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Insurance Contract Law
SUMMARY OF RESPONSES TO ISSUES PAPER 7:
The Insured's Post-Contractual Duty of Good Faith

This document summarises the responses to the Law Commissions' Issues Paper 7: The Insured's Post-Contractual Duty of Good Faith.

December 2010

THE LAW COMMISSION
THE SCOTTISH LAW COMMISSION

Joint Review of Insurance Contract Law

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*The Insured's Post-Contractual
Duty of Good Faith***

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NOTES

APPROACH TAKEN IN THIS PAPER

Describing responses

- N.1 This paper describes the responses we have received to the proposals set out in Issues Paper 7: The Insured's Post-Contractual Duty of Good Faith. We provide a short description of the current law in Part 1 and our proposals in outline throughout the document, but readers should refer back to the Issues Paper for a fuller explanation.
- N.2 This document aims to report the arguments raised by consultees. It does not give the views of the Law Commission or the Scottish Law Commission.

COMMENTS AND FREEDOM OF INFORMATION

- N.3 We are not inviting comments at this stage. However, if having read the paper, you do wish to put additional points to the Commissions, we would be pleased to receive them.
- N.4 Please contact us:

By email at commercialandcommon@lawcommission.gsi.gov.uk, or

By post, addressed to Christina Sparks, Law Commission, Steel House, 11 Tothill Street, London SW1H 9HL

- N.5 As the Law Commission will be the recipient of any comments, the Freedom of Information Act 2000 will apply and all responses will be treated as public documents. We may attribute comments and include a list of respondents in future response. Those who wish to submit a confidential response should indicate this expressly. Automatic confidentiality disclaimers generated by an IT system will be disregarded.

THANKS

- N.6 Many people have devoted considerable time and resources to this project. We would like to thank all those who have sent written responses to the Issues Paper, who have written articles on the proposals and who met us to discuss their views. We read and consider all responses we receive to our Issues Papers. Whilst we are unable to directly quote all consultees' submissions in this brief summary, those views are important to us as we put together our proposals for the next Consultation Paper.

PART 1

INTRODUCTION

- 1.1 In July 2010, the Law Commission and the Scottish Law Commission published Issues Paper 7, “The Insured’s Post-Contractual Duty of Good Faith”.¹ In practice, a policyholder’s main post-contract duty is to act honestly when making a claim. We asked whether the law should provide greater clarity on the remedies available to insurers when policyholders act fraudulently.
- 1.2 Insurance contracts are based on mutual duties of good faith. In our last paper, we considered the duties owed by an insurer after the contract has been formed, and proposed that an insurer should owe a duty to assess and pay valid claims within a reasonable period of time.² Issues Paper 7 examined the other side of the coin, and invited views on the duties owed by the policyholder.
- 1.3 This document summarises responses to that paper. We intend to publish further proposals on both late payment and fraudulent claims in a joint consultation paper in 2011. We received 33 responses, as shown below. We also considered several press and journal articles, which we found helpful.³

Table 1: Respondents to Issues Paper 7, by category

| Type of consultee | Number |
|---|-----------|
| Insurers, reinsurers and insurance trade associations | 12 |
| Lawyers, legal representative associations, and the judiciary | 9 |
| Academics | 5 |
| Other | 4 |
| Brokers and brokers’ associations | 3 |
| Total | 33 |

BACKGROUND

- 1.4 Fraudulent claims are a serious and expensive problem. Just as an insurer has the duty to avoid unduly delaying payment, a policyholder has the duty to act honestly when making a claim. In order to deter fraud effectively and provide insurers with an appropriate remedy, the law must be clear and understood by everyone.

¹ Insurance Contract Law, Issues Paper 7: The Insured’s Post-Contract Duty of Good Faith (July 2010).

² Insurance Contract Law, Issues Paper 6: Damages for Late Payment and the Insurer’s Duty of Good Faith (March 2010). In November 2010 we provided a summary of responses to Issues Paper 6, in a separate document, Insurance Contract Law, Summary of Responses to Issues Paper 6: Damages for Late Payment and the Insurer’s Duty of Good Faith (November 2010).

³ J Hjalmarsson, “Fraudulent insurance claims”, (Sept 2010) *Shipping & Trade Law* 3 – 5; K Hammell, “Just desserts”, (13 Sept 2010) *Solicitors Journal*; “Reform of Insurance law: The assured’s post-contractual duty of good faith” (Sept 2010) *Insurance Law Monthly* 4 – 7.

- 1.5 However, the law in this area is complex and confused. The duty of good faith was codified in section 17 of the Marine Insurance Act 1906,⁴ and provides insurers with the right to avoid the contract from the start. In other words, when a fraudulent claim is made, the insurer can ask the policyholder to repay all claims made under the policy, including perfectly genuine claims which were paid before the fraud arose. However, market practice has evolved and courts have navigated away from this position. Instead, courts have preferred to hold that a fraudulent policyholder forfeits the whole of the fraudulent claim, while leaving other aspects of the contract unaffected.
- 1.6 The relationship between the two approaches is far from clear. There is some debate over whether the common law remedy of forfeiture and avoidance under section 17 both continue to exist as available remedies, or whether forfeiture has replaced avoidance.⁵ In the Issues Paper, we recommended clarifying the remedies available to insurers and invited consultees' views.

CONTENTS OF THIS PAPER

- 1.7 This paper is divided into six further parts.
- (1) Part 2 looks at responses we received on the case for clarifying the remedies available to insurers.
 - (2) Part 3 considers views on how express terms dealing with liabilities following from fraudulent claims should be treated.
 - (3) Part 4 discusses the proposal for a statutory duty owed by the insured to not make a fraudulent claim, and appropriate remedies for breach.
 - (4) Part 5 discusses joint and group insurance, and consultees' views on our proposal for reform.
 - (5) Part 6 discusses the ongoing existence of good faith as a general, unspecified duty, and its application to notification of risk clauses.
 - (6) Part 7 notes consultees' concerns for third party fraud, and the recommendation that this should be included in our scope for reform.

⁴ This states, "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".

⁵ See N Legh-Jones (ed), *MacGillivray on Insurance Law* (11th ed 2008), at p 901, para 19-055, cf M A Clark, *The Law of Insurance Contracts* (looseleaf), at para 27-2C3. For more, see Insurance Contract Law, Issues Paper 7: The Insured's Post-Contract Duty of Good Faith (July 2010), para 2.21.

