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Mapping (Utmost) Good Faith in Insurance Law – Future Conditional?

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I. INTRODUCTION

Any homeowner who has had alterations done will confirm that an architect's plans, however meticulously prepared, never seem quite to match real life. There is always something awkward and unexpected that appears when it is too late to do anything about it. Law reform projects are much the same: however suited to solving the problem at hand, some difficulty can be trusted to appear. This article concerns one part of one such project. The project is the reform of insurance law under the Insurance Act 2015, which greatly limits the application of traditional common law principles developed by Lord Mansfield in the late eighteenth century. The part we are concerned with is the traditional classification of an insurance contract as a contract requiring a showing of utmost good faith, and how far this continues to apply today.

The background to this article, the Insurance Act 2015, can be fairly quickly summarised. It is a short piece of legislation aimed at the partial reform of English commercial insurance law. Backed by the insurance industry in the shape of the Association of British Insurers and drafted by the Law Commissions,¹ its effect is to remove a number of oddities, anomalies and uncertainties that have bedevilled English commercial insurance law for some two hundred years.² Two issues do not concern this article: namely, the re-writing of the common law rules on the effect of insurance warranties, widely accepted to be anomalous and far too favourable to the insurer; and certain highly technical changes to the Third Parties (Rights against Insurers) Act 2010 aimed at removing drafting errors that had so far prevented that Act being brought into force. Two others, however, are highly relevant. First, the 2015 Act introduces a new regime to deal with the effect of misrepresentation and non-disclosure by the assured. The traditional but draconian remedy of allowing the insurer to avoid the contract on the basis that misstatement or non-disclosure is a breach of a duty of utmost good faith is removed. Instead, a modernised duty of “fair presentation” is placed on the assured, with a more modulated set of remedies available to the insurer where this duty is broken. Secondly, the Act provides new rules replacing those available at common law in respect of another matter sometimes regarded as an aspect of the duty of utmost good faith, namely, the effect

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¹ In the plural: this was a joint exercise undertaken by the English and Scottish Law Commissions.

² The process started with a scoping paper in 2006. For progress reports see B. Soyer (ed.), *Reforming Marine and Commercial Insurance Law* (London: Informa, 2008); R. Merkin and J. Lowry, “Reconstructing Insurance Law: The Law Commissions’ Consultation Paper” (2008) 71 M.L.R. 95; G. Blackwood, “The Pre-contractual Duty of (Utmost) Good Faith: The Past and the Future” [2013] L.M.C.L.Q. 311; S. Rainey, “The Law Commission’s Proposals for the Reform of An Insurer’s Remedies for Fraudulent Claims Made under Business Insurance Contracts” [2013] L.M.C.L.Q. 357 and B. Soyer, “Beginning of A New Era for Insurance Warranties” [2013] L.M.C.L.Q. 384.

on the insurer's liability of an assured making a fraudulent claim under a policy – another matter previously both anomalous and uncertain.

Unfortunately all this leaves one important question hanging: after the 2015 reforms, what is the status today of the rule that an insurance contract is classified as a contract requiring the utmost good faith? The difficulty is that the traditional instances of utmost good faith that are said to mark out insurance contracts as a race apart are precisely the areas taken over in the two provisions referred to above. In any book on the law of contract, the characterisation of insurance contracts as contracts requiring utmost good faith is supported by the example of the extended role of avoidance for misrepresentation, covering not only positive statements but also (in contrast to the general rule in English law) material non-disclosure. Some also give as a further instance the right to avoid for later fraud, notably making a fraudulent claim, something which (it is highly arguable) follows *a fortiori* from any general obligation of good faith.³ But both of these areas are now covered by Parts 2 and 4 of the 2015 Act. Furthermore, this coverage is explicitly made exhaustive: under s. 14 of the 2015 Act, “any rule of law permitting a party to a contract of insurance to avoid the contract on the ground that the utmost good faith has not been observed by the other party is abolished.”⁴

One might be forgiven for thinking that the result of all this was to render effectively redundant the traditional classification of insurance contracts as requiring utmost good faith. If its two characteristic functions have been supplanted by bespoke statutory remedies, and, for good measure, any other right to avoid the contract for breach of the duty of utmost good faith has gone, can it not now be quietly forgotten? Unfortunately, life is not as simple as this. First, there are some dicta that the obligation of utmost good faith extends beyond rights to avoid for fraud, misrepresentation and non-disclosure.⁵ And secondly, this was not the intention of the Act. The Law Commissions explicitly recommended preserving the role of utmost good faith, ostensibly as an “interpretative principle” but apparently with one eye on allowing future developments on the basis of it.⁶ And, as if this was not clear enough, the treatment in the 2015 Act of s. 17 of the Marine Insurance Act (MIA) 1906 confirms the point. This provision, long accepted as reproducing the common law and hence applying *de facto* to all insurance,⁷ used to state: “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, the contract may be avoided by the other party.”

³ In *Black King Shipping Corp v. Massie (The Litson Pride)* [1985] 1 Lloyd's Rep. 437, for example, Hirst J, seems to proceed on the premise that advancing a fraudulent claim is a breach of the duty of utmost good faith on the part of the assured. See also the judgment of Evans J, in *Continental Illinois National Bank & Trust Co of Chicago v. Alliance Assurance Co Ltd (The Captain Panagos DP)* [1986] 2 Lloyd's Rep 470.

⁴ Continued existence of the remedy of “avoidance” would have undermined the reforms introduced by the Insurance Act 2015, especially introduction of proportional remedies in case of pre-contractual non-disclosure or misrepresentation.

⁵ See in particular the dissenting judgment of Pill LJ, in *Drake Insurance plc v. Provident Insurance plc* [2003] EWCA Civ 1834; [2004] 1 Lloyd's Rep. 268 at [177].

⁶ *Insurance Contract Law: Business Disclosure; Warranties; Insurer's Remedies for Fraudulent Claims; and Late Payment*, Cm 8898, SG/2014/13, Chap. 30.

⁷ See, e.g., *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1995] 1 A.C. 501 at 518 (Lord Mustill).

The latter words understandably had to be suppressed to accommodate s. 14 of the 2015 Act; but the former ones remain.

In the light of the above, we can now turn to the main subject of this article: what is the present effect of the statement in s. 17 of the MIA 1906 that “a contract of marine insurance is a contract based upon the utmost good faith” and the common law rule which that provision reproduces? The Law Commissions' view on the proposals which became the Insurance Act 2015 is that, in essence, the requirement of utmost good faith ceases to be significant as a matter of substantive law. However, together with a large number of consultees they see a large role for it as an interpretative principle running through commercial insurance law, and they emphasize that insurance contracts continue to be a special type of agreement marked off from contracts as a whole.⁸ Both these issues need looking at closely, and they will be treated separately.

II. AN “INTERPRETATIVE PRINCIPLE”

One of the Law Commissions' suggestions is that, even if the traditional effects of a breach of the duty of utmost good faith have been taken away, it may continue to act as a special feature of insurance contracts by acting as a powerful “interpretative principle”. The meaning of this suggestion, which is not carried over into the 2015 Act, is not entirely clear; and indeed there must be room for some doubt whether very much at all lies behind it other than a desire not to cause possible uncertainty, in a market which has happily lived with the idea of utmost good faith for a number of years, by getting rid of the requirement.

One possibility is that utmost good faith should, as an implied term, supplement insurance contracts by adding to them, as default rules,⁹ implied contractual obligations which would not otherwise obtain at all.¹⁰ There is something to support this view. Some obligations applying to the insurance relationship, such as the insured's obligation not to prejudice the insurer's rights of subrogation, are already referred to almost interchangeably as implied terms and obligations of good faith.¹¹ *Express* obligations to show utmost good faith are, moreover, fairly common, not

⁸ *Insurance Contract Law: Business Disclosure; Warranties; Insurer's Remedies for Fraudulent Claims; and Late Payment*, Cm 8898, SG/2014/13, para. 30.22.

⁹ Default because there is no restriction, either at common law or under the Act, on exclusion of utmost good faith duties. However, public policy would possibly not permit an assured to rely on an exclusion clause of that nature to exonerate himself in the event of fraud on his part in the presentation of the risk: *S Pearson & Son Ltd v Dublin Corporation* [1907] A.C. 351. See also *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1993] 1 Lloyd's Rep. 496 at 502 (Steyn LJ) and *HIH Casualty & General Insurance Ltd v New Hampshire Insurance Co* [2001] EWCA Civ 735; [2001] 2 Lloyd's Rep. 161 at [128].

¹⁰ As happens in Australia by statute: see s. 13(1) of the Insurance Contracts Act 1984 (Cth) and e.g., *CGU Insurance Ltd v AMP Financial Planning Pty Ltd* (2006) 235 C.L.R. 1. Also see *UEB Packaging Ltd v QBE Insurance (International) Ltd* [1998] 2 N.Z.L.R. 64, at 69 (Tipping J).

¹¹ In *Boag v Standard Marine Insurance Co Ltd* [1937] 2 K.B. 113 the Court of Appeal regarded it as purely an implied term: in *Horwood v Land of Leather Ltd* [2010] EWHC 546 (Comm); [2010] 1 C.L.C. 423 at [67] Teare J combined both analyses by regarding it as an implied term “which obliges the insured to act in good faith and reasonably with regard to the interests of the insurer.” See too *Willumsen v Royal Insurance Co Ltd* (1975) 63 D.L.R. (3d) 112 at [22].

only in joint venture and similar contracts,¹² but also in insurance policies,¹³ and these do indeed create added obligations on the authorities, such as duties to take positive steps to adhere to the spirit of the contract, to forward the agreed common purpose, and to act consistently with the justified expectations of the parties.¹⁴ Furthermore, it could be argued that such a starting-point would fit in fairly neatly with the accepted view that duties to observe good faith, let alone utmost good faith, do not form a general part of the English law of contract, applying only in particular types of contract.¹⁵ But this does not seem to be the approach of insurance law. There is clear authority at common law that the duty of good faith is not an implied term in the contract.¹⁶ Furthermore, in the insurance context the tendency has been to limit, rather than extend, possible further contractual duties owed by either party.¹⁷ The Law Commissions too are sceptical about the possible substantive effects of the recast duty, save perhaps in “extremely rare” instances of an “especially hard case or emergent difficulty”.¹⁸ What is more likely is that what they envisage is simply the use of the idea of “utmost good faith” as a matter of construction or interpretation of the wording of existing insurance contracts.¹⁹ Certainly this accords with the examples they give: apart from an enigmatic reference to its very occasional use to plug unforeseen holes in insurance contract law, they provide as instances²⁰ the use of utmost good faith to supplement the description of “fair presentation” (by penalising insureds who reveal the “bare minimum” of information, hoping no awkward

¹² For recent examples, see *CPC Group Ltd v Qatari Diar Real Estate Investment Co* [2010] EWHC 1535 (Ch); [2010] C.I.L.L. 2908; *Mid Essex Hospital Services NHS Trust v Compass Group UK Ltd* [2013] EWCA Civ. 200; [2013] B.L.R. 265; *Archer v Nubuke Investments LLP* [2014] EWHC 3425 (Ch).

