DUTY OF DISCLOSURE IN A CONTRACT OF INSURANCE : A CRITICAL ANALYSIS OF THE EXTENT TO WHICH THE COMMON LAW AND THE MALAYSIAN INSURANCE ACT 1996 SERVE TO PROTECT THE INTERESTS OF THE INSURED

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ABSTRACT

The doctrine of utmost good faith is central to the whole mechanism of insurance. As a contract of utmost good faith, in contrast to good faith as in non-insurance contracts, it imposes upon the parties to such a contract mutual duties to disclose facts, which are materials to the risk, that are not known by the other party. The Insurance Act 1996 as the primary legislation governing insurance business in Malaysia contains numerous provisions regulating insurer's conduct of business. Certain provisions pertaining to the regulation of the contractual terms of insurance policies are made in the interest of policyholders. Provision in relation to the duty to observe utmost good faith is provided under Section 150 of the said act. The first part of this paper discusses the concept of utmost good faith in a contract of insurance as it manifests in the English law. The second part analyses the adoption of the common law's test of materiality in Malaysian jurisdiction and certain provisions in the Insurance Act 1996 with an intention to seek the answer as to whether these two primary sources of law serve the interest of the insured when dispute in relation to non-disclosure of material facts arise. The author concludes that a modest reformation is needed in the Insurance Act 1996 to incorporate some elements of fairness in both pre and post-contractual duties of disclosure while the judiciary shall carefully look into the development of precedent effecting non-disclosure of material facts especially in the light of decisions arrived in *Abu Bakar* (1974), *Pan Atlantic* (1994) and the *'Star Sea'* (2001) cases of insurance law.

INTRODUCTION

Duty of disclosure is of vital importance in a contract of insurance. This is a mutual duty which imposes upon both parties to the contract. Unlike non-insurance contract, both parties in a contract of insurance must volunteer information that is material although it is not expressly asked. To an insurer, a material fact is something likely to influence a prudent insurer in deciding the premium or terms of his insurance offer. Basically, this duty imposed upon the insured is justified in the sense that the insurance company has a duty to the insured, to other policyholders and to their shareholders, to pay claims fairly. If a policyholder does not disclose factors relevant to his insurance, he is in fact stealing an advantage at other policyholders' expense. The issue of dishonesty, fraud, deceitful, insincerity are common to all contracts, but non disclosure is peculiar to a class of contracts, that is, contracts of utmost good faith, of which the insurance contract is the prime example. The duty of disclosure as required by the common law and the act is inline with the shari'ah principles that deceitful and fraudulent activities and acts of exploitation should be eliminated from any kind of commercial dealings (Billah 2003). Allah (s.w.t.) commanded in Al-Qur'an:

'Allah commands justice, the doing of good and liberality to kith and kin, and He forbids all shameful deeds and injustice and rebellion. He instructs you that you may receive admonition'[2].

In Latin, the principle of utmost good faith is known as 'uberimma fides', in contrast of 'caveat emptor' as in non-insurance contract. The maxim of 'caveat emptor' or in English means 'let the buyer beware' implies that a seller in a business transaction cannot be assumed to be completely transparent in the sense that the seller will make a guarantee to the quality of a particular product and that a buyer must accept any deficiencies he could have discovered by careful inspection. In other words, the seller is not obliged to volunteer information unless he is asked to by the potential buyer.

In contrast to the above-mentioned principle of 'caveat emptor', the doctrine of 'uberrima fides' or utmost good faith is a rule that needs to be observed in a contract of insurance - rule that requires a sense of good judgments, meticulous and fairness on both insured and the insurance company. The duty of utmost good

[2] Al-Qur'an, Surah al-Nahl 16:90.

faith in insurance law, was first enunciated by Lord Mansfield in the leading case of *Carter v Boehm (1766).*

"The special facts, upon which the contingent chance is to be computed, lie most commonly in the knowledge of the insured only. The underwriter trusts to his representations and proceeds upon confidence that he does not keep back any circumstance in his knowledge, to mislead the underwriter into a belief that the circumstance does not exist and to induce him to estimate the risqué, as if it did not exist. The keeping back such circumstance is a fraud and therefore the policy is void'[3].

