

## THE DOCTRINE OF ‘NON – DISCLOSURE’ UNDER THE LAW OF INSURANCE: A CRITICAL APPRAISAL

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### Abstract

The subject of insurance law has been a very tricky and clumsy one to anybody who desires to know about it or conduct any research with regard to same. The general notion of the public against insurance companies is very negative when it comes to the aspect of payment of indemnity by the insurers. Perhaps based on a simple or very trivial excuse, the insurer may repudiate liability either on the basis of non – disclosure or non – possession of insurable interest e.t.c. In most cases, insurers have denied or repudiated indemnities on ground of non – disclosure which in all of the policies are made to be a “warranty” or “conditions” which goes to the root of the contract itself. The common law rule on this is very strict and therefore operates against the claim of the assured whenever the defence is raised by the insurer.

However, the Nigerian Insurance Act, appears to have remedied this common law position by making the concept of non – disclosure equitable to both parties to an insurance policy. It is hereby suggested that other jurisdiction should follow suit for the development of insurance law.

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**Keywords:**Law of insurance, doctrine of ‘non – disclosure’

### The doctrine of ‘non – disclosure’ under the law of insurance: a critical appraisal

#### Intoduction

A contract of insurance can be defined as a contract whereby a person called the insurer agrees in consideration of money paid to him, called the premium, by another person, called the assured, to indemnify the latter against loss resulting to him on the happening of certain events.

In the widest sense of the term, a contract of insurance can also be defined as a contract whereby one person, called the “Insurer” undertakes, in return for the agreed consideration, called the “premium” to pay to another person, called the “Assured” a sum of money, or its equivalent on the happening of a specified event<sup>90</sup>.

It must be borne in mind from the outset that a contract of insurance is a contract uberrimae fidei<sup>91</sup> i. e., contract of utmost good faith. The utmost good faith is required from both the assured and the insurer although, the heavier duty usually falls on the assured<sup>92</sup>.

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<sup>90</sup>Prudential Insurance Co. v. Inland Revenue Commissioner (1904) 2 K. B. 658 at p. 663. per CHANNELL J. “Where you insure a ship or a house, you cannot insure that the ship shall not be lost or the house burned, but what you do insure is that a sum of money shall be paid on the happening of a certain event. That I think is the first requirement in a contract of insurance. It must be a contract whereby, for some consideration, usually, but not necessarily, for periodical payment called premiums, you secure to yourself some benefit usually but not necessarily the payment of a sum of money upon the happening of some event”.

<sup>91</sup> See Volume 25, Halsbury’s Law of England.

<sup>92</sup>London Assurance Co. v. Mansel (1879)11 Ch. D. 363.

It is a requisite of this principle that there should be no shady dealings, but transparent honesty. This principle of utmost good faith has become clearly established in the Law of insurance and thus, Lord Mansfield in 1766 said in Carter v. Boehn<sup>93</sup> as follows: -

*“The assured is under duty to disclose all material facts and make no misrepresentation .... The governing principle is applicable to all contracts and all dealing ..... 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”*

The rule of caveat emptor is not in consonance with the doctrine of uberrimae fidei in the law of insurance and the reason is to prevent fraud and encourage good faith.

The rationale for the rule include, the everyday requirement for honesty, the peculiarly aleatory<sup>94</sup> nature of a contract of insurance, which calls for perfect comprehension of the risk undertaken, and commercial usage as developed in this area over the ages. Thus, it may be said that in the contract of insurance the greatest premium is placed on the basis that one must love his neighbour as himself.

In America, the attitude has been to distinguish between the Marine and non-Marine Insurance contracts and to apply the rule of utmost good faith less stringently in the latter<sup>95</sup>.

On the other hands, in many African Countires the Courts have to follow the common law<sup>96</sup>.

In view of the fact that the harshness of the rule is sometimes recognized, nonetheless, not much has been done to alleviate the burdens of the assured especially where illiterates have been involved<sup>97</sup>. Thus, the law does not consider the parties interest in the subject-matter of the contract for its validity.

