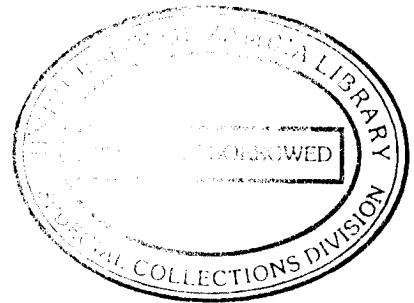


THE PROTECTION OF THE INSURED FACT OR FICTION?

By

LILY MITE BROWN

(28091191)



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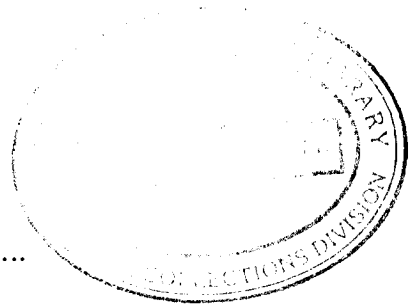
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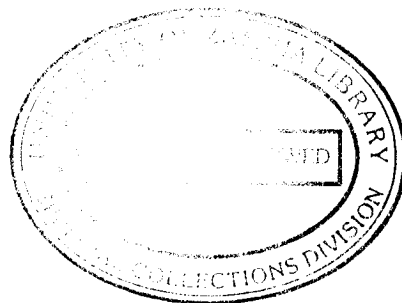
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ABSTRACT

The main aim of this paper is to show that even though the law attempts to be clear in defining a balance between the insurer and the insured, in reality there appears to be no equality between the two, as the insurer tends to be in a better bargaining position than an individual. The overall objective as such is to highlight how lack of proper mechanisms with regard to regulation of the insurance industry can be a source of inequality between the insured and the insurer. Further that the certain doctrines in insurance law are too rigid in the end negating the protection of the insured.

The outcome of the research indicated that it is a fundamental truth that Insurance is said to be there for the protection of the insured but more often than not the doctrines applied appear to favour and protect the insurers as opposed to the insured. This is attributable to the various exclusion clauses that are found in insurance contracts. It is further compounded by lack of proper and stringent supervision in the insurance industry. In addition, it was found that the lack of provision of fundamental doctrines in the Insurance Act favours the insurers as opposed to creating a balance. Consequently this leads to the insured losing out on the protection he bargained for at the beginning of the insurance purchase. The contention to be addressed to this end is whether or not there could be Insurance law reforms that re-establish justice and balance the rights and duties of the insurer and the insured.

The research paper therefore proposes changes in statutory law with regard to insurance in Zambia. In this respect the Insurance Act must be clear with the provisions relating to funds and the need for certain doctrines of insurance to be codified into the Act. Further the industry should set up the insurance Ombudsman Bureau which should hear complaints from policyholders and make awards that are reasonable. The ombudsman should consider not just the law but what is reasonable and fair. It is suggested that the Competition and Consumer Protection Act should have a section dedicated to insurance contracts. This will ensure that the Act protects consumers by regulating the sale of insurance. These recommendations aide in assuring that Insurance is a fact and not a fiction.

DEDICATION

“Anyone can hold the helm when the sea is calm”

-Anonymous-

“This paper is dedicated to my beautiful late mother Veronica Moira Brown who taught me many valuable and indispensable lessons of life. I thank you for all the sacrifices you made for me and for giving me the best education what more could I have asked for. You taught me that the gift of perseverance is valuable. You were an amazing mother, friend and mentor. I thank God for the moments we shared and the life lessons you shared with me they have paid off and am certain will continue this is just the beginning”.

ACKNOWLEDGEMENTS

Firstly, I would like to express my heartfelt gratitude to the big man above. Semester after semester he has shown me what a mighty God he is. Your amazing God you truly are am humbled. You've been my beacon of hope shining bright even when I thought it was not possible to overcome what I thought was insurmountable.

I express my thanks to Miss Tinenenji Banda my supervisor I'm reminded that nothing can be taught without a great deal of assistance. I thank you for teaching me to be calm and be sure of myself.

Eric I'm so lucky and grateful to have an amazing brother like you. We've shared this incredible journey together. You once told me that you were my greatest cheerleader. You have stood firm by those words. Thanks for putting up with me, the sacrifices you made like fighting for study space by the dining table or turning the TV volume down. You brought laughter into the house when I was weighed down with the stress of law school. You're the bestest lil bro.

Aunt Julia and Uncle Joe! You two have been the best support system I could ever ask for. Thanks for praying for me and believing in me even when I had no hope, your prayers are a testament to all the miracles I've experienced. Jessica Brown and Sara Drawwater thanks for your support you guys have cheered me on believing in me and encouraging me all along.

I owe a debt of gratitude to the following: Mr Robert Simeza for your wise words of wisdom and encouragement. Mwansa Njelesani your editing and proof reading saved me. To Adinas Banda thanks for being my spiritual friend. To my dear friend thanks for putting up with me and being so understanding: Siphwe Nkunka, Tamara Bbuku and Muka Salare. Mr Maybin Mwinga thanks for all your support throughout law school.

To the class of 2012 wow! What an awesome journey it has been, the scholarly banter has been nothing but interesting. To my friends and the court: Chew M'hango, Angelica Mwanza, Likando Mubita, Kaumbi Ndulo, Precious Tembo, Gloria Muyunda, Joshua Kabwe, Joshua Mwamulima, John Ngisi and Arnold Kaluba you guys have been tremendous and encouraging we've had fun. Angelica Mwanza! What can I say thank you for been by my side and encouraging me you've been a remarkable friend. Special thanks Etambuyu Mulele you're an awesome friend remember 2nd year first semester? I wanted to give up but thanks to you for not allowing or entertaining my thoughts of giving up. To all I say thanks.

To Mr kalokoni of Kalokoni and Company thank your help and to Mr Kamfwa and Cornhill of Wilson and Cornhill thank you for your invaluable help.

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1.0 CHAPTER ONE: PROTECTION OF THE INSURED FACT OR FICTION?

1.1 General Introduction

This chapter considers the fundamental aspects of the research. These include the background, objectives of the study, statement of the problem, research questions, and definition of concepts, methodology, and significance of the study.

1.2 Introduction

Insurance is of great importance both in the commercial and personal sphere as there are many uncertainties and dangers associated with transactions, human life and lifestyle in general. An insurance contract may broadly be defined as an agreement in which a person called the insurer agrees for consideration called the premium to pay a sum of money or to provide services for the benefit of another person called the insured or the assured on the occurrence of a specified event whose happening is uncertain¹.

The essence of an insurance contract is the protection of some interest of the insured. Insurance is known as a risk sharing device². Therefore, a contract of insurance is a contract under which a person pays someone else to bear or pay for the risk they are exposed to. It exists to combat the adverse effects of risks³. Insurance is a wide and diverse field that can be taken out against a great variety of risks which include: life, damage to personal and real property, financial loss, liability loss, motor car, and health insurance to mention but a few. The focus of this paper is of the protection of the insured in this regard an examination on the following concepts: insurable interest, the utmost good faith, misrepresentation, and the duty

¹ Mumba Malila, *Commercial Law in Zambia Cases and Materials* (Lusaka: UNZA Press 2006), 449.

² Malila, *Commercial Law in Zambia*, 449.

³ John Steele, *Principles and Practice of Insurance* (London: The CII Tuition Service 1984) 7/4.

of disclosure. Further an evaluation of the Insurance Act⁴ and The Pension Scheme Regulation Act⁵ will be examined. These principles and the aforementioned legislature will be scrutinized to determine whether or not insurance law does really set to protect the insured.

An insurable interest is an essential requirement of all contracts of insurance⁶. There is no single definition of insurable interest but the following covers its essential elements. It is the legal right to insure, arising out of a financial relationship recognised at law, between the insured and the subject matter of insurance⁷. In this regard the insurable interest must be discernible from the insured's relationship with the subject matter of the insurance⁸. Thus, the person seeking insurance must be in a position where they will suffer loss if the event against which they have insured occurs. Furthermore, the contract will be rendered illegal, void or simply unenforceable depending on the type of insurance if the subject matter is different⁹. The authority of this proposition was established in the case of *Castellain v Preston*¹⁰ where the court stated amongst other things that "what is insured in a fire policy? Not the bricks and materials used in building the house, but the interest of the insured in the subject matter of the insurance."

The nature of insurance contracts is that of the utmost good faith and it is on this premise that it is of the gravest importance to commerce that the position should be observed. Thus the law demands that both parties ought not to misrepresent the other¹¹. However, in practice, it is the assumption of this paper that this duty is placed strictly on the insured as opposed to

⁴ Insurance Act (No 27 of 1997)

⁵ The Pension Scheme Regulation Act, (No. 28 of 1996)

⁶ Malila, *Commercial Law in Zambia*, 474.

⁷ The Chartered Insurance Institution, *Insurance Law*, 2004.

⁸ Chitty, J. and Beale, H.G. *Chitty On Contracts: Specific Contracts* (2004), 1152.

⁹ Chitty, *Chitty on Contracts*, 1152.

¹⁰ [1886] 2 QB 380

¹¹ *Simwanza Namposhya v ZSIC SCZ* Judgment No 21 of 2010 (unreported)

both parties. The duty of good faith gives rise to the duty of disclosure and it is a reciprocal duty owed not only by the insured but the insurer as well. From the above, the paper will focus on the principle of *uberrimae fidei* and harshness of these doctrines.

Lastly the law pertaining to Insurance in Zambia is to be found in the Insurance Act No 27 of 1997, the Pensions Schemes Regulation Act and the Marine Insurance Act 1906 ("MIA 1906") partially codified in common law. Though strictly concerned only with marine insurance, many of its provisions are presumed to be equally applicable to other types of insurance and the common law rules of England. These three Acts harmonize the various pieces of legislation that regulate the insurance industry. This paper will focus on the inadequacies of the pieces of legislature in Zambia with regard to the concepts centred on the protection of the insured. Central to this is the question as to whether the statutory provisions incorporate the doctrine of misrepresentation and the duty of disclosure and ensure the protection of the insured.

