AN APPRAISAL OF THE IMPACT OF PRINCIPLES OF UTMOST GOOD FAITH IN THE PROMPT SETTLEMENT OF INSURANANCE CLAIMS IN NIGERIA

BY

Abiodun Isaac, ELUJOBA
LLM/LAW/12429/2011-2012

DEPARTMENT OF COMMERCIAL LAW
FACULTY OF LAW
AHMADU BELLO UNIVERSITY, ZARIA

AUGUST, 2016

AN APPRAISAL OF THE IMPACT OF PRINCIPLES OF UTMOST GOOD FAITH IN THE PROMPT SETTLEMENT OF INSURANANCE CLAIMS IN NIGERIA

B Y

Abiodun Isaac, ELUJOBA
LLM/LAW/12429/2011-2012

A DISSERTATION SUBMITTED TO THE POST-GRADUATE SCHOOLAHMADU BELLO UNIVERSITY, ZARIA IN PARTIAL FULFILLMENT OF THE REQUIREMENTS OF THE AWARD OF DEGREE OF MASTER OF LAWS (LL.M)

DEPARTMENT OF COMMERCIAL LAW
FACULTY OF LAW
AHMADU BELLO UNIVERSITY, ZARIA

AUGUST, 2016

DECLARATION

I hereby declare that this dissertation entitled "The Impact of Principle of Utmost Good Faith in the Prompt Settlement of Insurance Claims in Nigeria" has been written by me in the department of Commercial Law under the supervision of Dr. A.M. Madaki and Dr. A.R.Agom. The information derived from the thesis has been duly acknowledged in the text and a list of references provided. No part of this thesis was previously presented for another Degree or Diploma at any University.

Abiodun.I. Elujoba **Signature** _____ **Date** _____

CERTIFICATION

This dissertation entitled "An Appraisal of the Impact of Principle of Utmost Good Faith in the Prompt Settlement of Insurance Claims in Nigeria". Elujoba, Abiodun Isaac meets the regulations governing the degree of Master of Laws of Ahmadu Bello University, Zaria and is approved for its contribution to academic knowledge and literary presentation.

Dr. A. M. Madaki	----------	----------
Chairman, Supervisory Committee	*Signature*	*Date*
Dr. A. R. Agom	----------	----------
Member, Supervisory Committee	*Signature*	*Date*
Dr. A. R. Agom	----------	----------
Head of Department	*Signature*	*Date*
Professor A. Z. Hassan	----------	----------
Dean, School of Postgraduate Studies	*Signature*	*Date*

DEDICATION

This dissertation is dedicated to my parents, Mr. M. O. Elujoba and late Mrs. Comfort Elujoba, who brought me up in the fear of the Lord, and to my wife, Grace and children; Seyi, Sayo and Seye for their encouragement and support throughout the period of writing this thesis.

ACKNOWLEDGEMENTS

My deepest gratitude goes to the Almighty God for the strength to complete this thesis. I am also grateful to my main supervisor; Dr. A. M. Madaki who was a source of great encouragement and support, and whose patience and meticulous guidance and thoroughness has helped me to complete this thesis. My appreciation also goes to my second supervisor, Dr. A. R. Agom for his encouragement, and to all the staff of Faculty of Law.

I also appreciate the great help and support of all my colleagues, and the Law Librarian, Ahmadu Bello University, Kongo Campus, Zaria, towards the writing of this thesis, and also my appreciation and thanks to all the Law Library staff.

I am grateful to my Secretary, Phillips Modilim, for assisting me with the typing of this thesis. I however accept responsibility for any shortcoming, omissions or commission in views expressed and the style adopted in the thesis.

TABLE OF CASES

African Insurance Development Corporation vs. Nig. Liquefied Natural Gas Ltd (2012) E.C.H. CJ./3/74 -- -- -- 13

African Insurance Development Cooperation vs. Nigeria LGN Ltd (2009) 2 SC. NJ 119

Agapitos vs Agrew (The Aegeon) 2002) EWCA CW 247 -- -- --

Bancroft vs Health (1900) 16, TLR 138 -- -- -- 49

Carter vs Boehm (1977) 3 Burr. 1905 12, 26,27,42,43,52,57,66,68

Dr. Aluko vs NICON Insurance Ltd. 91976) -- -- 52, 53, 79

Drake Insurance Plc. vs. Provident insurance plce. (2003) EWHC 109 -- 52,60

Jones v. Environment ltd 92009) EWHC 16 -- -- 69

Leadway Assurance Co. Ltd vs. JUC Ltd 920090 5 NWLR (pt. 919) 5339 CA

Leadway Assurance Co. Ltd vs. Zelo Nig. Ltd. (2004) 22 WRN I.S.C. -- 76

Liberty Insurance (Plc.) vs Argo Systems FZE (2011) ECWA CW 1572 -- 47, 74

Ma kim Ying vs. Manulife (International) Ltd. (2012) HKCF 1941 -- 73

NICON Insurance Corporation vs. Olowoofeku Ayo 92005) 14 NRN 107 C.A

OloruntudeVs. Umaru Bonds (1973) 3 NMLR -- -- 13

Parker and parker vs. national Farmers Union Mutual Insurance Society LGN Ltd. (2012(EWHC 2156. -- -- 47,71

Phoenix Assurance ltd. Vs. Olabode 91992) 2 NMLR 122 -- -- 13

Synergy health (UK) Ltd vs CGU Insurance Plc. (2010) EWHC -- -- 69

The Niger Insurance Co. Ltd vs. African petroleum Ltd 92005) 17 WRN Sc A --

Versloot Dredging BV & Another vs HDI Gerling Industries AG 7 Others 92014) ECWA AV 1349. -- -- 70

TABLES OF STATUTES

Companies and Allied Matters Act	--	--	--	--	8
English Unfair Contract Terms Act 1977	--	--	--	--	73
Insurance Contract Act (ICA Australia) 1994	--	--	--	--	49, 56
Investment & Security Act (ISA)	--	--	--	--	8
Marine Insurance Act of 1906		--	39,40,54,54,55,57,69		
Misrepresentation & the financial Services Acts 1986	--	--	--		37
Nigeria Insurance Law 2004		--	--	--	64
Road Traffic Act 1930		--	--	--	3
Road Traffic Act 1972	--	--	--	--	40
Sale of Goods Act 1994	--	--	--	--	37
Supply of Goods (Implied Terms) Act 1973	--	--	--	--	37
Supply of Goods and Services Act 1982	--	--	--	--	37
Unfair Contract Act 1977	--	--	--	--	37

LIST OF ABBREVIATIONS

A.C.	-	Appeal Cases
All E.R.	-	All England Law Report
Cap	-	Chapter
ExL	-	Exchange
I.C.A.	-	Insurance Contract Act
Ibid	-	Ibidem
L.L.R.	-	Lagos Law Report
N.L.J.	-	Nigerian Law Journal
N.L.R.	-	Nigerian Law Report
N.M.L.R.	-	Nigerian Monthly Law Report
N.N.L.R.	-	Northern Nigeria Law Report
N.W.L.R.	-	Nigeria Weekly Law Report
Op.Cit	-	Opere Citato
P.C.	-	Privy Council
R.T.A.	-	Road Traffic Act
U.K.	-	United Kingdom
USA	-	United States of America

ABSTRACT

One of the most important principles of the contract of insurance is the utmost good faith in which one of the parties to the contract, the insured, is expected to disclose every material facts at his disposal to the insurer at the commencement of the insurance contract in order not to void the contract *abinitio*. The failure on the part of the insured not to disclose or to make misrepresentation will automatically void the contract *abinitio* or to exclude the other party insurer from liability of any claim that may arise under such contract. This dissertation has attempted to look at the principle of good faith worldwide, by tracing the historical background of insurance, the theoretical development of insurance, emergence of insurance companies in Nigeria and by widely studying the general principle of insurance contract and the claim settlement experience of insurance in Nigeria whether there is fairness in the operation of the principle or not. When emphasis shall be laid on the law of utmost good faith, 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, the role of intermediaries as regard the law of utmost good faith and of course remedies for breach of utmost good faith. The dissertation concluded by looking at the utmost good faith and its impact on claims settlement in Nigeria as regard common law, statues and relevant cases in Nigeria and abroad; recommendation proffered on the inequality on the operation of utmost good faith and the general expectation from insurance as a whole.

TABLE OF CONTENTS

Contents		**Page**
Title Page	-- -- -- -- -- --	i
Declaration	-- -- -- -- -- --	ii
Certification	-- -- -- -- -- --	iii
Dedication	-- -- -- -- -- --	iv
Acknowledgement	-- -- -- -- -- --	v
Table of Cases	-- -- -- -- -- --	vi
Table of Statutes	-- -- -- -- -- --	viii
List of Abbreviations	-- -- -- -- -- --	ix
Abstract	-- -- -- -- -- --	x
Tables of Contents	-- -- -- -- -- --	xi
CHAPTER ONE:GENERAL INTRODUCTION		
1.1 Introduction	-- -- -- -- -- --	1
1.2 Problems of the Research	-- -- -- -- -- --	5
1.3 Aim and Objectives	-- -- -- -- -- --	6
1.4 Justification	-- -- -- -- -- --	7
1.5 Scope of the Research	-- -- -- -- -- --	8
1.6 Research Methodology	-- -- -- -- -- --	8
1.7 Literature Review	-- -- -- -- -- --	9
1.8 Organizational Layout	-- -- -- -- -- --	20
CHAPTER TWO: NATURE AND SCOPE OF THE GENERAL PRINCIPLES OF INSURANCE CONTRACT		
2.1 Theoretical Development of Insurance Contract	-- -- --	22
2.2 Nature of Insurance and Contract of Insurance	-- -- --	24
2.2.1 Nature of Insurance as a Contract of *Uberrima Fidei*	-- --	26

2.2 Origin of Utmost Good Faith, Justification and its Meaning -- 26

2.3 General Principles of Insurance Contract -- -- -- -- 29

2.4 The Claims Settlement Experience of Insurance Industry in Nigeria 36

CHAPTER THREE:NATURE AND SCOPE OF THE LAW OF THE UTMOST GOOD FAITH

3.1 The Principle of Caveat Emptor -- -- -- -- -- 40

3.2 Overview of the Principle Utmost Good Faith -- -- -- 40

3.2.1 Evolution of the Duty of Utmost Good Faith -- -- -- 42

3.3 The Meaning of Materials Fact -- -- -- -- -- 40

3.3.1 Facts which must be disclosed -- -- -- -- -- 44

3.3.2 Facts which need not be disclosed -- -- -- -- -- 45

3.4 Duration of the Duty of Disclosure -- -- -- -- -- 46

3.4.1 At Common Law -- -- -- -- -- 46

3.5 The Role of Intermediaries as Regard the Law of Utmost Good Faith -- -- -- -- -- 48

3.6 Remedies for Breach of Utmost Good Faith -- -- -- 51

CHAPTER FOUR: ENFORCEMENT OF THE LAW OF UTMOST GOOD FAITH

4.1 Introduction -- -- -- -- -- 52

4.2 Issues of Utmost Good Faith under Common Law -- -- -- 52

4.2.1 Duty to Insurer -- -- -- -- -- 54

4.2.2 Duty to the Insurance Broker -- -- -- -- -- 56

4.3 Issues of Utmost Good Faith under Statutes -- -- -- -- 57

4.4 Challenges and Prospects in the Enforcement of the Law of Utmost Good Faith -- -- -- -- -- -- 60

4.4.1 United Kingdom Challenges and Prospects on Utmost Good Faith -- 62

4.4.2 Australian Insurance contracts Act 1984 on Utmost Good Faith -- 62

4.4.3 Nigeria Insurance Act of 2004 (Law of Federation of Nigeria Cap 233) 64

4.5 An Overview of Relevant Cases inNigeria, U.K. Australia, and USA 66

4.5.1 Carter vs. Boehm

4.5.2 HIH Casualty and General Ltd vs. Chase Mahhattan Bank

4.5.3 Synergy Health (UK) HD vs CGU Insurance Plc.

4.5.4 Jones vs. Environs Com Ltd.

4.5.5 Veriloot Dredging BV and another vs HDI Gerling Industries Versicherung AG and others (The 'DC Merwestone') (2014) ECWA Civ. 1349.

4.5.6 Parker and Parker vs. National Farmers Union Mutual Insurance society Ltd)2222012) EWHC 2156. -- -- 71

4.57 Ma Kim Ying vs. Manulife (International Ltd (2012) HKCFI 941 -- 73

4.5.8 Liberty Insurance (Pte) vs. Argo Systems FZE (2011) ECWA Civ 1572 -- -- -- -- -- 74

4.5.9 Lead Way Assurance Co. Ltd vs. ZECO Nigeria Ltd. -- -- 76

4.5.10 Rozanes vs. Bowen -- -- -- -- -- 77

4.5.11 Lambert vs. Cooperative Insurance society -- -- -- -- 77

4.6 Impact of Utmost Good Faith to Settlement of Claims in Nigeria and Lessons for Nigeria -- -- -- -- -- 79

CHAPTER FIVE: SUMMARY AND CONCLUSION

5.1 Summary -- -- -- -- -- -- -- 83

5.2 Findings -- -- -- -- -- -- -- 84

5.3 Recommendation s -- -- -- -- -- -- -- 86

Bibliography -- -- -- -- -- -- -- 89

CHAPTER ONE

GENERAL INTRODUCTION

1.1 INTRODUCTION

Insurance is a form of risk management, primarily used to hedge against the risk of a contingent loss; in essence, insurance is simply the equitable transfer of a risk of a loss, from one entity to another, in exchange for a premium[1]. The history of insurance could be traced to early methods of transferring or distributing risk by Chinese traders as early as the 3rd millennia BC. These merchants travelling treacherous river rapids would cleverly distribute their wares across many vessels, whereby their losses are distributed in which the vessels that are saved from capsizing compensate for the ones that are capsized[2]. The modern profit insurance manifested in Babylon almost 2000 years B.C. in a contract of loan of trading capital to traveling merchants[3]. The contract contained a clause that the risk of loss due to robbery in transit was borne by the party providing the loan. In consideration for bearing the risk, the lender calculated interest on the loan at an exceptionally high rate.[4]

The Greeks and Romans introduced the origin of health and life insurance around 600AD, when they organized guilds/benevolent societies such as (collegian and military societies) which afforded members certain benefits, such as proper burial rites, or a financial contribution towards burial costs or traveling expenses or members of the army. In exchange for this benefit, members of the society made regular contribution to it.[5]

---

[1] Chris Parsons, David Green, et al, Company & Contract Law and their application to Insurance (Study Course A520 Chartered Insurance Institute of Nigeria Publishing Division (1999), p. 45
[2] Ibid,p. 45
[3] Ibid,p. 52
[4] Ibid,p. 57
[5] Chris Parsons, David Green et al, Company & Contract Law and their application to Insurance (Study Course A520 Chartered Insurance Institute of Nigeria Publishing Division (1999) p. 45

Similarly, in this period, the Iranian monarchs were the first to insure their people to some extent, formalizing the process by registration thereof at Court[6]. In accordance with translation, the beginning of the Iranian new year, the heads of different ethnic groups presented gifts to the monarch, the purpose of these gifts was to ensure (insure) that whenever the gift-giver was in trouble, the monarch, (and the Court) would help him. In return, whenever the giver was in trouble or needed finance, the Court would check the gifts registration, and could even-if the amount exceeded 10,000 Derik double that in return.[7]

All these instances gave effect to the concept of mutual assistance in case of loss, but the actual concept of mutual assistance came to the fore in the guilds and similar associations and societies which existed in Europe and England during the middle ages[8].

These associations afforded members or their dependant assistance in case of loss caused by perish such as fire, shipwreck, theft, sickness or death. Separate insurance contracts (i.e. insurance policies not bundled with loans or other kinds of contracts) were invented in Genoa in the 14th century, as were insurance pools backed by pledges of landed estates[9].

These new insurance contracts allowed insurance to be separated from investment, a separation of roles that first proved useful in marine insurance, insurance became far more sophisticated in post renaissance Europe, and specialized varieties developed.[10]

[6] Chris Parsons, David Green et al, Company and Contract Law and their application to Insurance Study course A 520 Chartered Insurance Institute of Nigeria Publishing Division (1999) p. 50.
[7] Ibid
[8] Ibid
[9] Chris Parsons, David Green et al OP cit. p.50
[10] Ibid

On 3rd December 1591, one hundred Hamburg house owners concluded the so called Hamburg fire contract which are generally regarded as some of the first examples of true mutual insurance contract that we have today.[11]

Toward the end of the 17th century, London's growing importance as a centre for trade increased demand for marine insurance. In the late 1680s, Mr. Edward Lloyd opened a coffee house that became a popular haunt of ship owners, merchants and ship's captains and thereby a reliable source of the latest shipping news. It became the meeting place for parties wishing to insure cargoes and ships, and those willing to underwrite such ventures. Today, Lloyds of London remains the lending market for marine and other specialist types of insurance, but it works rather differently than the more familiar kinds of insurance[12].

Insurance as we know it today, traced to the great fire of London of 1666 that ravaged London from Tuesday, 2nd to Wednesday, 3rd September, 1666[13]. The great fire cost London an estimated £10 million, at a time when its annual income was just £12,000, not surprisingly, thus expense focused minds on the idea of insuring against fire.[14]

The first insurance company in the United States underwrite fire insurance and was formed in Charles town (modern-day Charleston), South Carolina, in 1732. As other needs for insurance arose in the 1830s, the practice of classifying risk had begun[15].Insurance had become accepted practice as farmers wanted crop insurance, travelers wanted travel insurance. Everybody turned to insurers to bring peace of mind.

