PROTECTING THE PARTIES TO AN INSURANCE CONTRACT IN INSURANCE COVER DISPUTES

By

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Being a Directed Research essay submitted to the University of Zambia Law Faculty in Partial fulfillment of the requirements for the Award of the Bachelor of Laws (LLB) Degree.
DECLARATION

I, CHISENGA MUTALE, do hereby declare that this Directed Research Essay is my authentic work and to the best of my knowledge, information and belief, no similar piece of work has previously been produced at the University of Zambia or any other Institution for the award of Bachelor of Laws Degree. All other works in this essay have been duly acknowledged. No part of this work may be reproduced or copied in any manner without the prior authorization in writing of the author.

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ABSTRACT

Insurance is undeniably essential in every society as risk can occur at any time. Hence, insurance cover is a necessity and therefore it becomes important to ensure that those who take up insurance receive the full benefit of such cover. The purpose of this research was to illustrate how important it is ensure that there is adequate protection to those that are insured under a policy of insurance. Therefore it was submitted that an understanding of the fact that a contract of insurance is like any other contract was an essential first step in ensuring adequate cover or protection. This paper therefore traced the formation process of insurance contracts. Further, the special nature of insurance contracts was essential to note in that the contract of insurance being of the Utmost good faith means that both the insured and the insurers have a duty to disclose all material facts. This is of importance in the sense that misrepresentation and non-disclosure rules are at play in insurance contracts. It was therefore important at this stage to examine the impact of contract law on insurance policies as the contract aspect makes insurance policy claims more susceptible to the insurers avoiding claims where there are misrepresentations or in instances where the insured does not disclose certain facts. At this point, there was a need to examine some of the duties that parties to an insurance contract are obligated to perform as these play a role in safeguarding the policy and ensuring that a claim made is successful. In addition, the research embarked on an analysis of how the courts in Zambia interpret insurance cover disputes following the case of Mattaniah Investments Ltd v Zambia State Insurance Corporation. Furthermore, the research analyzed how the courts in other jurisdictions particularly Canada, South Africa and America have interpreted insurance disputes. Lastly, this research outlined some recommendations as possible mechanisms to ensure that the insured and insurers alike are protected under the insurance contract.
DEDICATION

“This work is dedicated to my late father, Michael Mutale, and my mother Emma Mutale.

Dad I wish you were here to witness this time in my life. I am forever grateful to you for
instilling in me the will to persevere no matter what life throws me. Mum, thank you for not
giving up on me, for believing in me and helping me raise Emma, I would not be here today
without you.”
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CHAPTER ONE

1.0 INTRODUCTORY CHAPTER

1.1 INTRODUCTION

This chapter introduces the research structure by discussing some of the essential elements of a valid contract of insurance, as there can be no insurance cover if there is no offer and acceptance. Therefore, this chapter basically, traces the formation process of a contract of insurance.

A contract of insurance may be broadly defined as an agreement in which 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 on the occurrence of a specified event whose happening is uncertain\(^1\).

Cover refers to the insurer’s promise and obligation to pay or make good the loss in certain circumstances such as the happening of the event insured against\(^2\). Therefore, the whole essence of insurance cover is to guard against risk. In Zambia like in most other countries, the starting point for one to understand how a contract of insurance comes into being entails having an understanding of the Law of Contract and the common law rules as to capacity, offer and acceptance. An insurance contract is concluded when the parties agree to be bound in accordance with certain terms.

There must be an offer by one party and an acceptance on the terms in which it was made by the other. In *British Oak Insurance Company v Atmore*\(^3\), Schreiner J. considered the essentials of an insurance contract by stating that:-

\(^1\) M. Malilla. “Commercial Law in Zambia: Cases and Materials”(University of Zambia Press,2006) 462
\(^3\) (1939) T.P.D 9
‘it is not without importance to consider the nature of the simplest kind of contract relating to insurance in which the bare minimum is stated, namely, the nature of the indemnity, the period of the insurance and the amount of the premium. If such an agreement were made at one time there seems to be no reason to doubt that a contract binding on both the parties would be in existence’.

Normally it is the insured and not the insurer who makes the offer in a contract of insurance. The insurer merely invites the public to do business while the insured ‘offers’ to insure. The offer is made in an application known as a proposal. Invariably insurers contract on their own fixed terms and the applicant proposes that the insured issues him a policy in its usual form. The proposal consists of a series of questions, which the proposer is required to answer. In all forms, the insurer requires to know the proposers name, address and occupation. The proposal seeks information on the nature of the risk.

The insurance contract is complete only when the insurer accepts the proposal unconditionally. If a policy is issued in accordance with the terms of the proposal, there is an acceptance of the proposal. Which then in most cases becomes the basis of the contract. At this stage, it can be said that there is a valid contract of insurance between the parties. The insured becomes entitled to payment upon the occurrence of the event insured against. He must therefore prove that the risk insured against has happened as the onus of proof rests on him. This is the end product of an insurance contract and it is called a claim. However, problems do arise at this stage, such as where the insurer refuses to make good the promise. It then becomes the duty of the court to settle the dispute between the parties. When interpreting an insurance contract, the court must ascertain the intention of the parties. This must be

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7 Outboard Marine Corporation v Liberty Mutual Insurance Company (1993) 154 Ill. 2d 90,102
gathered from the language of the contract itself. If the language is clear the court must give effect to what the parties have themselves said. The idea is that a policy of insurance has to be construed like any other contract; it is to be construed from the terms used in it which terms are themselves to be understood in their primary, natural, ordinary and popular sense.

Since the policy is drafted in a language chosen by the insurers it must be taken against them. It must be construed contra proferentem, against those who offer it.

An insurance contract involves agreement to do something (indemnify the loss) in return of the payment of premiums, thereby creating a legal relationship between the parties to the contract (insurer and insured) all the basic elements of ‘normal’ contracts are therefore to be found in an insurance policy or contract.

The risk in an insurance policy represents so much of the burden of the insured’s potential loss as is, in consideration of the premium, transferred to the insurer. In every insurance contract there must be something insured. The definition of the subject matter is fundamental to the contract, for it is only in respect of the subject matter as defined that the insurer assumes liability. It is a question of construction whether the property described corresponds with the property which is the subject of a claim. The source of the loss is called the peril or hazard. The loss caused by the peril must fall within the limits and scope of the policy. If the risk does not attach to the subject matter there can be no loss.

The special characteristics of insurance contracts may be summarized in a nutshell. First, the subject matter of insurance contracts is an abstract and intangible one. Second, the manner of entering into an insurance contract differs from that of other contracts. Third, the insurance

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contract itself is usually a standard, or adhesion, contract and therefore the Insured’s freedom to negotiate and ability to influence its terms are limited. Fourth, the contents of insurance contracts are lengthy and strewn with concepts that are difficult for a non-professional to understand. Finally, the transaction is often perceived to be a transactional contract when in fact it is a relational contract. These unique characteristics of insurance contracts have had a direct influence on the formulation of the duties of disclosure and rules of interpretation applicable in this field, as well as on the symbiotic relationship that exists between the disclosure and interpretation doctrines. The rules of interpretation, just like duties of disclosure, function differently in insurance contracts than in other contracts because they are modified to respond to the complexities that characterize insurance contracts.

There are a number of special principles of insurance contracts\(^\text{14}\). Insurable Interest is one such principle which can be defined as the legal right to insure arising out of a financial relationship at law between the insured and the subject matter of insurance\(^\text{15}\). In the case of *Macaura v Northern Assurance Company*\(^\text{16}\), Mr Macaura effected a fire policy on an amount of cut timber on his estate. He had sold the timber to a one man company of which he was the only shareholder. A great deal of the timber was destroyed in a fire and the insurers refused to meet the claim on the basis that he had no insurable interest in the assets of the company of which he was the principle shareholder. What was established by the case was that the relationship between the timber and Mr Macaura had to be one recognised or enforceable by law, such a relationship did not exist in this case as his financial interest was limited to the value of his shares and he had no insurable interest in any assets of the company.

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\(^{16}\) (1925) AC 619
The contract of insurance is of the utmost good faith that is it is a contract *uberrimae fidei*. The reasoning behind this principle is that contracts of insurance are founded on the facts which are nearly always in the exclusive knowledge of one party and unless this knowledge is shared, the risk insured against may be different from that intended to be covered by the party in ignorance. There are generally no formalities required and the contract is complete and enforceable by both parties once they have agreed upon the essential terms. Agreement must be reached as to the articles insured; the risks insured against; the cover granted; the amount of premium payable; the term or period for which cover extends and any other conditions such as immediate notice of loss. All the legal requirements must be met as an insurance contract is said to be concluded when the parties agree to be bound in accordance with certain terms.

How the insurance policy is constructed will depend on the risk to which the insured is exposed. This is because an insurance contract covers an insured against loss caused by a peril named in the policy. Therefore, the risk must be described in the contract of insurance. The cause of the loss should be an insured risk in order for the insurance company to indemnify or compensate the insured. In the case of *Mattaniah Investments Limited v Zambia State Insurance Corporation*, the High Court stated that the sole issue to be determined by the court was whether, or not the loss suffered by the plaintiff was covered under the policy of insurance. The insured must prove that the risk insured against has happened. The policyholder bears the burden to show that a particular loss falls within the terms of the insuring agreement.

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18 London General Omnibus v Holloway (1912) K.B. 86
22 (2009) HPC 789
1.2 STATEMENT OF THE PROBLEM

The necessity of insurance cannot be over emphasized as it is the commonest and most efficient means of guarding against risk. The whole idea of insurance cover is to protect the insured from loss. However insurance business is marred with many complications as the process of effecting risk transfer is highly technical and not properly understood by members of the public who contemplate taking up insurance cover. Further the process of making claims is met in most cases by refusal by the insurers to pay the insured. The insured lacks an understanding of what he is getting himself into under the contract of insurance as it is a contract which brings with it a number of obligations and requirements. This often has the effect of preventing the insured from being covered under the right policy. There is need for the insured to understand what he is insuring himself against. This is because the policy is in form a unilateral undertaking by the insured on the happening of the specified event.

