

EVALUATING THE DUTY OF UTMOST GOOD FAITH IN LIGHT OF THE SAL LAW REFORM COMMITTEE'S "REPORT ON REFORMING INSURANCE LAW IN SINGAPORE"

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I. INTRODUCTION

How do we restore faith in the duty of utmost good faith ("UGF")? As Sir Longmore puts it, "[t]he time has come when...[the insureds'] burden should be a lighter one."¹ Parties to an insurance contract bear a statutory duty of UGF.² In particular, insureds have an independent duty to volunteer information material to the risk to be insured. The pre-contractual duty of disclosure is the chief manifestation of UGF, with the other manifestation being the duty of non-misrepresentation.³

Due to the asymmetry of information between insureds and insurers, UGF sought to prevent insurers from running a risk different from the risk they assumed to run.⁴ Stemming from the mid-18th century, when communication technology was rudimentary, Lord Mansfield presumed that insureds had superior knowledge because insurers lacked the technology to uncover information unique to insureds.⁵ In contrast, today, technological advancements equip insurers with information-gathering technologies,⁶ thereby ensuring that they are no longer stuck with the shorter end of the stick.⁷ For instance, insurers are progressively deploying big data analytics, artificial intelligence and "InsurTech" to augment the underwriting process.⁸ Given the reduced

* LLB, National University of Singapore, Class of 2022. I would like to thank my friends, Mok Yue Min and Jewel Hong, for sharing their thoughts on this paper. All errors and views expressed in this article remain my own. An earlier version of this article was submitted for the NUS Law Module LL4407 Law of Insurance. This article was initially published in July 2022 and uploaded in October 2022.

¹ Andrew Longmore, "An Insurance Contracts Act for a new century?" (2001) 3 LMCLQ 356 at 356 [Andrew Longmore].

² *Marine Insurance Act* (Cap 387, 1994 Rev Ed Sing), s 17 [MLA].

³ *Ibid*, s 20.

⁴ *Carter v Boehm* (1766) 3 Burr 1905.

⁵ Yeo Hwee Ying, "Of Shifting Winds—Insured's Pre-contractual Duty of Good Faith in Singapore" (2018) 30:1 Sing Ac LJ 345 at 346 [Yeo, "Of Shifting Winds"].

⁶ *Ibid*.

⁷ H Y Yeo & Yaru Chia, "The Morphing Duty of Good Faith and Disclosure—Lessons for Singapore" (2018) 5 JBL 425 at 439 [H Y Yeo & Yaru Chia].

⁸ See PricewaterhouseCoopers, "Opportunities await: How InsurTech is reshaping insurance", online: PricewaterhouseCoopers <<https://www.pwc.com/gx/en/industries/financial-services/fintech-survey/>

reliance on insureds' disclosures, the traditional rationale for active insureds and passive insurers⁹ is "no longer convincing nowadays"¹⁰ in the 21st-century market.¹¹ Insurers today are companies with greater capabilities than the consumer-insureds, who are individuals negotiating for personal cover and unlikely to suffer from unusually high risks.¹²

The shifting insurance landscape results in UGF being unfair to consumer-insureds and business-insureds as well, due to its harsh operation of the one-size-fits-all remedy of total avoidance¹³ being ineffective for insureds,¹⁴ its facilitation of passive underwriting,¹⁵ and its low materiality threshold in the "prudent-insurer test."¹⁶ Moreover, while there is a common law¹⁷ and statutory inducement requirement¹⁸ for avoidance, under which insurers bear the burden of proof, insureds must still explain and contextualise the undisclosed facts to dispute inducement even when they lack recollection given the time-lapse.¹⁹ Thus, commentators have opined that reform is "long overdue."²⁰

insurtech.html>. For Singapore, see Immediate.io, "How insurance technology helps disrupting the underwriting process in the insurance sector" (6 July 2020), online: Medium <<https://immediatesg.medium.com/how-insurance-technology-helps-disrupting-the-underwriting-process-in-the-insurance-sector-3baa4145cd5>>.

⁹ Yeo, "Of Shifting Winds", *supra* note 5 at 364.

¹⁰ Yeo Hwee Ying, "Call for Consumer Reform of Insurance Law in Singapore" (2014) 26:1 Sing Ac LJ 215 at 228 [Yeo, "Consumer Reform"].

¹¹ United Kingdom, The Law Commission (Law Com No 319) & The Scottish Law Commission (Scot Law Com No 219), *Consumer Insurance Law: Pre-contract Disclosure and Misrepresentation* (Cm 7758) (2009) at para 2.59 [The Law Commission & The Scottish Law Commission].

¹² See Ireland, Law Reform Commission, *Consultation Paper: Insurance Contracts* (LRC CP 65) (2011) at para 5.91. See also Yeo, "Consumer Reform", *supra* note 10 at 215.

¹³ The remedy of avoidance is also encapsulated in *MLA*, *supra* note 2, s 17.

¹⁴ This is further discussed in Section IV(A).

¹⁵ H Y Yeo & Yaru Chia, *supra* note 7 at 428. This is further discussed in Section II.

