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
by Kenneth McKenzie, Partner, Davies Arnold Cooper

"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.

has been successfully exported to the United States as well as to Australia and gives expression to a folk memory of mistrust in the exercise of over-weening state power.

In *Orme v Crockford* [1824] 13 Price 376, paragraph 4, Alexander L.C.B. in referring to this most important right, said that were that right were to be taken away, it must be done expressly by a clear and unequivocal enactment.

Just how often then, has Parliament stated unequivocally its intention of abrogating the privilege of self-incrimation by statute? Well, there are examples under the Theft Act 1968, the Criminal Justice Act 1987 and a number of examples in more recent financial legislation which have come under scrutiny in the last 12 months or so.

In *Re LUI Plc.* (1991) BCC 760 there was a DTI investigation under Section 432 of the Companies Act 1985, against the background of which Mr. Justice Scott reviewed the circumstances under which a person might refuse to answer questions put to him by a DTI inspector. It was said that it was possible to justify such a refusal if it could be shown that the appointment of the inspectors was invalid. It was also argued that the appointment of the inspectors and the questions asked were ultra vires as they were investigating the affairs of a wholly owned subsidiary which were not therefore the affairs of the company within the meaning of Section 432. The Judge held that the affairs of the company were wide enough to embrace the affairs of its subsidiary and that it was clear from the language of the Companies Act 1985 that the privilege against self-incrimination was not to apply.

In *Jeffrey S. Levitt* (1992) BCLC 250 the officer of an insolvent company was summoned to appear before the Court to be examined under Section 236 of the Insolvency Act 1986. It was held that the Insolvency Acts of 1985 and 1986 were the outcome of a radical overhaul of individual and corporate insolvency law with special reference to the need to discourage insolvent trading and to disqualify delinquent directors. Sections 234, 235 and 236 of the Act established a class of persons on whom was laid a duty to furnish all relevant information to such as the Receivers and therefore there was no entitlement to invoke the common law privilege against self-incrimination.

However, it does not seem that the principle of statutory abrogation of the privilege always runs straight. In *Re Arrows Ltd.* (1992) BCLC 126, Mr. Justice Hoffman refused to allow the Serious Fraud Office access to a transcript of an examination of an officer of a company to be held under Section 236 of the Insolvency Act 1986. The doctrine of public policy permitted a balance to be struck between the public interest in preserving secrecy and the public interest in the investigation of fraud. Thus the SFO's need to obtain information about the company's affairs was overridden by that of the liquidator as that information would not, it was feared, be forthcoming from the director of the company if the transcript of his evidence was then to be released to the prosecution authorities. Unless the SFO was denied access to the transcript, the probability was that the examination would produce no useful information for the liquidator or the SFO and hence the balance came down clearly in favour of such a direction being given.

After the liquidators had had the opportunity of examining the relevant director, they applied to the Court for further directions on the basis that the SFO's request under Section 23 of the Criminal Justice Act 1987 for a copy of the transcript of the examination remained outstanding. *(Re Arrows (No. 4)* (Times 11th November 1992). Mr. Justice Vinelott declined to consent to disclosure of the transcript unless the director of the SFO was willing to undertake that statements in it would not be adduced in evidence in the prosecution of the director, except in a prosecution for knowingly or recklessly making a false or misleading statement, or in prosecution of some other offence where the director made statements inconsistent with those in the liquidator's examination, and to secure a similar undertaking from any other body or person to whom the transcript was to be supplied.

Possibly the most celebrated case of the last year or so has been the Maxwell case, in which it seems people have been queuing up to ask questions and the right against self-incrimination has been invoked with great dedication.

First of all there was the rather ineffectual Parliamentary Select Committee. The Maxwell brothers appeared before it on 10th January 1992 and refused to answer questions on the basis of their common law right to silence. Although it might have been open to the Select Committee to ask the House of Commons to call the Maxwell brothers to the Bar of the Commons and seek to commit them for contempt if they continued to refuse to answer the questions, the decision not to do so may have reflected the unusual circumstances of a Select Committee inquiry running concurrently with legal actions. The legal actions first came to Court in *Bishopsgate Investment Management Ltd. v Maxwell & Another, Cooper v Maxwell, Mirror Group Newspaper & Another v Maxwell & Others* 1992 BCLC 475. BIM was the investment trustee in liquidation of a depleted common investment fund for Mirror Group company pension schemes. Kevin Maxwell was a director from February 1988 until December 1991 following his father's death. The provisional liquidators sought information on affidavit and on oral examination from Kevin Maxwell under Sections 235 and 236 Insolvency Act 1986.