It must be noted that it is not every loss that will bring about the insurers liability to settle the claim. The event insured against is always defined in the insurance contract. In the case of London and Lancashire Fire v Boland\(^2\), a policy on a bakers shop against loss by burglary, housebreaking and theft provided exemption to the insurer from loss happening through riot. Armed men entered the shop and stole money from the shop. It was held that that incident constituted a riot and therefore the insured could not recover. Therefore the insured could not recover because of the exemption.

In the case of Mattaniah Investments Limited v ZSIC, the issue to be resolved was the meaning of the word accident which was not defined in the policy. The High court held that the word accident could only be construed in the sense in which the plaintiff reasonably

\(^2\) [1954] 1QB 247

6
understood it since the policy was drafted by the insurers without the participation of the plaintiff.

In order to counter the problems faced under a policy of insurance, it is imperative to have an understanding of the obligations under the insurance contract.

However, it is important to note at this point that what is of critical importance is the obligation placed on the insured that in course of negotiating insurance cover, the insured should clearly understand the necessity of the proposed cover before taking it up and he should be fully convinced about its benefit. This is because in every insurance contract there must be something insured which will normally depend on the risk to which the insured is exposed. Therefore the three main ingredients of the promise placed on the insurer is based on the subject matter which the insured expects to be exposed to, the peril and the circumstances affecting the subject matter, the peril or both.

1.3 OBJECTIVES OF THE STUDY

1. To investigate the reasons and causes of the problems faced by the insured under the insurance policy.

2. To help any would be insured have an understanding of how insurance policies are formulated and interpreted thereby reducing the obstacles faced.

3. To suggest practical solutions to the problems faced under the insurance policies so as to ensure that the insured is adequately protected.

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1.4 SIGNIFICANCE OF THE STUDY

This study is of great importance in that it ensures that the insured reaps adequate protection from the insurance policy. The whole purpose of insurance cover is to guard against risk. Therefore this study seeks to make the life of any would be insured easier by looking at how insurance companies go about formulating and constructing insurance policies and also look at how claims are handled in the event that the insured suffers loss. This study places its focus on insurance cover in Zambia as it is today.

1.5 SPECIFIC RESEARCH QUESTIONS

I. How are Insurance Contracts formulated in Zambia

II. What is the effect of Contract law on insurance policies

III. What are some of the key elements that must be agreed upon before an insured is said to be covered under an Insurance policy

IV. What are the obligations of the insured under an insurance policy

V. What is the cause of the failure of most insurance claims

VI. How can such failures be minimized

1.6 METHODOLOGY

This study will embrace desk research investigations through conducting interviews with various Insurance companies. The desk research will be done through the collection of secondary data from relevant law reports, books, journals, dissertations and internet sources. The interviews to be conducted with Insurance companies such as Zambia State Insurance
Corporation, Professional Insurance to name but a few will provide an in depth insight into the actual working of Insurance because they deal with Insurance on a daily basis.

1.7 CONCLUSION

This chapter endeavoured to introduce the contents of the research paper by establishing that the contract of insurance is like any other contract and is, therefore governed by the general rules of contract law hence, the need to satisfy the requirements of offer and acceptance, there must be an agreement between the parties before a valid contract can be said to be in existence. The starting point for the formation of an insurance contract is the filling in of the proposal form. There is also the need for the insured to pay a premium to the insurers. The insurance contract is a special kind of contract, which requires the insured to have insurable interest in the property he is insuring. Further, there is a mutual duty on the parties of the Utmost Good Faith. This chapter also looked at the fact that the loss that occurs must fall within the category insured otherwise the insurer will not be liable to pay. The insured must be, adequately covered in that the scope of the policy must include the subject matter insured and the loss that occurs must be, covered under the policy. The next chapter looks at the impact of contract law on insurance.
CHAPTER TWO

2.0 IMPACT OF CONTRACT LAW ON INSURANCE POLICIES

2.1 INTRODUCTION

This chapter examines the impact that contract law has on insurance policies. In order to establish the effects if any that the insured is more likely to face based on the mere fact that insurance contracts are subject to the law of contract and whether this further decreases the insured’s chances of claiming successfully under the insurance policy.

In modern law, the word 'contract' generally means an agreement intended by the parties to it to have legal consequences and to be legally enforceable\(^\text{25}\). The instrument containing the contract of insurance is called a policy of insurance\(^\text{26}\). A contract of insurance is one having as its object the endeavour to avert loss from the party liable to suffer it, by shifting the possible loss on to the shoulders of others who are willing for money or some other consideration to take the risk\(^\text{27}\).

A contract involves offer and acceptance. The general principles of contract law requires that the parties to the contract while giving his offer or accepting someone else’s offer should have *consensus ad idem*, that is between the parties to the contract there must be a meeting of the minds, that is to say there must either be an express agreement or the circumstances must either be such as to admit of a reasonable inference that the parties were totally agreed\(^\text{28}\).

Hence, an acceptance, which the law requires to be unqualified, unequivocal, final, explicit, should correspond to the offer. In cases where the acceptance of a party does not comprehend

\(^{25}\) Rose and Frank Co v J.R Crompton and Bros Ltd(1923)2KB 261
\(^{27}\) M.Rogers. "Outline of the Commercial Law in East Africa" (1969)133
the offer made, then such acceptance does not lead to the conclusion of the contract and hence the contractual liability does not originate for the parties involved in the said contract. Despite the similarities between an insurance contract and any other contract there is a difference between the subject of the insurance and the subject of the contract. This is because the subject of the insurance is the property insured. In *Castellan v Preston*, it was stated that what is insured in the fire policy is not the bricks and the material used in building the house but the interest of the assured in the subject matter of the insurance, not the legal interest but the beneficial interest. The subject of the contract is the payment of money on the happening of the event insured against.

Contracts of insurance are *Uberrima fidei*, that is of the Utmost good faith. Special rules apply to insurance contracts such as Misrepresentation and Non-disclosure which differ from the rules applicable to contracts generally. Insurance contracts by their very nature require greater amount of good faith because the insurer bases their decision on whether to insure on the information supplied by the prospective insured.

### 2.2 MISREPRESENTATION

A contract of insurance is voidable for the misrepresentation of a material fact. Section 90(1) of the Insurance Act states that "notwithstanding anything contained in or incorporated in a policy, a policy shall not be avoided by reason only of an incorrect statement made in a proposal on the faith of which the policy was issued by the insurer, unless the statement was material to the risk and was made in the knowledge that it was untrue or with no reasonable belief that it was true."

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29 (1883) 11 OBD 380
31 R. Lowe, "Commercial Law" (London: Sweet and Maxwell, 1976) 375
32 Insurance Act, number 27 of 1997
A representation is not part of the contract but is something stated by one party as an inducement to the other party to make the contract. Misrepresentation in a contract results when a party to the contract makes a misleading statement during the negotiations leading to the contract. It has been 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 term. The party induced to enter into a contract by reason of a misrepresentation can refuse to carry out the undertaking, resist any claim for specific performance, and if necessary, have the contract set aside by means of the equitable remedy of rescission.

2.3 NON-DISCLOSURE

The rationale behind the duty of disclosure stems firstly from one of the parties being presumed to have means of knowledge which is not accessible to the other. When a person applies for insurance he is in possession of all the information, whereas the prospective insurer knows nothing at all. However, the general rule is that each party to a contract is entitled to make the best bargain he can and although he must not make any false statement, he is on the other hand not bound to draw the attention of the other party to everything that might influence his judgment.

In insurance contracts, involves parties who are not at all at par with each other and that one party may have some advantage over the other either economically or with other resources, thus in place of commercial relationships trust and confidence should be in place, requiring higher degree of honesty and disclosure of information. On this basis, the rationale for the duty of disclosure in insurance contract can be drawn accordingly to redress the imbalance.

Hence the insured is under a duty to disclose all material facts of which he knows or ought to

know. The principle of full disclosure was stated by Lord Blackburn, ‘in policies of insurance, there is an understanding that the contract is of good faith, that if you know any circumstances at all that may influence the underwriters opinion as to the risk he is incurring and consequently as to whether he will take it or what premium he will charge if he does take it, you will state what you know.’

However, no such analogy can comprehensibly demonstrate the rationale behind the rule than Lord Mansfield’s observation in Carter v Boehm. ‘Insurance is a contract upon speculation, the special facts, upon which the contingent chance is to be computed lay most commonly in the knowledge of the insured only: the under-writer trusts to his representation, and proceeds upon the confidence that he does not keep back any circumstance in his knowledge, to mislead the under-writer into a belief that the circumstance does not exist, and to induce him to estimate the risk as if it did not exist’.

Hence, the principle of utmost good faith under which the duty of disclosure in insurance contracts is applied bases itself to the principle of equity as well as more simpler idea of common sense whereby it is only natural that the information that one party knows but not the other should be disclosed as that piece of information can affect the consent of the parties entering into the insurance contract.

If the assured fails to make such disclosure the insurer may avoid the contract. This is a mutual duty though it has a greater impact on the insured. In Banque Franciere de la Cite v Westgate Insurance Co Ltd, both the Court of Appeal and the House of Lords held that the insurer has a duty to disclose all facts known to him which are material either to the nature of the risk sought to be covered or the recoverability of a claim under the policy which a prudent

39 Brownlie v Campbell[1880] 5 AC 925
40 [1766] 3 Burr1905
42 [1990] 1 QB 65
insured would take into account in deciding whether to place the risk for which he seeks cover with the insurer.

