

INSURANCE LAW IN NIGERIA
WITH PARTICULAR REFERENCE TO LEGISLATIVE INTERVENTION

BY

OMOGBAI I. OMO-EBOH
Department of Law
London School of Economics

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THESIS ABSTRACT

Insurance affects a substantial number of the Nigerian population who take out insurance cover for protection against fortuitous risks or as a form of financial investment and security. This has led to a growing insurance industry in Nigeria.

Over the years, a number of common law principles developed in the English courts have been adopted and applied by courts in Nigeria in the settlement of disputes arising from insurance contracts. Certain aspects of these principles and insurance practice are in need of reform as they tend to defeat the expectation of insurance consumers. As such, the legal principles have undergone significant statutory reforms in different countries including Nigeria.

It is against this background that the thesis examines some aspects of the common law principles as applied in Nigeria and the impact which indigenous enactments and recent statutory reforms have on them. The work, though not primarily intended as a comparative study, draws from the approach to insurance reform in other common law countries, and recommendations on further reform in Nigeria are made where appropriate.

The thesis is mainly directed at the protection of the insured and potential insured, an aspect of what is often known as consumer protection in insurance contracts. Thus, it is those aspects of the law affecting the insured that are mainly examined. These include the formation and

documentation of insurance contracts, the role of insurance intermediaries, and the law governing warranties, conditions, non-disclosure and misrepresentations in insurance. The work concludes with an examination of judicial control and governmental regulation of insurance.

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CHAPTER 1

GENERAL INTRODUCTION

1.1 Nigeria and the Common Law Tradition

Historical association between the geo-political territory now known as Nigeria in the West Coast of Africa and the British from the early part of the 19th century until independence in 1960, meant that the Nigerian legal system is fashioned largely on that of the British and English law represents a significant part of the law applicable in Nigeria till the present period.

The current enactment governing the reception of English law in Nigeria is the Law (Miscellaneous Provisions) Act, Cap. 89,¹ in force as a Federal law throughout the country. Section 45(1) provides that:

Subject to the provisions of this section and except in so far as other provision is made by any Federal law, the common law of England and the doctrines of equity, together with the statutes of general application that were in force in England on the 1st day of January, 1900, shall be in force in Lagos, and in so far as they relate to any matter within the exclusive legislative competence of the Federal legislature, shall be in force elsewhere in the Federation.

Under section 45(2), "Such Imperial laws shall be in force so far only as the limits of the local jurisdiction and local circumstances shall permit and subject to any Federal law". When the Act was passed, Lagos was a federal territory for which only the Federal legislature could

¹ Laws of Nigeria, 1958. See the Interpretation Act of 1964, s.28.

legislate. Lagos is now a State capable of legislating on matters within its legislative competence.

Subject to minor differences in wording from the above Act, principles of common law and equity, and English statutes of general application in force on the 1st day of January, 1900, have also been received by laws applicable in several States in Nigeria on matters within their legislative competence. These laws are: section 2 of the Law (Miscellaneous Provisions) Law 1973, Cap. 65, of Lagos State; sections 28, 29 and 35 of the High Court Law 1963, Cap. 49, applicable in 11 States forming Northern Nigeria; and section 15 of the High Court Law 1963, Cap. 61, applicable in 5 States forming Eastern Nigeria.

The only exception to the reception of English statutes are the 4 States forming Western Nigeria, where the legislature of that region enacted as part of its laws between 1958 and 1959 some pre-1900 English statutes in areas within its legislative competence. It is provided for that region in section 4 of the Laws of England (Application) Law 1959, Cap. 60, that "no Imperial Act hitherto in force within the Region shall have any force or effect therein". However, section 3 of the same Law retains the application in the region of English common law and equity "observed by Her Majesty's High Court of Justice in England".

Under the 1979 Constitution of Nigeria, insurance is listed as item 32 in the exclusive legislative list and, as such, only the Federal legislature can make laws regarding

insurance. Such laws, once made, apply throughout the country. Thus, insurance statutes applicable in Nigeria by virtue of the enactment receiving English statutes into Nigeria, above, include; the Life Assurance Act 1774, the Fires Prevention (Metropolis) Act 1774, the Policies of Assurance Act 1867, and the Married Women's Property Act 1882. The first three Acts have been re-enacted with modifications in the Insurance (Special Provisions) Decree 1988, and it could be argued that the English statutes have ceased to be applicable in Nigeria. This is because section 45(1), above, receives pre-1900 English statutes "except in so far as other provision is made by any Federal law", and section 45(2) makes received English statutes "subject to any Federal law".

Nigeria has gone through different phases in her history during which laws have been made by the colonial British Government in the form of "Ordinances", by elected civilian legislatures in the form of "Acts", and by the Military Government in the form of "Decrees". However, by section 1 of the Adaptation of Laws (Re-designation of Decrees, etc.) Order of 1980, any Decree passed by the Military Government in force on the date of the coming into force of the 1979 Constitution is re-designated and referred to as an Act. Certain provisions of the 1979 Constitution have now been suspended and others modified by the Constitution (Suspension and Modification) Decree of 1984 and the Constitution (Suspension and Modification) (Amendment) Decree of 1985 when the Military Government

took over the administration of Nigeria in 1983. Power to make Federal laws applicable throughout the country is now vested in the Armed Forces Ruling Council, and laws are made by Decrees.

The principal enactments touching upon insurance in Nigeria which are discussed in the course of the work include; the Motor Vehicles (Third Party Insurance) Act 1950, the Third Parties (Rights against Insurers) Act 1956, the Marine Insurance Act 1961, the Insurance Act 1976 (which started out as a Decree) and the Insurance (Special Provisions) Decree 1988.

Opinion is divided on whether the cut off date of the 1st day of January, 1900, in section 45(1), above, applies to the reception of English common law and doctrines of equity in Nigeria.² Moreover, the section provides that common law and equity "shall be in force" in Nigeria. It is unclear whether by this, principles of the common law and equity developed in the courts in England are automatically binding on the courts in Nigeria so that a decision of the High Court in England will bind even the Supreme Court which is the ultimate appellate court in Nigeria. Again,

² See Allott, Essays in African Law, (1960) p.30-33 and Elias, "Colonial Courts and the Doctrine of Judicial Precedent", (1955) 18 M.L.R. 356 at pp. 368-369, for the view that what is received is the common law and equity as at January 1, 1900. For a contrary view see, Park, Sources of Nigerian Law, (1963) pp.19-24; Obilade, The Nigerian Legal System, (1979) pp.70-72; Okonkwo, Introduction to Nigerian Law, (1980) pp.7-8.

opinion is divided on this point.³

Whatever the theoretical arguments may be, in practice, all the courts in Nigeria rely heavily on both pre and post 1900 English decisions in resolving disputes surrounding insurance contracts (as is the case in all other branches of the law) even if they do not say the English decisions are binding. This is revealed in the Nigerian case law discussed in the course of the work. Thus, Holden J., in Dede v. United Arab Airlines,⁴ refused to follow the decision of Bairamian J.S.C. in the Supreme Court in Sun Insurance Office Ltd. v. Ojemuyiwa,⁵ partly because the latter decision "came before the very clear judgment of the Court of Appeal [England] in Post Office v. Norwich Fire Ins. Co. Ltd.".⁶

1.2 A Brief Account of Insurance in Nigeria

Colonial and trading association with Britain explain the introduction of modern insurance in Nigeria about the early part of the 20th century. Insurance was introduced in Nigeria during this period through the appointment of trading organisations and certain individuals already well established in Lagos as agents of British owned insurance companies operating in the United Kingdom. The appointed

³ Ibid. See generally Allott, New Essays in African Law, (1970) Chapters 1-3; Umoh, Precedent in Nigerian Courts (1984) Chapters 4 and 13.

⁴ [1969] N.C.L.R. 58 at 61.

⁵ [1965] 1 All N.L.R. 1.

⁶ [1967] 2 Q.B. 363. See Chapter 8 para. 8.5, *supra*.

agents were authorised to accept risks, issue policies and settle claims on behalf of the foreign principals. In time, the agents established insurance departments of their own for this purpose, and the principals sent staff from the foreign office to assist in the local insurance business.⁷

This period was followed by the establishment of branch offices in Nigeria by British insurers. It is reported that the first company to have a branch office in Nigeria was the Royal Exchange Assurance in 1921. It remained the only company till 1949 when three other companies established offices in Lagos, namely; the Norwich Union Fire Insurance Society, the Tobacco Insurance Company, and the Legal and General Assurance Company.⁸

Prior to 1960, there were no indigenously owned insurance companies operating in Nigeria. With political independence in that year, a number of indigenous companies began operating. Participation in insurance business by Nigerian citizens was given a boost in the 1970's as part of the government's drive during this period towards placing areas of the economy in the hands of Nigerians. Within this period, the Government (both Federal and State) acquired substantial shares in some wholly owned foreign insurance companies, and wholly owned government insurance companies were formed. At present, the government,

⁷ See Cadmus, "The Role of Intermediaries in the Insurance Industry in Nigeria", (1973) II IIN Conference Papers 88; Farnsworth, "Some Notes on the Early Nigerian Insurance Scene", (1975) IV IIN Conference Papers 203.

⁸ Irukwu, "The Development of Insurance in Nigeria from 1900-1975", (1975) I WAICA Journal 12.

foreigners and individual citizens participate in insurance business in Nigeria. It is, however, unsurprising that the consequence of domination of the market by British companies is that the insurance practice prevalent in Nigeria is patterned after the British.

The Nigerian insurance market is the largest in Africa,⁹ recording a gross premium income of approximately N611.5 million in 1985,¹⁰ and with an estimated gross premium income of N1.2 billion in 1990. Professional and educational bodies present in the industry include; the Insurance Institute of Nigeria (IIN), the Nigerian Insurance Association (NIA), the Nigerian Corporation of Insurance Brokers (NCIB), the Institute of Loss Adjusters of Nigeria (ILAN), the Nigerian Insurance Law Association (NILA), the West African Insurance Companies Association (WAICA) and the African Insurance Organisation (AIO).

⁹ Siegrist, "Development of Insurance in Africa", (1983) VIII WAICA Journal 95.

¹⁰ Nigerian Insurance Year Book, (1987) p.184.

CHAPTER 2

THE CONTRACT OF INSURANCE: FORMATION AND DOCUMENTATION

2.1 Introduction

The principles governing the formation of insurance contracts in Nigeria are fairly well settled. The principles conform to those of the common law regarding the formation of contracts generally.

For an insurance contract to be formed the necessary requirements of offer, acceptance, consideration and an intention to create binding legal relations must be present. The offer is usually made by the proposed insured completing a proposal form and forwarding it to the insurer. The acceptance is constituted by the insurer accepting the proposal form on its terms, and issuing the policy for the consideration of the premium payable by the insured on which the insurer agrees to bear the risk of an uncertain event or events. The intention to enter into and create binding legal relations will be presumed where the other elements are satisfied.

The aim of this Chapter is to examine how insurance practice in the formation of insurance contracts fits with the requirements of the common law. More specifically, it is intended to study the documents on which insurance contracts are based such as the proposal form, cover note, certificate of insurance and the insurance policy. This is done with the aim of understanding the principles governing the use of these documents and the practice of Nigerian

insurers in their use. Problems that are created and defects in the current practice are noted, and suggestions for reform are made where necessary. The study is preceded by an attempt to define the nature of a contract of insurance.

2.2 The Nature of a Contract of Insurance

The words "contract of insurance", "insurance business", and "insurance" are commonly used to describe the same thing. An attempt at explaining what is meant when any of these words is used inevitably involves an explanation of the nature of insurance. It is important to define, or at least describe, what insurance is for two reasons. Firstly, the Insurance Act of 1976 contains detailed provisions discussed in the work regulating those carrying on insurance business and insurance contracts generally. Thus, it is provided in section 3(2) of the Act that "...no insurer shall commence or carry on insurance business in Nigeria unless the insurer is registered under or pursuant to this Decree".¹ It is important to know who is an insurer or one carrying on insurance business for the purposes of regulation. Secondly, a substantial number of people enter into contracts of insurance. These contracts have attracted peculiar principles of their own which are also examined in the course of the work. It is particularly important in a significantly illiterate population that the

¹ Redesignated an Act by virtue of S.I.13 of 1980; Adaptation of Laws (Re-Designation of Decrees, etc.) Order 1980.

nature of a contract of insurance is understood. The compulsory nature of a certain type of insurance serves to emphasise the point.

The Insurance Act of 1976 fails to define insurance, and references to the word contained in the Act are evasive of a definition. Thus, section 62 provides that "insurance" includes assurance, "insurance business" includes re-insurance business, "insurer" means a person who is carrying insurance risks and is registered under the Act for that purpose, and, that a "policyholder" means the person who for the time being is the legal holder of the policy for securing the contract with the insurer. The Act is, therefore, unhelpful for the purposes of a definition.

However, it has been judicially held that a contract of insurance in the widest sense of the term, is "A contract whereby one person called the insurer undertakes in return for the agreed consideration called the premium, to pay another person called the assured, a sum of money, or its equivalent, on the happening of a specified event."² A number of points follow from this concise definition meriting elaboration.

The undertaking of the insurer to pay upon a specified event must be a legally binding one. Thus, it has been held that a discretionary right reserved by one person to indemnify another against loss does not constitute

² Kayode v. Royal Exchange Assurance [1955-56] W.R.N.L.R. 154; Oloruntade v. Dantodo [1976] N.C.L.R. 57 at 59.

insurance.³ Furthermore, in relation to the event for which the insurer undertakes to pay, it has been held that; "There must, however, be uncertainty as to whether it will happen or not, or, if it is bound to happen, like the death of a human being, uncertainty as to the time at which it will happen".⁴

The undertaking of the insurer must be to pay "a sum of money or its equivalent". There is no requirement of the law that the indemnity must be in the form of a monetary payment. As shown in Chapter 7 para. 7.2, infra, insurers in Nigeria frequently elect to repair or reinstate damaged vehicles instead of paying the insured in cash. So long as the insurer confers some benefit on the insured worth money, the requirement is satisfied.⁵

It is evident from the judicial definition, above, that the consideration which is a necessary requirement for the validity of all contracts not under seal, is the premium which the insured pays or agrees to pay. In practice, the premium is a sum of money agreed between the insurer and insured. The acceptance of the insured's offer for insurance is usually constituted by the insurer's acceptance of the premium tendered.

Under section 32(1) of the 1976 Insurance Act, it is

³ Medical Defence Union Ltd. v. Department of Trade [1979] 2 W.L.R. 686.

⁴ Alexander J., in University of Nigeria v. Turner [1968] 1 A.L.R. Comm. 290 at 299, quoting Halsbury's Laws of England, (3rd ed.) Vol. 22, para. 347.

⁵ MacGillivray and Parkington on Insurance Law, (8th ed.) para.4; Birds, Modern Insurance Law, (2nd ed.) p.11.

an offence for an insurer either by itself or as a member of an association of insurers to make a general increase in rates of premiums charged with respect to any class of business without the prior approval of the Director of Insurance. The Director is the government official charged with the supervision of insurers and implementing the provisions of the Act. Penalties for non-compliance with section 32(1) are prescribed in section 32(1) and (2). These include, (a) the payment of a fine of ten times the amount of the premiums charged and received by the insurer on conviction, (b) suspension of the insurer's operations in respect of new business for a period of not less than six months or more than three years, and, (c) cancellation of the insurer's certificate of registration. There is no reported case where the Director has imposed any of the penalties or where an insurer has been convicted of an offence under the provisions.

Furthermore, section 33 provides for the appointment of a Rating Committee whose functions include the determination of reasonable and adequate rates of premiums chargeable for risks in any class of insurance business, and to consider applications for general increases in premium rates by insurers. The main purpose of the provision is to control inflationary pressures on the economy arising from excessive premiums while maintaining, at the same time, reasonable rates of premium commensurate with the risks undertaken by insurers.

A consideration of the effect which the non-payment of

premium by the insured has on the contract is made in Chapter 4 para.4.5, infra. Suffice it for present purposes that it was held in Babalola v. Harmony Insurance Co.,⁶ that once a contract of insurance is validly made, the insurer is bound by it whether or not the premium has been paid unless the contract contains a stipulation that there will be no insurance until the premium is paid wholly or by instalments.

Another way by which it is determined whether a transaction falls to be described as a contract of insurance is to ask if it is of a type attracting the peculiar features of contracts of insurance such as the duty on the parties to observe the utmost good faith, and the requirement that the insured should possess an insurable interest in the subject-matter of the contract.

This approach is illustrated in University of Nigeria v. Turner & Son Ltd. and African Alliance Insurance Co.,⁷ where the plaintiff, an educational institution established by statute, engaged the services of the first defendant broker to negotiate a so called "sinking fund Assurance" policy with the second defendant insurance company. Under the arrangement, the plaintiff was to pay a fixed sum annually for a period of fifty years, at the end of which the second defendant would pay over £3 million to the plaintiff. After paying the first instalment, the plaintiff, apprehensive that the second defendant might not

⁶ [1982] 1 O.Y.S.H.C 1 at p.7.

⁷ [1968] 1 A.L.R. Comm. 290.

be able to meet its obligation, sought to repudiate the contract and sued to recover the sum paid. Non-disclosure of the insurer's financial position was the alleged reason for the repudiation. Alexander J. observed that:

First of all, let me endeavour to clear up what appears to me to be a fundamental misconception upon which the pleadings and the plaintiff's case have been based, that is to say, that the transaction between the plaintiff and the second defendant was a contract uberrimae fidei in which each party is bound to show the utmost good faith...⁸

The learned judge quoted from the definition of insurance set out in Halsbury's Laws of England, 3rd ed. Vol. 22, at para. 347 that "... there must be an insurable interest in the assured in the sense, normally, that the event must be one which is *prima facie* adverse to the interest of the assured".⁹ It was held that the plaintiff's failure to disclose its insurable interest in the subject matter of the transaction meant it did not constitute a contract of insurance. According to the judge (at p.299):

It is not sufficient to call a document a 'sinking fund assurance policy' to invest it with the character of a contract of Insurance. There is no magic in the words 'insurance' and 'assurance'. The proposal...and the policy...fail to disclose the essential characteristics of a contract of Insurance. They do not disclose the risk or insurable interest involved.

The requirement of insurable interest in insurance is now governed by sections 3-5 of the Insurance (Special Provisions) Decree of 1988. The Decree re-enacts, with some

⁸ Ibid. at p. 298.

⁹ Note, however, that the requirement of adversity is not necessary in all forms of insurance: MacGillivray and Parkington, para.5.

modifications and additions, the provisions of the Life Assurance Act 1774 (U.K.), applicable in Nigeria as a pre-1900 English statute of general application. It is provided in section 3(1) and (2) of the 1988 Decree that:

(1) Any insurance made by any person on the life of any other person or on any other event whatsoever shall be null and void where the person for whose benefit, or on whose account the policy of insurance is made has no insurable interest in the insurance or where it is made by way of gaming or wagering.

(2) A person shall be deemed to have an insurable interest in the life of any other person or in any other event where he stands in any legal relationship to that person or other event in consequence of which he may benefit by the safety of that person or event or be prejudiced by the death of that person or the loss from the occurrence of the event.

Section 3(1) avoids all insurances without interest "on the life of any other person or on any other event whatsoever", whereas the 1774 Act is expressly made inapplicable, under section 4, to insurances "on ships, goods or merchandises". Thus, the 1988 provisions on insurable interest are wider in scope than those of the 1774 Act. However, it is submitted that the former provisions do not apply to marine insurance because marine insurance provisions on insurable interest are already codified and contained in sections 6-17 of the Marine Insurance Act of 1961, based on the same U.K. Act of 1906.

To the extent that the provisions of sections 3-5 of the 1988 Decree do not materially differ from those of the 1774 Act, except as mentioned above, nor alter or affect the common law on insurable interest, it is not intended to consider the former provisions in detail here. Moreover,

the requirement of insurable interest in contracts of insurance has not been a significant cause of dissatisfaction among persons seeking insurance, neither has it been the subject of much litigation in Nigeria. The only material variation of the common law requiring some comment is contained in section 3(3) of the 1988 Decree which provides that:

In this section, the expression "legal relationship" includes the relationship which exists between persons under Islamic law or Customary law whereby one person assumes responsibility for the maintenance and care of the other.

The general rule of the common law is expressed to be that a family relationship other than that of husband and wife does not in itself constitute an insurable interest. And, that unless there is some form of pecuniary interest, a parent has no insurable interest in the life of a child, nor the child in the life of its parent.¹⁰ It would appear it is with a view to altering this rule that section 3(3) is enacted.

The common law rule was bound to be unsatisfactory in an African society where the extended family is entrenched in the culture. It is common for one person in a family to provide financial support to other members of his family such as less well to do brothers and sisters and their offsprings, as well as his ageing parents. It is noteworthy that section 3(3) does not enumerate the classes of persons in whose lives another may have an insurable interest or

¹⁰ MacGillivray and Parkington, op.cit., para.90.

vice-versa. Instead, this is left to be determined under "Islamic law or Customary law". The list may not, however, be open ended because it is limited to relationships whereby "one person assumes responsibility for the maintenance and care of the other". This last qualification may suggest that the interest given is limited to the life of the other, and does not extend to any other liability which may fall on the other person. It is unclear from section 3(3) whether it is only the person maintaining or caring for another that has an interest in the other's life, or if both parties have an interest in each other's lives. Going by the test of benefit by the safety and prejudice by the death of one person as the definition of insurable interest given in section 3(2) above, it is submitted that both parties should have an interest in each other's lives.

If the above requirements of an undertaking to pay another having an interest in the subject-matter upon the occurrence of an uncertain event and in consideration of a premium are satisfied, the transaction may properly be classified as an insurance contract. Any person entering into such contracts regularly and as its principal or only business is carrying on insurance business, and is described as an insurer. It is the mode of, and the documents used in creating insurance contracts that is proposed to be examined hereunder.

2.3 The Proposal Form

The general requirements for the formation of a contract of insurance were stated in Babalola v. Harmony Insurance Co., thus:

A contract of insurance, like any other kind of contract, must be constituted by an offer and acceptance, and a consideration. The offer is normally contained in a proposal form duly filled and signed by the assured or the proposer and the acceptance is signified by a formal acceptance, or by the issue of a policy, or by the acceptance of the premium paid by the proposer, or by conduct on the part of the insurers.¹¹

The proposal form is the usual means by which the prospective insured makes his offer for insurance cover.¹² Proposal forms are fairly standard mass produced documents prepared by insurers. Insurers elicit in proposal forms various information from the prospective insured regarding the risk or subject-matter of the insurance, the amount of cover requested, and other information regarding the insurance to enable them evaluate the risk and decide whether or not to accept it. The proposal form for a number of reasons to be outlined constitutes an important document in the insurance transaction and some authors¹³ have gone as far as declaring it, simpliciter, as the basis of the contract.

¹¹ [1982] 1 O.Y.S.H.C. 1 at p.6. See also Salako v. Lombard Ins. Co. [1978] 10-12 C.C.H.C.J. 215 at 220; Lawal v. Amicable Ins. Co. [1982] 3 F.N.R. 283 at 292.

¹² "...while I agree that the usual practice in non-marine insurances...is for the person seeking to be insured to fill a proposal form, there is no statutory or any other legal obligation on any such person to fill any proposal form." Per Atake J. in Esewe v. Asiemio & anor. [1975] N.C.L.R. 433 at 438.

¹³ Achike, Commercial Law in Nigeria, (1985) p.319.

Insurance is a kind of contract commonly called contracts uberrimae fidei. As such, there is a common law duty imposed on the insured to disclose to the insurer all material facts within his knowledge before the conclusion of the contract. The proposal form is the most common way by which insurers in Nigeria elicit material information from persons desiring insurance. A failure to disclose fully, or answer accurately, information sought in the proposal form entitles the insurer to repudiate the contract and avoid paying the insured for a loss. Furthermore, it has become the standard practice for an applicant for insurance to be made to sign a declaration contained in a proposal form whereby the accuracy of the information supplied is warranted. In this way, statements contained in the proposal form are made warranties of past, present or future facts as the case may be.

To this end, the proposer must be cautious in ensuring that no material misstatements are made while completing the form. However, it is the case that in the absence of warnings drawing attention to the need to disclose facts accurately, most prospective insureds are unaware of the burden placed on them and the consequences which a wrong, though innocent or negligent, statement might bring upon them in the completion of proposal forms. Most proposers simply regard the form as nothing more than an application for insurance cover. A study of the duty of disclosure and the creation of warranties where proposal forms are used is reserved for discussion in Chapters 5 and 6, infra.

Dissatisfaction has been expressed at the technical wording and the print size used by insurers in contractual documents including proposal forms.¹⁴ Complaints have been made of the difficulty experienced by many in understanding the obligations assumed when proposal forms are signed as they are frequently made the basis of the contract of insurance. The Nigerian Law Reform Commission in its deliberations on the reform of insurance laws recognised the danger, and recommended that the Director of Insurance should be empowered to prescribe specific forms of warning in proposal forms, *inter alia*, with respect to the insured's duty of disclosure. It was further recommended that the warnings should conform to prescribed print type, size and colour, and, that proposal forms should be couched in "highly simplified and non-technical language".¹⁵ Surprisingly, these recommendations are not enacted in the Insurance (Special Provisions) Decree of 1988 designed to implement the Commission's recommendations.

Arguably, other avenues exist by which the results desired by the Law Commission may be achieved. Section 5(1)(e) of the 1976 Insurance Act provides that the Director shall register an applicant as an insurer if he is satisfied that the "proposal forms, terms and conditions of policies are in order and acceptable." Regrettably though, since the Act came into force on the 1st day of December

¹⁴ Isiekwene, "Rights and Duties of the Insurance Companies with Respect to the Insuring Public", Law Reform Journal (1986) p.45.

¹⁵ Law Reform Journal (1986) No.5 p.182.

1976 there has been no evidence of the Director rejecting any proposal form intended to be used by a company seeking registration. Neither has there been any guidelines/regulations issued on how insurers should use proposal forms, i.e. what warnings or notices should be written on them, nor the prescription of type, size and colour of the print used in the forms. One reason for the Director's reluctance to intervene may be found in the fact that proposal forms are fairly standard for different classes of insurance and have been in use from the earliest operations of insurance companies in Nigeria which were mainly British. The impression thus created is that since they have been tested over a long period of time, they must satisfy both the needs of insurers and insureds alike. That this is not necessarily the case as regards the insured is shown.

Once a proposal form incorporating the insurer's standard policy for that class of insurance by reference has been submitted and accepted by the insurer, the insured is bound by a contract of insurance on the insurer's standard terms even if a policy is not delivered to him and its terms are unknown to him.

In Northern Assurance Co. Ltd. v. Wuraola,¹⁶ the proposer desirous of insuring his taxi cab against third party risks completed and signed a proposal form containing a declaration in the following words; "I further agree to accept a policy subject to the terms, provisions and

¹⁶ [1969] N.C.L.R. 4.

conditions of the company." After paying the requisite premiums, he was issued a cover note declaring the risk to be held covered in the terms of the company's usual form of policy for a period of thirty days. This was followed by the delivery to him of a certificate of insurance which stated that the policy to which the certificate related was issued in accordance with the provisions of the Motor Vehicles (Third Party Insurance) Act of 1950. It was a term of the insurer's standard policy, howbeit, never delivered to the insured, that the due observance of the conditions in so far as they relate to anything to be done by the insured should be a condition precedent to any liability of the insurer to make any payment under the policy. Another term of the standard policy required the insured to give notice to the insurer of any prosecution in respect of an occurrence which might give rise to a claim. The taxi was involved in an accident and the driver prosecuted which the insured failed to notify the insurer. The insurer refused to indemnify the insured against a third party liability on account of the breach of a condition precedent. The insured contended in the ensuing action that as he had never been given a policy of insurance containing the conditions relied on by the insurer, and was unaware of their existence, he could not be bound by the insurers standard policy terms.

In the High Court,¹⁷ the learned judge opined that there was a contract of insurance, but that the insured was not

¹⁷ Reported in [1966] 1 A.L.R. Comm. 129.

bound by the terms appearing in the insurer's usual form of policy as he had not received a copy of the policy and had no notice of its terms. On appeal, the Supreme Court, narrowing the question to be asked and answered to whether the documents before the insured viz; the proposal form, cover note and certificate of insurance did not so much refer to the company's usual form of policy as to compel a court to hold that that policy was incorporated by reference in the contract of the parties, declared;

In our view, therefore, the pertinent question was and is whether the [insured] was bound by the terms and conditions of the policy and certainly not whether or not he had a copy of that policy. The pertinent question is answered in the affirmative.¹⁸

In the result, the insured's failure to comply with a condition precedent to liability unknown to him was fatal to his claim.

The case was followed ten months later by Yorkshire Insurance Co. Ltd. v. Haway.¹⁹ The facts were basically the same except that it was the insurer suing to recover money paid to a third party which it was bound to pay by compulsion of law notwithstanding the insured's breach of a condition requiring him to notify the insurer of third party proceedings.²⁰ The insured had signed a proposal form containing the same declaration as in Wuraola, above, and had been issued a cover note as well as a certificate of

¹⁸ [1969] N.C.L.R. at p.14.

¹⁹ [1969] N.C.L.R. 467.

²⁰ See Chapter 5 para. 5.5.2, *infra*.

insurance both providing that they were issued subject to the company's usual form of policy. The insured likewise argued that as he had not received the policy he was not bound by its conditions.

The trial judge had fallen into the same error in holding that as the policy was not delivered and the insured had no reasonable notice of its terms, he could not be bound by them.²¹ On appeal, the Supreme Court reversed the judgment and restated its decision in Wuraola (supra).

It is on these two decisions that the doctrine of "incorporation by reference" has come to be part of Nigerian insurance law. The ratio in the cases appears to be that as long as there are documents in the insured's possession or a signed proposal form referring to the existence of a policy, the insured is bound by the provisions of the insurer's standard policy notwithstanding that he has not received a copy of the policy. The Supreme Court decisions have been relied on in a number of other cases,²² and out of them grew the practice of Nigerian insurers not issuing policies to insured persons, contenting themselves instead with referring to the policy in the proposal form and the certificate of insurance in cases of motor vehicle insurance.

Inasmuch as the decisions of the Supreme Court are correct on principle, they present disturbing prospects to

²¹ Reported in [1968] N.C.L.R. 345.

²² Nasidi v. Mercury Ass. Co. Ltd. [1971] 1 N.C.L.R. 387; Salako v. Lombard Ins. Co. Ltd. [1978] 10-12 C.C.H.C.J. 215.

insureds when their effects are appreciated particularly the insurance practice which has grown out of them.

The position of the insured is sufficiently compounded, as shown in para. 2.6 below, by the fact that insurers in practice have the exclusive privilege of formulating the policy terms and conditions applicable to the contract. This is worsened by the fact that insurers do not have to make the policy available to persons insured before the latter are subject to its terms.

It is the position that warranties with which the insured is expected to comply are made in the proposal form. Additional warranties and conditions are contained in the policy of insurance. Thus, a principle of incorporation of policy terms by reference in proposal forms overlooks two undesirable results created. The first is that, in practice, the insured parts once and for all times with the proposal form incorporating the policy when the former is submitted to the insurer for consideration. Consequently, the insured is thereafter not in a position to ascertain his obligations for the purpose of complying. Secondly, non-delivery of the policy encouraged by a principle of incorporation by reference means the insured is equally not in a position to ascertain the obligations contained in the policy.

It was with a view to removing these results that the U.K. Law Commission recommended in 1980 that an insurer should be obliged, as a condition precedent to the legal effectiveness of a warranty, to furnish the insured with a

document in which the warranty is created as soon as practicable after the insured gave the warranty.²³ It appears this would include both the policy and the proposal form. Though the recommendations have not been made law, they are partially reflected in the Statements of Insurance Practice of the Association of British Insurers (ABI). The 1986 revised Statement of General Insurance Practice provides in para. 1(f), in relation to persons insured in their private capacity, that:

Unless the prospectus or the proposal form contains full details of the standard cover offered, and whether or not it contains an outline of that cover, the proposal form shall include a prominent statement that a specimen copy of the policy form is available on request.

By para. 1(b) of the same Statement, insurers will not raise an issue under the proposal form unless the insured is provided with a copy of the completed form either at the time of completion or within a period of three months thereafter on request.

The recommendations of the U.K. Law Commission, above, are to be preferred. They represent necessary reform of this aspect of insurance law in Nigeria. Surprisingly though, the Nigerian Law Reform Commission did not recognise the problem and, as such, no recommendations were made in its report.

2.4 Cover Notes

Cover notes are temporary insurance covers granted to

²³ Insurance Law: Non-Disclosure and Breach of Warranty, Law Com. No. 104, (1980) Cmnd. 8064 at para.6.14.

the insured and providing him with insurance cover for relatively short periods until the proposal form is accepted or a policy is issued or insurance refused. The use of cover notes has assumed increasing popularity among Nigerian insurers over the years and the main reasons for this are not difficult to come by.

Cover notes are predominantly used in Nigeria in the field of motor insurance where the Motor Vehicles (Third Party Insurance) Act of 1950, forbids any person to drive or permit the use of a motor vehicle without adequate third party liability cover, vide section 3. Cover notes have, therefore, been useful in providing motor vehicle users with temporary cover for third party risks pending the consideration and acceptance of a proposal for comprehensive insurance or renewal of an expired policy.

Commercial exigencies also necessitate the use of cover notes this way as the motor vehicle owner and insurance client is interested in being able to drive his vehicle at all times. If denied, at least, a third party cover by his insurer at anytime, he would be put in a difficult situation.

Again, administrative convenience accounts largely for the popularity and increasing use of cover notes. It will be observed that cover notes are mostly issued at the retailers end of the market i.e, through local insurance offices, insurance brokers and agents. By taking on the risk for only a limited period of time usually between 15-30 days, insurance companies are able to spread their

administrative costs while ensuring that clients and their essential premiums are not turned away pending consideration of their proposals and acceptance.

It is settled that cover notes constitute fully effective contracts of insurance and are distinct from the contract embodied in the policy.²⁴ This is the position in Nigeria although section 2 of the 1950 Motor Vehicles (Third Party Insurance) Act defines a policy of insurance as including a cover note. Thus, in Babalola v. Harmony Insurance Co. Ltd., (supra), it was held that a cover note creates an interim contract of insurance between the insured and insurer and that, as such, it must comply with the necessary formalities on the creation of insurance contracts. Similarly, in Industrial Insurance Co. Ltd. v. Aigbegue,²⁵ the Court of Appeal held that a cover note was an effective contract of insurance on which the insured could base his claim for an indemnity irrespective of the absence of a policy issued by the insurer.

An important requirement for the formation of a contract of insurance is that the parties must be agreed on the terms and conditions of the contract. Agreement must be reached on certain essential matters, namely; the amount of the premium, the nature of the risk and the duration of the risk.²⁶ It follows that consensus must similarly be reached

²⁴ Mackie v. European Assurance (1869) 21 L.T. 102.

²⁵ Unreported, Appeal No.CA/B/55/84, contained in (1987) 1 Nig. Bul. C.L. at p.115.

²⁶ Birds, Modern Insurance Law, p.55; Esewe v. Asiemo [1975] N.C.L.R. 433.

by the parties on these essential requirements before there can be a binding contract of insurance constituted by a cover note.

In Salako v. Lombard Insurance Co. Ltd.,²⁷ the insurer issued cover notes in respect of two vehicles covering them for a period of 30 days, but refused to issue certificates and policies of insurance in respect of the vehicles on the ground that this could not be done until the insured filled in a proposal form. The insurer refused to indemnify the insured for the loss of one of the vehicles by theft. The insured sued for an indemnity on the cover notes and an order for specific performance against the insurer to issue certificates and policies of insurance in respect of the vehicles. Agoro J., granting the insured's claim for indemnity, but refusing to order specific performance, held that there was a valid and binding temporary contract of insurance between the parties constituted by the cover note on which the insurer was liable to pay for the loss. According to the judge (at p.220), the essential terms of the contract were agreed because the parties;

...agreed on the risk to be covered, that is to say comprehensive cover for both vehicles. There was agreement on the duration of the cover and the amount and mode of the payment of the premium. Indeed the [insured] paid the premium and the [insurer] accepted such payment without any reservation.

One problem arising in practice is the scope of cover notes, especially whether policy conditions automatically apply to them since it is the law that cover notes are

²⁷ [1978] 10-12 C.C.H.C.J. 215.

contracts separate and distinct from that constituted by the policy. Most cover notes are silent on the conditions governing the contract constituted by them but would refer, however remotely, to the existence of a policy. Quite commonly, it is provided in the cover note that the risk is covered on terms of the insurer's usual form of policy. The common motor vehicle cover notes in use in Nigeria, such as those present in Salako (supra), and Nasidi v. Mercury Assurance Co. Ltd.,²⁸ would read thus;

The undermentioned having proposed for insurance in respect of the Motor Vehicle described in the Schedule below and having paid the premium indicated the risk is hereby held covered in the terms of the company's usual form of policy as described hereunder for a period of thirty days... (Emphasis added).

It is shown earlier that in Northern Assurance Co. Ltd. v. Wuraola and Yorkshire Insurance Co. Ltd. v. Haway (supra), the Supreme Court held that the presence of such a statement in a cover note had the effect of incorporating the terms and conditions of the insurer's standard policy into the cover note, so that the insured became bound by policy conditions not expressed in the cover note, and though he had no copy of the policy.

The principle laid down by the Supreme Court was applied in both Salako and Nasidi (supra), where, as is common, the insureds had not been given copies of their policies. Indeed, it is now usual for courts to hold that where a cover note incorporates the insurer's usual policy by reference, the contractual terms applicable to the

²⁸ [1971] 1 N.C.L.R. 387 at 392.

provisional contract of insurance constituted by the cover note are those specified in the standard policy of the insurer for that particular class of insurance though the policy has not been issued to the insured.²⁹

In Babalola v. Harmony Insurance Co. Ltd., (supra), it was held, relying on Queen Insurance Co. v. Parsons,³⁰ that the terms in the insurer's usual policy apply to a cover note issued where the proposal form completed by the insured preceding the cover note incorporates the policy terms by reference.

It is not hereby implied that the Nigerian authorities are wrong in principle. The complaint here relates to the practice which they could and do breed amongst Nigerian insurers. The Nigerian authorities correspond with the common law. In the Canadian case of Hawke v. Niagara District Mutual Fire Insurance Co.,³¹ Proudfoot V.C., analysing the position of temporary covers viz-a-viz the policy in scope, observed:

It would be unreasonable to hold that by giving an interim receipt the company meant to insure a larger liability than they were subject to on a policy; they must be understood as contracting for an insurance of the ordinary kind. The plaintiff asks for the completion of the insurance by the issuing of a policy;...he cannot, therefore, be in any better condition than if he had the policy in his possession.

This reasoning also appears in the judgment of Sargant

²⁹ Bida v. Motor & General Ins. Co. Ltd. [1972] N.C.L.R. 270 at 276; Industrial Ins. Ltd. v. Aigbegue, footnote 25, above.

³⁰ (1881) 7 App. Cas. 96.

³¹ (1876) 23 Gr. 139,148.

L.J. in Wyndham Rather v. Eagle, Star and British Dominions Insurance Co.,³² which the Supreme Court followed in both Wuraola and Haway. However, in Re Coleman's Depositories Ltd. and Life & Health Assurance Association,³³ the English Court of Appeal held that a policy condition requiring immediate notification of a loss must be discarded as inapplicable to a cover note issued which contained no mention of any conditions. The reasoning of the Court proceeded on the basis that it would be unreasonable to expect an insured to fulfil policy conditions obliging him to do certain things, unless he was aware of those conditions. This reasoning was approved, obiter, in Parker & Co. v. Western Assurance Co. Ltd.,³⁴ where the claim failed on other grounds, but an opinion was expressed that if a contract of insurance had been proved, it would have been free of certain policy conditions of which the insured was unaware.

The Supreme Court refused to follow the decision in Re Coleman's Depositories, (supra), in Wuraola and Haway. The former case was distinguished on the ground that it was not provided in the cover note that the risk was "covered in accordance with or subject to the terms of the policy". Inasmuch as this may be so, it cannot be denied that the principle enunciated by the Supreme Court works hardship as it frequently happens in practice that the policies to

³² (1925) 21 L.L.R. 214, 215.

³³ [1907] 2 K.B. 798.

³⁴ 1925 S.L.T. 131.

which the cover notes are made subject do not find their way to persons insured who are left unaware of the conditions under which they have contracted, or made bound by terms on which they may not have contracted.

The potential for hardship led the Australian Law Commission to recommend standard insurance cover in certain classes of insurance so that the terms of a cover note would be those of that standard class. It was further recommended that unusual terms must be brought to the notice of the insured.³⁵ Though the provisions are desirable, they would not easily apply in Nigeria where standardisation has so far not been achieved. It is submitted that insurers in Nigeria be obliged to issue the relevant policy for that class of insurance contracted as soon as practicable after the cover note is issued. It is the case that most persons applying for interim contracts invariably enter into full contracts of insurance. Delivery of a policy with the cover note obviates the need to deliver another when the full contract is granted, as such, the recommendation would not lead to appreciable increase in the cost of insurance.

Another point of importance in relation to cover notes and temporary contracts of insurance relates to their duration. It follows that since cover notes are issued as temporary covers pending the consideration and acceptance of the offer for a full contract, a policy may ultimately

³⁵ Australian Law Reform Commission, Report No.20 (1982), paras.206-208. See also s.37 Insurance Contracts Act 1984 (Australia).

be issued. It sometimes happen that the policy is issued before the expiration of the cover note, or it may be issued to operate with retrospective effect. Thus, there could be a period of overlap between the policy and cover note during which two binding contracts of insurance are in existence. This would appear to have been the position in Nasidi's case (supra) where a cover note was issued on October 25 1969, for a period of 30 days, whereas the policy was not to expire until November 15 of the same year. The question arising in such a situation is which of the contracts governs the relationship of the parties if a loss occurs during this period of overlap?

It has been held that a cover note expresses the terms of the contract of the parties up to the date the policy is issued. Once issued, the policy supersedes the interim contract from that date as to the future, so that any loss occurring after its issue is judged by reference to the policy but not otherwise.³⁶ In practice, it may not matter which of the two contracts is used since the cover note would normally be silent on terms, and would incorporate the terms of the policy by reference.

However, whether the cover note or the policy governs the contract becomes important where both contracts contain different terms. In the Canadian case of Inn Cor International Ltd. v. American Home Assurance Co.³⁷, the plaintiff company arranged insurance on the lives of four

³⁶ Babalola v. Harmony Ins. Co. Ltd. [1982] 1 O.Y.S.H.C. 1.

³⁷ (1974) 42 D.L.R. (3d) 46.

of its employees. A binder (presumably a cover note or at least some form of interim cover), and, subsequently, a policy were issued. The binder contained no limitation of the insurers liability, but the policy restricted its coverage to "full time active salaried employees", which the insured employees were not. On the death of one of the employees, the insurer denied liability on the basis of the restriction in the policy contending, *inter alia*, that the policy superseded the binder. The Ontario Court of Appeal affirming the decision of Holden J., held that as the binder evidenced a contract to insure the lives of the named persons, it was not open to the insurer, by issuing a policy, to unilaterally alter the terms of the insurance. Such a change, it was further held, could only be made with the consent of the insured.

2.5 The Certificate of Insurance

The certificate of insurance commonly found in relation to motor vehicle insurance derives its existence from the Motor Vehicles (Third Party Insurance) Act of 1950. The Act, in prescribing compulsory third party insurance against liability for death or bodily injury to any person arising out of the use of a motor vehicle, provides in section 6(4) that:

A policy shall be of no effect for the purposes of this Act unless and until there is issued by the approved insurer to the person by whom the policy is effected a certificate, in this Act referred to as a certificate of insurance, in the prescribed form and containing such particulars of any conditions subject to which the policy is issued and of such other matters as may be

prescribed.

The importance of the certificate lies in the fact that, as discerned from the section quoted above, it is made to contain certain conditions found in the policy. The tendency is for insurers to regard the certificate as a substitute for the policy, so that once a certificate is issued and delivered, it obviates the need to issue and deliver a policy.

It is difficult to conclude that the certificate, simpliciter, is the embodiment of the contract of insurance between the parties in cases where issued. A fortiori, in light of the fact that section 6(4) envisages the existence of a policy of insurance. Moreover, section 3(1) of the Act of 1950 in making it an offence for any person to use a motor vehicle without a third party cover, talks of being in force "a policy of insurance". One conclusion is that the Act in requiring a certificate to be issued sought to cure the mischief identified in the practice of insurers not sending out policies to motor insureds or not doing so promptly. Section 6(4) may have been drawn up to give motor insureds preliminary knowledge of basic policy conditions especially those regarding steps to be taken in the event of a loss giving rise to a claim. A second conclusion may be that in monitoring compliance with the provisions of the Act effectively, and in the absence of an insurance policy, the law had to create some other evidence of the existence of a third party liability cover. This is achieved via the certificate.