PART 2

THE CASE FOR REFORM

FRAUDULENT CLAIMS ARE A SERIOUS PROBLEM

- 2.1 Many consultees told us that fraudulent claims have become increasingly costly for the insurance industry. The Association of British Insurers (ABI) noted that in 2009, insurers detected £841 million of general insurance fraud. The Forum of Insurance Lawyers (FOIL) argued that given the “moral ambivalence” of the public surrounding the serious problem of fraudulent insurance claims, statutory reform would provide a clear reminder of the duties owed by the insured. Insurers told us that any reforms should convey a strong anti-fraud message.

THE CURRENT LAW IS UNNECESSARILY COMPLEX

- 2.2 In Issues Paper 7 we argued that the law on insurers’ remedies for fraud was unnecessarily complex and should be reformed. We gave three reasons:

- (1) The disjuncture between the common law and section 17 of the Marine Insurance Act 1906 generates unnecessary disputes and litigation;
- (2) The UK needs a set of rules which makes sense to an international audience;
- (3) The rules on fraudulent claims are intended as a deterrent, and deterrents work best if they are clear and well-understood.

- 2.3 The great majority of consultees agreed: out of the 25 consultees who addressed the question, all but three thought that the law was unnecessarily complex. All but two thought that it would be helpful to introduce legislation to clarify the insurer’s remedy for a fraudulent claim.

- 2.4 The ABI argued in favour of straightforward and clear legislation:

The duty not to make a fraudulent claim has been characterised in several irreconcilable ways by the courts. It has been considered both as an implied term of the insurance policy,¹ and as a breach of section 17 of the Marine Insurance Act 1906,² for which the insurer’s civil remedy was avoidance of the policy *ab initio*. It has also since been recognised as a distinct common law rule based on public policy³, where the insurer’s remedy was forfeiture of the claim and permission to rescind the policy. Alternative positions have thus been created as to the remedies available to insurers in respect of fraudulent claims, but none long-established.

¹ *Orakpo v Barclays Insurance Services Co Ltd* [1994] CLC 373.

² *Black King Shipping Corporation v Massie (The Litsion Pride)* [1985] 1 Lloyd’s Rep 437.

³ Mance LJ in *The Aegeon (No 1)* [2002] EWCA Civ 247.

2.5 Zurich noted that the language of the Marine Insurance Act “does not sit easily with the culture and lifestyle of the 21st century”. Ray Hodgkin from the University of Birmingham commented that section 17 had become “impossible to explain” to students and to lawyers.

2.6 Kennedys noted the importance of clarity in the law in this area.

For the law relating to fraudulent claims to be an effective deterrent, it should be clear and well understood, particularly as to what the consequences will be of any breach. Most opportunists do not appreciate that if they were to fraudulently exaggerate or fabricate part of a claim they risk receiving nothing at all.

Is the law already sufficiently clear?

2.7 Seven consultees remarked that while it would be helpful to clarify the law, the existing remedies work reasonably effectively. The Association of Financial Mutuals (AFM), for example, argued that insurers tended to “navigate the contradictions between the common law and legislation effectively”.

2.8 Two consultees thought that reform was unnecessary because case law had clearly established that the remedy for fraud was forfeiture of the claim. Johanna Hjarlmarsson of Southampton University wrote that “the common law rule following especially *Agapitos v Agnew*⁴ is a clear and incontrovertible part of English insurance law”. Furthermore,

[...] it is not legislation that is necessary to clarify what the law is, it is practitioners’ work, textbooks and university and practitioner education for those who use the law – particularly since the law – whether enacted or case law – will undoubtedly be further developed in its details.

2.9 Similarly, Keoghs argued that *AXA v Gottlieb*⁵ set out the position clearly and thought that reform may be helpful to extend the remedy, for example, to allow an insurer to recover expenses incurred in dealing with a fraudulent claim.

2.10 In Issues Paper 7 we examined these cases and concluded that they undermined the right to avoid under section 17:

Section 17 continues to exist, and in theory it remains open to an insurer to argue that a fraudulent claim permits the insurer to avoid the policy. However it is unlikely that a court would find for the insurer on this basis. Instead the courts have consistently held that the appropriate remedy for fraud is forfeiture of the claim.⁶

⁴ *Agapitos and Another v Agnew and Others (No 1) (The Aegeon)* [2002] 2 Civ 247; [2003] QB 556.

⁵ [2005] EWCA Civ 112; [2005] 1 All ER (Comm) 445.

⁶ Insurance Contract Law, Issues Paper 7: The Insured’s Post-Contract Duty of Good Faith (July 2010), para 2.23.

- 2.11 Some consultees, however, argued that the law was clear because it *did* permit avoidance. FOIL, for example, argued that the law was not unnecessarily complex and that “the right to forfeit the policy *ab initio* should be retained”. RBS argued that the two remedies subsisted alongside each other.

Section 17 of the Marine Insurance Act implies the remedy for making a fraudulent claim is avoidance from policy inception, whereas case law which is well established and has developed over the years supports avoidance being from the point of the fraudulent claim. Whilst admittedly not contained in one statute the law in respect of fraudulent claims is fairly clear.

MUTUAL DUTIES OF GOOD FAITH

- 2.12 In Issues Paper 7 we asked if consultees agreed that an insurance contract should be based on mutual duties of good faith. Most consultees agreed (21 of the 24 who answered the question, 86%).
- 2.13 Several argued that this was an essential feature of insurance. Aviva described it as “a fundamental principle in insurance law” that should apply throughout the term of the policy, and any subsequent renewal.
- 2.14 By contrast, Beachcroft had argued in its response to Issues Paper 6 that there may not be a need to retain mutual good faith once the constituent principles (nondisclosure, fraud, damages for late payment, etc) were clearly outlined in legislation. They repeated their thinking here.

As insurance contracts are divested of their special status and become like any other commercial contract, we find it hard to justify ...further remedies for other infringements when such rights are not available in other commercial contracts.

- 2.15 Similarly, the British Insurance Law Association (BILA) reported that some members queried whether the concept was helpful:

It would, in the view of some members of BILA’s Law Review Sub-Committee, be better if post-contract duties of good faith were replaced by more specific implied contractual obligations on the part of the insurer with respect to e.g. claims handling, and on the part of the insured with respect to e.g. not making fraudulent claims. This would, amongst other things, eliminate any possible contention that the proper remedy for post-contract duties of good faith was avoidance of the contract.

