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An Appraisal on the Effect of the Principle of Utmost Good Faith in Insurance Contracts: A Clear Contrast between Non Disclosure and Misrepresentation

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ABSTRACT:
This article has attempted to evaluate the principle of Utmost good faith and its effect in Insurance contract, by tracing the historical background of insurance. It asks the question why contracts are breached as a result of non disclosure of important facts, when parties to an insurance contract are expected come in good faith as it of the most benefit to them. The objective of this research work is to analyze critically the principle of Utmost Good Faith, its applicability and the effect of the principle of Utmost Good Faith to Insurance Contracts. It also seeks to determine whether there is fairness in the operation of the principle or not. The major significance of utmost good faith is solely focused on the principle of Caveat Emptor, overview of the principle of utmost good faith, the meaning of materials facts and the duration of the disclosure under the policy of insurance and remedies for breach of utmost good faith. This article seeks to tackle the issue of the breach of the principle of Utmost Good Faith, when it occurs as a result of misrepresentation and when it is brought about by non disclosure. The principal source of the research of this paper is the doctrinal method of research. This article utilized a lot of primary and secondary sources of data which include case laws, statues, textbooks and journals on insurance contracts, which would be cited in the bulk of this work. This article is concluded by looking at the striking contrast between misrepresentation and non disclosure, its general impact in insurance contracts and recommendation proffered on the fairness and impartiality on the operation of the principle of utmost good faith and the general expectation from insurance contracts.

Key Words: Utmost Good Faith, Insurance, Caveat Emptor, Disclosure and Non Disclosure of Material Facts, Misrepresentation

1. Introduction

The parties to an insurance contract must be honest with each other and must not hide any information relevant to the contract from each other. This is known as the principle of Utmost Good Faith, which is a minimum standard, legally obliging all parties entering a contract to act honestly and not mislead or withhold critical information from one another. Insurance is often arranged through a broker or an intermediary. If the broker fails to pass on the information to the insurer, or passes it on incorrectly, then the insurer will frequently have the right to avoid the policy even though the policyholder may not have been at fault. It is important to the insurer that

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they have a full and accurate picture of the risk that is proposed to them. This principle may result to misrepresentation or Non disclosure. Misrepresentation means where the information the consumer provided to the insurer was incomplete or misleading, either carelessly, deliberately or recklessly. Non Disclosure means where the consumer left out relevant information they were asked about when they took out their policy. According to the Insurance Contracts Act 1984 (the "ICA")[1], Non–disclosure is failing to tell the insurer information the insured knows that they are legally obliged to disclose in connection with an application for cover. Misrepresentation is actually telling the insurer something that is in fact false. Often they go together. If the insured supplies an incorrect answer to a question, they will generally also be failing in their legal duty to disclose the correct answer as well. Both non-disclosure and misrepresentation can be fraudulent or innocent. There are sections of the ICA[2] that describe what an applicant for insurance must disclose when they apply for cover or renew a policy and set out what the legal duty of disclosure is[3]. Where the failure to comply with the duty of disclosure is coupled with a deceitful state of mind, in other words, the information was withheld on purpose, or the insured acted recklessly and didn't care if the information they provided was true or not, the non-disclosure is fraudulent.

2.0 **Definition Of The Principle Of Utmost Good Faith**

The principle of Utmost Good Faith is defined in Collins English Dictionary as "a principle used in insurance contracts, legally obliging all parties to reveal to the others any information that might influence the others' decision to enter into the contract". Insurance contracts are agreements made in the utmost good faith, which implies a standard of honesty greater than usually required in most ordinary commercial contracts. The policy is voidable if utmost good faith is not observed by both parties. Utmost good faith is a principle used in insurance contracts that legally obliges all parties to reveal to the others all important information.

A minimum standard that requires both the buyer and the seller in a transaction to act honestly toward each other and to not mislead or withhold critical information from one another. This doctrine applies to many financial transactions such as financial markets, real estate, and all transactions in insurance. Its also known in its latin form as "uberrimaefidei". This doctrine also requires that the party seeking insurance discloses all relevant personal information.

