CONTRACTS OF INSURANCE AND THE PRINCIPLE OF UBERRIMAE FIDEI

A contract of insurance requires utmost good faith between the parties. It is also called a contract of uberrimae fidei. It is the duty of the insured to disclose all material facts concerning the subject matter which affect the liability of the insurer so that the insurer may accurately estimate the extent of risk he is undertaking since most of the facts are only within the knowledge of the insured, it is his duty not to conceal facts which may vitally affect the subject matter of insurance. He should not give false or untrue information. In the absence of utmost good faith, the contract is voidable at the instance of the insurer. Perhaps the earliest case in which this principle was laid down is *Carter* v. *Bohem*[1] where Lord Mansfield stated as follows:[2]

> "Insurance is a contract upon speculation. The special facts, upon which the contingent chance is to be computed, lie more commonly in the knowledge of the insured only; the underwriter trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge to misled the underwriter into a belief that the circumstance does not exist, and to induce him to estimate the risk as if it did not exist. The keeping back such a circumstance is a fraud, and therefore the policy is void."

Similar observations had been made by Scrutton C.J. in *Rozanes* v. *Bowen*[3] when he said:[4]

> "As the underwriter knows nothing and the man who comes to him to ask him to insure knows everything it is the duty

[1] (1766) 3 Burr 1905.

[2] *Ibid.*, at 1909.

[3] (1928) 32 Lloyd's Rep. 98.

[4] *Ibid.*, at 102.

> of the assured, the man who desires to have a policy, to make a full disclosure to the underwriters without there being asked of all the material circumstances because the underwriters know nothing and the assured knows everything. This is expressed by saying that it is a contract of the utmost good faith – uberrimae fidei,"

It is the duty of the proposed assured to disclose to the insurer all material facts within his actual knowledge. Thus observed Kennedy L.J. in *London General Omnibus Co. Ltd.* v. *Holloway.*[5]

> "No class of case occurs to my mind in which our law regards mere non-disclosure as invalidating the contract except in the case of insurance. That is an exception which the law has wisely made in deference to plain exigencies of particular and most important class of transactions. The person seeking to insure may fairly be presumed, to know all the circumstances which materially affect the risk, and generally, is, as to some of them the only person who has the knowledge, the underwriter who is to take the risk, cannot as a rule know, but rarely has either the time or the opportunity to learn by inquiry, the circumstances which are, or may be, most material to the formation of his judgment as to his acceptance or rejection of the risk, and as to the premium which he ought to require."

In *March Carbaret Club & Casino Ltd.* v. *London Assurance.*[6] May J. considered that the duty to disclose was not based upon an implied term in the contract at all and arose outside the contract. It applied to all aspects of uberrimae fidei. The test applied is that of a prudent insurer or reasonable insurer; these two terms have been used interchangeably.

Lush J. stated the same in *Horne* v. *Poland;*[7] according to him the question is not whether a certain individual thought a particular fact material, but it was in truth material. The test of

[5] [1912] 2 K.B. 72 (C.A.) at p. 85.

[6] [1975] 1 Lloyd's Rep. 169.

[7] [1922] 2 K.B. 364.

materiality has been laid down in the Marine Insurance Act, 1906.[8] It states:

> "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."

In Malaysia, the Road Traffic Act, 1958[9] lays down that the expression 'material' means of such a nature as to influence the judgment of a prudent insurer in determining whether he will take the risk and if so at what premium and on what condition.

In *London Assurance Co.* v. *Mansel*,[10] an applicant while making a proposal for insurance, in reply to a question 'whether he had applied to any other company for insurance and whether such application has been accepted, stated that he was insured with two companies but failed to state that his application was rejected by several other insurance companies. It was held that there was material concealment of fact and that the policy could be set aside.

A fact is material if it would influence the judgment of a prudent insurer in either fixing the premium or in determining whether to take the risk or not. Whether a particular fact is material depends upon the circumstances of a particular case. A fact material in one case may be immaterial in another case. In *Hemmings* v. *Sceptre Life Association Ltd.*,[11] the proposer mistakenly stated that the would be 41 on her next birthday, though in fact, she would have been 45. It was held that this was a material fact.[12]

Another test of materiality is that of the reasonable assured that is as a reasonable assured he should know what facts known to him are material to the risk. According to Fletcher Moulton L.J. in *Joel* v. *Law Union And Crown Insurance Co.*,[13] the test

[8] Section 18(2) (English Act).

[9] Section 80(5).

[10] [1879] 11 Ch. D. 363.

[11] [1905] 1 Ch. 365.

[12] However, the insurer continued accepting premiums on the policy even after knowledge of these facts, it could not, therefore, repudiate the contract.

[13] [1908] 2 K.B. 863.

is what a reasonable assured considered reasonable, he observed:[14]

> "If a reasonable man would have recognised that it was material to disclose the knowledge in question, it is no excuse that you did not recognise it so."