¹⁶ This is the first stage of the test established in *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1995] 1 AC 501 (HL) [*Pan Atlantic*], and adopted locally in *Tat Hong Plant Leasing Pte Ltd v Asia Insurance Co Ltd* [1993] 1 SLR(R) 728 (CA) and *UMCI Ltd v Tokio Marine & Fire Insurance Co (Singapore) Pte Ltd* [2008] SGHC 188.

¹⁷ *Pan Atlantic*, *supra* note 16; *Assicurazioni Generali SpA v Arab Insurance Group* [2002] EWCA Civ 1642; *AXA Versicherung AG v Arab Insurance Group* [2017] EWCA Civ 96.

¹⁸ *Consumer Insurance (Disclosure and Representations) Act 2012* (UK), c 6, s 4(1)(b) [CIDRA]; *Insurance Act 2015* (UK), c 4, s 8(1) [LA].

¹⁹ *Synergy Health (UK) Ltd v CGU Insurance plc* [2010] EWHC 2583 (Comm).

²⁰ Yeo, "Of Shifting Winds", *supra* note 5 at 350.

To address this unfairness, the Singapore Academy of Law's Law Reform Committee²¹ recommends reforming the duty of disclosure and non-misrepresentation doctrines. Its key recommendation is to enact a single Insurance Contract Act,²² which adopts the United Kingdom ("UK")'s "bifurcated insurance contract law regime"²³ supplemented with features of Australia's insurance regime.²⁴ Accordingly, while the *SAL Report* lists the Australian features,²⁵ this paper focuses only on key Australian features relevant to the UK regime.

This paper explores the feasibility of the *SAL Report*'s recommendation of adopting the UK's position, namely of: (1) removing the duty of disclosure but retaining the duty not to misrepresent for consumer-insureds;²⁶ (2) replacing the duty of disclosure with the duty of fair presentation for business-insureds;²⁷ and (3) substituting the avoidance remedy with proportionate remedies.²⁸ Each section analyses the effectiveness of the UK's position in mitigating the common law's harshness²⁹ while referencing the Australian regime,³⁰ before evaluating the UK's position in Singapore's context. Finally, this paper concludes by proposing a way forward for Singapore that best strikes a balance between the interest of the insureds and that of the insurers.

II. REMOVE DUTY OF DISCLOSURE BUT RETAIN DUTY NOT TO MISREPRESENT FOR CONSUMER-INSUREDS

The UK's *CIDRA* abolished the duty of disclosure in "one bold legislative stroke,"³¹ adopting an inquiry-based, rather than a disclosure-based, approach to insurance. It imposes on consumers a duty to take reasonable care not to make misrepresentations to insurers,³² which

²¹ Singapore Academy of Law, Law Reform Committee, *Report on Reforming Insurance Law in Singapore*, (Singapore: Singapore Academy of Law, 2020) [*SAL Report*].

²² *Ibid* at para 6.1.

²³ *Ibid* at para 2.72.

²⁴ *Ibid* at para 2.1.

²⁵ *Ibid* at paras 2.36–2.54.

²⁶ See *infra* Section II.

²⁷ See *infra* Section III.

²⁸ See *infra* Section IV.

²⁹ See *infra* Section IV(A).

³⁰ For example, Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Final Report*, by Commissioner Kenneth M Hayne, (2019) [*Australian Report*].

³¹ Yeo, "Of Shifting Winds", *supra* note 5 at 362.

³² *CIDRA*, *supra* note 18, s 2(2).

replaces any existing duty of disclosure or representations owed to the insurers.³³ This transforms the nature of the insurers' role from passive to active. Instead of a pre-contractual obligation to volunteer information, the onus is on insurers to inquire for information from the insureds. There are several justifications for Singapore to adopt a similar change.

A. *Fairness*

Removing the duty of disclosure is fairer to insureds as this eliminates the "evil" of passive underwriting,³⁴ where insurers only inquire "at the claims stage" to avoid liability.³⁵ As insureds are not insurance law experts, they "are unaware that they are under a duty to volunteer information" and "even if they are aware of it, they usually have little idea of what an insurer might think relevant."³⁶ Furthermore, materiality extends to facts beyond circumstances increasing the risk or relevant to the risk occurring. The uncertainty surrounding materiality is more pronounced in a reinsurance context. If insureds are uncertain as to what should be disclosed, this uncertainty snowballs through the reinsurance layers until the disclosure to the final reinsurer down the chain is no longer accurate nor reliable.

Yet, since the disclosure enquiry occurs *ex post facto*, the duty of disclosure "does not recognise the breadth and depth of the gap" between what insureds know and what insurers know.³⁷ By imposing an inquiry-based duty on insurers and abolishing the insureds' duty of disclosure,³⁸ *CIDRA* absolves insureds of their disproportionately onerous duty. In addition, judging materiality through the reasonable insured's perspective, instead of the prudent insurer's perspective, reduces the insureds' guesswork. Contrasted against insureds, insurers "are always better placed than [insureds] to identify the categories of information that they consider to be relevant to their decision of whether to insure a risk."³⁹ Thus, it is fairer to impose an active obligation of inquiry on insurers.

