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Marine Insurance
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Average

BRITISH SHIPPING LAWS

Arnould's Law of Marine Insurance and Average

VOLUME II

SIXTEENTH EDITION

by

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BRITISH SHIPPING LAWS

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VOLUME II

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Part Two

MATTERS RENDERING THE CONTRACT OF INSURANCE VOID OR UNAVAILABLE

CHAPTER 17

MISREPRESENTATION

Misrepresentation and non-disclosure [1] generally

579 The subject of disclosure and representations [2] is dealt with in sections 17 to 21 of the Marine Insurance Act 1906. Of these, section 17 enunciates a general principle [3] applying both to disclosure and to representations. The three following sections deal in more detail with the duties imposed on the assured. Section 21 is supplementary to the preceding sections.

The provisions of these sections [4] are as follows:

> *Insurance is uberrimae fidei*
>
> 17. A contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith be not observed by either party,[5] the contract may be avoided by the other party.
>
> ★ ★ ★
>
> *Representations pending negotiation of contract*
>
> 20.—(1) Every material representation made by the assured or his agent to the insurer during the negotiations for the contract, and before the contract is concluded,[6] must be true. If it be untrue the insurer may avoid the contract.
>
> (2) A representation is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk.
>
> (3) A representation may be either a representation as to a matter of fact, or as to a matter of expectation or belief.
>
> (4) A representation as to a matter of fact is true, if it be substantially correct, that is to say, if the difference between what is represented and what is actually correct would not be considered material by a prudent insurer.
>
> (5) A representation as to a matter of expectation or belief is true if it be made in good faith.
>
> (6) A representation may be withdrawn or corrected before the contract is concluded.
>
> (7) Whether a particular representation be material or not is, in each case, a question of fact.
>
> *When contract is deemed to be concluded*
>
> 21. A contract of marine insurance is deemed to be concluded when the proposal of the assured is accepted by the insurer, whether the policy be

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[1] In former editions of this work the term "concealment" was used. See *infra*, § 627, n. 1, for the reasons for preferring the term "non-disclosure."

[2] Although disclosure and representations are separately dealt with both in the Marine Insurance Act 1906 and in this work, there is no hard-and-fast division between them. The same circumstances may amount both to a misrepresentation and to a non-disclosure.

[3] In *Cantiere Meccanico Brindisino* v. *Janson* [1912] 3 K.B. 452 at p. 463, Vaughan Williams L.J. said that there might be a duty of disclosure under s. 17, although in the absence of inquiry there might be no such duty under s. 18, for which see § 628, *infra*.

[4] See § 628, *infra*, for ss. 18, 19.

[5] Lord Mansfield in *Carter* v. *Boehm* (1766) 1 W.Bl. 593; 3 Burr. 1905 pointed out that the duty lay not only upon the assured, but also upon the underwriter, who, for instance, would not be allowed to retain a premium in respect of a policy made on a ship which he knew at the time to have arrived safely.

[6] As to these words, see s. 21; and *infra*, §§ 619–622.

then issued or not; and 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.

Assured's duty of good faith

580 In almost every instance in which a policy of marine insurance is effected, the underwriter must rely solely on the good faith of the assured for supplying him with full and true information of many of those facts on which the character and nature of the risk, and consequently the rate of premium, depend. It is to the assured that all communications respecting the actual state of the property proposed for insurance, such as the time and place at which the goods are to be loaded, or the ship is to sail—the force and equipment of the vessel, her then situation, and progress in her voyage, etc.—are in the first instance addressed: he is thus the natural and sole depositary of much of that information, a full and true communication of which is absolutely essential to the underwriter in order that he may form a right judgment of the nature of the risk and the proper rate of premium.

Hence, on the true principles of equity and justice the non-disclosure or misrepresentation by the assured, whether wilful or not, of any facts which if truly represented or disclosed would be likely to influence the judgment of a prudent insurer, and the misrepresentation or non-disclosure of which did in fact influence [7] the underwriter,[8] in taking the risk or fixing the rate of premium, will give the latter the right to avoid the policy.[9]

Contract not void, but voidable by innocent party

581 It is commonly stated, both in the textbooks and the cases, that the effect of a material misrepresentation or non-disclosure is to avoid the insurance.[10] This is not strictly correct. The party who has been guilty of a non-disclosure or misrepresentation cannot, of course, avail himself of his wrongful act to treat the contract as void. The other party to the insurance can, however, elect either to treat the contract as valid or to repudiate it.[11] It has been stated that the effect of avoidance for non-disclosure or misrepresentation is that the policy is set aside *ab initio*.[12] The avoidance is certainly retroactive in the sense that the parties are entitled to a return of premiums and repayment of losses paid prior to the time of avoidance.[13]

---

[7] See *infra*, § 611.

