AFFIRMATION BY SILENCE
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The right of an insurer to avoid a contract of insurance on the grounds of non-disclosure or misrepresentation of material facts is well established and well known. In practical terms, the insurer will not be in a position to exercise that right of avoidance until he becomes aware of the non-disclosure or misrepresentation. The issue with which I wish to deal in this article is whether, once an insurer has full knowledge of all matters relevant to his right of avoidance, he can lose that right of avoidance by mere delay and inactivity.

In *Liberian Insurance v. Mosse* [1977] 2 Lloyd's L.R. 560 at 565, Donaldson J. (as he then was) summarised the law as he understood it in the following terms:

> "Full knowledge of the facts is essential before there can be any question of atffirmation – being put on enquiry is insufficient ... And, even when the underwriter has full knowledge of the facts, he is still entitled to a reasonable time in which to decide whether to affirm the contract ... In a situation in which the underwriter has taken no action to affirm or repudiate the contract and a reasonable time for making up his mind has elapsed, he will be deemed to have affirmed the contract if either so much time has elapsed that the necessary inference is one of affirmation or the assured has been prejudiced by the delay in making an election or rights of third parties have intervened ..."

If that is an accurate summary of the law, the situation is that whilst delay of itself will not necessarily give rise to an affirmation, it can in appropriate circumstances give rise to a deemed affirmation.

The alternative argument is that the insurer cannot be taken to have affirmed the contract of insurance unless he has made what amounts to an unequivocal representation by words or positive deeds as to his affirmation of the contract. That argument is principally based on two authorities. The first is *Allied Marine Transport Limited v. Vale Do Rio Doce Navegacao S.A.* ["The Leonidas D"] [1985] 1 WLR 925. In that case the issue was whether the silence and inactivity of the parties to arbitration proceedings could give rise to a binding agreement as to the abandonment of the proceedings or alternatively to some form of equitable estoppel. The Court of Appeal held that no such agreement or estoppel could arise on the basis that no offer or acceptance could be inferred from mere silence and inactivity. Further equitable estoppel requires the making of an unequivocal representation by the party alleged to be estopped which could not be made by mere silence and inactivity. In the course of

giving the judgment of the Court, Goff L.J. (as he then was) stated (at page 937) as follows:

"In the absence of special circumstances, silence and inaction by a party to a reference are, objectively considered, just as consistent with his having inadvertently forgotten about the matter; or with his simply hoping that the matter will die a natural death if he does not stir up the other party; or with his office staff, or his agents, or his insurers, or his solicitors, being appallingly slow. If so, there should, on ordinary principles, be no basis for the inference of an offer. Exactly the same comment can be made of the silence and inaction of the other party; for the same reasons, there appears to be no basis for drawing the inference of an acceptance in response to the supposed offer, still less of the communication of that acceptance to the offeror."

The second case is *Motor Oil Hellas (Corinth) Refineries S.A. v. Shipping Corporation of India* ["The Kanchengunga"] [1990] 1 Lloyd's L.R. 391. The issue in that case was whether the owners of a vessel were entitled to refuse to accept Karg Island as the nominated loading port and it was held by the House of Lords that whilst the owners had the right to reject the charterers' orders, the owner shad waived or abandoned that right. In his speech, with which the other members of the House of Lords agreed, Lord Goff, at page 398, stated as follows:

> "Election itself is a concept which may be relevant in more than one context. In the present case, we are concerned with an election which may arise in the context of a binding contract, when a state of affairs comes into existence in which one party becomes entitled, either under the terms of the contract or by the general law, to exercise a right, and he has to decide whether or not to do so. His decision, being a matter of choice for him, is called in law an election. Characteristically, this state of affairs arises where the other party has repudiated the contract or has otherwise committed a breach of contract which entitles the innocent party to bring it to an end, or has made a tender of performance which does not conform to the terms of contract. But this is not necessarily so. An analogous situation arises where the innocent party becomes entitled to rescind the contract, i.e. to wipe it out altogether, for example because the contract has been induced by a mis-representation; and one or both parties may become entitled to determine a contract in the event of a wholly extraneous event occurring, as under a war clause in a charter party. Characteristically, the effect of the new situation is that a party becomes entitled to determine or to rescind the contract, or to reject an uncontractual tender of performance; but, in theory at least, a less drastic course of action might become available to him under the terms of the contract."

At page 399, Lord Goff continued as follows:

> "Election is to be contrasted with equitable estoppel, a principle associated with the leading case of *Hughes v. Metropolitan Railway Company* [1877] 2 App. Cas. 439. Equitable estoppel occurs where a person, having legal rights against another, unequivocally represents (by words or conduct) that he does not intend to enforce those legal rights; if in such circumstances the other party acts, or desists from acting, in reliance upon that represenation, with the effect that it would be inequitable for the representor thereafter to enforce his legal rights inconsistently with his representation, he will to that extent be precluded from doing so.
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> There is an important similarity between the 2 principles, election and equitable estoppel, in that each requires an unequivocal representation, perhaps because each may involve a loss, permanent or temporary of the relevant party's rights."

