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# OF SHIFTING WINDS – INSURED'S PRE-CONTRACTUAL DUTY OF GOOD FAITH IN SINGAPORE

Just over 250 years ago, the infamous landmark case of *Carter v Boehm* laid the foundation for the principle of utmost good faith in insurance law in common law jurisdictions as well as established the *uberrimae fidei* principle in Singapore. At its core, the *uberrimae fidei* principle imposes a reciprocal duty on both the insurer and the insured to demonstrate good faith. Naturally, the most classic and notorious aspect of the duty pertains to the insured's pre-contractual duty of disclosure. As an ex-British colony and a legatee nation, Singapore has received much of this jurisprudence. This paper examines how the courts in Singapore have dealt with this doctrine of pre-contractual duty of disclosure and whether Singapore has similarly imported the unsatisfactory position.

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## I. Introduction

1 The iconic English case of *Carter v Boehm*[1] laid the foundation for the principle of utmost good faith in insurance law in common law jurisdictions (including Singapore). As this 1766 case has just marked its 250th anniversary in 2016, the time is ripe for a re-examination of such a seminal judgment and its impact on the Singapore jurisprudence.

2 The *uberrima fides* principle essentially imposes a reciprocal duty on both the insurer and the insured to demonstrate good faith pre-contractually and post-contractually. Of particular concern in this article is the insured's duty of good faith because the doctrine has evolved over the centuries in favour of the insurer. In recent years, however, the content of the duty has been in a state of flux and the problems of the much-criticised pre-contractual duty have finally been addressed in England via the enactment of the Consumer Insurance (Disclosure and Representations) Act 2012[2] ("CIDRA") (which applies to

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1 (1766) 3 Burr 1905.

2 c 6 (UK).

consumer insurance policies) and the Insurance Act 2015[3] (which applies to business insurance policies).

3 As a former colony and legatee nation, Singapore has received much of the English jurisprudence. This article traces how the local courts in Singapore have dealt with this doctrine and developed the law, with the discussion primarily focusing on the perspective of the insured's pre-contractual duty. It is submitted that Singapore is now at a crossroads and has to decide whether to remain static or opt to be unshackled from the worst excesses of the common law pre-contractual duties. The article will additionally consider how Singapore should forge ahead to ameliorate the problems still associated with the good-faith doctrine in the local insurance industry.

## II. Legal legacy

4 It should be worthwhile at this juncture to reflect on the historical background before proceeding to the main discussion on how Singapore ought to deal with the various insurance issues stemming from *Carter v Boehm*.

### *A. Weaknesses spawned by* Carter v Boehm

5 The development of the duty of good faith may be traced to the well-known articulation of Lord Mansfield in *Carter v Boehm*:[4]

> Insurance is a contract upon speculation. The special facts, upon which the contingent chance is to be computed, lie most commonly in the knowledge of the insured only: the underwriter trusts to his representation, and proceeds upon the confidence that he does not keep back any circumstance in his knowledge, to mislead the underwriter into a belief that the circumstance does not exist, and to induce him to estimate the risk as if it did not exist …

This oft-cited passage formed the foundational basis for the insured's pre-contractual duty. In view of the poor communication facilities and delayed overseas-news coverage that existed in the 18th century, the insured was presumed by Lord Mansfield to be the party with superior knowledge regarding the matter to be insured. There was a clear-cut case of information imbalance existing then in *Carter v Boehm*: the insurer, who was based in London, was not apprised of what the insured knew was happening thousands of miles away in Sumatra, given the

3 c 4 (UK).

4 (1766) 3 Burr 1905 at 1909; see also Peter Tyldesley, "Utmost Good Faith – Unintended Injustice?" (2011) 86 *Amicus Curiae* 1 at 2.

technology that was available at the time. Nowadays, however, in the world of data analytics and real-time news, the insurer can no longer claim to be disadvantaged with regard to the availability of information. In fact, modern-day insurance companies – with their heavy reliance on statistical analysis and information-technology tools – have even more access to superior knowledge than the layman insured.

6 *Carter v Boehm* was essentially the headwaters from which the streams of good faith in insurance law flowed. Since communication technologies were rather rudimentary then, the way the duty of good faith had evolved over the past centuries was pivoted on the presumption of information asymmetry. There arose a trail of English judgments that readily favoured the insurer who found it all too easy to avoid liability by faulting the insured for not disclosing material information. In 1906, the UK Marine Insurance Act[5] ("MIA 1906") codified the common law insurance principles, and the disclosure test contained in s 18 chose the perspective of the prudent insurer. The doctrine was further blighted in 1984 when *Container Transport International, Inc v Oceanus Mutual Underwriting Association (Bermuda) Ltd*[6] ("*Oceanus*") applied a very low threshold for the materiality test where "mere influence" (as opposed to "decisive influence") was all that was needed for the information to be viewed by the insurer as material; the single-pronged test thus created for triggering the disclosure obligation was manifestly unfair to the insured and fortified the insurer's hand considerably.

7 Some glimmer of hope surfaced around 1990 with the resuscitation of the reciprocity doctrine in *La Banque Financière de la Cité SA v Westgate Insurance Co Ltd*[7] ("*Westgate Insurance*"). However, serious breakthrough came only in 1995 with *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd*[8] ("*Pan Atlantic*") introducing the second limb of inducement in the test of materiality. In the upshot, the materiality test henceforth became two-pronged – with the objective test of the prudent insurer having to be influenced by the material information and the subjective test of the particular insurer having to be induced to arrive at a different decision had there been no non-disclosure or misrepresentation.

5 Marine Insurance Act 1906 (c 41).
6 [1984] 1 Lloyd's Rep 476.
7 [1990] 2 Lloyd's Rep 377.
8 [1995] 1 AC 501; [1994] 2 Lloyd's Rep 427.

### *B. Effect on Singapore*

8 The jurisprudential foundation for Singapore to follow English law had been set out by her British colonial master. To provide the legal framework for governing the Straits Settlements (which included Penang, Malacca as well as Singapore),[9] the British issued in 1826 the Second Charter of Justice[10] as the basis for the general reception of English law existing in England at the time; it may thus be said that English insurance principles have applied to Singapore since then. The Civil Law Ordinance[11] ("CLO") was enacted later in 1878 to allow for the continuing reception of English mercantile law; according to s 5 of this Ordinance, the law for application when dealing with local commercial activities (including insurance-related businesses) "shall be the same as would be administered in England in the like case at the corresponding period, if such question or issue had arisen or had to be decided in England".