2.1 Origin Of Utmost Good Faith

The common law doctrine of "good faith" in insurance contracts was originated in the 18th Century. Lord Mansfield is credited with first articulating this concept in the case of **Carter v Boehm**[4]states that

"*The general position was that the special facts upon which the contingent chance is to be computed, like most commonly in the knowledge of the insured only, the underwriter trusts to his*

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[1] Section 21 of the Insurance Contracts Act 1984
[2] Insurance Contract Act of 1984
[3] Section 21(a); Section 21(b) and Section 26 of the Insurance Contract Act of 1984
[4] (1766) 3 Burr 1905, 97 ER 1162; (1766) 1 Black W 593,96 ER 342.

representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge, to mislead the underwriter into a belief that the circumstance does not exist, and to induce him to estimate the risk, as if it did not exist." The keeping back of such circumstance is a fraud, and therefore, the insurance policy is void on the ground of the fraud and the principle of utmost good faith was introduced.

From the date of the origins of the doctrine, Lord Mansfield was careful to explain that the duty of good faith was reciprocal. He opined that an insurance policy would equally be void, against the underwriter, if he concealed the fact that he insured a ship on her voyage, which he privately knew to have arrived. In such a case, an action would lie by the insured, to recover the premium. Lord Mansfield went as far as to state that the governing principle of "good faith" is applicable to "all contracts and dealings"[5].

2.2 English Court on Doctrine of Good Faith

Utmost good faith was not defined exhaustively, "it is enough that much more than an absence of bad faith is required of both parties to all contracts of insurance". It is nevertheless clear however, that the court was not prepared to countenance arguments that there were shades of Utmost good faith, the duty is "not only to abstain from bad faith but to observe in a positive sense the utmost good faith[6]". This appeared to 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. Even so, during the 18th Century, the English Court placed limitations on the duty of disclosure. Lord Mansfield expressly pointed out that the insured need not mention what the underwriter knows or ought to know or, what he takes upon himself the knowledge of or, what he waives being informed of. Neither need the underwriter be told of what lessens the risk agreed and understood to be run by the express terms of the policy nor, to be told general topics of speculation[7]; for example, the underwriter is bound to know every cause which may occasion natural perils such as the difficulty of the voyage, the types of weather; the probability of lightening, hurricanes, earthquakes which may occur or, political perils which may arise.

In consequence, it was clear that although the insured is under a duty to disclose material facts to the insurer, he need not disclose facts which the insurer knows or is deemed to know. This seems to be fair enough. From its earliest days, the duty of good faith in making insurance contracts was a mutual obligation. It contemplated an active process of disclosure and questioning between the insured and the insurer but, within sensible boundaries. With the codification of the Marine Insurance Act 1906, the principle found expression in Sec 17 to 20: s 17 presents the general duty to observe the utmost good faith, with the following sections introducing particular aspects of the doctrine, namely, the duty of the assured (s 18) and the broker (s 19) to disclose material circumstances, and to avoid making misrepresentations (s 20)[8].

[5] *Carter* v*Boehm,* ER 96 KB 342 at 343.
[6] Ibid
[7] The Doctrine of Utmost Good Faith under Common Law November (2013). The Law Teacher
[8] Marine Insurance Act 1906.

However, in English Law there are still some extant divergences with regard to the understanding of utmost good faith in practice, since the test is founded on a hypothetical situation and the scope of s 17 is still uncertain. A minimum standard that requires both the buyer and seller in a transaction to act honestly toward each other and not mislead or withhold critical information from one another. In the insurance market, the doctrine of utmost good faith requires that the party seeking insurance discloses all relevant personal information and the principle of utmost good faith is one of the key principles in marine insurance law.

3.4 Principle Of Utmost Good Faith

The doctrine of the utmost good faith sometimes referred to by its Latin name, ***Uberrimae fides*** is a contractual legal doctrine that requires contracting parties to act honestly and not mislead or withhold any information that is essential to the contract[9]. The parties to an insurance contract include the insurer—meaning the licensed insurance agent or broker—and the applicant or insured. An applicant is a person who is seeking to buy insurance as an individual, or on behalf of a business. Once an applicant is offered an insurance policy, has paid the initial premiums, and has received the policy, she becomes the insured party. Contract of insurance are contracts uberrimae fidei, "there is no class of documents as to which the strictest good faith is more rigidly required in courts of law than policies of assurance[10]".

It is the duty of parties to help each other to come to a right conclusion and not to hold each other at arm's length in defence of their conflicting interests[11].It is the duty of the assured not only to be honest and straightforward but also to make a full disclosure of all material facts[12]. A failure to disclose, however, innocently, entitles the insurer to avoid this contract abinitio and, upon avoidance, it is deemed never to have existed[13]. In contracting with applicants, insurance companies gather certain information that's critical to the decision to insure an applicant or not, and in setting premium prices. It's in the disclosure of this crucial information that the doctrine of good faith comes into play.

