

## *Carter v Boehm*: Facts and context<sup>1</sup>

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### **Abstract**

The decision of the Court of King's Bench in London, given by Lord Mansfield in 1766 in the case of *Carter v Boehm*, famously articulated the principle of *uberrima fides* (utmost good faith), which became the standard benchmark for disclosure in modern insurance contracts. Yet the insurance policy and claim from which this ruling derived was anything other than standard. To assist our understanding of the ruling, and of Mansfield's comments on the scope and nature of liability and disclosure in insurance, this article outlines the historical facts and context surrounding the case and the nature of the risk that was insured.

### **Introduction**

There is a curious irony in the lawsuit *Carter v Boehm*. The final decision of the Court of King's Bench, delivered by Chief Justice Mansfield at Easter 1766, famously articulated the principle of *uberrima fides* (utmost good faith), which became the standard benchmark for disclosure in modern insurance contracts. Yet the insurance policy and claim from which this ruling derived was anything other than standard, and certainly outside the normal scope of anything covered by the British property insurance industry as it had developed by the middle

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of the eighteenth century. It is not the purpose of this article to explore the legal points about *Carter v Boehm* or the ramifications of the decision for modern insurance law.<sup>2</sup> However, to understand the ruling, and Mansfield's comments on the scope and nature of liability and disclosure in insurance contracts, it helps to know the facts and context surrounding the case and the nature of the risk that was insured. These are set out below.

### **The British in West Sumatra**

The policy concerned was taken out with the underwriter Charles Boehm in London on 9 May 1760 by Roger Carter, the Governor of the English East India Company Presidency at Fort Marlborough, near Benkulen on the west coast of Sumatra, to insure £10,000 against the fort being taken by a foreign enemy at any point between 16 October 1759 and 16 October 1760.<sup>3</sup> The fort was indeed attacked and captured by the French in April 1760. Carter's claim was resisted by the underwriter on grounds of non-disclosure and Carter sued in response. The case commenced in 1762 and went through several hearings in Chancery and a Court of Equity, where the facts were investigated and evidence collected by both parties, before it was tried before Mansfield and a special jury of merchants convened at the Guildhall. The jury found for the plaintiff, Boehm moved for a retrial, and the King's Bench decision of 1766 was to reject the appeal for a retrial and to uphold the verdict of the Guildhall jury.

The East India Company (hereafter the Company) had moved to Benkulen in 1685, a few years after the Dutch had ejected them from their original trading base at Banten in Java.

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<sup>2</sup> There is a useful discussion of the latter topic in S Park, 'Origin of the Duty of Disclosure in English Insurance Contracts' (1996) 25 *Anglo-American Law Review* 221.

<sup>3</sup> Benkulen, or 'Bencoolen', was the contemporary English spelling of present day Bengkulu, Indonesia.

Fort Marlborough was constructed in 1714 to replace an earlier Fort York, a few miles away, which had been found to be a poor location for shipping, and less healthy.<sup>4</sup> The Company's sole purpose in setting down in Benkulen was to retain the share of the trade in pepper to Europe that it had previously enjoyed in Banten. Officials recognized that a large proportion of the pepper it had been exporting derived from this area of south-west Sumatra. Treaties were signed with local rulers that granted the Company exclusive rights to operate in their territories, and contracts were drawn up with village chiefs by which their people would plant a given number of pepper vines and sell the pepper exclusively to the Company at stipulated rates.

Until 1760 Fort Marlborough was designated as a sub-presidency, under the authority of the Company's Presidency at Fort St George, Madras. The government at Fort Marlborough consisted of a council of senior servants, chaired by a Deputy Governor, to whom all other out-stations on the west coast, each with their own 'Resident' in charge, were subordinate. At Fort Marlborough the Company maintained up to 50 covenanted employees sent out from England - numbers fluctuated over time - including surgeons, military officers, sailors, paymasters and storekeepers, plus a few hundred European and Malay soldiers, and about 500 slaves.<sup>5</sup>

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<sup>4</sup> W Marsden, *The History of Sumatra*, 3<sup>rd</sup> edition, J. McGreery, London, 1811. Fort Marlborough was finally handed over to the Dutch in 1824 in exchange for Malacca.