However, in contract of insurance, this requirement must have to be complied with since the assured’s interest in the subject-matter of insurance is important for the validity of the contract. Per PHILLIMORE J. stated as follows:

*“Anybody who sues on a policy can only sue in respect of his own interest unless by special provisions, the law allowing it, the policy is made for the sake of another, or unless some statute says the policy shall enure for the benefit of somebody else”<sup>98</sup>.*

### **Elements of a valid contract of insurance**

It is pertinent to mention briefly that there are some essential elements of a valid contract of insurance.

In the first instance, there must be an agreement between parties through offer and acceptance. Thus, per LORD ESHER, M. R. stated that:

*“At the beginning ..... I was much taken with ordinary proposition that a proposal and an acceptance of that proposal make a contract. Whether that is so or not, depends on whether the one was meant to be a proposal and the other an acceptance by way of contract”<sup>99</sup>.*

An element of consideration must be present in all types of policies of insurance.

<sup>93</sup> (1766) 3 Bur at 1905, (1558 -1774) All E.R. Rep. 183.

<sup>94</sup>Blakbun v. Vigors Brothers Ltd. (1886) 17 Q.B.D. 561.

<sup>95</sup> Vance: Insurance Law 3<sup>rd</sup> ed. Chap. 7.

<sup>96</sup> See Akpata v. African Alliance Insurance Co. Ltd., (1966) 2 A.N.L.R. p. 317; *Zambian v. New India Assurance Co. Ltd.*, (1964) 1 A.L.R. (Comm.) p. 4.

<sup>97</sup>Northern Assurance Co. Ltd., v. Idugbee (1966) 1 A.L.R. (Comm.) p. 155.

<sup>98</sup>Cosford Union v. Poor Law and Local Government Officers’ Mutual Guarantee Association Ltd., (1910) 103 L.T. 463 at 465.

<sup>99</sup>Canning v. Farquhar (1886) 16 Q.B.D. 727.

The premium is the consideration which the insurers receive from the assured in exchange for their undertaking to pay the sum insured in the event insured against<sup>100</sup>.

Furthermore, capacity to enter into an insurance policy generally is the same as in other types of contract which is governed by the general law of contract. Thus, a minor may enter into a contract of insurance if it is for his benefit<sup>101</sup> otherwise, the contract of insurance will not be binding upon him<sup>102</sup>. At the same time, a contract of insurance made by a person of unsound mind or drunken person is in certain circumstances, voidable<sup>103</sup>.

Lastly, the subject-matter of the insurance contract must be present. For example, if a proposed assured is insuring a motor car or motor vehicle, the law requires him i.e. (the assured) to possess a motor car or motor vehicle which must have to be specifically, described in the insurance policy.

In a nutshell, the decision in Esewe v. Asiemo<sup>104</sup> has summarized all the essentials of a valid contract of insurance as follows:

*“The essentials of a contract of insurance are its objects namely, the vehicle insured, the amount for which it was assured, its purchase price and risk against which vehicle is insured”.*

The case held further that the intention to create the contract being established the essentials of the contract having been offered and premium having been paid there was a valid contract of insurance.

This article takes a critical look at the concept of non - disclosure as a basic principle of a contract of insurance at the time of making the contract.

Consequently, the substantial part to this paper will be devoted to the meaning of non - disclosure, the rationale behind the requirement of the concept in contracts of insurance, instances where it is applicable, within the common law perspective and the statutory provisions.

### **The nature and scope of the duty to disclose material facts**

In Lindenau v. Desborough<sup>105</sup> Barley J. said:

*“I think that in all cases of insurance, whether on ships, houses, or lives, the underwriter should be informed of every material fact within the knowledge of the assured ..... But if it must be disclosed it will be the interest of the assured to make a full and fair disclosure of all the information within their reach”*

Littledale J.<sup>106</sup> in the same case said:

*“It is the duty of the assured in all cases to disclose all material facts within their knowledge”.*

Also in Rozanes v. Bowen, Sankey L. J.<sup>107</sup> while concurring with Scutton L. J. said<sup>108</sup>:

*“The next point is that, apart from any question of the answers in the policy, persons who desire in England, and I have no doubt in other countries too, to insure are bound to disclose material facts”.*

Earlier on, in the case, Scutton L. J. has asserted that<sup>109</sup>:

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<sup>100</sup>Sun Insurance Office v. Clark (1912) A.C. 443.

