THE RELEVANCE OF UTMOST GOOD FAITH IN INSURANCE CONTRACTS IN GHANA

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ABSTRACT

Insurance contracts are seen as a special form of contracts and as such are distinguished from general contracts due to the fact that parties to insurance contracts are expected to observe the dignity of utmost good faith, which is the duty of disclosure. Thus, insurance contracts are termed contracts of Uberrimae Fidei. The duty of utmost good faith is so important and cardinal to an insurance contract to the extent that should a party fail to observe the duty, it affords the other party the right to avoid the contract. Section 17 of the Marine Insurance Act 1906 which codified the common law insurance is very clear on this. However, the duty of disclosure has suffered a lot of brutalization from both statutory and judicial pronouncement making it obsolete in insurance contracts. Simply, the position of Ghana in this state of confusion is more or has become more confusing due to the fact that one does not know whether parties to an insurance contract are supposed to observe this duty and if so the effect of it on the contract, should a party fail to observe this duty.

Within the Ghanaian legal jurisdiction, the contract Act of 1960 does not have any provision with regards to the duty of disclosure. It must be noted that Section 214 of the insurance Act of Ghana contracts provisions in relation to the duty of disclosure. However, a careful reading of that section quickly unveils the fact that, the section is a consequential amendment in relation to National Health Insurance Act 2003 (ACT 650) Accordingly, this research seeks to find out whether there exists the duty of utmost good faith in insurance contracts in Ghana. It also seeks to answer the question of the reliance by the courts in Ghana, on a common law principle that has been heavily sapped by statutory intrusion. This research will recommend an amendment to the insurance ACT of Ghana, particularly in relation to Section 214 to abjure the ambiguity or confusion cloaked in this section. This is to be achieved by putting into context the various changes in the common law position which has undergone.
INTRODUCTION

Insurance contracts are seen as a special form of contract which is usually distinguished from the general principles of contracts. Bensa M., has observed, as a distinct and autonomous contract, Insurance Contract is traceable to the earliest part of the 14th century which evolved just like so many other modern mercantile institutions. His work indicated that, the most primitive type of Insurance Contract is that the contract of marine insurance which were stipulations and accessories to the contract of carriage; which settled any incidence of risk of loss or damage to the goods carried. According to Valery M., some commercial contracts (such as contracts of ‘commenda’ or ‘mutuum’), within this period were never intended to be sales or loans, instead, considered as insurances. The period also witnessed the existence of some mutual associations which were modeled to guard against certain risks of the sea, and providing some form of security for letters of ‘marque’ and its associated risks and various forms of marine reprisals.¹ The 14th century saw a growing and flourished insurance business in many areas, for instance, the Florentine and Genoese merchants treated the cost of insurance as a regular part of the cost of transport.² Despite its prospects, insurance contracts had no rule for drawing up the contract which is fitting to a particular form or scope. Nonetheless, certain procedures had been developed in the various attempts at drawing up the contract in writing by a notary or a sworn broker. These developments in insurance caused the establishment of legal rules governing the contract. Chock-full legislations exist on insurance contracts today, each setting out or mitigating rigors in its development. The Common Law position on the development of the Insurance is codified by the Marine Insurance Act of 1906. Section 17 of the Act for instances, codified the common law position on insurance as a contract ‘Uberrimae Fidei’. Thus the duty of disclosure or outmost good faith which affords parties the right to avoid an insurance contract.

¹The ‘Officium Robarie’ was established an institution at Genoa— to give redress against Genoese citizens who had committed acts of piracy against any trader, which really gave a sort of state insurance against this particular risk.
²Societies of insurance brokers or a single Genoese notary on a single day in 1393, made more than 80 insurance contracts

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The development of insurance in Ghana is the reception of the Common Law rules, doctrine of equity and statute of general application of England which are by Section 14 of the Supreme Court Ordinances of 1876, applicable to Ghana. Even though the Insurance of Ghana lacks certain elements which the Marine Insurance Act adequately covers (such as propositions on subrogation, insurable interest, double insurance contribution among others), like many of the statutes in Ghana, some of its provisions could be described ‘pro rata’ with that of the Marine Insurance Act of England. Nonetheless, the laconic observation on the progress of the principles of Utmost Good Faith, most importantly, since the inception of the Marine Insurance Act in 1906 by both statutory and judicial pronouncements in England has rendered most of its positions obsolete in recent developments. The common law duty of disclosure has since 1906 suffered a lot of brutalization from both statutory and judicial declarations making it antediluvian in Insurance Contracts. The corollary implication of the application and reliance on the Marine Insurance Act by the Ghanaian legal system leads to the main question of this paper. Thus, exhaustively, questions on the scope, nature and extent of the Duty of disclosure within the Ghanaian Legal System. The confusion is one that is attributable to the uncertainty over the ‘faith’ of Utmost Good Faith in Ghana. It is observed that, the Contracts Act, 1960 (ACT 25) of Ghana, has no provisions in regards of the duty of disclosure. But Section 214 of the Insurance Act of Ghana 2006 (ACT 724), as per subsection 3(c) contains a duty of disclosure. Nonetheless, it important to state also that, Section 214 subsection 3(c) is merely a Consequential amendment of the National Health Insurance Act 2003 (ACT 650).

Meanwhile, The National Health Insurance Act, in its long tittle is said to be ‘an ACT to secure the provision of basic healthcare services to person’s resident in the country through mutual and private health insurance schemes. The inescapable question is that, does the duty of disclosure as per Section 214 subsection 3(c) which is merely a consequential amendment of the National Health Insurance Act 2003 have a universal application in all matters of insurance in Ghana? Or perhaps, the brutalized position of the duty of disclosure in England would be applicable ‘mutatis mutandi’ in Ghana. Against this backcloth, the paper sets to find out whether there exists a duty of utmost

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3 Section 68 Supreme Court Ordinances of 1876
4 Contracts Act, 1960 (ACT 25)
good faith in insurance contract in Ghana and also answer the question of the reliance by the courts in Ghana to a common law principle that has been heavily sapped by statutory intrusions.

NATURE AND SCOPE OF GENERAL INSURANCE CONTRACT

As a form of contract, there exists an upright inclination that Insurance contract ought to be governed by the rules forming part of the general principles of Law of Contract. Namely, “Agreement” which arises from offer and acceptance, and with it are other necessary elements such as “Consideration”, and “Intention to create legal relation” amongst others. Nonetheless, unlike the general contract theories, insurance contract has over the years developed its own principles. Unlike others contracts in legal areas, insurance contract as developed in England Emphatically revolves around the duty of utmost good faith as its nucleus element. It is effortlessly admitted by most literatures and text books that; the area is one that is not easily susceptible to definition. According Hodgin, in the second edition of the ‘Insurance Law Text and Materials’ ‘most law books, however, irrespective of the branch of law with which they are concerned, are usually forced to admit that there is no single accepted definition of their subject area, and Insurance law is no different, despite the fact that there are numerous statutes regulating this area’. Templeman LJ., who dabbles in this strand also has observed that, any attempt at defining insurance may be undesirable, and this is because, definitions sometimes tend to obscure and occasionally exclude that which ought to be included. Nonetheless, irrespective of the clustered literatures on the definitional challenges, a definition of the subject matter as a special form of contract is desirable to generate some level of consensus on its nature and scope. For this purpose, many literatures define insurance contract with regards to its features; namely, the premium, the nature of the risk, the subject matter of the insurance and the duration of the cover. Holdsworth defines Insurance as a contract by which one party (the insurer) in consideration of a premium, undertakes to indemnify another (the insured) against loss. Insurance contract is also defined by the ‘Encyclopedia of forms and precedents’, as a contract ‘uberrimae fidei’; thus a contract of