9 After attaining independence in 1965, Singapore still found it beneficial to retain the common law legacy in order to attract businesses and investments. However, Singapore could not continue to be permanently tethered to England. Hence, Singapore Parliament enacted in 1993 the Application of English Law Act[12] ("AELA 1993") to cut off the apron strings and declare the extent to which English law remained applicable to Singapore. On 12 November 1993, the provision for the continuing reception of English law under s 5 of the CLO was repealed; that became the cut-off reception date and "the common law of England (including the principles and rules of equity), so far as it was part of Singapore law immediately before 12 November 1993, shall continue to be part of the law of Singapore".[13] The English MIA 1906 was thereafter re-enacted as a local statute in 1994;[14] although a codification of the law relating to only marine insurance, this statute can be taken to be generally reflective of the common law position of and shares much commonality with general insurance law (especially with regard to the good-faith doctrine).

10 What then is the implication for Singapore? Do English decisions still apply after 12 November 1993? It is submitted that they continue to have very strong persuasive force in Singapore. However,

9 Other minor settlements (Labuan, Dinding, Christmas Island and Cocos-Keeling Islands) were also added to the Straits Settlements but they did not play any significant role.

10 Granted on 27 November 1826.

11 Ordinance IV of 1878.

12 Application of English Law Act 1993 (Act 35 of 1993).

13 See s 3(1) of the Application of English Law Act (Cap 7A, 1994 Rev Ed).

14 See Marine Insurance Act (Cap 387, 1994 Rev Ed).

Singapore courts retain much judicial discretion in determining whether to follow English common law after 12 November 1993, as asserted extrajudicially by Andrew Phang Boon Leong JA.[15] When fleshing out transplanted doctrine, Singapore courts may adapt the jurisprudence to meet the local social, legal and political context.

11 Rather than eschewing the baggage of *Carter v Boehm* and re-fashioning the doctrine of the utmost good faith, Singapore had unfortunately inherited all the weaknesses – warts and all. The first Singapore case where *Carter v Boehm* was explicitly mentioned is *Tat Hong Plant Leasing Pte Ltd v Asia Insurance Co Ltd*[16] ("*Tat Hong*"), where the insured (which was in the business of leasing cranes) was not required to complete any proposal form by virtue of its long-standing business relationship with the insurer. Hence, the insured argued that the insurer had waived the obligation to disclose material information because the latter chose not to enquire about the subject matter of the insurance. However, both first-instance and appellate courts decided in favour of the insurer as the insured's variation of its standard lease agreement with the lessee was found to be "a material fact … which a prudent insurer would take into account when reaching his decision whether or not to accept that risk or what premium to charge"[17] and "the fact that in this case the insurer did not specifically ask for the terms of the lease agreement or ask for a proposal form to be completed prior to the issue of the policy does not affect the obligation of the insured to disclose the terms of the lease agreement where those terms are material".[18] In doing so, the Court of Appeal effectively embraced the English approach of *Oceanus* with its low-threshold test of materiality. That the Court of Appeal did not demur in the face of such an unpopular and oppressive test of materiality could perhaps reflect the tractable spirit adopted by the Singapore courts in readily accepting that the reception provision of the CLO brought in the MIA 1906. In addition, the Court of Appeal's reference to the MIA 1906 signified the

15 Andrew Phang, "Cementing the Foundations: The Singapore Application of English Law Act 1993" (1994) 28 UBC Law Review 205 (noting the most plausible interpretation of s 3 of the Application of English Law Act 1993 (Act 35 of 1993) places discretion with the Singapore courts as to whether post-1993 English common law applies).

16 [1993] 1 SLR(R) 728. Some of these insurance issues were decided *obiter* but because of the paucity of direct local insurance cases on these critical doctrinal issues, these *obiter* decisions are relied upon to reflect the court's direction; there is no obvious reason why the local courts would digress from an entirely commercial doctrine that is embodied in a UK statute which Singapore has chosen specifically to re-enact.

17 *Tat Hong Plant Leasing Pte Ltd v Asia Insurance Co Ltd* [1993] 1 SLR(R) 728 at [15].

18 *The Asia Insurance Co Ltd v Tat Hong Plant Leasing Pte Ltd* [1991] SGHC 158 at [12].

Singapore courts' acknowledgment that in the realm of non-disclosure, the marine insurance principles apply to general insurance cases as well – as in the seminal English appellate decision of *Lambert v Co-operative Insurance Society Ltd*.[19]

12 With the embrace of the much-criticised "prudent insurer" test, the Singapore jurisprudence thus suffers from the affliction similar to that existing in England during the pre-reform era – opting for the view of the insurer rather than the perspective of the insured (who is the one saddled with the job of disclosing information). How is the insured supposed to step into the mind of the insurer and speculate on the latter's thirst for information? The aggravation of *Tat Hong* endorsing the low-threshold "want to know" test painted an altogether bleak jurisprudential picture for Singapore.

13 The Singapore High Court affirmed in *Tat Hong* that "an insurance contract is a contract *uberrima fides*; as such it can be avoided not only for misrepresentation of material facts but also for non-disclosure of material facts".[20] There was even earlier support for the *Carter v Boehm* position from a fraternal jurisdiction: in 1921, the Malaysian Supreme Court in *Teh Say Cheng v North British & Mercantile Insurance Co Ltd*[21] categorically recognised that a contract of fire insurance "is as much a contract of *uberrima fides* as is a contract of marine insurance"[22] and then proceeded to adopt the "prudent insurer" test, thus applying the standard of an insured's duty of disclosure in marine insurance to that in non-marine insurance.

## III. Duty of disclosure in Singapore

14 Unlike England, which recently introduced sweeping reforms via the enactment of the CIDRA and the Insurance Act 2015, the present situation in Singapore regarding pre-contractual disclosure in non-marine insurance remains outdated and unduly skewed in favour of the insurer. Reform is therefore long overdue.

