# A PRUDENT UNDERWRITER REPLIES
## by Reg Brown, R.E. Brown and others.

Having been asked to reply to Peter Rogan's article, I am grateful for two things:

(1) Someone must think that I am a prudent underwriter
and

(2) I attended the conference run jointly by BILA and the CII on Utmost Good Faith as recently as the 6th May.

Peter Rogan must have written his article before the Seminar and could not have been aware in advance of some of the views expressed. I doubt if he would be surprised to learn that he has a great deal of support for his argument that the current law is unsatisfactory, if not absurd.

We are not concerned here about personal lines business which is the subject of the Association of British Insurers' Code of Practice and comes within the jurisdiction of the Insurance Ombudsman or other similar dispute resolution schemes. The Ombudsman, Dr. Julian Farrand, spoke at the conference and I get the impression that whilst there is much room for improvement, the scheme is working well and much of the demand for legislation has fallen by the wayside.

Many at the conference were sympathetic to the suggestion that we needed either a similar code of practice for commercial lines business or legislation. I was surprised to learn, particularly from the arbitrators in the audience, how many disputes there were and how bad they believe insurers' performance to be.

I racked by brains to think how many non-disclosure or misrepresentation cases I had been involved in during the last few years. I had difficulty in recalling more than half a dozen where I am the leading underwriter but accept there are bound to be more in the market where I am a following underwriter. It does not appear to me to be a serious problem. Maybe I am too reasonable for my own good.

The state of the market must have a lot to do with the current attitude of insurers. When the insurance product is so seriously under-priced as it is at the moment something has to give. Insurers cannot afford to be generous when it comes to claims and appear to be taking a stricter view than in the past.

Brokers would do well to remember that constantly driving the price down has its disadvantages and they ought to bear in mind the insurers claims handling record as well as price.

Comment was made at the conference that loss adjusters and solicitors had been briefed by a number of insurers to be tougher on claims and to watch for non disclosure or misrepresentation. Peter Madge made reference in his talk to first and third division insurers. The third division are involved in more disputes and take more obscure points than the first. I am not sure what happened to the second and fourth division insurers. Maybe the entire second division has been relegated and the fourth has gone bust.

Another point made very forcibly by Peter Madge and one with which I have some sympathy is that you have only got to look at the results of the insurance industry over the last year or two to reach the conclusion that there is no such thing left as a prudent underwriter. Prudent underwriters would not have got the industry into the mess that it is currently in.

How can it be right to impose a duty of disclosure on a proposer which is far above the standards exercised by insurers?

Nice one Peter! I found this argument very attractive but I did not fall for it entirely. I have to believe that there are still some prudent underwriters left.

Nor was I entirely sold on the innocent proposer with no idea as to what a material fact is and being totally unaware of what his duties of disclosure are. Brokers can help by explaining the duties and if the client is so badly informed with the law in its present state will he not be equally as badly informed as to any legislation which might codify the law? Brokers will still have a role to play in explaining the legislation.

The *CTI* judgment had certainly moved the balance in favour of insurers and the two examples given by Peter Rogan in his post *CTI* paragraphs illustrate quite clearly the difficult question posed by his interpretation of the current law.

I agree entirely that the view of the actual underwriter rather than the mythical prudent underwriter as to what is material to him must be relevant. And if evidence can be adduced that the particular underwriter held particular views about materiality which may have differed from those held by other underwriters then surely that should be paramount.

I support Peter Rogan's desire for the matter to be considered by the House of Lords in the hope that a more balanced approach will prevail. I think he makes a very important point indeed about those insurers who are in run off with no ongoing commercial interests. We must not allow them to behave with total disregard to the interests of the London Market.

This brings me back to the state of the market. We need to improve the quality of training of brokers and underwriters. We need to raise standards which have been allowed to drop. And finally, and probably most important of all, we need to return to profitability otherwise we will all join the ranks of the unemployed.

## YOUELL - v- BLAND WELCH
## by Martin Bakes and Liam Kennedy, Herbert Smith and Co.

I must begin by declaring an interest: my firm acted in this case for the defendant brokers who were ultimately held liable for 80% of the plaintiff's losses and I was involved in the handling of the case. Criticism of the judgment, now reported at [1990] 2 Lloyds 431, therefore risks accusations of sour grapes but, there again, a sycophantic case note would be appallingly tedious.

As in most cases the judgment turned on the facts and because the facts were unusual it may have little general impact on brokers and other professionals' liabilities. Nonetheless the case has a number of interesting aspects. It illustrates how difficult it is for professional people to define exhaustively the scope of their duties and to ensure that their clients are satisfied with what they have done. Perhaps this is not so surprising given that the relationship between the professional and his clients is hardly ever reduced to writing. As this case shows, however, even when there is documentation apparently regulating the relationship, it may be of little or no assistance.

The case involved a tripartite dispute between insurers, reinsurers and brokers. The contractual arrangements were complex. Against the background of the placement of one shipbuilding risk with the insurers the brokers put in place a reinsurance programme known as the Superhulls cover in order to provide reinsurance in respect of that and any similar shipbuilding risks that the insurers might underwrite. The relevant contracts were placed in 1973 and 1974. The claims under the contracts did not arise until 1978.

Insurers were liable under their policies and they sought to recover from their reinsurers. The reinsurers alleged that they were not liable because the reinsurance contract contained a 48 month limitation which, they said, operated as a "cut off" or "guillotine". The relevant part of the reinsurance policy wording stated:-

> "The reinsured shall cede to the reinsurers and the reinsurers shall accept by way of reinsurance of the reinsured their proportion of the reinsured's liability in respect of risks attaching for periods as original (up to but not exceeding 48