It must be the case though, that the certificate once issued constitutes an acceptance of the proposer's offer and, despite the above analysis, there is now little doubt that the certificate forms a composite part of the insurance contract.

In Esewe v. Asiemo³⁸ it was held that provided an agreement to insure contains the essential requirements such as a premium, subject-matter and the parties, the contract of insurance created falls within the word 'policy' because there is no statutory or formal document necessary to make a contract of insurance. It was further held that any documents evidencing the contract, such as a certificate of insurance and a receipt for the premium "form in law what may be and can be called a 'policy' of insurance". In Ado v. Nigerian General Insurance Co. Ltd.,³⁹ it was held that the only conditions binding on an insured in the absence of the policy, are those contained in the certificate of insurance delivered to him. These cases support the view that in certain circumstances, the certificate of insurance is a contractual document.

It will be recalled that in Wuraola and Haway (supra), the insurers contended that the contract of insurance comprised the proposal form, the cover note, the certificate of insurance and the policy which was not delivered. The Supreme Court agreed with this contention in holding persons insured bound by policy conditions of

³⁸ [1975] N.C.L.R. 433 at 439.

³⁹ [1980] 4-6 C.C.H.C.J. 27.

which they had no notice. It also follows from the cases that a reference made in the certificate that the policy to which the certificate relates, is issued in accordance with the provisions of the Motor Vehicles (Third Party Insurance) Act, effectively incorporates all policy conditions by reference so that it is unnecessary to issue a policy.⁴⁰ Invariably, all certificates issued contain these words and insurers have developed the practice of issuing certificates in motor insurance seemingly as a substitute for the policy.⁴¹

A majority of motorists contacted to whom certificates of insurance were delivered regarded them as the document containing all the terms of the contract. The blame does not rest solely with these motorists for the erroneous belief. As seen in section 6(4) of the 1950 Act, the certificate is required to and does contain policy conditions (though not all). The typical conditions which the certificate contains relate to the use of the vehicle and the geographical limits in which it is to be employed. E.g, "for social, domestic and pleasure purposes only", and "for use within the Federal Republic of Nigeria". Most

⁴⁰ Cf. Ado v. Nigerian General Ins. Co., ibid.

⁴¹ It is useful to observe that in none of the following cases in which certificates had been issued was a policy issued: Northern Ass. Co. Ltd. v. Wuraola [1969] N.C.L.R. 4; Yorkshire Ins. Co. Ltd. v. Haway [1969] N.C.L.R. 467; Esewe v. Asiemo [1975] N.C.L.R. 467; Ado v. Nigerian General Ins. Co. Ltd. ibid. In Abed Bros. Ltd. v. Niger Ins. Co. Ltd., [1976] N.C.L.R. 458, the standard policy of the insurer was admitted in evidence by consent in the absence of a policy issued to the insured.

certificates go further to inform the insured of steps to take and steps not to be taken in the event of an accident, whereas the policy, apart from containing more comprehensive conditions and warranties, would contain clauses dealing with the risk and excepted perils.

Since both the certificate and the policy contain conditions of the contract, there is the remote possibility of a situation where both would contain differing provisions. If the policy imposes obligations not imposed by the certificate on the insured, going by the decisions in Wuraola and Haway, the policy will prevail if the certificate refers to it. What if, however, the policy subsequently issued contains provisions limiting the cover provided otherwise than those written on the certificate, e.g., the certificate provides "for use [of the vehicle] within the Federal Republic of Nigeria", while the policy provides "for use [of the vehicle] within Lagos State". One view in such a case may be that the policy would prevail. Since the certificate is not a distinct contract on its own unlike the cover note, it should at all times be subject to the provisions of the policy. The preferable view, however, would be that the policy should not be binding since the certificate would not contain "such particulars of any conditions subject to which the policy is issued". This would be the case upon a strict construction of the provisions of section 6(4) of the Act.

Whatever the interpretation, it is clear that the practice of issuing certificates without delivering

policies constitutes a potentially costly trap for the insured and should be discouraged.

2.6 The Policy of Insurance

The policy of insurance is the formal document evidencing the insurance contract usually executed by the insurer. In Thawardas v. British General Insurance Co. Ltd.,⁴² it was held that a policy of insurance is not the contract of insurance arising from the agreement reached by the parties, but merely evidences that contract.⁴³ The policy would normally contain a detailed description of the risk i.e., the subject-matter of the insurance, the premium payable and modes of payment, and the parties to the contract. More importantly, it contains the conditions and warranties governing the contract which must be performed by both parties, usually the insured, as a condition precedent to his right to call on the insurer to pay for an insured loss. A consideration of warranties and conditions is deferred till Chapter 5, infra. Finally, the policy delimits the cover in certain circumstances by the "excepted perils" clause.

⁴² [1974] N.C.L.R. 304 at 309.

⁴³ Nowhere in the Insurance Act of 1976 is a policy defined. s.62 of the Act provides that an "insurance policy" includes a cover note, unlike the repealed Insurance Companies Act of 1961 which provides in s.2 that a "policy" includes every writing whereby any contract of insurance is made or agreed to be made.

Except in Marine Insurance,⁴⁴ there is no requirement of Nigerian law that insurance contracts must be in writing. Thus, it was held in Esewe v. Asiemo (supra) that a contract of non-marine insurance need not be in writing, and that it is in law not necessary that there should be a formal policy in existence. It was further held that an oral contract of insurance is valid if there is an intention to enter into such a contract and the essential details of the contract are agreed between the parties, and the premium is paid and accepted.⁴⁵ In practice though, insurers reduce insurance contracts into writing in printed policy forms for different classes of insurance.

Insurance policies are standard mass produced documents drawn up solely at the instance of the insurer. All the terms, conditions, warranties and exclusions contained in them are drafted and inserted by the insurer.⁴⁶ A person

⁴⁴ s.24(1) of the Marine Insurance Act 1961 provides that; "Subject to the provisions of any statute, a contract of marine insurance shall not be admissible in evidence unless it is embodied in a marine policy in accordance with the form in the First Schedule to this Act or to the like effect.".

⁴⁵ Perhaps the lack of a requirement of Nigerian law that insurance contracts should be in writing is attributable in the main to the fact that insurers have always reduced this into writing and disputes have not often arisen on this issue. Cf. contracts for the sale or disposition of an interest in land and moneylending contracts which are statutorily required to be in writing. See Property and Conveyancing Law 1959, Cap. 100 (Western Nigeria), s.67(1); Moneylenders Act 1939, Cap. 124, s.12(1), 1958 Laws of the Federal Republic of Nigeria.

⁴⁶ As Professor Dennis Lloyd wrote; "The bulk of standard contracts are devised rather to consolidate those rules and usages which are best fitted to protect the interests of particular suppliers, rather than to strike

seeking insurance must take the standard policy as it is and abide by the terms which he has not participated in formulating. For this reason, the insurance contract has been categorised as a "contract of adhesion".⁴⁷

While conceding that there is considerable utility in terms of cost savings enjoyed by Nigerian insurance companies in the standardisation of policies, it cannot be denied that the consequence of the law imputing the insured's consent to the terms contained in standard policies without actual notice or negotiation, is to encourage a tendency among insurers to make them unfair. This is achieved because despite onerous terms most insurance consumers have little option but to submit to the terms as the necessity of insurance protection overwhelms contrary arguments in the absence of a national social security scheme. Indeed, the law compels insurance against third party motor liabilities. Legislative and judicial attempts at controlling unfairness in insurance contracts

a balance between the needs and practices of all concerned including the humble consumer." - The Idea of Law, (1981) pp.249-250.

⁴⁷ Kessler, "Contracts of Adhesion-Some Thoughts About Freedom of Contract"; (1943) 43 Col.L.R. 629. "A contract of adhesion is a form proposed by one of the contracting parties to the other as the definitive form of the contract which is intended to be unalterable except in trifling and unimportant detail; the party to whom this type of contract is offered may 'take it or leave it' but cannot negotiate its terms or conditions.":- Schmithoff, "The Unification or Harmonisation of Law by means of Standard Contracts and General Conditions", (1968) 17 I.C.L.Q. 551. For the argument that contracts of adhesion should be considered presumptively unenforceable see, Rakoff, "Contracts of Adhesion: An Essay in Reconstruction", (1983) 96 Harv. L.R. 1174.

are considered in Chapters 5 and 7, *infra*, respectively.

Insurance policies are notably framed in technical language. It has been shown in a survey that few people bother to read the policy document delivered to them, and a fewer number understand its import when read.⁴⁸ The Law Reform Commission noting the problems created recommended that policies be drawn up in simplified and non-technical language. It was also recommended that policies be reduced into the three major ethnic languages in Nigeria to help illiterate consumers.⁴⁹ However, neither of the recommendations has been implemented and, as such, the situation remains unchanged.

Another point in relation to insurance policies is the print in which they are written. Most insurance policies are written in 'fine prints' and this may partly explain the reluctance to read them, whereas the binding force of a contractual document generally cannot be impinged on account of its print. In Atu v. Face to Face Million Dollar Pools,⁵⁰ the plaintiff argued that he could not read the conditions of a pools contract because they were in "very small print" and, as such, was not bound by them. This argument was rejected. The trial judge restated the common law rule that in the absence of fraud or misrepresentation a document forming part of the contract

⁴⁸ Isiekwene, footnote 14, *supra*. See also Mensah, "Insurance Policy Conditions in Africa", (1975) VI IIN Conference Papers 99 at 101.

⁴⁹ Law Reform Journal, *op.cit*, p.180.

⁵⁰ [1974] 4 U.I.L.R. 131.

is binding on the parties to it irrespective of the size or nature of the print:

The legal position then is that by signing and suing on the coupon...the plaintiff is bound, strictly bound by all the terms and conditions appearing thereon and for him it will be wholly immaterial whether some of these conditions were in small type or not. Where the issue of fraud or misrepresentation is raised there, it may become material to consider whether the smallness of the type was calculated to mislead or deceive. ...I am satisfied that the plaintiff is bound by all the terms of the coupon, ...whether they be on thick type or small type.⁵¹

There is little doubt that the principle applies equally to insurance policies.⁵²

Of particular significance here, is the principle that standard policies form part of the contract of insurance if incorporated in the proposal form, cover note or certificate of insurance by reference, applied by the Supreme Court in Wuraola and Haway (supra). The effect of the principle has been to give insurers the green light not to forward copies of the policy to persons insured though the policy embodies terms governing the relationship of the parties, and insurers are prepared to rely on its provisions to avoid liability.

For a contract to be created, the common law has always demanded that there be a meeting of the minds of the parties on its terms. This is expressed by saying that the parties must reach a consensus ad idem. However, in view of the way in which modern commercial agreements are created,

⁵¹ Per Oputa J., ibid. at pp.136-137.

⁵² Koskas v. Standard Marine Ins. Co. (1927) 27 L.L.R. 59, 62.

it is not always possible that contracting parties agree on all the terms and conditions of the contract. Therefore, the law will, according to the circumstances, hold that parties have contracted on certain terms when such circumstances necessitate the inference that the parties have agreed to contract on those terms.

Out of this developed a general common law rule on incorporation of terms contained in other documents into agreements between parties once there is a clear intention that the terms contained in that other document be incorporated into their agreement. The courts also insist that reasonable notice be given by the party proffering a document as part of the contract to the other party that the terms contained in the document are intended by him to be incorporated into the agreement.⁵³ This may be done expressly by giving actual notice of the written terms and his intention, or by implication. The latter may occur where there is a common trade usage to utilise a particular standard form, or where there is a course of dealing between the parties to use a standard form.

As regards signed documents, the principle is that in the absence of fraud and misrepresentation, a party proposing to contract by signing a written document is bound by all the terms of the document together with any terms incorporated therein by reference, whether or not he

⁵³ See generally, Treitel, The Law of Contract, (7th. ed.) pp. 166-170; Clarke, "Notice of Contractual Terms", (1976) 35 C.L.J. 51; Parker v. S.E. Railway Co. (1877) 2 C.P.D. 416; Interfoto Picture Library v. Stiletto Visual Programmes Ltd. [1988] 1 All E.R. 348.

has read them.⁵⁴

As noted earlier, the usual starting point in the formation of insurance contracts is the submission of a proposal form containing a signed declaration by the proposer to the effect that he agrees to accept a policy issued by the insurer. The legal analysis may be that by declaring that he agrees to accept a policy issued by the insurer, the proposer makes an offer for insurance whose terms are contained in the policy, so that upon acceptance of that offer by the insurer, the proposer is immediately bound by the terms contained in the standard policy whether it is issued or not. This will be the correct interpretation of the Wuraola and Haway cases.

Moreover, there is the general principle in General Accident Insurance Co. v. Cronk,⁵⁵ that a proposer for insurance is deemed to have applied for the usual form of policy of the insurer in respect of the particular class of insurance. The case itself turned on whether a proposer could refuse to pay his premium on the ground that the policy issued differed from the terms of his proposal. On this, Wills J., held that a proposer must be taken to have applied for the ordinary type of policy issued by the company and if the wrong form of policy was issued, he no

⁵⁴ Halsbury's Laws of England, (4th ed.) Vol. 9 para. 283; Blay v. Pollard & Morris [1930] 1 K.B. 628; L'Estrange v. F. Graucob Ltd. [1934] 2 K.B. 394; Chargoury v. Adebayo [1972] N.C.L.R. 384. See generally, Spencer, "Signature, Consent, and the Rule in L'Estrange v. Graucob", (1973) 32 C.L.J. 104.

⁵⁵ (1901) 17 T.L.R. 233.

doubt had the right to reject it and insist on the right one.⁵⁶ It is not so clear whether the authority will permit of a situation where the insurer is relieved from doing what is reasonable to bring notice of the terms of the contract to the proposer in the absence of his signature. The decision in Re Coleman's Depositories Ltd.,⁵⁷ casts doubts on this possibility. In that case, the English Court of Appeal held that where a cover note delivered to the insured is silent on conditions, the terms contained in the policy are not automatically incorporated into the contract except they have been brought to the notice of the insured or are known by him. This was so despite the fact that a policy was delivered to the insured shortly after the contract. According to Vaughan Williams L.J. (at p.805);

It could not have been in the contemplation of the parties that this condition as to immediate notice should apply until the contents of the policy had been communicated to the employer. I hold that on the face of the award there is no evidence that the employer knew, or had the opportunity of knowing, the conditions of the policy...

Fletcher Moulton L.J. in a dissenting opinion appears to have preferred the traditional basis of an implied consent to the standard form contract by the insured. Thus, he observed (at p.812) that:

The doctrine that there is some duty on the part of the assurers to get the policy into the physical possession of the assured, and that the rights of the parties under the policy depend on the date at which this is effected, is to me so

⁵⁶ See South-East Lancashire Ins. Co. Ltd. v. Croisdale (1931) 40 L.L.R. 22.

⁵⁷ [1907] 2 K.B. 798.

bewildering and so, foreign to any principle of law applicable to written contracts, and so unlike anything to be found in previous decisions as to the liabilities of parties under contracts such as these, that I am unable to follow it.

Buckley L.J. held that the conditions in the policy were not applicable to the contract because at the date of the loss the insured was unaware of them and, as such, it was impossible for him to comply with them.

Though the weight of judicial authority in Nigeria is in favour of a principle that an insured is bound by terms contained in the insurer's standard policy for that class of insurance in the absence of delivery of a policy to him, or communication of its contents,⁵⁸ some courts have been reluctant to follow the principle.

In Ado v. Nigeria General Insurance Co. Ltd.,⁵⁹ the insured sued for indemnity under a motor insurance contract. It was established at the trial that the insured had completed a proposal form for comprehensive insurance, and had been delivered a certificate of insurance but not the policy. The insurer maintained that the insured's breach of conditions contained in the policy relieved it from the obligation to indemnify him. The insured submitted that he could not be bound by contractual conditions which were never communicated to him. On this, the insurer contended that the certificate delivered which provided that it related to a policy "issued in accordance with the provisions of the Motor vehicles (Third Party

⁵⁸ See footnotes 22 and 41, above.

⁵⁹ [1980] 4-6 C.C.H.C.J. 27.

Insurance) Act" effectively incorporated the terms of the standard policy into the contract. The trial judge rejected the insurer's argument on the ground that the statement in the certificate did not incorporate the policy by any means, and was not "conclusive that the policy was delivered to the [insured] thereby communicating the terms and conditions therein contained to him". In the final result it was held (at pp. 30-31) that:

The terms and conditions of the policy the breach of which the [insured] was alleged to have committed were not brought to the notice of the court by way of evidence or otherwise. And since it has not been established that these terms and conditions were communicated to the [insured] he could not be bound by them. - A party to a contract cannot be bound by the terms and conditions of the contract which were not communicated to him. The only terms which bind the [insured] are those contained in...the certificate of Insurance...

In Nigerian Safety Insurance Co. v. Zaria Co-operative Credit Marketing Union Ltd.,⁶⁰ the insured claimed for the cost of repairs carried out on its motor vehicle and for the cost of hiring an alternative vehicle during the period its own was out of use due to an accident for which the insurer repudiated liability. The insured had similarly completed a proposal form for comprehensive insurance and was delivered a certificate of insurance but not the policy. The insurer contended in the action that it was not liable for the insured's second claim because it was a consequential loss for which liability was expressly excluded in its standard motor policy. The trial judge

⁶⁰ [1978] N.C.L.R. 264.

refused to admit the standard policy in evidence. In the Court of Appeal, it was held, relying on Re Coleman's Depositories, (supra), that even if the standard policy had been admitted in evidence, the insurer could not rely on the exception clause contained in it because the policy was not delivered to the insured, and that the insured could not be presumed to know of a clause which had not been brought to his notice so as to be binding on him.

There is a real potential for injustice to persons insured arising from the absence of a clear principle of the common law or a statutory provision obliging insurers to deliver policies to persons insured by them once the contract is concluded or as soon thereafter as is reasonably practicable, or even to communicate contractual terms in some other way such as the delivery of a standard policy or prospectus before the contract is made. Perhaps, the most significant injustice is that the insured is left unaware of the rights and obligations assumed under the contract. This has ensured that in a significant number of cases in Nigeria, the insured is prevented from recovering an indemnity by reason of breach of policy conditions.

In Oyedele v. New India Assurance Co. Ltd.,⁶¹ the insurer repudiated liability to pay for damage to the insured's vehicle on the ground that the insured's failure to submit to arbitration was a breach of a condition precedent contained in the policy. The insured argued he was not bound by the conditions contained in the policy

⁶¹ [1969] N.C.L.R. 416.

since the policy was not delivered to him and he was otherwise unaware of its conditions. The presence of a proposal form signed by the insured, a cover note and a certificate of insurance all referring to a policy, led Thompson J., to note that the similarities with Wuraola compelled him to apply the decision in the latter case to hold that the insurer's standard policy was incorporated in the contract and the insured was bound by its terms irrespective of delivery of the policy. Thus, it was held that the breach of the arbitration condition precedent provided the insurer with an absolute defence to the insured's claim. The learned judge, however, warned (at p.432) that:

Citizens entering into contracts of insurance are advised to be fully conversant with their rights and duties. Insurance companies are fully aware of their rights and duties under the law and any party to an insurance contract who is not so vigilant is likely to be shipwrecked on the sea of speculation.

The necessity of having persons insured conversant with their contractual duties led the U.K. Law Commission to recommend that insurers should be obliged to furnish the insured with documents in which warranties are created.⁶² In practice, this would include both the policy and proposal form. It is submitted that this recommendation is a desirable one to be adopted in Nigeria as a statutory provision. Surprisingly though, the Nigerian Law Commission in its 1984 deliberations on the reform of insurance laws failed to identify the problem, and no proposal was made

⁶² Law Com. No. 104, para.6.14.

towards reform.

Arguably, an examination of the provisions relating to marine insurance makes reform in this area imperative. By section 23 of the Marine Insurance Act of 1961 (based on the Marine Insurance Act of 1906 U.K.), a contract of marine insurance shall be deemed to be concluded when the proposal of the assured is accepted by the insurer, whether the policy is then issued or not. However, by section 24 "a contract of marine insurance shall not be admissible in evidence unless it is embodied in a marine policy...". The curious result is that in the absence of a corresponding provision of the Act mandating an insurer to issue a policy, in the event that he fails and/or neglects to do this, while there is a valid and concluded contract between insured and insurer, the former cannot prove in law the existence of the contract so as to claim on it in the event of a dispute.

The above anomaly is aptly illustrated by the recent Supreme Court decision in National Insurance Corpn. of Nigeria v. Power & Industrial Engineering Co. Ltd.⁶³ Bags of rice were insured on a marine voyage from Thailand to Lagos or Port-Harcourt. Pursuant to the contract, the insurer issued a marine insurance open cover and, thereafter, a certificate of insurance evidencing the declarations of the particular consignment to the insured. Premiums were subsequently calculated and paid on the

⁶³ [1986] 1 N.W.L.R. 1. See also Bendel Insurance Ltd. v. Edokpolor [1989] 4 N.W.L.R. 725.

insured value of N1.2m. On a claim for an indemnity for loss arising from the sinking of the carrying vessel, the insurer denied liability on a number of grounds, inter alia, that there was no concluded contract of insurance, non-disclosure of the fact that the carrying vessel had sailed before insurance was obtained and non-payment of premium before loss. Both the High Court and the Court of Appeal entered judgment for the insured. On further appeal to the Supreme Court, it was strongly urged on behalf of the insurer that as there was no policy issued or admitted in evidence to prove the contract of marine insurance pursuant to section 24(1) of the Act of 1961, the insured's claim must fail. A finding by the court that the marine insurance open cover admitted in evidence was a policy within the meaning and intendment of the Act, saved the insured's claim. Obaseki J.S.C., delivering the lead judgment, held (at p.19) that it was clear that "under...the Marine Insurance Act 1961, a contract of Marine insurance is inadmissible in evidence unless it is embodied in a marine policy".

Oputa J.S.C., recognised the difficulty created by sections 23 and 24(1) when he observed (at pp.37-38) that:

Apparently then, it looks as though what has been given with one hand by section 23 has been taken away with the other hand by section 24...

Section 24 can in an appropriate case with an unscrupulous Insurance Company create problems for an assured if the Insurance Company withholds the policy thus making it impossible for the assured to prove the contract of marine insurance. But that is no reason why the courts should refuse to enforce the clear provisions of that section. All arguments on hardship of a case either on one side or the other, must be

rejected, when we are pronouncing what the law is... If section 24 of the Marine Insurance Act 1961 is thought to be oppressive or inconvenient, application to correct or amend it or repeal it must be made elsewhere and not to judges who are bound to interpret and uphold the law as it is and not as it ought to be...
(Emphasis added).

It sometimes happens that a proposal for insurance is made and accepted on the condition that the contract shall not commence until the policy is delivered to the proposer. This has been noted not to be an uncommon condition of a proposal for life insurance.⁶⁴ The effect is that though there is a proposal and acceptance, and the parties are agreed on the terms of the contract, the acceptance is of no legal significance as there is no binding contract in existence until the condition is fulfilled and the policy delivered.⁶⁵ In the absence of a contractual stipulation, there is authority to the effect that there is a strong presumption in the case of life insurance that no contract exists until the premium is paid and the policy is issued.⁶⁶ The question that comes to mind is whether it is just to prevent an insured's representatives from recovering upon the death of the insured where a policy is not issued even though the premium is paid and accepted?

There is no reported Nigerian authority on this, but

⁶⁴ MacGillivray and Parkington, op.cit. para. 254. Most life proposal forms in the Nigerian market provide that: "The assurance will commence as soon as the first premium is acknowledged by the issue of the company's official receipt and letter of acceptance...".

⁶⁵ Ibid.

⁶⁶ Southern Cross Ass. Co. v. Australian Provincial Ass. (1939) 39 S.R. (N.S.W.) 174.

a similar problem arose in the Malaysian case of Borhanuddin v. American International Insurance Co. Ltd.,⁶⁷ where a proposal for life insurance signed by the deceased insured provided that the "assurance applied for shall not take effect unless and until a policy is issued and delivered...". The insured paid the first premium on the policy and died shortly afterwards. On a claim by her representatives, the insurers contended that there was no contract in existence as no policy had been issued and delivered in accordance with the proposal, although a policy number had been allotted. The trial judge upheld this contention. Reversing the decision on appeal, the Supreme Court held that as the insured had performed her part of the bargain by paying the premium, and as there was nothing left for her to do, it became the duty of the insurer to issue and deliver a policy. The decision proceeded on the reasoning that since the insurer had accepted the premium and had not rejected the proposal, there was an obligation on its part to issue a policy. Furthermore, it was held that notwithstanding a contractual term to the contrary, non-delivery of the policy could not mean there was no concluded contract of insurance.

The response of the Australian Law Commission to the failure of insurers to deliver policies promptly, or at all, was to recommend the standardisation of insurance policies in the field of householders, motor vehicle, personal accident, consumer credit and travel insurances so

⁶⁷ [1986] L.R.C. (Comm.) 113.

as to contain fair provisions. The insurer is required to warn the insured of any deviation outside the standard cover. In addition, it was recommended that an insurer should be obliged to provide an insured, upon request, with a copy of the terms of the policy contracted.⁶⁸ The Commission resiled from recommending the delivery of a policy within a certain time on conclusion of the contract, or before the contract, *inter alia*, because it "would almost certainly impede the provision of interim cover", and "[It] might unduly restrict the industry in relation to the development of new methods of marketing".⁶⁹

Though the standardisation of contractual terms is desirable, it is submitted that the Commission's approach overlooks an important aspect. There is little utility in having a fair contract where the insured is ignorant of its terms so as to enable him comply. The reasons advanced by the Commission for rejecting an obligation on insurers to deliver a policy are not particularly convincing. Indeed, the Commission recognised that such a development would add marginally to the cost of some types of insurance. In relation to interim contracts, the view should be reiterated that such contracts are usually entered into as a prelude to a full contract. Thus, the delivery of a policy soon after an interim contract is concluded would nearly always obviate the need to deliver another policy when the full contract is granted. Furthermore, most

⁶⁸ Report No. 20, op.cit., paras. 33, 57-69.

⁶⁹ Ibid. at para.33.

indemnity contracts are annually renewable so that delivery of a policy on the original contract would nearly always obviate the need to deliver another for subsequent renewals when the terms are unchanged. It has been shown that in Nigeria where legislation requires insurers to deliver certificates of insurance in relation to third party motor liability contracts, this results in the mischief of misleading persons insured into thinking there is no other separate document in existence containing anymore contractual terms to be fulfilled.

2.7 Conclusion

One may conclude the Chapter by quoting the observations of Lord Devlin in McCutheon v. David McBrayne,⁷⁰ thus:

It may seem a narrow and artificial line that divides a ticket that is blank on the back from one that says "For conditions see time-tables" or something of that sort. That has been held to be enough notice. I agree that it is an artificial line and one that has little relevance to everyday conditions...It will remain unpalatable sauce...until the legislature, if the courts cannot do it, intervenes to secure that when contracts are made in circumstances in which there is no scope for free negotiation of the terms, they are made on terms that are clear, fair and reasonable and settled independently as such.

Legislative attempts at ensuring the fairness on insurance contract terms in Nigeria are examined in Chapter 5, infra. These attempts should be complemented with others obliging insurers to give adequate notice of terms by delivering a

⁷⁰ [1964] 1 W.L.R. 125 at pp. 136-137.

policy and all endorsements in it to persons insured when the contract is concluded or as soon thereafter as is reasonably practicable in the circumstances.

CHAPTER 3

THE REGULATION OF INSURANCE INTERMEDIARIES

3.1 Introduction

The previous Chapter dealt with the contract of insurance at formation stage, the documents used in the formation process and on which the contract is pivoted, the principles governing the use of these documents and the practice which Nigerian insurers have developed in their use with suggested reforms made. Underlining this is that insurance intermediaries are actively involved at the contracting period in bringing insured and insurer into contractual relationships.

The bulk of private insurance in Nigeria is transacted through the medium of different categories of insurance intermediaries. Moreover, the limitation of insurance companies and their branch offices to the Federal and State capitals, and major urban centres, is to constitute the intermediary into an integral force in the marketing machinery of insurance companies and, in many cases, is the first or only point of contact between [prospective] insured and insurer.

Intermediaries fall into different categories and their functions (depending on category) include, inter alia, advising insureds on the appropriate type of cover, soliciting proposals and aiding in their completion, collecting premiums, sending out renewal notices, issuing cover notes and interim contracts of insurance and,

assisting in the claims process. It is important that intermediaries are capable of performing the functions which they undertake or are required of them to be performed, that they are knowledgeable enough in what is sold, and that proper laws and principles exist to regulate their activities.

The next two Chapters, therefore, seek to examine the categorisation of insurance intermediaries in the Nigerian market, the legislative/regulatory framework existing for their control, and appraise how adequate these are at ensuring the realisation of the ultimate aim of protecting the insuring public against the possibility of losses arising from intermediary activities. Irrespective of category, an intermediary is primarily an agent of one party to the contract or of the other. Relevant agency principles as applied to insurance intermediaries will be examined in the next Chapter which is written against the backdrop of general common law agency principles including those adopted by the courts in Nigeria.

3.2 The Classification of Intermediaries

The word 'intermediary' is used here in the sense of those acting as middle men in bringing insured and insurer into positions where they deal with one another. The classification of insurance intermediaries in the Nigerian market falls into two broad heads, viz: agents and brokers. Suffice it for present purposes that the former is usually held the agent of the insurer while the latter is agent of

the insured. One cannot escape such a general categorisation at this stage as the law attaches duties, obligations and liabilities to them depending on category, and the statutory provisions regulating the operations of intermediaries classifies them accordingly. The following is an attempt at classifying insurance intermediaries in the local market under more specific headings.

3.2.1 Company Representatives

By section 3(a) of the Insurance Act of 1976, no person shall carry on any insurance business in Nigeria except a company duly incorporated as a limited company under or pursuant to the provisions of the Companies Act 1968. Although the section allows duly registered co-operative and mutual insurance societies to transact business, about 95% of insurance companies in the country are incorporated limited companies.

Of necessity, the artificial legal persona of an incorporated company can only act through natural human agents,¹ either as directors, managers or other salaried permanent employees. These functionaries are the organs through which incorporated associations operate and in varying degrees of responsibility are agents and servants of the company with powers to bind it so long as they act within the limits of their authority ² and the scope of

¹ See Viscount Haldane L.C. in Lennard's Carrying Co. Ltd. v Asiatic Petroleum Co. Ltd. [1915] A.C. 705 at 713.

² See generally, Chapter 4 para. 4.1, *infra*.

their employment. Quite apart from the fact that their ministerial and administrative functions as agents and servants of their employers brings them in constant touch with the insuring public, staffs of insurance companies not employed primarily as salesmen are offered commission on insurance business they may introduce from their connections, and in that capacity are intermediaries.

Section 12 of the 1976 Insurance Act imposes on insurers an obligation to notify the Director of Insurance of the appointment of a chief-executive (whether designated as the managing director, executive chairman or howsoever). Failure to comply renders the insurer and proposed chief-executive liable to a fine. Furthermore, a person who becomes or ceases to be the chief-executive of an insurer shall before the expiration of seven days notify the Director, and failure to comply renders the person liable to a fine.³ There are no reported cases on the effect of acts done by a chief-executive while acting in contravention of these provisions, and whether he would be held an agent of the company while so acting with powers to bind it. The better view is that since the Act contains specific provisions punishing contraventions, contracts entered into with third parties on behalf of the company remain valid on account of apparent authority.

3.2.2 Full Time Agents

This group includes full time 'tied' agents and other

³ s.13(1)&(3) Insurance Act 1976.

full time agents. The former are agents employed by insurance companies on agreements precluding them from acting for other insurers, while the latter are agents not precluded by agreement from acting for other companies but engaged primarily in the business of selling insurance only.

This group of intermediaries constitute the largest group in terms of numerical strength. They are employed to market the various products on offer, although engaged principally in life insurance where they are more of the 'tied' category. Their importance lies in the fact that the bulk of private life insurance is placed through them and, as such, they deal with a large cross-section of the population.⁴ As their primary function is to solicit proposals on behalf of insurers, they are armed with proposal forms which some undertake to fill for insureds, and are known to indulge in activities such as making representations on the scope and benefits of policies, advising on which of different policies is best suited to clients needs, in a bid to induce them to make proposals.

The general attitude of Nigerian life assurers to the marketing of life policies can be discerned from this passage:

Most people do not approach a Life Company to purchase life assurance, rather they are approached by a life assurance intermediary who

⁴ Oredugba, "A Critical Examination of the Marketing of Life Insurance in West-Africa", (1983) III WAICA Journal 197 at p.199: "In general, therefore, the most effective method in marketing individual life assurance is by the direct soliciting agent contracted to his company...".

actively encourages them to apply for coverage. Life assurance organisations must therefore actively sell their products, rather than wait for prospective buyers to approach them.⁵

Since the group constitutes an influential force in the marketing of insurance, the potential for abuse and consequent loss to the insuring public is real, and it is important that proper laws and principles exist for their regulation.

3.2.3 Part-time or Occasional Agents

These are intermediaries engaged in full time occupation other than insurance but whose profession or occupation brings them in contact with people desirous of effecting insurance. As such, they are involved in placing/selling insurance incidentally to their main occupation. Prominent in this group are motor dealers, solicitors, accountants, estate agents, mortgage houses and banks.

The group presents problems of classification as either agents of the insured or insurer. While the temptation is to classify them as agents of the insured in that they place insurances on their behalf,⁶ it cannot be denied that in some cases they act as agents of insurers with authority to bind them on interim contracts, especially motor dealers provided with cover notes and

⁵ Ibid. at p.198.

⁶ This may account for why they are described as occasional "brokers". See Birds, Modern Insurance Law, (2nd ed.) p.138.

authority to bind the insurer by their issue.

Some motor dealers are known to include insurance premiums in the cost of the vehicle so that the vehicle and insurance are sold as a package. For instance, in Price Control Board v. Owoyemi Motors & Finance Ltd.,⁷ the defendant motor dealer demanded from a purchaser additional sums in respect of insurance, licensing, registration and the provision of number plates as a condition for selling the car. The dealer was convicted of an offence under section 7(1)(b)(iii) of the Price Control Act of 1977, for offering to sell a controlled commodity subject to a condition requiring the making of a payment in respect of a service.⁸

Other dealers compel customers to insure with particular insurers with whom they have agency agreements and, in this way, are analogous to 'tied' agents receiving commission on insurance placed with the company. The tactics used by some to procure proposals from clients are sometimes questionable and at other times dishonest.⁹ Clients are assured they are given the best deal or that the finance company would not enter into the hire purchase contract unless the vehicle is insured with a specific insurer. It often turns out that the client has not

⁷ 2 L.R.N. 247.

⁸ Note that the Act is designed essentially to control inflationary trends in the economy, and not the regulation of motor dealers.

⁹ For a case illustrating the potential for abuse by this group, see James v. Mid-Motors Ltd. [1978] N.C.L.R. 119, *infra*.

received the best available cover. Some dealers demand more than a year's premium so that commission is increased. The cumulative effect is that free choice by insured is strangulated.

3.2.4 'Own' Case Agents

A prospective insured or proposer may prefer to avoid all of the above categories of intermediaries and deal directly with the insurer in placing his business. When this occurs, the client is given a discount or rebate in the premium payable which would otherwise go to the salesman, though the discount is normally less than commission paid to salesmen.

The use of 'intermediary' as one linking insured with insurer is inapt to describe the situation here, but the group is nevertheless worthy of mention because of its increasing popularity in the market. Evidence suggests that insurance companies now actively encourage clients to place future business with them directly instead of through their customary brokers. Some go as far as aiding in the licensing of clients as agents so as to side-track brokers and avoid paying the higher level of commission to them.¹⁰

Though the practice is on the increase, it is arguably

¹⁰ See the address of the President of the Nigerian Corporation of Insurance Brokers (NCIB) at the brokers open forum contained in (1987) XI WAICA Journal at p.147. A major reason for this practice may be found in the mistrust of brokers who indulge in withholding premiums, and insurers would rather avoid premiums getting into the hands of broking firms. See para. 3.6, *infra*.

prohibited by the Insurance Act. Section 47 provides that:

No person shall offer, either directly or indirectly, as an inducement to any person to take out or renew or continue an insurance contract in respect of any kind of risk relating to lives and property in Nigeria -
(a) any rebate of the whole or part of the commission payable under this Decree; or
(b) any rebate of the premium shown on the policy, except such rebate as may be allowed in accordance with the published prospectus or table of the insurer.

By sub-section 2, any person who offers or receives a rebate in contravention is guilty of an offence and liable to a fine of N1,000.

The wording of the section is absolute and applies to agents, brokers and insurers offering rebates as an "inducement". The section, however, permits insurers to offer rebates allowed in accordance with their published prospectus or table. It is common practice for insurers to discount premiums and offer rebates not only to clients who deal directly, but to those who have maintained clean records e.g., the no claim discount commonly found in motor policies. It would be curious if the Act intended to prohibit this practice, although, in appropriate cases, the wording is wide enough if such were held an "inducement". The better view is that the provision is directed principally at agents and brokers to remove the possibility of dishonest practice and compromise if allowed to cede part of their commission to insureds as reward for allowing them place their insurances.¹¹

¹¹ For a contrary view see Falegan, "Insurance Brokers: Blueprint for Effective Supervision", [1984] IINJournal at p.49, where the writer is of the view that 'own case'

The above reasoning is supported by the following statement of the Director; the official charged with implementing the provisions of the Act.

Let me also draw attention to the unethical practice, whereby some insurance brokers rebate commissions, whilst some others engage in other forms of inducement. In such circumstance, the professionalism in the business would appear to have been thrown overboard. If all brokers appreciate that such malpractice is not only unprofessional but also a breach of section 47 of the Insurance Decree 1976, no client will seek to obtain a rebate of the commission as a precondition to transacting business through a broker.¹²

It should be borne in mind that the Director was specifically addressing brokers and did not go as far as saying insurers were similarly prohibited or allowed.¹³ In the absence of a reported conviction therefore, the argument remains open.

3.2.5 Insurance Brokers

The insurance broker is an intermediary of professional standing and possessing specialised knowledge of the insurance market. The broker is one who holds himself out as having expert knowledge of insurance and the market. Brokers play a significant role in the local market, and are currently estimated to handle approximately

agency is abolished by s.47.

¹² Okwor, "The Broker and the Insurance Industry", (1987) XI WAICA Journal pp.153-154. See also Circular letter IDS 291/14 of 20.1.87 from the Director to insurers and brokers on the issue of premium rebating.

¹³ See, however, Ezejiofor *et al*, Nigerian Business Law, (1982) p.339, where insurers are included in the prohibited list.

60% of all insurances placed. Although brokers ideally should be the only group of intermediary that possess a semblance of independence in the sense of acting as advisers independent of any particular insurer, it remains to be seen below how independent local brokers are in practice.

Brokers generally are regarded as agents of insureds in the placement of insurance.¹⁴ While the weight of judicial opinion is to the effect that, *prima facie*, the broker is the agent of the insured by whom he is employed, it should be conceded that brokers do act as agents of insurers in certain cases.¹⁵

3.3 Background to the Supervisory Framework for the Control of Insurance Intermediaries

The historical development of intermediaries can be best understood by a brief account of the insurance industry itself as both grew alongside one another.¹⁶

Modern insurance was introduced to the then colony of Nigeria by the British about the first quarter of this century with the appointment of chief agents and, later, establishment of branch offices of British insurance

¹⁴ Birds, op. cit., p.138.

¹⁵ See Chapter 4 para. 4.1, *infra*.

¹⁶ See Lijadu, "Development of Support Services, Last Decade and Future Expectations", (1983) VIII WAICA Journal p.61.

companies¹⁷ to underwrite risks principally for exported farm produce which was the backbone of the colonial economy of the period. Most of the branch offices were no more than insurance agents and brokers as they were mainly pre-occupied with soliciting risks to be passed to the head offices in Britain which did the actual underwriting. The branch offices additionally performed minor administrative functions such as collecting premiums, dispatching policies once issued and keeping records of the domestic transactions.

As the economy began to grow owing to increase in commercial activities between the colony and Britain, British broking institutions established offices principally in Lagos to secure a share in the new market. The broking houses were similarly no more than agents to solicit risks and forward proposals to head offices in Britain which carried out the actual placement of insurance in the overseas market. The insurance industry was totally unregulated during this period, and the ease of operations soon attracted indigenous insurers, brokers and agents.

Complete freedom of operations began to show adverse effects as anyone irrespective of financial suitability, expertise, competence and technical knowledge was free to transact business as insurer, broker or agent. This era was

¹⁷ The chief agency system was one whereby overseas insurers appointed individuals or trading companies well established in Nigeria to accept risks, issue policies and settle claims on their behalf; See Cadmus, "The Role of Intermediaries in the Insurance Industry in Nigeria", (1973) II IIN Conference Papers 89; Chapter 8 para. 8.3.2, *infra*.

characterised by the proliferation of unscrupulous insurers and intermediaries who only saw the prospect of a newly created market as an avenue for making money quickly and going underground. Cases are reported of insurers and intermediaries collecting premiums from the public and disappearing unannounced.

With independence in 1960, it became obvious that some form of insurance regulation was needed to protect the insuring public. The new administration thought initial regulation should be Governmental to get the industry on a sound footing. This led to the enactment of the first insurance regulatory statute; the Insurance Companies Act of 1961. Briefly, the Act required the registration of both foreign and indigenously owned insurance companies operating in the country and prescribed certain prerequisites to transacting insurance business and registration.¹⁸ Implementation was vested in a government official known as the Registrar of Insurance.

A major shortcoming of the 1961 Act was that inasmuch as it envisaged the regulation of insurance companies, the activities of intermediaries went unregulated. The assumption may have been that adequate regulation of insurers would automatically equate with control of their intermediaries. While this may have been possible in the

¹⁸ The Act of 1961 was repealed by the Insurance Act of 1976 and a detailed consideration of the earlier Act is not contemplated. However, for a study of its provisions, see Olawoyin, "Governmental Control of Insurance Business in Nigeria", (1974) 8 N.L.J. p.80; "Akinkugbe, "Governmental Control of Insurance Business in Nigeria: A Critique", (1976) 10 N.L.J. p.56.

case of canvassing agents and staff employed directly by insurers and within the latter's immediate sphere of control, it proved wrong particularly in the case of brokers over whom insurers lacked real control.

Lack of legislative control of intermediaries during this period led to a multiplication in their numbers and consequent increase in the risks posed to the public. Owing to increase in commercial activities attendant on independence, total premium income of the industry had risen to N18m by 1967.¹⁹ It is reported that in some situations, intermediaries held themselves out as insurers, collected premiums, misappropriated them and went missing. Others failed to pass collected premiums to insurers. In the absence of prescribed qualifications, bad advice given by brokers without knowledge of insurance led to losses and dissatisfaction. The malpractice of intermediaries coupled with the poor record of insurers resulted in a gradual erosion of public confidence in the insurance industry.²⁰

Two reported cases during this period are worth

¹⁹ Irukwu, "The Nigerian Insurance Industry, Developments Since 1960 Focusing on the Growth of the Industry and Developments in the Laws Governing Insurance Operations in the Country", Unpublished paper.

²⁰ For an account of the activities of intermediaries prior to regulation, see Okwor, "Insurance Decree Analysed", (1976) IV WAICA Journal 167 at pp.173-174; Falegan, "The Nigerian Insurance Industry: A Proposal for Reform", (1982) 16 J.W.T.L. 189 at 191. It is claimed there would have been no need for Governmental control and regulation if the quality of performance of insurers and intermediaries were high enough: Ogunrinde, "Insurance Agents and Productivity", [1983] IIN Journal p.33.

mentioning. In Abumere v. The Commissioner of Police,²¹ the accused was arraigned on a three count charge of stealing a motor car, obtaining money by false pretences and stealing the sum of N200. He had represented himself as an agent and representative of an overseas insurer; the Neptune Insurance Company of Aldershot. He obtained premiums purporting to insure a motor vehicle with the foreign company, and issued a motor certificate in respect of the insurance. It turned out the foreign company was never registered nor authorised to transact business in Nigeria and appeared to be non-existent though the accused had falsely stated he was an underwriter to the company. The vehicle was involved in an accident in which the 'insured' owner was killed. On a claim for repair, the accused had further demanded the sum of N200 which was paid by the personal representatives as excess on the insurance, whereupon he assured them the vehicle was undergoing repairs. In the meantime, the 'agent' sold the car to a third party who sold it to a fourth, who caused it to be repaired and registered as a taxi cab. Police investigations led to discovery of these facts and charges were preferred. The trial magistrate in convicting the 'agent' and 'underwriter' on all three counts, observed:

The accused claims that his company insured the car... The Brodrick and Company Agencies Limited is not an authorised insurance company and there is nothing before me to substantiate the evidence of the accused that his company is an underwriter for the Neptune Insurance Company

²¹ [1980] 2 C.A. 179.