¹³ An example being a claims handling clause in issue in *Federal Mogul Asbestos Personal Injury Trust v Federal-Mogul Ltd (formerly T&N plc)* [2014] EWHC 2002 (Comm); [2014] Lloyd's Rep. I.R. 671, requiring the defence to be conducted by the insurers “in a businesslike manner in the spirit of good faith and fair dealing, having regard to the legitimate interests of the parties to this Policy and of the reinsurers thereof.”

¹⁴ *Mid Essex Hospital Services NHS Trust v Compass Group UK Ltd* [2013] EWCA Civ 200 at [111] (Jackson LJ), quoting Vos J in *CPC Group Ltd v Qatari Diar Real Estate Investment Co* [2010] EWHC 1535 (Ch); [2010] C.I.L.L. 2908 at [246]. See too Eder J in the insurance case of *Federal-Mogul Ltd (formerly T&N plc)* [2014] EWHC 2002 (Comm); [2014] Lloyd's Rep. I.R. 671 at [119]–[120].

¹⁵ See the useful summary by Leggatt J in *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111; [2013] 1 Lloyd's Rep. 526 at [132].

¹⁶ See, e.g., *Joel v. Law Union Insurance Co* [1908] 2 K.B. 863 at 886; *March Cabaret Club Ltd v London Insurance* [1975] 1 Lloyd's Rep. 169 at 175 (May J); *Banque Keyser Ullmann SA v Skandia (UK) Insurance Co Ltd* [1990] 1 Q.B. 665 at 701–702 (Steyn J). A neat example where the point was crucial is the Australian decision in *Khoury v Government Insurance Office (NSW)* (1984) 165 C.L.R. 622 (non-disclosure by insured a matter of general law, and thus not within a New South Wales statute giving court power to grant relief to insured in breach of a “term or condition” of the contract). To be fair, however, there are also dicta the other way: e.g., *William Pickersgill & Sons Ltd v London & Provincial Marine Insurance Co Ltd* [1912] 3 K.B. 614 at 621, and also *Manifest Shipping & Co Ltd v. Uni-Polaris Insurance Co Ltd & Le Réunion Européenne (The Star Sea)* [2001] UKHL 1; [2003] 1 A.C. 469 at [48] (Lord Hobhouse of Woodborough).

¹⁷ For example, the decisions in *Banque Keyser Ullmann SA v Skandia (UK) Insurance Co Ltd* [1990] 1 QB 665 and *Sprung v Royal Insurance (UK) Ltd* [1999] Lloyd's Rep. I.R. 111.

¹⁸ *Insurance Contract Law: Business Disclosure; Warranties; Insurer's Remedies for Fraudulent Claims; and Late Payment*, Cm 8898, SG/2014/13, at para.30.23.

¹⁹ Compare the old case of *Re Bradley & Essex Accident Indemnity Soc* [1912] 1 K.B. 415, where Farwell LJ at 430 thought the construction of insurance contracts *contra proferentem* was an aspect of good faith. This seems unconvincing.

²⁰ *Insurance Contract Law: Business Disclosure; Warranties; Insurer's Remedies for Fraudulent Claims; and Late Payment*, Cm 8898, SG/2014/13, at para.30.23.

questions will be asked about further facts they know), and the use of good faith concepts to inform the question whether to imply contractual terms into a policy under the traditional “business efficacy” test.²¹

But even this causes difficulty. The problem here is how much the Law Commissions' view reflects the idea of utmost good faith as traditionally understood in the insurance context (and reflected in the first part of s. 17 of the Marine Insurance Act 1906). To characterise a contract of insurance as a contract based on utmost good faith has always been understood as meaning that it is something qualitatively *different* from ordinary contracts:²² there are, in other words, ordinary contracts, and then there are contracts requiring utmost good faith, including insurance contracts and a number of others (clear instances being partnership contracts and arrangements to divide family property), to which special principles apply. In the cases cited by the Commissions it is hard to see much sign of this. In the first example, presumably the extra undisclosed information is relevant: and if so, then on orthodox principles it is disclosable under the duty of “fair presentation” anyway; good faith, whether as interpretative tool or otherwise, is beside the point. As for the second, the “business efficacy” test applies generally in the law of contract as a whole, and it is not entirely clear how the question whether a given term is necessary to promote it could be informed or supplemented by the invocation of good faith.

Indeed, it is possible to go further, and to argue that there is no room for any separate concept of “utmost good faith” interpretation, since the current rules of interpretation of commercial contracts generally, as developed by decisions from *Investors Compensation Scheme Ltd v West Bromwich Building Society*²³ to *Chartbrook Ltd v Persimmon Homes Ltd*²⁴ and *Attorney-General of Belize v Belize Telecom Ltd*,²⁵ leave ample scope for it already. As a result of these cases, whose principles apply just as much in the context of insurance as in any other kind of contract,²⁶ it is difficult to see anything otherwise classifiable under good faith that is not already taken account of: obligations under contracts are construed and supplemented according to what will best further the apparent commercial purpose of the parties, contracts must be read as a whole, literal meanings can be ignored where necessary, and so on.²⁷ Furthermore, if the contract is of a kind that in its nature requires a degree of long-term commitment and fidelity from the parties, that

²¹ See, in particular, *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd (No.2)* [2001] EWCA Civ. 1047; [2001] Lloyd's Rep. I.R. 667; *Goshawk Dedicated Ltd v Tyser & Co Ltd* [2006] EWCA Civ. 54; [2006] 1 Lloyd's Rep. 566; and *Bonner v. Cox* [2005] EWCA Civ. 1512; [2006] 2 Lloyd's Rep. 152.

²² Unless, of course, one argues that all contracts ought to be subject to good faith, and hence that on principle there is no reason to treat insurance as a special class at all. For an example of this argument, see R. Ashton, “Keeping the Faith – Good Faith in Insurance and the Emergence of General Contractual Good Faith” (2011) 22 *Ins. L.J.* 81.

²³ [1998] 1 W.L.R. 896.

²⁴ [2009] UKHL 38; [2009] 1 A.C. 1101.

²⁵ [2009] UKPC 10; [2009] 1 W.L.R. 1988.

²⁶ For a comprehensive analysis on how new parameters in contractual construction have had an influence on insurance case law see B. Soyer, “New Parameters in Construing Insurance Contracts” published as Chapter 2 in DR Thomas (ed), *Modern Law of Marine Insurance Volume 4*, (London: Informa, 2015) and cases such as *BAI (Run Off) Ltd v Durham* [2012] UKSC 14; [2012] Lloyd's Rep. I.R. 371

²⁷ See, e.g., *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111; [2013] 1 Lloyd's Rep. 526 at [134] (Leggatt J).

too can be dealt with using the usual rules of interpretation without the need to invoke any particular concept of “good faith contracts”.²⁸

III. THE CONTINUED SIGNIFICANCE OF UTMOST GOOD FAITH AS A SUBSTANTIVE PRINCIPLE

As mentioned above, the Law Commissions in their Report on Insurance Contract Law suggested that the concept of utmost good faith as a creator of substantive rights and duties, rather than as a subsidiary principle of interpretation, would effectively disappear as a result of the legislation that became the Insurance Act 2015.²⁹ The question is whether this is correct, or whether there remains more scope than appears for utmost good faith concepts to affect insurance contracts and their performance.

At first sight, it might be thought that a combination of the 2015 Act and established case-law provided an open-and-shut case for the Law Commissions' position. It is not only that the Act has supplanted the old common law duty in the two most high-profile aspects of utmost good faith, pre-contract information and fraudulent claims. More important is the combination of *Banque Keyser Ullmann SA v Skandia (UK) Insurance Co Ltd*³⁰ and s. 14 of the 2015 Act. In *Banque Keyser Ullmann* the Court of Appeal rebuffed an attempt to invoke a breach of the duty of utmost good faith (there a deliberate failure by underwriters to inform) as a breach of contract sounding in damages, implying that the only remedy for infringement was avoidance of the contract;³¹ but since s. 14 now bars avoidance for any breach of that duty, it must follow that the duty itself is now devoid of substantive content.

It is submitted, with respect, that this argument will not do, for a number of reasons. First, *Banque Keyser Ullmann* and the following cases following it are authority³² that damages are not available for breach of the good faith duty where the breach lies in non-disclosure. They do not, it is suggested, rule out damages for breaches of other aspects of the good faith duty.³³ Secondly, it is always worth remembering that there

²⁸ A point admitted by Leggatt J in what can be regarded as the high point of “good faith” thinking, *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB); [2013] 1 Lloyd's Rep. 526; see [132] and [143].

²⁹ As suggested in earlier articles when the Law Commissions were shaping their proposals: e.g., C Butcher, “Good Faith in Insurance Law: A Redundant Concept?” [2008] J.B.L. 375.

³⁰ [1990] 1 Q.B. 665 (CA).

³¹ See also, *HIH Casualty & General Insurance Ltd v Chase Manhattan Bank* [2001] EWCA Civ. 1250; [2001] 2 Lloyd's Rep 483 at [49] (Rix LJ); *The Star Sea* [2001] UKHL 1; [2003] 1 A.C. 469 at [49] (Lord Hobhouse). On appeal in the *Banque Keyser Ullmann* case ([1991] 2 A.C. 249), it was held that there had in fact been no breach of the duty, but this did not affect the decision on the damages point (which indeed was expressly endorsed by Lords Templeman (at 280) and Jauncey (at 281)). See also, to similar effect, *Stansfield Group Pte Ltd v Consumers' Association of Singapore* [2011] 4 S.L.R. 130 at [185]-[190].

³² Notably, in Slade LJ's argument that the duty to disclose and the correlative right to avoid for non-disclosure are a matter of equity, despite strong evidence that they have firm foundations in common-law cases such as *Carter v Boehm* (1766) 3 Burr. 1905; 97 E.R. 1162. The point is usefully discussed in B. Harris, “Should Insurance Risk Avoidance Be Reformed and Would Reform Be of A Right of Equitable Rescission or A Right Sui Generis?” [2013] J.B.L. 23, at pp. 24–26.

