



# Insurance Brief

## Duty of Utmost Good Faith Clarified

By Paul Smith

### **Manifest Shipping Company Limited v Uni-Polaris Shipping Company Limited and Others ("The Star Sea")**

House of Lords (UK) - 18/01/01

The English House of Lords has just produced a decision that clarifies how the duty of utmost good faith operates **after** an insurance policy has commenced.

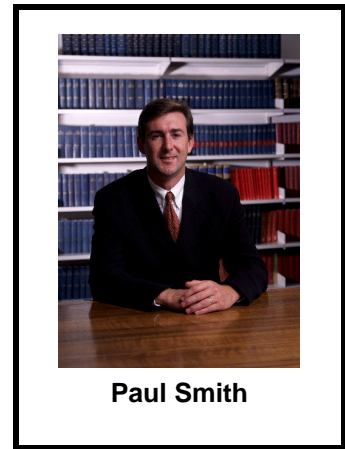
The duty of an insured prior to the start of a policy is a very broad obligation. The extent of the duty is relatively well known and has been the subject of many Court decisions. However, the position as to what is required of an insured pursuant to the duty after the policy has begun has been subject to some conflicting judicial comment.

In this case, Manifest Shipping had made a claim in respect of a ship, *The Star Sea*. A fire had destroyed the vessel in 1990. A claim was made of the insurer. The insured's claim was declined and litigation followed. Some expert reports had been commissioned by Manifest

Shipping for which privilege was claimed. During the trial, privilege in respect of those experts' reports was waived by the insured. It was said by the insurer that the failure to disclose the reports earlier (notwithstanding the claim to privilege) was a breach of the insured's obligation of utmost good faith. As a result, the insurer argued it was entitled to void the policy from inception.

This proposition was rejected by the House of Lords. Somewhat unsurprisingly the Court expressly rejected the idea that the duty of utmost good faith extended to where proceedings had been initiated between the parties to clarify their rights under the insurance policy. Manifest Shipping was entitled to claim privilege over the reports. The Court said that there were important changes in the party's relationship that came about when litigation started and their interests diverged from that point. The rights and relationship between the parties were then governed by the Court Rules and there were different remedies available to either parties for a breach of them. As such, the duty of utmost good faith could not extend as the insurer contended for in this case.

Additionally, the House of Lords offered some general comment about the scope of the duty after a policy commences. The Court said that it was very different from the duty that existed before the start of the contract. It was much



Paul Smith

more limited and the actual terms of the contract will often reflect the extent of the duty. The Court signalled that it would be very wary of any claim by an insurer that misrepresentations or non-disclosures in the context of a claim which were not material would nevertheless entitle an insurer to avoid the policy from inception under the duty.

Additionally, one of the judges took the opportunity to expressly criticise the relatively well-known decision in **The Litision Pride**. In that case the judge had said that there was a **general** duty of utmost good faith upon an insured after the insurance policy had started. In **The Star Sea**, it was said that **Litision Pride** should be confined to its own facts, at least for the purposes of precedent.

In this issue:	
1	<i>Duty of Utmost Good Faith Clarified</i>
2	<i>How Not To Bring a Claim Against Solicitors</i>

# How Not To Bring a Claim Against Solicitors

By Rob Coltman

## **The Guild (Claims) Limited v Eversheds & Others**

High Court (UK) -14/07/00

This case presented an object lesson in how not to bring a claim against a solicitor.

In the Eversheds case, the defendants' solicitors successfully struck out the claim brought against them, but nevertheless the judgment provides some useful guidance as to the relevant tests when it is being alleged that a solicitor has failed in a duty to provide advice on the commercial wisdom of transaction.

Here the defendants were advising parties on a series of acquisitions of businesses on the Unlisted Securities Market on the London Stock Exchange. The businesses offered holiday packages in the Mediterranean amongst other exotic climes. Ultimately the business ventures failed and the causes of action alleged to exist against the professionals involved were assigned to the plaintiff, a company formed solely to prosecute those claims.

In striking out the claims, the Court reinforced the Privy Council's decision on appeal from New Zealand in **Clark Boyce v Mouat** that normally solicitors were under no duty, before or after accepting instructions, to go beyond those instructions by offering unsought advice on the commercial wisdom of the transaction. To hold otherwise could impose intolerable burdens on solicitors.

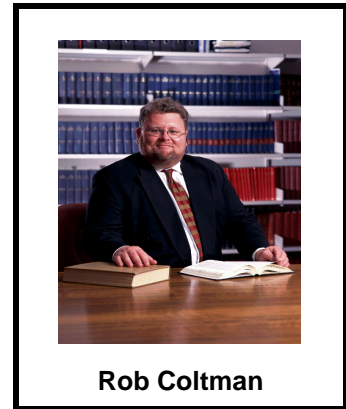
The Court went on to reiterate a

well established test when assessing breach of a professional duty (assuming the duty can be established). The test is not whether an expert in the field would himself have acted in a different way, but rather whether the defendant professionals had acted in a way which conflicted with the practice accepted at the time as proper by a reasonable body of professional opinion in the relevant field. On this point, as is often the case in such claims, no evidence was offered.

Finally the Court considered the causal link necessary between breach of duty and loss claimed by reiterating the House of Lords decision in **South Australia Asset Management Limited v York Montague Limited** that the law limits liability for the consequences of professional negligence to those consequences which are attributable to that which made the professional advice wrongful.

The Court emphasised that this is a test altogether different from a "but for" test which says "but for" the negligence, the loss would not have been caused (and therefore all the loss should be recovered from the negligent professional).

Here claims which had sufficient appeal to persuade the parties or their advisors to create a special company vehicle to prosecute them, failed when subjected to a number of relatively well established legal tests in the professional negligence arena.



Rob Coltman

**Law Commission Publications**

The NZ Law Commission has had a very busy period recently. Publications of interest to the Insurance industry include:

- "To Bind their Kings in Chains"- on Crown liability
- "Subsidising Litigation"
- "Electronic Commerce-Part III"

The reports may be downloaded from the Commission's website at [www.lawcom.govt.nz](http://www.lawcom.govt.nz)

Fortune Manning  
Price Waterhouse Centre  
66 Wyndham Street  
Auckland  
Phone: 09 915 2401  
Fax: 09 915 2402

Geoff Turner [gjt@fmlaw.co.nz](mailto:gjt@fmlaw.co.nz)  
DDI 09 915 2435

Rob Coltman [rpc@fmlaw.co.nz](mailto:rpc@fmlaw.co.nz)  
DDI 09 915 2417

Paul Smith [pms@fmlaw.co.nz](mailto:pms@fmlaw.co.nz)  
DDI 09 915 2415  
Visit our website  
[www.fmlaw.co.nz](http://www.fmlaw.co.nz)

Please note that this newsletter is intended as a guide only on certain aspects of insurance law. It should not be relied on as a substitute for professional advice. Specialist legal advice should always be sought in relation to any particular situation. Fortune Manning accepts no responsibility for any actions taken in reliance on any information in this newsletter, nor for any error in, or omission from, this publication.