BILA DEBATE

"The house considers current insurance contract law in the UK to be weighted in favour of insurers and to be in urgent need of reform".

by David M. Owen - London & Edinburgh Insurance Group

This was the subject of a lively debate conducted at the Sixth Annual BILA Conference on the 17th September 1991.

The panel selected to debate the motion comprised representatives from business as well as the academic world, ensuring that both the theory and the practice had adequate airing.

Professor John Birds of the Faculty of Law at Sheffield University brought to the debate his extensive background in the acadmic study of law to propose the motion, and he was ably seconded by Derek Cole whose lengthy practical experience as a broker and, more recently, as an expert witness ensured that the problems for the practitioner were not overlooked.

Opposing the motion were Duncan McMillan, currently Claims Director for the Janson Green Syndicate with a wealth of practical experience in dealing with the real contractual problems of insurance law when claims arise, ably supported by Tony Tudor of the Chartered Insurance Institute, currently Divisional Director for Examinations.

To ensure that the panel was kept in order, or at least to ensure that a certain level of objectivity was retained by the proceedings, Adrian Hamilton QC took the chair. However, even Mr. Hamilton had to admit that in dealing with insurance disputes the lawyer's attitude to insurers and insurance contract law may very much depend upon whom he is representing.

THE DEBATE
Professor J. Birds (Proposing the Motion)

Professor Birds was quick to identify that the motion was very broad in its scope and for the purposes of the debate he was limiting it very much to the areas covered by the ABI Statements of Practice, particularly with reference to non-disclosure and misrepresentation.

The historical perspective was clearly very relevant with the origins of insurance contract law in marine insurance, but it was apparent even from the early days, that the judiciary were conscious of certain areas where judges were obliged to apply insurance law strictly, although justice may have suggested otherwise. One Law Lord was even quoted as referring to the "mean and contemptible attitude" of a defendant insurer who chose to take advantage of the strict terms of insurance contract law!

It was not therefore surprising that the subject of reform of insurance contract law should have come under the scrutiny of both the Law Reform Committee and Law Commission, but in fact the only significant changes have been those of practice being implemented by the Association of British Insurers.

The first Statement of Practice of the then British Insurance Association was somewhat hastily drafted with a view to preventing the application of the Unfair Contract Terms Act 1977 to insurance contracts. This Statement of Practice was revised in 1986 and reissued in terms which specifically address the duty of disclosure and how the insurer should deal with this area.

So why is law reform still necessary?

Professor Birds felt that there were five substantial albeit overlapping reasons:-

1. The Statements of Practice are not legally binding - a liquidator of an insurance company would not necessarily consider himself bound to adhere to the Statements of Practice. They are made as conditions of membership for ABI members and also members of Lloyds, but they do not *legally* benefit the consumer.

2. A minority of insurers are neither ABI members, nor members of Lloyds, and it is therefore open for these insurers to take advantage of their strict legal rights. (This may be particularly pertinent in the context of wider freedom of services within the EEC). The DTI expects insurers who are not members of the ABI to

comply with the Statements of Practice, but Professor Birds was not aware of any mechanism for monitoring or controlling this compliance.

It might be argued that cheaper rates would be available from those insurers who do not comply, and that the consumer gets what he pays for, but this was not felt to be adequate protection for the consumer.

3. There is a real danger of uneven treatment of policyholders under current arrangements, depending on whether or not their insurer is a member of the ABI.

4. There must be certainty in the application of law, and there is no certainty at present. With increasing liberalisation, particularly within the EEC, more certainty is required and with the prospects of insurance law harmonisation in the near term rapidly receding, certain domestic changes are necessary in the short term. Such changes cannot be by way of code of practice, since this leads to further uncertainty and lack of even-handedness. What is needed is a carefully considered revision of law, even though there will always be an element of uncertainty arising from the interpretation of the law.

5. Unjustified hostility towards law reform - there seems to be a continuing hostility to formal legal reform although insurers were happy to accept codes of practice. This hostility existed when Professor Birds was involved in the Law Commission's work in this area and appears still to remain, although somewhat perverse in Professor Birds view.

Duncan McMillan (Opposing the Motion)

Mr McMillan countered Professor Birds with the benefit of 35 years' experience in the practice of insurance. He alleged that he came from a more humble and less distinguished background than Professor Birds but clearly had dealt with the issues in the real world of handling insurance disputes. His comments were based upon his personal experience and were not directly attributable to either the ABI or Lloyds.

No system is perfect and there will always be ambiguities and abuses. What was necessary was not reform but an attempt to iron out these inconsistencies. Law reform would inevitably lead to further litigation and further uncertainty, rather than increase certainty as proposed by Professor Birds.

Mr McMillan advocated further evolution rather than revolutionary reform and in any event no *urgent* reform was required. Reform had in fact been debated for many decades as evidenced by previous distinguished reviews by the Law Reform Com-

mittee and the Law Commission.

Mr McMillan's firm view was that the commercial orientation of insurers ensured a pragmatic approach and the strict interpretation by insurers of their legal rights would be constrained by these commercial and practical considerations. In any event, surely it was not too great a burden to ask an Insured for full disclosure of material facts within his knowledge. It is after all the insurer who needs protection, since he needs to know what risk he is underwriting.

In practice it is the private policyholder who is most exposed, due to his limited resources and knowledge. However, there are an increasing number of agencies to which the consumer may turn for help, including, of course, the Insurance Ombudsman Bureau with its very wide powers. Also both ABI and Lloyds have departments capable of dealing with consumer enquiries and complaints and, of course, the intermediary can and should involve himself with such problems to ensure the representation of his clients' interests. The larger commercial client has more muscle to flex. Once again it is the insurer who needs the protection and the role of the insurance broker is always important.

