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Statutory Reform of the Doctrine of *Uberrimae Fidei* in Insurance Law: A Comparative Review

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Abstract

The common law doctrine of *uberrimae fidei* is pivotal to all contracts of insurance. It imposes a duty on the parties to act towards each other with utmost good faith by disclosing all material facts and not misrepresenting any fact, either before the contract is formed or while the contract subsists. This article examines the doctrine and its statutory reforms in Nigeria and the United Kingdom. It argues that, before the statutory interventions, the iniquitous doctrine was a potent weapon, most often used by insurers to defeat just and legitimate claims by an insured. Although the legislation has brought some measure of relief to the insured in these jurisdictions, the article concludes that there are still some grey areas in the Nigerian law that need to be addressed to further the cause of justice between the contracting parties.

Keywords

Utmost good faith, common law reform, statutes, Nigeria, United Kingdom

INTRODUCTION

At common law, where parties contract with each other at arm's length, both being free agents and on equal terms, the mere non-disclosure of a material fact, in the absence of fraud, is not a sufficient ground for avoiding a contract.[1] The contract of insurance, however, forms an exception to this rule, as it is generally regarded, irrespective of its subject matter, as one of *uberrimae fidei* [utmost good faith].[2] It is a type of contract in which utmost good faith

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1 Lord Campbell in *Walters v Morgan* (1861) 3 De GF & J 708 at 723.

2 According to Lord Atkin in *Bell v Lever Bros Ltd* (1932) AC 161 at 227: "There are certain contracts expressed by law to be contracts of utmost faith where material facts should be disclosed, if not, the contract is voidable. Apart from special fiduciary relationships, contracts for partnership and contracts of insurance are leading instances. In such cases, the duty does not arise out of the contract; the duty of the person proposing the insurance arises before the contract is made." Other types of contracts in this category are contracts to take shares in companies, such as in *Derry v Peek* (1889) 14 AC 337, and contracts relating to all kinds of family arrangements, such as in *Gordon v Gordon* (1821) 3 Swan 400 and *Greenwood v Greenwood* (1863) 2 De GJ and Sn 28. All

and the fullest confidence are required from the two contracting parties in terms of fairness, reasonableness and ethical dealings. *Uberrimae fidei* connotes the two intertwined concepts of non-disclosure and misrepresentation, which are not easily discernible in practice. Non-disclosure or concealment implies negative conduct and has been defined as the failure or refusal to reveal something that either might be or is required to be revealed.[3] It has also been judicially defined as the concealment of a fact that there is a duty to disclose and that there was a duty to disclose the fact if it was a material fact.[4] Generally, non-disclosure would arise from an intentional or accidental failure by one party to communicate to the other party a fact that is (i) within the knowledge of the first party (actual or presumed by law); (ii) not known or deemed to be known by the second party; or (iii) calculated, if disclosed, to induce the second party either not to contract at all or else to stipulate better terms.[5] On the other hand, misrepresentation, which could be fraudulent, innocent or negligent, implies an inaccurate or untrue written or oral statement, made before or at the time the contract is concluded, by one of the parties to the contract or by his agent, which is material to the appraisal of the risk by the insurers or to the benefits contemplated by the insured, and has induced the aggrieved party to enter into the contract.

Despite the well-entrenched doctrine of *uberrimae fidei* in common law, some jurisdictions have enacted laws with provisions that have derogated from the established principles of the doctrine. In Nigeria, the Insurance (Miscellaneous Provisions) Decree 1988[6] introduced some far-reaching provisions to modify certain common law principles of insurance, including the doctrine of *uberrimae fidei*, conditions and warranties, insurable interests and assignment. The relevant provisions on the doctrine of *uberrimae fidei* have been re-enacted as section 54 of the Insurance Act, 2003 (Nigerian Act). Similarly, the United Kingdom (UK) introduced more comprehensive and fundamental reforms to the doctrine with the enactment of the Consumer Insurance (Disclosure and Representations) Act 2012 and Insurance Act 2015.[7]

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other forms of contracts are, generally, subject to the *caveat emptor* rule, that is, buyer beware.

3 G Bryan *Black's Law Dictionary* (9th ed, 2009, Thompson Reuters) at 1152.

4 Jessel MR in *London Assurance v Mansel* (1879) 11 Ch D 363 at 370.

5 Lord Mansfield in *Carter v Boehm* (1766) 3 Burr 1905 at 1909.

6 Decree No 40. This decree was repealed and its provisions were re-enacted verbatim as secs 48–58 of the Insurance Decree of 1991, No 58, which was itself repealed and re-enacted as secs 58–68 of the Insurance Decree, 1997, No 2 and subsequently as secs 54–63 of the Insurance Act 2003, cap I 17 Laws of the Federation of Nigeria (LFN) 2004.

7 Until recently, UK insurance law was largely based on the Marine Insurance Act, 1906 (MIA 1906). Before the enactment of the Consumer Insurance (Disclosure and Representations) Act 2012 and the Insurance Act 2015, insurance regulators and the insurance market introduced intermittent regulatory measures. These included measures under the Financial Ombudsman Scheme established in 2000 by part XVI of the Financial Services and Markets Act, the Association of British Insurers' (ABI) Code of

This article aims to examine the relative importance of the doctrine of *uberrimae fidei* in insurance contracts under common law and the extent of its statutory modifications in some common law jurisdictions, with particular focus on Nigeria and the UK. It also highlights the gaps and limitations in the Nigerian law and offers suggestions for further reform. The choice of Nigeria and the UK, as the basis of comparison, has been informed by the fact that Nigerian insurance law is largely rooted in the English common law.[8]

The article is divided into seven parts. The next and third parts focus on a discussion of the scope of the doctrine of *uberrimae fidei* and issues emanating from its application at common law. The fourth and fifth parts explore the extent of legislative interventions in the application of the doctrine in Nigeria and the UK. The sixth part provides suggestions for how to incorporate some of the reform ideas available in the UK law in particular, and those of some other common law jurisdictions in general, into the Nigerian law. The last part draws some conclusions.

SCOPE OF THE DOCTRINE OF *UBERRIMAE FIDEI*

James VC highlighted the uniqueness of the doctrine of *uberrimae fidei* in *Mackenzie v Coulson*,[9] when he asserted that "there is no class of documents as to which the strictest good faith is more rigidly required in courts of law than policies of assurance".[10] The doctrine prescribes a set of specific reciprocal duties for contracting parties in all forms of insurance, including marine,

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Practice on Non-Disclosure and the Insurance Conduct of Business Sourcebook (ICOBS) (2016). The Financial Ombudsman Scheme replaced the Insurance Ombudsman Bureau that insurers set up in 1981 and under which consumer disputes were resolved quickly and with minimum formality by an independent person through a framework that owed little to the MIA 1906, based on what was fair and reasonable in the circumstances of the case. The ABI's Code of Practice helped to reduce significantly the number of claims declined on grounds of non-disclosure and misrepresentation and ICOBS inter alia ensured that customers are treated fairly and given clear, fair and appropriate information about a policy in good time and in a comprehensive way so that they are able to make an informed decision about the arrangements proposed. See D Hertzell "Reforms to UK insurance law: Overview of key changes", available at: <https://uk.practicallaw.thomsonreuters.com/6-615-6445?_…/> (last accessed 23 April 2019); ICOBS, available at: <http://www.fca.org.uk/firms/insurance-conduct-business-sourcebook-icobs/> (last accessed 23 April 2019).

8 Interpretation Act, cap I23 LFN 2004, sec 32.

9 (1869) L R Eq 368. See also *Lee v British Law Insurance Co Ltd* (1972) 2 Lloyd's Rep 49 (where the court stated that full disclosure is of the essence of the contract); *Tabs Assurance Ltd v Awuzie Industries (Nig) Ltd* (1995) 4 NWLR (pt 388) 223 at 229; *Irukwu and Others v Trinity Mills Insurance Brokers and Others* (1997) 12 NWLR (pt 531) 117.

10 *Mackenzie v Coulson*, id at 375. See also Farwell LJ in *Re Bradley and Essex and Suffolk Accident Indemnity Society* (1912) 1 KB 415 at 430; Lord Jauncey in *Banque Financière v Skandia (UK) Insurance Co Ltd* (1990) 2 Lloyd's Rep 377 at 389.

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life and indemnity.[11] It essentially forbids either party from concealing what he privately knows or from making any untrue representation in order to draw the other into the bargain from his ignorance of that fact and his believing the contrary.[12] The rationale behind the doctrine, therefore, is the prevention of fraud and the encouragement of good faith between the contracting parties.[13] It is noteworthy, however, that, in practice, this duty weighs more heavily on the insured than on the insurer, in view of the general perception that the former occupies a better position in the bargaining process as regards knowledge of material circumstances about the subject matter of the insurance.[14] In the authoritative case of *Carter v Boehm*, the principle of utmost good faith in contracts of insurance was adroitly expressed by Lord Mansfield as follows:

> "Insurance is a contract upon speculation. The special facts upon which the contingent chance is to be computed lie most commonly in the knowledge of the insured only; the underwriter trusts to his representations 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 risque as if it did not exist. The keeping back of such a circumstance is a fraud. Although the suppression should happen through mistake, without any fraudulent intent, yet still, the underwriter is deceived and the policy is void because the risque run is really different from the risque understood and intended to be run at the time of the agreement."[15]

In this case, the action was based on a 12 month policy of insurance, taken out for the benefit of the governor of Fort Marlborough, George Carter, against the

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11 Jessel MR in *London Assurance v Mansel*, above at note 4 at 369; *Lindenau v Desborough* (1828) 8 B&C 586 at 592. Secs 17–21 of the MIA 1906 formally codified the common law rules on disclosure and representation. These sections are re-enacted in Nigeria as secs 19–23 of the Marine Insurance Act 1961, cap M2, LFN 2004. Sec 17 of the MIA 1906, for example, provides that a contract of marine insurance is a contract based upon utmost good faith and, if either party does not observe utmost good faith, the other party may avoid the contract.