5 Birds J., ‘Modern Insurance Law’, (9th Edn, London Sweet and Maxwell 2013)
6 Hodgin Ray., ‘INSURANCE LAW TEXT AND MATERIALS’ (2nd Edn, Cavendish Publishing Pty Ltd 2002), 2
7 Department of Trade and Industry v. St. Christopher Motorists’ Association Ltd. (1974) 1 All ER 395
8 Holdsworth, W, ‘The early history of the contract of insurance’ (17 Col LR 1917) 85
utmost good faith, one which requires all parties to an insurance contract to deal in good faith, making a full declaration of all material facts in the insurance proposal.\(^9\) In a similar fashion, Magens has in his work ‘An essay on insurance’, (which is quite recent than both works) described insurance as where one party called the insured, who pays a consideration called the premium to another party called the insurer, who engages to satisfy and make good to the insured unless a fraud appears, any loss, damage, or accident that may happen according to the terms of the contract or policy.\(^10\) There seems to exist consensus on the scope and nature of insurance contract along the definitions given as evident in many literatures on the subject matter. Some basis requirements or factors essentially driving insurance contract can be deduced from its nature and scope.

According to Channell J., the validity of an insurance contract is dependent on three basic requirements, namely, the contract should generate some benefit for the policy holder on the occurrence of some event; the occurrence should involve some element of uncertainty; and the uncertain event should be one which is prima facie adverse to the interest of the assured.\(^11\)

**UTMOST GOOD FAITH IN INSURANCE CONTRACT**

It is a general Common Law principle that, there is no duty of obligation on a party entering into a contract to disclose any material information.\(^12\) Ordinarily, failure to disclose any material fact which might influence the mind of a prudent contractor does not give right to a party to avoid the contract, this is because the principle of ‘cavet emptor’ applies outside contracts of sales.\(^13\) Nonetheless, some contracts are expressed by the law as one of utmost good faith, which requires the disclosure of material facts. Insurance Contract as a special contract is considered as a rare species of contract where both the proposer and the insurer are under a mutual duty of utmost good faith. That law of insurance emphatically revolves around the duty of utmost good faith. Etymological study points the origin of the term to the Latin expression ‘uberrimae fidei’.\(^14\)

\(^{10}\) Hodgin n(6)
\(^{11}\) Prudential Insurance Co v IRC [1904] 2 KB 658
\(^{12}\) Bell v Lever Bros Ltd (1932) AC 161 (HL)
\(^{13}\) Ibid Lord Atkin, 401
\(^{14}\) Birds’ ‘Modern Insurance law’, (9th edn 2013), 119
defraud another person. The term as used in the law of insurance requires a contracting party to make full and true disclosure of any material facts which could guide a prudent insurer in determining whether to assume or take the risk and, if so at what premium and on what condition.\textsuperscript{15} The classical origination of the duty to disclose material facts is traceable to Lord Mansfield in the earlier case of \textit{Carter v Boehm} (1766) 3 Burr 1905.\textsuperscript{16} The duty of utmost good faith is accorded a statutory codification under section 17 of the Marine Insurance Act 1906.\textsuperscript{17} Section 17. \textit{Insurance is uberrimæ fidei}; ‘A contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party.

The duty of disclosure is mutually shared among the parties to an insurance contract and they are by law bound to volunteer or share amongst each other information that is material before the contract is concluded.\textsuperscript{18} Utmost good faith essentially provides the standard of judgment to distinguishes some classes of contracts (for insurance contracts which highly one of utmost good faith) from other contracts of which no duty of disclosure of material facts is placed on those entering into the contract at common law.\textsuperscript{19} Lord Atkin has made this observation in the case of \textit{Bell v Lever Bros Ltd}, (1932) AC 161 (HL) where he stated, “[T]here are certain contracts expressed by law to be contracts of the utmost good faith where material facts must be disclosed; if not the contract is voidable. Apart from special fiduciary relationships, contracts for partnership and contracts for insurance are the leading instances. In such cases, the duty does not arise out of contract: the duty of a person proposing insurance arises before a contract is made...”\textsuperscript{20} Lord Atkin’s statement is of immense importance and significant endorsement and this is traceable to Lord Mansfield’s decision in \textit{Carta V Boehm} (1776) 3 Bur 1905.\textsuperscript{21} The materiality of the facts or information to be disclosed is expressed as, essentially every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk.\textsuperscript{22} The development of this duty according to Channel J in \textit{Re Yager} (1912) 108 L.T

\textsuperscript{15} \textit{Guardian Assurance Co, Ltd v Osei} (1966) GLR 762
\textsuperscript{16} \textit{Carter v Boehm} (1766) 3 Burr 1905
\textsuperscript{17} \textit{Cabaret Club & Casino Ltd v London Assurance} [1975] 1 Lloyd’s Rep 169. per May J The Act was intended to be declaratory of the common law.
\textsuperscript{18} Birds J., ‘Modern Insurance Law’, (9th Edn, London Sweet and Maxwell 2013), 119
\textsuperscript{20} (1932) AC 161 (HL); John Lowry, Philip., ‘Rawlings Insurance Law: Cases and Materials’, (2004), 129
\textsuperscript{21} (1776) 3 Bur 1905
\textsuperscript{22} Sections 18(2), Marine Insurance Act, 1906
35-40, is due to the unbalance in the bargaining power of the parties at the pre-contractual stage, namely the insurer’s weaker position was one of the determining factors for the introduction of good faith.\textsuperscript{23} This has received endorsement in the case of \textit{HIH Casualty and General Insurance Co v Chase Manhattan Bank} [2003]Lloyds Rep 61(HL), where Lord Hobhouse observed: “...the practical circumstance which has since been said to justify this special treatment of insurance contracts is a disparity between the knowledge of the proposer (and his agent) and the underwriter”.\textsuperscript{24} The duty of good faith is mutual and either party is stern from concealing what he privately knows to draw the other into a bargain from his ignorance of that fact and his believing the contrary.\textsuperscript{25}

**UTMOST GOOD FAITH BEFORE MARINE INSURANCE ACT**

The earliest example of an insurance policy is according to Holdsworth to be found in Genoa, dating from 1347. This form of insurance policy was known by the Greeks expression ‘polizza’. In the 1930’s, special insurance courts were established to deal with marine policies. The Judgment of Lord Mansfield during the 18th century largely led to the development of English insurance law. The period under discussion is largely dominated by the common law. At common law, insurance contract is one of \textit{uberrimae fidei} (that is, utmost good faith).\textsuperscript{26} This form of contracts requires the exercise of utmost good faith (\textit{uberrima fidei}) from both parties. The reasons for describing such contracts in this way are explained by Lord Mansfield in \textit{Carter v Boehm} (1766) 3 Burr 1905 which is obviously the classical case on Insurance Contract.\textsuperscript{27} It is noteworthy that Lord Mansfield’s antecedents were Scottish who were inclined to requirement of good faith by contracting parties under the civilian tradition. As pointed out by lord Mustill in \textit{Pan Atlantic Insurance Co v Pine Top Insurance co. Lord Mansfield} was the time attempting to introduce into the English commercial law a general principle of good faith. This attempt was ultimately unsuccessful and only survived for limited classed of transactions, one which was insurance. The common law principle of utmost good faith requires a party to make full and true disclosure of the