³³ “I cannot for an instant accept [counsel's] suggestion that a breach of this duty [to act with good faith in conducting legal proceedings] by an insurer, once a policy is in force, gives the assured no

are possible remedies other than damages and avoidance.³⁴ These include not only other money remedies such as those based on unjust enrichment, but also, more importantly, the response of ineffectiveness (in the case where restrictions are put on the exercise of rights). And thirdly, there are a number of documented cases where the courts have intervened on the basis of a lack of utmost good faith, and which are not caught by the 2015 Act. These subdivide into a number of categories. But this is a large subject and deserves a section to itself.

First, there are decisions suggesting that considerations of utmost good faith may on occasion control (and where necessary invalidate) the exercise of rights arising under an insurance contract. One instance is the liability insurer's invariable right to take over and control legal proceedings against the insured. In *Groom v Crocker*³⁵ the Court of Appeal were in no doubt that, because of the obvious potential conflict of interest involved, insurers could only do this "in what they bona fide consider to be the common interest of themselves and their assured."³⁶ Hence there the court took the view that an insurer could not legitimately admit fault by the assured for reasons not of forensic tactics but to safeguard the insurer's own private knock-for-knock arrangement; and subsequent cases have made it clear that for the same reason where liability cover is limited the insurer also owes at least some duty not to compromise the assured's position as regards uninsured liabilities.³⁷ Again, where an insured has been guilty of non-disclosure but the insurer has "blind-eye" knowledge of other facts which might make that non-disclosure innocuous, then there are suggestions in the Court of Appeal that it may be contrary to good faith for the latter to avoid, at least without consulting the insured.³⁸ This may or may not be academic

right other than rescission." *Cox v Bankside Members Agency Ltd* [1995] C.L.C. 671 at 680 (Lord Bingham MR).

³⁴ For suggestive remarks in this connection, see e.g., *Cox v Bankside Members Agency Ltd* [1995] C.L.C. 671 at 680 (Lord Bingham MR); *Merc-Skandia XXXXII v. Certain Lloyd's Underwriters (The Mercandian Continent)* [2001] EWCA Civ. 1275; [2001] 2 Lloyd's Rep. 563, at [11] and [22] (Longmore LJ); *Trans-Pacific Ins Co (Aus) Ltd v Grand Union Insurance Co Ltd* (1989) 18 N.S.W.L.R. 675, at 704–705 (Giles J). True, in *The Star Sea* [2001] UKHL 1; [2003] 1 A.C. 469 counsel accepted at [49], and Lord Hobhouse suggested at [81], not only that damages were not available, but that avoidance was the only remedy that was; similar suggestions appear in *CGU Insurance Ltd v AMP Financial Planning Pty Ltd* (2007) 235 C.L.R. 1 at [126] (Kirby J). But this was not necessary to either decision, and no other remedies were in play.

³⁵ [1939] 1 K.B. 194: compare more recently *Ace Insurance Ltd v Metropolitan Electrical Appliance Manufacturing Ltd* [2009] HKCFI 1132 (where the duty was accepted but found not broken). Note, however, some doubts about how far this concerns the duty of utmost good faith: see *Zurich Australian Insurance Ltd v Metals & Minerals Insurance Pte Ltd* (2007) 209 F.L.R. 247 at [264].

³⁶ *Groom v Crocker* [1939] 1 K.B. 194 at 203 (Lord Greene MR); also at 223 (Scott LJ). See too *Cox v Bankside Members Agency Ltd* [1995] C.L.C. 671 (CA) at 680 (Lord Bingham MR); *Cormack v Washbourne* [2000] C.L.C. 1039 (CA), at 1048 (Auld LJ). Sometimes, indeed, this may be expressly provided: an example is the asbestos liability policy in issue in *Federal Mogul Asbestos Personal Injury Trust v Federal-Mogul Ltd* [2014] EWHC 2002 (Comm); [2014] Lloyd's Rep. I.R. 671, requiring the defence to be conducted "in a businesslike manner in the spirit of good faith and fair dealing, having regard to the legitimate interests of the parties to this Policy and of the reinsurers thereof."

³⁷ *Cormack v Washbourne* [2000] C.L.C. 1039 at 1048 (Auld LJ); *The Mercandian Continent* [2001] EWCA Civ. 1275; [2001] 2 Lloyd's Rep. 563 at [22] (Longmore LJ). See too the Australian decision in *Distillers Co Bio-Chemicals (Aust) Pty Ltd v Ajax Insurance Co Ltd* (1974) 130 C.L.R. 1 at [51] (Stephen J).

³⁸ *Drake Insurance Plc v Provident Insurance Plc* [2003] EWCA Civ 1834; [2004] Q.B. 601 at [87] and [91] (Rix LJ), at [144] (Clarke LJ) and at [177] (Pill LJ). Here the assured was a motorist who failed to disclose a speeding conviction. Under the rating system used by the insurer the non-

in connection with avoidance:³⁹ but it may well be relevant elsewhere, for example where in a given case an insurer has the right to cancel the contract for the future⁴⁰ or demand extra precautions be taken.⁴¹ The precise ambit of the application of the good faith principle in this connection is uncertain. For example, it has been said not to apply where liability insurers stipulate that settlements of third-party claims will not be honoured unless previously approved; these have been held subject simply to the general contractual rule that discretions of this kind must not be exercised capriciously or arbitrarily, and not to any further demand that they be exercised with regard to the assured's own interests.⁴² Nevertheless, the fact that it applies to at least some specific rights seems clear.

Utmost good faith outside present applications

The duty of good faith may affect (i) the duty to exercise at least some particular rights with a view to the other's interests, (ii) a duty to correct mistakes, (iii) some aspects of the duty to provide information during the policy, and possibly, (iv) a duty to minimise loss. It seems, however, that there is no reason to regard these as closed categories. At a later stage it is worth asking how, if at all, the duty of utmost faith might be generalised – a matter of some interest, raising issues not only of possible analogies from other contracts classified, with insurance, as contracts of the utmost good faith, but also of recent developments in the field of good faith generally in English law.⁴³

(i) Exercise of rights

There is no doubt that the duty of utmost good faith continues even after the insurer has committed itself. It is true that (apparently because of the reduced need for co-

disclosure would have amounted to an increase in the premium only if the assured's wife, who was a named driver on the policy, was involved in an accident where she was at fault. In fact, the assured's wife was involved in an accident which initially was recorded as a fault incident on the broker's computer system but the claim was later settled in the favour of the assured's wife and the incident was classified as a non-fault incident in the system. After the insurer became aware of the speeding conviction it sought to avoid the policy for non-disclosure, but the Court of Appeal held that it could not. These dicta were referred to with apparent approval by Rix LJ in *Wise (Underwriting Agency) Ltd & Ors v Grupo Nacional Provincial SA* [2004] EWCA Civ. 962; [2004] 2 Lloyd's Rep. 483 at [48].

³⁹ It does not contravene s. 14 of the 2015 Act, since that only proscribes the remedy of *avoidance* for lack of good faith, whereas the remedy here is the opposite: disallowance of an otherwise valid avoidance. But it is arguable that the whole field should now be regarded as pre-empted by Part 2.

⁴⁰ This is different from the right to avoid, which has the effect of disentitling the assured to claim in respect of losses already incurred.

⁴¹ Commonplace in fire policies over commercial premises, where the insurer is given the right by notice to demand remediation of subsequently appearing fire hazards.

⁴² *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd* [2001] EWCA Civ 1047; [2001] Lloyd's Rep. I.R. 667 (a reinsurance case); also *Eagle Star Insurance Co Ltd v Cresswell* [2003] EWHC 2224 (Comm); [2004] 1 C.L.C. 926 at [54] (Longmore LJ). Contra, however, the Australian decision in *Distillers Co Bio-Chemicals (Aust) Pty Ltd v Ajax Insurance Co Ltd* (1974) 130 C.L.R. 1 (decided at common law before the changes introduced by the Insurance Contracts Act 1984 (Cth)).

⁴³ *The Mercandian Continent* [2001] EWCA Civ. 1275, [2001] 2 Lloyd's Rep. 563 at [22] (Longmore LJ).

operation at this stage) the duty is less exacting after that time (and in some respects amounts to little more than a prohibition on actual fraud).⁴⁴ Nevertheless, the argument that one party needs extended protection from self-interest, and where necessary the fulfilment of positive duties and the demonstration of something more than a simple absence of bad faith,⁴⁵ may still convincingly apply in a number of specific instances. Take, for example, the case where a liability insurer has the right to conduct litigation for the defence. There may be a need for at least some control here to protect the interests of the insured: as the Court of Appeal has put it, the insurer's discretion will protect it only "provided that they do so in what they bona fide consider to be the common interest of themselves and their assured."⁴⁶ Thus where cover is limited the insurer must be under some duty, in conducting the defence, not to compromise the assured's position as regards uninsured liabilities;⁴⁷ and indeed in *Groom v Crocker*⁴⁸ the Court of Appeal took the view that it was unacceptable for an insurer to admit fault by the assured when the object was not tactical litigation but instead the desire not to imperil the insurer's own knock-for-knock arrangements with another provider. Conversely, where a liability insurer agrees to meet the costs of a settlement by the insured, the latter cannot claim indemnity if he was not acting in good faith towards the insurer or knowingly sacrificed the insurer's interests to his own.⁴⁹ Again, where an insured has been guilty of non-disclosure but the insurer has "blind-eye" knowledge of other facts which might make that non-disclosure innocuous, the Court of Appeal has said that it may be contrary to utmost good faith for the insurer to avoid, at least without consulting the insured.⁵⁰ This latter instance is possibly academic today in so far as it applies to avoidance.⁵¹ but it may well be

⁴⁴ *The Star Sea* [2001] UKHL 1; [2003] 1 A.C. 469 at [72] and [111] (Lord Hobhouse and Lord Scott of Foscote respectively). See too the earlier *Alfred McAlpine plc v BAI (Run-Off) Ltd* [2000] 1 Lloyd's Rep. 437, at 441 (Waller LJ).

⁴⁵ "[M]uch more than an absence of bad faith is required of both parties to all contracts of insurance" (Stephenson LJ in *CTI Inc v Oceanus Mutual Underwriting Assn (Bermuda) Ltd* [1984] 1 Lloyd's Rep. 476, at 525). The pointed reference to "both parties" shows that this cannot be limited to the duty of fair presentation by the insured.