Thus, the insurance contract necessitates disclosure of all relevant facts and information by the parties to the contract. Such contracts uberrimae fidei require parties to disclose all information in their respective possession while entering into the contract. The concealment of a material circumstance avoids the policy.\(^{43}\)

2.4 HOW INSURANCE WORKS

Insurance is intended to be an effective risk-transfer mechanism, bringing peace of mind to the purchaser. The insured exchanges the risk of a loss of an unknown amount for the payment of a known premium. This process performs a valuable function in enabling the would be insured to plan their financial affairs prudently.\(^{44}\) If the insurer avoids a policy, the transfer of risk fails and the peace of mind has proved to be illusory. Where the insured had a legitimate and reasonable expectation of cover, that expectation should be respected. If not confidence in the market would be undermined. The law imposes a duty on insured to tell insurers anything which would influence the judgment of a prudent insurer in fixing the premium or deciding whether to take the risk.\(^{45}\)

The problem is that most insured’s have little idea of what might influence a prudent insurer. Yet the penalties for failure to disclose information to insurers are harsh. In *Kausar v Eagle Star Insurance Company limited*\(^{46}\), Lord Staughton stated that avoidance for non-disclosure is a drastic remedy which enables the insurer to disclaim liability after and not before he has

\(^{43}\) Brownlie v Campbell (1880) 5 AC 954

\(^{44}\) The Law Commission. "Insurance Contract Law: Misrepresentation, Non-disclosure and Breach of warranty by the Insured" (London.2007)11

\(^{45}\) The Law Commission. "Insurance Contract Law: Misrepresentation, Non-disclosure and Breach of warranty by the Insured" (London.2007)11

\(^{46}\) (2000) Lloyds rep 154 at 157
discovered that the risk turns out to be a bad one thereby leaving the insured without the protection which he thought he had contracted for.

If an insured fails to disclose material information, the insurer may treat the policy as if it does not exist and refuse all claims under it. The duty to disclose may operate as a trap for consumers, who are usually unaware that the duty exists. Policyholders may be denied claims even when they have acted honestly and reasonably\(^47\). The remedy may be overly severe. If the insured has made a mistake, the insurer may refuse all claims, even claims which it would have paid had it been given full information.

Proposal forms may sometimes form the basis of the contract. In such instances the insurers are entitled to avoid liability if any answer in the proposal form is incorrect irrespective of whether the insured made the answer fraudulently or innocently and irrespective of whether the answer relates to a material fact\(^48\). Thus, in *Davsons Ltd v Bonnin*\(^49\), the proposal form for the insurance of a lorry against fire required the proposer to state the full address at which the lorry would be garaged, unfortunately the wrong address was inserted. A claim was made under the policy when the lorry was lost by fire. The House of Lords held that as the proposal form was clearly expressed by the terms of the policy to be the basis of the contract, the answer in the proposal form amounted to a contractual promise as to its accuracy. Since the answer was not accurate the insurers had a right to avoid the policy for breach.

In law, this means that if any statement is incorrect, the insurer may refuse all claims even if the mistake is unimportant. The case of *Lambert v Co-operative Insurance Society Ltd*\(^50\), illustrates the problems with the duty to disclose. When Mrs Lambert insured her family’s jewellery, the insurer did not ask about her husband’s previous convictions and she did not

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\(^49\) [1922] 2AC 413

\(^50\) (1975) 2 Lloyds Rep 485
mention them. When Mrs Lambert claimed £311 for lost jewellery, the insurer avoided the policy even though Mr Lambert was not involved in the theft as the theft had been committed by unknown persons. The Court of Appeal held that the insurer was entitled to do so. The conviction was a material circumstance, which would have influenced a prudent insurer. It did not matter that a person in Mrs Lambert’s position would not have realised this. The law was clear, though not necessarily fair.

Insurance cover provides an insured with protection in the event that loss occurs, provided that the loss that occurs is a covered loss under the policy of insurance. Contracts of insurance may either be contracts of indemnity or contracts of non indemnity insurance\(^51\). In contracts of indemnity insurance the insured is entitled to recover the actual commercial value of what he has lost through the happening of the event insured against while contracts of non indemnity insurance the sum which the insured is entitled to receive from the insurer does not necessarily bear any relation to the actual loss suffered by the insured\(^52\).

\section*{2.5 DUTIES OF THE INSURED}

All contracts of insurance place certain requirements on the insured both before and after a covered loss has occurred\(^53\). For example, all insurance policies require that an insured notify the insurer of a covered loss and cooperate with the insurer in the investigation of the loss and in the pursuit or defence of any claims arising out of the loss. Traditionally, if an insured failed to comply with such notification or cooperation requirements, the insurer could flatly deny coverage of the claim\(^54\). It is the general practice for insurance contracts to contain terms stipulating the steps which the assured must take after the occurrence of the event insured against. Insurance policies require the policyholder to provide timely notice of a

\begin{itemize}
  \item \textsuperscript{51} G.Gordon. "South African Law of Insurance" (Wynberg: Juta and Company,\textsuperscript{2\textsuperscript{nd}} Edition.1969)77
  \item \textsuperscript{52} G.Gordon. "South African Law of Insurance"(Wynberg: Juta and Company,\textsuperscript{2\textsuperscript{nd}} Edition.1969)78
  \item \textsuperscript{53} The Chartered Insurance Institute. "Contract Law and Insurance"(Cambridge: Mackays.2004)4/5
  \item \textsuperscript{54} The Chartered Insurance Institute. "General Insurance Business" (Cambridge: Mackays.2003)11/2
\end{itemize}
claim to the insurer so that it may respond through investigation, defence, third-party claims or other appropriate means. Often the contract stipulates the time and manner in which the assured must notify the event or loss. In *Layher Ltd v Lowe*, it was held that the assured was not obliged under a clause requiring the assured to notify the insurer of an occurrence likely to give rise to a claim, to notify the insurer of the mere possibility of a claim. The insurer can defeat coverage if notice is late.

2.6 INTERPRETATION OF INSURANCE POLICIES

The insurance contract by its very nature is susceptible to misrepresentations and non-disclosure. It is also prone to involve disputes regarding interpretation of the terms used in the policy. It therefore becomes of paramount importance to interpret what exactly is covered and not covered by the insurance policy. The courts have various rules and guidelines regarding insurance coverage. An insurance contract being a contract must be interpreted pursuant to rules of contract law. Overall, courts approach disputes over insurance coverage as a subset of contract jurisprudence, but they are sensitive to the special nature of the insurance-contracting regime. In theory at least, this notion is even-handed. Policyholders should not pay premiums in vain, and insurers should not be fleeced by slippery policyholders.

In order to determine the intent of the parties to the insurance contract and the meaning of the words used on the insurance policy courts have recognised that they must construe the insurance policy as a whole, taking into account the type of insurance involved, the risks that were agreed to be undertaken by the insurance company and the subject matter or property

56 [1997] 58 L.R 42
that is being insured. Courts focus on the language used as a means to determine the intent of the parties. Thus where courts are presented with an insurance coverage question the focus is often on whether the language of the policy itself is ambiguous. In practice, this ambiguity analysis favours policy construction that finds or enhances coverage. For example, where two equally plausible interpretations of a disputed provision exist, the interpretation permitting greater indemnity will prevail. Policyholders should get the coverage to which a reasonable person would be entitled under the circumstances, while insurers should not pay for losses outside the reasonably intended scope of the policy. The text of a contract or rather the insurance policy determines the meaning of the contract hence courts are reluctant to interpret the meaning further. The overriding principles that controlling the question are that if the words contained in the insurance policy are clear and unambiguous, a court is to afford those terms their plain, ordinary and popular meaning and apply them strictly as written. Similarly in the case of Thompson v Equity Fire Insurance Co, a shopkeeper took out a fire policy which exempted the insurer from liability for loss or damage occasioned while gasoline is stored or kept in the building insured. The shopkeeper had a small quantity of gasoline for cooking only. A fire occurred and caused considerable damage. The court held that the insurer was liable for the loss. The words ‘stored or kept’ in their ordinary meaning implied a significant quantity and brought up the notion of warehousing or keeping in stock for trading.

Further courts construe insurance policies in such a way as to take in the reasonable expectations of the parties, a loss will be covered where coverage is consistent with the

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61 [1910] AC 592
policyholder's objectively reasonable expectations\textsuperscript{62}, even if a painstaking study of the insurance policy would negate those expectations. Courts interpreting policy language, assigning persuasion burdens, dealing with adhesion and ambiguity, and assessing the fairness of a contract term are often influenced by whether a given result is more consistent with the objectively reasonable expectations of the litigants\textsuperscript{63}. This reasonable expectations doctrine recognizes that expectations can vary between policyholder and insurer. Just as in general contract law a unilateral mistake will not make a contract voidable, the court will not nullify a policy where views differ\textsuperscript{64}. Rather, it must decide which party's expectation is more reasonable. These cases are often difficult and unpredictable. On one hand, the insurer is an expert entity regarding risk distribution and actuarial figures\textsuperscript{65}.

The insurer can be expected to cover things that can be profitably covered and avoid promising to cover things that will lead to insolvency\textsuperscript{66}. On the other hand, the insurer may not have made the policy's limitations clear, may miscalculate, or may attempt to take advantage of a particular policyholder or class of policyholders to improve its bottom line or solve a bad underwriting year. In these cases, courts must exercise sound judgment to render a decision that makes the policy do what it was intended to do even if the parties now dispute that intent. In these instances, courts occasionally find or exclude coverage even if the most natural reading of the text of the policy is to the contrary\textsuperscript{67}. Where the policy language is susceptible to more than one reasonable interpretation, the language is deemed to be ambiguous and will be construed against the insurer as the drafter of the policy language. "If two constructions are possible the court will usually prefer a construction which will make

\textsuperscript{63} Keene Corporation v Aetna Casualty and Surgery(1981) DC 667 F.2d 1034
the policy effective, rather than ineffective\textsuperscript{68}. In \textit{Frewin v Poland}\textsuperscript{69}, an author who insured his manuscript against loss resulting in the necessity to re-write was held entitled to recover under the policy when a loss occurred, even though he did not in fact re-write the book. The \textit{Contra proferentem} doctrine is sometimes referred to as the "contra insurer" doctrine because it is to be construed more strongly against the party who prepared it, that is in the majority of cases the insurance company\textsuperscript{70}. However, insurance companies do not always lose linguistic battles. On the contrary, they win at least their fair share because they are professionals with vast experience in using language that will define covered claims firmly, if not always clearly\textsuperscript{71}.

