"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?

1.4 In respect of any unauthorised insurance business underwritten *since* 12th January 1987, the C.A.'s conclusions is *Phoenix* v. *ADAS* are in any event inapplicable. They are expressly regulated by section 132 of Financial Services Act 1986.

2.1 **Jurisdiction**

Civil Jurisdiction and Judgment Act 1982 and the Conventions scheduled to it are now in force in U.K.

Section 3 of the 1968 Convention (Jurisdiction in Matters relating to Insurance) is probably *not* to be regarded as applying to reinsurance (Schlosser Report – see section 3). So third party proceedings v. reinsurers should remain possible in European countries: see Article 6(2) of Convention and also *Citadel* v. *Atlantic* (1982) 2 Ll.R. 543, 549.

3.1 *Discretion in exercising or restraining exercise of jurisdiction: Islamic Arab Insurance Co.* v. *Saudi Egyptian American Reinsurance Co.* ("IAIC v. SEARCO") (1987) 1 Ll.R. 315 C.A. applied principles of *The Spiliada* (1987) 3 W.L.R. 971 H.L. – and took into account the "specialist Court and specialist lawyers (available in English forum) which it is common ground Saudi Arabia has not" in reinsurance matters.

3.2 *E.I. Du Pont* v. *Agnew* C.A. (21/7/87) Original (liability) insurance, subject to English law. Claim to recover under insurance punitive damages awarded in tort in, and uninsurable by public policy of, Illinois, Held: claim should be tried in England. A similar issue could arise in respect of "punitives" awarded against an insurer in the U.S. (e.g. for bad faith in rejecting or handling a claim) if uninsurable by the relevant state law.

3.3 *South Carolina Insurance Co.* v. *"Seven Provinces"* H.L. now reported (1986) 2 Ll.R. 317, and referred to in *S.N.I.A.S.* v. *Lee Kim Jak* (1987) 3 W.L.R. 59 P.C.

4.1 **Proper law**

Fors. Vesta v. *Butcher* (Hobhouse J.) which accepted the possibility of a hybrid reinsurance contract – one subject primarily to English law, but nonetheless incorporating from the original insurance contract a block of terms to be construed according to another law – is now reported at (1986) 2 Ll.R. 179, but awaiting judgment on appeal expected to be given in October 1987.

4.2 *IAIC* v. *SEARCO* (see 3.1 above) also considers proper law of R/I contract in respect of Saudi Arabian insurances where

(i) R/I was treated as if it was London market business, with wording as agreed by leading London underwriter of parallel business and

(ii) Saudi Arabian Courts were known to be reluctant to recognize R/I. Proper law held arguably English as "closest system".

5.1 **Good faith, misrepresentation and non-disclosure.**

Highlands Insurance Co. v. *Continental Insurance Co* noted at (1987) 1 Ll.R. 109 recognises the marine insurance tests (*CTI* v. *Oceanus* (1984) 1 Ll.R.476) as applicable generally.

5.2 *Banque Keyser Ullmann S.A.* v. *Skandia* (1987) 1 Ll.R. 69 Steyn J. (under appeal) could well find reinsurance application.

6. **Title to sue:** The *Transcontinental Underwriting Agency* v. *Grand Union Insurance Co. Ltd.* (Hirst J. 31/3/87) recognises right of a broker or underwriting agent who effects a reinsurance in his own name (albeit also for his principal) to sue on it, holding the recoveries on trust for his principal: see also *Lloyd's* v. *Harper* (1880) 16 Ch. D 290; *Woodar* v. *Wimpey* (1980) 1 W.L.R. 277.

7. **Nature of reinsurance claims:** *Edmunds* v. *Lloyd Italico* (1986) 1 Ll.R.326 applies to reinsurance the general (though anomalous) insurance rule that claims sound in damages, not debt. The distinction though technical may be important – e.g. when considering set-off in respect of companies under schemes of arrangement and so outside the mutual set-off provisions applicable on statutory insolvency.

8.1 **"All terms, clauses and conditions as original", and arbitration clauses:** *Pine Top Insurance Co. Ltd.* v. *Unione Italiana Anglo Saxon Reinsurance Co. Ltd.* (1987) 1 Ll.R. 476 (Gatehouse J.) (i) treated "original" in a retrocession as referring to original insurance, not reinsurance and (ii) rejected any incorporation of insurance or reinsurance arbitration clause into retrocession as inapt. A healthy antidote to over-extensive use and over-expansive contruction of such phrases as "terms as original" in R/I documents.

8.2 Note also Reinsurance Law by Butler and Merkin (published 1986) - where at paragraph B. 1.2 15-16 a lively blast is directed at the treatment in *Vesta* v. *Butcher* of the phrase "warranted same terms and conditions as original" as effecting a complete incorporation.

9. **Construction:** *Stratton & Phillips* v. *Dorintal* (1987) 1 Ll.R. 482 tackles the perennial question: To what do the percentages in a R/I slip relate? (See e.g. *Wace* v. *Pan Atlantic* (1981) 2 Ll.R. 339, 349). Since the R/I order will frequently be unkown the customary answer is the 100% limits referred to on the slip.

10. **A future prognosis:** (a) Continuing Trans-Atlantic jurisidictional disputes, and (b) reinsurance litigation to resolve the effects of the U.S. courts' rulings on asbestosis and (possibly thereafter), hazardous waste.

MEMBERS' CHOICE
1. DUTY OF CARE AND DISCLOSURE UNDER HOUSEHOLD POLICIES
by Derek Cole

Have you read your Household Policy recently or more important still have you looked at the proposal form you completed when you took the Policy out? It may well be that you do not even have a copy of the form that you originally completed, and therefore will be unable to remember what was said or stated at the time. Action on both these matters could prove vital to avoid problems in the event of a loss.

Duty of Care

Duty of Care on the part of an Insured appears to be fairly straightforward. An Insurance Policy is based on Uberrima Fides – Utmost Good Faith – and in my opinion the insured is expected to act in a reasonable manner i.e. as if he was uninsured. Fraud is an exclusion in all policies for obvious reasons. If the insurers are wise they will make it very clear to the insured in the policy by a warranty that "the insured will take reasonable steps to protect the property and prevent accidents", and some insurers, add "and maintain the property in a sound condition and good repair".

What are 'reasonable steps to protect property'? One has only to read the Ombudsman recent reports of 1985/86 to discover that it is unreasonable to leave ones personal effects on the beach unattended whilst going for a swim, or to leave valuables in a car overnight because you are too tired to take them into the Hotel where you are staying. However, the Courts have held that it was reasonable for a lady to carry nearly £30,000 worth of jewellery in her handbag resting on a trolley whilst at Gatwick Airport. Had she left the trolley to go to a self-service food bar instead of her concentration having been momentarily distracted by her children causing an opportunity for