Examples of Principle of Utmost Good Faith in Insurance

- The life insurance applicant is asked to provide details of income, health, existing life insurance policies based on which the insurance company will decide to issue the policy or how much to charge for the same. If the applicant does not provide accurate information, then the insurance company can reject any claim arising in the policy,
- The insurance company has to disclose clearly the terms and conditions of the policy with details of exclusions. So if suicide as a mode of death is not covered in a life issuance

[9] John Bird, *Modern Insurance Law* (4th ed., Sweet & Maxwell, London, 1997.)

[10] R A Hasson, "The Doctrine of Uberrina Fides in Insurance Law - A Critical Evaluation",[1969] 32 MLR 615; See also Hasson, [1975] 38 MLR 89.

[11] Per Fletcher Moulton L in *Joel* v. *Law Union and Crown Insurance Co.* [1908] 2 KB 863, CA ; p890."Life Insurance"

[12]Per Karminski L J in *Lee* v. *British Law Insurance Co. Ltd.* [1972] pt2 Lloyd's Rep 49, CA (personal accident insurance) at p. 57; "Full disclosure of the very essence of the contract".

[13]*MacKencer* v. *Feldin A G* [1967] 2 QB 590

policy in the first policy year, this has to be clearly mentioned in the proposal form. If not mentioned and in case a claim arises and get rejected on these grounds, the nominee can take legal action against the insurance company.

Insurance Contract being a financial contract needs to follow Utmost Good faith. Commercial contracts are subject to the principle of Caveat Emptor i.e. let the buyer beware. Hence it becomes very important for the policyholder to disclose all relevant information at the time of commencement of the policy so that his family doesn't have to face difficulty at the time of getting the claim in the unfortunate event of death of the life insured.[14] In Insurance contracts Utmost Good Faith means that "each party to the proposed contract is legally obliged to disclose to the other all information which can influence the others decision to enter the contract". The following can be inferred from the above two definitions:

(1) Each party is required to tell the other, the truth, the whole truth and nothing but the truth.

(2) Unlike normal contract such an obligation is not limited to any questions asked and

(3) Failure to reveal information even if not asked for gives the aggrieved party the right to regard the contract as void.

Nature And Scope Of The General Principles Of Insurance Contract

3.1 Historical Development Of Insurance

A Contract of Insurance is an agreement between two or more persons intended to create a legal obligation between them to be legally enforceable. Creating contract means creating rights and obligations for the parties in case any of the contracting parties fails to perform the contract the other party is entitled to the rights for the legal remedy. The law of contract has been an important aspect in our daily life. It has been directed by certain rules and doctrine of privity is also an important rule of it.[15]

A contract of Insurance is a form of contract whereby the insurer undertakes to indemnify the insured in the event of the happening of an occurrence. Insurance contracts like every form of contract are subject to the ordinary rules of contract which the doctrine of privity of contract is one of them.

The principle of privity of contract provides that, as a general rule, a contract cannot confer rights or impose obligations arising under it to any person who is not a party.[16]

Thus a person who is not a party to the contract between the insured and the insurer cannot sue on contract even though the contract was undertaken for his benefit. The doctrine has long been criticized as artificial and contrary to the parties' intention to benefit a third party. As a result, the

[14]Deepak Yohannan "Principles of Insurance" CEO of My Insurance Club and Find Law's Team of Legal writers and editor (5th June 2017).

[15]Oke, Oluwakemi, The Application of the Doctrine of Privity of Contract to Insurance Contract in Nigeria (August 9 2015).

[16]Neetij Rai, "*Doctrine of Privity of Contract and its Exceptions*.

courts have frequently resorted to devices such as agency or trust to allow a third party to enforce a benefit conferred upon it. Legislation has also made incremental inroads into the doctrine by providing for certain specific exceptions.[17]

The provisions of the Insurance Act and the Motor Vehicle (Third Party insurance Act) gives right to third party to sue the insurer directly under an insurance contract if the insured becomes insolvent and imposes a duty on the insurer to satisfy a judgment debt in favour of a third party against the insured.