<sup>101</sup>Clements v. London & North Western railway o. (1894) 2 Q.B. 482.

<sup>102</sup>Imperial Life Insurance Co. v. Charlebois (1902) 22 C.L.R. 417.

<sup>103</sup>Imperial Life Assurance of Canada V. Audett (1912) 20 W.L.R. 372.

<sup>104</sup>(1974) 4 U.I.L.R. p. 355.

<sup>105</sup>(1828) 8 B & C 596 E.R. 1160

<sup>106</sup>Ibid at P. 1162

<sup>107</sup>(1928) 3211 L. R. 98

<sup>108</sup>Ibid at P. 103

<sup>109</sup>Ibid at P. 102

*“It has been for centuries in England the law in connection with insurance of all sorts ..... the duty of the assured ..... to make a full disclosure to the underwriters without being asked of all material circumstances”<sup>110</sup>.*

## **Limitation in the duty of disclosure**

### **Knowledge**

The duty to disclose is limited by one’s knowledge<sup>111</sup>. “It does not extend to what one does not know or what one cannot reasonably be expected to know<sup>112</sup>.”

In Joel v. Law Union and Crown Insurance Company Limited, Fletcher Moulton L. J. said:

*“But in my opinion there is a point here which often is not sufficiently kept in mind. The duty is a duty to disclose, and you cannot disclose what you do not know. The obligation to disclose therefore, necessarily depends on the knowledge you possess”<sup>113</sup>.*

Also, Lord Campbell in Wheelton v. Hardisty<sup>114</sup>, said that the assured is always bound;

*“To disclose any fact exclusively within his knowledge which is material for the assurer to know”.*

In Messers Century Insurance Company Limited v. Atuanya<sup>115</sup>. A man insured his car with the plaintiff. The car was destroyed by fire. When he claimed, the company denied liability on the ground that the plaintiff did not disclose a refusal of his insurance by another company. It was found, as a matter of fact that the plaintiff was ignorant of this fact when he was proposing the insurance. The court, therefore, held that the defence failed, as he could not be expected to disclose what he did not know.

Also in Akpata v. African Alliance Insurance Company Ltd<sup>116</sup>. Taylor C. J. held that the important point for consideration was not the period when the deceased, (who had insured his life) can be said to have had the first signs of carcinoma of the stomach or the ailments contained in question, rather:

*“It is when deceased first had knowledge that he was so suffering or if it took place before he had personal knowledge, when was he first told by his physician that he was so suffering”.*

In that case, it was shown by evidence, that the deceased did not know of his disease or ailment until after the policy was issued.

### **Opinion and intention**

Fletcher-Moulton, L. J. hastened to explain that the knowledge is quite different from opinion or intention. “I must not be misunderstood”, he warned, “Your opinion of the materiality is of no moment”<sup>117</sup>. But the question always is what was the knowledge you possessed such that you ought to have disclosed it”?

He proceeded to elucidate the real nature of the duty to disclose in the following statements:

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<sup>110</sup> See also Hartford Protection Insurance Co. v. Harmer 91853) 2 Ohio St. 452 at 472 (per Ranney J.)

<sup>111</sup> See Carter v. Boehm (1776) 3 Burr 1905; 97 E. R. 1166.

<sup>112</sup> Messers Centuy Assurance Co. v. Atuanya (1967) 2 A.; N.L.R. 317.

<sup>113</sup> (1908) L. K. B. 863.

<sup>114</sup> (1857) 8 e.&b. 232, at 269 – 270.

<sup>115</sup> (Per Ikpeazu, J.) (Supra) The Court showed a cleavage between Marine Insurance and Non-Marine Insurance in his case.