PART 3

EXPRESS TERMS

RETAINING THE CURRENT LAW

- 3.1 The Issues Paper pointed out that many insurance contracts include express “fraud clauses”. The courts allow the parties to extend the remedies available for fraud, provided they do so in clear, unambiguous terms. However, in consumer contracts, such terms must be fair within the meaning of the Unfair Terms in Consumer Contracts Regulations 1999.
- 3.2 We asked whether the law in this area should be retained. This was relatively uncontroversial: all but two consultees agreed. The Bar Council, however, argued that express terms on extending remedies for fraud should be limited to commercial insurance.

We would be unhappy in the consumer context of extending the remedies beyond those provided for by legislation. We doubt that most consumers read insurance terms and their policies will invariably be on insurers’ standard terms.

- 3.3 We also asked whether we should retain the existing law that a party may not exclude liability for his or her own fraud. There was unanimous support: all 26 consultees addressing this point agreed.

EXCLUDING THE FRAUD OF AN AGENT

- 3.4 One difficult issue is whether an insured may negotiate a term excluding liability for their agent’s fraud. The issue arose in *HIH Casualty & General Insurance Ltd v Chase Manhattan Bank*.¹ A syndicate of banks insured loans to finance films and negotiated very favourable contract terms. For example, one clause stated that the banks would “have no liability of any nature to the insurers for any information provided by any other parties”. The House of Lords held that the clause did not extend to fraud by the bank’s broker. Lord Bingham doubted whether an express clause could ever exclude a party’s liability for their agent’s fraud, but that issue was not decided definitively. The Issues Paper asked whether parties should be entitled to exclude liability for the fraud of their agents if they wish.

The case for the ability to exclude fraud of an agent

- 3.5 More than half (16 of 23) of consultees thought that the parties should be entitled to exclude the fraud of an agent, on the ground of freedom of contract. However, many qualified their support, and several noted that the question was difficult to answer. As the Faculty of Advocates said:

¹ [2003] UKHL 6; [2003] 1 CLC 358.

We have not found this an easy question, as the choice is necessarily difficult as to which of two innocent parties, the insured or the insurer, is to suffer the consequences of a fraudulent agent. On balance, we agree that parties should be free to negotiate this in advance by the terms of their contracts.

- 3.6 Clearly, any terms along these lines will be extremely rare. Only the most powerful of policyholders would ever be in a position to demand such an exclusion. Given this, BILA described the issue as “commercially insignificant”. As the Lloyd’s Market Association (LMA) noted:

In practice we believe it is highly unlikely that an insurer would agree to take this risk in relation to the insured’s broker or sub-brokers.

- 3.7 The question was only about express terms, and did not address the default position that, in the absence of an express term, an insured is liable for their agent’s fraud. Several consultees stressed that they only agreed if this default position in the current law was left intact.

Policyholder’s agent or insurer’s agent?

- 3.8 In Issues Paper 7, we considered only the policyholder’s fraud. However, consultees queried whether the right would be reciprocal. Although there may be a case for allowing policyholders to exclude liability for fraud which took place without their knowledge, consultees thought this should not extend to insurers “who had the opportunity to vet brokers and other agents before accepting business from them”. RSA for example, argued that the positions between the insured and the insurer were different.

As [the ability to exclude fraud of agents] may well be reciprocal, it is a ‘double edged sword’, and we would expect that the common approach would be not to entertain such a clause. We have some doubts whether the Financial Ombudsman Service (FOS) would, in fact, excuse insurers for the fraud of its agents even where this exclusion is clear and unambiguous.

The case against the ability to exclude fraud of an agent

- 3.9 Five consultees argued expressly against allowing a policyholder to exclude their liability for their agent’s fraud. For example, CIFAS, the UK’s Fraud Prevention Service, was of the very firm view that “any such clause may be open to abuse and lead to unnecessary complications”. Keoghs argued that any watering down of the insured’s liability for their broker’s fraud could be used “by organised fraudsters to take advantage of the insurance industry”.

PART 4

THE DUTY TO NOT MAKE A FRAUDULENT CLAIM

A STATUTORY DUTY

- 4.1 The Issues Paper argued that, even in the absence of an express term, policyholders should be under a duty not to make a fraudulent claim. We proposed that this duty should be set out in statute, as a particular instance of the duty to act in good faith.¹ The statute should then specify the appropriate civil remedy.
- 4.2 This question appeared to be uncontroversial; all but three consultees who answered the question agreed, though some urged that the duty should be adaptable over time. BILA queried whether the duty would be an implied contract term or imposed independently of the terms of the contract.
- 4.3 Three consultees disagreed on the ground that a statutory duty was unnecessary. For example, Beachcroft commented:

There is not such a statutory duty in other commercial contracts, so we do not see the need here.

THE DEFINITION OF FRAUD

- 4.4 The Issues Paper proposed that the definition of fraud should be left to the courts. We thought that although the exact definition was not clear-cut, this arose from the nature of the issue, and could not be caught within a statutory definition.²

Leaving the definition to the courts

- 4.5 Most consultees (20 out of 24) agreed with us. Aviva's comment summed up the majority view:

We broadly agree with the proposal that the definition (although not perfect) should be left to the courts. Rather than being fixed within the statute law, this would enable the definition to be capable of development in as wide a context as necessary to address, for example, increasingly sophisticated crimes, concealment, exaggeration etc.

- 4.6 Kennedys added that to set out a statutory definition for civil insurance fraud would cause confusion.

¹ Insurance Contract Law, Issues Paper 7: The Insured's Post-Contract Duty of Good Faith (July 2010), para 7.25.

² Above, para 3.63.

There is already a criminal definition of fraud, should the fraudsters be pursued through criminal proceedings, so it could unnecessarily overcomplicate matters to seek to introduce a specific definition for insurance fraud.

- 4.7 The ABI added that whilst the definition of fraud should be left to the courts, this should not allow the FOS to develop its own rules.

We would be keen to remind the Financial Ombudsman Service of their duty to uphold the rule of law. One such example is the policyholder's use of fraudulent devices, which we consider has been frequently misconstrued.

Should the definition of fraud be set in legislation?

- 4.8 Three consultees argued that the definition should be set out in legislation. The Bar Council, for example, felt that the confusion in the common law was the primary reason why the current position is untenable:

We are reluctant to leave the definition of fraud to the courts in view of the unsatisfactory and piecemeal way in which case law has developed over the years.