\textsuperscript{23} Re Yager (1912) 108 L T 35-40, Channel J
\textsuperscript{24} [2003] Lloyds Rep 61(HL)
\textsuperscript{25} \textit{Carter v. Boehm} (1766) 3 Burr 1905
\textsuperscript{26}The Encyclopedia of forms and precedents, (5th Edn Para 128 1998), 68
\textsuperscript{27} Hodgin n(6)
material facts which would guide a prudent insurer in determining whether to assume or take the risk and, if so at what premium and on what condition. The notion of materiality has acquired major significances in the common law system. In particular, an insurance company is entitled to cancel the insurance policy in the event of misrepresentation or concealment which is material to the risk. Often such material falsehoods and non-disclosures are identified at a fatal moment namely at the time of loss. Materiality is often defined as a contingency, state of affairs or event which has a ‘fundamental’ effect upon the insurance risk.\textsuperscript{28} The justification of the test of materiality under the common law may not be equally convincing in the modern insurances world.

UTMOST GOOD FAITH UNDER MARINE INSURANCE ACT

The period from 1906 saw the codification of Insurance policy by the Marine Insurance Act, 1906. The Marine Insurance Act, 1906 of England incorporates the principle of utmost good faith ranging from disclosure by assured and the agent effecting insurance down to representation pending negotiation of contract. According to the Marine Insurance Act of England, a Contract of Marine Insurance is is one of utmost good faith, failure to observe by either party, the contract may be avoided.\textsuperscript{29} Potential parties to insurance contract are under a duty to volunteer to each other any material information that is, every circumstances or facts that would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk or not before the conclusion of the contract.\textsuperscript{30} The insured’s duty of disclosure is spelled out in section 18 of the Marin Insurance Act 1906. This has been established in various judicial opinions which have largely contributed to its development. The Act codifies the common law principles and renders same applicable to non-marine insurance contracts. It is noteworthy to say that the classic formulation of the duty to disclose material facts by Lord Mansfield in the case of \textit{Carta v Boehm}\textsuperscript{31} and as subsumed in the concept of \textit{uberrimae fidei}, is accorded a statutory codification, specifically sections 17 and 18 of the Marine Insurance Act 1906. This duty has long been strictly applied to all types of insurance contracts; whether on ships, houses lives etc. The underwriter should be

\textsuperscript{28} Trakman L.E., ‘Mysteries surrounding the material disclosure in insurance law’, (1984)

\textsuperscript{29} Section 17, Marine Insurance Act 1906

\textsuperscript{30} Section 18(2) of the Marine Insurance Act 1906

\textsuperscript{31} \textit{Carter v. Boehm} (1766) 3 Burr 1905
informed of every material circumstance within the knowledge of the assured.\textsuperscript{32} It is important to note that Section 17 of the Act does not limit the principle of utmost good faith to marine insurance contracts only. In *Lindenau v Deborough* is was observed that, the principle should apply in all cases of insurance, whether on ships, houses, or lives, the underwriter should be informed of every material circumstance within the knowledge of the assured.\textsuperscript{33} Thus, section 18 of the Act codifies the common principle of utmost good faith and places the application of the principle beyond marine insurance into all forms of insurance contracts. Lord Mansfield’s formation of the duty of disclosure is given statutory recognition under section 18 of the Marine Insurance Act 1906. The incidental questions on the test of materiality or what ordinarily would amount to material information, were frequently answered by Section 18(2) of the Marine Insurance Act 1906. Under the section, every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium or determining whether he will take the risk. Also in *Rivez v Gerussi*,\textsuperscript{34} it was held that a material fact is the one which would affect the judgment of a prudent and rational underwriter in considering whether he will enter into a contract at all or at one rate or another. To determine whether or not a non-disclosed fact is material is under section 18(2) is one that would influence the judgment of the prudent insurer. Although the Act does not go on to define these requirements, the courts have laid down the requisite tests for determining whether they are satisfied to have any influence on the contract. The “Prudent insurer test” by Blackburn J. in *Lonides v Pender* (1874) LR 9QB 531 in helpful in determining the materiality of facts under this law. Accordingly, every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk.\textsuperscript{35} Under the Act, it is worthwhile to draw attention to the useful point that generally the disclosure of material facts as embedded in the principle of utmost good faith works at the pre-contractual or the negotiation stage and the claims process but not during the time that the contract subsists. A closer look at section 18(1) of the Marine Insurance Act 1906 reveals this position.

\textsuperscript{32} *Lindenau v Desborough* (1828) 8 Barn & C 586
\textsuperscript{33} (1828) 8 Barn & C 586
\textsuperscript{34} (1880) 6 QBD 222
\textsuperscript{35} *Lonides v Pender* (1874) LR 9QB 531
THE DRACONIAN BRUTALIZATION OF THE DUTY OF UTMOST GOOD FAITH IN INSURANCE CONTRACT

As it has been noted, before the conclusion of the insurance contract, the potential parties to it are bound to volunteer to each other information that is material. Thus the principle of utmost good faith in terms of a pre-contractual duty of disclosure applies to insurers and insured alike. It has long been said by Lord Mansfield in the case of *Carter v Boehm*\(^{36}\) that the requirement of utmost good faith applies to both parties to the insurance contract.\(^{37}\) Lord Diplock once said “the beauty of the common law is that it is maze not a motorway”. A plan of the maze would not come amiss. The duty of good faith is neither a motorway nor a one-way street – it is mutual.

There is no discrimination as to the effect of a breach of this duty because if the duty is not observed by either party, the contract may be avoided by the other party.\(^{38}\) However, it must be noted that until the imperative decision in *Banque Financiere de la Cite SA v Westgate Insurance Co Ltd*\(^{39}\) this did not, however, seem to have any real significance. In the instance case, there was a bold attempt by the judge at first instance, having applied such duty on the insurer, to give it some real teeth by awarding damages for breach of the duty. Both the court of appeal and the House of Lords asserted that even though there was a duty, the only remedy for breach of that duty is the traditional one of avoidance of the contract. The only other English case where the question of the remedy for a non-disclosure had been expressly considered previously was *Glasgow Assurance Corp v Symondson*,\(^{40}\) in which Scrutton J. stated that the only remedy was avoidance.

