

# **Marine Assured's duty of Disclosure A Study of English and Kuwaiti Law**

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## **Abstract:**

Marine Insurance is a contract of speculation. The facts upon which the risk is to be computed, lie, for the most part, within the knowledge of the assured only. The underwriter must therefore rely upon him for all necessary information; and must trust to him that he will conceal nothing, so as to make him form a wrong, estimate. If a mistake happens, without any fraudulent intention, still the contract is annulled, because the risk is not the same which the underwriter intended. Good faith forbids the assured by concealing what he privately knows to draw the underwriter into a bargain from his ignorance of the fact and his belief to the contrary.

This article attempts to explore various issues relating to the marine assured' duty of disclosure under English and Kuwaiti Law.

## **Introduction**

Before the insurance contract is concluded, the insurer will need necessary information about the risk he is asked to undertake. This information will allow him to evaluate whether he wishes to take the risk at all or what premium he should calculate, whether the insurance should be shared with others via co-insurance or re-insurance arrangements, whether there is a need for special safety regulations, etc. Information can be retrieved from various sources, but the central source will be the person effecting the insurance. The assured is, therefore, bound to make a full disclosure of material facts. In the leading case of Carter v.

Boehm<sup>(1)</sup> Lord Mansfield stated the universal rule relating to the duty of disclosure as follows:

“The special facts upon which the contingent chance is to be computed lie most commonly in the knowledge of the assured only; the underwriter trusts to his representation and proceeds upon confidence that he does not keep back any circumstance in his knowledge to mislead the underwriter into a belief that the circumstances do not exist. The keeping back of such circumstances is fraud, and therefore the policy is void. Although the suppression should happen through mistake, without any fraudulent intention, yet still the underwriter is deceived and the policy is void; because the risk run is really different from the risk understood and intended to be run at the time of agreement.... The policy would be equally void against the underwriter if he concealed.... Good faith forbids either party, by concealing what he privately knows to draw the other into a bargain from his ignorance of the fact, and his believing the contrary.”<sup>(2)</sup>.

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- (1) (1766) 3 Burr. 1905. This was a non-marine policy made in 1759 by the brother of General George Carter, the Governor of the Fort Marlborough, on his behalf. The General was stationed on the island of Sumatra in the East Indies and the policy, on an “interest or no interest” basis, insured against the risk of the fort’s being taken by a foreign enemy. Indeed the fort was taken by the French forces during the currency of the policy. The defendant underwriter defended the claim on the policy by alleging fraudulent concealment, relying on two letters from the governor, one to his brother and the other to the East India Company. The facts which it was alleged ought to have been disclosed were the weakness of the fort and the probability of a French attack. The plaintiff argued that he had only insured 10,000 of his 20,000 of property, and had been guilty of no fault in his defence of the fort. His counsel led evidence that it was not so much a fort as a trading post or factory which was secure against native assault but was not designed to resist European attack. The governor’s role was more mercantile than military. Counsel for the plaintiff crucially submitted that “all the circumstances were universally known to every merchant upon the exchange of London”. This argument was eventually accepted and the King’s Bench held that the defence of non-disclosure failed on the facts.
- (2) American marine insurance law, which is largely derived from English law, first adopted the English duty of disclosure in the landmark case of *McLanahan v. Universal Insurance Co.*, 26 U.S. (1 Pet.)170. This case involved, inter alia, the failure of a vessel owner to communicate to his agent information of the vessel’s loss, so as to countermand a previous order for the procurement of insurance. After acknowledging that a contract of insurance is a contract of utmost good faith, Justice Story, writing for the Court, stated:  
The true principle deducible from the authorities on this subject is, that where a party orders insurance, and afterwards receives intelligence material to the risk, or has knowledge of a loss, he ought to communicate it to the agent, as soon as, with due and reasonable diligence, it can be communicated, for the purpose of countermanding the order, or laying the circumstances before the underwriter. If he omits so to do, and by due and reasonable diligence the information might have been communicated, so as to have countermanded the insurance, the policy is void.”

The principle initiated by Lord Mansfield was later codified in the U.K. Marine Insurance Act 1906 (hereafter the MIA 1906). Section 18 sets out the general principle that "...the assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him. If the assured fails to make such disclosure, the insurer may avoid the contract".

The English model of duty of disclosure has operated for hundreds of years and its success has greatly influenced the Marine Insurance Laws of other nations among them Kuwait which adopted the principle in its Maritime Code 1980 (hereafter the *KMC 1980*) as one of the internationally recognized principles. Article 280/1<sup>(3)</sup> stipulates that "(Free translation) [T]he insurer may avoid the insurance contract,... if the assured fraudulent non-discloses information which could lead the insurer to underestimate the risk to be insured against".

The subject of this article is to study the duty of the assured to disclose primarily in the English law of marine insurance. During the investigation of the matter a comparison is made with Kuwaiti Maritime law.

The study will cover the following issues:

- 1 - Duty to Disclose.
- 2 - Materiality of Non-disclosure.
- 3 - Time of Non-disclosure
- 4 - Effects of Non-disclosure.

## 1. DUTY TO DISCLOSE

### 1.1. DISCLOSURE BY THE ASSURED HIMSELF

"The insurer is entitled to assume as the basis of the contract between him and the assured, that the assured will communicate to him every material fact of which the assured has, or in the ordinary course of

(3) KMC 1980, Article 280/1:

"يجوز للمؤمن أن يطلب إبطال عقد التأمين إذا... كتم (المؤمن له) بسوء قصد ما يلزم من البيانات وكان من شأن ذلك التقليل بصورة محسوسة من تقدير المؤمن لأهمية الخطر".

business ought to have, knowledge; and that he will take the necessary measures by the employment of competent and honest agents, to obtain, through the ordinary channels of intelligence in use in the mercantile world, all due information as to the subject-matter of the insurance. This condition is not complied with where, by the fraud or negligence of the agent, the party proposing the insurance is kept in ignorance of a material fact, which ought to have been made known to the underwriter, and through such ignorance fails to disclose it”<sup>(4)</sup>.

The MIA 1906, s.18 (1) regulates the duty of the assured to disclose as follows:

“Subject to the provisions of this section, the assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured,<sup>(5)</sup> and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him. If the assured fails to make such disclosure, the insurer may avoid the contract”.

The motive for non-disclosure is irrelevant. The duty to disclose is absolute, and it is not a good defence that the assured failed to inform the insurer properly either by mere inadvertence or by the belief that the fact was not material to the risk.<sup>(6)</sup> “It is well-established law” said Cockburn

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(4) Proudfoot v. Monterfiore (1867) L.R. 2 Q.B. 511, 519.

(5) It is submitted that where the assured is an individual, the actual knowledge means that he must disclose what is known to him personally; see *PCW Syndicates v. PCW Reinsurances* [1996] 1 Lloyd's Rep. 241, per Staughton L.J., at p. 254. Where the assured is a company, the actual knowledge depends on whose knowledge can in law be attributed to it. In the opinion of Staughton L.J., in *PCW Syndicates v. PCW Reinsurers* [1996] 1 Lloyd's Rep. 241 at 253, the relevant question under the limb of s.18 was whether the facts are known “to a director or an employee at an appropriate level”. In Staughton L.J.'s view, there is no reason to restrict the knowledge of a company under s.18 to what is known at a high level, by its directing mind and will, and knowledge held by employees whose business it was to arrange' insurance would for example be included; see Arnould 's Law of Marine Insurance and Average, 17th ed, 2008, pp. 614,615.

(6) Many cases have held that the assured need not have a specific intent to defraud the insurer. It will suffice if the assured knew that certain information was material, but did not disclose it, even though the insurer did not inquire about it (see, e.g., *Citizens Ins. Co. v. Whitley*, 67 S.W.2d 488 (Ky. 1934)(insurer may avoid if insured knew of materiality or an ordinarily prudent person would have known it). Under this view, the insurer may void the policy even though the information was withheld unintentionally, or by mistake or inadvertence, so long as the applicant knew it to be material (see e.g., *Methodist Med. Ctr. Of Ill. v. American Med. Security Inc.*, 38 F.3d 316 (7th Cir. 1994).

C.J., in *Bates v. Hewitt*<sup>(7)</sup> that it is immaterial whether the omission to communicate a material fact arises from intention, or indifference, or a mistake, or from it not being present to the mind of the assured that the fact was one which it was material to make known". The argument that the assured may have acted with perfect good faith and honesty of intention is not sufficient<sup>(8)</sup>.

Not only must material circumstances known by the assured be disclosed but also material circumstances which he is deemed to know and the assured is deemed to know every material circumstance which in the ordinary course of business ought to be known by him<sup>(9)</sup>. If, through neglect on his part, he does not happen to know or to have ascertained any material circumstance, he will nevertheless be deemed to have known it, and the consequent non-disclosure of it will enable the underwriter to avoid the contract. The question is not what he ought to have known, but what he must be deemed to have known. In *London General Ins. Co. v. General Marine Underwriters' Association*<sup>(10)</sup> a cargo per steamer *Vigo* had been insured with the plaintiffs, who decided to effect a reinsurance. They instructed their brokers at 10 a.m. on the following day, and the reinsurance was concluded with the defendants about 4 p.m. There was, however, posted on the casualty board at Lloyd's on that morning a telegram that the vessel's cargo had been on fire, and a copy of this announce (a casualty report) was, as usual, circulated among the subto Lloyd's. Owing to pressure of business these reports were not looked at by the plaintiffs' underwriter, but were put in a drawer, and were from time to time during the day taken to the claims department; and the underwriter of the defendants had himself not looked at the casualty

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= However, it is quite common to find a clause in an insurance policy, sometimes included by the insurer voluntarily but more likely required by statute, that requires that a non-disclosure must be willful to void the policy (see *Allstate Ins. Co. v. Chance*, 582 S.W.2d 530,533 (Tex. Civ. App. 1979)). A typical provision would state: "This entire policy shall be void if, whether before or after a loss, the insured has willfully concealed or misrepresented any material fact or circumstance concerning this insurance, or the subject thereof, or the interest of the insured therein...."

(7) (1867) L.R. 2 Q.B. 595, at p. 607.

(8) Willes, J., in *Anderson v. Pacific Fire and Marine* (1872), L.R. 7 C.P. 65, at p. 68

(9) MIA 1906, s. 18(1).

(10) [1920] 3 K.B. 23; Affirmed by the Court of Appeal [1921] 1 K.B. 104.

reports: so that all three parties were in fact unaware of the casualty when the reinsurance was effected. The defendants denied liability on the ground of non-disclosure of a material fact deemed to have been within the knowledge of the plaintiffs. Bailhache, J., held that the casualty report which had been circulated was sufficient notice to the plaintiffs of the casualty; that the plaintiffs must therefore be deemed to have had knowledge of the fire; that they had had ample time in which the information of the casualty might, and should, have been communicated by them to the brokers, and that therefore there had been a non-disclosure of a material fact which the assured was deemed to know, which relieved the defendants of liability. "I am not concerned," said Bailhache, J., "with the particular method in which the plaintiffs carried on their business. The question which I must ask myself is- was the casualty slip notice to the plaintiffs of the fire in the *Vigo*? And I think that it was. If it were not so, the magnitude of the business of an assured, or the extent of his personal attention to it, or even the pressure of a busy time, would always have to be considered in applying s. 18 of the Marine Insurance Act, and the same means of knowledge would have different results according to the way an assured chooses to carry on his business, and might even depend upon whether he was busy or slack, or whether his clerks, were efficient or inefficient." The Court of Appeal affirmed the decision.

The wider the risk the greater the burden upon the assured to make full disclosure of material circumstances. A policy "on ship or ships", or "on steamer or steamers", or a policy on goods with an indorsement of different lines of steamers on which the goods insured may be carried, requires greater care on the part of the assured than a policy on goods to be shipped on a named ship. His duty in both cases is the same, but the possibility of innocent non-disclosure is much greater in the one case than in the other.

Mere disclosure of part of the information will not avail the assured if that which remains undisclosed is found to be material<sup>(11)</sup>.

All information with regard to material facts which have been received must be disclosed, even if there are good grounds for doubting

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(11) Kirby v. Smith (1818), 1 B. & Ald. 672; *Westbury v. Aberdein* (1837), 2 M. & W. 267.

the correctness of the information. It is no defence to say that the source of the information was unreliable, nor will the assured be protected if the information turns out in the event to be untrue. His duty is to disclose the facts and their source, and to leave the underwriter to form his own opinion as to the correctness of the report, and its effect on the proposed contract. Thus, in *De Costa v. Scandret*<sup>(12)</sup> Lord Macclesfield, L.C., said:

“The insured has not dealt fairly with the insurers in this case; he ought to have disclosed to them what intelligence he had of the ship’s being in danger, and which might induce him at least to fear that it was lost, though he had no certain account of it.”

Similarly, in *Lynch v. Hamilton*<sup>(13)</sup> Sir James Mansfield, C.J., said:<sup>(14)</sup>

“I cannot distinguish this from the case of *Seaman v. Fonereau*<sup>(15)</sup> where a letter received stated that the vessel insured had been Seen in the night leaky, and had disappeared the next day, and though that rumour was false, inasmuch as the ship kept her course and was afterwards captured, it was held that for want of that disclosure the underwriters were not liable.”

## KUWAITI LAW

According to the *KMC 1980*, the assured should make truthful disclosure of the circumstances which are known to him and which are such as to enable the insurer to assess the risks to be insured. “Truthful” here means that the circumstances disclosed must be true and the assured can neither conceal the truth nor make misrepresentation<sup>(16)</sup>. The duty is to disclose what the assured knows, but he does not need to disclose what he ought to know<sup>(17)</sup> or the insurer knows or ought to know<sup>(18)</sup>. If the assured acts intentionally, in the sense that he knows that his act would be a breach of his duty, breaches the duty of disclosure, the insurer may avoid

(12) (1723), 2 P. Wms. 170

(13) (1810), 3 Taunt. 37.

(14) *Ibid.*, at p. 44.

(15) (1743), 2 Stra. 1183.

(16) See Sarkhoh, Y., *Marine Insurance in Kuwaiti Law* 1993, p. 164.

(17) Cf. Sarkhoh, Y., *op. cit.*, p.166 where he expressed the view that the assured has to disclose what he ought to know.

(18) See the Explanatory Memorandum of the *KMC 1980*, p. 254

the contract and forfeit the premium,<sup>(19)</sup> and the insurer is not liable for any loss rising from the perils insured against, whether or not the loss occurs before or after the avoidance. If the assured unintentionally, the insurer may avoid the contract but he must refund the premium.

## 1.2. DISCLOSURE BY AGENT EFFECTING INSURANCE

The duty of making a full disclosure of material circumstances lies upon the assured, whether the insurance is effected by himself or by an agent. The agent of the assured should not only disclose to the insurer the material circumstances that he knows, or ought to know, but also what the assured is bound to know unless it comes to the assureds' knowledge too late to communicate to the agent<sup>(20)</sup>. It was held that material facts ought to be forwarded to the agent with all reasonable diligence so as to reach the underwriter before the insurance is actually effected<sup>(21)</sup>.

Whether the knowledge of an agent is imputed to the principal assured depends on the nature of the position of the agent and the authority given to him by the principal. "Some agents, so far represent the principal that in all respects their acts and intentions and their knowledge may truly be said to be the acts and intentions and knowledge of the principal. Other agents may have so limited and narrow an authority, both in fact and in the common understanding of their form of employment, that it would be quite inaccurate to say that such an agent's knowledge or intentions are the knowledge or intentions of his principal."<sup>(22)</sup> The master of a ship and the general agent of a shipowner for the transaction of his shipping business,<sup>(23)</sup>

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(19) KMC 1980, article 285/4; Sarkhoh, Y, op. cit., p.170.

(20) See MIA 1906, section 19.

(21) Grieve v. Young [1782] Morison's Dictionary 7086.

(22) Blackburn Low & Co v. Thomas Vigors [1887] 12 A Cas. 531 at 537-538.

(23) In *Gladstone v. King* (1813) 1 M & S 35 it was held that the master of the ship and the general agent of a shipowner for the transaction of his shipping business are agents whose knowledge will be deemed to be the knowledge of the ship-owner. In *Australia & New Zealand Bank Ltd v. Colonial & Eagle Wharves Ltd; Boag (third party)*, [1960] 2 Lloyd's Rep. 241 at 254. McNair, J., after reviewing the authorities, summarised the law regarding the persons whose knowledge is imputed to the assured for the purposes of the rule as to non-disclosure in the following terms: "These judgments make it clear to my mind that it is not the knowledge of all agents or servants that is imputed to the proposer of any marine insurance, but only the knowledge of quite a limited class, namely, the broker who actually places the insurance, the master or the ship-agent, or, to use Lord Halsbury's phrase (in *Blackburn v. Vigors*) .. 'his general agent for the management of his shipping business'.

the consigner and shipper of a cargo<sup>(24)</sup> and the general representative of the assured at a foreign port<sup>(25)</sup> have been held to be agents with whose knowledge the assured is affected. If one of these agents has withheld information of a material fact from his principal which he should, in the ordinary course of events, have communicated to the latter at the time when the insurance is effected, the contract can be avoided by the underwriter on account of the non-disclosure of this fact, which, if the agent had done his duty, the principal would have been able to disclose. In such a case it may be said that the knowledge of the agent is the knowledge of the principal<sup>(26)</sup>. Thus, in *Proudfoot v. Montefiore*<sup>(27)</sup> where an agent shipped goods, and, after learning of the loss of the vessel, had deliberately abstained from telegraphing news of the loss to his principal who, thereupon, insured the vessel in ignorance of the casualty. It was held that the principal could not recover against the underwriter because the agent should have telegraphed communicating the loss<sup>(28)</sup>.