### *A. "Prudent insurer" test*

15 As mentioned earlier under the preceding sub-heading, the Court of Appeal in *Tat Hong* decided to adopt the "prudent insurer" test

19 [1975] 2 Lloyd's Rep 485.

20 *The Asia Insurance Co Ltd v Tat Hong Plant Leasing Pte Ltd* [1991] SGHC 158 at [12].

21 (1921) 2 FMSLR 248.

22 *Teh Say Cheng v North British & Mercantile Insurance Co Ltd* (1921) 2 FMSLR 248 at 258.

propounded in the English case of *Oceanus*. With such a low threshold for the test of materiality, it was not surprising that the insurer could avoid the policy without much difficulty.

16 The Court of Appeal also applied the "prudent insurer" test in *Everbright Commercial Enterprises Pte Ltd v AXA Insurance Singapore Pte Ltd*,[23] where the insurer argued that the insured had not fully disclosed the details of the vessel that carried the shipment of logs. Once again, the low threshold of the "prudent insurer" test led the appellate court to rule against the insured since a prudent insurer would not have been prepared to provide insurance for this particular risk.

17 Requiring the insured to step into the shoes of a prudent insurer is, in effect, an exercise in speculation as the insurer is, in fact, not under a duty to explain to the proposer what information is considered to be material. In Singapore, there is some legislative attempt to compel the insurer to draw the proposer's attention to the need to disclose material information: s 25(5) of the Insurance Act[24] states that the proposal form needs to contain "a warning that if a proposer does not fully and faithfully give the facts as he knows them or ought to know them, he may receive nothing from the policy". However, this provision is phrased too generally to provide any actual guidance to the proposer and it is impractical to expect the insurer to spell out in detail what information the prudent insurer would be looking for. Typically, in Singapore, the warnings found in insurers' proposal forms[25] tend to be of anaemic value in clarifying what facts the proposer ought to disclose. The inadequacy of such warnings was noted extrajudicially to be not "sufficient to ensure that [the proposer] would appreciate its scope and significance".[26]

18 For consumer insurance, there are other practical constraints to be taken into consideration as well. When consumers apply for travel insurance online or over the telephone, for example, it will be unrealistic to expect the insurers to receive unstructured disclosures under such circumstances as "direct marketing placed greater emphasis on making a

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23 [2001] 1 SLR(R) 672.

24 Cap 142, 2002 Rev Ed.

25 Such warnings are typically phrased as: "if a material fact is not disclosed in this application, any policy issued may not be valid. If you are in doubt as to whether a fact is material, you are advised to disclose it". However, flouting the provision merely incurs the penalty of a fine on the insurer's part. The insurer is not precluded from exercising his civil remedy of avoidance; *contra* the Australian approach, which impels the insurer to elaborate to the insured the nature of the disclosure duty and what it entails, failure of which would preclude the insurer from relying on the insured's non-disclosure: see ss 22(1)(a) and 22(5) of Australian Insurance Contracts Act 1984 (Cth).

26 Michael Kirby, "Australian Insurance Contracts Law: Local Reform with a Global Relevance" [2011] *Journal of Business Law* 309 at 321.

sale rather than obtaining the relevant information".[27] Hence, a more efficient process is recommended for the mass commoditised market of consumer insurance.

### *B. Inducement requirement*

19 In England, the harshness of the low threshold allowed in *Oceanus* had provoked a barrage of criticism. Some glimmer of hope emerged as the courts attempted to make amends for such excesses. In particular, the House of Lords in the landmark case of *Pan Atlantic* redressed the imbalance by introducing inducement in the following two-pronged requisite:

> (a) The first limb (which is objective) requires the misrepresented or undisclosed facts to be technically material to a prudent insurer[28] – the "want to know" test. This means that the information is material so long as an objective prudent insurer would want to know about it.
>
> (b) The second limb (which is subjective) requires the particular insurer to have been induced, either by the non-disclosure or misrepresentation of the material information, into accepting the risk or entering the contract on the prescribed terms.

The second limb of this two-pronged test helps to avoid the senselessness in allowing an imprudent or feckless insurer escape liability by simply asserting that the non-disclosed or misrepresented fact would have been material to a prudent insurer's assessment of the risk, even if subjectively it mattered not one whit to him. In such a scenario, there is "patently no absence of consensus that robs it of being a true agreement",[29] which was one of the normative rationales underpinning the disclosure rule as articulated in *Carter v Boehm*.

27 Michael Kirby, "Australian Insurance Contracts Law: Local Reform with a Global Relevance" [2011] *Journal of Business Law* 309 at 316.

28 See *Container Transport International, Inc v Oceanus Mutual Underwriting Association (Bermuda) Ltd* [1984] 1 Lloyd's Rep 476. The materiality test has been settled in favour of a very low relevance threshold; in other words, a material fact is one which a prudent insurer would take into account when deciding whether to underwrite the risk and when determining the relevant premium and/or terms to be included.

29 Yeo Hwee Ying, "Recent Developments in Materiality Test of Insurance Contracts" [1995] Sing JLS 56 at 70.

While the importation of subjectivity involves a difficult *ex post facto* judgment as to the particular insurer's attitude:[30]

> [I]t does close the door on the obvious anomaly of a negligent or careless insurer calling evidence to show that his/her more prudent counterpart would have been influenced by a non-disclosure, and thus avoid a contract on the basis of non-disclosure which the particular insurer would not consider material.

The House of Lords' decision was subsequently discussed at length in the English case of *Assicurazioni Generali SpA v Arab Insurance Group*,[31] which provides useful pointers on what constitutes necessary inducement. In essence, truth has to be tested: the insurer's assertion of influence by the non-disclosure or misrepresentation must be borne out in the underwriting trail.