In *Life Association of Scotland* v. *Forster,*[15] the assured had at the date of the proposal a slight swelling in her groin. She attached no importance to it and did not mention it to the insurance company's doctor. It was held that this did not amount to non-disclosure of a material fact, as a reasonable person unskilled in medical science and with no special knowledge of the law and practice of insurance would have done the same; on the other hand in *Godfrey* v. *Britainnic Association Co. Ltd.,*[16] the assured under a life policy had been told that he might have minor kidney trouble and should take care. Later he was told that the kidney condition was unchanged and an X-ray showed lung infection which was curable with treatment. He also had attacks of pharijingetis. None of these facts were disclosed to his insurance company when the proposal was signed. It was held that these were material facts and the company could avoid liability under the policy, for the assured as a reasonable man without any specialist knowledge should have appreciated that he possessed knowledge of his health which was of materiality to the company.

In *Goh Chooi Leong* v. *Public Life Assurance Co. Ltd.,*[17] one of the questions in the proposal form was 'have you ever had advice about your heart or lung or for cough''. The answer of the assured was 'No'. The fact of the matter was that the assured had been treated for tuberculosis and was hospitalised for about 5 months as an indoor patient in the T.B. ward of the District Hospital Kelang, Gill J. (as he then was) stated in that case:[18]

[14] *Ibid.*, at 884.

[15] [1973] 11 M. 351.

[16] [1963] 1 Lloyd's Rep. 515.

[17] [1964] M.L.J. 5.

[18] *Ibid.*, at p. 7.

"That being so, the contract of insurance with the defendant company is voidable. It is trite law that a contract of insurance is a contract of uberrimae fidei which can be avoided for non-disclosure of material facts."

Whether a particular fact is material depends upon the particular circumstances of a particular case. It does not necessarily follow that a fact which has been held to be immaterial in one case, is not material in another. Materiality is to be determined by reference to the date at which it should if at all, have been communicated to the insurer. If at that date the fact was material, its non disclosure is a ground for avoiding the contract, notwithstanding that it afterwards turns out to be immaterial. On the other hand non-disclosure of a fact which was not at that time material does not affect the validity of the policy even though afterwards it becomes material and actually brings about loss. In *Watson* v. *Mainwaring,*[19] the assured was suffering and ultimately died of a disease which was not generally considered fatal. It was held that there was no concealment of any material fact.

In *Lee Bee Soon & Others* v. *Malaysian National Insurance Sdn. Bhd.,*[20] a case relating to Marine Insurance, a vessel was meant for sundry goods. Subsequently the vessel sank while carrying bulk cargo of stones. The insurer disclamed liability on the ground of misrepresentation. It was held that the answer was true at the time of effecting the insurance although later on there was change of plans. It was held that the insurer was liable and the insured was not bound to inform the insurer of every change in the plan. Also there was nothing in the policy which prohibited the vessel to carry bulk cargo. In *Niger Co. Ltd.* v. *Guardian Assurance Co. Ltd.,*[21] it was observed:

> "The object of disclosure being to inform the underwriter's mind on matters immediately under his consideration with reference to the taking or refusing of a risk then offered to him. . . .it would be going beyond the principle to say that each and every change in an insurance contract creates an

[19] (1813) Taunt. 763.

[20] [1980] 2 M.L.J. 252.

[21] [1922] 13 L.I.L.R. 75 at p. 82 (H.L.).

occasion on which a new contract of insurance comes into existence. This would turn what is an indispensable shield for the underwriters into an engine of oppression against the assured."

All facts are material which suggest that the subject matter of insurance is exposed to more than ordinary danger by reason of it nature. In *Biggar* v. *Rock Life Assurance Co.*[22] where in an accident insurance the proposer was described as a tea traveller an omission to state that he was a publican was held fatal. However, in *Pacific & Orient Underwriter (M) Sdn. Bhd.* v. *Choo Lye Hock,*[23] the insured described himself as Timber Merchant while insuring his car although he was an employee in a plywood factory. The court did not attach any importance to this misdescription of profession. In *Santer* v. *Polland*[24] the date of manufacture of a motor car was held material. In *Anglo-African Merchants Ltd.* v. *Bayley,*[25] the policy could be avoided by the insurer when the insured described some leather jerkins as new when they were war surplus goods. When a motor car is insured against fire, the structure and locality of the garage may be material as affecting the chances of fire.[26]

The insured should communicate every fact to enable the insurer to ascertain the extent of risk. In *Bates* v. *Hewitt*[27] Cockburn C.J. stated this principle in the following terms.[28]

"The rule we find established in this that the person who proposes an insurance should communicate every fact which he is entitled to assume to be in the knowledge of the other party; the assured is bound to communicate every fact to enable the insurer to ascertain the risk against which he undertakes to protect the assured. . . . .and it is also well

[22] [1902] 1 K.B. 516.