This case is regarded as having laid down the law on the subject of information which ought to be communicated to the principal. The court said:

“If an agent, whose duty it is, in the ordinary course of business, to communicate information to his principal as to the state of a ship and cargo, omits to discharge such duty, and the owner, in the absence of

(24) In *Fitzherbert v. Mather* (1785) 1 T.R. 12 it was held that the consignor and shipper of the goods insured was the agent whose knowledge ought to have been communicated to the assured (owner of the goods) before the policy is effected; *Proudfoot v. Montefiore* (1867) LR 2 QB 511. As to the knowledge of a clerk of the assured being equivalent to that of the assured; see *Stewart v. Dunlop* (1785) 4 Bro Parl Cas 483, HL.

(25) *Proudfoot v. Montefiore* (1867) L.R. 2 Q.B. 511.

(26) Arnould, op. cit., p.619. See *Berger and Light Diffusers Pty Ltd v. Pollock* [1973] 2 Lloyd's Rep 442, where the shipping agents of the assured knew that the bills of lading in respect of an insured cargo were subject to certain clauses, that knowledge was imputed to him.

(27) (1867) L.R. 2 Q.B. 511.

(28) Compare, however, the American cases of *Mercantile Mut. Ins. Co. v. Folsom*, 85 U.S. 237 (1873) and *General Interest Ins. Co. v. Ruggles*, 25.U.S. 408 (1825).<sup>8</sup> In the former, the master of the vessel which was lost could have telegraphed news of the loss to the assured but did not do so. The policy was nonetheless held to be in force. In the latter, the master of the vessel which was lost, wilfully and with a fraudulent design to enable the owner to make insurance after a total loss, failed to communicate news of the loss, whereupon the owner, in good faith, placed coverage. The court held that the non-disclosure did not render the policy void or preclude the owner from a recovery under it.

information as to any fact material to be communicated to the underwriter, effects an insurance, such insurance will be void on the ground of concealment, or misrepresentation. The insurer is entitled to assume, as the basis of the contract between him and the assured, that the latter will communicate to him every material fact of which the assured has, or in the ordinary course of business ought to have, knowledge; and that the latter will take the necessary measures, by the employment of competent and honest agents, to obtain, through the ordinary channels of intelligence in use in the mercantile world, all due information as to the subject-matter of the insurance. This condition is not complied with where, by the fraud or negligence of the agent, the party proposing the insurance is kept in ignorance of a material fact which ought to have been made known to the underwriter, and through such ignorance fails to disclose it”<sup>(29)</sup>.

The above judgment, with some qualifications, was adopted by the House of Lords in *Blackburn v. Vigors*<sup>(30)</sup> where their Lordships held that it is not every agent whose knowledge can be deemed to be the knowledge of his principal. “Some agents”, said Lord Halsbury, “so far represent the principal that in all respects their acts and intentions and their knowledge may truly be said to be the acts and intentions and knowledge of the principal. Other agents may have so limited and narrow an authority, both in fact and in the common understanding of their form of employment, that it would be quite inaccurate to say that such an agent’s knowledge or intentions are the knowledge or intentions of his principal”. The agent whose knowledge is deemed to be that of his principal must be one to whom the principal looks for information concerning the property insured<sup>(31)</sup>.

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(29) (1867) L.R. 2 Q.B. 511, at pp. 521-522.

(30) (1887) 12 App. Cas. 531, where plaintiffs instructed a broker to insure an overdue ship. Whilst acting for the plaintiffs, the broker received information material to the risk and did not communicate it to them, but no policy was actually effected by him. Later the plaintiffs gave instructions to another broker, who effected the policy with the defendant. Both the plaintiffs and the second broker acted in good faith, and the question was whether the knowledge of the first broker would affect the policy and enable the defendant to treat it as void. The House of Lords decided that the policy was not vitiated on the ground that the first broker was not one of those agents whose duty it was to give information to the principal. For a somewhat unusual case where the agent stood in other relationships to the insured; see *St. Margaret's Trust Ltd v. Navigation & General Ins Co Ltd* (1949) 82 Ll. L.R. 752.

(31) Arnould, op. cit., at p. 620.

It should be noted that the agent's duty of disclosure extends only to those facts which the assured would be required to disclose if it knew of them. Thus, in *Sail v. Farex Giell*<sup>(32)</sup> Saville, L.J., said<sup>(33)</sup>:

“Why should it be a breach of good faith sufficient to deprive the assured of his contract if the agent fails to disclose something which, had the assured known of it, would not have had to be disclosed by the latter?”

This being so, a failure to disclose by an agent in these circumstances cannot be categorised as fraudulent or negligent, whatever the agent's motives may have been<sup>(34)</sup>.

The MIA 1906, codifying previous case law, provides in section 19:

“Subject to the provisions of the preceding section as to circumstances which need not be disclosed, where an insurance is effected for the assured by an agent, the agent must disclose to the insurer-

- a - every material circumstance which is known to himself, and an agent to insure is deemed to know every circumstance which in the ordinary course of business ought to be known by, or to have been communicated to, him; and
- b - every material circumstance which the assured is bound to disclose, unless it come to his knowledge too late to communicate it to the agent.”

In circumstances where the insurance is effected through more than one broker, it was held that the concealment of a material fact within the knowledge of any agent through whose agency, whether directly or indirectly, the insurance has been effected vitiates the policy<sup>(35)</sup>. On the other hand, where the insurance is not effected through the broker, the concealment of any material circumstance by the broker will not vitiate the contract<sup>(36)</sup>.

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(32) *Societe Anonyme d'Intermediaries Luxembourgeois v. Faro. Gie* [1995] L.R.L.R. 116.

(33) *Ibid.*, at 157.

(34) *National Westminster Bank v. Utrecht-America Finance Co* [2001] 3All E.R. 733.

(35) *Blackburn, Low & Co. v. Haslam* (1888) 21 Q.B.D. 144; *Republic of Bolivia v. Indemnity Mutual Mar. Ass. Co.* [1908] 14 Com. Cas. 156 at 168.

(36) *Blackburn Low & Co v. Thomas Vigors* [1887] 12 A Cas. 531.

## KUWAITI LAW

*KMC 1980* does not mention the duty of agent. The relationship between the principal and the agent and the relationship toward a third party are set out in the Kuwaiti Civil Law 1980. The general principle is that the principal should bear any consequence of the acts by the agent within his authority<sup>(37)</sup>.

It may follow that, when the assured makes an insurance contract through an agent, whatever the agent knows, is presumed to be the knowledge of the assured. However, this is not expressed by law in unambiguous words, so it is preferred that the *KMC 1980* could add an article imitating section 19 of the MIA 1906 so that any non-disclosure made by the agent through whom the insurance contract is made, for whatever reasons (except that the agent was defrauding the principal insured) and whether the principal knows, should result in the same consequence as if the non-disclosure were done by the assured himself.

Not all the employees have the same position as the agents under Kuwaiti law. The law does not specify in which conditions the employees' knowledge is imputed on the assured. Article 17 of the Kuwaiti Companies Law stipulates that "the company (as a legal person) shall bear the consequences of the acts done by its managers in the name of the company". Article 17 is concerning the employees' conduct, not their knowledge. The law would go too far if the employee's knowledge were all imputed on the employer. Kuwaiti law should use the English concept of the "agent to know" for reference on this point and only the knowledge of the agent to know should be imputed to the insurer.

## 2. MATERIAL CIRCUMSTANCES

### 2.1. THE TEST OF MATERIALITY

As discussed previously, every failure to disclose a material circumstance, whether by design or mistake, entitles the underwriter to avoid the policy. This brings us to the vexed question how is the

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(37) Kuwaiti Civil Code 1980, article 57:

"إذا أبرم النائب، في حدود نيابته، عقداً باسم الأصيل، فإن كل ما يترتب على هذا العقد من آثار ينصرف مباشرة إلى الأصيل".

'materiality' of a circumstance to be assessed; in other words, what criterion is to be used to determine whether a circumstance is, or is not, material. According to the MIA1906,<sup>(38)</sup> a representation or non - disclosure is material if it "would influence the judgment of a prudent insurer<sup>(39)</sup> in fixing the premium, or determining whether he will take the risk". The leading case on this very important subject is now the non marine case of *Pan Atlantic Insurance Co Ltd v. Pine Top Insurance Co Ltd*<sup>(40)</sup> where the House of Lords held that the appropriate test of materiality is whether the matter would have been taken into account by the prudent insurer when assessing the risk; it is not necessary to show that the matter would have had a decisive influence on the prudent insurer.

The facts of the case were as follows: Pine Top (the defendants) provided Pan Atlantic (the plaintiffs) cover for the years 1980, 1981 and 1982. During the meetings that the Pine Top's underwriter had with Pan Atlantic's broker, in 1982, the broker had in his possession two different kinds of Pan Atlantic's loss records. The 'long record' covered the years from 1977 until 1981 whereas the 'short record' covered only the years from 1980 to 1981. Although Pine Top's underwriter knew that the 'long record' was available to him, somehow his attention was diverted from asking to examine it and the broker offered just the 'short record' to him. Furthermore, the loss record for 1981 which was \$235,768 was inaccurate because Pan Atlantic had information (before the signing of the slip) about additional losses which was \$468,168 which they did not disclose. At some point Pine Top, after covering some of Pan Atlantic's losses that

(38) MIA 1906, s.20(2) and s.18(2).

(39) The term "prudent insurer" is nowhere defined but was considered in *Associated Oil Carriers Ltd v. Union Insurance Society of Canton Ltd* [1917] 2 K.B. 184. The insurer in this case argued that it was material on 31 July 1914 for charterers of a vessel to disclose that they were of German nationality. Aitkin, L.J., pointed out that this fact had been held material in *British and Foreign Marine Insurance Co Ltd v. Samuel Sanday & Co*, [1916] 1 A.C. 650, but rejected the insurer's contention that a prudent insurer must be taken to know the law as it was subsequently declared in *Sanday's* case. He stated:

I think that this standard of prudence indicates an insurer much too bright and good for human nature's daily food. There seems no reason to impute to the insurer a higher degree of knowledge and foresight than that reasonably possessed by the more experienced and intelligent insurers carrying on business in that market at that time."

(40) [1995] 1 AC 501.

proved to be disastrous, refused any further liability on the grounds of material non-disclosure and a claim was brought against Pan Atlantic for the sums that they had already collected under that same policy.

At first instance<sup>(41)</sup> the trial judge held that he was bound by the *C.T.I* case<sup>(42)</sup> to hold that a circumstance was material if it would have had an impact on the prudent underwriter's decision-making process, but not necessarily his final judgment. The judge found that the undisclosed actual losses for the year 1981 were material and that they should have been disclosed to the defendant. Therefore, the judgment was granted in favour of Pine Top who was entitled to avoid the contract. The Court of Appeal<sup>(43)</sup> affirmed the decision. The Court Appeal sought to ameliorate

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(41) [1992] 1 Lloyd's Rep 101.

(42) *Container Transport International Inc (C.T.I.) v. Oceanus Mutual Underwriting Assn (Bermuda) Ltd* [1984] 1 Lloyd's Rep 476. In this case, the plaintiffs (C.T.I.) were a company leasing out containers. C.T.I., had frequent disputes with its lessees as to who was responsible for the repairing of the small damages on the containers that were often. C.T.I., at some point, devised a plan called Damage Protection Plan (D.P.P.) under which it was agreed that, for an additional charge, it (C.T.I.) would bare the first \$250 (according to plan A) or \$500 (according to plan B) of the expenses and that the excess of the damage would be the lessee's responsibility. After devising the Damage Protection Plan, C.T.I. needed to insure the containers for up to \$250 (or \$500) which were included in the "plan". Before contracting with Oceanus, the plaintiffs had insured with two other insurers, but the subsequent claims of C.T.I. forced these insurers to either ask for changes in the insurance terms, or cancel the contract. When the losses occurred, Oceanus refused to meet C.T.I.'s claims. The refusal was based on the ground of non-disclosure of C.T.I.'s previous claim experience. The problem that had arisen in this case was whether or not the C.T.I.'s past claims record, on which Oceanus had relied, was complete.

At first instance, the court held that the contract could have been avoided for nondisclosure if the prudent insurer would have been influenced by the facts that were not disclosed. And because the defendants could not support the allegation for non-disclosure, the court held that plaintiff succeeded in his claim. Lloyd, J., in his decision, interpreted the meaning of the word "influence" in s.18(2) of the MIA 1906 and stated (at p. 187) that:

In general I would say that underwriters ought only to succeed on a defence of nondisclosure if they can satisfy the Court by evidence or otherwise that a prudent insurer, if he had known the fact in question, would have declined the risk altogether or charged a higher premium. It seems to me that this should be the general rule".

The Court of Appeal reversed the trial judge's decision and held (at p. 492) that:

[A]n insurer was entitled to avoid a contract under s. 18 (1) of the Marine Insurance Act, 1906 if there was undisclosed before the contract was concluded any circumstance which a prudent insurer would take into account when reaching his decision whether or not to accept that risk or what premium charge; the yardstick was the prudent insurer and not the particular insurer; here the representation made... was material and untrue within s. 20 [of the Marine Insurance Act 1906]...".

(43) [1993] 1 Lloyd's Rep 496.

what it perceived as the harshness of the ruling in *C.T.I.* by discerning two possible solutions which were consistent with the earlier Court's rejection of the "decisive influence" test. In his leading judgment, Steyn L.J., said:

"Having rejected the "decisive influence" construction, it seems to me that there were at least two feasible alternative solutions to be considered in *C.T.I. v. Oceanus*. The first solution was that a fact is material if a prudent insurer would have wished to be aware of it in reaching his decision. The second solution involves taking account of the fact that avoidance for non-disclosure is the remedy provided by law because the risk presented is different from the true risk. But for the non-disclosure the prudent underwriter would have appreciated that it was a different and increased risk. Approaching the matter in this way it is possible to say that the test is whether a prudent underwriter, if he had known the undisclosed facts, would have regarded the risk as increased beyond what was disclosed on the actual presentation....In my view we are free to choose between the two solutions. As between the two alternative solutions, I unhesitatingly choose the second solution. In other words, I would rule that, as the law now stands, the question is whether the prudent insurer would view the undisclosed material as probably tending to increase the risk. That does not mean that it is necessary to prove that the underwriter would have taken a different decision about the acceptance of the risk. After all, there may be many commercial reasons for still writing the risk on the same terms."<sup>(44)</sup>

The plaintiffs (Pan Atlantic) appealed to the House of Lords on the basis, among other, that that the words "influence the judgment" in s.18(2) and s. 20(2) of the MIA 1906 must mean that a contract could not be avoided for misrepresentation or non-disclosure unless it was shown that accurate and full disclosure would have had a decisive influence on the mind of the prudent insurer. The majority in the House of Lords, however, disagreed. Led by Lord Mustill, they interpreted the statute to reject the "decisive influence" test:<sup>(45)</sup>

(44) [1993] 1 Lloyd's Rep. at 505-06.

(45) To be material, the fact must be "something which would have controlled the underwriter's decision to accept the risk." *Knight v. U.S. Fire Ins. Co.*, 804 F.2d 9, 13 (2d Cir. 1986).

In American law materiality has not provided the judicial fireworks that it has in the United Kingdom. From earliest times in the United States the courts applying the admiralty law rule applicable to marine insurance cases have used what amounts to the "decisive influence" test: at =

“In the first place I cannot find the suggested meaning in the words of the Act. This is a short point of interpretation, and does not yield to long discussion. For my part I entirely accept that part of the argument for Pan Atlantic which fastens on the word ‘would’ and contrasts it with words such as ‘might’. I agree that this word looks to a consequence which, within the area of uncertainty created by the civil standard of proof, is definite rather than speculative. But this is only part of the inquiry. The next step is to decide what kind of effect the disclosure would have. This is defined by the expression ‘influence the judgment of the prudent underwriter’. The legislature might here have said ‘*decisively* influence’; or *conclusively* influence; or ‘determine the decision’; or all sorts of similar expressions, in which case Pan Atlantic’s argument would be right. But the legislature has not done this, and has instead left the word ‘influence’ unadorned. It therefore bears its ordinary meaning, which is not, as it seems to me, the one for which Pan Atlantic contends. ‘Influence the judgment’ is not the same as ‘change the mind’. Furthermore, if the argument is pursued via a purely verbal analysis, it should be observed that the expression used is ‘influence the judgment of a prudent insurer or [the underwriter] in... determining *whether* he will take the risk’. To my mind, this expression clearly denotes an effect on the thought processes of the insurer in weighing up the risk, quite different from words which might have been used but were not, such as ‘influencing the insurer *to take* the risk’.