<sup>5</sup> A L Reber, *The Private Trade of the British in West Sumatra 1735-1770*, unpublished PhD thesis, University of Hull, 1977, p 6; R J Young, 'The English East India Company and Trade on the West Coast of Sumatra, 1730-1760', unpublished PhD thesis, University of Pennsylvania, 1970, p 99 n 63; J Kathirithamby-Wells, *The British West Sumatran*

The Company found it expensive to maintain this establishment, let alone to expand it. For most of the eighteenth century the cost of the west Sumatran factories greatly exceeded the revenue they generated from the pepper trade. Between 1743 and 1753 an average of 460 tons of pepper was exported each year from Fort Marlborough. Net of expenses, an average annual loss of £3,400 was made on this trade. In the later 1750s, with a rising level of production and a clampdown on corrupt practices, Fort Marlborough managed to yield a modest profit. This encouraged the East India Company to promote it to an independent Presidency in 1760 with its own Governor. Thereafter, however, the balance sheet deteriorated again. With pepper prices falling, salaries and other costs rising, and no great increase in output, average losses reached £25,000 in the 1760s.<sup>6</sup>

The problems faced by the Company in west Sumatra were numerous and persistent. The first related to geography and climate. The coast was remote from established trade routes, especially from the main passage from India to China via the Straits of Malacca. Fort Marlborough was six to eight months by sail to London, two months to Madras. Landing was difficult for large ships due to heavy surf and sandbars. Few ships visited, not more than one or two a year in some periods in the early eighteenth century. On shore, tigers attacked livestock and smallpox outbreaks decimated local populations and forced natives to abandon their pepper gardens for the hills. For these and other reasons, Benkulen remained tiny

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*Presidency 1760-1785: Problems of Early Colonial Enterprise*, Penerbit Universiti Malaya, Kuala Lumpur, 1977, p 130.

<sup>6</sup> Profit/loss figures calculated from data in Kathirithamby-Wells, above n 5, appendix 4.

compared to Batavia, the rival Dutch capital in the East Indies, which had a population of 27,000 as early as 1673.<sup>7</sup>

Second, the English were surrounded by enemies and trading rivals, most notably the Dutch and the Achenese. The story of relations between the Dutch and English East India Companies in Sumatra during the first half of the eighteenth century is of the Dutch attempting to restrict the English to the Benkulen area, while the latter tried to assert their 'right' to trade freely with ports on the west and north coasts of Sumatra where the Dutch did not have a presence, yet claimed a trade monopoly over. In the early 1750s, when the English established new factories at Natal and Tapanuli in the north, deliberately outflanking the main Dutch factory at Padang, relations between the two companies reached a nadir. English private traders were harassed and had their ships and goods seized. In 1755 and 1756 the Dutch tried to blockade Natal and Tapanuli and demanded, in vain, that the English withdraw. The Achenese also laid claim to Natal. The Kingdom of Aceh in the north of Sumatra had been the most powerful state in the region and although it was in decline during the eighteenth century the Aceh rulers continued to consider the districts around the English settlements as tributary territories. Achenese forces attacked Natal in 1755, though they were beaten off after a month of heavy fighting. When French warships began to appear in the area in 1757 after the outbreak of the Seven Years War, it was only the latest in a series of acute military threats to the Company's Sumatra settlements.

Third, Fort Marlborough found it difficult to incentivize local planters to improve their production of pepper. The prices paid were too low, and the discipline and coercion

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<sup>7</sup> L Y Andaya, 'Interactions with the Outside World and Adaptation in Southeast Asian Society 1500-1800', in N Tarling (Ed), *The Cambridge History of Southeast Asia, Volume 1 Part 2 – From c.1500 to c.1800*, Cambridge University Press, Cambridge, 1999, p 27.

imposed on planters by Company servants was excessive.<sup>8</sup> Planters were burdened with debt that they could not pay, and suffered from being forced to receive payment in cloth rather than silver dollars, or from being not paid at all. This led to resistance, boycotts and sometimes rebellion against the English. The latter never fully came to terms with managing local relations in west Sumatra. By viewing native political hierarchies as feudal in nature, Company officials misunderstood the autonomy of local villages and their republican forms of government, and overestimated the power of chiefs to impose the pepper contracts on their communities.<sup>9</sup> The seizure by Company servants of family members of indebted planters as chattel slaves, and a failure to accept the Sumatran custom of debt slavery, further alienated local communities.