- 4.9 They cited *The Star Sea*³ and *The Aegeon*⁴ as cases which have caused problems in practice; each piecemeal development in the common law introduced change and uncertainty. For example, *The Aegeon* had led to a sudden surge in insurers' lawyers pleading "fraudulent means and devices" as a way of deterring the insured's claim. BILA also thought that the rule on fraudulent devices set out in *The Aegeon* was unduly harsh.
- 4.10 By contrast, RSA supported the position in *The Aegeon* that the use of fraudulent devices to support a genuine claim may amount to fraud. They wished to see a statutory definition which included fraudulent devices.

Retracting a fraudulent claim

- 4.11 Professor Rob Merkin pointed out one further issue on which the courts' approach may need to be changed – namely, whether a fraud can be retracted before it has induced the insurer to pay the claim.

In *Gottlieb*,⁵ Mance LJ thought that this was not possible, and that the claim remained tainted. However, there might be a case for arguing that an assured who submits a fraudulent claim and then genuinely recants and comes clean should be allowed to recover the genuine part of his claim.

³ *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd (The Star Sea)* [2001] UKHL 1; [2003] 1 AC 469.

⁴ *Agapitos and Another v Agnew and Others (No 1) (The Aegeon)* [2002] EWCA Civ 247; [2003] QB 556.

⁵ *AXA General Insurance Ltd v Gottlieb* [2005] EWCA Civ 112; [2005] 1 All ER (Comm) 445.

REMEDIES

- 4.12 The Issues Paper noted that, in practice, the courts would not permit insurers to avoid the whole policy for a fraudulent claim. We summarised the position as follows:

The current law appears to be that an insured who commits fraud forfeits the whole claim to which the fraud relates, including any interim payments already made on the claim. The insured does not forfeit any other claims previously paid under the policy.... The insurer also has to pay any outstanding previous claims.⁶

- 4.13 We thought that this was appropriate and should be given a statutory basis. We asked first whether consultees agreed that an insured who makes a fraudulent claim should forfeit the whole claim to which the fraud relates; and then whether the fraud should not affect previous claims (whether or not they had been paid).
- 4.14 Most consultees agreed with us on both points. Nevertheless, as we discuss below, several insurers were reluctant to abandon the possibility of avoidance in all cases.

Forfeiture of the whole claim

- 4.15 The great majority of consultees (all but one) agreed that the common law remedy of forfeiture of the whole claim was appropriate. As the International Group of P&I Clubs put it, forfeiture of the whole claim is “correct and the law should not be amended”. Also, as RBS put it:

There needs to be a disincentive to committing fraud and if a person is still provided with indemnity for the honest part of their claim, this will not happen. We therefore agree that an insured who commits fraud should forfeit the whole claim to which the fraud relates, including any interim payments already made on the claim.

- 4.16 That said, two consultees remarked that the courts should retain some discretion not to impose forfeiture in every case. The Bar Council commented:

We would wish such legislation to be framed in such a way as to enable the courts to retain a limited discretion to allow an insured to recover some of his claim where an insured has suffered a genuine loss but has done something minor to embellish or support that claim. We take the view that in those cases the courts could penalise the insured by way of costs, but still allow recovery. We are not persuaded that allowing the courts to exercise a discretion would undermine the deterrent effect of such a rule – any more than the indication of a maximum sentence generally does with regard to criminal offences.

- 4.17 BILA also argued that the courts should have discretion in a minority of cases:

⁶ Insurance Contract Law, Issues Paper 7: The Insured’s Post-Contract Duty of Good Faith (July 2010), para 7.28.

We recognise that there are times when an insured has stooped to doing something that constitutes a breach of a duty of good faith to assist his claim which is fairly minor and which is not intended to increase his claim. Arguably such conduct does not constitute fraud but, even if it does, it may be considered unfair that he should lose the whole of his claim while insurers reap the benefit of not being obliged to pay what may be a substantial claim.

4.18 The LMA, on the other hand, argued against any such discretion, saying that “a strict application of the forfeiture rule would provide two significant benefits: “certainty of outcome and a strong deterrent”.

4.19 There were also some calls for further clarification. Professor Rob Merkin asked for clarification about what amounts to a single claim:

Suppose that my factory is damaged, and that I have both material damage and business interruption (BI) cover. I then inflate my BI claim: should my material damage [claim] be lost as well? Just how far is a claim divisible? See *Yeganeh v Zurich Insurance*,⁷ where an assured guilty of fraud in his contents claim was held to have lost any right to recover for damage to the premises in which the contents were housed. I am not sure that this is entirely fair.

4.20 RSA noted that forfeiture of the claim should also extend to any settlements entered into in relation to the claim, asking for the “loophole” in *Direct Line v Fox*⁸ to be closed.

An end to avoidance

4.21 A majority of consultees (17 out of 21) agreed that a fraudulent claim should not affect previous claims, and should not avoid the whole policy. Some saw avoidance as fundamentally unfair. Roy Rodger commented:

There is “no way” the law should permit insurers to avoid a policy back to inception on the basis of a fraud that occurred several years after inception. That does not do our industry any credit.

4.22 Others accepted the proposal on the ground that it was an approach already taken under the current law. The Faculty of Advocates commented:

We note the proposal is to limit forfeiture to the claim (albeit the whole of the claim) to which the fraudulent claim relates, rather than to vitiate the contract or to entail the unravelling of prior completed and valid claims. We agree with this approach. It also accords with the trend of the modern law.

4.23 In sum, several insurers accepted that forfeiture was conceptually correct, and workable in practice. Swiss Re wrote:

⁷ [2010] EWHC 1185 (QB).

⁸ [2009] EWHC 386 (QB); [2009] 1 All ER (Comm) 1017, in which the use of a fraudulent device in relation to a settlement agreement was held not to amount to fraud in relation to the claim made under the insurance policy.

We agree that the existing position is about right conceptually. A fraudulent claim does not affect previous legitimate claims.

4.24 RSA noted:

Any pre-existing valid claims should be dealt with on their merits, although these may be scrutinised again to ensure that they were honestly made.

4.25 And RBS added:

We believe that there should be no automatic retroactive penalty if there was no intention to commit fraud previously.

Retaining avoidance?

4.26 Though consultees agreed that forfeiture was an appropriate and accepted remedy, the removal of avoidance was controversial. Peter Patient argued that the “penalty for fraud should not be reduced in any way” and that the “law must take a firm stand”:

Surely, an insured that purchases insurance and then commits fraud when presenting a claim reveals an inherent moral hazard not evident during the placing of the risk. In hindsight would an insurer, with later knowledge of fraud on the part of the insured in the presentation of a claim, have been so inclined to write the business in the first place? I think not. Any form of fraud surely demonstrates that the insured is untrustworthy.