Mechanically propelled vehicles were not used on the roads of the UK to any great extent before the beginning of the 20th century and, consequently, carinsurance is of more recent origin than fire, theft and general liability insurance. The increase in road

[11] Ibid
[12] Ibid
[13] Chris Parsons, David Green et al Op cit. p.51
[14]Wool.lawyers Chinbidia com/arties 1/10/12 at 2pm
[15] Freeman M. A., Pellatt, Motor Insurance (Motor Insurance Study Course 230) The CII Tuition Service)

traffic after 1918 and the rise in the number of occasions when members of the public were injured, led to the introduction of the Road Traffic Act 1930. This Act imposed for the first time in the UK-A statutory obligation on the users of all cars to provide security against their legal liability for death of or bodily injury caused to third parties.[16]

In a nutshell, insurance has a vast array of lines of business as virtually anything can be insured ranging from life, health insurance, or even noses of actors, actresses and sport figures[17].

The historical background of insurance practice in Nigeria can however be traced to colonization of the country by the British, which consequently led to the introduction of insurance business in the country.

The first insurance company (Royal Exchange Assurance) was established in 1928 and since that time more insurance companies have been established like National Insurance Company of Nigeria Limited (NICON) which was as at then solely owned by the Federal Government.

As at the First Quarter, of the year 2015, the Number of licensed Insurance Practitioners in Nigeria are as stated below:

Reinsurance	-	2
Underwriters	-	58
Brokers	-	577
Loss Adjusters	-	54
Agents	-	1900

Out of the above figures, 15 are licensed to underwrite Life Business, 29 Non Life Business, 12 are licensed on composite while only 12 are licensed to carry out the Business of Reinsurance.

[16] Ibid

[17] Oniwinde, A. K. Marketing of Insurance Services in our Society in: *Journal of the Insurance Institute of Nigeria*, Impact press, Ramole Avenue, Surulere, Lagos (1987)

Insurance contribution to the Nigerian Economy is ₦302,000,000 BN constitutes only about 10.55% to TGP[18]

Insurance however, operates on some basic principle, an example of which is the principle of utmost good faith *Uberimae Fidae* which requires all the parties to the contract to disclose every materials facts relating to the contract. Failure to disclose these facts relating to the subject matter of insurance may make the contract to be *voidabinitio*. The onus lies more on the insured than insurer which is expected to disclose all the facts relating to what supposed to be covered under the insurance contract[19].

The Nigerian insurance industry is therefore using this opportunity to wriggle out from paying genuine claims when they arise. The image of insurance industry in Nigeria in terms of prompt settlement of claims has not been encouraging as compared with their counterpart abroad[20]. This no doubt has led to skepticism on the part of insuring public in taking some of the insurance products despite the rigorous awareness programmes embarked upon by the industry of recent. An insurance company which refuses to pay a genuine claim based on the fact that the insuring customer failed to provide an information which is not at the knowledge of the customer at the time of the contract which now forms the subject matter of the claim by relying on the principle of utmost good faith is unacceptable. It is the effects of this lacuna that this thesis seeks to examine.

1.2 **Statement of the Problem**

Firstly, the policy holders of Insurance Business have been seriously complaining and not satisfied in terms of provisions of service by Insurance Industry especially as regard their claims settlement – The complaints always centre on non settlement of their genuine claims by using flimsy exercise in order to wriggle out form settlement of claims.

[18] National Insurance Commission (NAICOM website) Nov. 8, 2015 at 11.30am
[19] Ibid
[20] Oniwinde, A. K. Marketing of Insurance Services in our Society in: *Journal of the Insurance Institute of Nigeria*, Impact press, Ramole Avenue, Surulere, Lagos (1987)

It was stated by most policy holders that most Insurance companies rely on the prior information submitted at the commencement of the contract as the basis of repudiating their claims settlement and to decide whether the practice of insurance as regards utmost good faith as being practiced worldwide is what is also obtainable in Nigeria, the effect on Nigeria populace and the impact on prompt settlement of insurance claims in the Nigeria industry.

Secondly, our legislators have to be up and doing in the promulgation of Insurance Law that will no doubt protect the interest of the citizen especially the holders of Insurance Policy. The legislation introduced before could not take care of the imbalance in operation of utmost good faith.

This Research work shall attempt to find answer to the following questions:

(1) In the practice of Insurance Business in Nigeria is the Average policy holders satisfied in terms of provision of service by Insurance Company?

(2) Is sit true that an Insurance Company is ready to accept premium of the Commencement of the Contract but are reluctant to pay genuine claim to their policy holders when a claim arises?

(3) Is the regulation of Insurance Industry and legislation regulating Insurance practice adequate enough in Nigeria?

Lastly, the contribution of Insurance Industry to our Gross Domestic Product (GDP) in Nigeria is too low as compared with the other financial sub-sector contribution to the GDP, there is therefore a need to encourage policy holders and to educate the citizen about the importance of Insurance Business in order to boost the Income from this sub-sector.

Is contribution of Insurance sector to total Gross Domestic Products (GDP) adequate enough to necessitate the needed reform in Insurance Industry?

1.3 AIM AND OBJECTIVES OF THE RESEARCH

The main aim of this work is to find solution and proffer recommendations to the problem of the research.

This aim shall be achieved with the following specific objectives:

(1) To critically look at how the insurance is being practiced in Nigeria vis-à-vis what is obtainable in the other parts of the world. We focus on whether the contract has been fair or otherwise to the insuring public and of course we analyse defects or shortcomings where necessary.

(2) To place emphasis on the principle of utmost good faith and its impact on the prompt settlement of insurance claims. The question whether insurance companies are ready to collect premium but not ready to settle genuine insurance claims under the pretext that the insured has violated the principle of utmost good faith shall be adequately addressed.

(3) The Research work shall examine the legislation operating as at now and to know what are the legislation introduced by the Government in order to curb the menace of most Insurance Companies so as to protect the policy holders and the consuming public.

(4) The Research work shall examine what are the challenges for ture development of Insurance Business in Nigeria in order to improve their image for the purpose of meeting the challenges of the world globalization and to boost the country's economy.

(5) To examine further challenges as the world is becoming a global village, as a result, the future challenges of insurance business in Nigeria shall be critically analysed with a view to improving the image of insurance contract in the country.

The research shall, therefore, advice where more regulations, legislation, and protections by the government are necessary or required.

1.4 JUSTIFICATIONOF THE RESEARCH

Insurance plays a tremendous role towards the industrial development of a nation; it cushions the effects of a loss and acts to assist an entrepreneur to take a decision towards establishing an industry without fear of a loss. As a result of this, investors are not reluctant to access loans in the bank once they know that insurance shall protect them against an unforeseen circumstances thereby boost the economic development of a country like us. This will no doubt leads to employment of our youths, increase economic activities and in the long run shall contribute to the Gross Domestic Products (GDP) of the country.

Similarly, the purpose of Law in any society is to regulate the condition of human activities whereby it ensures that things are done properly. This work, therefore, will assist the Insurance Company about the best way of practice in order to enhance their productivity and to enable them be alert as to the responsibility of their customers requirements. The policy holders will also be as to their rights and duties under the contract of insurance in order not to jeopardize their interest when a claim arises.

The research work has potential to improve law relating to insurance, performance implementation and it will add to body of knowledge on their subject matter or it may generate further research and thereby shall be useful to law students, scholars, lecturers of law, legal practitioners, members of the bench, the investing public, the general reading public interested in insurance matters and of course the policy holders o insurance policy.

1.5 SCOPE OF THE RESEARCH

The scope of this research is determined by the statement of the problem and the aim and objectives of the work. As such, issues such as those raised in section 1.3 and section 1.4 as stated above shall constitute the area of interest of this work.

The scope of the work is limited to Nigeria jurisdiction. The research, however, look into other advanced jurisdiction like USA and UK where necessary to buttress our points and for comparison analysis only.

1.6 RESEARCH METHODOLOGY

The research method used in this work is doctrinal. Doctrinal means, theorizing without considering the practical consequences, it is called a visualized research, imaginative research, unpractical research, a visionary research, or a conceptual research.[21]

Primary sources of information include the Constitution of the Federal Republic of Nigeria, 199 (as amended) the received English Law, different legislative enactments in Nigeria including Companies and Allied Matter Act, (CAMA), Investments and Securities Act, (ISA), Insurance Laws and Acts.[22]

Decisions of superior Courts of records shall be relied upon, other primary authorities to rely upon include decision of the Code of Conducts Bureau, failed Banks Tribunal, Economic Finance and Corrupts Commission, (EFCC), etcetera.

Secondly, sources of information of this work shall include commentaries by legal scholars, text books, precedents, journals and periodicals written by legal authors etc.

[21] Aboki Y. Introduction to Legal Research Methodology A guide for writing long essays. Thesis, Dissertation and Article Tamaza Publishing Company Limited, Wusasa, Zaria (2nd Edition 2004)

[22] Aboki Y. Introduction to Legal Research Methodology A guide for writing long essays. Thesis, Dissertation and Article Tamaza Publishing Company Limited, Wusasa, Zaria (2nd Edition 2004)

1.7 LITERATURE REVIEW

Most contract are governed by the maxim caveat emptor or let the buyer beware, unlike other contracts in legal arena, the law of Insurance revolves around the duty of utmost good faith as nucleus element in Insurance contracts. Notwithstanding the fact that Insurance casts the duty upon both the parties – Insured and insurer, to an Insurance contract, the former finds himself in a more harsh and difficult condition when a dispute arises.

This Literature Review is directed to view the relevant writings on the subject with a view to presenting a comparatively study of the legal stand of the Insured and the Insurer so far as their duty as regard utmost good faith.

Herbert Smith[23] opines that one of the reasons for this principle of utmost good faith is the natural imbalance between the insurer in terms of knowledge. Take for example life policy, before the pre-contractual process of disclosure is commenced, the proposer for insurance is in a position to know all about his state of Health, previous ailments, family history and his habits such as smoking and exercise, if that person is not obliged to make full disclosure, Insurance could not work from either insurer's or the insured point of view. It is to redress this possible fatal imbalance that the duty of good faith has subsisted. under it, the insured is obliged to disclose to the insurer before the contract is made all matters that are material to the decision the insurer takes as to whether to offer to insure at all and, if so, on what terms[24].

The pertinent question to ask is that if an Insured does not know that he has an ailment like cancer for example, can he be asked to disclose what he does not know. This is one of the lacuna that this dissertation will like to address.

[23] Ibid
[24] Herbert Smith, 10 points to remember about insurance in Journal of Gleiss Lutz Vol, 1. 2012.

In the work of Allens on the subject matter, the duty of good faith requires insurers to act with due regard to the insured's interests in situations where there is a conflict of interest. The duty also requires the insured to act honestly when dealing with the insurer[25]

In most cases however in Nigeria context, the principle works in favour of insurers and they always work to protect their interest at the detriment of the insured which this dissertation is trying to iron out.

Malcolm Clarkes in his research[26] points out the difficulty situations an assured faces due to the resonant expression of the duty to disclose with reference to the judgment of a 'prudent insurer' a brain child of Commercial Merchandiser. The proposer might be skeptic thinking about the questionnaires of the proposal form whether he or she needs to say more as all the things may not be covered in the proposal form. Again the proposer is required to think in a way an insurer in the market does, which is understandably quite difficult for average level policy holders. Moreover, every information will be considered material if it would influence the Judgement of the prudent insurer at the time of contract or of renewal as to whether to take the risk at all or/and to fix a higher amount of premium.[27]

This assertion no doubt puts a heavy duty on the policy holder to unveil every fact which a prudent insurer would considers material; otherwise the insurer can refute the policy to be paid, no matter the assured be however innocent or reasonable in making the decision regarding whether or not a particular fact is material.

However, Shi Feng argues that the principle of utmost good faith has always been the crown of the field of marine insurance law, which derived from the case of *Carter v.*

[25] Allen A. Insurance & Reinsurance. The duty of Utmost Good Faith in the Journals of Link Laters 2001 vol. iv

[26] Ibid

[27] Malcolm Clarkes, Contract of Insurance in the Journal of Northumbria University 2006 vol. ix.

Boelm[28]. With the codification of the Marine Insurance Act 1906, the principle from expression in section 17 to 20,section 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 misrepresentation (S. 20)[29]

Woloniecki wrote about the duration of utmost good faith, as based in the decision in the case of *Carter v. Boelm* (Supra) concerned the pre-contractual duty of disclosure. Lord Mansfield did not consider the duties of the parties to one another after the contract has been made. Most of the 19th century cases concern breaches of the duty of good faith by reason of non-disclosure or misrepresentation at the time of the making of the contract, it was understood to be the law, however, that there was no obligation on assured to disclose to the underwriter facts material to the risk that came to the Assureds' knowledge after the contract was made[30].

It is, however,important to note that in the practice of insurance in Nigeria, the duty has no limit, the insurers use it at will in order to favour them and to wriggle out from liability and this is what this thesis is ready to address.

Prithvi wrote that utmost good faith requires that each party must be given a reasonable opportunity to make independent enquiries about the subject matter in question so that they may take a decision, thus, all material facts must be disclosed or made available, to the party so that he or she may reasonably enquire about the same. This further puts a duty on the party making the subject matter accessible to the person enquiring, not to play fraud or misrepresent the same, else it would be hit by section 19 of the Indian Act. Section 19 also clarifies that misrepresentation or even silence amounting

[28](1766) 3 Bur 1905, 1909.

[29] Shi feng, utmost good faith in Marine Insurance, A Comparative Study of English and Chinese Marltine Law, Plymonth Law Review 2008, Vol. 1.

[30]Woloniecki J, The duty of Utmost Good Faith in Insurance Law: Article (Defence Counsel Journal 2010.

to fraud will not entitle a party to avoid the contract if he had the means of discovering the truth with ordinary diligence and did not do so. Hence, there must thus be free consent and the parties must understand the same things in the same sense. The Insurer faces a lot of problems trying to verify all such details, even though the advent of Technology has made the task comparatively easier nowadays[31].

However there is still no clear cut distinction between what is material or immaterial, and this lack of distinction is largely dependent on the interest of the insurers, and the terms of the contract at the detriment of the insured.

Rupert Cohen argues in his paper "Utmost Good Faith in Insurance Law: A Redundant Concept" He stated that the duty of good faith should be removed from all transactions in Insurance Law that firstly, there seems little doubt that there is a compelling argument for reform of the duty to disclose.Secondly, the argument for retaining the overall duty of good faith in such a reform seems considerably weaker than those against. Thirdly, only in business transactions in which standard forms are not the means by which the policy drawn up does the duty retain an operative function[32]. The personal opinion of the researcher is not to remove the doctrine but to modify it in such a way that will remove an imbalance between the insured and the insurer so that its operation will not be done as to Jeopardize the interest of the insuring public.

Stuart Cotton states in his paper[33] about the relationship as regard utmost good faith that exists between the Reinsured and the Reinsurer as an honourable engagement and long term relationship based on trust and confidence were the norm. The cedant took care in the underwriting of its business, provided material information to the reinsurers, and took the interests of its reinsurers into consideration when settling claims, for its part,

[31]Prithvi P. Utmost good faith in Insurance Contracts, General Articles 2010.
[32] Rupert Cohen, Good Faith in Insurance Law: A Redundant Concept?
[33] Staurt Cotton, Utmost Good Faith-Following the fortunes, The theory for Reinsurers in Mound Cotton Nollan & Greengrads Journal, 2014 Vol. v

the Reinsurer did no contest the cedant's claim practice, and paid the claims upon demand.

This relationship existing between the Reinsurer and Reinsured does not exist when it comes to insured and Insurer in which there is an Imbalance and the Need to correct the imbalance is very germane to this thesis.

Christopher Butcher Q. C. advanced in his paper on Utmost Good Faith that as at present, there is occurring the latest in a series of Episodes in which serious consideration is being given to the reform of insurance law in the UK as well as in other countries, like Scottish law commission are looking at the matter and the possibility of reform in which they are concentrating their mind on whether present rules are justified. In the present area, it is suggested by him that there needs to be a long and careful look at getting rid of the doctrine of good or of the utmost good faith. To talk of insurance contract as being contracts of good faith tends to be either useless or positively harmful to a coherent development of the law. If there were to be reforming legislation, the whole concept could be dispensed with. That is to say, of course, that some of the present incidents of insurance contracts, which are said to be Justified by the doctrine of good faith, such as an obligation to make disclosure pre-contract, do not need to be retained. In some form, they clearly do. There is much legitimate and necessary debate as to exactly what that obligation should be and what should be the remedies for failure to perform it[34].

It is the opinion of this research work that the doctrine needs not to be entirely jettisoned as advised by the writer above, but to be codified for an equal Right of all the parties to the contract of Insurance to be maintained.

Smith T. S. points out that at present there is an onerous duty of disclosure on the part of the policy holder. It is recommended that a full and frank disclosure is made to

[34] Christopher Bucher Q. C. Good Faith in Insurance Law: A redundant concept? In Journal of King's Bench Walk 2008 v & 2.

insurers to avoid repudiation at a later stage. The complex Task of reforming the law on insurance is on going. That is certain to be an extended process in light of the significance and likely impact of any reforms as well as the number and size of stakeholders affected. Insurers are under the same duty as the insured in terms of good faith. However, it remains to be seen how far that concept will be developed by the courts and the law commissioner[35].