Lord Mustill also observed that the decisive influence test might cause practical difficulties:

"I am bound to say that in all but the most obvious cases the ‘decisive influence’ test faces them with an almost impossible task. How can they tell whether the proper disclosure would turn the scale? By contrast, if all that they have to consider is whether the materials are such

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= a minimum "the risk must be increased so as to enhance the premium." (See *M'Lanahan v. Universal Ins. Co.*, 26 U.S. (1 Pet.) 170 (1828). The decisive influence test is now universally employed under the strict admiralty rule; the American formulation is that a fact in order to be material must be "something which would have controlled the underwriter's decision." (See e.g., *Btresh v. Royal Ins. Co.*, 49 F.2d 720, 721, 1931 AMC 1044 (2d Cir. 1931); *Knight v. U.S. Fire Ins. Co.*, 804 F.2d 9, 1987 AMC 1 (2d Cir. 1986), cert. denied, 480 U.S. 932, 1987 AMC 2407 (1987).

that a prudent underwriter would take them into account, the test is perfectly workable”<sup>(46)</sup>..

After thoroughly reviewing the cases and authorities, Lord Mustill announced that materiality in s. 18(2) and s.20(2) means:

“[T]he duty of disclosure extend[s] to all matters which would have been taken into account by the underwriter when assessing the risk (i.e. the ‘speculation’) which he was consenting to assume. This is in my opinion what the Act was intending to convey, and what it actually says.”<sup>(47)</sup>

By a majority of 3 to 2<sup>(48)</sup>, the House of Lords decided to retain the “mere influence” test of *C.T.I.*

The effect of the *Pan Atlantic* decision was considered by the Court of Appeal in *St Paul Fire and Marine v. McConnell*<sup>(49)</sup>, where the issue of materiality was again put to the test by counsel for the defendant, who argued that the ‘increase of risk’ is the criterion to be applied for determining the materiality of a circumstance. This, together with counsel’s other suggestion that the test of materiality laid down by the House of Lords in *Pine Top* is not conclusive, was, however, roundly dismissed by Evans, LJ., as follows:

“... I would reject Mr. Phillips’ [acting for the defendants] submission that the fact cannot be material unless the risk is thereby increased, and I would support this conclusion on the wider ground that ‘material’, like ‘relevant’, denotes a relationship with the subject matter rather than a prediction of its effect”.

Thus, the ‘increased risk’ test was clearly rejected by the Court of Appeal.

In his valuable work, Arnould summarises the legal position as it is now established by the *Pan Atlantic* as follows:<sup>(50)</sup>

“The test of materiality is whether the matter would have been taken into account by the hypothetical prudent insurer when assessing the risk. The object of the rules in ss.18 and 20 of Act 1906 is to enable the insurer

(46) *Pine Top*, [1994] 3 All E.R. at 600-01.

(47) *Pine Top*, [1994] 3 All E.R. at 607.

(48) (Lords Goff, Mustill and Slynn; Lords Templeman and Lloyd dissenting).

(49) [1993] 2 Lloyd’s Rep 503; [1995] 2 Lloyd’s Rep 116, CA.

(50) Arnould, *op. cit.*, at pp. 561,562.

to judge accurately of the risk. There must be accuracy of representation on those matters which would naturally and reasonably enter into the estimation of the risk by a prudent insurer, and influence his thought processes in weighing up the risk. Such matters must be disclosed voluntarily except in those circumstances set out in s.18(3) where disclosure is not required. It does not have to be shown that the hypothetical prudent insurer would have reached a different decision, if supplied with an accurate presentation and proper disclosure”.

## KUWAITI LAW

The *KMC 1980* on the question of materiality does not present substantial difference. Article 280, without using any word equivalent to "materiality", provides that non-disclosure of circumstances made fraudulent by the assured which would diminish the insurer's view of the risk voids the insurance contract. Thus, article 280 does not vitiate the contract merely because the risks represented and the actual risks are different. It is not this difference which is important but the effect of the non-disclosure upon the insurer's opinion of the risk. Thus, the insurance is voidable only when the non-disclosure circumstance would influence the insurer's mind in determining either the conditions of the contract, or, even, its conclusion at all. The insurer is induced to undertake the risk by this opinion. The loss, also, needs not be connected with the non-disclosure. The same article says that the insurance is voidable even in the case where the non-disclosure would not have influenced the damage or the loss of the subject-matter insured.

The opinion of the risk relates either to the value insured or to the perils exposed. For instance, non-disclosure relating to the nature of the cargo (in a cargo policy), non-disclosure about the voyage and the date of the ship's sailing.

Further, false answer to questions contained in the proposal form render the insurance contract voidable, because their importance to the insurer is implied<sup>(51)</sup>.

Generally speaking, to establish materiality the insurer has to prove that the non-disclosure has modified his opinion of the risk. This is a

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(51) Kuwaiti Civil Code 1980, article 790/1.

matter of fact confined to the jurisdiction of the "judges of fact". The Court of Cassation, which reviews findings of law, inquires only if causation was established between non-disclosure and the conclusion of the contract.

*KMC 1980* seems to have adopted the particular insurer test since article 280 leave the word "insurer" unadorned, saying that the insurer may avoid the insurance contract, if the assured,... fraudulent non-discloses information which could lead the insurer to underestimate the risk to be insured against".

It is possible for the judges to read in the word "prudent" before the word "insurer" in article 280. A Kuwaiti scholar has supported this view<sup>(52)</sup>. It goes without saying that, between the particular insurer test and a prudent insurer test, the *KMC 1980* should choose the latter, which is the standing law of U.K.

## 2.2. EXAMPLE OF MATERIAL CIRCUMSTANCES

Section 18 (4) of the MIA 1906 states:

“Whether any particular circumstance, which is not disclosed, be material or not is, in each case, a question of fact.”

And section 18 (5) provides:

“The term ‘circumstance’ includes any communication made to, or information received by, the assured.”

In *Cantiere Meccanico Brindisino v. Janson*<sup>(53)</sup>, which concerned a floating dock insured for a voyage, Buckley, L.J., emphasized that the material circumstance referred to in s. 18(4) of the MIA 1906 was a material circumstance of fact, and observed:<sup>(54)</sup>

“But by material circumstance is, I think, meant a material circumstance of fact to the exclusion of a material circumstance of opinion. Whether the dry dock here tendered for insurance required to be strengthened for the voyage or not was, I think, a question of opinion. The assured honestly believed, and had the authority of Watkins’ report for believing, that she did not require to be strengthened for the voyage, but

(52) See Sarkhoh, Y, *op. cit.*, p. 165.

(53) (1912), 107 L.T. 281 C.A.

(54) (1912), 107 L.T. 281 C.A, at p. 287.

might safely be towed to a Mediterranean port provided that suitable arrangements for towing were made. The assured was bound to disclose that report as soon as he had it. He did so. If he had received any other report, say to a contrary effect, the existence of the opinion which it contained was a matter of fact, and its disclosure was necessary as being a material circumstance.”

It does not necessarily follow that because a fact has been held to be immaterial in one case, a similar fact is not material in another.

A number of cases decided before and after the passing of the Marine Insurance Act 1906 concerning the question of materiality are considered below. But we should notice that those cases particularly those from the nineteenth century or earlier, are to be treated with caution, as affording examples of the types of circumstances which are to be regarded as material, or as not being material, under a marine policy, or as indicating the scope of a marine underwriter's presumed knowledge. Materiality is a question of fact, on which nowadays expert evidence is almost invariably adduced. The question is to be judged in the light of contemporary conditions and patterns of business<sup>(55)</sup>.

### 2.2.1. Excessive Valuation

An Excessive valuation of the subject-matter insured may be a material circumstance to be disclosed because “the excessive valuation not only may lead to suspicion of foul play, but that it has a direct tendency to make the assured less careful in selecting the ship and captain, and to diminish the efforts which, in case of disaster, he ought to make to diminish the loss as far as possible, and cannot therefore properly be called altogether extraneous to the risks”<sup>(56)</sup>. In *Ionides*

(55) Arnould, op. cit., at p 647.

(56) Per Blackburn, J., in *Ionides v Pender* (1874), L.R. 9 Q.B. 531, 535. KMC 1980, article 284 provides (Free translation):

"1- The insurer may avoid the contract if the amount of the insurance exceeds the value of the things insured and fraud had been proved in the part of the assured or his agent. In such a case the insurer keeps the premium in full.

2- Where there is no fraud proved the contract remains valid to the extent of true value of the things insured".

" ١- يجوز للمؤمن طلب ابطال العقد إذا كان مبلغ التأمين يزيد على قيمة الاشياء المؤمن عليها وثبت التدليس من جانب المؤمن له أو وكيله. وفي هذه الحالة يبقى القسط كاملا من حق المؤمن.

٢- فإذا انتفى التدليس اعتبر العقد صحيحا بقدر الاشياء المؤمن عليها.

*v. Pender*<sup>(57)</sup> part of a cargo insured consisted of 222 casks, the cost, charges and insurance of which amounted to £973, but which were valued for insurance at £2,800. This over-valuation was not disclosed by the assureds. It was in evidence that excessive valuation, to such an extent as here, was considered by underwriters to be a speculative risk, which one class of underwriters would not take at all, and another class would take only if a sufficient premium were offered. The insurer was held to be entitled to avoid liability because the overvaluation was material.

In *Gooding v White*<sup>(58)</sup> a cargo of cloves was loaded aboard a barge to be taken from Harwich to London. The barge sprang a leak and had to be beached. Part of the cargo was then jettisoned, and the remainder was returned to Harwich where it was landed and dried. The cargo-owner claimed on his policy insurance, but the insurers refused payment, contending that the cargo was excessively over-insured at £5,000 and that 'the whole thing was a fraud from beginning to end'.

The court ruled in favour of the underwriters for the assured had concealed a material fact. "...To ascertain whether" said Pickford, J., "there was such an over-valuation as to alter the nature of the risk, his Lordship then examined the figures in great detail, and said that he had come to the conclusion that the cargo had been very much over-valued. He had the gravest doubts whether the cargo was worth half the £4,000 which was the figure one of the witnesses put upon it. It was unnecessary to say whether that over-valuation was effected for the purpose of defrauding the underwriters or was done with too enthusiastic an idea of the profits likely to be realised from the cargo. It was sufficient if there was, as he thought there was, such an over-valuation as ought to have been communicated to the underwriters, and as it had not been

(57) (1874), L.R. 9 Q.B. 531; see *Berger and Light Diffusers Pty., Ltd. v. Pollock*, [1973] 2 Lloyd's Rep. 442, Q.B.D. (Commercial Court), where the assured stated that some steel injection moulds were worth £20,000, it was held that the insurers had failed to prove that the alleged overvaluation was material. See also *Williams v. Atlantic Assurance Co., Ltd* [1932] All.E.R. 32, CA, where the insurers repudiated liability for the loss of a cargo of textile goods shipped from Alexandria to Liverpool, on the ground that they had been grossly overvalued. They contended that they had been told that they were worth £8,000 whereas in fact their value was only £250. Scrutton, L.J., giving judgment in the Court of Appeal, held (obiter) that this plea failed because the underwriters had not given evidence in support of their allegation.

(58) (1913) 29 TLR 312

communicated, there was a concealment of a material fact which avoided the policy. On that ground, therefore, the action failed”<sup>(59)</sup>.

In the case of hull insurance the position may be different than in the case of cargo because, as it was held, the underwriter is as well able as the assured to estimate the proper value. *In General Shipping and Forwarding Co. v. British General Insurance Co., Ltd*<sup>(60)</sup>. a vessel was insured for £2,000 in December, 1921 under a policy in which she was valued at £5,000. In fact her market value was about £1,500. She became a total loss on September 23, 1923 during the currency of the policy. The assured claimed £2,000 under the policy, but the insurers repudiated liability on the ground that she was grossly over

It was held that the claim succeeded. Although the vessel was considerably over-insured, probably to the extent of twice her value, the insurers were just as able to estimate her market value as her owners were. There was no fraud, and under s. 27 (3) of the MIA 1906 the value fixed by the policy was conclusive. Bailhache, J., observed:<sup>(61)</sup>

“Now it is sought to reopen the valuation upon the ground of excessive insurance. In considering that one must bear in mind that this was an insurance of hull and machinery and not an insurance of goods. One must bear in mind that the underwriter had at his hand in Lloyd’s Register of ships all the information about the (vessel) that the owners had, except, of course, the price at which she had changed hands, and the circumstances under which she became the property of the Janet S.S. Co. The defendants had been on the risk twice before; and on this third occasion they increased their risk to £2,000. The underwriters were just as well able in my judgment to estimate what the market value of the (vessel) was as were the people who owned her; and with all the information before them and the same possibilities of estimating her value they chose to accept this valuation and to make a contract on these terms and to take premiums on this valuation of £5,000. Now they seek to upset it on the ground that it is an overso excessive as to entitle them to be off the risk. Now, where the subject-matter of the case is goods, the matter is on

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(59) *Ibid.* at p 312.

(60) (1923) 15 Ll.L.Rep. 175, K.B.D.

(61) *Ibid.*, at p. 176

a different footing. There the underwriter has no means of knowing the value of the goods except the state of the assured. He has not, as in this case, all the information to his hand when he comes to insure goods; and it is much more easy to infer fraud from over-insurance of goods than from over-insurance of ships when both parties are in approximately the same position to know what the market value of the ship proposed to be insured is.

Moreover, it must be borne in mind that underwriters who know their business very well and make large sums of money out of it for the most part favour over of hull and machinery. They particularly favour it not only when they cover total loss and constructive total loss but particular average loss as well, because the 3 per cent franchise is harder to get over when the value is high than when the value is small. But there are good reasons why they should accept over-valuation in the case of total and constructive total loss, particularly where, as is always the case now, the insured value and the repaired value are to be taken at the same figure. But it is no business of mine to tell underwriters how to conduct business which they do very successfully. It suffices that they prefer over-valuation of hull and machinery.”

In *Piper v. Royal Exchange Assurance*<sup>(62)</sup> a vessel was insured for £2,500. She stranded on the Buxey Sands while on a voyage to Burnham-on-Crouch. The assured claimed under the policy, but was met with the defence that she was overvalued and that therefore there had been non-disclosure of a material fact, and that the insurers accordingly were entitled to avoid liability.

Roche, J., held that the claim succeeded. At the time of the stranding the assured was endeavouring to sell her at a price rather less than the insured value, and it could not be said that he was aware of her actual value, which was little more than the value of her lead keel. His Lordship observed:<sup>(63)</sup>

“In my judgment the vessel never was worth £2,500; but it does not follow that the overvaluation was one which avoided the policy.... I think

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(62) (1932), 44 Ll.L. Rep. 103, K.B.D.

(63) *Ibid.*, at p. 119.

[the assured] was hoping against hope that he might sell this vessel, and might sell her at somewhere about £2,000, or perhaps rather less. It may not have been very honest, from some points of view, to sell a vessel with those defects, but still, it is not a matter quite unknown in business and I am not prepared to find that he so knew at that date of her deficiency in value and that he ought to have told his underwriters in 1928. In other words, that was his asking price at that time, and I am not prepared to find that he ought to have declared her at a lower figure.”<sup>(64)</sup>

In *The Grecia Express*<sup>(65)</sup> the vessel was insured for US \$ 8 million, about twice her true market value. The market value was not disclosed and the insurer relied on that as being a material non-disclosure, justifying avoidance. That defence failed. Colman, J., concluded that (i) a vessel is insured for more than her open market value is not material per se; (ii) a valuation which is “consistent with reasonably prudent ship management”, in that it takes into account matters such as the cost of replacing a lost vessel and potential lost earnings, is not material to disclose; and (iii) “it is only where the disparity [between the market value and the insured value] cannot be justified on reasonable commercial grounds” that any duty of disclosure arises. On that basis, Colman, J., held that, the insured value being consistent with reasonably

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(64) Another issue in *Piper v. Royal Exchange Assurance* (1932), 44 Ll.L.Rep. 103, K.B.D. concerned a later policy in respect of the same yacht, and this issue also was whether she was overvalued. The insurers repudiated liability in respect of damage to her by fire on the ground that she had been overvalued to the assured's knowledge. It was proved that she was only worth half the sum for which he insured her, and there was little chance of selling her, and repairs which had been carried out on her had not been effective to get rid of the real trouble that affected her saleable value.