⁴⁶ *Groom v Crocker* [1939] 1 K.B. 194 (CA), at 203 (Greene MR); also at 223 (Scott LJ). See too *Cox v Bankside Members Agency Ltd* [1995] C.L.C. 671 (CA), at 680 (Bingham MR); *Cormack v Washbourne* [2000] C.L.C. 1039 (CA), at 1048 (Auld LJ); *Linsley v Petrie* [1998] 1 V.R. 427, at 440. Sometimes, indeed, this may be expressly provided: an example is the asbestos liability policy in issue in *Federal Mogul Asbestos Personal Injury Trust v Federal-Mogul Ltd* [2014] EWHC 2002 (Comm); [2014] Lloyd's Rep. I.R. 671 requiring the defence to be conducted "in a businesslike manner in the spirit of good faith and fair dealing, having regard to the legitimate interests of the parties to this Policy and of the reinsurers thereof."

⁴⁷ *Cormack v Washbourne* [2000] C.L.C. 1039 (CA), at 1048 (Auld LJ); *The Mercandian Continent* [2001] EWCA Civ 1275; [2001] 2 Lloyd's Rep. 563 at [22] (Longmore LJ). See too the Australian decision in *Distillers Co Bio-Chemicals (Aust) Pty Ltd v Ajax Insurance Co Ltd* (1974) 130 C.L.R. 1 at [51] (Stephen J).

⁴⁸ [1939] 1 K.B. 194 (CA). Note, however, some doubts about how far this concerns the duty of utmost good faith: see *Zurich Australian Insurance Ltd v Metals & Minerals Insurance Pte Ltd* (2007) 209 F.L.R. 247 at [264].

⁴⁹ *Broadlands Properties Ltd v Guardian Assurance Company Ltd* (1984) 3 A.N.Z. Insurance Cases 60–552 at 78,323–78,325.

⁵⁰ *Drake Insurance Plc v Provident Insurance Plc* [2003] EWCA Civ 1834; [2004] Q.B. 601 at [87] and [91] (Rix LJ), [144] (Clarke LJ) and [177] (Pill LJ). These dicta were referred to with apparent approval by Rix LJ in *Wise (Underwriting Agency) Ltd & Ors v Grupo Nacional Provincial SA* [2004] EWCA Civ 962; [2004] 2 Lloyd's Rep. 483 at [48].

⁵¹ Since it is arguable that the whole field should now be regarded as pre-empted by Part 2 of the 2015 Act. Note that it is unaffected by the general prohibition in s. 14 of the 2015 Act, because

relevant elsewhere, for example where in a given case an insurer has the right to demand extra precautions be taken and if they are not to cancel cover for the future.⁵² The precise ambit of the application of the good faith principle in this connection is uncertain.⁵³ For example, it has been said not to apply where liability insurers stipulate that settlements of third-party claims will not be honoured unless previously approved; these have been held subject simply to the general contractual rule that discretions of this kind must not be exercised capriciously or arbitrarily, and not to any further demand that they be exercised with regard to the assured's own interests.⁵⁴ Nevertheless, the fact that it applies to at least some specific rights seems clear.

(ii) A duty to correct mistakes

In *CTI Inc v Oceanus Mutual Underwriting Assn (Bermuda) Ltd*,⁵⁵ Parker LJ, in the course of discussing fair presentation and the duty of utmost good faith, made it clear that the latter was potentially open-ended. "If," he said, "the assured or his broker realized in the course of negotiations that the insurer had made a serious arithmetical mistake or was proceeding upon a mistake of fact with regard to past experience he would, under s. 17 [of the MIA 1906], be obliged to draw attention to the matter." It is true that the actual scenario proposed by Parker LJ is now academic, since he clearly had in mind allowing the insurer to avoid if the mistake was acquiesced in, and that is now barred by s. 14. However, it is perfectly possible to think of analogous cases that would not be, and where a good-faith duty to inform would be entirely plausible. Suppose, for example, that the subject matter of the insurance (for example, the identity of an offshore platform, or the address of commercial premises) is misstated in error, so that on a strict reading of the policy the insurance never attaches at all. It must now be highly arguable that if the insurer realises that there is probably a mistake, his obligation of utmost good faith will prevent him using the erroneous description at a later stage to decline liability. Again, imagine that payment of claims is made conditional on given information being provided about the loss by a given date. If the description of the loss is obviously defective owing to forgetfulness or error, it may well be that here too good faith must preclude the insurer from simply acquiescing in the mistake and then refusing payment on the basis that no adequate information was received. Yet again,

although that proscribes the use of utmost good faith as a basis for avoidance, it says nothing about its converse use as a ground for *preventing* avoidance.

⁵² A not uncommon provision in fire policies over commercial premises, where the insurer is given the right by notice to demand remediation of subsequently appearing fire hazards. For an example see *Ground Gilbey Ltd v Jardine Lloyd Thompson UK Ltd* [2011] EWHC 124 (Comm); [2011] P.N.L.R. 15.

⁵³ For example, Pill LJ, in *Drake Insurance Plc v Provident Insurance Plc* [2003] EWCA Civ. 1834; [2004] Q.B. 601 at [177]-[178] was adamant that continuing duty of good faith can be breached by the insurer even in the absence of fraud.

⁵⁴ *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd* [2001] EWCA Civ 1047; [2001] Lloyd's Rep. I.R. 667 (a reinsurance case). Contra, however, the Australian decision in *Distillers Co Bio-Chemicals (Aust) Pty Ltd v Ajax Insurance Co Ltd* (1974) 130 C.L.R. 1 (decided at common law before the changes introduced by the Insurance Contracts Act 1984 (Cth)).

⁵⁵ [1984] 1 Lloyd's Rep. 476. See too Stephenson LJ at 525: "[T]he principle [of utmost good faith] would therefore protect a party who had made a fundamental error such as overestimating the average book value per container against a party who had noticed the mistake and let it go uncorrected."

suppose that in filling in a complex proposal form for property insurance a proposer states a value which is obviously too low and fairly clearly unintended: would the insurer be allowed to accept the proposal, say nothing, and then reduce any payment for under-insurance? It seems unlikely.⁵⁶ In all probability an estoppel in such cases would preclude insurer from relying upon a policy term or the right that might otherwise be open to him.⁵⁷ In this context the scope of the duty is a bit more certain in the sense that for the duty to bite it is essential that the insurer is aware (or turns a blind eye) to the fact that the assured is operating under a mistaken view as to the need for a policy itself or its coverage.

(iii) Provision of information

The most obvious case of provision of information after conclusion of the contract possibly being bound up with the duty of utmost good faith are the rules on subsequent modifications and fraudulent claims. But these are not relevant to this article, since (a) as regards subsequent modifications it seems clear that Part 2 of the 2015 Act claims the whole field;⁵⁸ (b) there is some doubt whether the rule as to fraudulent claims is in fact an outgrowth of utmost good faith;⁵⁹ and (c) in any case this latter area is also now pre-empted by Part 3 of the Insurance Act 2015 to the exclusion of any common-law remedy. Nevertheless, there is authority that utmost good faith may go further than this. First, where the terms or circumstances of the insurance contract require information to be provided during the contract in order to inform a decision by the insurer, the knowing provision of false information or fraudulent non-disclosure of relevant facts may amount to a breach of the duty of good faith.⁶⁰ And secondly, while the courts will not infer as a matter of course a duty in an insured to keep his insurer informed,⁶¹ good faith may in special circumstances give rise to one. Thus in the Court of Appeal decision in *Alfred McAlpine plc v BAI*

⁵⁶ All three of these scenarios derive from real cases in civil law jurisdictions, also involving the application of the analogous obligation of good faith (there a general provision) to insurance contracts. In every case it was decided after argument that good faith prevented the insurer from declining liability or reducing recovery, as the case might be. See, respectively, the decisions of the supreme courts of Switzerland (22.10.1964, ATF 90 II 449) and Germany (BGH 14.11.1979, IV ZR 41/78; VersR 80, 159 and BGH 7.12.1988 - IVa ZR 193/87). The issue of how far general rules on good faith may be relevant to the discussion in this article is discussed in some detail below.

⁵⁷ *Sherdley v Nordea Life and Pensions SA* [2012] EWCA Civ. 88; [2012] Lloyd's Rep. I.R. 437.

⁵⁸ Save possibly in the case of held covered clauses, where in given circumstances the underwriter is bound willy-nilly to extend cover on demand at a reasonable premium (see *Liberian Insurance Agency Inc v Mosse* [1977] 2 Lloyd's Rep. 560 at 566–568 (Donaldson J)). On a strict reading the operation of such a clause does not lead to a variation of the insurance contract within s. 2(2) of the 2015 Act but simply to the evolution of new rights and duties arising out of the contract in its original form. It is to be hoped that the courts would avoid such a crabbed interpretation, but it remains perfectly plausible.

⁵⁹ Doubtful: *The Star Sea* [2001] 1 UKHL 1; [2003] 1 A.C. 469 at [102] (Lord Scott); *The Mercandian Continent* [2001] EWCA Civ. 1275; [2001] 2 Lloyd's Rep. 563 at [11] and [22] (Longmore LJ).

⁶⁰ So held in New Zealand: see *National Insurance Co Ltd v Van Gerner* [1986] 2 N.Z.L.R. 374 (though explicitly no finding of a fraudulent claim, false statements by insured as to whether he had been drinking constitute a breach of duty of utmost good faith justifying refusal of indemnity). This seems the best explanation of the otherwise difficult decision in *The Litsion Pride* [1985] 1 Lloyd's Rep. 437.

⁶¹ A proposition put beyond doubt in *New Hampshire Insurance Co v MGN Ltd* [1997] L.R.L.R. 24 (CA), at 58–61 (Staughton LJ). See too *NSW Medical Defence Union v Transport Industries Insurance Co Ltd* (1985) 4 N.S.W.L.R. 107. The converse is also it seems true: good faith gives rise to no general duty on an insurer to keep the insured informed. See *Plaza Fiberglass Manufacturing Ltd v Cardinal Insurance Co* (1994) 115 D.L.R. (4th) 37.