Fourth, the Company settlements never succeeded in becoming self-sufficient. They remained heavily dependent on imports from Java or India such as salt, rice, cloth, iron and opium. Despite repeated efforts, reforming deputy governors, including Roger Carter, failed to diversify out of pepper into other tradeable products. Various attempts to attract Chinese immigrants to the coast to engage in sugar cane planting, sugar refining and arrack brewing largely failed. Fort Marlborough and its out-stations to the north and south also suffered from chronic shortages of labour. Efforts to purchase slaves abroad proved largely fruitless.

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<sup>8</sup> J Bastin, *The British in West Sumatra (1685-1825)*, University of Malaya Press, Kuala Lumpur, 1965, p xvi.

<sup>9</sup> Kathirithamby-Wells, above n 5, at pp 31-3; B W Andaya, 'Political Development between the Sixteenth and Eighteenth Centuries', in N Tarling (Ed), *The Cambridge History of Southeast Asia, Volume 1 Part 2 – From c.1500 to c.1800*, Cambridge University Press, Cambridge, 1999, p 58.

Finally, the west Sumatran factories suffered from endemic corruption. Investigators sent out from Madras and London in the 1720s and 1750s found multiple cases of embezzlement by paymasters and storekeepers and sharp practices in dealing. Its servants were found to have overcharged the Company for inferior construction materials. They had sold large quantities of Company goods such as arrack, twine and rice to private persons without accounting for the proceeds in the books. They had engrossed the supply of salt to drive up its price, to the distress of the locals.<sup>10</sup> At the out-stations, various Residents were found to have paid pepper planters less than the price fixed by the Company and to have pocketed the difference. Others imposed dubious fines and charges on natives, or confiscated their clothes and salt.<sup>11</sup>

In 1725 a director of the East India Company complained that ‘the West Coast has been a mere bottomless pit to swallow up all we sent’.<sup>12</sup> Why then did the Company stay there for 139 years? Strategic rather than economic considerations were the key. The base in west Sumatra was regarded initially as a means to prevent the Dutch from engrossing the pepper trade to Europe. By the middle of the eighteenth century, as trade diversified, it helped support British claims to free navigation in the region. The East India Company, therefore, often against its better judgment, was drawn into trying to make Fort Marlborough self-sufficient, while also searching for a more suitable port in south-east Asia to support the Chinese trade. Eventually alternative bases were found, first at Penang in 1786, and finally at Singapore in 1819.

### **Roger Carter and private trading**

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<sup>10</sup> Young, above n 5, at p 24.

<sup>11</sup> For these and other examples, see Reber, above n 5, chapter 1.

<sup>12</sup> Cited by Young, above n 5, at p 24.

The above discussion shows that acute agency problems, poor information flows, chronic corruption, and a sickly, loss making and indebted local economy, formed the backdrop to the risk that was insured by Carter's policy of 1760. The specific object of the insurance was not the Company stock and buildings at Fort Marlborough. Contemporary insurers widely recognized that the East India Company carried its own risks and never insured.<sup>13</sup> Carter's intention was rather to insure his own private stock of goods from their loss through an enemy attack on the Fort.