[23] [1977] 1 M.L.J. 131.

[24] [1924] 19 L.I.L.R. 29.

[25] [1969] 1 Lloyd's Rep. 268.

[26] *Dawsons* v. *Bonin* [1922] 2 A.C. 413.

[27] [1867] L.R. 2 Q.B. 595.

[28] Ibid., at 607.

established law that it is immaterial whether the omission to communicate a material fact arises from intention or indifference, or a mistake or from it being not present to the mind of the assured that the fact was one which it was material to make known."

In *Fook Yew Timber Co.* v. *The Public Insurance Co. Ltd.*[29] a firm of timber merchants employing labour for felling trees and loading them into vehicles had taken a Workmen's compensation policy. The quantum of premium was dependent on the number of employees and wages payable to them during the year. The employer stated that only 6 employees were employed by the firm although it actually engaged 20 to 30 labourers. The insurance company declined to make payment when a claim was made. The court upheld the insurer. In a similar case *Suhami bin Ibrahim* v. *United Malaya Insurance Co. Ltd.*,[30] the employer had taken a workmen's compensation policy for 6 workers although he employed between 15 to 17 labourers. In response to a question 'Does the above schedule include all persons in your service', his answer was 'yes'. It was also warranted that during the currency of the policy only 6 persons would be engaged in the operation as declared in the proposal form. When a claim arose, the insurer disclaimed laibility which was upheld by the court.

All facts are material which suggest that the proposed assured is actuated by some special motive. In an insurance upon property it is material that the subject matter is greatly overvalued as to make the risk speculative[31] or by reason of previous experience, the proposed insured is not a person whose proposal can be accepted in the ordinary course of business and without special consideration. In *Locker And Woolf Ltd.* v. *Western Australian Insurance Co. Ltd.*,[32] Slesser L.J. emphasized this aspect of the matter when he said:[33]

[29] [1960] M;L;J; 72.

[30] [1966] 1 M;L;J; 140.

[31] *Huff Trading Co.* v. *Union Insurance Society of Canton Ltd.* (1929) 45 T.L.R. 466.

[32] [1936] 1 K.B. 408.

[33] *Ibid.*, at 414.

"It is elementary that one of the matters to be considered by an insurance company in entering into contractual relations with a proposed assured is the question of the moral integrity of the proposer, what has been called moral hazard."

The fact that the insured's husband had previous convictions for receiving stolen property and for theft has been held to be material in the case of 'all risk' insurance on jewellery.[34] It is also material that the proposed assured has suffered loss in the past from the peril insured against or that other insurers have refused to grant or renew an insurance. In *Tan Boon Heng* v. *Oriental Fire & General Insruance Co. Ltd.*,[35] the following relevant questions and answers formed part of the proposal form (1) Has any company or underwriter in respect of insurance of any motor vehicle cancelled your policy. Answer 'Nil'. (2) Have your ever made a claim under any motor vehicle policy? If so, please give particulars. Answer 'No' (3) Are you now or have been insured in respect of any motor vehicle? Name previous insurance company, policy number and vehicle number. Answer 'No'. The insurer alleged that the insured had previously been insured in respect to the same Hillman car with the New India Assurance Co. Ltd. and a claim of $700.00 was made and paid by the company and the policy was eventually cancelled. The trial judge dismissed the application for claim and set aside the third party proceedings (The appellate court, however, referred the case back to the lower court to hear the third party). In *National Insurance Co. Ltd.* v. *Joseph*,[36] the insured was asked whether any company had cancelled his policy of insurance in respect of any vehicle controlled or owned by him. He was further asked whether he had at any time met with an accident whilst driving, whether he was now or had been insured in respect of any motor vehicle. To each of these questions his answer was 'No'. In fact the insured had taken out a policy on the car with the New India Assurance Co. Ltd. which was cancelled as a result of an accident and within 22 days of cancellation and 45 days after the accident, he applied

[34] *Lambert* v. *Cooperative Insurance Society Ltd.* [1975] 2 Lloyd's Rep. 485 (C.A.).

[35] [1968] 1 M.L.J. 270.

[36] [1973] 2 M.L.J. 195.

for the insurance on the car with the National Insurance Co., Ltd. It was held that this amounted to concealment of material facts. However in *Tan Kang Hua* v. *Safety Insurance Co.*,[37] the assured had answered 'Nil' to a question whether he had ever made a claim under any motor vehicle policy. The Appellate Court reversing the judgment of the lower court held that at the time of the issue of the policy the insurer knew that the assured had made a claim on his previous insurers so that they also knew that he was not entitled to any no-claim bonus. It is obvious that the insurers cannot complain of having been deceived when they had knowledge of the facts which they say were not communicated. According to Cockburn C.J. in *Bates* v. *Hewitt*:[38]

> "The insurer cannot set up the defence of non-disclosure, not because the assured will have complied with the obligations which vested in them to communicate that which was material, but because it will not lie in the mouth of the underwriter to say that a material fact was not communicated to him, which he had present to his mind at the time he accepted the insurance. Probably even if the non-disclosure by the assured was intentional and fraudulent, the insurer cannot set aside the policy if, by reason of the knowledge, the non-disclosure did not influence their judgment."