[8] Arnould's words were (2nd ed.), p. 541: "any such facts as might reasonably be supposed to have influenced the underwriter," etc. The text has been altered for reasons which will hereafter be discussed.

[9] As to the principle on which the rule is based, see *infra*, § 595.

[10] This expression was in fact used by Arnould.

[11] An insurer cannot, however, deny liability for a claim on the ground of non-disclosure or misrepresentation while at the same time stating that he is not seeking to avoid the policy: see *West* v. *National Motor & Accident Ins. Union Ltd.* [1955] 1 All E.R. 800. See further, § 586, *infra*.

[12] See the previous edition, § 551; see also *Cornhill Ins. Co.* v. *Asenheim* (1937) 58 Ll.L.R. 27 at p. 31, *per* Mackinnon J.

[13] But a fraudulent misrepresentation may disentitle the assured to a return of premiums; see § 596, 1324, 1333, *infra*. The policy may itself provide for forfeiture of premiums in the event of misrepresentation; see the cases cited at § 596, n. 77, *infra*.

But where the right to avoid the policy is disputed, the assertion of that right does not preclude the other party from relying on clauses in the policy which relate to the law or to the procedure governing the contract or disputes arising under the contract.[14] It was stated in *Mackender* v. *Feldia A.G.*,[15] where the assured sought to rely on a foreign jurisdiction clause, that the effect of avoidance for non-disclosure was that the contract is not avoided from the beginning but only from the moment of avoidance.[16] At first sight, this is in conflict with the proposition that the contract is set aside *ab initio*. It is submitted, however, that the Court of Appeal was clearly not concerned in *Mackender* v. *Feldia A.G.* with the incidents or effects of a valid election to avoid the policy, and that this decision does not alter the law regarding the retroactive effect of avoidance for misrepresentation or non-disclosure.

When a policy has been avoided for non-disclosure or misrepresentation it may be ordered to be delivered up and cancelled.[17]

Time for election

582 The question then arises, when the election must be made. The Marine Insurance Act 1906 is silent upon this point. In almost all the cases the fact has been that the non-disclosure or misrepresentation by the assured was only discovered after a total loss had become known, or after the voyage insured had terminated. Under such circumstances the question of election is of no practical importance and has never arisen.[18] When, however, the underwriter becomes aware, before the voyage or period insured has come to an end, that he is entitled to avoid the contract, it may make a great difference to the assured whether the underwriter makes his election at once or delays making it. A prompt election may enable the assured to protect himself by taking out another policy, while a delay may render it impossible for him to effect an insurance at all, or to do so on as favourable terms as before.

It was not finally decided, in the only marine case[18a] in which this question arose, whether the party entitled to elect must do so within a reasonable time, or whether he may repudiate the contract at any time, unless in the meanwhile he has done something to affirm it, or unless the rights of third parties have intervened, or unless the other party to the contract has altered his position under the belief that the contract was a subsisting one.

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[14] See *Mackender* v. *Feldia A.G.* [1967] 2 Q.B. 590. Different considerations may apply if it can be said that the misrepresentation or non-disclosure had the effect that there was no consent at the time of making the contract, but this will not usually be the case, at least in the absence of fraud: see *ibid per* Diplock L.J. at p. 604 ("fraud may raise other considerations into which it is not necessary to go").

[15] [1967] 2 Q.B. 590.

[16] *Ibid. per* Lord Denning M.R. at p. 598; see also *per* Diplock L.J. at p. 603.

[17] *Rivaz* v. *Gerussi* (1880) 6 Q.B.D. 222; *Brooking* v. *Maudslay* (1888) 38 Ch.D. 636.

[18] But even in such a case, the underwriter may become debarred from taking the point if he causes the assured to incur trouble and expense in prosecuting a claim in the belief that it will not be taken; see § 586, *infra*.

[18a] But see now *Liberian Ins. Agency Inc.* v. *Mosse* [1977] 2 Lloyds's Rep. 560, cited at n. 28a, *infra*.

