Duration of Duty to Disclose in English Insurance Contracts

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Part 1. Common Law Position on Time to Disclose

1. 1. Introduction

There exist several reasons why the question of the exact time when the insured's duty to disclose material facts is relieved has been regarded as important in insurance contracts.\(^1\) Firstly, it determines when the insured ceases to be under any duty to the insurer to disclose material facts of which the insured becomes aware. Secondly, it may also determine whether any fact which has later come to the insured's attention but not disclosed to the insurer is material or not, as the expiry of the duty can make this fact immaterial. In other words, the question of the time to disclose is related to the crucial issue of whether such fact can affect the insurer's judgment in deciding whether or not to take the risk, and if he does, on what terms and premium.

1. 2. General Principle on New Contract

Considering that the purpose of the duty of disclosure is to give an assistance to insurer in his assessment of the risk, the duty of disclosure continues throughout the negotiations, at least until the contract has been completed. Any material fact of which during the negotiations the proposed insured becomes aware, including any alteration of circumstances which brings into existence a material fact, or in consequence of which a fact previously immaterial becomes material, must be disclosed to the insurers.\(^2\) In addition, any state-

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(1) Although the duty of disclosure applies to insurers as well as insureds, this paper will mainly deal with the case of insureds' duty of disclosure.  
ment made at any stage of the negotiations which become inaccurate as a result of a change of circumstances must be amended or withdrawn by the insured.\(^{(2)}\)

For instance, in *Pim v. Reid*,\(^{(4)}\) it was held that the insurer was not discharged where the risk increased during the currency of the policy. In *Whitell v. Autocar Fire and Accident Insurance Co. Ltd.*\(^{(5)}\), it was also held that the assured who did not become aware that his application for life insurance to another company was rejected until after the proposal had been accepted was not in breach of duty for failing to disclose the refusal. Channell J. clearly said in *Re Yarger and Guardian Assurance Co.*\(^{(6)}\):

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

Likewise, the materiality of a fact is decided by the circumstances at the time when the contract is concluded,\(^{(7)}\) not when the insurer comes on the risk in question. Therefore, for instance, a fact which was not regarded as material at the time when the duty of disclosure was performed does not affect the validity of the policy although it becomes material after the contract is made. Once the contract is concluded, the contract is subject only to ordinary good faith.\(^{(8)}\)

This is the general common law position on this issue\(^{(9)}\) and is stipulated in s. 18(1) of

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(4) (1843) 6 Man & G 1.

(5) (1927) 27 Li. L. R. 418.

(6) (1912) 108 L. T. 38, at p. 44.


(8) Of course, this position may be changed by specific provisions in the contract. This will be discussed later (1, 4).

the English Marine Insurance Act 1906 (hereafter M. I. A. 1906). This principle seems to be consistent with the test of material for the duty of disclosure in s. 18(2) which seems to ignore a post-contractual duty of disclosure, focussing on acceptance of the risk and fixing the premium.\(^{(10)}\)

Consequently, the question of which specific moment should be regarded as the time of the conclusion of a contract is extremely important. Section 21 of the M. I. A. 1906 clearly stipulates that;

"A contract of marine insurance is deemed to be concluded when the proposal of the assured is accepted by the insurer, whether the policy be then issued or not; and, for the purpose of showing when the proposal was accepted, reference may be made to the slip or covering note or other customary memorandum of the contract..."\(^{(11)}\)

In relation to its interpretation, the formation procedure of making a contract as well as the concepts of offer and acceptance are are crucial in deciding it. If the policy is initiated by a proposal or other application, the contract is concluded at the moment at which the proposal is accepted by the insurer. On the other hands, if the policy is taken out with Lloyd’s underwriters, the slip is important to decide it, because slip can be regarded as a minimum requirement for the policy.\(^{(12)}\) There had been arguments on the time of the conclusion of the contract especially in the case of marine insurance. In Ionides and Chapeaurouge v. Pacific Fire and Marine Insurance Co.\(^{(13)}\), it was held that the preparation of the slip by the broker was an invitation to treat and the initialling by the first underwriter was an offer to insure to percentage stated. That offer was conditional on 100% cover being reached and an acceptance came from the broker on behalf of the insured. Therefore, this case shows that there was no contract until the slip has been fully subscribed.

However, this approach was rejected in General Reinsurance Co. v. Forsikringsaktiebolaget Fennia Patria\(^{(13)}\), which held that the preparation of the slip was an offer, and

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(10) Although this is the general common law position, however, the continuing nature of the duty of disclosure which stems from the duty of utmost good faith is also recognized. See, Black King Shipping Corporation v. Massiei (The Ihtian Pride) [1985] 1 Lloyd’s Rep. 437, at pp. 511-512. For the full analysis of the continuing nature of the duty of disclosure, see part 2 of this paper.
(11) In the case of Lloyd’s separate duty of disclosure is evenly required to each of the subscribing underwriters.
(12) (1871) L. R. 6 Q. B. 674; affd (1872) L. R. 7 Q. B. 517.
each initialising slip was acceptance for the percentage stated. Therefore, the contract was concluded at the moment when the slip was initialled by Lloyd’s underwriters. It would appear that this judgment is compatible with the relevant section of the M. I. A. 1906.\(^{(14)}\) In conclusion, there is no duty to disclose supervening material facts which come to the knowledge of the insured, or any facts which become material after conclusion of the contract. In *Niger Co. Ltd. v. Guardian Assurance Co. and Yorkshire Insurance Co.*\(^{(15)}\), Lord Atkinson, after citing *Cory v. Patton*, said:

"I can see no reason why the principle laid down in the cases I have cited as to the disclosure by the assured of material facts between the signing of the cover and the issue of the policy should apply to the continuous cover created in this case."\(^{(16)}\)

In addition, the insured need not withdraw or correct any statements which do not become inaccurate until after conclusion of the contract. The meaning of a new insurance contract may include cases where a change in an existing insurance policy has been made significantly enough to alter the nature of the insurance contract in question. It has been accepted that the old contract in this case has been replaced by a new contract, and consequently the insured has a duty to disclose any facts material to the new insurance contract.\(^{(17)}\)

1.3. Renewal of a Contract

Considering the purpose of the duty to disclose material facts, which is to give the insurer an opportunity to decide whether to take the contract and, if so, on what terms, including premium, this duty should be required whenever the insurer has to make the same kind of decision.\(^{(18)}\) In England, it is widely recognized that this duty fully applies to the renewal of an insurance policy except that of life insurance, because the renewal of an ins-

\(^{(14)}\) Also see, *Berger v. Pollock* (1973) 2 Lloyd’s Rep. 442, at p. 461, where it was held that there was a continuing duty of disclosure between the date of the ‘cross-slip’ and ‘signing slip’.

\(^{(15)}\) (1922) 13 L. L. R. 75, at p. 79.

\(^{(16)}\) Also see, *Cory v. Patton* (1872) L. R. 7 Q. B. 304 in which it was held that assured’s non-disclosure of facts material to the risk of which he became aware only after conclusion of the contract would not give the insurer the right to avoid the policy.


\(^{(18)}\) M. Clarke, at p. 557.
urance policy has been regarded as the creation of a new fresh contract. Consequently, the insured is under a duty to disclose to the insurer any material facts which have come to his knowledge during the currency of the contract to be renewed. Although the principle is clear, however, a practical difficulty as far as the insured is concerned remains. In the case of renewal of an insurance policy, the new proposal is mostly required by the insured, not by the insurer. Therefore, a positive duty to disclose material facts will be imposed on the insured who is most unlikely to realize that the duty of disclosure exists on each renewal, and who hardly obtains a proper warning or advice from the insurer that material facts should be disclosed. However, this difficulty has been slightly modified in view of the insured being a consumer as a result of the Statements of Insurance Practice. In the U. S. A., the insured has no duty of disclosure in the case of pro forma renewal with no specific inquiries by the insurer.

The principle of the duty of disclosure on renewal of an insurance policy, however, does not apply to the renewal of life insurance policies. It is widely accepted that a life insurance is not a periodically renewable agreement but a long-term agreement which is usually continued by the payment of a periodic premium. In other words, the nature of renewal of a life insurance policy is not a fresh contract, but a continuation of the original contract between the parties. It has been said that the renewal of a life insurance contract is a sort of extension. The concept of extension can be distinguished from renewal in its nature. Renewal is made by the contracting parties' agreement, whereas extension is carried out by performance of one party's (usually the insured) right. In the case of a life insurance policy, the insured has unilateral right to continue the contract, and consequently the exercise of the right to continue the contract by the insured has nothing to do with the insurer's consent. Therefore, a renewal of a life insurance policy, which is actually an extension in nature, does not require the duty of disclosure unlike a renewal of other kinds.

(21) See, the Statement of General Insurance Practice, cl 3(a) --- "Renewal notices shall contain a warning about the duty of disclosure including the necessity to advise changes affecting the policy which have occurred since the policy inception or last renewal date, whichever was the later."; Also see, R. Merkin & A. McGee, Insurance Contract Law, (1988), London, A. 5. 2.--03 (hereafter Merkin & McGee).
(22) Zurich General Accident & Liability Insurance Co. v. Flickinger, 33 F. 2d, 853(4 Cir, 1929); Patrons Mutual Ins. Co. v. Rideout, 411 A. 2d, 673(Me, 1980); Also see, M. Clarke, at p. 559.
(23) C. Bennett, Dictionary of Insurance, (1992), London, at p. 196; Merkin & McGee, A. 5. 2.--03.
of insurance policies, which are based on the insurer's consent.\(^\text{(24)}\)

1. 4. Exceptions

1. 4. 1. Life Insurance & Fire Insurance

Although the common law position is that the duty of disclosure expires when the contract or a renewal (except a life insurance policy) is concluded, there are some exceptions, in practice, to this principle. In other words, the date at which the duty of disclosure comes to an end can be changed by express provisions in the policy.\(^\text{(25)}\) In particular, in life insurance policies, it is a common practice for a special clause that the commencement of the insurer's liability is to be postponed until receipt of the first premium to be inserted into the contract. It means that there is no contract until receipt of the first premium, and the insured's duty to disclose material facts is extended up to the moment that the first premium is paid.