4.27 Several consultees, whilst accepting that avoidance was very rarely used, were of the view that there was a value in retaining avoidance as a potential remedy in extreme cases. The ABI, for example, argued that insurers should still be permitted to have recourse to avoidance of the policy as a last resort.⁹ FOIL put the point as follows:

The right to forfeit the policy *ab initio* should be retained. Such a far-reaching remedy will be inappropriate in the majority of cases but it should still be available in extreme circumstances, or where the facts of the case justify it, to ensure that a just result can be obtained in all circumstances.

4.28 A suggestion put forward by QBE Insurance was that, in the event of a fraudulent claim, the insured should have a renewed duty to prove the validity of the other claims.

⁹ The ABI cited *Joseph Fielding Properties (Blackpool) Limited v Aviva Insurance* [2010] EWHC 2192 (QB) to demonstrate judicial enthusiasm for retaining the remedy of avoidance *ab initio* in certain circumstances. The case was very fact specific. The insurance policy in this case included a broadly worded fraudulent claims clause which allowed the insurer to avoid the policy from inception once it was proved that an insurance claim was tainted by fraud. The court upheld this clause.

If there are further claims upon the policy that previously appeared to be genuine in nature, then the burden is upon the insured to prove that those claims are genuine, otherwise those claims become forfeited (and repayable).

The effect of fraud on subsequent claims

4.29 The Issues Paper considered the effect of a fraud on subsequent claims. We put forth two possible approaches:

- (1) The fraud gives the insurer the right to terminate cover, but the policy continues until termination. This means that the insurer must pay any valid claims which arise between when the fraud is committed and when it is discovered.
- (2) The fraud automatically brings the contract to an end, invalidating any claim which arises after the fraud.

4.30 The Issues Paper commented that there was no definitive ruling on which interpretation was correct. However, the logic underlying the main cases points towards the first approach.¹⁰ We asked if consultees agreed that a fraudulent claim should give the insurer the right to terminate the contract, whilst not affecting a valid claim arising between the fraud and termination. A handful of consultees (7 of 27) agreed: an article in *Insurance Law Monthly* described this as “a sensible approach”.¹¹

4.31 However, most consultees (19 of 27) disagreed. Many thought that fraud undermined the necessary trust between the parties. Derrick Cole and Geoffrey Lloyd noted:

Having discovered fraud, it would be perfectly normal for the insurer to be extremely wary of subsequent claims for which they were still on risk. Trust would have evaporated.

4.32 The ABI argued strongly that a policy should be cancelled from the date of the fraudulent claim. Similarly, Beachcroft argued that making an insurer liable for valid claims which arose between the fraud and the termination would encourage insurers to make allegations of fraud too quickly.

If there is not to be avoidance of the whole policy, termination must at the very least take effect from the time of the fraud. Fraud investigations can take considerable time and fraud is not an allegation to be made lightly. If termination is not to take place until the claim has been refused, insurers will feel that their hand is being forced to make knee jerk allegations of fraud in order to avoid more claims. This will not benefit either insurers or insureds.

4.33 The FOS agreed:

¹⁰ Insurance Contract Law, Issues Paper 7: The Insured’s Post-Contract Duty of Good Faith (July 2010), paras 4.58 to 4.59.

¹¹ “Reform of Insurance law: The assured’s post-contractual duty of good faith” (Sept 2010) *Insurance Law Monthly*, p5.

We acknowledge the Law Commission's analysis on this point, but in practice, the policy normally specifies that the termination dates from the fraud. It might be detrimental to consumers if the law encouraged insurers to exercise the right to terminate prematurely without fully investigating an allegedly fraudulent claim.

- 4.34 RBS argued that on making a fraudulent claim, "the insured should forfeit subsequent claims, regardless of whether they are genuine". However, insurers need to ensure that they act in a timely manner to notify the insured. An insurer who failed to do so might waive their right to forfeit subsequent claims.

DAMAGES FOR CLAIMS INVESTIGATION

- 4.35 The Issues Paper asked whether an insurer should be entitled to claim damages for the reasonable and foreseeable costs of investigating a fraudulent claim. There was strong support for this: all but two thought that such damages should be available.

The case for damages

- 4.36 Most consultees noted that the cost of investigating a fraudulent claim can be significant. In addition, the threat of damages would offer a further element of deterrence. Zurich's view was representative of most consultees:

Insurers are incurring significant costs in creating ever more sophisticated business tools and processes to deter the professional fraudster. We believe that insurers should have the right to recover investigation costs. These costs would not have been incurred had it not been for the deceitful actions of the policyholder. Courts have made such awards in the past. The amount for costs recoverable should not be influenced by the value of the claim (although they will need to be reasonable in nature).

- 4.37 Keoghs noted that to provide for damages as a statutory remedy would be an improvement on the current practice of claiming under the tort of deceit.

At present an insurer must bring a successful action in the tort of deceit to obtain this remedy which can be expensive and complex. Introducing a simple statutory remedy would act as a deterrent to fraudsters, thereby benefitting the insurance industry and society in general and honest policyholders in particular.

The case against damages

- 4.38 Two consultees argued against damages for investigation costs. The FOS thought that it would be unfair:

It seems to us that the investigation of claims is an integral part of an insurer's business. In law, consumers are not compensated if a legitimate claim is declined in bad faith, so it strikes us as unfair and unbalanced for insurers to be entitled to such damages where consumers are not.

- 4.39 Similarly, the Bar Council were unconvinced that making damages available would be practical:

We are of the view that in most cases insurers would find it difficult to recover such damages as in our experience, most fraudsters either do not have substantial means or have managed to conceal such assets as they have. We would leave it to the courts to penalise fraudulent insureds by way of forfeiting the claims and awarding costs on an indemnity basis against them.

- 4.40 Some insurers agreed that pursuing fraudsters for damages would be rare and impractical, but nevertheless argued that damages should be available as a deterrent, to send a clear message to potential fraudsters that potential liability could be significant.

Defining reasonable and foreseeable costs

- 4.41 Consultees made additional points on this issue. The ABI argued that “reasonable and foreseeable costs” should include both external and internal costs so that internal staff could be used. The International Underwriters’ Association (IUA) thought that insurers should be compensated for all costs actually incurred, whether or not they had been incurred reasonably.

As a matter of principle, it would be more equitable to allow recovery for the actual costs accrued (subject to court approval as to their validity) and not employ a reasonableness test, which is not suitable when considering a fraudulent act.