Limited.²²

The second case is James v. Mid-Motors Ltd.²³ The appellant, who operated a transport business, obtained a motor vehicle on hire purchase from a branch of the respondent company dealing in motor sales and finance. The branch manager offered to arrange insurance of the vehicle and, after receiving the premium, issued a cover note and certificate made out in the name of an ostensibly genuine insurance company. The documents contained the respondent's official stamp as representatives/agents of the insurance company. When the 'insured' appellant tried to contact the supposed insurer for an indemnity upon loss, it turned out to be non-existent. Investigations revealed that the purported company was not registered with the regulatory authorities to transact insurance business. The appellant claimed damages suffered from the respondent's agent and servant in inducing him to insure with a non-existent company. The High Court dismissed the claim, but the Supreme Court, in allowing the appeal, held the motor dealers liable for the fraud of their agent - the branch manager, even though he acted without authority and insurance was outside the scope of their permitted business. The agent had issued the false insurance cover in the course of his employment and in the context of the company's business using the hire purchase agreement as a

²² Ibid. at p.182. On appeal, the Court of Appeal sustained the conviction as to stealing.

²³ [1978] N.C.L.R. 119.

means for perpetrating his fraud.

The cases represent examples of the dishonest practices perpetrated by intermediaries attributable to total lack of control. While punishment of the culprit in Abumere protected others from falling into similar traps in future, no one can tell how many might have been preyed upon in the past. Again, while the 'insured' in James got his compensation, the case brought into focus how certain motor dealers fraudulently manipulated clients.

It became obvious that some control was needed over the activities of intermediaries and channels through which insurance was sold to protect the public and insurers who had fallen victims to the misdeeds of intermediaries some of whom had collected premiums on behalf of bona fide insurers and absconded without trace whilst putting the insurers on risk.

The opportunity for control came in 1976 when the government proposed to plug the shortcomings of the Act of 1961 as regards the regulation of insurers generally, by enacting a new Insurance Act in that year bringing intermediaries under some regulatory mechanism.

3.4 Regulatory Framework under the Insurance Act of 1976

The enactment of the Act saw for the first time the activities of intermediaries being brought under regulation, and its provisions envisage their licensing and registration as prerequisites to transacting business. The Act recognises two broad heads of intermediaries for the

purpose of regulation namely; agents and brokers, and the sections relating to them have been described as the "most interesting provisions" of the Act.²⁴

3.4.1 Licensing Requirements for Agents

Section 25 forbids any person from transacting business as an insurance agent unless he is licensed in that behalf under the Act. Application for a licence is made to the Director.²⁵

If the Director is satisfied that the applicant has met the requirements of the Act and any other requirements as may be prescribed, he shall licence the applicant as an agent and notice thereof shall be published in the Gazette.²⁶ The requirements so far prescribed are that the application should be accompanied by a letter of appointment as an agent from each insurer²⁷ and a licensing fee of N100 is paid.²⁸ A licence, once issued, entitles the holder to act as an insurance agent for the insurer or insurers named therein and is renewable every year on payment of N25.²⁹

By section 26(4), any person transacting business as

²⁴ Yerokun, "Evaluation of Insurance Law in Nigeria", Nigerian Commercial Laws, (1984) p.196.

²⁵ s.25(2).

²⁶ s.25(3).

²⁷ Insurance Regulations 1977, reg. 18.

²⁸ Ibid. Schedule 2.

²⁹ s.25(4) and Insurance Regulations 1977, schedule 2.

an agent without a licence is guilty of an offence and liable on conviction to a fine of N500 or two years imprisonment or both. In addition, he must refund to their rightful owners all moneys collected by him while so acting. An insurer who recklessly or knowingly transacts business with an unlicensed agent is liable on conviction to a fine of N1,000, and the court may order the insurer to refund all moneys collected by the agent.³⁰

3.4.2 Registration Requirements for Brokers

Section 27 stipulates that no person shall transact business as an insurance broker unless he is registered and licensed in that behalf under the Act. Application for registration is made to the Director and accompanied by the prescribed fee and particulars.³¹

If the Director is satisfied on matters required of him to be satisfied, he shall register the applicant as an insurance broker by issuing him with a certificate of registration, and notice thereof shall be published in the Gazette.³² The certificate is initially valid for one year but renewable every year on payment of N100.³³

Certain provisions are made for grounds entitling the Director to cancel or refuse renewal of a broker's

³⁰ s.26(5).

³¹ s.27(2).

³² s.27(3). See para. 3.5.1, below, for the prerequisites.

³³ s.27(6) and Insurance Regulations 1977, schedule 2.

licence.³⁴ Any person aggrieved by reason of the Director refusing registration or renewal, and cancelling a licence, may appeal to the Minister of Finance.³⁵ A person transacting business as a broker without having been registered in that behalf is guilty of an offence and liable on conviction to a fine or imprisonment in varying degrees whether a body corporate or an individual.³⁶ In addition, the court may order a refund of the sums collected by unregistered brokers to their rightful owners or persons entitled to them. Furthermore, any insurer who knowingly or recklessly transacts business with an unregistered broker is guilty of an offence and is liable on conviction to a fine of N5,000. The court is also empowered to make orders for the return of sums involved to their rightful owners.³⁷

The Director however insists that before a registered broker can engage in reinsurance broking, he must apply separately for registration.³⁸ The rationale is that the limited registration requirements for brokers are

³⁴ s.27(7).

³⁵ s.27(5)&(7).

³⁶ s.28(4). N5,000 in the case of a body corporate, and for an individual or individuals comprising a firm, each such individual shall be liable to a fine of N2,000 or imprisonment for two years or both.

³⁷ s.28(5). In spite of the provisions, unregistered 'brokers' or those not renewing certificates/licences operate in the market. The Director has consistently warned against this and threatens to act against erring insurers and brokers. See Circular letters IDS 291/1 of 1.3.83; IDS 291/38 of 1.3.84; IDS 291/7 of 25.9.84.

³⁸ Vide Circular Letter IDS 291/9 of 20.12.84.

insufficient to ensure capability to handle the technical business of reinsurance broking. Inasmuch as the Director's concern is appreciated, the Act does not distinguish between insurance and reinsurance broking and the Director may well be acting ultra vires his powers.

While not attempting any definition of agents and brokers in line with the legal consequences that go with agency relationships, the Act provides in section 62 that "insurance agent" means a person licensed as such pursuant to the [Act] authorised by an insurer to solicit risks and collect premiums on its behalf for which he receives or agrees to receive payment by way of commission or other remuneration from the insurer. "Insurance broker" is defined simply as a person registered pursuant to section 27 of the Act.

Following therefrom, the first question that falls to be determined is, which of the classified groups of intermediaries, above, fall under the Act for the purposes of regulation? It is clear that the licensing requirements of the Act are not intended to apply to the first group comprising salaried administrative insurance staff, and employees paid commission on insurances placed through their personal connections. This is so notwithstanding that the definition of insurance agents under the Act could be construed as wide enough to include them. Licensing practice at the Insurance Division show they are exempt and are only intended to be regulated incidentally to the

supervision of insurance companies once registered.³⁹

Agents in para. 3.2.2, above, are clearly within the purview of the licensing requirements. Indeed, these full time agents are the main target of the Act's provisions as those "authorised by an insurer to solicit risks and collect premiums on its behalf for which he receives...commission...".

Part-time agents falling within the third group present a more difficult problem as to whether the licensing provisions apply to them. While it is desirable that those in the group are supervised owing to the way some conduct their activities, most regard themselves as outside the Act's purview and, consequently, do not seek licences though they place client's and customers insurances. The argument is that insurance being only incidental to their primary occupation, they do not come under the category of 'soliciting agents' which the Act is principally directed at.⁴⁰

³⁹ s.25 of the Act provides among other pre-registration requirements for insurance companies, that there be at least one competent and professionally qualified person to man each department of insurance business, and that the directors are persons who have not been involved in or been found guilty of fraud. The Director is empowered by s.38 to suspend an insurer from undertaking new business if it appears to him that the insurer has "failed to maintain adequate management control".

⁴⁰ Yerokun, "Vicarious Liability - Who is Whose Agent Under Insurance Law and Practice", Law Reform Journal No.5 (1986), notes at p.98 that: "The attention of the Insurance Act 1976 is directed to only one class of agents, and these are 'commission agents'. The commission agent may be an individual, association or an organisation such as accountants, solicitors, bank managers, estate agents, building societies or motor traders...", thus implying these all fall within the

The possibility of dishonest and unethical practice by members of the group such as solicitors, accountants, estate agents, banks and other finance houses, is remote and so is the risk they pose to the public in advising or placing insurances. This is because they are already subject to regulatory standards of conduct and discipline which should deter them.⁴¹ The same cannot be said for motor dealers who constitute a substantial part of part-time agents. They are not regulated by any central body and the modus operandi of this group in placing clients insurances needs to be checked.⁴² The Price Control Act of 1977 referred to earlier does not purport to regulate motor dealers in the placement of clients insurances. A call is, therefore, made for the licensing of this class of agents, if no other, within the group.

Whether certain provisions of the Act prohibit the payment of commission on insurance placed directly has earlier been noted. It is clear that those placing insurances direct with the insurer do not fall within the licensing requirements. To hold otherwise would lead to the absurd result that every client wanting to place his insurance directly would first have to be licensed as an

licensing provisions of the Act. Though a literal interpretation permits of this, practice at the Insurance Division differs from theory.

⁴¹ See e.g., ss.9 & 10 Legal Practitioners Act 1975; ss.12&13 Architects (Registration, etc.) Act 1969; s.8 Banking Act 1969; ss.13&14 Estate Surveyors and Valuers (Registration, etc.) Act 1975.

⁴² See para. 3.2.2, above, and James v. Mid-Motors Ltd. [1978] N.C.L.R. 119.

agent.

Since the Act only provides that a broker is one registered pursuant to its provisions, and fails to define 'broker' in the context of functions and obligations, it follows that for anyone to be entitled to describe his business as insurance broking, he must have complied with the prescribed registration requirements. However, a broker for the purposes of registration should be understood in terms of an intermediary professing special skills and knowledge of insurance, and independent of all insurers.

3.5 The Success of the Regulatory Provisions in Practice

Any system of regulation should have defined aims and objectives sought to be achieved. The benefits of regulating insurance intermediaries can be measured and understood in terms of an appreciation of the dangers posed in their unregulated state desired to be remedied.

Aside from the dishonest activities of intermediaries noted in tracing the development of this group in the Nigerian market, the necessity for their regulation is aptly put in general perspective by the following remarks:

In our society, insurance is an essential commodity and one that is socially beneficial. It must therefore be readily available, and it is right that it should be actively sold. But it is also a very complex product, often hard for ordinary people to understand. For this reason it is particularly important that its sellers should be both knowledgeable and trustworthy. There is a conflict here: the two requirements - maximum availability of the product, and expertise and integrity in those who sell it - pull in different directions; and any solution must be a

balanced compromise.⁴³

By a generous estimate, the currently insured lives in Nigeria represent 10% of the total insurable lives, and other classes of insurance follow the same trend.⁴⁴ Coupled with this, is the attitude that insurance is not bought but sold and more companies are heeding calls for aggressive marketing of their products especially life assurance.

Thus, it is observed:

Insurance is well known to be an intangible commodity whose benefits, the prospective buyer is very difficult to be convinced about, except where it is compulsory...the marketing of the product constitute an uphill task to an insurer. This is even so in Africa where the literacy component of the population is low and consequently,...the Insurance consciousness is relatively at a low ebb. In these, circumstances it is obvious that an effective marketing paraphernalia is required in African Insurance markets to facilitate bringing the services of the industry to as wide a section of the community as possible. This is achieved via the institution of Brokers and Agents...⁴⁵

We have often been told that life assurance is not bought, but is sold. I understand this to mean that no one really sets out to buy life assurance without his being prompted to do so by the seller of life assurance.⁴⁶

Decreasing growth rate of the insurance industry in

⁴³ Department of Trade (U.K.) consultative document, Insurance Intermediaries (1977), Cmnd. 6175, p.1. See also the comments of the chairman of the Nigerian Law Reform Commission in the Law Reform Journal (1986) at p.3.

⁴⁴ Irukwu, "The Development of Insurance in Nigeria from 1900-1975", (1975) I WAICA Journal p.14; Irukwu, "The Duties and Responsibility of the Nigerian Insurance Professional Today", (1983) VIII WAICA Journal p.130.

⁴⁵ Lijadu, op.cit., p.61.

⁴⁶ Irukwu, "Life Insurance in Africa", (1976) II WAICA Journal pp.52-53.

the past three years has brought to insurers the realisation that sales must be increased to stay profitably in business. Many assume that the best, or only, way of achieving this is by the direct marketing of policies through intermediaries.⁴⁷ In pursuance of this objective, companies arm agents with what can be described as almost unlimited authority to procure proposals. Moreover, the zeal with which some agents set about their tasks leaves room for malpractice. A writer, commenting on commission agents, observes:

The commission agents are armed with instruction manuals. Their functions are not limited to bringing the principal and third party into contractual relationship but to negotiate the contract, assist in the administration, (sic) performance of the contract and in the event of claim. In pursuance of their function, they grant temporary cover notes pending the insurer's decision, and on top of it all, receive premium.⁴⁸

The potential for abuse of authority by agents has led another writer, commenting on poor insurance practice in claims settlement, to note that: "a study, perhaps would have revealed that most problems are created at the point where policies are sold".⁴⁹

It is against this background that the regulatory and supervisory provisions on intermediaries will be examined in relation to specific problem areas in the tripartite link between insured, intermediary and insurer, that

⁴⁷ See Oredugba, footnote 4, above.

⁴⁸ Yerokun, Law Reform Journal (1986) No. 5 at p.98.

⁴⁹ Ogunrinde, "The Claim Settlement Provisions of the Nigerian Insurance Act 1976: A Solution to what Problem", (1985) 19 J.W.T.L. 170 at 177.

requires remedy.

3.5.1 Competence, Fitness and Suitability

The primary function of insurance intermediaries, particularly agents recruited by insurers, is to provide the sales force for marketing insurance products. The extent to which any of the classified groups is used will depend to a large extent on the product involved, the market structure for it, and the overall objective of maximum sales at minimum costs.

The starting point for any system of intermediary regulation should, therefore, be to ensure that salesmen are knowledgeable in the products offered for sale as an intention to insure or not will proceed in many cases on the advise given by the salesman. Agents should possess a sufficient understanding of various products on offer and distinctions in different policies available. More importantly, the distinctions between different policies in the same class of insurance offered by the same insurer should be known. This is essential in the field of life insurance where distinctions exist in different policies, and not all may suit the needs of a particular client. Furthermore, the salesman should know basic insurance principles. One that comes to mind in life insurance is insurable interest, to prevent ignorant agents prevailing on clients to take policies on lives in which there is no interest. These essentials can ultimately be achieved by proper education and adequate training of agents before

being sent out to canvass.

As regards canvassing and soliciting agents, the Insurance Act lays down no minimum qualification requirements for licensing. All that is required to be a fit and competent person is that an applicant is (a) not a minor, (b) not of unsound mind and, (c) must not prior to the date of his application, been convicted of any offence in the nature of criminal misappropriation of funds or breach of trust or cheating.⁵⁰ Satisfying these requirements does not guarantee knowledgeability in what is sold with the result that:

Since these intermediaries, more often than not, are not trained or experienced in the field, they do not understand the intricacies of the contract they solicit. In fact some may not have ever seen a policy!⁵¹

The consensus is that the provisions of the Act relating to competence, fitness and suitability of canvassing agents are inadequate to protect the public who must inevitably deal with them. The provisions are not commensurate with the responsibilities agents are made to bear. This fact has attracted the following criticism:

The Act with its provisions cannot be expected to have any effect on how much information is made available to the insured persons when policies are sold. The Act is not directed, through any of its provisions, to ensure specifically that the agents provide adequate information on their products. It is possible for an agent to withhold information or misinform the client for selfish

⁵⁰ s.25(5).

⁵¹ Emole, "Insurance Intermediaries: Agents of the Insured or Insurer", (1985) 20 N.B.J. 18 at p.29. See also Irukwu, "Life Insurance in Africa", op. cit., p.53.

reasons. The information provided can also be inadequate. This problem can be solved if agents are well trained.⁵²

If the provisions of the Act were enacted on the supposition that the authority of agents should be limited to canvassing for proposals, and not advising or supplying information to clients on policies intended to be sold, it is clear insurance practice differs markedly from this assumption, and regulations are needed to ensure the educational fitness and competence of agents as a licensing prerequisite.⁵³

On the other hand, if insurers intend to arm agents with more authority to deal with insureds than they would ordinarily possess, it is incumbent on them to ensure they are trained to a level proportionate with their duties. A fortiori, when insurers are prepared to denounce responsibility for the misdeeds of agents leading to losses.⁵⁴ However, insurance practice shows the converse situation. Not all companies insist on minimum qualifications before employing canvassing agents, and minimal training is given prior to their being sent out to

⁵² Ogunrinde, (1985) 19 J.W.T.L. at p.175.

⁵³ s.61 empowers the Minister of Finance to make regulations for the purposes of carrying out the provisions of the Act. Regulations as to minimum qualification requirements or minimum training for agents employed by insurers could be made as a criterion for licensing under section 25(2) without amending the Act.

⁵⁴ See Chapter 4 para. 4.2, *infra*.

canvass.⁵⁵

The need for prescribing minimum standards of educational qualification, competence, fitness and suitability for brokers proceeds on the necessity to professionalise this group of intermediaries as those possessing special skills and knowledge of insurance and the market. According to the Director:

As the law stood anyone could without experience, qualifications or financial backing set-up in business as an insurance broker. In an effort to distinguish between a mere agent who is only interested in insurance as incidental to his main business, and a breed of insurance brokers, who should hold themselves out as professionals and should be disciplined in the practice of their profession as architects, surveyors and accountants the Insurance Decree 1976 and the insurance regulations made the provisions contained in them. This distinction was to professionalise the business of insurance brokerage and establish in the minds of the public that they are men of integrity in which the public could have confidence.⁵⁶

As a prerequisite to the registration of a broker, the Act stipulates that the Director must be satisfied that the applicant has the prescribed qualifications.⁵⁷ These are:

(a) that the chief-executive is a holder of either an Associate of the Chartered Insurance Institute (A.C.I.I.), an Associate of the Chartered Institute of Bankers (A.C.I.B.) diploma, or,

(b) that the chief-executive has been principally engaged

⁵⁵ See generally Ademola, "Principles and Practice of Life Assurance Marketing in Nigeria", [1986] IIN Journal p.24.

⁵⁶ Okwor, "Insurance Decree Analysed", (1978) IV WAICA Journal 167 at 174.

⁵⁷ s.27(3)(a).

in insurance business for a continuous period of not less than five years on the date of, or at any time prior to the date of, application for registration.⁵⁸ In addition, the Director is empowered to cancel or refuse to renew the licence of a registered broker if, *inter alia*, the broker has been found guilty of fraudulent or dishonest practices (including misappropriation of clients' moneys).

The above provisions which seek to ensure that brokers are men of integrity, knowledgeable, and qualified to give advice are desirable. Insureds employing the services of brokers do so, among other reasons, for their expertise and sound insurance advice. The public is, therefore, entitled to assume that brokers transacting business are competent to advice when relying on their judgment. As the regulatory body in Nigeria is governmental, the likelihood of bias and the creation of monopolies present in a system of licensing is removed.

Having noted the qualification requirements under the Act, it remains to be seen how effective these operate in practice. A problem that plagues the Nigerian insurance industry is the inadequacy of trained and qualified manpower to meet its needs. Where a survey⁵⁹ on manpower

⁵⁸ Insurance Regulations 1977, reg. 19. Cf. the provisions of sections 3&4 of the Insurance Brokers (Registration) Act 1977 (U.K.) and regulations made thereunder which provide similar qualification requirements for the registration of brokers in the United Kingdom. See generally, Ellis and Wiltshire, Regulation of Insurance in the United Kingdom and Ireland, para. D.1.2.

⁵⁹ Okediji, "Government Participation in the Nigerian Insurance Market, Regulatory or Competitive?", (1986) 20 J.W.T.L. 540 at p.553.

carried out in 1980 by the Nigeria Reinsurance Corporation shows that only 7.2% of the total employment force of brokerage firms had received one form of insurance training or the other, it might be asked how does this satisfy the requirement of the Act?

The result of manpower shortage is that, to meet the registration provisions of the 1976 Act, applicants seek individuals possessing the relevant qualifications to front as chief-executives on payment of sums of money. Once registration is obtained, the individual drops out and has nothing to do with the new firm which is invariably left in the hands of those lacking in insurance training or experience. It is submitted that no stop gap measures can be prescribed to remedy such practice, and the problem would need to be tackled at source. More insurance training institutions are needed to meet the manpower needs of the industry.

The Government, in collaboration with the West-African Insurance Compaines Association (WAICA), the Insurance Institute of Nigeria (IIN), and other bodies, is presently engaged in tackling the problem by offering a variety of training programmes, and one does hope the situation will improve in the near future.⁶⁰

⁶⁰ See generally Ogunlana, "Role of the Insurance Industry in Nigeria's Economic Survival", [1986] IIN Journal at pp.11,58, on plans for the introduction of a post graduate insurance training programme designed to produce the right calibre of manpower for the needs of the industry; Irukwu, "Insurance Education and Training in West-Africa", (1975) 1 WAICA Journal p.46; Kargbo, "Universities and Insurance Education in West-Africa", (1975) 1 WAICA Journal p.53. Arrangements are under way

A shortcoming in the qualification provisions of the Act arises from the fact that all broking firms are required to be incorporated associations with unlimited liability (s.27(3)(b)). This requirement, coupled with that of having only the chief-executive qualified as prescribed, means that none of the directors of the firm who might in reality be responsible for the day-to-day activities and capable of influencing management, need be qualified.

Nowhere in the Act or regulations made is "chief-executive" defined in relation to broking firms.⁶¹ In many cases, the chief-executive though appointed by the board of directors, is not one of them. The curious result is that while the nominal administrator is qualified, there is the possibility that those responsible for the actual running of the firm are not.⁶² Furthermore, branch and local

for the Insurance Institute of Nigeria to offer the Chartered Insurance Institute's (U.K.) FCII and ACII programmes locally.

⁶¹ In relation to insurers, s. 2(1) describes a chief executive as including a managing director, executive chairman or howsoever named. The logical inference may be that the description has within its contemplation anyone responsible for the ultimate decision making and day to day running of the company.

⁶² Cf. the provisions of s. 4 of the Insurance Brokers (Registration) Act 1977 (U.K.), where bodies corporate carrying on the business of insurance broking can only be enrolled if (a) a majority of the directors are registered insurance brokers (b) if only one director, that he is registered (c) if only two directors that one of them is a registered insurance broker and that the business is carried on under the management of that director. The directors must have satisfied the qualification requirements prescribed in s. 3 to become registered insurance brokers. Para.3(3) of the Code of Conduct drawn up under the Act compels brokers to ensure that all work carried out in connection with their business shall be under the control and day-to-day

managers who are the persons with whom a majority of the public deal and would necessarily advice on insurance matters, are excluded from the Act's qualification and experience requirements or any other.

3.5.2 Impartiality

Agents employed by or tied to particular insurers cannot claim any semblance of impartiality since by the nature of their appointments they are involved in marketing only the products of specific insurer(s). Practice here, however, differs from this assumption. Canvassing agents are known to approach clients as experts in insurance matters, advising not only on the benefits of different policies which they intend to sell, but comparing these with policies of other insurers.

Lack of training of agents in addition to complete reliance on their advice pose substantial risks to clients. In order that those with whom they deal are made to realise their lack of independence and, as such, incapable of giving impartial advice, these agents should be required to disclose their true positions to clients, particularly, that they represent specific insurer(s).⁶³

supervision of a registered broker.

⁶³ The Association of British Insurer's (ABI) general insurance business code of practice and the corresponding life code, provide that intermediaries shall make it clear to clients that they are employees or agents of one or more companies as the case may be, and refrain from making inaccurate or unfair criticism of any insurer, or make comparisons with other types of policies unless they make clear the differing characteristics. While it demonstrates genuine concern

Traditionally, brokers are the group of intermediaries understood as independent and capable of giving disinterested advice in the best interest of clients. Thus, it has been observed that:

An insurance broker is expected to be more knowledgeable than the agent, so as to offer impartial advice to his clients. His main duty among other things, is to find solutions to the client's problems. He must be able to identify the needs of his clients, tailor-out the types of policies suitable for the clients and above all get the cover accepted by the insurer.⁶⁴

In light of the above statement by the Director, an examination of the regulatory provisions securing the independence and impartiality of brokers would be made to see how far these go. A proper examination of this topic is best made by a consideration of factors capable of compromising independence and impartiality, and how the Act and supervisory machinery have sought to tackle them.

3.5.3 The Remuneration of Brokers

It should be conceded from the outset that the remuneration pattern of insurance brokers constitutes the greatest single factor capable of compromising impartiality. Traditionally, brokers are remunerated by way of commission paid by the insurer with which business is

of insurers to protect the insuring public from intermediary misdeeds, its effect is limited in practice as no rights would accrue to an insured for breach of the code.

⁶⁴ Okwor, (1978) IV WAICA Journal at p.174.

placed.⁶⁵ This presents brokers with a conflict between interest and duty:- a duty owed to their clients to secure the best possible deal in the market, and a self interest to place clients' business with the insurer offering the highest rate of commission for that class of insurance notwithstanding its suitability for the client's peculiar needs.

The traditional practice of the broker looking to the insurer for his remuneration is recognised as constituting an exception to the agency rule that an agent is entitled to remuneration from the principal who employs him, and that remuneration by a third party could amount to receiving a secret profit in breach of fiduciary duties if the principal is not informed. The presumption in insurance is that the insured has impliedly consented to the broker's remuneration by a third party.⁶⁶

The incentive for brokers to put self interest above those of clients occasioned by receiving remuneration from insurers has attracted comments from different sources. Commenting on the situation in the United Kingdom, it is observed:

Perhaps the greatest difficulty arises from the source of commission payments. The fact that these payments are made by insurers places brokers, and to a lesser extent part-time agents, in a rather unusual and incompatible commercial

⁶⁵ See Anyaegbunam v. Crystal Brokers [1977] N.C.L.R. at pp.140,141; Incar Ltd. v. Ojomo Unreported, Suit No.CA/L/108/85.

⁶⁶ Great Western Insurance Co. v. Cunliffe (1874) 30 L.T. 661.

and legal position.⁶⁷

With particular reference to life assurance, the following comment is made:

...the vast majority of life companies sell their policies through intermediaries...to whom they pay commission. This is a thoroughly unsatisfactory system for the reason that the commission varies with the cost of premiums and with the type of policy...some companies pay less commission than others... Given such a system, it would indeed be surprising if the individual policyholder...were to receive objective and disinterested advice on such a technical subject.⁶⁸

The problem is compounded by the mode of commission calculations. An examination of Nigerian insurance practice reveals that, generally, commissions paid to brokers are calculated as a direct percentage of premiums paid on the policies procured irrespective of efforts put in by the broker.⁶⁹ The effect is a likelihood that brokers would recommend policies attracting higher premiums to secure higher commissions.

[...]probably of greater importance is the calculation of commission amounts to be paid. First, the remuneration system produces the following paradoxical result: where an intermediary expends additional effort to obtain some particular cover at the lowest possible price for his or her clients, his or her reward is likely to be a reduced commission payment compared to that received had the extra effort

⁶⁷ Colenutt, "The Regulation of Insurance Intermediaries in the United Kingdom", (1979) 46 Journal of Risk and Insurance 77 at p.80.

⁶⁸ Clayton, British Insurance, (1971) p.355.

⁶⁹ "An insurance broker...is paid a commission based on a percentage of the premium by the company in which the business has been placed": Umezinwa J. in Anyaegbunam v. Crystal Brokers, *supra*.

not been made.⁷⁰

The regulatory provisions of the Insurance Act seek to tackle the problem of conflicting interests by prescribing maximum rates of commission payable to intermediaries. Section 34 prohibits an insurer from paying commission to any agent, broker, or any other intermediary, in excess of 10% of the premium in respect of motor vehicle, workmen's compensation or contractor's all risk and engineering insurance, or exceeding 15% of the premium in respect of any other subdivision of non-life insurance business.⁷¹

Coupled with a standardisation of premium rates chargeable in respect of certain classes of insurance and a prohibition in section 32 of insurers or association of insurers making general increases in premium rates without the consent of the Director, or as prescribed by the Rating Committee charged with reviewing premium rates and commissions payable by insurers, the intention of the Act is to standardise brokerage commissions and, therefore, eliminate the possibility of conflict.

The first shortcoming in the provisions, apart from any others that may be expressed,⁷² is that the prescription

⁷⁰ Colenutt, op. cit., pp.81,82. This is reflected in s.34 of the 1976 Act which links commission rates directly to premiums.

⁷¹ "I agree...that the intendment of s.34 is to prevent speculative claims for commission...", - per Nnaemeka-Agu J.C.A. in Incar Ltd. v. Ojomo, *supra*.

⁷² General dissatisfaction is expressed by brokers who feel slighted that the Act should prescribe the same rate of commission for them as ordinary agents despite the differences in responsibility and liability. See the address of the chairman of the NCIB contained in (1987)

of maximum rates of commission is limited to non-life insurance business. Thus, life assurers are free to pay commissions as they deem fit. The same life office is capable of paying differing rates of commission on different kinds of life policies underwritten and, thus, bias an intermediary in the choice of different products within the same class of business by paying higher rates of commission on particular products alone. The picture created is that the apparent conflict is unchecked in an area where the individual consumer is in most need of advice on what type of life policy suits his need.⁷³

Secondly, the provisions, in prescribing maximum commission rates in the field of general insurance, presuppose that all insurers doing business in this category will limit commission payments to the prescribed maximum so that a choice of one insurer for another based on commission receipts is eliminated. In practice, while insurers do not exceed the prescribed limits, differences in commissions payable do exist from one insurer to another, so that the problem of seeking the insurer paying most still exists in general insurance business.

Other incentives given by particular Nigerian insurers which could influence a broker's choice include linking the

XI WAICA Journal at p.148.

⁷³ The draft Conduct of Business Rules drawn up by the SIB., (which SRO's are expected to match), under the Financial Services Act 1986 (U.K.) prohibits an authorised firm from biasing its salesmen by prescribing differing scales of commission on different investment products offered by the same firm.

commission payable directly to the volume of business placed, so that the more business is placed the higher the commission. It is doubtful if section 47 of the Act (para. 3.2.4, above) prohibits this practice as that section relates only to the offering of a rebate as an "inducement" to insured clients.⁷⁴

While there is little doubt that the aforementioned remuneration methods present brokers with a real conflict between interest and duty, the exact magnitude of the conflict and how much domestic brokers have succumbed in placing self interest above those of clients is difficult to estimate. What is not in doubt is that actions perpetrated by insurers and other practice prevalent in the industry have substantially compromised impartiality. For instance, it is known for insurers to quote different terms to competing brokers where the underwriting information supplied by both is the same. There are cases where senior insurance employees having received brokers slips and quoted terms to the broker, approach the prospective insured encouraging him to bypass the broker and insure directly with the company on the promise of a share in the commission which will accrue to the staff agents. In

⁷⁴ The prohibitions under the SIB rules above, apply to volume overriders whereby commission increases once a certain amount of business has been achieved by an intermediary. For a discussion of the regulatory framework of the Financial Services Act 1986 as it relates to insurance intermediaries, see Gray, "Insurance Intermediaries Under the Financial Services Act 1986", New Foundations for Insurance Law, (1987) pp.19-38; Hodgin, Insurance Intermediaries and the Law (1987), pp.114-125; Hodgin, Protection of the Insured, (1989) Chapter 6.

addition, brokers are known to share commissions with clients as an incentive to allow them place their insurances.

The Director has recently hinted at tougher investigation of brokers to detect and remedy such practices.⁷⁵ There is little doubt, however, that the cumulative effect of the practice noted above, is to compromise disinterested advice as the emphasis has shifted from client satisfaction to the accruing financial benefit in the placement of insurances.

Alternatives to the maximum rate prescribed by the Act, such as a client fee system whereby brokers are paid on a fee basis by clients on services performed, or a requirement that brokers disclose to clients the commission received on business placed,⁷⁶ have their own disadvantages. A client fee system is likely to be opposed by consumers who may see it as a means of effecting general increases in the cost of insurance. To them, the traditional method works well in ignorance of its inherent dangers and the fact that in reality, they remunerate brokers by way of .

⁷⁵ See the addresses of the chairman of the NCIB, the Director, and Mr. Nwokolo at the brokers open forum contained in (1987) XI WAICA Journal for a discussion of various practice compromising impartiality and general public dissatisfaction at the activities of insurance brokers. See also Circular Letter IDS 291/14 of 20.1.87 from the Director warning brokers to desist from rebating commissions contrary to s.47.

⁷⁶ Such as is contemplated by para.3(6) of the Code of Conduct for Insurance Brokers (U.K.), and s.32(1)(b) of the Australian Insurance (Agents and Brokers) Act 1984.

premiums paid.⁷⁷ A disclosure requirement to be effective presupposes that on commission disclosures, insureds would conduct searches round the market to ascertain commission rates offered by other insurers on similar policies. This is highly unlikely in practice. The way out in the meantime is a retention of the maximum rate structure with strict monitoring by the regulatory authorities of practices impinging on broker impartiality.

3.5.4 Organisational Structure of Broking Firms

The organisational set up of brokerage firms affect, to a limited extent, their independence in the following ways.

(i). 'Tied' brokers

The hallmark of an insurance broker is his freedom to operate independently of all insurers. This has been the customary understanding conveyed in the use of the term 'broker'. Where this understanding is not backed by the law to ensure that brokers are truly independent, the result is that while a regulatory system may allow a person to describe himself as a broker, or his business as that of insurance broking, upon satisfying prescribed conditions, only an illusion is created in the minds of people with whom such a person deals that he is completely independent and capable of securing the best deal across the spectrum

⁷⁷ The British Insurance Brokers Council appears sceptical of a change in the traditional methods of remunerating brokers to a client fee system partly on the ground that it is impractical and would upset many established practices. (1977) Cmnd. 6715, p.18.

of the market. This precisely, is the illusion created by the registration provisions of the Insurance Act which are completely silent as to the detachment of brokers from all insurers.

The definition of insurance broker by the Act as one registered under its provisions simpliciter, the failure to prescribe complete detachment as part of its registration or renewal requirements, and the absence from the definition or provisions of a minimum spread of business, has the effect that a majority of brokers enjoying the privilege of using the title once a certificate of registration and licence are obtained, are no more than tied insurance intermediaries employed by particular insurers only and paid on a commission basis on insurance placed via their media. This has attracted the following criticism:

...there is a distinction between insurance agents and insurance brokers whereas in Nigeria there are no brokers in the correct definition of the word, what we have are "conduit pipes" or "post offices" who are best described as glorified agents.⁷⁸

While brokers do not enter into prohibitive agency agreements,⁷⁹ in practice, many do not place business with

⁷⁸ Falegan, "Insurance Brokers: Blueprint for Effective Supervision" [1984] IIN Journal at p.49.

⁷⁹ Clause 15 of the constitution of the Nigerian Corporation of Insurance Brokers (NCIB) provides for the expulsion or suspension of a member employed by any insurer on terms which require him to give the insurer a first offer of any form of business. See also s.29 of the Australian Insurance (Agents and Brokers) Act 1984 prohibiting agreements whereby some or all contracts are placed with one insurer only.

more than two or three insurers and infrequently, just one. Thus, the choice of insurers encompassing the market and the ability to obtain the best in this market which accounts for why many insureds utilise the services of brokers, is no more than a choice of two or three insurers.

The failure of the regulatory provisions to limit the description of 'broker' to those who are truly independent is a gap needing rectification, if the bottom is not to be knocked off the whole basis for requiring a specialist class of intermediaries in the market. One can draw on the example of section 11(1)(c) of the Insurance Brokers (Registration) Act 1977 (U.K.), which empowers the Council, as the body charged with implementing the provisions of the Act, to make rules⁸⁰ to ensure that:

...the number of insurance companies with which [registered brokers] place insurance business, and the amount of business which they place with each insurance company, is such as to prevent their business from becoming unduly dependent on any particular insurance company.

Moreover, fears have been expressed by some brokers in Nigeria on a form of accreditation practiced by insurers whereby an insurer would only deal with a broker who has obtained a clearance from the insurer's head office. This, it is argued, subjugates brokers to insurers and erodes the former's impartial status. The Nigerian Insurance Association (NIA) representing member insurers maintains that the practice is only to secure compliance with the 1976 Act which prohibits dealing with unregistered brokers,

⁸⁰ See S.I. 1979 No.489.

and the Director's warnings to that effect.

(ii). Single organisation may be both insurer and broker

A situation where independence and impartiality are easily compromised arises when a single organisation operates both as an insurer and a broker. In such cases, the broking business cannot claim complete independence from the insurance business. A closely related situation is where a broker and insurer are owned and controlled by a single organisation. In both situations, the broking firm will be subject to organisational influences and there is the likelihood that the interest of the insurer or parent would be considered before those of clients in transactions. An example is the National Insurance Corporation of Nigeria (NICON), owned by the Federal Government and empowered by the Act establishing it to carry on any class of insurance business, to insure and reinsurance against loss of any kind arising from any risk or contingency,⁸¹ and to act as insurance agent or insurance broker in relation to any insurance.⁸²

There are also cases of State Governments owning both insurance companies and broking firms.

⁸¹ National Insurance Corporation of Nigeria Act 1969, s.4(1).

⁸² Ibid. s.4(2)(e). With the establishment of NICON, all brokers were excluded from handling Government insurances. It has been suggested that the poor performance of brokers prior to regulation led to this unfortunate result, see Falegan, op. cit.; Akhile, "Insurance Law, Regulation and Practice in Nigeria", [1987] IIN Journal at p.46.

(iii). Broker connections

Connections which brokerage firms have with insurers could compromise independence. Notable examples are cross-directorships and cross-shareholdings. Directors of insurance companies could similarly be directors of broking firms with the same applying to the shareholders. In such a situation, external influences could be exerted on broking operations.

No provisions are made in the Insurance Act prohibiting any or all associations in categories (ii) and (iii) above. Cases of such associations exist in the industry though they do not form the majority.⁸³ If a ban is not advocated or contemplated due to the economics of the situation, it is expected that brokers who are not independent of insurers with which they propose to place a client's business should disclose this fact to the client so that the onus is on the latter to evaluate the chances of impartial advice. Reference is made to section 74 of the Insurance Companies Act 1982 (U.K.), which allows regulations to be made requiring any intermediary who is connected with an insurer with which he is suggesting that a proposer for insurance contracts, to disclose in writing details of his connection. And, section 38 of the Insurance (Agents and Brokers) Act 1984 (Australia) mandates brokers

⁸³ The General Secretary of the NCIB intimated at an interview that two banks recently succeeded in establishing broking firms, to which the NCIB takes objection and is pursuing the matter with the Director on the ground that it erodes the independence of the brokers.

to disclose associations to insureds before the contract or as soon as practicable.

3.6 Intermediaries in the Receipt and Collection of Premiums

The following figures in millions, represent the unremitted premium income in the hands of insurance intermediaries between 1980 - 1985:

1980	1981	1982	1983	1984	1985
N. 179.4	248.1	304.9	321.3	360.7	372.5

(Source: Figures released by the Director of Insurance).

In each year, unremitted premiums represented between 40 and 50 per cent of the total premium income of the industry. The issue of unremitted premiums has become a major source of concern to the supervisory authorities and the industry in general. While the figures represent premiums held by agents and brokers alike, the practice of withholding premiums by brokers is more serious.

Agents employed by insurers to solicit and collect premiums, are generally under the direct control of their employers and, to this extent, it can be safely assumed that tighter control and supervision of their activities by insurers would reduce the incidence of retention of premiums by them. The same cannot be said of brokers who handle approximately 60% of the business underwritten in the market and over whom insurers lack the necessary degree of control to effectively curb detention of premiums. In view of the importance of premiums in insurance, the issue

of unremitted premiums deserves special consideration.

The tripartite arrangement between insured, broker and insurer as regards the collection and payment of premiums means that the retention of insurance moneys by a broker would have adverse effects on all parties concerned. Deprivation of 40% of total premium income threatens the liquidity, profitability and financial stability of insurers in two material ways. In the first place, insurers are deprived large sums of investment funds and the returns therefrom if invested. Secondly, insurers are deprived working capital, and expenditure forecasts are jeopardised. Low liquidity levels could ultimately lead to insolvency and inability to meet payment obligations arising under policies. It is evident that an insolvency will be costly on both the industry and insureds in particular.

It appears that the lack of statutory control of the investment of brokerage funds⁸⁴ permit brokers to invest retained premiums in short term investments with high yielding returns. Due to the nature of such investments, the risk involved is high and losses invariably incurred on them threaten the solvency of brokers. The insolvency of a broker on whom an insurer is principally dependent could lead to the insolvency of the insurer with consequent losses to insureds. Furthermore, some brokers retaining

⁸⁴ s.18 of the Insurance Act contains provisions regarding the investment of funds by insurance companies only. Cf. s.26(4) of the 1984 Australian Act which allows brokers to invest insurance money in prescribed securities only.

premiums are known to appropriate them for their personal use. In either event, insurers may dispute the validity of policies at the point of claim for non-payment of premiums.

In his address to the Nigerian Corporation of Insurance Brokers (NCIB) in 1987, the Director observed:

The general excuse that the premiums were not collected do not in many cases seem tenable as investigations into some of the cases reported showed that a large part were (sic) brokers divert the premiums to personal purposes. There are reports of cases, where brokers evolve all forms of delay tactics before premiums collected are paid over to the insurance companies. The delay affords them the opportunity to invest the premiums in short term bonds.⁸⁵

The Director had earlier observed in 1978 while evaluating the 1976 Insurance Act, that:

The policyholder has a right to expect certain standards of integrity and sound management from all who handled his money. He is also entitled to be protected from the results of the incompetence, fraudulence or insolvency of a broker to whom he has entrusted his money.⁸⁶

The question is, what are the lapses of the 1976 Insurance Act enabling brokers to retain premiums?

The view is strongly held that a nexus exists between brokers' working capital and the retention of premiums. That until the former is reviewed, the latter problem will persist. Thus:

Unless and until the capital base of insurance brokers is substantially increased, they are not likely to be in a position to distinguish between

⁸⁵ Okwor, (1987) XI WAICA Journal at p.153.

⁸⁶ Okwor, (1978) IV WAICA Journal at p.174.

their working capital and premium held in trust for insurance companies.

Firstly, the capital requirement for the establishment of...firms of insurance brokers...must be considerably raised upwards.

[...] The broker's most important tool...is his working capital. The link between the broker's working capital and the market's outstanding balance has been amply demonstrated by past events.⁸⁷

The capital requirement for establishing as a broker is contained in section 27(3)(c) which prescribes that an applicant for registration shall have deposited on a fixed basis, N25,000 with the Central Bank. If the understanding of the argument is that this statutory deposit should be increased to solve the problem of premium retention, the conclusion that this affords no solution is inevitable. The sum, once deposited, is not available for use by the broker in the course of his business and, as such, does not pass as working capital. Indeed, brokers and commentators have argued for the abrogation of the fixed deposit as it unnecessarily ties down funds which could be employed in the running of the business, thereby affecting the liquidity of brokerage firms.⁸⁸ One is inclined to agree with the argument. As a substitute for the fixed deposit, a solvency margin or capital reserve requirement could be prescribed whereby assets exceed liabilities by a minimum sum at any given time to ensure financial stability without unduly tying down funds.

While accepting that brokers fail to distinguish

⁸⁷ Ogunlana, "Role of the Insurance Industry in Nigeria's Economic Survival", [1986] IIN Journal at pp.10-11.

⁸⁸ See Falegan, [1984] IIN Journal at p.49.

adequately between premiums and working capital, inadequacy of working capital is not the sole reason for holding on to premiums. Insurance moneys are retained for purely selfish and dishonest reasons accentuated by the failure of the Act to prescribe minimum standards of financial probity in the conduct of broking business and, in particular, the holding of clients money. This is coupled with the failure of the supervisory authorities to monitor brokers effectively.

All that is provided by the Act regarding premium receipts, is that every premium collected shall be paid to the insurer not later than 30 days after receipt thereof by a broker, and 15 days by an agent. The Director is empowered to cancel the registration of a broker failing to comply, and such broker is permanently barred from carrying on the business of insurance broking.⁸⁹

That the problem of unremitted premiums worsens despite the provisions of the Act and the powers of the Director illustrates the failure of the supervisory authorities to monitor compliance effectively.

The recommendation is that standards of financial probity to be imposed on brokers in the conduct of their business to reduce the incidence of premium retention should include the following;

(a). A separation of clients money from general income, and keeping money belonging to clients in separate designated bank accounts.

(b). A general prohibition of brokers from investing

⁸⁹ ss.26 & 28.

premiums received for transmission to insurers. Moreover, a percentage of brokerage income should be invested in prescribed investments if necessary.

(c). Maintaining and rendering periodically to the supervisory authorities specified accounts and audit reflecting the above, as is currently prescribed for insurers under section 19.