Low rates of pay and limited promotion prospects at such a remote location encouraged Company servants to engage in their own private or 'country' trade. No great 'nabob' wealth could be accumulated in west Sumatra. Clive returned to England from India in 1760 with an estimated £200,000, but Company men at Fort Marlborough between the 1740s and 1760s struggled to accumulate £10,000, barely enough to generate an income for a gentleman's comfortable lifestyle back home.<sup>14</sup>

Money could be made, not by violating the Company monopoly in pepper, but rather by legally indenting for cloth and opium from Coromandel on Company ships, hawking these along the north coast using one's own vessels in return for camphor, benzoin and gold from the Batak hill tribes, then transferring these back to Company ships for sale in Madras. In 1759 top grade benzoin could be sold in Europe for four times its purchase price in

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<sup>13</sup> C Wright and C E Fayle, *A History of Lloyds*, Macmillan, London, 1928, at p 189; Anon, *Considerations on the Dangers of Altering the Marine Insurance Laws of Great Britain*, W Flint, London, 1811, at p 10. East India Company servants, however, carrying their own goods in the holds of Company ships, often insured at Lloyds.

<sup>14</sup> Reber, above n 5, at pp 9-11.



Sumatra.<sup>15</sup> The business was so lucrative that Company servants at Natal formed their own private trading syndicate, the Natal Concern. The authorities at Fort St George tried to regulate this private trade by imposing new duties on imports into Benkulen, by insisting on the manifesting of private trade goods, and by threatening the suspension or dismissal of any servant defrauding the Company of the required customs, but these measures had only limited effect.<sup>16</sup>

Roger Carter (1723-74), the plaintiff in *Carter v Boehm*, was a founding partner in the Natal Concern, and heavily engaged in the country trade. He was born into a Lincolnshire gentry family. He was appointed Writer to the Company at Benkulen in 1741, and was later Factor, and then Resident at various outposts along the west coast. In 1753 he was appointed Resident at Natal, where he stayed for three years, by which time he was number four in the Fort Marlborough council.<sup>17</sup> Carter and his partners owned their own boats and traded in salt, iron, benzoin, as well as rice, coconuts, oil, slaves, brass wire, opium and gold. In 1759 he even proposed to establish an Opium Society to give Fort Marlborough council members exclusive rights to that trade. Under Carter's scheme, the Company was to supply opium exclusively to the Society in return for a fixed commission on sales of each chest.<sup>18</sup> The plan indicates how interlocked private and Company interests were in the minds of Carter and his fellow officials in Sumatra. Between 1750 and 1760 Carter sent home nearly \$21,000, a large

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<sup>15</sup> Reber, above n 5, at pp 118-20. Benzoin, or 'benjamin', was a tree resin widely used for incense.

<sup>16</sup> Reber, above n 5, at pp 133-4, 141-2.

<sup>17</sup> S Watterson, '*Carter v Boehm* (1766)', in C Mitchell and P Mitchell (Eds), *Landmark Cases in the Law of Contract*, Hart Publishing, Oxford and Portland, 2008, pp 61-2.

<sup>18</sup> Kathirithamby-Wells, above n 5, at pp 144-5.

sum, but by no means the greatest remitted by Company servants in Sumatra.<sup>19</sup> Carter's later depositions in Chancery stated that he had £20,000 of goods at Fort Marlborough at the time of the French attack in 1760, though he had insured only £10,000.<sup>20</sup>

### **The French attack**

Carter left Natal for England in April 1756, apparently to lobby the Company for his own faster promotion either in India or in West Sumatra. He managed to persuade the directors to elevate Fort Marlborough to the status of a Presidency and to appoint himself as its first Governor, although this did not take effect until 1760. With this promotion in his pocket, he returned to Benkulen as temporary Deputy Governor in May 1758.

By then Britain and France had been at war for two years. As noted above, Carter had already recently experienced armed conflict with the Achenese and the maritime blockades by the Dutch of the new factories at Natal and Tapanuli. The presence of the French in the region only added to these threats. In May 1757 two French ships in the Sunda Strait seized East Indiamen coming from China. Dispatches to Fort Marlborough from Madras in the summer of that year showed that the authorities there were aware of the factory's desperate situation as stocks of rice, salt and cloth ran out, and pepper wasted in the Company's godowns. With the arrival of supply ships during the winter of 1757-8, the situation improved, yet shortly after Carter's return, a French fleet under Comte D'Aché captured or sunk two Company ships off the Sumatran coast. About the same time Cuddalore and Fort St David on the Coromandel coast fell to the French. Later that year the French laid siege to Fort St George, cutting off the main supply line to the settlements in west Sumatra. By this stage it

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<sup>19</sup> Reber, above n 5, at pp 91, 135-40. The figure is in Spanish silver dollars, exchanging at about \$4 to £1.