583 In *Morrison* v. *Universal Marine Insurance Co.*[19] the plaintiff's broker had effected an insurance with the defendants, without disclosing certain material information in his possession. In doing so he acted in good faith, believing that the information was incorrect. The slip was initialled on October 12, and on the same day the defendants' assistant underwriter became possessed of the information which had been withheld. On the fourteenth or fifteenth the defendants executed and delivered the policy, without any protest or any notice that they would treat it as void. On the nineteenth news of the loss of the ship was posted at Lloyd's, and on the twentieth the defendants gave notice to the broker that they did not consider the policy binding on them. At the trial, Blackburn J. directed the jury that when the underwriter discovers that there has been a non-disclosure or misrepresentation he is not entitled to wait until he hears that there has been a loss, and then repudiate the policy. He must make his election, not, indeed, with hot speed, but in a reasonable time.[20] The learned judge did not express an opinion on the question whether in delivering the policy the underwriters had done an act which amounted to an election, and the jury found expressly that the defendants had not elected to treat the policy as subsisting. A verdict having been entered for the defendants, the Court of Exchequer (Cleasby B. dissenting) ordered a new trial on the ground of misdirection. Martin B. held that the jury should have been told that if the conduct of the defendants in delivering the policy would induce the plaintiff to suppose that he had a valid policy, they were estopped from denying it. Bramwell B. considered that delivering the policy with knowledge of the non-disclosure was prima facie an election, and threw on the defendants the burden of showing circumstances to explain it.[21]

The Court of Exchequer Chamber reversed this judgment.[22] They accepted the verdict of the jury, that there had been no election in fact to affirm the policy, presumably on the ground urged by the defendants, that by usage the contract is deemed to be complete when the slip is initialled, and that the delivering of the policy is a mere formal act which the underwriter is in honour bound to perform, even if he intends to dispute its validity, as without the policy no action could be brought.[23] They considered that there was no evidence that the plaintiff had been prejudiced by

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[19] (1872–73) L.R. 8 Ex. 40, 197.

[20] *Morrison* v. *Universal Mar. Ins. Co.* (1872) L.R. 8 Ex. 40 at p. 47. See also *per* Bramwell B., *ibid.* p. 55.

[21] L.R. 8 Ex. 40 at p. 56.

[22] L.R. 8 Ex. 197.

[23] It is submitted that the repeal of the stamp laws affecting marine policies, as a result of which an underwriter can be compelled to issue a policy and actions can probably be brought on the ship (see Chap. 2, *supra*), does not alter the validity of the argument that in general the mere issue of a policy would be insufficient to show an election to affirm. The issue of a policy inconsistent in its terms with those of an earlier representation may, however, amount to a waiver of the right to insist on substantial compliance with the representations or to rely on a failure therein as a ground for avoiding the policy: see *Bize* v. *Fletcher* (1779) 1 Daigl. 12, n. (4); 284. See also *Jones* v. *Bangor Mutual Shipping Ins. Society Ltd.* (1890) 61 L.T. 727, where the issue of a marine policy and acceptance of premiums were treated as a waiver of a breach of condition as to double insurance.

the defendants not electing earlier to disaffirm the policy, and it was not material to consider whether the plaintiff understood their conduct in delivering the policy *without a protest* as amounting to an election to affirm it, unless under that belief he altered his position.

Question of time of election left undecided

584 One question, as we have said, the Exchequer Chamber left undecided, namely, whether the underwriter must make his election in a reasonable time, or whether he may defer making his election so long as he does nothing to affirm the contract, or unless the rights of third parties have intervened, or the other party to the contract has altered his position under the belief that the contract was a subsisting one. The same court, in *Clough* v. *London and North-Western Ry.*,[24] held that a party who had been induced by fraud to enter into a contract was entitled to " keep the question open " subject to the conditions stated in the text. But it was nevertheless there pointed out that mere lapse of time without rescission will furnish evidence that the party has determined to affirm the contract, and when the lapse of time is great might be conclusive to that effect.

It was not necessary for the Court of Exchequer Chamber to decide, in *Morrison* v. *Universal Marine Insurance Co.*, whether Blackburn J.'s direction, that the election must be made in a reasonable time, was correct, and the court expressly refrained from overruling this direction.[25] The rule laid down in *Clough* v. *London and North-Western Ry.*, and already referred to, was, however, cited in the judgment of the court, and the opinion of the court seems, therefore, to have been that that rule should be applied to contracts of marine insurance, whether the representation be fraudulent or innocent.[26]

Its application to such contracts is, however, not free from difficulty. The Exchequer Chamber said that if, in consequence of the defendants' delay, Morrison had been induced to believe that the defendants waived their right to avoid the contract, and had consequently abstained from effecting an insurance elsewhere, the plaintiff would have been entitled to a verdict; but there was no evidence to that effect. Yet it must be difficult in most cases to determine to what extent the position of an assured has been altered by the delay in rescinding. In this particular case the Exchequer Chamber pointed out that the plaintiff had actually attempted, but failed, to effect further insurances, and therefore the delay could have made no difference. But if he had known that he was not protected by the defendant's policy, he might have offered a higher premium. The question whether the assured's position has been altered must often be a speculative one, which cannot be satisfactorily determined.