*Looker v. Law Union & Rock Insurance Co. Ltd*\(^\text{(26)}\) shows a clear example of this. The proposer answered 'Yes' to a question 'Are you now free from disease or ailment?' in a proposal for life insurance. The insurance company sent a conditional acceptance of the risk stating that: 'If the health of the life proposed remains meanwhile unaffected, the policy will be issued on payment of the first premium.' He became ill soon after, but he did not disclose his illness. He sent the company a cheque for the first premium, but the cheque in question was dishonoured on presentation. He died 4 days after the illness began. It was held that the insurers were under no duty to issue the policy as a result of the non-disclosure of that material fact, because the duty of disclosure existed down to the payment of the first premium.\(^\text{(27)}\) The link 'between the commencement of the insurer's liability and the payment of the first premium is also found in a fire insurance policy.\(^\text{(28)}\) In addition, the duty to disclose material facts which increase the risk in question during the currency of the policy is, in practice, imposed on the insured in the case of a fire insur-

\(^{(24)}\) M. Clarke, at pp. 559–560.

\(^{(25)}\) In most cases, the meaning of 'changed' is 'delayed'.

\(^{(26)}\) [1928] 1 K. B. 554.


ance policy. It would appear that the nature of that duty additionally imposed on the insured in a fire insurance policy is usually a promissory warranty rather than the principle of utmost good faith. Anyway, the insured’s duty in this case continues even after conclusion of the contract.

1. 4. 2. Other Exception

The insured’s duty of disclosure may also be extended by an express clause in a policy stating that the insurer’s liability is to be postponed until actual delivery of the policy to the insured. In other words, the contract will not have been completed until the policy is actually delivered to the insured. Therefore, the duty of disclosure will exist longer.

Other exceptions can be found in marine insurance policy (voyage policy). In a case where the vessel changes, deviates or delays its voyage, a ‘held covered’ clause is usually applied in order to continue the cover for the insured. One of the conditions for the ‘held covered’ clause to be operated is the requirement for the insured to disclose immediately these things to the insurer. In this sense, the duty of disclosure exists beyond conclusion of the contract.

In addition, the insured’s duty of disclosure may be revived even after completion of the contract where the insured tries to alter some of the terms as to his benefit. In this case, the insured has to disclose any material facts which relate to those alterations. Although the insured has become aware of these facts after the contract is concluded. A limited duty of disclosure is also applied even after conclusion of the contract when there is a change which is not significant enough to alter the nature of the contract but affects the risk in question. In conclusion, the duty of disclosure is generally and mostly required prior to conclusion of the contract. However, it is still needed when the insured has an express or implied duty to disclose material facts to enable the insurer to make a decision.

(29) Shaw v. Robberde (1837) 6 A. & E. 75; Glen v. Lewis (1853) 8 Ex. 607.
(31) As to the effects of these, see, ss. 43-49 of the M. I. A. 1906.

2. 1. Introduction

In the U. S. A, an implied covenant of good faith and fair dealing in every contract that neither party will do anything which will injure the right of the other to receive the benefits of the agreement has been prevalent and applied in a positive and broad way.\(^{(36)}\) In England, Lord Atkin in *Southern Foundries Ltd. v. Shirlaw*,\(^{(37)}\) expressed a so-called duty of co-operation in the light of a continuing duty of good faith in the general English law of contract, saying that;

"……a positive rule of the law of contract that conduct of either promisor or promisee which can be said to amount to himself 'of his motion' bringing about the impossibility of performance is in itself a breach,"

This expression means that there is an implied term that neither party will do anything *throughout the contract in question* to cause a situation in which all or a part of the contract cannot be performed.

A duty of co-operation in a contract in England, however, has only applied in the case of absolute necessity and its application in practice seems to be less positive. In England, this principle does not go so far as to require one party actually to perform positive acts to further the other’s enjoyment. In other words, the purpose of this principle seems to have been restricted to prohibiting acts which harm the enjoyment of the other party, as the English law of contract does not require an attention by one party to the other which amounts to absolute "good faith."\(^{(38)}\) Nevertheless, it is quite clear that the concept of a continuing duty of good faith in a contract has been approved in England, apart from the question of the degree of the actual application of this principle.


2.2. Continuing Duty of Good Faith in Insurance Contracts

The concept of the continuing duty of good faith in insurance contracts has been recognized by the Australian courts and legislation. Section 13 of the Insurance Contracts Act 1984 confirms it, saying:

"A contract of insurance is a contract based on the utmost good faith and there is implied in such a contract a provision requiring each party to it to act towards the other party, in respect of any matter arising under or in relation to it, with the utmost good faith."