<sup>20</sup> *Carter v Boehm* (1766), 3 Burr 1906 at 1907; All ER Rep 183 at 184.

was clearly understood by the directors in London and by those at Fort Marlborough that its fortifications could not stand up to any sustained assault from sea or land, should the French decide to interest themselves in what would be for them merely a secondary target.

Meanwhile, the Dutch at Batavia prohibited sales of gunpowder to Fort Marlborough and stepped up their harassment of English ships.<sup>21</sup>

In the autumn of 1758 the French fleet under D'Aché left the Coromandel coast to winter at Mauritius and the Cape. A Company agent, Alexander Wynch, happened to be at the Cape when the French ships arrived. In conversation with some of the French, Wynch discovered that they had considered, but then abandoned, a plan to attack Fort Marlborough towards the end of 1758. He sent this information in a letter dated 4 February 1759, which reached Carter at Fort Marlborough on 14 August. A few months before this, a ship had arrived from Batavia carrying news that the siege of Fort St George had been lifted. The same packet of correspondence also contained a third-hand report, passed on by John Herbert, the Company's agent at Batavia, that nine French ships were bound for Fort Marlborough and another two were waiting to intercept English ships in the Sunda Strait. The council at Fort Marlborough, however, discounted these reports as probably inaccurate. By contrast, Wynch's letter, which was later cited in the lawsuit as evidence of a failure to disclose material facts about the risk, sparked Carter and his council into belated action. The garrison commander was ordered to draw up a plan of defence; instructions were drafted about signals for shipping; a survey was ordered of Benkulen entrance to ensure the safety of ships forced closer to shore in an emergency; and a report was ordered of the state of the military supplies and fortifications.<sup>22</sup>

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<sup>21</sup> Young, above n 5, at pp 202-4.

<sup>22</sup> Watterson, above n 17, at pp 65-9.

On 24 September 1759 the Company ship *Pitt* left Benkulen for London with a package of documents from Carter. These included a general letter to the Company's court of directors; copies of correspondence, including Wynch's letter, which were intended for the Company's secret committee of directors only, plus a letter from Carter and another council member Richard Preston, dated 16 September 1759, also intended for the Company's secret committee. The Carter/Preston letter set out the measures just taken at Fort Marlborough, but also made it clear that it could not be defended against the French. In the event of an attack the only option would be to retreat into the interior. Any attempt to hold out in the fort would result in the 'absolute loss of everything'. Also in the package was a private letter, dated 22 September 1759, from Roger Carter to his brother George in London asking the latter to take out an insurance policy on his behalf against the risk of a European enemy attack on Fort Marlborough. The *Pitt* arrived at Kinsale, Ireland, on 23 February 1760. The Company documents were forwarded by express to London and read by the court at their meeting on 4 March 1760. Carter's private instruction, however, did not reach his brother until the *Pitt* docked in the Thames in the middle of April.<sup>23</sup> By this time, the event that would trigger the insurance claim, the fall of Fort Marlborough, had already occurred.

It was not the main French fleet that eventually attacked the factories in west Sumatra, but a privateering expedition sailing from Mauritius of two warships and some 900 men, commanded by a career soldier, Comte D'Estaing. After capturing prizes in the Persian Gulf and sacking the Company factory at Gambroon, on the Straits of Hormuz, D'Estaing's ships appeared off the west coast of Sumatra in February 1760.<sup>24</sup> After blockading Natal bay for a month, the French moved in to capture that port and Tapanuli early in March. Company

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<sup>23</sup> Watterson, above n 17, at pp 70-2.