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[24] (1871) L.R. 7 Ex. 26 at p. 34.

[25] See L.R. 8 Ex. 205. In *Glasgow Ass. Corpn.* v. *Symondson* (1911) 16 Com.Cas. 109, Scrutton J. appears to have thought that the policies could not be avoided after the lapse of a reasonable time from first disclosure of the facts to the underwriters, but the relevant passage in his judgment (at p. 121) was *obiter*.

[26] Cohen adopted this view: *Laws of England* (4th ed.), Vol. 25, § 247 (unaltered).

585 The decision in *Clough* v. *London and North-Western Ry.*[24] was followed in *Allen* v. *Robles* [27] where it was held that a mere lapse of time in taking a point on breach of condition as to giving notice of an accident did not prevent the insurers from repudiating liability on that ground. In the words of Fenton Atkinson L.J.: " The lapse of time would only operate against them [the insurers] if thereby there was prejudice to [the insured] or if in some way rights of third parties had intervened or if their delay was so long that the court felt able to say that the delay in itself was of such a length as to be evidence that they had in truth decided to accept liability." [28] It is submitted that the same principles apply in relation to the right to avoid a marine policy for misrepresentation or non-disclosure.[28a]

Circumstances where the underwriter is precluded from avoiding the policy

586 As we have seen, the underwriter is precluded from avoiding the policy if in the meantime he has done something to affirm it, or if the rights of third parties have intervened, or if the assured has altered his position in the belief that the contract was a subsisting one. It is clear that before this doctrine can operate, the underwriter must have full knowledge of the facts entitling him to avoid the policy.[29] He then has a reasonable time in which to decide what course of action to take, and he cannot be said to have affirmed the policy by his conduct until such time has elapsed.[30] Insurers have been held to be precluded from relying upon misrepresentation or non-disclosure, or upon warranties or conditions in the policy, upon a variety of grounds.[31] Plainly, an express affirmation of a policy with knowledge of facts entitling the insurer to avoid it will preclude him from avoidance. Affirmation may also be inferred from the acceptance of further premiums,[32] or from the giving of instructions [33] in relation to the

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[27] [1969] 1 W.L.R. 1193; see also *Simon Haynes, Barlas and Ireland* v. *Beer* (1945) 78 Ll.L. Rep. 337, *American Stevedores Inc.* v. *Sun Ins. Office* (1964) A.M.C. 1549.

[28] [1969] 1 W.L.R. 1193, at p. 1196.

[28a] *Allen* v. *Robles* (*supra*) v. *Robles* (*supra*) was followed, and the law stated in substantially the same terms, in *Liberian Ins. Agency Inc.* v. *Mosse* [1977] 2 Lloyd's Rep. 560, *per* Donaldson J. at p. 565 (a case on a marine policy).

[29] *McCormick* v. *National Motor & Accident Ins. Union* (1934) 49 Ll.L. Rep. 361; see also *Evans* v. *Bartlam* [1937] A.C. 473; *Suisse Atlantique Société d'Armement Maritime S.A.* v. *N.V. Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361 at p. 426.

[30] *McCormick* v. *National Motor & Accident Ins. Union, supra.*

[31] For a more detailed discussion of this topic, see MacGillivray and Parkington on *Insurance Law* (6th ed.), paras. 801–803, 896–912, 1792–73.

[32] *Wing* v. *Harvey* (1854) 5 de G.M. & G. 265; *Hemmings* v. *Sceptre Life Ass. Ltd.* [1905] 1 Ch. 365; *Jones* v. *Bangor Mutual Shipping Ins. Society Ltd.* (1890) 61 L.T. 727; *Holdsworth* v. *Lancashire & Yorkshire Ins. Co.* (1907) 23 T.L.R. 521; *Ayres* v. *British Legal etc. Ass. Co.* [1918] 1 K.B. 136. But a mere failure to return premiums is not affirmation; see *March Cabaret Club & Casino Ltd.* v. *London Assurance* [1975] 1 Lloyd's Rep. 169 at p. 178.