This research work also expects an improvement in Nigeria as regards the modification of the law in this area.

In Chris Parsons et al Company & Contract Law and their application to insurance.[36] The duty of utmost good faith is viewed as "a positive duty to voluntarily disclose, accurately and fully, all facts material to the risk being proposed, whether asked for them or not"

The problem with this definition is how does an insured knows what is material or what an insurer is expected, the insurers should have asked all the materials they feel it is material and not to leave the insured at their mercy. This lacuna shall be filled in this thesis.

Oniwinde A. K. in his paper Marketing of Insurance Services in our Society[37] discussed utmost good faith "as a person who proposes his life or property for insurance is expected to disclose all material facts pertaining to the risk object to be insured which may influence the mind of the underwriter or insurer as to whether or not to accept the risk for insurance"

[35] Smith T. S. Uberrime Fidei: of the Utmost Good Faith in the Journal of Legal news and Resources 2012.
[36] Chris Parson, David Green et al Company & Contract Law and their Application to Insurance (Study Course A520) Chartered Insurance Institute of Nigeria Publishing Division (1999)
[37] Oniwinde A. K. Marketing of Insurance Services in our Society in Journal of the Insurance Institute of Nigeria, Impact Press 91 Ranole Avenue Surelere Lagos (2002).

It is expected that the duty should be reciprocal whereby the insurer is also expected to disclose to the insured all relevant information pertaining to the insurance services that may need to be offered.

In Ojo P. F. Effects of SAP on property insurance[38] "the principle of utmost good faith is viewed as a doctrine that stems from the assumption that the insurer knows nothing about the risk proposed but the insured knows everything so that it is only logical for the insured to disclose all material facets which is said to be any fact which will influence the judgement of a prudent underwriter in assessing a risk and deciding whether he will accept the risk or not and at what rate of premium"

It is should be noted however that there are certain facts which tend to lessen the risk which is not in the contemplation of the author, for example, facts of public notoriety. One is also expected the insurer not to accept an insurance which they know is not enforceable at Law or to issue a policy in ambiguous terms. This needs so to be considered vis-à-vis the duty expected of the insured in order to remove the imbalance as expressed by the Authors.

Agomo C. K. in duty of disclosure and test for materiality in insurance Law: A tale of two developments[39] discussed the principle of utmost good faith as the one "which is manifested in the sub-rules of non-disclosure, misrepresentation and perhaps, warranties, states that the parties to a contract of insurance owe one another the duty to disclose all facts which are material to the risk proposed. It imposes on the parties a higher standard of probity than is required in ordinary commercial contract; it also separates a contract of insurance from a wager[40]

[38] Ojo, P.F. Effects of SAP on Property Insurance in Journal of the Insurance Institute of Nigeria, Impact Press, 91 Randle Avenue Surulere, Lagos. 1997
[39] Agomo C. K. Duty of Disclosure and Test for Materiality in Insurance Law: A Tale of Two Developments In WAICA Journal Vol. xiv 1990
[40] Ibid

Looking at the above definition, the duty is borne by both the insurer and the insured, but in practice it is borne exclusively by the insured and is, therefore, a very potent weapon in the hands of insurers since it gives them the right to avoid the whole contract and not just the particular liability and thereby avoid to pay claim.

It is therefore not surprising that the practice application of this doctrine may provide a fertile ground for litigation across the length and breadth of insurance Law as this lacuna is too open and needs to be filled by this thesis.

The legislatures reviewed both in UK and Nigeria calling for the reform of the duty of disclosure namely (1) the English Law Commission in 1980, the national consumer council in 1997 and Nigeria Insurance Act of 2004. All attempted to initiate sweeping reforms across the area of interest, however, despite the manifold calls there has been no dramatic change as one party the insurance company still determines what is materials facts to a contract of insurance at the detriment of other party (the insured). In doing this, it fell short of the scope of this thesis. Its area of concentration is but an aspect of this thesis, and as such differs from it in scope, as the emphasis of those legislations were purely market oriented and not holistically focused on the general welfare of all the parties concerned.

1.8 ORGANIZATIONAL LAYOUT

Chapter one is the general introduction dealing with historical background, literature review, problems of the research, scope, research methodology, justification and organizational layout.

Chapter two deals with the Nature and Scope of the General Principles of Insurance Contract theoretical development of insurance contract Nature of Insurance and Contract of Insurance, Nature of Insurance of a contract of uberrime fidei, origin of

utmost good faith, justification and its meanings, general principle of insurance contract and of course the claims settlement experience of insurance industry in Nigeria.

Chapter three dwells on the principle of Caveat Emptor, the general overview of the principle of utmost good faith , the meaning of materials fact, meaning and duration of the duty of disclosure, the role of intermediaries as regard of the law of utmost good faith and the remedies for breach of utmost good faith.

Chapter four examines Issues, challenges and prospects in the enforcement of the Law of utmost good faith on utmost good faith under common Law, utmost good faith under statutes, an overview of relevant cases in Nigeria and abroad and the impact of utmost good faith to settlement of claims in Nigerian.

Chapter five is the concluding chapter summarizing the work making findings and recommendations.

CHAPTER TWO

NATURE AND SCOPE OF THEGENERAL PRINCIPLES OF INSURANCE CONTRACT

2.1. Theoretical Development of Insurance Contract

The history of insurance consisted of the development of the modern business of insurance against risks, especially regarding cargo, property, death, automobile accidents and medical treatment. The industry helps to eliminate risks (as when fire insurance companies demand the implementation of safe practice and the installation of hydraints spreads Risks from the individual to the larger community), and provides an important source of long-term finance for both the public and private sectors the insurance industry is generally profitable and provides attractive employment opportunities for white collar workers.[1]

In some sense, we can say that insurance dates back to early human society. We know of two types of economies in human societies, natural or non-monetary economies (using barter and trade with no centralized nor standardized set of financial instruments) and monetary economies (with markets, currency, financial instruments and so on). Insurance in the former case entails agreement of mutual and if one family's house gets destroyed, the neighbours are committed to help rebuild it. Granaries embodied another early form of Insurance to indemnify against famines. These types of insurance have survived to the present day in countries of areas where a modern money economy with its financial instruments is not widespread.

The first method of transferring or distributing risk in a monetary economy, were practiced by Chinese and Babylonian traders in the 3rd and 2nd millennia BC, respectively, Chinese Merchants travelling treacherous River rapids would distribute their

[1] Franklin J. The Science of Conjecture: Evidence and Probability before Pascal (2001) John Hopkins University Press.

waves across many vessels to limit the loss due to any simple vessel's capsizing. The Babylonians developed a system which was recorded in the famous code of Hamurabi (1750 BC and practiced by early Mediterranean Samling Merchants. If a merchant received a loan to fund his shipment, he would pay the lender an additional sum in exchange for the lender's guarantee to cancel the loan should the shipment be stolen or lost at sea[2]

Separate insurance contracts (i.e. insurance policies not bundled with loans or other kinds of contracts were invested in Genoa in the 14th Century, as were Insurance Pools backed by pledges of landed Estates. The first known Contract dates from Geno in 1347, and in the next century Maritime Insurance developed widely and premiums were intuitively varied with Risk[3].

These new Insurance Contracts allowed Insurance to be separated from investment, a separation of roles that first proved useful in marine insurance. The first printed book on Insurance was the legal treatise on Insurance and Merchants Bets by Pedro ele Santarem (Saterna), written in 1488 and published in 1552[4].

Insurance became more sophisticated in Enlightenment era Europe, and specialized varieties developed, some forms of insurance developed in London in the will of the English Colonist Robert Heyman mentioned two "Policies of Insurance" taken out with the chooses Chancellor of London, Arthur Duck of the value of two each, one related to the safe arrival of Hayman's ship in Guyama and the other was in regard to Two assured by the said Dr Arthur Ducke on his life[5].

Property Insurance as we know it today can be traced to the Great fire of London, which in 1666 devoured more than 13,000 houses, the devastating effects of the fire

[2]Palmer, Sarah et al, (2007) Oxford Dictionary of National Biography, Oxford University Press.
[3] E. P. Hennock, The Origin of the Welfare State in England and Germany (2007)
[4] Ibid.
[5] Pearson Robin, The Development of International Insurance (2010) Oxford University Press.

converted the development of insurance from a matter of convenience into one of urgency, a change of opinion reflected in Sir Christopher wron inclusion of a site for the insurance office in his new plan for London in 1667[6].

Business Insurance the First Insurance Schemes for the intimating of Business ventures became available. By the end of 17th Century, London's growing importance as a centre for trade was increasing demand for marine insurance. In the late 1860s, Edward Lloyd opened a Coffee house on Tower Street in London. It soon became a popular hamount for ship-owners, merchants and ship captains, and thereby a reliable source of the latest shipping news. These later transformed to insurance market Lloyds of London and later charged to society of Lloyds[7].

The first life insurance policies were taken out in the early 18th century. The first company to other life Insurance was the Amicable society for a perpetual Assurance Office, Founded in London in 1706, by William Talbot and Sir Thomas Allen. The first plan of life Insurance was that each member paid a fixed annual payment per share on from one to 3 share with consideration to age of the members being 12-55. At the end of the year a proportion of the amicable contribution was divided and it was in proportion to the amount of shares the heirs owned. Amicable society started with 2,000 members[8].

Accident insurance started in 19th Century. This operated much like modern disability insurance, the US Company to offer Accident Insurance was the Railway Messengers Assurance Company formed in 1844 in England to insure against the rising number of fatalities on the nascent railway system[9].

By the late 19th century, governments began to initiate national insurance programs against sickness and old age. German Build on a tradition of welfare programs

[6] Franklin J. The Science of Conjecture: Evidence and probability before Pascal (2001) John Hopkins University Press.
[7] Ibid
[8] Woodward A. P The Disability Insurance Policy (2014) Oxford University Press.
[9] Ibid.

in Prussier and Saxony that began as early as in the 1840s. In the 1880s Chancellor Otto von Bismarck introduced old age persons, Accident Insurance and medical care that formed the basis for German's welfare stage[10].

2.2 Nature of Insurance and Contracts of Insurance

Insurance is an agreement whereby a group of individuals facing similar risked can share the for tuition losses of the unlucky few by the transfer of such risks to the insurer who agrees to compensate the losses.[11]

Insurer can collect premium from a group of people in similar circumstances not all of whom will suffer losses in any one year. These premiums are then pooled together and used by the insurer to pay losses. Losses are thus shared out among all the policy holder rather than borne solely by the unlucky few.[12]

An insurer company sets itself up to operate the pool. It takes contributions, in the form of insurance premium from many insured and pay for the losses of a few. The operation of the common pool is very much based on the successful application of the law of the large number.[13]

Law of large number, states that the larger the group of similar risk, the closer the actual losses experienced by the group will approach the expected losses. This law implies that the greater the number of similar risk, the more accurate the insurer can be in predicting the future losses. This allows the insurer to fix premium in advance and insurer can assess the risk and fix a premium which reflect the hazard and value of the risk which an insured brings to the pool.[14]

[10] Prithvi, J. Utmost good faith in Insurance Contract (2010) Insurance Journal vol. 2
[11] Ajay Gantan: Insurance Definition defin and functions of insurance (2013) mayurvihar Publicities Delhi Indian
[12] Franklin M.S. the special nature of the insurance contract: a few suggestion for further study (2001)
[13] Suze Orman, Life Insurance: concept, nature and scope (2004) Mayor Publication
[14] Ibid

Insurance premium is the contribution which is the consideration an insured pays to the insurer for an insurance coverage of a specified nature for a specified policy period.[15]

The breakdown of the premiums is pure premium Risk, example, loading, contingency loading and the profit loading. Expense loading is to cover the expenses incurred in maintaining the insured's contribution, contingency loading is to cover the possible variability of claims cost, while profit loading is to cover expected dividend payment for the insurer's shareholders.[16]

Premium is calculated as follows:

Sum insured x Premium Rate = premium payable

$$\text{Premium Rate} = \frac{\text{Average Total Claims}}{\text{Average Total value}} \times 100\%$$

The characteristics of risks that are insurable are financial value, must have large number of similar Risks, must be pure only, no catastrophic loss, insurable interest, it must be legal and not against public policy coupled with reasonable premium[17]

The function of insurance can be broadly divided in primary and secondary functions.

Primary function deals with Risk transfer mechanism; while secondary functions deals with releasing funds otherwise tied up in reserves, stimulate business, remove fear and worry, reduction of losses, serving and for social benefits[18]

Other functions of insurance include investment of funds and dealing with an invisible export, sources of employment, insurance industry has generated numerous employment opportunities.

---

[15] Clark, M.A. the law of Insurance Contract London Press 4th Edition (2004)
[16] Ibid
[17] Suze Orman, Life Insurance: concept, Nature and scope (2004) Mayor Publication
[18] Clark, M.A. The Law of Insurance contract London Press 4th Edition (2004)

Insurance is broadly divided into 2 classes' life assurance and general insurance. Risk covered by life Assurance include premature death, continues stream of income during retirement, sickness or disability. Risk covered by general insurance includes motor vehicles, Marine and Aviation and products or goods sold. It should be noted that the claim under life is certain Event, the only uncertainty is when the time it will occur.

General insurance has a term of contract, it is only one year and it is cancelable by both parties, life longer term can only be cancelled by the insured, while general insurance is subject to the principle of indemnity.

2.2.1 Nature of Insurance as a Contract of *Uberrimae Fidei*

Most contracts are governed by the maxim 'caveat emptor' or let the buyer beware;Insurance,however, is governed by the doctrine of utmost good faith, both at common law and by reason of section 17 of the Marine Insurance Ordinance, which applies both to marine and non-marine insurance policies.[19]

Insurance is a contract of speculation. The special facts upon which the contingent chance is to be computed lie most commonly in the knowledge of the Assured only; The underwriter Trusts to his 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 circumstances do not exist. The keeping back of such circumstances is fraud, and, therefore, the policy is void.[20]

The duty of utmost good faith or *uberimae fidei* requires all the parties to act in good faith. The duty imposes responsibilities to both parties in the following ways. The duty of utmost good faith requires an insurance company to Assess claims promptly, not delay paying claims without proper cause, not refuse to pay claims without proper cause

[19] Marine Act 1906
[20] Carter v. Boehm 1776.

(for example, by inappropriately preferring a general practicemedical opinion over that of a specialist) and in some instances to specifically advise the consumer of what risks the policy covers[21].

The duty of utmost good faith requires an insurance person to disclose all information relevant to the insurer's decision to accept the risk, not to make false or exaggerated claims and to cooperate with the insurer when making claims.

2.2.2 Origin of utmost good faith, Justification and its meaning

The doctrine of utmost good faith first appeared in the seminal judgment of Lord Mansfield sitting as Chief Justice of the Court of King's Bench, in *Carter v. Boehm* in 1766. The Judgment itself contains no specific citation of earlier authority, merely stating that the duty is derived from the law of merchants. Thus, it seems that the precise origin of the doctrine of utmost good faith will probably never be known. It may have been created by the law merchant. The possibility that it was originally a branch of the equitable Jurisdiction to relieve against imposition cannot be entirely discounted[22].

In *Carter v. Boehm* the brother of the Governor of fort Marlborough in Simatra took out a policy against the taking of the fort by a foreign enemy. The fort was duly taken and the insurer tried to avoid liability on the grounds of material non-disclosure. The outcome of the case is of little historical interest, instead it is the obiter dicta of Lord Mansfield which we must focus on. He stated that: Good Faith forbids either party by concealing what he privately knows, to draw the other into a bargain, form his ignorance of that fact, and his believing the contrary[23].

[21] Ibid
[22] Rupert Cohen, Good Faith in Insurance Law, A Redmadan Concept (2010)
[23] Carter v. Boehm (1776) 3 Burr. 1905.

This principle originally intended to apply to all contracts, the application of this statement was rejected by the human law and only survives in respect of insurance law. In light of subsequent case law, one of the most notable features of law Mansfield's dicta was that he intended for only the pre-contractual period to be governed by the duty. This was continued by Lord Black Burn in *Brownlie v. Campbell* over a hundred years later[24].

Soon after law Black Burn's statements, the human law of marine insurance was codified in the Marine Insurance Act of 1906. Despite its title, the contents of the Act have been held to apply to all insurance contracts.

Section 17 of the Act provides that a contract of marine insurance is a contract based upon the utmost good faith and if the utmost good faith be not observed by either party, the contract may be avoided by other party[25].

Section 18 requires the Assured to voluntarily disclose to the insurer every material circumstance of which he is unaware[26].

2.2.3 Meaning and Justification for the Doctrine

The justification for the doctrine was stated in the judgment of Mansfield in the case of *Carter v.Boelm* and in section 18 of the Marine Act, 1906, that the concept of materiality is very important and form the scope of the Assureds' duty to disclose every things he knows about the risk as the other party insurer does not know much about the Risk. He needs to disclose on those things which would influence the judgment of a prudent insurer in fixing the premium, whether to Reject the Risk or to accept it or to impose special terms on the risk[27].

[24]Browlie v. Campbelll (2004) UK Hl6.
[25]Marine Insurance Act 1906.
[26] Ibid.
[27]Wolonieki. J. The duty of utmost good faith in Insurance Law: Where it is in the 21st Century (2004) Academic Journal Article of before Counsel

This duty extends to those facts which the Assureds knows, however if the assured turns a blind eye or fails to gain confirmation, he was held to have known about the circumstance.