<sup>24</sup> Watterson, above n 17, at pp 72-4.

property was burnt - there were few stores left to plunder - and both settlements were then abandoned. Early on the morning of 1<sup>st</sup> April the French ships arrived off Fort Marlborough. Carter dispatched the Company's cash and treasure to the south, to be loaded on ships at Batavia, and then gave the order to evacuate, fleeing with the other Europeans inland. The Company's Malay troops plundered the storehouses and attacked the English as they fled. On 3<sup>rd</sup> April the French landed and took control, while the Malays retreated. After several days of negotiation, Carter and his fellow Company servants surrendered, and were allowed to leave for India via Batavia. The French occupiers soon suffered high attrition rates from disease, summer rains and a lack of provisions, and they prepared to abandon west Sumatra. Pepper gardens were raided, godowns emptied, sugar cane fields destroyed and several hundred Chinese and a few slaves were interned, ready for shipping out to Mauritius. On 17 March 1761 the last of the French troops blew up Fort Marlborough and left. After so much destruction, the Company faced a huge cost to reestablish Fort Marlborough, and it waited over a year before sending Carter back there as the Governor of a new Presidency. In the interim period private traders reappeared on the coast to trade for pepper in the absence of the Company, and this helped encouraged locals to resume planting in anticipation of the Company's return.<sup>25</sup>

### **Carter's insurance**

As noted above, Carter's policy was not taken out by his brother in London until 9 May 1760, over a month after Fort Marlborough had fallen. The underwriter, Charles Boehm, was well known in the City as a merchant and director of the Bank of England and the London

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<sup>25</sup> Young, above n 5, at pp 235-55; Kathirithamby-Wells, above n 5, at pp 47-55.

Assurance Corporation.<sup>26</sup> The insurance that he wrote was highly unusual. It was most probably regarded by him as an opportunity for a little private speculation. Mansfield himself stated that ‘the case so seldom happens (I never saw one before)’.<sup>27</sup> The policy itself has not survived but scholars have been able to infer its terms from the description of it in the case reports of *Carter v Boehm*.<sup>28</sup> It was an insurance against the occurrence of an event - an enemy attack. It was not an indemnity for any damage resulting from this event to specific property, stock or building. The premium of £400, at the rate of 80s%, was greater than Carter’s annual salary. There is evidence in the instruction to his brother that in the event of a war with the Dutch he was anxious to have the insurance at any rate.<sup>29</sup> It was also expensive by comparison with property insurance in England at the time. Policies on highly inflammable industrial risks in London such as sugar refineries, for instance, were charged no more than half the premium rate that Carter paid.<sup>30</sup>

Carter’s policy also contained the terms ‘interest or no interest’, ‘free from average’, and ‘without benefit of salvage’.<sup>31</sup> These revealed to everyone concerned, including Mansfield, that it was a wagering policy. By contrast, average and salvage clauses were

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<sup>26</sup> Cf. Boehm’s entry in *Lex Mercatoria Rediviva: or the Merchant’s Directory*, W Beawes, London, 1752.

<sup>27</sup> *Carter*, 3 Burr 1906 at 1912; All ER Rep 183 at 186. See also Watterson, above n 18, at p 114 n 270.

<sup>28</sup> Watterson, above n 17, at pp 77-9.

<sup>29</sup> Watterson, above n 17, at pp 75.

<sup>30</sup> R Pearson, *Insuring the Industrial Revolution: Fire Insurance in Great Britain 1700-1850*, Ashgate, Aldershot, 2004, p 76.

<sup>31</sup> Watterson, above n 17, at p 77.

normal features of eighteenth century fire insurance contracts. The policies issued by the six property insurance companies operating in London at the time all provided for the deduction for salvage during loss adjustment. Changes of circumstance that affected the risk, such as the introduction of new manufacturing processes into a workshop or different goods into a store, had to be endorsed on the back of the policy. Moreover, the property insured was identified and specified, often by inspection, prior to the insurance, and again during loss adjustment.<sup>32</sup> None of these elements formed part of the Carter insurance.