Every form of insurance proposal in Malaysia now contains a warning against concealing of facts. Section 16(4) of the Insurance Act, 1963 lays down as follows:

> "No Malaysian insurer shall use in Malaysia a form of proposal which does not have prominently displayed therein a warning that if a proposer does not fully and faithfully give the facts as he knows them or ought to know them, he may receive nothing from the policy."

[37] [1973] 1 M.L.J. 6.

[38] [1867] L.R. 2 Q.B. 595 at 608.

All facts are material which are to the knowledge of the proposed assured regarded material by the insurer. The opinion of the insurer that a fact is material may be inferred by differential rate of premium on presense or absence of a particular fact. In *Dent* v. *Blackmore,*[39] the question put to the insured was 'what accidents have occurred in connection with your car during the past two years including cost." The insured's reply was 'damaged wings'. In the previous year he had 7 accidents in which wings of the car had been damaged but in one of those accidents a substantial injury was caused to a third party. It was held that this fact was material. In *Trustee of G.H. Munday* v. *Blackmore*[40] in reply to a question what accident the insured had, the reply was 'with 8 cars insured at the same time, a few minor accidents' One of the insured car had a head-on collision resulting in a damage of £130. This was considered to be a material fact. In *Dunn* v. *Ocean, Accident and Guarantee Corporation Ltd.*[41] the insurance company was entitled to repudiate liabilities because the proposer had not disclosed that her husband who was going to drive the car, had been involved in 3 accidents and had been required by one insurer to bear the first 20 per cent of the risk.

The purpose for which a car is to be used is considered material because a higher rate of premium is charged on commercial vehicles. In *United Malayan Insurance Co. Ltd.* v. *Lee Yoon Heng,*[42] the purpose for which the car was to be used was described as 'private'. The car which was like a van was actually used for business purposes to carry film projectors and slides of the owner who was an advertiser. The company declined to pay when an accident occurred on the ground of misstatement; as a commercial vehicle the company could have charged a higher rate of premium with added conditions. In *Jones* v. *Welsh Insurance Corporation Ltd.,*[43] the insured was described as a motor mechanic and the car was insured for private use. In his

[39] [1927] 29 Lloyd's Rep.

[40] [1928] 32 Lloyd's Rep.

[41] [1933] 47 Lloyd's Rep. 129 (C.A.).

[42] [1964] M.L.J. 453.

[43] [1937] 4 All. E.R. 149.

spare time, the mechanic farmed a few sheep. At the time of the accident the car was being used for carrying sheep. He could not recover on his insurance as the car was being used for carriage of goods in connection with a business other than that stated in the policy. This case was followed in Malaysia in *Seri and Another* v. *Oriental Fire & General Insruance Co. Ltd.*,[44] In this case a motor vehicle was insured and in the proposal the insured described himself as a clerk and the use of the vehicle for 'social, domestic and pleasure purposes'. In fact the proposer was running a catering business during the day and was in charge of a bar in the evenings. His catering business consisted of collecting cakes from bakeries and selling and delivering them to various canteens and coffee houses. The policy did not cover use of car for carriage of goods other than samples in connection with any trade or business. The vehicle was involved in an accident while the insured was carrying cakes for delivery. It was held that the insurer could avoid liability. In *Tan Ah Leng* v. *The American Insurance Co.*,[45] the car was insured only for social, domestic and pleasure purposes and for the insured's business. The policy did not cover use for hire and reward. The car was involved in an accident while picking up a passenger for reward. It was held that the insurance company was not liable.

Statement of facts during negotiations is generally regarded as representation and does not form part of the contract. However, a stipulation may make the accuracy of all statements made during the negotiation a condition to the validity of the policy. In such a case no distinction is drawn between statements that are material and that are not material. The practice of making the accuracy of statements in the proposal form, 'the basis of the contract' was amplified in *Provincial Insurance Co. Ltd.* v. *Morgan*[46] and in *Dowsons Ltd.* v. *Bonnin*[47] where Viscount Haldane observed as follows:[48]

[44] [1969] 1 M.L.J. 126.
[45] [1975] 2 M.L.J. 13.
[46] [1932] 38 Com. cas. 92 (H.L.).
[47] [1922] 2 A.C. 413.
[48] *Ibid.*, at 424.

> "I think that the words employed in the body of the policy can only be construed as having made its accuracy a condition. The result may be technical and harsh but if the parties have so stipulated, we have no alternative sitting as a court of justice but to give effect to the words agreed on. Hard cases must not be allowed to make bad laws. . . it appears to me that when answers, including that in questions, are declared to be the basis of the contract, this can only mean that their truth is made a condition, exact fulfilment of which is rendered by stipulation fundamental to its enforceability."