20 Although this House of Lords case occurred after 12 November 1993 (the cut-off reception date for the AELA 1993), Singapore embraced the tempering foil which was subsequently applied to local cases. In, for example, the local case of *American Home Assurance Co v Hong Lam Marine Pte Ltd*[32] ("*Hong Lam Marine*"), the insurer argued that the insured failed to disclose the backdating and variation of an agreement. However, the arbitrator found that Tan (the chief witness for the insurer) had initialled the backdated agreement without any comment and thus inferred that Tan was clearly disinterested in the backdating of the agreement for whatever reason this was done; a mere assertion by Tan that he would have been influenced had he known the undisclosed facts was deemed to be insufficient. The first-instance and appellate courts then went beyond Tan's bare assertion to look for indicia of inducement and they agreed with the arbitrator that "the question of a breach [of the duty of disclosure] did not arise because it was not established that the insurer had been induced by the alleged non-disclosure to enter into the contracts".[33] Previously, with the single-pronged approach, the insurers could readily win their cases by calling for expert witnesses to assert that they would have wanted to know the undisclosed information; now, however, the inducement requisite as a second prong has become a game changer. Hence, insurers can no

30 Anthony A Tarr & Julie-Anne Tarr, "The Insured's Non-disclosure in the Formation of Insurance Contracts: A Comparative Perspective", (2001) 50(3) *International & Comparative Law Quarterly* 577 at 582.

31 [2003] 1 All ER (Comm) 140; [2003] Lloyd's Rep IR 131. For more detailed discussion on the case, see Yeo, "Of Inducement and Non-disclosure in Insurance Contracts" (2004) 10 *The Journal of International Maritime Law* 84.

32 [1999] 2 SLR(R) 992. Once again, the insurance comments were made *obiter* but they essentially reflected the judicial direction and philosophy.

33 *American Home Assurance Co v Hong Lam Marine Pte Ltd* [1999] 2 SLR(R) 992 at [70].

longer expect walkover victories by merely making bald assertions that they would have been influenced by the non-disclosure because the courts will look for supporting evidence of inducement in the underwriting trail.

21 In addition, the Court of Appeal in *Hong Lam Marine* drew attention to the arbitrator's finding that the insurer was only interested in receiving the premiums. This is reminiscent of the UK Law Commission's criticism of the unacceptable mercenary underwriting practice of grabbing the business first and underwriting at the claims stage.[34]

22 In the 2008 case of *UMCI Ltd v Tokio Marine & Fire Insurance Co (Singapore) Pte Ltd*,[35] which also amply demonstrates the court's insistence on specific proof of inducement in the context of misrepresentation, the insured (who had previously suffered cargo shipment losses) engaged the broker, Willis, to spruce up the shipment processes so as to minimise further cargo losses. The Willis report, which was prepared in consultation with the insured, had been forwarded to the insurer. After the insured lodged another claim for damaged cargo on a subsequent voyage, the insurer cried foul and contended that some of the representations contained in the Willis report were materially inaccurate. However, the court found that there was no reference to the Willis report in any of the insurer's documents and concluded that the alleged misrepresentations in this report were irrelevant to the insurer during the underwriting evaluation. The only evidence of inducement was a bare statement in the insurer's affidavit that "I was induced" but the court refused to rubber-stamp such an assertion. After conducting a meticulous examination of the evidence, the court was not convinced that the insurer in this case had been induced:[36]

> There was no evidence that the representations in the Willis report were relied upon by the defendant apart from a bare statement in the affidavit of … the defendant's deputy general manager. There was no document which showed that the representations in the Willis report were considered by the defendant in assessing the risk and/or determining the rates to be applied to the policy. In particular, none of the defendant's marine underwriting profile forms mentioned the

34 See *American Home Assurance Co v Hong Lam Marine Pte Ltd* [1999] 2 SLR(R) 992 at [71]; see also UK Law Commission & Scottish Law Commission, *Insurance Contract Law: The Business Insured's Duty of Disclosure and the Law of Warranties* (Consultation Paper No 204/Discussion Paper No 155) at paras 5.37 and 5.6.

35 [2008] SGHC 188.

36 *UMCI Ltd v Tokio Marine & Fire Insurance Co (Singapore) Pte Ltd* [2008] SGHC 188 at [30].

> representations in the Willis report. Although the correspondence did discuss the recommendations in the Willis report, there was no mention of the representations therein. The addendum issued by the defendant to record the agreement reached between the parties did not mention the representations in the Willis report …

23 How then should the insurer prove that he had been induced by the non-disclosure or misrepresentation? In the past, the insurers would call for expert underwriters – fellow insiders in the industry – as the hypothetical prudent insurer in order to fortify the doctrine in their favour. Nowadays, however, the insurers need to be more diligent and detailed in their underwriting evaluation. There should be, at the very least, some reference to the undisclosed or misrepresented information in the underwriting notes; it ought to be obvious from the underwriting evaluation how the information, if disclosed or not misrepresented, could have influenced the insurer's decision-making process. In addition, the court may look back at the insurance company's past underwriting practice in order to ascertain how the particular insurer had usually reacted in previous instances. In fact, the court may even theorise on how the information or lack thereof would have played out in the particular underwriter's mind. The upshot of it all is that the inducement evidence must be able to withstand judicial scrutiny.

24 An area of practical concern is that the requirement of inducement or its fuller application may not have entirely filtered down to the junior courts. In the 2012 case of *QBE Insurance (International) Ltd v USL Asia-Pacific Pte Ltd*,[37] the District Court noted that the storage of flammable substances was "material information which would influence the underwriter's assessment of risk"[38] and proceeded, without explicitly examining the inducement requirement, to hold that the insured had breached his duty of disclosure. It was not discernible from the court proceedings that the two-pronged test had been taken into consideration: the District Court either failed to take cognisance of the inducement requirement or assumed that the inducement requirement had been satisfied without bothering to examine the evidence in detail. This case lends credence to the argument that the inducement requirement may not be adequate in protecting the insured especially if the exact procedural burden of proof is not fully appreciated.

25 In any event, that material non-disclosure remains a scourge can be seen from the articulation of local judges like Tan Lee Meng J, who

37 [2012] SGDC 84.