Nor did Carter's policy bear any resemblance to a standard marine insurance of the time, where 'interest or no interest' policies had been banned by act of parliament in 1746.<sup>33</sup> Parliament had been responding to concerns about the need to control fraud in marine insurance, which it was believed was damaging trade. There was a widespread belief, supported by the courts, that only those who actually sustained the loss should benefit from the insurance of that loss. For the same anti-gambling reasons, the act also banned marine reinsurance, unless the insurer became bankrupt or died.<sup>34</sup>

It was a wager policy with a difference, however, as it did contain an insurable interest, namely Carter's private stock. In his detailed study of the case, Watterson speculates, surely correctly, that the reason that Carter's policy took this wagering form was that he would have found it difficult to prove, to the satisfaction of any underwriter and/or court in

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<sup>32</sup> Pearson, above n 30, chapter 8.

<sup>33</sup> 19 Geo II c.37 made invalid such policies on British ships and cargoes, though not policies on privateers and foreign ships that contained these terms.

<sup>34</sup> H E Raynes, *A History of British Insurance*, 2<sup>nd</sup> edition, Pitman, London, 1964, p 162; D Jenkins and T Yoneyama (Eds), *History of Insurance – Volume 7 – Marine*, Pickering and Chatto, London, 2000, p 199.

London, that he owned stock of a particular value in Fort Marlborough at the time of an attack, still less the extent of its loss or damage.<sup>35</sup> Another reason may have simply been that Carter would have found it impossible to persuade an underwriter or insurance company in London to issue him a policy on his stock at that remote location, still less one containing any of the standard property insurance conditions. In any case before the establishment of the Phoenix Fire Office by London sugar refiners in 1782, no British fire insurance company even attempted to insure property outside the British Isles.

### **The dispute over Carter's claim and Mansfield's judgment**

The underwriter Boehm resisted the claim on the grounds that Carter had concealed circumstances about the risk that he should have disclosed, namely the weakness of the fortifications and the probability of its being attacked by the French. Counsel for Boehm argued 'that the insurer has a right to know as much as the insured himself knows.'<sup>36</sup> The broker who handled the policy, upon cross examination said that 'he did not believe that 'the insurer would have meddled with the insurance' if he had seen two letters sent by Carter via the *Pitt*, one to his brother and the other to the Company, describing the weakness of Fort Marlborough in 1759. 'Whatever really increases the risque ought to be disclosed', he asserted. 'It cannot be supposed that the insurer would have insured so low as £4 % if he had known of these letters'.<sup>37</sup>

Carter provided depositions in Chancery to show that there was no concealment with intention to defraud. His counsel argued that all the circumstances were 'universally known

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<sup>35</sup> Watterson, above n 17, at pp 78.

<sup>36</sup> *Carter*, 3 Burr 1906 at 1907.

<sup>37</sup> *Carter*, 3 Burr 1906 at 1908. Cf. All ER Rep 183 at 187, which has the broker simply stating that the policy would not have been written.



to every merchant upon the exchange of London' and that the insured is only obliged to disclose facts, 'not ideas or speculations which he may entertain, upon such facts'.<sup>38</sup>

Mansfield came down unanimously on the side of the insured and, drawing on the common law concept of *bona fides*, systematically dismissed all of Boehm's arguments. 'Insurance is a contract upon speculation', characterized by an asymmetry of information. 'Good faith forbids either party by concealing what he privately knows, to draw the other into a bargain, from his ignorance of that fact, and his believing the contrary'.<sup>39</sup> However, either party to a contract 'may be innocently silent'. The insured need not mention what the underwriter knows or ought to know, and the latter cannot insist that a policy is void because the insured did not tell him what he knew already or what he reasonably ought to have found out by inquiry. This included 'general topics of speculation, including every cause which may occasion natural perils, the difficulty of a voyage, the kind of seasons, political perils'.<sup>40</sup>

Mansfield accepted that Carter had proved that Fort Marlborough was no military fortress but a trading factory, and that the general state of its fortifications was 'well known by most people conversant with Indian affairs', and 'could not be kept secret or concealed from persons who should endeavor by proper inquiry to inform themselves'.<sup>41</sup> The underwriter in London in May 1760 'could judge much better of the probability of the contingency' than Carter had been able to at Fort Marlborough in September 1759. The former would, or should, have known the state of the war in Europe, what naval forces had been sent by the French and the English to the East Indies, and the probability of a Dutch

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<sup>38</sup> *Carter*, 3 Burr 1906 at 1907.