1.3 Statement of the Problem

Even though the doctrines and principles in insurance law attempt to be clear in defining a balance between the insurer and the insured, in reality there appears to be no equality between the two, as the insurer is in a better bargaining position than an individual. This assumption is based on the fact that the insured often times has little understanding of the ambiguous language used in the Insurance Company's policy or proposal forms.

Insurance is said to be there for the protection of the insured but more often than not the doctrines applied seem to favour and protect the insurers as opposed to the insured. For example, mandatory third party insurance for motor vehicle can be a source of inequality as the insured has no time to scrutinize the terms of the insurance policy. This is attributable to

the various exclusion clauses. Consequently the insured will lose out during the claim process because of failure to stay within the confines of the contract. The prudent insurer test used to determine materiality should be assessed as the test appears to be a source of the inequalities faced by the insured when making claims. This test underscores the notion that insurance is there for the protection of the insured. The question to be addressed to this end is whether or not there could be Insurance law reforms that re-establish justice and balance the rights and duties of the insurer and the insured. This would place the insured in a somewhat better position to bargain and should not be encumbered from the rigid doctrines that insurance law follows.

Further, the paper seeks to postulate the statutory provision in the Insurance Act¹² and the Pension Scheme Regulation Act¹³. The provisions in the aforementioned Acts are said to be inadequate in relation to the protection of the individual consumer. Owing to the recent growth in the insurance industry in Zambia there is paramount need to regulate the Insurance industry in Zambia. There are now eighteen licenced Insurance entities and thirty five insurance brokers and two hundred and forty Insurance agents.¹⁴

1.4 Objectives of the Study

This paper intends to illustrate how the insured's power to negotiate contractual terms is very limited by the doctrines in insurance law. It further highlights the inadequacies of the legislation and its ambiguity as a source of contribution to the lack of protection from the insured's perspective.

¹² Insurance Act (No 27 of 1997)

¹³ The Pension Scheme Regulation Act (No 28 of 1996)

¹⁴ <http://www.pia.org.zm/index.php/insurance/licenced-insurance-entities> (accessed 18th April 2012)

1.5 Specific Objectives

1. The emphasis of this paper is to analyse the law surrounding the protection of the insured and how the law should state clearly what rights and obligations the insured should have.
2. To give recommendations as to how the doctrines of insurance law can be amended so that they are coherent, clear, and fair in that they meet the reasonable expectations of both the insured and insurers. In essence to insure that both interests are balanced.
3. To analyse the extent on how the Zambian courts handle cases in relation to the doctrine of the utmost good faith and other doctrines that surround the protection of the insured.
4. To illustrate the difficulties that the insured person encounters upon claiming.

1.6 Research Questions

- (i) Should the concept of insurable interest be codified into the Insurance Act?
- (ii) Should the principle of *uberrimae fidei* be codified into the Insurance Act?
- (iii) Does the Pensions and Insurance Authority (PIA) have the necessary powers to regulate the insurance industry in Zambia?
- (iv) Should there be a minimum capital for insurance companies inserted into the Insurance Act?
- (v) To what extent can the duty of disclosure be less arduous on the insured and how can a balance be achieved in terms of the duty falling on both sides?
- (vi) Should the duty posed on the prudent insured shift and fall on the prudent insurer?

- (vii) Can the materiality test be changed to include what a reasonable man would consider as being material as opposed to what a reasonable man would consider material to a prudent underwriter?
- (viii) To what extent have the Zambian courts followed the doctrine of the utmost good faith?
- (ix) How have the Zambian courts handled cases pertaining to claims of the insured?

1.7 Significance of the Study

As an emerging economy, it is critical for Zambia to ensure that its laws pertaining to Insurance are viable and justifiable and that Insurance regulation must be certain. Further, given that Zambia is attracting more investors there should be clear and concise business practices in the field of insurance so as to increase investor confidence. In addition, insurance laws need to be understandable to the average citizen.

If Zambia wishes to influence European and international developments, it must seek to develop its insurance law in a coherent, principled and fair way. Thus insurance law must meet international standards. Moreover most of Zambia's citizens are being empowered economically by the growth it is currently experiencing to this effect there has been an emergence in the number of insurance companies coming into the country.

More people are acquiring wealth this brings with it a need to insure the risk of their various assets acquired. Considering that most of the population are ignorant as to the value of and importance of insurance it would be pertinent for insurance laws not to be rigid as half the population does not even understand the importance of insurance. Creating an environment, where the general public have access to insurance will stimulate economic growth. Insurance

law postulates that they will bear the risk in exchange for a premium but in the end the doctrines enacted to prevent immense loss and hardships caused to the insured seem to work against the insured as they favour the insurer more.

This topic is justified because it seeks to critically analyse the fundamental doctrines of insurance. These proposals are undeniably intended to bring the insured in as much a favourable contracting position. Presently, the scales of fair dealings are currently heavily weighted in favour of the insurer. Implementing these suggestions will greatly improve the efficacy of the insurance industry as a whole.

1.8 Operational Definition of Terms

uberrimae fides- the utmost good faith, which is a duty owed by both the insurer and the insured.

Insured- the person seeking insurance.

Insurer- means a company that carries on insurance business.

Insurable Interest- Subject matter of the insurance contract.

Warranty- a term used in an insurance contract that is a promise made by the insured relating to facts or something which they agree to do.

Condition- terms other than warranties that impose an obligation on the insured.

Consumer insurance- Insurance taken out by individuals to cover their risks.

Commercial Insurance- Insurance taken out by large companies to cover their risks.

1.9 Chapter Layout

CHAPTER ONE: The Protection of the Insured Fact or Fiction?

This chapter discusses the pinnacle aspects of this research. The following constitutes the chapter: the background, objectives of the study, statement of the problem, research questions, definition of operative terms, significance of the study and methodology.

CHAPTER TWO: The Formation of the Insurance Contract

Chapter two mainly constitutes the steps in forming an insurance contract. The chapter continues by highlighting the benefits of purchasing an insurance policy and then proceeds to show the reader what amounts to forming an insurance contract. Under chapter two the Doctrine of Insurable Interest including Warranties and Conditions are analysed. This is to show readers the fundamental aspects of what purchasing an insurance contract entails.

CHAPTER THREE: The Utmost Good Faith: The Duty of Disclosure and Misrepresentation

In chapter three, the paper analyses the principles of insurance law. The essence of this chapter is to acquaint the reader with the doctrines of insurance law. To this end, the following doctrines are critically discussed: the Utmost Good Faith, the Duty of Disclosure, and misrepresentation. The significance of the above is to further make the reader aware of the importance of these doctrines while highlighting the harshness of these doctrines as well.

CHAPTER FOUR: An Analysis of the Legal Regime Surrounding Insurance in Zambia

Chapter four examines the Insurance Act and the Pensions and Insurance Authority Act. The chapter reviews the necessary provisions of both these Acts in relation to the protection of the insured. Thereafter, there is a discussion of findings relating to the provisions of the above mentioned Acts and case law.

CHAPTER FIVE: Conclusion and Recommendations

In Chapter five, the conclusion and recommendation as to the protection of the insured are elaborated. In addition, recommendations are advanced on the law reform on insurance law with special emphasis on the protection of the insured.

1.10 Methodology

The paper intends to achieve its objectives by referring to a number of authorities on this matter. It will gather information from authors of books, journals and scholarly articles who have methodically analysed the issues pertaining to insurance doctrines with regards to the insured's protection. This research is qualitative as well as quantitative. It will rely mainly on desk research of which this will be done through the collation of data in form of statutes, law reports, dissertations, literature written by eminent scholars, journals and credible and legitimate sources from the internet. Field investigations shall be in the form of open ended interviews conducted with the relevant officials carried out by interviewing persons and organizations involved in matters pertaining to the topic. These are persons who work in

2.0 Chapter Two: THE FORMATION OF AN INSURANCE CONTRACT

2.1 Introduction

The aim of this chapter is to explain how insurance contracts are formed. Before delving into the specifics of the insurance contract a brief look at the importance of insurance will be discussed. Thereafter, specific principles relating to the formation of the insurance contract will be evaluated and include: insurable interest, warranties and conditions. The relevance of this is to demonstrate how the formation of the insurance contract with as it relates to the principles of insurance can be a source of and contribution to the lack of certainty surrounding insurance purchase. In the process it negates the essence of protection that the insured purchased. As a consequence, begs the question as to whether Insurance is a fact or a fiction?

2.2 The Benefits of Purchasing an Insurance Policy

The need for an insurance cover is growing today owing to the occurrence and risk of enhanced hazards, which were previously unknown to life, trade and commerce¹. The essence of Insurance is to safeguard a person from unforeseen events, which might be of some detriment to an individual. It provides a person with an assurance to save them from any loss which might be brought about by the happening of any unforeseen event either to their life or property². As such, given Zambia's rapid economic growth, it can be appreciated that insurance is of vital importance.

A brief discussion of the benefits of insurance at this juncture is essential in appreciating the importance of insurance. Insurance serves many purposes and has many benefits for both individuals and businesses. Some of the benefits of purchasing an insurance policy include

¹ Robert Ongom Cwinya-ai, "What is the Necessity of Insurable Interests in Insurance Contracts" (2008) <http://ssrn.com> abstract=1407578 (18th January 2012), 1-3.

² Robert Ongom Cwinya-ai, "What is the Necessity of Insurable Interest, 4.

the fact that it provides protection against the potential or unexpected future losses, and can help make sure that future assets, income, and property are kept whole. It follows that when consumers purchase an insurance policy they can know there is a certain measure of protection from unforeseen calamities and losses.