In addition, Trans-Pacific Ins. Co.(Australia) Ltd. v. Grand Union Ins. Co. Ltd.\(^{(39)}\) held that "the duty of good faith is not limited to the time of entry into the contract of insurance but subsists throughout the currency of that contract.\(^{(40)}\)

In England, this concept of the continuing duty of good faith in a contract of insurance has been also approved.\(^{(41)}\) For instance, Mathew L. J. in Boulton v. Houlder Brothers & Co.\(^{(42)}\) said that:

"It is an essential condition of a policy of insurance that the underwriters shall be treated with good faith, not merely in reference to the inception of the risk, but in the steps taken to carry out the contract. That being the meaning of the contract, effect is given to it by means of the order for discovery of ship's papers, and the affidavit with relation to them.\(^{(43)}\)

A series of recent English cases has confirmed that the requirement for utmost good faith from which the duty of disclosure stems survives beyond the effecting of the policy, and continues throughout the contractual relationship.\(^{(44)}\) It is clear that there is more to the duty of utmost good faith than simply pre-contractual disclosure. Logically, it is natural that the duty of disclosure, which is regarded as one aspect of the duty of utmost good faith and is mostly required prior to contract formation, is still required beyond the forma-

\(^{(39)}\) (1889) 18 N. S. W. L. R. 675, at pp. 702-703.
\(^{(41)}\) See s. 17 of the M. I. A. 1906.
\(^{(42)}\) (1904) 1 K. B. 784.
\(^{(43)}\) Ibid, at pp. 791-792; Also see, Leon v. Casey\((1932)\) 2 K. B. 576, at pp. 579-580.
tion of the contract, considering that the purpose of the duty of disclosure is to enable the insurer to decide whether he will take up or continue the contract or not. The duty of disclosure undoubtedly applies in the case of the insured’s claims for insurance money as well as in the cases of extension or renewal of the cover.\(^{(45)}\)

It is also beyond doubt that the continuing duty of disclosure mutually exists between insured and insurer, even though it is mostly imposed on the insured. The insurer’s continuing duty of disclosure to the insured seems to be closely related with the recoverability of a claim under an insurance policy, which is the main interest of the insured. Moreover, if a claimant is a person inexperienced with insurance contracts, the insurer has a continuing duty of disclosure concerning the benefits, the coverage included in the policy and any limitation for making a claim, if it exists.\(^{(46)}\)

2. 3. Rationale of Continuing Duty of Good Faith (Disclosure)

It is logical for the duty of good faith to be applied both after as well as before the insurance contracts are made, considering the meaning of s. 17 of the M. I. A. 1906, the prerequisite requirement of the “held covered” provisions in marine insurance policy and the so called “ship’s papers” cases.

2. 3. 1. S. 17 of M. I. A. 1906

Firstly, s. 17 of the M. I. A. 1906 indicates that there might be some post-contractual duty of disclosure. There is no time limitation of the application of the duty of good faith in the wordings of s. 17, and the Court of Appeal in C. T. I. v. Oceaneus\(^{(47)}\) clearly held that ss. 18-20 of the M. I. A. 1906 (non-disclosure and misrepresentation) were simply examples of the broader principle in s. 17 (utmost good faith), saying:

“The duty of disclosure, as defined or circumscribed by sections 18 or 19, is one aspect of the overriding duty of the utmost good faith mentioned in s. 17…… the duty imposed by s. 17 goes, in my judgment, further than merely to require fulfilment of the duties under the succeeding sections. If, for example, the insurer shows interest in circumstances which are not material within s. 18, s. 17 requires the assured to disclose them fully and fairly.”\(^{(48)}\)

Therefore, the application of the duty of disclosure in s. 18 should be interpreted in the

\(^{(45)}\) As to the extension of renewal of the cover, see, part 1 of this paper.


\(^{(48)}\) Ibid., at pp. 492 and 512.
light of s. 17 where there is no restriction of the duty to pre-contractual disclosure, and consequently the duty of disclosure may exist beyond the formation of the contract, if necessary.

2. 3. 2. 'Held Covered' Clauses

Secondly, the 'held covered' provisions of the Institute Clauses in a marine policy also require the continuing duty of good faith. In case of deviation or change of voyage or any breach of warranty, the cover may still continue by the 'held covered' clause provided notice be given to the underwriters immediately after receipt of advices and any amended terms of cover and any additional premium required by them be agreed.\(^{(49)}\) McNair J., in Overseas Commodities, Ltd. v. Style,\(^{(49)}\) clearly expressed the relationship between the 'held covered' clause and the continuing duty of utmost good faith:

"To obtain the protection of the 'held covered' clause, the assured must act with the utmost good faith towards the underwriters, this being an obligation which rests upon them throughout the currency of the policy."

A similar explanation as to the 'held covered' clause can be found in Liberian Insurance Agency Inc. v. Nosse.\(^{(51)}\)

The assured seeking the benefit of this clause must give prompt notice to underwriters of his claim to be held covered as soon as he learns of the facts which render it necessary for him to rely upon the clause, and the assured cannot take advantage of the clause if he has not acted in the utmost good faith. In other words, an insured disentitles himself from relying on 'held covered' clauses if he has not acted with utmost good faith throughout the currency of the policy. Likewise, the prerequisite for a 'held covered' clause is strongly related to the conduct based on the continuing duty of utmost good faith.