³³ *Ibid*, s 2(4).

³⁴ H Y Yeo & Yaru Chia, *supra* note 7 at 444.

³⁵ The Law Commission & The Scottish Law Commission, *supra* note 11 at paras 5.6, 5.37.

³⁶ *Australian Report*, *supra* note 30 at 298. See also H Y Yeo & Yaru Chia, *supra* note 7 at 440.

³⁷ *Ibid* at 297.

³⁸ UK, House of Lords, *Consumer Insurance (Disclosure and Representations) Bill [HL] Explanatory Notes*, HL Bill 68 (London: The Stationary Office, 2011) at para 10.

³⁹ *Australian Report*, *supra* note 30 at 298.

1. *Proposal Forms and Renewals*

The benefits of transforming insurers into active insurers are more apparent in proposal form and renewal scenarios since the transformation is more consistent with consumer-insureds' expectations and perceptions of fairness. *CIDRA* does not fault insureds when insurers fail to ask the right questions to get relevant information.

Currently, in Singapore, insureds risk breaching their duty of disclosure in proposal form and renewal situations when they are misled by the comprehensive nature of questions posed to them and the impression that honestly answering these questions satisfies their duty.⁴⁰ Notwithstanding the possibility of a waiver via proposal form questions limiting the duty of disclosure,⁴¹ insureds can still bear the duty to disclose facts beyond the scope of questions in the proposal form.⁴² The fact that particular questions relating to the risk are put to the insured “does not per se relieve him of his independent obligation to disclose all material facts.”⁴³ Despite merely being told to complete the form,⁴⁴ there is no presumption that matters not dealt with in the form are immaterial.⁴⁵

Apart from proposal forms, unsuspecting insureds are unaware of their disclosure obligations during policy renewals since they do not perceive renewals as entering into new contracts.⁴⁶ Furthermore, with passive underwriting,⁴⁷ insurers are discouraged from reminding insureds of this duty. Therefore, removing the duty of disclosure ensures fairer proposal form and renewal processes that are consistent with the insureds' expectations, in light of how the mutuality of UGF heavily favours insurers in reality.⁴⁸

⁴⁰ Yeo, “Of Shifting Winds”, *supra* note 5 at 357.

⁴¹ *Doheny v New India Assurance Co Ltd* [2004] EWCA Civ 1705.

⁴² *Schoolman v Hall* [1951] 1 Lloyd's Rep 139 (CA) [*Schoolman*].

⁴³ Evan James MacGillivray *et al*, *MacGillivray on Insurance Law: Relating to all risks other than marine*, 14th ed (London: Sweet & Maxwell, 2018) at para 17-018; *Schoolman*, *supra* note 42.

⁴⁴ *Lambert v Co-operative Insurance Society Ltd* [1975] 2 Lloyd's Rep 485 at 487 (CA); *The Melanie*; *United Oriental Assurance Sdn Bhd, Kuantan v W M Mazgarol* [1984] 1 MLJ 260 (Federal Court, Kuala Lumpur); *March Cabaret Club & Casino Ltd v The London Assurance* [1975] 1 Lloyd's Rep 169 (QB) [*March Cabaret*]. See also Yeo, “Of Shifting Winds”, *supra* note 5 at 357.

⁴⁵ *March Cabaret*, *supra* note 44 at 176.

⁴⁶ Yeo, “Of Shifting Winds”, *supra* note 5 at 357.

⁴⁷ H Y Yeo & Yaru Chia, *supra* note 7 at 443.

⁴⁸ This is further discussed in Section IV(A), which explains how the avoidance remedy usually only benefits insurers.

B. *Relevance*

By imposing active obligations on insurers, *CIDRA* remains consistent with reality.

First, *CIDRA*'s expectation for insurers to inquire is consistent with the reality of insurers being better positioned to identify categories of relevant facts. While s 25(5) of Singapore's *Insurance Act*⁴⁹ aims to protect consumer-insureds by requiring insurers to remind insureds to furnish facts known to themselves, academics have questioned the effectiveness of such warnings.⁵⁰ On the one hand, these warnings are often phrased too generally and, consequently, fail to warn insureds of their duty of disclosure. As a result, they are of anaemic value in clarifying what facts insureds ought to disclose, and their inadequacy was noted extrajudicially as being insufficient "to ensure that [the insureds] would appreciate [their] scope and significance."⁵¹ On the other hand, it is impractical to expect insurers to specify information the prudent insurer would be looking for.⁵² Instead, it is more feasible for insurers to ask about categories of relevant facts.

Second, *CIDRA*'s removal of the duty of disclosure aligns with modern consumer insurance practices. *CIDRA* targets potential pitfalls stemming from the changing face of insurance practice discouraging disclosure.⁵³ For example, with technological advancements, policies are increasingly sold through computerised sales processes, making "it more likely that consumers fail to disclose things which insurers can try to use to avoid liability,"⁵⁴ or via telephone where insureds answer predetermined questions without much opportunity to disclose additional information.⁵⁵ After all, "direct marketing [emphasises] making a sale rather than obtaining the relevant information."⁵⁶ Thus, insurers must ask the questions that best encourage insureds to reveal information relevant to the insurers' decision-making, and Singapore can draw guidance from *CIDRA*'s emphasis on insurers inquiring on relevant information.