Confidence and trust is still necessary in the insurance sphere to make things work and if the legal requirements are relaxed in favour of the insured then they will be further open to abuse. This will cost everyone more and achieve very little benefit.

At the end of the day it is in the insurer's interest to act with extreme probity benefiting both the consumer and the market as a whole.

Derek Cole (Seconding the Proposition)

Mr Cole explained that he had over 40 years exposure to insurance practice at "the front end" being involved from the perspective of insurer, broker and expert witness. In his view, if one asked the man on the legendary Clapham omnibus he was likely to state that insurance was in fact a "blasted nuisance" - a world of small print and incomprehensible rules. Insurance law is archaic in its origins, based on the old Marine Insurance Act from the early part of the century which is now largely irrelevant. In those days surveys were not very common and indeed the underwriter would rarely leave his own chair in underwriting a risk. Such is no longer the case, Mr Cole submitted.

Peter Madge in his evidence to the House of Lords had identified the problem of how the broker can advise his client on what to disclose - how can he know what is material to the individual underwriter?

The Australian Insurance Contracts Act has retained the necessity for dislcosure of material facts, but applies a much more reasonable test as to materiality than currently exists under English law.

One fundamental problem with relying upon Statements of Practice is that the ABI Statement of Practice does not cover commercial insurances. The ABI's apparent presumption is that the commercial policyholder is better advised and better informed and therefore better able to identify what and how to disclose to the insurer. But have they ever sat down with a commercial proposer to justify these suppositions?

Similarly, why should a private motor boat be excluded from the benefits of the Statement of Practice, because it is a marine risk - why is this any different from a private motor car? - the policyholder does not change his expertise!

The disclosure requirement also causes a significant problem to the broker who may be placed in irreconcilable conflict of interest. If the insurer voids the cover for non-disclosure the broker may face being sued.

In any event in addressing disclosure of material facts, who is this fictitious character whom we are all to bear in mind, the "prudent underwriter"? Mr Cole alleges he has yet to meet this character.

Tony Tudor (Seconding the Opposition)

Mr Tudor was amused by the suggestion that "urgent reform" was necessary. This was not the case at all since it had been under discussion for a century or more, probably centuries, without any positive action.

In the 1980 Law Commission report the word "reasonable" wends its way through the whole report and wherever the word "reasonable" appears, this almost certainly means uncertainty.

Of course, uncertainty does exist at present but if a new law is proposed, this will create even more uncertainty.

In Mr Tudor's view for "reasonable" we can read "danger territory". What is reasonable for the underwriter to know? - Surely the proposal form and the advice of the broker can be relied upon. Wouldn't a reasonable man go to his broker for advice?

The recommended law reform would build uncertainty upon uncertainty and one

only needs to look at the Australian Insurance Contracts Act to see that case law under it is growing year by year.

It may have been John Locke who suggested that "life without law would be brutish and short" but we do have to be careful that law reform does not leave us with a life which is messy, expensive and uncertain.

Self-regulation may be a somewhat tired phrase, but it does work very well. The Insurance Ombudsman has been able to take insurance problems out of the legal arena and promote a practical resolution and this surely has to be a good thing. The question, therefore, needs to be asked, is it wise to regulate so strongly the commercial activities of insurers, since continued self-regulation would adequately meet the needs of the consumer. Law reform would unfortunately be a clumsy and inadequate solution.

Open Forum

The debate was then opened up to comments from the rest of the "house" which covered a wide range of points, including:

- The problems of conflicts of interests for the broker under Binding Authority Agreements.

- The need for clear law rather than pressure from the media.

- The need to specify more precisely the reforms required.

- Additional guidance to be provided by insurers as to the completion of proposal forms.

- The real cost of reform i.e. whether or not the customer is willing to pay for it.

- The distortion resulting from the duty of disclosure of the insured, when it is the insurer who really knows what information he requires.

- The lack of viable distinction between the personal and the commercial policyholder.

The debate also benefited greatly from contributions form the Insurance Ombudsman and his deputy who made very pertinent comments upon the practical application of

insurance law currently, which they have the "benefit" of overviewing. This includes increasing tendencies to side-step the disclosure problems by dispensing with the proposal form completely and relying upon specific exclusions. There is also the constant need to perform a balancing act in considering the merits of particular cases, given that insurance contract law is still a dynamic and constantly changing area of law.

Closing

In closing the debate the proposers and opponents had the opportunity to sum up their positions re-emphasising the perceived difference between the certainty of required law reform and the flexibility of current practice.

Ultimately the proposition was put to the vote, but notwithstanding the powerful argument put by John Birds and Derek Cole, the motion achieved only one third of the votes and failed, the balance of the house voting against the motion.

The debate identified many of the underlying problematical issues still current within insurance contract law, although it now seems likely that any reform may well be overtaken by action required by the European Community such as the draft Unfair Contract Terms Directive and other longer term endeavours to harmonise contract law across the European Community.

MINUTES OF THE ANNUAL GENERAL MEETING OF THE BRITISH INSURANCE LAW ASSOCIATION HELD AT UNIVERSITY COLLEGE, GOWER STREET, LONDON WC1 AT 12 NOON ON TUESDAY 17TH SEPTEMBER 1991.

1. APOLOGIES

Apologies for absence were received from Sir Denis Marshall, Sir Maurice Bathurst, Mrs Sue Johnson, and Messrs Cowtan, Gough, Foster, Griffiths and Bland.

2. MINUTES

The Minutes of the Annual General Meeting held on Tuesday, 18 September 1990 were approved.