The above ratio derived from the Carter's case was a case in marine insurance[4]. Although marine insurance law is in general different from other indemnity contracts, the demarcation between those two classes of insurance law is hardly noticed especially as far as the question of materiality in non-disclosure is concerned[5]. A duty of utmost good faith is also equally imposed upon the insurer.

'The policy would equally be void, against the underwriter, if he concealed, as if he insured a ship on her voyage, which he privately knew to be arrived and an action would lie to recover the premium'.[6]

At common law, there is a complete failure of consideration on the part of the insurers and an obligation to return the whole of the premium paid to the insured is allowed if there has been fraud or breach of good faith by the insurance company. At first sight, the duty of utmost good faith seems to be fair to both parties and the remedies available in case this duty is breached are equally provided by both the common law and contracts act 1950. Unfortunately, this reasonable expectation is defeated in situation where the insurer on the basis of non-disclosure and misrepresentation rejects claims in most cases. This paper aims to analysis the adequacy of the Insurance Act 1996 and the applicability of the common law in Malaysia as whether it has done justice to both parties or it is just a one sided affair. In going on with this paper, references are made to case law and acts in other countries especially in the UK and Australia.

SOURCES OF INSURANCE LAW IN MALAYSIA

Basically, the sources of insurance law in Malaysia are the legislation, the applicability of English law and the common law. One of the primary sources of insurance law in Malaysia is the legislation passed by parliament or an authorized law making body. Before having the Insurance Act 1996 as a primary legislation governed by the Bank Negara Malaysia, it was the Insurance Act 1963 which came into force on 21 January 1963 for West Malaysia and on the 1 January for East Malaysia. The introduction of Insurance Act 1963 was mainly for the regulation of insurance business and was drafted with the help of the Insurance Commissioner of Australia (Soe 1979). Insurance Act 1963 had gone through significant amendments notably in the year1965, 1973, 1975 and 1978. The Insurance Act 1996, which repealed the the Insurance Act 1963, and the Insurance Regulations 1996 came into existence on 1st January 1997. This is the main principal governing the non-marine insurance business in Malaysia. The role of the Director General of Insurance (DGI) remains with Bank Negara Malaysia under the Insurance Act 1996. It shall be noted that for life insurance contract, there are huge number of statutes applicable in Malaysia. Besides the primary Insurance Acts and Regulations 1996, there are the Civil Law Act 1956, Bankruptcy Act 1967 (revised 1988), Distribution Act 1958 (revised 1983), Wills Act 1959 (revised 1988), Income Tax Act, Contract Act 1950 (revised 1974) and a lot more. In Motor Insurance, the Road Transport Act 1987 applicable throughout Malaysia from 1st January 1988 is the legislation governing several aspects of the motor insurance contract. Another important aspect of the insurance contract in Malaysia is the applicability of the Contract Act 1950 which governs the general principles of contract and the law of tort or the laws of liability governing certain aspects in the contract of liability insurance.

The applicability of English Law in Malaysia is made possible by virtue of Sections 3[7] and 5 of the Civil Law Act 1956. For example, Section 5 of the Civil Law Act 1956 provides for the reception of English

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[3] *Carter v Boehm* (1766) 3 Burr 1905, for ref., see Hodgin, Ray, *Insurance Law*, Cavendish Publishing Limited, 2002, p.201.

[4] *This is now codified under Section 17 of the Marine Insurance Act (UK) 1906* (Wilhelmsen, T., 2000)

[5] Statutory definition of a material fact in Section 18(2) Marine Insurance Act 1906 applies to all classes of insurance.

[6] *Carter v Boehm* (1766) 3 Burr 1905, for ref., see Hodgin, Ray,' *Insurance Law'*, Cavendish Publishing Ltd, 2002, p. 201

commercial statute in certain classes of insurance business such as marine, life and fire insurance. However, with the introduction of the Insurance Act 1996, several English statutes had now been repealed such as the Gaming Act 1845, the Married Women's Property Act 1882, the Insurance Companies Act 1974 and 1981, the Life Assurance Act 1774 and the Policies Assurance Act 1867. The most significant of all the English statutes is the Marine Insurance Act 1906 that applies in Malaysia and there is no significant effort done by the Malaysian legislator to set out a code of marine insurance that applies to the maritime trading. This is understandable since Malaysia is part of the commonwealth countries and the Marine Insurance Act 1906 is still the primary legislation in countries such as the Australia, Canada, Hong Kong, New Zealand and Singapore (Clarke 1994; 1999).

