WAIVER, ESTOPPEL AND ELECTION
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A. Introduction

It is conceded by courts (cautiously) and law students (sadly) that the doctrines of waiver and estoppel exist and that a distinction must be drawn between them. Students' spirits rose in 1989 when the Court of Appeal appeared to say that the distinction did not matter[1] but they sagged again later that year when the House of Lords said that it did[2]. Most courts, like most persons stopped in the street who say that they believe in God, assert that it (he or she) exists but are much more reticent about definitions. Indeed, doctoral dissertations have been submitted on the matter, and anything said in these pages on the issue must read without sadness, I hope, but certainly with some caution.

The confusion is but confounded by the possibility that waiver itself may be used in more than one sense. Here, waiver means election: B argues that A made a choice between two courses of action and, having made his election, is not allowed to change his mind. For example, A was entitled to terminate the contract on account of B's breach of contract but elected not to terminate it but to affirm it. Again, A was entitled to rescind their contract on account of B's misrepresentation or non-disclosure or to resist B's insurance claim on the ground of, for example, late notice but chose to affirm[3].

Estoppel, too, arises in more than one sense. Here it means promissory estoppel: B argues that A has represented that he will not pursue a course of legal action, for example some right, against B[4]. If that right is a right to terminate or rescind the contract, is it a case of waiver or of estoppel? And, whichever it is, does it matter?

1. *The Wise* [1989] 2 Lloyd's Rep. 451. Also in this sense, many statements by Lord Denning, for example, *AIP v Texas Bank* [1982] Q.B. 84, 122; and the Supreme Court of the United States in *Globe Mutual v Wolf* (1877) 95 U.S. 326, 333.
2. The Kanchenjunga [1990] 1 Lloyd's Rep. 391
3. Until recently that also seemed true of a breach of warranty, but now see *The Good Luck* (below).
4. Distinguish estoppel not about what A *intends* to do or not do and estoppel about existing facts. Distinguish also proprietary estoppel.

B. Waiver and Estoppel: The Distinction.

General agreement exists that in many if not most cases the result is the same whether decision is based on estoppel or waiver. This is a major reason why courts are slow to choose between them. Why grasp a nettle if you don't have to? When the distinction must be drawn, however, it is clear in English law - much clearer than it was a few years back - how the distinction can be made.

Many years ago, waiver and estoppel were distinguished by the High Court of Australia in *Craine v Colonial Mutual Fire Ins Co Ltd*[5]. The question was whether an insurer could reject a fire claim because notice (required within 15 days of loss) was three hours late. A "waiver clause" provided that any waiver by the insurer had to be in writing. As the alleged waiver was not in writing, the claimant pleaded the insurer's conduct as estoppel and the Court accepted the plea. Isaacs J dinstinguished waiver and estoppel along lines that have been retraced more recently in England. In The *Kanchenjunga* (2) the ship of that name obeyed the order of its charterer to go to Kharg Island (Iran) at a time when it might be attacked there by Iraqi aircraft. The House of Lords held that, by sending the ship to Kharg Island, the shipowner had waived his contractual right to refuse to go there because it was unsafe.

First, for waiver the court pays particular attention to the conduct of the waivor (insurer A), to see "whether he has elected to get some advantage to which he would not otherwise have been entitled, so as to deny to him a later election to the contrary"[7]. For estoppel, while still looking for a representation by the person estopped (insurer A), the court pays more particular attention to the effect of the representation, usually in the form of relilance, on B (the insured). Waiver "is not dependent upon reliance upon it by the other party"[8]. whereas equitable estoppel requires "such reliance by the representee as will render it inequitable for the representor to go back upon his representation"[9].

Secondly, for waiver the court looks to the intention and knowledge of the waivor, while the knowledge or actual intention of the person estopped is irrelevant.

5. (1920) 28 C.L.R. 305, affirmed [1922] 2 A.C. 541 (P.C.).
6. See note 2 above.
7. See note 5 above, Craine p 326.
8. See note 2 above, *The Kanchenjunga* p 399 per Lord Goff (HL).
9. Ibid. Also in this sense: *Youell v Bland, Welch & Co Ltd, The Superhulls Case* [1990] 2 Lloyd's Rep 431, 452.