Roche, J., held that the vessel was overvalued to the knowledge of the assured, and that the insurers were not liable. He observed at p. 120:

I am satisfied that at that time the vessel was worth little more than, if as much as, half the value at which she was insured; that £1,000 or £1,200 would have represented the whole value of the ship-her mast, her sails, and everything. That, in my judgment, is a material circumstance which the assured knew, and which would have made a difference to the underwriters so that they would not have insured the risk at all. I accept the evidence given on that matter by the underwriters. The matter had been progressive ever since the beginning. The inherent defects in this ship, and her want of salability, had been becoming progressively known to the assured, and at that date, at any rate, if not before, he ought to have disclosed the decrease in value to the underwriters if he wanted them to insure her at that value.”

(65) [2002]1 Lloyd's Rep. I.R. 669.

prudent ship management, there had not been a failure to disclose a material fact. He said that it was nothing to the point that the insurer was thereby deprived of the opportunity of investigating why there was a disparity. An insurer who wanted such an opportunity had the simple expedient of asking for an independent market valuation and calling for an explanation of the disparity from the insured.

In *King v. Aetna Ins. Co. (The Greyhound)*<sup>(66)</sup> a vessel purfor \$2,500 was insured for \$40,000 without there being a disto underwriters of the purchase price. In addition, the assured placed two additional policies of \$10,000 and \$5,000 with other insurance companies and was refused a third additional policy of \$15,000 because he refused to divulge the purchase price.

One week after the binder was issued the vessel was totally destroyed by fire. Underwriters defended upon the basis of concealment of the purprice. In upholding the defense, the court observed that concealof an overvaluation so excessive as to make the risk speculative vitithe policy, and that a valuation sixteen times what she had just cost the insured made the risk speculative because the insured had less incentivo protect her than he would have had if he had paid a price somenear commensurate with the stated value.

Materiality is in this sense, therefore, a question of degree and of the explanation for it. An excessive valuation of the hull is not necessarily material per se<sup>(67)</sup>.

### 2.2.2. Nature of the Cargo

Generally speaking it is not necessary, in a policy on goods, to disclose information relating to their condition (although there is no implied warranty that the goods are seaworthy)<sup>(68)</sup> because the underwriter will not in any event be liable for loss caused by the condition of

(66) 1931 AMC 1940 (2d Cir). See, also, *Btresh v. Royal Ins. Co.*, 1931 AMC 1044 (2d Cir.), and *Hauser v. American Central Ins. Co.*, 1964 AMC 526 (E.D., La.).

(67) Arnould, op. cit., p.652. In *The Dora* [1989] 1 Lloyd's Rep. 69 (where the issue was treated as one of misrepresentation, but the same position would apply if the point were treated as one of non-disclosure)., Phillips J., held that overvaluation was not to be material in the light of the expert evidence.

(68) MIA 1906 s.40(1). Where there is a warranty of seaworthiness, matters rendered superfluous by reason of that warranty do not have to be disclosed; s. 18(3)(d) of the 1906 Act.

the goods themselves<sup>(69)</sup>. In *Mann, Macneal and Steeves v. Capital and Counties Ins. Co*<sup>(70)</sup> policies of insurance were effected upon the hull and machinery of a wooden ship at and from ports in the United States to port in France, while there, and back again to ports in the United States. At the date of the insurance the owners had engaged the vessel to carry 100,00 gallons of petrol in 2500 iron drums from New Orleans to Bordeaux; but this fact was not disclosed to the underwrites. The voyage to Bordeaux was completed without mishap, but on the return journey she was totally lost by an accidental fire. In answer to a claim on the policies the underwriters pleaded non-disclosure of the engagement for carriage of the petrol to Bordeaux. It was proved that petrol in iron drums was an ordinary form of merchandise for inclusion as part of a general cargo to be carried across the Atlantic. Greer, J., in the court of first instance, held that there had been non-disclosure of a material fact and gave judgment for the underwriters. In the Court of Appeal, Bankes, and Atkin, L.J., whilst refraining from overruling this finding of Greer J., held that the requirement of disclosure had been waived. Younger L.J., also held that the fact withheld was immaterial. The judges were therefore unanimous in allowing the appeal. Atkin, L.J., further, remarked that the reasons given for this decision do not necessarily apply to the case of a cargo which is unusual and of a cargo of dynamite. The solution depends upon the circumstances of each particular case. But even upon the facts of this case the insurer could protect himself by making an inquiry or by insisting on a warranty against such cargo.

The above rule, however, is not unrestricted, as it is clear from *Greenhill v. Federal Insurance Co*<sup>(71)</sup> that the previous history or condition of the goods may in certain circumstances be a material fact which should be disclosed. In this case, a consignment of celluloid was shipped from Halifax, Nova Scotia, to Nantes, and arrived in a damaged condition. When a claim was made under the policy, the insurance company repudiated liability on the ground that there had been non-disclosure of the fact that the celluloid had been

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(69) In accordance with section 55 (2) (c) of the MIA 1906, the insurer is not in any event liable for inherent vice of nature of the subject-matter insured. See Arnould, op. cit., p. 663.

(70) [1921] 2 K.B. 300.

(71) (1926), 135 L.T. 244, C.A.

previously carried from New York to Halifax on a very slow steamer, and that the cargo had been exposed to rough weather on deck and had been left on an open quay on arrival at Halifax. The Court of Appeal held that the pre-carriage of goods was a material fact and ought to have been disclosed to the underwriters by the owners when effecting the policy. Accordingly, the insurance company was entitled to avoid liability.

### 2.2.3 Other Insurance Policies effected by Assured

Even though in a particular case there may be no duty to make any disclosure with regard to the valuation of the subject matter insured, there may be other contracts of insurance which place the assured or his servants who have the management of the property in the position of making a profit out of its destruction<sup>(72)</sup>. When such is the position (i.e. changing the character of the risk from a business to a 'speculative' risk) the existence of the other insurances must be disclosed<sup>(73)</sup>. Thus, in *Thames and Mersey Marine Insurance Co., Ltd. v. Gunford Ship Co., Ltd*<sup>(74)</sup>.the assured effected a valued policy in respect of a vessel for a voyage from Hamburg to Santa Rosalia, the sum insured being £18,500,

(72) Arnould, op. cit., at p 656.

(73) KMC 1980 adopts a similar rule. Article 285 provides (Free translation):

"1- Except in the case of the fraud, if the risk is insured against by several contracts.... and the total amount of the insurance stated in those contracts exceeds the value of the thing insured, then those contracts shall be considered valid and the assured may recourse against the various insurers within the limit of the damage which shall not exceed the value of the thing insured...

2- The assured who demands the damages must declare to the insurer

about the other existing insurances which he knows otherwise his claim shall not be acceptable.

3- If the assured committed fraud then each of the several insurance contracts becomes avoidable upon the request of the insurance.

4- In all cases the premium shall be the right of the insurer who acts in good faith".

١- فيما عدا حالة الغش إذا كان الخطر مؤمنا عليه بعدة عقود سواء أكانت مبرمة في تاريخ واحد، أم في تواريخ مختلفة، وكان مجموع مبلغ التأمين المذكور في هذه العقود يزيد على قيمة الشيء المؤمن عليه، اعتبرت عقود التأمين صحيحة وجاز للمؤمن له الرجوع في حدود الضرر وبما لا يزيد على قيمة الشيء المؤمن عليه على المؤمن المتعددين بغير ترتيب بينهم بنسبة مبلغ التأمين الذي يلتزم به كل منهم إلى القيمة الحقيقية للشيء المؤمن عليه.

٢- ويجب على المؤمن له الذي يطلب تسوية الضرر الذي لحق به أن يصرح للمؤمن بوجود التأمين الأخرى التي يعلم بها وإلا كان طلبه غير مقبول.

٣- وفي حالة ثبوت الغش من المؤمن له، يكون كل عقد من عقود التأمين المتعددة قابلاً للإبطال بناء على طلب المؤمن.

٤- وفي جميع الأحوال يكون قسط التأمين بأكمله من حق المؤمن حسن النية.

(74) (1911), 105 L.T.312, H.L.

whilst her real value was only £9,000. But the insurance company was not told that the assured had also taken out policies to a large amount on freight and disbursements. She was wrecked off the Brazilian coast. It was held by the House of Lords that the insurance company could avoid liability on the ground of non-disclosure of a material fact.

Lord Shaw of Dunfermline said:<sup>(75)</sup>

“I do not find myself able to agree with the judgment of either House of the Court of Session. It follows upon the nature of the argument there presented that no duty rests upon the owners, or agent, to disclose to the insurers of the hull facts of the character found in this case. I cannot assent or give any countenance to such a view. The learned Lord Ordinary says: ‘I cannot see that there is any duty whatever on the part of the assured to disclose to the underwriter on hull, who accepts the vessel at a declared value, that he is also effecting insurances upon freight and disbursements.’ The opinion of all your Lordships is to an opposite effect, and I humbly agree with that opinion. So far as the effecting of insurances upon freight is concerned that is sound business, because it is grounded upon a stipulation for true indemnity; but so far as disbursements, wherever they are duplications of freight, are concerned, these, when freight has already been insured, form no part of a contract of indemnity, but the insurance upon them is merely a gamble, discountenanced by sound principle and not enforceable by law.”

However, where the additional policies do not change the character of the risk then the defence of non-disclosure will be failed. Thus in *Mathie v. Argonaut Marine Insurance, Ltd*<sup>(76)</sup> the plaintiff sent his vessel in ballast from a port in the United Kingdom to Delagoa Bay to load a cargo there for Mauritius. He took out a freight policy for £6,000 in the form “Freight and anticipated freight and/or chartered freight on board or not”. On the arrival of the vessel at Delagoa Bay a cargo for Mauritius was not available, so the plaintiff supplied a cargo of coal for Bombay and insured it for £6,000. The cargo was lost in the course of the voyage to Bombay. The plaintiff claimed against the insurers, but they repudiated liability on the ground that he had not disclosed the fact

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(75) (1911), 105 L.T 312, H.L., at p.317.

(76) (1925), 21 Ll.L.Rep. 145, H.L.

that there was already in existence a policy for £6,000 on freight. They contended that the actual freight upon the coal from Delagoa Bay to Bombay might have been something from £1,800 to £2,000, and that, if the insurance of the cargo and the freight were added together, there was no doubt that it was considerably in excess of the total value of the cargo and the freight which, calculated on the price at which the plaintiff thought that he could sell the cargo at Bombay, was £7,200.

The House of Lords held that the action succeeded, for there had been no non-disclosure of a material fact. Lord Buckmaster adopted<sup>(77)</sup> the test used by Bailhache, J., who had said in the trial Court:<sup>(78)</sup>

“As I understand it, in order to find out whether existing insurances ought to be disclosed when a fresh insurance is taken out one has to consider this: of course, one must take the figures, but one has to consider whether the discrepancy between the insured value and the actual insurable value is of such a nature as to change the character of the risk from a business risk to a speculative risk.”

His lordship saw no reason to differ from the conclusion of fact reached by Bailhache, J., to the effect that in the circumstances of the case there had been no change in the character of the risk.

In *Wilson, Holgate & Co., Ltd. v. Lancashire and Cheshire Insurance Corporation*,<sup>(79)</sup> 657 barrels of palm oil were insured for a voyage from Singapore to Liverpool. The policy contained the following clause:

“Average payable on each package separately or as customary including risks of leakage, and breakage from any cause whatsoever irrespective of percentage.”

One hundred and seven of the barrels were found to be damaged on arrival at Liverpool. The assured claimed for a loss under the policy, but the insurers denied liability on the ground that the assured had failed to disclose that they had effected another insurance against marine risks “f.p.a. and warranted free from all claims for leakage and breakage however caused”.

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(77) *Ibid.*, at p. 146

(78) (1924), 18 L.L. Rep. 118 at p. 121.

(79) (1922), 13 L.L.Rep. 486, K.B.D.

Bailhache, J., held that the defence of non-disclosure failed, and that the insurers were liable. He observed:<sup>(80)</sup>

“Then it is said that there has been non-disclosure of material facts. The first material fact non-disclosed is that there was an insurance effected with the Marine Insurance Society of Canton. That was an insurance against marine risks f.p.a., and warranted free from all claims from leakage and breakage, however caused. It did not cover the particular risk intended to be covered by this policy, and, in my opinion, there was no reason why the fact of that insurshould be disclosed to the underwriters in this case.”

#### **2.2.4. Circumstances that may aggravate the Risk**

When the assured has entered into a contract which makes the risk of ultimate loss to the underwriter greater than the usual one, this fact ought to be disclosed<sup>(81)</sup>. Thus, the insertion of a new kind of clause in the contract, concluded between the assured and a third party, must be disclosed by the former when he takes out a policy against the eventual non-performance of the contract inasmuch as this clause may effect the rights of the underwriters. In *Tate v. Hyslo*<sup>(82)</sup> the plaintiffs effected policies of marine insurance with the defendants on goods for the carriage of such from ocean-going ships, by way of lighters, to their refinery. Insurances of that nature, at a higher premium, gave recourse against lightermen in the event of a loss. However, the plaintiffs failed to inform the insurers that, under an agreement, the lighterman was only covered against loss brought about by his negligence. When a loss occurred in the course of lighterage, the insurers refused payment, because they had not been informed of this special arrangement which, in effect, altered the risk.

The Court of Appeal ruled that the insurers were not liable under the policies. The non-disclosure amounted to the concealment of a material fact which would have influenced the insurers in undertaking the risk and setting the premium.

In *Mercantile Steamship Co. v. Tyser*<sup>(83)</sup> the plaintiffs, on the 29th of July, 1875, chartered their ship *G.* for a voyage from New York to

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(80) *Ibid.*, at p. 488.

(81) Arnould, *op. cit.*, at p 668.

(82) (1885) 15 Q.B.D. 368.

(83) (1880) 7 Q.B.D. 73.

Odessa. The charterparty contained a clause giving the charterer an option to cancel the contract “if the vessel has not arrived at the port of New York on or before the 1st of September, 1875.” The plaintiffs, on the 7th of August, 1875, effected an insurance with the defendant “to and from London to New York while there, and thence to Odessa, via Constantinople,” on their chartered freight, including, besides the ordinary ones, all risks “incident to steam navigation”. The clause in the charterparty giving the option to cancel was not mentioned to the defendant. The ship started from England on the 7th of August, but owing to the failure of her machinery in the British Channel was obliged to put back for repairs, which occupied so much time that she did not reach New York until after the 1st of September, whereupon the charterers cancelled the charter and the freight was lost.

Lord Coleridge C.J., held that the interest in the chartered freight had commenced at the time when the charter was cancelled, but that the defendant was not liable, for the freight was not lost by any of the perils insured against, but by the exercise of the option to cancel in the charterparty; and, further, that the withholding from the defendant information as to the power to cancel vitiated the policy. “The evidence showed” said the learned Chief Justice “that this provision as to the cancelling option was of comparatively recent introduction into charterparties, that it had come in with the greater prevalence of steamships in the mercantile marine, that it was sometimes inserted and sometimes not in the charters of steamships, and that there was no usage as to its disclosure or non-disclosure. It is plain that it may enormously increase the risk to be run. In this case there were four or five days to spare; but the argument as to its non-disclosure would have been the same if there had been but an hour. I think, therefore, that the fact of this option existing in this charter was a fact which the assured was bound himself to disclose to the underwriter. The case of *Bates v. Hewitt*<sup>(84)</sup> appears to me to be directly in point. On the whole I give judgment for the defendant.”<sup>(85)</sup>

(84) (1867), L.R. 2 Q.B. 595.

(85) (1881) 7 Q.B.D. 73,77. Cf. *Ruger v. Firemen's Ins Co*, 90 Fed.R. 310 (1898), where an American court held that underwriters are presumed to have knowledge of cancellation clauses in charterparties.

Where, however, it is the general and well-known practice to put a certain clause in a particular kind of mercantile contract, the underwriter is presumed to know that the contract contains the clause, and therefore the assured is not bound to give information about its insertion, though the clause may tend to increase the risk.

In time charters it is now the universal practice for an off-hire clause to be inserted, providing for the payment of hire to cease in specified events. For obvious reasons, the presence of such a clause in a time charter will, depending on the terms of the clause and of the policy, tend to increase the risk under a freight policy, but considering that off-hire clauses are always inserted and that in most cases they are in a standard form which is well known, there is no obligation to disclose them. The Court of Appeal has thus held that an assured is not bound to disclose that a charterparty contained an off-hire clause<sup>(86)</sup>.

#### 2.2.5. Condition of Goods on Shipment

It would be necessary for the assured to disclose to the underwriter the fact that the goods to be insured consisted of an end of stock clearance purchase in which there may be a proportion of seconds or rejects, for in the event of a claim there could be difficulty in distinguishing between damage already in existence and damage sustained in transit. Moreover, defective or previously repaired goods might be susceptible to further damage. In *Liberian Insurance Agency Inc. v. Masse*<sup>(87)</sup> a cargo described as “enamelware (cups and plates) in wooden cases” was insured for a voyage from Hong Kong to Monrovia and arrived in a damaged condition. Donaldson, J., held that the insurers

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However, cancelling clauses are now so general in charterparties that it is extremely doubtful whether a court would now hold that it was material to disclose the fact of their inclusion even in a case where this increased the risk.