(Run-Off) Ltd,⁶² concerning failure to keep a liability insurer properly informed, Waller LJ seemingly accepted that deliberate concealment or misinformation might be a breach of the duty of utmost good faith.⁶³ And in *Phoenix General Insurance Co v Halvanon Insurance Co Ltd*⁶⁴ Hobhouse J took the view that where the circumstances demanded it – particularly in the case of liability insurance and reinsurance – there would be an obligation arising out of good faith to keep adequate records and make them available to the insurer (or reinsurer) in order to allow the latter to keep track of his liabilities.⁶⁵ It was not made clear what the remedy would be in such a case, but it seems from later authority that there is no reason why remedies other than avoidance should not be available.⁶⁶

(iv) A duty to minimise loss

An insured is, it seems clear, not under any general duty to look to his insurer's interests when conducting his affairs. Thus it is clear that he is under no duty (unless by express provision) to take care to avoid a loss,⁶⁷ and can generally exercise rights under the contract entirely in his own interests.⁶⁸ Nevertheless, there may be limits to this immunity. What if an insured knowingly and without good reason sees a loss about to occur and takes no steps whatever to prevent or minimise it? There is Australian authority at common law that this may amount to a breach of his duty of good faith;⁶⁹ and one New Zealand case illustrates the matter neatly. In *UEB Packaging Ltd v QBE Insurance Ltd*⁷⁰ an insured under a liability policy failed to tell the insurer of a possible claim; as a result the insurer lost the ability to take over the

⁶² [2000] 1 Lloyd's Rep. 437.

⁶³ [2000] 1 Lloyd's Rep. 437 at 441. No such deliberate act was present. On this see too *The Mercandian Continent* [2001] EWCA Civ 1275; [2001] 2 Lloyd's Rep 563 at [11] and [22] (Longmore LJ).

⁶⁴ [1985] 2 Lloyd's Rep 599.

⁶⁵ *Ibid.*, 614. This was apparently approved by Lord Scott in *The Star Sea* [2001] UKHL 1; [2003] 1 A.C. 469 at [81].

⁶⁶ *The Mercandian Continent* [2001] EWCA Civ 1275; [2001] 2 Lloyd's Rep. 563, at [22] (Longmore LJ).

⁶⁷ Reflected in the long-standing rule that negligence in the assured does not bar his right to claim: see, e.g., *Dixon v Sadler* (1839) 5 M. & W. 405 at 414 (Parke B); *Trinder Anderson & Co v Thames & Mersey Marine Assurance Co* [1898] 2 Q.B. 114. It should be noted that for contracts that come under the scope of the MIA 1906, such a duty is imposed on the assured by virtue of s. 78(4) of the Act.

⁶⁸ An example being fac/oblig reinsurance: as Lord Millett put it in *Aneco Reinsurance Underwriting Ltd v Johnson & Higgins Ltd* [2001] UKHL 51; [2002] 1 Lloyd's Rep. 157, at [71], "Fac/oblig treaties are naturally less attractive to reinsurers than quota share treaties. They are subject to the obvious risk that the insurer will retain good business for his own account and cede poor business to the treaty. There is, or at least is assumed to be, no obligation of good faith on the part of the ceding party when exercising his discretion whether to cede or retain a risk. The only constraint upon him is that he must exercise some restraint if he wishes to maintain a good reputation in the market and any hope of doing future business with existing and prospective reinsurers."

⁶⁹ *Re Zurich Australian Insurance Ltd* [1999] 2 Qd. R. 203, 210 (Chesterman J); also the earlier *Newnham v Baker* [1989] 1 Qd. R. 393, at 399 (Derrington J), accepting that medical insurance implicitly required, as a matter of utmost good faith, reasonably prompt treatment; also *AFG Insurances Ltd v City of Brighton* (1973) 126 C.L.R. 655; D. Derrington & R. Ashton, *The Law of Liability Insurance* (3rd ed., Sydney, LexisNexis Butterworths, 2013), at 4-3. Contra, admittedly, dicta of Scrutton LJ in *City Tailors Ltd v Evans* (1922) 91 L.J.K.B. 379, at 385, accepting the duty but putting it on causation grounds.

⁷⁰ [1996] 2 N.Z.L.R. 467.

defence, and judgment went by default against the insured. Baragwanath J held the insured in breach of the duty of utmost good faith and hence unable to claim.⁷¹ However, it should be noted that even if in the absence of an intervention from the doctrine of good faith, the assured would presumably be deprived of his right to indemnity in a case where the existence of a causal link between the loss and breach of the duty to minimise or avert loss could be established.⁷² Therefore, it is debateable whether the duty of good faith adds much in this context.

IV) IN SEARCH OF OVERARCHING PRINCIPLES – SOME POSSIBLE GUIDES

What can we make of these decisions, apart from the fact that they show that there are at least some cases where the courts have recognised a continuing utmost good faith duty in circumstances which remain unaffected by the changes introduced by the 2015 Act?⁷³ It would be possible to regard them as simply disjointed instances, once tacked on to the duty to disclose as a kind of afterthought, and now left high, dry and anomalous after the hiving-off of the “duty of fair presentation” to a modern statutory regime. But while this is a tenable attitude, it is suggested that we can do better. A more constructive approach would be to build on these authorities, with a view to formulating a useful general principle on the duties of parties to an insurance contract to forward the aims of that contract. In seeking to do this, there are three helpful guides. The first of these is the developing Australian jurisprudence on the definition of utmost good faith, following the rejuvenation of the topic by Commonwealth legislation dating from 1984. The second is the treatment of the concept of utmost good faith in other contracts classified as requiring it, notably partnership contracts. The third is the development of ideas of good faith in a more general sense in English contract law and elsewhere.

Other contracts requiring utmost good faith

In English law the requirement of utmost good faith traditionally characterises not only insurance, but a *category* of contracts of which insurance is merely the most important. As for which contracts fall in this class, these have been said at various times to include not only insurance but contracts for the sale of land, contracts of suretyship, compromises, composition deeds, partnership agreements, and any contract made against the background of a fiduciary relationship.⁷⁴ However, before

⁷¹ [1986] 2 N.Z.L.R. 467 at 479. The case concerned a direct claim against the insurer under the NZ equivalent of the Third Parties (Rights against Insurers) Act 1930. See too another example given by Stephen J in the High Court of Australia in *Distillers Co Bio-chemicals (Aust) Pty Ltd v Ajax Insurance Co Ltd* (1972) 130 C.L.R. 1 at 32: an insured who settled a claim against himself on the basis of extraneous considerations, such as the avoidance of bad publicity, might well on that basis alone lose any right to indemnity from his liability insurer.

⁷² *State of the Netherlands v Youell* [1998] 1 Lloyd's Rep. 236 (CA).

⁷³ Unaffected because they are outside both the general pre-emption in Parts 2 and 3 of the law on fair presentation and fraudulent claims, and also the general s. 14 prohibition on avoidance

⁷⁴ A.K. Turner, *Spencer Bower & Turner on Actionable Non-disclosure* (2nd ed., London, Butterworths, 1990), at 5-01. See however *Chitty on Contracts* (31st ed., London, Sweet & Maxwell, 2012), at 6–150, which by doubting whether anything other than insurance is a contract

discussing this class a word of caution is needed. The subject is normally discussed with regard only to the duty of disclosure and the exceptions to the rule that mere silence does not count as a misstatement.⁷⁵ Furthermore, even here land sales,⁷⁶ suretyship⁷⁷ and compromise⁷⁸ are very doubtful; and while fiduciary relationships undoubtedly can carry protective equitable duties to disclose, they seem to have little in common with insurance.

We are, therefore, left in effect with partnership and composition deeds.⁷⁹ As regards the former, there is no doubt that this supports a wide interpretation of utmost good faith. The obligation between partners extends well beyond a pre-contractual duty of disclosure,⁸⁰ to encompass a post-contract duty of general co-operation in operating the business and determining and distributing each partner's share in its assets.⁸¹ It also operates to prevent the invocation of apparently unlimited rights where abusive and contrary to the spirit of the agreement; so (for instance) a power to expel a partner "cannot be relied upon unless there is good faith; it cannot be used if the motive is really to get an undue advantage over the other partner by purchasing him out on unfavourable terms."⁸² More generally, in an analogous joint venture agreement embodying an explicit obligation of "utmost good faith" ⁸³ the duty between partners was interpreted expansively as one "to observe reasonable commercial standards of fair dealing in accordance with their actions that related to the agreement", requiring "faithfulness to the agreed common purpose and consistency with the [counterparty's] justified expectations".⁸⁴ In addition, in

uberrimae fidei in the strict sense, comes close to denying the existence of the category altogether.

⁷⁵ See e.g., *Chitty on Contracts* (31st ed.), at [6-150]; M.Chen-Wishart, *Contract Law* (2nd ed., Oxford, Oxford University Press, 2007), at pp. 208–209.

⁷⁶ See *Spooner v Eustace* [1963] N.Z.L.R. 913; A.K. Turner, *Spencer Bower & Turner on Actionable Non-disclosure* (2nd ed.), at [7–17]; also cf. C. Harpum, "Selling without Title: A Vendor's Duty of Disclosure?" (1992) 108 L.Q.R. 280, at p. 318.

⁷⁷ "A suretyship contract is not a contract *uberrimae fidei*" – Lord Scott in *Royal Bank of Scotland Plc v Etridge (No 2)* [2001] UKHL 44; [2002] 2 A.C. 773, at [185]; also *North Shore Ventures Ltd v Anstead Holdings Inc* [2011] EWCA Civ. 230; [2012] Ch 31 at [14] (Morritt C). See too A.K. Turner, *Spencer Bower & Turner on Actionable Non-disclosure* (2nd ed.), at [8-02] – [8-03].

⁷⁸ *Turner v Green* [1895] 2 Ch. 205; *Wales v Wadham* [1977] 1 W.L.R. 199, at 214–215 (Tudor Evans J) (overruled in *Livesey v Jenkins* [1985] A.C. 424, but on other grounds); D. Foskett, *The Law of Compromise* (6th ed., London, Sweet & Maxwell, 2005), at [4–38].

⁷⁹ Family arrangements theoretically are also contracts *uberrimae fidei*; but since all the cases deal with the ability to avoid them in the event of non-disclosure they do not take this discussion any further and can be left aside.

⁸⁰ Which does exist: e.g., *Bell v Lever Bros Ltd* [1932] A.C. 161 at 227 (Lord Atkin); *Conlon v Simms* [2006] EWCA Civ. 1749; [2008] 1 W.L.R. 484 at [127] (Jonathan Parker LJ).

⁸¹ A partner is "bound in all transactions affecting the partnership, to do his best for the common body" – *Lindley & Banks on Partnership* (19th ed., London, Sweet & Maxwell, 2010) at [16-14]. See too *Golstein v Bishop* [2013] EWHC 881 (Ch); [2014] Ch. 131, at [136] (Christopher Nugee QC). The discussion there was of an express duty of utmost good faith, but (it is suggested) nothing turns on this.

⁸² *Green v Howell* [1910] 1 Ch. 495 at 504 (Cozens-Hardy MR). See too *Blisset v Daniel* (1853) 10 Hare 493, and more recently cf. *Lie v Mohile* [2015] EWHC 200 (Ch) and *Johnson v Snaddon* [2001] VSCA 91.