12 Lord Mansfield in *Carter v Boehm*, above at note 5 at 1905; *Banque Financière de la Cité v Westgate Insurance Company Ltd* (1987) 1 Lloyd's Rep 69; Steyn J in *Banque Keyser Ullmann SA v Skandia (UK) Insurance Co Ltd and Others* (1987) 2 All ER 923; MIA 1906, secs 18(1) and 20(1).

13 *Dalglish v Jarvie* 2 Mac & G 231 at 243.

14 Romer LJ in *Seaton v Heath* (1899) 1 QB 782 stated (at 793) that: "Contracts of insurance are generally matters of speculation, where the person desiring to be insured has the means of knowledge as to the risk, and the insurer has not the means or not the same means." See also *London General Omnibus Co Ltd v Holloway* (1912) 2 KB 72; *Joel v Law Union & Crown Insurance Co Ltd* (1908) 2 KB 863.

15 *Carter v Boehm*, above at note 5 at 1909. It has been held in subsequent cases that failure to observe the utmost good faith renders the contract voidable and not void. See, for example, *Mackender v Feldia AG* (1967) 2 QB 590; *National Insurance Corporation of Nigeria v Power and Industrial Engineering Ltd* (1986) 1 NWLR (pt 14) 1.

loss of the fort to a foreign enemy. The insured event occurred, as the fort was taken during the policy period. The defendant underwriter, Boehm, denied liability to indemnify the insured on the ground of the concealment (non-disclosure) of circumstances that ought to have been disclosed, in particular the weakness of the fort and the probability of its being attacked by the French. The court, however, found that: the underwriter knew that the insurance was for the governor, the governor must be acquainted with the condition of the fort, the governor's duties prevented him from disclosing that condition, and, by taking out the insurance, the governor was aware of the possibility, at least, of an attack; and that the insurer underwrote the policy with this knowledge and without asking any questions. The court held that, in the circumstances, by underwriting, the underwriter assumed the knowledge of the condition of the fort and that the fact alleged to have been concealed was a matter as to which he might be informed in various ways and that it was not a matter within the privileged knowledge of the governor such that the governor was bound to disclose it. Thus, although the court in this case imputed the knowledge of the weakness of the fort and the likelihood of its being attacked to the insurer (as they were common knowledge that the insured was not therefore obliged to disclose), the underlining principle of the doctrine of utmost good faith, as expressed by Lord Mansfield, was established.

In general, therefore, before a contract is concluded, the insured is obliged to disclose all matters within his actual knowledge or that he could ascertain by reasonable inquiries, that he believes to be material to the insurer's appraisal of the risk, whether or not they have been specifically requested. The insured is also obliged not to make any material misstatement of any fact. In this regard, it would generally not suffice for him to perform the duty in good faith and to the best of his understanding.[16] Also, where the insurance contract has been negotiated by an agent on behalf of the insured, any fact within the agent's knowledge must be disclosed.[17]

Moreover, when a fact is not disclosed by the insured when it ought to have been disclosed in answer to a question, there is a prima facie case of non-disclosure. On the other hand, an insured may have given honest answers to questions raised in the proposal form and yet not have acted in utmost good faith because of concealing a particular fact, or *suppressio veri*.[18] In *Bufe v Turner*,[19] the plaintiff had one of several warehouses next but one to a builder's shop that caught fire. On the evening after that fire had apparently been extinguished, he gave instructions, by an extraordinary conveyance, for insuring that warehouse, while leaving others uninsured, but did not appraise the insurers of the neighbouring fire. Although the terms of the insurance did not

16 *Dalglish v Jarvie*, above at note 13 at 243; *London General Omnibus v Holloway*, above at note 14.
17 *Northern Assurance Co Ltd v Idugboe* (1966) 1 All NLR 88.
18 J Irukwu *Fundamentals of Insurance Law* (2007, Witherbys Printing) at 93.
19 (1815) 6 Taunt 338.

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expressly require the communication, it was held that the concealment of that fact voided the policy. Similarly, in *London General Omnibus v Holloway*,[20] the employer of a servant, when taking a bond that purported to make a surety responsible for the fidelity of the servant, did not disclose to the surety that he knew that the servant had previously been guilty of dishonesty in his employment. It was held that the employer could not enforce the bond against the surety in respect of the servant's subsequent dishonesty, although the employer's non-disclosure of the servant's previous dishonesty was not fraudulent. It is thus generally irrelevant whether the insured discloses what he thinks to be material and the insurer will not be on risk if he has been materially deceived as to the nature of the risk he is assuming.[21]

Nevertheless, there is no need to disclose facts known to the insurers,[22] or within the constructive knowledge of the insurers,[23] within common knowledge,[24] relating to business practice or custom,[25] or that lessen the risk agreed and understood to be run by the express terms of the policy.[26] Also, where, from the facts communicated to him, the insurer would naturally infer the existence of other undisclosed facts, his omission to make further inquiry is deemed an implied waiver of a more explicit disclosure.[27]

On the other hand, when making statements as to the nature and effect of the risks for which the insured seeks cover or the recoverability of a claim under the policy, the insurer is obliged to ensure that such statements are accurate, for they are crucial factors that a prudent insured would ordinarily take into account in deciding whether or not to place the risk.[28] It was thus noted in *Re Bradley and Essex and Suffolk Accident Indemnity Society*[29] that, in observing the duty of utmost good faith, it is incumbent on insurance

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20 Above at note 14.

21 *London Assurance v Mansel*, above at note 4.

22 *Carter v Boehm*, above at note 5 at 1911; *Bates v Hewitt* (1867) 2 QB 595 at 605.

23 *Foley v Tabor* (1862) 2 F&F 778.

24 *Bates v Hewitt*, above at note 22.

25 *Mann Macneal and Steeves Ltd v Capital and Counties Insurance Co Ltd* (1921) 2 KB 300; *Noble v Kennoway* (1780) 2 Dong 510 at 512.

26 *Carter v Boehm*, above at note 5 at 1910.

27 *Hair v Prudential Assurance Co Ltd* (1983) 2 Lloyd's Rep 667 at 673; *Roselodge v Castle* (1966) 2 Lloyd's LR 113. MIA 1906, sec 18(1) requires the assured to disclose to the insurer, before the contract is concluded, every material circumstance that is known to the assured and the assured shall be deemed to know every circumstance that, in the ordinary course of business, ought to be known by him. However, in the absence of inquiry, sec 18(3) absolves the proposer from disclosing any circumstance that diminishes the risk, known or presumed to be known to the insurer, including matters of common notoriety or knowledge and matters that an insurer in the ordinary course of business, as such, ought to know. Also, the assured need not disclose any circumstance as to which information is waived by the insurer or that it is superfluous to disclose by reason of any express or implied warranty.

28 Shade LJ in *Banque Financière v Westgate Ins Co* (1989) All ER 952 at 990 CA; approved by the House of Lords in (1990) 2 All ER 947 at 950 HL.

29 Above at note 10.

companies to make clear, in both their proposal forms and policies, the conditions precedent to their liability to pay. This is because those conditions have the same effect as forfeiture clauses and may inflict loss and injury on the assured and anyone claiming under him out of all proportion to any damage that could possibly accrue to the insurer from the non-observance or non-performance of the conditions. Also, where an underwriter conceals a fact that ought to have been made known to the insured (such as where the underwriter concealed that he insured a ship for a voyage when he privately knew that she had already arrived[30] or where the insurer effected a fire insurance policy on a house that the insurer knew had been demolished),[31] the insured could avoid the policy.

Furthermore, as noted in *Manifest Shipping Co Ltd v Uni Polaris Shipping Co Ltd*,[32] utmost good faith is a principle of fair dealing that does not end when the contract has been made, but continues for as long as the policy is valid. Thus, where facts emerge during the currency of the policy that are materially at variance with the information originally given at the conclusion of the insurance contract, those facts must be disclosed to the insurer.[33] The insured is subject to the same duty when seeking renewal of the policy, since renewal generally constitutes the making of a new contract of insurance.[34] However, where an alteration is only to be made to the original contract, the duty of disclosure arises only in relation to the part affected by the alteration.[35]

Utmost good faith is also required at the claims stage. As such, the insured is barred from making fraudulent claims or inflating items in his or her claim. In *Goulstone v Royal Insurance Co*, a fraudulent claim was described as one that is "wilfully false in any substantial respect".[36] In *Britton v Royal Insurance Co*,[37] the insurer declined payment on a claim made by the insured in respect of a fire policy upon household furniture, trade fixtures and stock-in-trade, alleging both arson and fraud, as the assured had set fire to his house and presented a claim that was greater than it actually was. Willes J stated:

30 Lord Mansfield in *Carter v Boehm*, above at note 5.

31 Lord Jauncey in *Banque Financière v Scandia*, above at note 10 at 389.

32 (2001) 2 WLR 170.