Under the duty of disclosure, a person applying for insurance must disclose relevant information to the insurer before a contract is entered into. A person applying for insurance must fully and completely answer all the questions on the proposal form; answer questions asking for detailed information if need be. A page with additional information can be attached if there is not enough space on the form[28].

This is very important as the failure to observe the principle of utmost good faith will allow the innocent party to void the contract abinitio.

The duty of utmost good faith is a continuing duty as section 18 and 20 of the Marine Insurance Act both refer to the situation as continuing before the contract is concluded although section 17th contains no such limiting language[29]. In Black King shipping *Corp vs. Messie, Hirst J.* Said that duty of utmost good faith applied with full rigour in relation to the giving of information by the assured to the underwriter about the voyage of a vessel under policy that required the giving of such information.

The Insurer has no right to claim damages for a breach of the duty – his only option is to avoid the policy abinitio, which is to say he treats himself as never having been on risk, this means:

1. All claims the insurer has already paid under the policy he learned of the non-disclose or misrepresentative can be reclaimed by the insurer.
2. The insurer has no liability to pay any further claims as they arise.
3. The insurer returns the premium paid, unless the non-disclosure misrepresentation was fraudulent in which case the insurer can keep the premium.

[28] Ibid.
[29] Black King shipping Corp. v. Massie (2001) ECWH.

4. The insurer can avoid the policy
5. Legally, it does not matter that the insurer has not asked for the specific information from the insured in the pre-contractual negotiations, although if he has not there are arguments of waiver[30].

However, the drastic consequences of when disclosure and misrepresentation have attracted much criticism and which no doubt form the reason for this thesis

2.3 General Principles of Insurance Contract

To appreciate the concept of insurance in relation to our day to day activities, it is very important to understand the guarding principles of insurance practice.

There are two (2) schools of thought on the number of these principles. The first school of thought believes that the principles are five (5) in number; while the second (2nd) school of thought says that they are six (6). However, for the purpose of this thesis, we shall subscribe to the second (2nd) school that says the principles are six.

The principles of insurance are as follows:

i. Utmost good faith
ii. Insurable interest
iii. Proximate cause
iv. Indemnity
v. Subrogation
vi. Contribution

} These two are regarded as corollary to the principle of indemnity.

Despite the fact that detail shall not be emphasized in this thesis on the principles, we shall however explain briefly the five principles; while emphasis shall be placed on utmost good faith at chapter three of this thesis which is the focal point of our thesis. Operation of insurance is based on fundamental principles notable among them are,

[30] Shi feng, Utmost good faith in marine insurance, A comparative study of English and Chinese Maritime Law (2003) Ply month Law Review.

insurable interest, utmost good faith and indemnity, the corollary of indemnity are subrogation and contributions.

By insurable interest on person who wants to purchase an insurance service must stand to benefit from the existence of the life or property to be insured and stand to suffer some pecuniary loss by its destruction. The interest of the person insuring the risk must have a legal recognition otherwise the contract will not engage.[31]

Utmost good faith means that a person who proposes his life or property for insurance is expected to disclose all material facts pertaining to the risk or object to be insured which may influence the mind of the underwriter or insurer as to whether or not to accept the risk for insurance.

A contract of insurance is basically a contract of indemnity. This principle applies to all classes of insurance except life and personal accident. The simple interpretation of this expression is that in event of an occurrence insured against, thereby causing a loss to the insured, the insured will be placed in exactly the same position he occupied just immediately before the loss. The insured is not expected to make any profit or gain out of insurance.[32]

To aid this principle of indemnity are two categories namely, subrogation and contribution. By the rule of subrogation the insurer after settling a claim in full is entitled to step into the shoes of the insured and exercise the insured's legal right against a negligent third party. The rule of contribution applies for insurance contribution to be made when two (2) or more insurers are covering the same subject matter of insurance.

[31] Legh-Jones, Birds and Owen (eds), MacGillivray on Insurance Law, (10th Edition 2005)
[32] Ibid

2.3.1 Principle of Insurable Interest

One of the consequences of the principle of indemnity is that the insured can claim to be indemnified only for the loss he sustains, and in order to suffer a loss he must have an interest in the subject matter of insurance i.e. he must stand in some relationship to the subject matter, recognized by law, by reason of which he will benefit by its continued safety or be prejudiced by its loss. It is referred to as a legal right to insure. This principle is very fundamental to the practice of insurance.[33] Any person that does not have an insurable interest in a property cannot insure such property. A duty to insure property may arise in one of the three ways:

a. By statute
b. By contract
c. By custom

The principle exists in order to prevent gambling, reduce moral hazard and to measure a loss.[34]

2.3.2 Principle of Indemnity

Indemnity entails putting the insured back to the same financial position after a loss as he enjoyed immediately prior to the loss. This is in accord with the basic concept of insurance, which is to compensate the unfortunate few for the loss they have sustained, but which is not intended to provide profit from misfortune.

In reality, the insured cannot be placed back to the position he enjoyed before the loss because of the policy terms and conditions, such as application of excess, depreciation and average etc.

[33] Legh-Jones, Birds and Owen (eds), MacGillivray on Insurance Law, (10th Edition 2005)
[34] Ibid

However, the principle of indemnity cannot apply to all life and personal accident contracts, it is impossible to provide an excess financial compensation in respect of claims, because life, limbs and fleeth cannot be precisely measured in financial terms.[35] The method of providing indemnity can be by cash payment, replacement, repair or reinstatement.

2.3.3 Principle of Subrogation

Subrogation is a corollary of indemnity. The principle provides that the insurer after indemnifying the insured shall step into the shoes of the latter (i.e. the insured) by taking up the rights of the insured against a negligent third party in order to reduce his outlay.[36] Subrogation can arise in torts e.g. negligence, by contract e.g. common carrier, tenancy agreement, under statute e.g. riot (damage) Act 1886, and salvage e.g. selling of wreck after indemnification.

2.3.4 Principle of Contribution

Contribution is the doctrine which enables an insurer to call upon other insurers similarly (but not necessarily equally) liable to the same insured to share the cost of an indemnity payment. It arises when there are two (2) or more policies on the same subject matter of insurance covering the same perils.[37]

2.3.5 Principle of Proximate Course

Proximate cause means "the active, efficient course that sets in motion a train of events which brings abort a result, without the intervention if any force started and working actively from a new and independent source"[38]

[35] Legh-Jones, Birds and Owen (eds), MacGillivray on Insurance Law, (10th Edition 2005)
[36] Ibid
[37] Ibid
[38] Legh-Jones, Birds and Owen (eds), MacGillivray on Insurance Law, (10th Edition 2005)

This principle assists the insurer in determining whether a loss is covered by the policy or not. The writer shall however defer the discussion on utmost good faith to the next chapter of this thesis as it is the nucleus.

2.3.6 Role of Insurer or Insurance

At this juncture, we would like to examine the functions of insurance as follows:

i. **Risk Transfer Mechanism**

We mentioned at the beginning of this thesis that insurance is a mechanism which involves the process of transferring risk by an organization to another. The fact that your potential financial liability is transferred, removes headache and then allows the organization to focus more on their own primary activity with increased productivity.[39]

ii. **Homogeneous Exposure or Risk Characteristics**

Another function is the analysis of risk antecedent which leads to the creation of a pool of fund into which several insured pay their premium. From this fund, the few that suffered losses get compensated, by way of indemnity. With the large numbers of persons and organizations contributing to the fund, the insurance company is able to predict almost accurately how much claim is likely to be incurred in the coming year. There may be variations in claims forecast from year to year, with experience, the premiums include a small load factor to build a reserve upon which the company may draw in bad years.

iii. **Equitable Contribution**

Each party wishing to insure will bring to the fund differing degrees of risk both in form of value and degree of hazard. It is the function of insurer to ensure

[39]Clark M. A. The Law of Insurance Contract (4th Edition 2014).

that the amount paid by way of premium is commensurate with the degree of risk introduced. Insurers are efficient in equitable distribution and management of the amount going into the fund, and if not, the insurer might be in problem. In fact rate cutting which is one of the major problem the industry is facing today is the inequitable contribution of premium going by basic insurance theory into the fund on a global basis.

iv. **Investment**

The main stimulus is the release of fund to business. The premium contributed by numerous insured constitute a bulk fund which is invested and channel through various financial institutions to reflate the already the deflated economy. In the same vein, insurer encourages savings through various life assurance policies by payment of small amount that could go into other casual spending.[40] Total investible fund within the economy is over N200 billion. From this pool those are in need of fund borrow there from for their various enterprises.

v. **Employment**

The insurance market grow tremendously to an extent that it now employs about 5% of the total country's population. The employment which is both direct or indirect includes middle and too management cadre.

vi. **Loss Prevention**

Another function of insurance which is akin to as stimulus to business is loss prevention as most companies employ the services of fire surveyors to identify source of potential risk and therefore events fire loss. Theft surveyors make recommendations for the protection of property against theft. The protection devices installed on their recommendation will deter many casual thieves etc.

[40]Clark M. A. The Law of Insurance Contract (4th Edition 2014)

vii. **Claim: End Product of Insurance**

The end product of insurance is claim payment. Before an insurer will pay a claim, certain conditions must be net which include the followings:

a. **Insured event must occur**

Non-life policy holder must suffer some financial loss before compensation is paid. In life insurance, the insured event (death or survival, as the case may be) must take place.

b. **The insurer must be told – Notification**

Once an insurer has been notified of the loss, they usually request for further details and issues a claim form which will contain loss information.[41]

c. **Proof must be furnished**

The onus of loss is on the policy holder to show that a loss or event covered by the insurance has occurred and to prove the extent of such loss via purchase receipt or other evidence.

d. **The Claim must be legal**

The law does not allow anyone to profit from his own wrong. So also claims which are illegal or against public policy are not covered or could be paid for.

e. **The insurance contract must be enforceable**

Certain conditions must hold before a contract is legally enforceable, known armed robbery or brothels are excluded so also are the minors.

f. **The Policy must cover the appropriate insured perils**

Certain causes are often excluded by insurer, for example, losses caused by explosion are usually excluded from the standard fire policy.

[41]Chris Parsons, David Green et al Company and Contract Law and their application to Insurance (Study Course A 520). CIIN Lagos 2012.

g. **The size of the claim must be decided**

The amount payable by any one insurer will depend on the type of insurance cover and whether there is any under insurance or co-insurance. Insurers generally pay a valid claim within a reasonable period in order to avoid bad publicity occasioned by delays. In fact, a policyholder with a valid claim is legally entitled to a full and speedy settlement of his/her claim.[42]

2.4 The Claims Settlement Experience of Insurance Industry

One of the greatest causes that have militated against insurance is the criticism emanating from the myth that insurers are only out to make money (premium) from the public without wishing to reciprocate by effective settlement in the event of claims. As a result there has been immerse outcry, even among the supposedly educated literate and enlightened Nigerians including the Court judges that sit over insurance oriented cases that insurers are rogues and swindlers.[43]

Considering the fact that it has been founded that some mushroom insurance companies that constitute backshore of the industry do conduct their practice in a way unbecoming of a servicing industry such as insurance, the same cannot be said of the generality of all.

The problem to a great extent lies with insuring public itself. Insurance as defined and asserted is based on some established principles, practice and procedure which in most part are reflected in the wordings and construction of an insurance policy, the sole document evidencing on insurance contract. But the question is how many insured's bother to read through the policy whenever it is handed over to them in the event of

[42]Chris Parsons, David Green et al Company and Contract Law & Other Application to Insurance (CIIN Lagos 2014.)

[43] Afolayan G. Insurer: Friend or foe, being a paper delivered at Insurance Wreck of Chartered Insurance Institute, Kaduna Chapter, Kaduna on the 13th of Oct., 1997

entering into a contract of insurance? If the firm would be admitted, at least 95% of the insuring public does not bother to read their policies, rather they cast it aside when it is given to them. Another 50% bother to go through it only on the occasion of an event given rise to claim. And that is if they suspect that the claim may be subject to disputation on certain grounds or how in actual facts been repudiated.[44]

As a result of this neglect, the insured fail to familiarize himself with the various terms, conditions and warranties governing the contract, the breach of which could render the contract void or voidable as the case may be and entitles the aggrieved party be it the insured or insurer to repudiate the contract. In most instances when an insurance company repudiates a claim on ground of a breach, it is usually in the interest of not the company who has to bear the shortfall in the fund, administrative expenses and overheads but for the benefits of all other insured's who rely on the same fund for relief in the event of a genuine and successful claims.

There is hardly any insurance company that has had the experience and exposure of fraudulent claims conceived by some insured solely or in conspiracy with other agents, brokers or even staff of the company. If an insurance company allows itself to be cajoled or intimidated into settlement of suspicious, unfunded, unapproved and unsatisfactory claims every time it is faced with such it will sooner or later end up bankrupt to the detriment of the shareholders and the policy holders.[45]

The principles of average and excess which play invaluable part in claim settlement are either unknown or purposely ignored by the insured when claim arises. Insurance companies can therefore considerably improve their image and consequently in the enlightenment of the public in general on the procedure and principles governing insurance claims.

---

[44] Ibid

[45] Afolayan G. Insurer: Friend or foe, Being a paper delivered at Insurance Wreck of Chartered Insurance Institute, Kaduna Chapter, Kaduna on the 13th of Oct., 1997.

Excess is the condition whereby the insured agrees to bear the first part of every loss or damage to the insured's property.[46] This is sometime pre-fixed in terms of percentage but usually in monetary form – e.g. N5,000 which means that he will be responsible for any loss or damage that is below N5,000 or if above, the insurer will pay the excess above. The essence of this condition is to curtail proliferation of small claims the totality of which could lead to an exorbitant cost, considering the fact that in most cases nearly the same procedure is adopted in the settlement of both the small and large claims.

Average on the other hand seeks to defeat under insurance and its adverse affects on both the insured and insurer by making the insured a co-insurer when under insurance exists. In the circumstance the insurer only pays those properties of which the sum insured bears to the value of the property insured at the time of the loss. Thus, if the property concerned is insured for N100,000 and the loss is N200,000 the insurer will pay 2/3 of the amount of the loss. It is of course possible for the full sum insured to be paid in the event of a total loss but this leaves the insured, as coinsurer, of the remaining loss. However average is not always applicable when it comes to motor insurance but you cannot claim more than sum insured. Continuous revaluation is necessary under motor insurance in order to fall in line with inflationary rate so that the insured shall be adequately compensated when the loss occurs.

However, this explanation and effort is to make the claimant reason with insurer along the terms and conditions of the policy and applicable principles were always lost due to his fury and prejudice against the integrity of the insurance companies as a whole.

Similarly, a situation where the insured has breached a warranty or some other conditions that entitle the insurer to repudiate claim and the later intends to enforce its

[46] Afolayan G. Insurer: Friend or foe, Being a paper delivered at Insurance Wreck of Chartered Insurance Institute, Kaduna Chapter, Kaduna on the 13th of Oct., 1997.

right leads to a contemptuous accusation from the insured.[47] Among the warranty and condition of the policy that may lead to repudiation of a claim is the breach of utmost good faith as discussed in chapter three of this thesis.

[47] Ogunshola, A.O. Insurance and Pension Practice in Nigeria, Board Publications Limited, Ibadan (1984)

CHAPTER THREE

NATURE AND SCOPE OF THE LAW OF UTMOST GOOD FAITH

3.0 Introduction

This chapter of the Research work shall focus on the Nature and Scope of the law of utmost good faith. We shall examine the principle of Caveat Emptor and compare with the principle obtainable under Insurance. The meaning of material facts shall be elaborately discussed; the rules play by intermediaries and the chapter shall be concluded with remedies available for an aggrieved party for breach of utmost good faith in the contract of Insurance

3.1 The Principle of Caveat Emptor

In the English Law of contract, the general rule is that a contracting party is under no duty to disclose material facts known to him to the other party. The legal doctrine of Caveat Emptor (let the buyer bervane) applies, which means that it is the duty of the buyer to make himself be acquainted with the defects.[1]

Most commercial contracts are subject to the doctrine of Caveat Emptor. These contracts are subject to the Sale of Goods Act 1979 (as a amended by the Sale and Supply of Goods Act 1994), the Supply of Goods and Services Act 1982. The Misrepresentation Act 1967, the Supply of Goods (Implied Terms) Act 1973 and the Unfair Contract Terms Act 1977,[2] but basically it is the responsibility of each party to the contract to ensure that they make a good or reasonable bargain. In most of these contracts, each party can examine the item or service which is the subject matter. So long as one does not mislead the other party answers questions truthfully, there is no question of the other party avoiding the contracts.[3] There is no need to disclose information which is not asked for.

[1] Section 2 Sale of Goods Act 1994
[2] Ibid
[3] Ibid

3.2 Overview of the Principle of Utmost of Good Faith

A contract of insurance is different from the principle of Caveat Emptor.The principle of utmost good faith is applicable to Insurance. The nature of the subject matter of insurance and the circumstances pertaining to it are facts particularly within the knowledge of the insured, as the proposer in the contract of insurance is in a superior position to know more what is insuring![4]

While the proposer can examine a specimen of the policy before accepting its terms, the insurer is at a disadvantage as he cannot examine all aspects of the proposed insurance which are material to him. Only the proposer knows, or should know, all the relevant facts about the risk proposed.[5] The underwriter can have a survey carried out but he must rely on information given by the insured in order to assess those aspects of the risk which are not apparent at the time of a survey.