Another source of insurance law in Malaysia is the English and Malaysian common law or case law. Any case decided by the common law courts in England and Malaysia is relevant to the insurance affair in Malaysia. As a common law country, Malaysia, Singapore, England and other former British colonial countries are related to the doctrine of binding judicial precedents or the doctrine of stare decisis. Singh (2001) notes that the doctine of precedent refers to a judgment or decision of a superior court of law, cited as an authority for deciding a case on similar set of facts. The doctrine is applied when the cases are in pari material[8] with our enacted statutes and similar set of facts. It implies that a court in Malaysia in deciding a particular legal dispute of insurance contract is confronted with Malaysian, English and Singapore decisions to be followed and this is not an easy matter for the judge to appreciate the value of decisions having decided in the previous cases in these countries. In Malaysia, where there is no settled English law, decisions from courts of other jurisdictions, other than those jurisdictions in England, could be properly applied by Malaysian courts (Soe 1979). This implies that jurisdictions of the US, Canada, India or Australia can be applied as far as insurance disputes are concerned.

MATERIALITY IN A CONTRACT OF INSURANCE

Materiality of a particular fact, from the point of view of a layman is very subjective. But from the legal point of view, this is a fact of such importance that without it a contract or other legal obligation would not have been made. Since these facts are so important that would alter an underwriting decision of an insurer, it must be revealed at times of insurance application. If it is not revealed, insurers are at a disadvantage position when inappropriate amount of premium and terms are imposed based on unrevealed information. The relations existing between an insured and his underwriter are such that a full disclosure of all the facts concerning the risk must be made. Specifically, this stage mainly involves insurance application form-declaration of subject matter intended to be insured, completed and proposed either by assured or their broker or agent to insurer. In most cases, such important facts often come to light after a claim has been reported and disputes arise as a result. For example, concealment of previous losses and claims can be grounds for an insurer to void the policy.

The requirement to disclose facts that are material originates from the Marine Insurance Act 1906 that governs the marine insurance business. This is codified in sub-sections 17,18,19 and 20 of the said act. In Malaysia, the definition of a material fact in a contract of insurance is described in Section 150 of the Insurance Acts 1996. It is interesting to note at this stage that our act pertaining to the requirement of disclosure is similar to that in the Marine Insurance Act 1906. Basically, this section infers that a material fact must be disclosed to the licensed insurer if he, the prospective insured knows to be relevant to the decision of the licensed insurer on whether to accept the risk or not and a reasonable person in the circumstances could be expected to know. Section 150 does not exactly provide examples of material facts. However, it does mention that what are immaterial facts. Section 150 shall be examined in detail at a later stage of this paper. For motor insurance, a similar requirement of disclosing what is material to an insurer is specifically mentioned in Section 80(5) of the Road Traffic Ordinance (Malaysia) 1958 and Section 96(5) of the Road Transport Act 1987[9].

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[7] Section 3 of the Civil Law Act 1956 provides for the general reception of English common law and equity as administered in England up to 7 April 1956.

[8] Pari material rule means that other statutes that use same language or address same issues can provide reference point for interpretation.

[9] Section 96 of the Road Transport Act 1987 deals with the duty of insurers to satisfy judgements against persons insured in respect of third party risks.

Cases of non-compliance of the duty of utmost good faith revolve around the act of omission and commission (Billah 2003) and the breach of warranty. The validity of a contract of insurance is put in question when there is an act of omission committed either through non-disclosure of any material facts by way of concealment. At common law, non-disclosure by the insured enables the insurer to avoid the policy from the beginning while non-disclosure by the insurer enables the insured to avoid the contract and claim for a return of premium[10]. Total failure of consideration occurs once there has been fraud or breach of good faith by the insurers and the whole amount of premium need to be returned back to the insured. Section 150(4) (b) confirms the common law requirement of mutual duty of disclosure to both the insured and the insurer.