33 *Black King Shipping Corporation v Massie, "Litsion Pride"* (1985) 1 Lloyd's Rep 437. In *Bank of Nova Scotia v Hellenic Mutual War Risks Association, "Good Luck"* (1988) 1 Lloyd's Rep 514, Hobhouse J in the court of first instance stated (at 545–46) that: "the obligation of utmost good faith is one which arises normally in relation to the making of the contract. This is because that is the situation in which the duty is most usually relevant. But, as stated by Hirst J in *"Litsion Pride"*, the duty exists throughout the contract."

34 *Lambert v Co-operative Insurance Society Ltd* (1975) 2 Lloyd's Rep 485; *Heart of Oak Building Society v Law Union and Rock Insurance Co Ltd* (1936) 2 All ER 619. In Nigeria, most policies, other than life assurance policies, are for just one year and renewable annually.

35 O Yerokun *Insurance Law in Nigeria* (2013, Princeton Publishing Co) at 205.

36 (1858) 1 F & F 276 at 279.

37 (1866) 4 F & F 905.

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> "The law is that a person who has made such a fraudulent claim could not be permitted to recover at all. The contract of insurance is one of perfect good faith on both sides, and it is most important that such good faith should be maintained. It would be most dangerous to permit parties to practise such frauds, and then, notwithstanding their falsehood and fraud, to recover the real value of the goods concerned. And, if there is wilful falsehood and fraud in the claim, the insured forfeits all claim whatever upon the policy."[38]

Similarly, in *Galloway v Guardian Royal Exchange (UK) Ltd*,[39] it was held that the insured is under a duty to ensure that he or she does not make a claim for an amount greater than his or her actual loss, so that the insurer is not misled by his claim. The court further held that, since there is no such thing as "substantially fraudulent", once it has been proved that a claim was made with the fraudulent intentions, the insurer is entitled to reject the whole claim.[40]

However, it is noteworthy that the doctrine of *uberrimae fidei* does not apply to a contract that merely resembles an insurance contract. Thus, in *University of Nigeria Nsukka v Turner and Another*,[41] the plaintiff had wanted to invest the sum of 25,830 Nigerian Pounds (NGP) a year for 50 years with the aim of receiving NGP 3 million from the defendant insurers at the end of that period. However, it mistakenly took a so-called "sinking fund" policy of assurance with the defendants. When the plaintiff later discovered that the insurance company's authorized capital was too meagre to meet the insurer's obligations, it repudiated the policy on the ground that the agent should have disclosed that fact. It was held that an investment contract had been created between the university and the defendant and, as such, the defendants were not bound to make any disclosure to the plaintiff as to their capital structure or as to their financial strength in general.

ISSUES ARISING FROM THE APPLICATION OF THE DOCTRINE AT COMMON LAW

It is noteworthy that it is material facts that are required to be disclosed or not to be misrepresented in the discharge of the contracting parties' respective duties. A pertinent issue arising from the application of the doctrine at common law is, therefore, the determination of what constitutes a material fact. Under sections 18(2) and 20(2) of the Marine Insurance Act, 1906 (MIA 1906), the legal test of the materiality of a fact is stated to be "one which would influence the judgement of a prudent insurer in fixing the premium, or

38 Id at 909.
39 (1999) Lloyd's Rep 209.
40 See also "*Litsion Pride*", above at note 33 and "*Good Luck*", above at note 33.
41 (1968) 1 ALR Comm 29.

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determining whether he will take the risk".[42] In *Akpata and Another v African Alliance Insurance Co Ltd*,[43] the Supreme Court also stated:

> "The basic test hinges upon whether the mind of a prudent insurer would be affected, either in deciding whether to take the risk at all or in fixing the premium, by knowledge of a particular fact if it had been disclosed. The fact must, therefore, be one affecting the risk. If it has no bearing on the risk, it need not be disclosed; and if it would do no more than cause the insurers to make inquiries, resulting no doubt in delay in issuing the insurance, it is not material if the result of the inquiries would have no effect on a reasonable insurer. It is for the court to rule as a matter of law whether a particular fact is capable of being material and to give directions as to the test to be applied, but the decision ultimately is one of fact depending on the circumstances as proved in evidence."[44]

Also, in *Mayne Nickless Ltd v Pegler*, the court stated that, "[i]n determining the question whether a particular fact is one which ought to be disclosed, the test to be applied is not what the assured thinks, nor even what the insurers think, but whether a prudent and experienced insurer would be influenced in his judgement if he knew it".[45] However, in *Container Transport International Inc and Reliance Group Inc v Oceanus Mutual Underwriting Association (Bermuda) Ltd*[46] it was held that a fact is material if a prudent insurer would like to have known it, although the evidence showed that the prudent insurer would, in fact, have accepted the proposal on standard terms. This decision was later affirmed by the House of Lords in *Pan Atlantic Insurance v Pine Top Insurance*,[47] holding that the test of materiality of disclosure, for the purposes of both marine insurance under section 18 of the MIA 1906 and non-marine insurance, should be based on the natural and ordinary meaning of section 18. It was thus held that "material circumstance", which would require disclosure under the act, constitutes a circumstance that would influence the judgment of a prudent insurer. It does not necessarily mean that an insurer must have acted differently if he had known the fact, but merely that the insurer would have wanted to know the fact when making his decision. The

42 It was held in *Locker and Woolf Ltd v Western Australian Insurance Co Ltd* (1936) 1 KB 408 that the definition of "material" circumstance in the MIA 1906 is applicable to all forms of insurance. See also Lord Mustill in *Pan Atlantic Insurance Co Ltd v Pine Top Insurance* (1995) 1 AC 501 at 588–619.

43 (1967) 3 ALR Comm 264.

44 Id at 279. See also *United Nigeria Insurance Co Ltd v Salawu Karimu* (1969) NCLR 247 at 250.

45 (1974) 1 NSWLR 228 at 239.

46 (1982) 2 Lloyd's Rep 178.

47 Above at note 42. It was also held in *St Paul's Fire and Marine Insurance Co (UK) Ltd v McConnell Dowell Constructors Ltd* (1995) 2 Lloyd's Rep 116 that it was sufficient that the non-disclosure was an inducement and that it was not necessary that it was "the" inducement.

court further held that, in order for an insurer to be entitled to avoid a contract of insurance or re-insurance on the ground of non-disclosure, the insurer must show both that the undisclosed fact was material and that its non-disclosure induced the contract on the relevant terms, using "induced" in the sense in which it is used in the general law of contract.

Thus, matters such as previous insurance as in *Akpata v African Alliance Insurance*,[48] previous refusal as in *Container Transport and Reliance v Oceanus Mutual*,[49] *London Assurance v Mansel*[50] and *Northern Assurance v Idugboe*,[51] previous convictions, especially those relating to fraud or dishonesty as in *Roselodge v Castle*,[52] and matters affecting the insurer's right to subrogation as in *Tate v Hyslop*[53] have all been held to be material facts that the insured must disclose to the insurer. Furthermore, in life and personal accident policies, where specific questions are often asked about matters affecting people in general, all facts relating to age and occupation must be accurately stated by the assured, especially where the assured is engaged in any hazardous occupation. Thus, in *Bamidele and Another v Nigeria General Insurance Co Ltd*,[54] the deceased assured had described himself to the insurer in respect of personal accident insurance as a horticulturist and greengrocer, whereas he was actually a labourer. It was held that the statement constituted non-disclosure that, if known, might have influenced the insurer in fixing the premium or in deciding whether or not to take the risk, and that the deceased's failure to state his occupation entitled the insurers to avoid the contract. Furthermore, the assured must disclose peculiar matters affecting him or her that are not likely to be known to the assurers and that, had they been known, would, no doubt, have been made the subject of specific enquiries.[55] Similarly, in motor vehicle insurance, matters such as the age

48 Above at note 43.
49 Above at note 46.
50 Above at note 4.
51 Above at note 17. *American International Insurance Co Ltd v Dike* (1978) NCLR 408.
52 Above at note 27. *Lambert v Cooperative Insurance Society*, above at note 34.
53 (1885) 15 QB 368.
54 (1973) 3 UILR (pt 4) 418. See also *Holmes v Cornhill Insurance Co* (1949) 82 LTL Rep at 575.
55 In contrast to the strict posture of the courts in determining the discharge of the duty of disclosure in non-marine cases, the courts seem to have adopted a more flexible approach in determining issues of non-disclosure in marine insurance cases. For example, in *Lebon & Co v Straits Insurance Co* (1894) 10 Times LR 517, it was stated (at 518) that, in marine insurance, issues of previous refusal or the rate of premium to be charged are not material facts that the proposer is bound to disclose. What are considered as material facts in marine insurance are those relating to the nature of the risk and not those relating to the judgment of other people. See also *Glasgow Assurance Corporation v Symondson & Co* (1911) 16 Com Cas 109 at 119; *Mann Macneal & Steeves v Capital and Counties Insurance Co Ltd* (1921) 2 KB 300; *Beckwith v Sydebotham* (1807) 1 Camp 116; and *Fort v Lee* (1811) 3 Taunt 38. It is remarkable that, in these cases, disclosure was held unnecessary, even though, in all of them, the circumstances appear to be material and known to the assured at the time of making the contract.

of the vehicle, its value and make, are material facts that must be disclosed.[56]

It is worth noting, however, that the insured is only required to disclose facts that he knows and of which the insurer does not know.[57] As succinctly stated by Fletcher Moulton LJ in *Joel v Law Union and Crown Insurance*:

> "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 … Your opinion of the materiality of that knowledge is of no moment. If a reasonable man would have recognised that it was material to disclose the knowledge in question, it is no excuse that you did not recognise it to be so. But the question always is, was the knowledge you possessed such that you ought to have disclosed it."[58]

In this case, the assured had given a negative answer to the question as to whether she had suffered mental derangement, because she did not know that she had been mentally deranged. In an action brought by the assured's executrix following the assured's suicide, it was held, inter alia, that a person cannot conceal what he does not know. Also, in *Century Insurance Co v Atuanya*,[59] the insured was unaware that an earlier policy of insurance on his car, issued to him by his previous insurer, had been cancelled. The insurer had turned down a claim made when the car was destroyed by fire on the ground that the insured had failed to disclose that material fact. It was held that the proposer is asked to state no more than what he believed, on reasonable grounds, to be the true situation and, since the plaintiff had no knowledge that his previous insurers had cancelled his policy, the defence of non-disclosure must fail. Similarly, in *Akpata v African Alliance Insurance*,[60] the court held that there was no suppression of fact by the deceased assured who said he was in good health when he was, in fact, very ill, because the nature of his illness was not medically detectable at the time when he was obliged to supply the information in question.