These should be complemented by periodic inspection of broking firms to ensure compliance. Section 30 of the 1976 Insurance Act empowers the Director to authorise an investigator to conduct an examination of any agent or broker as may be reasonable for the purpose of satisfying himself as to whether the provisions of the Act are being complied with. Due to shortages in the Insurance Division of the Ministry of Finance, the power has remained largely unutilised, providing brokers who indulge in retaining premiums an escape route.⁹⁰

In his latest effort to reduce the incidence of premium retention, the Director has directed that in future, applications for renewal of licences by agents and brokers must be supported by written evidence signed by the chief-executive of all insurers concerned that the premiums for business placed during the preceding year have been settled.⁹¹ This initiative has met with opposition from

⁹⁰ Since the enactment of the Act in 1976, an investigation unit on alleged malpractice by insurers and brokers came into operation only in September 1986, see Circular Letter IDS 291/13 of 30.9.86.

⁹¹ Circular Letter IDS 291/14 of 20.1.87 from the Director on Payment of Premiums Collected to Insurers.

some brokers on the ground that the Director cannot unilaterally alter regulation 19(b) of 1977 made under the Act which makes it clear that applications for renewal should be supported by a declaration from the applicant that all premiums collected in the past year have been remitted.⁹² It is also argued that the Director's requirement would subject brokers to the whims and caprice of insurers who could prescribe preconditions to granting the letter in a bid to erode brokers' independence. The Director, in response to the objections, has stated his preparedness to renew licences without insurers letters provided the broker can show satisfactory evidence of remittance of premiums.

Inasmuch as the imposition of financial standards on brokers is desirable, the problem of retained premiums cannot be solved by regulation and supervision alone. Insurers have as much a part to play, as current insurance practice encourage brokers to retain premiums.

Some insurers are known to grant credit facilities and maintain running accounts with brokers. Failure to monitor the accounts and take decisive action when credit limits are exceeded is partly responsible for outstanding premiums. Lack of proper co-ordination between agency, underwriting and account departments of some insurers results in a failure to detect promptly on which policies premiums are outstanding and which intermediary is holding

⁹² Though the Director has expressed his knowledge of the falsity of some of the declarations, see Okwor, (1987) XI WAICA Journal at p. 153.

them.

Allegations have been made of insurers renewing cover with full knowledge that premiums for preceding years have not been paid over by brokers, though it is submitted that acting otherwise would be penalising insureds for broker misdeeds. More fundamentally, apprehension of loss of business from brokers who threaten to move their custom elsewhere if action to recover premiums or complaints are lodged against them have succeeded in deterring insurers from moving swiftly.⁹³

3.7 Occupational Regulation of Brokers

Despite the Director's best intentions and efforts, the greatest constraint in implementing the provisions of the 1976 Act at ensuring that agents and brokers alike are well supervised in their activities, is the supervisory machinery under which he operates. The 1976 Act lumps together under one umbrella, the control of insurers, brokers, and agents thereby overburdening the office of the Director. Manpower shortages and attendant civil service bureaucracy have also had their share.

In light of this, a system of occupational industry regulation with legislative backing for brokers is desirable. The only professional body representing insurance brokers is the Nigerian Corporation of Insurance

⁹³ For a discussion of insurance practice leading to a worsening of the situation and suggested solutions, see Talabi, "Brokers Liability for Insurance Premium", - a paper presented to the Legal Committee of the Nigerian Insurance Association in 1987.

Brokers (NCIB) established in 1962. The NCIB has a code of conduct, and membership is open to any registered broker. The NCIB handicap is that in its present composition without legislative backing to regulate brokers, it remains no more than an association of brokers relying on individual integrity for maintaining standards. Of a total of 256 registered brokers as at January 1989, 107 are NCIB members. The Corporation cannot, therefore, claim to be representative of all brokers.

The NCIB has recently been advocating that it should be made a registration precondition for brokers to be members of the Corporation, and also for a greater say in the registration of brokers so as to bring all brokers under closer scrutiny. The NCIB has a disciplinary committee and council for malpractices, but disciplinary action is limited to expelling erring members who are free to continue in business. This makes it of limited help to the public. However, the NCIB utility lies in the fact that it could serve as the superstructure for any new broker regulating body. While the powers of the Director in registering and licensing brokers should be reserved, his supervisory functions should be transferred to the new body. In addition, while the body should have powers to supervise and control the activities of registered brokers, ultimate disciplinary powers to cancel or refuse renewal of licence or certificate should be left in the Director after a case has been made out by the regulatory body. This has the advantage that fears of creating monopolies and

partiality by a totally self regulatory body with powers to register and dismiss, are removed.

The NCIB favours a system of occupational regulation for brokers and less Governmental intervention, for which it has found support from certain quarters of the industry.⁹⁴ However, it is unlikely that the Government will accede to calls for total self regulation as the belief that the Government is best positioned to strike a fair balance between the industry and public is strong. In the meantime, the NCIB can do more by closer monitoring of member broker activities, liaising with the office of the Director, and lodging prompt complaints with the Director on brokers suspected of unprofessional conduct.

3.8 Conclusion

That the immediate impact of the licensing provisions of the Act of 1976 on insurance intermediaries was a drastic reduction in their numbers, illustrates the regulatory regime sought to ensure that the business of broking is professional, and that only those meeting minimum standards could transact business as brokers.

However, there was a flaw in the initial operation of the Act. This arose from the wording of section 56(1) that:

No person other than an insurer or broker registered pursuant to this Decree or an agent so

⁹⁴ See Nwokolo, (1987) XI WAICA Journal p.156; Falegan, "Governmental Supervision and Control of Insurance Business: Too Much or Too Little", Law Reform Journal No. 5 (1986) pp.123,124.

licensed shall,...use the word "insurance" or any derivative thereof as part of his business name or for describing the nature or object of such business.

The result was that some registered brokers and licensed agents described their business as "ABC Insurances", "Insurance Services", or "Insurance Agency". This allowed unscrupulous agents and brokers to misrepresent to unsuspecting clients that they were not simply intermediaries, but branch offices of insurance companies and, in extreme cases, insurers. The Director as recently as 1987 remarked that he was aware that some registered brokers collected premiums and sought to underwrite insurance risks and settle claims themselves.⁹⁵

The position has been substantially remedied in the case of brokers. It is now a precondition to registration that the name of the firm should reflect the word 'broker', and that names such as "consultancy", "enterprises", "services" will no longer be accepted.⁹⁶ This provision, coupled with a general prohibition of anyone from carrying on a broking business without registration and of insurers dealing with unregistered brokers, makes this class of intermediaries exclusive. This has the advantage that members of the public dealing with anyone in this group can safely assume that they are dealing with a regulated

⁹⁵ Okwor, (1987) XI WAICA Journal at p.152.

⁹⁶ Para.9 of the Conditions for Registration as a Broker/Adjuster under the Insurance Decree 1976 of 15.12.86, issued by the Insurance Department.

broker.⁹⁷ Transacting business as an agent is also exclusively reserved for those who are licensed and thus regulated. However, this does not remove the case for requiring intermediaries, where appropriate, to disclose the fact that they act exclusively for particular insurer(s) so that clients realise independent advice is not forthcoming.

The main shortcoming of the regulatory regime is in the inability of the supervisory authorities to effectively monitor compliance. For this reason it is suggested that the supervision of brokers should be transferred to an occupational body, while the transfer to insurers of overall responsibility for the activities of licensed agents employed by them should ensure that the public is protected from losses arising from the activities of this group.

One may conclude the Chapter by adopting the following passage:

...the theoretical choice for or against a broker, an agent, or the absence of both is not crucial; the important elements is rather the quality of their service to the underwriters and the insured i.e., their technical knowledge, the ability to train and lead skilled personnel; and it is also of course their professional conscientiousness. If he has all three qualities, the intermediary, whether broker or agent, or both, will be useful; but the insured as well as the insurer have a right to be demanding on him;

⁹⁷ Cf. the Insurance Brokers (Registration) Act 1977 (U.K.) which has been criticised in that while it reserves the use of the title 'broker' to only those intermediaries registered pursuant to its requirements, it allows other non-regulated insurance intermediaries to continue in business. See Birds, Modern Insurance Law, (2nd ed.) p.154; Gray, op. cit., at p.21.

moreover, insurers and control services can quite legitimately discourage the proliferation, under the name of brokers, of worthless intermediaries with no real technical knowledge who would be attracted to the Insurance Industry because of the perspective of a newly created national market.⁹⁸

⁹⁸ The Role of Insurance and Reinsurance Brokers in Africa - A Report, (1975) I WAICA Journal 67 at p.69.

CHAPTER 4

THE APPLICATION OF AGENCY PRINCIPLES TO
INSURANCE INTERMEDIARIES

4.1 The Concept of Authority

Notwithstanding the broad categorisation of insurance intermediaries into agents and brokers and the definition, or lack of it, given by the Insurance Act of 1976 discussed in the preceding Chapter, all categories of intermediaries are agents in the legal sense and subject to general common law principles of agency not only in the creation of agency relationships and on whom this falls, but also as to the legal obligations and duties arising from their agency.

Agency is defined as:

...the fiduciary relationship which exists between two persons, one of whom expressly or impliedly consents that the other should act on his behalf, and the other of whom similarly consents so to act or so acts. The one on whose behalf the act or acts are to be done is called the principal. The one who is to act is called the agent. Any person other than the principal and the agent may be referred to as a third party.¹

From the above definition, it is clear that agency is principally a matter of agreement between parties. The agreement may be express or implied² and would determine

¹ Bowstead on Agency, (15th ed.) Art.1 p.1. This is the traditional consent theory for the creation of agency which does not explain the creation of all kinds of agency relationships. See Fridman, "Establishing Agency", (1968) 84 L.Q.R. 224.

² Other ways in which agency relationships are created are by ratification, by estoppel, by operation of law and agents of necessity. The last two have little application to insurance, as to the others, see Bowstead, op. cit.

the power/authority which the agent has to bind the principal and affect his legal relationships with third parties.

Agency exists in insurance transactions in the nature of intermediaries bringing insureds and insurers into positions where they deal with one another contractually. Central to agency is the concept of authority, for an agent acting within the scope of his authority will bind his principal on transactions with third parties. The agreement appointing an agent would normally spell out the agent's authority when it is expressed in writing or by words and this is the most straightforward case.

Outside authority expressly conferred on an agent by agreement, there is uncertainty as to the categorisation of other forms of authority resulting from loose terminology employed in the case law and a lack of consensus of opinion among writers. The problem commonly arises in relation to the implied or ostensible authority of an agent to act. Without attempting categoric definitions of either, the following points should be borne in mind in identifying authority. Every agent has an implied authority by his principal's consent to do all that is necessary for, or incidental to, the effective execution of his express instructions. Other manifestations of implied authority are; (a) usual authority to do whatever an agent of the type concerned would normally have authority for (b) customary authority to act in accordance with applicable business customs as are reasonable, and, (c) authority

implied by the course of dealing and the circumstances of the case.³

Furthermore, the act of an agent outside his express or implied authority may bind the principal if it appears to a third party that the agent is authorised to carry out the act in issue. This is interchangeably referred to as ostensible or apparent authority, and is that which the principal by words or conduct represents, or permits to be represented, to the third party that the agent has. Ostensible authority is sometimes described as authority by estoppel,⁴ and is established from the relationship between the principal and third party only.⁵ Because the representation may be found in the conduct of placing the agent in a position carrying authority which agents in that position would usually command, it shares a common characteristic with implied authority and both "co-exist and coincide".⁶ This may explain the difficulty noted by the learned authors of Bowstead (15th ed.) at p.94 in determining the real basis of the decisions in some of the cases.

³ Bowstead, op. cit., p. 93.

⁴ Although writers are not agreed on this description. See Markesinis and Munday, An Outline of the Law of Agency, (2nd ed.) p.30.

⁵ For a detailed comment on the nature of ostensible authority see Diplock L.J. in Freeman & Lockyer v. Buckhurst Park Properties [1964] 2 Q.B. 480, 502-503; Bowstead, op. cit., Art. 76.

⁶ Ibid. See e.g., Hely-Hutchinson v. Brayhead Ltd. [1968] 1 Q.B. 549.

It is arguable that the choice of factors open to a court in finding authority in any given set of facts leads to the feeling that underlying policy considerations of justice and fairness plays a role in deciding whether a principal should be bound by the act of his agent.⁷

According to Fridman in a related context:

...agency is a purely legal concept employed by the courts as and when it is necessary to explain and resolve the problems created by certain fact situations.⁸

Decisions involving disputes between insurers and insureds in Nigeria have turned largely on the implied and ostensible authority of insurance intermediaries (as employees, canvassing agents or brokers). Unsurprisingly, the real basis of certain decisions is not easy to establish as some apply both implied and ostensible authority as though they were synonymous without a separation of concepts, while the facts of others may permit the application of both. Some cases have laid important principles and these will be considered to deduce the general agency principles established by the courts.

In Nasidi v. Mercury Assurance Co. Ltd.,⁹ the question was whether the insurer was bound to pay on a cover note

⁷ See generally, Edmunds v. Bushell & Jones [1865] L.R. I Q.B. 97; Daun v. Simmins (1879) 41 L.T. 783; Watteau v. Fenwick [1893] 1 Q.B. 346.

⁸ Fridman, (1968) 84 L.Q.R. at 231. See also Lord Wilberforce in Branwhite v. Worcester Works Finance [1969] A.C. 552,587; Lord Keith in Armagas Ltd. v. Mundogas [1986] 2 Lloyd's Rep. 385,395.

⁹ [1971] 1 N.C.L.R. 387.

issued by its local branch manager above his expressly authorised limit of insured value, and where the manager gave the insured credit for unpaid premiums in breach of his express authority. Wheeler J., held that an employer by placing an employee in a position in which he acts on the employer's behalf impliedly holds out the employee as having the authority which is usual for an employee in that position to have. And, that all persons dealing with the employee are entitled to assume, unless they have notice to the contrary, that he possesses such authority.

Furthermore;

...as [the manager] was acting within the apparent scope of his authority in issuing the cover note...he must be deemed to have had authority to issue it, and the [insurers] as his employers, cannot be heard to dispute its validity on the ground that it was unauthorised in fact.¹⁰

The decision appears to proceed on the ostensible authority of the manager arising from the position which the insurer placed him and estopping the insurer from denying the authority.

In Esewe v. Asiemo & Face-to-Face Assurance,¹¹ the branch manager of the insurer was invested with authority to enter into insurance contracts, receive premiums and issue cover notes and certificates on behalf of the

¹⁰ Ibid. at p.395. The case also establishes that a local manager with actual authority to conclude contracts has ostensible authority to vary the terms of the policy and allow for a longer time within which premiums should be paid.

¹¹ [1975] N.C.L.R. 433.

insurer. The manager issued a cover note and certificate to the insured upon receiving premiums. On a claim for indemnity, the insurer argued it was not bound by the unauthorised act of the manager in entering into a contract of insurance whilst misappropriating premiums paid to him. Atake J., found the manager had express authority to bind the company on the interim contract but held, in the alternative, that he at least had an implied or ostensible authority to do so, relying on Murfitt v. Royal Insurance Co. Ltd.,¹² by virtue of the position he occupied.

It has been held, relying on Mackie v. European Assurance Society,¹³ that an intermediary entrusted with blank cover notes by the insurer has authority to issue them and create a binding contract between the recipients and the insurer.¹⁴ It would appear that the authority in such cases would either be implied or ostensible.

Incidental to the question of an agent's authority to bind the insurer is, how far is an insured entitled to presume that acts done or to be done by the agent will be properly and regularly done? The following cases illustrate the problem. In Onwuegbu v. African Insurance Co. Ltd.,¹⁵ the representatives of a deceased claimed against the insurer (under compulsorily insured motor liabilities) for his death in a motor accident after

¹² (1922) 38 T.L.R. 334.

¹³ (1869) 21 L.T. 102.

¹⁴ Babalola v. Harmony Ins. Co. [1982] 1 O.Y.S.H.C. 1,6.

¹⁵ [1965] 2 All N.L.R. 111.

obtaining judgment against the insured driver. An agent employed by the insurer as "underwriting clerk", but with power to canvass for customers, collect premiums and issue cover notes, had issued the insured with a cover note and, subsequently, a motor certificate covering third party risks. The insurer argued, among others, that as the certificate was not signed or authenticated by the proper officer (the agent not being the proper officer), it was not a validly binding document. Kaine J., rejecting this argument observed (at pp. 115-116) that:

I am also of opinion that the signing of a certificate is the internal affair of an Insurance Company and it is not the concern of the insured to find out who signs the certificate... There is nothing before me to show that the insured was in league with the agent to defraud the defendant company...
[...] It is not the duty of the insured to authenticate the certificate and if the certificate should be authenticated and it was not, it is the negligence of the insurer and his workmen... I am of opinion that the failure does not invalidate the certificate of insurance held by the insured.

A similar argument was raised in Esewe v. Asiemo (supra) where the insurer contended that the failure of the proper and authorised officer to countersign the company's stamp on the insurance certificate issued by the local manager invalidated the contract. Atake J., relying on Onwuegbu, above, observed:

But how was the [insured] to know that the signature over the company's stamp or seal is not that of the properly authorised officer of the [insurer]? - the more so as he was dealing directly with the accredited branch manager of the company. It was enough that the [insured] was acting in good faith, as he clearly was, with someone who had obviously authority to do all that was done in this case: and that includes the

issuing of the certificate.¹⁶

The principle discernible from the cases is that in administrative matters pertaining to the internal management of an insurer, an insured dealing in good faith is entitled to assume that things are done regularly. It appears also that the position and express authority of the agent with whom the insured deals is of importance, as this may go to decide whether the insured is under a duty to inquire about the extent of the agent's authority. Dealing with a branch manager was sufficient without inquiry in Esewe, and so was dealing with a clerk authorised to issue cover notes and collect premiums in Onwuegbu.

In Onuh v. United Nigeria Insurance Co.,¹⁷ the insurer covered goods owned by the insured in a store located in a town in Western Nigeria against loss by theft. During the currency of the policy, the insured goods were moved to a store situated in a town in Eastern Nigeria where they were stolen. Before the theft, the insured notified the insurer of the change in location and received a letter signed by an employee of the insurer purportedly authorising the change. The employee turned out to be a clerk and, in the ensuing action, the insurer repudiated liability for the change in risk maintaining that as the clerk was without authority to permit the change or waive policy provisions, his action was not binding. Relying on Royal British Bank

¹⁶ [1975] N.C.L.R. at p.439.

¹⁷ [1975] N.C.L.R. 413.

v. Turquand,¹⁸ it was submitted for the insured that the position occupied by the person with whom the insured had dealt was the internal arrangement of the insurer. Secondly, that an outsider could not tell who was an authorised officer of the insurer and once the insurer held out the clerk to deal with the public, it must be liable for his actions. Phil-Ebosie J., in dismissing the insured's claim observed that:

An insurance company is liable for the acts of its agents or servants if they have actual or apparent authority to do the act, notwithstanding any internal arrangements; for a claimant to succeed, he must show that the company's agent or servant had the actual or apparent authority and that he relied on that authority... It is not enough to assume that the servant or agent has the authority even if he says so.¹⁹ (Emphasis added).

Accordingly, it was held that it was the insured's duty to find out the position which the clerk held at the time, and the mere fact that he signed a letter authorising the change could not ipso facto invest him with authority. The insured's failure to investigate the extent of authority was fatal to his claim. No doubt, the judge was influenced in his decision by clause 2 of the policy which provided that "...no waiver of or alteration to or change in the terms...shall be valid unless...signed by the attorney...or by an authorised official." The clerk was not an

¹⁸ (1856) 6 E.& B. 327.

¹⁹ [1975] N.C.L.R. at pp.421-422.

"authorised official".²⁰

The case illustrates the dangers with which insureds are faced when dealing with agents generally and servants in particular where the courts choose to determine the issues on an application of agency principles of authority. An insured is unlikely to know the extent of the agent's express authority and most will accept as true, the authority an agent claims he possesses, or the authority he appears to possess. There can be no successful attempt to establish an objective test of ostensible authority, for the way an agent's authority appears will vary from one insured to another.

The uncertainty in the application of principles of authority therefore makes it of limited benefit to insureds. Evidence in the Onuh case showed the insured had always dealt with the clerk in question in the exchange of correspondence. However, this was held insufficient to vest him with ostensible authority. The case lays a positive duty on insureds to verify the agent's authority in all cases and not assume its existence. The justification for the decision and rationale for the rule is summed up in the following statement:

This is important in that if the law were otherwise it would have been difficult to draw the line, for an office messenger could write

²⁰ Cf. Marsden v. City & County Ass. Co. (1865) 13 L.T. 465, where notice given to a local agent who had ceased to be agent of the insurer without the insured's knowledge was held binding, even though a condition in the policy required notice to be made "to the manager, or to some known agent of the company".

such a letter which would bind his employers.²¹

In view of the uncertainty, there is a case for a provision holding the insurer responsible for the activities of its employees notwithstanding authority, provided the insured acted honestly.

So far, only the position of the intermediary employed by, and under the control of, the insurer has been examined. This leads to an examination of the position of the broker.

It has been observed that:

An insurance broker is a full-time insurance specialist of professional standing. The law at least expects him to be so. His primary function is to act for the insured in the handling of all his insurance problems. For all the numerous services rendered by a broker to his client, he is not entitled to demand or receive any payment from the insured. He is paid a commission based on a percentage of the premium by the company in which the business has been placed. But in spite of the fact that he is paid by the insurance company, he is not the agent of the insurance company. He is the agent of the insured.²² The position is however different from that of a mere insurance agent. An ordinary insurance agent is the agent of the insurance company and not that of the insured. In his capacity as agent of the insured, it is the duty of the broker to negotiate a settlement when a claim arises with the insurance company and he must ensure that the client receives a fair settlement.

...if the broker as an expert negligently gives faulty advice to his client which causes damage to him...he renders himself liable to be sued for damages in an action for professional

²¹ [1975] N.C.L.R. at p.422.

²² This explains why the broker is said to be in an anomalous legal position. See Chapter 3 para.3.5.3, supra.

negligence.²³

The traditional view that the broker acts as agent of the insured only²⁴ appears to have originated from the attitude of the common law courts in England to the early cases concerning brokers coming before them and the practice of the Lloyd's insurance market where brokers mainly operated at that time. Briefly put, business at Lloyd's is customarily required to be placed through a Lloyd's broker.²⁵ Since the broker at Lloyd's is initially unclear as to which of several underwriters will bear a proportion of the risk, it was impossible to hold him as the agent of any of them, but rather that he was agent of the insured employing him. Thus;

When a broker is asked to get an insurance at Lloyd's he has no idea what member of Lloyd's will insure. He takes a slip round which is a

²³ Per Umezinwa J. in Anyaegbunam v. Crystal Brokers [1977] N.C.L.R. 135 at 140-141. His lordship was obviously stating a general rule, for the broker is entitled to be paid by the insured if in addition to placing his business, he performs other functions such as servicing his insurances. Furthermore, the general rule as regards agents is now fraught with exceptions that one wonders if it should continue to be a *prima facie* rule. See para. 4.2, *infra*, for the exceptions.

²⁴ Rozanes v. Bowen (1928) 32 L.L.R. 98; Anglo-African Merchants v. Bayley [1970] 1 Q.B. 311. In African Insurance Brokers v. Veritas Insurance Co. [1985] H.C.N.L.R. 146 at 149, Sowemimo J. observed that: "The law is clear about the relationship between the broker, assured and the insurance company; and it is settled that in all matters relating to the placing of insurance, the insurance broker is the agent of the assured and of the assured only".

²⁵ For a review of the practice at Lloyd's, see Lord Diplock in American Airlines Inc. v. Hope [1974] 2 Lloyd's Rep. 301,304: "Contracts of insurance are placed at Lloyd's by a broker acting exclusively as agent of the assured".

proposal...but until he goes to Lloyd's he will have no idea for whom he is acting except that it will be a member of Lloyd's if he can get anybody to accept his proposal.²⁶

Cases have shown, however, that the broker acts, as well, as the agent of the insurer in relation to certain matters. Where an insurance broker is entrusted with blank cover notes and expressly authorised to bind the insurer by their issue under limited circumstances, it has been held that the broker has ostensible authority to issue them and bind the insurer outside the specified circumstances.

In Salami v. Guinea Insurance & Gode,²⁷ the broker acted as agent for the insurer with express authority to bind the latter only in respect of third party motor liability, and that comprehensive motor insurance could only be granted after the proposal form had been accepted by the insurer. The broker was provided with blank cover notes capable of use for both third party and comprehensive insurances. The broker gave the insured a comprehensive cover note on payment of the premium and completion of a proposal form providing that "no liability undertaken until the proposal form is accepted by the company and the premium paid to and received by them". On a claim for loss, the insurer repudiated liability contending that as the cover note was issued outside the scope of the broker's express authority, it could not be liable on it. The

²⁶ Per Scrutton L.J., in Rozanes v. Bowen (supra).

²⁷ [1977] N.C.L.R. 161.

insured maintained that (a) as the broker issued comprehensive cover notes to other customers to the insured's knowledge and the insurer acquiesced in the practice, it was estopped from denying the broker's authority to grant temporary comprehensive cover, and (b) by placing comprehensive insurance cover notes at the disposal of the broker, the insurer held him out as having authority to issue them. The trial judge upheld the second contention inasmuch as the proposal form had not made it clear that the broker's authority was limited to issuing third party cover only, and the insured had no notice of the limitation contained in the broker's letter of appointment.²⁸ He however rejected the first argument concluding that:

If an agent has authority to, or is held out by his principal as having authority, to make any contract or do any act on behalf of his principal, he will bind his principal by making such a contract or performing that act even though in fact he is acting in his own interest entirely and with intent to defraud his principal.²⁹ (Emphasis added).

In light of the above dictum, it is difficult to justify the failure of the learned judge to uphold the first argument of the insured. The argument was rejected

²⁸ The judge quoted with approval the statement appearing in MacGillivray & Parkington on Insurance Law, (6th. ed.) para.465, thus: "An agent in possession of temporary cover notes issued by insurers has ostensible authority to bind the insurers to grant interim cover to an applicant for insurance (even if he is not actually empowered to do more than forward the application to the insurers for approval or rejection...) since his possession of the cover notes indicates *prima facie* the insurers' authorisation of his granting cover." Ibid. at p.175.

²⁹ Ibid. p.176.

relying on principles of promissory estoppel and holding that since the insured was not a party to the earlier contracts, there could be no representation made directly to him so as to estop the insurer. The essence of the insured's argument, however, appears to be authority arising from the insurer's acquiescence. If by acquiescing in the broker issuing comprehensive cover to others, the impression conveyed is one of authority to bind the insurer, the latter should be estopped from denying the authority of the broker to give such cover to an insured claiming to have relied on the representation.³⁰ The crux of ostensible authority is the holding out of the agent by the principal as having authority.³¹

Moreover, the decision in Salami runs counter to that in Murfitt (supra) where the ratio for holding that an agent had implied authority to bind the insurer on a temporary oral contract of fire insurance proceeded partly on the acquiescence of the insurer in the practice of granting oral cover which the agent had done for some time.

It was held in Stockton v. Mason³² that where a broker

³⁰ Brokelbank v. Sugrue (1831) 5 C.&P. 21. It is stated in MacGillivray and Parkington, (8th ed.), para. 405, that: "If, moreover, the insurers know that the agent is making contracts on their behalf, and acquiesce in this practice, they will be estopped from denying his apparent authority to do this later".

³¹ "...the 'holding out' must be...under such circumstances of publicity as to justify the inference that [the third party] knew of it and acted on it". -Per Lord Lindley in Farguharson Bros. v. King & Co. [1902] A.C. 325 at 341.

³² [1978] 2 Lloyd's Rep. 430 (C.A.).

orally informed the insured's wife that he was covered on the terms of his old contract, the broker did so as agent of the insurer. In Woolcott v. Excess Insurance Co. Ltd.,³³ a broker was held to have received material facts as agent of the insurer, and his knowledge of the facts was imputed to the insurer. Finally, a broker collecting premiums on behalf of an insurer must be the latter's agent for that purpose.³⁴

These cases go to show that outside Lloyd's, there cannot be a blanket rule that a broker is agent of the insured only. The undesirability of such a blanket rule stems from the fact that irrespective of the truth of the situation, insureds will always be responsible for losses occasioned by the acts or omissions of insurance brokers. On whom the broker's agency falls would depend on the particular transaction or matter involved as between the insurer and insured. *A priori*, the reality of modern insurance arrangements involving brokers dictate that they should be capable of acting for the insurer in certain matters so long conflicts are avoided.³⁵ By acting through a broker, the insurer and insured should be regarded as having impliedly consented to the broker representing two

³³ [1979] 1 Lloyd's Rep. 231 (C.A.); [1978] 1 Lloyd's Rep. 633.

³⁴ In Lloyd's Ins. Co. v. African Trading Co. [1975] 1 A.L.R. Comm. 250, it was noted by the Supreme Court of Liberia that a broker is the agent of the insurer for the purpose of collecting, adjusting and remitting premiums.

³⁵ Anglo African Merchants v. Bayley [1970] 1 Q.B. 311; North & South Trust v. Berkeley [1971] 1 W.L.R. 470.

principals.³⁶

A broker acting for the insured owes him certain duties like any agent acting for a principal. These, briefly stated are, the duty to obey and carry out the principal's instructions, not to allow self interest to conflict with those of the principal, not to accept secret profits and, above all, to act with reasonable diligence, skill and care in the exercise of his functions.³⁷

A breach of duty will entitle the insured to claim damages and/or terminate the agency. It was held in University of Nigeria Nsukka v. Turner,³⁸ that an insurance broker acting as agent of the insured, has a contractual duty to exercise, to a reasonable extent, the amount of skill, ability and experience demanded of a professional adviser in insurance and related matters. Failure to act accordingly renders him liable for damages which his client suffers as a result of his professional negligence.³⁹

³⁶ The general rule is that an agent should not accept instructions from a second principal inconsistent with his duty to the first principal unless after disclosure of his position, both agree to this. See Fullwood v. Hurley [1928] 1 K.B. 498,502; Excess Life Ass. v. Firemen's Ins. Co. [1982] 2 Lloyd's Rep. 599,619. In the normal course of a broker's activities, there isn't likely to be much inconsistency as there will be a clear separation of activities where the broker is acting for either insured or insurer.

³⁷ For an account of the duties and liabilities of insurance intermediaries see Hodgin, Insurance Intermediaries and the Law, (1987), Chapter 3.

³⁸ [1968] 1 A.L.R. Comm. 290.

³⁹ Where the broker acts in accordance with the express instructions of the insured, he is exonerated if loss is suffered as a consequence; see U.N.N. v. Turner, ibid.; Juli Pharmacy & Stores Ltd. v. Glanvill Enthoven & Co.

As a safeguard to brokers' inability to pay for losses sustained as a result of professional negligence, section 28 of the 1976 Insurance Act provides as part of the requirements for conducting business, that every insurance broker shall have and maintain at all times a professional indemnity insurance cover of an amount not less than N50,000 or 25% of its annual brokerage income during the preceding year, whichever is greater. While this is a desirable safeguard, it does not obviate the need to hold brokers as agents of insurers where the facts necessitate this. Otherwise, it would be unfair for insureds to carry the consequences of misdeeds even where the professional indemnity cover cannot compensate for loss suffered.

4.2 Agents in Completing Proposal Forms and Receiving Disclosure

Liability for the actions of insurance agents in the completion of proposal forms and receipt of material information is an issue which courts in most common law jurisdictions have had to deal with and, as the following discussion shows, the authorities are not always consistent or easy to reconcile. This constitutes a main source of friction in Nigeria, as insurers show an eagerness to denounce responsibility for the acts of those that would ordinarily be their agents and shift that responsibility to insureds.

Problems usually arise in any of the following context:

- (a). A proposer may have given correct answers to the agent, but due to the latter's misunderstanding, mistake or even fraud, wrong answers are recorded in the signed proposal form.
- (b). A proposer may have given correct answers whereupon the agent advises that those answers are irrelevant and need not be disclosed or recorded.
- (c). A proposer may not have given relevant answers trusting that the agent with knowledge of the answers or facts will record them in the signed proposal or otherwise convey them to the insurer.
- (d). A proposer may have signed the proposal form in blank relying on the agent's knowledge and expertise to fill in correct answers whereas untruths are recorded.

In each case, the insurer relies on non-disclosure, misrepresentation (discussed in Chapter 6, *infra*) or breach of warranty (discussed in Chapter 5, *infra*) to repudiate liability on account of incorrect answers or failure to disclose material facts in the proposal and the contention that in the completion of proposal forms, the employee acted no longer as its agent, but as agent of the insured. Judicial resolution of the problem may involve an application of the agency rules examined to determine whether the agent had authority (implied or apparent) to do the act in question, or whether in the absence of such authority, he acted as agent of the proposer.

The starting point in an examination of the relevant judicial principles is the decision of the Supreme Court in the earliest reported case of Northern Assurance Co. v. Idugboe.⁴⁰ The insurer relied on non-disclosure and misrepresentation of material facts contained in a signed proposal form completed on behalf of an illiterate proposer by his clerk and a canvassing agent, to repudiate liability on a motor cover note issued by the agent. The insured's argument was that the alleged facts were disclosed to the agent but, at his direction, these facts were left unrecorded, while at the same time directing the clerk to record facts which turned out to be untrue. The trial judge, accepting the insured's version of events, relied on Bawden v. London, Edinburgh & Glasgow Assurance,⁴¹ and Golding v. Royal London Auxiliary Insurance,⁴² to hold that the insurer was bound by the knowledge of its agent which was imputed to it. On appeal, the Supreme Court distinguishing Bawden, and relying on Newsholme Bros. v. Road Transport & General Insurance,⁴³ held that in completing the form, the agent acted as agent of the insured and not the insurer and his knowledge of the truth could not be imputed to the insurer. Concluding the judgment of the court Onyeama J.S.C. observed that:

⁴⁰ [1966] 1 All N.L.R. 88; followed in Bamidele v. Nigerian Gen. Ins. Co. [1973] 3 U.I.L.R. 418 at 423.

⁴¹ [1892] 2 Q.B. 534.

⁴² (1914) 30 T.L.R. 350.

⁴³ [1929] 2 K.B. 356.

The plain fact of the matter is that Y.A. [agent] and the [insured's] clerk wrote down untrue answers in the proposal form, and we hold that in filling up the form they were the agents of the person making the proposal.⁴⁴

The court assumed throughout that the case fell on all fours with that before the English Court of Appeal in Newsholme and proceeded to adopt the reasoning and judgment of Scrutton L.J. in that case. For them, "it is unfortunate that Newsholme's case was not cited to the learned trial judge". In view of this, it becomes necessary to examine the decision of the Supreme Court in Idugboe in the context of Newsholme to see if both are analogous, and in the context of other relevant English cases.

The facts in Newsholme, simply put, were that an agent had inserted false answers in a proposal form for inexplicable reasons though aware of the truth. In the ensuing action, the Court of Appeal following Biggar v. Rock Life Assurance Co.,⁴⁵ held that in completing the form, the agent acted as agent of the insured and not the insurer employing him, and his knowledge of the true facts was not to be imputed to the latter. Scrutton L.J. described the agent as the "amanuensis" of the proposer, and his other views adopted by the Supreme Court are examined below.

"In my view the decision in Bawden's case is not applicable to a case where the agent himself, at the request of the proposer, fills up the answer in purported conformity with information supplied

⁴⁴ At p.94.

⁴⁵ [1902] 1 K.B. 516.

by the proposer."⁴⁶

Certain assumptions of the Supreme Court not borne out by the facts, flaws this analogy. It is assumed the agent filled in the proposal form at the request of the illiterate insured, whereas the facts reveal the insured's clerk filled in the form at the direction of the agent as to what should be recorded and unrecorded. In the absence of a specific request from the proposer, the logical assumption should be that the insurer impliedly authorised the agent to fill the form or direct how it should be filled in respect of illiterate persons being unable to read or write. Secondly, the assumption that the form was filled in conformity with information supplied by the proposer runs contrary to the finding of the trial judge that: "Each of the particulars of non-disclosure relied on by the [insurer] was disclosed to him [agent] by the [insured] as he, the [insured] and the [insured's] clerk have told this court."

"[...] the agent of an insurance company cannot be treated as their agent to invent the answers to the question in the proposal form; and that if he is allowed by the proposer to invent the answers, and to send them as the answers of the proposer, the agent is, to that extent, the agent, not of the insurance company but of the proposer.

[...] If the answer are untrue and he knows it, he is committing a fraud which prevents his knowledge being the knowledge of the insurance company."⁴⁷

The first paragraph of the dicta presupposes that due

⁴⁶ Idugboe, p.93; Newsholme, p.375.

⁴⁷ Idugboe, p.93; Newsholme, p.372, 375-376.

care by the proposer would have prevented the agent 'inventing' the untrue answers. Insurance agents in approaching proposers, do so exhibiting knowledge and authority "which may deceive the prospective insured into believing the agent is the company personified".⁴⁸ There is no apparent reason why a proposer should not be entitled to rely on this knowledge and reasonably assume that the agent representing the insurer is aware of information sought by the latter when contracting.

The dicta appears to proceed on the basis that the fraud of an agent on his principal in inventing untrue answers in the proposal form ceases to bind the latter. With respect, this does not accord with settled principle and authority. The principle is settled that the act of an agent within the scope of his authority (actual and apparent) will not cease to bind his principal merely because the agent was acting fraudulently and in furtherance of his own interests.⁴⁹

Accordingly, the decision in Idugboe is contrary to settled law including that of the Supreme Court in the later case of James v. Mid-Motors Ltd.,⁵⁰ where, applying the decision of the House of Lords in Lloyd v. Grace, Smith

⁴⁸ Agomo, "The Role of Agents in Insurance Contracts: Case for a Different Approach in Nigeria", Unpublished paper, p.8.

⁴⁹ Bowstead, op. cit., Art. 74.; Lloyd v. Grace, Smith & Co. [1912] A.C. 716; Salami v. Guinea Ins. Co., footnote 27, above.

⁵⁰ [1977] N.C.L.R. 119. See Chapter 3 para. 3.3, supra.

& Co.⁵¹ and that of the Privy Council in the Nigerian case of U.A.C. v. Owoade,⁵² it was held that a principal is liable to a third party for the fraud of its agent while acting within the scope of his authority and the course of his employment provided the third party has not participated in the fraud. There was no suggestion of fraud by the proposer in Idugboe, for the Supreme Court (at p. 90) upheld the decision of the trial court rejecting fraud.

"In any case, I have great difficulty in understanding how a man who has signed, without reading it a document which he knows to be a proposal for insurance, and which contains statements in fact untrue and a promise that they are true, and the basis of the contract, can escape from the consequences of his negligence by saying the person he asked to fill it up for him is the agent of the person to whom the proposal is addressed."⁵³

If the agent directs how the form should be completed, it is submitted that the proposer is entitled, within reasonable limits, to repose confidence in the agent that proper directions will be given. The standard of reasonableness for illiterate persons must be low because they repose total confidence and trust in agents. Thus, it is commented that:

In the nature of things proposers do repose a good measure of trust and confidence in the agents and indeed it is in the interest of business that this confidence should be sustained and that the insured would not be checking and cross-checking forms completed or things done by

⁵¹ [1912] A.C. 716.

⁵² [1955] A.C. 130.

⁵³ Idugboe, p.93; Newsholme, p.376.

the agent.⁵⁴

The negligence of an illiterate in failing to read over a completed proposal form should be viewed within narrow limits, as negligence can hardly be a factor in such cases, since the illiterate is truly handicapped. The Supreme Court recognised this fact when it observed:

The [insured] is an illiterate and some of the expressions used by Scrutton L.J., such as the reference to allowing the agent to invent the answers, and signing a document without reading it, are not applicable without qualification to every illiterate proposer...⁵⁵

Paradoxically, the court went on to hold that "In this instance the [insured's] illiteracy is no ground for not following Newsholme's case."⁵⁶ Indeed, Greer L.J. (at pp. 381-382), in Newsholme, explained Bawden as turning on its special facts, and one such special fact was the assured's handicap which made him deserve to be protected.

That the decision in Bawden turned partly on the actual authority of the agent concerned to negotiate proposal forms was affirmed by Denning M.R., in Stone v. Reliance Mutual Insurance Association⁵⁷ where the actual authority of the insurance inspector to negotiate proposals prevented him from being the agent of the insured in completing the form. Instead, the agent's knowledge of the

⁵⁴ Osunbor, "American International Insurance Co. Ltd. v. Dike: Yet Another Penalty for Illiteracy", (1981-83) 9/13 N.J.C.L. 91,96.

⁵⁵ At p.93.

⁵⁶ At p.94.

⁵⁷ [1972] 1 Lloyd's Rep. 469.

truth was imputed to the insurer. Both decisions in Newsholme and Idugboe appear, however, to treat the authority of the agents in question as immaterial, and appear to lay absolute rules that irrespective of authority, the insurance agent is always agent of the insured in completing proposal forms.⁵⁸

Perhaps, had the Supreme Court adequately considered the authority of the agent in Idugboe, it might have come to a different conclusion. The court found that the agent "was a commission agent whose duty was to canvass for customers. It was not his duty to investigate facts in the proposal forms or to negotiate proposals."⁵⁹ Yet the agent was authorised, and did issue, a cover note presumably after receiving premiums. It should be the case that an agent with authority to issue a cover note was not a mere canvassing agent and his authority to bind his company on interim contracts will include doing all acts as are necessary or incidental for bringing about insurance contracts, including completing proposal forms or, at least, advising on how these should be completed.⁶⁰ In this respect, Idugboe clearly differed from Newsholme where there was no finding that the agent in the latter case was

⁵⁸ "I do not understand how in receiving the information as to answers and in writing those answers, [the agent] can be taken to be anything else than agent of the person whose answers they are to be...". Per Scrutton L.J., in Newsholme at p.364.

⁵⁹ At p.92.

⁶⁰ See Tedeschi, "Assureds Misrepresentation and the Insurance Agent's Knowledge of the Truth", [1972] Israel L.R. 475, pp.482-484.

authorised to grant cover notes or receive premiums. Scrutton L.J. concedes in the case that: "If the person having authority to bind the company by making a contract in fact knows of the untruth of the statements and yet takes the premium, the question may be different."⁶¹ However, the Supreme Court in disregard of this declared: "we do not think that anything turns on the fact that [the agent] had authority to give cover notes."⁶²

A more fundamental objection to Idugboe arises from the facts. If properly understood, it appears the agent himself did not write down the material answers, but merely dictated to and advised the insured's clerk who did the writing that the material information were irrelevant and should not be disclosed. Accordingly, the analogy with Newsholme should not have arisen. Rather, the attitude of the court should have been, (a) whether the agent had, and acted within his, authority as agent of the insurer, in waiving disclosure of material facts, and (b) whether material information received while acting for the insurer should be imputed to the latter. Arising from the agent's authority to bind the insurer on interim contracts and the principles laid in Ayrey v. British Legal & United Provident Assurance,⁶³ and Wing v. Harvey,⁶⁴ where agents

⁶¹ At pp.373-374.

⁶² At p. 93. For a criticism of the decision, see Olawoyin, "Northern Assurance Company Limited v. Idugboe - A Penalty for Illiteracy?", (1973) 11

⁶³ [1918] 1 K.B. 136.

⁶⁴ (1854) 5 De G.M.&G. 265.

were held to possess authority to waive material disclosures and breaches of condition, the answer to both questions should have been in the affirmative.

The next important case is the High Court decision in Ogbebior v. Union Insurance.⁶⁵ The insured, desirous of insuring a new vehicle, signed a proposal form in blank leaving the particulars to be completed by an agent who recorded in it false information. On a claim for an indemnity upon the policy issued by the insurer after a cover note was issued by the agent, the insurer denied liability on account of non-disclosure and misrepresentation of material facts in the proposal form. The insured argued that correct facts were disclosed to the agent, and that his knowledge should be imputed to the insurer. The insurer, relying on Newsholme, submitted that in filling the proposal form, the agent did so as agent of the insured only and his knowledge of true facts could not be imputed. Irikefe J., held that where an insurance agent, after the proposer signs a form in blank, inserts in it false statements without the proposer's knowledge, then, even though the agent is acting on behalf of the proposer in filling in the form, the latter is not bound by the false statements and the insurer will be estopped from relying on them to nullify the contract.

Though the result in Ogbebior seems fair, the ratio is not easy to follow. Idugboe was not cited in the judgment,

⁶⁵ [1967] 3 A.L.R. Comm. 166.

but the learned judge relying on Biggar and Newsholme held, on the one hand, that the agent in completing the form signed in blank did so as agent of the insured and not the insurer and, as such, the proposer was bound by the misrepresentations contained in it. On the other hand, relying on Bawden, he held that knowledge of the truth conveyed to and acquired by the agent before completing the form was imputed to the insurer.