In order to make the situation more equitable the law imposes a duty of uberrimae fidei or utmost good faith on the parties to an insurance contract. The contract is deemed to be one of faith or trust and most contracts of a Fiduciary nature are subject to the same doctrine.[6]

In the case of Ma Kim Ying vs. Manu life,[7]Mr. Wong Tong applied for a life policy on 12 July, 2004 and it was issued backdated to 1st July 2004 with Mr. Wong as policyholder and his wife as sole beneficiary, Mr. Wong died on 14th May 2007 from a condition which the had not disclosed to the Insurers.

The court held that the Non-disclosure had been fraudulent that the facts withheld were material, that the underwriter had been induced to write the policy when it would

[4] Clark, M. A. The Law of Insurance Contracts (4th Edition, 2004)
[5] Ma Kim Ying v. Manu life (International) Ltd (2012) 4KCFI 941
[6] Ibid
[7] Ibid

otherwise have not been written and that the incontestability clause did not provide a deference.

The duty of full disclosure rests on the underwriter also[8] and must not withhold information from the proposer, which leads him into a less favourable contract. It is to the great credit of the insurance industry that breaches of this duty by insurers are extremely unlikely, but examples of the duty are:

i. Not to withhold from a proposer that the sprinkler system in his premises entitles him to a substantial discount on his fire insurance premium
ii. Not to accept an insurance which they know is enforceable at law, or which they are not registered to underwrite.
iii. Not to make untrue statements during negotiation for a contract.

3.2.1 Evolution of the Duty of Utmost Good Faith

The doctrine of utmost good faith first appeared in the seminal judgment of Lord Mansfield in the popular case of *Cartar v. Boehim in 1766*.[9]The judgment itself contains no specific citation of earlier authority;it merely stated that the duty is derived from the laws of merchants. That it seems that "the precise origin of the doctrine of utmost good faith will probably never be known. It may have been created by the law merchant. The possibility that it was originally a branch of the equitable jurisdiction to relieve against imposition cannot be entirely discounted"[10]

In the case of *Carter vs Boehm*, the brother of the Governor of fort Marlburrough in Sumatra took out a policy against the taking of the fort by a foreign enemy. The fort was duly taken and the insurer tried to avoid liability on the grounds of material non-disclosure. The outcome of the case is of little historical interest; instead it is the *obiter*

[8] Ibid
[9] *Carter vs Boehm (1766) Burr, 1905*.
[10] Ibid

dicta of Lord Mansfield which we must focus on. He stated that: "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"[11]

It was originally intended to apply to all contracts; the application of this statement was rejected by the common law and only survives in respect of insurance law. In light of subsequent case law, one of the most notable features of Lord Mansfield's dicta was that he intended for only the pre-contractual period to be governed by the duty. This was confirmed by Lord Blackburn in *Brownlie vs Campbell* over 100 years later.

Soon after Lord Blackburn's statements, the common law of marine insurance was codified in the Marine Insurance Act 1906. Despite its title, the contents of the Act have been held to apply to all insurance contracts. Section 17 of the marine insurance Act provides that: "A contract of marine insurance is a contract based upon the utmost good faith and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party"[12]

The pertinent question to task is what is the duty of utmost good faith? The duly of 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 asked for them or not"[13]

Section 18 of marine insurance Act of 1906 requires the assured to voluntarily disclose to the insurer every material circumstance of which he is aware.[14] The next pertinent question is what are material facts? Material facts are all facts that would influence the judgment of aprudent insurer in fixing the premium or determining whether he will take the risk.

[11] *Carter vs Boehm* (1976) 3 Burr. 1905
[12] Prithvi Y. Utmost Good Faith in Insurance Contract (2010) Insurance Journal, Vol. II.
[13] Clark, M. A. The Law of Insurance Contract London Press 4th Edition (2004) p. 232.
[14] Marine Insurance Act 1906

It is however to be noted that the marine insurance Act, 1963 is somewhat relaxes in application when it comes to the principle of utmost good faith. This is mainly because of the problems of access to the vessel, cargo, etcetera as well as the Jurisdictional problems associated with international waters. If at any point of time, the vessel or cargo is destroyed on high seas, the time when the same came to the knowledge of the parties needs to be considered rather than the general principles of insurance contract.

Section 19-23 of the Act talk about the principle of utmost good faith by using the terms disclosure and representation. Section 19 lays down the general principles and says that in essence of utmost good faith, the contract may be avoided by the parties, section 20(1) says that the assured must disclose every material circumstance he knows. Thus, the knowledge of the insured is more important than the actual happening of the events.

Section 22(1) says that the representation made by the insured must be true, which is again dependent on the capacity of the insured to know the truth and is hence subjective.Finally, section 22 also says that whether the assured failed to disclose internationally or innocently or inadvertently is immaterial[15].

3.3 The Meaning of Material Fact

The current legal definition of a material fact is contained in the Marine Insurance Act 1906. Section 18(2) in these words:

"Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium or determining whether he will take the risk" The concept of materiality serves to paramaterise the scope of the assureds' duty.[16] This statement has been reaffirmed in the Road Traffic Act 1972 and in *Lambert v C.I.S* in similar terms.

[15] Marine Insurance Act 1963 (section 19-23)
[16] Section 18 (2) Marine Insurance Act 1906

It is the view of the writer of this dissertation that the term "prudent underwriter should be substituted with reasonable underwriter, and also to further, a reasonable insured rather than a reasonable underwriter should be the test of whether a fact is material or not[17]. This shall be further expatiated in chapter four of this dissertation.

3.3.1 Facts which must be disclosed

Any fact which would influence the insurer:

i. In accepting or declining a risk or

ii. In fixing the premium or terms and conditions of the contract is material and must be disclosed. The fact must be material at the date at which it should be communicated to the insurer. A fact which was immaterial when the contract was made, but later becomes material, need not be disclosed in the absence of a policy condition requiring continuous disclosure. It is not for a particular insured or for a particular insurer to decide what is material, but ultimately for the Courts to decide what at present a prudent or reasonable insurer would decide. Facts which require disclosure are:

a. Facts which show that the particular risk being proposed is grater internally than would be expected from its nature or class.
b. Similarly if external factors make the risk greater than normal.
c. Facts which would make the likely amount of loss greater than that normally expected.
d. Previous losses and claims under other polices
e. Previous declinature or adverse forms imposed on previous proposals by other insurers.
f. Facts restricting subrogation rights due to the insured relieving third parties of liabilities which they would otherwise have.

[17] Prithvip utmost good faith in Insurance General Articles 2010 p.8

g. Existence of other non-indemnity policies such as life and accident.

h. Full facts relating to and descriptions of the subject matter of insurance

3.3.2 Facts which need not be disclosed

It was stated that everything is material which could influence the terms offered. It follows that in addition to the detrimental facts outlined there could be facts which improve the risk and if the proposer does not disclose these facts he is not putting the under writer at a disadvantage.

These are materials that need not be disclosed by a proposer:

i. Facts of law everyone is deemed to know the law

ii. Facts which an insurer is deemed to know, facts of common knowledge such as strife in the middle East or the usual or normal processes within a particular trade.

iii. Facts which lessen the risk e.g. the existence of an alarm system in a theft risk or sprinklers in a fire risk.

iv. Facts about which the insurer has been put on enquiry: The most common example is where the proposer has referred the insurer to the claims record under a previous policy.

v. Facts which the insurer's survey should have adopted

vi. Facts covered by the policy conditions e.g. that burglar alarms are regularly mentioned.

vii. Facts which the proposer does not know

viii. Facts (conventions) which are spent under the rehabilitation of offenders Act 1974.[18]

[18] Chris Parsons, David Green, et al, company and contract law and their application to insurance (study course A520) Chartered Insurance Institute of Nigeria Publishing Division 1999.

3.4 Duration of the Duty of Disclosure

The duration of the duty to disclose material facts varies. It takes place in the following circumstances which affects the duration.

3.4.1 At Common Law

The duty at common law starts at the commencement of negotiations for a contract and terminates when the contract is formed; when there is offer and acceptance. During the currency of the contract the duty is one of good faith, not of utmost good faith, in that at common law there is no need to disclose changes while the contract is running.

3.4.2 Contractual Duty

Sometimes the conditions of a policy extend the common law position by requiring full disclosure during the currency of the contract, and giving the insurer the right to refuse to underwrite the change. In other cases, the policy condition may require disclosure of certain types of fact only.[19]

3.4.3 Position of Renewal

The duty of disclosure at time of renewal defends on the type of contract:

i. In a long-term business, for instance, in this type of Assurance e.g. Life Assurance and Permanent Health, the Assurer is obliged to accept the renewal premium if the Assured wants to continue the contract and there is no duty of disclosure operating at renewal.

ii. In other business, however, renewal requires the assents or agreement of the insurer, and in such cases the original duty of disclosure is revived. The facts as applying

[19] Chris Parsons, David Green, et al, company and contract law and their application to insurance (study course A520) Chartered Insurance Institute of Nigeria Publishing Division 1999.

as the time of negotiating the renewal must be disclosed as in *Liberty Insurance v. Argo systems*[20]

3.4.4 Alterations to the Contract

If, during the currency of the contract, it is necessary to alter the terms of it, perhaps to increase the sum insured or alter the description of property insured, the facts as applying as the time of negotiating the renewal must be disclosed Parker and Parker v. NFU.[21]

3.5 The Role of Intermediaries as regard the Law of Utmost Good Faith

A very high proportion of insurance business is brought about by the services of insurance intermediaries for some of these, the bringing together of proposer and insurer in their full time business. These include brokers and insurance consultants. In other cases, the arrangement of insurance contract is brought about by intermediaries whose main business is in another field; garages, solicitors, accountants, estate agents, building societies and banks. In the case of banks, many of them have set up separate insurance broking companies, although the initial contact by a member of the public may be to the local bank manager"[22]

In law, all intermediaries are agents of the principal whom they represent. Insurance practice generally refers to the part-time intermediary as an 'Agent', whereas the full time specialist is called a Brokers or a consultant. Here we will use the word Agent to apply to any intermediary.[23]

Where a principal engages another parties to act for him in negotiating a contract, the principal is liable for the fraud, concealment or misrepresentation of the agent, where

[20]Liberty Insurance (Pte) v. Argo Systems FZE (2011) ECWA CW 157.
[21]Parker and Parker v. NFU Mutual Insurance Society Ltd (2012) ECHC 156.
[22] Keenan, D. English Law, Longman London (14 edition 2006)
[23]Parker and Parker v. NFU Mutual Insurance Society Ltd (2012) ECHC 156

that agent is separately acting in the course of the principal's business as authorized. Where an agent, acting for an insurer, accepted a premium for a risk even though he knows that the insured had broken a policy condition, the insurer was prevented from avoiding the policy.[24] This is an example of the doctrine of estoppels.

This concept arises out of the principle of equity. Sometimes one party makes a concession which he is under no obligation to make and for which the receives no consideration. If the other party relies on this concession it would be unjust if he was to suffer loss by the concession being withdrawn retrospectively.

In the case of *Wing vs Harvey*, the agent by accepting the premium, was waiving his principal's rights of refuting the policy on the grounds of breach of condition. Having relied on that principal's waiver by assuming that he was insured, it would have been unjust to the policy holder if liability had been denied.

A similar position arises in the case of *Murfitt vs Royal.*[25] Here the agent had no authority to issue cover, but the company had ratified his ultra vires outcomes on two previous occasions. This led the insured to think that the agent had authority to issue cover and the insured would have been prejudiced if this in fact was not the case.

Where the insured uses an intermediary, the knowledge of the agent is imputed to the principal and vice verse, and this knowledge, where material, must be communicated to the insurer.

Difficulties sometimes arise as to whether an agent is an agent of the proposer or of the company. In the one transaction he can be an agent of both, but the individual actions within that transaction will decide on whose behalf he is acting at a particular time.

[24]Lead way Ass. Co. Ltd. V. Zeco Nigeria ltd (2004) 22 WRN 1 Sc.
[25]*Murfit vs Royal Insurance Company Ltd*. (1922) 38, 7LR 334

This now brings us to the dimension whether the agent is agent of the proposer or the agent of the insurance company.

3.5.1 The Agent is Agent of the Proposer

The agent is the agent of the proposer in the following circumstances:

i. If the only recognition he receives from the insurers is the payment of commission[26]

ii. If he and the proposer are in collusion over fraud against the insurers.

iii. If he fills in, alters or adds to the answers in a proposal form and the proposer knew or ought to have known of this:*Facer v. Vehicle & General Ins. Co. Ltd.*[27]

iv. If he competes a form on the proposer's behalf and the firm incorporates a wording to the effect that if the form is completed by someone other than the proposer, that person is deemed to be the agent of the proposer. *Facer vs Vehicle and General Ins. Co. Ltd.*[28]

v. If an agent gives advice to the proposer as to the cover he requires and the market in which he should place his business.

vi. If the agent gives the insured advice about how to formulate his claim.

3.5.2 The Agent is Agent of the Insurance Company

The agent is agent of the insurance company in the following circumstances:

i. If he has express authority from it to receive and handle proposal forms.

ii. If he handles the form according to a previous course of business with the insurers and within an implied authority that has arisen.

iii. If he surveys and describes the property on the insurer's behalf

[26]*Bancroft vs Health* (2001) 16 TLR 138.
[27]Facer v. Vehicle & General Ins. Co. Ltd (2002) 12 TLR 102
[28]Ibid

iv. If he acted within express authority, where the company either ratifies his action or his had ratified such action in the past. *Murfit vs Royal Insurance Co* (Supra).

v. If he expressly or impliedly has authority to collect premiums.

vi. If he is instructed by the insurers to ask questions and fill in the answers on a proposal form. He is then the insurer's agent even when the proposal contains a declaration to the contrary. *Stone vs Reliance Mutual Ins. Co. Ltd*.[29]

3.6 Remedies for Breach of Utmost Good Faith

The aggrieved party has the following options:

a. To avoid the contract by either by:

   i. Repudiating the contract *'ab initio'*

   ii. Avoiding liability for an individual claim.

b. To sue for damages in addition to, if concealment or fraudulent misrepresentation.

c. To waive his rights to (a) and/ or (b) and allow the contract to carry on unhindered.

The aggrieved party must exercise his option within a reasonable time of discovery of the breach, or it will be assumed that he has decided to waive his rights.

[29] Stone vs Reliance Mutual Co. Ltd (2002) 1 LR469

CHAPTER FOUR

ISSUES, CHALLENGES AND PROSPECTS IN THE ENFORCEMENT OF THE LAW OF UTMOST GOOD FAITH

4.1 Introduction

The chapter of the Research work shall focus on the issues of utmost good faith under Common Law, Statutes as regards the enforcement. All the challenges emanating under common law and statutes shall be elaborately described, and the prospects in the enforcement of the law of utmost good faith shall be addressed in the conclusion of the chapter.

4.2 Issue of Utmost Good Faith under Common Law

The duty of good faith initially arose to explain why the insured was required to disclose to the insurer all information relevant to the risk insured. This duty, however, was also placed on the insurer, so that there was a mutual obligation of disclosure prior to entering into the contract" In *Carter vs Boehim* (Supra), Lord Mansfield stated at page 1909-1910 as follows:

The policy would be equally void against the underwriter, if he concealed, as if he insured a ship or her voyage, which he privately knew to be arrived, and an action would lie to recover the premiumgood faith forbids either party, by concealing what he privately knows to draw the other into a bargain from his ignorance of the faith, and his believing the contrary.[1]

While the most common manifestation of the duty of good faith is pre-contractual duty of disclosure, the duty also extends throughout the period of the policy (that is it is also a post-contractual duty).For example,*Drake Insurance Plc v. Provident Insurnce*[2]it was held that the duty of good faith commences before a policy is made via the duty the

[1]*Carter vs Boehm* (1977) 3 Burr. 1905
[2]*Drake Insurance Plc v. Provident Insurance Plc. (2007) EWHC 109.*

disclosure continues so long as the parties are in contractual or continuing relationship with each other manifestations of the post-contractual duty of good faith usually arise in relation to claims – either the way the insured made the claim or the way the insurer handled the claim[3].

In Drake Insurance Plc v. Provident Insurance Plc[4] it was also held that the remedy of providence of a contract is a self help remedy and could not be overturned by the court by the exercise of its equitable jurisdiction.

In other jurisdiction like Austrialia, it has been held that the duty of good faith continues, even if the parties commence litigation in respect of the policy until judgment (and perhaps, even after that)[5].

In another case of England in *Manifest Shipping & Co. Ltd. Vs Uni-polaris Insurance Co Ltd*[6] it was held that the duty of good faith ends once litigation commences, as the parties had become adversaries and the rules of Court will given discussion (without the needed to be supplemented by the duty of good faith). While the English interpretation is more sensible, it remains to be seen what decision the higher Australian Courts will come to. It is the opinion of this writer that the applicable principle of utmost good faith in this instance has not been too fair to the insured which is moreless for the benefit of the other party insurer.