3.2 General Principles Of Insurance Contract

In an insurance contract, there are six basic principles that must be met. These principles are the foundation that forms the legal basis of every contract of insurance. They are:

- Insurable Interest: The right to insure arising out of a financial relationship, between the insured to the insured and legally recognized.
- Utmost good faith: An action to disclose accurately and completely, all facts material (material fact) about something that will be insured is requested or not. The meaning is: the insurer must honestly explain everything clearly about the extent of the terms/conditions of the insurer and the insured must also provide a clear and correct for objects or interests of the insured.
- Proximate Cause is an active cause, efficient cause that chain of events that lead to a result without the intervention of the start and working actively from a new and independent.
- Indemnity: One mechanism by which the insurer provides financial compensation to place the insured in a financial position that he had prior to the loss (Commercial code article 252,253 and affirmed in section278).
- Subrogation: Right transfer request from the insured to the insurer after a claim is paid.
- Contribution: While the insurer has the right to invite any other person equally bear, but do not have the same obligations to the insured to participate in providing indemnity.

4.0 Nature Of The Principle Of Utmost Good Faith In A Contract Of Insurance

A contract of insurance is one whereby one party (the insurer) undertakes for a consideration to pay money or provide a corresponding benefit to or for the benefit of the other party (the assured) upon the happening of an event which is uncertain, either as to whether it has or will occur at all or as to the time of its occurrence.[18]

In, ***Liberty Insurance Co Ltd v. Mrs. U. John***[19] the court defined a contract of insurance as a contract whereby one person called the insurer undertakes in return for agreed consideration

[17]Ibid pg 35
[18]Chitty on Contracts, Volume II Specific Contracts pg 41-001
[19] (1996) NWLR (Pt 423); 192 at 2020 – 203.

called 'premium' to pay to another person called the 'insured' a sum of money or its equivalent on the happening of a specific event. Most contracts of insurance are contracts of indemnity whereby insurer agrees to compensate the insured for the loss that the latter may sustain through the happening of the event upon which the insurer's liability may arise. An insurance contract like any other contract must contain basis elements of a contract which includes; offer, acceptance, consideration and intention to enter into legal relationship[20]. The offer is usually made by the proposed insured completing a proposal form and forwarding it to the insurer. The acceptance is made by the insurer accepting the proposal form on its terms and issuing the policy for the consideration of the premium payable by the insured on which the insurer agrees to bear the risk of an uncertain event or events.

Contract of insurance are contracts uberrimae fidei, "there is no class of documents as to which the strictest good faith is more rigidly required in courts of law than policies of assurance".[21]

There is also a fundamental requirement for insurance contract which is insurable interest. The requirement of insurable interest is that for a contract of insurance to be valid the person insuring must stand in a particular relationship with and be interested in the subject matter of the insurance. The absence of insurable interest on the part of the insured makes the contract void. Applying the doctrine of privity of contract to insurance contacts meant that though a policy is taken out by a person to cover his liabilities to third parties, and though the normal operation of a liability policy is to the benefit of the third party to whom a liability is established. In the event that the liability occurs, the third party as a stranger to the contract between the insured and insurer cannot sue directly on the contract to enforce it against the insurer[22]. The recognition of the potential for hardship on the third party created by a strict application of the doctrine of privity of contract in insurance as led to statutory and judicial relaxation of the principle in certain cases. The statutory provisions relevant to the right of third parties to sue the insurer directly are contained **in Section 10 and 11 of the Motor Vehicle[23] (Third Party Insurance) Act and (Section 69 of the Insurance Act)[24].**

4.1 Overview Of The Principle Of Utmost Good Faith

The doctrine of utmost good faith, also known by its Latin name *uberrimae fidei*, is a minimum standard, legally obliging all parties entering a contract to act honestly and not mislead or withhold critical information from one another. It applies to many everyday financial transactions and is one of the most fundamental doctrines in insurance law[25]. The doctrine of utmost good faith requires all parties to reveal any information that could feasibly influence their decision to enter into a contract with one another. In the case of the insurance market, that means

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[20] Paul Bierly, B.A "General Principles of Insurance" by University of Washington (1982)

[21] Per James in *Mackenzie v Coulson* (1869) L. R. 8Eq. 368, 375

[22] OmogbaiOmo-Egbo, "The Law of Insurance in Nigeria" (West African Book Publishers Limited; 1st Edition, 2012) pg 423).