Life Insurance provides the dual benefits of savings and security. For instance, life Insurance not only provides for financial support in the event of untimely death but also acts as a long term investment. The purchase of a Life Insurance policy enables an individual to plan for various stages of their life stages to meet their goals, be it their children's education, their marriage, building ones dream home or effectively planning for one retirement, according to one's life stage and appetite for risk³.

With the purchase of insurance an individual is assured of protection against rising health expenses. By way of example, health insurance plans offer the benefits of protection against critical diseases and hospitalization expenses. This benefit has assumed critical importance given the increasing incidence of lifestyle diseases and escalating medical costs⁴.

In light of the foregoing advantages that insurance offers the question might arise as to whether the insured truly has an equal bargaining power and whether insurance is a fiction of fact is what this paper seeks to solve.

2.3 Formation of an Insurance Contract

With the background set it is now safe to adumbrate how the insurance contract is formed. The writer believes that the average person purchasing insurance from a consumer

³ <http://www.lifeinscouncil.org/consumers/advantages-of-insurance> (accessed on the 18/04/2012)

⁴ <http://www.iciprulife.com/public/Life-plans/Key-Benefits.htm> (accessed on the 18/04/2012)

perspective is not familiar with the terms of an insurance contract. John Steele⁵ further supports this by stating that,

policies are often couched in legal terms and most consumers find it difficult to follow....further problems may arise when a claim occurs which is excepted by the so called small prints...unfortunately if the consumer is cannot understand what is said he may not be in a position to judge whether or not it meets his requirements.

This poses a great challenge to people wishing to purchase insurance as there may be instances where one knows the importance of having an insurance policy but they do not understand the terms that govern the policy, thus creating challenges upon claiming because of lack of adherence to the terms. Furthermore, in a country like Zambia the author believes that the average person is risk averse that is they don't appreciate the value of protecting their risk. Also, high levels of unemployment, and poverty, make that most people, focus on day to day survival, versus long-term benefits of insurance.

The law relating to contracts of insurance is part of the general law of contract. Contracts of insurance are however, a species of that special class of contract known as contracts of the utmost good faith. Special rules therefore, apply in insurance law relating to non-disclosure and misrepresentation which differ from the rules applicable to contracts generally⁶. The rules relating to non-disclosure and misrepresentation will specifically be dealt with in the forthcoming chapters.

The first step in forming a contract of insurance is the proposal or application by means of which the assured gives to the insurers particulars of the risk which he wishes them to undertake⁷. There special principles that govern the contract of insurance which have been succinctly explained by Lowe⁸ he states that:

⁵ John Steele, *Principles and Practice of Insurance* (London: The CII Tuition Service 1984), 11/2.

⁶ Robert Merkin ed., *Collinvaux's Law of Insurance*, (London: Sweet & Maxwell 1997), 122.

⁷ Merkin, *Collinvaux's Law of Insurance*, 127.

⁸ Robert Lowe, *Commercial Law* (London: Sweet & Maxwell 1970), 390.

The usual procedure followed is for the person seeking insurance to complete a proposal form which is then submitted to the insurers. If they reject the proposal, there is no contract. If they accept it a contract may come into existence but the precise moment at which it does so is essentially a question of construction of the relevant documents. Thus if acceptance provides (as it sometimes does) that no insurance can take place until the first premium is received, it is clear that there will be no cover until the premium is paid or tendered and it has been suggested that even if the premium is tendered the insurers are at liberty to change their minds and decide not to proceed.

According to Robert Merkin⁹ there “are aleatory contracts depending on an uncertain event or contingency as to both profit and loss for financial or other consideration the insurer agrees to pay or otherwise benefit the assured on the happening of a specified event or contingency which is outside the control of the insurer.”

Insurance is a contract upon speculation,¹⁰ by which one party in consideration of a price (called the premium) paid to him, adequate to the risk, becomes security to the other that he shall not suffer loss, damage or prejudice by the happening of the perils specified to certain things which may be exposed to them¹¹. There must be either some uncertainty whether the event will happen or not, or if the event is one which must happen at some time or another, there must be uncertainty as to the time at which it will happen¹².

It is said that Insurance contracts are therefore unusual in that while the insured is required to *perform by paying the premium, the insurer is only called on to perform (if ever) at some distant point in the future*¹³. This is how the insurance contract is formed one pays the premium in consideration that they will be protected on the event of a happening to the risk against which they insured. Herein lies the problem most people believe that once they have

⁹ Merkin, *Collinvaux's Law of Insurance*, 1.

¹⁰ As per Lord Mansfield In *Carter v Boehm* (1776) 3 Burr 1905

¹¹ Christopher Parsons, Moral Hazard in Liability Insurance, *The Geneva Paper on Risk and Insurance* Vol 28 No 3 (July 2003) 448

¹² Merkin, *Collinvaux's Law of Insurance*, 5.

¹³ John Lowry and Phillip Rawlings, *Insurance Law: Doctrines and Principles* (Oxford Hart Publishing 2005), 11.

paid that premium, they have essentially paid for the consideration to be protected. However, as stated above insurance contracts are of a specific species: in other words, they come with special terms and principles that need to be adhered to or else the protection that they had initially purchased will be considered void. This can lead one to speculate that the whole concept of protection is simply a myth and a way of encouraging individual consumers to buy into obtaining insurance.

2.4 The Doctrine of Insurable Interest

It must be appreciated from the outset that in insurance contracts the normal contractual obligations that ought to be followed in normal contract law ought to be fulfilled. However, if these requirements are fulfilled, the contract may still fail if the policy holder has no valid interest which he can insure. This means that the policy holder must be in a position where they will suffer loss if the event which they have insured against occurs. Such conditions are what create an insurance contract to be of a different kind of contract. And it is against this background that the author believes ambiguities are created for the insured and thus in the process of insuring and effecting their policies the protection of the insured is undermined because of the peculiarity that the insurance contract has, whilst essential are to a certain extent problematic.

For instance whether a person has an insurable interest in the subject matter or not is a question of fact and circumstances of each case and the court's interpretation of the insurance contract's clauses¹⁴. This means that someone can have an insurable interest genuinely but the court may interpret it otherwise.

¹⁴ Chartered Institute of Insurance, Insurance Law 2004, 6/6.

The meaning of insurable interest was best defined by Rodda¹⁵ who stated that:

“...Insurable interest may be defined as an interest of such a nature that the occurrence of the event insured against would cause financial loss to the insured...”

Thus the taking of an insurance policy does not protect the insured property from loss or damage, but protects the insured's interest in the property. The insurable interest must have a pecuniary value i.e. it must be measurable in terms of money¹⁶. In **Lucena v. Craufurd**¹⁷ insurable interest was explained as:

...A man is interested in a thing to whom advantage may arise or prejudice a right to the whole, or a part of a thing, nor necessarily and exclusively that which may be subject of privation, but the having some relation to, or concern in the subject of insurance, which relation or concern by the happening of the perils insured against may be so affected as to produce a damage, detriment or prejudice to the person insuring; and where a man is so circumstanced with respect to matters exposed to certain risks or dangers as to have a moral certainty of advantage or benefit, but for those risks or dangers, he may be said to be interested in the safety of the thing.... The property of a thing and the interest divisible from it may be very different; of the first, the price is generally the measure, but by interest in a thing every benefit or advantage arising out of or depending on such a thing may be considered as comprehending...

The nature of insurable interest it is submitted is a necessary step to take in relation to an insurance contract and does not pose any encumbrances on the insured in relation to their protection per se. Nonetheless the argument it is submitted, is that the consequences of lack of interest in some way have led insurance companies and underwriters to sometimes seek to evade their just obligations on the ground of want of interest. In *Wolf v Horncastle*¹⁸ it was stated that “it seems that the underwriters or company having received the premium the

¹⁵ Robert Ongom Cwinya-ai, “What is the Necessity of Insurable Interests in Insurance Contracts, 4.

¹⁶ *Castellain v Preston* [1886] 2 QB 380

¹⁷ (1806) 2 BOS & PNR 269

¹⁸ (1798) 1 BOS & PUL 316

objection that there was no insurable interest is often thus a technical objection that there was no insurable interest which has no real merit as between the assured and the insurer.”

The classic example of objection on a technicality basis is to be found in the case of *Macuara v Northern Insurance*¹⁹ it was held that if a policy is not a wager, but the assured has no interest at the date of the loss either because he has never obtained any interest or because he has obtained interest but subsequently lost it he cannot suffer any loss and thus the indemnity principle prevents any recovery by him. Thus in the above case, Mr Macaure insured against fire, cut timber upon his estate. The timber was subsequently sold to a one man company of which he was the sole effective shareholder. The greater part of the timber was destroyed by fire. The insurers refused to pay on the ground that he being a mere shareholder, had no insurable interest in the assets of his company, and on submission to arbitration under the terms of the policy their contention was upheld. This case is perhaps the most practical example of the hardship that the doctrine of insurable interest can pose. Many times the issue of insurable interest might be a way of insurance companies evading the payment of premiums.

In Zambia the issue of insurable interest was discussed in the case of *Simwanza Nampohsya V ZSIC*²⁰ where the Supreme Court held that the motor vehicle insured was different because the vehicle that was insured was not the same due to the replacement of the chassis number. The court’s holding was in tandem with the principle of insurable interest as the subject matter in the instant case had changed.

¹⁹ [1925] A.C. 619

²⁰ SCZ Judgment No 21 of 2010 (unreported)

2.5 Warranties and Conditions

There are two noteworthy terms to consider in insurance contracts a warranty and a condition. In insurance contracts a warranty is of great importance. A warranty in insurance is an undertaking made by the insured relating to facts or to something which they agree to do. A warranty may relate to past or present²¹ and in these contracts, terms of insurance cover various dimensions including payment of the premium, rights of cancellation and the application of arbitration in the event of a dispute.