In determining whether a term is ambiguous courts usually give words their ordinary rather than technical meaning unless the parties' prior course of dealing or custom in the industry calls for application of a technical term\textsuperscript{72}. Dictionary definitions are not determinative unless they square with common usage\textsuperscript{73}. By their very nature, dictionaries define words in the abstract rather than in the context of a specific insurance policy\textsuperscript{74}.

In addition, courts will not invoke the ambiguity doctrine in order to provide coverage in bizarre situations obviously outside the intent or expectations of the parties or where the coverage sought would undermine the effective operation of the insurance markets or otherwise run foul of public policy. In \textit{Houghton v Trafalgar Insurance Co}\textsuperscript{75}, a four seater motor vehicle was covered by a policy that excluded liability if it was used to carry a load in excess of that for which it was construed. The car was carrying two extra passengers when an accident occurred. The court had to consider the meaning of the word 'loads' in the policy.

\textsuperscript{68} R.Lowe, "Commercial Law" (London: Sweet and Maxwell.1967)392
\textsuperscript{69} (1968) 1 Lloyds Rep. 100
\textsuperscript{73} Lake v Summons [1927]AC 487
\textsuperscript{74} Lake v Summons [1927]AC 508
\textsuperscript{75} [1954] 1 QB 247
and held that it was intended to cover lorries built to carry specified loads and did not apply to the carriage of passengers.

Furthermore, a court in construing the insurance policy language is not to pervert the plain language of the policy in order to create an ambiguity where none exists. Courts are not to adopt an interpretation that is strained, forced, unnatural or unreasonable or one that leads to an absurd result.

An increasing number of courts are requiring that the insurer show that it has been prejudiced in some way before it can deny coverage. This requirement of showing prejudice is referred to as the insurer prejudice rule. This has the effect of preventing the insurer from denying claims made as a matter of right. In the same way there is need to prevent the insurer from declining claims in cases where the basis of the denial stems from the words used in the insurance policy. This principle of contract law works both ways in insurance disputes. Insurers cannot expect premiums for policies sold through high-pressure tactics and cannot avoid their obligations by fraudulently obtaining agreement to exclusions. Conversely, policyholders cannot obtain coverage by using misrepresentations to procure the policy or by making a fraudulent claim.


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2.7 CONCLUSION

This chapter has attempted to show that contract law poses a challenge on the insured’s ability to claim successfully under an insurance contract in that the special rules of Misrepresentation and Non-disclosure apply and therefore may operate to disadvantage the insured where he is unable to claim based on the existence of a misrepresentation. Furthermore, the duty of disclosure poses another hurdle on the insured’s ability to make a claim hence the need for reform to ensure that the insured reaps the benefits of his policy upon the happening of the thing insured against. Disputes relating to the interpretation of insurance policies must aim to strike a balance between the reasonable expectations of the insurer and insured but mostly the interpretation must determine the intent of the parties. Courts must borrow from the insurer prejudice rule, which requires the insurer to show how it has been prejudiced before it can deny coverage to the insured.

The next chapter analyses the Mattaniah Investments Ltd v Zambia State Insurance Corporation Case\(^8\), so as to show how the courts in Zambia go about resolving insurance cover disputes.

\(^8\) (2009) HPC 789
CHAPTER THREE

3.0 AN ANALYSIS OF MATTANIAH INVESTMENTS LIMITED V ZAMBIA STATE INSURANCE CORPORATION AND ITS IMPACT ON INSURANCE LAW IN ZAMBIA

3.1 INTRODUCTION

This chapter examines how the courts in Zambia settle insurance cover disputes in order to establish the key principles that are employed to ensure that section 79(1) of the Insurance Act\textsuperscript{82} is observed. Section 79(1) provides 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.

3.2 FACTS OF THE CASE

\textit{Mattaniah Investments Limited v Zambia State Insurance Corporation}\textsuperscript{83} was a case involving a dispute over Insurance Cover. By a policy dated 5\textsuperscript{th} February 2008 the plaintiff company insured 150,000 broiler chickens against loss due to accident, disease and illness. On 9\textsuperscript{th} April 2008 the plaintiff company lost 3,363 broiler chickens due to failure of electricity supply at its farm. The defendant was notified of the loss but declined to settle the claim ‘alleging that the loss was not covered by the plaintiff company’s insurance policy’. Hence the action.

3.3 LEGAL ISSUES

1. Whether the loss suffered by the plaintiff company, was covered under the policy of insurance

2. Whether the cause of the plaintiff company’s loss was an accident

\textsuperscript{82} Insurance Act number 27 of 1997

\textsuperscript{83} (2009) HPC 789
3.4 APPROACHES TO CONSTRUING INSURANCE CONTRACTS

The courts will consider firstly whether there was a valid contract of insurance between the parties. There must be a valid offer and acceptance between the parties. There must also be consideration. This is an important aspect that the court must consider before taking steps to resolve the dispute.

In order to determine whether the loss that occurred falls within the provisions of the policy, it would be important to consider the two central rules of interpretation of the insurance contracts. That is the ‘rules of interpretation against the drafter’ and the ‘reasonable expectations of the insured test’[^64]. The one common denominator of insurance law interpretation rules is that they are all designed to accord protection to the insured’s interests[^85]. Virtually every insurance policy is a standard form hence courts have developed various canons of insurance policy interpretation to even the field for the insureds who do not in most cases have any input on how insurance policies are drafted. Therefore, any ambiguity in the words will be construed contra proferentem[^86], meaning any ambiguity shall be against the insurers who drafted the policy[^87]. At this point, there is shifting the burden of proof where the parties to the claim may call witnesses to testify. The courts do not attempt to determine the mutual intent of the parties entering into an insurance contract, rather, courts construe insurance policies to satisfy the "reasonable expectations" of the insured’s in seeking

[^64]: D.Schwartz. “Interpretation and Disclosure in Insurance Contracts” (Israel: Ono Academic College. Faculty of Law.2008) 112
[^85]: D.Schwartz. “Interpretation and Disclosure in Insurance Contracts” (Israel: Ono Academic College. Faculty of Law.2008)113
[^87]: D.Schwartz. “Interpretation and Disclosure in Insurance Contracts” (Israel: Ono Academic College. Faculty of Law.2008)113
coverage. Courts will protect the reasonable expectations of the insured regarding the coverage afforded by insurance contracts even though a careful examination of the policy provisions indicates that such expectations are contrary to the expressed intention of the insurer.

Policies of insurance are to be construed in the same way as any other written document. Therefore, to determine the intent of the parties it is necessary that "when interpreting a contract of insurance it is important to consider the intent of the parties as manifested by the language of the instrument. Where the policy language is clear, the contract will be applied as written." Courts have long recognised that they must construe the insurance policy as a whole taking into account the type of insurance involved, the risks that where agreed to be undertaken by the insurance company and the subject matter or property that is being insured. There is need to focus on the language used in the insurance policy to determine the intent of the parties.

Courts faced with an insurance coverage dispute often examine whether the words of the policy are unambiguous in interpreting the meaning of the policy. The principle of ambiguity in the context of insurance policy interpretation is governed by two overriding principles. Firstly, if the words contained in the policy are clear and unambiguous, the court is to afford those terms their plain, ordinary and popular meaning and apply them strictly as written. Secondly, a court construing the insurance policy is not to pervert the plain language

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88 D.Schwartz. "Interpretation and Disclosure in Insurance Contracts" (Israel: Ono Academic College. Faculty of Law.2008)121
91 Firemans Fund Insurance v Empire Fire and Marine Insurance Company(2001) CV 2932.13
of the policy in order to create ambiguity where none exists. The doctrine was extended to its present form in the case of *Steven v. Fidelity and Casualty Co* from the Supreme Court of California. Where, Mr Steven purchased a flight insurance policy from a machine at an airport. On his return flight, he was unexpectedly required to take an unscheduled flight and was killed when the aeroplane crashed. The insurance company sought to deny recovery by his widow because the policy only covered "scheduled air carriers". The court, by applying the doctrine of reasonable expectations to the policy, determined that Mr. Steven was covered under the policy of insurance which he had purchased at the airport. The court should limit the construction in favour of the insured by "reasonableness" and apply it only if it is impossible to give the contract a fair interpretation by using other rules. The doctrine has been extended to give effect to the reasonable expectations of policyholders to cases which did not involve ambiguous provisions in the policy.

In *Hutton v Wailing*, lord Greene observed that the true construction of a document means no more than that which the court puts on it as the true meaning, and the true meaning is the meaning which the party to whom the document was handed or who is relying on it would put on it as an ordinary intelligent person construing the words in the proper way in light of the relevant circumstances. If the meaning of the words is reasonably clear it must have full effect even though it operates harshly against the assured. Words should not be construed with extreme literalism but with reasonable latitude keeping in mind the principle object of the contract of insurance while ensuring as far as possible to give sensible effect to every condition and stipulation in the policy. Where a policy does not by its express terms cover the facts which have happened and in respect of which a claim is made it is permissible to

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95 (1962), 58 Cal. 2d 862  
96 (1948) Ch 398  
97 Smith v Accident Insurance (1870) L.R 5 Ex.302  
imply a term which does not cover those facts if the proper inference from the reading of the policy as a whole is that the parties would have so expressed themselves if they had applied their minds to those particular facts happening\textsuperscript{99}. On the other hand if the proper inference from reading the policy as a whole is that the ensuing turn of events which have happened was completely outside the contemplation of the parties, the court will not so apply the policy even though it is framed in the words which if taken literally or absolutely do cover what has happened\textsuperscript{100}. Therefore, the place to begin any inquiry as to whether an event triggers insurance coverage under a given policy is to review the policy language itself\textsuperscript{101}. Policies may contain a provision which defines what events are covered pursuant to a policy, others may contain a coverage section while other policies may contain a provision identified as an insuring agreement\textsuperscript{102}.