Perhaps, a resolution of the apparent conflict would be found in an application of the estoppel principle⁶⁶ by the learned judge. Inasmuch as the misrepresentations in the form by the agent were those of the proposer, the insurer was estopped from relying on them to avoid the contract because the insurer could not deny the authority given to the agent to conclude interim contracts of insurance on its behalf, including obtaining or waiving material information in completing proposal forms to aid him in carrying out this authority.

Finally, the trial judge in Ogbebior was not disposed to look favourably on the agent because his conduct appeared dishonest, and the insurer employing him should be responsible for this. According to the judge:

[the agent] strikes me as a thoroughly dishonest and unprincipled individual who would readily

⁶⁶ See generally, Merkin, "Transferred Agency in the Law of Insurance", (1984) 13 Anglo-American L.R. at pp.45-46, where the writer submits that only those insureds with actual knowledge that an agent does not have authority to forego information should be barred from pleading estoppel. See also Western Australian Insurance Co. Ltd. v. Dayton (1924) 35 C.L.R. 355; Blanchette v. C.I.S. Ltd. (1973) 36 D.L.R. (3d) 561.

allow himself to be used to achieve a fraudulent end, provided he stood to gain from such fraud. His answers under cross-examination demonstrate quite convincingly that he and truth had never been in association.⁶⁷

Most recently, for which party a canvassing agent acts in completing proposal forms came up for resolution in American International Insurance Co. v. Dike.⁶⁸ The insured, an illiterate who could neither read nor write but could append his signature, sought insurance cover for goods-in-transit in his transport business. A canvassing agent expressly required by the insurer to fill in proposal forms for prospective customers completed the form with information supplied by the insured. Due to a misunderstanding, the agent recorded 'No' to the question; 'Are you at present insured or have you ever proposed for insurance in respect of any goods-in-transit risks?', although the insured previously had a goods-in-transit policy with a different insurer. The signed proposal contained a 'basis' clause warranting the truth of information supplied (discussed in Chapter 5, *infra*). The insurer paid on a loss but, on discovering the falsity of the answers, sought to recover the sums paid on the ground that the policy was void for non-disclosure of the previous policy, misrepresentation, and breach of warranty. It was argued that notwithstanding express instructions given to the agent to complete proposal forms, he had done so as agent of the insured, and knowledge of material facts could

⁶⁷ At p.173.

⁶⁸ [1978] N.C.L.R. 402.

not be imputed to the insurer. This argument was upheld following Newsholme and Idugboe. However, subtle distinctions arising from the case and judgment demand closer examination.

It was the insurer's policy, irrespective of illiteracy, and express authority was given to agents to complete proposal forms. On the reasoning that the decision of Denning M.R., in Stone, turned on the authority of the inspector to complete proposals,⁶⁹ and that of Wright J., in Biggar, turned on the lack of authority, the holding in Dike should have been in favour of the insured without the necessity of following the absolute rules laid down in Newsholme and Idugboe. Since the agent had actual authority to complete the form, he did so as agent of the insurer who should have been estopped from denying that authority and made to bear responsibility for the inaccurate statements. Instead, Agoro J., held:

...the [insurers] compelled their agents to fill in a proposal form for any prospective assured. Be that as it may, there can be no doubt from the authorities that when [the agent] filled in the proposal form he was thereby acting as the agent of the [insured] and not as agent of the [insurers]⁷⁰

Perhaps had the judge considered the express wording

⁶⁹ See Cockerell & Shaw, Insurance Broking and Agency, (1979) p.72, where it is submitted that no man on the street could understand Stone, had the decision been otherwise. Denning M.R., in Stone, had similarly approved the earlier decision in Bawden as turning on the actual authority of the agent in that case. See Merkin, op. cit., p.41.

⁷⁰ At p.412. Cf. Deaves v. CML Fire & Gen. Ins. (1978) 23 A.L.R. 539, where the apparent authority of the agent to receive information, and not authority to complete proposal forms, was held to be the determining factor.

of the proposal form, he might have been able to hold that the authority of the agent to complete the form and receive information on the insurer's behalf was limited. The material part of the signed proposal reads:

...I agree that...the answers above given, and not any extraneous knowledge or information possessed by the company, shall be the basis of the contract between me and the company.

In M'Millan v. Accident Insurance Co.⁷¹ it was held that a clause in the policy providing that the insurer shall not be liable in respect of any knowledge of, or notice to, an agent which shall not have been communicated to and acknowledged in writing by it, operated to limit the authority of the agent to obtain disclosure of material facts. Inasmuch as the above clause in Dike might have had this effect, it did not stipulate that the agent was agent of the proposer in completing the form and the reliance on Newsholme and Idugboe in the presence of actual authority appears, with respect, erroneous.

Apart from clauses limiting the authority of agents to accept disclosure of material facts, Nigerian insurers far from satisfied with the favourable state of the law as laid in Idugboe, insert express clauses in proposal forms transferring the agency of canvassers to the insured who must bear the risk for their misconduct. This is done in a bid to dispel residuary doubts that agents employed by insurers remain their's while completing proposal forms. It is common to find the following declaration in proposal

⁷¹ 1907 S.C. 484. See also Levy v. Scottish Employer's Ins. Co. (1901) 17 T.L.R. 229.

forms used in the market:

I/We further agree that if this proposal in any particular is filled in by another person, such person shall be deemed to be my/our agent and not the agent of the company.

In so far as the above provision is different from that in Dike, and the latter did not receive consideration in the case, it is uncertain what the attitude of judges is to them, though they have received judicial blessing in England.⁷²

In Salami v. Guinea Insurance (supra), Akpata J., had simply disregarded a clause in the proposal form reciting that no liability is undertaken until the proposal is accepted and the premium is received by the insurer when, in reality, the broker issuing a cover note and receiving premiums was expressly authorised to conclude interim contracts and acted within his ostensible authority as agent of the insurer. Though the point is now purely academic in view of the Insurance (Special Provisions) Decree 1988 discussed below, it is contradictory for insurers to mandate and arm agents with actual authority to complete proposal forms and in the same breath negate the authority by express transfer clauses.⁷³ An unwillingness of English courts to allow this is discernible from the rhetoric of Megaw L.J., (at p. 477) in Stone (supra), where

⁷² Facer v. Vehicle & General Ins. Co. Ltd. [1956] 1 Lloyd's Rep. 113.

⁷³ Merkin, op. cit., p.50 - "Transferred agency clauses are unashamedly intended to protect insurers from the consequences of doing business through agents paid by commission (in part at least) and not fully trained in insurance law".

the Court of Appeal refused to allow reliance on such a clause.

Notwithstanding the above and other criticisms⁷⁴ of Dike, however, the approach taken by the judge, if not the result, is commendable for two reasons.

Firstly, the trial judge found from the facts that the answers supplied and recorded in the proposal were those of the insured and the agent had not "invented" them. The wrong information was supplied on a misunderstanding of the question asked by the agent, and there had been no fraudulent intent on the part of the proposer. Therefore, even if his Lordship was prepared to, there was no disclosure of the truth which could be imputed to the insurer.

Secondly, unlike the Supreme Court in Idugboe, Agoro J., (at p.413) recognised that in appropriate cases relief ought to be granted illiterate persons signing legal documents without understanding their purport, and that the Newsholme principle should not be automatically applied to them. However, the failure of the illiterate proposer to act "responsibly and carefully" according to Lord Wilberforce in Saunders v. Anglia Building Society,⁷⁵ precluded relief. Agoro J., held (at pp. 413-414) that:

...the [insured] was negligent in signing the

⁷⁴ See Osunbor, "American International Insurance Co. Ltd. v. Dike: Yet Another Penalty for Illiteracy", (1981-83)9/13 N.J.C.L. 91, where the writer in reference to Idugboe, opines that the effect of the decisions is to penalise illiterates.

⁷⁵ On appeal from Gallie v. Lee [1971] A.C. 1004 at 1027.

form without requesting [the agent] to read the answers to him after filling in the form. The word "negligence" in this connection has no special, technical meaning. It only means carelessness.⁷⁶

The learned judge avoided the absurdity of requiring an illiterate to read over a completed form by placing a positive duty on illiterate insureds to request agents to read over completed forms to them before signing. With respect, this approach is unconvincing. The illiterate, like any other proposer, should be entitled to rely on the agent's expertise when completing proposal forms, an act described as a "trying experience".⁷⁷ According to Lord Denning M.R. in Stone, an agent completing a proposal form without asking questions impliedly represents to the proposer that he has done so accurately and the insured could safely sign it. If this turns out to be a misrepresentation, the insurer is estopped from denying that the form was correctly filled in.⁷⁸

One could contrast Dike with Zabian v. New India Assurance Co. Ltd.,⁷⁹ where the Supreme Court of Sierra Leone held that where a proposer is blind or illiterate to the knowledge of the insurer's agent who completes a proposal form on the basis of information supplied, there is an implied request by the proposer that the agent will

⁷⁶ At pp.413-414.

⁷⁷ Hodgin, op. cit., p.34.

⁷⁸ [1972] 1 Lloyd's Rep. at p.475.

⁷⁹ [1964] 1 A.L.R. Comm. 4. See also the Ghanian ^{case} of Guardian Royal Exchange v. Kodjo [1974] A.L.R. Comm. 2.

read over the form to him, and the agent's failure to read it debars the insurer from relying on any non-disclosure or misrepresentations in the proposal.

4.3 Protection for Illiterate Proposers under the Illiterates Protection Act 1958

While writers and commentators alike agree that current principles regarding who bears the burden for the acts of insurance agents in completing proposal forms creates an unnecessary disparity in the contracting positions of insureds and insurers,⁸⁰ most are unanimous that hardest hit by these principles are illiterate proposers who deserve special protection. Contemporary Nigerian thoughts are best expressed in the following remarks:

In a largely illiterate society, as Nigeria is in which there is dire need to nuture and encourage a culture of insurance, the application of a degree of proposer's care evolved by and applicable to such highly industrialised societies as the United States and the United Kingdom will do no good to the growth of the insurance industry.⁸¹

The main reason why a different approach by the Nigerian Courts is advocated here is that there is a high degree of illiteracy in the country. The law distinguishes carelessness or negligence on the one hand and genuine incapacity on the other hand... Illiteracy is no less a handicap and ought to be taken into consideration when the question of individual responsibility of a party to a contract of insurance is in issue.

⁸⁰ See Timmins, "Misrepresentations in Insurance Proposal Forms Completed by Agents", [1974] Vict. Uni. of Wellington L.R. 217; Merkin op. cit.; Tedeschi, op. cit.; Hodgin, op. cit., pp.34-42.

⁸¹ Osunbor, (1981-83) 9/13 N.J.C.L. at p.95.

[...] Illiterate proposers are sitting ducks for fraudulent agents. They therefore, deserve the protection of the law.⁸² (Emphasis added)

Some writers conclude that the protection which illiterate proposers need will be found in applying the Illiterates Protection Act of 1958 to insurance arrangements.⁸³ It is thus pertinent to examine the provisions of the Act, with a view to determining if the Act can by itself offer the protection sought. It should be observed from the onset that in no reported case involving insurance agents has the Act been invoked.

It is provided in section 3 that:

Any person who shall write any letter or document at the request, on behalf, or in the name of any illiterate person shall also write on such letter or other document his own name as the writer thereof and his address; and his so doing shall be equivalent to a statement:-

(a) that he was instructed to write such letter or document by the person for whom it purports to have been written and that the letter or document fully and correctly represents his instructions; and

(b) if the letter or document purports to be signed with the signature or mark of the illiterate person, that prior to its being so signed it was read over and explained to the illiterate person, and that the signature or mark was made by such person. (Emphasis added)

Section 4 prescribes a fine of N100 or six months imprisonment for failure to comply with the provisions.

The Supreme Court in P.Z. & Co. v. Gusau & Kantoma,⁸⁴ held that the Illiterates Protection Act "was designed to

⁸² Agomo, "The Role of Agents in Insurance Contracts: Case for a Different Approach in Nigeria", Unpublished paper, pp.18-19.

⁸³ Ibid., at pp.19-21; Olawoyin, (1973) N.B.J. 81.

⁸⁴ [1962] 1 All N.L.R. 242 at 246.

protect illiterates from being taken advantage of by being made to sign or acknowledge a writing or document which does not bear out their real intention."

Applying the protection given by the Act to insurance contracts, its only real utility would come in situations where proposal forms are filled in for and on behalf of illiterate persons by insurance agents. In such cases, the Act requires that the contents of the form represent the true intentions of the proposer, and are read over and explained before being signed by illiterate proposers.

Apart from the penalties provided in section 4, the real consequences of a failure to comply with the provisions of the Act have come in the attitude of the courts towards enforcing written agreements made in its violation. Although not declaring the agreements void, the courts have held that they are not enforceable at the instance of the 'Writer'. This was the holding of the Supreme Court in Djukpan v. Orovuyovbe,⁸⁵ approving the dictum of Smith J., in U.A.C. v. Edems & Ajayi,⁸⁶ that:

The object of the Ordinance is to protect an illiterate person from possible fraud. Strict compliance therewith is obligatory as regards the writer of the document. If the document creates legal rights and the writer benefits thereunder, those benefits are only enforceable by the writer of the document if he complies strictly with the provisions of the Ordinance.
(Emphasis added).

Needless to say, proposal forms create legal rights between the insured and the insurer especially by virtue of

⁸⁵ [1967] N.M.L.R. 287 at 291.

⁸⁶ [1958] N.R.N.L.R. 33 at p.34.

the 'basis' clause which an insurer would want to benefit from. However, it is unlikely in practice that the insurer would be the 'writer' of the proposal form under the Act, so as to prevent it from taking advantage of its legal rights if done in breach of the provisions. The situation regularly arising in practice is one whereby the writer is the insurance agent, e.g., a canvassing agent who completes a proposal on behalf of an illiterate in breach of the provisions of the Act.

Going by established agency principles, if the act of an agent within the scope of his authority is the act of his principal, then the act of a canvassing agent in completing a proposal form as the 'writer', must be the act of the insurer. Therefore, any failure to comply with the Act (e.g. in reading over the contents of the proposal form to the illiterate proposer or recording accurately his answers) would attract the consequences propounded by the courts above and debar the insurer from enforcing any legal rights arising such as relying on the proposal form and misstatements contained in it to avoid liability. The opposite, however, is the case in insurance law where, as shown, the insurance agent is held the agent of the proposer and not of the insurer in completing proposal forms. Apart from other specific problems arising from the application of the Act (e.g. the meaning of "illiterate", "writer" and the consequences of non-compliance),⁸⁷ it is

⁸⁷ The Act has amassed a sizeable body of judicial pronouncements on these issues, but an examination is outside the scope of this work. Good reference sources

submitted that this is the greatest drawback in its application to agents in completing proposal forms and may account for why lawyers have not sought to invoke it in this respect despite its application in almost every other contract.⁸⁸

One can safely conclude that, as the law stands, the Illiterates Protection Act offers no real protection to illiterate persons when proposal forms are completed by insurance agents. The proposer is not protected from the ability of the insurer to enforce legal rights arising from the form, since the 'writer' (i.e. the canvassing agent) is his agent. The only penalty suffered by an agent acting in breach is the fine or imprisonment imposed in section 4. It is unlikely that an insured would prefer an agent paying a fine or serving a prison term to having his policy repudiated for incorrect answers due to the agent's fault.

4.4 Reform Methods

In most jurisdictions where courts have held insurance

are; Nwogugu, "An Examination of the Position of Illiterates in Nigerian Law", [1968] 12 J.A.L. 32; Sagay, "The Illiterate and Contractual Obligations in Nigeria", (1984) 1&2 J.P.P.L. 17; Adeyemo, "Judicial Interpretation of Illiteracy Protection Law", (1976) 13 N.B.J. 37.

⁸⁸ P.Z. v. Gusau & Kantoma, *supra*; U.A.C. v. Edems & Ajayi, *supra* (guarantee contracts); Igbadune v. Bentworth Finance Ltd. [1965-66] M.W.N.L.R. 122 (hire purchase contract); Djukpan v. Orovuyovbe, *supra*, (contract for the transfer of an interest in land); Osefo v. Nwania [1971] 1 A.L.R. Comm. 421. (simple debt).

agents in the execution of their instructions as agents of the insurer, policy reasons and public interest have largely accounted for this. Such policy considerations have proceeded on the basis that it would be unfair to allow a party who has clothed its agent with authority to subsequently deny that authority when third parties have acted on the representation since an insured cannot be expected to know the limits of an agent's authority.⁸⁹ Secondly, that insurers must bear responsibility for the shortcomings in the way they choose to do business.⁹⁰ Finally, in a country with a high incidence of illiteracy, public policy demands that the Newsholme principle be displaced.

The above policy considerations are exemplified by the Ghanian case of Hijazi v. New India Insurance Co.,⁹¹ where the trial judge concluded (at pp. 23-24) thus:

In a country such as Ghana, in which the overwhelming majority of its citizens are illiterate...it does seem to me to be wrong to accept the principle that normally an insurance agent must be regarded as nothing more than an amanuensis of a would be customer and, therefore the latter's agent for all purposes connected with completing a proposal form... If an insurance company does business through the canvassing activities of an agent employed by it,

⁸⁹ Rapides Club v. American Union Ins. Co. 35 F.2d. 253 (1929); Scott v. Continental Ass. Co. 150 N.E. 2d 38 (1958) (U.S.A.); Stone v. Reliance Mutual [1972] 1 Lloyd's Rep. 469. (U.K.); Blackley v. National Mutual Life Assoc. Ltd. [1972] N.Z.L.R. 1038. (New Zealand).

⁹⁰ Jones v. John Hancock Mut. Life Ins. Co., 289 F. Supp. 930 (1968); Deaves v. CML Fire & General Ins. Co. (1978) 23 A.L.R. 539; Western Australian Ins. Co. v. Dayton (1924) 35 C.L.R. 355 (Australia).

⁹¹ [1969] 1 A.L.R. Comm. 7.

there seems to be no justification whatever in law or in common sense in relieving the company of the consequences of the wrongful acts of its own agent to which no one else has contributed... It is up to insurance companies to see that when dealing with illiterate persons, the latter are placed in a position to appreciate and understand the full import and significance of the transaction.

However, it would appear such policy considerations have hardly found their place in the minds of the Nigerian courts.

Conflicting judicial opinion in common law jurisdictions indicates that the problem is beyond resolution by the courts. The trend is for legislation to shift responsibility for the acts of agents to insurers where the failure of case law has rendered the need more compelling. Thus, section 10 of the New Zealand Insurance Law Reform Act 1977 provides that:

(1). A representative of the insurer who acts for the insurer during the negotiation of any contract of insurance, and so acts within the scope of his actual or apparent authority, shall be deemed as between the insured and the insurer and at all times during the negotiations until the contract comes into being, to be the agent of the insurer.

(2). An insurer shall be deemed to have notice of all matters material to a contract of insurance known to a representative of the insurer concerned in the negotiation of the contract before the proposal of the insured is accepted by the insurer.

Sections 11 and 12 of the Australian Insurance (Agents and Brokers) Act 1984 cumulatively makes an insurer responsible for the conduct of his agent or employee in connection with any matter relating to insurance notwithstanding the agent or employee acted outside his authority, provided the

insured or intending insured acted in good faith. In the United Kingdom, the Law Reform Committee in 1957 was of opinion that:

Any person who solicits or negotiates a contract of insurance should be deemed, for the purposes of the formation of the contract, to be the agent of the insurers...the knowledge of such person should be deemed to be the knowledge of the insurer.⁹²

This provision is yet to be implemented however.

The Nigerian Law Reform Commission, in its deliberations on the review of insurance laws, conceded that "the situation where an agent employed by an insurance company helps a potential insured to fill in a proposal form is regarded for that purpose as the agent of the insured, is highly unsatisfactory and has led to harmful results". A recommendation was made for legislative reversal of this rule by regarding insurance employees as agents of the insurer unless there is clear evidence that the insured had made him his agent.⁹³ The Commission opined that this necessitated amending the definition of an insurance agent in section 62 of the Act of 1976 to include an "agent who helps an applicant to complete an application or proposal form for insurance unless there is written evidence to the contrary".

However, the Insurance (Special Provisions) Decree

⁹² Fifth Report, Conditions and Exceptions in Insurance policies, (1957) Cmnd. 62, at p.7. This view was reiterated by the U.K. Government in the document on the regulation of intermediaries, see Insurance Intermediaries, (1977) Cmnd. 6715 at paras. 14-16.

⁹³ Law Reform Journal, No.5 (1986), paras.1-2 p.178.

1988 enacted in response to the Commission's reform proposals refrained from adopting even the limited recommendation. The law makers chose instead to give legislative force to the rule in Newsholme and Idugboe by providing, *inter alia*, in section 1 of the Decree that:

(2) The proposal form or other application form for insurance shall be printed in easily readable letters, and shall state, as a note in a conspicuous place on the front page, that "An agent who assists an applicant to complete an application or proposal form for insurance shall be deemed to have done so as the agent of the applicant."

(3) A disclosure or representation made by the insured to the insurance agent shall be deemed to be disclosure or representation to the insurer, provided the agent is acting within his authority.

Section 1(2) is a departure from the Law Commission's views and comes as a surprise when the trend in common law jurisdictions is to place responsibility for the acts or omissions of agents, at least in the completion of proposals, firmly on insurers employing them. The provision serves the dual purpose of giving legislative approval to the rule in Idugboe with its effects, and express transfer of agency clauses by making the latter compulsory.

Perhaps, the law makers were persuaded by the need to place the duty of disclosing material facts accurately primarily on insureds irrespective of whether proposal forms are completed personally or by agents. Apparent justification for the approach is premised on the fact that insureds would take greater care to ensure that misstatements are unrecorded by agents in proposal forms,

moreso that a residual duty of disclosure where proposal forms are used is abolished.⁹⁴ While this is desirable, section 1(2) proceeds on the unlikely assumption that applicants will read and be aware of the legal consequences of the printed provisions. This assumption is not borne out by insurance practice and the reality of canvassing, whereby it is common for insurers to compel agents to complete proposals irrespective of illiteracy, as in Dike. In the absence of compulsion, some agents would by themselves insist on completing forms. In such cases, no opportunity is afforded the proposer to read the proposal form before answers are inserted by the agent.

It is not obvious why a proposer should not rely on the skill and care of an agent expressly authorised to negotiate the proposal. In any event, the provision does not protect illiterate proposers who of necessity require others to complete applications on their behalf, and it is contended that the agent who approaches them is best placed to fulfil the task.

Section 1(3) might have been intended to water down the effects of section 1(2). In practical terms, section 1(3) would apply only where proposal forms are not completed. Since the effect of section 1(1) is to abolish a residual duty of disclosure in cases where proposal forms are used,⁹⁵ there is nothing to disclose to the agent requiring imputation to the insurer in such cases. More

⁹⁴ See Chapter 6 para. 6.5, *infra*.

⁹⁵ Ibid.

importantly, in limiting itself to agents acting within authority, however, the provision alters nothing in the common law.

The incapability of the concept of authority to protect insureds dealing with agents in all cases was shown in Onuh v. United Nigeria Insurance Co., (supra), and the reasons are aptly stated in the following view:

The present law determines the rights of insurer and insured partly by reference to arrangements between insurer and agent and partly by reference to the authority which persons in the agent's position normally have. Each of these is beyond the knowledge and experience of many members of the public. What is within their knowledge and experience is what an insurance agent represents to them as being within his authority. To place restrictions on an insurer's responsibility by reference to an agent's actual and apparent authority is necessarily to discriminate against those persons in the community who, by reason of their knowledge and background, education and training, are lacking in knowledge, are most in need of advice and assistance and are most likely to rely uncritically on the advice of the insurer's agent.⁹⁶

The long term effect of the 1988 provisions would be a reduction in the level of training, supervision, and control which insurers exercise over agents and employees since the law relieves them of liability for the negligent, and perhaps fraudulent, acts of agents in completing proposals forms.

Furthermore, it appears an ambiguity is created when the 1988 provisions are applied to practical situations such as those arising in Idugboe and Ogbebor, where insureds supplied correct material information to the agent

⁹⁶ Australia Law Reform Commission Report No.16, Insurance Agents and Brokers, (1980) p.23.

while the latter acting on his own records untruths. By section 1(2), the agent acts for the insured so that incorrect answers would enable the insurer to repudiate, whereas, by section 1(3) if the agent is authorised to receive disclosures, his knowledge of the truth is imputed to the insurer. In practice, insurers would deny the agent's authority to accept disclosures as a means of avoiding section 1(3).

On a wider note, it would appear the Decree limits its application to agents and does not cover brokers.⁹⁷ Thus, common law principles would continue to govern the latter with the effect that they remain agents of the insured in the completion of proposal forms and, more importantly, disclosures made to them may not be imputed to the insurer.⁹⁸ The geographical location of insurers makes Nigerian brokers in many cases the only link with insurers. Moreover, brokers are not completely outside the control of insurers as insurers would make one believe. In many cases, insurers utilise brokers as contact points in getting through to insureds e.g., delivery of policies, collection of premiums, issuing cover notes and renewal notices. There is no reason why in appropriate cases disclosure to

⁹⁷ Cf. the New Zealand and the Law Reform Committee (U.K.) proposals, which apply to both agents and brokers.

⁹⁸ See O'Connor v. Kirby [1972] 1 Q.B. 90; Dunbar v. A & B Painters [1986] 2 Lloyd's Rep. 38. In Robert v. Plaisted [1989] 2 Lloyd's Rep. 341 at 345, Purchas L.J. expressed concern at the principle that a full and frank disclosure to a broker was not disclosure to the insurer, and thought it deserved the attention of the Law Commission at an appropriate time.

brokers should not be disclosure to insurer.⁹⁹

The limitation of the Decree to completion of proposal forms and receipt of information means that other activities of agents such as misrepresentations in the scope of policies and policy conditions, false promises as to benefits derivable from particular policies, waiver of disclosure and breach of conditions, must be left to be settled by common law principles of authority which is to the advantage of insurers to deny their agents as possessing.

It is submitted that the solution should be for the law to place general responsibility on insurers for the conduct of agents employed by them in all their activities while acting for the insurer.¹⁰⁰ This has the significant advantage that the natural consequence would be tighter control and supervision of agents by insurers which they are well placed to undertake. This would invariably lead to higher standards of education and training for agents considered overdue in the absence of minimum standards of qualification for licensing under the Insurance Act of 1976. Finally, a burden would be removed from the

⁹⁹ See e.g. Woolcott v. Excess Ins. Co. [1979]1 Lloyd's Rep. 231.

¹⁰⁰ See ss. 11 and 12 of the Insurance (Agents and Brokers) Act 1984 (Australia). This is the view taken by the U.K. government on the regulation of intermediaries in the consultative document preceding the Insurance Brokers (Registration) Act 1977,-Insurance Intermediaries Cmnd. 6715, paras.15&16. However, the view is yet to be implemented in relation to agents. See also Colenutt, "The Regulation of Insurance Intermediaries in the United Kingdom", (1979) 46 Journal of Risk and Insurance 77.

supervisory authorities under the 1976 Act. Governmental supervision will then be limited to the licensing of agents, but not detail supervision.

The Act of 1976 presently retains some check on the activities of brokers by empowering the Director under section 27(7)(c) to cancel the certificate/licence of a broker who has materially misrepresented the terms and conditions of any policy or contract of insurance which he has sold to clients or seeks to sell to prospective clients. There is no explanation for why similar restrictions are not placed on agents. The unlimited liability of brokers, their professional status and professional indemnity cover, and the requirement that they maintain a statutory deposit at all times mean they are better placed than agents to compensate insureds for losses resulting from their acts or omissions.

4.5 Agency in the Collection and Payment of Premiums

The premium is the consideration (usually monetary) paid by the insured to the insurer for the latter's agreement to bear the risk of loss which may befall the former. The necessity for a definition is to show the importance of premium payments in keeping the insurer on risk. This also explains the desirability of considering the law governing intermediaries in the receipt and payment of premiums.

Most proposal forms in the market provide that "No insurance is in force until the proposal has been accepted

by the company and the premium paid". And, it is invariably recited in the policy that the due payment and receipt of the premium is a condition precedent to the liability of the insurer to settle any claims.¹⁰¹ The presence of this clause in the policy issued in Bamidele v. Nigerian General Insurance Co. Ltd.,¹⁰² and the finding that premiums claimed to have been paid to the insurer's canvassing agent were never transmitted to the insurer, led to the holding that a condition precedent to liability had not been satisfied. Indeed, by virtue of the "Payment of Premium Warranty" introduced to stem the level of outstanding premiums owed to insurers, certain policies should contain a term to the effect that there will be no cover unless premiums are received by the insurer within in a certain period of time, (see Chapter 8 para. 8.3.1, below).

In the absence of express policy stipulations, there may be no concluded contract unless there is agreement on the amount of premium.¹⁰³ It has been held that non-payment

¹⁰¹ In Fadayomi v. Mercury Ass. Co. [1973] 3 U.I.L.R. 424, the policy provided that "the company shall not be liable in respect of any claim arising during non-payment of instalments", and this was held sufficient to defeat a claim by the insured for loss suffered during a period of late payment. In the absence of policy stipulations, however, there maybe a binding contract irrespective of the non-payment of premiums, see Babalola v. Harmony Ins. [1982] 1 O.Y.S.H.C. p.7.

¹⁰² [1973] 3 U.I.L.R. 418.

¹⁰³ Esewe v. Asiemio [1975] N.C.L.R. 433 at 438.

of premium within the days of grace lapses a life policy.¹⁰⁴

In Obaro v. African Alliance Insurance Co.,¹⁰⁵ it was held that the punctual payment of the renewal premium is essential to the continuance of all classes of insurance unless there is something in the contract to dispense with it. It was further held that, where no such stipulation exists, it is the well established understanding in insurance that time is of the essence of the contract, and whether there is an express forfeiture clause or not, default in the payment of any one premium, even for a day, will release the insurer from further liability.

In many instances, for reasons of remoteness, premiums are handed to agents and brokers for onward transmission to insurers. In some cases canvassing agents demand that premiums be paid to them immediately on completion of proposal forms, while brokers issuing cover notes demand prepayment of premiums. Problems arise in any of the situations when premiums paid to intermediaries fail to find their way to insurers so that when claims arise insurers refuse to pay for non payment of premiums, and the issue is whether they are entitled to do so. Notwithstanding claims, some insurers contend they have the right to look to the insured for premiums even though these have been paid to an intermediary. As discussed in Chapter

¹⁰⁴ Crusader Insurance v. Anunike [1975] 1 All N.L.R. 98; Ajala v. American Life Insurance Co. [1972] N.C.L.R. 95.

¹⁰⁵ [1975] N.C.L.R. 113 at p.123. See also Chime v. United Nigeria Insurance Co. Ltd. [1972] 2 E.C.S.L.R. 808 at 811.

3 para. 3.6, supra, large sums of premium income remain outstanding in the hands of insurance intermediaries and this makes the problem more real than imaginary.

As the law stands, a resolution of the problem will depend on an application of relevant agency principles on authority. It is settled that where the agent of an insurer, whether he is a salaried servant or canvassing agent, has authority to collect premiums, money paid to him is deemed to be paid to and received by the insurer so long as he acts within that authority.¹⁰⁶ U.A.C. v. Owoade,¹⁰⁷ establishes that the agency principle is the same where the agent acts in fraud of his principal by misappropriating premiums received so long as the third party is not privy to the fraud. It would appear from Bamidele (supra) that knowledge by the insured that the agent is defrauding the insurer by misappropriating the premiums paid to him prevents the operation of this principle.

In Onwuegbu v. African Insurance Co. (supra), the insurer claimed additionally, it was not bound to indemnify the insured on the certificate issued by its canvassing agent since the agent had made away with the premium paid to him. Kaine J., held that since the agent was authorised by the insurer to receive premiums, if he

¹⁰⁶ It was held in Chime v. United Nigeria Ins. [1972] 2 E.C.S.L.R. 808 that employers of the insured who regularly paid his premium directly to the insurer after deducting it from his salary were not thereby constituted agents of the insurer for the receipt of premiums.

¹⁰⁷ [1955] A.C. 130.

"misappropriated the amount collected on their behalf, it is their own look out and not that of the insured."¹⁰⁸

A similar defence re-echoed in Esewe v. Asiemo (supra), where the insurer sought to escape liability on account of the fraud of its branch manager in misappropriating premiums collected. Atake J., observed that:

I have not been satisfied on this fraud... but assuming he was fraudulent and that he did misappropriate the premium...he was nonetheless the servant of the [insurer] acting within the scope of his authority in the execution of his master's business. U.A.C. Ltd. v. Owoade is authority for saying that in such a case liability to a third party still lies with the master.¹⁰⁹

From the cases, it is clear that whether an insurer is deemed to have received premiums collected by the agent will turn on the latter's express, implied or apparent authority. In some cases, authority to collect premiums and hold on account for the insurer is contained in the agreement appointing the agent. In the absence of express authority, it appears canvassing agents with authority to issue cover notes and certificates, or in possession of the insurer's receipt books and with authority to issue receipts for premiums, will have an ostensible authority to collect premiums.¹¹⁰ Local agents with similar powers would also possess ostensible authority to collect premiums on

¹⁰⁸ [1965] 2 All N.L.R. at p.115.

¹⁰⁹ [1975] N.C.L.R. at p.439.

¹¹⁰ See Northern Ass. Co. v. Idugboe, supra; Onwuegbu v. African Ins. Co., supra; Babalola v. Harmony Ins. Co., supra.

the insurer's behalf.¹¹¹ Branch managers and senior employees should at least have implied actual authority to receive premiums.¹¹²

The position is more complicated in relation to brokers. This stems from deeply rooted judicial views examined earlier that brokers act as agents of insureds in all matters relating to the placement of insurance. This enables insurers to argue that receipt of premiums by brokers is not receipt by them. A specimen agency agreement with a broker provides:

By the acceptance of this Agreement, you agree that all moneys received or collected under this Agreement shall be treated wholly as fiduciary funds and shall be reported upon and transmitted in accordance with instructions.

It may be possible to construe such a clause as constituting the broker as an agent of the insurer in the receipt of premiums.

In the absence of express authority, it could be argued that section 28(2) of the Insurance Act of 1976, in requiring brokers to forward to insurers all premiums collected within 30 days of receipt, constitutes brokers into statutory agents of insurers with authority to collect premiums on their behalf. This proposition has not been tested in the courts and it is difficult to envisage judicial reaction. However, it appears the courts are prepared to accept that a broker with authority to issue

¹¹¹ Bamidele v. Nigerian General Ins. [1973] 3 U.I.L.R. 418.

¹¹² Esewe v. Asiemo, supra; Nasidi v. Mercury Ass. [1971] 1 N.C.L.R. 387.

cover notes and bind the insurer on interim contracts, and entrusted with premium receipt books, has an ostensible authority to collect premiums on the insurer's behalf. This would follow from the ratio in Salami v. Guinea Insurance, (supra) where, though the case did not turn on payment of premiums, it was held that if a broker is held out as having authority to do any act on behalf of the insurer, he will bind the insurer by performing that act even though acting entirely in his own interest and with intent to defraud.

It has been observed that although a broker, *prima facie*, has no authority to receive premium, in practice, he is often constituted an agent for that purpose and the agreement usually provides that he holds the premium in trust for the insurer.¹¹³ Courts may be able to give effect to this trade practice.

Moreover, it has been said that brokers fall into the category of agents known as de l'credere agents and, as such, are guarantors of premium payments to insurers.¹¹⁴ In the absence of judicial support, this view cannot be accepted as the position, neither does Nigerian insurance practice support the conclusion. Nigerian brokers do not

¹¹³ Orojo, Nigerian Commercial Law and Practice, (1984) para.10.89.

¹¹⁴ Talabi, "Brokers Liability for Insurance Premium", p.4, a paper presented to the legal committee of the Nigerian Insurance Association in July 1987. For a contrary view, see Adeyemi, "The Legal Status of Insurance Agents", Nigerian Commercial Laws, (1984) p.219.

guarantee payment of premiums to insurers whether received from insureds or not.¹¹⁵ The marine broker constitutes an exception to this rule, however, as his position is clearly defined by section 54(1) of the Marine Insurance Act of 1961 which provides that:

Unless otherwise agreed, where a marine policy is effected on behalf of the assured by a broker, the broker is directly responsible to the insurer for the premium, and the insurer is directly responsible to the assured for the amount which may be payable in respect of losses, or in respect of returnable premium.

The position of marine brokers in the market is thus analogous to that of Lloyd's brokers and marine brokers under the Marine Insurance Act of 1906 (U.K.) on which the 1961 Act is based. In marine contracts, the insurer must look only to the broker for premiums whether or not received by the broker. The limitation to marine insurance and failure of the Act of 1976 to extend the provision to all classes of insurance is inexplicable. Perhaps, the problem of premium retention and its vitiating consequences on insurance contracts were not envisaged at the time of enactment.

While it is not necessary to hold brokers personally liable to insurers for the payment of premiums which have not been received,¹¹⁶ there is the need for a legal provision holding agents employed by insurers and brokers

¹¹⁵ The customary practice in the Lloyd's insurance market is for underwriters to look to brokers for premium payments.

¹¹⁶ See Wilson v. Avec Audio-Visual Ltd. [1974] 1 Lloyd's Rep. 81.

as agents of insurers in the receipt of premiums, so that sums paid to them are deemed as paid to the insurer.¹¹⁷ The necessity arises to eliminate the uncertainty in the application of principles of authority and to estop insurers from disclaiming liability once premiums are shown to be received by an intermediary through whom the policy is effected. Surprisingly, the 1988 Insurance Decree is completely silent on the issue.

4.6 Conclusion

General responsibility should be placed on insurers for the activities of agents employed by them, whether in the completion of proposal forms, misrepresentations, receipt of material information, or premiums. Such a development would not be onerous on insurers as most agents are under their direct control and all that need be done is to increase the supervision of their activities.

The advantage of the recommendation lies in the fact that it makes insurance law correspond to modern practice and expectation of insureds. Consumers dealing with insurance agents do so on the footing that they are knowledgeable and trustworthy people and dealing with them is as good as dealing personally with the insurer. However, the law as it stands gives a shock when it holds

¹¹⁷ This is the effect of s.14 of the Australian Insurance (Agents and Brokers) Act 1984 which further provides that payment by the insurer of moneys destined for the insured to an intermediary does not discharge any liability of the insurer to the insured in respect of the moneys.

the converse of the assumption. The same cannot readily be said for brokers since arguments that insurers lack real control over the activities of this group, is correct. For them, a system of occupational self regulation is called for with the hope that better monitoring of compliance with professional standards would ensure that their business is properly conducted in the interest of those relying on their expertise. However, there must be a clear recognition by the law that in certain cases the broker acts as the agent of the insurer.

As at January 1989 there were 256 registered brokers and 12,253 licensed agents operating in the market, and all under the supervision of the Director of Insurance thereby making overall supervision less effective. The proposals have the additional advantage that agents and brokers are removed from a common supervisory umbrella, leaving the office of the Director better positioned to undertake the supervision of insurance companies only.

CHAPTER 5

WARRANTIES AND CONDITIONS IN INSURANCE CONTRACTS

5.1 Introduction

Insurance transactions are contractual, involving an agreement between parties to the contract (insurer and insured) on the terms that will regulate their rights, duties and obligations during the contractual period. Agreed terms are usually embodied in the policy of insurance.

Freedom of contract means that parties are free to impose contractual terms on themselves which the courts would uphold as binding. The result is that though parties are deemed to have voluntarily agreed, it is not infrequent that one party complains and seeks to be protected from the consequences of non-performance of certain terms on the ground that they do not operate fairly towards him. This party is usually the insured in contracts of insurance.

Quite apart from complaints about the manner of creating contractual terms and the need for harmonisation, the lack of adequate notice of these terms, difficulty encountered in comprehension, and the ease with which onerous terms can be imposed considered in Chapter 2, *supra*, dissatisfaction is expressed at the legal consequences flowing from non-observance of contractual terms as judicially interpreted.

It is the aim of this Chapter to evaluate problems raised by contractual stipulations against the desirability

of protecting insureds, and how far Nigerian insurance law has attempted to secure protection. It should be borne in mind that the most common reason why insurers in Nigeria have refused to pay upon loss has been on account of the non-observance of contractual stipulations. Relevant legal principles are laid down in the case law which will be examined, and reform suggestions are made where appropriate.

5.2 Defining Contractual Terms

Stipulations appearing in a contract of insurance imposing obligations on the insured divide in two broad heads viz; warranties and conditions as in the general law of contract. In the general law though, the expression 'warranty' is used to refer to a collateral term of the agreement the breach of which entitles the party not in breach to damages only, while a 'condition' is held a vital term of the contract breach of which entitles the innocent party to rescind the contract and/or claim damages.

In insurance law, while it appears settled that a warranty carries the consequences of avoidance as a condition in the general law, it is not so clear whether there is a distinction in the words 'warranty' and 'condition' regarding their effects on the insurance contract upon breach. Both words are sometimes used with reference to vital terms of the contract entitling the insurer to repudiate the policy, thus, creating some

difficulty in defining these terms in insurance law.¹ In Provincial Insurance Co. Ltd. v. Morgan, Lord Wright noted that the "words are used as equivalent in insurance law".²

There is also a lack of unanimity in the methods adopted in defining or classifying contractual terms in the texts. The learned authors of MacGillivray and Parkington on Insurance Law (8th ed.), while refraining from a definition of conditions generally, define a warranty, at para. 727, as a term the breach of which entitles the insurer to avoid the policy and repudiate all liability from the date of breach. Professor Ivamy, however, classifies terms bearing similar consequences as conditions precedent or subsequent to the validity of the policy without defining a warranty.³

For the purposes of this Chapter, however, it is proposed to discuss contractual stipulations under the heads of warranties and conditions. Warranty is used here in the sense described in MacGillivray above. However, it is important to note that by virtue of "condition precedent" clauses contained in policies, compliance with terms described as 'conditions' are made precedent to either the continued validity of the policy in which case

¹ "The use of those two words [condition and warranty] is not entirely happy because it is well known...that the word 'warranty' is often used when those who use it in truth mean 'condition'". - Per Roskill J. in Lane v. Spratt [1970] 2 Q.B. 480, 486.

² [1933] A.C. 240,253.

³ Ivamy, General Principles of Insurance Law, (5th ed.) pp.274-276.

they possess the attributes of a warranty, or the insured's ability to recover for a particular loss without affecting the existence of the policy.

Much of the dissatisfaction expressed in relation to contractual terms have been directed at the effects of breach in law. However, this issue cannot be divorced from their classification in insurance, as the effect of a term by and large depends on category, and both the effect and category are linked with the mode of creation. Hence, it is appropriate to consider the three issues together under the headings of 'warranties' and 'conditions'.

5.3 Warranties:

The expression 'warranty' imports that a particular state of facts in the present or in the future is a term of the contract, and, further that if the warranty is not made good the contract of insurance is void. It is not necessary that the term 'warranty' should be used, as any form of words expressing the existence of a particular state of facts as a condition of the contract is enough to constitute a warranty. If there is such a warranty the materiality in themselves is irrelevant; by contract their existence is made a condition of the contract.⁴

Subject to the qualification that a breach of warranty does not automatically avoid the contract but gives the insurer the option to avoid it from the date of breach,⁵ the

⁴ Per Viscount Finlay in Dawsons Ltd. v. Bonnin [1922] 2 A.C. 413 at 428-429 quoted by Taylor C.J. in Akpata v. African Alliance Ins. Co. [1967] 3 A.L.R. Comm. 264 at 281. Note the use of the word 'condition' in defining a warranty.

⁵ See Bank of Nova Scotia v. Hellenic Mutual, The Good Luck [1989] 3 All E.R. 628. (C.A.).

above dictum sums the nature of warranties in insurance and show they divide into two main categories of promises by the insured.

Warranties of past and present facts are promises that a particular state of facts have existed in the past or exist at the time they are made till the contract is concluded. If the promise is false, the insurer can avoid the policy from inception since the matters relate to the precontractual period and the existence of the contract is preconditioned on their correctness. Promissory or continuing warranties are promises that a certain state of affairs will or will not exist throughout the duration of the contract. Non-fulfillment of that promised enables the insurer to avoid the policy from the date of breach only and not before then. The significance is that a loss occurring before the breach remains covered but not subsequent losses.

Section 34(1) of the Marine Insurance Act 1961 which is the ipsissima verba of Section 33(1) of the 1906 Act (U.K.) states that a warranty means;

a promissory warranty, that is to say, a warranty by which the assured undertakes that some particular thing shall or shall not be done, or that some condition shall be fulfilled, or whereby he affirms or negatives the existence of a particular state of facts.

Use of the word 'promissory' does not mean marine warranties can only relate to the future. The word is used in the sense that warranties are promises made so that the above definition envisages past and present warranties in marine contracts.

Warranties are contractual terms and, as such, are found in documents evidencing the contract usually the policy or in a proposal form incorporated in the contract by reference.⁶ When warranties appear in the policy, the promise(s) would usually be preceded by 'it is warranted' or similar words, though in the absence of such words it is for the courts to decide whether a warranty is created by certain statements.⁷ A common method of creating warranties in the Nigerian market, as elsewhere, is by means of a declaration in proposal forms known as the 'basis of contract' clause. This device deserves separate consideration in view of the importance of the law surrounding it.