Another pertinent issue in the application of the doctrine is the warranty of the accuracy of the information the insured gives in a proposal

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56 *Santer v Poland* (1924) 19 LTL Rep 29. Also, in a burglary proposal, it was held in *Glicksman v Lancashire and General Assurance Company Ltd* (1925) 2 KB 593 that the position and the condition of the premises in which the articles to be insured are contained is necessarily a very material fact.

57 *Heart of Oak v Law Union and Rock*, above at note 34 at 620.

58 Above at note 14 at 884. In *Economides v Commercial Union Assurance Co Plc* (1998) 1 QB 587, it was also held that a private individual has to disclose only the facts that are known to him. Accordingly, provided that he did not wilfully shut his eyes to the truth, the only obligation is that of honesty and there is no requirement to inquire further into the facts.

59 (1960) 2 All NLR 317.

60 Above at note 43.

form.[61] The proposal form generally constitutes an offer by the proposer to the insurer. Once the insurer accepts the form, the terms contained in it are binding on the parties and it would make no difference that the insurer has not yet issued a policy to the insured.[62] Moreover, in practice, a basis of contract clause is usually inserted in the proposal form, under which the insured warrants the accuracy of the information supplied in the form as well as covenanting with the insurer that the declaration should form the basis of the contract between the parties. More often than not, the proposer gives the warranty without actually realizing its importance or legal implications. When the insurer eventually issues the policy, the basis of contract clause is usually incorporated into it, having the effect of enlarging the express terms of the contract between the parties. In this case, all information is ultimately considered as a material fact in determining the liability or otherwise of the insurer, irrespective of its relevance or materiality to the insured risk, or the integrity and honesty of purpose of the insured. It was held in *Duckett v Williams*[63] that, once the truth of a statement had been made the basis of the contract, an insurer was entitled to avoid the contract if he could show that the statement was untrue or inaccurate, and that it was immaterial that the insured was unaware that the statement was not true.[64] Similarly, in *Royal Exchange Assurance Nigeria Ltd v Chukwura*[65] the Supreme Court stated that, where a proposal is made the basis of a contract of insurance, any misstatement in it is a ground on which insurers may avoid liability under the policy and it is also a good and valid defence to an action for indemnity by the policy holder. In general, the basis of contract clause has always been used as a sort of trap or a vicious device for the insured, as it performs little or no educative function.[66] Thus, in *Akpata v African Alliance Insurance*,[67] the plaintiffs, as administrators of the estate of the late Dr Akpata, claimed the sum of NGP 3,000 upon a life policy entered into by the deceased in 1965 with the defendant company. However, the defendant denied liability on the ground of non-disclosure, in that the deceased, in answer to one of the questions in the proposal form,

61 MIA 1906, sec 33(1) defines a warranty as "a promissory warranty, that is to say, a warranty by which the assured undertakes that some particular thing shall or shall not be done, or that some condition shall be fulfilled, or whereby he affirms or negatives the existence of a particular state of facts".

62 *Ngillari v NICON* (1998) 8 NWLR (pt 561) 1.

63 (1834) 2 Cr & M 348.

64 Also, in *Anderson v Fitzgerald* (1859) 4 HLC 484, it was held that the basis of the contract clause removed any question of materiality from consideration by the jury.

65 (1976) 11 SC 295.

66 Lord Green MR in *Zurich General Accident and Liability Insurance Co Ltd v Morrison* (1942) 2 KB 53 at 57–58. It has been argued in some quarters that the basis of contract clause was originally introduced with the purpose of drawing the attention of the applicants for insurance to the fact that the information required of them was very important: R Hasson "The doctrine of *uberrimae fidei* in insurance law: A critical evaluation" (1969) 32/6 *Modern Law Review* 615.

67 Above at note 43.

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had denied ever having previously entered into a contract of life assurance with another company, although he had a policy of life assurance under which a sum of NGP 2,000 was paid. A declaration was made in the proposal form that the statements should be made the basis of the contract of insurance. It was held that the plaintiffs could not claim on the policy. The court noted that:

> "The deceased, having warranted the truth of the statements in the proposal form and having agreed that they formed the basis of the contract and that all sums paid should be forfeited and the contract declared null and void if any of the statements are untrue, cannot now be heard to claim on the policy because of the uncontested fact that the answer to one of the questions is untrue to the knowledge of the deceased."[68]

In *Dawson v Bonnin*,[69] the proposer, in respect of a fire insurance policy on a lorry, was required to state the full address at which the lorry would be garaged and, inadvertently, inserted the wrong address. Since the policy contained a basis of contract clause, the insurer was held to be entitled to repudiate liability on a claim made under the policy when the lorry was lost by fire, even though the assured's representation as to the place where the vehicle was garaged was immaterial. However, where there is no such basis of contract clause, an insurer seeking to avoid a policy on the grounds of non-disclosure or misrepresentation would have to prove either fraudulent intention or that the misstatement was related to a material fact.[70]

One other issue that could arise with the use of a proposal form is the effect of the insured leaving specific questions unanswered. In *Lindenau v Desborough*,[71] it was held that the non-answering of a specific question would amount to concealment if the person concerned knew the fact and was able to answer it. Similarly, it was held in *Marcovitch v The Liverpool Victoria Friendly Society*[72] and *Roberts v Avon Insurance Co Ltd*[73] respectively that omitting to answer a question cannot be regarded as a mis-statement of fact, but that the omission will constitute a misstatement of fact if the obvious inference is that the applicant intended the blank space to represent a negative answer. However, the insurer's subsequent issue of a policy of insurance in such circumstances, without further inquiry, was held to amount to a waiver of information.[74]

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68 Id at 279–80.

69 (1922) AC 423. In *Horne v Poland* (1922) 2 KB 364, the failure of the insured to disclose that he was of alien birth and that he entered the contract under an assumed name was held to vitiate the contract.

70 *Sirius International Insurance Corp v Oriental Assurance Corp* (1999) 1 All ER 699.

71 Above at note 11.

72 (1912) 28 TLR 188.

73 (1956) 2 Lloyd's LR 240.

74 Ibid.

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Another pertinent issue in the application of the doctrine of *uberrimae fidei* is the status and authority of an insurance agent who assists a proposer to complete a proposal form. Insurance trade custom generally allows an intermediary to act as an agent of both the insurer and the insured simultaneously. However, where the agent has assisted a proposer to complete a proposal form, the agent is deemed the proposer's amanuensis[75] and the agency rule of *qui facit per alium facit per se* [he who acts through another does the act himself] will be enforced. This is so, irrespective of the proposer's permanent or temporary incapacity, such as blindness or illiteracy. In *Salako v Lombard Insurance Co Ltd*,[76] it was held, inter alia, that it is the proposer's responsibility to complete and sign the proposal form and if for any reason the proposer allows any other person to complete the form before he signs it, that person must be regarded as the proposer's agent. Indeed, as rightly noted in some quarters, both the underwriter and the insured might have been deceived by the agent's act or omission, but it is the insured who ultimately bears the brunt by way of a rejected claim.[77] Thus, in *Northern Assurance v Idugboe*,[78] the plaintiff insured was found not to have disclosed the fact that his motor vehicle had been insured under another policy against third party risk, which, however, refused to grant him comprehensive cover. The non-disclosure appeared to be the decision of the insurer's agent who assisted the illiterate insured to complete the proposal form, as the plaintiff alleged that he had disclosed the fact to the agent. Nevertheless, the court held that there was a material non-disclosure and that the insurers were entitled to avoid the contract.[79] However, a different decision was reached in *Bawden v London, Edinburgh and Glasgow Assurance Co*,[80] where Bawden's administratrix brought an action to recover the amount secured to the deceased by a policy of insurance against accidental injury granted to him by the defendant company. In this case, Bawden was an illiterate man, who was almost unable to read or write, but could write his name. The agent produced a printed proposal, completed the blanks as dictated by Bawden and Bawden then signed his name. The proposal contained a statement by the assured that he had no physical infirmity and that there were no circumstances that rendered

75 *Newsholme Brothers v Road Transport and General Insurance Co Ltd* (1929) 2 KB 356.

76 (1978) 10–12 CCHCJ 215; *Iwuola v Express Insurance Co Ltd* (1976) 2 CCHCJ 275.

77 C Agomo "The problem of insurance claims in Nigeria" in I Sagay and O Oluyide (eds) *Current Developments in Nigerian Commercial Law* (1998, Throne of Grace) 230 at 233.

78 Above at note 17. *American International Insurance v Dike*, above at note 51.

79 This unfortunate decision was critically reviewed in G Olawoyin "*Northern Nigeria Assurance Co Ltd v Idugboe*: The penalty for illiteracy" (1973) 11 *Nigeria Bar Journal* 81.

