is needed before one draws conclusions about one jurisdiction from the other.

MATTHEW CONAGLEN

RESCISSION: INDUCEMENT AND GOOD FAITH

IN *Drake Insurance plc* v. *Provident Insurance plc* [2004] 2 W.L.R. 530 a third party, B, was injured by K when K was driving the car of her husband, S. K was insured under her own policy with Drake and was also insured as a named driver in the policy of S with Provident. Drake compensated B and sought contribution from Provident which, however, purported to avoid its policy with S on the ground of non-disclosure of a motoring conviction (fact A) by S on his last renewal. S, however, had also failed to disclose another matter (fact B), which was in his favour. That would have offset fact A with the net result that, if Provident had known both facts, the insurance would have been renewed on the same terms. The majority of the Court of Appeal, Rix L.J. and Clarke L.J., held that Provident's purported avoidance was invalid.

Inducement: the whole picture

The main ground lay in the law of misrepresentation: "an insurer who seeks to avoid for non-disclosure must show that he had actually been induced by the non-disclosure to enter into the policy on the relevant terms": Rix L.J. at [62]. The Court found that, if fact A had been disclosed, it was "very likely" that fact B would have come to light too. Thus if there had been disclosure of A, Provident would have had the whole picture and would have entered the contract on "the relevant terms", with the corollary that Provident had not been induced by non-disclosure of fact A to contract on different terms. That was enough to decide the case, but the Court also addressed the associated and more general question, "whether the insurer's right to avoid must be judged according to the information provided to the insurer at the time of contract ... or according to the true facts as at that time".

This was a question "on which no cases have been cited to us" and on which "I would therefore wish to be cautious": Rix L.J. at [69]. In principle, he said, "a party which seeks to terminate a contract, whether under an express clause, or whether by way of rescission for misrepresentation or avoidance in insurance for non-disclosure, or whether for breach of condition, or by way of acceptance of a repudiation, must make good his ground for

bringing the contract to an end". In this he is not "limited to the ground which he advances at the time of termination", for if he gives no ground or a bad ground then but finds later that he has a good ground, he can fall back on the latter. For this the Court might have cited *The Mihalis Angelos* [1971] 1 Q.B. 164, 193, *per* Lord Denning M.R. As regards avoidance Clarke L.J. agreed. The insurer's right to avoid must be judged according to the true facts at the time of contracting.

Rescission and good faith

Alternatively, if Provident did have a ground to avoid for non-disclosure, the majority of the Court opined that the exercise of the right was limited by the doctrine of good faith. Rix L.J. at [85] quoted recent statements in the House of Lords to this effect, but conceded at [88] that actual decisions "are not to hand" because:

> once an insured has been found wanting in good faith in the matter of pre-contractual non-disclosure, it is likely to be hard to conclude that the same doctrine of good faith itself prevents the insurer from exercising his right to avoid. On the whole English commercial law has not favoured the process of balancing rights and wrongs under a species of what I suppose would now be called a doctrine of proportionality. Instead it has sought for stricter and simpler tests and for certainty.

In any event, the exercise of the right to avoid for non-disclosure is the independent act of the insurer and not the act of the court. Any limit on the right comes into play only if the point comes before a court. In *The Grecia Express* [2002] 2 Lloyd's Rep. 88, 133, Colman J. thought that avoidance in such a case would be "starkly unjust" and "unconscionable". But in *Brotherton* v. *Aseguradora* [2003] 2 All E.R. (Comm) 298 this view was flatly rejected by Mance L.J. at [27]. Precedent, he said, established that "rescission in the general law of contract ... is not generally subject to any requirement of good faith or conscionability". However, he cited precedent that does not directly address the point; and other statements in the House of Lords support Colman J.: see [2003] C.L.J. 557. It would surely be odd that the court should have a discretion to refuse specific performance but not, apart from the Misrepresentation Act 1967, to refuse rescission.

Good faith for all?

Be that as it may, in *Drake* Rix L.J. acknowledged at [89] that "not all insurance contracts nowadays are made by those who engage in commerce" and that it "may be necessary to give wider effect to the doctrine of good faith and recognise that its impact may

demand that ultimately regard must be had to a concept of proportionality implicit in fair dealing". This statement is reminiscent of a recent banking case, in which Lord Bingham explained the central requirement of good faith in the Unfair Terms in Consumer Contracts Regulations as being "one of open and fair dealing": *Director General of Fair Trading* v. *First National Bank* [2002] 1 A.C. 481 at [17]. It remains only for the courts to bridge the gap between unfair terms and unfair behaviour. That should not take long.

As for the gap between "those who engage in commerce" and those who do not, in practice there is not even a line, still less a gap. A line is hard to draw without resort to arbitrary tests such as turnover and the dichotomy has already been ignored. A notable example is *Cook*, in which Lord Lloyd, with whom Lord Steyn and Lord Hope agreed, said of a self-employed builder that his certificate of disability insurance "must be construed in the sense in which it would have been reasonably understood by him as the consumer": *Cook* v. *Financial Insurance Co.* [1998] 1 W.L.R. 1765, 1768.

Drake does not close the gap, but it does promote the alignment of insurance contract law with general contract law. One reason for that is that insurance non-disclosure and misrepresentation can be hard to separate. If I describe the shandy that I have just bought you as lemonade, is that non-disclosure of part, the beer, or misrepresentation of the whole? Another is that, if there are still to be special rules for insurance contracts, they must be explained and justified to busy lawyers and their clients; and this is becoming harder to do.

MALCOLM CLARKE

NOT SO BLACK AND WHITE: THE LIMITS OF THE AUTONOMY PRINCIPLE

PURSUANT to a letter of credit, a bank undertakes to pay the beneficiary of the credit upon presentation of documents which comply strictly with its terms. It is a fundamental principle, however, that a bank may not justify its refusal to pay on the ground that there has been a breach of the underlying transaction, which the letter of credit is being used to finance. This is the principle of autonomy: see Articles 3(*a*) and 4 of the Uniform Customs and Practice for Documentary Credits (UCP 500). Its limits were considered recently in *Sirius International Insurance Corp. (Publ.)* v. *FAI General Insurance Co. Ltd.* [2003] EWCA Civ 470, [2003] 1 W.L.R. 2214.