Section 150(4) (b) Insurance Act 1996 reads:

"No licensed insurer or insurance agent, in order to induce a person to enter into or offer to enter into a contract of insurance with it or through him shall fraudulently conceal a material fact"

Commission happens in the form of fraudulent act or by misrepresentation. Representation is not a part of the contract but are statements made by the applicant to the insurer in the process of obtaining a policy. Representation may be oral or included in a written application. Oral representations, however, are difficult to prove. On the other hands, it does mean that representation is usually made during the process of negotiations, meaning that after filling out the insurance application form for effecting an insurance is verbal or written statements made to the underwriter, either by the assured or the broker, which may influence the opinion of the underwriter as to the desirability of acceptance or refusal of the risk submitted, and as to the rate of premium which he will charge if he accepts it.

Misrepresentations, on the other hand, are situations where the wrong or misleading answer has been given to questions post of the applicant of insurance. Misrepresentation is only actionable if it does induce the other party into the contract and it must be material to the making of the contract[11] (Parsons et. al 1991:3). Nik Ramlah Mahmood (1992 : 71) mentions that the distinction between non-disclosure and misrepresentation is not even appreciated by the courts in resolving cases involving insurance's dispute.[12] The legal consequences of a fraudulent and misrepresentation are clearly explained in Sections 18 and 19 of the Contracts Act 1950. The legal burden of proving non-disclosure of a material fact rests upon the party alleging the non-disclosure. Once this burden has been discharged, the onus then shifts to the other party to deny it either by showing that there had been a disclosure or that the fact allegedly not disclosed was in fact not material.

Another important avenue for insurer to avoid their liability in a contract is based on the breach of warranty. At common law, breach of warranty originates from the answer written by the insured in the proposal form that forms the basis of the contract[13]. A warranty in insurance is defined as a stipulation in the policy relating to the nature of the risk insured, which conditions the insurer's liability. Thus, in a theft insurance contract, if the insured agrees to keep the doors locked while the house is unattended, that promise is a warranty. If the insured states in the policy that a watchdog is used, that statement is also a warranty. Noncompliance with a warranty, or a falsely warranted statement, furnishes grounds for the insurer to avoid the contract. The materiality of a warranty is never questioned if the contract becomes the subject of litigation. A warranty is presumed to be material. To avoid the contract, the insurer needs prove only that a warranty has been violated. Breach of a warranty may void a policy even if the insured gave the information to the best of his or her knowledge.

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[10] *Banque Keyser Ullman SA v Skandia (UK) Insurance Co Ltd & Ors (1987)* 1 Lloyds' Rep 69 quoted in Birds, J. and Hird, Norma J, *'Bird's Modern Insurance Law'*, London Sweet & Maxwell, 2001, p 128

[11] Section 19(2) of the Contracts Act 1950 reads that a contract is not voidable if misrepresentation did not cause the consent of the other party to enter into the contract.

[12] Nik Ramlah)1992) made reference to the case of *United Malaysan Insurance Co v Lee Yoon Heng* (1964) MLJ 450 p 454.

[13] Dawsons Ltd v Bonnin (1992) 2 AC 413 quoted in Birds, J. and Hird, Norma J, *'Bird's Modern Insurance Law'*, London Sweet & Maxwell, 2001, p 138.

THE COMMON LAW TEST OF MATERIALITY IN MALAYSIA

Does the common law test of materiality in Malaysia favor the insured more than the insurer? The following discussion aims to locate the answer. The common law test of materiality has been criticized intensively by the legal practitioners and was the subject of several statutory and self-regulatory reforms in countries like the UK and Australia[14]. Ward (1999) comments that judicial dissatisfaction with regards to the test emerged from the reinsurance case of *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd (1994)*. Basically, there are two different tests commonly used in determining the materiality of a particular fact. A fact is material if the prudent insurer considers it to be material fact for the purpose of the insurer making a decision in relation to the risk and this is a test of a prudent insurer. On the other hand, the reasonable insured test implies that a fact is material if a reasonable insured considers it to be material for making such a decision (Colin 1984)

Ward (1999) states that the test of a prudent insurer has been around for 200 years and this principle was endorsed by the English court in *Ionides v Pender (1874)*[15] where the judge described a material fact as one "which would affect the judgement of a rational underwriter governing himself by the principles..on which do in practice act."

