

UNSEAWORTHINESS — TURNING A BLIND EYE?

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1 Introduction

The safety of human life, the confidence of cargo interests and parties with financial interests, whether insurers or banks, and the protection of the environment all demand certain standards of construction, maintenance, and operation of shipping. Marine insurance law establishes required standards by affording insurers defences where vessels are unseaworthy.¹ The *Marine Insurance Act 1909* (Cth) ('MIA') states that 'a ship is deemed to be seaworthy when she is reasonably fit in all respects to encounter the ordinary perils of the seas of the adventure insured'.²

Into every voyage policy, whether on cargo, hull, freight or other interest, there is implied a warranty of seaworthiness of the vessel. This is by far the most important of the implied warranties in a contract of marine insurance. Unless the policy otherwise expressly provides, every voyage policy on hull or on goods contains an implied warranty that the ship shall be seaworthy for the voyage when she sails, by which is meant that she shall be in a reasonably fit state as to repairs, equipment, crew, and all other respects to encounter the ordinary perils of the voyage insured at the time of sailing on it.³ There is nothing in the law of marine insurance more important to commerce and the preservation of human life than a strict compliance with this warranty.⁴ An assured, who, by its nature, is privy to the contract of insurance of its ship, is under a duty to disclose any details about its ship which might render her unseaworthy, either prior to the commencement of the voyage or once the voyage commences. If the insured fails to disclose such information which may affect the insurer's intention to insure the ship, it is knowingly 'turning a blind eye' and effectively misleading the insurer.

However, in a time policy, which is commonly commenced during performance of a voyage, the House of Lords⁵ held that it would be wrong to impose an obligation, in the form of an implied warranty, at that time, when it would not exist in a voyage policy; and that, at that time, the assured would generally be unaware of the condition of the vessel.⁶

Minimal compliers are those ship-owners that lack any quality standards of their own, that cut every corner possible to save costs, but still hope to just be able to scrape over the bar of quality standards set by others. Until exposed by post-casualty investigation they may be able, chameleon-like, to take on the colouring of reputable ship-owners.⁷

In 2001 the Australian Law Reform Commission ('ALRC') put forward recommendations for changes to the MIA:⁸

10. The MIA should be amended to repeal the implied warranties of seaworthiness. Obligations of seaworthiness should be dealt with as express terms of the contract.
11. The MIA should be amended so that an insurer is discharged from liability to indemnify the insured for any loss attributable to a breach of an express term of the contract relating to the seaworthiness of a ship where the insured knew or ought to have known of the relevant circumstances and that they rendered the vessel unseaworthy and where the insured failed to take such remedial steps as were reasonably available to it.

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¹ Bennett, H, *The Law of Marine Insurance* (2nd Ed, 2006) 565.

² MIA, s 45(4).

³ Mustill, M, and Gillman, J, (Eds) *Arnould's Law of Marine Insurance and Average* (16th Ed, 1981) 706.

⁴ *Douglas v Scougall* (1816) 4 Dow 276; *Wilkie v Geddes* (1815) 3 Dow 60.

⁵ *Gibson v Small* (1853) 4 HCL 353.

⁶ Rose, F, *Marine Insurance: Law and Practice* (2004) 174.

⁷ Coghlin, T. 'Tightening the Screws on Substandard Shipping' [2005] *Lloyd's Maritime and Commercial Law Quarterly* 316, 317.

⁸ The Australian Law Reform Commission, *Review of the Marine Insurance Act 1909 (Cth)*, Report No 91, reflecting the law as at 28 February 2001 ('ALRC MIA Review').

It is my thesis that the proposed ALRC amendments will not stop the ‘blind-eye’ knowledge of a few ship owners, their agents or tardy flag states from taking out insurance policies, fully aware that their vessels are not fit for the job — express or implied terms regardless.

2 The Marine Insurance Act 1906 (UK) (‘MIA (UK)’ and the MIA

The English law of marine insurance is both a confluence of external sources and a source from which other legal systems have drawn.⁹ The MIA reflects the UK legislation, the MIA (UK).

Over more than 200 years, marine insurers used the same standard form policy to cover all kinds of risks, and its strange and antiquated wording was the subject of litigation in thousands of cases. The resulting body of law was complicated and confusing, and as a result the United Kingdom passed the MIA (UK) in an attempt to introduce sense and order. Australia followed suit three years later with the MIA containing the same provisions as the MIA (UK).¹⁰ While there have since been some minor amendments to the UK legislation, the two Acts remain similar. However, they are not identical.¹¹

Although the MIA was designed to be a code, it did not completely replace the common law. It does, however, regulate all aspects of marine insurance. Section 4 provides that rules of the common law, including merchant law, apply to contracts of marine insurance ‘save in so far as they are inconsistent with the express provisions of the Act’.¹² Section 6(1) provides that the MIA applies to ‘marine insurance other than State marine insurance, and to State marine insurance extending beyond the limits of the State concerned’.

3 The Warranty of Seaworthiness

A warranty is a promise by the assured ‘that some particular thing shall or shall not be done, or that some condition shall be fulfilled, or whereby [the assured] affirms or negatives the existence of a particular set of facts’.¹³ The legal expression ‘warranty’ has, over the years, caused confusion in this area of law.¹⁴ However, the meaning of the word is now, in light of the House of Lords pronouncement in *The Good Luck*,¹⁵ firmly established. A feature which has never been in doubt is that the term ‘warranty’ in insurance is used in a sense wholly different to that commonly understood in general contract law, where a breach afforded the innocent party with only a right to sue in damages with no right of avoidance of the contract. Though the point in dispute was in relation to an express warranty, the judgment is nevertheless applicable to all warranties, express or implied.¹⁶

A warranty may be express or implied. An insurer is never ‘on-risk’¹⁷ once the warranty is breached.¹⁸ Express warranties are conditions, which are ‘included in or written upon the policy or contained in some form of document incorporated by reference into the policy’.¹⁹ Implied warranties are not expressly stated but understood or implied as important terms of the agreement.²⁰

There is a requirement of exact compliance. The general rule is that, once the meaning of a warranty has been ascertained, there must be exact, or literal, compliance with it.²¹ Its true meaning, for a warranty to be given its

⁹ Mustill, J, ‘Fault and Marine Losses’ [1988] *Lloyd’s Maritime and Commercial Law Quarterly* 310, 311.

¹⁰ Davies, M, and Dickey, A, *Shipping Law* (3rd Ed, 2004) 481.

¹¹ The section numbers in the MIA are found by adding six to the section numbers in the MIA (UK).

¹² See also *P Samuel & Co Ltd v Dumas* [1924] AC 431, 451.

¹³ MIA, s 39(1).

¹⁴ Hodges, S, ‘The Quest for Seaworthiness: A Study of US and English Law of Marine Insurance’ in Thomas, D, (Ed) *The Modern Law of Marine Insurance*, Vol 2, (2002) 199, 202. The English courts will not be wedded to nomenclature; if they think that the term ‘warranty’ is misplaced, they may well construe it as something else, for example as a suspensive condition: see *Roberts v Anglo-Saxon Insurance Association Ltd* (1926) 26 Ll L Rep 154. However, it is true to say that so far this flexibility has not been applied to a warranty of seaworthiness and there are particularly good policy reasons why it should not be.

¹⁵ *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd (The Good Luck)* [1988] 1 Lloyd’s Rep 514; rvsd [1990] 1 QB; rvsd [1992] 1 AC 233. Lord Goff stated that fulfillment of the warranty is a condition precedent to the liability of the insurer and, in case of breach, the remedy is automatic discharge of the insurer from its further liabilities.