Similarly, under the common law, a breach allows the innocent party to avoid the contract if the breach occurs prior to the contract execution, then the contract is avoided from the very beginning if the breach occurs after contract formation (e.g. during claims) then the traditional view has been that the contract may also be avoided from the very beginning of the contract. The more logical approach, however, is that the contract is

[3] Ibid
[4] Drake Insurance Plc v. Provident Insurance Plc (2007) EWHC 109.
[5] Horbelt vs GGIC (1978) 2 Looyds Rep. 425.
[6] *Manifest Shopping & Co. Ltd vs Unipolaris Insurance Co. Ltd* (unreported Supreme Court of South Austrialia 26th June 1952.

avoided from the time of the breach. This avoids the situation of having earlier claims (which were made honestly) being tainted by the later Act of bad faith. This was recognized by the AustralianLawReform Commission Insurance Contracts[7]which stated "the strict application of the doctrine of utmost good faith conceivably result in the insurer being entitled to avoid the contract *ab initio* from the beginning. If so, an insurer might be entitled to deny a prior claim untainted by fraud or to require repayment of moneys paid by it in connection with such a claim"[8]

It has to be noted that the damages are allowed in Australia under the common law for a breach of the duty of good faith.

The common law imposes duty on both the two (2) parties to the insurance contract (the insured and the insurer and not insured alone) the duty of good faith has resulted in the following duties for the insurer.

4.2.1 Duty to Insurer

a. Pre Contractual Disclosure and Non-Misrepresentation

Generally, an insurer must not misrepresent about the policy (or any other facts) that are material to the policy. The insurer must also disclose any relevant policy terms that hence major consequences (such as denial of claims.

The insurer must ask the insured specific questions relevant to the risk. Failure to do so waives the insurer's ability to claim that the insured failed to disclose the relevant fact. The insurer must specifically ask the insured about exceptional circumstances which:

i. are known to the insurer
ii. is what a reasonable person in the circumstances would know is a matter relevant to the risk.

[7] Australia law Reform Commission Insurance Contracts No. 2, 1982.
[8] Insurance Company Act (ICA Australia) 1972.

iii. is something which the insurer would not be expected to specifically ask about.

The insurer must inform the insured in writing about the insured's duty of disclosure and the effect of non-disclosure. The purpose of these section is to ensure that the insured is prompted to provide the current information and that they are made aware of the consequences of failure to comply with the duty of disclosure (and the duty of good faith)[9]

b. **Drafting Policies**

The insurer must draft its policies in clear, plain English so that the policy can be easily understood by the insured. This is implemented in all the common wealth countries. In addition, the insurer must bring to the insured's attention any insured terms of the policy. This is merely a manifestation of the insurer's duty to have due regard to the insured when drafting its policies.

c. **Post Contractual Claims Handling**

Naturally, when deciding whether to approve claims, the insurer's interest will conflict with the insured's interest. The duty of good faith therefore requires the following from the insurer.

i. To manage, administer and process claims efficiently and without undue delay.
ii. To decline claims only with reasonable evidence or belief that the claim should be declined.
iii. To investigate the claim before declaring a claim
iv. To investigate claim in a reasonable manner
v. To not use in appropriate reasons to deny a claim (such as a minor misrepresentation which did not impact on the event causing the claim.

[9] Hodges, Suan (eds), cases and materials on Marine Insurance Law, Canvendish London (1999).

d. **Court Defence/Settlement**

When conducting an insured's Court defence or negotiating settlements on the insured's behalf, the following duties apply:

i. To conduct the defence efficiently, economically and to consider the insured's interest as well as the insurer's own interest.

ii. To consider the insured's interest in respect of settlement amounts. For example, it be bad faith for the insurer to not offer a settlement amount solely on the basis that there is a small chance the Court may award a lower amount against the insured.[10] This is because continuing the trial may run up large defence costs for the insured (assuming the insured is liable for Court costs).

e. **Renewal of Policies**

The duty of good faith may be breached where the insurer offers in commercial terms to an existing policy holder in an attempt to rid itself of that policy holder. This should not be a breach, however, if the insurer has honest commercial reasons for doing so.

4.2.2 Duty to the Insurance Broker

A broker is generally considered to be the agent of the insured. As such, the actions of the broker will been seen as the actions of the insured. This means a broker's action may effectively result in the insured breaching its duty of good faith. This can happen in various ways:

i. making a false claim

ii. intertionally leaving out relevant information (either in entering into the policy or in making a claim)

iii. refusing to assist the insurer with its defence or rights of subrogation.

[10] Hodges, Suan (eds), cases and materials on Marine Insurance Law, Can vendish London (1999)

If a breach occurs as a result of the broker's actions, than the insurer will be able to canceal the contract and reduce the amount payable under the relevant claim.

The result is that the insured will make a claim against the broker for negligence. What does this mean to the broker? It means that the broker must be aware of the insured's duty and ensure that it does not breach that duty on the insured's behalf.[11]

A broker has no duty of good faith to the insurer on its own account – it only owes that duty to the insurer as agent of the insured.

4.3 Issues of Utmost Good Faith under Statutes

The principle of utmost good faith has always been the crown of the field of marine insurance law, which derived from the case of *Carter vs Boehim* (Supra) with the codification of the Marine Insurance Act 1906, in England where Nigeria received her law as a result of colonization. We in Nigeria have started operating in line with this promulgation. The principle found expression in section 17 to 20.

Section 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 (section 18) and the brokers (section 19) to disclose material circumstances, and to avoid making misrepresentations (section 20).[12]

The Marine Insurance Act, 1963 somewhat relaxed in application when it comes to the principle of utmost good faith. This is mainly because of the problems of access to the vessel, cargo etc, as well as the jurisdictional problems associated with international waters. If at any point of time, the vessel or cargo is destroyed on high seas, the time

[11] Hodges, Suan (eds), cases and materials on Marine Insurance Law, Can vendish London (1999)
[12] Marine Insurance Act 1906

when the same came to the knowledge of the parties need to be considered rather than the general principles of insurance contract.[13]

Section 19-23 of the Act talk about the principle of utmost good faith by using the terms disclosure and representation. Section 19 lays down the general principle and says that in absence of utmost good faith, the contract may be avoided by the parties.[14] Section 20(1) says that the assured must disclose every material circumstance he knows. Thus, the knowledge of the insured is more important than the actual happening of the event section 20(1) says that the representation made by the inured must be true, which is again dependent on the capacity of the insured to know the truth and is hence subjective.

Finally, section 22 also says that whether the assured failed to disclose intentionally or innocently or innocently or inadvertently is immaterial.

However, in English law there are still some extent 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 section 17 is still uncertain.[15]

In other countries legislation like China and Australia, maritime law especially in China, there is no separate legislation with respect to maritime insurance law, and relevant content is covered as a chapter of the maritime code of the people's republic of China under the heading of "contract of marine insurance.[16] Under this title, there is no specific principal provision which stipulates the doctrine of utmost good faith.

Therefore, analysis of this doctrine is crucial for the study of marine insurance law in the UK. As stated earlier, section 17-20 of the marine insurance Act 1906 list two leading aspects of utmost good faith – the duty of disclosure, and not to make misrepresentations pending negotiation of contract. Therefore, on the marine insurance

[13] Marine Insurance Act 1906
[14] Ibid
[15] Keenan, D; English Law; Longman London (14th Edition 2014)
[16] Keenan, D; English Law; Longman London (14th Edition 2014)

Act, the narrow sense of utmost good faith mainly covers two definitions: duty of disclosure and representation but, since the requirements for utmost are so abstract, and the UK is a common law country, the identification and enforcement of the relevant test has been hampered and become much more complicated in practice.[17] Examples are the standard to measure 'utmost' when to disclose and make representation; whether the duty is only pre-contractual or continuing, the test for maturity.

There are a number of specific issues to be identified with regard to English marine insurance. These issues include breach and duration of duty, materiality and the test, limits on disclosure, misrepresentation, legislative intervention, reform, remedies and legal consequences' for breach, especially for the issue about identifying the scope of section 17. At the time the Act was drafted, Lord Mansfield did not mention or maybe did not notice, the probability of fraud claims advanced by the assured, which results in the divergences' about whether the duty of utmost good faith is a continuing one or not. To date the argument has concentrated on whether the fraud claim is covered by utmost good faith doctrine or not. After the review of a group of classic cases, there is a suggestion that the judgment tends to discourage the exaggerated extension of section 17 and prefers to catalogue the fraudulent claim under the heading of 'fraud' at Common Law.[18]

With regard to China, the situation is not good; either the legislation or the enforcement is poor and lacks regulation. Chinese Insurance Law adopts similar words to section 17, listing the legal effects of the breach of this obligation. In China, there is still no principal provision dealing with utmost good faith in the marine insurance contract until now.

Besides the lack of utmost good faith requirements in the maritime code, the maritime code of China adopts the term 'inform' instead of disclosure under the marine

[17] Ibid
[18] Keenan, D, English Law; Longman London (14th Edition 2014)

insurance Act 1906. Whether this is purposely or just a translation problem needs further verification as well. However, there are some distinctions on the content of provisions.

As compared with the marine insurance Act 1906, the inform duty in the Chinese maritime code covers the duty of disclosure and not to make misrepresentation in English maritime insurance. With respect to the breach of duty, the legal consequences are different.

In China, the infringement of duty is divided into two (2) categories. Intentional and non-intentional Act, which leads to two different legal consequences of duty breach.[19] In contrast, in marine insurance Act 1906, if the assured fails to perform the duty, no matter whether utmost good faith, or the duty of disclosure and not make misrepresentation under this heading, the contract may be avoided. But sometimes, as there is no either remedy, avoidance of the contract is the only remedy available to the assured since the courts held that damages cannot be awarded for such breach.

4.3 CHALLENGE AND PROSPECTS IN THE ENFORCEMENT OF THE LAW OF UTMOST GOOD FAITH

The obligation imposed by the duty of good faith is that the Assured is obliged to disclose all material matters, which are those which would influence the judgment of a prudent insurer in fixing the premium or determining whether he will take the Risk.[20] The unfairness which may stem from the operation of the obligation is best illustrated by the case of *Drake Insurance Plc. v. provident Plc*.[21] In the insurers attempted to avoid a claimant's motorcycle claim on the grounds of material Non-disclosure. The information which the claimant failed to disclose concerned a speeding conviction. The insurers operated a points system whereby events such as

[19] Ibid
[20] Legh-Jones, Birds and Owen (eds) Macalliuray on Insurance Law, 10th Edition (2003)
[21] Drake Insurance Plc. V. Provident Plc (2003) ENHC, 109.

speeding tickets and crashes carry certain points the total of which dictates the level of an applicant premium. The disclosure of the speeding conviction has led to an increase in the claimant's points of total of 10. However, the claimant had also failed to inform the insurer that a previous accident he had been involved in had been re-designated as no fault accident. This would have led to a points reduction of 15. Therefore, had he fulfilled his duty of good faith and told the insurer everything that a prudent insurer would have regarded as material, his points total would have decreased by 5.

The majority of the court expressed sympathy but ultimately rejected his claim that the Insurer had breached its duty of good faith by not checking whether the earlier accident had been reclassified. This case illustrates the imbalance which exists in the formation of insurance contracts between the insurer and the assured.

Lord Mansfield's original inception of good faith says it applies to both parties; however, because the assured is almost always in a position of greater knowledge concerning the issue or object requiring insurance, it is to them the duty applies. The insurer benefits from the overall duty without facing reciprocal obligations. As legh Jones et al state that as the law presently stands avoidance is not constitutional upon the insurers acting in good faith and the insurer is not obliged to enquire whether undisclosed pre-placement allegations have been shown to be unfounded before electing to avoid the contract.[22]

The Effects of the obligations stated above are aggravated by the sole and draconian remedy of avoidance enshrined in 517 of the MA 1906. It means where an assured innocently believes that a fact is not relevant to a policy, the Insurer only need establish that its absence is material, the Insurer will be able to avoid the claim

[22] Legh-Jones, Birds end Owen (eds) MacGillivray on Insurance Law, with Edition (2003)

in its entirety. For Butcher this state of affairs is draconian[23] and for Eggers et al one of "Overkill"[24].

This imbalance in the Utmost Good Faith has long been recognized by both the Courts and the Industry itself and various approaches have evolved to minimize the burden that the duty places a on the assured.

4.3.1 United Kingdom Challenges & Prospects on Utmost Good Faith

There have been many calls for reform of the duty of disclosure in UK. The law reform committee in 1957; the English Law Commission in 1980; and the National Consumer Council in 1997 attempted to initiate sweeping reforms across the Area[25]. However, despite the calls there has been no, legislature change, instead reform has focused on market based solutions which was advocated by the British Insurers that changes is not necessary.

Market based solutions have been used reactively and correspond to waves of public industry and judicial outcry. As a result of this, statement of practice were issued in 1977 in which insurers agreed not to rely on their strict legal rights in some circumstances, the financial services Authority has also incorporated a series of practice requirement s into its guidelines, a further layer exists in the form of the financial Ombudsman Service.

Finally, the Association of British Insurers issued a Code on Non-disclosure regarding long-term protection insurance which required insurers to consider what they would have done had they known the full facts, as opposed to instantly avoiding the policy where the applicant has made a careless error.

4.3.2 AUSTRALIAN INSURANCE CONTRACTS ACT 1984 ON UTMOST GOOD FAITH

[23] Butcher, Good Faith in Insurance Law: a redundant Concept? (2008) Journal of Business Law.
[24] Eggerset, the Principle of Good faith in Insurance Overview (2007) Journal Business
[25] Bennet, mapping the doctrine of Utmost Good Faith in Insurance Law (1999)

The duty of good faith is now an implied statutory term inserted into every general insurance contract in Australia under section 13 of the Insurance contract Act 1984. Section 13 requires both the insurer and the insured to act towards the other, in respect of any matter arising under or in relation to it, with the utmost good faith. Therefore, like the common law, the duty spans from the pre contractual stage (duty of disclosure) to the post contractual stage (the making and handling of claims).

In addition, being a contractual term, damages are allowed to the innocent party in case of a breach.[26] The insurance contract Act does not, however, apply to all insurance contracts. For example the common law duty of good faith still applies to the following contracts namely: reinsurance contracts, health insurance, friendly society, marine insurance and workers compensation contracts.

The duty of good faith under the ICA however is not vastly different than that under the common law it is merely made more explicit as it is now in statute form. e.g. section 12 states that the duty is not to be read down in any way by any other law or any other provision of the ICA. However in practical terms, the duty under the ICA does not require a higher duty of disclosure for the insured than under the common law.

Section 14 states that if the reliance by a party on any provision of the contract would fail to be an Act of good faith, then the party cannot rely on that provision.

This is generally aimed at the insurer and is merely another way of saying that the insurer must have due regard to the insured's interest when the insurer is placed in a position of conflict.

[26] Insurance contract Act (ICA Australia) 1994

The ICA expressly allows damages for post contractual breaches of the duty of good faith. The ability to cancel the contract in all cases of a breach is also preserved.[27] Damages are allowed as the duty is an implied contractual term of the contract. From the insurer's point of view, however, the damages will manifest in the form of reduced claim payments (section 54 of the Act).[28]

4.3.3 **Nigeria Insurance Act of 2004 (Law of Federation of Nigeria Cap 233)**

Having expressed above all the legislation affecting utmost good faith in other advanced countries of the world; the legislation affecting the rules of utmost good faith as being practiced in our country was initially marine Act of 1906 as being used in UK due to the received English law from our colonial masters.

All the common law rules as being practiced in UK with the decisions reached on cases as passed by the emperor Court in UK were all applicable.

In order to address the Lacuna as expressed above under marine insurance Act 1906, there was an insurance Decree of No 2 which was passed in 1997 in order to address this inequality as witnessed before, between the insured and the insurer. This decree of 1997 later was repealed and metamorphosed to Insurance Act of 2004. Section 58 and 59 of the insurance Act have placed a lot of responsibility on the insurer and in fact modifies the utmost good faith principles as follows:[29]

a. A proposal or application form for insurance are to be drawn by insurers in such a manner to elicit all such information that the insurance considers material in accepting risk. Therefore any information not specifically requested will be deemed to be immaterial.

[27] Insurance Contract Act (ICA Australia) 1994
[28] Ibid
[29] LFN Cap 233

b. The insurance proposal or application form must be printed in easily readable letters with a notice conspicuously on the front page where it is completed by an agent, he is deemed to have done so on behalf of the insured/applicant.

c. Disclosure or representations made by the insured to the agent will be deemed made to the insurer provided the agent is acting within his authority.

d. A break of insurance contract term (normality or condition) does not give the insurer any right to repudiate any claim or provide a defence unless the breached term is material and relevant to the risk/loss insured against.

e. Where there is a breach of the insurance contract term, the insurer is not entitled to cancel the whole of the policy or any part of it or repudiate any claim due to the breach unless:

    i. The breach amounts to fraud.

    ii. It is a breach of a fundamental term (whether or not it is called a warranty) or the contract e.g. non-payment of premium.

f. Breach of a material term of the insurance contract in respect of which the insurer is not entitled to repudiate the policy wholly or partly will entitle the insured to full claim indemnification if the breached term is not the cause of the claim.

g. Insurers are permitted to cancel the contract if a term is breached even before occurrence of the risk or loss insured against.

Consequence upon the above therefore insurers are:

1. Only entitled to automatically cancel a policy or repudiate a claim if the breach of contract term relates to fraud or breach of fundamental condition
2. Not permitted to repudiate any claim if the breached term is not related to the risk or loss.

3. Entitled to cancel any policy before its expiration or occurrence of the risk/loss insured against so far there is breach of material term.
4. Not to withhold information that is beneficial to the insured e.g. entitling to premiums, discount for installation of good and efficient fire-fighting equipment.
5. Not to underwrite any risk or class of business for which they are not licensed and
6. Not to make misrepresentation during the contract negotiations.