Malaysian legislature and judiciary endorsement to the English law's test of materiality seems to be fair and equal from the point of view of a layman. The legislation definition of 'materiality' itself in a contract of insurance endorses the test of a prudent insurer in Malaysia. However, the meaning of materiality first described in Section 15C(4A) of the now repelled Insurance Act 1963 was totally unsatisfactory to reinforce the prudent insurer test. This section reads:

"material matter or material facts means such matter or fact which, if known by the insurer, would have led to a refusal by the insurer to issue a life policy to the insured or would have led the insurer to impose terms less favourable to the insured than those imposed in the policy".

Based on the above, what is exactly the nature of these material facts? Nik Ramlah Mahmood (1992) further argues that the above section fails to clarify the meaning of 'influence the judgement of a prudent insurer'. Section 96(5) of the Road Transport Act 1987 is more satisfactory in explaining the nature of these material facts and its endorsement to the test of a prudent insurer in Malaysia. Section 96(5) reads:

"The expression material means of such a nature as to influence the judgement of a prudent insurer in determining whether *he will take the risks, and if so at what premium and on what conditions.."*

The current legislation of the Insurance Act 1996 with regards to non-disclosure of material facts will be examined later. It can be seen that Section 96(5) of the Road Transport Act 1987 does mentions the word 'prudent insurer' and this implies that Malaysian legislature endorses the test of a prudent insurer but prior to that it is not proven in the Insurance Act of 1963 that this test was completely endorsed. Cases of insurance law decided in Malaysian jurisdiction with regards to non-disclosure are interesting. In most cases of general insurance, the test of a prudent insurer was clearly accepted. This was evidenced in the case of *The Say Cheng v North British and Merchantile Insurance Co Ltd (1921)*[16] and *Wong Lang Hung v National Employees' Mutual General Insurance (1972)*[17]. The judge in the later case in his judgement implied that it did not matter if the insured himself did not appreciate the materiality of the non-disclosed fact, what mattered was whether such a non-disclosure would have influenced the prudent insurer in making his decision.

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[14] In the UK, these recommendations for reform were made both by the Law Reform Committee in 1957 and by the Law Commission in 1980. For ref., see Hodgin, Ray, *Insurance Law*, Cavendish Publishing Ltd, (2002), p.220.

[15] In this case, duty of disclosure is extended to surrounding circumstances, including moral hazard. For ref., see http://www.swissre.com/INTERNET/pwswpspr.nsf/

[16] [1921] 2 FMSLR (Federated Malay States Reports) 248 quoted in Nik Ramlah Mahmood, *'Insurance Law in Malaysia'*, Malayan Law Journal Pte Ltd, 1992, p 52

[17] [1972] 2 MLJ 191 quoted in Nik Ramlah Mahmood, *'Insurance Law in Malaysia'*, Malayan Law Journal Pte Ltd, 1992, p. 53

A slightly different approach was applied by the Federal Court in the case of *Abu Bakar v Oriental Fire and General Insurance Co Ltd (1974)*[18]. The approach used by the judge in Abu Bakar case should be highly welcomed by the insured or the consumers in Malaysia. The lordship in Abu Bakar case did recognized the prudent insurer test but with two qualifications. On the authority of *Joel v Law Union (1908)*[19], the lordship in his judgement mentioned that one can only disclose facts which one knows or is expected to know and second, even though a fact is material in the eyes of a prudent insurer, it need not be disclosed if the insured himself is not able to appreciate that the prudent insurer will regard such fact as material.

Amazingly, the two qualifications introduced in the case of Abu Bakar resemble the requirement of disclosure of material facts in Section 150 of the Insurance Act 1996. This is a significant effort of our legislature body in drafting the current insurance act by taking into consideration the ratio derived from the Abu Bakar's case. It is interesting to see how the subsequent cases will be decided in light of the decision in Abu Bakar. Cases cited, thus, far illustrate the recognition of the prudent test in the area of general insurance, but not in life insurance. The application of the prudent insurer test in life insurance's dispute is more restricted in the sense that it can only be applied in limited cases. A provision is made with regards to misstatement of age and non-avoidance of policy under Section 147 of the Insurance Act 1996.

