

Consultation response
Insurance Law Research Group
University of Southampton

Fair presentation of the risk

1. We understood the policy objective as being a general clarification of and, if any change is intended, a reduction in the scope of the proposer's duty of disclosure, to harmonise with the trend in (if not the terms of) consumer insurance. We did not think that the proposal fully met these ambitions and thought that it would be useful to set out a few of our question marks for your consideration.
2. Section 4(1) provides for a very high standard of disclosure for two reasons.¹ First, the expression "prudent insurer" represents an objective standard and is therefore understood to mean an ideal insurer with consistent and high standards, not affected by the vicissitudes of human nature.²
3. Second, since the duty of fair presentation is on the insured, the burden of proof will be on the insured to prove that it has lived up to that high standard, if that fact is questioned by the insurer. The insured must do so by providing market evidence, that is, evidence by other underwriters. The insured must thus find an unrelated but sufficiently initiated underwriter who is willing, in effect, to testify against its own interests in the market. We felt that for these two reasons, the burden of proof was too demanding on the insured to fulfil and that the effect was too high a standard of disclosure.
4. The concept of prudent insurer reappears in section 4(7) and again sets a high standard of disclosure for the proposer.
5. Section 8 abolishes the current statute and case law and reintroduce very similar sounding rules, but without the depth and comfort of case law to assist with interpretation. We felt that this approach was likely to cause significant confusion and widespread litigation and therefore not to meet the policy objectives. We thought that given a clean slate, judges would still be likely to direct themselves to existing case law on MIA ss 18-20 by way of guidance, but to be bemused by the express prohibition against doing so, in particular in light of sections such as 6(1) which closely replicates current statute.
6. If the policy objective is to detach the duty of disclosure (or its successor) from the Marine Insurance Act, we did think this approach was successful, but we did not think it

¹ For simplicity the terminology of "sections" will be employed.

² In fact, the best available judicial dicta on the concept are to the effect that it is open to interpretation: "This is an objective test, and the characteristics to be imputed to a prudent insurer are in substance a matter for the courts to decide." – Tugendhat J in *Norwich Union Insurance Ltd v Meisels* [2006] EWHC 2811 (QB)

helpful to also detach it from parts of existing case law that would be useful in its interpretation.

7. By virtue of section 7 and the Schedule, 'deliberate or reckless' breaches of the duty of presentation lead to the remedy of avoidance, and other breaches lead to a proportionate remedy. It is assumed that the language of deliberate or reckless is employed in place of "fraudulent" as a means of avoiding any enhanced standard of proof. While we do not approve of any enhanced standard of proof in this context, we also noted that this again works to the advantage of the insurer who can now more easily demonstrate relevant facts to the balance of probabilities than if the standard of proof were to remain that for fraud.
8. In sum, the proposals shift the law almost entirely in the favour of the insurer for technical reasons not apparent from the statute itself and we thought such factors worth looking at before finalising the language.
9. We also did not think that the proposals added clarity to the current law, in particular in light of the rejection of existing case law that may be pertinent to the interpretation of the revised statute.

Fraudulent claims

10. We took the policy objective against which the proposals should be assessed to be the reduction in fraudulent claims and encouraging honesty in the claims process.
11. We felt that the proposals were good in their minimalism, but that they represented an excessive swing of the pendulum in favour of the insurer and might benefit from tempering.
12. The proposals leave intact the meaning of 'fraudulent claim' by not providing a definition. We believe that the definition of fraudulent claims is not currently unclear or problematic, at least not to an extent where it cannot be handled by the courts, and that therefore this is a good solution. However, there is a problem of overall imbalance. The scope of the definition of fraudulent claims has in recent years been increased to encompass also entirely honest claims promoted by fraudulent means and devices. The recent judicial discussion of subjective intent is unlikely to represent a major shift.³ It was already the case that an exaggeration made for the purpose of negotiation was not a fraudulent claim.⁴ The law has therefore for some years been subtly shifting in favour of the insurer – this is consistent with the policy aims, but care must be taken that the shift does not go too far when statutory form is considered.

³ Both *Aviva Insurance Ltd v Brown* [2012] Lloyd's Rep IR 211 and *Versloot Dredging BV v HDI-Gerling Industrie Versicherung AG (The "DC Merwestone")* [2013] Lloyd's Rep. IR 582 were decided in favour of the insurer.

⁴ *Orakpo v Barclays Insurance Services* [1994] CLC 373 at p 382.

13. We noted that the termination remedy in 10(2) represented the option harshest on the insured. Termination by notice with retrospective effect from the date of the fraudulent act is a more onerous remedy for the insured than other potential termination remedies, such as notice of prospective termination following a stipulated notice period or termination with immediate effect from receipt of notice. The remedy is in reality an election to terminate with retrospective effect and would affect subsequent honest claims made in reliance upon notice not being given and the insurance remaining in place. This would affect the position of a generally honest insured who had lapsed into a fraudulent claim but had made several honest claims before and afterwards, and who would have had the opportunity to take out a policy elsewhere but relied on the policy to remain in place.
14. It should be noted that the forfeiture rule is already designed to be punitive.⁵ If it is now accepted that avoidance is not an available remedy for fraudulent claims, out of the potential termination options, the one opted for by the Law Commissions is the harshest one. We therefore felt that from a more global overview perspective, it would be good to temper the proposals slightly in favour of the honest or not-so-dishonest insured with two recommendations to this end.
15. First, a majority of our group thought that the judicial discretion rule embraced by section 56 of the Australian Insurance Contracts Act 1984 would be appropriate also in our jurisdiction, especially in relation to entirely honest claims following a mostly genuine claim tainted by “slight” fraud and taking into account the exaggeration or other dishonesty in proportion to the total claim. This was considered especially appropriate in view of the relative harshness of the retroactive effect of termination in section 10(2)(a).
16. Second, while it would probably be technically difficult to devise a clear and implementable rule that the honest part of claims should be paid without detracting from the punitive essence of the common law forfeiture rule, there would be a simple measure that could assist the policy objective, while simultaneously reducing the shift in the law in favour of the insurer. Thus we felt that it would probably help promote honesty in the claims process if the insured were able to retract a fraudulent claim with the effect that the claim had to be paid. Legislation would be necessary to achieve this purpose as there is adverse case law.⁶ The legislation could stipulate that the retraction had to be unprompted and timely:

10 Remedies for fraudulent claims

...

(5) Where a fraudulent claim has been made, but is retracted unprompted before the insurer expresses reservations in respect thereof, the insurer is not entitled to a remedy.

⁵ “The fraudulent insured must not be allowed to think: if the fraud is successful, then I will gain; if it is unsuccessful, I will lose nothing”; Lord Hobhouse in *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd (The Star Sea)* [2001] UKHL 1; [2001] 1 Lloyd's Rep. 389 at [62].

⁶ *Direct Line v Fox* [2009] EWHC 386 (QB); [2010] Lloyd's Rep. IR 324

Late payment

17. We agree that the 'implied term' based solution was the best of the three available options for introducing a cause of action for late payment of claims. We agree that paragraphs (1)-(3) are suitably drafted to achieve that purpose.
18. The 'reasonableness' requirement in relation to late payment imposes a new task on the judiciary, namely to assess what is a 'reasonable' time within which the insurer ought to have paid the claim. Such assessment will be on a case-by-case basis, taking into account all the material facts. Given the novelty of this assessment, the non-exhaustive list of matters to be taken into account in section 12(3) is to be welcomed.
19. We felt that paragraph (4) was poorly drafted. The introductory words imply a retrospective view, but (a) implies that the dispute on the substance is still ongoing. The technical effect of the connective word "but" between (a) and (b) is unclear. Paragraph (b) appeared to be the main point of sub-section 12(4), but the drafting structure did not reflect this fact. On the whole, paragraph (4) seems to add little but complexity to the proposed section 12 and indeed it is not clear what facts would make up the reasonable grounds under (4) but which would not already be covered by (1)-(3).
20. Regarding contracting out of late payment of a claim, we endorse the blanket provision excluding late payment of claims in the consumer context.
21. For business insurance, contracting out of the implied term on late payment is proposed to be permitted where the late payment was not deliberate or reckless. We felt that this was too wide a scope for contracting out. In the Consumer Insurance (Disclosure and Representations) Act 2012, 'deliberate or reckless' stands in for 'fraud' as the most serious degree of misrepresentation. A deliberate or reckless case of failure to pay in time is therefore to be considered a very serious matter and we would argue that the threshold is too high. In *Sprung*,⁷ the failure to pay was not necessarily deliberate or reckless, but only careless.
22. We also felt that SMEs would not only be contracting on an unequal footing with the insurer, but would also be disproportionately vulnerable in terms of cash flow to the effects of late payment of an insurance claim. We consider that there would be no harm in prohibiting contracting out also in relation to SMEs, in the same terms as would apply to a consumer.
23. We also thought that contracting out in the context of a settlement agreement, although such an agreement is not an insurance contract, should be considered in this context.

⁷ *Sprung v Royal Insurance (UK) Ltd* [1997] CLC 70 [1999] Lloyd's Rep IR 111

Good faith

24. Part 5 is designed to remove the remedy of avoidance for breaches of the duty of utmost good faith. It addresses solely the remedy and does not purport to affect the contents of any doctrine of good faith. We consider this a minimalistic incision with potential for a successful outcome for insurance law, in particular in view of dicta in *The Star Sea* and *Goshawk v Tyser*.⁸
25. However, we have considered the implications on the amendments on the Marine Insurance Act 1906. Following the amendments, section 17 will be situated directly underneath the header “Disclosure and representations” and immediately followed by section 21, “When contract is deemed to be concluded”. This new geography may influence its interpretation in the context of marine insurance so that any application of the provision in a post-contractual context is put in question.
26. Section 13(2) implies an amendment of the Consumer Insurance (Disclosure and Representations) Act 2012, without in fact changing the language of that statute. A possible, very unfortunate inference is that the words of the Consumer Insurance Act carry one meaning from 6 April 2013 until the date of entry into force of this new Act, and thereafter take on another.
27. Finally, it appears clear from the consultation process that the Law Commission would like good faith (or utmost good faith, which we do not consider to be anything different) to remain as a guiding principle. That being the case, we would recommend including a provision to that effect in the new Act. The principle currently only appears in the Marine Insurance Act 1906 s 17 and in its wording makes direct reference to marine insurance, so that it could feasibly be inferred in the interpretation of new legislation applicable to insurance in general that it did not apply to other forms of insurance.

This response is based on contributions by Oluwafikemi Adewale, Daniel Barnes, Mateusz Bek, Anna Bursich, Bertha Chileshe and Johanna Hjalmarsson, University of Southampton

⁸ Lord Hobhouse in *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd (The Star Sea)* [2001] UKHL 1; [2001] 1 Lloyd's Rep. 389 at [52]-[53] and *Goshawk Dedicated Ltd v Tyser & Co Ltd* [2006] EWCA Civ 54 at [53].