In *Mackay* v. *London General Insurance Co. Ltd.*,[49] in answer to a question in the proposal form of a motor car policy, the insured had said that he had never been convicted. A few years earlier, he had been fined 10 shillings for riding a motor cycle with defective brakes. The insured had warranted the truth of the statements, the accuracy of which had been made the basis of the contract. Holding that the insured could not recover under the policy, Swift J. observed:[50]

> "They would never have refused him his policy if they had known everything which they know now. But they have seized upon this opportunity in order to turn him down and leave him without any indemnity. Sorry as I am for him there is nothing that I can do to help him. The law is quite plain."

In *Condogianis* v. *Guardian Assurance Co. Ltd.*,[51] the question asked was. "Has the proponent ever been a claimant on a fire insurance company in respect of the property now proposed or any other property." The answer was 'yes, Ocean' but he did not mention to an earlier claim against another company in respect of some other property. It was held that the proposer has concealed material information. In the course of his judgment Viscount Dunedin observed as under:[52]

[49] [1935] 51 Lloyd's Rep. 201.

[50] *Ibid.*, at 202.

[51] [1921] 2 A.C. 125.

[52] *Ibid.*, at 163.

> "A contract of insurance is denominated a contract of uberrimae fidei. It is possible for persons to stipulate that answers to certain questions shall be the basis of the insurance and if that is done there is no question as to materiality left because the persons have contracted that there should be materiality in the question."

It has been further held by the courts that notwithstanding the questions, the proposer must disclose facts which are not covered by the questions but are material and relevant. In *Taylor* v. *Eagle Star Insruance Co. Ltd.*,[53] a certain question in the proposal form related to the commission of driving offences it was held material that the insured had been convicted of certain drinking offences and also had been convited upon a charge of permitting a car to be used without a policy of insurance. However, "the insurance company also runs the risk of the contention that matter they do not ask questions about are not material, for, if they were, they would ask question about them", per Scrutton L.J. in *Newsholme Bros. Ltd.* v. *Road Transport & General Insurance Co. Ltd.*[54]

In *Abu Bakar* v. *Oriental Fire & General Insurance Co. Ltd.*,[55] the insured was asked 'for what purposes are the premises occupied (e.g. dwelling, shop, godown, etc). If vicariously tenanted please state the trade or business carried therein', The answer was 'sundry shop downstairs, dwelling first floor'. Goods, furniture, fixtures and fittings were insured for $17,000.00 At the back of the ground floor, there were electrically operated grinding mills. There was a signboard in front of the shop indicating that there were grinding mills for the use of the customers. Fire broke out in the shop and the insurance company disclaimed liability on the ground that the insured had misdescribed and mis-represented the purposes for which the premises were occupied and the the insured had failed to show the utmost good faith in the contract. The trial court held for the insurance company. In appeal, Gill J. upheld

[53] [1940] 67 L.I.L.R. 136.

[54] [1929] 2 K.B. 356 at 363.

[55] [1974] 1 M.L.J. 149.

the trial judge in giving his dissenting judgment. He mostly relied on clause (1) of the policy which stated as follows:

> "If there be any material misdescription of any of the property hereby insured, or of any building or place in which such property is contained, or any misdescription as to any fact, material to be known for estimating the risk, or any omission to state such facts, the company shall not be liable upon this policy so far as it relates to property affected by such misdescription, misrepresentation or omission."

Azmi L.P. and Ong Hick Sim J. on the other hand held that the answer to the question was correct and existence of the grinding machines at the back of the shop did not change the character of the premises. They based their decision on Viscount Dunedin's observations in *Condogianis* v. *Guardian Assurance Co. Ltd.*, when he said:[56]

> "In a contract of insurance, it is a weighty fact that the questions are framed by the insurer and that if an answer is obtained to such a question which is upon a fair construction a true answer, it is not open to the insuring company to maintain that the question was put in a sense different from or more comprehensive than the proponent's answer covered. Where an ambiguity exists, the contract must stand if an answer has been made to the question on a fair and reasonable construction of the question otherwise the ambiguity would be a trap against which the insured would be protected by court of law."

Ong Hick Sim J. was rather harsh on the insurer when he said:[57]

> "There is no evidence on record in what way the presence of grinding mils is considered to appear to increase the risk with respect to propety insured. I have yet to come across a more

[56] [1921] 2 A.C. 125 at 127.

[57] *Abu Bakar* v. *Oriental Fire & General Insurance Co. Ltd.* [1974] 1 M.L.J. 149 at 155.

callous and unconscienable attempt to evade their contractual obligations as the respondents have shown in their appeal."