Meanwhile, Mirror Group Newspapers obtained an Order in aid of Mareva relief requiring Mr. Maxwell to supply information on specific transactions. In both the BIM and MGN actions, Mr. Maxwell refused to comply with a disclosure order claiming entitlement to rely upon the privilege against self-incrimination. The judge in the BIM proceedings held that the purpose of Section 235 and Section 236 of the 1986 Act, necessarily involved the abrogation of the privilege against self-incrimination where information concerning a company's affairs was sought by an office holder (i.e. the provisional liquidator) in accordance with his powers under the Act. He granted the provisional liquidator a declaration to that effect and an Order under Section 236(2).

However, in the MGN action, it was held that Kevin Maxwell was entitled to rely on the privilege against self- incrimination, notwithstanding MGN's argument that privilege did not extend to permit a fiduciary agent or servant to claim the privilege in an action brought against him by the principal for breach of that duty. Mirror Group and Kevin Maxwell both appealed and both lost those Appeals.

Perhaps the last word should go to the House of Lords. In *A.T. Istel Ltd. v Tully* (1992) 3WLR 344, Lord Templeman said that the privilege against self-incrimination in civil proceedings was an archaic and unjustifiable survival from the past. If much needed reform of that privilege was to be carried out by its abolition or abridgement, that had to be done by Parliament, as had occurred in a number of statutes. The Courts were, however, entitled to substitute some different protection in place of the privilege against self-incrimination, provided that such protection could properly be considered as adequate. In that case, a Discovery Order was made which provided against the evidence being used in the prosecution of the offence alleged to have been committed by the person required to make that disclosure; and the prosecution authorities agreed not to make use, directly or indirectly, of material divulged as a result of compliance with the Order. The House of Lords held that this was an adequate substitution for the privilege against self-incrimination in those circumstances. Lords Ackner and Lowry echoed the message that the House of Lords were not undertaking any review of the privilege - which must remain the prerogative of Parliament alone - it was simply that the privilege was superfluous in the circumstances.

By and large then it seems that in spite of some Parlimentary encroachment, this area of privilege survives. It can be overridden specifically by Parliament, or, it seems, where in the Judgment of the House of Lords, the risk of actual incrimination is removed. In addition, there is a modicum of discretion in some circumstances to allow the interests of the prosecution authorities in the form of the Serious Fraud Office to be subordinated to the liquidator's interests, presumably on behalf of creditors. In both *Re Arrows Ltd. No. 4* and *Istel v Tully*, a practical device has been used to remove the danger of self-incrimination posed, rather than maintaining the right to silence.

Nonetheless, there is comparatively little in these decisions from which directors and officers can draw comfort. Parliament's readiness to abrogate this ancient privilege is manifest most noticeably in the area of corporate regulation. The director or officer is once more caught between the devil and the deep blue sea. If the House of Lords' comments in *Istel* are anything to go by, there is no enthusiasm for the privilege on the part of the senior judiciary who will not perhaps be minded to seek interpretations favourable to the individual if further in-roads are made into the privilege by Parliament. Directors and officers must take what consolation they can from Lorenzo Dow's reflections on Calvinism - you will be damned if you do - and you will be damned if you don't.

BANKERS BLANKET BOND ASSURANCE
by Andrew J. Rose, Berwin Leighton

Insurance with the perhaps somewhat curious sounding name of a "Bankers Blanket Bond" was first developed by Lloyd's, although primarily for the American Market. At the turn of the century, the only insurance available to banks was a fidelity policy for named employees, and a policy to cover losses arising from hold-ups or similar events. The second policy was split into two sections, one called "night burglary" and the other "daylight robbery", although that phrase has moved rather far away from its original meaning, unless the premium charged for that section of the policy was particularly high. At that time, Lloyd's was a growing institution and the 1911 Lloyd's Act freed it from the restriction of writing marine business alone. America was a country which then had approximately 25,000 separate financial institutions (whether banks, savings associations, or whatever) operating in states, most of which required insurance coverage as a condition of being given the appropriate license. There was clearly a potentially huge business opportunity there.