- 4.42 On the other hand, CIFAS urged caution:

Clearly there would need to be some thought given to definitions of such terms as “foreseeable” and “reasonable”. The Office of Fair Trading should be consulted to ensure that the approach adopted by insurers does not suffer the same fate as some of the charges that banks and credit card companies tried to impose on consumers, where the charges did not relate to their actual costs.

- 4.43 FOIL noted that exemplary damages have already been accepted judicially in *AXA v Jensen*.¹²

Double recovery?

- 4.44 The Issues Paper pointed out that insurers may already be compensated for the cost of investigating claims by the savings from not paying the legitimate element of forfeited claims. We asked whether damages should only be available where investigation costs are not recouped from the insurer’s savings in retaining the legitimate element of the claim.

- 4.45 Most consultees (13 of 19) disagreed with limiting double recovery in this way. Many felt that would weaken the deterrent to fraud. The ABI commented:

All costs foreseeable and reasonably incurred should be recoverable from the fraudulent policyholder by the insurer. It is arbitrary and anomalous to draw a distinction between where the costs of investigating the fraud amount to less than the insurer's saving and conversely where they are more substantial.

4.46 RSA queried how such a limitation would work in practice.

RSA questions where the burden of proving that some of the claim is legitimate would lie. If it is the insured how would this burden be discharged, given an absence of credibility? Where insurers have to prove fraud to a high standard (whether this is on more than the balance of probabilities or to a standard commensurate with the probability of fraud making on balance a difficult hurdle to overcome) the burden resting with a fraudulent insured must be at least the same high standard.

4.47 By contrast, a few consultees supported limits on double recovery. The Faculty of Advocates argued:

This could be said to flow from damages being recoverable in respect of losses incurred. To the extent that the costs of investigation were offset by the savings made, there is no recoverable loss.

USING PROCEEDINGS FOR CONTEMPT OF COURT

4.48 A few insurers drew our attention to the possibility of using proceedings for contempt of court as a remedy against fraudsters. In an article in *Solicitors Journal*, Kathryn Hammell (Weightmans LLP) noted that insurers were increasingly bringing proceedings for contempt of court in lieu of a more suitable remedy. The article concluded that proceedings for contempt "may be the answer."¹³

Bringing contempt of court proceedings through to judgment can have a significant deterrent effect that should not be underestimated, even if insurers are wary of the costs involved. Claimants are likely to reconsider bringing a fraudulent claim if they are aware of the possibility of imprisonment and, furthermore, claimants' solicitors are likely to apply a greater amount of scrutiny to prospective clients before accepting cases.

¹² [2008] Birmingham County Court (10/11/08), in which Mr Recorder Lochrane noted that a court may be open to award exemplary damages where the insured had profited deliberately from fraud.

¹³ K Hammell, "Just desserts", (13 Sept 2010) *Solicitors Journal*.

PART 5

FRAUD BY A CO-INSURED

FRAUD BY A JOINT POLICYHOLDER

The proposed reform

- 5.1 Particular difficulties arise where two or more policyholders are insured under the same policy. Should fraud or wrongdoing by one policyholder taint the claim of the other? The law currently distinguishes between joint and composite insurance. For joint insurance, the fraud of one party affects the others. For composite insurance, each policyholder is treated separately.¹
- 5.2 Problems arise where two policyholders start by taking out insurance jointly, but later become estranged. For example, there have been several cases in other jurisdictions where a husband and wife jointly insure their home, but one spouse then attacks the other by setting light to it. The question of whether the victim should forfeit his or her share of the insurance claim is not straightforward.
- 5.3 The Issues Paper tentatively proposed that where fraud is perpetrated by a co-insured, there should be a presumption that the fraud was carried out on behalf of all co-insureds. If an innocent policyholder provides evidence which refutes the presumption, then their share of the claim should be paid. We then asked whether the recovery should be limited to the extent of the innocent insured's own interest and payable only if the guilty insured would not benefit from the recovery.

Support in principle

- 5.4 Most consultees supported the basis of the reform: 16 of 21 consultees (76%) were in favour in principle. As the Bar Council explained, the proposal would strike a more balanced approach between the parties' (often conflicting) interests:

We see no reason why the innocent joint policyholder should fall foul of the penal policy which the law has developed in this area – particularly where this may serve the purposes of the fraudulent joint policyholder (eg the vengeful spouse who deliberately sets fire to the family home, thereby hoping to damage the interests of the innocent spouse).

- 5.5 However, many raised queries about how the proposal would work in practice. Five consultees concluded that these practical difficulties rendered the proposal unworkable.

¹ For more, see Insurance Contract Law, Issues Paper 7: The Insured's Post-Contract Duty of Good Faith (July 2010) Part 7.

Practical problems

The burden of proof

- 5.6 The first query was how an innocent policyholder was expected to prove a negative fact – namely, that they were not involved in a fraud. Two consultees suggested that the onus should be on the insurer to prove the fraud. Ray Hodgkin of the University of Birmingham noted that on balance the insurer would be more likely to satisfy the burden of proof were it placed on them:

I am not clear how [the insured will rebut the presumption] to the satisfaction of the insured or the court. Equally I see that it is difficult to see how the insurer would set about the problem. However, as insurers are skilled in proving fraud I would prefer that the burden be on their shoulders to prove the complicity. After all, they are already investigating the claim in detail.

- 5.7 Similarly, CIFAS noted:

Under British law, the overarching principle is that we are all innocent until proven guilty.... It is our firm view that it should be for the insurer to prove the guilt. There can be no shortcuts to save money when they lead to compromised justice.

Partitioning the innocent policyholder's share

- 5.8 The second issue was how the insurer was expected to value the innocent policyholder's share, especially where the parties were married. RSA pointed out that "where property is owned jointly, even the divorce courts have difficulty in separating interests".

What is [the innocent party's] share? 50%? Should this take account of the length of time the couple have been married? Or the assets that they brought into the relationship? Income? Children and their age? What one party has put into the relationship? 50% is just a figure and means nothing in terms of legal entitlement.

- 5.9 It was suggested that it would be even more difficult to prevent the guilty party from benefiting, particularly by couples who "pretend separation" and then "allegedly reconcile". Additionally, in the case of home insurance some consultees queried how an insurer might be expected to reinstate half a house. The ABI summarised these concerns as follows:

We are concerned that in many circumstances, the guilty party will benefit from his own fraud, for instance where the joint policyholders continue to cohabit or where they live apart for a while and subsequently reconcile. How is the insurer expected to quantify the rateable proportion of an indemnity, and to rebuild half of a jointly owned property burnt to the ground by the jealous husband without benefitting him, for example?