In *Wong Lang Hung* v. *National Employees Mutual General Insurance Association Ltd.*,[58] a case involving fire insurance, the following questions were put in the proposal form (1) Are any hazardous trades carried on or hazardous goods stored? If so, give details. The answer was 'No'. (2) Are there any stoves, furnaces or means of producing fire, heat, other than cooking? The answer was 'Kerosene stove and fire wood stoves' (3) Are the premises attached to other buildings?. If so, state construction and occupation of adjoining buildings. The answer was 'Nil'. It was made a condition of the policy that any material misdescription of any property or any ommision to state such fact, the insurer would not be liable. It was further warranted that during the currency of the policy the building insured was detached by at least 20 feet on all sides from any building (excluding small out-house). The fact of the matter was that there were 2 buildings less than 12—13 feet away from the insured building. Also Benzine was stored in the ceiling and elsewhere. Benzine was used for operating two water pumps. The insured house was destroyed by fire and a claim was made on the insurer. Holding for the insurer Lee J. stated:[59]

"If he (insured) conceals anything that he knows to be material, it is fraud, but besides that, if he conceals anything that may influence the rate of premium which the underwriter may require, although he does not know that it would have that effect, such concealment entirely vitiates the policy."

In *Connecticut Matual Life Insurance Co. Hartford* v. *Moore*,[60] the question asked was 'Have you had any other illness, local disease or personal injury? And if so, of what nature, how long since, and what aspect upon general health?'

[58] [1972] 2 M.L.J. 191.

[59] *Ibid.*, at 195.

[60] [1881] 6 App. Cas. 644 P.C.

The answer given was 'No'. It was held that a reasonable construction must we put on the illness. No body can remember all the illness or personal injuries. In *Austin* v. *Zurich General Accident & Liabiltiy Insurance Co. Ltd.,*[61] the question put to the assured was 'Do you suffer from defective vision? Answer 'No'. The assured wore thick glasses but he could clearly see with glasses. It was held that the answer was correct. In *Revell* v. *London General Insurance Co. Ltd.,*[62] the question put was 'Have you or any of your driver ever been convicted of any offence in connection with the driving of motor vehicle? The answer was 'No'. In fact the insured and her driver had been convicted of using motor vehicle without exterior mirror and not having third party policy. It was held that 'offence' here means any offence connected with the actual driving of a motor vehicle and not any technical offence. In *New India Assurance Co. Ltd.* v. *Pang Piang Chong & Another,*[63] the question in the proposal form was, 'Have you or any person who to your knowledge will drive been convicted during the past 5 years of any offence in connection with the driving of any motor vehicle''. The answer was 'No'. The fact of the matter was that the insured had been convicted of 5 technical offences under the Road Traffic Ordinance, 1958. It was held by Syed Othman J. that the offence has nothing to do with the careful or skilful manner or the careless or unskilful manner in which the car is being driven on the road or its damage as a moving object.

In *Holt's Motors Ltd.* v. *South East Lancaster Insurance Co. Ltd.,*[64] the question was 'Has any company or underwriter declined to insure'. The answer was 'No'. In fact another insurance company had stated that it would not renew the existing policy. It was held that the proposer had given a wrong answer, although there is a difference between renewal and declining. Similarly where the insured does not answer a question while leaving it blank or putting a dash, an inference against the insured can be drawn.

[61] [1944] 77 Lloyd's Rep. 409.

[62] [1931] 50 Lloyd's Rep. 114.

[63] [1971] 2 M.L.J. 34.

[64] [1930] 35 Com. Cas. 281.

In England, the Law Reform Committee stated in their 54th Report[65] that the practical effect of the law of non-disclosure was that the insurers were entitled to repudiate the liabiltiy whenever they could show a fact within the knowledge of the insured was not disclosed which according to current insurance practice would have affected the judgment of the risk.

The Committee further observed:[66]

> "Whether the insuring public at large is aware of this it is difficult to say; but it seems to us to follow from the accepted definition of materiality that a fact may be material to insurers, in the light of great volume of experience of claims available to them, which could not appear to a proposer for insurance, however, honest and careful, to be one which he ought to disclose."

The committee recommended that for the purpose of insurance no fact should be deemed material unless it would be considered material by a reasonable insurer.

The Law Commission's Report on Insurance Law 'Non-Disclosure And Breach of Warranty' Cmnd 8064 (Published in 1980) in para 10—9 has endorsed the views of the Law Reform Committee. It says:

> "The duty of disclosure should be retained but it should be modified along the lines suggested in the Fifth Report of the Law Reform Committee. A fact should be disclosed to the insurer by an applicant if:—
> (a) it is material in the sense that it would influence a prudent insurer in deciding whether to offer cover against, the purposed risk and if so, at what premium and on what terms; and
> (b) it is either known to the applicant or it is one which he can be assumed to know; for this purpose he should be assumed to know a material fact if it would have been ascertainable by reasonable enquiry and if a reasonable man

[65] Conditions and Exceptions in Insurance Policies 1957 Cmnd 62.