38 *QBE Insurance (International) Ltd v USL Asia-Pacific Pte Ltd* [2012] SGDC 84 at [65].

proffered the following stinging rebuke for the ubiquity of this defence by the insurers:[39]

> Why material non-disclosure, which is so widely relied on by insurers that Lord Sumner warned in *Niger Company, Ltd v Guardian Assurance Company* (1922) 13 Ll L Rep 75 at 82 that this indispensable shield for an insurer should not be turned into an engine of oppression against the insured, was not pleaded from the very start cannot be fathomed …

### *C. Challenges posed by current law*

26 Regrettably, the silver lining of inducement does not go far enough. It has not made adequate compensation for the hitherto lopsided development of the *uberrima fides* doctrine. The test of materiality continues to be very insurer-centric and there are still challenges posed by the current law.

27 In the first limb, materiality is an objective test used to determine the information that is required by the insurer pre-contractually. In the second limb, inducement is a subjective test used to determine whether the particular insurer would have entered into the contract had the information been disclosed or not misrepresented. In both limbs, there is clearly nothing to accommodate the lay insured and the way he would approach the situation. Research has also shown that even professional risk managers may fail to understand the law in this area – not because the words and terms are complex, but because the concept is counter-intuitive.[40]

28 Furthermore, the inducement requirement is conceptually unsatisfactory: not only is it effectively judicial legislation, the inducement requirement also sits uneasily with the materiality requirement as it potentially introduces via the back door the "decisive influence" test. Although the addition of the inducement limb was used to alleviate the harshness of the "prudent insurer" test in the first limb, it is submitted that the element of inducement would have been unnecessary if the court had instead adopted the "decisive influence" test for the first limb in the first place. Decisive influence calls for a change in position. This is something that inducement demands as well but then each is, in theory, pitched differently – an objective standard for the former versus a subjective standard for the latter.

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39 *NTUC Income Insurance Co-operative Ltd v Toh Kheng Boon* [2007] 3 SLR(R) 772 at [16].

40 UK Law Commission & Scottish Law Commission, *Insurance Contract Law: The Business Insured's Duty of Disclosure and the Law of Warranties* (Consultation Paper No 204/Discussion Paper No 155).

29 The problem is exacerbated when there is a lack of clarity as to whether the duty of disclosure to volunteer information exists independently on top of the requirement to answer the questions in the proposal form and to what extent the drafting of the questions in the proposal form affects the scope of the duty. In fact, the use of questions in proposal forms can be rather misleading because the impression thus given is that the proposal form is already comprehensive and the proposer need only respond to what the insurer has asked for. To expect a lay consumer to additionally consider other information (which may possibly be completely unrelated to the insurance policy and the questions asked) and volunteer this information to the insurer may be placing too much of a burden on the insured. It should also be pointed out that the duty to disclose material information has thus far not been sufficiently highlighted and explained to the insured (especially at the contract renewal stage when lay persons are generally not cognisant of the fact that the duty to disclose arises afresh).

## IV. Remedy of avoidance in Singapore

30 Another major problem that Singapore has embraced is that avoidance remains the sole remedy for breach of the duty of disclosure and there is no possibility for the courts to consider the award of damages instead. This was confirmed *obiter* in, for example, the local case of *The Stansfield Group Pte Ltd v Consumers' Association of Singapore*[41] – in sync with the common law case of *Westgate Insurance*, which had been brought into Singapore jurisprudence.

31 Upon a breach of the duty of disclosure, the contract is avoided *ab initio*: the insured is not only unable to recover his current losses under the policy, but also liable to pay back all previous successful claims which had been paid out by the insurer.[42] The insured is thus unable to enjoy the protection which he assumed he was entitled to. This is despite the fact that the insurer might only have increased the premiums by a small amount had there been disclosure of the facts.[43]

32 The rationale often proffered for avoidance being the sole remedy is that "the risk run is really different from the risk understood

41 [2011] 4 SLR 130.

42 Franziska Arnold-Dwyer, "The Disclosure of Unfounded Allegations in Business Insurance" (2014) 3 UCL Journal of Law and Jurisprudence 173.

43 UK Law Commission & Scottish Law Commission, *Insurance Contract Law: The Business Insured's Duty of Disclosure and the Law of Warranties* (Consultation Paper No 204/Discussion Paper No 155) at para 4.53.

and intended to be run, at the time of agreement".[44] However, this line of argument, which was based on the information asymmetry prevalent during preceding decades, is no longer convincing nowadays since insurers already have at their disposal the means to discover the information they need for risk assessment.[45]

33 The blanket remedy of elective avoidance is disproportionately harsh towards the insured. In fact, this one-size-fits-all remedy leaves little room for the courts to manoeuvre; for example, the insurer is allowed to repudiate the policy even if the undisclosed or misrepresented information bears no relevance to the actual loss suffered by the insured. Repudiation by the insurer also has adverse implications for the insured in future: it will affect the insured's ability to obtain new insurance coverage because any previous cancellation of insurance coverage becomes a material fact that has to be disclosed in the future to other insurers.

34 Another weakness of this blunt remedy is that it completely disregards the fault or *culpa* of the insured. Even if the proposer had acted "honestly and reasonably" during the disclosure period, the insurer is still entitled to repudiate the policy in the event of any non-disclosure or misrepresentation. As long as the insurer is able to prove both materiality and inducement, it does not matter whether the insured was innocent or whether the insurer would have demanded any changes of policy terms had the information been disclosed or not misrepresented. Such an inflexible instrument equiparates the fraudulent insured with the innocent (or careless) insured. This is grossly unfair especially to the insured who innocently runs afoul and is then deprived of the benefits provided in the policy because the insurer is allowed to "escape retrospectively the liability to indemnify which he has previously and … validly undertaken".[46]

35 It should also be pointed out that good faith is actually reciprocal in nature: the insurer is equally under a duty of disclosure. However, while the remedy of avoidance offers a windfall to the insurer when the insured has breached his duty of disclosure, such a remedy is of cold comfort to the insured in the case of the insurer's breach of duty. For the latter scenario, the insured will most likely prefer to retain

44 See para 5, n 4 above. It is submitted that this harsh remedial approach is unjustified. The remedy emanated from *Carter v Boehm* (1766) 3 Burr 1905, where Lord Mansfield founded the right of avoidance based on the fact that the insurer was misled. Yet, it was clear that Lord Mansfield did not intend for the right to arise in every case of non-disclosure; see para 53, text to n 70, below.