[33] See *De Maurier (Jewels) Ltd.* v. *Bastion Ins. Co. Ltd.* [1967] 2 Lloyd's Rep. 550; compare *The Yacht Escapade* (1961) A.M.C. 2410, where the underwriters were held to have waived a breach of warranty by requiring the assured to incur suing and labouring expenses; but such conduct cannot estop an insurer from asserting that there was no loss by an insured peril: *Reisman* v. *New Hampshire Ins. Co.* (1963) A.M.C. 1151; see also *Yorkshire Ins. Co.* v. *Craine* [1922] 2 A.C. 541; *Daneau* v. *Laurent Gendron* [1964] 1 Lloyd's Rep. 220 (Exchequer Court: Quebec). The wording of the standard form of marine policy prevents attempts to recover the insured property from being treated as a

subject-matter of the insurance. A denial of liability for a particular claim may, if it leaves the assured to suppose that the insurer is not putting the policy itself in question, also be evidence of affirmation.[34] So also, conduct of the insurer which leaves the other party to abstain from effecting insurance elsewhere [35] or to incur trouble and expense in the belief that the policy is being treated as subsisting [36] may preclude the insurer from avoiding the policy.

In the converse situation, where the assured seeks to avoid the policy for misrepresentation, it was suggested in one case [37] that the right to rescind was not available since the insurers would not have been able to rely on the misrepresentation by their own agent to avoid liability and the assured had had the benefit which she could not restore of being covered by insurance in the meantime, but this contention (which if upheld would in almost all cases preclude an assured from avoiding a policy for misrepresentation) was rightly rejected.

Compromise of claim under a voidable policy

587 As we have seen, the consequence of a rightful avoidance of a policy is that the underwriter is entitled to recover losses which he has paid prior to the time of avoidance.[38] But in such circumstances, the question may arise whether the insured may still enforce an agreement made to compromise his claim under the policy. This point arose in *Magee* v. *Pennine Ins. Co. Ltd.*[39] where it was held that the agreement to compromise was voidable in equity for common mistake, neither party being aware at the

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waiver or acceptance of abandonment, but this does not affect the point presently under discussion. The decision in *Provincial Ins. Co. of Canada* v. *Leduc* (1874) L.R. 6 P.C. that attempts by the underwriters to salve the insured property amounted to an acceptance of abandonment and a waiver of a breach of warranty would, it is submitted, still hold good in relation to the breach of warranty.

[34] See *Simon, Haynes, Barlas & Ireland* v. *Beer* (1945) 78 Ll.L.Rep. 337; *Barrett Bros. (Taxis) Ltd.* v. *Davies* [1966] 2 Lloyd's Rep. 1; *De Maurier (Jewels) Ltd.* v. *Bastion Ins. Co. Ltd., supra*; *Rock Transport Properties Corpn.* v. *Hartford Fire Ins. Co.* (1970) A.M.C. 2185. But a party need not state his reasons for denying liability and a mere general denial will not be treated as waiver of any particular defence; see *Whyte* v. *Western Ass. Co.* (1875) 22 L.C.J. 215 (P.C.); see also *Lemar Towing Co.* v. *Fireman's Fund Ins. Co.* (1973) A.M.C. 1843.

[35] *Morrison* v. *Universal Mar. Ins. Co.* (1872–73) L.R. 8 Ex. 40, 197; *De Maurier (Jewels) Ltd.* v. *Bastion Ins. Co. Ltd., supra*; see also *Glasgow Ass. Corpn.* v. *Symondson* (1911) 16 Com.Cas. 109 at p. 121 (failure to raise objection within a reasonable time after disclosure of the names of the assured in claim notes submitted under a reinsurance treaty).

[36] *Toronto Ry. Co.* v. *National British Irish Millers Ins. Co. Ltd.* (1914) 111 L.T. 553 at p. 563. The same principle is illustrated by several American decisions (not all easily reconciled) relating to the waiver of notice provisions in life and accident policies; see MacGillivray & Parkington, *op. cit.* para. 1792; *Trippe* v. *Provident Fund Society* (1893) 37 Am.S.R. 529. See also, *Webster* v. *General Accident Fire & Life Ass. Corpn. Ltd.* [1953] 1 Q.B. 520.

[37] *Kettlewell* v. *Refuge Ass. Co.* [1908] 1 K.B. 545; Affd. in the House of Lords without opinion, *sub nom. Refuge Ass. Co.* v. *Kettlewell* [1909] A.C. 243.

[38] See § 582, *supra*; *Cornhill Ins. Co.* v. *Asenheim* (1937) 58 Ll.L.Rep. 27, 31.

[39] [1969] 2 Q.B. 507; see also *Solle* v. *Butcher* [1950] 1 K.B. 671; *Grist* v. *Bailey* [1967] Ch. 532, where the scope of the equitable doctrine of mistake is discussed. These cases are not easily reconciled with *Bell* v. *Lever Bros. Ltd.* [1932] A.C. 161, but it is submitted that the doctrine is now well established. For the position regarding the validity of an agreement to assign a policy made on the basis of a common mistake, see *Scott* v. *Coulson* [1903] 2 Ch. 249.