⁸³ Increasingly common: for two recent examples see *Berkeley Community Villages Ltd v Pullen* [2007] EWHC 1330 (Ch), [2007] 3 E.G.L.R. 101 and *CPC Group Ltd v Qatari Diar Real Estate Investment Co* [2010] EWHC 1535 (Ch) (both cases of joint development ventures).

⁸⁴ See *Berkeley Community Villages Ltd v Pullen* [2007] EWHC 1330 (Ch); [2007] 3 E.G.L.R. 101 at [97] (Morgan J).

partnership law courts happily seem to contemplate remedies other than avoidance in the event of breach of the duty:⁸⁵ for example, the inability to enforce or exercise rights,⁸⁶ or to plead what would otherwise amount to a defence to a claim.⁸⁷ Compositions with creditors are a less fruitful source of case-law on utmost good faith, since the scope for breach is narrow: it is essentially limited to the hiding or conclusion of side agreements with the debtor with a view to getting an unfair advantage over other creditors.⁸⁸ But they do also confirm that remedies for breach other than escape from the agreement may be possible. Thus there is old authority that a hidden arrangement of this sort cannot be enforced against the debtor,⁸⁹ and an Australian court has made suggestions seeming to indicate that a restitutionary remedy may be available to the other creditors.⁹⁰

Australian jurisprudence

Before the enactment of the Insurance Contracts Act 1984 at the federal level, Australian authority on utmost good faith was uninformative. It largely aped English case-law on pre-contract disclosure: with a few exceptions⁹¹ there was little if anything about the more esoteric parts of the doctrine. The 1984 Act sought to change this in two ways: first, by making utmost good faith an implied obligation in every insurance contract;⁹² and secondly, by barring reliance on any provision of an insurance contract where such reliance would amount to a lack of utmost good faith.⁹³ The concept itself, however, remained deliberately and pointedly undefined. Hence the definition of the conduct that will trigger the application of the 1984 Act is presumably unchanged from the common law; from which it follows that authorities on it remain highly relevant to the present discussion.⁹⁴ And these authorities, while accepting that characterising utmost good faith is a highly fact-specific exercise,⁹⁵

⁸⁵ *United Dominions Corporation Ltd v Brian Pty Ltd* (1985) 157 C.L.R. 1, at 6 (Gibbs CJ).

⁸⁶ As in *United Dominions Corporation Ltd v Brian Pty Ltd* (1985) 157 C.L.R. 1 (no enforcement of mortgage held by partner in breach of duty of utmost good faith). The expulsion cases in note above are another instance.

⁸⁷ *Clements v Hall* (1858) 2 De. G. & J. 173; 44 E.R. 954 (otherwise clear defence of laches barred to defendant guilty of non-disclosure).

⁸⁸ E.g., *Britten v Hughes* (1829) 5 Bing 460; 130 E.R. 1139; *Fisher (ET) and Co Pty Ltd v English Scottish & Australian Bank Ltd* (1940) 64 C.L.R. 84.

⁸⁹ *Britten v Hughes* (1829) 5 Bing. 460; 130 E.R. 1139.

⁹⁰ The law “will not allow him to recover or retain any such secret benefit”: see Williams J. in *Fisher (ET) & Co Pty Ltd v English Scottish & Australian Bank Ltd* (1940) 64 C.L.R. 84 at 103 (emphasis added). See too *McKewan v Sanderson* (1875) L.R. 20 Eq. 65.

⁹¹ For example, the suggestive statement of Chesterman J about a possible duty to mitigate loss in *Re Zurich Australian Insurance Ltd* [1999] 2 Qd. R. 203, 210.

⁹² Section 13. The duty applies, understandably, throughout the currency of the contract (***Camellia Properties Pty Ltd v Wesfarmers General Insurance Ltd*** [2013] N.S.W.S.C. 1975 at [109]). It is enforceable not only by parties to the contract but, since the Insurance Contracts Amendment Act 2013, by third party beneficiaries and also by administrative intervention; see now ss. 13(3), 13(4) and 14A.

⁹³ Section 14. On the reforms see generally M. Mills, “Duty of Good Faith: The ‘Sleeper’ of Insurance Obligations?” (2006) 80 A.L.J. 387 and K. Lewins, “Going Walkabout with Australian Insurance Law: The Australian Experience of Reforming Utmost Good Faith” [2013] J.B.L. 1.

⁹⁴ See e.g., B. McGivern, “Coming to the Party: The Evolution of Post-contractual Duties of Good Faith under the ICA” (2013) Ins. L.J. 159, at p. 164.

⁹⁵ S. Drummond, “Unconscionable Conduct and Utmost Good Faith” (2003) 14 Ins. L.J. 208, at p. 210 (utmost good faith “varies according to the context”). For another spirited attack on over-

show a clear tendency has been towards an expansive interpretation. Typical formulations are in terms of notions of “fairness, reasonableness and community standards of decency and fair dealing”;⁹⁶ a duty “not to 'snap up' bargains, not to 'stretch' ... undertakings in ways which the promisee knows or suspects the promisor did not intend”; “not to insist upon full enforcement when doing so would mean truly intolerable imposition”;⁹⁷ an obligation not to use contractual powers for furtherance of an ulterior and unintended purpose;⁹⁸ or (in the insurer's case) a duty “to act, consistently with commercial standards of decency and fairness, with due regard to the interests of the insured”.⁹⁹ Furthermore, although failure to show utmost good faith apparently stops short of encompassing omissions to act caused by pure inadvertence,¹⁰⁰ there is certainly no need for deliberate dishonesty;¹⁰¹ caprice and unreasonableness, even without moral obliquity, may suffice.¹⁰² Descending to specifics, it has been held or accepted that a failure in utmost good faith can be evidenced on the insurers' side by such matters as failure to warn an insured of an unexpected exclusion of cover;¹⁰³ defending a claim on the insured's behalf with an undisclosed intention to indemnify only if liability is established on one specific basis out of several pleaded;¹⁰⁴ delay in making payment on clearly inadequate grounds;¹⁰⁵ and, where the insurer's power to determine facts relevant to liability makes it judge in its own cause, deciding the matter capriciously¹⁰⁶ or on the basis of information available only to it without allowing the insured any chance to access or rebut it.¹⁰⁷ On the insured's side, the obligation has been held to encompass dishonest reticence when claiming on a policy, even where this does not amount to

generalisation in this context, see the perceptive judgment of Chesterman J in *Re Zurich Australian Insurance Ltd* [1999] 2 Qd. R. 203, at 217.

- ⁹⁶ See the WA case of *Kelly v New Zealand Insurance Co Ltd* (1996) 130 F.L.R. 97, at 111 (Owen J). Similarly see *Edwards v Hunter Valley Co-op Dairy Co Ltd* (1992) 7 A.N.Z. Ins. Cas. 61–113 at 77,536–77,537 (McClelland J: “good faith and fair dealing”); *Hannover Life Re of Australasia Ltd v Sayseng* [2005] N.S.W.C.A. 214; 13 A.N.Z. Insurance Cases 90–123 at [54]–[56] (Santow J: ditto, though strictly not a decision under the 1984 Act).
- ⁹⁷ *ACN 074 971 109 (as trustee for the Argot Unit Trust) v National Mutual Life Association of Australasia Ltd* 2006 V.S.C. 507 at [863].
- ⁹⁸ *ACN 074 971 109 (as trustee for the Argot Unit Trust) v National Mutual Life Association of Australasia Ltd* 2006 V.S.C. 507 at [862].
- ⁹⁹ *CGU Insurance Ltd v AMP Financial Planning Pty Ltd* (2007) 235 C.L.R. 1 at [15] (Gleeson CJ and Crennan J).
- ¹⁰⁰ *CIC Insurance Ltd v Barwon Region Water Authority* (1989) 10 A.N.Z.I.C. 61-425, at 74,773 – 74,774.
- ¹⁰¹ *CGU Insurance Ltd v AMP Financial Planning Pty Ltd* (2007) 235 C.L.R. 1 at [15] (Gleeson CJ and Crennan J); *Speno Rail Maintenance Australia Pty Ltd v Metals & Minerals Insurance Pte Ltd* (2009) 226 F.L.R. 306 at [152] (Beech AJA).
- ¹⁰² *CGU Insurance Ltd v AMP Financial Planning Pty Ltd* (2007) 235 C.L.R. 1 at [131] (Kirby J, dissenting but not on this point); also at [15] (Gleeson CJ and Crennan J) and [257] (Callinan and Heydon JJ). See too in WA *Kelly v NZ Ins Co Ltd* (1994) 9 A.N.Z. Ins. C. 31-167 at 76,520 (Owen J).
- ¹⁰³ *Australian Associated Motor Insurance Ltd v Ellis* (1990) 54 S.A.S.R. 61 (car insurance: fitting of alloy wheels).
- ¹⁰⁴ *Nigel Watts Fashion Agencies Pty Ltd v Forbes* (1995) 8 A.N.Z. Ins. C. 61-235; *A.C.N. 007 838 584 Pty Ltd v Zurich Australian Insurance Ltd* (1997) 69 S.A.S.R. 374.
- ¹⁰⁵ *Moss v Sun Alliance Australia Ltd* (1990) 55 S.A.S.R. 145, esp at 154. So too at common law, according to one New Zealand court: *Stuart v Guardian Royal Exchange Assurance Co of NZ Ltd (No 2)* (1988) 5 A.N.Z.Ins.C. 60-844.
- ¹⁰⁶ *Lockwood v Insurance Australia Ltd* (2010) 107 S.A.S.R. 299 at [27].
- ¹⁰⁷ *Beverley v Tyndall Life Insurance Co Ltd* (1999) 21 W.A.R. 327, esp at 329–333 (Malcolm CJ); 338, at 347–348 (Ipp J). See too *Chammas v Harwood Nominees Pty Ltd* (1993) 7 A.N.Z. Ins. C. 61-175.

the making of a fraudulent claim,¹⁰⁸ and (it would seem) use of insurance products for purposes they were never envisaged to serve.¹⁰⁹

Good faith generally

One might have thought that “utmost good faith” would be informed at least in part by the more general idea of ordinary “good faith”,¹¹⁰ especially since it is not entirely easy to see what the word “utmost” adds anyway. In England, however, apart from a few dicta,¹¹¹ this did not happen. This may look curious but is entirely understandable, given the lack of any general duty of good faith in English contract law as a whole. There is no reason why this state of affairs should continue. There are at least two reasons for this: first, the increasing acceptance of good faith in common law (especially Commonwealth) jurisdictions,¹¹² and secondly, possible analogies from elsewhere. Both could do with a brief look.