<sup>116</sup> (1967) A. L. R. (Comm.) 4.

<sup>117</sup> Joel’s Case (supra) P. 879 et. Sep.

*“This duty is analogous to a duty to do an act which you undertake with reasonable care and skill, a failure to do which amounts to negligence, which is not atoned for by any amount of honesty or good intention. The disclosure must be of all you ought to have realized to be material, not of that only which you did in fact realize to be so.”<sup>118</sup>*

The above statements of the law represent the English position, that the assured cannot insist on what he thinks or believes to be material as the prudent insurer is the test. In Horne v. Poland Lush J. said:

*“It is immaterial that the plaintiff would not take the view that his countrymen are not as careful and trustworthy as Englishmen”<sup>119</sup>.*

Also in Bates v. Hewitt<sup>120</sup> Cockburn C. J. declared:

*“I think that we should be sanctioning an encroachment on a most important principle, and one that is vital in keeping up the full and perfect faith which there ought to be contracts of Maine Insurance, if we were to hold that a party who is under an obligation to communicate the material conditions and facts which he invites another to enter may speculate as to what may or may not be brought to his mind by the particulars disclosed to him by the assured, if those particulars fall short of the fact which the assured is bound to communicate. If we were to sanction such a course ... we should be lending ourselves to innovations of a dangerous and monstrous character”.*

### **Duration of the duty of disclosure**

Generally the duty of disclosure starts from the period when the assured proposes to the insurer and continues throughout the negotiations until at least the contract has been completed by acceptance or the negotiation ceased. As such, any material fact which at any stage of the negotiation comes to the knowledge of the proposed assured must be communicated to the insurers. Also, statements which were accurate at one stage of the negotiation but has become inaccurate thereafter must be disclosed before all contract is concluded. On the other hand, the duty of disclosure ceases when the contract is concluded<sup>121</sup>. In Re Yager and Guardian Assurance Company<sup>122</sup>, Channel J. said:

*“The time up to which it must be disclosed is the time when the contract is concluded. Any material fact that comes to his knowledge before the contract he must disclose”.*

Similarly, in Canning v. Farguhar<sup>123</sup>, Lord Esher M. R. said:

*“In insurance law ..... the material time is the moment when the insurance is made and the representations ought to be true then”.*

In Whitwell v. Autocar Fire and Accident Insurance Co. Ltd<sup>124</sup>, the proposer was asked whether any company had declined to insure him. He answered in the negative. The answer was in fact true. At that time, quite unknown to the proposer, however, two days before the proposal was accepted, another insurance company had declined to insure him. The court held that there was no duty to disclose this fact afterwards because the contract was concluded before the refusal was known to the assured.

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<sup>118</sup> Ibid (underlining mine)

<sup>119</sup> (1922) 2 K. B. 364

<sup>120</sup> (1867) L. R. 2 Q. B. 595.

<sup>121</sup> Lishman v. Noethern Maritime Ins. Co. (1875) L. R. 10 C. P.

<sup>122</sup> (1912) 108 L. T. 8.

<sup>123</sup> (1886) 16 O.B.D. 727.

<sup>124</sup> (1927) 27 Ll. L.R. 418.

The parties are however free to extend the duration of disclosure or modify it as they wish by the terms of the contract. This is commonly done in life policies where a clause is inserted, to the effect that the risk commences only after the receipt of the first premium by the insurer. In such a case, the proposer will be obliged to disclose any material fact which comes to his knowledge before the first premium is received.

Thus, in Looker v. Law Union and Roack Insurance Co. Ltd<sup>125</sup>, there was question as follows: -

*“Are you now free from disease or effects?” The proposer answered, Yes, five days later the insurance company sent a conditional acceptance of the risk stating that, “if the health of the life proposed remains meanwhile unaffected, the policy will be issued on payment of the first premium”.*

Five days after the receipt of this letter, the assured became ill and died within four days from pneumonia. No notice of his illness was given to the company but the assured sent a cheque for the first premium to the company. The cheque was however dishonoured on presentation.