45 Yeo Hwee Ying, "Call for Consumer Reform of Insurance Law in Singapore" (2014) 26 SAcLJ 215 at 228.

46 *Manifest Shipping Co Ltd v Uni-Polaris Shipping Co Ltd* [2001] 2 WLR 170 at [57].

insurance coverage instead of recovering all the premiums he had previously paid to the insurer.

36 There is, in principle, some form of soft-law mitigation in Singapore. The Life Insurance Association Singapore ("LIA") seeks to constrain the life insurers' right to avoid; accordingly, life insurers should not unreasonably reject a claim or invalidate a policy on grounds of non-disclosure or misrepresentation (unless fraud or deception is involved). However, there is a lack of evidence showing how much this has been applied in practice in Singapore. Without a similar constraint by the General Insurance Association of Singapore ("GIA") on the general insurers' right to avoid, the situation is even more pessimistic for Singaporean consumers with general insurance policies. Hence, the possibility of relying on soft-law mitigation in Singapore appears slim at best.

37 Prior to the enactment of the CIDRA and the Insurance Act 2015, England had been more successful in implementing such soft-law mitigation: the Financial Ombudsman Service ("FOS") was created in 2001 with the aim of protecting consumers by determining complaints not based on the "strict letter of the law" but according to "what is fair and reasonable in all the circumstances of the case".[47] An important feature of FOS (which was a compulsory scheme for insurers in England) was that its awards could be enforced through the courts. There were also published reports on the disputes resolved by FOS. Singapore has similarly set up in 2005 the Financial Industry Disputes Resolution Centre ("FIDReC") to adjudicate the complaints lodged by the insured; unfortunately, there were no published reports (including the grounds of decisions) released to the general public. There is therefore no documentary trail to show that FIDReC applies rules that are remotely close to the ameliorating and equitable yardstick of the UK FOS.

38 In summary, the ombudsman regime in Singapore is not as developed as that in England (prior to the legislative reforms). In addition, there is a lack of reported court judgments on insurance-related disputes in Singapore – understandably so as the country is small with a population that is only one-tenth that of England.[48] Consequently,

47 Baris Soyer, "Reforming the Assured's Pre-contractual Duty of Utmost Good Faith in Insurance Contracts for Consumers: Are the Law Commissions on the Right Track?" [2008] *Journal of Business Law* 385 at 389–390; see also UK Insurance Ombudsman Bureau's Annual Report 1989 at pp 29–30.

48 Christopher Chen, "Measuring the Transplantation of English Commercial Law in a Small Jurisdiction: An Empirical Study of Singapore's Insurance Judgments between 1965 and 2012" (2014) 49 Tex Int'l LJ 469 at 496. Chen has argued that

(*cont'd on the next page*)

the local judges lack much opportunity to evaluate controversial insurance issues and the hope of "moving the law forward by case law is limited".[49]

## V. Recommendations for Singapore

39 Perhaps the strongest indication that the duty of disclosure and remedy of avoidance in Singapore are outdated can be seen from the fact that other commonwealth jurisdictions[50] have already surged ahead in terms of reforms (which have also incorporated the need for added consumer protection). In response to the heightened jurisdictional competition for the position of having the most optimal and progressive laws which best address modern business requirements, England has found it necessary to proceed with reforms (after having experimented with self-regulation by industry for several decades). These English reforms have serious implications for Singapore, which seeks to become an insurance hub like England.

40 As discussed earlier, the duty of disclosure and remedy of avoidance in Singapore remain imbalanced in favour of the insurers. The local courts' ability to do justice is fenced in by strict law and precedence. Singapore clearly requires reforms in these areas. This is possible via:

(a) judicial development;

(b) soft law; or

(c) hard law.

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Singapore, with a more Asian culture, tends to adopt a less litigious approach, which has thus generated a smaller pool of insurance cases than in England.

49 Christopher Chen, "Measuring the Transplantation of English Commercial Law in a Small Jurisdiction: An Empirical Study of Singapore's Insurance Judgments between 1965 and 2012" (2014) 49 Tex Int'l LJ 469 at 496.

50 Examples include Australia, New Zealand and Malaysia. See, *eg*, Robert Merkin, "Reforming Insurance Law: Is There a Case for Reverse Transportation?", available at http://www.lawcom.gov.uk/app/uploads/2015/03/ICL_Merkin_report.pdf (accessed 31 January 2018), Michael Kirby, "Australian Insurance Contracts Law: Local Reform with a Global Relevance" [2011] *Journal of Business Law* 309and Kate Lewins, "Going Walkabout with Australian Insurance Law: the Australian Experience of Reforming Utmost Good Faith" [2013] *Journal of Business Law* 1. Although the New Zealand Law Commission and governmental authorities had considered insurance law reform on various occasions since the 1970s, the actual legislative output has been piecemeal and only minimal changes have been made (in particular, remedies for misrepresentation). Basically, the New Zealand law reform consideration process has been described as painfully slow.

41 Technically speaking, the local courts may proceed incrementally to adopt a piecemeal approach to develop the law (such as by adopting the Australian approach in *Barclay Holdings (Australia) Pty Ltd v British National Insurance Co Ltd*[51] or by finding that the Singapore Marine Insurance Act[52] ("MIA") is non-exhaustive with regard to remedies).[53] However, it is submitted that this is not preferred as such an approach will naturally entail a judicial massaging of the MIA by stretching its language or reading extra requirements into the text. In fact, this is tantamount to judicial legislation and will in all likelihood lead to confusion in the insurance industry.

42 Reform by way of soft law – such as insurance practice codes – is also inadequate. It is difficult to monitor how assiduously the insurance industry in Singapore adheres to the soft law, especially in light of the opacity of the financial ombudsman[54] (which does not publish tribunal decisions for dissemination to the general public). The tribunal (unlike its UK counterpart) lacks a clear direct remit of applying the yardstick of what is fair and reasonable in all the circumstances of the case and subordinating legal technicality to general principles of good insurance practice, regulatory guidance and statements of practice in consumer cases. In addition, applying industry codes allows insurers to be judges of their own cause; the insured can only rely on the integrity of the insurer and there is no legal recourse because such codes lack the force of law.