⁴⁹ (Cap 142, 2002 Rev Ed Sing).

⁵⁰ H Y Yeo & Yaru Chia, *supra* note 7 at 436.

⁵¹ Michael Kirby, "Australian Insurance Contracts Law: Local Reform with a Global Relevance" (2011) 4 JBL 309 at 321 [Michael Kirby].

⁵² Yeo, "Of Shifting Winds", *supra* note 5 at 351.

⁵³ Yeo, "Consumer Reform", *supra* note 10 at 225.

⁵⁴ UK, House of Commons Library, *Consumer Insurance (Disclosure and Representations) Bill (Bill No 274 [HL] 2010/12): Research Paper 12/06*, by Timothy Edmonds, (20 January 2012) at 2.

⁵⁵ Baris Soyer, "Reforming the Assured's Pre-Contractual Duty of Utmost Good Faith in Insurance Contracts for Consumers: Are the Law Commissions on the Right Track?" (2008) 5 JBL 385 at 392.

⁵⁶ Michael Kirby, *supra* note 51 at 316.

Third, *CIDRA* caters to sophisticated consumers who may pose unusual risks, by considering insureds' unique characteristics,⁵⁷ policy type and clarity of proposal form questions when assessing whether they complied with their duty not to misrepresent.⁵⁸ *CIDRA*'s comprehensiveness prevents sophisticated consumers from exploiting the regime by taking out personal policies catering to the risks of *average* consumers.

C. Public Policy

CIDRA's removal of the insureds' duty of disclosure and its recognition of active insurers alleviate the harshness stemming from the cumulative consequence of the common law duty of disclosure and passive underwriting, namely that of the avoidance remedy being one-sided.⁵⁹ As Australia is also facing similar consequences,⁶⁰ the Australian Parliament has adopted the *Australian Report's* recommendation⁶¹ and followed *CIDRA* in replacing the consumer-insureds' duty of disclosure with a duty to take reasonable care not to make a misrepresentation for *all* consumer-insureds.⁶² This ensures a consistent level of consumer protection across all consumer insurance policies.⁶³ The revised duty of disclosure encourages insurers to pose specific questions.⁶⁴ Going a step further than *CIDRA*, the *ALA* removes the guesswork for insureds in determining which facts are relevant to insurers and discourages insurers from asking open-ended questions permitted under *CIDRA*, where the facts desired remain ambiguous.⁶⁵ Likewise, Singapore can draw inspiration from *CIDRA* and *ALA* to craft an insurance regime sensitive to public policy needs.

⁵⁷ *CIDRA*, *supra* note 18, s 3(4).

⁵⁸ *Ibid*, s 3(2).

⁵⁹ This is discussed in Section IV(A).

⁶⁰ *Australian Report*, *supra* note 30 at 299.

⁶¹ *Ibid*, Recommendation 4.5 at 302.

⁶² *Insurance Contracts Act 1984* (Cth), s 20B [*ALA*]. See also Clyde & Co, "New duty to take reasonable care not to make a misrepresentation to insurer on consumer insureds in Australia" (12 May 2021), online: Clyde & Co <<https://www.clydeco.com/en/insights/2021/05/new-duty-to-take-reasonable-care-not-to-make-a-mis#:~:text=The%20existing%20duty%20of%20disclosure%20imposed%20on%20insureds%20under%20section,so%2C%20on%20what%20terms%3B%20or>>.

⁶³ H Y Yeo & Yaru Chia, *supra* note 7 at 439.

⁶⁴ *ALA*, *supra* note 62, s 20B(3)(c).

⁶⁵ Australia, House of Representatives, *Insurance Contracts Amendment Bill 2013: Explanatory Memorandum*, (2013) at para 1.56.

III. REPLACE DUTY OF DISCLOSURE WITH DUTY OF FAIR PRESENTATION FOR BUSINESS-INSUREDS

Singapore can follow the UK's drive towards active insurers while striking a balance by distinguishing between consumer-insureds and business-insureds. The UK's *LA* has recharacterised the duty of disclosure as the duty of "fair presentation" in the context of businesses.⁶⁶ It requires business-insureds to make a fair presentation of risks that can put insurers on notice to inquire.⁶⁷ Failure to inquire is treated as insurers waiving their right to information.⁶⁸ While the *LA* follows *CIDRA*'s push towards active insurers, it also *recognises* how business-insureds are usually in a stronger position than consumer-insureds. Thus, it strikes a balance between insurers and business-insureds by expecting business-insureds to adopt a more active role relative to consumer-insureds in assisting the insurer by disclosing information.