The court held that the company was not bound to issue a policy. According to Acton J.: “There was a failure to discharge a duty incumbent upon all proposers of contracts of insurance ..... namely, a duty to inform the insurers of any material change in the nature of the risk to be undertaken by them.....”.

In Re Yager and Guardian Assurance Co. Ltd<sup>126</sup>. A fire policy contained a condition that “No insurance is in force until the premium is paid”.

On 27<sup>th</sup> September, 1910, the claimant became aware that L. C. Company had refused to continue his policy beyond 1910, but he did not communicate this to the Guardian Assurance Co. Ltd on 28<sup>th</sup> September, the Guardian executed a policy in his favour from 1910 – 1911. A fire occurred and this claim was brought. The claim was resisted by the Guardian for a failure to disclose a material fact.

The court held that the fact that L. Company had refused to continue the policy was a material fact, that when this fact became known to the claimant on the 27<sup>th</sup> September there was no concluded contract and that it was still the duty of the claimant to disclose such fact to the Guardian.

Lord Alverstone said:

*“In my opinion it cannot be said that this document of the 21<sup>st</sup> September was a contract. There was in the first place, on the face of the document to be no contract until the premium was paid”.*

Similarly, in Harrington v. Pearl Life Assurance Co. Ltd<sup>127</sup>, a man applied for a life insurance in May 1912 and his proposal was accepted. The insurer’s doctor declared him medically fit on examination. This policy was not effected since no premium was paid.

In October, 1912, he made the proposal again stating that there was no material change in his health. He became ill on 6<sup>th</sup> November and died when the premium was received on 8<sup>th</sup> November. It was held that there was a duty on the assured to disclose the change in his health before he paid the premium.

The parties may even further provide that the risk will not commence until the policy is issued and delivered to the assured. Thus, in Allis Chalmers v. Maryland Fidelity and Deposit Company<sup>128</sup>, it was provided that the insurance came into effect from the issuance of the policy. The policy, was executed by the insurer on 8<sup>th</sup> March, but was delivered on 18<sup>th</sup> April, on 13<sup>th</sup> April, the insured employee left the office and the employer suspected that he

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<sup>125</sup> (1928) L. K. B. 554.

<sup>126</sup> (1912) 108 L. T. 38.

<sup>127</sup> (1927) 43 T. L. R. 331.

<sup>128</sup> (1916) 114 L. T. 433.

had absconded. On 18<sup>th</sup> April, the insured's manager was informed whereby he paid the premium on that day and obtained a policy.

When the employer claimed, it was held that the non-disclosure of the employee's abscondment vitiated the claim since there was no binding contract when the employee absconded.

Earl Loreburn concluded as follows:<sup>129</sup>

*"I therefore come to the conclusion that there was no completed agreement ..... At any rate before April 18<sup>th</sup> and that prior to April 18<sup>th</sup> either party could have refused to proceed with this business of the insurance. When the policy was delivered and the premium was paid on April 18<sup>th</sup>, there was knowledge of a state of facts upon the part of the assured which admittedly ought to have been communicated to them and it is agreed that it is impossible to recover under the policy"*

When the policy is retrospective, there is a duty to disclose such facts which were material at the date from which the policy take effect and also all facts becoming material down to the actual date on which the contract is made. However, where the assured subsequently seeks to procure an alteration in terms of the contract for his own benefits, his duty to make disclosure will re-arise to the extent to which any material fact he then knows in relation to the alteration. Similarly, where the insurance is renewable or made periodically, the assured must disclosed all material facts which have come to his knowledge since the first contract<sup>130</sup>.

### **Consequences of non disclosure**

A failure to disclose any material fact, would render the contract voidable<sup>131</sup>. The aggrieved party may notify the other party that he wishes to avoid the contract upon discovering the non-disclosure<sup>132</sup>. Thereupon that party would be discharged from his obligations under the contract. The contract is however valid until thus avoided<sup>133</sup>.

Since the duty to disclose is not an implied term in the contract there is no cause of action for damages upon a breach of this duty<sup>134</sup>. The court may however award costs where appropriate, especially in cases of fraudulent non-disclosure<sup>135</sup>.