[23] Motor Vehicles Insurance of 1945 (Third Party Insurance Act of 1950);

[24] Nigeria Insurance Act (2003);

[25] Doctrine of Utmost Good Faith by Daniel Liberto and reviewed by Eric Estevez, published Feb 3 (2021).

that the agent must reveal critical details about the contract and its terms. Applicants, meanwhile, are legally obliged to present all material facts, as they are known, including precise details on whatever needs to be insured and if they have been refused insurance coverage in the past. This information is used by insurers to decide whether to insure the applicant and how much to charge for a policy. The doctrine of utmost good faith provides general assurance that the parties involved in a transaction are truthful and acting ethically. Ethical transactions include assuring all relevant information is available to both parties during negotiations or when amounts are determined.

How is this duty of Utmost Good Faith to be practiced? And what are the facts that the proposer has to disclose? The answer to both the question is simply the proposer must disclose to the insurer all material facts in respect of the subject matter of Insurance.

4.2 The Applicability Of The Principle Of Utmost Good Faith In Insurance Contracts

Both the parties to a commercial contract are by law required to observe good faith. For Instance, you go to a shop to buy an electrical appliance. You simply will not enter, pay and pick up any sample piece but will check two, three or even more pieces. You may be even ask the shopkeeper to give a demonstration to ensure that it is in working condition and also ask several questions to satisfy yourself about what you are buying. Then when you go home you find it does not work or is not what you were looking for exactly so you decide to return the item but the shopkeeper may well refuse to take it back saying that before purchasing you had satisfied yourself and he is possibly right.

The common law principle "Caveat Emptor" is applicable to commercial contracts and the buyer must satisfy himself that the contract is good because he has no legal redress later on if he has made a bad bargain[26]. The seller cannot misrepresent the item he has sold or deceive the buyer by giving wrong or misleading information but he is under no obligation to disclose all the information to the buyer and only selective information in reply to the buyers queries is required to be given. But in Insurance contracts the principles of "Uberrima fides" i.e. of Utmost Good Faith is observed and simple good faith is not enough.

Why this difference in Insurance contracts?

Firstly, in Insurance contracts the seller is the insurer and he has no knowledge about the property to be insured. The proposer on the other hand knows or is supposed to know everything about the property. The condition is reverse of ordinary commercial contracts and the seller is entirely dependent upon the buyer to provide the information about the property and hence the need for Utmost Good Faith on the part of the proposer[27]. It may be said here that the insurer has the option of getting the subject matter of Insurance examined before covering the risk. This is true that he can conduct an examination in the case of a property being insured for fire risk or of getting a medical examination done in the case of a health policy. But even then there will be

[26]Martin McRandall "Acting in Good Faith is of Utmost Importance" (June 1st 2018).

[27]Muhammed Zaidan Jordan - Duty of Disclosure (Part 1 of 2); Petra for Law and Intellectual Property (PLIP) (28th April 2009)

facts which only the insured can know eg the history of Insurance of the property whether it has been refused earlier for Insurance by another company or whether it is also already insured with another company and the previous claim experience. Similarly a medical examination may not reveal the previous history i.e. details of past illness, accidents etc. Therefore Insurance contracts insist on the practice of Utmost Good Faith on the part of the Insured.

Secondly, Insurance is an intangible product. It cannot be seen or felt. It is simply a promise on the part of Insurer to make good the loss incurred by the Insured if and when it occurs. Thus the Insurer is also obliged to practice Utmost Good Faith in his dealings with the Insured. He cannot and should not make false promises during negotiations. He should not withhold information from the Insured such as the discounts available for good. Utmost Good Faith can be defined as “A positive duty to voluntarily disclose, accurately and fully all facts material to the risk being proposed whether requested for or not.

An applicant for a life insurance policy will be asked to provide information about their health and family history[28]. Based on these responses, the insurer will decide whether to insure the applicant and what premium to charge. Usually, applicants are asked to sign a declaration at the end of the application form, stating that the given answers to the questions and other personal statements are true and complete. Concealing facts, such as for instance a smoking habit, is deemed a material misrepresentation that can lead the insurer to void the contract. If the insurer had known that the applicant smoked, the premium would likely have been significantly higher.

5.0WHAT IS A MATERIAL FACT?

Material facts have been statutorily defined on two occasions: The Marine Insurance Act 1906, Section 18(2), provides: "Every circumstance is material which would influence the judgment of a prudent underwriter in fixing the premium or determining whether he will take the risk". The Road Traffic Act 1934, Section 10(5), reads: "The expression 'material' means of such a nature as to influence the judgment of a prudent insurer in determining whether he will take the risk, and, if so, at what premium and on what conditions".