In cases where there is a misstatement or misrepresentation of age, Section 147(1) of the Insurance Act 1996 provides that the insurer shall not dispute liability under a life policy by reason only of the age. Section 147(4) of the same act further requires that insurer shall not dispute the validity of a life policy after the expiry of two years from the date on which it was effected unless that material fact was fraudulently made or omitted to be made by the policy owner. One important point to note here is that Section 147(1) does not mention that the act of misstatement which does not invalidates the life insurance contract is done by way of fraud or innocent. In Australia, with respect to misstatements of age, Section 30 of the Australian Insurance Contracts Act 1984 provides that there is to be no avoidance of the contract even if they are fraudulent[20]. This might invites further disputes in the future. Unfortunately, there is no case law to be cited here in ascertaining the application of the said section. It remains unseen to what extent has the common law in our jurisdiction reacted in relation to matters provided under Section 147 of the Insurance Act 1996.

THE SUFFICIENCY OF THE MALAYSIAN INSURANCE ACT 1996 IN PROTECTING THE RIGHT OF THE INSURED

Unlike the now repelled Insurance Act 1963, the current Insurance Act 1996 provision in relation to the duty of utmost good faith is rather more comprehensive although minor reforms and amendments are still needed. Section 150 of the Insurance Act 1996 defines that a fact that needed to be disclosed is a matter that the proposer knows to be relevant to the decision of the licensed insurer on whether to accept the risk or not and the rates and terms to be applied or a reasonable person in the circumstances could be expected to know to be relevant.

Section 150 resembles the judicial precedent of the Abu Bakar's case although the legislature body in Malaysia is not bound by the decision of the judiciary. Section 150 is an obvious endorsement of the common law reasonable insured test that had gained less attention in cases of non-life insurance in Malaysia since the first reported case in the year 1921. The term 'the proposer knows to be relevant' and 'a reasonable person could be expected to know' imply that material facts which are relevant and important to the underwriter in deciding their acceptance is no longer a decisive factor.

On the other hand, the term 'the proposer knows to be relevant' in Section 150 can be burdensome at the stage of pre-contractual duties to the insured himself. The problem is that it is the insured alone who has ultimate responsibility for deciding that which is material and should be disclosed and that which is irrelevant may be put to one side. As the party who stands to lose most from any non-disclosure and the party with control of the greatest share of the information, it may be argued that it is the insured who is in the weakest position, as he does not necessarily know what information the insurer wishes to have.

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[18] [1974] 1 MLJ 149 quoted in Nik Ramlah Mahmood, *'Insurance Law in Malaysia'*, Malayan Law Journal Pte Ltd, 1992, p. 53

[19] This is a case of life insurance. For Ref., see S. Santhana Dass, *'Law of Life Insurance in Malaysia'*, Alpha Sigma, 2000, p. 89

[20] For Ref., see Tarr, A.A., *Australian Insurance Law*, The Law Book Company Limited, (1987), p 92.

Recommendation on the action needs to balance the burden during the pre-contractual duties of the duty to disclose between the insured and insurer shall be considered later.

Section 150(2) (3) which explains what are immaterial facts and the right of insurer to avoid the policy when there is a waiver are similar to the one of Section 21 (2) (3) of the Australian Insurance Contracts Act 1984. Both of these two subsections delimit the insured's pre-contractual duties and shall be maintained if future amendment is to be made to the act.

Section 150(4) provides further protection for the insured, which requires the insurers and their agents to be transpired in their representations. Insurers and their agents shall not make misleading or false statement, shall not fraudulently conceal a material fact or use brochure or sales illustration not authorized by their principal. Furthermore, Bank Negara Malaysia had also released a guideline in the year 2003 on the minimum standard on product disclosure and transparency in the sale of medical and health insurance policies. In this guideline, insurers are required to provide sufficient details of the essential features of medical and health insurance policies in their marketing and sales materials. Important provisions such as exclusions and limitations of benefits must be explained clearly and in a simple and easy to understand manner[21].

