

## Commission rules on the continuing duty of good faith

4 October 2011

### Background

Under Indian law, insurance contracts are governed by the principle of utmost good faith, as demonstrated by Section 19 of the Marine Insurance Act 1963 and a number of judgments of the Indian courts. In the past, the concept has traditionally been considered in the context of the disclosure obligations that exist during the negotiation of insurance contracts, before their inception.

Until recently, there had been no clear statement by the Indian courts on whether there is a continuing duty of good faith - that is, whether the duty of good faith ends in whole or in part at the date of policy inception; or, if it continues after the date of policy inception, whether it extends to all conduct in relation to the policy or only certain conduct. A recent judgment of the National Consumer Disputes Redressal Commission in *Crown Consultants v The Oriental Insurance Company* is the first on the subject. Oriental's reinsurer was HIH Winterthur Underwriting (Australia) but, as the commission noted, the reinsurer had "chosen not to be represented in these proceedings".

### Facts

A claim was made by Crown under a master policy issued by Oriental to the National Stock Exchange (NSE) for the benefit of NSE members, for whom errors and omissions (E&O) cover was mandatory. The master policy provided E&O and other insurance. Crown was a stockbroker and member of the NSE and was insured under the master policy.

In 1996 Crown notified a claim that had arisen in the course of its trading on behalf of a client. The policy expressly covered "the Assured having been deceived as to the identity of any person for the purpose of buying or selling of Securities". Crown claimed to have been so deceived. Oriental rejected the claim.

### Decision

In the course of a detailed judgment, the commission found that the insured had:

*"engaged in highly speculative trades... that resulted in a large loss. The [insured] knew that it was not a case of deception by someone impersonating [its client]. However, because the complainant did not quite follow the procedure laid down by the NSE to accept and execute orders for transaction with [its client], it found it impossible to bring [its client] to own up these deals and face the consequences. The [insured] then tried its level best to persuade [the client] to share at least, a part of the loss but failed. It was only then that the [insured] realised...that it could make out a possible case for an insurance claim on the ground of deception by an unknown person".*

When considering the question of the continuing duty of good faith, the commission argued that “a contract of insurance is based on the doctrine of *uberrimae fides*, ie, ‘utmost good Faith’, in the conduct of the Insured”.

The commission further referred to and relied on Lord Mansfield’s seminal judgment in *Carter v Boehm*,<sup>(1)</sup> in which he said:

*“Insurance is a contract of 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 confidence that he does not keep back any circumstances in his knowledge, to mislead the underwriter into a belief that the circumstance does not exist... Good faith forbids either party by concealing what he privately knows, to draw the other into a bargain from his ignorance of that fact, and his believing the contrary.”*

The commission referred to a number of judgments by the Supreme Court where the duty of utmost good faith has been held to apply to insurance contracts, across all classes of life and general insurance business.

The commission then stated as follows:

*“Though this point does not appear to have been specifically amplified in any case before the Apex Court, it is our considered view that to be consistent with the law laid down by the Apex Court as well as the international legal framework relating to insurance, the doctrine of utmost good faith must pervade the entire range of conduct of both the assured/insured and the insurer all through the life of an insurance contract. For, it can be nobody’s case that while the parties to an insurance contract must be held answerable to this doctrine in making the contract, ie, the insured putting up its proposal for the insurance and the insurer in issuing the policy, they would be exempt from conduct adhering to this doctrine at some later stage of the contract, say, in filing a claim for indemnification of a loss or in examining it.”*

The commission’s ruling that the duty of the utmost good faith continues to apply beyond policy inception, and that it “must pervade the entire range of conduct of both the assured/insured and the insurer all through the life of an insurance contract”, was not qualified by reference to, for example, conduct amounting to fraud, as it is in some other jurisdictions.

The insured had delayed notification of the claim to insurers by three weeks even though the policy required notification within no later than 30 days of the incident giving rise to the claim. The commission had no sympathy for the insured. The commission considered:

*“the normal conduct of the management of a stock broking company, which genuinely concluded, after careful consideration by its Board of Directors, that it had been ‘deceived’ in the course of a set of transactions that it had just carried out in ‘good faith’.”*

It concluded that:

- The insured would “see if the insurance policy that it had availed of covered the peril that it had faced” and, if the insured did not have the policy document or if it was unclear as to what the policy required, then “it would... make urgent enquiries with the NSE or [Oriental] or both regarding the detailed terms and conditions of the policy, the perils covered, the stipulated procedure, required documentation, etc, for filing a sustainable claim”.
- Where dishonesty is involved, the insured “would, simultaneously and quite irrespective of the requirement or otherwise of the insurance policy, also lodge a complaint with the Police”.

The commission also summarised a number of other obligations that are placed on an insured during the claims process:

*“It is settled law... that the burden of proving that the loss was caused by a peril insured against is on the assured [and there is] no need to emphasise that the assured would further have to state the amount of the loss and support it with documentation, evidence, etc, which would enable a Surveyor appointed under Section 64 UM of the Insurance Act, 1938 to assess the loss.”*

## Comment

The commission’s decision has not yet been appealed. However, it is expected that the Supreme Court will be forced to consider the continuing duty of good faith in due course.

For further information on this topic please contact Tuli & Co by telephone

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Originally edited by, and first published on, [www.internationallawoffice.com](http://www.internationallawoffice.com)

## Endnotes

(1) [1766] 97 ER 1162.