The house of lords in the case of *Banque Financiere de la Cite SA v Westgate Insurance Co Ltd* did approve of the reasoning of the court of appeal to the effect that an insurer is under a pre-contractual duty of disclosure to its insured but only in respect of matters that are material to the risk or to the recoverability of a claim. It rather more disappointing that the case established a rather narrow duty of disclosure on an insurer and a fairly ineffective remedy limited to avoidance and return of the premium. It has been said that the reasoning of the court of appeal, approved by

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\(^{36}\) (1766) 3 Burr
\(^{37}\) See also the judgment of Farwell L.J. in *Re Bradley and Essex and Suffolk Accident Indemnity Society* {1912} 1 K.B. 415.
\(^{38}\) Section 17 of the Marine Insurance Act 1906
\(^{39}\) [1991] 2 A.C. 249
\(^{40}\) (1911) 16 com.cas. 109, 121
the House of Lords, as to why a breach of a duty of disclosure could not result in damages is unsatisfactory.\textsuperscript{41} Accordingly, that court in rejecting Steyn J.’s adoption of the principle \textit{ubi jus ubi remedium}, stated that to found a claim in damages it was necessary that there was a breach of contract, a tort, a breach of statute or a breach of a fiduciary relationship. It must be noted that the duty of disclosure did not result from an implied term of the contract of insurance, hence there was no breach of contract. In the case under discussion, the court of appeal, and by adoption, the House of Lords, was reluctant to create such a novel tort. There was no authority in support, although it is unclear why this should be decisive since there are modern cases where the judges have in effect created new torts to give a damages remedy where one was not available before.\textsuperscript{42} There were several reasons why the court was not willing to award damages as a remedy: The first related to the supposed equitable origin of the relief for non-disclosure of material facts. According to Professor Birds, with respect, this seems quite rather strange reasoning due to the fact that the duty of disclosure stems from the common law courts of Lord Mansfield.\textsuperscript{43} The second referred to the fact that in relation to avoidance, the effect on the actual insurer (of non-disclosure by the insured) or the actual insured (of non-disclosure by the insurer) is irrelevant. So there would be difficulties in translating this approach to a case where the insured is seeking damages.\textsuperscript{44} This position will not stand having regards to the House of Lords decision in Pan Atlantic v Pine Top.\textsuperscript{45} The court of Appeal’s third reason was based on the fact that the Marine Insurance Act 1906 did not refer to damages being available for a breach of the requirement of utmost good faith or a non-disclosure by the insured.\textsuperscript{46} This reason has once again been criticised by Professor Birds. According to him, this reasoning is very poor and shocking that the House of Lords was content to adopt it. He further argued that the 1906 Act was merely a codification of the law as it had developed as at a particular date.\textsuperscript{47} The obvious fact is that in those circumstances, the statement that if parliament had contemplated damages as a remedy, “it would surely have said so”\textsuperscript{48} is, with respect, nonsense.\textsuperscript{49}

\textsuperscript{41} Birds J., ‘\textit{Modern Insurance Law}’, (9th Edn, London Sweet and Maxwell 2013), 157.
\textsuperscript{43} Birds J., ‘\textit{Modern Insurance Law}’, (9th Edn, London Sweet and Maxwell 2013), 158
\textsuperscript{44} Container Transport International v Oceanus Mutual Underwritten Association (Bermuda) Ltd [1984] 1 Lloyd’s Rep. 476
\textsuperscript{45}[1994] 3 ALL E.R. 581
\textsuperscript{46} Section 17 and 18 of the Marine Insurance Act 1906 respectively
\textsuperscript{47} Birds J., ‘\textit{Modern Insurance Law}’, (9th Edn, London Sweet and Maxwell 2013), 159
\textsuperscript{48} [1990] Q.B. at 781.
\textsuperscript{49} Birds n(45)
Professor Birds also noted that this view is also reinforced by the decision in *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co*

where the House of Lords did read words into the 1906 Act by holding that inducement was an implied requirement in sections 18 and 20. Finally, the court referred to the fact that the damages remedy would have to be reciprocal and would cause hardship because of the draconian nature of the duty of disclosure, not being dependent on fault at all. It must also be noted that this reasoning did not situate well within the thinking of the law even though it sounds convincing as asserted by Professor Birds. He supported his assertion by adducing that a party in breach of contract can be liable in damages to the other party without any fault or other blameworthiness at all. He concluded that the case under discussion, at least in part, very badly reasoned and leaves the distinct impression of a timid judiciary. It must be noted that despite the criticisms levelled against the above decision, it has been followed recently in *Aldrich v Norwich Union Life Insurance Co Ltd.*

It has been established that in the area of insurance law, the house of lords was somewhat content to create new law by introducing the requirement of inducement into the insured’s duty of disclosure: In *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co,* All their Lordships held that the actual underwriter had to be induced by the misrepresentation or non-disclosure. There were not too many merits on either side, but the balance of merits was on the side of the reinsurers, in that the reinsured had failed to disclose recent alarming figures, hence, satisfying the test for avoidance, on either version of the law. So *Pine Top* secured the draconian remedy of avoidance. It was incumbent on the avoiding underwriter to prove that he was induced by the non-disclosure or misrepresentation by the assured or the assured’s agent.

The common law duty of disclosure imposed on the assured and its subsequent codification by the Marine Insurance Act of 1906 was seen to have placed a heavy burden on the insured rather than the insurer. According to the common law position as postulated by *Carter v Boehm*, it the insured who has knowledge of the subject matter that he wants to effect the insurance on as such must voluntarily disclose all material facts pertaining to the subject matter in other for the insurer to

50 [1994] 3 ALL E.R. 581
51 Birds J., ‘*Modern Insurance Law*,’ (9th Edn, London Sweet and Maxwell 2013), 159
52 ibid
53 ibid; Kelly, “the insured’s rights in relation to the provision of information by the insurer” (1989) 2 Ins. L.J. 45
54 [2000] Lloyd’s Rep I.R. 1
form a decision as to whether to accept the risk or not and at what premium. This position was also codified under section 18 of the Marine Insurance Act of 1906. This section demands that the assured must disclose to the insurer every material circumstance which is known to the assured. The assured is deemed to know every circumstance which in the ordinary course of business, ought to be known by him. The point need to be stated that should the assured fails to make such disclosure, the insurer may avoid the contract. From the provisions of this section, it is unarguable that the insurer is not under such voluntary disclosure. Another area of concern in relation to section 18 is the scope of this duty of disclosure placed on the assured. Thus, to what extent such duty is required. In addressing this issue, this section provides that, the assured must disclose all material facts prior to the conclusion of the contract. The section further stipulates that should the assured fail to observe this duty, then the insurer may avoid the contract.

In addition, section 20 of the Marine Insurance Act which also deals with the representations pending negotiation of the contract provides that every material representation made by the assured or his agent to the insurer during the negotiations for the contract, and before the contract is concluded, must be true else the insurer may avoid the contract.

The effect of these two statutory provisions are that the duty of disclosure comes to an end before or at the conclusion of the contract. Thus, after the contract has been concluded between the assured and the insurer, the duty will then stub out. In short, the import of sections 17, 18 and 20 of the Marine Insurance Act is to the effect that, the duty of disclosure does not go beyond conclusion of the contract. It is thus said to be a pre-contractual duty only. The duty is deemed to be outside the contract and as such an assured is therefore not under any clear obligation to disclose any change in material facts in respect of the property the subject matter of the contract once the policy has been concluded. This duty shall only arise during a renewal of the policy upon expiration as was the case in *Pim v Reid*, where the court held among others that non-disclosure of the change in material facts is not actionable. In simple terms, the duty of disclosure does not have a continuing effect in this sense.