43 Hence, the preferred reform method is by way of hard law; this will have the advantage of stifling any objections of judicial legislation. Singapore Parliament needs to enact new legislation so as to address the

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51 (1987) 8 NSWLR 514. In this case, the New South Wales Court of Appeal distinguished between an investigative stage and an ultimate decision-making stage, and held that only facts which would affect the latter stage would be considered material.

52 Cap 387, 1994 Rev Ed.

53 Howard Bennett, "Mapping the Doctrine of Utmost Good Faith in Insurance Contract Law" [1999] *Lloyd's Maritime and Commercial Law Quarterly* 165 at 182. The learned author rightly points out that if ss 18 and 20 of the English Marine Insurance Act 1906 (c 41) are not exhaustive with respect to the requirements for a legally actionable non-disclosure (*ie*, the requirement of inducement), it is difficult to see why ss 17 and 18 should be read as exhaustive with respect to remedies.

54 In the UK, individuals with rejected insurance claims may complain to the Financial Ombudsman Service, which may investigate the complaint and order a reinstatement of the insurance policy on original terms. Although it is true that the Financial Industry Disputes Resolution Centre in Singapore can adjudicate disputes between the insured and the insurance company, this is of limited utility as it is only open to individuals and sole proprietors and its jurisdiction is limited to claims of up to $100,000: see Financial Industry Disputes Resolution Centre, "The Jurisdiction of FIDReC" <http://www.fidrec.com.sg/website/jurisdiction.html> (accessed 31 January 2018).

problems associated with the duty of disclosure and the remedy of avoidance in insurance contracts. To that end, Singapore can draw some inspiration from the CIDRA and the Insurance Act 2015 enacted by the English Parliament.

44 For a start, Singapore should initiate consultations with stakeholders as soon as possible with a view to law reform – drafting rules that encapsulate what, in essence, are the best practices in the insurance industry. At present, the overriding concern should be for the vulnerable consumers who need the peace of mind that they will be treated fairly by the insurers and that valid claims will be paid without undue delays.

45 Similar to England (which recently bifurcated insurance into consumer insurance and business insurance), an even balance must be sought in Singapore by way of a separate consumer regime. This worked out far more easily for England, which primarily legislated the then-existing soft law. However, Singapore's soft law is much more opaque and, in truth, may not have operated like that in England. It should be pointed out that in Singapore both LIA and GIA had previously adapted British Insurance Law Association's code of practice but there is a lack of information on whether the local insurers have been adhering to their respective statements of practice (which had evolved since then).[55] Nevertheless, these two local insurance associations appear to recognise the normative ethos of fairness and good industry practice which no one ought to quarrel with; given this frame of mind, a move towards a separate consumer regime should not be met with too much objection.

46 Since there is a need to protect local consumers who do not understand enough English[56] to decipher the insurance proposal forms (especially for those who speak their mother tongues), Singapore should consider the possibility of embracing the CIDRA, which has technically[57] abolished the duty of disclosure in one bold legislative stroke: s 2(2) states that "it is the duty of the consumer to take reasonable care not to make a misrepresentation to the insurer" while s 2(4) adds that "the duty set out in sub-section (2) replaces any duty relating to disclosure or representations by a consumer to an insurer

55 See Yeo Hwee Ying, "Call for Consumer Reform of Insurance Law in Singapore" (2014) 26 SAcLJ 215.

56 The courts are increasingly mindful of the insured's level of sophistication as a consideration in determining duties: see, *eg*, *Eurokey Recycling Ltd v Giles Insurance Brokers Ltd* [2014] EWHC 2989 (Comm) at [86] and *Osman v J Ralph Moss Ltd* [1970] 1 Lloyd's Rep 313.

57 "Technically" here implies that the soft-law position in the consumer realm has already dealt the consumer with kid gloves and moved on to a more inquiry approach.

which existed in the same circumstances before this Act applied". The burden has been effectively reversed in England: instead of the insured having to disclose all information of material interest to a prudent insurer, the duty is now foisted on the insurer to pose a series of carefully crafted questions so as to elicit the information required for evaluating the risks. This should not pose too much of a problem for the insurer because the range of relevant factors is rather predictable for consumer insurance; for example, in motor vehicle insurance, the standard factors that are relevant to the insured risk are usually the road-worthiness condition of the vehicle and the driving experience of the owner.

47 In effect, the CIDRA merely imposes on the consumer proposer a passive reactive duty "to take reasonable care not to make a misrepresentation during pre-contractual negotiations"[58] (that is, merely to "answer insurers' questions honestly and to take reasonable care that their replies are accurate and complete").[59] This statute also offers some guidance on the issue of whether the consumer insured has taken reasonable care to answer questions correctly: s 3(1) specifies that that this "is to be determined in the light of all the relevant circumstances", with the provision spelling out an indicative (rather than exhaustive) list that includes, *inter alia*, the type of consumer insurance contract, the relevant explanatory materials and the clarity of the insurer's questions.[60] The standard of care in England is that of a reasonable consumer[61] – an objective yardstick that disregards the particular characteristics of the individual consumer but is still subject to the following riders:

> (a) "If the insurer was, or ought to have been, aware of any particular characteristics or circumstances of the actual consumer, those are to be taken into account".[62]
>
> (b) "A misrepresentation made dishonestly is always to be taken as showing lack of reasonable care".[63]

48 The arguments for abolishing the duty of disclosure in consumer insurance cannot be directly transposed to non-consumer insurance. Unlike consumers who tend to be more homogeneous (for

58 Consumer Insurance (Disclosure and Representations) Bill (Bill 68 of 2011) Explanatory Notes, cl 10.

59 Consumer Insurance (Disclosure and Representations) Bill (Bill 68 of 2011) Explanatory Notes, cl 21.

60 See s 3(2) of the Consumer Insurance (Disclosure and Representations) Act 2012 (c 6) (UK).

61 See s 3(3) of the Consumer Insurance (Disclosure and Representations) Act 2012 (c 6) (UK).

62 Consumer Insurance (Disclosure and Representations) Act 2012 (c 6) (UK) s 3(4).

63 Consumer Insurance (Disclosure and Representations) Act 2012 (c 6) (UK) s 3(5).

instance, car owners applying for motor vehicle insurance) and who generally contract on standard policy terms, businesses are more heterogeneous given the diversity of specialist or unusual risks often encountered in commerce or industry.[64] This is especially so for Singapore, which strives to be an insurance hub serving the wide array of different businesses found in various countries. Hence, bifurcation into consumer and non-consumer regimes merits serious consideration for Singapore.