¹⁶ Hodges, above n 14, 202.

¹⁷ Ie exposed to a chance of loss.

¹⁸ *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd (The Good Luck)* [1988] 1 Lloyd’s Rep 514; rvsd [1990] 1 QB; rvsd [1992] 1 AC 233; cf an exemption clause, which is a term in a contract purporting to exclude or restrict the liability of one of the parties in specified circumstances, and is found more usually in non-marine insurance contracts.

¹⁹ MIA, s 41.

²⁰ Joseph, J, ‘The Implied Warranty of Seaworthiness in Marine Insurance’ [2002] 2 *Malayan Law Journal* 49.

²¹ MIA, s 39(3); *De Hahn v Hartley* (1786) 1 TR 343.

proper effect, as intended by the parties must be determined as a matter of construction.²² Enforcement of the warranty should not be affected by any latitude, equity, construction or excuse, however reasonable it may seem.²³

3.1 What is 'Seaworthiness'?

The statutory definition of seaworthiness can be found in s 45(4), which stipulates: 'A ship is deemed to be seaworthy when she is reasonably fit in all respects to encounter the ordinary perils of the seas of the adventure insured.'²⁴

Seaworthiness can be defined as 'ability to withstand ordinary stress of wind, waves and other weather which the vessel might normally be expected to encounter'.²⁵ In *The Pride of Donegal*²⁶ it was held that unseaworthiness was 'a question of fact in each case'. The Court cited Lord Diplock in *Hong Kong Fir Shipping Co v Kawasaki Kisen Kaisha*, where it was held that not every defect that requires repair makes a vessel unseaworthy. However, in some circumstances a trivial defect, or a defect that the crew can repair, can render it so.²⁷ There is a presumption that a vessel is unseaworthy if 'there is something about it which endangers the safety of the vessel or its cargo or which might cause significant damage to its cargo'.²⁸ Clearly the incompetence of a master (or crew) can constitute unseaworthiness: this was described by Lord Atkinson as a 'disabling lack of skill and disabling lack of knowledge'.²⁹

It is obvious that there can be no fixed and positive standard of seaworthiness, but that it must vary with the varying exigencies of mercantile enterprise. 'The ship', said Lord Cairns, 'should be in a condition to encounter whatever perils of the sea a ship of that kind, and laden in that way, may be fairly expected to encounter' on that voyage.³⁰ The state of repair and equipment that would constitute seaworthiness for one description of voyage might be wholly inadequate for another. Moreover, the extent of the warranty may be different for the same voyage at different seasons, or for the same voyage in the same season, according to whether the ship is in ballast or loaded with one kind of cargo or another.³¹ In respect of all these voyages the standard required might be quite different and quite unpredictable at the moment of inception. This problem, which weighed heavily with several of the Judges who formed the majority in *Gibson v Small*,³² is still alive, as witness the later case of *The Miss Jay Jay*,³³ where the Court had to determine the proximate cause of the loss suffered. This concerned a specialized type of motor yacht, safe enough for calm coastal passages, but not for the type of weather to be anticipated during the cross-Channel voyage on which she was engaged at the time of the casualty. Here, the standard of seaworthiness had to be ascertained by reference to the kind of service on which it could be expected that a boat of this kind would be employed, and this in turn was inferred from the promotional literature issued by the boat-builders.³⁴

The implied warranty of seaworthiness does not cover only the structure of the vessel, but also extends to the smallest details on board, such as the adequacy of stores and accuracy of the charts.³⁵

Seaworthiness can be distinguished from the cargoworthiness of a vessel but, in carriage of goods by sea, the scope of the implied warranty of seaworthiness is wide enough to cover cargoworthiness as well.³⁶ Therefore it is possible for an owner under a voyage policy to be in breach of an implied warranty of seaworthiness if, at the

²² Rose, above n 6, 167.

²³ *Nelson v Salvador* (1829) M & M 309.

²⁴ This definition is derived from the case of *Dixon v Sadler* (1839) 5 M & W 405, affd (1841) 8 M & W 405.

²⁵ *Black's Law Dictionary* (1990).

²⁶ *Project Asia Line Inc of Delaware & United Shipping Services Ltd v Andrew Shone (The Pride of Donegal)* Unreported, Commercial Court (UK), Andrew Smith J, 24 January 2002.

²⁷ [1962] 2 QB 26. In this case Lord Diplock held that the term 'unseaworthiness' has a very broad meaning, ranging from trivial defects like a missing life preserver to a major flaw that would sink the ship.

²⁸ *Athenian Tankers Management SA v Pyrena Shipping Inc (The Arianna)* [1987] 2 Ll L R 376.

²⁹ Clarke, M, 'Good Faith and Good Seamanship' [1998] *Lloyd's Maritime and Commercial Law Quarterly* 465; *Standard Oil Co of New York v Clan Line Steamers Ltd* [1924] AC 100, 120 per Lord Atkinson.

³⁰ *Steel v State Line SS Co* (1877) 3 App Cas 72, 77.

³¹ *Daniels v Harris* (1874) LR 10 CP 1, 6.

³² (1853) 4 HLC 353.

³³ *J J Lloyd Instruments Ltd v Northern Star Ins Co Ltd (The Miss Jay Jay)* [1985] 1 Lloyd's Rep 264. The question of seaworthiness was not raised on appeal ([1987] 1 Lloyd's Rep 32).

³⁴ Mustill, above n 9, 348.

³⁵ Soyer, B, *Warranties in Marine Insurance* (2001) 61.

³⁶ *Reed v Page* [1927] 1 KB 743, 755 per Scrutton, J.

commencement of a voyage, she is not reasonably fit to carry the goods or other moveables to the destination contemplated by the policy.³⁷

The standard of seaworthiness has been gradually raised from a more perfect knowledge of shipbuilding, a more enlarged experience of maritime risks and an increased skill in navigation,³⁸ but the law's intolerance of negligence with respect to the seaworthy condition of vessels insured has failed to discourage negligence with respect to maintenance.³⁹ Unfortunately there are ship owners that will compromise themselves to insurance companies in order to gain insurance for their vessels, and it has been suggested that there may exist unethical insurance companies. This can be due to the arrogance or ignorance of the ship-owner or perhaps of the flag state charged with ensuring seaworthiness of its registered ships so they meet the highest maritime standards.

3.2 Implied v Express Terms in Warranties

The main object of warranties is to establish the existence of circumstances without which the insurer does not undertake to be bound.⁴⁰ Lord Mansfield described it as 'a condition on which the contract is founded'.⁴¹ Section 39(2) of the MIA states that a warranty may be express or implied. Express warranties are actually expressed in the policy, or incorporated therein by reference. They have been made a part of the insurance contract and are known by both parties to the contract. Implied warranties, on the other hand, do not appear in the policy, but are tacitly understood by the parties to be present. They are implied by law from the circumstances in which the bargain was effected. Implied warranties are only found in marine insurance policies and not in policies covering general insurance. The reason for this lies in the rather unique nature of the marine adventure and maritime perils, the fact that neither the assured nor the insurer is in a position to ascertain the condition of the insured vessel during the period when she performs the voyage, and the effect that has on balancing out the conflicting interests of contracting parties.⁴²

An express warranty may require compliance of any kind on the part of the assured. It may be in any form of words from which the intention to warrant is to be inferred.⁴³ It must be included in, or written upon, the policy, or must be contained in some document incorporated by reference⁴⁴ into the policy. The inclusion of an express warranty in a policy does not exclude the implication of warranties unless they are inconsistent with the express warranty.⁴⁵

In time policies there is nothing prohibiting parties from departing from the general rule laid down in s 45(5) of the MIA by incorporating an express warranty of seaworthiness into the policy. Providing that an intention to warrant may be inferred, the express clause, or warranty, may be in any form of words.⁴⁶ The case of *The Lydia Flag*⁴⁷ demonstrates the efficacy of an express warranty of seaworthiness in a time policy on hull. Just as it is possible for the parties to negate the warranty of seaworthiness implied by s 45(5), it is also possible for the parties in a time policy to insert an express warranty of seaworthiness in spite of the statutory declaration that there is no implied warranty of seaworthiness in such a policy.⁴⁸

Two types of warranty are implied by operation of the MIA; one of which is seaworthiness.⁴⁹ The ALRC⁵⁰ recommended abolition of both implied warranties — the intention being to force their inclusion among the express terms of the contract.⁵¹

³⁷ Joseph, above n 20, 49.