Amiss the heavy burden these provisions placed on the assured and couple with the fact that ‘the cry for freedom’ was not adhere to, came another dumbfounded ruling from the house of lords in

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56 These sections place limitation on the scope of the duty of disclosure at only the pre-contractual stage.
the case of *Manifest Shipping Company Limited v Uni Polaris Shipping Company Limited & others (The Star Sea)*. Their Lordships were called upon to determine among others the extent this duty of disclosure runs in the insurance contract. They considered sections 17 and 18 in the light of the scope of the duty of disclosure. The house came to a conclusion that the duty does not come to an end when the contract is concluded but runs through the currency of the contract until litigation when it is expected that civil procedure rules will take care of the duty of disclosure. According to Lord Hobhouse, with whom the other lords agree, ‘utmost good faith is a principle of fair dealing which does not come to an end when the contract is concluded’. The star sea case, introduced a post contractual duty which runs throughout the subsistence of the policy. It expanded the duty beyond pre-contractual as required under section 18 to the time of litigation. Lord Hobhouse accordingly came out with two duties imposed on the parties but undoubtedly more heavily on the assured. He termed them the pre-contractual duty which is found outside the contract and the post-contractual duty which is embedded in the contract and of course outside the scope of section 18. The star sea case failed to state the exact nature and content of this post-contractual duty. This made it difficult to state when the only remedy of avoidance ab initio will be available.

Although strictly the Marine Insurance Act of 1906 only applies to marine insurance, the courts have consistently held that it applies to all forms of insurance, including consumer insurance, on the grounds that it codifies the common law. It must also be stated that these sections which codified the common law are of general application since they apply to both marine and non-marine insurance.

The ‘*draconialism*’ of the statutory provisions in relation to this duty of utmost good faith together with various judicial complexities brought about massive criticism from the players and commentators within the insurance industry. There was a massive cry for reform within the insurance industry calling on the powers that be to see to it that reforms have taken place in order to address the defects associated with the common law and its consequent codification. There was a total failure by the legislature to carry out the reforms which require legislation despite the call

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57 [2001] UKHL 1
58 Sections 17 – 20 of the Marine Insurance Act 1906
60 *Lambeth v Cooperative Insurance Society* [1975] 2 Lloyd’s Rep 485
by many to find a way to alleviate the sternness of the avoidance provisions amiss inadequate remedy and materiality confusion.

Despite the various calls for reform over 64 years or so, insurers successfully fought a rear guard action to prevent any legislative intervention that might dilute the disclosure duty. This clearly evidences the reaping-off effect of this duty to the detriment of the assured. In 1957, the Law Reform Committee published its Fifth Report,\textsuperscript{61} which considered the harshness of the duty referred to by the Court of Appeal in the Lambeth case.\textsuperscript{62} The proposals put in place by this Committee once again fell on deaf ears. It has been argued that these proposals were not adhere to because the government of the day accepted the insurance industry’s word that, in practice, insurers only relied on their strict legal rights when they suspected, but could not prove, fraud.\textsuperscript{63} The next major call for reform came in 1980 when the Law Commission published its report, \textit{No 104, Insurance Law – Non-Disclosure and Breach of Warranty, Cmnd 8064}. The Law Commission concluded that the disclosure duty was ‘far too stringent’. Ultimately the DTI belatedly issued a draft Insurance Bill for consultation but not surprisingly nothing came out of this. In 1986 the government announced that it was satisfied that the Statements of Practice issued by the Association of British Insurers in 1977 and revised in 1986, in return for achieving exemption for the industry from the Unfair Contract Terms Act 1977, struck the appropriate balance for the consumer-insured.

In 1997 a thorough review of the disclosure duty, among other areas of insurance law, was undertaken by the National Consumer Council. Its report, \textit{Insurance Law Reform – The consumer case for a review of insurance law,}\textsuperscript{64} took the Australian Insurance Contract Act 1984 as its template in framing its proposal for reform of UK insurance law. Finally, in January 2001 the British Insurance Law Association established a sub-committee to examine contentious areas of insurance law and to make recommendations to the Law Commission ‘as to the desirability of drafting a new Insurance Contracts Act’. Its report, \textit{Insurance Contract Law Reform}, was published in September 2002.

\begin{footnotesize}
\begin{enumerate}
\item Conditions and Exceptions on Insurance Policies, Cmnd 62 1957
\item Lowry, Philip., ‘Rawlings Insurance Law: Cases and Materials’, (2004), 191
\item Birds J., ‘Modern Insurance Law’, (9th Edn, London Sweet and Maxwell 2013)
\end{enumerate}
\end{footnotesize}
THE ARRIVAL OF THE MUCH AWAITED INTERVENTIONS

The draconian duty of disclosure which governed all forms of insurance contracts in the United Kingdom for close to a century was finally laid to rest by the promulgation of two powerful and well-thought legislations. The first intervention which was geared towards the alleviation of the heavy burden placed on the insured by the provisions in the Marine Insurance Act 1906 was the Consumer Insurance (Disclosure and Representations) Act, 2012. This Act has drawn a distinction between consumers and non-consumers of insurance. Section 1 defines consumer insurance as a contract entered into by an individual wholly or mainly for purposes other than or unrelated to his profession, business or trade. Consumer is defined as an individual who enters into a contract of consumer insurance. Section 2(4) has abolished the pre-contractual duty of disclosure that existed under sections 17 and 18 of Marine Insurance Act, 1906. It has been replaced by section 2(2) of the Consumer Insurance (Disclosure and Representations) Act, 2012 with a duty to take reasonable care not to make a misrepresentation to the insurer before contract is concluded or varied. Section 5 discusses what amounts to a misrepresentation. It provides that, a misrepresentation is one that is deliberately or recklessly made or a careless one. It is deliberate or reckless if assured knew same to be untrue or misleading but did not care whether or not relevant to the insurer. It shall be careless if it falls outside the two stated above. Section 4 provides a remedy against any misrepresentation made by consumers. In effect, sections 18, 19 and 20 of the Marine Insurance Act, 1906 have been abolished per the consequential provision under section 11 of the Consumer Insurance (Disclosure and Representations), 2012 within the United Kingdom. The current duty on the assured in respect of consumer insurance is not to make a misrepresentation and, again he is not under any obligation to volunteer information.

Again, the passage of the Insurance Act, 2015 has also made significant inroad. It has changed the duty under the Consumer Insurance Act, 2012 to a duty to make a fair presentation of the risk to the insurer in respect of non-consumer insurance by doing away with disclosure per section 3. The

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65 The 1906 Act was perceived as archaic, unclear and unfair. In particular, the rules applying to non-disclosure and misrepresentation are unacceptably confusing. The increasingly, differences in the law between the UK and other jurisdictions cannot be justified.
risk presentation by the assured must be reasonably clear and accessible. The assured’s duty of fair presentation is fulfilled once he gives sufficient information to put a prudent insurer on notice that it needs to ask further questions. Thus, the assured is only to make such fair presentation on the proposal form from the insurer. The insurer has a remedy against the assured where he can show that, but for the breach of fair presentation of the risk; he would not have entered into the contract or would have done so on different terms per section 8. Part Five (5) of the same Act has abolished avoidance of the contract on the ground that utmost good faith has not been observed. The resulting effect of the change in the duty to a fair presentation in respect of non-consumers has abolished sections 18, 19 and 20 of the Marine Insurance Act, 1906 as captured under section 21 of Part 7 of the Insurance Act 2015.

Clearly, England has moved from the position in *Carter v Boehm*, which is the duty of utmost good faith and disclosure as codified in the Marine Insurance Act, 1906 to a duty not to make a misrepresentation in respect of Consumer Insurance and; for non-consumers, the current duty is for the assured to make a fair presentation per the 2015 Act.