The similarity in the definitions can readily be seen and both can be traced to their parent, Lord Mansfield, in his judgment in *Carter* v. *Boehm*[29]. The common factor is that the insurer or underwriter alone determines what material is.

From an underwriting point of view, material facts might be classified as first, tangible, and secondly, intangible, i.e. that group of facts which give the background to the moral character, the reputation for integrity etc of an insured.[30]

Of the first group, there are innumerable cases. An omission to state that adjoining property had been damaged by fire, that the fire had been extinguished but it was feared it would break out again, should be considered as to constitute non-disclosure of a material fact.[31] Where a motor

[28] The Life Insurance Corporation Act, 1956
[29]ER 96 KB 343.
[30] Gabriel Smith, 'Non-Disclosure of Material Facts', [1958] J.B.L. 259.
[31] Ibid

car is insured against fire, the structure and situation of the garage are material facts affecting the possibility of a fire breaking out and of its being extinguished.[32] However, it may safely be said, any fact, which affects the material, is considered as a material fact.

But these are not the only facts which an underwriter requires to know before he can assess the risk. It has many times been stated that what is insured is not property but the interest in property. Thus, Jessel M R observed that: "The word 'property' as used in several of the conditions (in the policy) means not the actual chattel, but the interest of the assured therein".

5.1 Facts Which Must Be Disclosed

The insured is under a duty to disclose all material facts relating to the insurance which he proposes to effect. In addition, he must make no misrepresentation regarding such facts. Usually, however, these duties are modified by the terms of the contract[33]. In a case Fletcher Moulton L J , remarked that[34] "Insurers are thus in the highly favorable position that they are entitled not only to bona fides on the part of the applicant but also to full disclosure of all knowledge possessed by the applicant that is material to the risk". Good faith, therefore, requires that he should not, by his silence, mislead the insurers into believing that the risk, as proposed, differs to their detriment from the risk which they will actually run[35]. On the contrary, he should help them by all means in his power to estimate the risk at its proper value[36].The duty of disclosure requires that statements made by the proposer be that of facts not of opinion. A misstated opinion is actionable only if not given in good faith.

The burden of proving that there has been a breach of duty on the part of the insured rests on the insurer. Facts that must be disclosed are:

1. Facts, which show that a risk represents a greater exposure than would be expected from its nature.
2. External factors that make the risk greater than normal
3. Facts, which would make the amount of loss greater than that normally expected.
4. History of Insurance
   (a) Details of previous losses and claims
   (b) If any other Insurance Company has earlier declined to insure the property and the special condition imposed by the other insurers;
5. The existence of other insurances
6. Full facts relating to the description of the subject matter of Insurance

[32] *Dawson Ltd* v. *Bonnin* [1922] 2 AC 413.
[33] Diploma in Insurance Services. Principles of General Insurance. Module 2 pg 58.
[34] Supra 73 at p. 885.
[35] *Seaton* v. *Burnard* [1899] 1 QB 782 CA (Solvency Insurance) per Romer L J at p. 793.
[36] Supra 73 per Lord Fletcher Moulton L J at p. 890.

Some examples of Material facts are:

(a) In Fire Insurance: The construction of the building, the nature of its use i.e. whether it is of concrete or Kucha having thatched roofing and whether it is being used for residential purposes or as a go down, whether fire fighting equipment is available or not.

(b) In Motor Insurance: The type of vehicle, the purpose of its use, its age (Model), Cubic capacity and the fact that the driver has a consistently bad driving record

(c) In Marine Insurance: Type of packing, mode of carriage, name of carrier, nature of goods, the route.

(d) In Personal Accident Insurance: Age, height, weight, occupation, previous medical history if it is likely to increase the choice of an accident, Bad habits such as drinking etc.