It should be noted that under the Nigeria legislation, the duty of utmost good faith starts at the commencement of the negotiations, continues during the currency of the policy as regards alterations/changes and it is revived at renewal.

It is the opinion of this writer that the duty is too cumbersome on the part of one party of the contract (insured) to the other party (the insurer); which therefore require a further legislation to cushion the effect on the insured in order to be fair to all the parties to the insurance contract.

4.4 AN OVERVIEW OF RELEVANT CASES IN NIGERIA, UK, AUSTRALIA, CANADA AND USA

It is imperative to discuss the principle of utmost good faith in detail, we shall need to examine some of the relevant cases in both foreign countries and our country, Nigeria.

The most locus classicus case on the subject matter is the case of:

1. ***Carter vs Boehm***[30]

Facts

Mr. Carter was the Governor of Fort Marlborough (now Bengkulu), which was built by the British East Indian Company in the Island of Sumatra. He took out an insurance policy with Mr. Boehm against the fort being taken by a foreign enemy. A witness called captain Tryon testifies that Mr. Carter knew the fort was built to resist attacks from

[30]*Carter vs Boehm* (1766) 3 Burr. 1905

natives but not European enemies, and the French were likely to attack. The French did attack, and Mr. Boehm refused to fulfill the insurance claim. Mr. Carter sued.

Judgment

Lord Mansfield held that Mr. Carter as the proposer owed a duty of utmost good faith to the insurer under which he was required to disclose all facts material to the risk. He stated "insurance is a contact based upon speculation. The special facts, upon which the contingent chance is to be compiled, lie most commonly in the knowledge of the insured only; the underwriter trusts to his representation and proceeds upon the 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 risqué as if it did not exist. Good faith forbids, either party by concealing what he privately known, to draw the other into a bargain from his ignorance of that fact, and his behaving the contrary"

Lord Mansfield proceeded to qualify the duty of disclosure either party may be innocently silent, as to the grounds open to both, to exercise their judgment upon … an underwriter cannot insist that the policy is void, because the insured did not tell him what he actually knew… the insured need not mention what the underwriter ought to know; what he takes upon himself of; or what he waives being informed of the underwriter needs not be told what lessens the risqué agreed and understood to be run by the express terms of the policy. He needs not be told general topics of speculation" [31]

Lord Mansfield found in favour of the policyholder on the grounds that the insurer knew or ought to have known that the risk existed as the political situation was public knowledge.

Significance

[31] *Carter vs Boehm* (1766) 3 Burr. 1905

In *manifest shipping Co Ltd vs Uni-polaris Shipping Co Ltd* "As Lord mustil points out, Lord Mainsfield was at the time attempting to introduce into English Commercial Law a general principle of good faith, an attempt which was ultimately unsuccessful and only survived for limited classes of transactions, one of which was insurance. This judgment in *Carter vs Boehm* was an application of his general principle to the making of a contract of insurance. It was based upon the inequality of information as between the proposer and the underwriter and the character of insurance as a contract upon a "speculation" the equated non-disclosure to fraud".

"The keeping back (in) such circumstances is a fraud, and therefore the policy is void. Although the suppression should happen through mistake, without any fraudulent intention; yet still the underwriter is deceived, and the policy is void"

It thus was not actual fraud as known to the common law but a form of mistake of which the other party was not allowed to take advantage.[32]

2. ***HIH Casualty and General Insurance Ltd vs Chase Manhattan Bank***[33]

Facts

Chase Manhattan Bank was in the slightly speculative business of lending money against receipts from five future movies (in this case, Amy foster, U Turn, Apt pupil) the Bank wanted to protect against the substantial Risk. So it took out a policy of insurance with HIH Insurance. Intermediaries who knew about movies, much more than either the park or the insurer, negotiated. The bank made a claim for insurance cover. HIH resisted the Bank's claim and in doing so alleged misrepresentations, both negligent and fraudulent by the bank's agents (not the bank itself). The insurance contract had disclaimers for misrepresentations by the bank. One issue was whether the disclaimers could absolve the bank of liability for misrepresentation.

[32]*Manifest shipping Co Ltd vs Unipolaris Shipping Co. Ltd* (2001) UK HL1
[33]*HIH Casualty & General Ins Ltd vs Chase Manhattan Bank* (2003) UK HL6

Judgment

"The majority judges of the Lord House held the disclaimers could exclude liability for negligent misrepresentation, but not for fraud, were it established. You could exclude liability for someone's else's fraud, but not your own". They said that to try and exclude liability for one's fraud would be contrary to public policy.

Synergy Health (UK) HDV CGU Insurance Plc[34]

In this case the insured informed its Insurance Company for 4 months before renewal of is policy that it was installing an intruder alarm. Due to the administrative errors the alarm was not installed and a major fire occurred.

The court held, that by falling to correct its material misrepresentation, the incurred had impliedly repeated the misrepresentation on renewal. However on the facts, the insurance company had not been reduced by the misrepresentation to renew the policy and so could not avoid it.

Jones v Environs Com Ltd[35]

Jones operated an electrical goods waste recycling plant and operated cutters were used for cutting up the items, insurer regarded the plasma cutter as high fire risk, a major fire was reported to insurer in 2007 however, it was established that the use of plasma cutters had not been disclosed as well as a number of smaller firms. It was alleged that the broker Miles Smith, had not provided adequate guidance on what should have been revealed.

It was held that the standardized wording of these documents was insufficient as they did not show what a material fact was, its effect on the policy cover, or when it should be declared. The main course of the loss was the failure to disclose the

[34]Synergy health (UK) HDV CGU insurance Plc (2010) EWHC 2883.
[35] Jones v Environs Com Ltd (2009) EWHC 16

plasma cutter by the insured and even if the broker had carried out more stringer enquiries and as such the insured is in breach of duty.

Veriloot Dredging BV and another v HDI Gerling Industrie Versicherung AG and others (The 'DC Merwestone') (2014) EWCA Civ 1349[36]

This is an appeal from a judgment of Poppelwell J. The claimants were owners of the DC Merwestone, a vessel, insured under a Hull and Machinery time policy by the defendant underwriters. The cause of loss was crew negligence consisting of a failure to close the sea suction valve and drain a pump with the ultimate result that after the ice in the pump thawed, the engine room flooded causing damage to the engine itself. Insurers denied liability. At first instance, Poppelwell J determined that the policy responded to the loss but that the claim was forfeited by reason of a fraudulent means or device. The general manager of the vessel owners had made a false statement in relation to the circumstances of the loss. The judge applied the test (obiter) in *Agapitos v Agnew* (The Aegeon) [2002] 2 Lloyd's Rep 42 as set out by Mance U. This test was that there would be a fraudulent claim where: a fraudulent device was directly related to the claim; the device was intended to promote the insured's prospects of success; and the device would have tended to yield a not insignificant improvement in the assured's prospects of success prior to any final determination of the parties' rights. When this test was applied to the facts Poppelwell J found that there had been a fraudulent claim involving the use of fraudulent means and devices. The insured appealed.

The owners appealed on the basis that: the judge had erred in determining that: (1) the general manager's statement was a fraudulent device; (2) the test in The Aegeon should not be followed; and, (3) the denial of recovery of a legitimate claim (even if the claim was supported by a fraudulent device) resulted in a deprivation of possessions

36 Veriloot Dredging BV and another v HDI Gerling Industries (2014) EWCA CW1349.

under article 1 of the First Protocol to the European Convention of Human Rights (implemented under the Human Rights Act 1998).

Christopher Clarke U gave judgment for the Court of Appeal. The appeal was dismissed.

The court at first instance had been right to conclude that the general manager's statement was a fraudulent device; it served as a false representation.

The law on fraudulent claims had been applied correctly. There was a long line of authority which established a special common law rule that any lesser claim (for a true amount) was forfeited where a fraudulently exaggerated claim was made. The rule rested on the duty of good faith applied to contracts of insurance. The duty applied also to fraudulent means and devices as these were sub-species of fraudulent claims. Further, the fraudulent assured should not be allowed to think that if the fraud did not work nothing would be lost. There was also sufficient public policy justification for protecting insurers from fraud. It did not matter that the consequences could be harsh for the insured.

Parker and Parker v National Farmers Union Mutual Insurance Society Ltd [2012] EWHC 2156[37]

The first claimant (C 1) was the owner of a house, which was insured in her name by The National Farmers Union Mutual Insurance Society Limited (NFU), the insurers, under a policy dated 6 July 2009. On 22 July 2009 the second claimant (C2), who was by then living with C1, was added as an assured. The house was damaged by fire on 6 December 2009, and a claim was made by C I. The insurers denied liability on a number of grounds: there was non-disclosure of a fraudulent claim by C2 in 2002 in respect of a stolen watch; there was non-disclosure of a fraudulent claim by both C1 and C2 in 2007 in respect of two stolen watches; C2 had deliberately set the fire in 2009; false documents relating to the lease of the property had been submitted in support of the claim; and there was breach of a policy condition which required

37 Parker and Parker v National Farmers Union Mutual Insurance Society Ltd [2012] EWHC 2156

documents. NFU counterclaimed for repayment of the sums paid for the earlier claims, for the cost of investigating the fraud and for a declaration that any sums payable to C1 could be recovered by way of subrogation from C2. Teare J held as follows.

1. NFU did not have a non-disclosure defence against C1. (a) The 2002 claim by C2 had been fraudulent. (b) The 2007 claim by C2 had been fraudulent, but C1 had not been involved in the fraud. (c) The policy was composite and not joint. Cl and C2 had different interests in the property. C1 was the owner, and if C2 had any interest at all it was either some form of equitable interest or possibly in the rent payable under a lease to C1 and C2. Given that the rights of C 1 and C2 were different, the policy could not be avoided against C1.
2. The fire had been deliberately set by C2. However, C1 was not involved in the fraud and the fact that the policy was composite meant that she was not prevented from recovering.
3. False documents were not submitted in respect of the fire, so on the facts there was no argument that C2 had submitted false documents as agent for C1 so that C1's claim would be lost.
4. The insurers could rely upon the defence of breach of condition. (a) The general condition "To qualify for benefit you .... must keep to the terms and conditions of the policy" rendered the claims conditions a condition precedent to liability, and that applied to the obligation on C1 "to provide all the written details and documents that [the insurers] ask for". (b) C1 was in breach of that condition, by refusing the insurers' request to provide bank statements to evidence the availability of funds to rebuild the property. (c) The condition was not void under the Unfair Terms in Consumer Contracts Regulations 1999. The term did not cause a significant imbalance in the parties' rights under the contract to the detriment of

C1: the insurers were entitled to ask for documents which were in Cl's possession as long as they acted reasonably; under ICOBS 8.1 the insurers could not reject a claim unreasonably; and the general condition was expressed in plain, intelligible language.

5. ICOBS 8.1.1R, which prevents an insurer from unreasonably rejecting a clam, did not take effect as an implied term in the policy, although they were legally binding. In the present case the breach of condition was connected to the loss, and reliance on the condition was not unreasonable in that C I had been informed of the consequences of no-compliance.
6. Had it been necessary to decide the point, the insurers would have had a subrogation claim against C2. C2 faced liability for damaging Cl's property, and the insurers would have been entitled to exercise subrogation rights against C2.
7. The insurers' counterclaim would be upheld. (a) The insurers were entitled to repayment of the sums paid in respect of the earlier fraudulent claims, with compound interest. (b) The insurers were entitled to damages representing the costs of investigating the fraudulent claim, with simple interest.
8. If the insurers were liable, the diminution in the value of the house after the fire was some £425,000. As that was less than the agreed costs of reconstruction, that was the sum that would have been payable.

Ma Kim Ying v Manulife (International) Ltd (2012) HKCFI 941[38]

Mr Wong Shiu Tong applied for a life policy on 12 July 2004, and a policy was issued backdated to 1 July 2004 with Mr Wong as policyholder and his wife as sole beneficiary. The policy contained an incontestability clause which stated: "The Owner's or the life insured's failure to disclose any fact or their misrepresentation of any fact

[38] Ma Kim Ying v Manulife (International) Ltd (2012) HKCFI 941

within their knowledge that is material to the insurance (and it is not disclosed by the other party) will not, in the absence of fraud, render this policy voidable by the company after it has been in force during the life insured's lifetime for 2 years from its date of issue or date of reinstatement Mr Wong died on 14 May 2007 from a condition which he had not disclosed to the insurers. The Court held that the non disclosure had been fraudulent, that the facts withheld were material, that the underwriter had been induced to write the policy when it would otherwise have not been written and that the incontestability clause did not provide a defence. In addition, the assured was in breach of a warranty stating that the answers had been given to the best of his knowledge and belief.

Liberty Insurance (Pte) v Argo Systems FZE (2011) EWCA Civ 1572[39]

The assured entered into a contract for its floating casino to be towed from the US Gulf to India. The towage contract (Towcon), which was in standard form, stated that the tugowner would not be liable for any loss or damage sustained by the tow. By a voyage policy, dated 11 March 2003, on the terms of the Institute Voyage Clauses 2003, the defendant insurers agreed to insure the assured against total loss caused by perils of the seas. The policy, which was governed by English law, contained a warranty stating "no release, waivers or 'hold harmless' given to Tug". The sum insured was US $1,225,000 and the premium was US$160,000. The vessel sank on the twelfth day of the voyage.

The insurers obtained a copy of the Towcon after the casualty, and on 18 July 2003 the insurers' US attorneys sent a letter stating that the insurers "hereby den[y] coverage, for claims by the assured arising from the sinking". A variety of defences were pleaded, including: failure to prove an insured peril; breach of a weather warranty; and

39 Liberty Insurance (Pte) v Argo Systems FZE 120111 EWCA Civ 157

misrepresentation of six matters. There was no mention of release, waivers or the hold harmless warranty. The letter concluded with the statement that the insurers "reserve the right to alter [their] position in light of discovery of previously undisclosed information which would materially alter the facts and circumstances presently known ... the foregoing is without prejudice to all the remaining terms and conditions of the policy, along with any other defences which may be, discovered after, further investigation."

The assured commenced proceedings against the insurers and the brokers in Alabama. The insurers did not rely upon breach of the warranty, and they were removed from the proceedings. The assureds' claim against the brokers subsequently failed. The assured commenced proceedings against the insurers in England, and four preliminary issues were raised before the court. These were answered as follows:

1. There was breach of warranty, the warranty applied to standard "hold harmless" terms and not just to non-standard terms.
2. The insurers were estopped from relying upon breach of warranty by reason of their failure to plead the breach for seven years, in particular by not alerting the assured to that possible defence when the claim against the brokers was brought and also by the terms of the reservation of rights in the letter of July 2003 which referred only to unknown matters.
3. The insurers had waived the right to avoid the policy for misrepresentation, in that they had only ever purported to deny coverage and not to avoid, and they had also failed to return the premium to the assured.
4. The insurers' argument that they were entitled to damages for misrepresentation under section 2(1) of the Misrepresentation Act 1967 even though they had lost the right to avoid was not "bad in law", although further argument on the point was necessary.

The insurers appealed based on the question as to whether they had lost the right to rely upon breach of warranty. The Court of Appeal reversed the trial judge and held that there had not been any waiver by estoppel:

1. In the case of breach of warranty, the risk terminated automatically so there was no possibility of waiver by affirmation. The only form of waiver was waiver by estoppel, which required an unequivocal representation and reliance.
2. There had not been any unequivocal representation that the hold harmless warranty would not be relied upon. The words "The foregoing is without prejudice to all the remaining terms and conditions of the policy" clearly indicated that the insurers were reserving the right to rely upon any remaining terms and conditions in the future, so that there was no representation let alone an unequivocal one. Further, the failure by the insurers to advert to the warranty for some seven years did not amount to a representation. The general rule was that silence did not give rise to a representation let alone an unequivocal representation.

Lead way Assurance Co. Ltd v ZECO Nigeria Ltd[40]

The plaintiff/respondent instituted an action against the defendant of the Federal High Court, Kaduna claiming the sum of ₦6, 698, 280 being the value of the goods insured which the defendant/appellant but not delivered to the plaintiff being the amount the plaintiff paid for clearance and duties for goods.

The defendants defence was no report of the alleged loss of the goods insured was made within 21 days of that discharge of the goods from the slip as required by the contract of insurance.

[40]Lead way Assurance Co. Ltd v Zeco Nigeria Ltd (2004) 22 WRN 1 Sc.

After considering evidence of both parties the learned trial judge formed that an oral report of the loss was made by the plaintiff to the defendant within the stipulated period and thereupon entered judgment in favor of the plaintiff for the sum of ₦ 5,542,641.54.

The dependant's appeal to the court of Appeal and Supreme court failed.

African Insurance Development Corporation v. Nigeria LGN Ltd.[41]

The insured took a Bond with the plaintiff and failed to perform the Bond, on the call for the bond, the plaintiff sued for Non performance and the insured rely on the claim of Arbitration on the Bond for Non-performance held by Appeal Court that only a person who is a party to a contract can sue on it.

3. ***Rozanes vs Bowen***[42]

Facts

The Court considered a proposal form for a jewellers block policy as filled in by the insured or his agent which incorrectly identified only one previous loss although there were several previous losses. The form stated that "it is understood that this proposal will serve as the basis of the contract if a policy is issued.