Waiver, as election, must generally "be an informed choice, made with knowledge of the facts giving rise to the right" and, in the view of some courts[10] but not others[11], awareness of the right that arises from the facts. In contrast, in the case of estoppel, no "question arises of any particular knowledge on the part of the representor"[12]. For the requiste reliance to occur, however, there must be knowledge of the representation on the part of the representee[14].

Thirdly, waiver, at least waiver of past breaches of duty, cannot be revoked[14], whereas it has been said that promissory estoppel can always be revoked by reasonable notice[15] unless it is impossible to resume the previous position.
In general, however, "election once made is final", whereas "estoppel may be suspensory only"[16].

10. For example, *The Uhenbels* [1986] 2 Lloyd's Rep 294, 298 per Hirst J, relying mainly on *Peyman v Lanjani* [1985] Ch 457 (CA).
11. Carter (1992) 5 JCL 198, 215.
12. *The Kanchenjunga* p 399 per Lord Goff (HL); *Superhulls Case* pp 449-450.
13. *Lark v Outhwaite* [1991] 2 Lloyd's Rep 132, 142.
14. *Scarf v Jardine* (1882) 7 App Cas 345, 360; *Cia. Tirrena di Assicurazioni SpA v Grand Union Ins Co Ltd* [1991] 2 Lloyd's Rep 143, 153. Thompson [1983] CLJ 257, 261. Aliter, of course, if it is expressed as a temporary concession.
15. *Ajayi v Briscoe (Nigeria) Ltd* [1964] 1 WLR 1326, 1330 (PC).
16. *The Kanchenjunga* [1990] 1 Lloyd's Rep 391, 399 per Lord Goff (HL). See also Carter (1991-2) 4 JCL 59.

C. Waiver and Estoppel: When do they Apply?

Waiver, said Lord Diplock[17], arises when a person is entitled to alternative rights inconsistent with one another, as on forfeiture of a lease or rescission of a contract for wrongful repudiation. By contrast, estoppel debars a person from raising a defence to a claim against him. If the Diplock distinction is applied to insurance contracts, it suggests that procedural conditions, if broken, provide the insurer with defences and are therefore within the area of estoppel rather than waiver; and that forfeiture for non-payment of premium, rescission for misrepresentation or non-disclosure (and perhaps breach of warranty) give rise to alternative and inconsistent rights (rescission or affirmation) and are thus within the area of waiver. However, misrepresentation, non-disclosure, and breach of warranty usually arise as defences to claims; and breach of procedural conditions presents the defending insurer with the alternative of raising the defence to a claim or not. For insurance contracts, the Diplock distinction does not work, and a more useful answer has been given more recently by Lord Goff:

"In the context of a contract, the principle of election applies when a state of affairs comes into existence in which one party becomes entitled to exercise a right, and has to choose whether to exercise that right of not. On the other hand, equitable estoppel requires an unequivocal representation by one party that he will not insist upon his legal rights against the other party"[18].

When the insurer knows something which entitles him to rescind the contract (misrepresentation, non-disclosure), or repudiate a claim (breach of procedural condition), he 'has to choose whether to exercise that right or not', and what follows is a case of waiver. When, for some reason or other, the insurer indicates that he will not insist on disclosure, observance of a warranty or performance of a procedural condition, what follows is a question of estoppel.
Even so, the courts will not often be required to choose between waiver and estoppel. Cases of one often involve the other and what starts as estoppel ("I shall not insist ...") may progress to waiver ("I shall not enforce my remedy for your past failure ..."). The two doctrines may be applied in quick succession to the same facts by judges disinclined to draw lines between them.