Such a distinction between consumer-insureds and business-insureds is warranted because most business-insureds have greater information-gathering capabilities than consumer-insureds. This was the UK Law Commission's rationale for ensuring that the law did not "molly-coddle businesses,"⁶⁹ which Yeo Hwee Ying and Yaru Chia cited when arguing for imposing a "fair presentation" duty on business-insureds.⁷⁰ Otherwise, applying *CIDRA* to business-insureds treats them equally with consumers who may have scant insurance knowledge, which will be unduly onerous on insurers. Some business-insureds may face unusual or specialist risks, and insurers cannot lead the disclosure process to the same extent as that for consumer-insureds, given the various risks involved in non-consumer contexts.⁷¹ Instead, business-insureds can more easily provide the information as they are experienced in their respective industries.

⁶⁶ *LA*, *supra* note 18, s 3(1).

⁶⁷ *Ibid*, s 3(4).

⁶⁸ H Y Yeo & Yaru Chia, *supra* note 7 at 429.

⁶⁹ UK, The Law Commission (Consultation Paper No 204) & The Scottish Law Commission (Discussion Paper No 155), *Insurance Contract Law: The Business Insured's Duty of Disclosure and the Law of Warranties*, A Joint Consultation Paper (2015) at para 4.22.

⁷⁰ H Y Yeo & Yaru Chia, *supra* note 7 at 438.

⁷¹ UK, The Law Commission (Law Com No 353) & The Scottish Law Commission (Scot Law Com No 238), *Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims; and Late Payment*, Executive Summary (2014) at para 6.28.

Furthermore, to facilitate business efficacy, the *LA* ensures that business-insureds do not data-dump insurers with unnecessary information.⁷² While business-insureds can justify data-dumping as being overly cautious since they do not know if the insurer “ought to know” or “is presumed to know” particular circumstances,⁷³ insurers can always obtain relevant information through their own means or seek further information from business-insureds.

Taking a leaf out of Australia’s book, Singapore can treat new businesses as consumers,⁷⁴ thereby granting these new business-insureds similar treatment as consumer-insureds. Distinguishing these businesses from established businesses is justified given the new businesses’ lack of experience with the disclosure process. In addition, a lighter duty on new businesses is consistent with Singapore’s bid to establish a start-up ecosystem by encouraging start-ups to take up insurance coverage.⁷⁵ This provides start-ups with insurance coverage benefits, such as risk management.

IV. REPLACE AVOIDANCE REMEDY WITH PROPORTIONATE REMEDIES

A. *Harshness and One-sidedness of Avoidance Remedy*

Both courts and academics recognise the harsh reality of the avoidance remedy’s “draconian” and “extreme” nature,⁷⁶ and it being “wholly one-sided” in favouring insurers.⁷⁷ These drawbacks eventually led to UK’s insurance law reforms.⁷⁸ When insurers breach their duty, avoidance is

⁷² *LA*, *supra* note 18, s 3(b), which requires the business-insured to disclose in a manner reasonably clear and accessible to a prudent insurer.

⁷³ *Ibid*, s 3(5).

⁷⁴ *ALA*, *supra* note 62, s 11AB(2)(a).

⁷⁵ The Business Times, Claudia Chong, “Build it, and they will come: How Singapore forged a startup ecosystem from scratch” (8 May 2021), online: Enterprise Singapore <<https://www.enterprisesg.gov.sg/media-centre/news/2021/may/build-it--and-they-will-come--how-singapore-forged-a-startup-ecosystem-from-scratch>>.

⁷⁶ For instance, *Drake Insurance plc v Provident Insurance plc* [2003] EWCA Civ 1834 at para 92 [*Drake Insurance*]; Andrew Longmore, *supra* note 1 at 366.

⁷⁷ For instance, the House of Lords in *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2003] UKHL 6; Peter MacDonald Eggers, “Remedies for the failure to observe the utmost good faith” (2003) 2 LMCLQ 249 at 273 [P Eggers].

⁷⁸ UK, The Law Commission (Law Com No. 104), *Insurance Law: Non-Disclosure and Breach of Warranty*, Report on a reference under Section 3(1)(e) of the Law Commissions Act 1965 (Cmnd 8064) (London: The Stationary Office, 1980) [The Law Commission (Law Commission No. 104)]; H Y Yeo & Yaru Chia, *supra* note 7.

detrimental to insureds where the risk insured against has already crystallised. While avoidance can benefit insureds if their policies are “about to end or [have] ended without [them] having suffered any [losses] as yet,”⁷⁹ such instances are rare since the policies must not have a surrender value and the insureds must be “aware of the non-disclosure before the occurrence of the contingency against which [they] intended to insure.”⁸⁰ Furthermore, “the hypothesis of continuing dealings with each other will normally postulate some claim having been made by the [insureds] under the policy.”⁸¹

As demonstrated, avoidance predominantly fails to address the prejudice insureds face. It leaves insureds without cover since the non-disclosures usually only surface when insureds have suffered losses and attempt to claim from their policies. They are left unable to benefit from the cover they assumed they were entitled to, even when insurers might only have increased premiums marginally had the facts been disclosed.⁸²

