a claim was only tainted with illegality and recovery would be denied if:

either

(a) the assured needed to plead or to prove illegal conduct to establish his claim;

or

(b) the claim was so closely connected with the proceeds of crime that to allow recovery would offend the conscience of the Court.

As the assured did not have to plead or prove illegality – he could establish his claim without relying on the invoice – and as the claim was not connected with the proceeds of crime, he could recover.

In view of his conclusion on this question, the Judge did not strictly have to deal with the second question on this point, namely whether underwriters could rely on taint with illegality, not under English law, but under foreign law. Nonetheless he dealt with this interesting point in his judgment. He concluded that a claim under an English insurance contract would only be tainted with foreign illegality if (i) the transaction from which the taint arose would not be enforceable here by virtue of the illegality and (ii) there was a sufficient connection between the transaction and the claim that would debar recovery on the principles applicable if the conduct had been illegal under English law. On the facts of the case, although the contract would not have been enforced by an English Court because of the illegality, the illegality was not sufficiently connected to the claim to debar recovery.

The issues raised by the case are important as there has over the years been (and there will no doubt continue to be) debate over the extent to which illegal conduct should affect the right to recovery. After all a number of types of insurance expressly insure the assured against his own illegal conduct. This judgment is significant in that it sets out the principles to be deducted from a number of cases in such a lucid and helpful manner.

I understand that an appeal has been made by underwriters and that the case is due to be heard by the Court of Appeal in October. I would venture to express the opinion that the conclusion of Staughton J is correct and I would not expect the appeal to succeed.

Finally I turn to a decision that is not on property insurance, but is a case that raises an interesting and important point on the meaning of "claim" and is topical as I understand it is to be heard by the Court of Appeal in mid September.

Steyn J. in *Thorman* v. *New Hampshire Insurance,* 23 December 1986, so far unreported, a case on architects' liability insurance, was concerned among other points with the meaning of the word "claim" in a primary insuring clause as there was a dispute on the question as to which policy years the claim attached. After referring to the earlier decision of Devlin J. in *West*

Wake Price v. *Ching* (1956) 2 Lloyd's Rep 618, a decision on an accountants professional indemnity policy as to whether if there were several causes of action including one for dishonesty, there was one claim or more than one claim, he concluded that claim in the primary insuring clause meant:

> "the assertion by a third party against the insured of a right to relief because of the breach by the insured of the duty (set out in the insuring clause)."

He illustrated this definition thus:

> "If an employer asserts that he suffered loss due to faulty workmanship in respect of the floors and roof of a building, and this assertion is notified to the insurers, that may be regarded as one claim. But if he subsequently adds a new and unrelated assertion of damage to windows which is passed on to the insurers, both the man of business and the lawyer would say that it is a new claim under the policy".

There are, however, two other decisions where the word "claim" has been considered and it would appear that they were not cited. These were two cases on excess or deductible clauses: *Australia & N.Z. Bank* v. *Colonial & Eagle Wharves* (1960) 2 Lloyd's Rep. 241 and *Trollope & Colls* v. *Haydon* (1977) 1 Lloyd's Rep. 244. In the first case, (which concerned a wharfinger's liability policy), McNair J held:

(i) "claim" could mean either "the right to make a claim" or "the assertion of a right to make a claim", and in either of these senses could mean a claim against the insured by his client (or customer) or a claim by the insured against underwriters; it could therefore have four possible meanings in the excess clause.

(ii) in the clause in question, claim meant the occurrence of a state of facts which justified a claim on the underwriters, but did not mean the actual assertion of a claim against underwriters.

(iii) it was immaterial to the operation of the clause in what form the client asserted his claim against the insured or the insured formulated his claim against the underwriter; what mattered was not the form in which the claim was asserted but the facts giving rise to the claim.

This decision was followed by the Court of Appeal in the second case – a decision on builder's liability insurance; the Court observed that it was a question of fact whether the occurrence of a state of affairs gave rise to one or more claims:

"If there were several defects at the same time in the same dwelling, each contributing to rendering that dwelling unweathertight, I think it would be absurd to treat them as giving rise to several claims rather than to one. At the other extreme, I think it would be absurd to treat all the failures and defects in all the dwellings as giving rise to only one claim" (per Cairns L.J. at p 249).

It is unfortunate that there is now differing authority on the meaning of "claim" – the two cases on deductibles treating a claim as the existence of a state of facts that justified the making of a claim and *Thorman* defining claim as the assertion of a right to claim; the fact that the two earlier cases concern an excess clause and the recent case the primary insuring clause makes no difference; the distinction in the two types of clause can only make a difference to whether claim means a claim against the assured or a claim against the underwriters.

It will be interesting to see how the Court of Appeal resolve the question and on this Appeal I would not be so rash as to venture an opinion.

4. UPDATE ON REINSURANCE LAW
by Jonathan Mance Q.C.
(The following notes formed the basis of Mr. Mance's presentation)

1.1 **Insurers carrying on business in contravention of Insurance Companies legislation:** In *Phoenix General Insurance Company of Greece* v. *ADAS* (1986) 2 Ll.R.552; (1987) 2 W.L.R.512, the Court of Appeal in 22 pages of obiter dicta concluded that lack of authorisation by an insurer renders *both* the original insurances *and* the insurer's reinsurances illegal and unenforceable – whether the party seeking to enforce them is the unauthorised insurer or (subject to the crumb of comfort that in some circumstances there might be an express or implied collateral warranty enforceable in damages) an innocent original insured.

1.2 The CA felt compelled to this conclusion by the wording of the legislation, despite the legislation's general purpose to protect insureds. An appeal to the HL is understood to be pending.

1.3 Note that in *European Commission* v. *Federal Republic of Germany* Case 205/84 (F.T. 13/1/87 – The Schleicher Case), the European Court has held that a requirement of authorisation may be maintained by member states but *only* in so far as justified as grounds relating to the protection of policy-holders and insureds. Ought not the *consequences* of non-authorisation under English law to comply with this principle?