- 5.10 Several consultees thought that the Law Commissions' exploration of the issues was too narrow and too focused on domestic violence. The Issues Paper did not explore how the proposal would work in a commercial context. For example, the International Group of P&I Clubs queried whether the case had been made for reform in commercial policies, for which insurers ought to retain the freedom to incorporate express terms and conditions. Similarly, the IUA explained that in the professional indemnity market, parties have developed policy clauses to negate potential problems:

Contracts of insurance will usually contain a "separation of insureds" or "anti-avoidance" clause. The former has the practical effect of creating separated indemnities with regard to fraudulent activity by a single partner vis-à-vis recovery by innocent parties. The latter maintains a right of recovery for an innocent partner in any further claim relating to the fraudulent partners activity.

Is the proposal unworkable?

- 5.11 In spite of these difficulties, many consultees still expressed support for the proposals. However, five consultees expressly felt that the practical problems were serious enough to render the whole proposal unworkable. On this basis, the ABI concluded that;

The establishing of title, benefit and share of jointly owned assets would be extremely difficult to prove and would place an unreasonable burden and cost on the insurer. It would also encourage misrepresentation and fraudulent claims activity on the basis that at least half the claim would be paid.

- 5.12 FOIL reached a similar conclusion:

There is a danger here that in seeking to do justice to a tiny minority, the law makes it easier for fraudulent claims to succeed.

Abolishing joint insurance

- 5.13 Professor Howard Bennett raised a more fundamental point. He queried whether joint insurance should be abolished, so that co-insureds are never held responsible for each other's fraud.

There is ... a gulf between the law's treatment of joint assureds and co-assureds that does not correspond to any real fundamental difference between interests that are regarded in law as joint and those that are regarded in law as separate. With respect to co-insurance, the law's approach is that the rights of individual co-assureds should not be prejudiced by the fact that for convenience their interests are insured under one policy. I ask the question, what is it about joint interests that dictate potential insurance contamination in a way that does not apply to co-assureds?

Terminology of joint insurance

- 5.14 Finally, the Faculty of Advocates asked that future legislation should not refer to "joint" insurance:

It is our understanding that the word 'joint' covers diametrically opposed circumstances in English and Scots law.... The Scots usage of "joint" might accord to the usage of "composite".... We respectfully suggest that other terminology is devised (e.g. composite/severable or non-severable/single policies) to avoid the possibilities for confusion.

FRAUD IN GROUP INSURANCE

- 5.15 The Issues Paper asked whether legislation should provide insurers with the same remedies available where a group member acts fraudulently. All consultees but one agreed.

Support for consistency

- 5.16 Most felt that it should be put beyond doubt that the group member is in the same position as the direct policyholder. The Bar Council emphasised that without special provision, an individual member who made a fraudulent claim would not suffer any penalty, above losing the fraudulent element of the claim:

At present, whilst a group member's fraudulent claim would not succeed to the extent that it was fraudulent... the common law arguably does not go further and allow the court to penalise the fraudulent group member - for example by requiring the genuine parts of the claim also to be forfeited.

- 5.17 The ABI noted that the Law Commissions' Consumer Insurance Bill² dealing with pre-contract disclosures had made special provision for group insurance. They thought that the same was needed here:

It makes sense, for consistency with the position pre-contract, that any new legislation regarding the law post-contract directly addresses the effects of fraudulent claims by insured members.

Notes of caution

- 5.18 There were, however, a few notes of caution. Whilst all but one consultee supported the proposal, some queried how the proposal would operate in practice. We were also asked to consider whether wider consequences could follow from effectively granting scheme members the status of an insured.
- 5.19 RBS observed that duties would need to be imposed on a group member without there having been a direct relationship with the insurer in place at inception. Similarly, CIFAS was concerned whether fraud liability would arise for the insured where group members were simply unclear or incomplete at disclosure.

² Joint Report on Consumer Insurance Law: Pre-Contract Disclosure and Misrepresentation, Law Com No 319, Scot Law Com No 219.

PART 6

OTHER ASPECTS OF THE INSURED'S POST CONTRACT DUTY OF GOOD FAITH

- 6.1 Part 6 of the Issues Paper considered whether the insured's post contract duty of good faith applied in other contexts, outside the area of fraudulent claims. It concluded that the duty had limited application, but discussed "notification of risk clauses" and whether a more general duty should be preserved.

CLAUSES REQUIRING THE INSURED TO REPORT INCREASES IN RISK

Should notification clauses be interpreted restrictively?

- 6.2 In many European countries, it is common for the insured to be under an obligation to report increases in risk to the insurer. However, UK insurance policies tend to be annual contracts, and the insurer is expected to ask about any alterations to the risk before issuing a renewed contract every year. As such, UK policies sometimes contain express terms for notification, but the courts have tended to interpret such terms restrictively. We asked consultees if they agreed that this was the right approach.
- 6.3 Most consultees agreed: 16 of 20 consultees who answered the question thought such clauses should be interpreted restrictively. The IUA, for example, noted that notification of risk is generally handled well in the market, and that there was no further need for reform. Derrick Cole and Geoffrey Lloyd's view represented the view of many consultees:

Having negotiated a contract of insurance – and here we are thinking in terms of the usual UK time period of 1 year – the parties should be prepared to stick to it even if the risk changes.

- 6.4 Aviva argued that insurers should be able to include such clauses in the interest of freedom of contract. However:

We recognise that such conditions would need to be stated clearly within the policy wording and that insurers would need to specify what increases or decreases in risk need to be notified and when. Following notification, it needs to be clear what actions the insurer can take.

- 6.5 Aviva accepted that conditions to notify convictions mid-term may not be upheld by the courts or by FOS. However, they saw a need for notification clauses in annual travel insurance policies.

Good faith in notification clauses

- 6.6 The Issues Paper asked if consultees agreed that the duty of good faith had no particular application to clauses requiring notification of an increase in the risk. We received mixed responses, with 14 of 24 consultees arguing that good faith should apply to these clauses. On one hand, RBS argued that if a notification led to a variation of the contract, this effectively led the insurer to re-underwrite the risk:

Material change in risk amounts to a variation of the insurance contract, and pre-contract duty of good faith applies in respect of variation.

- 6.7 On the other hand, the Bar Council argued that breach of a notification clause should not lead to the policy being voided by the insurer *ab initio*.

If the insurer wishes such a clause to operate as a warranty, the insurer should be required to stipulate clearly for that result.