49 For non-consumer insurance, England has boldly adopted the duty of fair presentation as specified in ss 3(1) and 3(4) of the Insurance Act 2015, where the business insured's duty to disclose material information is complemented by the insurer's duty to ask relevant questions in order to elicit further information or clarify any doubts after the insured has disclosed "sufficient information to put a prudent insurer on notice that it needs to make further enquiries for the purpose of revealing those material circumstances".[65] Instead of remaining passive during the information discovery process (and underwriting only at the claims stage), the insurer in England now needs to engage the insured by actively making enquiries when required. The insurer's failure to do so constitutes a waiver of the insured's duty of disclosure; this should help businesses in England to save costs as they no longer have to disclose copious amounts of information to the insurers. Singapore should thus monitor how this duty of fair presentation will pan out in future.

50 In point of fact, the wording of s 3(4)(b) in the Insurance Act 2015 appears reflective of the doctrine of waiver embodied in cases such as *Garnat Trading & Shipping (Singapore) Pte Ltd v Baominh Insurance Corp*[66] and *WISE (Underwriting Agency) Ltd v Grupo Nacional Provincial SA*.[67] Since this concept of "being put on inquiry" is similar to

64 UK Law Commission & Scottish Law Commission, *Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims; and Late Payment* (Consultation Paper No 353/Discussion Paper No 238) at para 6.28; see also Peter Macdonald Eggers QC, "The Past and Future of English Insurance Law: Good Faith and Warranties" (2012) 1(2) UCL Journal of Law and Jurisprudence 211 at 226.

65 Insurance Act 2015 (c 4) (UK) s 3(4)(b). Working out the parameters of this reformed duty in the UK has its own challenges: see Rob Merkin & Özlem Gürses, "The Insurance Act 2015: Rebalancing the Interests of the Insurer and Assured" [2015] 78(6) MLR 1004 at 1007–1008 and Professors B Soyer & A M Tettenborn, "Mapping (Utmost) Good Faith in Insurance Law – Future Conditional?" (2016) 132 *Law Quarterly Review* 618; see also Simon Goh, "*The Impact of the UK Insurance Act 2015 on Singapore Insurance Law and Practice*" *Singapore Law Gazette* (October 2016).

66 [2011] 1 Lloyd's Rep 589.

67 [2004] 2 Lloyd's Rep 483.

that found in common law, s 3(4)(b) is arguably more iterative than groundbreaking. Nevertheless, having this concept elevated from a mere defence as expounded in common law to that of a positive step in discharging the duty of fair presentation will serve to highlight its importance.

51 Reforming the duty of disclosure alone will not make for an adequate response if the common law scourge of the sole remedy of retrospective avoidance is not re-calibrated as well. Hence, Singapore should additionally consider the possibility of proportionate remedies as spelt out in both CIDRA and Insurance Act 2015:

> (a) Where the insured's breach was reckless or deliberate, the insurer is still entitled to avoid the contract unless fairness demands otherwise.
>
> (b) Where the insured's breach was neither reckless nor deliberate, the remedies are based on what the insurer would have done if the information had been disclosed or not misrepresented. If, for example, the proposal would have been rejected had there been no non-disclosure or misrepresentation, the insurer can still avoid the policy and refuse all claims. If, on the other hand, the insured would merely be charged a higher premium, the insurer may then proportionately reduce the amount to be paid out on the claim.

52 Although the introduction of a proportionate remedy structure will entail major changes in the one-size-fits-all remedy regime currently existing in Singapore, such reform is desirable as it allows the local courts greater flexibility to obtain fairer results. Adopting a proportionate remedy that is pegged to the insured's level of fault will mitigate the overly harsh application of the avoidance remedy while achieving a more equitable result for both parties. On the one hand, the honest insured will not be denied coverage under the policy in the unfortunate event of an unintentional mistake. On the other hand, allowing the insurer to avoid the contract if there had been deliberate or reckless misrepresentation will address the insurers' concern that proposers may be given free licence to conceal any unfavourable information so as to secure lower premiums.

53 Veritably, the classical notion of good faith underpinning insurance contracts does not contemplate that any non-disclosure should result in avoidance. Although Lord Mansfield said in *Carter v Boehm*[68] that what mattered was whether an insurer had been misled, he

68 (1766) 3 Burr 1905 at 1909.

pointed out later in *Mayne v Walter*[69] that "it must be a fraudulent concealment of circumstances that will vitiate a policy".[70] Hence, proportionate remedies based on fault will bring the remedies doctrine back into alignment with the original conception of good faith as articulated by Lord Mansfield.

## VI. Conclusion

54 It is no longer acceptable for Singapore, which aims to be an insurance hub, to be stuck with outdated English case law in insurance.[71] The insurance regime in Singapore should be aligned with global standards of best practice; otherwise, businesses may be discouraged from investing here due to a lack of confidence in the local insurance law.

55 In particular, the time has come for Singapore to initiate reforms for the insured's duty of good faith which has remained largely unchanged over the past fifty-odd years since independence. Despite having put off reforms for so long, England (the progenitor jurisdiction) eventually found it necessary to introduce sweeping changes via the enactment of the CIDRA and the Insurance Act 2015. Ushering in some radical far-reaching changes, these two statutes provide a useful model for Singapore to consider. Naturally, the sociopolitical context in Singapore is different and certain aspects of the two statutes may not be appropriate for the insurance industry here. Nevertheless, the English insurance reforms offer a useful starting point for the local consultations to begin and Singapore should then adapt what is best for the local jurisprudence.

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69 (1782) 99 ER 548.

70 James Allan Park, *A System of the Law of Marine Insurances* (Butterworth, 4th Ed, 1800) at p 195.

71 See Ravi Menon, Managing Director, Monetary Authority of Singapore, "Singapore as a Global Insurance Marketplace", keynote address at the 12th Singapore International Reinsurance Conference (6 November 2013).