It would appear that the 'held covered' clause also applies to non-marine insurance cases. The insurers may confirm that a risk is 'held covered' pending completion of the formal arrangements.

\(^{(49)}\) Clause 10 of Institute Cargo Clauses (A) (B) and (C); Clause 3 of Institute Time Clauses (Hulls); Clause 2 of Institute Voyage Clauses (Hulls); Clause 2 of Institute War and Strikes Clauses (Hulls—Time and Hulls—Voyage); Clause 4 of Institute Time Clauses (Freight); clause 3 of Institute Voyage Clauses (Freight); Clause 2 of Institute War and Strike Clauses (Freight—Time and Freight—Voyage).


2. 3. 3. Ship's Papers

Lastly, the right of an insurer in a marine policy to immediate disclosure of ship's papers on the occurrence of a loss is based on a continuing duty of utmost good faith. According to this practice, an underwriter is entitled at the earliest stage of an action on a policy of insurance to an affidavit of ship's papers. One of the reasons the Common Law Courts invented the order for ship's papers is a recognition of the plain fact that the underwriter is entitled to be treated with utmost good faith throughout the currency of the policy and to get information from the insured as to all that has been done with reference to the subject-matter of the insurance.\(^{(52)}\) Scrutton L. J., in *Leon v. Casey*,\(^{(53)}\) clearly expressed the relationship between the practice of ship's papers and a continuing duty of utmost good faith, explaining the origin of the order for ship's papers:

"...and partly of the fact that insurance has always been regarded as a transaction requiring the utmost good faith between the parties, in which the assured is bound to communicate to the insurer every material fact within his knowledge not only at the inception of the risk, but at every subsequent stage while it continues, up to and including the time when he makes his claim, the Common Law Courts invented the order for ship's papers, an order which is made as soon as the writ is issued in an action on a policy of marine insurance."

2. 4. Ambit of a Continuing Duty of Good Faith

The next question relates to the ambit of the duty of utmost good faith in the post-contract stage. It would not necessarily be the same as that of the pre-contract duty of utmost good faith.\(^{(54)}\) There have been two interpretations as to this question, i.e., a passive(narrow) interpretation and a positive(broad) interpretation.

2. 4. 1. Passive(Narrow) Interpretation

This interpretation suggests that there is substantial difference in the scope of the duty as it applies pre and post-contract. According to this interpretation, once the contract is concluded, the duty of utmost good faith is no more than a duty to abstain from bad faith, whereas the duty of utmost good faith at the pre-contractual stage applies in its fullest amplitude. In other words, the duty at the post-contractual stage is simply not to act

fraudulently, either where under the terms of the contract the insured has a duty to do something or in the making of a claim on the policy.

This interpretation seems to be related to the precedent that there is no duty to disclose material facts which arise after the contract is concluded. For example, in Cory v. Patton,\(^{55}\) the Court of Queen's Bench held that the assured need not communicate to underwriters facts which afterwards come to his knowledge material to the risk insured against, and that non-disclosure of such facts does not vitiate the policy of assurance afterwards executed. In other words, the existence of the insured's duty of disclosure at the post-contractual stage was denied. Again, in Lishman v. Northern Maritime Insurance Co.,\(^{56}\) Blackburne J. said;

"...the obligation to disclose material facts does not...extend to making it necessary to disclose facts after the underwriter is once bound in honour and so tempt him to break his engagement."\(^{57}\)

Likewise, according to the passive and narrow interpretation, the duty of utmost good faith at the post-contractual stage is simply not to act fraudulently and it does not include the duty of disclosure.

However, it would appear that this interpretation seems to be inconsistent with the implication of s. 17 of the M. l. A. 1906. There is no doubt that the duty of disclosure stems from the principle of utmost good faith. S. 17 does not stipulate any time limitation as to the application of the duty of utmost good faith. It would seem that the correct interpretation is that if, for example, the insurer shows interest in circumstances after conclusion of the contract which are not material within s. 18, the insured, however, should disclose the facts according to the principle in s. 17.\(^{58}\)

The narrow interpretation is also incompatible with both the purpose of the principle of the duty of disclosure and a commercial viewpoint that the insurer, throughout the currency of the policy in question, should be entitled to all material facts which influence his decision on additional premium and the process of the claim etc. Furthermore, the powerful recent decisions clearly support the positive interpretation which may include the duty of

\(^{55}\) (1872) L. R. 7 Q. B. 304.
\(^{56}\) (1875) L. R. 10 C. P. 179, at p. 182.
\(^{57}\) Also see, Niger Co. Ltd v. Guardian Assurance Co. and Yorkshire Insurance Co.(1922) 13 Ll. L. R. 75, at p. 79.
disclosure at the post-contractual stage.\(^{59}\)