80 (1892) 2 QB 534; *Holdsworth v Lancashire and Yorkshire Insurance Co* (1907) 23 Times LR 521; and *Thornton-Smith v Motor Union Insurance Co* (1913) 30 Times LR 139. Also, in *Golding v Royal London Auxiliary Insurance Co* (1914) 30 Times LR 350 and *Ayrey v British Legal and United Provident Assurance Co* (1918) 1 KB 136, disclosure of the true facts to the respective insurance company's agent was held to bind the insurance company, although the answers were incorrectly stated on the proposal form.

him peculiarly liable to accident. It was agreed that the proposal should form the basis of the contract between him and the company. At the time Bawden signed the proposal, he had lost the sight of one eye, a fact of which the agent was aware, though he did not communicate it to the defendant. The assured, during the currency of the policy met with an accident that resulted in the complete loss of sight in his other eye, such that he became permanently blind. It was held, inter alia, that, under the circumstances, the knowledge of the defendant's agent was the knowledge of the defendant and that it was liable under the policy.[81]

Generally, the onus of proving non-disclosure or misrepresentation is on the party alleging it and, more often than not, this rests upon the insurer.[82] In *Drake Insurance Plc v Provident Insurance Plc*[83] it was held, inter alia, that an insurer seeking to rely on the insured's non-disclosure of material information was obliged to show that it would not have entered into the contract or would have charged a different premium. A successful plea vitiates the policy and renders it voidable from the outset at the instance of the aggrieved party.[84] In this respect, the innocence, inadvertence, negligence or carelessness of the guilty party would be immaterial.[85] However, where the alleged non-disclosure of a material fact cannot be substantiated by the insurer, the insured is entitled to recover the insured sum. Thus, in *Audu Bida v Motor and General Insurance Co*,[86] the insurer had alleged that the insured car was old, not a new car as represented by the insured; it was held that the risk had attached on the issue of the cover note and that the subsequent loss suffered by the insured was recoverable from the insurers. Similarly, where there is an alleged misrepresentation of a material fact, the court would consider a given statement in its entirety in order to ascertain its veracity. A statement that is basically accurate will, therefore, not vitiate the policy on the ground of a trivial misstatement. Thus, in *United Nigeria Insurance v Salawu Karimu*,[87] the insurers had alleged that there was a material misrepresentation when the defendants wrote the names of two persons as if they were one person, without disclosing this fact or informing the insurers that the parties were in partnership. It was held that the misrepresentation was not material and

81 In respect of marine insurance, where insurance is effected for the assured by an agent, sec 19(b) of the MIA 1906 requires the agent to disclose to the insurer every material circumstance that the assured is bound to disclose, unless it comes to the knowledge of the latter too late to be communicated it to the agent.

82 Evidence Act 2011 (Nigeria), sec 136; *Chukwura v Royal Exchange Assurance (Nig) Ltd* (1974) ECSLR 319.

83 (2004) 2 WLR 531.

84 *Mackender v Feldia*, above at note 15; *London Assurance v Mansel*, above at note 4. MIA 1906, sec 18(1) also gives the insurer the right to avoid the contract where the assured fails to make the necessary disclosure.

85 *London General Omnibus v Holloway*, above at note 14.

86 (1972) NCLR 270.

87 Above at note 44.

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that, even if there had been a misrepresentation, it was clear that it would not have influenced the insurers one way or the other, in fixing the premium or determining whether or not to accept the risk. Generally, once a contract has been avoided, it has a retrospective effect as the parties are restored, as far as possible, into their original positions as if the contract of insurance has never been made. In *Cornhill Insurance Co Ltd v Assenheim*,[88] the court stated that avoiding a policy results in its being set aside from the outset, leading to the repayment of any losses and the return of any premiums paid.[89] Thus, if the insurer had already settled a claim by paying the insured sum, he is entitled to demand repayment of that sum on the ground of money paid under a mistake of fact. In the same vein, in the absence of fraud or fraudulent concealment of fact, avoidance of the policy by the insured entitles him to a repayment of any premium he has paid based on a quasi-contractual action for money paid against consideration that has totally failed.[90]

AN EXPOSÉ OF THE EPOCH-MAKING STATUTORY INTERVENTION IN NIGERIA

In respect of non-marine insurance contracts, the common law doctrine of *uberrimae fidei* has been modified by section 54 of the Nigerian Act, with the intention of curing the mischief of the old order.[91] The statutory intervention impacts the test of materiality of a fact, the status and authority of an insurance agent and the effect of the basis of contract clause. With regard to the proposal form, section 54(1) provides that, "[w]here an insurer requires an insured to complete a proposal form or other application form for insurance, the form shall be drawn up in such manner as to elicit such information as the insurer considers material in accepting the application for insurance of the risk and any information not specifically requested shall be deemed not to be material." The use of the word "where" in this provision implies that the Nigerian Act has not changed the common law rule regarding non-marine insurance contracts concluded orally.[92] Thus, where the contract has

88 (1937) 58 Lloyd's Rep 27 at 31, per Mackinnon J.

89 See also *American International Insurance v Dike*, above at note 51; *National Insurance v Power and Industrial Engineering*, above at note 15.

90 *Feise v Parkinson* (1912) 4 Taunt 640. Also, in *Banque Keyser Ullmann v Skandia*, above at note 12, Steyn J held that the insured's remedy for a breach of utmost good faith is avoidance of a contract and a return of the premium. Also, in *Banque Financière v Westgate*, above at note 12, it was held that, in the light of secs 17 and 18 of the MIA 1906, the only remedy that the act provides is that the aggrieved party can avoid the contract. The right to claim damages was dismissed.

91 In *Irukwu v Trinity Mills*, above at note 9, it was held, inter alia, that the principle of *uberrimae fidei* is still applicable in Nigerian insurance law.

92 A valid and binding contract of non-marine insurance can be concluded orally so long as it is clear by the ordinary rules and inference of law that there is an intention to enter into the contract and as long as all the fundamental essentials of the contract are present: *Ngillari v NICON*, above at note 62; *Salako v Lombard*, above at note 76; *Esewe v*

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not been initiated by the use of a proposal form, the common law requirement for disclosure measured by the test of a prudent insurer prevails. However, where the contract is initiated by the use of a proposal form, the insurer is required to ensure that the form is designed in such a comprehensive manner as to elicit from the insured all the information that the insurer considers to be material in accepting the application for insurance of the risk. Thus, the insurer cannot elect to treat unrequested facts as material or immaterial, as the use of the word "shall" in the section would be strictly construed by the court to deem unrequested information to be immaterial.

The provision is salutary, as it has generally removed the uncertainty as to what facts are material, which has hitherto served as a means for the insurer to exploit the insuring public. It has also taken cognizance of the social problem of Nigeria being a predominantly illiterate society.[93] Moreover, the provision has recognized the fact that the insurer is in a better position to determine what information it considers material to the risk and should be demanded from the insured.[94] In this way, the common law duty of "utmost" good faith has given way to "diligent" good faith on the part of the insurer. As such, the insurer can no longer repudiate an insurance contract on grounds of non-disclosure where the undisclosed information had not been specifically requested in the proposal form. It can, however, be safely presumed that, where the insured voluntarily discloses any information not requested, that disclosure must be done in good faith; otherwise, it would be incompetent of him to argue that the information had not been specifically requested by the insurer.

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contd
Asiemo (1976) 1 ALR Comm 388. It ought to be noted, however, that in practice it is very rare for insurance contracts to be concluded orally without the use of a proposal form. Moreover, these forms are included in the documents that must be submitted to and approved by the National Insurance Commission under sec 6(1)(d) of the Nigerian Act, as part of the application to register as an insurer.

93 A survey conducted by UNESCO showed that, despite improvements in the country's education system, about 65 million Nigerians remain illiterate. This translates to just over 50% of the Nigerian population: M Bakare "65 million Nigerians are illiterates: UNESCO" (17 December 2015) *The Vanguard* (Nigeria), available at: <www.vanguardngr.com/2015/12/65-million-nigerians-are-illiterates-unesco/> (last accessed 23 April 2019). An illiterate was judicially defined in *Ntiashagwo* v *Amodu* (1959) WRNLR 273 at 277, as "a person who is unable to read with understanding and to express his thoughts by writing in the language used in the document made or prepared on his behalf". Also, in *PZ & Co Ltd* v *Gusau & Kantoma* (1961) NRNLR 1, an illiterate was defined (at 3) as a person who is unable to read the document in question in the language in which it was written and includes a person who, though not totally illiterate, is not sufficiently literate to read and understand the contents of the document.

94 See also Hasson "The doctrine of *uberrimae fidei*", above at note 66, arguing inter alia that the insurer is in a stronger position since he alone decides which information, out of the mass in the proposer's possession, is relevant to the conclusion of the insurance contract.

Nevertheless, deeming unsolicited information to be immaterial, as portrayed in this provision, could lead to the frequent suppression of facts by the insured. It is generally not practicable, under all circumstances, to elicit all the necessary material information from the assured by merely asking questions in the proposal form and it could be extremely difficult for the insurer to prove that the insured thought any unsolicited information to be material.[95] As was rightly observed in *Insurance Corporation of the Channel Islands v Royal Hotel*, "the human propensity is not to disclose embarrassing or prejudicial material fact"[96] and "there are limited occasions on which matters of moral hazard come to light and the fact that they commonly do so only during investigation of a claim tend to make moral hazards appear both rarer and more significant".[97] As such, it might be difficult for the insurer to prove that the insured's failure to provide the necessary information was due to inadvertence. There is, therefore, the need to strike a fair balance between the interests of the insured and of the insurer.

