sufficient to note the following points of doubt involved in the case, most of which will doubtless be aired before the House of Lords some time next year (1989).

(1) Given that the insurer does owe a duty of utmost good faith, to what does it apply? Can it, as the Court of Appeal thought, extend to the prospects of a successful claim by the assured under the policy, or is it limited to factors which might reduce the premium which the assured is willing to pay?

(2) Is there a worthwhile remedy? According to the Court of Appeal, reversing Mr Justice Steyn, damages are not available. Moreover, the Court of Appeal ruled that damages in *tort* were not available, on the basis that damages for economic loss should not be awarded for failure to speak.

(3) Is the insurer's duty of utmost good faith a continuing duty, that is, does it operate after the contract has been formed?

Insurers are awaiting the answers to these questions with bated breath.

The Proposed Directive on Winding Up of Insurance Undertakings

by A.P. O'Dowd, Assistant Manager, International Department, Lloyds of London

The idea of an EC directive on the winding up of insurance undertakings has been about for a long time. The first text, on which there was consultation in the mid-seventies, stood by itself. Later there was going to be a Bankruptcy Convention, harmonising the general law of bankruptcy throughout the Community and the directive was conceived as an adjunct to that. Now the Convention has been shelved and the directive has re-emerged as an independent document (Official Journal C71 of 19 March 1987). It has been formally proposed by the Commission to the Council of Ministers and is at present awaiting discussion by the European Parliament.

The proposal does not attempt a comprehensive harmonisation. It is based upon a single central idea which is seen as a guarantee that policyholders in all Community countries will receive an equal degree of protection in the event of failure of an insurance enterprise which has carried on business in more than one country.

The idea is that the assets representing the technical reserves should be segregated from the rest. They should then constitute a fund earmarked for the policyholders. There should be a pooling of these funds from the head office and all the branches in

the Community, under the control of a liquidator appointed in the head office country, and claims against these funds should be dealt with under a single set of rules.

The directive contains no rules for the distribution of the "free assets" (ie those outside the earmarked technical reserve fund). Here existing national legislation will continue to apply.

This central idea seems reasonable enough at first sight. Its translation into practice, however, gives rise to great difficulty. The first question is, how are the assets representing the technical reserves to be segregated? The answer proposed is that every insurer must keep a register of these assets. Article 2.3 requires that the total value of the assets entered in the register "shall at all times be not less than the value of the technical reserves". If this implies a daily adjustment of the register, a very heavy administrative burden is being imposed. If it will be sufficient to do the necessary calculations at the end of each financial year, there will be room for considerable disparity between the amount shown in the register and the amount actually required to meet liabilities to policyholders when a winding-up order is made.

Next there is the thorny old question of gross and net reserving. Article 2.3 attempts to answer that question by providing that liabilities are to be computed gross but the assets in the register may include reinsurance claims. A reinsurance claim, however, comes into existence only after the events to which it relates. It is not possible, at the moment when a winding-up order is made and the register, according to the directive scheme, is "frozen", for the register to include all the relevant re-insurance claims. Many of these can only be formulated in the course of the winding-up proceedings.

Given that the register will unquestionably involve insurers in additional work and cost, it ought not to be required unless it can be shown to serve a useful purpose. Since the overwhelming majority of insurers do not go bankrupt, most of the work involved will be wasted but it is far from clear that it will be worth while even in the cases where bankruptcy does occur. Liabilities to policyholders dwarf all other categories of liability for insurance enterprises. A bankrupt insurer usually cannot pay all his policyholders. Therefore the concept of two neat pots of money, one sufficient to satisfy the policyholders and the other to be shared out among the remaining creditors, has little reality. In practice, the technical reserves of a bankrupt insurer are inadequate. To give policyholders a preference over the technical reserves and to give them a preference over the assets as a whole amount to much the same thing. Add the doubt whether a bankrupt insurer will have kept his register correctly and one is driven to the conclusion that the register will in most cases prove to have been a waste of time.

There are only two other major categories of unsecured creditor which an insurance enterprise is likely to have - its employees and the taxman. A preference for policyholders is likely to prejudice these two. Since prejudice to the employees would be a political stumbling block, the Commission has, in article 18.1, included employees among those who have a claim on the earmarked technical reserve fund. This is at variance with the basic concept of the directive and still further reduces the likely usefulness of trying to divide the assets into two funds.

Article 18 contains the order of preference applicable to the distribution of the earmarked fund and it creates a major difficulty. Claims on direct insurance contracts are given preference over claims on reinsurance contracts. Thus if an enterprise writes a book comprising half direct insurance and half reinsurance, its direct customers are very well off because they have a preferential claim over the reserves relating to the reinsurance business, which cushions any shortfall in the reserves generally. The reinsurance customers, on the other hand, are prejudiced by being left with the crumbs which fall from the direct customers' table. Therefore a ceding insurer is well advised to deal with a pure reinsurer in preference to an enterprise writing a mixture of business, while the direct customer should prefer the mixture to an insurer who does direct business only. It is not the function of winding-up rules to introduce this sort of distortion into the market. Article 18 as drafted is unacceptable.

The directive has not been introduced to meet any identified need; the Commission has not referred to any cases in which policyholders of a failed insurer suffered injustice because of the large share of the assets taken by other categories of creditor. It is a deeply flawed proposal which must be drastically amended if it is to be adopted at all. No tears will be shed if it is abandoned.

HONORARY SECRETARY'S REPORT 87/88

This has been my first year as Honorary Secretary of the Association and I have been somewhat awed by the excellence with which Ken Davidson and his secretary Jean Gerrish did the job before me. I have quickly discovered that the position of Honorary Secretary is very rewarding and enjoyable, but one which is burdened with a great deal of administrative routine. It was clear that a change of Secretary was the right time to reappraise how this routine was handled and your Committee decided to employ part-time help in the form of Kathy Maclaren (née Dixson), who not only copes with all the routine (thus avoiding the occasional panic) on the secretarial side, but has also been able to take a lot of the day-to-day work from the Treasurer.

Obviously this sort of help costs money and that is the main reason for the