2. 4. 2. Positive Interpretation

2. 4. 2. 1. Scope of Duty

It is widely recognized that *Black King Shipping Corporation v. Massie (The Litsion Pride)*\(^{60}\) is a leading authority for the broad interpretation that the duty of utmost good faith includes a positive duty of disclosure and applies beyond the formation of the contract. Hirst J. in this case clearly rejected the passive and narrow interpretation as to the continuing duty of utmost good faith. That is to say, as regards the scope of the continuing duty of disclosure, Hirst J. held that the duty of utmost good faith applies after the contract is concluded, where either party has an obligation, express or implied, to do, or to say something or abstain from doing something, or where one party enters into communication with the other, whether in pursuance of a duty or not.\(^{61}\) In other words, the post-contractual duty of utmost good faith applied with its full vigour in relation to disclosing material facts;

"...it seems to be manifest that, as part of the duty of utmost good faith, it must be incumbent on the insured to include within it all relevant information available to him at the time he gives it; and in any event the self-same duty required the assured to furnish to the insurer any further material information which he acquires subsequent to the initial notice as and when it comes to his knowledge, particularly if it is materially at variance with the information he originally gave."\(^{62}\)

His reasoning is supported by many authorities. For example, Lord Justice Scrutton said in *Leon v. Casey*\(^{63}\):

"...the assured is bound to communicate to the insurer every material fact within his knowledge not only at the inception of the risk, but at every subsequent stage while it continues, up to and including the time when he makes his claim."\(^{64}\)

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\(^{61}\) Ibid., at pp. 511-513.

\(^{62}\) Ibid., at p. 512.

\(^{63}\) [1932] 2 K. B. 576.

Hobhouse J. in *The Bank of Nova Scotia v. Hellenic Mutual War Risk Association (Bermuda) Ltd.*, *(The Good Luck)*,[65] also expressed the same view, saying:

".....there can be situation which arise subsequently where the duty of utmost good faith makes it necessary that there should be further disclosure because the relevant facts are relevant to the later stages of the contract...... A fortiori, those considerations can also apply to contracts of insurance and a duty of disclosure which can exist under the continuing duty to show the utmost good faith. The duty is a continuing one."[66]

Considering s. 17 of the M. I. A. 1906 which does not imply any difference between the post-contractual duty of utmost good faith and that of the pre-contractual stage, this positive interpretation is much more convincing and reasonable. The correct interpretation should be that the general duty of utmost good faith applies at the post-contractual stage just as much as at the pre-contractual stage.

2. 4. 2. 2. Test of Materiality in Continuing Duty of Disclosure

It is logical to say that the post-contractual duty of utmost good faith is related to matters which would affect the future conduct of the parties after the conclusion of the contract. For instance, in *La Banque Financiere v. Westgate Insurance,*[67] Lord Jauncey showed some examples which are within the scope of the continuing duty of utmost good faith such as a ship entering a war zone or insured failing to disclose all facts relevant to a claim.[68]

A question remains in relation to the recognition of a continuing duty of disclosure: what is the test of materiality of non-disclosure? The clue may be found in s. 18 of the M. I. A. 1906 along with s. 17, and from practical and good commercial sense. A circumstance is material if non-disclosure of it would influence the prudent insurer's judgment in making the relevant decision, at the post-contractual stage, such as the fixing of additional premiums or a variety of decisions in relation to a claim, for instance, accepting, rejecting, or compromising a claim.

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(66) Ibid., at pp. 545-546; Also see, *Phillips v. Foxall* (1872) L. R. 7 Q. B. 666; *The Zinnia* [1984] 2 Lloyd's Rep. 211.


(68) Ibid., at p. 389.
2. 5. Duty of Utmost Good Faith in Claims Process

2. 5. 1. General Considerations

It has been widely recognized that the duty of utmost good faith which continues throughout the currency of the policy also applies to the context of claims. The established principle of the reciprocity of the duty of utmost good faith requires an insurer to react reasonably and fairly to a claim made by the insured, for instance, a duty not to take a long time to settle the claim and a duty to disclose the adjusters’ reports to the claimant. In other words, the insurer has a duty to disclose to the insured all facts which would influence the judgment of the prudent insured in deciding whether or not to compromise the claim or to issue proceedings.169

On the contrary, as far as an insured is concerned, he is under the duty to make a full disclosure of the material facts concerning his loss when he makes a claim against the insurer.170 In other words, the claim must be honestly made and the insured must not hold back all material facts surrounding the claim in question. The submission of a fraudulent claim is a breach of that continuing duty of utmost good faith, and consequently the insured forfeits all benefits under the policy. Willes J. said in Britton v. Royal Insurance Co:171

"The law is that a person who has made such a fraudulent claim could not be permitted to recover at all. The contract of insurance is one of perfect good faith on both sides, and it is most important that such good faith should be maintained. It is the common practice to insert in fire-policies conditions that they shall be void in the event of a fraudulent claim; ... It would be most dangerous to permit parties to practice such frauds and then, notwithstanding their falsehood and fraud, recover the real value of the goods consumed."172

Some recent judgments clearly show the continuing duty of disclosure in relation to the claim process. In Black King Shipping Corporation v. Massie(Litson Pride),173 it was held that the insured should disclose all details of his own breaches of the policy terms and con-

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(70) Shephered v. Chewier(1808) 1 Camp. 274, at p. 275.