Also, the Nigerian Act is silent on what is required of both parties in the case of the renewal of insurance policies, since the insured is then not required to complete a proposal form or other application. There is also no provision regarding the respective positions of the parties in situations where the proposer fails or neglects to answer a particular question or where he gives an incomplete or irrelevant answer.

On the status of an insurance agent who assists a proposer to complete the insurance application or proposal form, section 54(2) provides: "[t]he proposal form or other application form for insurance shall be printed in easily readable letters and shall state, as a note in a conspicuous place on the front page, that: 'An insurance agent who assists an applicant to complete an application or proposal form for insurance shall be deemed to have done so as the agent of the applicant.'" Although this provision changes the form of the common law rule, it has no effect on the substance, since the requirement that the proposal form should be "printed in easily-readable letters" is implied in any insurance contract. However, it has, to some extent, solved the problem of the small and almost illegible print that had been prevalent in Nigerian insurance policies.

Furthermore, this provision has not changed the law regarding the status of an insurance agent who assists the proposer in completing the proposal form. Nevertheless, the insurer is now explicitly required to warn the proposer of the implication of allowing an insurance agent to complete his proposal form. The warning required by this provision may, however, not be of any significance to an illiterate proposer. Section 54(3) provides that any information disclosed or represented by the insured to an insurer's agent, acting within the

95 Jessel MR in *London Assurance v Mansel*, above at note 4 at 369; *Lindenau v Desborough*, above at note 11 at 592.

96 (1998) Lloyd's Rep IRI 151 at 154.

97 Ibid.

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scope of his authority, is tantamount to a disclosure or representation of information to the insurer as the principal. However, there is still the problem of ascertaining when an agent can be said to be acting within the scope of his authority. Certainly, this is a question of fact that can only be substantiated after evidence has been adduced in court. Under section 54(4), an applicant for insurance would be regarded as an insured for the purpose of that section.

The severity of the effect of a basis of contract clause on the insured has also been lessened by the provisions of section 55 of the Nigerian Act. Under this provision, a breach of a term, whether called a warranty or a condition, will not avail an insurer of any right against the insured or of any defence to the insured under the contract, unless the term is material and relevant to the insured risk. Furthermore, where there has been a breach of a contractual term, the insurer is not allowed to repudiate the whole or any part of the contract or a claim brought on the grounds of the breach, unless the breach amounts to fraud or is a breach of a fundamental term of the contract.

REFORM OF THE DOCTRINE IN THE UNITED KINGDOM

Two major legislative interventions have had a significant impact on the common law rules on disclosure and representation in insurance contracts in the UK. These are the Consumer Insurance (Disclosure and Representations) Act 2012 (CIDRA)[98] and the Insurance Act 2015 (UK Act). As the name implies, CIDRA applies to consumer insurance, defined in section 1 as a contract of insurance between an individual and an insurance company, wholly or mainly for purposes unconnected with the former's trade, business or profession. The UK Act, on the other hand, applies mainly to business-related insurance policies, referred to as non-consumer insurance contracts, although some of its provisions apply to both consumer and non-consumer policies.[99] The reform measures in these laws have focused on the respective duties of the insured and the insurer, the test of materiality of a fact, the basis of contract clause and the remedies available to the insurer in case of a breach of the duties imposed on the insured under the acts. This article now examines the relevant provisions of these statutes.

Sections 2 through 5 of CIDRA specifically make provision for disclosure and representations before an insurance contract is consummated or varied. First, the onerous and absolute common law rule, that the insured must disclose all material facts within his actual knowledge or that he could ascertain by reasonable inquiries, has been replaced, under section 2(2) of CIDRA. Under that provision, the consumer is now only required to take reasonable care not to make a misrepresentation to the insurer. Also, the consumer is obliged

98 CIDRA, sec 2(4) and 2(5)(a) and (b) specifically made the common law rules on utmost good faith, as well as sec 17 of the MIA 1906, subject to its provisions.

99 UK Act, sec 1 defines a non-consumer insurance contract as a contract of insurance that is not a consumer insurance contract, ie all business-related insurance policies.

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to accede to any request from the insurer to confirm or amend particulars previously given, as failure could amount to misrepresentation for the purposes of the act.[100] Furthermore, unlike the common law standard of the prudent insurer for determining the materiality of a fact, the standard of care required of the consumer is now objective, as it is generally determined on the basis of a reasonable consumer.[101] This is, however, subject to any knowledge that the insurer has, or ought to have, of any particular characteristics or circumstances of the actual consumer, as well as any misrepresentation dishonestly made.[102] Moreover, whether or not the consumer has complied with the duty to take care not to make a misrepresentation is to be determined in the light of all the relevant circumstances, including: the type of consumer insurance contract in question and its target market; any relevant explanatory material or publicity produced or authorized by the insurer; the clarity and specification of the insurer's questions; the clarity of the insurer's communication of the importance of answering questions (or the possible consequences of failing to do so) regarding the renewal or variation of an existing contract; and whether or not an agent was acting for the consumer.[103]

In any situation where the consumer is found to be in breach of the duty to take reasonable care not to make a misrepresentation, the insurer has a remedy against the consumer only in respect of what CIDRA describes as a "qualifying misrepresentation", which could either be (a) deliberate or reckless or (b) careless.[104] Thus, unlike the common law rule that allowed the insurer to avoid a contract in its entirety for breach of the duty of utmost good faith,[105] the consumer's state of mind is a crucial factor in determining the remedy available to the insurer under the act and it is the insurer's duty to prove that an alleged misrepresentation has been made in a particular manner.[106] However, unless the contrary is proved, there is a general presumption that the consumer possesses the knowledge of a reasonable consumer, as well as knowledge of the relevance to the insurer of a matter about which the insurer has asked a clear and specific question.

Where the misrepresentation is found to be deliberate or reckless and concerns a new contract, the insurer can avoid the contract, refuse all claims and

100 CIDRA, sec 2(3).
101 Id, sec 3(3).
102 Id, sec 3(4) and (5).
103 Id, sec 3(1) and (2). Id, sched 2 provides rules to determine the status of an agent. Under para 3, an agent is taken to act on behalf of the consumer where, for example, the agent undertakes to give impartial advice to the consumer or is paid a fee by the consumer.
104 Id, sec 4(2) and (5). A qualifying misrepresentation is deliberate or reckless if the consumer knew that it was untrue or misleading, or did not care whether or not it was untrue or misleading, and also knew that the matter to which the misrepresentation related was relevant to the insurer, or did not care whether or not it was relevant. On the other hand, a qualifying misrepresentation is careless if it is not deliberate or reckless.
105 MIA 1906, sec 17; *London Assurance v Mansel*, above at note 4.
106 CIDRA, sec 5(4).

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keep any premiums paid, unless it would be unfair to the consumer for them to be retained.[107] However, where the misrepresentation is found to have been made carelessly and a claim has been made upon the insurer, the insurer's remedy is generally dependent on what it would have done had the consumer complied with the duty to take reasonable care not to make a misrepresentation. If the insurer would not have assumed the risk on any terms, it can avoid the contract and refuse all claims. Any premium paid would, however, have to be returned.[108] However, if the insurer would have assumed the risk on different terms, other than those relating to the premium, the contract is deemed to be concluded on those different terms, if the insurer so requires.[109] Alternatively, if the insurer would have concluded the contract but would have charged a higher premium, any amount payable on a claim could be adjusted in proportion to the underpayment.[110] Where there is no outstanding claim, the insurer can give notice to the consumer of its intention to have the contract concluded on those different terms or higher premiums, or give reasonable notice to the consumer of its intention to terminate the contract, provided it is not wholly or mainly a policy of life insurance. The consumer is also entitled to terminate the contract by giving reasonable notice to the insurer if the revised terms proposed by the insurer are unacceptable to him. If either party terminates the contract under these circumstances, the consumer is entitled to a refund of the premiums paid for the terminated cover in respect of the balance of the contract term. Such termination would also be without prejudice to the treatment of any claim that arises in the meantime. The parties' contractual right to terminate the contract remains intact irrespective of these provisions.[111]

In the case of a variation of a consumer insurance contract, if the subject matter of the variation can be severed from the rest of the contract, the provisions mentioned above relating to new contracts apply with any necessary modifications. Where, however, severance is impossible, these provisions apply with any necessary modifications as if the qualifying misrepresentation related to the whole contract rather than merely to the variation.[112]

It is also noteworthy that section 6(2) of CIDRA has abolished the basis of contract clause. This provision has specifically precluded the insurer from using another provision or term of the contract to convert any representation made by the consumer in connection with a proposed insurance contract or a proposed contract variation into a warranty, or from declaring that such a representation formed the basis of the contract or otherwise.

107 Id, sched 1, para 1.
108 Id, sched 1, part I, para 5.
109 Id, para 6.
110 Id, para 7.
111 Id, para 9.
112 Id, sched I, part 2.