³⁸ *Knill v Hooper* (1859) 2 H & N 277.

³⁹ *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd (The Star Sea)* [1995] 1 Lloyd's Rep 651; *rvsd* in part [1997] 1 Lloyd's Rep 360; *affd* [2001] UKHL 1, [2003] 1 AC 469.

⁴⁰ Rose, above n 6, 165.

⁴¹ *Bean v Stupart* (1778) 1 Doug 11, 14.

⁴² Soyer, above n 35, 55.

⁴³ Rose, above n 6, 167.

⁴⁴ For example, the rules of a P&I Club; *Pittegrew v Pringle* (1832) 3 B & Ad 514.

⁴⁵ Davies and Dickey, above n 10, 528; MIA, s 41(3).

⁴⁶ MIA, s 41(1). An express warranty may be in any form of words from which the intention to warrant is to be inferred.

⁴⁷ *Martin Maritime Ltd v Provident Capital Indemnity Ltd* (1982) 2 Lloyd's Rep 652.

⁴⁸ Hodges, above n 14, 213.

⁴⁹ The other being legality.

⁵⁰ ALRC MIA Review, above n 8, Recommendations 10-15, 186-187.

⁵¹ Davies and Dickey, above n 10, 527.

3.3 Warranties in Voyage Policies

In a voyage policy of insurance on hull, the undertaking of seaworthiness is clearly defined as a warranty under marine insurance law. The basis for the implied warranty, as only found in voyage policies, is section 45(1)-(4) of the MIA,⁵² but the classic exposition remains that of Parke B in *Dixon v Sadler*:⁵³

In the case of an insurance for a certain voyage, it is clearly established that there is an implied warranty that the vessel shall be seaworthy, by which it is meant that she shall be in a fit state as to repairs, equipment, and crew, and in all other respects, to encounter the ordinary perils of the voyage insured, at the time of sailing upon it. If the assurance attaches before the voyage commences, it is enough that the state of the ship be commensurate to the then risk; and if the voyage be such as to require a different complement of men, or state of equipment, in different parts of it, as, if it were a voyage down a canal or river, and thence across the open sea, it would be enough if the vessel were, at the commencement of each stage of the navigation, properly manned and equipped for it. But the assured makes no warranty to the underwriters that the vessel shall continue seaworthy, or that the master or crew shall do their duty during the voyage ...

The foundation of the implication of the warranty has been stated as being a desire to ensure that persons with an insurable interest arising out of the adventure do not, by reason of their insurance cover, grow careless of the condition of the vessel and the safety of the master and crew.⁵⁴ The underwriter, when assessing the risk of a particular voyage, must have the right to assume a certain fitness of the vessel to encounter the ordinary hazards of the adventure in order to fix an appropriate premium.⁵⁵ Both the cases and the MIA make it quite clear that in a voyage policy, there is an implied warranty that, at the commencement of the voyage, the ship shall be seaworthy.⁵⁶ The reason for this was the general rule that a loss through decay, waste or inherent vice should not normally fall on the underwriter and the further consideration that the assured could be presumed to be well acquainted with the condition of its ship on sailing.⁵⁷

The implied warranty of seaworthiness is prima facie confined to the commencement of the voyage.⁵⁸ The rule is intended to be disciplinary in nature, being designed to protect the innocent shippers and crew against the consequences of the owners' cynical act of sending the ship on its way in a condition which puts all the interests at risk. Once the ship has sailed in a seaworthy condition the policy will attach, and there is no warranty of continuing seaworthiness that she shall be seaworthy during the course of the voyage.⁵⁹ Supervening unseaworthiness affords the underwriter no defence.⁶⁰ However, where different legs of one voyage embrace different maritime conditions which require the vessel to be seaworthy for all such conditions at the inception of the voyage, the seaworthy doctrine is relaxed by the doctrine of stages,⁶¹ which permits one to distinguish 'definite, well recognized, and distinctly separate stages of the voyage' such as a stay in port, a river voyage, and a sea voyage.⁶² In such a case, the seaworthiness of a vessel will be judged at the commencement of each stage by reference to the circumstances of that stage.⁶³

⁵² Warranty of seaworthiness of ship:

- (1) In a voyage policy there is an implied warranty that at the commencement of the voyage the ship shall be seaworthy for the purpose of the particular adventure insured.
- (2) Where the policy attaches while the ship is in port, there is also an implied warranty that she shall, at the commencement of the risk, be reasonably fit to encounter the ordinary perils of the port.
- (3) Where the policy relates to a voyage which is performed in different stages, during which the ship requires different kinds of or further preparation or equipment, there is an implied warranty that at the commencement of each stage the ship is seaworthy in respect of such preparation or equipment for the purposes of that stage.
- (4) A ship is deemed to be seaworthy when she is reasonably fit in all respects to encounter the ordinary perils of the seas of the adventure insured.

⁵³ (1839) 5 M & W 405, 414.

⁵⁴ *Wilkie v Geddes* (1815) 3 Dow 57.

⁵⁵ Bennett, above n 1, 573.

⁵⁶ MIA, s 45(1).

⁵⁷ Diamond, A, 'The Law of Marine Insurance – Has It a Future?' [1986] *Lloyd's Maritime and Commercial Law Quarterly* 25, 37.

⁵⁸ Bennett, above n 1, 573.

⁵⁹ Hodges, above n 14, 200.

⁶⁰ MIA, s 45(1); *Bermon v Woodbridge* (1781) 2 Dougl 781.

⁶¹ Bennett, above n 1, 573.

⁶² *Quebec Marine Insurance Co v Commercial Bank of Canada* (1870) LR 3 PC 234, 241.

⁶³ MIA, s 45(3).

3.4 Warranties in Time Policies

A radically different approach is taken to seaworthiness in time policies to that taken in voyage policies. Nineteenth-century case law refused to recognise the existence of a seaworthiness warranty in time policies,⁶⁴ but recognised a defence based upon the knowledge of the assured.⁶⁵ This has since codified in the MIA in section 45(5):

In a time policy there is no implied warranty that the ship shall be seaworthy at any stage of the adventure, but where, with the privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness.