Insureds also lack incentive to litigate because avoidance offers minimal relief relative to the losses sustained from the misfortunes,⁸³ and courts cannot grant damages in lieu of avoidance to insureds due to its inconsistency with UGF's equity juridical basis and the court's refusal to create a novel tort.⁸⁴ Moreover, the bluntness of avoidance reduces insureds' bargaining power in future negotiations for insurance policies because previous cancellations amount to material disclosure.⁸⁵ Long-term health and life policyholders are particularly affected as their premiums typically increase with age. Besides costlier future covers, avoidance leaves them without existing cover when cover is most needed, given the nature of life policies. This led to *CIDRA* restricting grounds for termination⁸⁶ for insurers of contracts that are “wholly or mainly [ones] of life insurance.”⁸⁷ It would be manifestly unfair to deny hapless insureds of any life policy benefit despite having “dutifully paid the premiums over the years in the expectation of cover should

⁷⁹ H Y Yeo, “Of reciprocity and remedies—duty of disclosure in insurance contracts” (1991) 11:2 *Legal Stud* 131 at 153.

⁸⁰ *Banque Keyser Ullmann SA v Skandia (UK) Insurance Co Ltd* [1990] 1 QB 665 at 775 (CA) [*Banque Financiere*].

⁸¹ P Eggers, *supra* note 77 at 273.

⁸² Yeo, “Consumer Reform”, *supra* note 10 at 228.

⁸³ *The Stansfield Group Pte Ltd (trading as Stansfield College) v Consumers' Association of Singapore* [2011] 4 SLR 130 (HC).

⁸⁴ *Banque Financiere*, *supra* note 80.

⁸⁵ The Law Commission (Law Commission No. 104), *supra* note 78. See also Yeo, “Of Shifting Winds”, *supra* note 5 at 358.

⁸⁶ Yeo, “Consumer Reform”, *supra* note 10 at 231.

⁸⁷ See *CIDRA*, *supra* note 18, Schedule 1, para 9(5).

disaster strike,”⁸⁸ especially when they are “unlikely to find alternative life coverage at that stage.”⁸⁹

In addition, when insurers elect to avoid the contracts due to the insureds’ breaches, avoidance is not subject to UGF. As English courts have yet to recognise that the right of avoidance is subject to UGF,⁹⁰ local courts are likely to refuse to do so as well. There is also no general contractual principle requiring rescission to be subject to a UGF requirement. Hence, it will be inconsistent for insurance law to recognise otherwise. On the insureds’ end, avoidance also disregards the blameworthiness of fraudulent insureds.⁹¹ Given that innocent and fraudulent non-disclosures trigger the same avoidance remedy, fraudsters are encouraged to suppress information to obtain better terms. With proportionate remedies based on fault, the remedies doctrine is realigned with the classical notion⁹² and original conception of UGF as articulated by Lord Mansfield—that “it must be a fraudulent concealment of circumstances that will vitiate a policy.”⁹³

B. *Fairness*

Singapore should consider following *CIDRA*’s⁹⁴ and *LA*’s⁹⁵ replacement of the avoidance remedy with proportionate remedies to mitigate the harshness and unfairness of the all-or-nothing avoidance remedy under common law. Proportionate remedies tied to the insureds’ fault level better ensure a mutually equitable result.⁹⁶ They strike a balance between the insureds’ and insurers’ interests. On the one hand, they protect the insurers’ rights to have all necessary information to assess risk and to avoid the contract where there is a deliberate or reckless misrepresentation.⁹⁷ On the other hand, insureds benefit from partial recovery when their breach

⁸⁸ Yeo, “Consumer Reform”, *supra* note 10 at 231.

⁸⁹ See The Law Commission & The Scottish Law Commission, *supra* note 11 at para 6.95.

⁹⁰ *Drake Insurance*, *supra* note 76.

⁹¹ *Container Transport International Inc v Oceanus Mutual Underwriting Association (Bermuda) Ltd* [1984] 1 Lloyd’s Rep 476 (CA). See also Yeo, “Of Shifting Winds”, *supra* note 5 at 358.

⁹² Yeo, “Of Shifting Winds”, *supra* note 5 at 365.

⁹³ James Allan Park, *A System of the Law of Marine Insurances*, 4th ed (Butterworth, 1800) at 195.

⁹⁴ *CIDRA*, *supra* note 18, s 4(1).

⁹⁵ *LA*, *supra* note 18, s 8.

⁹⁶ Yeo, “Of Shifting Winds”, *supra* note 5 at 365.

⁹⁷ *Ibid.*

does not justify a total rejection of the claim,⁹⁸ such as when there is an "unintentional mistake."⁹⁹

Upon a "qualifying breach"¹⁰⁰ or "qualifying misrepresentation"¹⁰¹ occurring, UK courts consider what the insurer would have done had the insured disclosed the risks and the insured's culpability to determine the appropriate remedy. The consideration of the insured's culpability coheres well with the fact that insurance contracts are contracts of UGF. A partial recovery is also an option when total rejection is unwarranted, ensuring insureds remain covered to the extent that they contracted and duly paid for.¹⁰²

Beyond the UK position, Australia also recognises the value of proportionate remedies, since Australia's insurance law regime includes these remedies.¹⁰³ Indeed, the *Australian Report* recognised the pitfalls of an "avoidance" regime that is unfairly weighted in favour of insurers" and proposed reducing the instances where insurers could avoid life insurance policies.¹⁰⁴

C. Public Policy

As proportionate remedies encourage insureds to sue insurers for their breach (in contrast to avoidance),¹⁰⁵ it provides courts with opportunities to examine UGF and develop its jurisprudence. Currently, insurers can rely on the one-sidedness of the avoidance remedy to encourage insureds to settle, thereby preventing favourable judgements from being overturned. However, this also impedes the development of UGF in courts.