On the face of it, those two cases would seem to provide powerful support for the argument that an insurer cannot lose his rights to avoid a contract of insurance unless and until he has made an unequivocal representation (whether by words or conduct) as to his intention to affirm the contract. However, to apply "The Leonidas D" and "The Kanchengunga" to the avoidance of a contract of insurance for non disclosure or misrepresentation of material facts entails the drawing of the conclusion that the right to avoid a contract of insurance is analogous to the exercise of other contractual rights which have the effect of bringing a contract to an end. In order to ascertain whether such a conclusion is justified, one has to consider the nature and origin of the right of avoidance. If it is contractual in nature, then clearly the appropriate analogy can be brought. Fortunately, the nature and origin of the right of avoidance has been the subject of recent judicial investigation. In *La Banque Financiere de la Cite S.A. v. Westgate Insurance Company Limited* [1988] 2 Lloyd's L.R. 513, the Court of Appeal had to decide whether there could be a claim for damages for non-disclosure of material facts. If the duty of good faith was an implied contractual duty, such a remedy would be available and it would of course follow that the right of avoidance could be regarded as a contractural remedy arising in the event of a breach of the contractual duty of good faith. However, after a comprehensive review of the relevant authorities (see the judgment of Slade L.J., who gave the judgment of the Court, at page 543 ff), the Court of Appeal concluded that the duty of good faith and the right to avoid a contract for non-disclosure of material facts were not of a contracutal nature. At page 550, Slade L.J. summarised the conclusion of the Court in the following terms:

> "... the powers of the Court to grant relief where there has been non-disclosure of

material facts in the case of a contract uberrimae fidei stems from the jurisdiction originally exercised by the Courts of Equity to prevent imposition. The powers of the Court to grant relief by way of recission of the contract where there has been undue influence or duress stem from the same jurisdiction. Since duress and undue influence as such give rise to no claim for damages, we see no reason in principle why non-disclosure as such should do so."

Although that case was subject of an appeal to the House of Lords (the decision of the House of Lords being reported at (1990) 2 Lloyds L.R. 377), the House of Lords was able to decide the case on a basis which made it unnecessary for them to decide whether the Court of Appeal was right on this particular issue. However, at pages 387-8, Lord Templeman, with whom the other members of the House agreed, expressed his whole hearted-approval of the reasoning and conclusions of Slade L.J. in the Court of Appeal on this aspect.

On the basis that the relevant principles are those applicable to cases of undue influence and duress rather than the exercise of contractual remedies, it is to the authorities on undue influence and duress that one must turn for guidance as to the circumstances in which a right to avoid a contract of insurance for non-disclosure or misrepresentation of material facts can be lost. The leading authority in the field of undue influence is *Allcard v. Skinner* [1887] 36 Ch. D. 145 in which Lindley L.J., at page 187, summarised the principles in the following terms:

"So long as the relation between the donor and the donee which invalidates the gift lasts, so long as it necessary to hold that lapse of time affords no sufficient ground for refusing relief to the donor. But this necessity ceases when the relation itself comes to an end; and if the donor desires to have his gift declared invalid and set aside, he ought, in my opinion, to seek relief within a reasonable time after the removal of the influence under which the gift was made. If he does not the inference is strong, and if the lapse of time is long the inference becomes inevitable and conclusive, that the donor is content not to call the gift in question, or, in other words, that he elects not to avoid it, or, what is the same thing in effect, that he ratifies and confirms it."

The insurer coming to have knowledge of the non-disclosure or misrepresentation of material facts would be in the equivalent position for these purposes of the donor of a gift ceasing to be under the influence of the donee. Applying the principle laid down in *Allcard v. Skinner* to the right of avoidance of a contract of insurance, it is quite clear that in *Liberian Insurance v. Mosse,* Donaldson J. was quite right to include delay as being a potential source of affirmation. The principles set out in *Liberian Insurance v.*

Mosse were cited with approval by Hobhouse J. in *Iron Trades Mutual Insurance Company Limited & Others v. Companhia de Seguros Imperio* [31.7.90, unreported], the Defendant having unsuccessfully sought to persuade him that the relevant principles were those set out in "The Kanchengunga".

It seems unlikely that cases will turn on the distinction between the nature and origin of the right of avoidance and contractual remedies because even in relation to contractual remedies, Lord Goff "The Kanchengunga" stated as follows:-

> "It all cases, he has in the end to make his election, not as a matter of obligation, but in the sense that, if he dones not do so, the time may come when the law takes the decision out of his hands, either by holding him to have elected not to exercise the right which has become available to him, or sometimes by holding him to have elected to exercise it."

It is though important to bear in mind that the existence of an "unequivocal representation" is not an invariable prerequisite for there to be an affirmation of a contract by an insurer. If the insurer delays too long in seeking to avoid the contract, he will be deemed to have affirmed the contact. The period of delay necessary for such a deemed affirmation to arise will of course be a question of fact in each case and time will not begin to run against an insurer until he had full knowledge of all the relevant facts and has had a reasonable time in which to make up his mind as to whether or not to avoid the contract. However, once time has begun to run against the insurer, he must ensure that the decision whether or not to avoid is taken reasonably promptly as otherwise the right to avoid could be lost.

FITNESS FOR PURPOSE IN CONSTRUCTION

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In the construction industry and professions, the difference between reasonable skill and care and fitness for purpose is often misunderstood; the potential impact on insurance cover of these obligations is a source of problems in the nogotiation and agreement of construction contracts and collateral warranties. The starting point of any discussion of these issues has to be an understanding of the legal meaning of reasonable skill and care and fitness for purpose.