The learned author Chitty²² explains that “Insurance contracts nearly always contain a number of terms and conditions which may be classified according to their effect” The classification of terms for instance include: the terms which if not fulfilled, entitle the insurer to treat himself as discharged from further liability under the contract, terms which if not fulfilled entitle the insurer to refuse to pay a particular claim under the policy, but which do not affect the continued validity of the policy²³.

Warranties have been criticised as unfair. It follows that difficult questions can arise in determining construction of terms and also in determining into which of the above categories a particular provision in a policy falls. This was succinctly explained in the case of *African Banking Corporation Limited v Agricargo (Zambia) Limited*²⁴ where the court held that the defendant was not entitled to recover the sum claimed under the insurance policy from the third party. The insurance policy limited the usage of the motor vehicle to agricultural use. The policy expressly excluded hiring out the motor vehicle for other uses. The truck was stolen in Zimbabwe while ferrying ceramic tiles. The usage was not covered by the policy.

²¹ John Steele, 7/4.

²² Joseph Chitty, *Chitty on Contract: Specific Contracts* (London Sweet & Maxwell 2004), 11 :1192.

²³ Chitty, *Chitty on Contract*, 1192.

²⁴ 2002/HPC/ 0228 (Unreported)

Therefore the claim was denied. The effect of breaking of a warranty was avoidance of the contract.

Consequently, the initial protection that the insured sought is taken away for merely not adhering to the terms of the contract. The difficulty is that most individuals do not understand the importance of the warranty upon the formation of the contract. In the aforementioned case, the company had obtained a territorial extension of the insurance policy to cover Zimbabwe. In this case they thought that this was enough evidence that they had purchased insurance and were abiding by the contract rules.

These terms thus impose an obligation on the insured to do something or refrain from doing something as their part of the bargain. If the insured fails to comply with a term of this sort, a question then arises as what is the effect of the breach²⁵. It is from this breach that the protection of the insured is lost. A warranty in an insurance contract if broken allows the insurers to repudiate the contract as a whole²⁶. This being the case it can be said that warranties are of great importance and if broken may bring about the most drastic effects if they are broken. It is to this end that they are problematic to the insured. Thus negating the aspect of protection the insured looks forward to receiving.

Conditions are terms other than warranties that impose obligations on the insured. By way of example a life insurance policy may contain a condition that the policy will not come into effect until the premium is paid; if the term is not complied with the insurance will be void *ab initio*. The expression condition precedent to liability is used to describe a term that allows the insurers to avoid liability for a particular loss if the term is broken but not avoid the contract as a whole.

²⁵ Malila, *Commercial Law in Zambia*, 468.

²⁶ John Lowry and Phillip Rawlings, *Insurance Law*, 185.

2.6 Conclusion

In conclusion, contracts of insurance are formed on the usual principles of contract such as offer and acceptance. However, they are special rules that govern insurance contracts in that there contract of the utmost good faith. From this flows the fact that these special principles' can be a source of problems for the individual consumer purchasing insurance who might not be aware of the gravity of not following certain terms that are couched in the principles of insurance. Therefore, the initial protection that one sought might appear to be a fiction as the draconian effect of not following the terms of a warranty and condition or lack of insurable interest is avoidance of the insurance contract.

3.0 CHAPTER THREE: THE UTMOST GOOD FAITH: THE DUTY OF DISCLOSURE AND MISREPRESENTATION

3.1 Introduction

In chapter two the principles and doctrines of insurance in the early stages of forming a contract of insurance were introduced. The focus of this chapter is on the doctrine of the utmost good faith which is the bedrock of this paper. It will seek to clarify the basis of this doctrine and centre on the protection of the insured. Consequently, the fundamental question as to whether insurance is a fact or fiction shall be considered in line with the above-mentioned doctrine. As such, the following important principles and doctrines shall be evaluated: the utmost good faith, the duty to disclose material facts, the role of the agents and brokers and lastly misrepresentation.

3.2 Utmost Good Faith

A fundamental principle governing insurance transactions is that of the utmost good faith. The English common law doctrine of good faith in insurance contracts is well over 200 years old¹. Schwartz asserts that,

During that time, it has been codified into statute and subjected to attacks and criticisms at various times. It is believed that, in modern commercial practice, the duty of good faith is honoured more in the breach than the observance. While others believe that it may be an anachronism in a modern age of remorseless commercial pressures, instant communications and hybrid transactions. Nevertheless, it endures through occasional criticisms that harsh judgments make bad law and create uncertainty².

¹Peter Schwartz., *Non-Disclosure under the Utmost Good Faith Doctrine in English Law* London, www.ssrn.com (accessed September 3rd, 2011).

² Schwartz, *Non-Disclosure and the Utmost Good Faith*, 22.

In marine insurance, it is provided by statute that the contract of insurance is a contract based upon the utmost good faith and if the utmost good faith is not observed by either party the contract may be avoided by the other party³.

In essence the fundamental components of the duty of utmost good faith are to ensure proper disclosure of all material circumstances and to avoid making misrepresentations about material facts, circumstances or beliefs. This principle was aptly upheld in the case of *Zlatan Zlatko Arnautovic v Professional Life Insurance Corporation Zambia Ltd*⁴ In this case it was found that an insured has a continuing obligation of good faith and to disclose all facts to an insurer but the plaintiff did not disclose the transfer of the motor vehicle that took place. Therefore, the transfer that had taken place was not disclosed consequently, warranting that the plaintiff did not have insurable interest in the said motor vehicle. Further it was reiterated that an insured must act in utmost good faith at all times and must fully cooperate with the underwriter and provide such information as will enable the underwriter to establish fully the circumstances of the loss of the subject matter of the insurance contract.

In insurance contracts, it is believed that the knowledge regarding the nature of the risk proposed for is almost exclusively possessed by one side. The proposer is deemed to know all about the risk at the time he is proposing for insurance, whilst the insurer knows nothing and has to rely on the proposer to supply him with the information to assess the risk⁵. As per Malila⁶ ‘in order to make insurance transactions fair for all parties the law has elevated insurance contracts to a status of contracts uberrimae fidei, that is to say contracts of the utmost good faith’.

³ Lord Hailsham. *Halsbury's Laws of England* (London,:Butterworths 1978), 200.

⁴ SCZ Judgment No 82 of 2011 (unreported)

⁵ Mumba Malila, *Commercial Law in Zambia: Cases and Material* (Lusaka UNZA Press, 2006), 482.

⁶ Malila, *Commercial Law in Zambia*, 482.

The result of the aforementioned principle is that each party to the contract must not only refrain from actively misleading the other, but must disclose and not conceal any material information relating to the proposed insurance. To achieve this duty, the law obliges the parties to disclose all material facts. This principle was echoed in the case of *Simwanza Nampohsya v ZSIC*⁷ where it was held that “it is trite law that an insurance contract is a contract *uberrimae fidei*, which is a contract based on utmost good faith. There is a duty on both the insurer and the assured to observe utmost good faith in their dealings with each other. This includes the duty to disclose all material facts to each other”.

A material fact is one which would affect the mind of a prudent insurer in deciding whether or not to accept the proposal, and on what terms he would accept⁸. The legal basis of the principle of the utmost good faith and the duty of disclosure was discussed in the seminal case of *Carter v Boehm*⁹ where it was stated that:

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 confidence that he does not keep back any circumstances in his knowledge to mislead the underwriter into a belief that the circumstance does not exist and to induce him to estimate the risk as if it did not exist. The keeping back of such circumstance is a fraud, and therefore the policy is void.....Good faith forbids either party, by concealing what he privately knows to draw the other into contract from his ignorance of that fact and his believing the contrary.

The law of insurance contracts provides that if the policyholder is shown to have knowingly misrepresented material facts about his risks in his application, the insurer can cancel the contract *ex post facto* and refuse to pay any claims¹⁰. The legal definition of a material fact is contained in the Marine Insurance Act 1906 s 18(2): “Every circumstance is material which

⁷SCZ Judgment No 21 of 2010 (unreported)

⁸ *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1995] 1 AC 501

⁹ (1776)3 Brr 1965

¹⁰ The Chartered Insurance Institute, Insurance Law 2004 7/9.

would influence the judgement of a prudent insurer in fixing the premium or determining whether he will take the risk.”

The author believes that this good faith principle is general, but implemented with unequal strictness. Further it has been stated that at present individual consumers can lose out when innocent errors on proposal forms are deemed “non-disclosure” of something that affects insurers’ risk assessment, or “misrepresentation” where the consumer makes an incorrect statement of “a fact that is material¹¹”. A failure in either area can mean refusal to pay a claim. Hence the whole concept of protecting the insured is nullified by these strict rules.

The duty to disclose and refrain from misrepresentation when negotiating in an insurance contract appears to be a thin line. This is evidenced by the common practice of insurers raising a defence to a claim.

3.3 Misrepresentation

A misrepresentation can be defined as an untrue statement of a material fact made by one party to the contract to the other party which induces the contract but which is not a contractual term¹². The House of Lords in *Derry v Peek*¹³ established that a lack of honest belief on the part of the representor central to an allegation of fraud. Lord Herschell defined fraudulent misrepresentation as a false statement made (1) Knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it is true or false. If a false statement is made on grounds that would not necessarily convince a reasonable person, it may be negligent, but in the absence of dishonest intent, it will certainly not be fraudulent¹⁴. A fraudulent misrepresentation renders the contract voidable and the insurer can retain premiums paid

¹¹ Jeffrey Stempel, Doris S. & Theodore B. Lee, “The Insurance Policy as Thing” *Tort Trial & Insurance Practice Law Journal* 813 (2009) <http://ssrn.com/abstract=1650930> (accessed 17 October, 2011)

¹² M.P. Furmston., *Cheshire, Fifoot and Furmston’s: Law of Contract* (Oxford: University Press 2007), 341.

¹³ [1889] All E.R. 1

¹⁴ Lowry John, and Rawlings Phillips, *Insurance Law*, 112.

under the policy. The insurer may also bring an action for damages against the misrepresenter in the tort of deceit.