5.3.1 The Basis of the Contract Clause in Proposal Forms

The easiest and most common way by which insurers create all classes of warranty is by the insertion of a declaration signed by the insured in a proposal form whereby the latter is made to warrant the truth and accuracy of the answers supplied and declared to be the basis of the contract between the parties.⁸ The declaration is fairly standard and, subject to minor differences, the

⁶ See Chapter 2 paras. 2.3 and 2.6, *supra*.

⁷ Wheelton v. Hardisty (1858) 8. E. & B. 232.

⁸ MacGillivray and Parkington, *op. cit.*, para.737; Birds, Modern Insurance Law, (2nd ed.), p.106. However, Professor Ivamy writes that if the performance of an obligation is declared to be the basis of the contract, the stipulation is to be construed as a condition: Ivamy, *op. cit.*, p.278.

material portion reads:

I the undersigned...do hereby declare that the particulars and statements of this proposal are true and complete and...hereby agree that this declaration shall be held to be promissory and shall form the basis of the contract between me and the [insurer].

It is common for the policy issued to recite that answers supplied in the proposal form shall be the basis of the contract. In addition, an independent clause of the policy makes the truth of answers and statements in the proposal, a condition precedent to the liability of the insurer to make any payment. However, the absence of these policy provisions is immaterial provided it is the intention of the parties that the proposal form should be the basis of the contract between them.⁹

This device for creating warranties together with the law surrounding its use has English common law origins,¹⁰ and came to be used in the Nigerian market by virtue of the early British domination of the industry. While a breach of warranty *prima facie* entitles the insurer to avoid the contract and the basis clause is only one way of creating a warranty, much of the unsatisfactory state of the law

⁹ For a criticism, see MacGilliray and Parkington, op.cit., para.728. Okagbue J., referring to the declaration in the proposal form only, noted that "the effect of this is that the proposal form and the policy shall be read as one". - Ilonzo & Sons v. Universal Ins. Co. Ltd. [1972] 2 E.C.S.L.R. 611 at 613.

¹⁰ See the comprehensive article by Hasson, "The 'Basis of the Contract Clause' in Insurance Law", (1971) 34 M.L.R. 29, where the writer traces the early development of the device to its modern use and concludes that the judges in formulating the law surrounding its initial use never intended the consequences ascribed to it in modern times.

regarding the effects of warranties in insurance arise from the consequences of the basis clause as interpreted in the cases. Thus, Hasson opines that "No meaningful reform of insurance law can be achieved without a complete overhaul of the law which has developed around the clause in insurance litigation."¹¹

The effects of the device are two fold. A cardinal principle of warranty is that breach entitles the insurer to avoid irrespective of its materiality to the risk (in the sense of operating to prevent it or affecting the insurer in accepting the risk) and though the breach is irrelevant to the loss subsequently occurring. The basis clause by converting answers in proposal forms into warranties clothes them with these effects. Secondly, all representations in the form become material. The rationale is that parties are free to determine for themselves which terms are material and the basis clause is one way of achieving this.¹² An incorrect answer supplied by the insured is fatal to his claim whether or not the question was answered to the best of his knowledge and belief, and notwithstanding he was not in possession of the requisite information at the time of answering.¹³ The effects are

¹¹ Ibid.

¹² Thomsom v. Weems (1884) 9 App. Cas. 671 at 683,684; Anderson v. Fitzgerald (1853) 4 H.L. Cas. 484 at p.503.

¹³ Joel v. Law Union and Crown Ins. [1908] 2 K.B.863. In Ilonzo v. Universal Ins. Co. Ltd. (supra) Okagbue J., on the effect of a basis clause, said; "In fact where there is any misrepresentation on the proposal form the policy can be avoided by the insurers".

summed up thus:

The result of the presence of such a clause in a proposal form is therefore to render irrelevant any question either of the materiality of the information so obtained, or of the honesty or care with which it was given. If the answer given was inaccurate, the insurers are at liberty to repudiate.¹⁴

The results are illustrated in the cases; Akpata v. African Alliance Insurance Co. Ltd.,¹⁵ is the earliest reported Nigerian decision in point. Here, an applicant for life cover completed a proposal form containing, inter alia, the following questions; "Do you usually enjoy good health?" and "Has any proposal on your life ever been made?". The questions were answered in the affirmative and negative respectively. The signed proposal contained the basis of the contract declaration which was recited in the policy issued. The proposer was put to a medical examination the results of which were recorded in a questionnaire warranting the truth of answers supplied, but without being declared as forming the basis of the contract. To the question "Have you ever suffered or do you now suffer from...Gastric or duodenal ulcers", the reply was 'No'. The assured died of cancer of the stomach. It was revealed at trial that unknown to him and his doctors, he suffered from stomach ulcers at the time of the answers. The ulcer was also undetected by the insurer's

¹⁴ The Fifth Report of the Law Reform Committee, Cmnd. 62 (1957) p.4. This should be read with the qualification that trifling inaccuracies will not vitiate the contract: Dawsons Ltd. v. Bonnin [1922] 2 A.C. 413.

¹⁵ [1967] 3 A.L.R. Comm. 264.

doctor during the examination. It also turned out that the assured held a life policy in the past.

On the above facts, Taylor C.J., found both the proposal and questionnaire formed the basis of the contract.¹⁶ The insurer was unable to repudiate on account of the untrue statements as to the assured's health since these were not incorrectly answered in light of the knowledge available to him, but could do so by virtue of the false answer to the previous policy. Applying the House of Lord's decision in Dawsons Ltd. v. Bonnin,¹⁷ it was held that the materiality of the answers was irrelevant; "Once the truth of the facts is warranted the question of materiality does not arise".¹⁸

The same result followed in Ilonzo & Sons v. Universal Insurance Co. Ltd. (supra), where applying the Dawsons case, insurers were held entitled to repudiate the contract on account of a false answer given in the proposal as to where books of accounts are kept without regard to its materiality. Thus, in both Akpata and Ilonzo the basis clause was sufficient to convert proposal answers into warranties of existing facts.

While the above were decisions at first instance, a similar result was arrived at by the Supreme Court in Royal

¹⁶ This was because the questionnaire referred to the proposal while the latter was declared to be the basis of the contract.

¹⁷ [1922] 2 A.C. 413.

¹⁸ [1967] 3 A.L.R. Comm. at p.280.

Exchange Assurance Co. Ltd. v. Chukwurah.¹⁹ An insured under a motor policy answered 'No' to question 6(c) on the proposal form "Will the motor car be driven by any person who to your knowledge has held for less than one year a full licence to drive such vehicles?". To an earlier question (6(a)), the insured described himself as a learner driver. The answers were warranted and declared to be the basis of the contract. The insured had an accident with the vehicle when his licence was a month and two days old whereupon the insurer repudiated liability on account of the wrong information supplied to question 6(c). Sir Darnley Alexander C.J.N., held the insured in breach of a promissory warranty not to drive the vehicle with less than a full year's licence. Applying the decision in Dawsons (supra), he observed:

...where a proposal is made the "basis" of a contract of insurance, any misstatement in it, whether material or not, is a ground on which the insurers may avoid liability under the policy and is a good and valid defence to an action for indemnity by the policyholder.²⁰

Apart from the irrelevance of the breach to the loss (which the court felt unnecessary to consider) other important results arise from the use of the clause in the case.

It was contended for the insured that question 6(c) as framed was not intended to apply to him but only to others. The trial judge accepted this argument, observing that to construe the question otherwise would have made the words

¹⁹ [1976] N.C.L.R. 191.

²⁰ Ibid. at pp.196-197. The dictum was applied by Agoro J., in American International Ins. v. Dike [1978] N.C.L.R. 402.

'to your knowledge' used therein ridiculous and meaningless, but the Supreme Court regarded the argument as "untenable".

Secondly, it is arguable that by requiring the insured to answer to his knowledge, only a warranty of opinion or belief was created which gave the insurers a right if dishonestly or recklessly made.²¹ The case illustrates the difficulty faced by insureds in appreciating the effect of warranties created by answers supplied when declared to be the basis of the contract.²²

Finally, the answer to question 6(a) had shown the proposer as a learner driver holding no valid licence at the time it was supplied, which the court found correct. It would appear that but for the basis clause, therefore, the insurer could not have relied on non-disclosure or misrepresentation to avoid liability since the proposal would be considered as a whole.²³

5.3.2 Strict and Literal Compliance with Warranties

Ancillary to the principle that the materiality of a warranty whether created by the basis clause or written on the policy is irrelevant, is the principle mandating the

²¹ For this type of warranty see Birds, Modern Insurance Law, p.103. Though this may not affect the result reached.

²² See Birds, "Warranties in Insurance Proposal Forms", [1977] J.B.L. 231. As the writer points out, it is unfortunate that insurers do not draft proposal questions intending to create warranties clearly nor make it clear to the layman the consequences of the slightest inaccuracy.

²³ For this aspect of the case see Chapter 6 para. 6.5.4, *infra*.

insured to comply strictly and literally with the terms of the warranty once created. Accordingly, it is inconsequential that non-compliance did not contribute to the loss or increase the possibility that a loss would occur in the way it did, or at all. Implicit in the requirement are that;

- (a) Substantial compliance with a warranty does not suffice.
- (b) The purpose for which a warranty is created is secondary.
- (c) The peculiar circumstances of the insured or insured property and his ability to comply are irrelevant.

The most common warranty which has worked against insureds in Nigeria is that generally called the 'Documentary Evidence Warranty' whereby the insured warrants to keep during the policy "a complete set of books, accounts and stocks sheet showing a true and accurate record of all business transactions" in English. This has become fairly standard in commercial burglary or fire policies insuring stock-in-trade.

In Mattar v. Norwich Union Fire Insurance Society,²⁴ such a warranty appeared in a burglary policy on which the insured sought to recover for loss by theft whereupon the insurer relied on its breach. The insured contended that he kept sufficient books and records to enable the insurer determine what goods were in the shop and their value at the time of loss. Accordingly, it was submitted that as

²⁴ [1965] A.L.R. Comm. 268.

the warranty was vague, the sales books and invoices kept by the insured would suffice. This argument was rejected by the Supreme Court. It was held that terms in the nature of warranties demanded strict and literal compliance and not substantial compliance no matter how close. In reaching this conclusion, the court appeared unmindful of the warning of the Lord President in the Scottish case of Kennedy v. Smith that:

If insurers seek to limit their liability under a policy by relying upon alleged undertaking as to the future prepared by them and accepted by the insured, the language they use must be such that the terms of the alleged undertaking and its scope are clearly and unambiguously expressed or plainly implied,... any such alleged undertaking will be construed, in *dubio*, *contra proferentem*.²⁵

Identical warranties appeared in the policies in Ilonzo (supra), and Onuh v. United Nigeria Insurance Co.²⁶ The courts had no difficulty in holding insurers entitled to avoid for the failure to keep books of account. It was emphasised in the latter case that the importance of keeping account books is to enable insurers ascertain the character and amount of loss and to check exaggerations and falsity. However, in neither case was it necessary to show that the breach prevented the insurers from ascertaining the loss suffered or that the claims were falsely exaggerated.

²⁵ 1976 S.L.T. 110 at p.116. See the Ghanaian case of Hijazi v. New India Ins. Co. [1969] 1 A.L.R. Comm. 7 where a term requiring the insured to keep books of account was held a condition allowing claims to be adjusted after loss and not a warranty.

²⁶ [1975] N.C.L.R. 413.

Using door locks different from chubb locks warranted and declared a condition precedent to payment in Narsons Ltd. v. Lion of Africa Insurance Co., was a breach allowing repudiation. According to Kassim J.:

When it is said that there must be strict and literal compliance with the terms of a warranty, what is meant is that the actual thing stipulated for must be provided or done, and it is not open for the assured to say that what in fact was provided or done was, although not the same, a substantial equivalent, and that the variation was immaterial.²⁷

In the circumstances, further consideration of whether the breach contributed to the loss or increased the risk was unnecessary.

A unique application of the third listed effect that the circumstances of the insured are immaterial in considering breach of a warranty is illustrated in two cases. In Amaechi v. Norwich Union Fire Insurance²⁸ a burglary policy contained the documentary evidence warranty, and the insurer repudiated for failure to keep the requisite books. Bennet J., in upholding the insurer's right observed that the insured's counsel had put forward "an interesting but untenable proposition, that as the [insurer] had contracted with a petty trader and as it is a notorious fact that petty traders in Nigeria do not keep proper books of accounts the [insurer] cannot reasonably require the [insured] to produce the sort of evidence which a competent businessman would be able to produce".

²⁷ [1969] N.C.L.R. 185 at 187; see also s.32 M.I.A. 1961.

²⁸ Unreported, Suit No. LD/1958. (Lagos High Court).

In Okoli v. West African Provincial Insurance,²⁹ a semi-literate insured warranted in a burglary policy to keep a night watch man on the premises and books of account. The court, in holding the insured in breach when he did neither, rejected the argument that his educational standing and the unsophisticated nature of his business were such that he could not comply or be expected to appreciate the far reaching consequences of the warranties.³⁰

Perhaps, the following comment serves as an illustration of policyholders' views on insurance warranties in Nigeria:

...the requirements for what the insurance companies consider a valid claim are so stringent that one does not require to be insured after meeting such requirements. For example, to claim for a stolen car, you must have locked the steering wheel, must have installed pedal lock, must have locked the doors, and must have put the car in a locked garage!!! After all these, why does one need to insure a car against theft?³¹

5.4 Conditions

The practice is for insurers to draw up policies to contain a number of stipulations under the general heading "conditions". Non-observance of such stipulations will at least prevent recovery, while others, depending on the

²⁹ Unreported, Suit No. JD/42/63. (Jos High Court).

³⁰ Cf. Farwell L.J. in Re Bradley and Essex Accident [1912] 1 K.B. 415. In Hijazi v. New India Ins. Ltd. (supra), it was held the duty of insurers to see that illiterates with whom they deal are in a position to fully understand the transaction.

³¹ Diatchavbe, "Raw Deals From Insurance Contracts", Daily Times, May 18 1981, p.3.

court's construction, may entitle the insurer to repudiate the entire contract from the date of breach. This is because almost all policies contain a general clause making the observance of all other conditions, a condition precedent to the insurer's liability in the following words;

The due observance and fulfillment of the terms conditions and endorsements of this policy in so far as they relate to anything to be done or complied with by the insured and the truth of the statements and answers in the said proposal shall be conditions precedent to any liability of the [insurer] to make any payment under this policy.

Two points arise from the clause.

The first is that not all contractual stipulations can be conditions precedent to recovery or liability since some only impose obligations on the insured after indemnification, e.g., clauses requiring the insured to co-operate in the exercise of subrogation rights, while others do not impose obligations at all.³² To this end it was held in Akangbe v. West-African Provincial Insurance,³³ that an excess clause is not a condition precedent to the insurer's liability to make payments.

Secondly, by turning what may otherwise be warranties into conditions precedent to payment, it is arguable that the right to avoid for breach of a warranty is lost, and the option converted to a right to refuse payment only while leaving the contract in force. This argument may be

³² In Re Bradley and Essex Accident Indemnity [1912] 1 K.B. 415 at 432, the practice of inserting such general clauses was criticised by Farwell L.J.

³³ [1975] 1 N.M.L.R. 215.

of limited practical importance as in either case, the insurer can deny recovery for a loss which is what directly affects the insured. Moreover, courts in Nigeria have not pursued the argument or drawn distinctions. In Matter (*supra*), where it was warranted that certain books be kept, clause 9 of the policy contained a condition precedent proviso in the above terms. The Supreme Court, without discussing the insurers right to avoid the policy on breach of warranty *stricto sensu*, simply held that the failure to comply was fatal to the insured's claim. The same result was reached in Narsons Ltd. (*supra*).

It may, however, be important to draw the distinction because, as shown earlier, the breach of a warranty entitles the insurer to avoid the policy without showing that breach contributed to the loss, whereas there is authority to the effect that the breach of a condition entitles the insurer to refuse indemnity if there is a causal connection between breach and loss.³⁴ *A fortiori*, the 'conditions precedent' declaration influences the courts in ascribing effects to terms. Thus, in Stoneham v. Ocean Rwy. and General Accident Insurance, where a policy condition requiring notice of death was held not to be one precedent to the insurer's liability, Cave J., observed:

It seems to me that the rational conclusion is that all these conditions mean what they say, and that where there is a provision that the condition shall be a condition precedent it is so, but where there is no such provision it is

³⁴ Lane v. Spratt [1970] 2 Q.B. 480.

not.³⁵

In Phoenix Assurance Co. v. Olabode, condition 5 of a motor policy required the insured to take all reasonable steps to safeguard the vehicle from loss or damage and to maintain it in an efficient condition at all times, while clause 9 contained the usual condition precedent clause. Taylor C.J., in interpreting the effects of the provisions adopted the test in Shawcross on Motor Insurance, (2nd ed.) thus; "Is it an essential condition? - That is, is it a condition the breach of which entitles the insurers to declare the policy void? It is submitted with some hesitation, it is not".³⁶ In effect, clause 9 was construed in such a way as requiring compliance with clause 5 to be precedent only to the liability of the insurer to make payments and not precedent to the continued validity of the policy, breach of which renders the policy voidable.

On the other hand, in Cox v. Orion Insurance Co. Ltd.,³⁷ condition 2 of a motor policy required the insured to deliver detailed particulars of loss while condition 8 contained the condition precedent declaration. The insured's misrepresentations in supplying particulars upon

³⁵ (1887) 19 Q.B.D. 237 at p.241. See also Fletcher Moulton L.J. in Re Bradley [1912] 1 K.B. at p.428.

³⁶ [1968] 2 A.L.R. Comm. 7 at 11. Notice the use of "essential condition" as opposed to warranty or condition precedent to liability despite the fact that they bear similar consequences on breach. This adds to the unsatisfactory confusion in the state of the law regarding the classification of insurance terms and the effect of breach.

³⁷ [1982] R.T.R. 1. (C.A.)

a loss was held a breach of both conditions and, in the circumstances, the insurer was entitled to repudiate the whole contract and refuse payment under the policy. Thus, the condition precedent clause was used to convert terms of the policy imposing an obligation after loss into conditions precedent to the continued validity of the policy or warranty.³⁸

The authorities on whether the breach of a term obliging the insured to take or refrain from taking certain steps, or to maintain a particular state of affairs before loss, entitles the insurer to withhold indemnity without showing a connection between the breach and loss are not settled. However, the inclusion of a condition precedent clause may be vital.

In Conn v. Westminster Motor Insurance Co.,³⁹ a motor policy contained a clause requiring the insured to take steps to maintain the vehicle in an efficient condition, while another contained the condition precedent declaration. Sellers L.J., at first instance, held that since the breach was unconnected with the loss, the insurers were prevented from relying on it. The Court of Appeal reversed the decision holding that it was irrelevant

³⁸ Waller L.J., with whom Donaldson and O'Connor L.J.J. agreed, spoke of a breach of condition 'which goes to the root of this case'. Quaere whether clause 8 in making conditions of the policy 'conditions precedent to any liability ...to make any payment under this policy' should be interpreted as one making compliance with all conditions a quid pro quo to the continued validity of the policy i.e., a warranty.

³⁹ [1966] 1 Lloyd's Rep. 407.

whether breach caused the accident, but only whether there was a breach of condition.⁴⁰ Salmon L.J. alone relied on the condition precedent declaration to hold that the breach *per se* prevented recovery.

However, in Lane v. Spratt (supra), Roskill J., appears to have proceeded on the assumption that a provision requiring the insured to safeguard insured goods in circumstances where an employee absconded with the goods, was a type which entitled the insurer to refuse indemnity only if there was a connection between the breach and loss. Recently, in Port-Rose v. Phoenix Assurance Co.,⁴¹ Hodgson J., in a judgment notable for its practical approach, held that however a condition in a policy obliging an insured to take reasonable steps to prevent loss was looked at, whether as a condition precedent to liability or as one suspending cover temporarily, a causal connection between the breach and loss must be shown to allow an insurer refuse payment.

The only Nigerian case in which the issue has been considered is consistent with the approach in Conn. In Lion of Africa Insurance Co. v. Oduah, insurers suing the insured to recover sums paid to a third party under a liability policy relied on breach of clause 5 of the policy requiring the insured to maintain the vehicle in an efficient state. The insured had driven the vehicle with a

⁴⁰ Ibid. at pp.409, 412; (Willmer L.J with whom Davies L.J agreed).

⁴¹ (1986) 136 New L.J. 333.

worn out front tyre at the time of the accident. Clause 9 contained the condition precedent proviso. The trial judge, though finding that the breach caused the accident, observed:

I do not think that the issue here is whether or not the tyre burst was responsible for the accident. The issue to my mind is whether the car involved in the accident was fitted with a worn out tyre automatically rendering the car not to be in a state of efficient repair and maintenance thereby incurring a breach of clause 5 of the policy conditions...⁴²

Perhaps, the decisions in Lane and Port-Rose, above, could be explained on the ground that in cases where it is not clear that the facts alleged to constitute a breach point conclusively to a breach of condition, a causal connection between the breach and loss becomes relevant in establishing the breach of condition itself.

A related issue is whether it is necessary for an insurer to show it was prejudiced by the breach of a condition before relying on it to refuse payment. This commonly concerns terms requiring the insured to take certain steps after loss. As such, the relevant question is whether the breach has prejudiced the insurer and not whether it was connected with the loss. The authorities in point were rationalised by Bingham J., in Pioneer Concrete (U.K.) Ltd. v. National Employers Mutual Insurance Ltd.,⁴³ where condition 1 of an accident insurance required written notice of 'any accident or claim immediately the same shall

⁴² [1973] 3 E.C.S.L.R. 78 at p.80.

⁴³ [1985] 2 A.E.R. 395.

have come to the knowledge of the insured or his representative', while condition 2 contained the condition precedent provision. The material issue for determination was whether on a failure to give the requisite notice the insurer had to show it was prejudiced. The learned judge refused to accept the judgment of Denning M.R. in Lickiss v. Milestone Motor Policies⁴⁴ as authority for the proposition that an insurer cannot rely on a breach of condition unless actual prejudice is shown to have been suffered. According to Bingham J.:

The condition in question was included as a condition of the policy agreed between the insured and the insurers and expressed in clear terms to be a condition precedent to any liability of the insurer to make payment under the policy. On ordinary principles of contract, it would seem to me that the insurer could rely on this breach of condition whether the breach caused him prejudice or not and whether the refusal of payment in those circumstances was in general terms meritorious or unmeritorious. That, as I understand it, is the position under the Marine Insurance Act 1906.⁴⁵

The principles deducible from the cases exposes a shortcoming in insurance law from the insured's viewpoint. In most cases breach is unconnected with loss and causes no prejudice to the insurer who can deny payment or repudiate the contract. This leads to a consideration of common

⁴⁴ [1966] 1 W.L.R. 1334.

⁴⁵ At pp.400-401. The reference to the Marine Insurance Act 1906 would appear to be a reference to s.33(3) where breach of a warranty entitles the insurer to repudiate the contract whether material or not and irrespective of prejudice. This is also the position outside marine insurance as shown earlier in the Chapter. Notice again that the presence of the condition precedent clause influenced the holding.

policy conditions affecting insureds at the point of claim and judicial attitude to them in Nigeria.

5.4.1 Conditions Requiring Insureds to Take Steps to Prevent Loss

Most property and liability policies contain provisions obliging the insured to take reasonable steps to safeguard insured property from loss or damage and maintain it in an efficient condition at all times in order to prevent the occurrence of the risk.

Judicial tendency is to hold the insured in breach in circumstances where a loss results during non-compliance without adequate regard to the circumstances of the insured or the reasonableness of the steps taken by him. In Lion of Africa Insurance Co. v. Oduah (supra), the insured argued that he satisfied the obligation imposed by employing an experienced mechanic to ensure that his vehicles were properly maintained at all times. Having found that a front tyre was worn out to the canvass at the time of the accident, the judge held it would be absurd to argue that the insured had taken reasonable steps to safeguard the vehicle from loss. Similarly, in Phoenix Assurance Co. v. Olabode (supra), it was held immaterial that two rear tyres as opposed to front tyres were worn out. In both cases this amounted to lack of reasonable care to maintain any vehicle in a roadworthy condition.

The danger posed to insureds arising from the wide construction some courts are prepared to give such

conditions is illustrated in Hauwa v. Nigerian Peoples Insurance Co.⁴⁶ Condition 5 of a motor policy contained the reasonable steps and efficient maintenance provision while condition 10 was the general condition precedent declaration. The insurer refused payment for an accident involving the insured vehicle colliding with stationary objects at night, alleging breach of the conditions. It was found at the trial that the conduct of a driver employed by the insured in failing to drive in a way which the judge considered sufficient to avoid the collision had caused the accident. However, there was no specific finding of recklessness on the driver's part. It was held that the driver "did not exercise the degree of care and circumspection a prudent and reasonable driver would have done, and was therefore responsible for the accident". The judge was also satisfied that condition 5 read with 10, was a condition precedent to the insurer's liability to make any payment which had not been complied with.

Some points arise for comment from the above holding. It would appear the condition was read out of context. The contract was between the insured owner of the vehicle and the insurer. Thus, the obligation was on the insured to take reasonable steps to safeguard the vehicle from loss or damage which should have been satisfied by her taking steps to employ a careful and experienced driver, and not an absolute obligation to employ a driver who would never be involved in an accident as the case suggests. It appears

⁴⁶ [1972] N.C.L.R. 168.

from the court's construction that an insured is in breach of the condition in all accident cases involving negligence. Whereas, there is no rule of insurance law relieving an insurer for losses occasioned by negligence which is the primary risk insured against in nearly all insurances. However, assuming the obligation could be construed to cover the negligence of both the insured and employee, negligence per se would not relieve the insurer from liability. To be relieved, recklessness in the sense of appreciating a danger and courting it would have to be shown as described by Diplock L.J., in Fraser v. Furman⁴⁷ and applied in Lane v. Spratt (supra).

A similar argument raised by insurers that an accident occurring in circumstances involving a burst front tyre and brake pipes was *prima facie* evidence that the insured was in breach of a condition to maintain the tanker in a roadworthy condition, and of negligence, was rejected in Ojo v. Nigeria Reliance Insurance.⁴⁸ It was there held that an accident occurring in circumstances beyond the control of the driver and without the fault of the insured did not amount to a breach of the condition.

5.4.2 Conditions Requiring the Notification of Loss

Most policies contain provisions requiring the insured to notify the insurer of loss. In life and property

⁴⁷ [1967] 2 Lloyd's Rep. 1. The test of recklessness was held to be objective in Roberts v. State General Insurance Manager [1974] 2 N.Z.L.R. 312.

⁴⁸ [1983] 2 F.N.R. 313.

policies, the condition may require notification of death or loss, while liability policies require notice of the occurrence of an event likely to give rise to a claim or liability and of prosecutions, inquests, proceedings, writs etc. Some specify the time within which notice should be given while others use words like 'immediately' or 'as soon as possible'.

In addition to policy provisions, the Motor Vehicles (Third Party Insurance) Act of 1950 in requiring an insurer to satisfy third party judgments on compulsorily insured liabilities, provides as a precondition in section 10(2)(a) that notice must be given to the insurer before or within seven days of the commencement of proceedings in which judgment was obtained.

The problem arising is basically the same; the insured or third party has not complied with the requirements and the insurer seeks to rely on this to refuse indemnity. Here, the courts have adopted a liberal attitude in construing the provisions where third parties are involved but insureds have been prejudiced by them. Lambo J., in holding that a third party's solicitor's letter to the insurer satisfied both the provisions of the motor policy and the Act, observed as follows about notification conditions:

They are not inserted for the purposes of enabling the insurers to escape liability, but rather to give them a reasonable opportunity of investigating the claim under the most favourable circumstance, and thereby of detecting and rejecting fraudulent or exaggerated demands. The condition ought to be construed fairly to give effect to this object, but at the same time so as

to protect the assured against being trapped by obscure or ambiguous phraseology.⁴⁹

That the judge might have been over sympathetic to insureds in stating the law was confirmed when in Northern Assurance Co. v. Wuraola⁵⁰ and Yorkshire Insurance Co. v. Haway⁵¹ the Supreme Court held insureds in breach of policy conditions precedent requiring them to notify insurers of the commencement of third party claims against them, even though in Wuraola it appeared the insurer came to know of the proceedings shortly after.

In the absence of a contrary stipulation in the policy, it was held in Edema v. Express Insurance Co.⁵² that notice of the theft of insured vehicle given to the local agency through which the contract was effected was notice to the insurer. And, in Ojo v. Nigeria Reliance, (supra), it was held that notice of an accident given to the insurer's local branch manager is adequate notice to the insurer.

The extent to which insurers may choose to go in relying on notice conditions is shown in Unity Life & Fire Insurance Co. v. Banire⁵³ where clause 4(a) of a

⁴⁹ Martins v. National Employers' Mutual [1969] N.C.L.R. 46 at p.56; affirmed in [1969] N.C.L.R. 395. See Harrington v. Link Policies, The Times, 12 May 1989, p.29.

⁵⁰ [1969] N.C.L.R. 4.

⁵¹ [1969] N.C.L.R. 464. See also United Nigeria Ins. v. Oloko [1981] 3 C.A. 241.

⁵² Unreported, Suit No. I/36/81, contained in (1985) 1 Nig. Bul. C.L. 76.

⁵³ [1981] 3 C.A. 46

householder's comprehensive policy required the insured to give immediate notice of loss in writing. The insurer denied payment contending that notice was not given in writing though admitting the insured had orally notified it of the theft of her jewellery. A finding by the Court of Appeal that the insurer had waived written notice by sending assessors to investigate the loss protected the insured. Thus, it was unnecessary to consider whether notice acquired by means other than stipulated in the condition would suffice.⁵⁴ A waiver in almost similar circumstances was, however, rejected in Egbejobi v. Mercury Assurance Co.⁵⁵ where the insured was held in breach of a condition precedent requiring notice of accident within thirty days.

The case (Egbejobi, above) is of equal significance to another type of condition commonly found in liability policies that "no admission, offer, promise, payment or indemnity shall be made or given by the insured without the written consent of the insurer". The insured was held in breach of this condition by expressly admitting liability for the accident and by his conduct of taking custody of the third party's damaged vehicle. The use of such

⁵⁴ See Lickiss v. Milestone Motor Policies [1966] 1 W.L.R. 1334.

⁵⁵ [1985] H.C.N.L.R. 276.

conditions drew adverse comments from the Australian Law Reform Commission in its report on insurance contracts in the following words:

Yet the application of such a clause may well give rise to hardship in individual cases. In the case of accidents, there may well be spontaneous admissions, either as a result of shock or from natural concern for those who are injured or whose property has been damaged or destroyed.⁵⁶

It is noteworthy that in none of the above cases where insurers were held entitled to refuse payment on account of breach of conditions was the issue of prejudice considered.

5.4.3 Arbitration Conditions; The Scott v. Avery Clause

Common in insurance policies in the Nigerian market are clauses providing that all differences arising out of the contract should be referred to arbitration, and the satisfaction of this is made a condition precedent to the insured having a right of action against the insurer. The clauses are commonly called the Scott v. Avery⁵⁷ clause after the insurance case deciding that such clauses are enforceable as conditions precedent to the liability of an insurer so long as they do not purport to oust the jurisdiction of the courts.

Most of the clauses prescribe the submission of 'all differences' to arbitration and this would include legal

⁵⁶ Australian Law Reform Commission Report No. 20 (1981-82) para.233. Such a condition was held not to be contrary to public policy in Terry v. Trafalgar Union Ins. [1970] 1 Lloyd's Rep. 524.

⁵⁷ (1856) 5 H.L.C. 810.

issues of liability which are best resolved by the courts.⁵⁸ The primary criticism directed at insurance arbitration is that it encourages insurers in the use of technical and unmeritorious defences since arbitration provides a cloak from public opprobrium.⁵⁹ Thus, the Law Reform Committee (U.K.) expressed concern at the possibility of abusive use of arbitration clauses by insurers, but refrained from making recommendations because some insurance associations had agreed not to insist on arbitration in disputes over liability.⁶⁰ However, both the Australian and New Zealand Law Commissions recommended that compulsory arbitration clauses be rendered ineffective.⁶¹

Reliance on arbitration clauses has assumed significant proportions by Nigerian insurers, and the practice is suggestive of misuse. Arbitration clauses are employed as delay tactics that may eventually disuade an insured from pursuing the settlement of legitimate claims. This seems another logical explanation for why an insurer would insist on arbitration when an action is instituted in court for adjudication. Surely, insurers cannot claim lack

⁵⁸ It was recently held in Hayter v. Nelson & ors., The Times, 29 March 1990, that in the context of insurance arbitration, the words 'disputes' and 'differences' were applicable to cases even where it could be there and then determined that one party or other was in the right.

⁵⁹ Birds, Modern Insurance Law, p.204; Australian Law Reform Commission, op. cit., p.205; New Zealand Report of the Contracts and Commercial Law Reform Committee on Aspects of Insurance Law, pp.10-11.

⁶⁰ Cmnd. 62 (1957) para. 13.

⁶¹ Footnote 59, above.

of proper hearing in a court of law.

Courts have tried to forestall abusive practice by holding that arbitration clauses do not provide a defence against a claim, but only gives insurers the right to apply for a stay of proceedings commenced in breach of the provision under section 5 of the Arbitration Act 1958,⁶² which the court may grant or refuse at its discretion. Thus, Egbuna J., in Ezeigbo v. Lion of Africa Insurance Co., adopting the text in 22 Halsbury's Laws of England, 3rd ed., para. 505, observed:

An arbitration clause does not necessarily preclude the assured from bringing an action to enforce his claim. The clause may be nothing more than a collateral term of the contract...by which a tribunal for determining disputes is provided...if the assured brings an action, the insurers are not relieved from liability, but they are entitled to apply under the clause to have the action stayed.⁶³ (Emphasis added).

In most cases, the fact that the insurer has taken a step in defending the proceedings prevents the grant of a stay.⁶⁴

However, two recent decisions of the Court of Appeal have taken away this protection from insureds and present worrying prospects as regards the use of arbitration clauses. They are: United Nigeria Insurance Co. Ltd. v.

⁶² Cap. 13, 1958 Laws of Nigeria. States have corresponding provisions.

⁶³ [1967] N.C.L.R. 88,95. See also Taylor J. in Kayode v. Royal Exchange Ass. [1955-56] W.R.N.L.R. at 158; Oghene & Sons v. Royal Exchange Ass. [1967] N.C.L.R. at 321, for similar conclusions.

⁶⁴ Shaibu v. Maximum Ins. [1976] N.C.L.R. 179; Egbejobi v. Mercury Ass. Ltd. [1985] H.C.N.L.R. 276.

Oloko⁶⁵ and United Nigeria Insurance Co. Ltd. v. Oshinuga.⁶⁶

The Court of Appeal accepted as the law the statement appearing in MacGillivray on Insurance Law (4th ed.) para. 1780 that:

Where arbitration is made a condition precedent to the commencement of any action and the assured declines arbitration and commences an action, the [insurer] may either set up the clause as an absolute defence to the action or waive the condition precedent and, treating the clause as merely a collateral agreement to refer, apply for a stay of proceedings pending the reference...⁶⁷

In the former case, participation by the insurer throughout third party proceedings constituted a waiver of its right to rely on the clause as an absolute defence. In the latter case, non-compliance by the insured with the arbitration condition precedent was held an absolute defence to the claim relieving the insurer from liability.

The key factor appears to be that arbitration is declared a condition precedent to liability or commencement of action as it always is in most policies. Thus, in Omole Motors Ltd. v. Riverbank Insurance Co.,⁶⁸ it was held that the failure of the insurer to apply for a stay of proceedings under section 5 of the Arbitration Act did not preclude it from setting up the arbitration clause contained in the policy as an absolute defence to the insured's claim if it was a Scott v. Avery type where

⁶⁵ [1981] 3 C.A. 241.

⁶⁶ [1983] 1 F.N.R.108.

⁶⁷ Ibid. at p.115.

⁶⁸ [1982] 1 O.Y.S.H.C. 44 at p.48.

arbitration is made a condition precedent to any action.

Again, in none of the above cases did the issue of prejudice to the insurer occasioned by non submission to arbitration considered. In light of the decisions, there is a case for rendering compulsory arbitration clauses ineffective and enforceable only if the insured agrees to arbitration after a claim arises.⁶⁹

5.5 Control of Policy Terms and their Effects

At different times, various Governments have found it desirable to control insurers' use of policy terms against insureds and third parties, as well as prescribing what consequence breach of policy stipulations should carry. The broad objective of such controls is to protect the insured, or third parties to whom the insured is liable, from oppressive contractual provisions. It is proposed to examine under this part the control measures so far adopted in Nigeria and appraise their results drawing from comparisons with other common law jurisdictions.

5.5.1 The Motor Vehicles (Third Party Insurance) Act of 1950

The first attempt at controlling certain terms and their effects in insurance policies came under the Motor Vehicles (Third Party Insurance) Act of 1950. The Act

⁶⁹ E.g., the New South Wales, Victoria and Queensland approach contained in the Australian Law Commission Report, op. cit., para. 331 p.204. This recommendation is enacted in s.8 of the Insurance Law Reform Act 1977, (New Zealand).

brought into force compulsory liability cover for death or bodily injury to third parties arising out of the use of motor vehicles,⁷⁰ and enacts in section 8 that:

Any condition in a policy...issued...for the purposes of this Act providing that no liability shall arise under the policy...or that any liability so arising shall cease in the event of some specified thing being done or omitted to be done after the happening of the event giving rise to a claim...shall be of no effect in connection with such claims as are set out in paragraph (b) of subsection (1) of section 6 [third party liability claims]:

Provided that nothing in this section shall be so construed as to render void any provision in a policy...requiring the person insured...to repay to the insurer...any sums which the insurer...may have become liable to pay under the policy...and which have been applied to the satisfaction of the claims of third parties.

Section 9 further provides that so much of a policy as purports to restrict the insurance granted in relation to certain matters shall, in respect of third party liabilities, be of no effect. The section however gives the insurer the right to recover sums paid out, which would not otherwise have been paid to third parties on account of the breach of policy provisions, from the insured. The matters covered by the section are:

- (a) the age or physical or mental condition of persons driving the motor vehicle; or
- (b) the condition of the motor vehicle; or
- (c) the number of persons that the motor vehicle carries; or
- (d) the weight or physical characteristics of the goods that the motor vehicle carries; or
- (e) the times at which or the area within which the motor vehicle is used; or
- (f) the horsepower or value of the motor vehicle; or
- (g) the carrying on the motor vehicle of any

⁷⁰ Sections 3(1) & 6(1)(b).

particular means of identification...⁷¹

It is clear that section 8 operates, in relation to third party claims, to invalidate those terms not relating directly to the risk covered, but obliging an insured to take or refrain from taking certain steps after loss, e.g., conditions requiring notification of loss or prohibiting the admission of liability to third parties or compromising the claim as in Egbejobi (supra), though the case did not concern third party death or injury, but third party property damage.

In United Nigeria Insurance Co. Ltd. v. Oloko (supra), a provision requiring the insured to give immediate notice in writing of a claim was held to be of no effect against the third party claiming from the insurer by virtue of section 8.⁷²

Whether arbitration clauses making an award a condition precedent to liability are affected by the section arose for decision in the Oloko case, above. The Court of Appeal took the view that though it was held in Jones v. Birch Bros. Ltd.,⁷³ that an arbitration condition precedent is unaffected by a similar provision of the Road

⁷¹ The provisions contained in ss.8 & 9 are similar to those contained in ss.148(1)&(2) of the Road Traffic Act 1972 (U.K.).

⁷² [1981] 3 C.A. at p.260. See also Martins v. National Employers' Mutual [1969] N.C.L.R 46 at p.56.

⁷³ [1933] 2 K.B. 597.

Traffic Act 1930 (U.K.),⁷⁴ since section 10 of the Nigerian Act gives a third party the right to proceed against the insurer once judgment is obtained against the insured, the arbitration condition which may be used against an insured seeking indemnity cannot be used against the third party seeking satisfaction of the judgment.

While section 8 relates to 'conditions', section 9 invalidates provisions whether or not described as 'warranties', 'conditions', or 'exceptions'. Thus, while it may be possible to evade section 8 by framing the terms as exceptions (though this is doubtful) no such formal techniques can be used to evade the effects of section 9 once the matter relates to anything specified therein. Common clauses requiring the insured to maintain the vehicle in a roadworthy condition are invalidated against third parties by the latter section.

The above provisions of the Act are designed for the protection of third parties⁷⁵ (and not persons insured), so that they are not prejudiced by breach of conditions to which they have not contributed, and to ensure that their chances of recovery are not dependent on private arrangements between insurer and insured. Consequently, the

⁷⁴ With respect, this may have been a wrong reading of the case for Greer and Romer L.J.J., felt the Scott v. Avery part of an arbitration clause (making an award precedent to liability) was void under section 38 of the Act of 1930.

⁷⁵ The Law Reform Commission was of the view that the protection afforded third parties by ss.8 & 9 should be extended to third parties covered by other types of liability policies. - Law Reform Journal (1986) p.181. The recommendation was, however, not adopted in the Insurance (Special Provisions) Decree 1988, infra.

proviso to section 8 allow insurers to insert in policies provisions empowering them to recover from insureds sums they would not otherwise be liable to pay by reason of non-compliance with conditions, but for the section. The proviso to section 9 on the other hand gives insurers an automatic right to recover. In Yorkshire Insurance Co. v. Haway,⁷⁶ the Supreme Court held that an insurer who settled third party claims as required by the Act notwithstanding a breach of notice condition by the insured could recover the payments from him by virtue of a provision in the policy to that effect and the proviso to section 8. It was further held that the insured could not set up the payment to the third party as an estoppel against an insurer relying on the breach.

There is authority in Sule v. Norwich Union Fire Insurance⁷⁷ that section 8 protects a permitted driver by invalidating certain conditions, so that the driver who sued his employer's insurer for an indemnity in respect of damages awarded against him for injuring a third party succeeded despite his, and the insured employer's, breach of notice conditions in the policy.⁷⁸

In the absence of a term in the policy allowing an insurer to recover sums paid out to third parties from the insured, it was held in Lion of Africa Insurance Co. v.

⁷⁶ [1969] N.C.L.R. 464, 475-476.

⁷⁷ [1971] 1 N.C.L.R. 271.

⁷⁸ Ibid. at pp.287-288. On the issue of privity of contract, see Chapter 8 para.8.5, *infra*.

Oduah (*supra*), that where an insurer settles third party claims under compulsion of law despite the insured's breach of a condition precedent to notify the insurer, the latter is entitled to claim the sum from the insured under general contract law. This is because the insured is in breach of contract and damages awarded for the breach would be the amount paid by the insurer.

5.5.2 Legislative and Administrative Control of Policy

Terms

In many jurisdictions, Governments have found it necessary to control policy terms through direct legislative intervention or prescribed administrative machinery. Such interference with freedom of contract arises from the recognition of insurance as "contracts of adhesion",⁷⁹ and the disparity in bargaining positions between insurers and a significant number of insureds. Moreover, insurance is recognised as a business affected with "a public interest"⁸⁰ hence the need to control the ability of insurers to prescribe onerous and oppressive terms. Though the system used to achieve the result is varied, a central motive behind regulating policy terms is said to be the desire to protect the public from unfair

⁷⁹ See Chapter 2 para. 2.6, *supra*.

⁸⁰ Hasson, "The Special Nature of the Insurance Contract: A Comparison of the American and English Law of Insurance", (1984) 47 M.L.R. 505.

contracts and unfair treatment of policyholders.⁸¹

In some countries, statutory standard policies are prescribed for certain classes of insurance especially consumer type contracts. This form of control described as "the most substantial and the most inflexible interference with freedom of contract", is common in a number of American States,⁸² and is that favoured by the Australian Law Commission which recommended standard cover in motor vehicle, householder's, personal accident, consumer credit and travel insurances.⁸³ Also common in America, are statutory requirements that a policy contain specified individual provisions or a prohibition from containing prescribed terms e.g. a life policy exempting liability if death occurs in a specified manner.

Other countries require policies to be submitted to an administrative officer called the Insurance Commissioner, Superintendent etc. The submission may be for tacit approval, i.e. for information only, or for active vetting of terms as a precondition of use. This form of administrative control is common in continental European

⁸¹ Lijadu, "Governmental Control of the Operations of Insurance Companies", (1972) I IIN Conference Papers p.77.

⁸² See the detailed work by Kimball and Pfennigstorf, "Legislative and Judicial Control of the Terms of Insurance Contracts: A Comparative Study of American and European Practice", (1964) 39 Indiana L.J. 675 at pp.687-699. The writers conclude that 'On the whole in the American insurance market, the insurance contract is under virtually complete public control'.

⁸³ Australian Law Reform Commission, op. cit., pp.35-51. The recommendation is enacted in ss.34-37 of the Insurance Contracts Act 1984 (Australia).

countries.⁸⁴ Penalty for non-compliance ranges from a fine to invalidation of non-complying terms or revoking the licence of a recalcitrant insurer.