THE DUTY OF UTMOST GOOD FAITH; OVERVIEW OF THE GHANAIAN PERSPECTIVE

The lengthy discussions from the previous topics herein points out the importance of Utmost Good Faith in insurance contracts in respect of the Common Law Jurisdiction. To situate the discussion purposively within the Ghanaian legal system, this section scrutinizes the nature and scope of Utmost Good Faith by identifying and examining the concept in respect of insurance contracts in Ghana. The section commences with an overview of the history and development of the Law, followed by a discussion on the Nature and scope of Utmost Good Faith.

**History and development of the law**

Duty of Disclosure in Insurance Contract has been part of the Ghanaian law and well known amongst legal practitioners. The development of insurance in Ghana is the reception of the common law rules, doctrine of equity and statute of general application of England which are by
Section 68 of the Supreme Court Ordinances of 1897, applicable to Ghana.

Accordingly, like many of the statutes in Ghana, the Insurance Act 2006 (ACT 731) could be described ‘pro rata’ with that of the Marine Insurance Act of England. As a common law principle, its validity and application under our jurisdiction is endorsed under Article 11(1) (e) and 11(2) of the 1992 Constitution of Ghana.

“Article 11 (1) The laws of Ghana shall comprise- (e) the common law...
(2) The common law of Ghana shall comprise the rules of law generally known as the common law, the rules generally known as the doctrines of equity and the rules of customary law including those determined by the Superior Court of Judicature.”

This principle also received statutory endorsement when it featured conspicuously under the ‘Supplementary and Miscellaneous Provisions’ in the INSURANCE LAW, 1989 (PNDCL 227). Under this Law, a party to a contract of insurance shall not be under any obligation to disclose any fact about which no question is asked by the insurer or his agent. This notwithstanding, where a party to a contract of insurance with intent to avoid the rejection of the risk by the insurer or the payment of higher premiums, conceals from, or fails to disclose to the other party to the contract any fact which he knows or believes or has reasons to believe to be material to the contract, the contract may be rescinded by the other party. The test of materiality of Fact under this Law is determined for the purpose of any contract of insurance, if in a given circumstances it would be considered material by a reasonable person. The Insurance Law, 1989 (P.N.D.C.L. 222) [and its subsequent Amendment Laws, the Insurance (Amendment) Law 1991 (P.N.D.C.L. 260) and the Insurance (Amendment) Law 1993 (P.N.D.C.L. 316)] have been repealed by the Insurance Act, 2006 (Act 724).

The duty of Good Faith after the repeal of The Insurance Law, 1989 (P.N.D.C.L. 222) was conveyed into the current Insurance Act with quite similar provisions. Nonetheless, there are obvious and major changes that render or change completely the nature, and scope of application.

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66 Section 68 Supreme Court Ordinances of 1897
67 Section 57
68 Section 57(2)
69 Section 58
70 Section 213(1) The following are repealed by this Act-: (a) the Insurance Law, 1989 (P.N.D.C.L. 22z); (b) the Insurance (Amendment) Law 1991 (P.N.D.C.L. 260); (c) the Insurance (Amendment) Law 1993 (P.N.D.C.L. 316).
of the duty as existed under PNDCL 222. Section 214 of the Insurance Act, 2006 (ACT 724) for the purpose of the discussion in this paper shall serve a fulcrum point to commence analysis herein. Under the current Law, a party to a contract of insurance shall not be obliged to disclose a fact about which a question is not asked by the insurer or the insurer's agent.  

“Section 214 (3), For purposes of the National Health Insurance Act 2003 (Act 650):- (c) a party to a contract of insurance shall not be obliged to disclose a fact about which a question is not asked by the insurer or the insurer's agent”

Nonetheless, under this Law, a party to a contract of Insurance is entitled to rescind the contract where the other party conceals from, or fails to disclose a fact which he believes to be material to the contract.  

“Section 214(d) a party to a contract of insurance may despite paragraph (c), rescind the contract where the other party, with the intent to avoid the rejection of the risk by the insurer or the payment of a higher premium, conceals from, or fails to disclose to the party to the contract, a fact which that other party knows or believes or has reasons to believe to be material to the contract”

It vital to point out here that, under the old law, even though the Duty of Good Faith Featured prominently, its provisions were squeezed under ‘Supplementary and Miscellaneous Provisions’ but with a massive precision and effective generalization of its application in all cases of Insurance Contract. After the repeal of the old Insurance Law (P.N.D.C.L 222), these provisions were conveyed into the new Insurance Act 2006(Act 724) and again squeezed under “Consequential amendment” linking its application to the NATIONAL HEALTH INSURANCE ACT, 2003 (ACT 650) under Section 214 with a very limited scope in its application. Whilst it is not the objective of this paper to undertake a comparative exploration of P.N.D.C.L 222 and ACT 724, it is imperative to stimulate the discussion along the scope of application, and the nature of the Duty of Utmost Faith under the current and all previous Insurance Laws. The Insurance Act is silent on the effect of non-disclosure in general Insurance Contracts. Or if one desires, ACT 724 unlike the P.N.D.C.L 222, Lacks precision on the generality of the application of the duty of Disclosure in all Insurance Contracts. Despite this big mention of the duty under the section, it likely some legal

71 Section 214(c)
72 Section 214(d)
questions must arise from its application. This is largely attributable to fact that the Duty of Disclosure under Section 214 of the ACT 724 is merely a consequential amendment for the purposes of the NATIONAL HEALTH INSURANCE ACT, 2003 (ACT 650). This requirement of utmost good faith, though not generally clutched under the Insurance Act of Ghana, Act 2006 (Act 724), it may seem that the Duty under section 214 is accepted as the statutory source on the general duty of disclosure in all insurance contracts. It appears that, the duty of disclosure in insurance contracts is under Section 214(3) (c), a rather unusual one, since a party to a contract of insurance shall not be obliged to disclose a fact about which a question is not asked by the insurer or the insurer's agent. Presumably so, the section makes it highly questionable that, an insured would anticipate any such obligation or a duty to disclose facts or information which is not asked by the insurer or the insurer's agent. Succinctly, the section stipulates that, there should be no duty on the insured to disclose matters about which no questions were asked.\textsuperscript{73}

Nonetheless, Pursuant to Section 214(3) subsection (d), a party to a contract of insurance may rescind the insurance contract where the other party willfully conceals or fails to disclose some material facts reasonably within his knowledge or contemplation from the other party, purposely to avoid the rejection of the risk by the insurer or the payment of the higher premium. The obligation under this section compound the confusion on what exactly the position is. The failure to disclose some information within the knowledge and contemplation of a party which specifically have not been asked, under section 214(3) (d), may amount to concealment of material information which entitles the other party to rescind the contract; although there is no such duty to disclose under section 214(3)(c) if not asked. The removal of the obligation to disclose matters which have not been specifically asked, under section 214(3) (e), may amount to concealment, which is forbidden under section 214(3) (d). there are some judicial pronouncements before the enactment of the Insurance Act of Ghana in 2006 which express fidelity to common law principles of utmost good faith.