Most vessels today are insured under time policies in which context there is no implied warranty of seaworthiness. It has been established since *Gibson v Small*⁶⁶ that there is no implied warranty of seaworthiness in a time policy, except where, with the privity of the assured, the ship is sent to sea in an unseaworthy state, in which case the underwriters are not liable for any loss attributable to such unseaworthiness. As Pollock CB observed in this case, a time policy ‘takes up the vessel in port or at sea, employed or unemployed, earning freight or seeking a cargo, undergoing repairs or encountering a storm’. Therefore, to succeed with a defence under s 45(5) of the MIA, underwriters must show that: (a) the ship was sent to sea in an unseaworthy state with the privity of the assured; and (b) the whole loss or a certain part of it was attributable to such unseaworthiness.⁶⁷

The other reason the majority in *Gibson v Small*⁶⁸ distinguished time from voyage policies is that, whereas the warranty under the voyage policy may serve a disciplinary purpose, it would be unfair to impose a similar burden in the case of a time policy, given that the assured may have no opportunity to verify the condition of its ship on inception.⁶⁹

The weakness, perceived by some in the industry, of the law on seaworthiness under time policies has prompted insurers to address the problem posed by sub-standard shipping by a variety of express contractual terms.⁷⁰

3.5 Distinction Between the Terms ‘Attributable To’ and ‘Proximately Caused By’

Why Sir MacKenzie Chalmers, the drafter of the MIA (UK) in s 39(5)⁷¹ avoided the phrase ‘proximately caused by’ in favour of ‘attributable to’ (the phrase also adopted in the context of the wilful misconduct defence which embraces both intentional and reckless loss or damage)⁷² is of interest. This responds to the last-in-time approach to proximity of causation by permitting the courts to consider an otherwise legally remote, if factually significant, cause. Accordingly, if unseaworthiness necessarily increased the danger which led to the loss, the insurer would have a good defence even if, when the accident overtook the vessel, the accident was the cause of the loss most immediate in time.⁷³ The position is the same today, with the exception that the causation doctrine does not deny unseaworthiness as being a proximate cause.⁷⁴

The fact that s 45(5) of the MIA has chosen to use the term ‘attributable to’ and not ‘proximately caused by’ to describe the causal connection between the unseaworthy defect and the loss, indicates that the expressions must mean different things. An insurer is freed from liability if the loss is ‘attributable to’ such unseaworthiness to which the assured is privy. The reach of the term ‘attributable to’ is far wider. In law ‘proximate cause’ is a precise and technical concept, whereas ‘attributable to’ is a blunt term that any person would take to mean simply ‘caused by’. The term ‘attributable to’ is much wider in scope and will ensnare any loss that is in some way, however minor or remote, brought about, or contributed to, by the unseaworthiness. A loss that is proximately and solely caused by unseaworthiness would simply not be recoverable by reason of the fact that unseaworthiness is not an insured peril. Hodges contends that, in such a case, there is no need to inquire as to

⁶⁴ Thomas, D, (Ed) *The Modern Law of Marine Insurance*, Vol 2 (2002) 190.

⁶⁵ *Gibson v Small* (1853) 4 HLC 353.

⁶⁶ Ibid. The rule was endorsed in *Jenkins v Heycock* (1853) 8 Moo PC 351 and is now embodied in MIA, s 45(5).

⁶⁷ O’May, D, *Marine Insurance: Law and Policy* (1993) 85.

⁶⁸ (1853) 4 HLC 353.

⁶⁹ Mustill, above n 9, 349.

⁷⁰ Such as the due diligence proviso to the Inchmaree Clause, the Institute Hull Clauses, International Hull and Freight Clauses, Classification Societies and International Ship Management Code.

⁷¹ And subsequently to be found in MIA, s 45(5).

⁷² *Morley v United Friendly Insurance Plc* [1993] 1 WLR 996.

⁷³ *Thompson v Hopper* (1856) 6 El & Bl 172; (1858) El Bl & El 1038.

⁷⁴ Bennett, above n 1, 583; *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd (The Star Sea)* [1995] 1 Lloyd’s Rep 651; *rvsd* in part [1997] 1 Lloyd’s Rep 360; *affd* [2001] UKHL 1, [2003] 1 AC 469.

whether the assured is privy to the unseaworthiness.⁷⁵ In *George Cohen, Sons & Co v Standard Marine Insurance Co*⁷⁶ Roche J held that ‘it is enough if a matter of unseaworthiness, being a matter to which the assured is privy, is a cause, or part of the cause, of the loss’. In using ‘attributable to’ as the causal rule, a wider net is cast in s 45(5) of the MIA.

The ARLC MIA Review suggests, when discussing reform of warranties, that the remedies for a breach of an express term relating to the seaworthiness of a ship are essentially the same as for a breach of any other express term, except that the insurer is no longer liable to indemnify the insured for loss which is ‘attributable’ to the breach. The term ‘attributable’ has been used, in this Review, to better reflect the current position and in contrast to the stricter test of proximate causation. Therefore, a causal connection between the unseaworthiness of the ship and the loss that is looser than that required in relation to other express terms will entitle an insurer to relief. However, this applies only if the breach of a term relating to unseaworthiness arises where the insured was aware of the facts constituting the unseaworthiness, was aware that those facts constituted unseaworthiness, and nonetheless failed to take whatever steps might reasonably have been available to it to remedy the position. Thus, insureds who do not know of the unseaworthiness, or were in no position to do anything about it once it arose, will nonetheless be covered. This reflects, with some modification, the current position in relation to time policies.

3.6 Breach of Warranties and Defences

A warranty is a condition precedent to the underwriter’s liability for a loss.⁷⁷ It is described in s 39(3) of the MIA as a condition.⁷⁸ This section provides that breach of a warranty by the assured discharges the insurer from all further liability from the date of the breach. The burden of proof on the issue of unseaworthiness is on the underwriter.⁷⁹ Discharging this burden may, however, be facilitated by a factual inference arising from an unexplained deterioration in the condition of the vessel.⁸⁰ Certainly if a ship is unseaworthy, someone usually will have been at fault. But it is the fact of the unseaworthiness and its connection with the loss that are material, rather than its origin; with the one exception, that contemplated by s 45(5) of the MIA. However, it is always for the assured to prove a prima facie loss by a peril and, until it has done so, no question of seaworthiness arises.

Section 45(5) of the MIA affords insurers a defence in respect of loss attributable to unseaworthiness of the vessel at any time it is sent to sea, provided the assured has knowledge of such unseaworthiness.⁸¹ It makes no difference whether the unseaworthiness was due to the fault of the assured or even whether it was capable of being avoided. Nor does it matter whether the unseaworthiness caused the loss. If the underwriter proves a breach — and it has the burden of doing so⁸² — that is the end of the claim.⁸³ The harsh penalties of non-compliance with warranties are mitigated in most cases by the ‘held covered’⁸⁴ provisions of the policy, but not in the case of unseaworthiness.⁸⁵

Where the unseaworthiness and a covered peril constitute joint causes of the casualty, the insurer will be liable unless they can establish the s 45(5) unseaworthiness defence.⁸⁶

4 Privy of the Assured — Turning a Blind Eye?

The significance of section 45(5) of the MIA in the modern law of marine insurance lies in its requirement of privity. The doctrine of privity provides that a contract cannot confer rights or impose obligations arising under

⁷⁵ Hodges, above n 14, 217.

⁷⁶ (1925) 21 Ll L Rep 30.

⁷⁷ *Christie v Secretan* (1799) 8 TR 192.

⁷⁸ *Overseas Commodities Ltd v Style* [1958] 1 Lloyd’s Rep 546, 558.

⁷⁹ *Parker v Potts* (1815) 3 Dow 23.

⁸⁰ Bennett, above n 1, 584.

⁸¹ Bennett, H, ‘Fortuity in the Law of Marine Insurance’ [2007] *Lloyd’s Maritime and Commercial Law Quarterly* 315, 331; *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd (The Good Luck)* [1988] 1 Lloyd’s Rep 514; *rvsd* [1990] 1 QB; *rvsd* [1992] 1 AC 233.