As regards contracts generally, it seems at least a limited duty of good faith in commercial contracts now applies in Canada¹¹³ and Australia.¹¹⁴ This is significant, because there is some indication that in both cases this growing line of authority on general good faith has begun to seep into discussion of utmost good faith in insurance cases.¹¹⁵ Thus in Australia a statement that parties to an insurance contract had under the rubric of utmost good faith to observe “fairness,

¹⁰⁸ *NZ Ins Co Ltd v Forbes* (1988) 5 ANZIC 60-871; *Norwood v Ian Dickson Ltd* (1993) 7 A.N.Z.Ins.C. 61-176 at 78,004 – 78,005. So also in New Zealand at common law: *National Insurance Co Ltd v van Gameren* [1986] 2 N.Z.L.R. 374 at 378–379 (Smellie J).

¹⁰⁹ For example, the use of a unit-based life insurance policy as a means of risk-free arbitrage, at least where the insured knew that the insurer did not envisage such operations: *A.C.N. 074 971 109 (as trustee for the Argot Unit Trust) v National Mutual Life Association of Australasia Ltd* 2006 V.S.C. 507 at [859]–[894] (appealed on other grounds at (2008) 21 V.R. 351).

¹¹⁰ As in Scotland, where in a series of early cases judges regularly used the term *uberrima fides* to characterise contracts which the Romans called contracts *bonae fidei*. See e.g., *Menzies v Menzies* (1712) 4 Bro. Sup. 899, at 900 (arguendo) (“emption vendition is *contractus uberrimae fidei*, to be regulated *secundum bonum et aequum*”); also the earlier *Oxford (Viscount) v Watson* (1701) 4 Bro Sup 512, and *Corbet v Cochran* (1707) 4 Bro Sup 678 (“maritime contracts are *optimae et uberrimae fidei*”).

¹¹¹ Including a well-known line from Lord Mansfield himself in *Carter v Boehm* itself: see (1766) 3 Burr. 1905 at 1910; 97 E.R. 1162 at 1164 (“The governing principle is applicable to all contracts and dealings. Good faith forbids either party by concealing what he privately knows, to draw the other into a bargain, from his ignorance of that fact, and his believing the contrary”).

¹¹² Where, interestingly enough, the influence has operated in reverse: utmost good faith in insurance has informed the development of more generalised good faith elsewhere. See e.g., *Bhasin v Hrynew* 2014 SCC 71, [2014] 3 S.C.R. 495 at [35] ff (Cromwell J); and A. Mason, “Contract, Good Faith and Equitable Standards in Fair Dealing” (2000) 116 L.Q.R. 66, at 73.

¹¹³ *Bhasin v Hrynew* 2014 SCC 71, [2014] 3 SCR 495.

¹¹⁴ See *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 N.S.W.L.R. 234, 268 (Priestley JA), *Hughes Aircraft Systems International Ltd v Airservices Australia Ltd* (1997) 76 F.C.R. 151 at 192–193 (Finn J) and the enthusiastic endorsement to be found in J.W. Carter, *Contract Law in Australia* (6th ed., Chatswood NSW, LexisNexis Butterworths, 2012), Ch 2.

¹¹⁵ Australia: *ACN 074 971 109 (as trustee for the Argot Unit Trust) v National Mutual Life Association of Australasia Ltd* 2006 V.S.C. 507 at [860]–[864]; F. Hawke, “Utmost Good Faith -- What does it really mean?” (1994) 6 *Insurance Law Journal* 91. Canada: *Bhasin v Hrynew* 2014 SCC 71, [2014] 3 SCR 495 at [35]–[36], [55] (Cromwell J).

reasonableness and community standards of decency and fair dealing” towards each other was explicitly based on a discussion of good faith in commercial contracts generally;¹¹⁶ and similarly the Supreme Court of Canada has suggested that contractual good faith may preclude an insurer from denying a claim on entirely technical and non-prejudicial grounds.¹¹⁷ In England matters are less certain;¹¹⁸ but it is certainly possible for such an obligation to be expressly undertaken,¹¹⁹ and where it is, it takes the form of a broad duty to act “honestly and conscionably vis-à-vis the other parties”,¹²⁰ which closely tracks what has been said to be the content of an explicit obligation of utmost good faith and is essentially identical to the “obligation to observe reasonable commercial standards of fair dealing in accordance with their actions that related to the agreement and also requiring faithfulness to the agreed common purpose and consistency with the [counterparty's] justified expectations” that has been said to characterise an obligation of utmost good faith.¹²¹

When it comes to analogies from elsewhere, one European jurisdiction stands out: namely Germany, where a general duty of good faith pervades all obligations,¹²² including insurance,¹²³ and where the impact of good faith on insurance specifically is pervasive, universal and well documented.¹²⁴ Despite the obvious hazards inherent in attempts at cross-jurisdictional transfers, it is suggested that this may provide at least some suggestive guidance.

Here, in contrast to the common law position, much of the authority concerns the *insurer's* duty. A few examples can suffice. Insurers are regularly prevented on good faith grounds from relying on unusual limitations of cover likely to escape the insured's notice unless warned.¹²⁵ Again, where information provided by a confused

¹¹⁶ *ACN 074 971 109 (as trustee for the Argot Unit Trust) v National Mutual Life Association of Australasia Ltd* 2006 V.S.C. 507 at [863].

¹¹⁷ *Somersall v. Friedman* (2002) 215 D.L.R. (4th) 577 at [52] (Lacobucci J) (technical but harmless impairment of subrogation rights).

¹¹⁸ With the traditional view in *ING Bank NV v Ros Roca SA* [2011] EWCA Civ 353; [2012] 1 W.L.R. 472 at [92] (Rix LJ) compare Leggatt J in *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB); [2013] 1 Lloyd's Rep. 526 at [120]–[141].

¹¹⁹ See e.g., in the insurance context *Federal-Mogul Asbestos Personal Injury Trust v Federal-Mogul Ltd (formerly T&N Plc)* [2014] EWHC 2002 (Comm); [2014] Lloyd's Rep. I.R. 671 (reinsurance: claims handling by insured to be “exercised in a businesslike manner in the spirit of good faith and fair dealing”).

¹²⁰ See [2014] EWHC 2002 (Comm); [2014] Lloyd's Rep. I.R. 671 at [119] (Eder J).

¹²¹ *CGU Insurance Ltd v AMP Financial Planning Pty Ltd* (2007) 235 C.L.R. 1 at [15] (Gleeson CJ and Crennan J).

¹²² Under BGB, § 242.

¹²³ “It is accepted law that the insurance relationship is governed to a peculiar extent by good faith and regard for business morality” – a statement frequently made by German courts and quoted, with references, in Prölss/Martin, *Versicherungsvertragsgesetz*, (26th ed., Munich, C.H.Beck), 2015 at p. 40 (authors' translation). In the leading *Münchener Kommentar zum BGB*, (7th ed., Munich, C.H.Beck), 2015, § 242 Rn 460, there is an instructive section on good faith directed specifically at insurance.

¹²⁴ See Prölss/Martin, *Versicherungsvertragsgesetz*, 26th ed., at 40 ff.

¹²⁵ E.g., BGH 09.10.1974, IV ZR 118/73 (roofer's liability policy excluding liability for scaffolding hired out); OLG Köln, 17.09.92, VersR 93, 304 (business liability policy: exclusion of liabilities arising out of use of vehicles said to include a lawn tractor landscaping the premises); OLG Hamm, 22.9.1993, 20 U 59/93 (business policy ceased to cover chattels when insured moved premises: good-faith duty to warn when insurer found out about move). So too with consumers: BGH 13.12.1978, IV ZR 177/77 (motor theft policy: good faith duty to warn that clause requiring luggage to be in boot meant no coverage when stowed in rear compartment of hatchback).

insured bears marks of likely inaccuracy, a series of cases precludes reliance on this incorrectness to deny cover.¹²⁶ There is also authority requiring fair and open decision-making where a discretion of the insurer is in issue,¹²⁷ and preventing abusive reliance on technical exclusions.¹²⁸ Furthermore, once the contract is on foot, the insurer is bound as a matter of good faith not to use its superior bargaining power not to extract a disadvantageous settlement from the insured.¹²⁹ Nor is this duty limited to the insurer: for example, even where cover is ex facie unlimited, the requirement of good faith places a duty on the insured to take reasonable steps to minimise the amount of any claim.¹³⁰

V) PULLING TOGETHER UTMOST GOOD FAITH IN INSURANCE LAW – POSSIBLE FUTURE DEVELOPMENTS

In this and the next section we try to pull together the previous paragraphs and look at the substantive issue: in the light of developments in England and elsewhere, how might the concept of utmost good faith develop? This section will deal with the definition of what amounts to utmost good faith: the next, with the possible remedies where there is a failure to show it.

As regards the meaning of utmost good faith in the insurance context, it is suggested that there are five statements that can be safely made.

First, there is no reason not to accept utmost good faith as a general doctrine, applicable to the conduct of both parties alike throughout the insurance relationship. Admittedly the common law authorities on post-contract good faith could, if one wished, be fitted into distinct categories: for example, provision of information due to the insurer, duties in respect of claims management, the duty not simply to acquiesce in a mistake, and the need to minimise loss. But there is no reason to do so, or to regard these categories as closed. On the contrary, the authorities clearly suggest that existing instances are merely examples of a general doctrine open, as with common law generally (and in this case the civil law as well), to incremental development.

¹²⁶ E.g., BGH, 7. 12. 1988, IVa ZR 193/87 (buildings insurance: insured undervalued premises in proposal form when he predictably misread fiendishly obscure provision: no reliance on underinsurance to reduce claim); BGH 14.11.1979, VersR 80, at 159 (claim conditional on correct completion of damage report form on pain of losing claim: error clear: insurer, having failed to query it, precluded from refusing payout).

¹²⁷ BGH 11.6. 2003, V ZR 418/02; also OLG Frankfurt, 28.5.1991, VersR 92, at 224 (no reliance on private medical report not shown to insured to refuse disability cover). See too LG Dortmund, 21.05.2008, 2 O 400/07 (same report on alleged burglary kept secret by insurer).

¹²⁸ BGH 03.10.1984, IVa ZR 76/83 esp [18]; BGH 18.07.2007, IV ZR 129/06 (disability insurance for professionals: despite prohibition on working while claiming, no power to cancel when trivial and purely ministerial functions performed in relation to profession).