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On the other hand, section 3(1) of the UK Act imposes a new "duty of fair representation" on the insured in respect of non-consumer contracts,[113] requiring the insured to make to the insurer a fair representation of the risk. This contrasts with the common law duty required of the insured and CIDRA, which requires the consumer to take reasonable care not to make a misrepresentation to the insurer, as well as the Nigerian Act, which requires the insurer to elicit from the insured all information it considers material by asking relevant questions. The representation also need not be contained in a single document or oral representation.[114] Fair representation of the risk, which incorporates the law on non-disclosure and misrepresentation, refers to representations that either disclose every material circumstance that the insured knows or ought to know, or one that gives the insurer sufficient information to put a prudent insurer on notice that it needs to make further enquiries for the purpose of revealing those material circumstances.[115] It also includes a disclosure made "in a manner which would be reasonably clear and accessible to a prudent insurer [and representation] in which every material representation as to a matter of … expectation or belief is made in good faith".[116] In the absence of enquiry, however, section 3(5) of the UK Act, like the common law rule,[117] absolves the insured from disclosing any circumstance that diminishes the risk, or of which the insurer has actual or presumed knowledge or ought to know, or regarding which the insurer waives information.

With regard to knowledge possessed by the respective parties, sections 4 and 5 of the UK Act define what knowledge the respective parties are taken to know or ought to know. Accordingly, in the case of an individual insured, knowledge refers to what is known to the individual and what is known to one or more individuals who assist in procuring the insured's insurance.[118] In the case of an organization, knowledge is taken to mean what is known to one or more of the individuals who are either part of the insured's senior management or responsible for the insured's insurance, such as employees of the insured's agent or broker.[119] Furthermore, unlike the common law rule that restricts knowledge to that acquired in the ordinary course of business,[120] section 4(6) of the UK Act deems an insured to have knowledge of a material circumstance that should reasonably have been accessed by a reasonable

113 UK Act, sec 2(1).
114 Id, sec 7(1).
115 Id, sec 3(4). Circumstance is defined under id, sec 7(2) to include any communication made to, or information received by, the insured.
116 Id, sec 3(3).
117 MIA 1906, sec 18(3).
118 UK Act, sec 4(2).
119 Id, sec 4(2) and (3). "Senior management" is defined in id, sec 4(8)(c) as those individuals who play significant roles in the making of decisions about how the insured's activities are to be managed or organized.
120 MIA 1906, sec 18(1).

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search of information available to the insured, however conducted.[121] In this instance, information includes that held within the insured's organization or by any other person, including the insured's agent or person for whom cover is provided by the contract of insurance. However, an insured who has taken responsibility for an individual's or organization's insurance is deemed not to have confidential information known to an individual if the individual is, or is an employee of, the insured's agent and the information was acquired by the insured's agent or by an employee of that agent through a business relationship with a third party unconnected with the contract of insurance.[122]

On the other hand, under section 5(1) of the UK Act, an insurer is deemed to know something only if it is known to one or more individuals who participate on behalf of the insurer in deciding whether to underwrite the risk, and if so, on what terms. Also, by section 5(2), an insurer ought to know something that either its employee or agent knows and that ought reasonably to have been passed on to the individuals taking the decision on the underwriting of the risk, or is relevant information that the insurer itself held and is readily available to the individuals deciding the underwriting of the risk. Moreover, as a means of enhancing expertise and professionalism in the industry, the insurer is presumed to have knowledge of things that are common knowledge and things that an insurer underwriting the relevant class of business would reasonably be expected to know in the ordinary course of business.[123]

In general, reference to individual knowledge includes actual knowledge, as well as matters that the individual suspected and would have had knowledge of, but deliberately refrained from confirming or making necessary enquiries about.[124] Section 6(2) of the UK Act also creates a general exception in respect of knowledge of fraud perpetrated, either on the insured or the insurer, by an individual responsible for the insured's insurance or, in the case of an organization, by those who participate on behalf of the insurer in taking a decision regarding the underwriting of the risk. Such knowledge is not to be attributed to the insured or the insurer.

Unlike section 3(3) of CIDRA and section 54(1) of the Nigerian Act, section 7 (3) of the UK Act restates the common law rule on the test of materiality as any circumstance or representation that would influence the judgment of a prudent insurer in determining whether to take the risk and, if so, on what

121 It has been argued in some quarters that this requirement for a "reasonable search" potentially imposes a far more onerous obligation on the insured compared to the common law rule of knowledge possessed by the insured in the ordinary course of its business. See TaylorWessing "Fundamental changes to insurance contract law: The Insurance Act 2015" (January 2016), available at: <https://united-kingdom.taylorwessing.com/en/fundamental-changes-to-insurance-contract-law-the-insurance-act-2015> (last accessed 23 April 2019).

122 UK Act, sec 4(4).

123 Id, sec 5(3).

124 Id, sec 6.

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terms. This includes special or unusual facts relating to the risk, any particular concerns that led the insured to seek insurance cover for the risk and anything that insurers in that class of insurance, or field of activity in question, would consider as something to be dealt with in a fair representation of the risks of the type in question.[125] Under section 7(5) of the UK Act, a material representation is deemed substantially correct if a prudent insurer would not give consideration to any difference between what is represented by the insured and what is actually correct.

In the event that the insured is in breach of the duty of fair representation, the insurer has a remedy only in respect of a "qualifying breach", which could either have been deliberate or reckless, or neither deliberate nor reckless.[126] As with CIDRA, this is a significant reform of the common law rule that gave the insurer the automatic right to avoid the contract. The onus of proving that a qualifying breach was deliberate or reckless is on the insurer. It is also incumbent upon the insurer to prove that, but for the breach, it would not have assumed the risk at all or would only have done so on different terms.[127]

Thus, in respect of new contracts, a deliberate or reckless breach entitles the insurer to avoid the contract and refuse all claims, as well as giving him the right to retain all premiums that have been paid.[128] Where the breach was neither deliberate nor reckless, the remedies available to the insurer depend on a number of specified factors. First, if, but for the qualifying breach, the insurer would not have assumed the risk on any terms, the insurer can avoid the contract and refuse all claims, but must return the premiums paid on the policy to the insured.[129] Secondly, if the insurer would have assumed the risk, but on different terms except for those pertaining to premiums, the contract is deemed to have been concluded on those different terms, if the insurer so requires.[130] Thirdly, if the insurer would have assumed the risk, but by charging a higher premium, the insurer is entitled to reduce the amount payable on any claim proportionately to reflect the higher premium.[131] In cases where the insurer would have concluded the contract on the same terms, no remedy is available. In respect of the variation of existing contracts, the remedies available to the insurer are similar to those relating to new contracts with necessary modifications in respect of when the variation takes effect and the higher premiums attributable to the variation.[132] For instance, a deliberate or reckless qualifying breach entitles the insurer, by notice to the insured,

125 Id, sec 7(4).
126 Id, sec 8(3) and (4).
127 Id, sec 8(5). A qualifying breach is deliberate or reckless if the insured knew that it was in breach of the duty of fair representation, or did not care whether or not it was in breach of that duty.
128 Id, sched 1, para 2.
129 Id, para 4.
130 Id, para 5.
131 Id, para 6.
132 See generally id, sched 1, part 2.

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to treat the contract as having been terminated from the time the variation was made, without any obligation to return premiums paid.[133] The provisions of section 84 of the MIA 1906 on the return of premiums for failure of consideration are made subject to the foregoing provisions in relation to marine insurance contracts.[134]

Another significant reform of the doctrine concerns the basis of contract clause. As under CIDRA, section 9(2) of the UK Act precludes the insurer from converting any representation made by the insured into a warranty, by means of any provision of the proposed non-consumer insurance contract or of the terms of the variation or of any other contract, or by declaring that the representation forms the basis of the contract or otherwise.

SUGGESTIONS FOR FURTHER REFORM OF THE NIGERIAN LAW

In line with the policy of social engineering in the delivery of insurance services encapsulated in the statutory reforms of the common law doctrine of *uberrimae fidei* and in the light of the discussions on the statutory reforms of the doctrine in the UK, there is a need to revisit some issues that have not been adequately addressed in Nigerian law. Lessons can also be drawn from reform measures in some other common law jurisdictions.

First, in furtherance of the general tenor of the provisions of section 54(1) of the Nigerian Act, it is important that a duty be imposed on the insurer to inform the insured by a conspicuous notice in the proposal form, or in writing in the case of renewal, of the general nature and effect of the duty of disclosure and accurate representation of any fact before a contract of insurance is executed or renewed, as the case may be.[135]

Secondly, in any proceeding where the insurer is able to prove to the satisfaction of the court that a particular fact is material, even though it was not requested in the proposal form because the insurer could not be reasonably expected to ask for it in the circumstances, and a reasonable man in the circumstances of the applicant would consider it to be a material fact that ought to be disclosed to the insurer, having regard to the nature of the insurance cover, the insurer should be entitled to appropriate relief in the interest of justice.[136] Nevertheless, while it is indisputable that some criminal

133 Id, sched 1, part 2, para 8.

134 Id, sched 1, part 3, para 12.

135 CIDRA, sec 3(1) and (2). Also, sec 22 of the Canberra Insurance Contracts Act 1984 (Act No 8) (as amended) imposes a duty on the insurer to inform the insured clearly in writing, before the contract of insurance is entered into, of the general nature and effect of the duty of disclosure. Any insurer who fails to discharge this duty may not exercise its rights in respect of a failure by the insured to comply with the duty of disclosure, unless that failure is fraudulent. Sec 22 of the Insurance Contracts Act 1984 (as amended) (Australia) contains similar provisions.

136 CIDRA, sec 3(3); Insurance Contracts Act, 1984 (as amended) (Australia), sec 21(1)(b). *Roselodge v Castle*, above at note 27.