The principles governing misrepresentation have been codified in the Marine Insurance Act 1906 section 20 (1) which is of general application. It thus provides that

Every material representation made by the proposer for insurance in negotiating the contract must be true; if it be untrue the insurer may avoid the contract. This is the equivalent to the right to rescind in the law of contract.

This essentially means that any false statement in the proposal, even if it does not become a term of the contract, will be a misrepresentation and the insurer is entitled to avoid the contract if the insured makes any material misrepresentation during negotiations for the contract. This indeed is unfair for the protection of the insured.

According to Merkin¹⁵ in Colinvaux's Law of Insurance, 'it is plain from section 20 (1) that the right to avoid is not confined to cases in which the assured has been guilty of fraud or negligence'. This principle was illustrated in the case of *Graham v Western Australian Insurance*¹⁶, that if there is information given, be it quite innocent, which is not a matter of contract, and never becomes a matter of contract, yet, nevertheless, if it is inaccurate, it can be used to avoid the policy or policies in question.

Accordingly the aforementioned case exemplifies the harshness of insurance principles. Despite the fact that the insured acted with perfect good faith and honesty of intention he loses out. It has been said that the insurer can rely upon misrepresentation or non-disclosure if two requirements are fulfilled that is the fact misstated or withheld must be material; and the insurer must be induced by the misstatement on non-disclosure to enter into the contract of insurance.

The test for materiality is laid down in section 20 (2) which, echoing Section 18 (2) provides that a representation is material if it, 'would influence the judgement of a prudent insurer in

¹⁵ Merkin R, ed., *Colinvaux's Law of Insurance* (London: Sweet & Maxwell 1997), 127.

¹⁶ (1931) 40 L.L.R.64, 66.

fixing the premium, or determining whether he will take the risk. And a misrepresentation may be a statement of fact, expectation or belief.

3.4 The Duty to Disclose Material Facts

The duty to disclose material facts in a contract of insurance is mutual, although the occasions for disclosure by the insurers are rare since the facts material to the insurance are not as a general rule known to the insurers but only to the proposer of insurance¹⁷. Although the duty applies equally to both parties, the duty on the insured is particularly important because the insured is said to be in a position where he possess more knowledge about the risk he wants to insure¹⁸. The common law duty of disclosure has been codified in the Marine Insurance Act 1906 section 18 (1) provides:

Subject to the provisions of this section, the assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him. If the assured fails to make such disclosure, the insurer may avoid the contract.

The duty is not limited to disclosing facts about which express questions are asked in the proposal form, although the fact that the specific questions are asked may be construed as waiving the requirement to disclose other information¹⁹.

Clearly, the rationale behind this rule is that in order to make fair dealing possible, the party in possession of all the information must make full disclosure, so that the other may be in a position to make an accurate estimate of what he is undertaking²⁰. The rule in insurance law has thus been that no policy of insurance is valid where the insured has not made a complete

¹⁷ Lord Hailsham., *Halsbury's Laws of England*, 201.

¹⁸ Malila, *Commercial Law*, 435.

¹⁹ The Chartered Insurance Institute 2004 7/10

²⁰ D. Browne., *MacGillivray on Insurance* (Sweet & Maxwell, London), 796.

disclosure of everything which it was material for the insurer to know in order to judge (1) whether he should accept the risk, (2) what premium he should charge²¹.

In order to arrive at this requirement, there is a test of materiality, therefore, it is not what the insured considers material nor what a reasonable insurer would consider material, but whether the circumstance would be taken into account by a prudent insurer when assessing the risk (even if it would not, of itself, have had a decisive effect on his decision whether to accept the risk and if so at what premium)²².

Additionally, there is a post-contractual duty of disclosure in cases where the insurance contract is to be amended or renewed²³. During the currency of the contract the duty is one of good faith, in that at common law there is no need to disclose changes while the contract is running²⁴. The limits of the disclosure duty were further discussed in *Glencore International AG v Alpina Insurance Co Ltd*²⁵

The duty of disclosure requires the insured to place all material information fairly before the underwriter, but the underwriter must also play his part by listening carefully to what is said to him and cannot hold the insured responsible if by failing to do so he does not grasp the full implications of what he has been told.

The above case is interesting in that it attempts to balance and harmonise the interests of both parties however, the interpretation by courts in Zambia is different as evidenced in the case of *Africa Banking Corporation Limited v Agricargo and Others (Zambia) Limited*²⁶ where despite the defendant contracted for an extra territorial contract the underwriter did not ask further questions as to whether the contract was to remain the same.

²¹ Browne, *MacGillivray on Insurance*, 796.

²² Chitty Joseph., *Chitty on Contract: Specific Contracts* (London: Sweet & Maxwell 2004), 1171.

²³ Chitty, *Chitty on Contract*, 1170.

²⁴ Steele J.T., *Principles and Practice of Insurance* (London: Burlington Press Cambridge 1984), 2/3.

²⁵ [2004] 1 Lloyd's Rep 111

²⁶ 2002/HPC/0228

The duty of disclosure at time of renewal depends on the type of contract e.g. long term business. If the renewal of the policy requires the insurer's consensus, each renewal is in effect a new contract and it follows that all new material facts must be disclosed when applying for renewal²⁷. In other cases renewal requires the assent or agreement of the insurer and in such cases the original duty of disclosure is revived. The facts applying at the time of negotiating the renewal must be disclosed²⁸.

3.5 Critical Analysis of the Duty of Disclosure

Having ascertained the duty of disclosure it is submitted that the duty of disclosure, as it presently stands, can operate too harshly against the insured. For example, the insured may not be aware that, after giving his responses to questions on a proposal form, he is still under a duty to disclose any other material facts to which none of the questions related to. Nor is will he be aware that duty is also revived upon renewal of the contract.

Lowry²⁹ contends that the effect of non-disclosure by the insured entitles the insurer to avoid the contract *ab initio*, notwithstanding the absence of any fraudulent intent. He further underscores the above by stating that the economic consequences are severe and disproportionately harsh. In the end the policy becomes valueless so that the insured loses the financial safeguard that the policy was designed to provide should the losses caused by the insured risks come to pass.

Consequently, while the principle of disclosure seems relatively harmless and practically important in determining the insured's risk it can be seen that, in practical terms, the issue

²⁷ Robert Lowe, *Commercial Law* (London: Sweet& Maxwell 1970), 387.

²⁸ Lowe, *Commercial Law*, 387.

²⁹ John Lowry, "Whither the Duty of Good Faith in UK Insurance Contracts?," *Connecticut Insurance Law Journal* 98, no 16:1 [2009] 115

which pervades the duty of good faith according to Lowry³⁰ can be reduced to the following question: “how can the ordinary insured, whether acting in a private or commercial capacity, untutored in the niceties of insurance law, be expected to know what particular circumstances are material and would, therefore, influence the prudent underwriter? The sheer breadth of the insured’s duty together with the all or-nothing consequence of avoidance, therefore, rightly gives rise to legitimate concern.” The legitimate concern with regard to this paper is whether the protection of the insured a fact or fiction?

Also, in relation to renewals, an insured may not know that in law, a renewal constitutes a new contract of insurance and so his duty of disclosure arises afresh, at every renewal, so that he is under an obligation to disclose any material facts arising in the interim. In Zambia this is demonstrated by the case of *Zlatan Zlatko Arnautovic v Professional Life Insurance Corporation Zambia Ltd*³¹.

Implicit from the aforementioned paragraphs is that the consequence of non-disclosure, whether at the time of the original proposal or upon the renewal of the insurance is to render the insurance contract voidable, thereby entitling the insurer to avoid it *ab initio*. This consequence is harsh for persons who have no idea of what the magnitudes is for omitting or failing to disclose what is considered material facts to the underwriter. Instead there should be consideration to the fact that insurers should not be content to play a passive role during the disclosure process but should be prepared to make necessary enquiries about the risk to be underwritten. This is so because how can the insured disclose that which he does not appreciate to be material.

³⁰Lowry, “Whither the Duty of Good Faith in UK Insurance Contracts?,” 116.

³¹ SCZ Judgment No 82 of 2011 (unreported)

It has been said that non-disclosure terminates the contract, puts the parties in *statu quo ante* and restores things, as between them, to the position in which they stood before the contract was entered into³². This position was eloquently stated in the case of *HIH Casualty and General Insurance Co v Chase Manhattan Bank*³³

It means that if an assured or his agent has failed to make full disclosure to the underwriter of all facts, which he knows or ought to have known, material to the risk, the underwriter can avoid the policy. In other words the policy becomes valueless to the assured. This negates the purpose of insurance which is to provide a secure and certain financial safeguard against losses caused by the insured risks. It makes the safeguard insecure.

The rules of disclosure appear to be applied stringently; the insured may be in breach of duty even though he acts in good faith and accurately answers all the questions put to him by the insurer. This brings doubt as to whether the rule is still justified, especially in view of the ease of modern communications and the extensive use by the insurers of standard form proposal, which enable them to ask specific questions about matters relevant to the contract³⁴.

Could we then still say that the duty of disclosure is necessary?

Lord Staughton LJ echoed these sentiments in *Kausar v Eagle Star Insurance Co Ltd*³⁵

‘Avoidance for non-disclosure is a drastic remedy. It enables the insurer to disclaim liability after, and not before, he has discovered that the risk turns out to be a bad one; it leaves the insured without the protection which he thought he had contracted for’

Thus it could be concluded by stating that not all insurance contracts are made by those engaged in commerce and the general nature of consumer insurance has come along with new problems. Lowry³⁶ rightfully submits that “It may be necessary to give wider effect to the doctrine of good faith and recognize that its impact may demand that ultimately regard must

³² Lowry, and Rawlings, *Insurance Law*, 83.

³³ [2001] Lloyds Rep IR 191

³⁴ Lowry and Rawlings, *Insurance Laws*, 83.