(e) Burglary Insurance: Nature of stock, value of stock, type of security precautions taken. As mentioned this is not an exhaustive list but only a few examples. Details of previous losses is a material fact which is relevant to all policies

5.2 Facts Which Need Not Be Disclosed

Facts of Law:

Everyone is deemed to know the law. Overloading of goods carrying vehicles is legally banned. The transporter cannot take excuse that he was not aware of this provision. Facts which lessen the Risk: The existence of a good fire fighting system in the building. Facts of Common Knowledge: The insurer is expected to know the areas of strife and areas susceptible to riots and of the process followed in a particular trade or Industry. Facts which could be reasonably discovered: For example the previous history of claims which the Insurer is supposed to have in his record. Facts which the insurers representative fails to notice: In burglary and fire Insurance it is often the practice of insurance companies to depute surveyors to inspect the premises and in case the surveyor fails to notice hazardous features and provided the details are not withheld by the Insured or concealed by him them the Insured cannot be penalized. Facts covered by policy condition: Warranties applied to Insurance policies i.e. there is a warranty that a watchman be deployed during night hours then this circumstance need not be disclosed.

5.3 Duration Of Duty Of Disclosure

The duty of disclosure remains in force throughout the entire negotiation stage and till the contract is finalized. Once the contract is finalized then the contract is subject to utmost good faith. However when an alteration is to be made in an existing contract then this duty of full disclosure recovers in respect of the proposed alteration. The duty of disclosure also revives at the time of renewal of contract since legally renewal is regarded as a fresh contract. For example: A landlord at the time of proposal has disclosed that the building is rented out and is being used as an office. If during the continuation of the policy the tenants vacate the building and the landlord subsequently rents it out to a person using it as a go down then he is required to disclose this fact to the Insurer as this is a change in material facts and effects the risks

5.4 Breaches Of Utmost Good Faith

Breaches of Utmost Good Faith occur in either of 2 ways.

(1) Misrepresentation, which again may be either innocent or intentional. If intentional then they are fraudulent.

(2) Non-Disclosure, which may be innocent or fraudulent. If fraudulent then it is called concealment.

Misrepresentation: Misrepresentation in the strict sense has not been of particular importance in the insurance context. This is partly because the extreme width of the duty to disclose material facts has meant that often non-disclosure has subsumed questions of misrepresentation. Cases have frequently failed to distinguish between the two defenses taken by an insurer and indeed it appears to be standard practice for an insurer, where possible, to plead both defences. While this may be conceptually unsatisfactory,[37] Lord Mustill held that the rules relating to misrepresentation and non-disclosure at least as they affect materiality and subsequent avoidance, should be, and indeed always have been, the same.[38] Whilst Lord Mustill's proposition may be a desirable one from a practical point of view, we would argue that the law may be wrong in theory, to assume that an undisputed principle of misrepresentation must necessarily apply to non-disclosure. Lord Mustill's judgement is based upon this assumption. This is not surprising if one considers that the rules relating to misrepresentation have been developed by the Courts of Equity, whilst non-disclosure is decidedly a creature of the common law.[39] Furthermore, an innocent misrepresentation, on its true construction can never be an actionable non-disclosure - one is not held liable for not disclosing what one does not know and it is the representing partys' genuine belief in the truth of his statement that distinguishes the innocent misrepresentation from the fraudulent.[40]

It is important to distinguish between the two: Misrepresentation and Non-Disclosure

i. Misrepresentation Innocent: This occurs when a person states a fact in the belief or expectation that it is right but it turns out to be wrong. While taking out a Marine Insurance Policy the owner states that the ship will leave on a specific date but in fact the ship leaves on a different date.
ii. Intentional: Deliberate misrepresentation arises when the proposer intentionally distorts the known information to defraud the insurer. The selfish objective is somehow to enter the contract or to get a reduction in the premium e.g., If an applicant for motor Insurance stated that no one under 18 would drive the vehicle when in fact his 17 years old son drives frequently. Such a misrepresentation would be material as it would affect the decision of the insurer.

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[37] R A Hasson, 'The Doctrine of Uberrina Fides in Insurance Law - A Critical Evaluation, [1969] 32 MLR 615. See also Hasson, [1975] 38 MLR 89.

[38] *Pan Atlantic Insurance Co. Ltd. and another* v. *Pine Top Insurance Co. Ltd.* [1994] 2 ALL E R 581.

[39] John Bird and Norman J Hird, 'Misrepresentation and Non-Disclosure in Insurance Law - Identical Twins or Separate Issues?', [1996] 59 MLR 285.