⁹⁸ The Law Commission (Law Commission No. 104), *supra* note 78 at 2.

⁹⁹ Yeo, "Of Shifting Winds", *supra* note 5 at 365.

¹⁰⁰ *LA*, *supra* note 18, s 8.

¹⁰¹ *CIDRA*, *supra* note 18, s 4(1).

¹⁰² *Kausar v Eagle Star Insurance Co Ltd* [2000] Lloyd's Rep IR 154 at 157 (CA).

¹⁰³ *ALA*, *supra* note 62, s 28. See Clyde & Co, "Insurance Act 2015: Shaking up a century of insurance law", online: Clyde & Co <https://www.clydeco.com/clyde/media/fileslibrary/Admin/CC010256_Insurance_Act_2015_26-07-16-web.pdf> at 12.

¹⁰⁴ *Australian Report*, *supra* note 30 at 301–302.

¹⁰⁵ See *supra* Section IV(A).

D. *Potential Uncertainty*

Singapore should note the potential uncertainty arising from *CIDRA*'s comprehensiveness in anticipating the insurers' possible reaction if the facts were disclosed.¹⁰⁶ Where insurers would have required additional warranties or a deductible, narrowed the scope of risk through exclusion clauses, or reinsured the risk, uncertainty stems from the lack of guidance to courts in this "question of guesswork" when determining the reduction in amount owed to the insured.¹⁰⁷ There are challenges in proving or challenging the notional premium.¹⁰⁸ Singapore's Parliament is unlikely to take up James Davey's suggestion of an equitable alternative,¹⁰⁹ given the court's lack of equitable jurisdiction to prevent avoidance,¹¹⁰ unlike in Australia.¹¹¹ This demonstrates how equity is restricted in non-disclosure or misrepresentation cases. Instead, a more feasible solution is the implementation of statutory principles to aid courts in determining the appropriate remedy.

V. A PROPOSAL FOR SINGAPORE'S WAY FORWARD

This paper argues that Singapore should adopt a similar position as the UK in light of the benefits gained from the UK's revised position.¹¹²

A bifurcation of business and consumer insurance policies addresses consumer-insureds' concern of passive underwriting and insurers' concern of business-insureds concealing information for lower premiums. For its consumer regime, Singapore should follow *CIDRA*'s "active insurer" requirement¹¹³ and *ALA*'s encouragement for insurers to pose specific questions.¹¹⁴ This prevents insurers from asking open-ended questions to "cover more ground"¹¹⁵ and generating uncertainty for insureds who cannot identify what insurers want to

¹⁰⁶ The Law Commission (Law Commission No. 104), *supra* note 78 at 31.

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid* at 33–34.

¹⁰⁹ See James Davey, "Proportionality, fair presentation of the risk & the hypothetical bargain: The Law Commission's remaking of commercial insurance law" (2019) 3 LMCLQ 359.

¹¹⁰ *Brotherton v Aseguradora Colseguros SA (No 2)* [2003] EWCA Civ 705 at paras 45–48.

¹¹¹ *ALA*, *supra* note 62, s 31.

¹¹² This is discussed in Sections II to IV.

¹¹³ See *supra* Section II.

¹¹⁴ See *supra* Section II(C).

¹¹⁵ The Law Commission & The Scottish Law Commission, *supra* note 11.

know. This denies an escape route for insurers to avoid a claim where insureds have honestly answered the sweeping questions.¹¹⁶ Alternatively, a more conservative approach is to follow Germany in interpreting such questions *contra proferentem* against insurers.¹¹⁷ After all, Singapore courts have used the *contra proferentem* tool where the policy language is ambiguous to develop post-contractual UGF and sidestep the otherwise inflexible remedy of avoidance.¹¹⁸ For the business regime, Singapore should follow Australia's enactment of statutory safeguards for new businesses.¹¹⁹

In addition, Singapore should adopt proportionate remedies for both its consumer and business regimes, given the harshness of the avoidance remedy. Australia has already embraced proportionate remedies and intends to extend them across more insurance contexts.¹²⁰ To cope with the inherent uncertainty associated with proportionate remedies, Parliament could provide non-exhaustive statutory principles to assist courts in crafting the appropriate proportionate remedy. Without such principles, the urge for justice and the "voice of busy common sense" can often descend into merciless justice or merciful but unjust beneficence.¹²¹

When implementing these recommendations, Singapore should codify the proposed reforms, given that the "possibility of relying on soft-law mitigation in Singapore appears slim at best."¹²² Self-regulatory codes or states will never "compensate for a technically harsh regime that is in dire need of reform."¹²³ Singapore's soft law remains "very opaque," with consumers left in the dark on the content and execution of claims-handling guidelines,¹²⁴ and insurers left to be "judges of their own case."¹²⁵ The Life Insurance Association of Singapore's *Statement of Life Insurance Practice* is not legally binding, "has largely been ignored"¹²⁶ and is not publicly available,¹²⁷ while the General Insurance Association of Singapore's *Code* lacks promises like

¹¹⁶ *Manifest Shipping Co Ltd v Uni-Polaris Shipping Co Ltd* [2001] UKHL 1 at para 57.