The court may in trying to determine the cause of the loss look to the proximate cause of the loss. The doctrine of proximate cause is concerned with the rules which are employed in the insurance industry to determine whether or not a loss which is the subject matter of a claim was covered by an insured peril\textsuperscript{103}. In order to make the insurer liable to indemnify the insured, the loss must be a direct consequence of the peril insured against. In \textit{Marsden v City and County Insurance}\textsuperscript{104}, a shopkeeper insured his plate glass against loss or damage arising from any cause except fire. In due course fire broke out in the insured’s, neighbours’ property prompting a mob to gather. The mob then rioted and in so doing broke the plate glass. The judge held that the riot and not the fire was the cause of the loss and therefore the insured

\textsuperscript{99} The Moorcock (1889) 14 PD 64
\textsuperscript{100} D.Browne. "MacGillivrays Insurance Law" (London: Sweet and Maxwell.1961) 704
\textsuperscript{103} M.Malil. "Commercial Law in Zambia: Cases and Materials" (Lusaka: Unza Press.2006) 96
\textsuperscript{104} (1865) LR 1 CP 232

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could recover. An insured peril is the risk or danger insured against while an excepted peril is one specifically excluded by the wording of the policy.\textsuperscript{105}

There exists guidelines designed to assist the process of determining the proximate cause so that if there is a single cause and that single cause is an insured peril, then the proximate cause of the loss is an insured peril and there is a valid claim under the policy.\textsuperscript{106} Lord Summer, in \textit{Becker Gray and Co v London Assurance Corporation},\textsuperscript{107} observed that cause and effect are the same for underwriters as for other people. Proximate cause is not a device to avoid the trouble of discovering the real cause or the common sense cause and though it has been rigorously applied in insurance cases it helps the one side no more than it helps the other.\textsuperscript{108} The scope of exception clauses is such that an exception is a mere qualification that excludes losses that fall within the scope of the contract which would be covered if they had not been excepted.\textsuperscript{109} In considering the question on whom, the burden of proof lies, one must distinguish between proof of loss and proof that the loss falls within an exception, for the burden varies accordingly.\textsuperscript{110} The burden of proving that the loss was caused by a loss insured against lies on the insured and unless he discharges the burden, the claim must fail.\textsuperscript{111} The insured must prove a prima facie case, and once he has done this, the burden of proof is discharged. When the insured has proved a prima facie case of loss within the policy, the burden shifts to the insurers,\textsuperscript{112} who must then prove that the loss is not covered or that it falls within an exception.

\textsuperscript{107} (1918) AC 101
\textsuperscript{109} E.R.H. Ivamy, “Fire and Motor Insurance” (London: Butterworths.1968) 79
\textsuperscript{110} E.R.H. Ivamy, “Fire and Motor Insurance” (London: Butterworths.1968) 154
\textsuperscript{111} E. Ivamy, “General Principles of Insurance Law” (London: Butterworths.1966) 342
\textsuperscript{112} E. Ivamy, “General Principles of Insurance Law” (London: Butterworths.1966) 344
3.5 ANALYSIS

In the *Mattaniah Investments limited* case, the policy of insurance was for loss due to accident, disease and illness. The High court considered firstly whether there was a valid contract of insurance between the parties. This is the essential first step in insurance contracts hence the proposition that where an insured understands that a policy of insurance is governed by the general principles of contract law there would be less existence of the problems faced by insured’s in most insurance policies.

The sole issue, to be determined, by the High court was whether the loss suffered by the Plaintiff was an insured risk. The word ‘accident’, was not defined in the policy of insurance. As such, other sources had to be resorted to in seeking the meaning of the word. In such instances, the courts may consider dictionary meanings if the meaning of the word is not defined in the policy of insurance.113

Similarly, in the case of *Zambia State Insurance Corporation Limited v Northern Breweries Limited*114, the respondent company took out an insurance policy generally known as the Boiler and Pressure Vessel Insurance policy. The policy was to indemnify the respondent company for damage to the boiler or other apparatus in the schedule of the policy and to other property insured. In due course, the boiler was damaged, the respondent company made a claim under the policy. However, the appellant repudiated the claim on the ground that the boiler did not collapse within the meaning of collapse as defined in the policy. The appellant issued summons under the policy. The learned trial Judge found that the damage to the boiler did not amount to “collapse as defined under the policy”. The learned trial Judge found that the boiler was damaged as a result of the negligence of its servant Mr Mkhalipi and that the said damage fell within the confines of the policy. Judgment was given in favour of the respondent. The appellant appealed. The Supreme Court considered the fact that there was a

114 SCZ Judgment No. 6 of 2000.
wilful act by Mr Mkhalipi in bridging the circuit. The policy specifically stated that it did not cover damage or liability caused by the wilful act or wilful neglect of the insured. The Supreme Court held that the learned trial judge having found that the collapse of the boiler was not a collapse as defined in the policy misdirected himself in holding that the collapse was caused by the negligent act of Mr Mkhalipi. Negligence was not covered because it was excepted under the Policy. The Supreme Court allowed the appeal and held that the claim was properly repudiated by the appellant as the damage was not covered by the Policy.

In the Mattaniah Investments Ltd case the High court was of the view that the sum and substance of all the definitions is that an ‘accident’ is simply something unusual, unforeseen or an unexpected occurrence that causes injury, loss or death. What happened was an unexpected event which was not designed or intended by the Plaintiff. Therefore the incident was an accident which resulted in the loss of the Plaintiff’s 3,363 chickens. The loss of the Plaintiff’s chickens was a direct consequence of an insured peril, namely, loss due to an accident.

Under common law, whether the policy provides coverage depends on which peril is chosen as the proximate cause\textsuperscript{115}. If the peril selected as the proximate cause is covered\textsuperscript{116}, courts consider the loss to have been caused by the covered peril and will hold that the loss is covered\textsuperscript{117}. If the peril selected as the proximate cause is uncovered or excluded, courts consider the loss to have been caused by the uncovered or excluded peril and will hold that the loss is not covered. In the Mattaniah Investments Ltd case, the High court was of the view that the plaintiff could be assumed to have intended that the kind of loss that occurred should be covered in its policy of insurance and since the word ‘accident’ was not defined in the policy, which was drafted by the Defendant without the participation of the Plaintiff. It could

\textsuperscript{115} E.R.Ivamy, “Fire and Motor Insurance” (London: Butterworths.1968) 146
\textsuperscript{116} E.R.Ivamy, “Fire and Motor Insurance” (London: Butterworths.1968) 146
\textsuperscript{117} E.R.Ivamy, “Fire and Motor Insurance” (London: Butterworths.1968) 147
only be construed in the sense in which the Plaintiff might reasonably have understood it. The word was to be construed against the Defendant who prepared the insurance policy. The first principle of insurance law is that ambiguities in an Insurance policy must be construed in favour of the policy holder.\textsuperscript{118} The application of \textit{contra proferentum} in the context of an insurance dispute generally results in adopting the interpretation that is against the interest of the insurer. The ambiguity rule is so common that it is often cited without elaboration on the basis for the rule, while it was originally grounded in the policy that the drafter should bear the risk of inadequate drafting.\textsuperscript{119} Further, the High court had to consider whether the loss of chickens was due to failure of electricity supply and whether failure of electricity supply was expressly excluded in the exclusion clause of the insurance policy and since it was not expressly excluded, it meant that it is included by implication. Exclusions refer to specific circumstances, events, occurrences or losses which are not covered under the insurance policy.\textsuperscript{120} If a claim falls within the terms of an exclusion clause under the policy, then the insurer can deny indemnity. Courts, as a general guiding principle, will interpret a policy using the natural and ordinary meaning of words and, where possible, giving effect to the commercial intent or purpose of the policy. Courts read down exclusion clauses in favour of the insured if there is any ambiguity. Judgment was accordingly entered in favour of the Plaintiff for the claimed sum as the defendant could not prove that the loss that occurred was not covered by the policy of insurance. Therefore, it can, be said that the courts construe contracts of insurance in such a way as to preserve the intent of the parties.

\textsuperscript{119} D. Schwartz. "Interpretation and Disclosure in Insurance Contracts" (Israel: Ono Academic College. Faculty of Law.2008)121
\textsuperscript{120} M. A. Toniato and W. Mandani. "Interpretation of Insurance Policies" (www.holmanwebb.2012) 2
3.6 CONCLUSION

An analysis of the *Mattaniah Investments Limited v Zambia State Insurance Corporation* is important because it provides an insight on how the courts in Zambia go about resolving insurance cover disputes as it is one of the more recent decisions touching on insurance policy interpretation. The court seeks to ensure that the true intent of the parties is determined and therefore the court uses various rules of interpretation to determine the intent of the parties to the insurance policy. The burden of proof lies firstly on the insured to show that the loss that occurs falls within the provisions of the insurance contract. Where the insured proves its case the burden shifts to the insurers. The court may employ the principle of proximate cause in determining the cause of the loss. The courts will ensure that the cause of the loss does not fall within an exception.