**Scope of application**

It is instructive to turn to the incidental question of the generalization of section 214 of the Insurance Act, (which is captioned, ‘consequential amendment’ narrowing its scope to the

\textsuperscript{73} Per section 214(3)(c) Insurance Act, 2006 (ACT 724)
National Health Insurance Act) in all cases of insurance contracts. That is, does section 214 have a general application in all insurance contracts in Ghana? Unlike the Insurance of Act of Ghana, the Marine Insurance Act 1906 does not limit the principle of utmost good faith to marine Insurance contracts only. This was observed in Lindenau v Deborough\textsuperscript{74} that the principle should apply in all cases of insurance, whether on ships, houses, or lives, the underwriter should be informed of every material circumstance within the knowledge of the assured. The principles developed in regard to marine insurance have by and large been applied to the other types of insurance that developed subsequently.\textsuperscript{75} A critical scrutiny of section 214(3) of Act 724; which commences with the following sentence, ‘\textit{For purposes of the National Health Insurance Act 2003 (Act 650)}’ quickly unveils the fact that, the duty of disclosure as contained therein is exclusively within the issues covered under the National Insurance Act.

It useful to consider succinctly the courts approach to interpretation of statues to make some projections on how the courts ceased with any question on the interpretation, are likely to answer the incidental question raised herein. In fulfilling their task of applying the law to the facts before them, the courts frequently have to interpret or decide on the meaning of a particular provision(s) in statutes. Whilst it is true to say that the intention of the framers should prevail, the courts have adopted a number of conventional practices to resolve various ambiguities. Different rules of interpretation would produce differing results or answers to the question raised. For instance, interpretation of the phrase ‘\textit{For purposes of the National Health Insurance Act 2003 (Act 650)}’ by the Literal rule would demand interpretation using the ordinary meaning of the language of the statute. Accordingly, one can justify the application of section 214 only in matters covered by the National Insurance Act.

Various Judicial pronouncements on the duty of Utmost Good Faith exist in our Law reports as recognized by the Ghanaian Courts. It is important therefore to take a few snapshot of some of such cases. A year after the passage of the Insurance Act of Ghana, Margaret Insaidoo J., stated the nature of the duty of disclosure In \textit{Grafitec V. Phoenix Insurance Co Ltd.}\textsuperscript{76} She observed that, the doctrine of \textit{uberrima fidei} and the duty of full disclosure have consequences on a claim by the

\textsuperscript{74} (1828) 8 Bam & C586
\textsuperscript{75} Birds ‘\textit{Modern Insurance Law}’, (9th edn 2013)
\textsuperscript{76} (2007) in the High court of Justice Accra, commercial Division,
insured. The law imposes an onerous duty of disclosure on proposers because they are supposed to have a detailed knowledge of the risk which is not available to insurers. Accordingly, it is the duty of the insured to disclose all material facts within his knowledge or contemplation. A contract of insurance is expressed in *Guardian Assurance Co, Ltd v Osei*, as one of utmost good faith (uberrimae fidei) where the insured must make full and true disclosure of all material facts which would guide a prudent insurer in determining whether to assume or take the risk and, if so at what premium and on what condition.\(^{77}\) In *Guardian Assurance Co., Ltd. V. Osei [1966] GLR 762* Edusei J., in determining whether or not a statement as to the ownership of an insured vehicle was a material fact non-disclosure of which rendered the insurance contract void ab initio, expressed in clear terms;

“The contract of insurance is one of utmost good faith (uberrima fides) which requires the proposer to make full and true disclosure of material facts which would guide a prudent insurer in determining whether to assume or take the risk and, if so at what premium and on what conditions”.\(^{78}\)

In this case, the court whilst determining whether a statement as to the ownership of an insured vehicle was a material fact, established that, Non-disclosure of material fact will render a policy of insurance issued in consequences void ab initio.

In *Salami v State Insurance Corporation* [1967] GLR 442-446 C.A, where in completing an application form for insurance with the respondents, the appellant not only misrepresented certain conditions that existed in his business situation, but he also falsely warranted that certain precautions would be taken. These facts were discovered by the respondents when the appellant made a claim following the premises being burgled. Consequently, they repudiated the claim but not the policy. The appellant submitted on appeal, as he had at the trial, that since the respondents did not repudiate the policy then, they could not repudiate the claim. The Court Appeal in dismissing this appeal held, the respondents were entitled to repudiate the appellant's claim for breach of warranty without avoiding the whole contract.

\(^{77}\) *Guardian Assurance Co, Ltd v Osei* (1966) GLR 762  
\(^{78}\) *Guardian Assurance Co., Ltd. V. Osei [1966] GLR 762*
Also in *Norwich Union Fire Insurance Society Ltd. V. Tabbica and Sons (1967) GLR 226-230*, where the defendants (insured) in February 1962 filled in a proposal form with a view to insuring their vehicle with the plaintiffs (insurers). The defendants had prior to completing the proposal form, they had entered into a hire-purchase agreement with a third party in respect of the vehicle. Nonetheless, they concealed this information which was required in the proposal form. The insurers however, did not invite specific answers to the questions but rather went on to issue the policy of insurance. The plaintiffs in July 1963, instituted an action to avoid the policy of insurance on the ground that the policy was either obtained by the insured by the non-disclosure of a material fact or by a representation of fact which was false in a material particular. Edusei J., relying on Dicta of Lord Blackburn in *Thomson v. Weems* (1884) 9 App. Cas. 671 at pp. 683-684, H.L. and of Lord Sumner in *Yorkshire Insurance Co., Ltd. v. Campbell* [1917] A.C. 218 at p. 225, P.C. Since the parties incorporated into the proposal form, questions such as whether the vehicle was subject to a hire-purchase agreement, the answers given to the questions were material. Succinctly put, the effect of non-disclosure of a material fact, rendered the contract of insurance voidable at the election of the aggrieved party.79 It is obvious from the foregoing discussions that, the courts in Ghana recognize a duty of Good faith in insurance contracts; one requiring the full and true disclosure of material facts which would guide a prudent insurer in determining whether to assume or take the risk.

A modified objective test strikes a fair balance between the interests of insured and insurers by ensuring that an onerous disclosure duty is not imposed on applicants to disclose information when a reasonable person in their situation would not have appreciated its relevance in the circumstances. Prospective insured will be obliged to disclose what a reasonable person would consider relevant in the circumstances, even if that information is not specifically requested. The replete cases decided under Ghana law generally endorses the exhibition of utmost good faith in insurance contract as expressed by the common law and also under the Marine Insurance Act. However, the common law, indubitably, places a higher responsibility on the potential assured to disclose facts or information material to the insurance contract as compared to that of Ghana.80

79 *Carter v. Boehm* (1766) 3 Burr. 1905 per Lord Mansfield at p. 1910
The magnitude of the duty of disclosure expected to be demonstrated by the insured at common law is expressed by Scrutton L J., in Rozanes v Bowen that,

“*It has been for centuries in England the law in connection with insurance of all sorts, marine, fire, life guarantee and every kind of policy, that as the underwriter knows nothing and the man comes to him to ask him to insure knows everything it is the duty of the insured, the man who desires to have a policy, to make a full disclosure to the underwriter without being asked of all the material circumstances, because the underwriter knows nothing and the assured knows everything. That is expressed by saying that it is a contract of the utmost good faith — uberrima fides.*”

**OBSERVATIONS AND RECOMMENDATION**

From the discussions herein, the following observations are made for various recommendations at curing any mischief or vacuum created *mutatis mutandi*.