D. Waiver of Warranties

Until recently, it was widely assumed that breach of warranty, like breach of a procedural condition such as notice of loss, was just another case in which the insurer had to make a choice - to terminate the contract or not. But section 33(3) of the Marine Insurance Act states that "the insurer is discharged from liability as from the date of the breach of warranty". From this it seems to follow that, when a breach of warranty occurs, the insurer has no election to make. Moreover, now the House of Lords has told us through Lord Goff that this is the position for all-warranties, both wet and dry; that "the insurer is discharged from liability as from the date of the breach of warranty, for the simple reason that fulfilment of the warranty is a condition precedent to the liability or further liability of the insurer.... [T]he rationale of warranties in insurance law is that the insurer only accepts the risk provided that the warranty is fulfilled...[T]he word 'condition' is being used in its

17. *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* [1971] AC 850, 882-883, adopted in *Cia. Tirrena di Assicurazioni SpA v Grand Union Ins Co Ltd* [1991] 2 Lloyd's Rep 143, 153.
18. *The Kanchenjunga* (above) p 399 (HL). The distinction was anticipated by Bower and Turner, The Law Relating to Estoppel by Representation, (3rd ed., London 1977) no 310; see also p 324. Cf the USA where it has been held that "waiver" of non-coverage is irrevocable" *Consolidated Electric Cooperative v Employers Mutual Liability Ins Co,* 106 F Supp 322 (ED Mo, 1952); *Salerno v Western Casualty & Surety Co,* 336 F 2d 14 (8 Cir, 1964).

classical sense in English law, under which the coming into existence of (for example) an obligation ... is dependent upon the fulfilment of a specified condition"[19].

At the same time, however, Lord Goff approved the statement of Kerr L.J. that "the consequence of the breach is that the cover ceases to be applicable unless the insurer subsequently affirms the contract."[20] Before this, waiver of breach of warranty was seen as a reprieve for the insured, it now seems something more like a kiss of life for his cover - cover which died at the time of breach. So, although section 34(3) of the Act states that a breach of warranty may be "waived by the insurer", that is the language of 1906 and, for conceptual correctness, we must now call it something else. In view of what Lord Goff himself said in *The Kanchenjunga* (above), it seems that we must now call it estoppel. The 'waiving' insurer of 1906 has become an insurer estopped; if he indicates to the insured that, in spite of the breach of warranty, he wants the cover to continue, he is saying to the insured: 'if the point should arise (when you claim under the insurance contract), I shall not plead that my liability under the contract, having been discharged by your breach of warranty, no longer exists.' Indeed, in the broader frame of contact law, there is now some precedent that a person may be estopped from denying the existence of a (whole) contract, with the result that the very contract, which ex hypothesi did not exist, is treated as if it did exist[21]. If so, why not also let him be estopped from denying the continued existence of a contract that seemed to have died? If this is indeed a case of estoppel, some thought will have to be given to two further points.

19. *The Good Luck* [1991] 2 Lloyd's Rep. 191, 202, with reference to Lord Blackburn in *Thomson v Weems* (1884) 9 App. Cas. 571, 684:
"compliance with that warranty is a condition precedent to the attaching of the risk". See Bennett [1991] J.B.L.; Clarke [1991] L.M.C.L.Q. 437.
20. *State Trading Corp. of India Ltd v M. Golodetz Ltd.* [1989] 2 Lloyd's Rep. 277, 287.
21. *The Henrik Sif* [1982] 1 Lloyd's Rep 456; *The Uhenbels* [1986] 2 Lloyd's Rep. 294; *A-G for Hong Koing v Humphrey's Estate* [1987] 1 A.C. 114, 127-128.

D1. Waiver of Silence?

The proposition can be found that the insurer, who is silent in the fact of a breach of warranty, has waived the breach by his silence[22]. Rather more cases can be found in the general law of contract for another proposition that the representation to found estoppel must be positive and unequivocal, including some clear statements by Lord Goff: silence will not do[23]. Here is a conflict that will have to be

resolved, probably in favour of the latter rule.

D2. Can Waiver Extend the Scope of Cover?

The proposition can be found that neither waiver or estoppel can operate to extend the cover of an insurance contract to a particular case of loss after the loss has been incurred; the corollary is that they operate only on procedural conditions such as notice of loss. Note that the proposition is confined to what is said or done after loss, and thus does not affect decisions that the insurer may estopped by what is said at the point of contracting about the scope of the cover on offer.