- (86) *The Bedouin* [1894] P. 1., the non-disclosure of cesser clause in a policy on time freight was held to be not non-disclosure of a material fact.; see also *Salvador v. Hopkins* (1765) 3 Burr. 1707, where it was held that the underwriter need not be told that a charterparty of the East India Company contained a clause entitling the company to keep the ship out in India for a year, there being a general usage of the East India trade to this effect.
- (87) [1977] 2 Lloyd's Rep. 560. Cf. *Berger and Light Diffusers Pty., Ltd. v. Pollock* [1973] 2 Lloyd's Rep. 442, QBD (Comm), the fact that the bills of lading relating to some steel injection moulds which were insured for a voyage from Australia to England were “claused” in that they described the goods as “unprotected”, “secondhand” and “insufficiently packed” was held not to be material.

could avoid liability on the ground of non-disclosure of material facts *viz.* (i) the cargo included 823 cartons as contrasted with wooden cases; (ii) a significant proportion of the enamelware had been touched up by overpainting; and (iii) the cargo was an end of a stock or job lot purchase and had been bought at a cheap rate.

### 2.2.6. Nationality

The national character of the subject insured may be material. No general rule can be laid down with regard to any particular nationality. If insurers would be influence in deciding whether to accept a risk, or what premium to charge, by the fact the subject insured was of a particular nationality, then the nationality in question becomes a material fact to be disclosed. Thus, in *Bates v. Hewitt*<sup>(88)</sup> a policy was effected in 1864 on a vessel which had been a Confederate war cruiser in the years 1863 and 1864, and which afterwards was dismantled and sold to the plaintiff. The vessel had been notorious to the British public at the time she was cruising, and after she had been laid up in Liverpool had been the subject of comment in the London newspapers and in the House of Commons. The defendant, one of Lloyd's underwriters, had been cognisant of all this; but at the time that the risk was proposed to him nothing revived his recollection of these things, and it did not occur to him that this might be the Confederate cruiser. The court held that the previous knowledge possessed by the defendant did not release the plaintiff from disclosing that the vessel was the late Confederate cruiser, and therefore liable to capture by the United States.

In *Demetriades v. Northern Assurance Co*<sup>(89)</sup>. a Greek subject purchased a foreign ship and afterwards transferred the vessel to an impecunious British subject, who was registered as owner. A subsequent agreement between these parties bore that the British subject agreed to sell the vessel to the Greek on her arrival in Greece, and also stipulated that, during the voyage, the vessel should be managed by the Greek. The vessel was insured by the transferee. The Greek's interest in the vessel was not disclosed to the insurers, and she was represented as sailing under the

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(88) (1867) L.R. 2 Q.B. 595.

(89) (1925) 21 Ll.L. Rep. 265, H.L.

British flag and with British crew. When the insurance was effected Greek-owners vessel were uninsurable, or only insurable at exceptionally heavy premium. The House of Lords held that the insurers were entitled to avoid the policy both on the ground of misrepresentation and non-disclosure. Lord Shaw of Dunfermline said:<sup>(90)</sup>

“A material representation which should have been made, and was not made but was concealed, was that this was a Greek ship. In my opinion, as I have said, that was material enough to avoid the contract if the falsehood in regard to that matter was upon the register. But when we come to the actual fact of the nation of the vessel, how material it is appears from the evidence of Mr. Harper, the shipping editor of ‘Lloyd’s List and Shipping Gazette’, who gives the official statistics with regard to a long period of time, namely, the period from September 1, 1920 to November 30, 1921. During that period, 14 British vessels of over 500 tons were lost, and during the same period 27 Greek vessels were lost, that is to say, nearly double the number of Greek vessels to British. But, my Lords, that is not really the substantial comparison. The substantial comparison is the relation of Greek losses to Greek tonnage afloat as compared with British losses compared with British tonnage afloat, and the startling fact is that for every 22,000 Greek tons afloat one vessel was lost, whereas in the case of British regisships one loss only occurred in the case of 1,570,000 tons afloat, a contrast so startling that it requires very little evidence in a law court to convince me that in the insurance and shipping world any representation which would conceal the Greek nationality of the vessel was a material matter for the conparties. That misrepresentation or concealment on that subject having occurred, the defence is completely justified.”

### 2.2.7. Nature of Port

The adverse characteristics of ports within the insured trading area were held to be material circumstances requiring disclosure. In *Harrower v. Hutchinson*<sup>(91)</sup>, the policy was effected on goods “at and from Buenos Ayres and port of ports of loading in the province of Buenos Ayres”. The

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(90) (1925) 21 Ll.L. Rep. at 269.

(91) (1870) L.R. 5Q.B. 584.

place of loading was Laguna de los Padres. It was not an artificial port, but only a roadstead protected by natural headland, forming kind of bay. Laguna de los Padres was known to underwriters as a place of loading; and if underwriters, on a policy as above, had been informed that the vessel was going to load there they would have required a higher premium than the defendant charged. The Exchequer Chamber held, reversing the judgment of the Queen's Bench,<sup>(92)</sup> that the non-communication of the fact that the vessel was going to Laguna de los Padres to complete her cargo was a concealment of a material fact which vitiated the policy.

#### 2.2.8. Previous History of the Subject Matter insured

The extraordinary history of the subject-matter insured is a material fact which should be disclosed. Thus, in *Greenhill v. Federal Insurance Co*<sup>(93)</sup>, celluloid was shipped from Halifax, Nova Scotia, to Nantes, and arrived in a damaged condition. When a claim was made under the policy, the insurance company repudiated liability on the ground that there had been non-disclosure of the fact that the celluloid had been previously carried from New York to Halifax on a very slow steamer, and that the cargo had been exposed to rough weather on deck and had been left on an open quay on arrival at Halifax. It was held by the Court of Appeal that the pre-carriage of goods was a material fact and ought to have been disclosed. Accordingly, the insurance company was entitled to avoid liability.

In *Bates v. Hewitt*<sup>(94)</sup> it was held that the assured should have disclosed that the insured vessel, which was a merchant ship, had formerly a Confederate cruiser.

#### 2.2.9. Unseaworthiness of Vessel

In *Tremaine v. Phoenix Ins. Co*<sup>(95)</sup>, a failure to disclose that the vessel was unseaworthy and sunk and in need of repairs was held to be material in an application to renew and extend the insurance and was a complete defense to underwriters.

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(92) (1870) L.R. 4Q.B. 523.

(93) (1926), 135 L.T. 244, C.A.

(94) (1867), L.R. 2 Q.B. 595.

(95) 1935 AMC 753.

In *The*<sup>(96)</sup> the US Court of Appeal held that the insurers were entitled to avoid liability under a time policy in respect of the insured vessel because the assured had not disclosed that (i) in June 1961 the master had reported to the assured that the vessel had unusual rhythmic vibrations and leaked excessively; (ii) after a period in a shipyard she again leaked excessively; and (iii) in September 1961 a marine surveyor had reported that she was unfit for any use off shore.

### 2.3. Examples of immaterial Circumstances

“No proposition of insurance law can be better established than this, viz. that the party proposing the insurance is bound to communicate to the insurer all matters which will enable him to determine the extent of the risk against which he undertakes to guarantee the assured. It is true, if matters are common to the knowledge of both parties, such matters need not be communicated. It is also true that when a fact is one of public notoriety, as of war, or where it is a matter of inference, and the materials for informing the judgment of the underwriter are common to both, the party proposing the insurance is not bound to communicate what he is fully warranted in assuming the underwriter already knows.”<sup>(97)</sup>

Section 18(3) of the MIA 1906 states:

“In the absence of inquiry the following circumstances need not be disclosed, namely:

- (a) Any circumstance which diminishes the risk;
- (b) Any circumstance which is known or presumed to be known to the insurer. The insurer is presumed to know matters of common notoriety or knowledge, and matters which an insurer in the ordinary course of his business, as such, ought to know;
- (c) Any circumstances as to which information is waived by the insurer;
- (d) Any circumstance which it is superfluous to disclose by reason of any express or implied warranty.”

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(96) 409 F.2d 974, 1969 AMC 781.

(97) Per Coxburn C.J., in *Bates v. Hewitt*(1867) L.R. 2 Q.B. 595.

### 2.3.1. Facts within the actual or presumed Knowledge of the Insurer.

The insured needs not, in the absence of inquiry, disclose that which the insurer actually already knows<sup>(98)</sup> or that which the insurer is presumed to know. The presumed knowledge extends to “matters of common notoriety or knowledge” and “matters which an insurer in the ordinary course of his business, as such, ought to know”<sup>(99)</sup>. This encompassed matters such as physical risks, including “lightning, hurricanes, earthquakes”, as well as political risks, such as the likelihood of conflict or peace. In the celebrated judgment on this subject already cited, Lord Mansfield said: “There are many matters, as to which the insured may be innocently silent. He needs not mention what the underwriter knows... The insured needs not mention what the underwriter ought to know; what he takes upon himself the knowledge of;... He needs not to be told general topics of speculation; as for instance- The underwriter is bound to know every cause which may occasion natural perils; as, the difficulty of the voyage- the kind seasons- the probability of lighting hurricanes, earthquakes, etc. He is bound to know every cause which may occasion political perils; from the ruptures of states from war, and the various operations of it. He is bound to know the probability of safety, from the continuance or return of peace; from the imbecility of the enemy, through the weakness of their counsels, or their want of strength”<sup>(100)</sup>.

On the particular facts of *Carter v. Boehm*, the Court of King’s Bench held that the state and strength (or otherwise) of the fort was “in general well known, by most persons conversant or acquainted with Indian affairs”<sup>(101)</sup>. Indeed, having carefully reviewed the evidence, Lord Mansfield concluded: “The underwriter at London, in May 1760, could judge much better of the probability of the contingency, than Governor Carter could at Fort Marlborough, in September 1759”<sup>(102)</sup>. This applied in particular to the likelihood of an attack by the French, which was held

(98) As a matter of first principles, the actual knowledge of the insurer should be treated in the same way as the actual knowledge of the insured. This topic is discussed at p.5 and following above.

(99) Arnould, op. cit., at p. 675

(100) *Carter v. Bohem* (1766) 3 Burr 1905,1910

(101) (1766) 3 Burr 1905, 1912-1913.

(102) (1766) 3 Burr 1905,1914.

to be a matter which the underwriter could more accurately assess than the Governor, thereby rejecting the second allegation of non-disclosure made in the case<sup>(103)</sup>.

In *North British Fishing Boat Insurance Co., Ltd. v. Starr*<sup>(104)</sup> an insurance company claimed on a reinsurance policy in respect of a motor fishing vessel which was destroyed by fire. The reinsurer refused to pay the claim on the ground that the company had not disclosed a material fact, viz. that there had been an exceptional increase in the number and amount of fire losses among motor fishing vessels insured by the company.

Rowlatt, J., held that the defence failed because under s. 18(3)(b) of the Marine Insurance Act 1906 the assured was under no duty to disclose facts which the insurer knew or ought to know. In the present case the reinsurer ought to know the losses which were taking place in motor fishing vessels.

His Lordship observed:<sup>(105)</sup>

“I must look at the underwriter in this case as a person doing the business of insuring ships and as necessarily conversant with the course of losses affecting particular classes of ships. What he is not bound to know in the ordinary course of his business are particular circumstances specially affecting ships or lines of ships, and specially affecting some limited number of ships.

In my judgment this action must succeed and the defence fails, because I think that whether motor boats fishing round the coast of England as a whole are or are not suffering losses making a particular premium worth while taking is a matter which the underwriter ought to find out, or is supposed to know, because it is his business to know that class of thing, and, therefore, the assured is not bound to go into these matters or disclose these matters when he comes with his business.”

In *St. Margaret's Trust, Ltd. v. Navigators and General Marine Insurance Co Ltd*<sup>(106)</sup>, the insurance company knew the age, type,

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(103) (1766) 3 Burr 1905,1916.

(104) (1922), 13 Ll.L. Rep. 206, K.B.D.

(105) *Ibid.*, at p. 210.

(106) (1949), 82 Ll.L. Rep. 752, K.B.D.

condition and agreed value of a ketch, and the intended manner in which she was going to be laid up. Morris, J., held that it was unnecessary for the assured to describe the neglected state of her topsides caulking.

The learned Judge observed:<sup>(107)</sup>

“In the present case, the defendant company had insured this craft when she was owned by the Hardway Company. They had insured her without survey when she was in a mud berth at Fareham Creek, and they had insured her without survey after she was moved to deep water moorings at Gosport. When asked for a quotation assuming that the craft was to be used as a houseboat they said: ‘Our quotation then is 2 per cent, provided that there is a satissurvey on the underwater part of the hull and the moorings.’ Afterwards the defendants were told that the quotation was not sought for the craft to be used as a houseboat, but it was sought for her when in mud berth and for a time when she would be out of commission, during which time she would be worked on by Mr. Griffin, who was an experienced man in connection with yachts. The defendants knew that the *Vishela* was an old craft; that she was 43 years old.”

In *Bates v. Hewitt*<sup>(108)</sup> the court expressed the proposition that it is not enough for the assured to show that the particulars supplied by the assured, coupled with the underwriter’s previous knowledge, would, if the underwriter had given sufficient consideration to the subject, have brought to his mind the material fact not communicated. He must establish that the facts not disclosed were present to the insurer’s mind at the time he underwrote the policy. The facts of the case were as follows: a policy was effected in 1864 on a vessel which had been a confederate cruiser in the years 1863 and 1864, and which afterwards was dismantled and sold to the plaintiff. The vessel had been notorious to the British public at the time she was cruising, and after she had been laid up in Liverpool had been the subject of comment in the London newspapers and in the House of Commons. The defendant, one of Lloyd’s underwriters, had been cognisant of all this; but at the time that the risk was proposed to him nothing revived his recollection of these things,

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(107) *Ibid.*, at p. 762.

(108) (1867) L.R. 2 Q.B. 595.

and it did not occur to him that this might be the Confederate cruiser. Under these circumstances the jury found that the defendant was not aware that the vessel he was underwriting was the Confedecruiser, but that at that time he had abundant means from the particulars to be found in the slip of identifying the ship. The court held that the previous knowledge possessed by the defendant did not release the plaintiff from the duty of disclosure<sup>(109)</sup>.

Further, it was laid down in the same case that where a fact is a matter of inference, and the materials for informing the judgment of the underwriter are common to both parties, the party proposing the insurance is not bound to make any communication on the subject. And this principle was applied in the case of *Gandy v. Adelaide Insurance Co*<sup>(110)</sup>. the facts of which were as follows: The plaintiff was the owner of a vessel, which was classed in Lloyd's register in November, 1865, as A.1. for seven years. In order to retain that position it was required to undergo a half-time survey in the fourth year, the result of which was reported to the committee. If the survey was satisfactory to the committee, the ship retained her class and the letter "H.T." with the date of the survey were placed opposite to the entry of her name. On the 23rd of October, 1869, the plaintiff informed Lloyd's survey that he would not continue the vessel in Lloyd's register. On the 28th October the plaintiff's agent asked the defendants at what rate they would insure the vessel. After having seen that the vessel stood as A.1., the latter gave the current rate of insurance as of a ship so classed, and on the 15th November the ship was initialed for insurance. On the 16th of November the ship was struck out of Lloyd's register, and subsequently she was lost. In an action for recovery the defendants pleaded non-disclosure. The jury found that the fact that the plaintiff had resolved not to continue the ship on the register, and had so stated to the surveyor was not material. The Court of Queen's Bench declined (Cockburn C.J., dissenting) to say that this finding was wrong because the underwriter ought to have seen from

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(109) It has also been held in the Supreme Court of the United States, that the assured cannot excuse his omission to disclose material facts by showing that they were actually known to the underwriter, unless the knowledge of the latter was as full and particular as his own. *Sum Mutual Ins Co v. Ocean Ins Co* 107 U.S. 485 (1882).

(110) (1871), L.R. 6 Q.B. 746.

the entry in the register that the time for the survey had passed, and that no survey had been held. Cockburn C.J., however, thought that this fact was material. The refusal to submit to the survey, he said, led fairly to the inference that the owner was conscious that the condition of the vessel had so far deteriorated that the result of the survey would be unfavourable. The Chief Justice refused to apply the rule which he had laid down in *Bates v. Hewitt*<sup>(111)</sup> on the ground that the fact which was not disclosed was “a matter of positive knowledge to the party proposing the insurance, and only matter of possible inference, from very imperfect materials, to the underwriter”; for it was proved that vessels were suffered to remain as of their former class though the half time had expired and no fresh survey had been held.