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convictions constitute moral hazards, disclosure of which would be necessitated by the nature of a particular insurance contract, the insured should be relieved of disclosing spent convictions and old allegations of dishonesty in the interest of proper rehabilitation and re-integration into society.[137]

Thirdly, in the event that the proposer fails or neglects to answer a particular question or gives an incomplete or irrelevant answer, and the insurer fails to pursue the matter further, the insurer should be deemed to have waived compliance with the duty of disclosure in respect of that matter.[138]

Fourthly, it is noteworthy that, in answering questions requiring an opinion, which are commonly contained in proposal forms, it is not only an illiterate proposer, but also a supposedly literate one, who may, on occasion, need the assistance of someone more knowledgeable in insurance matters.[139] Thus, in any situation where the questions asked in the proposal form are found to be ambiguous or not specific and the insured is found to have acted reasonably in the circumstances to give what he believes to be the right answers to the questions as he understands them, the insured should be relieved from incurring any liability.[140] In this respect, it is important that the National Insurance Commission gives due consideration to proposal forms submitted to it for the purposes of insurer registration, under section 6(1)(d) of the Nigerian Act, to ensure that questions requiring expert or value knowledge, beyond that which the proposer could reasonably be expected to possess or obtain, are expunged.

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137 For example, the UK Rehabilitation of Offenders Act, 1974 relieves the assured from disclosing spent offences. Similarly, convictions for mere dishonesty or old convictions are not required to be disclosed. In *North Star Shipping Ltd v Sphere Drake Insurance Plc* (2006) 2 Lloyd's Rep 183 at 189, Waller LJ reiterated the fact that spent convictions no longer have to be disclosed, neither do old allegations of dishonesty or allegations of not very serious dishonesty. Also, in *Reynolds v Phoenix* (1978) 2 Lloyd's Rep 440, the judge rejected the underwriter's expert evidence and agreed with the insured's expert that the fact that the assured had been convicted in 1961 of receiving two stolen tractor batteries worth between GBP 10 and GBP 12, for which he was fined GBP 250 was too trivial and too distant to be material. The conviction had been 11 years before a policy against fire was taken out.

138 This provision is contained in sec 21(3) of the Insurance Contracts Act, 1984 (as amended) (Australia). Indeed, under sec 27 of this act, a proposer is not taken to have made a misrepresentation by reason only that he failed to answer a question included in a proposal form or gave an obviously incomplete answer to such a question.

139 For example, in *Joel v Law Union and Crown Insurance*, above at note 14, many of the questions the assured was asked related to matters of health, the answers to which could only be matter of opinion, even if given by a medical expert. *Akpata v African Alliance*, above at note 43.

140 CIDRA, sec 3(1) and (2)(c). Also, the Insurance Contracts Act, 1984 (as amended) (Australia), sec 23 provides that, where a statement is made in answer to a question asked in an insurance proposal and a reasonable person in the circumstances would have understood the question to have the meaning that the person answering the question apparently understood it to have, that meaning shall, in relation to the person who made the statement, be deemed to be the meaning of the question. See also Insurance Act, 2006, Act 724 (Ghana), sec 214(3)(f).

Fifthly, given the level of illiteracy in Nigeria, where it is established that an illiterate proposer disclosed to the agent a fact that is alleged to have been concealed and the non-disclosure is attributable to the default of the insurance agent, the illiterate proposer should be given the necessary protection by the law in the interests of justice. Indeed, as was aptly stated by Akufo-Addo J in the Ghanaian case of *Muhammed Hyane v New Indian Assurance Co Ltd*,[141] an insurance agent, in the regular employment of an insurer, must for all purposes be connected with the completion of a proposal form and must be held to be the agent of the insurer unless the evidence, express or implied from the conduct of the proposer, is otherwise. This judicial pronouncement was given statutory expression in section 210(1) of the Ghanaian Insurance Act, 2006, under which an insurance agent or sub-agent who completes an insurance form or similar document on behalf of a proposer is deemed to have done so as the agent of the insurer. The section further imputes any knowledge acquired by that insurance agent or a sub-agent in the course of completing such form or other document to the insurer and nothing contained in the contract of insurance will absolve the insurer from any liability in respect of knowledge so acquired by the insurance agent or sub-agent.[142] Furthermore, for the purposes of section 54(3) of the Nigerian Act, there is a need to specify the circumstances under which an agent can be said to be acting within the scope of his authority, as is available under the UK law.[143]

Nevertheless, as noted in *Newsholme Brothers v Road Transport and General Insurance Co Ltd*,[144] where the agent knows that answers given by the proposer are untrue and the agent still completes the proposal form in purported conformity with the information supplied by the proposer, he is committing fraud and his knowledge should not be imputed to the insurer. Similarly, where the proposer is literate and has signed, without reading it, a proposal form that contains statements that are, in fact, untrue and has given a promise that they are true, he should not be allowed to escape from the consequences of his negligence by alleging that the person he asked to complete the proposal form was the agent of the insurance company.[145]

The provisions of section 55 of the Nigerian Act that have limited an insurer's right to avoid a policy on grounds of breach of a term of the contract (which might or might not have been described as a warranty) to instances where that term is material and relevant to the insured risk is, no doubt, salutary. Nevertheless, where the fact alleged to have been concealed by the

141 (1970) ALR Comm 27.

142 See also *Bawden v London, Edinburgh and Glasgow Assurance*, above at note 80.

143 CIDRA, sched 2.

144 (1929) 2 KB 356.

145 Indeed, under the general law of contract, the plea of *scriptum predictum non est factum suum* [the signature on the deed was not his own] is not available to a contracting party who, because he is too busy or lazy, fails to scrutinize a document before appending his signature: *Blay v Pullard & Morris* (1930) 1 KB 628; *Awosile v Sotubo* (1992) 5 NWLR (pt 243) 514.

insured or the alleged misrepresentation, though material, has not induced the insurer to issue the policy on the relevant terms, the insurer should not be allowed to avoid the policy.[146] Furthermore, where the alleged non-disclosure or misrepresentation has not materially influenced the insurer's judgment in assessing the insurance premium and has no substantial effect on the terms and conditions of the policy of insurance, the insurers should not be allowed to avoid the entire policy on a mere technicality. In this situation, the insurer should be mandated to make necessary adjustments in the payment of the premium or the insured sum, as the case may be, in such a way that would put the insurer in the position in which he would have been if the insured had made the necessary disclosure or had not misrepresented the fact.[147] With this type of reform, a misstatement of the assured's occupation for example, such as in *Bamidele v Nigeria General Insurance*,[148] would have been adequately addressed.

Overall, it is imperative for insurance practitioners to embark on a massive enlightenment campaign to sensitize the public about the importance of utmost good faith. This, no doubt, would promote mutual confidence between the parties and make insurance more appealing to many more of the Nigerian populace.

CONCLUSION

This article has tried to analyse the doctrine of *uberrimae fidei* from the stop-gap development at common law to its statutory reform in Nigeria and the UK. There is no gainsaying the fact that, before the statutory interventions, the doctrine of *uberrimae fidei* was unfairly prejudicial to the insured. Insurers were entitled, not only to good faith from the insured, but also to full disclosure of all knowledge possessed by the latter in respect of the subject

146 See, for example, the House of Lords decision in *Pan Atlantic v Pine Top*, above at note 42; *Fraser Shipping Ltd v Colton* (1997) 1 Lloyd's Rep 586.

147 See generally, CIDRA, sched 1, part 1 and UK Act, sched 1; Insurance Contracts Act, 1984 (as amended) (Australia), sec 28. Indeed, under sec 31 of the Australian act, in any proceedings by the insured in respect of a contract of insurance that has been avoided on the ground of fraudulent failure to comply with the duty of disclosure or fraudulent misrepresentation, the court is empowered, if it is of the opinion that (in respect of the loss that is the subject of proceedings before the court) the insurer has not been prejudiced by the failure or misrepresentation or, if the insurer has been so prejudiced, the prejudice is minimal or insignificant, to disregard the avoidance; if the court does disregard the avoidance, the court may allow the insured to recover the whole (or such part as the court thinks just and equitable in the circumstances) of the amount that would have been payable if the contract had not been avoided. Furthermore, the court, in the exercise of this power, is enjoined to have regard to the need to deter fraudulent conduct in relation to insurance, and also to weigh the extent of the insured's culpability in the fraudulent conduct against the magnitude of the loss that the insured would suffer if the avoidance were not disregarded.

148 Above at note 54.

matter of the insurance. Also, the insured was generally obliged to determine the materiality of a fact from the insurer's perspective and make full disclosure even if such materiality was not appreciated by the insured. It was only natural, in this situation, that the opinions of the insured and the insurer could differ on the issue of materiality of any particular fact, as it was practically impossible for the insured to ascertain on what the particular insurer may require information in a given situation. Yet, the insurer was the sole judge of what it considered a material fact, contrary to the principle of *nemo judex in causa sua* [no-one should be a judge in his own case]. Indeed, a review of some of the cases has revealed that breach of the duty by the insured need not have any relevance to the actual loss. Consequently, many insured have had their expectations defeated on a purely technical ground at the time of making a claim.[149] It is, indeed, a great relief that the potency of the obnoxious doctrine has been formally eroded in several common law jurisdictions, including Nigeria and the UK, largely to protect the interests of the insuring public. It can generally be inferred from the reforms that the insurer can no longer remain passive in the information gathering process. Insurers are now required to be more pro-active and ensure that they engage the insured in such a way that they are able to elicit all material information needed to appraise the risk and reach a decision on whether or not to assume the risk. The automatic right of avoidance that was available to insurers at common law has also been significantly curtailed under the legislation. With these modest reforms, the insured's just and legitimate interests are now more adequately protected and can no longer be jettisoned unjustly.

149 See, for example, *Dawson v Bonnin*, above at note 69.

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