[66] *Ibid.*, para 4.

applying for the insurance in question would have ascertained it; and

(c) it is one which a reasonable man in the position of the applicant would disclose to his insurers, having regard to the nature and extent of the insurance cover which is sought and the circumstances in which it is sought."

Usually a contract of insruance is entered into by the insured with the agent of the insurer. It is the agent who fills the form after getting certain question answered by the proposer. In many cases the agent does not fill the form in the presence of the proposer but gets his signature on a blank propasal form. The qeustion is then as to what extent notice or information given to the agent can be imputed to his principal that is the insurer. In most of the cases the courts have held that in filling the proposal form, the agent acts as the agent of the proposer and not of the insurer. In *United Malayan Insurance Co. Ltd.* v. *Lee Yoon Heng*,[67] the insurance company declined to pay when an accident occurred on the ground of misstatements as to the use of the car. One of the pleas taken by the defendant was that the proposal form was filled up by the agent of the insurer. The court held that the agent in filling the form was then acting for the insured and not for the insurer. Halsbury's Laws of England,[68] states the position thus:

"In filling in the answers in a proposal form an insurance agent except in case of industrial insurance, is normally regarded as the agent for the proposer, at the request, express or implied of the latter. Even if the agent knows the truth, his knowledge is not in that case imputed to the principal. If he is careless in filling up the form, it is the proposer, not the insurers, who may maintain an action in negligence against him. Furthermore, where the proposer himself signs the proposal form, as is usually insisted upon by the insurers, by signing he adopts whatever answers the agent has inserted and makes them his own. This is clearly the case where he reads and approves the answers before signing, but the position is

[67](1964) M.L.J. 453.

[68]Vol. 22, (3rd. Ed.).

the same, if he chooses to sign the proposal without reading them or if he signs the form when it is blank. It is irrelevant to inquire how the inaccuracy arose; or whether the agent acted honestly or dishonestly; or whether the agent had forgotten or misunderstood the correct information he had been given; or whether the answers were a mere inventions on the part of the agent; if the result is that inaccurate or inadequate information is given on material matters or that a contractual stipulation as to accuracy or inadequacy of any information given is broken, it is the proposer who has to suffer."

In *China Insurance Co. Ltd.* v. *Ngau Ah Kau*,[69] the insured had made some claims more than 3 years earlier and according to the insured, the agent advised him not to disclose claims made more than 3 years prior to the proposal. It seems that the agent consulted his boss on the proposal and the risk was accepted with the imposition of the excess clause up to $600.00. Because of these facts the trial judge held that the answers were not material and the knowledge of the agent could be imputed to the principal. In appeal Suffian F.J. in a dissenting judgment agreed with the trial judge. He was of the opinion that full facts were disclosed to the agent who had consulted his boss on phone before accepting the proposal. In arriving at the decision, Suffian F.J. relied on *Barret Bros. (Taxis) Ltd.* v. *Davies*,[70] where the assured failed to give notice of accident but the insurance company got information from the police. The insurer wanted to repudiate liability on the ground that no notice of accident had been given. In that case Lord Denning held that law never compel a person to do that which is useless and unnecessary. He went on to say:[71]

"The condition was inserted in the policy so as to afford a protection to the insurers so that they should know in good time about the accident and any proceedings consequent on it. If they obtain all the material knowledge from another

[69] [1972] 1 M.L.J. 52.

[70] [1966] 1 W.L.R. 1334.

[71] *Ibid.*, at 1340.

source so that they are not prejudiced at all by the failure of the insured to tell him then they cannot rely on the condition to defeat the claim."

However, the majority decided in favour of the insurance company. Another point raised in this case was whether oral evidence is admissible to contradict the written one. In *Newsholme Bros.* v. *Road Transport & Genral Insurance Co. Ltd.*,[72] a proposal was handed by an agent to a partner of the plaintiff firm for insuring a motor omnibus of the firm. In answer to 3 questions, the partner gave correct answers orally to the agent. The agent wrote in the form incorrectly either because he misunderstood or forgot or intentionally to earn a commission. The partner then signed the form which contained a warranty that the answer would be the basis of the contract. An accident having occurred, the company disclaimed liability on the ground that the written proposal contained untrue statements. The Court of Appeal held that the agent was not authorised by the company to fill in the proposal form and in doing so he must be regarded as the agent of the proposer and knowledge of the agent could not be imputed to the company. The written contract alone could be regarded as to contain the terms of the contract. Their Lordships also quoted from Salmond and Winfield Principles of Law of Contract[73] which states as follows:

"In the case of a contract in writing..... the written instrument is exclusive and conclusive evidence and therefore no other substituted evidence is admissible as to what thsese terms are ..... A written contract is what the written contract says it is. . . nothing more nothing less, and nothing different."

According to Denman C.J. in *Gross* v. *Lord Nugent:*[74]

[72] *[1929] All. E.R. Rep. 442.*

[73] [1927] Edition.