⁸² *Pickup v Thomas & Mersey Insurance Co Ltd* (1878) 3 QBD 594.

⁸³ MIA, s 93(3).

⁸⁴ Such clauses have most commonly been employed to provide cover after unjustifiable deviation has discharged the insurer from liability. However, their use is not confined to cases of deviation. In current marine insurance contracts such cover is provided for in clauses with more specific titles which combine statements of the effects of non-compliance with the contract with terms for extended cover: Rose, above n 6, 247.

⁸⁵ *Christie v Secretan* (1799) 8 TR 192.

⁸⁶ *J J Lloyd Instruments Ltd v Northern Star Ins Co Ltd (The Miss Jay Jay)* [1985] 1 Lloyd’s Rep 264.

it on any person or agent except the parties to it. Therefore an owner who seeks insurance for its vessel knowing that it is not fit for the voyage for which it is being insured is at odds with the policy it seeks to take out. If the business of international trade by sea is to carry on safely, there have to be some protections against wilful negligence of those closely involved with the use of substandard shipping. Where the ship sails from her home port, or at least from her home country, the assured should be there on the quayside to make sure that all is in order. However, at the time when the warranty of seaworthiness was developed, voyages from distant ports were out of the personal control of the shipowner, who had to trust to agents for whose default it would, if they had been chosen with proper care, bear no moral responsibility. When the shipowner did have the opportunity of putting things right before the start of the voyage, there still might be a mishap without any culpable conduct on its part: and yet, if the ship weighed anchor in an unseaworthy condition, all claims under the policy would fail, since the law implied a warranty of seaworthiness, not an obligation to use due diligence.⁸⁷

What if the assured knew, or shut its eyes to the fact, that the ship was unseaworthy at the inception of the voyage on which she suffered the casualty?⁸⁸

The phrase ‘blind-eye knowledge’ originates in the refusal by Vice-Admiral Nelson at the Battle of Copenhagen to recognise a signal from a superior officer. Nelson had lost an eye in an earlier engagement. Informed that the flagship had signaled to disengage, Nelson raised a telescope to his blind eye and is reported as saying: ‘I have only one eye; I have a right to be blind sometimes’. He continued with the engagement and won a famous victory. A person with blind-eye knowledge has a clear and conscious suspicion of the existence of the relevant circumstances and deliberately refrains from seeking or receiving confirmation that the suspicion is true.⁸⁹

In the foundation case of *Thompson v Hopper*⁹⁰ the ship was outward bound from Sutherland. At the time, she was unseaworthy. She anchored offshore and was caught by a gale. A series of mishaps ensued and the ship ran aground. In the judgment there were three issues to be addressed. The third point to be argued was the question of the assureds’ personal responsibility for the unseaworthy state of the ship. Here the background was the special rule of causation that entitled the Court to look behind the last in the sequence of events leading up to the loss, to enquire whether there was any wrongful act on the part of the insured which set the whole business in motion. If it was found that there was, the claim would fail. The debate, therefore, centred on the plea that the plaintiffs ‘knowingly, willfully and improperly sent the ship to sea in an unseaworthy state’, and on the way in which the trial judge and jury responded to this plea.⁹¹ As a result of this case the rule of law on this point emerged which was subsequently codified by s45 (5): ‘[W]here, with the privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness’.

In *The Gloria*⁹² in 1935, Branson J, although rejecting an argument that privity was confined to actual knowledge of the unseaworthiness, stated his opinion as follows:

I think that if it were shown that an owner had reason to believe that his ship was in fact seaworthy and deliberately refrained from an examination which would have turned his belief into knowledge he might properly be held privy to the unseaworthiness of his ship. But the mere omission to take precautions against the possibility of the ship being unseaworthy cannot, I think, make the owner privy to any unseaworthiness which such precaution might have disclosed.

This approach was subsequently adopted and elaborated upon by the Court of Appeal in 1977 in *The Eurysthenes*.⁹³ Lord Denning, in this English Court of Appeal decision, described ‘privity’ as including: ‘(i) actual knowledge and consent; or (ii) “turning a blind eye” and refraining from investigating a suspicious situation’.⁹⁴

In this case it was emphasised that mere negligence in not knowing the truth was insufficient, but equally that the concept of privity was not to be equated with wilful misconduct. It was held that privity was not to be equated with the expression ‘actual fault or privity’, but that it denotes actual or ‘shut-eye’ knowledge on the part of the ship owner or its ‘alter ego’. Lord Denning, in this judgment, stated:

⁸⁷ Mustill, above n 9, 346.

⁸⁸ Ibid, 352.

⁸⁹ Bennett, above n 1, 578.

⁹⁰ *Thompson v Hopper* (1856) 6 El & Bl 172; (1858) El Bl & El 1038.

⁹¹ Mustill, above n 9, 353.

⁹² *Compania Naviera Vascongada v British & Foreign Mar Ins Co Ltd (The Gloria)* (1935) 54 Ll LR 35; (1936) 54 Ll LR 35.

⁹³ *Compania Maritima San Basilio SA v Oceanus Mutual Underwriting Association (Bermuda) (The Eurysthenes)* [1977] QB 49.

⁹⁴ Ibid.

If a man suspicious of the truth, turns a blind eye to it, and refrains from enquiry — so that he should not know it for certain — then he is to be regarded as knowing the truth. The ‘turning a blind eye’ is far more blameworthy than mere negligence. Negligence in not knowing the truth is not equivalent to knowing of it. The knowledge must also be the knowledge of the ship-owner [assured] personally, or his alter ego, or, in the case of a company, its head man or whoever may be considered their alter ego.

More than mere negligence, it was held, is required, although not necessarily a deliberate course of conduct designed to produce a loss. The assured must know, before his claim is to be defeated under s 45(5) of the MIA, not only the facts constituting the unseaworthiness, but also that those facts rendered the ship unseaworthy.

The judgment of Lord Roskill is perhaps more realistic and acceptable:

If the facts amounting to unseaworthiness are there staring the assured in the face so that he must, had he thought of it, have realized their implications upon the seaworthiness of his ship, he cannot escape from being held privy to that unseaworthiness by blindly or blandly ignoring those facts or by refraining from asking relevant questions regarding them in the hope that by his lack of inquiry he will not know for certain that which any inquiry must have been made plain beyond possible doubt.

The tenor of his speech appears to suggest that an objective test is to be applied, although Lord Hobhouse thought that the phrase ‘had he thought of it’ should not be construed as proposing an objective test.

What exactly is meant by the word ‘privity’ was more recently considered in 2001 in the House of Lords decision of *The Star Sea*.⁹⁵ The *Star Sea* was one of a fleet of over thirty vessels beneficially owned by the assured. The previous year two other vessels in the fleet had been rendered constructive total losses by fires. Defective dampers were a cause in both cases and the Korean crew on one ship had also failed to release the carbon dioxide until too late because of a ‘extraordinary belief’ that it would damage the ship’s engines.⁹⁶ The assureds responded by replacing their Korean crews with Greek officers and Maldivian ratings. They did not, however, ensure that the insured vessel’s safety equipment was thoroughly checked in the light of what was known about the earlier fires, nor did they ensure that the vessel’s new Greek master was properly trained in the operation of the vessel’s carbon dioxide fire-fighting equipment.