The United Kingdom market is probably the least regulated in terms of control of policy terms. Apart from the Statements of Insurance Practice, freedom of contract prevails uninhibited.⁸⁵ There have been calls, however, for the enactment of standard policies in the principal classes of insurance and for the administrative vetting of policy terms by an Insurance Superintendent.⁸⁶

Though a recent comparative study shows that over regulation inhibits inventiveness and competition, and is inimical to policyholders' interests, the writers concede that a system of control of policy terms is desirable to eliminate "surprising" or "unfair" clauses in the "fine print", but opined that a standard contract law declaring

⁸⁴ See additionally, the article by Kimball and Pfennigstorf, "Administrative Control of the Terms of Insurance Contracts", (1965) 40 Indiana L.J. 143, comparing the various system of administrative control in America and Western European Countries.

⁸⁵ See generally, Ellis and Wiltshire, Regulation of Insurance in the United Kingdom and Ireland, para.A.6. For a more detailed analysis of the Statements see, Birds, Self-Regulation and Insurance Contracts, New Foundations for Insurance Law, (1987) Chapter 1, and Forte, "The Revised Statements of Insurance Practice", (1986) 49 M.L.R. 754. The Law Commission (U.K.) in its report stated "We do not intend to interfere in the manner in which insurers describe or limit the risk which they are prepared to cover: this can be left to competition and market forces".- Non-Disclosure and Breach of Warranty in Insurance Law, (1980) Cmnd. 8064 at p.99.

⁸⁶ Birds, [1982] J.B.L. at 458; Hasson, (1984) M.L.R. 505 at 519.

unfair or misleading clauses void would suffice.⁸⁷

Early British influence on the Nigerian market meant that freedom of contract was the tradition, insurers being completely free as to the choice of terms. Complete freedom produced adverse results as the coverage offered by policies described as 'comprehensive' were wittled down by exemption and limitation clauses and the imposition of terms which insureds found difficult to comply with in the local context. Expressing public opinion, it was once observed:

The point is that in spite of an enlightened public, the insurance companies backed by a one sided law, succeed in their unfair dealings by using, ...delaying tactics and nebulous clauses to hoodwink a public that is yet to be inoculated against that kind of assault.⁸⁸

The unsatisfactory results led to calls for standardisation and control of policy terms⁸⁹ which were

⁸⁷ Finsinger, Hammond and Tapp, Insurance: Competition or Regulation?, Institute of Fiscal Studies Report No. 19 (1985) at p.176. See also, Finsinger and Pauly, The Economics of Insurance Regulation: A Cross National Study, (1985). It would appear that Hasson disagrees with this approach, arguing that policing insurance contracts by the use of devices such as 'unconsciounability', 'unequal bargains' and the like, are too vague to offer much support for the insured.- (1984) 47 M.L.R. at 519. One is inclined to agree with his view and add that a reasonableness test presupposes the dispute would ultimately be litigated in court, which expense is likely to act against a significant number of insureds.

⁸⁸ Diatchavbe, footnote 31, above.

⁸⁹ For a list of policy conditions in use considered unrealistic to conditions in Africa, see Mensah, "Insurance Policy Conditions in Africa", (1975) IV IIN Conference Papers 99; for common motor conditions occasioning discontent among the insuring public, see Chapman, "Motor Insurance in West-Africa: Problems and Possible Solutions", (1976) II WAICA Journal 36; and for a call to standardise and control policy conditions, see McGillivray, "Insurers

heeded by the enactment of administrative control provisions in the Insurance Act of 1976.

As one of the pre-registration requirements of the Act, section 5(1)(e) provides that the Director shall register an insurer if he is satisfied that the "proposal forms, terms and conditions of policies are in order and acceptable". It is further enacted in section 14(1) & (4) thus:

(1). Subject to subsection (4) below, no insurance policy or certificate of insurance shall be issued and no contract shall be entered into by any insurer without the prior approval of the Director and no rider, clause, warranty or any endorsement whatsoever shall be attached to, printed or stamped upon any document containing any such policy, certificate or contract or deleted therefrom unless the form of such rider, clause, warranty or endorsement or the matter to be deleted has the prior approval of the Director.

(4). Where the form of any policy, certificate, contract, rider, clause, warranty or endorsement or deletion therefrom referred to in this section is one of a standard class, that is where any such form does not deviate from the others in that particular class in any material particular, then only six copies of any such form need be referred to the Director for the purposes of this section.

While section 5(1)(e) is a pre-registration requirement, section 14(1) operates as a complement in imposing a continuing obligation to seek approval of policy terms once an insurer is authorised. Furthermore, the impractical approach of requiring the approval of each and every term is reversed in subsection (4) as most consumer contracts are fairly standard. The provisions appear delightful on paper, for they provide a forum by which the

Director could standardise policy terms and prevent the use of unfair ones. They, therefore, received public approval as protectionary devices from "most of the snares of which insurers may lay in a printed standard form contract".⁹⁰ The Director described section 14 in 1978 as:

...a further measure of control, aimed at preventing insurers from imposing obscure terms and conditions, which may render policies worthless to the detriment of the ignorant insured, seeking insurance protection.⁹¹

It was not long though before it became clear that the provisions were incapable of achieving these results in practice. Being essentially anchored on administrative controls, their success depended on a properly set up and efficiently run administrative department. The inadequacy of skilled and competent staff of which the Director has complained, but which remains unchanged,⁹² the task of regulating insurers, brokers and agents as well as controlling policy terms, meant the Director had to choose what he considered priority issues within the capability of his department. The result was a compromise solution with the industry whereby the Director advised insurers shortly

⁹⁰ Anifalaje, "State Intervention in Contracts of Insurance in Nigeria: A Reform Without Substratum", (1984) 1&2 J.P.P.L. 81 at 89. The writer's suggestion that the Director could use his powers under the provisions to cure more fundamental defects in insurance law such as the requirement of insurable interest, non-disclosure and warranties, appear over-optimistic. The provisions were never designed to achieve these results.

⁹¹ Okwor, "Insurance Decree of 1976 Analysed", (1978) IV WAICA Journal 167 at p.179.

⁹² Ibid. at p.177. See also Nwokolo, "The Need for a Comprehensive Reform of Insurance Law and Practice in Nigeria", Law Reform Journal No.5 (1986) at p.26.

after the enactment of the Act that only 'substantial alterations' in insurance documents then in use would require his approval. Insurance executives were quick to interpret the advice as a waiver of the provisions, and freedom of contract continues undisturbed. While appreciating the Director's constraints, a better alternative for him would be to draw up minimum standard terms for categories of popular consumer insurances like motor vehicle and householder's policies on consultation with the industry and consumer groups, with a prohibition from insurers offering less. However, the problem of monitoring effective compliance still remains in such a case.

Administrative shortcomings in implementation aside, certain fundamental drawbacks reveal themselves in the provisions. Section 14(3) imposes a fine of N2,000 on conviction of a non-complying insurer. This compels the Director to initiate proceedings in court to convict the offending insurer. At an interview with the Chief Inspector of Insurance, he intimated that the slow and painstaking process of litigation makes the provision unattractive and the Director has generally refrained from pursuing the remedy. However, his department was trying to secure a dispensation from the Government whereby the Director will be empowered to impose some of the fines prescribed by the Act summarily without recourse to the courts. In the meantime, he said, the department dealt with complaints on a case by case basis and cited the example of a case where

a court upheld an insurer's right to refuse a claim on account of a term in a motor policy covering theft but expressly excluding a loss by armed robbery from the definition of theft. According to him, the office of the Director was assisting in getting the decision reversed on appeal. As a general comment, it is unlikely the attempt would succeed since the Court of Appeal would most likely hold the term as a contractual exception binding on both parties. This attempt at curing rather than preventing is unhelpful. The problem could easily have been avoided by a co-ordinated approval system so that such terms do not find their way to the market initially.

Secondly, section 14(2) gives the insured an option to avoid a non-complying policy. The effect of electing to avoid is to discharge the insurer from liability to make payments while premiums paid are returned. This probably explains why there is no reported case where an insured has exercised the option when an insurer seeks to rely on non-approved terms to repudiate liability. A better alternative would be a provision declaring the unapproved terms (warranties, conditions or exceptions) void so that an insurer is prevented from relying on them to escape liability, and the contract is enforced as though the terms were not part of it. This has the advantage that insureds capable of challenging the insurer's repudiation in court would be protected.

The Law Reform Commission recognising that section 14 has so far served no useful purpose recommended the

establishment of an additional supervisory body whose function would include the control of policy terms and contractual conditions to complement the efforts of the Director.⁹³ It is unlikely that the recommendation will be adopted in the near future in view of its absence from the 1988 Decree.

5.5.3 Legislative Intervention in Insurance Contract Law

While the provisions of the Motor vehicles (Third Party Insurance) Act of 1950 were designed to protect third parties alone, those of the Insurance Act of 1976 were designed to protect the insured as well as third parties. That the latter Act has failed so far in achieving its aim is shown above. Assuming its success however, the insured remains vulnerable in other ways to the insurer's ability to refuse indemnity.

There exists the possibility that insureds would breach approved policy terms and the question arises as to the effect breach should carry. Under the common law discussed earlier, an insured loses his claims once a term is broken. The materiality and/or relevance of the term or breach, and the fact that the insurer is not prejudiced are inconsequential. This is the crux of the problem necessitating reform in common law countries including

⁹³ Law Reform Journal No.5 (1986) para.14 p.180. Anifalaje had made an earlier recommendation to this effect at p.96 of his article (footnote 90, above). However, an insurance executive has called for section 14 to be expunged from the 1976 Act in its entirety on account of the Director's inability to implement the provisions: see Nwokolo, footnote 92, above, at p.26.

Nigeria.

The U.K. Law Commission dealing with warranties in insurance noted there were major defects arising from their characteristics and manner of creation. In particular, that insurers could demand strict and literal compliance with warranties immaterial to the risk, and reject claims for breach of material warranties where the breach is unconnected with a loss suffered. Furthermore, "basis of contract" clauses constitute, in their view, a major mischief in law and objectionable to the extent that they applied to past and present facts in proposal forms.⁹⁴ Accordingly, the following broad remedial steps were recommended;

- (a). Prohibiting insurers from creating warranties of past and present facts by means of the basis clause, but allowing its use in creating promissory warranties.
- (b). A formal requirement that all warranties be referable to a written document supplied to insureds.
- (c). That a term of the contract should only be capable of constituting a warranty if material to the risk, in the sense that it is an undertaking relating to a matter which would influence a prudent insurer in deciding whether to accept the risk and, if he does accept it, at what premium and terms.
- (d). Insurers be disentitled from rejecting a claim if the insured's breach of warranty could not have increased the

⁹⁴ Insurance Law - Non-Disclosure and Breach of Warranty, Law Commission Report No.104, (1980) Cmnd. 8064, at paras. 6.9 & 7.5.

risk of loss occurring in the way it did even though the loss is of a type which the warranty was intended to make less likely.⁹⁵ These recommendations are largely reflected in the 1986 revised Statements of Insurance Practice (U.K.).⁹⁶

The New Zealand Contracts and Commercial Law Reform Committee⁹⁷ commented unfavourably on the injustice occasioned by warranties created by the basis clause and its recommendations are enacted in the Insurance Law Reform Act of 1977. The Act provides, *inter alia*, in section 5 that a contract shall not be avoided by reason of any statement made in any proposal, unless the statement was both substantially incorrect and material. Section 11 provides broadly in relation to promissory warranties and conditions that an insured shall not be disentitled from indemnity if he can prove on the balance of probability that the loss suffered was not caused or contributed to by the happening of events or the existence of circumstances defined in a contract of insurance to exclude or limit the liability of the insurer. And, by section 9, contractual provisions prescribing the manner or time limit within which notice of a claim must be brought or action commenced

⁹⁵ Ibid. at paras.6.11, 6.12, 6.22 & 7.10. See generally Merkin, "Insurance Law and the Law Commission", [1981] 3 L.M.C.L.Q. 347, 353-356; Birds, "The Reform of Insurance Law", [1982] J.B.L. 449.

⁹⁶ On the Revised Statements, see Forte, (1986) 49 M.L.R. 754; Birds, "Self-Regulation and Insurance Contracts", op. cit., Chapter 1.

⁹⁷ Aspects of Insurance Law part 1.

are binding on the insured only if in the opinion of the court the insurer has been so prejudiced by the insured's failure to comply that it would be inequitable if such provisions were not to bind the insured.

Existing principles on warranties and conditions examined suggest two main defects which reform measures are geared at:

1. Terms enabling insurers to decline payment come in different categories with the effect of breach depending on classification, e.g., past, present, and promissory warranty, condition precedent, exemptions and temporary exclusions.

2. However classified, a breach enables the insurer to escape liability where (a), the term broken is immaterial to the risk, (b), if material, the breach has not contributed to a loss suffered, and (c), the breach results in no prejudice to the insurer. In relation to this second effect of warranties, the U.K. Law Commission recommended a material and "nexus" test,⁹⁸ while the House of Lords recently observed:

It is one of the less attractive features of English insurance law that a breach of warranty in an insurance policy can be relied on to defeat a claim under the policy even if there is no causal connection between the breach and the loss.⁹⁹

⁹⁸ Law Com. No.104, paras.6.12 & 6.21.

⁹⁹ Per Lord Griffiths in Vesta v. Butcher (No. 1) [1989] 1 All E.R. 402 at 406. Judicial criticism of the conversion of proposal representations into warranties by the 'basis' clause are well documented in the Law Com. Report No.104 at para. 7.2.

Adverse comments on principles governing warranties and conditions, and insurers use of these, are no less forthcoming from the courts in Nigeria. In Lion of Africa Insurance Co. v. Oduah (supra) Nwokedi J., observed thus (at page 82):

I have no doubt that the operation of insurance business at the moment generates untold hardship for a vast number of people. And I feel very strongly that the time has now come for the Government to step in and protect citizens of this country from the harshness of insurance operations.

Reliance on a personal accident policy barring claims brought after a year of loss, *inter alia*, attracted the following remarks from the Court of Appeal:

This is yet another case rather common before us these days, of some insurance companies being rather too quick to pocket the insured's premium but trying to hang on every straw to frustrate the very intention of the policy by repudiating liability when a claim arises.¹⁰⁰

The Supreme Court recently commented that "Insurance companies have far too often managed to get away with it on mere legal technicalities".¹⁰¹

The Law Reform Commission concluded its deliberations on Nigerian insurance law remarking that "the law governing warranties which impose certain duties on the insured as to present or future facts the breach of which, however trivial entitles the insurer to repudiate the whole contract regardless of the materiality of the term, places

¹⁰⁰ Lion of Africa Ins. v. Fisayo [1986] 4 N.W.L.R. 674 at 684.

¹⁰¹ National Ins. Corp. of Nigeria v. Power & Industrial Ltd. [1986] 1 N.W.L.R. 1 at p.35.

the insurer in a very advantageous position to the detriment of the insured".¹⁰² The Commission's recommendations on how this should be remedied are enacted in section 2 of the Insurance (Special Provisions) Decree of October 1988 under the heading "Warranty and Conditions". It is proposed to examine the provisions of the law in this connection.

Section 2 provides in full that:

- (1). In a contract of insurance, a breach of a term whether called a warranty or a condition shall not give rise to any right by or afford a defence to the insurer against the insured unless the term is material and relevant to the risk or loss insured against.
- (2). Notwithstanding any provision in any written law or enactment to the contrary, where there is a breach of a term of a contract of insurance, the insurer shall not be entitled to repudiate the whole or any part of the contract or a claim brought on the grounds of the breach unless -
 - (a) the breach amounts to a fraud; or
 - (b) it is a breach of a fundamental term (whether or not it is called a warranty) of the contract.
- (3) Where there is a breach of a material term of a contract of insurance and the insured makes a claim against the insurer and the insurer is not entitled to repudiate the whole or any part of the contract, the insurer shall be liable to indemnify the insured only to the extent of the loss which would have been suffered if there was no breach of the term.
- (4) Nothing in this section shall prevent the insurer from repudiating a contract of insurance on grounds of a breach of a material term before the occurrence of the risk or loss insured against.

(Emphasis supplied).

A notable improvement is that the provisions avoid distinguishing warranties and conditions in insurance, so that the effect of breach is no longer hinged on terminology used or distinctions created by insurers and

¹⁰² Law Reform Journal (1986) No.5 at p.180.

amplified by the courts which characterised the common law. Moreover, in providing for terms "whether called a warranty or a condition" the provision avoids referring to the mode of creating contractual terms imposing obligations such as warranties created by the 'basis' clause. Difficulties have been generated in determining what form of warranty is created or the effect intended when the device is used.

The difficulty arises when proposal questions warranted as true are capable of creating a past, present, or promissory warranty. In the first two classes, the insured is protected if facts warranted obtain at the time of contracting, whereas in the third, there is a continuing obligation to maintain the facts warranted throughout the contract.¹⁰³ In Royal Exchange Assurance Co. v. Chukwurah (supra), a negative answer to the question: "Will the motor car be driven by any person who to your knowledge has held for less than one year a full licence...", was held a promissory warranty by the insured not to drive the car while holding a licence less than a year old. The court rejected the plausible argument that the warranty related to others, excluding the insured.¹⁰⁴

A different problem is created when the issue is one of deciding whether questions and answers supplied in a

¹⁰³ See Woolfall & Rimmer v. Moyle [1942] 1 K.B. 66; Hales v. Reliance Fire and Accident Ins. Co. [1960] 2 Lloyd's Rep. 391; Kennedy v. Smith 1967 S.L.T. 110; Colinvaux, The Law of Insurance, (5th ed.) paras. 6-22 and 6-23.

¹⁰⁴ Cf. Kirkbride v. Donner [1974] 1 Lloyd's Rep. 549, where the question 'will the car to your knowledge be driven by any person under 25 years' was held not to refer to the future.

proposal form create promissory warranties or are only intended to operate as temporary exclusions suspending cover during the period of non-compliance only, without affecting the validity of the policy.¹⁰⁵ A Nigerian illustration is the proposal questions and answers in Lawal v. Amicable Insurance Co. Ltd.¹⁰⁶ In a goods-in-transit contract, the proposer listed five vehicles to the question; "Details of vehicles to which the insurance is to apply", and declared to be the basis of the contract. Carrying goods which were stolen in an unlisted vehicle was held a breach of promissory warranty entitling the insurer to repudiate the contract without considering the possible effect of suspending cover only when different vehicles were used. The new provisions by relieving the courts and parties of the task of ascertaining the nature of terms created so as to ascribe effect to them, is a step in the right direction, for:

The effect of a term should not depend on whether it is in the form of a warranty or a condition. Similarly, the difference in effect between breach of warranty and the occurrence of an excluded loss is not justified. The rights of the parties should depend on matters of substance, not on subtle differences in form.¹⁰⁷

Section 2(1) in providing that the breach of a term shall be of no effect "unless the term is material and

¹⁰⁵ Provincial Insurance Co. Ltd. v. Morgan [1933] A.C. 240; Farr v. Motor Traders Mutual Ins. [1920] 3 K.B. 669; De Maurier Ltd. v. Bastion Ins. Co. [1967] 2 Lloyd's Rep. 550. For a discussion of relevant cases on the point, see Birds, [1977] J.B.L. 231.

¹⁰⁶ [1982] 3 F.N.R. 283 at 292.

¹⁰⁷ Australian Law Reform Commission, op. cit., para.224.

relevant to the risk or loss insured against" makes one thing clear. This is that a term must be material to the risk or loss insured before an insurer can derive any right from it. The approach is consistent with the U.K. Law Commission proposal that warranties should be material to the risk in the sense of influencing a prudent insurer as noted earlier.¹⁰⁸ This is now reflected in para.1(b) of the Statement of General Insurance Practice (ABI). Section 2(1), however, refrains from defining "material", but it is submitted that the word should be understood in the sense proposed by the U.K. Commission.

What is less clear from the section is the effect of the requirement that the term broken should also be "relevant to the risk or loss insured against". This may mean either that the term should be relevant to the risk or loss insured in the sense that it should be material to it and intended to reduce the likelihood of the insured loss occurring, or that the term should be relevant to a resulting loss suffered in the sense of being causative of or contributory to it, i.e., a causal connection between the breach and loss. The latter interpretation is to be preferred, and this should be read as the intention of the law makers since it is the construction in accord with current reform methods. It is the interpretation which would remove the 2(b) basic defect in the common law noted earlier. Indeed, the latter construction is that recommended by the Law Commission which concluded that

¹⁰⁸ Law Com. No.104, para.6.12.

common law principles on warranties should be reformed with a view to "preventing an insurer from rejecting a claim for any breach even of a material nature when such breach is irrelevant to the loss. For example the case of a motor policy where the insured warrants that he has had a driving licence for ten years and has in fact had it for nine years. The vehicle is stolen...the insurer should be disallowed from rejecting the claim on the basis of the breach of warranty. This is because the breach...had no relation to the loss."¹⁰⁹

The above recommendation is consistent with the "nexus" test proposed by the U.K. Law Commission and reflected in para. 2(b)(iii) of the Statement of General Insurance Practice (ABI), that insurers will not repudiate liability "on grounds of a breach of warranty or condition where the circumstances of the loss are unconnected with the breach unless fraud is involved". Similarly, the effect of section 54 of the Insurance Contracts Act 1984 (Australia) is to prevent insurers from refusing claims where the insured proves that no part of the loss was caused by his breach of warranty, condition or exception.¹¹⁰ It would be an unfortunate development if section 2(1) is

¹⁰⁹ Law Reform Journal No.5 (1986) p.181. Unfortunately the Commission appended no draft Bill to the report.

¹¹⁰ See also s.11 Insurance Law Reform Act 1977 (New Zealand), *supra*; Art. 6.14, Insurance Code 1952 (Texas) that: "No breach or violation by the insured of any warranty, condition or provision of any...contract of insurance...upon personal property, shall render void the policy or contract, or constitute a defence to a suit for loss thereof, unless such breach or violation contributed to bring about the destruction of the property."

interpreted otherwise.

Under section 2(1), the breach of an immaterial and irrelevant term "shall not give rise to any right by or afford a defence to the insurer", so that in addition to preventing reliance by the insurer in refusing payment, it also prevents insurers from suing for damages for breach having paid.

It is arguable, however, that section 2(1) on the preferred interpretation, is inapplicable to terms requiring the insured to take, or refrain from, certain steps after a loss is suffered (known as conditions subsequent to loss) e.g., notification, compromise and arbitration conditions. It is equally inapplicable to terms requiring the insured to maintain a certain state of affairs before loss but not relating to the risk in the sense of preventing its occurrence e.g., the documentary evidence warranty considered earlier. The reason is that such terms though they may be "material" to the risk, are not "relevant" to the loss suffered since they would not be causative of insured loss.

The provisions do not expressly forbid the use of the 'basis' clause. However, it is submitted that since the effect of the device is to convert representations of fact into warranties, such warranties must be material and relevant to the risk or loss under section 2(1) in order to be relied upon. Accordingly, the section achieves the same result as section 24 of the Australian Insurance Contracts Act 1984 which provides that a representation by the

insured does not operate as a warranty, thereby restoring the criteria of materiality in actionable misstatements since removed by the 'basis' clause.

The protection under section 2(1) would appear obscured in many ways by section 2(2)(b) which in effect allows an insurer to repudiate the whole or part of the contract, or a claim brought under it, if the insured is in breach of a 'fundamental term'. A joint reading of subsections (1) and (2)(b) of section 2 is the creation of a dichotomy between 'material terms' on the one hand, and 'fundamental terms' on the other; the former allowing the insurer to repudiate the contract or claim upon breach only if relevant to the risk or loss, and the latter allowing repudiation irrespective of materiality and connection with risk or loss. This is a rather unfortunate and unnecessary distinction. Having created the distinctions, the Decree fails to define 'material' and 'fundamental' in relation to contractual terms thereby forcing the courts to embark on the task which may lead to confusion and uncertainty in the law. This has the result of compelling insureds to resort to litigation in all cases where insurers refuse indemnity on the ground of breach of a term, for judicial determination of the nature of the term in question so as to justify or refute the insurer's conduct. In view of the prohibitive cost of legal proceedings,¹¹¹ the ultimate result would be to deny a significant number of insureds

¹¹¹ Legal aid in Nigeria at present is limited to criminal cases: Legal Aid Act 1976, s.6 sched. 2.

the means of vindicating their rights.

In Niger Insurance Co. Ltd. v. Abed Bros. Ltd.,¹¹² Bello J.S.C. adopted the dicta of Lord Upjohn in the Suisse Atlantique¹¹³ case that:

A fundamental term of a contract is a stipulation which the parties have agreed either expressly or by necessary implication or which the general law regards as a condition which goes to the root of the contract so that any breach of that term may at once and without further reference to the facts and circumstances be regarded by the innocent party as a fundamental breach.

The effect of this fundamental breach, according to Lord Upjohn, is to entitle the innocent party to treat the contract as repudiated and at an end.

The learned authors of Chitty on Contracts (26th ed.) opine at para.790 that "the concept of the fundamental term has most often been employed in relation to exemption clauses...so that no such clause could exonerate a party from failure to perform the fundamental term of an agreement", as Bello J.S.C. appears to have held in the Abed case, *supra*.¹¹⁴ The authors, however, in noting there is no longer such a rule of law, conclude that "it is neither necessary nor desirable to create yet a fourth category of contractual term - the 'fundamental term' - in addition to conditions, warranties and intermediate terms". And, that "there exist no category of terms which can be in

¹¹² [1976] N.C.L.R. 37 at 49.

¹¹³ [1967] 1 A.C. 361 at 422.

¹¹⁴ This aspect is considered in Chapter 7 para. 7.3.2, *infra*.

any sense 'fundamental' other than conditions".¹¹⁵ The view appears consistent with the earlier opinion expressed that:

While in a clear case...a "fundamental term" or a "fundamental breach" may be readily identified in terms of its consequences they are not, at present, capable of any precise definition.¹¹⁶

Thus, section 2(2)(b) in creating 'fundamental terms' in insurance contracts at a time when developments in the general law supports moving away from such classifications appears to create an unnecessary, imprecise and unidentifiable category of terms.

However, on the analogy that fundamental terms in the general law are conditions, and conditions in insurance law are warranties, it follows that warranties become fundamental terms in insurance. This accords with current insurance thinking particularly in cases where warranties are created by the basis clause.¹¹⁷ Birds, commenting on Dawsons Ltd. v. Bonnin (supra) observes that the "Basis [clause] was sufficient to render the contents of the proposal form into fundamental terms of the contract."¹¹⁸ In Royal Exchange Assurance Co. Ltd. v. Chukwurah the Supreme Court observed on the 'basis' clause: "that the undertaking given by the [insured] in...the proposal...is a basic and fundamental term of the contract of insurance...and is a

¹¹⁵ Chitty, op.cit., para.962.

¹¹⁶ Leigh-Jones and Pickering, (1970) 86 L.Q.R. at p.516.

¹¹⁷ Colinvaux, op. cit., para. 6-01.

¹¹⁸ Birds, Modern Insurance Law, (2nd ed.) p.107.

stipulation foundational to its enforceability".¹¹⁹

The danger with the above analogy is that section 2(2)(b) enables the courts to equate warranties with fundamental terms of insurance contracts breach of which allows the insurer to repudiate under the provision without establishing materiality and relevance.

It is unclear how section 2(2)(b) ties with 2(1). Perhaps, an explanation could be given for the necessity to include the former provision. The wording of section 2(1) shows it can only apply to terms, however described, relating directly to the risk in the sense of evaluating or preventing its occurrence, e.g., terms obliging an insured to take steps to safeguard insured property. Only these can be "material and relevant to the risk or loss insured against" within the provision. If this is a correct view, it leaves out a vast number of terms like those regulating behaviour after loss e.g., notification, arbitration, and compromise conditions. Something had to be done to curtail the insurer's ability to rely on these terms and hence, the inclusion of section 2(2)(b) allowing reliance only if they are fundamental terms. It is submitted that a better result would be achieved by a 'prejudice' requirement preventing insurers from relying on terms to escape liability unless prejudiced by the breach.¹²⁰ The need to decide whether

¹¹⁹ [1976] N.C.L.R. at p.197.

¹²⁰ For provisions having this effect, see s.18(1) of the Insurance Act 1902 (New South Wales); s.9 Insurance Law Reform Act 1977 (New Zealand); s.54(1) of the Insurance Contracts Act 1984 (Australia).

terms are fundamental leaves scope for evasion as explained in para. 5.6.4, below.

Section 2(2)(a) which in effect enables insurers to repudiate the contract or claim where breach amounts to a fraud resembles para. 2(b)(iii) of the General Statement of Insurance Practice (U.K.), and adds nothing new to the common law.¹²¹ In relation to the latter provision, the view is expressed that the exception, in so far as it may allow an insurer to rely on a fortuitous unconnected breach of warranty or condition instead of proving a suspected fraudulent claim, is unfortunate.¹²² This remark is equally apposite to section 2(2)(a).

Section 2(3) may be an attempt at introducing the principle of proportionality into insurance law favoured by the Australian Law Commission,¹²³ whereby the insured's claim is reduced by damages awarded to the insurer measured by reference to the prejudice the insurer suffers as a consequence of the insured's breach of undertaking. Thus, the effect of section 54(1) of the Australian Insurance Contracts Act 1984, is that an insurer cannot refuse to pay a claim by reason only of the insured's breach, but the insurer's "liability in respect of the claim is reduced by the amount that fairly represents the extent to which the

¹²¹ See Chapter 6 para. 6.2, *infra*, for a discussion of fraud.

¹²² Birds, "Self-Regulation and Insurance Contracts", op. cit., p.5.

¹²³ Report No.20, op. cit., paras. 228 and 241.

insurer's interests where prejudiced" by the breach. By section 54(2), where the breach could reasonably be regarded as being capable of causing or contributing to a loss, the insurer may refuse to pay the claim, but not if the insured can prove that no part of the loss was caused by the breach. Finally, by section 54(4), where the insured proves that his breach did not cause part of the loss, the insurer cannot refuse to pay the claim in respect of that part.

It is unclear, however, if section 2(3) of the 1988 Decree has the above effects in view of the provisions of section 2(1). The former provision in limiting its application to breach of a 'material term' presumably under subsection (1), appears inapplicable to a 'fundamental term' under (2)(b), and further emphasises the distinctions. Section 2(3) applies to limit the insurer's liability only "where there is a breach of a material term" and "the insurer is not entitled to repudiate the whole or any part of the contract" presumably because the breach is irrelevant to a loss suffered under 2(1). It is, however, not easy to see why the liability of the insurer should be limited on the breach of a term though material to the risk, is unconnected with the loss. In such a case, it is submitted that 2(1) should prevail to prevent the insurer from relying on the breach as a defence, or to confer a right, and 2(3) is inapplicable to reduce the insurer's liability.

Section 2(3) might apply, however, where there is

breach of a 'material term' (presumably one intended to decrease the likelihood or extent of loss) but the breach is causative only of part of the loss suffered, and not the whole. An example would be where the insured provides a sprinkler system in only part of insured premises in breach of a term requiring him to provide for the whole, and the whole premises are damaged by fire. Subsection (3) may operate in such a situation to limit payment to the damaged part containing the sprinkler only.

Section 2(4) inasmuch as it enables insurers to repudiate the contract on a breach of 'material term' before the occurrence of the risk or loss insured against is, *prima facie*, a welcome provision. It ensures protection for the insurer against an insured in breach of a term designed to reduce or prevent the likelihood of loss. It would be unreasonable to compel an insurer to continue cover for an insured in breach of terms and disregarding the possibility of loss resulting from his conduct. Its advantage lies in enabling the insured to make alternative arrangements for cover on repudiation before loss instead of leaving him exposed when repudiation is made at the point of claim only, as is usually the practice. 'Material terms' may not be difficult to identify in this context since they are limited to those imposing obligations before, and not after, loss. Finally, the absence of "relevant" from the provision supports the preferred interpretation of that word used in section 2(1) as referring to a breach that is causative of the loss.

suffered.

5.5.4 Unresolved Issues and Possible Means of Evading

Section 2

The section of the 1988 Decree on warranties and conditions leaves some issues unresolved, and contains loopholes by which insurers may evade the provisions and circumvent the intentions of the law makers. The latter possibility would be considered first. Although the provisions avoid distinguishing warranties from conditions, an examination shows that their application is limited to terms obliging certain conduct by insureds and prohibiting others. Thus, policy stipulations limiting or suspending cover commonly known as exclusions from cover, are outside the purview of section 2. An insurer in defining the risk undertaken may use any of the following method(s):

- (a). The insured hereby warrants (or it is a condition precedent) that the motor vehicle shall at all times be maintained in an efficient condition.
- (b). Cover is granted (or this policy applies) only when the motor vehicle is maintained in an efficient condition.
- (c). The insurer shall not be liable for any loss while the vehicle is not maintained in an efficient condition.

Section 2(1) stipulates a two tier test of materiality and relevance in cases of breach of example (a) and is inapplicable to the latter two excluding losses suffered in certain circumstances. The second and third examples have

variously been described as 'temporal exclusions',¹²⁴ 'clauses descriptive of the risk',¹²⁵ 'suspensive conditions',¹²⁶ and 'restrictive definition of the risk',¹²⁷ but the effect is the same; the insurer is not on risk during a period of non-compliance with cover reattaching when compliance is made.

If a term is drafted in a way as to define the risk assumed, the courts would most likely treat it as such, and not as a condition obliging the insured in any way. By framing what were hitherto warranties and conditions as total or temporary exclusions, insurers could evade section 2(1) and render the need to show that a broken term is material and relevant unnecessary.

Section 2(2)(b) allowing repudiation on breach of a 'fundamental term' without attempting a definition, leaves open scope for evasion. Insurers could list certain terms under the heading 'fundamental terms' and seek to convince a court that breach gives an automatic right to avoid without establishing materiality or relevance to loss, or what prejudice is suffered on account of the breach. *A fortiori*, it appears open to an insurer to make compliance with any obligation fundamental.¹²⁸ If judicial attitude to

¹²⁴ Ibid. at para.217.

¹²⁵ Birds, Modern Insurance Law, (2nd ed.) at pp.109-111.

¹²⁶ MacGillivray and Parkington, op. cit., para.550.

¹²⁷ Baer, (1978) 2 Can. Bus. L.J. 485.

¹²⁸ Colinvaux, op. cit., para.6-02, citing Cox v. Orion Ins. [1982] R.T.R. 1.

the practice of inserting general condition precedent clauses discussed earlier is a useful indice, the chances are that the argument will be upheld. In this connection the moribund power of the Director to control policy terms under section 14 of the 1976 Act take on new significance. The Director could use the power to prevent relatively insignificant provisions being described as fundamental terms. Moreover, he would need to control the use of exemption clauses seeking to limit liability in order to escape section 2(1) of the 1988 Decree.

An unresolved issue is the effect of the new provisions on existing law, particularly the Marine Insurance Act of 1961. Section 34 of that Act allows an insurer to avoid a policy for breach of immaterial and irrelevant warranties. The question arising is whether this provision is now subject to section 2(1) of the Decree. Section 2(2), it will be recalled, opens with the words "Notwithstanding any provision in any written law to the contrary", but as we have seen, the provision applies only to breach of a 'fundamental term'. The inference may be that an insurer can only rely on breach of a marine warranty if classified as a fundamental term without having to show that the term is material or the breach is relevant to the loss as is the position at common law. However, the absence of the opening words contained in section 2(2) from 2(1) may mean that marine warranties are not subject to the material and relevance tests prescribed in the latter.

The position is unsatisfactory.¹²⁹ If the provisions are not intended to apply to marine insurance, one wonders why they should apply to other commercial contracts where the parties are of equal bargaining strength. No doubt, common law principles on conditions and warranties operated most unfairly in cases of private individuals, and small business insurances as the case law suggests. If the intention of the Decree is to protect this category of insureds alone, a provision to this effect would save problems.

Another issue raised concerns the ability of insurers to contract out of the new provisions. The Decree is silent on this though it is unlikely that a court would hold an insurer entitled to do so.

Finally, the Decree is silent on whom lies the burden of proving that a term is both material to the risk and relevant to the loss under section 2(1), and fundamental under section 2(2)(b). The courts have consistently held the onus of proving breach of policy provisions and exclusions as resting on the insurer.¹³⁰ It should follow that it is for the insurer to prove that a term is material to the risk and contributory to the loss, and also that it is fundamental. This is for the logical reason that the insurer inserts the term in the policy and seeks to rely on

¹²⁹ s.14 Insurance Law Reform Act 1977 (New Zealand) makes the Marine Insurance Act 1908 subject to its provisions. Cf. s.9(1)(d) Insurance Contracts Act 1984 (Australia).

¹³⁰ See Chapter 7 para. 7.5, *infra*.

it to refuse payment.¹³¹ It may be necessary in some cases for the insured to prove that breach did not cause the loss where the circumstances of the loss are peculiarly within his knowledge.

5.6 Conclusion

Strict application of common law principles governing warranties and conditions by the courts has led to harmful results. While the provisions of the Motor Vehicles (Third Party Insurance) Act of 1950 succeeded to a large extent in protecting third parties from these results, those of the Insurance Act of 1976 have been without such success as regards insureds.

The Insurance (Special Provisions) Decree of 1988 was passed to redress the imbalance. The new provisions though exhibiting an understanding of, and desire to cure, the underlying problems of the common law, are poorly drafted and untidily set out. Section 2(2) is an unnecessary and potentially costly inclusion. The attempt at reclassifying insurance terms into 'material' and 'fundamental' is regrettable, and one hopes it does not throw the law into a state of confusion.

While unable to do more than conjecture at this stage on the long term effects of the new provisions, it is certain their success would depend to a large extent on

¹³¹ Cf. the U.K. Law Commission proposal for a presumption of materiality of warranties and the onus is then cast on the insured to rebut the presumption and show that breach did not contribute to the loss. - Law Com. 104, para. 6.13 & 6.22.

judicial attitude to them. The courts would ultimately have to decide what terms are 'material' or 'fundamental' and apply the Decree accordingly. It is hoped that however terms are classified, courts would prevent insurers from relying on a breach where no prejudice is caused, for this appears to be the lynchpin of the new provisions.

Finally, section 14 of the 1976 Act and the Director's power to control policy terms should be resuscitated. Notwithstanding administrative constraints, the Director can prescribe minimum standard policy provisions for popular consumer insurances and prohibit insurers from offering less by way of limitations and/or exclusions.

CHAPTER 6

FRAUD, NON-DISCLOSURE AND MISREPRESENTATION IN INSURANCE CONTRACTS

6.1 Introduction

Insurance contracts provide the prime example of the class of contracts described as contracts uberrimae fidei (of the utmost good faith). From the nature of such contracts, the law imposes reciprocal obligations on the parties, i.e. the insured and insurer, to observe the utmost good faith in the dealings with each other before and during the contractual relationship. However, the law as it has developed makes one more familiar with the duties owed to the insurer by the insured.

Three essentials of the duty on the insured are; to avoid fraudulent conduct, to avoid misrepresenting facts inducing the insurer to contract, and freely to disclose before the contract is concluded all material facts exclusively within his knowledge. The doctrine of contracts uberrimae fidei traceable to common law of the 18th century, has witnessed significant developments which are likely to continue particularly as regards the duty of disclosure.

It has been argued at different times that this unique duty places onerous burdens on insureds unjustifiable under modern insurance practice. Consequently, insurance reforms in common law jurisdictions seek to place precise limits on the insured's duty of good faith generally, and that of

disclosure in particular.

It is the aim of this Chapter to examine the principal issues arising from the doctrine while relating this to its application in the Nigerian context, note shortcomings in its application which reform proposals and measures are intended to rectify, and appraise the extent to which Nigerian reforms affect and modify applicable common law principles.

6.2 Fraud

Utmost good faith forbids either party to an insurance contract from participating in fraud. Fraud in insurance is more common to the insured and can be categorised under three headings; (i) fraudulent pre-contractual misrepresentations inducing the insurer to contract, (ii) fraudulent conduct during the period of contract, and (iii) making fraudulent claims on the insurer. The last two are discussed here while a discussion of the first is dealt with under misrepresentations in para. 6.3.2, below.

Fraud for general purposes has been described as:

...a wilful act on the part of anyone, whereby another is sought to be deprived by illegal or inequitable means of what he is entitled to. Fraud for the purposes of civil law includes acts, omissions and concealment by which an undue and unconscientious advantage is taken of another.¹

Of significance in insurance law is the obligation on an insured to refrain from engaging in fraudulent conduct

¹ Oputa J.S.C. in Adimora v. Ajufo [1988] N.W.L.R. 1 at p.13.

to the prejudice of the insurer during the contract. The courts take a serious view of conduct suggestive of fraud, and have at times prevented the insured from recovering where there is *prima facie* evidence of fraud.

In Bamidele v. Nigerian General Insurance Co.², a factor which influenced the judge to hold that the insurer was entitled to repudiate liability under a personal accident policy was the finding of fraudulent collusion between the deceased insured's representatives and an agent of the insurer enabling the latter to misappropriate the premiums paid to him.

In Onuh v. United Nigeria Insurance³, though the judge found breach of conditions entitling the insurer to repudiate, another factor relied on was the inference of fraudulent collusion between the insured and agent of the insurer in procuring the latter to write letters authorising a change in risk in breach of policy provisions.

It is settled that if there is a wilful falsehood or fraud in the claim, the insured forfeits all claim whatever upon the policy.⁴ The duty not to make fraudulent claims and not to make claims in breach of the duty of utmost good

² [1973] 3 U.I.L.R. 418 at pp.420-422.

³ [1975] N.C.L.R. 413 at p.420.

⁴ Wills J. in Britton v. Royal Ins. Co. (1866) 4 F. & F. 905.

faith has been held an implied term of the contract.⁵ The law confers this protection on insurers because losses frequently occur in circumstances exclusively within the knowledge of the insured with the insurer unable to verify its occurrence or scope. Courts have, therefore, sought to give full effect to anti-fraud devices used by insurers. In Martins v. National Employers' Mutual, it was held that conditions requiring the giving of notice of loss are not intended to enable insurers escape liability, but rather "to give them a reasonable opportunity of investigating the claim under the most favourable circumstances, and thereby of detecting and rejecting fraudulent or exaggerated demands".⁶ Similarly, in Onuh v. United Nigeria Insurance (supra), it was held that for there to be compliance with a warranty requiring the insured to keep a complete book of account and stock sheets, and to produce them in the event of a claim, the details must be sufficient to enable the insurer "ascertain the character and amount of loss and to check exaggeration and falsity". And, that if the insured fails to comply with the requirement as a whole, he cannot recover in respect of those items, the details of which were supplied.

Whether a claim is fraudulent would depend on the circumstances of the case. However "Mere exaggeration [is] not conclusive evidence of fraud, for a man might honestly

⁵ Hirst J. in Black King Shipping Corp. v. Massie, The Litsion Pride [1985] 1 Lloyd's Rep. 437 at 518. See, however, para.6.3.1 and footnote 31, infra.

⁶ [1969] N.C.L.R. 46 at p.56.

have an exaggerated idea of the the value of the stock, or suggest a high figure as a bargaining price".⁷

There is no evidence on how serious the issue of fraudulent claims is in the Nigerian market though insurers claim they often suspect fraud. At least the case law does not bear the suspicion out. Most cases are concerned with exaggerated claims in which the courts are slow to infer fraud or find the exaggeration proved. In Ado v. Nigeria General Insurance Co.⁸, the insurer repudiated liability on a claim for loss of a vehicle comprehensively insured, probably suspecting a fraudulently exaggerated claim, but contending instead the insured's breach of utmost good faith by over insuring his car. The argument was rejected by the judge finding no case of over valuation proved. An identical argument raised in Babalola v. Harmony Insurance attracted the following remarks from the Oyo State Chief Judge:

The [insurers] must be conversant with the current prices of new cars especially the type for which they are ready to give cover to their customers or clients. If they knew that a new Peugeot...sold for only N4,000 why did they insure such a car for N7,000 after 4-5 years of its use? I think only persons who wanted to cheat by way of premiums would behave that way.⁹

Allegations of fraud must be specifically pleaded and proven beyond reasonable doubt as required by the general

⁷ Per Goddard J. in London Assurance v. Clare (1937) 57 L.L.R. 254 at 268. For instances in which an exaggerated claim would be considered fraudulent see, Ivamy, General Principles of Insurance Law, (5th ed.) pp.410-411.

⁸ [1980] 4-6 C.C.H.C.J. 27.

⁹ [1982] O.Y.S.H.C. 1 at p.9.

law before a contract or claim would be set aside. In Jamal Transport v. African Insurance Co. Ltd.,¹⁰ upon a claim for sums paid to third parties for loss of oil occasioned by the accidental collision of the vehicle insured, the insurer repudiated liability alleging the claim was fraudulent. The insurer pleaded in its defence a clause in the policy that all benefit shall be forfeited if any claim shall be fraudulently exaggerated or if any fraudulent devices are used to obtain any benefit. This was held insufficient to satisfy the requirement that fraud must be specifically pleaded, and, in any event, the judge found the allegation was not supported with particulars and proved beyond reasonable doubt.