The next chapter examines how the courts in other countries construe insurance policy or cover disputes and the techniques they employ to ensure that the intent of the parties is observed.
CHAPTER FOUR

4.0 HOW THE COURTS IN OTHER JURISDICTIONS INTERPRET INSURANCE POLICY PROVISIONS

4.1 INTRODUCTION

Insurance Policy interpretation involves the principle that what has to be considered is the language used in the policy, as it is an expression of the parties 'bargain'\textsuperscript{121}. When presented with a dispute, the Courts function is to interpret what the parties have agreed contract, not to postulate what they might have had in mind when entering into the contract or to speculate on the intention of the parties\textsuperscript{122}. This chapter analyses how the Courts in three jurisdictions interpret insurance policy provisions.

4.2 CANADA

The Supreme Court of Canada has interpreted numerous types of insurance policies with varying subject matters and in each case, the terms of the policies have differed. However, the Courts approach to interpretation has been relatively consistent\textsuperscript{123}. Ordinary rules of contractual construction apply with a few significant exceptions in that where the contract is commercially reasonable any ambiguity will be construed against the person who drafted the contract\textsuperscript{124}. If the policy is in standard form rather than individually drafted, doubt will be resolved in favour of the insured\textsuperscript{125}. One of the leading cases on the principles of policy interpretation in Canada\textsuperscript{126} is Consolidated Bathurst Export Ltd. v. Mutual Boiler and

\textsuperscript{121} Want v Blunt (1810) 12 East 183


\textsuperscript{124} F.Kean and B.Lyde. "International Comparative Review of Liability Insurance Law" (London: Informa UK Ltd.2007) 38

\textsuperscript{125} F.Kean and B.Lyde. "International Comparative Review of Liability Insurance Law" (London: Informa UK Ltd.2007)38

\textsuperscript{126} J.L.Davis and L.Gilbertson. "ABC's of Policy Interpretation" (Canada: Toronto, Canadian Institute.1994) 2
Machinery Insurance Co, in which the appellant company Consolidated Bathurst Export Ltd, a manufacturer of paper products, suffered a loss as a result of the failure of three heat exchangers. Consolidated had a policy of insurance with the respondent, Mutual Boiler and Machinery Insurance Co for certain property, including the heat exchangers. Mutual Boiler resisted Consolidated’s claim for the loss on the basis that the damage to the heat exchangers was caused by corrosion and that this risk was specifically excluded from coverage. In writing for the majority, Justice Estey observed that insurance contracts and the interpretative difficulties arising therein have been before the courts for at least two centuries and it is trite that where an ambiguity is found to exist in the terminology employed in the contract, such terminology shall be construed against the insurance carrier as being the author or the party in control of the contents of the contract.

In Pense v. Northern Life Assurance Co, Meredith J.A observed that there is no just reason for applying any different rule of construction to a contract of insurance from that of a contract of any other kind and there can be no sort of excuse for casting a doubt upon the meaning of such a contract with a view to solving it against the insurer, however much of the claim against him may play upon natural bias. In a contract, effect must be given to the intention of the parties, to be gathered from the words they have used. A plaintiff must make out from the terms of the contract a right to recover; a defendant must likewise make out any defence based upon the agreement. The onus of proof is upon each party respectively, precisely the same.

In McClelland and Stewart Ltd. v. Mutual Life Assurance Co. of Canada, the issue involved the definition of “effective date” in the context of a life insurance policy. The appellant company McClelland and Stewart Ltd, was the irrevocable beneficiary of a life

127 (1980) 1 SCR 88
128 (1907) 15 O.L.R 137
129 Judgment of Meredith J.A (Adopted in 1908 [ (1908) 42 S.C.R 246] )
130 (1981) 2 SCR 6
insurance policy. The terms of the policy stated that McClelland was not entitled to the proceeds of the policy if the insured died by his own hands within two years of the effective date of the policy. The term, "effective date" was not defined. The majority of the Court found in favour of McClelland. However, Justice Estey, in his dissenting judgment followed his decision in Consolidated Bathurst Export Ltd v Mutual Boiler and Machinery Insurance Co and again discussed the rule of contra proferentem. The contra proferentem rule is firmly anchored in Canadian jurisprudence and is applied in an even handed manner, equally to the insurer and insured alike, as the facts dictate.

In Scott v. Wawanesa Mutual Insurance Co, the appellant couples' home was damaged by a fire deliberately set by their 15 year old son without their knowledge. The Scotts' were the holders of a homeowner's insurance policy with the respondent, Wawanesa Mutual Insurance Company, denied the Scotts' claim on the basis that the loss occurred through the "wilful act of the Insured" within the meaning of an exclusion clause in the policy. In writing for the minority, Justice La Forest discussed the modern approach to interpreting contracts of insurance as set out in Consolidated Bathurst Export Ltd v Mutual Boiler and Machinery Insurance Co and held that the courts must when interpreting insurance policies be guided by the reasonable expectations, the purpose of entering such contract and the language employed in the policy is to be given its ordinary meaning, such as the average policy holder as well as the insurer, would attach to it.

In National Bank of Greece (Canada) v. Katsikonouris, a businessman, Dimitrios Katsikonouris obtained loans from the National Bank of Greece (Canada) and others, and pledged one of his properties as security for the loans. It was a term of the loans that Katsikonouris insure the property in favour of National Bank of Greece and others. As such,

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131 J.L.Davis and L.Gilbertson. "ABC's of Policy Interpretation" (Canada: Toronto, Canadian Institute.1994) 5
132 (1989) 1 S.C.R 1445
133 (1990) 2 S.C.R 1029
Katsikonouri purchased a fire insurance policy from the respondents, Simcoe and Eric Insurance Company, General Accident Insurance and Balboa Insurance Company. The property was later destroyed and Simcoe and Eric insurance company refused to pay the indemnity alleging that the policy was void as the result of misrepresentations by Katsikonouri when the policy was purchased as there were previous fire losses that were undisclosed. National Bank of Greece and others brought an action against Simcoe and Eric on reliance upon the standard mortgage clause contained in the fire policy that the insurance shall be in force notwithstanding any act, neglect, omission or misrepresentation attributable to the mortgagor, owner or occupant of the property insured. In examining the effect of the standard mortgage clause, Justice La Forest, in writing for the majority, affirmed the principles discussed in his dissent in Scott v Wawanesa Mutual Co and stated that insurance contracts should be interpreted as they would be understood by the average person applying for insurance, and not as they might be perceived by persons versed in the niceties of insurance law.

In Brissette Estate v. Westbury Life Insurance Co\textsuperscript{134}, a married couple purchased a life insurance policy from Westbury Life Insurance Co., formerly Pitts Life Insurance Company, for a term of five years in the amount of $200,000, which was payable to the survivor. Two years after the policy was purchased, Gerald Brissette murdered his wife and made a claim against Westbury for the proceeds of the policy. The Court was asked to consider whether Westbury was absolved from paying anything under the life insurance policy given the circumstances of Mary Brissette's demise. In writing for the majority, Justice Sopinka discussed the principles of contract interpretation, where he observed that in interpreting an insurance contract the rules of construction relating to contracts are to be applied as follows, firstly, the court must search for an interpretation from the whole of the contract which

\textsuperscript{134} (1992) 3 S.C.R 87
promotes the true intent of the parties at the time of entry into the contract. Secondly, where words are capable of two or more meanings, the meaning that is more reasonable in promoting the intention of the parties must be selected. Third, ambiguities should be construed against the insurer. Fourth, an interpretation which will result in either a windfall to the insurer, or an unanticipated recovery to the insured is to be avoided.

In *Reid Crowther & Partners Ltd. v. Simcoe & Erie General Insurance Co*\(^{135}\), the appellant, Simcoe and Erie General Insurance Company, insured the respondent, Reid Crowther & Partners Limited a professional engineering firm, for third party liability pursuant to the terms of a “claims-made” policy. Reid Crowther designed and supervised the construction of a municipal sewage and water system that was defective, and admitted to improperly supervising the project. Reid Crowther sought coverage under the policy. In writing for the Court, Justice McLachlin cited some general principles of interpretation and expanded upon the “reasonable expectation” doctrine where he observed that in each case, the courts must interpret the provisions of the policy at issue in light of general principles of interpretation of insurance policies, including the contra proferentum rule, the principle that coverage provisions should be construed broadly and exclusion clauses narrowly and the desirability, where the policy is ambiguous, of giving effect to the reasonable expectations of the parties.

By way of summation, the Courts in Canada follow a two-step process when faced with a conflict on insurance policy interpretation. Step one, requires the Courts to apply the general rules of contractual interpretation without bias. Step two, is used when step one is inconclusive and it requires the application of *Contra proferentum* rule where any doubt as to the meaning and scope of the excluding or limiting term, the ambiguity will be resolved against the party who has inserted it and who is now relying on it. As he seeks to protect

\(^{135}\)(1993) 1 S.C.R 252
himself against liability to which he would otherwise be subject, it is for him to prove that his words clearly and aptly describe the contingency that has in fact arisen.