Although the underwriter is presumed to have knowledge of a general nature on such matters as those just mentioned above, he cannot be expected to carry in his head a detailed knowledge of every item of intelligence that might be available to him concerning every particular vessel, unless, of course, the casualty to the vessel in question is of such importance as to have achieved common notoriety. However, the assured is expected to have knowledge of matters relating specifically to his own business<sup>(112)</sup>.

### 2.3.2. Circumstances tending to diminish the Risk

The insurer has no ground of complaint because he is not informed of a circumstance which diminishes the risk<sup>(113)</sup>. In *Carter v. Boehm*<sup>(114)</sup>- Lord Mansfield illustrated this point when he said:<sup>(115)</sup> “The underwriter needs not be told what lessen the risk agreed and underto be run”. Thus, to take the instances furnished by his lordship: “If the underwriter insures for three years, he needs not be told any circumstances to show it may be over in two; so if he insured a voyage, with liberty of deviation, he needs not to be told what tends to show there will be no deviation.”

(111) (1867) L.R. 2 Q.B. 595

(112) See *Morrison v. Universal Marine Insurance Co.*(1873), L.R. 8 Exch. 197.

(113) Although a circumstance which diminishes the risk need not be disclosed under s. 18(3)(a) it may still be material within the meaning of s 18(2): *PCW Syndicates v. PCW Reinsurers* [1996] 1 All ER 774, [1996] 1 WLR 1136, CA.

(114) (1766), 3 Burr. 1905.

(115) *Ibid.*, at p. 1910.

### 2.3.3. Circumstances as to which Information is waived by the Insurer

If the assured satisfies the requirements of the contract by acting honestly in his disclosures, and by showing an endeavour to treat the insurer fairly, he will not be held responsible for not explicitly disclosing a fact which afterwards turns out to be material, if the information which he has given discloses sufficiently to warn the insurer that such a fact existed. Section 18(3) (c) of the MIA 1906, provides that the assured needs not disclose any circumstance as to which information is waived by the insurer. The Act codifies, therefore, the law as it was already laid down by Lord Mansfield in *Carter v. Boehm*<sup>(116)</sup> where his lordship said:<sup>(117)</sup>

“The insured needs not mention what the underwriter ought to know, what he takes upon himself the knowledge of, or what he waives being informed of.”

Further, his lordship illustrates as follows the application of the principle:

“If an underwriter insures private ships of war, by sea and on shore, from ports to ports, and places to places, anywhere- He needs not be told the secret enterprises they are destined upon; because he knows some expedition must be in view; and, from the nature of his contract, without being told, he waives the information”.

The reason is that where from the facts communicated a reasonable insurer could infer the existence of other facts non-disclosed, the fact that he abstained from asking more details implies that he needs not be further informed on the point in question

As an example of the waiving of information by the underwriter the case of *Asfar & Co. v. Blundell*<sup>(118)</sup> may be referred to. The plaintiffs were charterers of the steamer *Govino* for a lump sum freight, and effected an insurance with the defendant underwriters 'on profit on charter,' but the latter were not informed whether the vessel had been chartered for a lump sum or at a tonnage rate. The *Govino* loaded a cargo, largely consisting of dates, in the Persian Gulf for London, and was sunk by collision in the

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(116) (1766), 3 Burr. 1905.

(117) *Ibid.*, at p. 1910.

(118) [1895] 2 Q.B. 196.

Thames. The dates were condemned as unfit for human food, and were sold and exported for distilling purposes. The 'profit on charter' having thus been totally lost, no freight being payable in respect of the dates, the plaintiffs sued the defendant underwriters to recover a total loss under the policy. The defendants pleaded that there had been a concealment of a material fact - that they ought to have been informed by the plaintiffs that the charter was for a lump sum and not at a tonnage rate. Mathew J., held that the plaintiffs were entitled to recover for a total loss. 'I am not satisfied,' said his Lordship, 'that there was any concealment in point of fact. But even if there had been no disclosure the point would be disposed of by reference to the principle that underwriters need not be given information which they waive. Here the underwriters, if they wanted to know about the provision of the charter-party, should have asked for information.' This decision was affirmed by the Court of Appeal and in the course of his judgment, Lord Esher M. R. said:

'The rules applicable to concealment in the contract of insurance ought to be well known. The assured is bound to disclose every material fact within his knowledge which is not fairly to be taken as being within the knowledge of the underwriter, and if he fails to do so he is guilty of concealment. But for years it has been established that the assured is not bound to enter minutely into every material fact which he is bound to disclose. If sufficient is disclosed with regard to a material fact to enable an underwriter to ask for further information, if he wants it, that is enough. Here the plaintiffs informed the underwriters that there was a charter-party, because the subject-matter of insurance was the difference between the charter freight to be paid by the plaintiffs to the owners and the bills of lading freight which the plaintiffs were to get. In effect, all the circumstances were disclosed, for the assured were clearly saying, "We want to make a profit on this charter." Having told the underwriters so much, the assured did not mention whether the charter freight was a lump sum or at a tonnage rate. As I have said, it was almost certain that it was a lump sum freight, and the underwriters could have had immediate knowledge on the point by asking. If they wanted to know they ought to have put the question. According to the rules I have mentioned, there was sufficient disclosed to them by the plaintiffs, and Mathew

J. was justified in holding as he did. There is no new law in the case. It deals with well principles of insurance; it has been decided by an experienced Judge, and there is nothing wrong in his decision.’

Waiver was also raised as a defence to a plea of non-disclosure by the assured in the following cases:<sup>(119)</sup>

In *Mann, MacNeal & Steeves v. Capital and Counties Ins Co*<sup>(120)</sup> a wooden vessel was insured for a voyage from the United States to France and return. The vessel was lost by fire on its return voyfrom France to the United States. The Underwriters defended on the ground of non-disclosure of the fact that the vessel was carrying as part of its cargo 100,000 gallons of petrol in 2,500 drums. The evidence indithat the carriage of petrol in drums was not an unusual occurence in trade from the United States to France and that the vessel normally would carry petrol and oil for its own engines.

Greer, J., in the court of first instance, held that there had been non-disclosure of a material fact and gave judgment for the underwriters. In the Court of Appeal, Bankes, and Atkin, L.J., whilst refraining from overruling this finding of Greer J. held that the requirement of disclosure had been waived. “I do, however, consider” said Bankes, L.J., “that the appellants are entitled to succeed upon either of two grounds with which the learned Judge does not deal. In the first place, I think that the evidence as to the practice in relation to the non-disclosure of the

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(119) See *Property Ins. Co., v. National Protector Ins. Co.*, a reinsurance policy effected “subject without notice to the same clauses and conditions as the original policy”. Scrutton J., held that, by the words “without notice”, the reinsurer waived information as to an unusual clause of which he ought otherwise to be informed. In *Cantiere Meccanico Brindisino v. Janson* [1912] 3 K.B. 452, C.A. a floating dock in tow of two tugs was insured for a voyage from Avonmouth to Brindisi. The policy contained a clause stating “seaworthiness admitted”. The dock was lost on the voyage and the assured claimed for a total loss. The insurers refused to indemnify the assured on the ground that there had been a failure by them to disclose a material fact, viz. that the dock had not been specially strengthened for the voyage. The Court of Appeal held that the action succeeded. The insurers, by the use of the clause “seaworthiness admitted”, had waived any duty on the assured’s part to disclose the want of special strengthening. Again, in *The Bedouin* [1894] P.1. there was an insurance on chartered freight. The “slip” stated “Freight chartered and/or as if chartered on board or not on board one-third diminishing each month”. This showed the insurer that he was insuring “time chartered freight”. It was held that the insurer had waived information as to the fact that such a charter-party contained the usual “off-hire” clause.

(120) (1920), 124 L.T. at p. 780.

character of cargo when effecting a policy on hull does not only justify, but requires, the court to hold that an underwriter waives any information in relation to what may be fairly described as a parcel of ordinary cargo of lawful merchandise, which this parcel was. In the second place, I think that the plea of waiver can be supported on the ground indicated by Lord Esher, M.R., in *Asfar v. Blundell*, where in dealing with the question of concealment he says: 'But it is not necessary to disclose minutely every material fact; assuming that there is a material fact which he'-the assured-'is bound to disclose, the rule is satisfied if he discloses sufficient to call the attention of the underwriters in such a manner that they can see that if they require further information, they ought to ask for it.' In my opinion the disclosure in the present case that this vessel was a wooden vessel with auxiliary motor engines was a disclosure of the fact that it was proposed to carry cargo from the United States to France in a vessel specially and dangerously liable to fire damage, and that such a disclosure was, within Lord Esher's language, a sufficient disclosure to put the underwriter on inquiry."

In *Garnat Trading and Shipping (Singapore) Pte Ltd and another v. Baominh Insurance Corp*<sup>(121)</sup> the second plaintiff (Vinashin) wished to purchase a floating dock and workshop for commercial use in Vietnam. The first plaintiff (Garnat), acting as a broker, identified a floating dock for sale in Vladivostok. It was agreed that the first plaintiff would purchase the floating dock from its owners, and sell it to the second plaintiff. The first plaintiff was to arrange for modifications to the dock, to make it ready to be towed from Vladivostok to Vietnam, and sell it to the second plaintiff in a seaworthy state ready for towing. A towage plan was made for the voyage, which was approved by a classification society, and insurance for the voyage was provided by the defendant insurer on the basis that the towage plan had been so approved. During the negotiations over the terms of the insurance, the draft policy had contained an express towage plan warranty, but that was removed from the final form of the policy as the insurer was satisfied that the classification society had inspected and approved the technical content of the towage plan. While the dock was being towed to Vietnam, it sank in rough seas. The plaintiffs

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(121) [2011] 1 All ER (Comm) 573.

sought to recover under the insurance policy, but the insurer refused to pay on, inter alia, the ground that the plaintiffs had failed to disclose, under s.18 of the Marine Insurance Act 1906, documents that formed part of the towage plan, which had concluded that sea towage was permissible only in conditions up to a wave height of 3.5 metres.

Christopher Clarke, J., held that the defence of non disclosure failed. On the evidence, there had been actual disclosure of the information which the insurer complained was not told to it. The disclosure constituted a fair presentation of the risk and included the wave height limit. Alternatively, disclosure of the information was not required, as a reasonable underwriter of floating docks would have known that the towage of the dock would be subject to some limitations regarding wave height (although not the precise limitations for the particular dock),

The practice of underwriters, however, in accepting risks or not making inquiries on particular points cannot affect the duty of the assured to disclose, or be received as evidence of waiver in any particular case. In short, waiver is not to be easily presumed. Thus, in *Greenhill v. Federal Insurance Co., Ltd*<sup>(122)</sup> celluloid was shipped from Halifax, Nova Scotia, to Nantes, and arrived in a damaged condition. When a claim was made under the policy, the insurance company repudiated liability on the ground that there had been non-disclosure of the fact that the celluloid had been previously carried from New York to Halifax on a very slow steamer, and that the cargo had been exposed to rough weather on deck and had been left on an open quay on arrival at Halifax. It was held by the Court of Appeal that the pre-carriage of goods was a material fact and ought to have been disclosed. Accordingly, the insurance company was entitled to avoid liability. There had been no waiver of non-disclosure arising from the absence of inquiry by the company as to the manner in which the celluloid had been brought to Halifax.

Sargent, L.J., said:<sup>(123)</sup>

“But it is said that here there was, within s. 18, sub-so (3), sub-head (c), a waiver by the insurer of information as to the previous history of

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(122) (1926), 135 L.T. at p. 253.

(123) *Ibid.*, at p. 253.

the goods so far as pre-carriage was concerned, and this because such goods were known not to have originated in Halifax; that there must have been some pre-carriage, and that it was therefore for the insurers to make inquiries as to the circumstances of such pre-carriage. Had the pre-carriage necessarily or ordinarily involved incidents-vicissitudes—of the same character as those which occurred in the actual pre-carriage here, there would have been much in favour of this arguBut it is clear from the evidence that this is not so, and that the circumof the pre-carriage were so exceptional that they would necessarily be material and ought to have been disclosed. Indeed, the argument of the plainif pressed to its logical conclusion, would in almost every case negative mere non-disclosure as a defence, since in almost every case appropriate inquiries would have got behind the non-disclosure and have elicited the material circumunless indeed they had resulted in a positive mis-statement by the assured."

In his judgment Scrutton, L.J., endeavoured to settle certain limits in the plea of waiver, which otherwise would have entirely destroyed the obligation to disclose at all. He considered it to be of great importance that the general duty of disclosure should be maintained and not whittled away by alleged waiver. But he said:

“the way in which cargo is tendered may put the underwriter on inquiry. For instance, this celluloid shipment appears to have a variety of odd names- fiberloid, pyralin...I can conceive that if an underwriter is told, “I propose to ship pyralin,” and does not ask, “what on earth is that?” he waives the disclosure to him of the ordinary qualities of puralin or fiberloid. But if any particular shipment of puralin or fiberloid has some peculiar quality which would not ordinarily follow from, or be disclosed by, saying “This is puralin,” it seems to me that that is clearly a matter which ought to be disclosed”.

In *Marc Rich (MR) & Co AG v<sup>(124)</sup>*.MR brought an action against P, underwriters of a marine insurance policy. MR had instructed its brokers to obtain demurrage liability cover for its vessels. Cover was obtained with P but MR volunteered no information, nor did P request any, relating to the incidence of demurrage liability or their previous loss

(124) [1996] 1 Lloyd's Rep 430.

experience. It seems that the broker did not regard it as part of his responsibility to volunteer information about the plaintiff's claims experience. A substantial claim arose and P denied liability on the ground that MR had not disclosed the relevant information concerning loss experience. MR argued that (1) P must be presumed to have known about the likely delays at the ports for which the demurrage insurance was sought, it being a matter of common knowledge; (2) that P, on his own admission, knew there was a fundamental requirement to ask for the loss record which he did not do, that he should have been on inquiry, and his failure to inquire implied waiver of the duty to disclose and (3) that P had not discharged the burden of showing inducement by the non-disclosure.

Longmore, J., held that the broker's presentation of the risk, which made no reference to the demurrage claims experience, which revealed extensive losses, could not be a fair presentation of the risk. MR appealed.

The Court of Appeal<sup>(125)</sup> held, dismissing the appeal, that (1) the information regarding the appellant's loss experience was not a matter of common knowledge and was not, therefore, something the insurer could be presumed to have known without that information being disclosed by the appellant; (2) waiver of the necessity for disclosure could not be imputed from the underwriter's failure to question the appellant's loss experience, distinguished and (3) the evidence of the expert underwriters was that the appellant's losses were so serious that the risk would have been uninsurable, and that had the information been disclosed to the underwriter, despite his imprudence, he would probably have investigated further, and the risk would have been written on different terms.

The question of waiver has been clearer recently in the case of *C.T.I. v. Oceanus*<sup>(126)</sup>, the brokers relied in their presentation of the risk on summaries which they had prepared of expiry rates under earlier policies. The rates were mis-stated in every instance, and certain rates had been omitted; it was held by Kerr, L.J., that there was nothing which could reasonably be said to have put the underwriters on notice of those errors and omissions; the fact that the broker had the full placing file with him containing lengthy policy documents from which (if they had studied

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(125) *Glencore International AG v. Portman* [1997] 1 Lloyd's Rep 225 (CA).

(126) [1984] 1 Lloyd's Rep. 476.

them) the underwriters could have ascertained the correct expiry rates could not be treated as giving rise to any question of waiver. The proper test, as stated by Kerr, L.J., is as follows:

“the principle is that if a certain fact is material for the purposes of ss.18(2) and 20(2) so that a failure to draw the underwriter’s attention to it distorts the fairness of the broker’s presentation of the risk, then it is not sufficient that this fact could have been extracted by the underwriter from material to which he had access or which was cursorily shown to him. On the other hand, if the disclosed facts give a fair presentation of the risk, then the underwriter must ask if he wishes to have more information.”

Then after discussing *Asfar v. Blundell*<sup>(127)</sup> Kerr, L.J., stated:

“The doctrine of waiver cannot be applied to undisclosed facts which are unusual or special, so that their non-disclosure distorts the presentation of the risk. In such cases, the underwriter is not put on enquiry about the existence of any such facts.”<sup>(128)</sup>

#### 2.3.4. Circumstances covered by a Warranty

In the absence of inquiry the assured needs not disclose any circumstance which is superfluous to disclose by reason of any express or implied warranty. The reason for this being that all warranties, whether express or implied, must be strictly complied with, and if they are not so complied with the underwriter is discharge from liability. Thus, the MIA 1906, provides that “in a voyage policy there is an implied warranty that at the commencement of the voyage the ship shall be seaworthy for the purpose of the particular adventure insured”, and consequently the assured needs not make any disclosure of information relating to the ship’s unseaworthiness when she sailed, because if she did not start on her voyage in a seaworthy condition, the insurer would not be liable<sup>(129)</sup>. It is,

(127) [1896]1 Q.B. 123.