¹¹⁷ Manfred Wandt, "Insured's pre-contractual duties to inform according to German Law" (Paper delivered at the NUS Colloquium on "Carter v Boehm after 250 years: Insured's and Insurer's Pre-Contractual Duties", 2016) [unpublished] at 7.

¹¹⁸ *Tay Eng Chuan v Ace Insurance Ltd* [2008] 4 SLR(R) 95 (CA).

¹¹⁹ See *supra* Section III.

¹²⁰ See *supra* Section IV(B).

¹²¹ P Eggers, *supra* note 77 at 251.

¹²² Yeo, "Of Shifting Winds", *supra* note 5 at 359.

¹²³ Yeo, "Consumer Reform", *supra* note 10 at 230.

¹²⁴ *Ibid* at 235.

¹²⁵ Yeo, "Of Shifting Winds", *supra* note 5 at 361.

¹²⁶ See Myint Soe, *Life Insurance Law* (Singapore: Singapore College of Insurance, 2006) [Myint Soe].

¹²⁷ See *ibid* at Appendix 1.

those mentioned in the *Statement of Life Insurance Practice*.¹²⁸ Besides soft law, alternative dispute resolution options, such as the Financial Industry Dispute Resolution Centre, prohibit legal representation and publication of decisions.¹²⁹ In contrast, statutes provide greater certainty without the piecemeal development of common law, preclude objections relating to judicial legislation,¹³⁰ and are more expedient given the relatively less litigious nature of Singaporeans and its small population, which presents little opportunity for local courts to evaluate and decide on controversial insurance issues.¹³¹ Furthermore, Sir Longmore has pointed out that “it is cheaper to legislate than to litigate.”¹³²

VI. CONCLUSION

Singapore’s current insurance regime remains outdated and heavily favours insurers due to the one-sidedness of UGF and its associated duties. The consequent avoidance remedy remains unjustly inadequate for insureds.¹³³ For Singapore, reforms are long overdue¹³⁴ to ensure that “this indispensable shield for an insurer” does not become an “engine of oppression against the insured.”¹³⁵ This paper proposes a way forward for Singapore: (1) follow the *SAL Report’s* recommendation of adopting the UK’s position supplemented by Australian features; (2) enact non-exhaustive statutory principles to guide courts in dispensing proportionate remedies; and (3) implement these changes via legislation. Singapore’s insurance regime has long skewed in favour of the insurers, and it is high time for Singapore to join the ranks of the UK’s legatees which have “forged ahead” to rid themselves of outdated doctrines.¹³⁶ Only then can Singapore remain aligned with global standards of best practice¹³⁷ and Asia’s leading insurance hub.¹³⁸

¹²⁸ General Insurance Association of Singapore, *The Singapore General Insurance Code of Practice*, Singapore: General Insurance Association of Singapore, 2016.

¹²⁹ See Christopher Chen, “Measuring the Transplantation of English Commercial Law in a Small Jurisdiction: An Empirical Study of Singapore’s Insurance Judgments between 1965 and 2012” (2014) 49:3 *Tex Int’l LJ* 469.

¹³⁰ Yeo, “Of Shifting Winds”, *supra* note 5 at 361.

¹³¹ *Ibid* at 359.

¹³² Andrew Longmore, *supra* note 1 at 364, citing Sir Mackenzie Chalmers’ when he published the originally proposed Marine Insurance Bill as a digest of the law relating to marine insurance in 1901.

¹³³ P Eggers, *supra* note 77 at 277.

¹³⁴ H Y Yeo & Yaru Chia, *supra* note 7 at 434.

¹³⁵ *Commercial Union Assurance Co Ltd v The Niger Co Ltd* [1922] 13 Lloyd’s List LR 75 at 82 (HL).

¹³⁶ Yeo, “Consumer Reform”, *supra* note 10 at 218. See UK, The Law Commission & The Scottish Law Commission, *Reforming Insurance Law: Is there a Case for Reverse Transportation?* by Robert Merkin, A Report

for the English and Scottish Law Commissions on the Australian Experience of Insurance Law Reform (2006).

¹³⁷ Yeo, "Of Shifting Winds", *supra* note 5 at 366.

¹³⁸ See Ravi Menon, "Singapore as a Global Insurance Marketplace" (Keynote Address delivered at the 12th Singapore International Reinsurance Conference, 6 November 2013) [unpublished, archived at online: Monetary Authority of Singapore <<https://www.mas.gov.sg/news/speeches/2013/singapore-as-a-global-insurance-marketplace>>].