4.3 SOUTH AFRICA

In the appeal case of African Products Ltd v AIG South Africa Ltd\(^{36}\), the issue was whether the loss of gross profits, suffered by the appellant company, due to loss of production as a result of electrical failure was covered under a policy of insurance issued by the respondent. The appellant was a subsidiary of Tongaat-Hulett Group Ltd, which owned and operated a maize milling facility situated at Kliprivier, known as the Kliprivier Mill. The Mill was designed and constructed by Fluor SA (Pty) Ltd and production commenced in 1998, soon after completion of the construction process. The designing of the Mill included the installation of electricity substations and layout of electricity cables which transmitted power from an Eskom power point to, and past, the substations to the machinery in the plant. It was common cause that all the equipment (machinery) used in the operation of the Mill was powered by electricity. It was not in dispute that at 04:50 on 11 September 2002 a cable failure was detected at the Mill when a certain switch tripped. Further cable failures, were experienced during the course of the day. Technicians, who, were called in discovered that cables under one of six substations, substation two, were heating up. They had been laid in sand under a concrete slab and bent at a 90° angle beneath the substation before entering it. A total of 650 cables were connected from the substation to the Mill. The cables beneath the concrete were not at all visible from above. So also the cables inside the substation. To get to them, the concrete slab had to be excavated. Temporary cables had in the meantime been connected so as to ensure continued production at the Mill. After the concrete slab had been broken up, closer inspection of the cables beneath it revealed that the cables had been laid

\(^{36}\) (2009) ZASCA 659
close to each other. Because of this, the heat generated by the electric current which passed through the cables did not dissipate sufficiently. The result was that the polyvinylchloride (PVC) insulation covering the copper conductors had softened and worn away. Consequently, some of the copper conductors, came into contact with each other and this caused the cable failure. It was also discovered that a substantial number of cables which had not as yet come into contact with each other had functionally failed because, having regard to the wearing out of the insulation as a result of the excessive heat, they were dangerously close to each other and would imminently come into contact and fail electrically. By 19 September 2002 it became clear to the appellant that operations at the plant could not continue since, in the view of the management, it had become unsafe to do so. Pending the redesign of the cables from substation 2 to the Mill, temporary measures were taken by laying cables in such a manner as would bypass the failed ones. For this operation a decision was taken to shut down the Mill from 19 September 2002. It was reopened on 15 October 2002. It is the loss of production during this period of shut down which the appellant sought to recover under the indemnification provided for in the contract of insurance. The insured event in this case was defined in section 3 of the insurance policy, headed as 'Business Interruption' and it was said to mean ‘Loss following interruption of or interference with the business in consequence of damage occurring during the period of insurance in respect of which payment has been made or liability admitted under’

The Engineering section defined the insured event as an unforeseen and sudden physical damage to the machinery described in the schedule from any cause whilst it was at work or at rest and went on to provide that ‘Machinery shall mean all plant and machinery or electronic equipment including that equipment being an integral part of controlling machinery, property held in trust or on commission and foundations supporting machinery’. The Supreme Court observed that, in order to succeed in its claim the appellant would not only have to prove that
the electrical cables that failed constituted machinery as defined, but also that the damage it relied on, was 'unforeseen and sudden'.

The respondent opposed the appellants claim and submitted that (a) the electricity cables did not constitute machinery as defined in the Engineering section; (b) that the physical damage relied on may have been 'unforeseen', but it was not 'sudden'; and (c) that in any event the claim was excluded by specific exception 4 of the Engineering section of the policy, which reads: 'The Insurers shall not be liable to indemnify the Insured irrespective of the original cause in respect of wastage of material or the like or wearing away or wearing out of any part of the machinery caused by or naturally resulting from ordinary usage or working or other gradual deterioration.

On the specific exception, it was contended on behalf of the respondent that the damage to the cables was due to wearing away or wearing out caused by gradual deterioration of the PVC insulation and that the appellant's claim for indemnification was therefore excluded. However, the Supreme Court was prepared to accept, without deciding, that the electricity cables fell under 'all plant and machinery' in the definition section and thus constituted machinery as defined in the policy document as it was convenient at that stage to give a closer description of the design of the cables with which the dispute concerned.

Counsel for the appellant submitted that damage to the mechanical properties of the cable did not lead to a failure of the cables. The proposition was that it was only when the electrical properties of the cable fail, that is, when the copper conductors come into contact with each other, that the cable fails. Counsel accordingly contended that even though the damage to the copper wires may have flowed from the softening of the PVC insulation, physical damage in this instance occurred when the copper conductors, came into contact with each other and that this happened instantaneously. The cables, could still be used even though there was damage to the PVC. The physical damage thus relied upon in support of the appellant's claim
was that when the copper cables failed, by touching, this constituted actual and independent
damage, which was unforeseen and sudden.

In construing a policy of insurance the ordinary rules relating to the interpretation of contracts
must be applied, so as to ascertain the intention of the parties. Any provision which purports
to place a limitation upon a clearly expressed obligation to indemnify must be restrictively
interpreted for it is the insurer's duty to make clear what particular risks it wishes to exclude.
A policy normally evidences the contract and an insured's obligation, and the extent to which
an insurer's liability is limited, must be plainly spelt out. In the event of a real ambiguity the
contra proferentem rule, which requires a written document to be construed against the
person who drew it up. Since the words 'unforeseen' and 'sudden' were joined by the
conjunctive 'and', the physical damage to the cables must have been both unforeseen and
sudden, and because the two words may, depending on the context, bear the same meaning,
they must each be given a meaning that will avoid tautology or superfluity. A court should
thus be slow to conclude that words in a single document are tautologous and superfluous.
The Supreme Court agreed with Joffe J in Wellworth's Bazaar, that the word 'sudden' in
the expression 'unforeseen and sudden' in the context in which it is used in the insurance
policy concerned, should be understood in its temporal sense, meaning 'abrupt' or 'occurring
quickly' or 'taking place all at once'. When a temporal sense, is ascribed, to 'sudden', the
requirement that physical damage be both unforeseen and sudden is not tautologous. Indeed,
the intention of the parties becomes clear in the sense that the physical damage that would
have occurred as a result, of the snapping of the screw would have been both unforeseen and
sudden. Where it was to be found however, that a screw inside the motor had broken as a
result, of wearing out over a period, then the physical damage, though unforeseen, would not
have been 'sudden'.

137 Wellworths Bazaars v Chandlers Ltd and another (1947) 2 SA 37 (A) 43
The Supreme Court could find no reason why giving a meaning with a temporal element to the word 'sudden' would not be in accordance with sound commercial principles and good business sense. As the court attempted to demonstrate that there was no ambiguity when 'sudden' was given a meaning with a temporal element such as 'abrupt' or 'taking place all at once'. Clearly, therefore, the damage to the cables occurred when the PVC wore away, resulting in the copper conductors becoming exposed, with the inevitability of them, coming into contact with, each other. The Supreme Court held that the physical damage to the cables was not sudden as it was the manifestation of the damage that was sudden and not the actual damage, which had occurred over a lengthy period of time. It therefore followed that the appeal failed and the appeal was dismissed.

In conclusion, the general rules regarding the interpretation of insurance contracts is that construction of an insurance policy is a question of law\(^{138}\), therefore the Courts have a duty to ascertain the intent of the parties. The words of the policy must be given their plain, ordinary, popular and grammatical meaning unless it appears clearly from the context that both parties intended them to bear a different meaning. If there is no ambiguity in the words of the contract, there is no room for a more reasonable interpretation than the words themselves convey\(^{139}\).

### 4.4 UNITED STATES OF AMERICA

In America, the ordinary rules of contractual interpretation apply to insurance policies\(^{140}\).

Thus, interpretation of insurance policies is governed by the same rules that govern interpretation of other contracts. The court primarily seeks to give effect to the written

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\(^{138}\) Norris v Legal and General Assurance Society Ltd and Another 1962 (4) S.A 743


\(^{140}\) F. Kean and B. Lyde. "International Comparative Review of Liability Insurance Law" (London: Informa UK Ltd.2007) 34
expression of the parties’ intent\textsuperscript{141}. Therefore, if the contract language is clear and explicit, it governs. If it is ambiguous, the court will interpret the language to give effect to the insured’s expectation. In the USA, some courts have applied a “reasonable expectations doctrine” which, in its broadest form, negates a clear and unambiguous exclusion clause if it conflicts with the reasonable coverage expectations of the policy holder\textsuperscript{142}.

The American courts have adopted a policy with regard to the interpretation of standard forms of insurance contract known as the “reasonable expectations” doctrine. Following this doctrine, courts have consistently accepted the argument that they should honour the reasonable expectations of an insured in situations where the policy is ambiguous despite the presence of policy provisions which would appear to negate coverage\textsuperscript{143}.

Some jurisdictions will not defer to the insured’s expectations when the policy has not been drafted by an insurer, or when an insured has sophisticated knowledge of insurance and is familiar with terms of art in the industry\textsuperscript{144}. The first step in understanding insurance policy interpretation must be to discover the standards employed in assessing ambiguity\textsuperscript{145}. The first dimension of assessment is what is called the linguistic standard of care where the first inquiry courts make is to determine whether to invoke contra proferentem\textsuperscript{146}. This involves scrutiny of the language of the policy provision whose meaning is in issue. A policy provision is ambiguous if it is reasonably susceptible to two meanings\textsuperscript{147}. Typically, when the contract provision is found to be ambiguous, the courts allow the admission of extrinsic

\textsuperscript{141} F.Kean and B.Lyde. “International Comparative Review of Liability Insurance Law” (London: Informa UK Ltd.2007) 34
\textsuperscript{142} N.P.Kent. “Excluding Exclusions: The Role of Reasonableness in the Interpretation of Insurance Policies” (Newyork: CBA Insurance Law Section.2012) 14
\textsuperscript{143} N.P.Kent. “Excluding Exclusions: The Role of Reasonableness in the Interpretation of Insurance Policies” (Newyork: CBA Insurance Law Section.2012) 14
\textsuperscript{144} F.Kean and B.Lyde. “International Comparative Review of Liability Insurance Law” (London: Informa UK Ltd.2007) 34
evidence or parole evidence to assist in the explanation of the provision. The time honored rules governing contract interpretation are embodied in California Civil Code, is such that when interpreting a term in an insurance policy, courts often have considered extrinsic evidence, such as the usage and understanding of that term in a particular industry. California courts have long recognized that extrinsic evidence in the form of how the parties to a contract performed under the contract has great probative value as to the meaning of the contract. As the court held in City of Hope National Medical Center v. Genentech, Inc., a party's conduct occurring between execution of the contract and a dispute about the meaning of the contract's terms may reveal what the parties understood and intended those terms to mean.