Generally, the premiums which the assured has paid are hardly recoverable, in some rare circumstances however, premiums may be recovered. Such circumstances exist where there is no fraud on the part of the assured.

In American International Insurance Co. Ltd v. Dike<sup>136</sup>, the assured was allowed to recover his premium since he was not fraudulent. The court held that where there no fraud and an insurer elects to avoid or repudiate a policy, such avoidance will have a retrospective effect of nullifying the contract abinitio. In that circumstance, therefore, the parties should be put back as far as possible into their original position as if the contract of insurance was never made.

It is however open to the aggrieved party to waive his right and affirm the policy all the same<sup>137</sup>. To amount to waiver there must be a clear action on the part of such a party

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<sup>129</sup> Ibid at P. 434.

<sup>130</sup>Boag v. Standard Marine Ins. Co. (1937) 2 K. B. 113 (that increase in value must be disclosed).

<sup>131</sup> See. Lambert v. Cooperative Insurance Society Limited, (1975) 2 Ll. L. R. 485.

<sup>132</sup>March Cabaret Club abd Casino Ltd v. London Assurance (Supra).

<sup>133</sup>Armstrong v. Turquand (1885) 91 I. C. L. 32.

<sup>134</sup> See. Wickens, Life Assurance law in Australia, 4<sup>th</sup> ed.

<sup>135</sup>Guardian Assurance v. Osei (1966) 2 A. L. R. (Comm.) 441.

<sup>136</sup> (1967) C. C. H. C. J.....

<sup>137</sup> see also per Udo Udoma, C. J. in Jubilee Insurance Co. Ltd v. Sematengo (1965) A. L. R. (Comm.) 88.

showing that he would not repudiate the contract. When there is a waiver the contract would bind both parties.

### **Criticisms**

It is interesting to say that the general application of the concept of non – disclosure known to the common law and its strict technical interpretation may in some cases operate unfairly to the interest of the assured in an insurance policy, but it appears that the provision of section 59 (1) (2) (3) (4) and (5) of the Insurance Act, Cap. 117 Law of the Federation of Nigeria 2004, has provided a sufficient remedy to checkmate the flagrant abuse of this principle by the insurers to repudiate liabilities. The relevant provision state thus:

*“(1)In a contract of insurance, a breach of a term, whether called a warranty or a condition, shall not give rise to any right by or afford a defence to the insurer against the insured unless the term is material and relevant to the risk or loss insured against.*

*(2)Notwithstanding any provision in any written law or enactment to the contrary, where there is a breach of a term of contract of insurance, the insurer shall not be entitled to repudiate the whole or any part of the contract or a claim brought on the grounds of the breach unless: -*

*(a)the breach amounts to a fraud; or*

*(b)it is a breach of a fundamental term (whether or not it is called a warranty) of the contract.*

*(3)Where there is a breach of a material term of a contract of insurance and the insured makes a claim against the insurer and the insurer is not entitled to repudiate the whole or any part of the contract, the insurer shall be liable to indemnify the insured only to the extent of the loss which would have been suffered if there was no breach of the term.*

*(4)Nothing in this section shall prevent the insurer from repudiating a contract of insurance on the ground of a breach of a material term before the occurrence of the risk or loss insured against.*

*(5) In subsection (2)(b) of this section, “fundamental term” means a warranty, condition or other term of an insurance contract which a prudent insurer will regard as material and relevant in accepting to underwrite a risk and in fixing the amount of premium”.*

### **Conclusion**

The rationale of this doctrine is borne out of the fact that the nature of insurance contract warrants some degree of good faith and honesty in order to enable the insurers have the full grasp of the subject of insurance, its attendant risk and the assessments of the appropriate premiums. However, the strictness of the common law rules in this area of the insurance law has left much to be desired as it may be used as an engine of fraud by the insurer. This is why the Nigerian Insurance Act differs from the common law position which is a welcome development by legislating on this concept with a view to doing what is just and equitable to both parties in an insurance policy.

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