(71) (1866) 4 F. & F. 905, at p. 909.


ditions which have contributed to the loss in question. Also, in *Continental Illinois National Bank of Chicago v. Alliance Assurance Co. Ltd., The Captain Panagos*,(74) Evans J. held that the insured should disclose the facts of previous fraudulent attempts to demolish the subject matter in the policy when a claim was made by the insured.(75)

2. 5. 2. Meaning of Fraud

The question of whether the claim is fraudulent or not is a question which the jury have to decide.(76) The examples of fraudulent claims are various, including cases where the insured has suffered no loss under the policy in question.(77) where the loss was not caused by the peril insured against in the policy,(78) and where false evidence or false statements of fact are submitted.(79) However, mere exaggeration of the extent of the loss which is honestly made by the insured is not a fraudulent claim.(80)

Another question is whether or not ‘fraud’ is necessarily required in relation to the breach of utmost good faith principle in the claims context. This question is concerned with the ambit of the duty of good faith in the claims process. At Common law, it had been an accepted view, before *Black King Shipping Corporation v. Massie (The Litsion Pride)*,(81) and *Continental Illinois National Bank & Trust Co. of Chicago v. Alliance Assurance Co. Ltd., The Captain Panagos*,(82) appeared, that the insurer had a right to reject a fraudulent claim or to avoid the policy for breach of the contract, but the duty was not applied in cases where the

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insured innocently withheld a material fact when he made his claim against the insurer.\(^{(42)}\)

In *Black King Shipping Corporation v. Massie(The Litsion Pride)*,\(^{(43)}\) Hirst J. extended the ambit of the duty of utmost good faith in the claims context, saying:

"...... in contrast to the pre-contract situation, the precise ambit of the duty in the claims context has not been developed by the authorities...... It must be right, I think, by comparison with the *Style* and *Liberian* cases, to go so far as to hold that the duty in the claims sphere extends to culpable misrepresentation or non-disclosure.\(^{(44)}\)"

This expression means that some culpability on the part of the insured as to non-disclosure of a material fact is necessarily required, rejecting the narrow view that the duty is restricted only to fraudulent claims. Likewise, the ambit of the duty of utmost good faith in the claims process is extended beyond 'fraud'. Two recent cases, *Bucks Printing Press Ltd. v. Prudential Assurance Co.*\(^{(45)}\) and *Re Ontario Securities Commission and Osler Inc.*\(^{(46)}\) indicated that fraud was not a necessary requirement, saying that recklessness on the insured's part was enough for the breach of the duty of utmost good faith.

It would appear that Hirst J.'s reasoning is based on the nature of the concept of utmost good faith from which the duty in the claims context stems. As a matter of general principle, the breach of the duty of utmost good faith does not depend upon fraud. This broader concept includes the insured's negligent or reckless non-disclosure of the circumstances which would influence the prudent insurer's decision to accept, reject or compromise the claim in question. The better view seems to be that 'fraud' is not a decisive and necessary requirement in the claims context.

One remaining question is whether the duty of utmost good faith in the claims context entitles the insurer to reject the claim on the grounds of an insured's *innocent non-disclosure* of a material fact. A possible answer is that the underlying principle in *Black King Shipping Corporation v. Massie(The Litsion Pride)*\(^{(47)}\) which adopted the broader concept of utmost good faith may give the insurer the right to reject the claim for the insured's innocent non-disclosure of a material fact, because the concept of utmost good faith includes

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\(^{(85)}\) Ibid., at p. 512.  
\(^{(86)}\) 1991, unreported.  
even innocent non-disclosure of a material fact.\(^{(89)}\)

However, the better view seems to be, considering the fact that the degree of disclosure which is required in a claims process is different from that at the formation of the contract, that an insured's innocent non-disclosure in the claims process does not defeat a claim. The extension of the insurer's right to innocent non-disclosure is unjustified.\(^{(90)}\) In addition, this view seems to be supported by *Re Ontario Securities Commission and Osler Inc.*\(^{(91)}\) and *Bucks Printing Press Ltd. v. Prudential Assurance Co.*\(^{(92)}\) which only referred to fraudulent and reckless non-disclosure.

2.5.3. Effect of Breach Duty in Claim Process

At common law, the obligation not to submit a fraudulent claim is regarded as an implied term in the policy.\(^{(93)}\) If the insured submits a claim in which material facts relating to the extent or amount of the loss or to the circumstances of the loss\(^{(94)}\) have been fraudulently omitted, the insurer has the right to terminate the contract for breach\(^{(95)}\) or the right to reject the claim in question. In practice, a special fraudulent claim clause which gives the insurer the right to repudiate the policy from the date of breach is often inserted in insurance policies, particularly in fire policies. From this clause, it is clear that the prior honest claims which have been already settled and paid by the insurer are not affected by the insurer's repudiation of the contract.