In order to understand the rule as laid down in this case, it is important to understand the facts: the parties were in agreement that the *Star Sea* was unseaworthy, and that the assured did not have actual knowledge of her defective condition. In time policies, as discussed earlier, there is no implied warranty of seaworthiness, but in cases where the vessel is sent to sea in an unseaworthy state the insurer is entitled to a defence based upon the knowledge of the assured. It was alleged that the assured had ‘blind eye knowledge’ of the *Star Sea*’s unseaworthiness, as they had not done anything about checking the fire-fighting equipment or competence of her master and crew with regard to fire fighting following the earlier casualties. The vessel was rendered a constructive loss after a fire onboard, but the loss, having been due to fire which was an insured peril, was prima facie recoverable from the insurer. However, the problem was whether the additional damage sustained by her was attributable to unseaworthiness. As the assured company had no actual knowledge of the incompetence of the master, the controversy was whether it had constructive knowledge of his incompetence. According to Lord Hobhouse, whether the suspicion is sufficiently strong may be revealed by asking why the assured failed to seek further information. There is privity if the reason was to avoid suspicion being transformed into certainty. ‘If on the other hand, he did not enquire because he was too lazy or he was grossly negligent or believed that there was nothing wrong, then privity has not been made out.’⁹⁷

This case was complex in that, in order to determine whether the insured was privy to the unseaworthiness, the first step was to identify the person whose knowledge counted.⁹⁸ The *Star Sea* was registered in Cyprus and owned by the claimant, a Cypriot one-ship company, which was managed by an English company. However, activities relating to the ship in Greece were conducted through a Greek company. The insurance policy described the insured as the managing English company. The Court ignored the corporate structure and looked for the natural person who actually ran the affairs in question. The House of Lords held, concurring with the Court of Appeal, that the defence under section 39(5) of the MIA (UK) failed. There was, in the Court’s view, no evidence of privity on the part of those persons, namely the relevant directors, whose state of mind could be attributed to the assured. The managers and the other relevant persons believed that the captain they had

⁹⁵ *Manifest Shipping & Co Ltd v Uni-Polaris Insurance Co Ltd & La Reunion Europeene (The Star Sea)* [2001] UKHL 1; [2003] 1 AC 469.

⁹⁶ *Ibid*, para 28 per Lord Hobhouse.

⁹⁷ *Ibid*, para 25.

⁹⁸ Lord Denning’s alter-ego test, as laid out in *Compania Maritima San Basilio SA v Oceanus Mutual Underwriting Association (Bermuda) (The Eurysthenes)* [1977] QB 49.

appointed to the *Star Sea* was competent and experienced. As the Court of Appeal pointed out, correctly, the judge had not made a finding that any of the relevant individuals had suspected or believed that the *Star Sea* might be unseaworthy because of any deficiency. The evidence did not, on the correct view of the law, sustain the finding of ‘privity’ because, as Leggatt LJ had pointed out, ‘an allegation that they [the relevant directors] ought to have known is not an allegation that they suspected or realised but did not make further enquiries’. A finding of negligence, the House of Lords held, even to a very high degree, did not suffice for a finding of ‘privity’.⁹⁹

The limits of ‘blind-eye knowledge’ are also considered in *The Star Sea*.¹⁰⁰ Lack of knowledge of the master and defective dampers rendered the insured vessel unseaworthy, but the question was whether the assured was privy to that unseaworthiness. At first instance, Tuckey J made no express findings of a deliberate decision to refrain from seeking confirmatory evidence of a subjective belief of unseaworthiness,¹⁰¹ and the higher courts reaffirmed the inadmissibility of inferring subjective knowledge from objective negligence. It was of course possible, as Tuckey J observed,¹⁰² that the assured failed to respond properly through an unwillingness to incur substantial repair costs.¹⁰³ The High Court held, in effect, that the assured did not want to know about her unseaworthiness and therefore had ‘blind eye knowledge’, a finding where one would have thought the existence of suspicion by the assured is implicit. This was overturned by the Court of Appeal and the House of Lords, which found, in effect, that the assured was negligent, in that he failed to take effective steps to ensure that the past failure to use the CO₂ system correctly would not happen again, but that this negligence did not constitute ‘blind eye knowledge’, and thus privity. Lord Clyde held that:¹⁰⁴

Blind-eye knowledge in my judgment requires a conscious reason for blinding the eye. There must be at least a suspicion of truth about which you do not want to know and which you refuse to investigate ... I am not able to spell out of the judgment of Mr Justice Tuckey ... any finding that the assured ... suspected any incompetence on the part of the master of *Star Sea*, let alone any suspicion of his incompetence in the particular respect which mattered. That is sufficient to dispose of this part of the case; but in any event there is no finding of a suspicion on the part of the insured of the defective state of the dampers which contributed to the loss.

All of the judges talked in terms of suspicion as the decisive criterion. But how is this suspicion to be discovered, when ‘even the Devil knows not the thought of man’?¹⁰⁵ Lord Hobhouse believed the test to be subjective and not objective, meaning that the Court is not concerned with the frame of mind of the prudent shipowner, but only with that of the assured. He stated that ‘[t]he test is subjective: Did the assured have direct knowledge of the unseaworthiness or an actual mind which the law treats as equivalent to such knowledge?’¹⁰⁶

The underwriters’ defence in *The Star Sea* failed.

Hodges¹⁰⁷ opines that the matter must surely turn upon whether the suspicion of the assured *ought to have been* aroused, rather than whether his suspicion *is in fact* aroused. If the suspicion of an ordinary prudent shipowner ought to have been aroused, it should not lie with the particular assured to claim, save for very powerful reasons, that his suspicion was not aroused by the facts and circumstances of the case.

On point are the issues arising out of the break-up of the *MV Kirki*. In July 1991 the *MV Kirki*, carrying oil from the Arabian Gulf, suffered loss of the bow section during a storm while sailing off the coast of West Australia, and lost 17,000 tonnes of crude oil to the seas, causing a major pollution hazard to the surrounding environment. The enquiry, carried out by the Australian Transport Safety Bureau after the accident,¹⁰⁸ concluded that structural surveys failed to identify areas of corrosion, and that the condition of two of the ballast tanks, together with a number and nature of deficiencies in safety equipment, indicated that a number of surveys over a period of time, including surveys that were carried out under international safety conventions, were not

⁹⁹ DMC’s casenotes at http://www.onlinedmc.co.uk/the_star_sea.htm.

¹⁰⁰ *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd (The Star Sea)* [1995] 1 Lloyd’s Rep 651; *rvsd* in part [1997] 1 Lloyd’s Rep 360; *affd* [2001] UKHL 1, [2003] 1 AC 469.

¹⁰¹ Something that Lord Scott considered essential for a finding of blind-eye knowledge: para 115.

¹⁰² [1995] 1 Lloyd’s Rep 651, 664.

¹⁰³ Bennett, above n 1, 579.

¹⁰⁴ [2001] 1 Lloyd’s Rep 389, 391.

¹⁰⁵ Hodges, above n 14, 215.

¹⁰⁶ [2001] 1 Lloyd’s Rep 389, 413.

¹⁰⁷ Hodges, above n 14, 215.

¹⁰⁸ Australian Transport Safety Bureau ‘Marine Safety Investigation Report — Final: Loss of Greek registered oil tanker *Kirki* en route to Kwinana’: http://www.atsb.gov.au/publications/investigation_reports/1991/MAIR/mair33.aspx.

performed effectively.¹⁰⁹ Deficiencies in equipment were so numerous that the inspectors could not accept the owner's submission that they all developed over a short period of time. It was concluded that the patching with canvas and the camouflaging of No 7 tank lids was a deliberate attempt to mislead any person undertaking a load line survey. It was not possible for the inspectors to determine how long ago the patching was done, or whether it was done with either the owner's knowledge or those on board the vessel at the time of the incident. Whose eyes were shut?