Judgment

Scrutton L. J. said the second point (taken by the insured's counsel) was that the answers were not in any way incorporated with the policy so that the correct answering was a condition president. The answer to that appears to be at the bottom of the form. This proposal is to serve as the basis of the contract; and if so, the Truth of the statements in it equally the basis of the contract"

4. **Lambert vs Cooperative Insurance Society Ltd**

Facts

41African Insurance Development Corporation v. Nyeire LGN Ltd. (2000) 2. Sconj 119
[42]*Rozane vs Bowen* (1928) 32 LR 98

Mrs. Lambert signed a proposal form for 'All risks' Insurance over her husband's Jewelry, without mentioning her husband was convicted previously of receiving 1730 stolen cigarettes and was fined £25. The Coop issued the policy. Mr. Lambert was convicted of two dishonesty offences in 1971 and sentenced to 15 months jail. Mrs. Lambert did not reveal this either when the policy was renewed in 1972. In April 1972 some items worth £311 were lost or stolen and the Coop refused on the basis of a failure to disclose.

Judgment

Mackenna J. held "the assured is under a duty to disclosure. (but the) extent of the duty is the matter in controversy. You could have a duty to disclose everything you think is material, everything a reasonable person thinks is, everything the particular insurer thinks is, or everything a reasonable or prudent insurer thinks is, like in section 18 marine insurance Act 1906, because there is no difference between this insurance and marine insurance in principle, it should be the letter. He did however say the law was unsatisfactory and the Coop were doing a heartless thing … but that is their business, not mine.[43]

Having looked at some of the decided case in UK, we observed that the principle of utmost good faith is more or less one sided in favour of the underwriter despite the fact that their underwriters are also expected to observe the principle.

In Nigeria however, some of decided cases on the subject matter have been very rare because few people take insurance policy and among the few, majority do not challenge their cases in Court.

[43]*Lambert vs Cooperative Insurance Society Ltd* (1975) 2 Lloyd's Rep 485.

The only case in Nigeria on the subject matter that is germance is that of *Dr. Aluko vs NICON insurance Company Ltd.*[44]

Facts

Dr. Aluko took up a life policy by completing the proposal form that he was hale and hearty with NICON insurance. The life policy ran for 10 years; while at the 3rd year of effecting the policy, the assured life (Dr. Aluko) died of cancer. In the course of the claim, the insurance company refused to pay the death claim because of non-disclosure of this ailment at the common cement of the policy.

Judgement

It was held in favour of the insured that in as much as the ailment of cancer is a medical issue which could not be detected by the assured himself but by an expert (a Medical Doctor), the insurance company was compelled to pay the claim.

4.5 IMPACT OF UTMOST GOOD FAITH TO SETTLEMENT OF CLAIMS IN NIGERIA AND LESSONS FOR NIGERIA

A breach of the duty of good faith in relation to lodging a claim can arise in a number of ways. These include:

1. When a claim is lodged for an event that has not happened, or for an item that has not been lost or damaged.
2. When a false statement is made relating to the circumstances leading to the loss itself, or relating to what happened after the loss.

The law in Nigeria relating to the effect of a false claim for one or more items on a claim which would otherwise be valid in itself, is well established. For example, insured losses all right to a claim on an item or property where they have knowingly made a false

[44]*Dr. Aluko vs NICON Insurance Company Ltd* (1976) 1NWLR 76

statement of loss, in addition to this they lose all right to any other part of that claim which was sustained, even under other policies.

The value of the items falsely claimed relative to the entire claim cannot save the insured who acts with proven intent to defraud.

The law related to making a false statement about any aspect of a claim is well settled. A false statement is one made with knowledge that is untrue, or a statement made recklessly without care as to whether it is true or not.

A false statement entitles the insurer to decline the claim. It does not matter if the insurer subsequently finds out the truth, either as a result of its own investigations or as the result of a later admission by the insured. Making an untruthful statement is a circumstance which excludes liability under the policy.

Naturally, when deciding whether to approve claims, the insurer's interest will conflict with the insured's interest, the duty of good faith therefore requires the following from the insurer.

1. To manager, administer and process claims efficiently and without undue delay.
2. To decline claims only with reasonable evidence or belief that the claim should he declined.
3. To investigate claims in a reasonable manner.
4. To investigate the claim before declining a claim
5. To not use in appropriate reasons to deny a claim (such as a minor representation which did not impact on the event causing the claim
6. To conduct the defence efficiently, economically and to consider the insured's interests as well as the insurer's own interests.
7. To consider the insured's interest in respect of settlement amounts. For example, it may be bad faith for the insurer to not offer a settlement amount solely on the

basis that there is a small chance the Court may award a lower amount against the insured. This is because continuing the trial may run up large defence costs for the insured (assuming the insured is liable for Court costs).[45]

It was observed by the writer that Nigerian Insurance Industry always look for an excuse to rigour out of a genuine claim by too much reliance on the principle of utmost good faith at the detriment of the insured.

This attitude no doubt has affected the image of insurance practice in Nigeria in which some people have lost confidence in insurance business as people who are ready to collect premium but reluctant to settle claims due to flimsy excuse of non-disclosure and misrepresentation.

In as much as the drastic consequences of non-disclosure and misrepresentation have attracted much criticism worldwide, and indeed throughout the common law countries, there was recently suggested changes to the law to alleviate the worst perceived inequality, in particular in relation to innocent non-disclosure. Purpose changes have been adopted in England, Australia and other common law countries, Nigeria inclusive with the changes reflected in section 58 and 59 of insurance Act of 2004 as stated in chapter 4.3 of this thesis.

It should however be noted that despite all these changes, Nigerian insurance industry is still working on the intelligent of innocent insured to avoid to settle a genuine claim where non-disclosure or misrepresentation are so flimsy or even not relevant to the claim being requested by the insured.

Agents & Brokers too are not helping matter as regard disclosure and misrepresentation. It is the view of the writer that where broker misrepresents an insured or leaving out relevant information either at policy or at claim level he should be held

[45] Chris Parsons, David Green, et al, Company and Contract Law and their application to Insurance (study course A520) Chartered Insurance Institute of Nigeria Publishing Division (1999).

professionally liable, and the broker should be compelled to assist the insurers with its defence or right of subrogation where a claim has been genuinely settled by an insurer.

CHAPTER FIVE

SUMMARY AND CONCLUSION

5.1 SUMMARY

In summary of this thesis, chapters one covers the general introductory stage of the thesis as relates to the historical background of insurance contract and the emphasis on the historical development in Nigeria coupled with the general layout of the thesis

Chapter two dealt with the general principle of insurance contract. It commences with theoretical development of insurance contract, nature of insurance and contract of insurance, nature of insurance as a contract of uberrima fidei, origin of utmost good faith, justification and its meaning, general principle of insurance contract were deeply treated and the chapter was concluded with the claim settlement of experience of insurance industry in Nigeria.

Chapter three focused on the general laws of utmost good faith, the principle of Caveat Emptor which was followed with the overview of the principle of utmost good faith, the chapter dealt with the meaning of material facts, duration of the duty of disclosure, the role of intermediaries as regard the claim of utmost good faith and the chapter was concluded with remedies for breach of utmost good faith.

Chapter four dealt with issues, challenges and prospect in the enforcement of law of utmost good faith,issues relating to utmost good faith under common law and the statutes were elaborately discussed. The general challenges and prospect in the prospects in the enforcement of utmost good faith in different jurisdictions were discussed and the chapter was concluded with an overview of relevance cases on the subject matter in Nigeria and some commonwealth countries.

Chapter five is the summary and concluding chapter of the thesis.

5.2 FINDINGS OF THE RESEARCH

The followings are the findings of this thesis:

1. Most common law countries like UK, Australia and Indian have made several amendments to their laws e.g. UK marine Act 1976, Insurance contract Act 1984 (Austrilian) and Even Nigeria Insurance Act 2004 have made several amendments in order to rectify the inequality observed under the principle of utmost good faith has enshrined in the marine Act of 1906. The amendment have more or less made it imperative to the insurers to state what is material on the subject matter of insurance on the proposal form.
2. Most of the amendments have not really solved the problem of inequality as most insurance company still wriggle out from genuine insurance claims which they are supposed to settle under the flimsy excuse of non-disclosure and misrepresentation by the insured. What is material is being determined by the underwriter and not by independent judgement. The disclosure of material facts on the proposal form should be limited on what should form consideration at the time of a claim.
3. The principle of utmost good faith which emanated from the case of Carter vs Boehm (1766) defined by Lord Mansfield is more or less moribund as more legislations have been promulgated in various jurisdiction to reflect the reality operating in their circumstances.
4. The principle of utmost good faith has been given prominence in the marine Act of 1906 which formed the watershed of all common law legislations as regard the practice relating to disclosure and misrepresentation in the contract law of insurance.

5. The findings show that the duty of disclosure and material representations of an insured commences on the part of a proposer at the time of effecting the contract, it continues during the duration of the contract and it also continues at the renewal and at the time the claim is being lodged with the insurer. This no doubt perceived the inequality of the principle as being one sided in favour of the insurer but at the detriment of the insured whereas the principle is supposed to be reciprocal.
6. Insuring public are very few in Nigeria which consequently led to few litigation on the subject matter of discussion. The public are skeptical to take their grievances to law Court coupled with lack of proper insurance education among the populace.
7. Nigerian insurance industry has not been living up to expectation in terms of claims settlement. Failure or delay to prompt settlement of insured's claim due to excuse of non disclosure or misrepresentation has been on the increase. This no doubt lead to lack of growth of insurance business in Nigeria and consequently lack of confidence among the insuring public.
8. Hitherto, there is no effective control on the operation of insurance business in Nigeria, which is as a result of lack of proper enacting laws to regulate the activities of these insurance businesses and the National Insurance Commission (regulatory body) has not been living up to expectation in this regard. But in compliance with insurance Act of 2003, there is a lot of improvement in terms of supervisory role of NAICOM of making sure that all parties practice the insurance in accordance to the rules.
9. The findings have shown that some insurance companies are doing self regulation in order to attract more customers and to boost their image by reducing their small prints on their policy, jettison the legalistic jargons on their documents in order to

make the principle more equitable and fair to the insured. More changes have been introduced by some insurance companies in the draft of their proposal form through printing in easily readable form, implication of filing form by agents and the implication of breach of a material term of the insurance contract are conspicuously stated on the form.

10. The Court's endorsement of the wider view of the duty of utmost good faith is not available for both insurers and insured. It is observed by the writer that acting honestly will not be sufficient to disclosing the statutory obligation owed by parties to an insurance contract to act in utmost good faith to each other.
11. The findings also show that there is no legislation as to the duty of utmost good faith requires at the post-contractual obligation that is applicable to both the insured and the insurer. The expectation of the duty is limited only to pre-contractual obligation only. Uncertainty remains, however, as to the circumstance in which an insurer will be found not to have acted with utmost good faith where it "sit on the fence" and delays in making a decision whether to grant indemnity. The decision also leaves insured's in an invidious position when faced with commercial and external pressures to resolve claims quickly on the one hand and, on the other, an insurer who defers making a decision on indemnity.

5.3 RECOMMENDATIONS

From the findings of the study, the following recommendations are proffered for the benefit of insuring public, the government and the insurance industry as a whole:

1. The principle of utmost good faith has emanated and defined in the marine Act of 1906 has become moribund. There is a need for a legislation to look into injustice created for the insured and make sure that the inequalities to the parties to the

insurance contract are reduced if not totally eliminated. This is very imperative in Nigeria where efforts have not been made in this regard.

2. The duty of disclosure and material facts representation of an insured should be limited to the knowledge within the insured and the knowledge to be determined by common man on the street. The duty should not be so large but limited to only common sense and it should be relevant to the subject matter of the contract and also fraud will not be intended. A situation whereby an insurer uses various excuses for breach of utmost good faith in order to avoid a claim settlement is not acceptable. If possible the principle may be out rightly struck out of insurance.
3. The claims settlement experience of Nigeria insurance industry must be improved upon. Breach of utmost good faith which is not relevant to the claim in issue should be discountenance. There must be reciprocal duty expected from an insurance company to make sure that the contract is fair and their policy wordings is readable and most of the technicality removed so that the common man on the street can understand the contract wordings.
4. Insuring public must be well educated and enlightened as regard insurance contract through public enlightenment programme as it was observed that people are not well educated in this regard even among the well read in the society. The supervisory body like National Insurance Commission (NAICOM) coupled with National Orientation Agency should be saddled with this responsibility of enlightenment.
5. There must be a firm and effective control of insurance industry in Nigeria. An effective control is germane to the general practice of insurance business. Government needs to rise to the occasion and make sure that a firm control

through stricter legislation and effective supervisory body to monitor the activities of the operator is very imperative.

6. Institutions to offer courses in insurance must be encouraged and improved upon in order to arrest the dearth of knowledge in this area by the government. Insurance industry should be encouraged to provide adequate data in order to boost the study in this area by researchers.
7. Nigeria insurance industry must strive to improve their business and consequently their image by Jettison the legalistic jargons on their documents, to introduce changes in their proposal form, and introduce human face in the mode of settling their claims. Self regulation is key in this dispensation in order to boost their income.
8. Insurance company should be clear at the pre-contract level of what information required by them; and what information required at the post contract level in order to make the contract clearer to both parties. As at present the expectation of the duty at both pre-contractual and post-contractual level should be very clear and not give room for ambiguity at the detriment of the insuring public. The principle in English unfair contract terms Act 1977 may be introduced in Nigeria in order to protect the innocent insuring public.
9. There have been many calls for reform of the duty of disclosure e.g. the law reform committee in 1957; the English law common in 1980 and the National Consumer Council in 1977, all attempted to initiate sweeping reforms in the UK. The writer therefore recommends that Nigeria should also follow suit in the reform process of our legislation as regard this moribund principle of insurance which does not provide equality and fairness to the innocent policy holder.

BIBILOGRAPHY

A - **Books**

Aboki Y. Introduction to Legal Research Methodology A guide for Writing Long Essays, Thesis, Dissertation and Articles, Tamaza Publications Company Limited, Wusessa Zaria (2nd Edition 2004)

Clark, M. A.: The Law of Insurance Contracts (4th Edition 2014)

Chris Pasons, David Green, et al, Company and Contract Law and their Application to Insurance (Study Course A520) Chartered Insurance Institute of Nigeria Publishing Division 1999.

Elujoba, A. I. The Investment of Insurance Funds: A Case Study of Leadway Assurance Co. Ltd. Being a Thesis Presented to the Faculty of Business Administration. Ahmadu Bello University for the Award of MBA (Unpublished) 1995

Keenan, D. English Law; Longman London 14th Edition 2014.

Ogunshola, A. O. Insurance and Pension Practice in Nigeria (reflections of a Nigeria Actuary), Board Publications Limited, Ibadan (1984).

Uzoma, P. A. Pension Scheme in Nigeria, Gentle Press Limited & Kubay Associates Ltd, Lagos (2nd Edition 1993)

B - **Journal**

Yasin K. C. In terms of Utmost God Faith, the Law of Insurance imposes strict obligation on Insured as compared to the insurer publication of Northumbrik University, 2007.

Herbert Smith, 10 points to remember about insurance: In Journal of Gleiss Lut2 vol. 1, 2012.

Allen A. Insurance & Reinsurance, the duty of Utmost Good Faith: In the Journals Linklater 2001, Vol. IV

Malcolm Elarkes, Contract of Insurance: In the Journal of Northumbria University 2006, vol. IV

Shi Feng, Utmost Good Faith in Marine Insurance: A Comparatively Study of English and Chinese Maritime Law, Phymouth Law Review 2008, vol. 1.

Wolonieki J, The duty of utmost good faith in Insurance Law, where is it in the 21st Century in the Academics Journal Article, Defence Counsel Journal 2010.

Prithvi P. Utmost Good Faith in Insurance Contracts, General Article 2010.

Rupert Cohen, Good Faith in Insurance Law: A Redundant Concept? (2010) Journal of Business Law.

Stuart Cotton, Utmost good Faith – Follow the Futures, the Theory and the Reality: What are the implications for Cedants and for Re-insurers in mound Cotton Wollen Green grass Journal 2014, vol. v.

Christopher Britch Q.C., Good Faith in Insurance Law: A redundant Concept? In Journal of Kings Bench Walk 2008, vol. 2.

Smith T. S. Uberime Fidei: of the Utmost Good Faith in the Journal of Legal News and Resources, 2012.

Afolayan G. Insurer: Friend or Foe, Being a Paper Delivered at Insurance Week of Chartered Insurance Institute, Kaduna Chapter, Kaduna on the 13th of Oct, 1997.

Legh-Jones, Birds and Owen (eds), Maccillivray on Insurance Law (10th Edition 2003).

Hodges, Suan (eds), Cases and Materials on Marine Insurance Law, Canvendish London (1999).

Oniwinde, A. K. Marketing of Insurance Services in our Society in: Journal of the Insurance Institute of Nigeria; Impact Press, Randle Avenue, Surulere, Lagos. (1987).

State Council, Regulation of the PRC on Contracts of Property Insurance (1st September, 1983).

The Law Commission and the Scottish Law Commission Joint Report and Draft Bill, Consumer Insurance Law: Pre-Contract Disclosure and Misrepresentation (15th December, 2009)

C - **Internet**

https://sites.google.com/site/349924on 4/1/13 by 2.05pm

www.lawyerschinbindiacom/arties 1/10/12 at 12noon.