(128) [1984] 1 Lloyd’s Rep. 476 at 498.

(129) *Schoolbred v. Nutt* (1782) 1 Park’s Marine Insurances (8th Edn) 493; *Haywood v. Rodgers* (1804) 4 East 590; *Beckwith v. Sydebotham* (1807) 1 Camp 116; *Gunford Ship Co Ltd v. Thames and Mersey Marine Insurance Co Ltd* 1910 SC 1072 (revsd, but not on this point, sub nom *Thames and Mersey Marine Insurance Co Ltd v. Gunford Ship Co Ltd, Southern Marine Mutual Insurance Association v. Gunford Ship Co Ltd* [1911] AC 529, HL) (qualification of master; it was held that neither his name nor his previous history were in ordinary circumstances, or in the circumstances of that case, material to be disclosed). In *Boyd v. Dubois* (1811) 3 Camp 133 =

however, otherwise in the case of a time policy<sup>4</sup>, where there is no implied warranty of seaworthiness<sup>5</sup>. Thus, in *Russell v. Thornton*<sup>(130)</sup> a time policy on a ship was effected on the 19th of January. On the 15th the assured had received a letter from the captain informing him that the vessel had been ground on the 2nd of January, and had sprung a leak, and was forced to go into port for repairs. The Court of Exchequer held that the non-communication of these facts avoided the policy.

It is to be noticed that in a voyage policy the effect of the words “seaworthiness admitted” is that the insurer cannot dispute the seaworthiness, unless it is proved that the assured knows any material circumstance within the meaning of the Marine Insurance Act 1906; but it has been held that, where the nature of the insured vessel is such as to raise a doubt as to its seaworthiness, the defence of concealment fails inasmuch as the assured has put the insurer on inquiry as to its construction, and the latter may investigate if he thinks further information is required.

### 2.3.5. Matters contained in Lloyd's List

It was one time held that the underwriter was presumed to have knowledge of the contents of Lloyd's List. In *Friere v. Woodhouse*<sup>(131)</sup> Burrough, J., said: “what the underwriter, by fair inquiry and due diligence, may learn from the ordinary sources of information need not be disclosed”. However, this knowledge was not deemed to extend to contents of the foreign lists filed in the reading room.

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= the insurers claimed to avoid the policy, which was on cargo, on the ground that the fact that the cargo had been damaged had not been disclosed to them. Lord Ellenborough C.J., said that the assured was 'not bound to represent to the underwriter the state of the goods'. This observation was doubted in *Carr v. Montefiore* (1864) 5 B & S 408 at 423, and cannot now be regarded as authority for the general proposition that a person insuring cargo is never bound to disclose the condition of the goods; see *Greenhill v. Federal Insurance Co Ltd* [1927] 1 KB 65, CA. Probably the true view is that any unusual circumstances relating to the cargo must be disclosed, but that the assured is not bound to point out to the insurer the consequences which naturally follow from the facts which he discloses unless the insurer inquires as to those consequences: *Greenhill v. Federal Insurance Co Ltd* supra at 84 per Scrutton LJ; and see *Cantiere Meccanico Brindisino v. Janson* [1912] 2 KB 112 at 115 per Scrutton J (affd [1912] 3 KB 452, CA).

(130) (1859), 4 H. & N. 788.

(131) 1817, Holt N.P. 572

But it is now considered unreasonable to expect the underwriter to have knowledge of all facts disclosed in Lloyd's lists relating to all the ships there. In *Morrison v. Universal Marine Insurance Co*<sup>(132)</sup> the defendants were subscribers to Lloyd's and the entry found in the Liverpool Mercury newspaper had first appeared in Lloyd's List, where, however, their underwriter did not discover it until after he had initialled the slip; and as the broker, admitting his own knowledge of the entry, had taken upon himself to make no mention of it, this failure to disclose defeated the policy. Upon the point here under consideration, Bramwell B., said: 'It is impossible to say that there is any rule of law or any principle of authority which affects the underwriter with knowledge of what is contained in Lloyd's Lists. No doubt some knowledge may be assumed in the underwriter-what, I will not attempt to define or describe; though I agree with what was thrown out by my brother Cleasby in the course of the argument, that the matters he must take knowledge of are matters of general knowledge, not matters relating to any particular ship. But to hold that the underwriter is bound to carry in his head all that is contained in Lloyd's Lists relating to a ship in which he has no interest, rather than to hold the owner of the ship bound to disclose it, would be to put a difficult and useless burden on the underwriter, while the opposite view puts no difficulty at all in the way of the owner.'

This view of the law thus expressed by Bramwell B. was concurred in by the other members of the Court of Exchequer.

The decision in *Morrison v. Universal Manne* was cited and applied by Colman, J., in *The Grecia Express*<sup>(133)</sup> Colman, J., concluded, therefore, that a proposer for insurance is not entitled to presume that an underwriter will carry around in his head previous casualties with which he was not concerned and be in a position to relate that information to a new risk proposed. That being so, coupled with a delay of 18 months between the previous casualty and the placing of the new risk, the previous casualty (and specifically that the insured was concerned in the charter of the previous vessel) could not be said to be a matter of common notoriety or knowledge. This decision demonstrates that issues

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(132) (1872) L.R. 8 Ex. 40; on appeal (1873) *ibid.* 197

(133) [2002] 2 Lloyd's Rep. 88 at 135.

of this kind are to be decided on their own particular facts and in the modern context in which they arise.

#### 2.3.6. Usage of Business

Section 18(3)(b) of the MIA 1906, provides not only circumstances known to the insurer but matters of common notoriety or knowledge, and matters which an insurer in the ordinary course of his business, as such, ought to know, need not be disclosed.

It follows that the underwriter is presumed to know the usual practice of the trade which may operate upon the subject-matter of the insurance. In *Noble v. Kennoway*<sup>(134)</sup> it was held that an insurer is bound to know the nature and peculiar circumstances of the branch of trade to which the policy relates; “every underwriter”, Lord Mansfield said, “is presumed to be acquainted with the practice of the trade he insures, and that whether it is established, or not. If he does not know it, he ought to inform himself”. Thus, in *Vallance v. Dewar*<sup>(135)</sup> it was held that the assured is not bound to communicate the usage of the Newfoundland trade according to which ships upon their arrival at the coast are either employed for some time in fishing (called banking) or they make an intermediate voyage in the American seas before beginning to take in their homeward cargo.

Again the underwriters are bound to take notice either of a usual mode of loading in a particular trade, or the usage that certain goods are properly carried on the decks of ships, or the usual course of landing the goods insured, such as transshipment on board the shallops.

But, the insurer is not deemed to know the contents of a casualty slip relating to a vessel which at the time he receives the information would have had no interest to him at all. Thus, in *London General Insurance Co., Ltd. v. General Marine Underwriters' Association, Ltd*<sup>(136)</sup> the plaintiffs on September 24 insured “lost or not lost” the cargo of a vessel which was on a voyage from Italy to the United Kingdom. On the evening of that day she put into port with her cargo on fire. Notice of the fire was posted on the casualty board at Lloyd's on September 25 at 10 a.m. At about 4

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(134) (1780) 2 Roug. 511.

(135) (1809) 1 Camp. 503

(136) [1920], 124 L.T. 67, C.A.

p.m. on that day the plaintiffs effected a reinsurance policy on the cargo “lost or not lost” with the defendants. Neither the plaintiffs nor the defendants knew of the casualty at the date of effecting the reinsurance. The plaintiffs claimed for a loss under the reinsurance policy, but the defendants contended that the occurrence of the fire should have been disclosed to them, and that consequently they were not liable. The plaintiffs, however, maintained that since the defendants ought to have known in the course of their business the contents of casualty slips, this was a circumstance which they were not bound to communicate to them. The Court of Appeal held that the defendants were not deemed to know the contents of casualty slips about a vessel which, at the time they received the information, would have had no interest to them at all, and that therethe plaintiffs’ contention failed.

Lord Sterndale M.R., said:<sup>(137)</sup>

“There remains another point, and that is this: It is said that if that is true of the plaintiffs it is equally true of the defendants, and as they ought to have known in the course of their business the contents of the casualty slips it was a circumstance which the plaintiffs were not bound to communicate to them. The learned Judge has taken the view-again I do not see my way to differ from it-that the defendants were not upon the risk in the *Vigo*. I think that is right, and he has then taken this-that you could not expect the defendants, supposing they had looked at the casualty slips, to have present to their minds always the information about a vessel which at the time they got the information, if they did get it, would have had no interest to them at all.”

One of the issues<sup>(138)</sup> in *Piper v. Royal Exchange Assurance*<sup>(139)</sup> was whether the insurers should have known any facts material to the actual value of a yacht, which was excessively overvalued to the knowledge of the assured. When she was damaged by fire, the insurers sought to disclaim liability on the ground that the assured was guilty of non-disclosure of material facts, but the assured contended that he was

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(137) (1920), 124 L.T. at p. 70

(138) Another issue was whether the assured knew that the yacht was excessively overvalued. AS to this aspect of the case see p. 25

(139) (1932), 44 Ll.L. Rep. 103, K.B.D.

excused from disclosing them by reason of s. 18(3) (b) of the Marine Insurance Act 1906.

Roche, J., held that the facts were not deemed to be known to the insurers, and that the assured's contention failed. He observed:<sup>(140)</sup>

“With regard to that, various comments have been made, and perhaps I have made some of them, on the organisation of the defendants' business. The fact

is that some things are known to one department which are not known to another, and some things were not known to people who were underwriting the later insurance which might well, under a better business organisation-which, I understand, has now been introduced-have been known to them, but they were not the facts which I have found ought to have been the subject-matter of disclosure on this occasion. They knew from the reports which they had received both from the voyage damage and in respect of the stranding damage that there were defects in this ship which would affect her value. Of course, she was not valued at the value of a new ship, which would be many times more than £2,500, and there was little to show that a number, at any rate, of those defects of which they had been made aware were not remedied by subsequent repair, and certainly what they did not know was of the progress of the deterioration board the ship, evidenced by her manifest unsaleability and evidenced by the resolution of the plaintiff himself to make the best he could of her for himself, whatever that might be, instead of continuing to put her upon the market. I am not saying, and it was never contended on the part of the defendthat those were facts which ought to have been disclosed *eo nomine* or specifically to the underwriters, but what was said was that this deterioration and these facts with regard to her value were matters which were known to the assured and were not known to the underwriters. I think that is true, and, therefore, I hold that the plaintiff is not saved by the provisions of s. 18(3) (b) of the Marine Insurance Act 1906.”

It is submitted that to dispense with communication of anything done according to usage, such usage must be notorious and uniformly established among all merchants in the branch of trade under

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(140) *Ibid.*, at p. 120.

consideration. In *Glencore International AG v. Alpina Insurance Co Ltd*<sup>(141)</sup> Moore-Bick, J., said<sup>(142)</sup>:

“[W]hen an insurer is asked to write an open cover in favour of a commodity trader he must be taken to be aware of the whole range of circumstances that may arise in the course of carrying on a business of that kind. In the context of worldwide trading the range of circumstances likely to be encountered is inevitably very wide. That does not mean that the insured is under no duty of disclosure, of course, but it does mean that the range of circumstances that the prudent underwriter can be presumed to have in mind is very broad and that the insured’s duty of disclosure, which extends only to matters which are unusual in the sense that they fall outside the contemplation of the reasonable underwriter familiar with the business of oil trading, is correspondingly limited. It also means that the insured is not bound to disclose matters which tend to increase the risk unless they are unusual in the sense just described.”

### 2.3.7. Usual Clauses in mercantile Contracts

where there is a general and commonly known practice to insert a certain clause in a particular kind of mercantile contract, the assured is entitled to assume that the underwriter knows that the contract may contain that clause, and therefore needs not inform him of this fact, although the clause may tend to increase the risk<sup>(143)</sup>.

Thus, time charters generally contain the so-called “off-hire” clause expressly providing for cessation of hire inasmuch as certain events prevent the working of the vessel for more than twenty-four consecutive hours. In *The Bedouin*<sup>(144)</sup> case a policy on chartered freight was effected, and, from the description of the ship, the insurer was sufficiently aware of the nature of the risk. As the clause in the charterparty was put into operation through the immediate action of the perils insured against, the Court of Appeal held the insurer liable for the loss, though he was not

(141) [2004] 1 Lloyd’s Rep. 111.

(142) [2004] 1 Lloyd’s Rep. 111.

(143) Arnould, op. cit., at p. 679

(144) [1894] P. 1; see also *Salvador v. Hopkins* (1765) 3 Burr. 1707, where it was held that the underwriter need not be told that a charterparty of the East India Company contained a clause entitling the company to keep the ship out in India for a year, there being a general usage of the East India trade to this effect.

told at the time of initialing the slip, that he was insuring freight under a time charter, containing the twenty-four hours' clause, this did not amount to non-communication of a material fact as this cesser clause is practically universal in a time charter.

Again where a ship was chartered at a lump freight and the charterers insured their 'profit on charter', the fact that it was agreed that a lump sum freight shall be paid, although material, needs not be communicated, provided that it had been sufficiently disclosed by a reference to the charterparty. The reason is, as the Court of Appeal said, that a clause for payment of a lump sum for freight is a usual clause in charterparties, and the obligation specifically to disclose the contents of a charter extends only to unusual clauses, the insertion of which the underwriters could not reasonably have anticipated<sup>(145)</sup>.

### 2.3.8. Where the Insurer calls for Information

In the end of the discussion of the circumstances which the assured is not bound to communicate it is to be remarked that, as the MIA 1906, sets out, it is only "in the absence of inquiry" that the assured is discharged from the duty to disclose the matters enumerated, otherwise if information upon the subject be particularly called for, then he must disclose truly what he knows in respect required.

It has been suggested<sup>(146)</sup> that if an insurer shows an interest in matters which are not material within s.18 of the MIA 1906, s.17 requires the assured to disclose them fully and fairly. It would seem to follow from that proposition that the underwriter will have a right to avoid on the ground of nonof immaterial circumstances, which were the subject of a specific inquiry, although if he proceeds to write the risk without having received a response it can be envisaged that arguments as to waiver and as to the requirement of inducement might arise. It is not clear how far this principle should be taken. If an assured's failure to respond can be seen as fraudulent or dishonest, the availability of a right of avoidance presents no difficulty; it is clearly established that materiality needs not be shown where there is fraud. But in other circumstances, a doctrine

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(145) *Asfar v. Blundell* [1896] 1 Q.B. 123. It has been held in the United States that underwriters are presumed to have knowledge of cancellation clauses in charterparties-*Roger v. Firemen's Ins Co*, 90 Fed.R. 310 (1898).

(146) *CTI v. Oceanus* [1984] 1 Lloyd's Rep. 476, per Parker LJ. at 512

which enables the underwriter unilaterally to extend the scope of the assured's duty appears harder to justify<sup>(147)</sup>.

### **Kuwaiti Law**

In Kuwaiti law there is no special provision relating to matters which need not be disclosed. Nevertheless, from the general principles of interpretation, we can deduce for instance that the rule of section 18(3)(a) of the MIA, 1906, releasing the assured from the duty to disclose any circumstance which diminishes the risk, is equally valid in the context of Kuwaiti law<sup>(148)</sup>.

Again it is generally admitted that the assured is not bound to communicate facts of public notoriety which are presumed to be known or facts which the insurer must normally know.

Further, it is submitted that where the insurer may seek information but he does not he commits a fault, and consequently he is not entitled to plead non-disclosure<sup>(149)</sup>.

### **3. THE DURATION OF THE DUTY OF DISCLOSURE**

As the purpose of the duty of disclosure is to help the insurer to assess the risk, the duty of disclosure continues throughout the negotiation of the contract and ceases at the time when the contract is concluded<sup>(150)</sup>. And according to s. 21 of the MIA 1906, "a contract of marine insurance is deemed<sup>(151)</sup> to be concluded when the proposal of the

(147) Arnould, op. cit., p. 695.

(148) Sarkhoh, Y, op. cit., p.167.

(149) Sarkhoh, Y, op. cit., p.167

(150) MIA 1906, s.18(1).

(151) The presumption is, however, rebuttable. It may happen that the terms of cover are intentionally changed after the slip has been initialled. Two consequences follow. First, the duty of disclosure continues, until the contract is finalised (although in some cases the indorsement may be severable from the main contract, in which case it would appear that only the relevant indorsement would stand to be avoided by non-disclosure subsequent to the making of the original contract. Secondly, failure to disclose facts which are not material to the risk described in the policy would afford no defence to the underwriter, even though those facts were material to the risks described in the slip: see *British & Foreign Mar Ins Co v. Sturge* (1897) 77 L.T. 208; 2 Com. Cas. 244, where the alteration appears to have been intended by the broker, but not by the underwriter. If the alteration is made by mistake, the underwriter could in an appropriate case seek rectification of the policy to bring it into line with the slip and then seek to avoid the contract, but there was no claim to rectify in the case cited; see Arnould, op. cit., p. 579.

assured is accepted by the insurer, whether the policy be then issued or not<sup>(152)</sup>. So any non-disclosure of facts made after the conclusion of the contract, will not entitle the underwriter to avoid the policy, for it did not influence him in accepting the risk. It follows that it is necessary to determine what constitutes such acceptance. The same section provides that “for the purpose of showing when the proposal was accepted, reference may be made to the slip or covering note or other customary memorandum of the contract (although it be unstamped)”<sup>(153)</sup>. The initialing, therefore, of the slip<sup>(154)</sup> concludes the contract and subsequent non-disclosure has no effect upon the policy<sup>(155)</sup>.