**Observations**

1. It is observed that, the Contracts Act, 1960 (ACT 25) of Ghana, has no provisions in regards of the duty of disclosure.\(^8\)

2. The duty was given statutory base when it featured conspicuously under the ‘*Supplementary and Miscellaneous Provisions*’ in the INSURANCE LAW, 1989 (PNDCL 227).\(^9\)

3. The Insurance Law, 1989 (P.N.D.C.L. 222) [and its subsequent Amendment Laws, the Insurance (Amendment) Law 1991 (P.N.D.C.L. 260) and the Insurance (Amendment) Law 1993 (P.N.D.C.L. 316)] has been repealed by the Insurance Act, 2006 (Act 724).

4. Under Section 214 of the Insurance Act of Ghana 2006 (ACT 724), as per subsection 3(c) contains a duty of disclosure. Nonetheless, the provisions on the Duty of Disclosure under

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\(^{81}\text{Ibid}
\(^{82}\text{Contracts Act, 1960 (ACT 25)}
\(^{83}\text{See Part VI; sections 57, 58 and 59 of the said Act}
Section 214 is by subsection 3(c) placed under the Consequential amendment affecting the operation of the National Health Insurance Act 2003 (ACT 650).

5. The National Health Insurance Act, in its long title is considered as an ACT to secure the provision of basic healthcare services to person’s resident in the country through mutual and private health insurance schemes.

6. It is also observed the courts in Ghana recognize a duty of Good faith in insurance contracts; one requiring the full and true disclosure of material facts which would guide a prudent insurer in determining whether to assume or take the risk.

7. The marine insurance Act under sections 17-20 codifies the common Law position of duty of disclosure in Insurance Contracts and they are of general application. The principles apply to marine and non-marine insurance although the proposals of the Law Commission were addressed to marine insurance contract; there being no difference between marine and non-marine insurance in this respect.\(^{84}\)

The unescapable question is that, does the duty of disclosure as per Section 214 subsection 3(c) which is merely a consequential amendment of the National Health Insurance Act 2003 have a universal application in all matters of insurance in Ghana? Or perhaps, the brutalized position of the duty of disclosure in England would be applicable ‘mutatis mutandis’ in Ghana. Against this backcloth, the set to proposed some recommendations for future implementation.

**Recommendation**

As already noted that Ghana as a country is not under any obligation to apply the provisions in the various legislations that have been enacted and passed in England, couple with the fact that the common law position which hitherto was applicable to the Ghanaian legal regime has been heavily affected by massive statutory intrusion.

It is recommended that there must be a robust legislation to govern the duty of disclosure by putting into context the various statutory changes made to the common law by way of legislation. This

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\(^{84}\) PCW Syndicates v PCW Reinsurers (1996) 1 WLR 1136, 1140
can be done by amending the Insurance Act 2006\textsuperscript{85}, particularly in relation to Section 214 to abjure the ambiguity or confusion cloaked in this section.\textsuperscript{86}

It is also recommended that there must be a separate legislation purposely for consumer insurance in which the term consumer would be given a definition such as will reflect the definition given by the Consumer Insurance (Disclosure and Representations) Act 2012 of England with the necessary modifications to suit the Ghanaian socio-economic and cultural tendencies. This is due to the fact that the policyholders that the National Insurance Commission are supposed to protect are not on the same footing. The individual consumer who might not know anything whatsoever pertaining to insurance and as such may not appreciate the requirement of the law and its effect on the insurance contract as compare with a corporate entity which will have the privilege of hiring the services of a lawyer and or insurance expert.

\textbf{REFERENCES}

- Birds J., ‘\textit{Modern Insurance Law}’, (9th Edn, London Sweet and Maxwell 2013)
- Hodgin Ray., ‘\textit{INSURANCE LAW TEXT AND MATERIALS}’ (2\textsuperscript{nd} Edn, Cavendish Publishing Pty Ltd 2002), 2
- Holdsworth, W, ‘\textit{The early history of the contract of insurance}’ (17 Col LR 1917) 85
- Trakman L.E., ‘\textit{Mysteries surrounding the material disclosure in insurance law}’, (1984)

\textsuperscript{85} Act 742 of Ghana
\textsuperscript{86} The relevant provisions in relation to the duty of disclosure must be remove from the Consequential amendment and be brought under the main provisions. Its limited scope must also be amended to give it a general implication.
• Kelly, “the insured’s rights in relation to the provision of information by the insurer” (2 Ins. L.J. 1989) 45
• Prudential Insurance Co v IRC [1904] 2 KB 658
• Bell v Lever Bros Ltd (1932) AC 161 (HL)
• Department of Trade and Industry v. St. Christopher Motorists’ Association Ltd. (1974) 1 All ER 395
• Guardian Assurance Co, Ltd v Osei (1966) GLR 762
• Carter v Boehm (1766) 3 Burr 1905
• March Cabaret Club & Casino Ltd v London Assurance [1975] 1 Lloyd’s Rep 169, per May J
• Re Yager (1912) 108 L T 35-40, Channel J
• Lindenau v Desborough (1828) 8 Barn & C 586
• Rivez v Gerussi (1880) 6 QBD 222
• Banque Financiere de la Cite SA v Westgate Insurance Co Ltd [1991] 2 A.C. 249
• Re Bradley and Essex and Suffolk Accident Indemnity Society {1912} 1 K.B. 415.
• Seager v Copydex [1967] 2 ALL ER 415, [1969] 2 ALL ER 718
• Fraser v Thames Television [1983] 2 ALL ER 101).
• Container Transport International v Oceanus Mutual Underwritten Association (Bermuda) Ltd [1984] 1 Lloyd’s Rep. 476
• PCW Syndicates v PCW Reinsurers [1996] 1 WLR 1136, 1140
• Grafitec V. Phoenix Insurance Co Ltd (2007) in the High court of Justice Accra, commercial Division,
• Salami v State Insurance Corporation [1967] GLR 442-446 C.A,
• Norwich Union Fire Insurance Society Ltd. V. Tabbica and Sons (1967) GLR 226-230,
• Thomson v. Weems (1884) 9 App. Cas. 671 at pp. 683-684, H.L. Dicta of Lord Blackburn
Lonides v Pender (1874) LR 9QB 531
Glasgow Assurance Corp v Symondson, (1911) 16 com.cas. 109, 121
Banque Financiere de la Cite SA v Westgate Insurance Co Ltd
Aldrich v Norwich Union Life Insurance Co Ltd. [2000] Lloyd’s Rep I.R. 1
Manifest Shipping Company Limited v Uni Polaris Shipping Company Limited & others (The Star Sea) [2001] UKHL 1
Supreme Court Ordinances of 1876
Contracts Act, 1960 (ACT 25)
Marine Insurance Act, 1906
Conditions and Exceptions on Insurance Policies, Cmd 62 1957
Insurance Act 2006 (ACT 731)
INSURANCE LAW, 1989 (PNDCL 227).
The Insurance Law, 1989 (P.N.D.C.L. 222) [and its subsequent Amendment Laws, the Insurance (Amendment) Law 1991 (P.N.D.C.L. 260) and the Insurance (Amendment) Law 1993 (P.N.D.C.L. 316)] have been repealed by the Insurance Act, 2006 (Act 724).
National Health Insurance ACT, 2003 (ACT 650)