Nelson knew that if he should look using his good eye, he would see the truth. By not looking and displaying conduct of utter indifference, he could never be accused of harbouring any suspicion or to have knowledge of the truth. In the words of Lord Scott,¹¹⁰ 'if he did not enquire because he was too lazy or he was too grossly negligent or believed that there was nothing wrong, then privity has not been made out'. Heaven help the shipowner who does actually turn its thoughts to the seaworthiness of its vessel. Once it has performed this task, and a problem with his ship arises, it will have been deemed to have turned a blind eye!

5 Other Industry Standards

Shortcomings in the approaches of individual shipowners and managers, together with the practical need of international shipping for harmonised standards, have led to a significant number of safety standards being prescribed by international maritime law, with the primary responsibility for enforcement being allocated to the vessel's flag state.¹¹¹ Ships are subject to a wide variety of surveys and inspections these days, not only by classification societies, but also by P&I clubs, by charterers and by port state control inspectors. Information from all of these sources is now readily available electronically.¹¹² For hull and freight underwriters, therefore, the identity of the owner, managers, and flag state is of critical importance in the assessment of risk. A change of identity represents a material alteration of risk, which may signal a less diligent attitude towards standards. A change of flag, for example, may indicate a desire by the owner to move the vessel to a flag state with a more relaxed approach to compliance.¹¹³

The Institute Hull and Freight Clauses and International Hull Clauses respond to underwriters' concerns and also reflect the current requirements under the International Safety Management (ISM) Code.¹¹⁴ Insurance policies are to be automatically terminated for failure to maintain class or to comply with the ISM Code compliance requirements, with the exception of where loss of a vessel at sea or loss of class results from insured loss or damage. Clause 14.4 of the International Hull Clauses¹¹⁵ also imposes a continuing duty on the assured, owners, and managers 'at the inception of and throughout the period of this insurance and any extension thereof to ... comply with all statutory requirements of the vessel's flag state relating to construction, adaptation, condition, fitness, equipment, operation, and manning of the vessel'.

Underwriters are not liable for any loss, damage, liability, or expense attributable to any breach. However, the deficiencies of a few flag states may undermine the achievements of the majority. Standards can slip.¹¹⁶

Regulation 10 of Chapter 1 of SOLAS 74¹¹⁷ applies to all ships and provides for the surveys of hull, machinery and equipment of cargo ships. It provides specifically that every ship shall undergo an initial survey when built, and special surveys of hull, machinery and equipment at intervals as dictated by the vessel's flag state but not exceeding five years. The SOLAS requirements are similar to those of MARPOL 73/78.¹¹⁸ There is also a requirement under both Conventions that a vessel and its equipment must be maintained in order to conform with the required standards, so that it is fit to proceed to sea without danger to the ship and the persons on board, and so that it does not present an unreasonable threat of harm to the environment.

¹⁰⁹ Significant defects should have been observed by Germanischer Lloyds, the ship's classification society, which was responsible for the issue of statutory certificates on behalf of Greece; inspections by BP Vetting and Myanmar Marine Enterprises; and port state inspections by the Australian Maritime Safety Authority.

¹¹⁰ [2001] 1 Lloyd's Rep 389, 413.

¹¹¹ Rose, above n 6, 591.

¹¹² Coghlin, above n 7, 321.

¹¹³ Bennett, above n 1, 591.

¹¹⁴ The International Management Code for the Safe Operation of Ships and for Pollution Prevention (known as the International Safety Management (ISM) Code) was adopted by the International Maritime Organisation on 4 November 1993, and was incorporated the following year into the Safety of Life at Sea Convention 1974 as Chapter IX.

¹¹⁵ 01/11/2002.

¹¹⁶ Coghlin, above n 7, 320.

¹¹⁷ *International Convention for the Safety of Life at Sea* 1974.

¹¹⁸ *International Convention for the Prevention of Pollution from Ships* 1973, Annex 1, Regulation 4.

The ISM Code sets out core requirements¹¹⁹ on safety management of vessels. The flag state is then responsible for verifying compliance, followed by certifying compliance through the issuing of a Document of Compliance and a Safety Management Certificate. Clause 13 of the International Hull Clauses, which has paramount status, imposes a continuing obligation at the inception of, and throughout the period of, cover that the vessel owners, or parties assuming responsibility from the owners for operating the vessel, must hold a valid Document of Compliance in respect of the insured vessel and the vessel must have a valid Safety Management Certificate.¹²⁰ In the event of breach, cover terminates automatically, subject to deferment of termination if the vessel is at sea at the date of breach until arrival at the next port.¹²¹ Clause 13 does not, however, enquire into the reality behind the documents. The ISM Code, by its very nature, requires production of documents by each and every ship plying the seas, but at no stage does it seek proof that these documents are not a figment of someone's imagination. Where the reality is that the company and shipboard management do not operate the vessel in accordance with an ISM Code-compliant safety management system, the company is operating illegally and underwriters may invoke the warranty of legality under section 47 of the MIA.

Classification societies evolved to meet the need for expert and objective inspection of vessels before international maritime standards came into force. A shipowner will enter its vessel with a classification society to have the society perform a variety of surveys and inspections of the hull and equipment. The information gained will be used by a shipowner as evidence of the good condition of its vessel when seeking insurance cover. The leading classification societies are members of the International Association of Classification Societies (IACS), which publicises new technical specifications for vessels, known as 'Unified Requirements', and oversees member's internal quality management systems and compliance with a code of ethics. A classification society surveyor may, for example, face a conflict of interest between the fundamental duty to act impartially and ethically as required by the IACS, and pressure from a shipowner to waive certain standards or adopt a less rigorous approach in the interests of cost. IACS auditors, independent from member societies, often accompany surveyors to ensure that standards are upheld.¹²² Classification societies are in competition with each other but, importantly, they compete in terms of service and not in terms of being soft on shipowners.¹²³ International conventions impose obligations on flag states, requiring a variety of surveys and inspections of vessels that are, more often than not, delegated to 'recognised organisations'. However, the International Maritime Organisation has adopted resolutions addressing eligibility for status as a recognised organisation that, in reality, only classification societies can meet. So it is these societies that carry out the vast majority of the survey and inspection work required under international maritime law.¹²⁴

Yet another player is the insurance market which is comprised of the P&I clubs. They have always been immensely important in the context of improving standards, mainly as, being mutual associations, the shipowner members exert peer pressure on other members.

The primary responsibility for the operation of well built, equipped, manned, and maintained vessels naturally falls, now and in the future, on the vessel's owners and managers. Over recent years the number of substandard operators in ocean-going trade has been on the decline. Consolation can perhaps be taken with the knowledge that there are not as many rust-buckets on the seas as there were 10 or 20 years ago. Perhaps substandard operators will be squeezed out by hull and P&I underwriters substantially raising their premiums.¹²⁵ However, the industry should not rest on its laurels. The unscrupulous are not going to go away. Whether terms are implied or express, written as terms or otherwise, there will always be the ship-owner with their eyes tightly shut when looking out to sea.

In an ideal world there would be no need for port state control. Flag states would ensure that all their shipping was up to standard. The reality is light years away from that ideal. The reason is simple and obvious. Shipping is a highly competitive trade. It is much cheaper to run a sub-standard ship than one which complies with international standards, let alone standards which the best shipowners adopt. In order to achieve this highly undesirable, but much desired, objective, it is necessary to register vessels with a flag state that either has no

¹¹⁹ In para 1.4.