[74] (1853) 5 B & Ad. 58.

> "If there be a contract which has been reduced into writing, verbal evidence is not allowed to be given of what passes between the parties, either before the written instrument was made or during the time it was in a state of preparation so as to add or substract from, or in any manner to vary or qualify, the written contract."

In *China Insurance Co. Ltd.* v. *Ngau*[75] in arriving at his decision Azmi J. also relied on condition No. 9 of the policy which stated as follows:

> "The due observance and fulfilment of the terms of this policy in so far as they relate to anything to be done or not to be done by the insured and the truth of the statements and answers to the proposal shall be conditions precedent to any liability of the company to make any payment under this policy."

Azmi J. also referred to section 91 of the Evidence Ordinance 1950 which provides that where the terms of any contract have been reduced to the form of a document, no evidence of any oral agreement or statement shall be admitted as between the parties to any such contract or their representatives in interest for the purpose of contradicting varying, adding to or substrating from its terms, unless the matter can be brought under any of the provision of section 92. He further stated that:

> ". . . there is still in my view, the further question as to whether the learned (trial) judge could consider the question as whether the answers to these questions were material or not. In my view he could not because the truth of the answers had been made a condition of the policy."

In *National Insurance Co. Ltd.* v. *Joseph*[76] the plea of the insured that he has informed the agent about the cancellation of the previous policy on ground of accident was rejected by the court. In a similar case *New York Life Insurance C.* v.

[75] See note 69.

[76] [1973] 2 M.L.J. 195.

Fletcher,[77] it was held that the agent's conduct was a gross violation of duty, in fraud of his principal and in the interest of the other party. To hold the principal responsible for his acts and assist in the consumation of the fraund would be monstrous injustice.

As regards signing the blank proposal form, it was observed in *Taylor* v. *Yorkshire Insurance Co.*[78]

> "In any case, I have great difficulty in understanding how a man had signed, without reading it, a document which he knew to be a proposal for insurance and which contains statements in fact untrué and a promise that they were true, and the basis of the contract, can escape from the consequenced of his negligence by saying that the person he asked to fill it up for him is the agent of the person to whom the proposal is addressed."

Following the English Law, the courts in Malaysia have generally held that in the filling of the proposal from for insurance, the agent is acting for the proposer and not for the insurance company. The rigour of this approach has been some what mitigated by the addition of a new section 44A in the Insurance Act of 1963.[79] This section lays down:

"44A — *Knowledge of and statement by autgorised agent to be deemed knowledge and statement by insurer.*

(1) A person who has at any time been authorised as its agent by an insurer and who solicits or negotiates a contract of insurance in such capacity shall in every such instance be deemed for the purpose of the formation of the contract to be the agent of the insurer and the knowledge of such person relating to any matter relevant to the acceptance of the risk by the insurer shall be deemed to be the knowledge of the insurer.

[77] 117 U.S. 519.

[78] [1913] 2 Ir. R. 1.

[79] Introduced by the Amendment Act of 1978.

(2) Any statement made or any act done by any such person in his representative capacity shall be deemed, for the purpose of the formation of the contract, to be a statement made or act done by the insurer notwithstanding any contravention of section 16A or any other provision of this act by such person.

(3) This section shall not apply –

(a) Where there is collision or connivance between such person and the proposer in the formation of the contract; or

(b)Where such person has ceased being its agent and the insurer has taken all reasonable steps to inform or bring to the konwledge of potential policy owners and the public in general the fact of such cessation."

The full force of his new section has been some what weakened by subsection 3(a) which lays down taht this section shall not apply when there is collision or connivance between the insured and the agent. The fact that the insured conveys all information to the agent who puts it in his own words differently may amount to collision or connivance. Furthermore in view of section 91 of the Evidence Ordinance, the court would be governed more by the written terms of the contract rather than the oral statement of the insured. Another question is whether the insurer can contract out of the this situation by providing that in filling up the proposal form, the agent shall be deemed to be the agent of the proposer unless each and every answer is in the hand writing of the proposer. The new section does not apply to a proposal forms filled in prior to the new section coming into force. This will be more true in respect of proposal forms for life insurance.[80] In any case the validity of

[80] The new subsection 15C(4) introduced by the insurance Amendment Act 1978 however gives some relief to the insured in case of life insurance policies only. The subsection 15C(4) provideds as follows:

"No life policy effected before the commencement of this section shall, after the expiry of two years from such commencement, and no life policy effected after the commencement of this section shall, after the expiry of two years from the date on which it was effected be called in question by an insurer on the ground that a statement made in the proposal for any person, or in a report of a doctor, referee or any person, or in a document leading to the issue of the policy, was inacurate or false unless the insurer shows that such statement was on a material

the new section 44A is yet to be tested in a court of law in Malaysia.

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matter or suppressed a material fact and that it was fraudulently made by the policy holder with the knowledge that the statement was false or that is suppressed a material fact."