However, Hirst J. in *Black King Shipping Corporation v. Massie (The Litsion Pride)*\(^{(96)}\) expressed a different view. He held that the submission of a fraudulent claim was a breach of a general duty of utmost good faith in s. 17 of the M. I. A. 1906 which continues throughout the currency of the policy, and a breach of this duty gave the insurer the right to reject the claim in question, affirming the contract or the right to avoid the contract *ab*

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\(^{(89)}\) A. Pincott, *ibid.*, at p. 33; Also see, Merkin & McGee, *A. 5. 2.-08.*

\(^{(90)}\) M. Clarke, at p. 708; Merkin & McGee, *A. 5. 2.-08.*


\(^{(92)}\) 1991, unreported.

\(^{(93)}\) *Britton v. Royal Insurance Co.* (1866) 4 F. & F. 905; M. Clarke, at pp. 715–716; Merkin & McGee, *C. 1. 3.-01.*


\(^{(96)}\) [1985] 1 Lloyd's Hep. 437.
initio. He said;

"In my judgment, "avoidance" in s. 17 means avoidance ab initio. Certainly this is the case in relation to pre-contract avoidance……, and I see no reason for putting a different meaning on the word in relation to post-contractual events…… Section 17 provides that the policy may be avoided, not that it must be avoided."(98)

If the insurer chooses the right to avoid the policy ab initio for a fraudulent claim, the law regards the policy in question as never having existed. It may deprive the insured of the benefit of all previous settled claims.(99) Consequently, the previous losses which the insured honestly suffers may not be protected by the policy.

However, this decision seems to be incompatible with another of Hirst J.'s Judgments.(100)

As to the nature of the duty not to submit a fraudulent claim, he said;

"I am prepared to hold that the duty not to make fraudulent claims and not to make claims in breach of the duty of utmost good faith is an implied term of the policy, since I prefer the authority of Blackburn v. Vigors in the Court of Appeal to the obiter dicta in the Merchants & Manufacturers case."(101)

The effect of the breach of an implied term of the policy is repudiation of the policy from the date of breach, not avoidance ab initio. Therefore, these two decisions seems to be inconsistent with each other. In Gore Mutual Insurance Co. v. Biford,(102) the Canadian court held that the insurers were entitled to terminate the contract from the date of breach where a fraudulent claim was made. Clearly, Hirst J.'s decision as to the right to avoid the policy ab initio for a fraudulent claim seems to be to the insured.(103)

2. 6. Continuing Duty of Utmost Good Faith to the Third Parties

The courts in La Banque Financiere v. Westgate Insurance(104) and Bank of Nova Scotia v. 

(97) Ibid., at pp. 512-515.
(100) Merkin & McGee, C. 1. 3.-04.
(103) As to the objection to Hirst J. decision, see, M. Clarke, at pp. 715-716; Johnson v. Agnew[1980] A. C. 367
Hellenic Mutual War Risks Association (Bermuda) Ltd., The Good Luck\(^{(105)}\) held that the insurer owed a continuing duty of utmost good faith to the insured. Does an insurer, then, owe a duty of utmost good faith to the third parties who have interests concerning the validity of the insurance policy? The courts in Bank of Nova Scotia v. Hellenic Mutual War Risks Association (Bermuda) Ltd., The Good Luck case held that the insurer owed the continuing duty of disclosure only to the insured, not to the assignee of the proceeds of the policy, even though the assignee of the proceeds of the policy has interests in the validity of the cover given by the insurer to the insured.\(^{(106)}\)

The reason is that an assignment of the proceeds of an insurance policy, i.e., an assignment of the right to recover under an insurance policy, does not make a new contract between the assignee and the insurer. Therefore, the assignor still remains as an insured in the insurance policy in question. As to this issue, Hobhouse, J., at first instance, said:

"The duty of the utmost good faith is an incident of the contract of insurance. It is mutual. The assignee of the benefit of such a contract does not initially owe any duty of the utmost good faith to the insurer, nor on the basis of mutuality is there, initially, any duty owed by the insurer to the assignee. The insurer's duty is to the shipowner, and if that duty is broken as against the shipowner, the assignee can have the benefit of the rights and remedies that arise from such a breach. The rights of the assignee can only arise from obligations to the assignor."\(^{(107)}\)

However, the duty to speak from the "Letter of Undertaking" in Bank of Nova Scotia v. Hellenic Mutual War Risks Association (Bermuda) Ltd., The Good Luck is a different one. The courts held that the insurer's duty to speak from the "Letter of Undertaking" to the third party (in this case, the bank) still existed, as this promise was a part of the contract which was enforceable against the insurer.


\(^{(106)}\) An insurance policy is undoubtedly assignable. Generally speaking, three conditions are required for an effective assignment—the insurer's consent, assignment of the subject matter of the policy together with the policy and a proper form required from a law or equity. Unlike the assignment of the policy itself, the assignment of the proceeds of the policy does not need any consent from the insurer as to the assignment. Also assignment of the underlying subject matter of the policy is not required.: See, M. Clarke, at pp. 167–179; McGillivray & Parkington, Insurance Law, (8th ed. by Parkington and others, 1988), London, at paras. 1611–1626; J. Birds, Modern Insurance Law, (3rd ed., 1993), London, at pp. 153–162; Merkin & McGee, D. 1. 1-03-09.