³⁵ [2000] Lloyds rep IR 154 at 157

³⁶ John Lowry, “Whither the Duty of Good Faith in UK Insurance Contracts?,” 110.

be had to a concept of proportionality implicit in fair dealing.” Accordingly, the right of insurers to avoid a contract from its inception should be abolished except for cases of fraudulent non-disclosure on the basis that avoidance *ab initio* was wholly disproportionate to the harm caused by an insured’s non-fraudulent nondisclosure. Rather, Lowry³⁷ proposes that “the insurer should be able to cancel the contract prospectively and be entitled to adjust a claim to take into account the loss actually suffered by it as a result of the insured’s breach of the disclosure duty.” This is fair dealing that can help with the protection of the insured.

Having laid down the principles of the utmost good faith, it is clear that if the utmost good faith is not observed by either party, the contract may be avoided by either party. The issue that arises and one that has generated considerable judicial debate, concerns the pre and post contractual scope of this duty. In the process of claims a material statement is fraudulent if the insured either knew it to be false or else was reckless as to its truth, mere carelessness will not suffice. The onus of proof is on the insurer, and given the nature of the allegation the burden will be greater than on a mere balance of probabilities³⁸. In assessing the effect that a fraudulent claim has on the validity of the policy the critical question is whether the insured’s duty of utmost good faith continues beyond the time when the policy is initially effected and renewed so that it also operates when an insured seeks to claim against the insurers for a loss³⁹.

The duty of utmost good faith has been extended beyond that of post-contractual stages to even the claim stages and the rationale for this extension was explained in *Orakpo v Barclays Insurance Services*⁴⁰ Hoffman J stated:

³⁷ John Lowry, “Whither the Duty of Good Faith in UK Insurance Contracts?,” 113

³⁸ Lowry and Rawlings, *Insurance Law*, 255.

³⁹ Browne, *MacGillivray on Insurance*, 796.

⁴⁰ [1999] LRLR 433

I do not see why the duty of good faith on the part of the assured should expire when the contract has been made. The reasons for requiring good faith to continue to exist, Just as the nature of the risk will usually be within the peculiar knowledge of the insured, so will the circumstances of the casualty ; it will rarely be within the knowledge of the insurance company. I think that the insurance company should be able to trust the assured to put forward a claim in good faith.

The above case justifies the importance of the duty of the utmost good faith and why it should weigh heavily on the insured as opposed to creating a balance between the two parties.

It is well settled that if the insured makes a fraudulent claim, he or she will not be able to recover their premium. The consequence is that the insured will forfeit all rights under the policy and it can therefore be terminated for breach. This was well articulated in the case of *Simwanza Namposhya v ZSIC*⁴¹ where it was held that the insurance policy from the beginning up until the point of making the claim was characterized with fraud and thus making the policy void.

The major contention faced though is whether the policy can be void *ab initio* so that the insurer can recover any payments made with respect to an earlier loss, or whether the insurer should be restricted to recovering only from the date of the fraudulent claim? The author strongly believes that the insurer should only be restricted to recover from the date of the fraudulent claim. Because the insurance contract promises that it will protect you in consideration of the premium one pays and since the law will not entertain any form of illegality it only makes it fair that the insurer should not recover from the date of the fraudulent activity.

⁴¹ SCZ Judgment No 21 of 2010 (unreported)

3.6 Conclusion

This chapter has been an analysis and critique of the doctrines and principles on the protection of the insured. It has been observed that in terms of the substantive law, the protection of the individual consumer does not apply equally to insured and the insurer. While the principles and doctrines appear to be sound, the reality is that the doctrine of the utmost good faith works against the insured because of the imbalanced duty of uberrimae fidei. Insurers rightfully worry about insurance fraud, and they work diligently to ensure that this destructive behaviour is punished by the force of law. Nevertheless, it does not necessarily reflect the true expectation of both parties. This is so because expectation of the insured is frustrated by mere basis of technical terms in the contract.

The doctrine is intended to bring both parties in a much more favourable bargaining position by imposing that this duty is owed to both parties however; the principles in essence favour the insurer because it is qualified by the fact that certain knowledge is only known by the insured. This is unfair on the insured as they are required to disclose all facts even those not in their actual knowledge at the time of bargaining the insurance contract.

4.0 CHAPTER FOUR: AN ANALYSIS OF THE LEGAL AND REGULATORY FRAMEWORK THE INSURANCE INDUSTRY IN ZAMBIA

4.1 Introduction

This Chapter starts by outlining the current legal and regulatory framework of the insurance industry in Zambia. In delineating the regulatory framework specific statutes such as the Insurance Act and the Pension Scheme Regulation Act will be evaluated. Consequently, this chapter examines the extent of protection that the Insurance Act and other legislative regulations offer the insured. The overall objective of this chapter is to highlight how the lack of proper regulatory mechanisms in the insurance industry can be a source of inequality between the insured and the insurer.

The preceding chapters outlined important doctrines of insurance to this end an evaluation of the regulatory system as to whether it adheres to those doctrines or adjusts them will be ascertained. Thereafter, it concludes by looking at case law and focuses on how the courts have made judgments with regard to the doctrine of the utmost good faith and other terms that surround the insurance contract. This is all done to underscore the question of whether insurance is a fact or fiction.

4.2 The Insurance Act

The insurance industry in Zambia is governed by the Insurance Act No 27 of 1997 which was amended by No 26 of 2005 this been the principle Act. It is a comprehensive piece of legislation which deals with many issues in insurance including insurance contracts, insurance organizations, insurance supervision and insurance intermediaries.

In light of the above it is cardinal to highlight that in the insurance industry the interests of the policy holder, the insurer's and brokers must be protected. The preamble of the Insurance

Act¹ provides that it is '*An Act to regulate the insurance industry*'. This provision of the law illustrates that the insurance Act is a regulatory framework for the insurance industry. The justification for regulation and legislation governing insurance was summed up by the words of Maugham J. In *Re North and South Insurance*²

An insurance company differs in its nature from almost every other trading concern. It starts, in the first instance, without liabilities. It obtains premiums sometimes to very large amounts....inasmuch as the claim comes in every case after the premiums have been secured there is always a risk that an insurance company may, by offering what looks like very advantageous terms to the public, obtain a very large premium income which, as the result of the practical working of the company, prove to be an insufficient income for the purpose of meeting claims.

The above statement confirms the peculiarity of insurance contracts therefore necessitating the need for a strong regulatory system. In Zambia this is achieved through the Insurance Act which governs the conduct of insurance companies. However, it is submitted that insurance laws and regulations generally protect the insurance industry and not the insurer, and impose onerous duties on the insured.

In light of the foregoing, particular attention to the following provision will be evaluated. Part IV of the Insurance Act deals with the financial regulation of insurance in Zambia. This part is of great importance to this paper as has been established Insurance is unique in that a person sees no immediate benefit from purchasing the service. He sees immediate evidence that he has a contract in the form of a cover note, certificate or policy document but unless he has a claim at once he does not see any tangible benefit³.

The insurers promise to indemnify policyholders should certain insured events occur, and the consumer must be assured that the funds will exist at the right time to pay his and any other

¹ The Insurance Act No. 27 of 1997

² [1933] 47 L.L.R. 356, 358.

³ John Steele, *Principles and Practice of Insurance* (London: Burlington Press Cambridge 1984), 11/1.

claim that might arise. One source of problem for policy holders that might arise is where insurance companies' funds are not effectively managed. Simply put that funds are not available when the insured claims for them. Section 33⁴ makes it mandatory that insurers dealing in general insurance shall set aside reserves for unearned premium to meet the liabilities on the unexpired risks. Further, Section 34 specifies that an insurer shall make adequate provision in its accounts for liabilities in respect of claims incurred. Additionally section 35 (1) provides that an insurer shall establish and maintain a fund.

The above provisions are mandatory as insurers have an obligation to have an adequate fund to meet their client's claims. These provisions are significant to this paper because lack of regulation in relation to the aforementioned provisions inevitably means that the consumers who purchased insurance are left with no protection if the insurers have inadequate funds to meet the claims. The problem emanating from the aforementioned provisions lies in the fact that the Act does not have a specific provision relating to the debt equity ratio. This is the amount of funds relative to the potential liability on claims and corporate expenses⁵.

From the generality of the section 33 – 35 a question might arise as how the fund should stand in respect to potential liabilities? Additionally, the Act has no provisions laid down as to who should manage the funds, should it be the insurer or an independent body? There needs to be clear benchmarks so that in the event of insolvency the Pensions and Insurance Authority (herein PIA) can safeguard the insured's policy by bringing to book those companies that have defaulted and safeguarding the interests of the insured.

Clearly the provisions above are restrictive or prohibitive on the insurers in that they are mandatory. Upon observation of the Act, one may consider that these regulations protect

⁴ Insurance Act (No. 27 of 1997)

⁵ As Per Interview with Mr Gregory Cornhill of Wilson and Cornhill 18th April 2012

policy holders because the Act imposes restrictions and prohibitions on insurers by stipulating that the fund ought to be in place. I propose that this is not the case because these provisions while necessary are mainly compliance in nature and are vague because there no set guidelines as to who is to run the fund.

Another problem to consider is that the insurance Act does not protect the interest of the insured because none of the doctrines relating to the insured have been codified into the Act. The insured is thus left to rely on common law doctrine. This is not particularly good for the insured because of the issue of hierarchy of laws which stipulates that statute precedes common law.

Further the Act has no provisions relating to grievances of the consumer under the Act as it this discourages most individuals from when seeking their claims. From this it can be stated that the insurance Act does not state clearly what the rights and obligations the insured possesses. Section 79 (1)⁶ of the Act is the only provision in the Act which merely attempts to protect the insured. It stipulates that:

The holder of a policy shall, notwithstanding any contrary provision in the policy, be entitled to enforce his rights under the policy against the insurer named in the policy in any competent court in Zambia.