[40] Ibid

iii. Non-Disclosure Innocent: This arises when a person is not aware of the facts or when even though being aware of fact does not appreciate its significance eg A proposer at the time of effecting the contract has undetected cancer therefore does not disclose it or A proposer had suffered from Rheumatic fever in his childhood but he does not disclose this not knowing that people who have this are susceptible to heart diseases at a later age.

iv. Deliberate: This is done with a deliberate intention to defraud the insurer entering into a contract, which he would not have done had he been aware of that fact. A proposer for fire Insurance hides the fact knowingly by not disclosing that he has an outhouse next to his building, which is used as a store for highly inflammable material.

Remedies also present a problem when misrepresentation and non-disclosure are treated as one and the same. Traditionally, the remedy for misrepresentation has always been recession, granted by the Courts of Equity. The common law gave no remedy for innocent misrepresentation although it always recognized fraud. The remedy for non-disclosure is a common law remedy. So now if misrepresentation and non-disclosure are the same creature, and is an equitable one, this automatic right to avoid the contract must become questionable. Will the judiciary be able to deny avoidance, even if materiality and inducement are proved, and insist instead that the innocent party settles for damages?[41] Finally, it is not understandable why his Lordship held that inducement is required for non-disclosure as well as misrepresentation![42] This is absolutely novel in relation to non-disclosure, although not of course to misrepresentation - inducement has always been a requirement for misrepresentation, at least in the general law of contract. Also it is difficult to appreciate how an undisclosed fact is contrast to a misrepresented one can actually induce an insurer into making a contract. A misrepresented fact clearly can be an inducement, but to suggest that something the insurer has no idea of its existence; can actually induce him into making a contract seem, with respect, rather odd.[43]

5.5 Repercussions Of Violations Of Utmost Good Faith

Depending on the nature of the transaction, violations of the doctrine of good faith can result in a variety of consequences. Most commonly, a contract created with inaccurate information from intentional misinformation or fraudulent concealment may cause the contract to become voidable. Further, in the case of the provision of goods or services before the information is discovered or disclosed, the misinformed party may enforce legal action. Legal action can include the right to recoup costs associated with the fulfillment of the contract that could be deemed fraudulent. Violation of this doctrine in a contract often has legal consequences depending upon the nature and degree of the violation. This can lead to contract damages; also the contract is voidable by the injured party. The same conduct may constitute criminal fraud.

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[41] Supra 76

[42] Ibid. pp. 610 (para e)-618 (para b). He also appears to accept here that marine insurance may have been different with its own rules and principles "which is something completely strange".

[43] Norman J Hind, 'Insurance British Business Law', [1995] J.B.L. 194

Conclusion

The Insurance Industry has long accepted that many of the rules set out in the 1906 Insurance Act are inappropriate for a modern consumer market. There have been several criticisms of the law regulating Insurance policies in Nigeria and Recommendations for the reform of this law so as to positively favor insurers in an insurance contract which has come to a nullity.

In 1980, the English Law Commission considered non-disclosure, breach of warranty and misrepresentation, its conclusion was that the law was "undoubtedly in need of a reform" and that such reform had been too long delayed. Despite the many proposals for reform, there has been no change. It has been long accepted that the strict letter of the law no longer correlate with the to the expectations of the market. It also fails to match accepted standards in the business market, seeing as it says that a good contract of insurance practice is to avoid a policy for misrepresentation only where there has been some element of dishonesty in the proposal. Yet the law allow insurers to avoid for mistakes that were made honestly and reasonably and also to avoid for an innocent misrepresentation, it is inevitable that some insurers will rely on their strict legal rights. It may be argued that business consumers should adjust their expectations to correspond with the law. However, many insurers are not experts in insurance; they do not understand the law or the effect of the policy offered.

In evaluating the law, it is important that a line or a fair balance should be struck between the interests of Insurers and policyholders. The Law should make sure that potential policyholders are given some kind of guarantee or assurance in insurance by ensuring that it meets their reasonable expectations while protecting the legitimate interests of insurers and not imposing undue costs or unnecessary restrictions. It should also be clear, concise and very comprehensive.

For the purpose of this research work, it is deemed that the law should generally follow accepted practice in the absence of an agreement to the contrary. The parties should be free to desert from good practice where they agree to do so. For business insurance contract, it is important to preserve flexibility for the parties to make arrangements that suit them best.

Finally, the law is defective because it does not set out its basic requirements in clear, accessible rules that are available to both insurers and consumer advisers; there are several confusing and overlapping laws and regulations. Moving forward, recent laws and further amendments to the law should be made clear and concise to accord with the standards of fairness and good practice in the Nigerian Insurance Laws.