<sup>39</sup> *Carter*, 3 Burr 1906 at 1909-10; All ER Rep 183 at 184.

<sup>40</sup> *Carter*, 3 Burr 1906 at 1910; All ER Rep 183 at 185.

<sup>41</sup> *Carter*, 3 Burr 1906 at 1912-13; All ER Rep 183 at 187.

attack.<sup>42</sup> There was no knowledge of any plan to attack Fort Marlborough existing in September 1759, and therefore no concealment by Carter - the attack by D'Estaing was opportunistic and without premeditation. Boehm's other charges of failure to disclose were also dismissed. Carter's fear that the French fleet might attack West Sumatra if unable to relieve the French land forces on the Coromandel was a mere speculation, and not a fact material to the insured risk, as was his reference to the likelihood of an attack by the Dutch. The failure to disclose the intelligence contained in Wynch's letter - as it related to a French plan abandoned in 1758 - was also not material to the risk of an attack during the period insured.<sup>43</sup> Mansfield was also of the view that the opinion of the broker ought to be disregarded as mere 'opinion after an event', not evidence. There was 'no imputation upon the governor as to any intention of fraud'. Indeed, Carter's conduct down to the appearance of D'Estaing's ships off Natal in February 1760 'shewed that he thought the danger [of an attack] very improbable'.<sup>44</sup>

Finally, Mansfield asserted that if Boehm's objections to Carter's claim were to prevail, the disclosure rule, which was designed to prevent fraud and encourage good faith, could be turned perversely into an instrument of fraud in the hands of the insurer. The underwriter, knowing that Carter was well acquainted with the state of Fort Marlborough, knowing that he apprehended a danger, had signed the policy without question or inquiry, and then had tried to use the objection that he was not told about the danger to avoid liability. If Boehm's objections were allowed, this would be tantamount to the insurer having drawn

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<sup>42</sup> *Carter*, 3 Burr 1906 at 1914-15; All ER Rep 183 at 187.

<sup>43</sup> *Carter*, 3 Burr 1906 at 1916-18; All ER Rep 183 at 188.

<sup>44</sup> *Carter*, 3 Burr 1906 at 1918; All ER Rep 183 at 189.

Carter ‘into a false confidence that, if the worst should happen, he had provided against total ruin, knowing at the same time that the indemnity to which the governor trusted was void’.<sup>45</sup>

## **Conclusion**

What do the facts and context say about Mansfield’s ruling? It may be thought that Mansfield did not given enough weight to the significance of the information received at Fort Marlborough in 1759 about French fleet movements, not just that contained in Wynch’s letter, but also the intelligence received from John Herbert in Batavia a few months earlier, and their direct impact on Carter’s resolution to take belated measures to improve the defenses, while at the same time taking out an insurance to protect the value of his own private goods. Plenty evidence, however, points to the economic frailty and military weakness of the East India Company’s west Sumatran settlements being well known about in London and Madras several years before Carter’s policy was issued. As we have seen, the Dutch and the Achenese had already posed a real and persistent threat to these settlements in the 1750s. Moreover, the major agency problems of corruption, indiscipline and poor administration, that had bedeviled the Company’s operations at Benkulen for decades, and had caused several teams of investigators to be sent out there, would also have been well known in the City and presumably would have given any prudent underwriter considering an insurance there cause for thought.

It seems very likely that Mansfield’s ruling was intended to promote modern underwriting practices, as they were being developed by the London insurance companies of the period – by compelling private underwriters, even those writing wagering policies, to inform themselves more fully about the nature of the risk and not to defraud their policyholders by attempting *post hoc* to use the non-disclosure rule to avoid liability. At the

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<sup>45</sup> *Carter*, 3 Burr 1906 at 1918-19; All ER Rep 183 at 189.

same time, the ruling was intended to regulate and specify more precisely the contractual obligations of both insurers and insured, and to strike an equitable balance between the latter's obligation to disclose and the latter's obligation to inquire. Despite the many legal and technical debates about the definition and application of *uberrima fides* since 1766, the durable influence of Mansfield's decision suggest that, at least in part, he succeeded.