¹²⁹ "... [T]he insurer is particularly strongly bound, as a matter of good faith, not to turn its superior familiarity with the case and the law to the disadvantage of the insured." See BGH 30.03.2011: IV ZR 269/08, II.2(a) (author's translation); also BGH 28.02.2007: IV ZR 46/06 II.2(a); BGH 07.02.2007, IV ZR 244/03 (all disability insurance cases).

¹³⁰ E.g., BGH, 12. 3. 2003 - IV ZR 278/01 at [37] (medical insurance: no claim for non-vital treatment if disproportionately expensive).

Secondly, the existing categories, while not constrictive, might well nevertheless provide a useful guide as to future development. The underlying contract of insurance, it is suggested, is best expressed as a co-operative agreement, to be construed according to the understanding of reasonable parties, to assess, underwrite and pay risks in an efficient, informed and reasonably expeditious way. If so, the essential obligation under it, which the duty of utmost good faith should aim to support, should be expressed on the lines of a duty to do all that is reasonable, by way of provision of information or other facilities, to further the proper performance of that contract.¹³¹ Such a characterisation would take account of the special nature of the insurance contract and its similarity to other co-operative ventures, and go some way towards explaining why we regard such contracts as requiring good faith in contrast to, say, a time charterparty or a speculative sale of soya beans. It would also neatly encapsulate the four forms of the obligation described above. The duties to inform and correct mistakes would ensure that performance took place in a properly informed manner as expected by the parties; the duty not to misuse rights, and to take at least some steps to minimise losses, would be there to ensure that performance took place as nearly as possible in accordance with ordinary business understanding.

Thirdly, the duty to support performance of the contract should essentially be a duty to do all that can reasonably be expected, but no more. Just as the general doctrine of good faith, where that is applicable to contracts as a whole, does not demand disinterested altruism,¹³² so also there should be no breach of the duty of utmost good faith where a party is acting reasonably or seeking to defend its legitimate commercial or other interests. An example would be where an insured purchases a fac/oblig facility.¹³³

Fourthly, any duty would clearly be subject to any express or implied contrary agreement: to this extent, it would have to be narrower than in the civil law, where lawyers are inured to the idea that freedom of contract does not necessarily trump good faith. Thus, as held in both Australia and England, insofar as the contract itself, the commercial background or the dealings of the parties permits a particular activity or means of doing business, there would be no room for a finding of a breach of duty; and similarly where, even if the contract did not permit such conduct, it was implicitly permitted or acquiesced in by the other party.

¹³¹ Compare Morgan J in *Berkeley Community Villages Ltd v Pullen* [2007] EWHC 1330; [2007] 3 E.G.L.R. 101 at [97], construing an express utmost good faith clause as requiring “a contractual obligation to observe reasonable commercial standards of fair dealing in accordance with their actions which related to the Agreement and also requiring faithfulness to the agreed common purpose and consistency with the justified expectations of the [parties].”

¹³² “If adherence to such standards of conduct is the predominant component of a separate obligation of good faith in performance of a contract, it becomes necessary to enquire about the extent to which selflessness is required. It must be accepted that the party subject to the obligation is not required to subordinate the party's own interests, so long as pursuit of those interests does not entail unreasonable interference with the enjoyment of a benefit conferred by the express contractual terms so that the enjoyment becomes (or could become) ... 'nugatory, worthless or, perhaps, seriously undermined'” – *Overlook Management BV v Foxtel Management Pty Ltd* [2002] NSWSC 17 at [65] (Barrett J).

¹³³ See observations made by Lord Millett in *Aneco Reinsurance Underwriting Ltd v Johnson & Higgins Ltd* [2001] UKHL 51; [2002] 1 Lloyd's Rep 157 at [71].

Fifthly, the precise nature of the duty and what is expected of parties should depend on the issue at stake. For example, duty to correct a mistake on the part of the insurer could arise only in a case where the insurer is aware (or turns a blind eye) to the fact that the assured has made a mistake as to the need, nature or scope of the cover. Conversely, it is debateable whether the duty of the assured to provide information under a contractual provision could be breached in the absence of fraud on the part of the assured.¹³⁴ It is submitted that in some cases misconduct less than wilfulness might suffice but that is a matter that depends on the nature of the obligation or even type of the insurance contract in question.

Remedies

It is true that there are suggestions¹³⁵ that, putting aside the provisions of the 2015 Act, the only possible remedy for a breach of the duty of utmost good faith is avoidance of the contract. But these, as is suggested above, are unconvincing.

It is true that, owing to the decision in *Banque Keyser Ullmann SA v Skandia (UK) Insurance Co Ltd*¹³⁶ the award of damages raises special difficulties; hence we must leave this aside for a moment. But there is no reason to think that damages and avoidance exhaust the possible responses of the law to breaches of good faith obligations. It is perfectly plausible for the law to run to other remedies, such as inability to exercise rights under the contract, reduction of liability or the loss of the right to rely on a limit of liability. Indeed it seems clear that it already does so. For example, it is accepted that a liability insurer taking over the defence of a claim must as a matter of good faith have proper regard to the interests of the insured: but, as Lord Bingham has pointed out,¹³⁷ this makes no sense if the only response that the insured can make is to cancel the insurance, decline cover and get his premium back. Unless the duty is to be regarded as a dead letter, there must be at the very least a power to disallow reliance on a limit of cover where the insurer's wrong leaves the assured personally exposed. Again, if there is a duty in the insured based on utmost good faith to take at least some steps to mitigate loss, it has never been suggested that this automatically gives the insurer the right to avoid the contract and cancel all cover, rather than merely to refuse to pay out to the extent that the loss could have been avoided; and yet again, the suggestion that in certain cases the right to cancel the contract or decline cover may be lost through failure to show utmost good faith is entirely inconsistent with any limitation to avoidance. Although the authority against the availability of damages for breach of contract as a *direct* remedy for breach of the duty is solid,¹³⁸ this does not necessarily tell the whole

¹³⁴ This was the judicial stance at the time when s. 17 introduced "avoidance" as a remedy into the equation.

¹³⁵ *Banque Keyser Ullmann SA v Skandia (UK) Insurance Co Ltd* [1990] 1 Q.B. 665, at 773–776 (Slade LJ).

¹³⁶ [1990] 1 Q.B. 665.

¹³⁷ *Cox v Bankside Members Agency Ltd* [1995] C.L.C. 671, at 680. Compare the Hong Kong decision in *Ace Insurance Ltd v Metropolitan Electrical Appliance Manufacturing Ltd* [2009] HKCFI 1132, where it seems to have been accepted that mishandling of a liability claim might prevent the insurer from relying on a deductible payable by the insured.

¹³⁸ At least in England. Other common law jurisdictions, such as New Zealand, have had fewer qualms: e.g., *Stuart v Guardian Royal Exchange Assurance Co of NZ Ltd (No 2)* (1988) 5

story. It may still be possible to use the duty of utmost good faith in order to create indirect liability on some other basis.

One example concerns the case where a liability insurer fails to have proper regard to the interests of the insured, for example by admitting liability for a sum much larger than the policy limit for inadmissible reasons. It must be arguable that there is liability in damages here: not because the act of failing to observe the utmost good faith is capable of creating a liability to compensate, but because the insurer, who in taking over the insured's defence was acting as the latter's agent, is now liable for acting outside his authority.¹³⁹ The effect of the breach of the duty of utmost good faith is, in other words, not to create the liability but merely to set the scene for liability on some other basis.

The other example arises where, as a result of deliberate failure in bad faith to provide information, one or other party directly suffers loss. Although *Banque Keyser Ullmann* makes it quite clear that no direct liability is possible here, it may be possible to reach the same result indirectly via deceit. Despite the general rule that deceit requires a positive statement and that silence is not enough,¹⁴⁰ in *Conlon v Simms*¹⁴¹ Lawrence Collins J held, and the Court of Appeal agreed, that where there was an unsatisfied duty to speak this made up for the lack of any positive misrepresentation. Hence in that case it was held that a solicitor who negotiated for a partnership without revealing his own murky past could on principle¹⁴² be sued for damages in deceit. If this case is correct (and it is controversial), then the way may be open, at least in the case of deliberate silence, for at least some liability in damages.¹⁴³

VI) CONCLUSIONS

The conclusions of this article can be briefly stated. First, we believe that the recast s. 17 of the MIA 1906 – which will no doubt be taken as representing insurance law generally in the manner of its predecessor – is likely to turn out to be far more than just the anodyne “interpretative principle” referred to by the Law Commissions when it comes to the development of the doctrine of utmost good faith. This is unlikely to be through a decision to incorporate the doctrine as an implied term, as in Australia; this is contrary to existing authority, and in any case we regard such a solution as undesirable and conducive to uncertainty. Rather, it is suggested, the removal of the reference to avoidance, coupled with the reaffirmation of the underlying nature of

A.N.Z.I.C. 60-844. But all seem to accept that there can be no liability in tort: see *Lomsargis v National Mutual Life Association of Australasia Ltd* [2005] Q.S.C. 199; [2005] 2 Qd. R. 295 and *CGU Workers Compensation NSW Ltd v Garcia* (2007) 69 N.S.W.L.R. 680.

¹³⁹ As essentially was the case, though at one remove, in *Groom v Crocker* [1939] 1 KB 194. The solicitors' defence there, that they had been acting on the instructions of the plaintiff's insurers, failed because these had been instructions that the insurers had no business to give on behalf of the plaintiff.

¹⁴⁰ Trenchantly affirmed in *Sykes v Taylor-Rose* [2004] EWCA Civ 299; [2004] 2 P. & C.R. 30.

¹⁴¹ [2006] EWHC 401 (Ch); [2006] 2 All E.R. 1024; (on appeal) [2006] EWCA Civ 1749; [2008] 1 W.L.R. 484

¹⁴² A finding of liability at first instance was reversed, but only on a pleading point.

¹⁴³ Similar sentiments have been echoed by Rix LJ, in *HIH Casualty & General Insurance Ltd v Chase Manhattan Bank* [2001] EWCA Civ. 1250; [2001] 2 Lloyd's Rep. 483, at [48]–[49].

insurance contracts as requiring utmost good faith, is likely to make courts more willing to extend the doctrine interstitially to other situations where the remedy can be more nuanced. Examples may well include responses such as an inability to exercise rights under the contract where this would be seriously unfair, or the loss of the right to rely on a limit of liability. More drastic developments are perhaps unlikely, at least at this stage: but there will be a slow development of the idea, perhaps on the lines of the development of what counts as bad faith in Australia. In twenty years' time, it is suggested, the law of insurance may well be somewhat different from its form today. How different, and in what ways, only time will tell. However, one thing is clear: change is in the air.