The California Supreme Court has applied these principles in the insurance context in Garcia v. Truck Insurance Exchange. This case shows how extrinsic evidence is interpreted properly under California law. Garcia involved a liability policy that the California Hospital Association purchased for hospitals. After a medical malpractice lawsuit was brought against a hospital and a doctor, the insurer agreed to cover the hospital but not the doctor, citing an exclusion for individuals not employed by the hospital. The doctor, who was not involved with the negotiation or procurement of the insurance policy, challenged the insurer's interpretation of the policy and offered his own interpretation. To support its interpretation, the insurer offered testimony from the Association's general counsel, who was involved in negotiating and procuring the policy many years earlier. He testified that the parties did not intend to provide coverage for private doctors under these circumstances. The court ruled that the testimony of the Association's general counsel was highly probative and properly admitted to support the insurer's reasonable interpretation of the policy. Given the decades of

149 Section 1635 - 1656
150 (2008) 43 Cal 4th 375
151 (1984) 36 Cal 3d 426

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California law, those seeking to interpret an insurance policy should recall the fact that the
terms of an instrument appear clear to a judge does not preclude the possibility that the
parties chose the language of the instrument to express different terms. That possibility exists
whenever the parties' understanding of the words used may have differed from the judge's
understanding.

In conclusion, the basic rules of construction adopted by the American courts are that the
court should look at the words of the contract to determine if there is ambiguity, thereafter the
court should ascertain the intention of the parties concerning specific provisions by reference
to the language of the entire contract. Further, the court should construe ambiguities found in
the insurance contract in favour of the insured and lastly the court should limit the
construction in favour of the insured by "reasonableness" and apply it only if it is impossible
to give the contract a fair interpretation by using other rules. Furthermore, the Courts in
America may employ the use of extrinsic evidence so as to ascertain the true intent of the
insurance policy provisions.

4.5 CONCLUSION

This chapter has examined case law relating to Insurance Policy Interpretation from Canada,
South Africa and the United States. The Courts in Canada follow a two-step when faced with
a conflict on insurance policy interpretation seeks firstly to determine the intent of the parties
and employ the contra proferentum rule if there is ambiguity. In South Africa, the Courts
seek to give the words of the policy their plain, ordinary, popular and grammatical meaning
unless it appears clearly from the context that both parties intended them to bear a different
meaning. Therefore, the Supreme Court is ready to employ even a temporal sense in order to
determine the intent of the parties. The American courts look at the words of the contract to
determine if there is ambiguity and ambiguities found in the insurance contract are construed
in favour of the insured which is limited by "reasonableness. The Courts also employ the use of extrinsic evidence to ascertain the true intent of the insurance policy provisions.
CHAPTER FIVE

5.0 CONCLUSION AND RECOMMENDATIONS

5.1 GENERAL CONCLUSION

The objective of this research has been to determine how the parties to an insurance contract particularly the insured can be, protected in instances where the insurer denies a claim made by the insured even though the insured has paid insurance premiums. The objective of the concluding chapter is to give a summary of all the chapters and advance recommendations on how, to ensure the protection of the insured.

Chapter One introduced the research by advancing the objectives, which are to bring to light the reasons and causes of the problems faced by the insured under the insurance policy. To help any would be insured have an understanding of how insurance policies are formulated and interpreted thereby reducing the obstacles faced. To suggest practical solutions to the problems faced under the insurance policies to ensure that the insured is adequately protected. The significance of this study is that it ensures that the insured reaps adequate protection from the insurance policy. The whole purpose of insurance cover is to guard against risk. Therefore this study seeks to make the life of any would be insured easier by looking at how insurance companies go about formulating and constructing insurance policies and also look at how claims are handled in the event that the insured suffers loss. To ensure the realisation of the research objectives, the research focused on specific research questions and further the research embraced desk research investigations through conducting interviews with various Insurance companies and the collection of secondary data from relevant law reports, books, journals, dissertations and internet sources.
Chapter Two of the research examined the impact of contract law on insurance policies. Contract law plays a major role on the insured's ability to make a successful claim under the insurance policy due to the fact that, the rules of Misrepresentation and Non-disclosure applies. The parties to the insurance contract have duties under the insurance contract that have an impact on the insurance policy as the interpretation of insurance policy by the Courts seeks to give effect to the intent of the parties.

Chapter Three, analysed how the Zambian Courts interpret disputes relating to insurance contracts based on the decision of the High Court in the case of *Mattaniah Investments Limited v Zambia State Insurance Corporation*. The court determines the intent of the parties by the wording of their insurance policy document. The burden of proving rests on the insured where the insurer disclaims liability, and this liability shifts to the insurer where the insured is able to prove the liability of the insurers.

Chapter Four, analysed how the Courts in Canada, South Africa and America interpret insurance coverage disputes. In Canada, the Courts when faced with insurance coverage disputes follow a two-step process. Step-one requires the Courts to apply the general rules of contractual interpretation without bias while step-two requires the application of *Contra proferentem*. In South Africa, the Courts have a duty to ascertain the intent of the parties by giving the words used in the insurance policy their plain, ordinary, popular and grammatical meaning unless the parties intended them to bear a different meaning. In America, the Courts ascertain the intention of the parties by making, reference to the provisions of the entire insurance contract. Any ambiguity found is construed in favour of the insured, which is limited by reasonableness.
5.2 RECOMMENDATIONS

This concluding chapter seeks to advance recommendations on how to ensure that the parties to a contract of insurance particularly the insured are, protected and how to ensure that he who takes up insurance reaps the full benefit of his cover unless his case truly does not entitle him to do so. Therefore, what is of paramount importance is for

a) FULFILLMENT OF OBLIGATIONS

The insured must have an understanding of their insurable risk, secondly the insured must fulfil their obligations under the policy and ensure that the information that they give in relation to their contract of insurance is true and to disclose any kind of information that would have an effect on the mind of a prudent insurer.\footnote{152}

b) REFERENCE TO ARBITRATION

Where disputes arise relating specifically to the interpretation of the insurance policy provisions, if the insured played no part in drafting the insurance policy any ambiguity in the policy provisions should be construed against the insurer who drafted it. Disputes relating specifically to the interpretation of insurance policy provisions must be referred to arbitration. Section 79(2) of the Insurance Act\footnote{153}, provides that 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 and any such arbitration shall be held in Zambia in accordance with the Arbitration Act. Reference to arbitration would cut down on the cost incurred by the insured that paid insurance premiums before the happening of the unfortunate event.

\footnote{152 W. Twambo, “Obligations of a Customer in Insurance” (Lusaka: Times of Zambia.2012)1}
\footnote{153 Insurance Act, Number 27 of 1997. Section 79(2)
c) THE INSURER PREJUDICE RULE

There is a dire need to borrow from the Insurer Prejudice Rule as was alluded to in chapter Two, which requires the insurer to show how it has been prejudiced before it can deny coverage to the insured. This would not be possible unless the courts begin to employ such a rule in the same way that they employ such rules as interpretation against the drafter and the reasonableness tests. Where the insurer seeks to deny coverage, they must be able to show that the insured failed to comply with procedural requirements contained in the insurance contract or that the insured breached a provision of the insurance policy. Where the insurer denies liability based on a provision in the contract for which they bore sole responsibility to draft, they should be, precluded from denying the claim, in that they should be able to show how they have been prejudiced.

d) REFORM OF HOW QUESTIONS ARE ASKED AND ANSWERED

At the pre contract stage, it is important that a law be enacted requiring insurance consumers to take reasonable care to answer the questions they are asked accurately and completely as was alluded to in chapter one. Reform, should be guided by the following principles:

Firstly, insurers should ask questions about what they want to know. An insured is not in the insurance business to know what is relevant or not. It is imperative that the insurer who receives consideration in the form of premiums exercises reasonable care by asking questions about what he knows to be important information based on the type of risk. There is need for a complete overhaul of the proposal form. Insurance companies must endeavour to establish specialised systems that can ensure that adequate information which is of paramount

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importance to any given policy is within their reach as insurers being in the business of insurance know better what information is necessary. There is need to bear down on insurance companies that put themselves ahead of their policyholders and policyholders should do their part by challenging coverage denials that are wrongful and manipulative.

Secondly, insurance companies should not expect consumers to give information that the insurance company has not asked for. The rules of Non-disclosure are highly unfair to the insured as the insured is not in a position to know what, is material. The greater the Insurer’s compliance with its duty of disclosure, the less courts need resort to the Interpretation Against the Drafter rule because an Insurer who complies with its duty of disclosure, with respect to the insurance contract, effectively changes the Insured’s resulting knowledge into the external circumstances surrounding the insurance contract. In other words, by complying with its duty of disclosure, the Insurer clarifies its understanding of what the insurance policy means so that both the Insurer and the Insured now have the same understanding of the policy. The information that the Insurer imparts to the Insured pursuant to the Insurer’s duty of disclosure thus becomes part of the external circumstances surrounding the formation of the contract.

Thirdly, an insured who is, both honest and careful in giving pre-contract information should not have a claim turned down on the basis that the information was incorrect or incomplete. However, an insured who is honest in giving pre-contract information but less careful than they should have been should automatically lose their claim as the outcome should depend on what the insurer would have done had the true situation been known.
5.3 CONCLUSION

In conclusion, Insurance is an essential service that is relevant to any given society. Therefore, insurance companies must strive to improve upon the services that they provide. There is need for the Courts in Zambia to borrow from the Insurer Prejudice rule, insurers should show cause as to why a claim made by an insured has failed. Further, disputes relating to the scope of the cover must as a general rule be construed against the drafters of the policy provisions unless the insurer is able to show that the insured failed to adequately comply with his obligations under the insurance policy. Furthermore, there is need to refer matters relating to coverage disputes to arbitration to minimise the costs faced by the insured. Lastly, there is need for reform at the pre-contract stage, insurers should ask questions about what they want to know, insurers should not expect the insurer's consumers to give information about what the insurance company has not asked for and finally an insured that is honest and careful should not have a claim denied.
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