- 6.8 BILA also thought that notification clauses were not akin to the re-underwriting of a contract, and that good faith ought not to apply what is essentially a specific contract obligation. On this point, Professor Howard Bennett, referred us to the case of *Commercial Union v Niger*,¹ where Lord Sumner rejected the possibility that a failure to comply with a notification term breached the duty of good faith.

The PEICL approach

- 6.9 The Issues Paper noted the alternative approach to notification of risk taken by the Principles of European Insurance Contract Law (PEICL). Under PEICL, the insured is under a duty to notify changes, but the remedies for breach are relatively mild: the insurer may only refuse to pay a subsequent claim if the loss was caused by the aggravation of the risk. Furthermore, if the insurer would have continued to insure the risk at an increased premium, the insured may receive a proportion of the claim. The insured is also entitled to request a premium reduction for decreases in the risk.
- 6.10 We did not feel that this approach is necessary in the UK market, which is based on annual renewals. However, we asked consultees if they saw any advantages in the PEICL approach. Most did not: 20 of 23 consultees thought that the UK position should be retained. Aviva, like many insurers, argued that insurers should contract expressly for requirements for notification.

In the event that an insurer needs to be advised of mid term material changes in the risk, Aviva recognises that insurers would be required to provide clear, concise instructions to policyholders in this regard.

- 6.11 The IUA noted that the UK market had a different tradition from other European jurisdictions:

¹ (1922) 13 LI L Rep 75 at 82.

With specific regard to the UK, there are a number of key differences between the PEICL principles and the existing and even proposed UK provisions. So whilst it is illustrative to note European developments, one should not overplay the importance of PEICL as a potential legislative instrument.

- 6.12 On the other hand, BILA noted that as cross-border business in insurance increases, PEICL would be of increasing relevance. Beachcroft also noted that PEICL provides a proportionate approach which “chimes with the proposed approach to non-disclosure”.

GOOD FAITH AS A GENERAL DUTY

- 6.13 Finally, the Issues Paper invited views on whether the duty of good faith should be confined to fraudulent claims, or whether it should have some other general and unspecified effect.

The case for good faith

- 6.14 Views were split on this issue: 15 of 22 consultees (68%) argued that good faith should retain a general effect throughout the contract. It was felt that disclosure was a unique feature of a contract for insurance, and that a fluid duty of good faith was appropriate to ensure adequate protection. As Zurich put it:

The duty of utmost good faith is closely allied to that of moral hazard. Whilst both may be regarded as unspecific, given the unique nature of an insurance contract both are essential in protecting the insurer against the unscrupulous or indifferent policyholder. The duty of utmost good faith extends to the provision of accurate and honest information regarding the circumstances of the claim, it supports the policyholder’s obligation to take reasonable precautions to minimise potential exposure to loss and to comply with the general conditions regarding claim notification.

- 6.15 Several consultees argued a general duty of good faith provided the courts with some flexibility. As Keoghs said:

A wide duty should be retained and if this narrowed there is a risk that such a restriction would limit a Court’s ability to adjudicate matters justly.

The case against good faith

- 6.16 By contrast, 7 of 22 consultees (31%) felt that good faith should have a confined effect. Some suggested that if the post-contract duties owed by parties were outlined in statute, there would be little value in retaining a general duty of good faith. As Geoff Lord put it:

The duty of good faith post-inception should be confined to a duty not to make fraudulent claims; its use elsewhere has created nothing but difficulty.

- 6.17 Professor Rob Merkin argued that the post-contract duty of good faith should be abolished:

The notion that there can be any avoidance remedy for post-contract matters brings English law into disrepute. Anything happening post-contract should be the subject of express terms or, if none, implied terms (and the courts have rightly been unwilling to imply very much when insurers are perfectly capable of looking after themselves – see, eg, *Bonner v Cox*).

6.18 Ray Hodgkin agreed:

The good faith doctrine does not apply to other branches of commercial law and while there might have been good reasons for its introduction in the 18th century it is impossible to see how it should be extended in any way in the 21st.

PART 7

THIRD PARTY FRAUD

- 7.1 Three consultees (Keoghs LLP, QBE and FOIL) argued that the Law Commissions should review the law on fraudulent claims by third parties making claims for personal injury through the courts. This was a particular problem in England and Wales. As Keoghs put it:

In *Shah v Ul-Haq*,¹ the Court of Appeal held that the claim of a 'genuine' claimant who had supported fraudulent claims made by others, should still be paid (with the proviso that the costs could be sought against such claimant). The message that the Court of Appeal was sending was effectively that those supporting fraudulent – and therefore criminal – behaviour can be safe in the knowledge that their own claims will be met in a civil court. The Court indicated that any changes to the law were a matter for the legislature....

As the rate and cost of undetected insurance fraud continues to soar into many billions of pounds, it is a matter of great concern to insurers that no one is prepared to confront what is a serious problem and one which challenges the tenets of morals and justice that are the pillars of our judicial system.

- 7.2 FOIL wrote:

Whilst recognising that the issue of third party fraud is outside the scope of this issues paper, FOIL believes that the principle of forfeiture of the whole claim should also be adopted in fraudulent claims brought by third parties.

- 7.3 Consultees suggested that the Law Commission should consider a new project on this issue as part of its 11th programme of work. The Law Commission is currently considering this suggestion alongside the many others made for its next work programme.

¹ [2009] EWCA Civ 542.

APPENDIX A

LIST OF CONSULTEES

We considered 33 responses to our Issues Paper, along with several articles which we found to be helpful. We also received 2 confidential responses.

WRITTEN RESPONSES

Association of British Insurers

Association of Financial Mutuals

Aviva

Beachcroft LLP

Professor Howard Bennett

British Insurance Law Association

CIFAS

City of London Law Society

Mr Derrick Cole and Mr Geoffrey Lloyd

Faculty of Advocates

Financial Services Authority

Financial Ombudsman Service

Forum of Insurance Lawyers

The General Council of the Bar

International Group of P&I Clubs

International Underwriting Association

Kennedys LLP

Keoghs LLP

Lloyd's Market Association

Mr Geoff Lord

Mr Peter Patient

QBE European Operations

RBS Insurance

RSA

Swiss Re

Mr Ray Hodgkin

Mr Roy Rodger

Zurich

ARTICLES

Kathryn Hammell, "Just Desserts" Solicitors Journal, 13 September 2010

Johanna Hjarlmarsson, "Fraudulent Insurance Claims" Shipping & Trade Law, September 2010 p 3 – 5

Insurance Law Monthly, September 2010 p 4 – 7