(2) Any question of law arising in any action under a policy may validly provide that the amount of any liability under the policy shall be determined by arbitration any such arbitration shall be held in Zambia in accordance with the Arbitration Act.

While the above provision appears to protect the policy holder by ensuring and providing them with recourse to the law in any event that a dispute might arise it is not enough in guaranteeing that the policy holder is protected from the insurers. This underscores what has been explained in the previous chapter, that being if the insured fails to disclose what the insurer considers to be material facts but not what the insured would consider being material

⁶ Insurance Act (No 27 of 1997)

the law will automatically avoid the contract. This is what the doctrine of non-disclosure obliges a prudent insured ought to do. The insurance act is silent on this aspect and actually seems to be favouring the insurers as opposed to creating a balance on both parties. There is no coherency or clarity that meets the reasonable expectations of the insured even though there is provision that in any event that a dispute arises one may have recourse to the courts or follow the arbitration Act. Not all people that are insured will be able to afford a lawyer and go by way of arbitration as taking on a big company may seem daunting and scary for an individual. A person is left with no recourse and the protection that they envisaged is foregone.

4.3 The Pensions and Insurance Authority

The insurance industry is also regulated by the Pensions and Insurance Regulations Act No 25 of 2005 which is a regulatory and supervisory body of insurance business and administering the Insurance Act. To this end section (4) provides that:

There is hereby established the pensions and insurance authority which shall be a body corporate with perpetual succession and a common seal, capable of suing and of being sued in its corporate name, and with power subject to the provisions of this Act, to do all such acts and things as a body corporate may by law do or perform⁷.

The significance of the Pensions and Insurance Authority is embodied in the preamble of the Act.

To regulate the conduct of the pensions and insurance industry through prudential supervision in order to protect the interests of the pensions scheme members and insurance policy holders and foster the industry's growth.

The Pensions and Insurance Authority (hereinafter PIA) in its execution of functions must have the interests of the policy holders as it is the regulatory authority that ensures that the

⁷ Section 4 (1) of The Pensions Scheme Regulation Act as amended Act No 27 of 2005

Insurance Act is being followed. To this end Section 99⁸ (c) is aimed at ensuring that the insurance contract does not contain obscure or ambiguous statements or terms that are oppressive and alien to the policy holder. Additionally, the Pensions and Insurance Authority makes recommendations to the Minister on matters affecting the insurance industry. This is cardinal as it ensures that viable policies and laws will be formulated as they are the regulatory body that are well versed with the problems that the insurance industry in Zambia faces.

Regulation is cardinal in establishing a legal and ethical framework within which commerce can flourish⁹. It is against this background as to whether the PIA judiciously carries out their obligations to ensure that the industry is running smoothly. With this said does the PIA have the necessary powers to regulate the insurance business in Zambia in the event that there is insolvency? The PIA faces a lot of problems such as failure to take action on undercapitalized insurers, failure to persuade insurers to share risks and continued licensing of defaulting brokers¹⁰ The PIA has been charged with the duty of ensuring that the Insurance Act is complied with however, in its discharge it has failed to make sure that it addresses the needs of the policy holders by not making themselves more aware to citizens.

The insured relies on the expectation that the insurer will still be in business at the unspecified future date and have sufficient financial resources to discharge its obligations. Therefore it becomes critical to ensure that promises are kept, thus the need to have a strong supervision of the insurance practice. However it is questionable as to the authority of the PIA has as it is asserted that it does not perform its functions effectively because it faces

⁸ The Pension Scheme and Regulation Act (No 28 of 1996)

⁹ Mulenga Ngosa, C.S., *The Regulation of the Insurance Industry: An Assessment of the Pensions and Insurance Authority (PIA)*, 30.

¹⁰ Kamfwa Kasongo etl *Addendum to the Preliminary Report on Review of the Insurance Legislation in Zambia*, 2007, 2.

problems such as funding constraints, serious staffing issues, and failure to take action on the undercapitalized insurers¹¹.

Rodney Lester¹² articulates that the main issue addressed in regional consumer protection requirements is recourse in the event of disputed claims. A number of countries require that insurers have internal dispute resolution mechanisms in place and most jurisdictions specify that the insurance supervisor is the next step if resolution cannot be achieved¹³. To this end the Pensions and Insurance Authority through its provisions has set itself to be more applicable to commercial coverage's as opposed to individual consumer policies as it is suggested that individual policies rarely contain arbitration clauses.

4.4 An Analysis of Insurance Case Law in Zambia

This paragraph seeks to observe the extent Zambian courts have interpreted the doctrines of insurance law in determining the cases before them. The background of this paper begun with the case of *Simwanza Namposhya v Zambia State Insurance Corporation*.¹⁴ The following are the brief facts:

The contention by the respondent was that, the insurance policy was characterized by serious breaches of the principle of utmost good faith by the insured from the beginning of the policy up until the lodging of the claim thus making the policy void. Particular breaches of the utmost good faith were listed to be the insured lied about previous Insurance. The insured overstated the value of the subject matter of insurance contrary to the current insurance practice. Cardinal was the fact that post insurance breaches of utmost good faith the alleged accident was fake or at the very least questionable and mere hearsay.

¹¹ Kamfwa Kasongo, Preliminary Review on Insurance Legislation, 3.

¹² Rodney Lester, The Insurance Sector in the Middle East and North Africa Challenges and Development Agenda Policy Research Working Paper 5608 The World Bank Middle East and North Africa Region Financial and Private Sector Development Unit March 2011,6.

¹³ Rodney Lester, The Insurance Sector in the Middle East and North Africa, 7.

¹⁴ SCZ Judgment No 21 of 2010 (unreported)

The major issue in this appeal was the identification of the subject matter of insurance. The police failed to identify the motor vehicle as the subject matter of insurance. The court had to decide whether the motor vehicle in question insured by the plaintiff was the same vehicle that was involved in the car accident.

In the holding of the court it was found as a fact that the motor vehicle, which was insured by the plaintiff, was not the same motor vehicle which was involved in the car accident. The plaintiff did not prove her case on a balance of probabilities. Therefore, the insurer had the right to refuse the claim. From this case the doctrine of insurable interest and the utmost good faith will laid down accurately by the courts. Because of the nature of the insurance contract it is pertinent to adhere to the above mentioned principles that ensure that instances of fraud are guarded against.

In another case *Zlatan Zlatko Arnautovic v Professional Life Insurance Corporation Zambia Ltd*¹⁵ the brief facts of this case where that the Appellant contended that he insured his Mercedes Benz with the defendant under a comprehensive policy and that he had been duly paying his annual premiums to the defendant. The express and implied terms of the policy were that the defendant would compensate the plaintiff fully in the event of the loss of the insured vehicle by way of theft, and that the payment would be prompt. Thus later on the insured's motor vehicle was stolen and he promptly reported the matter to the police and filed a claim to the defendant for compensation. The respondent contended that upon loss of the subject matter of insurance, an insurance underwriter must fully investigate the circumstances of loss before indemnification and it was found that it is an implied or express term of its standard conditions of insurance that an insured has a continuing obligation of good faith and to disclose all facts to an insurer but the plaintiff did not disclose the transfer of the motor

¹⁵ SCZ Judgment No 82 of 2011 (unreported)

vehicle that took place. Further it is an express/implied term of any insurance contract that an insured can only claim for indemnity on property of which he has an insurable interest. Because of the transfer that had taken place the plaintiff did not disclose therefore, he ceased to have an insurable interest in the said motor vehicle and that an insured must act in utmost good faith at all times and must fully cooperate with the underwriter and provide such information as will enable the underwriter to establish fully the circumstances of the loss of the subject matter of the insurance contract.

The main contention in this case was that: The plaintiff failed to surrender the spare keys to the defendant to enable it to satisfy itself that the motor vehicle was not converted by a person or persons with full knowledge of the plaintiff 'and know him' that there is no evidence to establish that the said motor vehicle was not lost through theft; and in the further alternative that the plaintiff's claim is void as it is an attempted fraud on the defendant.

The plaintiff had a duty to disclose the change of ownership but failed to do so, He further disclosed that the change of ownership took place before the purported theft and the insurance interest no longer existed in the plaintiff.

The main reason for refusing the claim was the fact that cars of that type were rarely stolen in such circumstances. Holding the court below found that the plaintiff had failed to prove his claim on a preponderance of probabilities. The Supreme Court upheld the decision of the lower court as the appellant failed to prove satisfactorily account for the key to the vehicle in question.

According to Merkin¹⁶ 'where the assured makes a fraudulent claim the insurer apparently has the right to either to reject the claim or to regard the assured as having deprived himself of all

¹⁶ Merkin R, ed., *Colinvaux's Law of Insurance*. (London: Sweet & Maxwell 1997), 213.

the benefits under the policy'. Consequently, in the case of insurance on real or personal property or for that matter against liability it is sufficient for the assured to prove his loss and there is no need for him to prove his loss to demonstrate that he had an insurable interest at the inception of the policy.

Most cases that go to court in Zambia are in the minority as most cases are settled outside court¹⁷. In the case of *Trevor Genjagenga v Madison General Insurance*¹⁸ there was a potential claim of seven million kwacha for the replacement of the windscreen. The insurance company refused to honour this claim based on a technicality. They were of the view that the insured did not have an insurable interest because the insured had leased the vehicle from the bank therefore the car belonged to the bank. The plaintiff contended that the bank was the legal owner whereas he was the trustee paying off the loan. Moreover, the plaintiff stated that when taking out the insurance policy they had disclosed to the insurance company that the car was in the banks name. The courts awarded damages to the plaintiff in the tune of sixty million kwacha.

From the above cases, it can be ascertained that the Zambian courts have taken a rigid adherence to the doctrines of the principles of insurance. In the case of *Hawley v Luminar Leisure Limited and Others*¹⁹ the issue which the Judge had to determine was whether the "bodily injury" caused to the claimant was "accidental" within the meaning of paragraph B2 of the schedule to the policy, i.e. "sudden, unforeseen, fortuitous and identifiable". In this case it can be ascertained that the courts always construe an insurance policy in favour of the insured.