REFORMATION, RECOMMENDATIONS AND CONCLUSION

Section 150 of the Insurance Act 1996 is enriched with pre-contractual duties, although it seems to be a one sided duty but silent on the post-contractual duties of disclosure. The act shall be amended in a way that it shall provide a clear guideline to the duty imposed to the insured and insurer upon the completion of the contract. Clear guideline in this case shall mean the remedies available in situation where the provision of Section 150 is breached. Although a claim for damages in tort is available by the discretion of the court, if there is a breach of fraud non-disclosure of both parties as provided in Section 76 of the Contracts Act 1950 (Parsons et. al. 1991), it is still unsatisfactory since fraud as a state of mind is utterly difficult to be proven by the plaintiff in his action. Insurance Act 1996 must address matters in relation with remedies available to both parties in a reasonable manner.

Section 149 (4) imposes a single remedy, that is, avoidance of the contract at the option of the insurer when there is a breach and Section 150(4) addresses the same rule at the option of the insured but this remedy itself seems to be of more considerable benefit to the insurer rather than insured. Imagine a situation when a contract is rescinded as a result of innocent non-disclosure and assumes that it involves material facts. Non-disclosure is commonly discovered as a consequence of possible claims by the insured. Rescission of a contract would leave the insured with no right to claim and obviously it benefits the insurer. When there is a breach of non-disclosure on the part of the insurer or their agent, the insured might also rescind the contract but this is not always the case as the main purpose of the contract is for his or her protection against accidental event and to rescind a contract is not a worthy option. Pre-contractual duties similar to the one provided under Section 150 of the Insurance Act 1996 shall be available to bind the insurer. Our legislation and statute shall impose the insurer to require the insurer to guide the insured by asking questions and requesting information. By judging at the context of Section 150, although it is more favourable to the insured, yet the insured duties are more onerous and the legal consequence for failure to observe them can be severe.

As mentioned earlier, the Insurance Act 1996 makes no reference to the post-contractual duties and this will benefit the insurer if they require a continuous duty by way of an express term. Post-contractual duties seriously need a place in the act. In fact, our Malaysian judiciary and the legislature can take note on the ratio derived from the marine insurance's case of *Manifest Shipping Co. Ltd v Uni-Polaris Insurance Co. Ltd* (2001). It was accepted in that case that the duty of utmost good faith continues to apply after the conclusion of the insurance contract but that it does not necessarily follow that the content of the duty is the same as that existing prior to or at the time of the making of the contract. The duty of good faith after the making of the contract must be considered as a new and different type of duty than that beforehand, which should not be shadowed by the extent of the duty owed pre-contractually by the insured. The court confirmed that duty of good faith owed after the contract is not the same as in pre-contractual stages. It will be interesting to see how our courts will respond to the above development in future cases of non-disclosure.

[21] http://www.liam.org.my

Does Insurance Act 1996 protect the interest of the insured in their duty to observe utmost good faith? Does our common law deliver justice to the insured or it manages to balance both parties' interest? To conclude, it is not easy since it requires the author to synthesise the whole discussion. Basically, the Insurance Act 1996, with reference to Section 150 that makes provision in relation to the duty of utmost good faith is considerably fair to the insured, especially when it reinforces the common law test of a prudent insured rather than the test of a prudent insurer. On the other hand, it lacks sufficient details on the post-contractual duties of disclosure to both parties and pre-contractual duties of the insurer and this shortage must be considered by the legislature. When the oldest statute of Marine Insurance Act 1906 is being criticized and reformation is being suggested everywhere, what can be expected from our Insurance Act that came in force in the year 1996? Or maybe it is the right time to follow Australia in drafting our own Contracts Act specifically for contracts of insurance since some provisions such as the provision of remedies in the Contracts Act 1950 does not exactly serve justice to the insured. Abu Bakar's fire insurance case in the year 1974 marked a significant step towards the need to balance the two contrasting test of materiality of reasonable insured and reasonable insurer. Hopefully, our judges will continue to incorporate the current case law developments especially on questions of non-disclosure and misrepresentation. The reasonable insured test shall, in fact, remain king!

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