In *Niger Co., Ltd. v. Guardian Assurance Co., Ltd.*<sup>(156)</sup> which concerned a loss of goods stored in a warehouse at Burutu whilst in transit from the United Kingdom to Africa and from Africa to the United Kingdom, an excessive accumulation of goods occurred there due to the difficulty of getting shipping space. The policy was effected in

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(152) MIA 1906, s.20(1)

(153) MIA 1906, s.21.

(154) In *Berger and Light Diffusers Pty Ltd v. Pollock* [1973] 2 Lloyd's Rep 442, an insurance was accepted under an open cover on a 'cross slip', to be supplemented by further information. It was held there was a continuing duty of disclosure between the date of 'cross slip' and the 'singing slip'.

(155) *Cory v. Patton* (1872) LR 7 QB 304; *Lishman v. Northern Maritime Insurance Co* (1875) LR 10 CP 179, Ex Ch; and see *Ionides v. Pacific Insurance Co* (1871) LR 6 QB 674 (affd (1872) LR 7 QB 517, Ex Ch). The fact that the contract was concluded by the slip being initialled subject to ratification by the assured, and that the matter concealed came to his knowledge before the issue of the policy, makes no difference: *Cory v. Patton* (1874) LR 9 QB 577, following *Hagedorn v. Oliverson* (1814) 2 M & S 485. This accords with the MIA 1906 s 86. Where, however, a broker is instructed to effect a policy on goods and by mistake effects one on the ship, and the insurer afterwards agrees to a rectification of the policy, the broker is bound to disclose a material fact which has come to his knowledge between the execution of the policy and its rectification, for the insurer is under no obligation to make the alteration, and by doing so he is really making a new and distinct insurance: *Sawtell v. Loudon* (1814) 5 Taunt 359. If, on the other hand, the policy does not correspond with the slip to which the insurer has assented, so that it is his duty to correct the error, the alteration does not make a new contract, but merely declares the true meaning of that already concluded, and there is no necessity to disclose the information acquired after the making of the contract: 2 Duer on Marine Insurance 428. It seems that if the contract is varied between the initialling of the slip and the issue of the policy, matters material to the variation, and those only, must be disclosed when the variation is made: see *Lishman v. Northern Maritime Insurance Co* (1875) LR 10 CP 179 at 182, Ex Ch, per Blackburn J).

(156) (1922) 13 Ll. L.R. 75.

January 1916, and the accumulation occurred after that date. When they were sued under the policy, one of the defences pleaded by the insurers was that the assured should have disclosed the accumulation, and since no disclosure had been made, they could avoid liability under the policy.

It was held by the House of Lords that this defence failed, and that the claim under the policy succeeded, because there had been no non-disclosure, since non-disclosure was a matter which went only to the formation of the contract, and once the contract had been concluded no further disclosure was necessary<sup>(157)</sup>.

Lord Summer observed:<sup>(158)</sup>

“There remains the question of non-disclosure. The object of disclosure being to inform the underwriter’s mind on matters immediately under his consideration with reference to the taking or refusing of a risk then offered to him, I think it would be going beyond the principle to say that each and every change in an insurance contract creates an occasion on which a general disclosure becomes obligatory, merely because the altered contract is not the unaltered contract, and therefore the alteration is a transaction as the result of which a new contract of insurance comes into existence. This would turn what is an indispensable shield for the underwriter into an engine of oppression against the assured.”

If a statement made at the time of the policy is true, the fact that due to a change of plan on the part of the assured the statement subsequently becomes untrue does not entitle the insurer to avoid the policy, unless the

(157) The House of Lords in the *Niger* case relied heavily on the earlier authorities of *Cory v Patton* (1874) LR 9 QB 577, and *Lishman v. Northern Maritime Insurance Company* (1875) LR 10 CP 179, HL. In *Cory v Patton* (1874) LR 9 QB 577, goods were shipped and were, by the perils insured against, wholly lost. The insurer declined payment on the basis that a circumstance material to the risk was not disclosed, namely, that the goods on board had met with an accident and misfortune before the loss occurred. The court ruled that the slip is the complete and final contract binding upon the parties. Accordingly, whatever events may subsequently happen, the assured need not communicate to the underwriters material information which only came to his knowledge after the conclusion of the contract.

Similarly, in *Lishman v. Northern Marine Insurance Company* (1875) LR 10 CP 179, the assured failed to disclose the loss of the ship after acceptance of the risk by the insurer, but before issuing the policy. The court, applying *Cory v. Patton*, held that the concealment of the loss was not a concealment of a material fact so as to avoid the policy which had already been concluded.

(158) (1922) 13 Ll.L.R. 75.

change of plan is expressly prohibited by the contract. In *Willmott v. General Accident Fire and Life Assurance Corporation*<sup>(159)</sup> a motor boat, which was insured under a time policy, sank during a gale while lying at moorings off Anchor Head near Weston-super-Mare. When a claim in respect of a total loss was made by the assured, the insurers denied liability on the ground that he had not disclosed the fact that the vessel would be habitually moored off Anchor Head. When the policy was entered into, he had no intention that she should ever be moored anywhere except in Knightstone Harbour, and, in fact, she was not moved to Anchor Head until two months later.

Branson, J., held that this defence failed, and that the action succeeded. The change of plan as to mooring was made subsequent to the date of the policy, and such a change was not prohibited by the policy. Consequently the question of non-disclosure of that material fact did not arise.

He observed:<sup>(160)</sup>

“The position with regard to that is this, that until some time after Whitsuntide, which happened in June, this policy having been entered into in April, there seems to have been no intention on the part of the plaintiff that the ship should ever be moored anywhere but in Knightstone Harbour. No doubt in June, when it was discovered that sometimes it shortened the period during which the vessel would be available for running passenger trips, moorings were put down in this Gut and afterwards the ship was very frequently moored there, but the fact that that state of things arose in June is nothing to do with the allegation that there was a failure to disclose the material fact in April.. It was not a fact in April that she was going to be moored off Anchor Head; that was simply something which came about at a subsequent time altogether. As I said in the course of the argument, had the defendants desired to make it a contractual obligation on the part of the plaintiff to keep his boat in Knightstone Harbour and noelse, they could have made a condition to that effect, but they did not, and the result is that though they may have complained if he had intended, when he gave his answers

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(159) (1935), 53 Ll.L. Rep. 156, K.B.D.

(160) (1935), 53 Ll.L. Rep. at p. 158.

to the questionnaire, to keep this boat at Anchor Head and not at Knightstone Harbour—of course, they could have complained then—they cannot complain, if the answer was true at the time it was given, because a subsequent change of plans, which is not prohibited by the contract into which he has entered, has not prevented him from keeping her not inor indeed very often, at another and less safe mooring”.

Where, however, the underwriter issues the policy under protest, after he has received information that a material circumstance has not been disclosed is not estopped from disputing his liability on the ground of such non-disclosure, merely because he has issued the policy. In *Nicholson v. Power*<sup>(161)</sup> the defendant, an underwriter, signed a 'slip' effecting an insurance on the freight of a certain ship; at the time of his so signing plaintiff knew of, but did not communicate to defendant, a fact which the court held to be a material fact, which plaintiff was bound to communicate. The defendant subsequently, at a time when he was fully acquainted with this fact, signed a policy in conformity with the terms of the 'slip', but also at the same time wrote a letter of protest to plaintiff's brokers, declaring that he would resist any claim made under the policy: Held the policy was vitiated by the non-disclosure, and the action was not maintainable.

## Kuwaiti Law

Kuwaiti law does not follow English law. The duty of disclosure should be observed throughout the contract. It is submitted that KMC 1980, articles 280 and 281<sup>(162)</sup> do not distinguish between non-disclosure made before and after the conclusion of the contract and that in the contract of insurance, which has a continuous character (without further qualification), the insurer is entitled to be informed inasmuch as the risk attaches.

(161) (1869), 20 L.T. 580.

(162) KMC 1980, article 281/1 provides (Free translation):

"The assured should notify the insurer of the material circumstances arise during the currency of the contract and which may increase the risk insured against within 3 days from the date he has come to know it, holidays excluded, and if he did not do so, the insurer may avoid the contract".

"على المؤمن له أن يخطر المؤمن بالظروف الجوهرية التي تطرأ أثناء سريان العقد ويكون من شأنها زيادة الأخطار التي يتحملها المؤمن، وذلك خلال ثلاثة أيام من تاريخ العلم بها بعد استبعاد أيام العطلة الرسمية، فإذا لم يقع الأخطار في الميعاد المذكور جاز للمؤمن فسخ العقد".

#### 4. EFFECT OF NON-DISCLOSURE

MIA 1906, Section 18 is explicit as to the legal effect of the breach of the duty of disclosure; the contract 'may be avoided' by the insurer. Avoidance of the contract is the main, if not the sole remedy, for the breach of the duty of disclosure,<sup>(163)</sup> and in most cases where the insurer seeks for remedy, avoidance is an adequate and proper remedy. Many cases have decided that a failure on the part of the insured to observe the duty of disclosure renders the insurance contract avoidable at the option of the insurer<sup>(164)</sup>. "The policy is equally liable to be avoided whether his failure is attributable to fraud,<sup>(165)</sup> carelessness<sup>(166)</sup>, inadvertence<sup>(167)</sup>, indifference,<sup>(168)</sup> mistake,<sup>(169)</sup> error of judgment,<sup>(170)</sup> or even to his failure to appreciate its materiality."<sup>(171)</sup> In breach of the duty of disclosure, the policy is not avoided automatically. The insurer may either elect to avoid the policy or confirm it<sup>(172)</sup>. The effect of avoidance is "total retroactivity",<sup>(173)</sup> which means that avoidance "terminates the contract, puts the parties in *statu quo ante* and restores things, as between

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(163) Tuckey, J., at first instance, in *Star Sea* [1995] 1 Lloyd's Rep 651, remarked: Tuckey, J., [p667] "...the only specified remedy for such a breach is avoidance. The courts have held that damages cannot be awarded for such a breach (see *Banque Financiere de la Cite SA v. Westgate Insurance Co Ltd* [1990] 2 Lloyd's Rep 377)".

(164) *Carter v. Boehm* (1766) 3 Burr 1905; *Bank Leumi le Israel BM v. British National Insurance Co* [1988] 1 Lloyd's Rep. 71.

(165) *Rivaz v. Gerussi* [1880] 6 QBD 222 C.A.).

(166) *M'Millan v. Accident Insurance Co* 1907 S.C. 484 per Lord Stormonth-Darling at 493; *Cantere Meccanico Brindisino v. Janson* [1912] 3 K.B. 452, (C.A.) per Fletcher Moulton L.J. at 469.

(167) *Abbott v. Howard* [1832] Hayes 381 (life insurance).

(168) *Bates v. Hewitt* [1867] 2 Q.B. 595, per Cockburn CJ at 60.

(169) *Carter v. Boehm* (1766) 3 Burr 1905, per Lord Mansfield CJ at 109.

(170) *Elton v. Larkins* (1832) 5 C. & P. 385; *Morrison v. Universal Marine Insurance Co.* (1872) L.R. 8 Ex. 197, where the broker had made inquiries and satisfied himself that the information did not relate to the ship in question, though, as a matter of fact, it did.

(171) *Dalglish v. Jarvie* [1850] 2 M. & G. 231 at 243 per Rolfe B.; *Asfar & Co v. Blundell* [1896] 1 Q.B. 123, (C.A.) per Lord Esher MR at 129; *Bates v. Hewitt* (1867) L.R. 2 Q.B. 595; *Joel v. Law Union & Crown Insurance Co* [1908] 2 K.B.863, (C.A.) (life insurance).

(172) *Mackender, Hill and White v. Feldia A.G., Ch. Brachfeld and Sons S.A. and Diamil S.R.L.* [1966] 2 Lloyd's Rep. 449, per Lord Denning MR at 455.

(173) Malcolm A. Clarke, *The Law of Insurance Contracts*, 4th ed. (London: LLP, 2002) at para. 23-17C. If, however, the contract is avoided by reason of actual fraud on the part of the assured, whether committed by himself or his agent, there shall be no return of premium; and this principle is implied in ss. 84(1) and (3)(a) of the MIA 1906 (see Arnould, op. cit., at p. 166).

them, to the position in which they stood before the contract was entered into”<sup>(174)</sup>. It follows that the insurer must return the premiums<sup>(175)</sup> and he is not liable for claims arising before the moment of avoidance; even if the insurer has paid the claim only after which he finds the breach of the duty of disclosure on the part of the assured, the insurer has the right to recover the compensation from the assured.

## Kuwaiti Law

Articles 280 and 281 of *KMC 1980* purport to regulate a situation in which the assured is proven to have breached the duty of disclosure. The provisions differentiates between intentional non-disclosure and unintentional non-disclosure. If the assured has knowingly concealed important information prior or after the conclusion of the insurance contract, the insurer is entitled to avoid the contract, keep the premium paid, and refuse to indemnify any losses incurred before the avoidance the contract. If the assured has unintentionally failed to disclose truthfully any important information to the insurer, the insurer is entitled to choose between avoiding the contract or demanding additional payment for the premium. If the insurer chooses to avoid the contract, he is liable for the loss incurred prior to the avoidance of the contract unless it can be proven that the undisclosed matter or information contributed to the occurrence of the insured risk or incident. In the second situation, the insurer’s liability to indemnify the assured largely depends on the proof that the undisclosed information is relevant to the risk that caused the loss or damage concerned.

(174) *Abram Steamship Co v. Westville Shipping Co* [1923] A.C. 773, per Lord Atkinson at 781. In *Johnson v. Agnew* [1980] A.C. 367, House of Lords drew a clear distinction between rescission for breach of contract, which operates prospectively, and rescission for misrepresentation/non-disclosure, which operates retrospectively. See Malcolm A. Clarke, *The Law of Insurance Contracts*, 4th ed. (London: LLP, 2002) at para. 23-17C.

(175) The insurer may retain the premium yet cancel the policy if the non-disclosure is fraudulent. See *Feise v. Parkinson* (1812) 4 Taunt. 640 at 641; *Anderson v. Fitzgerald* (1853) 4 H.L.Cas. 484 at 508; *Fowkes v. Manchester and London Life Assurance and Loan Association* (1863) 3 B. & S. 917 at 927, 931; *Prince of Wales Association v. Palmer* (1858) 25 Beav. 605; *Rivaz v. Gerussi* [1880] 6 Q.B.D. 222 at 229-230; Marine Insurance Act 1906, s.84 (1), (2). Nicholas Legh-Jones, gen. ed., *MacGillivray on Insurance Law*, 10th ed. (London: Sweet & Maxwell, 2003) at para.

## 5. CONCLUSION

The duty to disclose is one of the most effective means of achieving contractual equality between the marine assured and the marine insurer. Clearly, at the time the proposal is made by the assured, it is the assured who has the most intimate knowledge of the nature of the risk. Even with the sophisticated information databases available in today's technological insurance market, the insurer is often at a considerable disadvantage in trying to assess the nature and extent of the risk. The law thus requires the assured to volunteer all information material to the assessment of the risk by the prospective insurer which the assured knows or ought to have known. But the assured needs not to disclose facts which are matters of common notoriety or knowledge or which an insurer in the ordinary course of business, as such, ought to know. Further, if the insurer forbears to ask questions after disclosure of facts have put him on inquiry, he may be taken to have waived the right to disclosure of the facts which such inquiry would have disclosed.

The duty to disclose extends to agents of the assured who are employed by him actually to make the contract on his behalf. The duty only extends, however, to facts within the knowledge of his principle, which are presumed to have been communicated in due course to the agent, or to facts which he has discovered in the course of his agency.

The duty is to disclose every material fact, namely, every circumstances which would influence the judgment of a prudent insurer in fixing the premium or his determining whether he will take the risk. Materiality is a question of fact, but it is the practice to adduce expert evidence on the point from insurers, brokers and the like.

The duty to disclose persists throughout the pre-contractual negotiation until the contract is concluded. Any material fact which comes to light, or any previously immaterial fact which becomes material through change of circumstances, must be disclosed, though once the contract is made, there is no duty to disclose material facts which then occur or which previously were neither known nor ought to have been known.

Non-disclosure, however innocent, makes the contract of marine insurance voidable, not void, so that the insurer has an election whether or not to avoid the contract.