¹⁷ As per Mr Gregory Cornhill of Wilson and Cornhill Interviewed on the 18th April 2012

¹⁸ 2010/HPC/0527(unreported)

¹⁹ [2006] EWCA 18

It can be ascertained the courts in Zambia may appear to take a rigid view in light of adhering to the principles and doctrines of the insurance cases. The view that the Zambian courts seem to favour the insurers is not as true as there is a balance achieved. Most of the reported cases fall into the category of cases of fraud therefore, denying the insured the claim sought. The law stands where the contract is tainted with fraud the courts will not enforce such contracts. It can be surmised from the forgoing cases that the courts in Zambia seem favour the insurers.

4.5 Conclusion

From the preceding paragraphs it has been observed that certain requirements of the contract of insurance such as the utmost good faith are not expressly written down in the statute. The lack of inclusion of fundamental principles in the statutes is of great concern because such omissions create inequalities between the insured and the insurers as the regulatory systems is more in tandem of insurance adherence from a commercial perspective as opposed to individual consumers. Currently the Insurance Act focuses on the stability of the industry as opposed to the protection of the insured.

In addition, the stance taken by the courts appears to be more of a conservative approach when it comes to construing insurance policies. The courts in such instances are more likely to rule in favour of the insurers because of the nature of the cases that go before them. Generally it appears from the forgoing that, insurance laws and regulations generally protect the insurance industry, and impose onerous duties on the insured as opposed to protecting them. There is need for Insurance law reforms to take place in Zambia such as re-establishing justice and balancing the rights and duties of the insurer and the insured. This needs to be critically addressed and is especially true in relation to ensuring that the Insurance Act and The Pension Scheme Regulating Act also consider the individual consumer that

purchase insurance. Further the regulation of the industry must be strictly followed through as this in turn will afford the insured the desired protection it needs.

5.0 CHAPTER FIVE: *CONCLUSION AND RECCOMENDATIONS*

5.1 Conclusion

This study's main objective was to illustrate how the insured's power to negotiate contractual terms is very limited by the doctrines in insurance law. It further highlighted the limited bargaining power and the ambiguity of proposals as a source of contribution to the lack of contract certainty surrounding an insurance purchase, from the insured's perspective. Thus the protection of the insured is limited by virtue of the laws that govern insurance.

This paper centred its analysis on the law surrounding the protection of the insured. To this end statutory provisions in the Insurance Act and the Pensions and Insurance Authority Act were analysed. The basis of this was to examine whether the law states clearly what rights and obligations the insured ought to have. Further the purpose of the research was to evaluate the extent on how the Zambian courts handle cases in relation to the doctrine of the utmost good faith and other principles that surround the protection of the insured. Lastly, the research was conducted to show how the doctrines of insurance law can be changed so that they are coherent, clear, and fair in that they meet the reasonable expectations of both the insured and insurers.

It is concluded that the though Insurance contract principles are set out to help both the insured and insurer's: the terms in most insurance contracts weigh heavily against the insured thus the equality that is desired from the law is not put into place in practice. However, the courts in Zambia do play a fair role in interpreting the principles laid down. This said, only a minority of the cases make it to court as such there is a strong need for an ombudsman who will address the needs of both the insured and the insurer and balance the inequality currently been experienced.

Insurance legislation in Zambia needs to be clear in what the insured's rights and obligations are as opposed to mainly regulating insurance companies. There is a fundamental and strong need for certain doctrines of insurance to be codified into the Act. As regards regulation, the Insurance Act must be clear with the provisions relating to funds. It must clearly state, who will manage the fund and what the debt ratio of equity of the fund ought to be. These are very important provisions that in turn safeguard and protect the interests of the insured. Further, the Pensions and Insurance Authority must be given an effective mandate to exercise its power for instance in situations such as insolvency so that insurance companies are held accountable. The hypothesis of the study was whether insurance law is a fact or fiction. The research suggests that insurance appears to be a fiction.

In chapter two, a brief history of insurance was adumbrated to explain the genesis of insurance practice in Zambia. Thereafter, the formation and formalities of an insurance contract were particularized to illustrate to the reader conditions under which the initial process of the insurance contract begins. The research paper set out to establish that warranties and condition are unfair. Chapter two ended with why insurable interest is necessary in a contract of insurance a fundamental doctrine in establishing whether one ought to be compensated upon claiming.

Chapter three was the cornerstone of this research. It set out to demonstrate that the doctrine of the utmost good faith is onerous especially in relation to individuals that purchase consumer protection. To this end, the doctrines of the utmost good faith, the duty to disclose, and misrepresentation were discussed in detail to establish whether the protection of the insured is a fiction or fact.

Chapter four of this research, delved into the legal and regulatory framework of the insurance industry in Zambia. This was undertaken in-order to assess whether this framework is in

tandem with principles that are meant to benefit and protect the insured. Specific statutes that relate to insurance were evaluated to carry out this assessment. The emphasis of this chapter was to analyse the law surrounding the insured in relation to their protection.

In summation the insurance industry does not differentiate the rules that govern insurance between commercial consumer and that of individual consumers. A commercial consumer with regard to insurance are usually better placed to understand the rules and principles of insurance. This is usually because they have departments that handle insurance with experts that address issues relating to insurance. Whereas an individual consumer, despite the fact they may be literate, an understanding of the doctrines and rules that regulate insurance may not come that easily. This may result in the individual consumer losing the protection they had bargained for. The underlying findings suggests that the regulatory regime should be flexible enough to encompass both consumer and commercial insurance, while demonstrating certain and clear objectives.

5.2 Recommendations

The following are recommendations as to how the law may be improved upon in order to apply equally and effectively the protection of the individual consumer with regard to insurance. Furthermore the recommendations are made in an attempt to improve upon the legal framework governing the protection of the insured.

1. Clarifying the Doctrines and Principles in Insurance Law

(i) It has been established that the principle of *uberrimae fidei* (of absolute good faith) is a fundamental principle that governs both parties to a contract of insurance. Therefore specific statutory enumerations are required for protecting the interest of policyholders so that unintended minor mistakes in disclosure do not lead to a loss of coverage. So far as

practicable insurers should avoid asking questions which require expert knowledge beyond that which the proposer could reasonably be expected to possess or obtain or which would require a value judgement on the part of the proposer. The proposer's duty should be restricted to answering to the best of his knowledge and belief.

(ii) As observed the current state of the law is fragmented and complex and that future reform should be directed towards constructing a coherent regime for insurance contracts that meets the objectives of certainty and clarity, while being sufficiently flexible to encompass both consumer and commercial insurance.

(ii) At present consumers can lose out when innocent errors on proposal forms are deemed "non-disclosure" of something that affects insurers' risk assessment, or "misrepresentation" where the consumer makes an incorrect statement of "a fact that is material". It is submitted that new laws are needed to restore consumer confidence in personal policies. This may be achieved were the errors would have caused a premium increase or special terms, the claims should be met proportionally rather than being turned down altogether. If an undisclosed fact would have doubled the premium, any resulting claim should be halved.

2. Improvement of the Regulatory Framework in Zambia

(i) In order to ensure authorised insurance companies meet their liabilities under policies the law must be amended to include that the Insurance Act be administered by the policyholder's protection board, which will have the duty to ensure payment and to raise the funds from which payment is to be made. The main effect of an independent body will be to guarantee to the policyholders of an insurance company in liquidation that the obligations of the company will be met either fully or substantially by the insurance industry as a whole. This is

pertinent in a developing country where companies can run away after making their profits while leaving innocent victims with no recourse.

(ii) It is recommended that the individual policyholder protection can be enhanced by ensuring the Pensions and Insurance Authority is empowered to effectively monitor insurance companies. This can be achieved by ensuring that the Act has provisions that stipulate the responsibility of insurance companies by spelling out clearly the terms and conditions of insurance policies.

(iii) The law should be amended to ensure that the Insurance Act includes a provision that empowers the PIA has authority by ensuring that an independent body monitors the funds of the insurers and certain limitation ought to be spelled out in terms of the debt equity ratio. This will allow the PIA to step in if the Insurance Company falls below its funds. This in turn will ensure that the funds are well protected in the best interests of the policyholders.

(iv) The Competition and Consumer Protection Act¹ should have a section dedicated to insurance contracts as a starting point. Currently the Competition and Consumer Protection Act of 2010 does not provide for any protection related to insurance. Further the sections that purport to protect consumers do not address the protection of the insured. Section 53 -54 which are aimed at protecting the consumer are silent on the protection of the insured. Since insurance contracts are a special breed of contract unlike ordinary contracts the consumers in insurance contracts ought to be distinguished from ordinary contracts. Thus the section in the Competition and Consumer Protection Act should protect consumers by regulating the sale of insurance. The Act should promote consumer awareness of rights under their insurance plans that require binding arbitration to resolve any disputes.

¹ CAP of the Laws of Zambia

3. Improving the Confidence of the Insurance Industry

(i) A desirable associated developmental step would be to increase consumer awareness of insurance and its role. There should be a joint industry and governmental program to educate the public about the role of insurance and to generate greater trust in the sector.

(ii) Mechanisms should be put in place in the industry to set up an insurance ombudsman Bureau which should hear complaints from insured's and to make awards that are reasonable. The ombudsman should consider not just the law but what is also reasonable and fair. This will allow some form of mitigation for some of the harsher effects that result from strict enforcement of the insurers legal rights in the courts of law. More importantly such measures will serve the ultimate purpose of protection in so far as mitigating the harshness of the duty, at least in so far as it applies to consumer insured's and small businesses.

(iii) Renewal notices should contain a warning about the duty of disclosure including the necessity to advise changes affecting the policy which have occurred since the policy inception or last renewal date, whichever was the later.

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