¹²⁰ International Hull Clauses (01/11/03), cl 13.1.4–13.1.5.

¹²¹ Bennett, above n 1, 595.

¹²² Ibid, 592.

¹²³ Rt Hon Lord Donaldson of Lynton, 'Safer Ships; Cleaner Seas' – Full Speed Ahead or Dead Slow? (1998) *Lloyd's Maritime and Commercial Law Quarterly* 170, 172. The Donald O'May lecture was delivered at the Institute of Maritime Law, Southampton University, on 12 May 1997.

¹²⁴ Bennett, above n 1, 593.

¹²⁵ Coghlin, above n 7, 317.

resources or no will to enforce standards.¹²⁶ Shipowners intent upon maximising profit, or avoiding loss, regardless of the risk to seafarer lives, unfortunately have quite a choice of these flags of convenience.¹²⁷

6 Recommendations of the ALRC

The ALRC has recommended¹²⁸ that the concept of warranties, both express and implied, as used in the law of marine insurance, should be abolished and replaced with a system permitting the subject matter currently covered by them to be the subject of express terms of the contract. Except as provided by the MIA as amended, and subject to the terms of the contract, a breach by the insured of an express term (including those replacing warranties) will entitle insurers to be relieved of liability to indemnify the insured for a loss where the breach is causative of that loss. The ALRC's recommendations on warranties have two purposes. The first is to soften the often harsh and disproportionate impact on an insured of the remedies currently provided by the MIA in favour of insurers. Secondly, and consistently with certain other recommendations, the amendments will force warranties, including implied warranties, onto the face of the contract so that both parties, and the insured in particular, can be under no misapprehension as to the content of the contract, the terms with which they are required to comply, and the ramifications of any breaches. To this end, the ALRC has recommended the abolition of the concept of warranties. However, in place of express warranties, they propose a regime under which the insurer has a number of structured remedies available to it should there be a breach of any express term of the contract by the insured.

The ALRC, when examining its approach to reform of the MIA, feared that radical unilateral changes to Australian marine insurance law may impact adversely on, and isolate, the Australian market by severing the association between Australian and English law and practice, a link shared with marine insurance regimes in other Common Law systems and, in practice if not in law, in many other countries as well. The ALRC's research showed that, although there is a common basis of the law of marine insurance found in many countries, particularly those in the Common Law world, there is certainly no uniformity and it is clear that the international marine insurance market tolerates a wide degree of variation in law and practice. It was decided that reform of the MIA must also take into account possible moves towards harmonisation of international marine insurance regimes, particularly those initiated by the Comité Maritime International (CMI). It was also recognised that the present codification of marine insurance law and practice is long established and well known, at least to those within the insurance industry, contributing to a business environment in which the meaning of contracts is well understood and is backed up by comprehensive case law.¹²⁹

Any significant divergence in Australia from English law and practice may create a real or perceived risk of uncertainty for insureds, and proposals for change to the MIA have to take account of possible flow-on effects on existing clauses and their interpretation. Submissions and consultations confirmed that maintaining a high level of consistency with English law, and international practices based on it, was seen as necessary if insurers are to compete in the international marine insurance market.¹³⁰ The area of warranties is a prime example. There has been significant statutory amendment in New Zealand, and in Canada and the USA the courts have departed substantially from the conventional Anglo-Australian view of warranties and the ability of insureds to remedy breaches prior to a loss occurring.¹³¹

Derrington suggests that the purpose of the recommendations relating to warranties is twofold: first, to ameliorate what has been perceived as the harsh and unfair consequences of the operation of the doctrine of warranties; and secondly, to ensure that provisions in contracts of marine insurance that still might have the effect of operating as a warranty appear clearly in the policy or contract as express terms.¹³² The controversies surrounding warranties are not new. In 1986 Diamond¹³³ suggested that the issue of warranties could well be resolved by a standard clause, such as those then available to industry in Institute Voyage Clauses (Hulls). However, Diamond concluded that these clauses merely add a further element of ambiguity and confusion to the problem, as they do not mention the warranty of seaworthiness at all from beginning to end, whether to set it out, to exclude it, or to modify it. He asked how one could reconcile an absolute promise that the vessel will be seaworthy on sailing with the existence of cover against latent defects and said that the clause failed to do this.

¹²⁶ Commonly known as flags of convenience.

¹²⁷ Rt Hon Lord Donaldson of Lynton, above n 123, 172.

¹²⁸ By the ALRC MIA Review, above n 8.

¹²⁹ Ibid, para 3.3.

¹³⁰ Ibid, para 3.46.

¹³¹ Ibid, para 3.49.

¹³² Derrington, S, 'Marine Insurance Law in Australia: the Australian Law Reform Commission Proposals' [2002] *Lloyd's Maritime and Commercial Law Quarterly* 218.

¹³³ Diamond, above n 57, 37.

He was of the opinion that there was a fundamental lack of communication between the market place and legal practitioners on this issue.

7 Conclusion

Opinions of those in the industry are varied. In recent years the English courts have been critical of the harsh and arbitrary effect of such warranties. As a consequence, the modern tendency is for hull policies to include, in their place, promises that spell out the consequences of breach, make those consequences more appropriate to the breach, and re-establish full cover after the breach is remedied.¹³⁴ It is the opinion of the author that the shonky ship-owner is not going to change, chameleon-like, its skin just to toe the party line of its hull policy.

The large corporate structures that own and manage ships, such as that uncovered in *The Star Sea*, are complex and time-consuming for a court to navigate, and often do not result in a clear-cut answer. The job of classification societies' inspectors is becoming more taxing, due to there being greater numbers of ships to inspect. A half-hour per ship inspection is not unheard of today, but this is not enough time to uncover defects in all aspects of a vessel. It is hardly enough time to walk from bow to stern of the larger bulk carriers. Again, shonky operators prevail.

Hare¹³⁵ characterises these warranties as the 'toxic English warranty', which should be consigned to the obscurity of history where they belong. However, the converse argument is that warranties are the only effective remedy that insurers can use to protect themselves from the shonky operators that exist within the industry. While there is a broad consensus that the provisions of the MIA dealing with warranties are capable of operating in an unfair manner, and that fair outcomes may require insurers to 'do the right thing' even where they may have no legal obligation to honour a claim, there are still some commentators who favour their retention.¹³⁶

The result of the application of the subjective test to determine blind-eye knowledge is to punish the attentive and the vigilant, and to reward the lazy, slovenly and uncaring ship-owner. Hodges suggests that it cannot be right to reward what she calls an obtuse fool, or to burden an insurer with the need to engage in a deep psycho-analysis of its ship-owning clients or their managing directors. The criterion of the notional prudent and honest shipowner is the only sensible and safe basis.¹³⁷

It is my contention that removal of the implied warranty of seaworthiness as advocated by ALRC will still not deter the blind-eyed shipowner. Shonky operators will persist, despite the structured remedies proposed by the ALRC reforms. The solution lies not in the resolutions of international maritime organisations, but in identifying sub-standard operators and enforcing appropriate commercial sanctions that will result in their — hopefully permanent — departure from the maritime industry.

¹³⁴ OECD, *Maritime Transport Committee Report on the Removal of Insurance from Substandard Shipping* (June 2004).

¹³⁵ Hare, J, 'The Omnipotent Warranty: England v The World' Paper presented at the International Marine Insurance Conference, University of Antwerp, November 1999: <http://www.uctshiplaw.com/imicfram.htm>.

¹³⁶ ALRC MIA Review, above n 8, para 9.2.

¹³⁷ Hodges, above n 14, 216.