At first sight, the proposition is more persuasive with regard to exceptions than warranties. Both are concerned with the scope of cover, however, whereas the true warranty says 'yes if', the true exception says 'not if'. In other words, the warranty says that, as long as the warranty is fulfilled, there is cover. The exception says that, if X occurs or does not occur, there is no cover. Behind the warranty is cover, so, it seems, when the warranty is waived an obstacle is removed revealing the sculpted promise of cover beind. Behind the exception, however, is nothing: to waive the exception is to extend something that was never there before[24].

One objection to this view of insurance contracts is that *The Good Luck* (above) tells us that the warranty says not only 'yes if' but also 'not unless'. If there is no cover until a warranty is fulfilled or no cover from the time that it is broken, any 'waiver', be it called waiver or estoppel, purports to provide cover that was not there before. In *The Good Luck*, there was no cover in the Gulf unless notice had been given, but the court still envisaged a waiver of that failure thus extending cover to the Gulf. In *The Kanchenjunga*, by waiving their right to reject the charters' nomination of Kharg Island, the owners were extending the range of ports to which they were obliged to proceed. In each case, the issue of the scope of the duty had come to a head, it was clear that there was no duty at all but, nonetheless, an extension was contemplated in *The Good Luck* and enforced in *The Kanchenjunga*.

22. For example, *C.T.N. Cash & Carry Ltd v G.A.F.L.A.C. plc* [1989] 1 Lloyd's Rep. 299, 303.
23. For example, *The Leonidas D* [1985] 1 W.L.R. 925, 937 per Robert Goff L.J. (CA)
24. This assumes a definitional role for exceptions; see Clarke, "The Law of Insurance Contracts" (1989), para 19-1A; and, more generally, Macdonald 12 L.S. 277 (1992).

In contrast, many courts in the United States have stated firmly that neither estoppel or waiver "operate to extend coverage of an insurance policy after the liability has been incurred ... and the application of the doctrines in this respect is therefore to be distinguished from the waiver of, or estoppel to assert, grounds of forfeiture"[25]. "While a forfeiture of benefits contracted for an insurance policy may be waived, the doctrine of waiver or estoppel cannot create a liability for benefits not contracted for"[26]. English law, it seems, has parted company with its progeny across the 'pond' - except, it seems, as regards New York. There it has been held[27] that "once the foundational facts for an estoppel have been established, liability of an insurer may be imposed, even for a loss falling outside the risks insured under the policy or beyond the policy limits." Once again, the nations are divided, it seems, by a common language.

SILENT OR DAMNED
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"Some sipping punch, some sipping tea but as you by their faces see all silent and all damned"
Wordsworth

The privilege against self-incrimination and its corollary the right to silence has been aired on a number of occasions recently in the English Courts. It is a question which can be of considerable moment to a director or officer who, as the repository of information and documents concerning the affairs of the company which employs him, is now subject to an increasing number of legislative requirements to impart such information, regardless of the danger of self-incrimination to which disclosure may expose the director personally.

The privilege, enshrined in the maxim "nemo tenetur prodere seipsum", became established as part of our legal heritage in the seventeenth century as a reaction and defence against repetition of the excesses of the Star Chamber. The principle

25. *Aetna Casualty & Surety Co v Richmond,* 143 Cal Rptr 75, 79-80 (1977). See also *Underwriters at Lloyds v Denali Seafoods Inc,* 729 F Supp 721 (WD Was, 1989), affirmed 927 F 2d 459 (9 Cir, 1991); *Kane v Aetna Life Ins,* 893 F 2d 1283 (11 Cir, 1990); *Nancarrow v Aetna,* 932 F 2d 742 (8 Cir, 1991); *Braun v Annesley,* 936 F 2d1105 (10 Cir, 1991)
26. *Nieves v International Life Ins Co,* 964 F 2d 60, 66 (1 Cir, 1992 - life).
27. *Bucon Inc v Pennsylvania Manufacturing Assn,* 547 NYS 2d 925, 927 (1989 - liability): it was held that the insurer was estopped from denying that a particular contractor was covered by another contractor's insurance.