Arising from difficulties in meeting the requirements of proof, insurers argue they only rely on breach of good faith and technical defences such as breach of warranty when there is strong suspicion of fraud but are unable to prove it;

In some cases, the insurers are almost certain that the claim is fraudulent - all the circumstances of the case indicate fraud, but the insurers cannot prove it...In cases like this, most experienced insurance officials adopt the...method of looking for the "tiny print" escape clauses in the policies and to repudiate liability relying on such clauses even though they are really repudiating because they suspect fraud...and yet achieve the desired objective of not paying the claim by taking advantage of...the breach of...warranty...or other similar minor breaches.¹¹

¹⁰ [1971] 2 N.C.L.R. 145, 149.

¹¹ Irukwu, "The Settlement of Insurance Claims in Nigeria - Some Social, Legal and Psychological Problems", (1972) I IIN Conference Papers at p.58. For a condemnation of the

It appears, and for good reason too, that courts are reluctant to allow fraud to be established by this suspect method in the guise of breach of good faith. In American International Insurance Co. Ltd. v. Nzayi¹², the personal representative of the deceased insured claimed under two life policies taken by the insured. While not denying the policies, the insurer contended that the insured was never in existence, and that the claim was a fraud perpetrated by the representatives and the supposed insured. Curiously, it was also argued that the insured fraudulently misrepresented he was worth N40,000, whereas he died leaving assets worth only N19. The Court of Appeal affirmed the decision of the trial judge who rejected the arguments holding that the insurer had failed to plead specifically the issues of fraud, and had also failed to discharge the onus which lay on it to establish fraud beyond reasonable doubt.

Under the general law, fraud renders a contract voidable at the option of the innocent party who may claim rescission and recover any consideration given provided restitution is possible and parties can be restored to the status quo ante.¹³ It would appear the seriousness with

practice see Agomo, "Some Thoughts on the Attitude of Insurers Towards Insurance Claims", The Lawyer, (1985) Vol. 15 at p.70; Merkin, "Uberrimae Fidei Strikes Again" (1976) 39 M.L.R. 471 at p.481 footnote 19.

¹² Unreported, Appeal No. FCA/1/33/82 of 24/11/82, contained in (1987) 2 Nig. Bul.C.L. 110.

¹³ See generally Treitel, The Law of Contract, (7th ed.) p.290.

which the law views fraud in insurance prevents the recovery of premiums paid once fraud is established.¹⁴

The legal position was considered in American International Insurance Co. v. Dike,¹⁵ where the insurer sued to recover sums it paid out on a loss, and for the forfeiture of premiums paid by the insured on account of his fraudulent non-disclosure and misrepresentation. The judge having negatived the allegation of fraud allowed the insured to recover the premiums paid on the policy being declared void for innocent non-disclosure and misrepresentation.

Fraud by the insured is always a defence to a claim brought on the policy, in which case the insurer is not bound to return premiums paid. Additional safeguard is provided by express policy provisions commonly inserted in policies providing for forfeiture of premiums in the event of fraud by the insured as in Jamal Transport (supra), and enforceable as a contractual provision binding on the insured.

6.3 General Points on Non-disclosure and Misrepresentation

"Contracts of insurance are contracts uberrimae

¹⁴ See MacGillivray and Parkington on Insurance Law, (8th ed.) at paras. 571-574 and the cases cited in footnote 96; Birds, Modern Insurance Law, (2nd ed.) at pp.78,124.

¹⁵ [1978] N.C.L.R. 402. See Chapter 4 para.4.2, supra.

fidei",¹⁶ and "There is no class of documents as to which the strictest good faith is more rigidly required in Courts of Law than policies of assurance".¹⁷ This is statutorily expressed in section 19 of the Marine Insurance Act 1961, based on the U.K. Act of 1906, so far as marine insurance is concerned, as follows :

A contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith is not observed by either party, the contract may be avoided by the other party.

The principle is of general application to all insurances and there is consensus that the Act of 1906 is a codification of the common law of insurance generally.¹⁸

It is observed in Ado v. Nigeria General Insurance (supra, at p. 30) that the duty arising under contracts of the utmost good faith is three fold; "a duty to disclose material facts, a duty not to misrepresent material facts and a duty not to make fraudulent claims." The third duty is discussed earlier, the second is applicable to all contracts while the first is limited to certain contracts of which insurance is the primary example.¹⁹

¹⁶ National Ins. Corp. of Nigeria v. Power & Industrial Ltd. [1986] 1 N.W.L.R. 1, 37.

¹⁷ Per James V.C. in MacKenzie v. Coulson (1869) L.R. 8 Eq. 368, 375.

¹⁸ Jessel M.R. in London Assurance v. Mansel (1879) 11 Ch. D. 363, 367; Joel v. Law Union & Crown Ins. [1908] 2 K.B. 863, 878; Lambert v. Co-operative Ins. Society. Ltd. [1975] 2 Lloyd's Rep. 485, 487, 493; Highlands Ins. Co. v. Continental Ins. Co. [1987] 1 Lloyd's Rep. 109.

¹⁹ "The duty to disclose...applies to all contracts uberrimae fidei and is not limited to insurance contracts; it also applies, for instance to contracts of partnership,

It is proposed to examine jointly the first and second duties, above, as applied in insurance. The reason for this is that as the law has developed, there is now a narrow distinction between them, and in most cases where breach of good faith is raised, the two defences are alleged together, for the misrepresentation of a fact implies the non-disclosure of the truth.²⁰ Moreover, common legal questions arise in both defences, e.g., the requirement of materiality and its test, as well as available remedies.²¹

It is important to bear in mind that the widespread use of proposal forms and basis of contract clauses, discussed in the preceding Chapter, has an appreciable impact on the defence of non-disclosure and

contracts of surety, certain family settlement contracts and other similar types of contractual relationships." - Per May J. in March Cabaret v. London Ass. [1975] 1 Lloyd's Rep. 169, 175. Cf. Treitel, op.cit., p.308.

²⁰ E.g., Northern Ass. v. Idugboe [1966] 1 All N.L.R. 88; Bamidele v. Nigeria General Ins. [1973] 3 U.I.L.R. 418; American International Ins. v. Dike [1978] N.C.L.R. 402. "If a representation were to be the heads of a coin, concealment would be the tails" - Harnett, "The Doctrine of Concealment: A Remnant in the Law of Insurance", 15 Law & Contemp. Prob. (1950) pp.391, 392.

²¹ Remedy for non-disclosure and misrepresentation is avoidance of the contract ab initio. The Misrepresentation Act of 1967 (U.K.) of which there is no Nigerian equivalent may have altered this for innocent misrepresentations, but this is far from certain. In Highlands Ins. Co. v. Continental Ins. Co. [1987] 1 Lloyd's Rep. 109, it was said that the discretion to award damages in lieu of rescission conferred by s.2(2) of the Act would not be applied to commercial insurances. This, according to Birds, leaves open the possibility of its availability for consumer insurances: Modern Insurance Law, p.80. Colinvaux argues, however, that the Act of 1967 is wholly irrelevant to insurance law: The Law of Insurance, (5th ed.) para. 5-09.

misrepresentation, particularly on the latter. Thus, breach of warranty has tended to be the more popular defence with insurers in Nigeria. This impact will be noted where appropriate. However, in view of the recent legislative provisions curtailing the effect of the basis clause, in my view,²² it is to be expected that non-disclosure and misrepresentation would become increasingly popular defences.

6.3.1 Non-disclosure: Origins and Scope

It has been for centuries in England the law in connection with insurance of all sorts...[that] it is the duty of the assured...to make a full disclosure to the underwriters without being asked of all the material circumstances...

So observed Scrutton L.J. in Rozanes v. Bowen²³ restating a principle traceable to the statement of Lord Mansfield in Carter v. Boehm²⁴ in laying down a duty largely peculiar to insurance contracts. Reiterating Lord Mansfield's rationale for the duty in the earlier case, Scrutton L.J. observes in the same passage:

...as the underwriter knows nothing and the man who comes to him to ask him to insure knows everything, it is the duty of the assured...to make a full disclosure to the underwriters without 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 - uberrima fides.

The quoted passages fairly represent prevailing judicial

²² See Chapter 5 paras.5.3.1 and 5.5.3, *supra*.

²³ (1928) 32 L.L.R. 98,102.

²⁴ (1766) 3 Burr. 1905,1909.

views on the duty on an insured to disclose material facts within his knowledge prior to the conclusion of the contract. It is argued, however, that modern application of the duty is out of line with that laid down by Lord Mansfield and the early cases.²⁵

The policy of some of the early cases may have been to prevent a situation whereby the insured could mislead the insurer through indifference by failing to convey information which a reasonable person would appreciate to be material to the insured risk. It is, therefore, not surprising to find dicta that only a deliberate or fraudulent concealment would vitiate a policy.

It is doubtful if Lord Mansfield's dictum in Carter v. Boehm (supra) that keeping back a material fact is a fraud, means an insured who failed to convey facts he did not appreciate were material had an intent to deceive. This is supported by the sentence following the observation where it is said that; "Although the suppression should happen through mistake, without any fraudulent intention, yet still the underwriter is deceived and the policy is void...".²⁶ Mistake here is understood in the sense of realising the materiality of the fact but failing to disclose it due to carelessness or indifference falling short of fraud, and not on account of ignorance of its materiality.

²⁵ Hasson, "The Doctrine of Uberrima Fides in Insurance Law - A Critical Evaluation" (1969) 32 M.L.R. 615, 616; Birds, Modern Insurance Law, op. cit., p.82.

²⁶ (1766) 3 Burr. 1905, 1909.

Indeed, Lord Mansfield stated categorically in the later case of Mayne v. Walter²⁷ that "It must be a fraudulent concealment of circumstances that will vitiate a policy". And, in Hambrough v. Mutual Life Insurance Co. of New York, Lopes L.J. held it a "very good statement of the law" that: "In policies of insurance on life, an erroneous statement respecting the life insured, or mere silence respecting a material fact, in the absence of any fraudulent intention does not avoid the policy...".²⁸ No better backing can be found for this view than the statement of Lord Mansfield in his formulation of the doctrine and its limitations that "The reason of the rule which obliges parties to disclose, is to prevent fraud, and to encourage good faith."²⁹

Whatever scope the duty was initially intended to have, it is clear that it presently goes beyond bona fides and the absence of mala fides. An accurate statement of the current width of the duty is given by Professor Ivamy as follows:

A failure on the part of the assured to disclose a material fact within his actual or presumed knowledge renders the policy voidable at the option of the insurers. The assured's conduct cannot be taken into consideration as in any way affecting this result. The policy is equally liable to be avoided whether his failure is attributable to fraud, carelessness, inadvertence, indifference, mistake, error of judgment, or even to his failure to appreciate

²⁷ See Park, A System of the Law of Marine Insurances, (1842) p.431.

²⁸ (1895) 72 L.T. 140,141.

²⁹ (1766) 3 Burr. at p.1911.

its materiality. Even his ignorance of the fact will not excuse him, if it is one which he ought to have known.³⁰

Despite uncertainties in the juridical basis of the duty,³¹ it appears that the decision of the English Court of Appeal in Banque Financiere S.A. v. Westgate Insurance Co.,³² settles the issue that the power of the court to grant relief where there has been non-disclosure and misrepresentation of material facts stems from the jurisdiction originally exercised by the Courts of Equity to prevent imposition (at pp.548-550). In reaching this conclusion, Slade L.J. rejected the view that the duty was founded on an implied term of the contract. The learned judge preferred the opinion of Lord Esher M.R. in

³⁰ General Principles of Insurance Law, (5th ed.) p.156 and the cases cited in the passage; quoted by Slade L.J. in Banque Financiere v. Westgate Ins. Co. [1988] 2 Lloyd's Rep. 513 at p.550.

³¹ The decision of Lord Watson in Blackburn, Low v. Vigors (1887) 12 App. Cas. 531 at 539, is taken as authority for the view that the duty of disclosure is an implied term of the contract. This is followed by Hamilton J. in Pickersgill v. London and Provincial Marine [1912] 3 K.B. 614 at 621, and by Hirst J. in The Litsion Pride [1985] 1 Lloyd's Rep. 437 at pp.518-519. On the other hand is the opinion of Scott L.J. in Merchants' & Manufacturers' v. Hunt [1941] 1 K.B. 295 at 313, finding it difficult to explain the duty as resting on an implied term of the contract. This is supported by the view of May J. in March Cabaret v. London Ass. [1975] 1 Lloyd's Rep. 169 at 175, that the duty arises outside contract, and is that favoured by Irikefe J. in Ogbebor v. Union Ins. Ltd. [1967] 3 A.L.R. Comm. 166. See generally, Matthews, "Uberrima Fides in Modern Insurance Law", New Foundations for Insurance Law, (1987) p.39.

³² [1988] 2 Lloyd's Rep. 513; followed in Bank of Nova Scotia v. Hellenic Mutual, The Good Luck [1989] 3 All E.R. 628 at 658-659.

Blackburn, Low & Co. v. Vigors³³ that freedom of an insurance contract from misrepresentation or concealment is a condition precedent to the right of the insured to insist on the performance of the contract.

The duty is enacted in section 18(1) of the Marine Insurance Act of 1906 (U.K.) and section 20(1) of the 1961 Nigerian equivalent, in terms of one arising outside the contract thus;

...the assured shall disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured, and the assured shall be deemed to know every circumstance, which, in the ordinary course of business, ought to be known by him. If the assured fails to make such disclosure, the insurer may avoid the contract. (Emphasis added).

This represents the law in other classes of insurance as the 1906 provision is agreed to be a codification of the common law of insurance.

The difficulty of complying with an unlimited duty of disclosure is, however, mitigated by certain limitations placed on its scope.³⁴ The duty is to disclose material facts known before the contract is made,³⁵ although the duty of observing the utmost good faith (which may include a duty to speak) applies throughout the contract.³⁶ The duty

³³ (1886) 17 Q.B.D. 553, 561.

³⁴ A detailed study of the limits can be found in MacGillivray and Parkington, op. cit., Chapter 8; Birds, op. cit., Chapter 6.

³⁵ s. 18(1) M.I.A. 1906; s. 20(1) M.I.A. 1961.

³⁶ The Litsion Pride [1985] 1 Lloyd's Rep. 437; The Good Luck [1988] 1 Lloyd's Rep. 514, revsd. in [1989] 3 All E.R. 628.

is to disclose only material facts within the insured's knowledge and unknown to the insurer.³⁷ In Century Insurance Co. Ltd. v. Atuanya, the insurer sought to set aside in the High Court an arbitrator's award in favour of the insured, contending that non-disclosure of the cancellation of a previous policy avoided the contract. The arbitrator finding the insured unaware of the cancellation held him not bound to disclose the fact. The trial judge, in upholding the award, observed that the proposer's obligation is "to disclose what he actually knows and what he can ascertain by inquiries which he is reasonably expected to make".³⁸ In the circumstances, the insured was not in breach of duty. It was on the same principle that Taylor C.J. in Akpata v. African Alliance Insurance,³⁹ applying the dicta of Fletcher Moulton L.J. in Joel v. Law Union and Crown Insurance,⁴⁰ held the assured was not in breach of the duty of disclosure in failing to disclose stomach ulcers unknown to him and his doctors at the time he proposed for insurance.

More limitations on the duty are provided in section

³⁷ As to disclosure of facts within insured's constructive knowledge see, MacGillivray and Parkington, op.cit., paras. 639-642.

³⁸ [1966] 2 All N.L.R. 317,321.

³⁹ [1967] 3 A.L.R. Comm. 264 at 265. The case turned on the effect of the basis clause in proposal forms as to which see Chapter 5 para. 5.3.1, supra.

⁴⁰ [1908] 2 K.B. 863 at 884.

20(3) of the Marine Insurance Act 1961 as follows:⁴¹

In the absence of inquiry the following circumstances need not be disclosed namely:-

- (a) any circumstance which diminishes the risk;⁴²
- (b) any circumstance which is known or presumed to be known to the insurer, and for the purposes of this paragraph, the presumption shall extend and apply to matters of common notoriety or knowledge, and to matters which an insurer in the ordinary course of business, as such, ought to know;
- (c) any circumstance as to which information is waived by the insurer;
- (d) any circumstance which it is superfluous to disclose by reason of any express or implied warranty.

It is in relation to the matters specified in subsections (b) and (c) above, that early cases on the duty imposed significant limitations on its scope in order to protect insureds. The cases held that insurers must be taken to know facts ascertainable by reasonable inquiry and those reasonably clear from the information in their possession though not expressly mentioned by the assured, and that it is the fault of insurers if they shut their eyes to the light.⁴³ Some of the cases can also be explained on the ground of waiver, for an insurer neglecting to make simple inquiries which a reasonably

⁴¹ See s.18(3) M.I.A. 1906, which essentially is a codification of the limitations enumerated by Lord Mansfield in Carter v. Boehm (supra) beginning with the statement at p.1910 that: "There are many matters as to which the insured may be innocently silent".

⁴² Carter v. Boehm, above; The Dora [1989] 1 Lloyd's Rep. 69, 90.

⁴³ Carter v. Boehm, above; Foley v. Tabor (1862) 2 F.&F. 778; Freeland v. Glover (1806) 7 East. 457; Noble v. Kennoway (1780) 2 Doug. 510; Court v. Martineau (1782) 3 Doug. 161; Friere v. Woodhouse (1817) Holt N.P. 572; Asfar v. Blundell [1896] 1 Q.B. 123. See Hasson, (1969) 32 M.L.R. 615 at pp. 616-618.

prudent insurer ought to make would be held to waive disclosure of the facts in question.⁴⁴ This approach, however, contrasts with current English common law development which prevents waiver being too readily inferred and places the burden firmly on the insured to disclose material facts, thereby resisting any further erosion of the duty by a principle obliging the insurer to make reasonable inquiries. An apposite example of this approach is the following observation:

I have always understood the proper line that an underwriter should take, except in matters that he is bound to know, is absolutely to abstain from asking any questions, and to leave the assured to fulfil his duty of good faith, and to make full disclosure of all material facts, without being asked.⁴⁵

6.3.2 Misrepresentation: Origins and Scope

As with all contracts, a false material statement, whether fraudulently or innocently made, inducing the other party to contract, renders the contract voidable at the option of the injured party. A representation is fraudulent if it is made knowing it to be false or without belief in its truth or recklessly as to whether it is true

⁴⁴ It has been held in America that once the insurer acquires information through which it could ascertain a material fact, it has a duty to investigate the existence of the fact: Washington National Ins. v. Estate of Reginato, 272 F. Supp. 1016 (1966).

⁴⁵ Scrutton L.J. in Greenhill v. Federal Ins. Co. [1927] 1 K.B. 65 at p.85. See also, Mellor J. in Bates v. Hewitt (1867) L.R. 2 Q.B. 595,608; Mann, Macneal & Steeves v. Capital and Counties Ins. Co. [1921] 2 K.B. 300, 317; Container Transport Inc. v. Oceanus Mutual [1984] 1 Lloyd's Rep. 476, 508.

or false.⁴⁶

For a misstatement to be actionable, it must be of existing, and not a future, fact⁴⁷ nor one of law, opinion, or belief, unless the representor does not honestly or reasonably hold the opinion or expectation at the time the statement is made. Inasmuch as the principles are the same as those in the general law of contract, no detailed study will be made of them here.⁴⁸

The law on marine representations, which has been held declaratory of the common law of all insurance,⁴⁹ is contained in section 22 of the Act of 1961 (s. 20(1) M.I.A. 1906 (U.K.)):

Every material representation made by the assured or his agent to the insurer during the negotiations for the contract, and before the contract is concluded must be true; and if untrue the insurer may avoid the contract.

It is arguable, however, that the marine provision is not exactly declaratory of the position in all classes of insurance. There is the dictum of Lord Cranworth in Anderson v. Fitzgerald that "If there is no fraud in a representation...it is perfectly clear that it cannot affect the contract; and even if material, but there is no fraud in it, and it forms no part of the contract, it

⁴⁶ Derry v. Peek (1889) 14 App. Cas. 337.

⁴⁷ Bank Leumi v. British National Ins. [1988] 1 Lloyd's Rep. 71,75.

⁴⁸ See generally, Chitty on Contracts, (25th ed.) Vol.1 Chapter 6.

⁴⁹ Highlands Ins. v. Continental Ins. [1987] 1 Lloyd's Rep. 109.

cannot vitiate the right of the party to recover."⁵⁰ The case related to a claim under a life policy. Against this is the statement of Roche J. in Graham v. Western Australian Insurance,⁵¹ in a motor insurance claim, that an innocent misstatement can be a ground for avoiding any policy.

As noted by the learned authors of MacGillivray and Parkington on Insurance law (8th ed.) at para. 580, it would be curious if life policies were treated differently from others. Justification for the difference may be that questions on the health and medical history of a proposer for life assurance are such that no layman could do better than profer his honest opinion or belief as answer. This, therefore, may explain the reluctance to grant insurers the remedy of avoidance if the statements are made in good faith without fraudulent intent, and in the absence of a warranty of accuracy.⁵² It would appear this factor influenced the decision in Joel (supra).

In spite of the reasoning above, the better view is that expressed by the above authors that an innocent but material misrepresentation vitiates any contract of

⁵⁰ (1853) 4 H.L. Cas. 484,504, cited by Vaughan Williams L.J. in Joel v. Law Union & Crown Ins. [1908] 2 K.B. 863, 877.

⁵¹ (1931) 40 L.L.R. 64,66; repeated in Versicherungs und Transport A.G. v. Henderson (1934) 48 L.L.R. 54,58.

⁵² For this reason, some American courts require an 'intent to deceive' before a life policy is avoided for misstatements, see Keeton, Insurance Law-Basic Text, (1971) p.323; Metropolitan Life Ins. Co. v. Burno, 33 N.E. 2d 519 (1941).

insurance if the insurer so elects, as long as it is not one of opinion or belief. In other contracts equity grants relief by way of rescission for purely innocent misstatements, and if justification for this in insurance is the desire to prevent imposition,⁵³ the rationale is no less applicable in certain classes of insurance than others. However, the reason advanced by the authors for rejecting the dictum in Anderson v. Fitzgerald, (supra) that it was a decision founded on an action at common law before the Judicature Acts fails to take account of similar dictum by Lopes L.J. expressed after the judicature Acts in Hambrough v. Mutual Life Insurance (supra), that in life policies an erroneous statement in the absence of fraud, does not avoid the policy.⁵⁴

6.4 Materiality of Undisclosed and Misrepresented Facts

The twin duties on all insureds are to disclose and refrain from misrepresenting material facts. The common feature of 'material' leads to a consideration of the tests adopted by the courts in determining the materiality of facts for the purposes of the duties. The authorities suggest four possibilities and these will be examined in their development to the present model.

⁵³ Merchants' & Manufacturers' Ins. v. Hunt [1941] 1 K.B. 295, 318.

⁵⁴ See the text ending in footnote 28, above.

6.4.1 The Particular Insured

This test regards as material only those facts which the particular insured concerned considers relevant to the risk. The test has never been in serious contention, for it would entail allowing the insured to pick and choose what facts to disclose - a practice eroding the basic concept of the duty which is to lay all facts before the insurer and allow the latter decide. Judges have consistently negatived this test,⁵⁵ the earliest is probably Bayley J. in Lindenau v. Desborough:

I think that in all cases of insurance...the underwriter should be informed of every material circumstance within the knowledge of the assured; and that the proper question is...not whether the party believed it to be so. The contrary doctrine would lead to frequent suppression of information, and it would often be extremely difficult to show that the party neglecting to give information thought it material.⁵⁶

6.4.2 The Particular Insurer

Early marine cases on the duty of disclosure appear to measure materiality in relation to what the particular insurer would consider relevant to know in estimating the risk. Accordingly, it was held that: "A material concealment is a concealment of facts, which, if communicated to the party who underwrites, would induce him either to refuse the insurance altogether or not to effect

⁵⁵ Cockburn C.J. in Bates v. Hewitt (1867) L.R. 2 Q.B. 595, 607; Chanell J. in Re Yager and Guardian Ass. Co. (1912) 108 L.T. 38, 44; Fletcher Moulton L.J. in Joel v. Law Union [1908] 2 K.B. 863, 884.

⁵⁶ (1828) 8 B.&C. 586 at p.592.

it except at a larger premium than the ordinary premium."⁵⁷ Consistent with this approach, Kelly C.B. defined a material fact as "one which if made known to the underwriter would have affected his estimate of the character and degree of the risk".⁵⁸

This position was, however, changed on discovering that the converse situation of allowing the opinion of particular insurers to affect materiality would not make for certainty of compliance, and would impose a duty difficult for the insured to satisfy. Furthermore, the difficulty of proving or disproving materiality present in the particular insured test exist equally in the test of the particular insurer. This change is marked by the decision in Ionides v. Pender.⁵⁹

6.4.3 The Reasonable Insured

There are those authorities mainly in life assurance holding the test of materiality in non-disclosure to be that of the reasonable insured.⁶⁰ Thus, if a reasonable man would have recognised that it was material to disclose the

⁵⁷ Tindal L.C.J. in Elton v. Larkins (1832) 5 C.&P. 385, 392.

⁵⁸ Harrower v. Hutchinson (1870) L.R. 5 Q.B. 584, 590. See also Lynch v. Dunsford (1811) 14 East. 494; Bridges v. Hunter (1813) 1 M.&S. 15; Seaman v. Fonnereau (1743) 2 Strange. 1183.

⁵⁹ (1874) L.R. 9 Q.B. 531 at p.539.

⁶⁰ Durrell v. Bederly (1816) Holt N.P. 283; Swete v. Fairlie (1833) 6 C.&P. 1; Fowkes v. Manchester & London Ass. (1862) 3 F.&F. 440; Life Association of Scotland v. Foster (1873) 11 M. 351.

knowledge in question, it is no excuse that the particular insured did not recognise it to be so; the facts are material.⁶¹

There is also a line of non-life cases where dicta suggestive of this test have been applied.⁶² McNair J., after a detailed review of the authorities in Roselodge Ltd. v. Castle (a non-life insurance case), preferred the reasonable insured test to that of the reasonable insurer because he considered the former test fairer to insureds and dependants claiming on their policies.⁶³

6.4.4 The Prudent Insurer

Since the decision in Ionides v. Pender (supra) this has generally been the accepted test in marine insurance, and it is enacted in sections 18(2) and 20(2) for non-disclosure and misrepresentation respectively that a circumstance is material "which would influence the judgment of a prudent insurer in fixing the premium, or

⁶¹ Fletcher Moulton L.J. in Joe1 v. Law Union & Crown Insurance Co. [1908] 2 K.B. 863,884.

⁶² Lush J. in Horne v. Poland [1922] 2 K.B. 364,367; Sterndale M.R. in Becker v. Marshall (1922) 12 L.L.R. 413,414; Pearson J. in Regina Fur Co. v. Bossom [1957] 2 Lloyd's Rep. 466,483; McNair J. in Roselodge v. Castle [1966] 2 Lloyd's Rep. 113,131. The reasonable insured test has been applied in the Australian cases of Guardian Ass. v. Condolianis (1919) 26 C.L.R. 231 and Southern Cross Ass. Co. v. Australian Provincial Ass. (1939) 39 S.R. (N.S.W.) 174.

⁶³ [1966] 2 Lloyd's Rep. 113 at p.129. The judge accepted the reasonable insured test in Joe1's case as a "correct statement of the law on the topic".

determining whether he will take the risk".⁶⁴

The test judges materiality by reference to what a notional prudent insurer would regard as material. However, despite its application to life,⁶⁵ burglary⁶⁶ and motor⁶⁷ insurance, there was doubt as to whether it was a test of general applicability in non-marine insurances. This doubt was finally dispelled by the Court of Appeal in Lambert v. Co-operative Insurance Society Ltd.⁶⁸

It was held in Lambert, after an extensive review of the authorities, particularly those applying the reasonable insured test, that there could be no difference in the test between marine and non-marine insurances, and, that the correct test in all classes is that of the prudent or reasonable insurer laid down in the Act of 1906 and declaratory of the rule in all insurance law. Lawton L.J., (at p.492) explained the preference for the reasonable insured test on the ground that lawyers were of opinion that the test of the prudent insurer was unfair to many policyholders. He, however, preferred to leave injustices in the latter test for Parliament to get rid of.

The effect of the prudent insurer test is that the

⁶⁴ M.I.A. 1906 (U.K.). See ss. 20(2) & 22(2) M.I.A. 1961 for the equivalent Nigerian provisions.

⁶⁵ Mutual Life Ins. Co. of New York v. Ontario Metal Products Co. Ltd. [1925] A.C. 344.

⁶⁶ Becker v. Marshall (1922) 12 L.L.R. 413.

⁶⁷ Zurich General Accident v. Morrison [1942] 2 K.B. 53.

⁶⁸ [1975] 2 Lloyd's Rep. 485.

opinion of the particular insurer is irrelevant.⁶⁹ Thus, a fact may be material so as to vitiate a policy though it has no effect on the mind of the particular insurer, if it influences the mind of the notional prudent insurer by which every insurer must be judged. Kerr J. in Berger v. Pollock⁷⁰ felt this result absurd but conceded he was wrong in the later case of Container Transport International v. Oceanus Mutual,⁷¹ in the Court of Appeal.

Sections 20(2) of the Marine Insurance Act 1961⁷² and 10 of the Motor Vehicles (Third Party Insurance) Act 1950⁷³ lay down the prudent insurer test, and are reinforced by the cases as the true test in all insurances in Nigeria.

In Bamidele v. Nigeria General Insurance (supra) Odesanya J., in holding that the description of a daily-paid labourer in a personal accident proposal form as a horticulturist and greengrocer amounted to a material misrepresentation and non-disclosure vitiating the policy, observed (at p. 423):

If the company had known that he was a daily-paid labourer the usual prudence associated with men engaged in this type of insurance would have compelled the company to seek precise information about his duties before accepting the risk. At least the fact...could have influenced the computation of the premium. A contract of

⁶⁹ Colinvaux, op. cit., para.5.13; Chitty on Contracts, (25th ed.) para. 3686.

⁷⁰ [1973] 2 Lloyd's Rep. 442 at p.463.

⁷¹ [1984] 1 Lloyd's Rep. 476 at 495. See para. 6.4.5, below.

⁷² S.18(2) M.I.A. 1906 (U.K.).

⁷³ S.149(5)(b) Road Traffic Act 1972 (U.K.).

insurance is based upon the utmost good faith, which good faith was not reflected in the non-disclosure and misrepresentation...

In Ado v. Nigeria General Insurance (supra) material facts were defined as "every circumstance which would influence the judgment of a prudent insurer in fixing the premium or his determining whether he will take the risk".

On the prudent insurer test of materiality,⁷⁴ a previous refusal of insurance of the same type was held a material fact to be disclosed in Northern Assurance v. Idugboe.⁷⁵ In Akpata v. African Alliance Insurance, Taylor C.J., in holding a false answer to a question seeking information on previous life policies a material misrepresentation, observed:

It seems to me that the object of this question is to determine whether the deceased has ever been refused insurance cover, for, if he had, an answer to that effect is a most material fact in determining his eligibility for assurance... The reasons for the previous refusal of the insurance company to insure the deceased would and must have some effect on the determination of this question. If in fact it turned out that the insurance company had insured the deceased, it would still be important to a subsequent company whether the "cover" was at the ordinary rate or otherwise.⁷⁶

In American International Insurance Co. v. Dike,⁷⁷ the

⁷⁴ English case law is replete with examples of material facts which are not intended to be examined here. For details see, Ivamy, General Principles of Insurance Law, (5th ed.) pp.142-148; MacGillivray and Parkington, op. cit., paras. 670-693; and the comprehensive review of the case law by Hasson in (1969) 32 M.L.R. 615.

⁷⁵ [1966] 1 All N.L.R. 88.

⁷⁶ [1967] 3 A.L.R. Comm. 264 at p.279.

⁷⁷ [1978] N.C.L.R. 403.

assured supplied a negative answer to a proposal question asking whether he had been previously insured, whereas he held an expired goods-in-transit policy the year before. The presence of the basis clause made it irrelevant to consider the materiality of the misrepresentation but the judge found, obiter, a material non-disclosure of the previous policy.

It need only be mentioned, in addition, that applying the prudent insurer test means evidence is admissible from insurers to determine what prudent members of the industry would consider material.⁷⁸ However, courts are free to test the evidence, and some have found facts material irrespective of evidence while others have rejected certain evidence of materiality.⁷⁹

Furthermore, facts have been held material having no bearing on the characteristics of the risk, in so far as they relate to the proposed insured and tend to show him as a higher risk for insurance. Such facts, commonly known as the moral hazard, include principally the criminal record of the insured.⁸⁰

⁷⁸ See Evans, "The Role of Expert Evidence as to Materiality in Insurance Contracts", (1984) 12 Australia Bus. L.R. 4.

⁷⁹ In The Dora [1989] 1 Lloyd's Rep. 69, Phillips J, (at p.93) considered 'unrealistic' evidence that smuggling a bottle of whiskey is a material fact to be disclosed. See also Roslodge v. Castle [1966] 1 Lloyd's Rep. 113 at 132; Reynolds v. Phoenix Ass. Co. [1978] 2 Lloyd's Rep. 440 at 457-459.

⁸⁰ See MacGillivray and Parkington, op. cit., para. 680; Birds, op. cit., pp.90-93 and the cases cited in both references; The Dora, ibid. at pp.92-96.

6.4.5 The Reformed Prudent Insurer Test

Judicial development of the test of materiality does not stop at the prudent insurer simpliciter. This test is developed by the English Court of Appeal in Container Transport International v. Oceanus Mutual Underwriting⁸¹ (CTI), where it was held that facts are material for the purposes of marine misrepresentations and non-disclosures if they would have an impact on the formation of a prudent insurer's opinion or decision making process in evaluating the risk only. In reaching this conclusion, it was held unnecessary to show that a prudent insurer would have acted differently by refusing the risk or loading the premium had the true or undisclosed facts been known.

The decision turned primarily on the interpretation of sections 18(2) and 20(2) of the Act of 1906 and the meaning of the word 'influenced' used therein. While the conclusion reached is supported by a strong line of dicta from cases considered in the judgments, the result is not entirely without difficulty.

It is by no means certain that the distinction which the court sought to create was present to the mind of the judges whose dicta were relied on. Some of the cases considered such as Ionides v. Pender,⁸² Rivaz v. Gerussi⁸³ and Tate v. Hyslop⁸⁴ were primarily concerned with making it

⁸¹ [1984] 1 Lloyd's Rep. 476.

⁸² (1874) L.R. 9 Q.B. 531.

⁸³ (1880) 6 Q.B.D. 222.

⁸⁴ (1885) 15 Q.B.D. 368.

plain that a prudent insurer test was the accepted test of materiality, and not with whether a prudent insurer's final decision must be affected. Indeed, in the last case, evidence revealed that the insurers, to the knowledge of the insureds, would have charged a higher premium if the undisclosed facts were known. There are equally those dicta, admittedly in which the distinction was not present in the mind of the court, suggesting that the approach is to ask whether the concealed or misstated facts would have occasioned a difference of action by the insurer.⁸⁵ In Brownlie v. Campbell Lord Blackburn observed on disclosable facts in insurance that;

...if you know any circumstance at all that may influence the underwriter's opinion as to the risk he is incurring, and consequently as to whether he will take it, or what premium he will charge, if he does take it, you will state what you know. ⁸⁶

Moreover, the decision of Viscount Haldane in Dawsons v. Bonnin⁸⁷ that a fact is immaterial if it would have a negligible or no influence on the premium can be best explained on the ground that the final action of the insurer must be affected before a fact is considered material.

The holding of the Privy Council in Mutual Life

⁸⁵ See Brooke, "Materiality in Insurance Contracts", [1985] L.M.C.L.Q. 437 and the dicta quoted at p.440, particularly that of Tindal L.C.J. in Elton v. Larkins (1832) 5 C.&P. 385. See also Macclesfield L.C. in Dacosta v. Scandret in Parks, op. cit., at p.409, (footnote 27, *supra*), and in 171 E.R. 246.

⁸⁶ (1880) 5 App. Cas. 925, 954.

⁸⁷ [1922] 2 A.C. 413, 420.

Insurance Co. of New York v. Ontario Metal Products⁸⁸ in which the distinction was present that a fact is not material if its effect on a reasonable insurer was delay, and delay alone, in coming to a decision was distinguished in CTI on the ground that it was based on a Canadian statute requiring a misrepresentation to have induced the contract. The absence of the requirement of inducement from the marine provisions significantly influenced their Lordships in CTI. Thus, Parker L.J. observed:

Turning to the language of the Act itself... There is no requirement that the particular insurer should have been induced to take the risk or charge a lower premium than he would otherwise have done and I can see no justification for importing such a requirement either in relation to non-disclosure under s.18 or a representation under s.20(1) where there is a right to avoid for material misrepresentation and no requirement that the insured (sic) should be or have been induced thereby.⁸⁹ (Emphasis added)

While this must be the correct interpretation of the marine provisions where inducement is absent, it does not easily fit with other classes of insurance or reconcilable with established principle. It is settled that for a misrepresentation to be actionable, it must have induced the contract⁹⁰ by causing one party to contract on the strength of misstated facts, and thereby giving rise to a difference of action. The authors of MacGillivray and Parkington on Insurance Law (8th ed.) at para. 618 state

⁸⁸ [1925] A.C. 344 at 351.

⁸⁹ [1984] 2 Lloyd's Rep. at p.510.

⁹⁰ Romilly M.R. in Pulsford v. Richards (1853) 17 Beav. 87, 96.

that the difficulty in proving that a particular misstatement induced the contract has meant courts are prepared to accept as a rebuttable presumption that the insurer was induced and misled once misrepresented facts are established as material and a policy is issued. However, it is submitted that, the statement does not alter the general rule of contract on actionable misrepresentations noted above, though it may lead to the assertion that materiality of facts and inducement to contract are distinct concepts,⁹¹ therefore, a fact is not material only because it induces the contract. While this may be so in non-disclosure where there is no requirement that the particular insurer be induced,⁹² it does not appear the courts have accepted it as such in misrepresentations where materiality and inducement have been applied as linked concepts.⁹³

In the Mutual Life case above, where insurers sought to avoid liability on account of inaccurate or incomplete statements supplied, the Privy Council preferred to hold the misstatements immaterial because the insurer would have issued the policy on the same terms had the true facts been

⁹¹ See Treitel, op. cit., at p.263.

⁹² Zurich Accident v. Morrison [1942] 1 All E.R. 529, 539.

⁹³ In Museprime Properties Ltd. v. Adhill Properties Ltd., The Times, 13 March 1990, Scott J. accepted as an accurate statement of the law the opinion expressed in Goff and Jones, The Law of Restitution, (3rd ed., 1986) p.168, that any misrepresentation which in fact induced a person to enter into a contract entitled him to rescind it, and that whether or not it would have induced a reasonable person to enter the contract (i.e. material), related only to the question of onus of proof.

known. As such, it was held that the facts "...would not have influenced a reasonable insurer so as to induce him to refuse the risk or alter the premium".⁹⁴ Indeed, in the Canadian case of Security Mutual Casualty Co. v. Cunningham,⁹⁵ inducement to contract was treated as a condition of materiality, and subject to jurisdictional differences, this is in accord with the test adopted in America. According to Harnett, "Materiality has as its reference point the bearing on the acceptance of the risk...a fact occupies that status known as materiality when the insurer's knowledge of the facts would result in his refusal to enter that contract of insurance".⁹⁶ The same approach was followed in Ogbebor v. Union Insurance Ltd.,⁹⁷ where the insurer argued that alleged misrepresentations were material because they induced the agent to grant a 15% discount on the premium paid. Irikefe J. finding the discount was given because the insured was buying a new car, held the misrepresentations immaterial as they were not relied on to induce a reduction in premium.

If it is accepted that inducement is a requirement in misrepresentations at least, the test of materiality in CTI

⁹⁴ [1925] A.C. 344 at p.352.

⁹⁵ (1980) 108 D.L.R. (3d) 208.

⁹⁶ Harnett, 15 Law & Contemp. Prob. (1950) at p.396. It appears it is for this reason s.28(1) of the Insurance Contracts Act 1984 (Australia) provides no relief for an insurer who would have contracted on the same premium and terms if the insured had disclosed or had not misrepresented facts.

⁹⁷ [1966] A.L.R. Comm. 166. See also United Nigeria Ins. v. Karimu [1969] N.C.L.R. 247,250.

which focuses on facts which a prudent insurer would want to know and not what the truth of such facts would have led him to do may not be of general application. The opposite is the case, however, as authorities after CTI appear to accept the test laid therein as one of general application to non-disclosure and misrepresentation alike in all insurances.⁹⁸

On the hypothesis that the power to grant relief where there has been non-disclosure and misrepresentation of material facts, duress, and undue influence stems from the equity jurisdiction exercised by the courts to prevent imposition,⁹⁹ it is not easy to see how relief by way of avoiding the contract should be granted an insurer whose only complaint is his desire to know facts which admittedly would not affect his ultimate decision one way or another.¹⁰⁰ It appears the reformed test imposes extra burdens on insureds as far as the duty to disclose go¹⁰¹

⁹⁸ Highlands Ins. v. Continental Ins. [1987] 1 Lloyd's Rep. 109; Banque Financiere v. Westgate Ins. [1988] 2 Lloyd's Rep. 513.514; The Dora [1989] 1 Lloyd's Rep. 69, 88-89; The Good Luck [1989] 3 All E.R. 628 at 659; Roberts v. Plaisted [1989] 2 Lloyd's Rep. 341,345.

⁹⁹ Banque Financiere v. Westgate Insurance Co. [1988] 2 Lloyd's Rep. 513 at pp.548-550.

¹⁰⁰ The reluctance of the courts to grant relief in cases where no hardship results may explain why rescission is refused a contracting party complaining of undue influence if he cannot show the transaction is "manifestly disadvantageous" to him: Bank of Credit and Commerce v. Aboody [1989] 2 W.L.R. 759.

¹⁰¹ See Birds, Modern Insurance Law, at pp.88-89; Hodgin, Protection of the Insured, (1989) p.156; for a contrary view see Khan, "A new Test of Materiality in Insurance Law", [1986] J.B.L. 37 at pp.43-44.

since it requires disclosing all "information which a prudent insurer would obviously want to know".¹⁰²

Finally, the reformed test fails to take account of the inherent difference between non-disclosure and misrepresentation. In the former, there is no knowledge hence the test can only be objective whereas in the latter, the insurer has been led to believe untrue facts therefore the question of their effect on the insurer's mind is a subjective one.

6.5 Reform of the Uberrima Fides Doctrine

Over the years, judges, law reform agencies, academics and consumer representatives in different common law jurisdictions have expressed dissatisfaction and regret as to how the doctrine of good faith has developed and been applied. The central problem revolves around the duty of disclosure and the test of materiality of undisclosed and misrepresented facts.

It is evident from the foregoing discussion that the duty on the insured goes beyond dealing fairly and honestly with the insurer and, unsurprisingly, legal developments in common law countries have sought to restore this as the acceptable balance. The English Law Reform Committee reporting in 1957 on the insured's duty to disclose observed:

whether the insuring public at large is aware of this it is difficult to say; but it seems to follow from the accepted definition of

¹⁰² Stephenson L.J. in C.T.I v. Oceanus, (supra) at p.527.

materiality that a fact may be material to insurers...which would not necessarily appear to a proposer for insurance, however honest and careful, to be one which he ought to disclose.¹⁰³

The Committee was of opinion that "no fact should be deemed material unless it would have been considered material by a reasonable insured".¹⁰⁴

A principle developed out of the superior knowledge of facts relating to a proposed risk possessed by the insured was bound to outlive its usefulness with time and changes in insurance practice enabling the insurer to obtain all information considered necessary. And, when easier accessibility of information meant the insurer possessed equal, if not better, knowledge about particular risks. This represents another criticism for presently retaining the common law duty of disclosure,¹⁰⁵ and explains the reluctance of the American courts to extend it to non-marine cases where only deliberate and fraudulent concealment vitiates a policy.¹⁰⁶

¹⁰³ Conditions and Exceptions in Insurance Policies, (1957), Cmnd. 62.

¹⁰⁴ Ibid. at p.7. In Lambert v. Co-operative Ins. (supra), MacKenna J. noting the unsatisfactory state of the law expressed regret at the non-implementation of the recommendation.

¹⁰⁵ See Hasson, (1969) 32 M.L.R. at p.633.

¹⁰⁶ The policy justification for this is given in Hartford Protection Ins. Co. v. Harmer, 2 Ohio St. 452 (1853): "...if the underwriter assumes the risk without taking the trouble to either examine, or inquire, he cannot very well, in the absence of all fraud, complain that it turns out to be greater than he anticipated". For the position in the U.S.A. see generally, Keeton, Insurance Law-Basic Text, (1971), pp.326-328; Colinvaux, op. cit., para. 5-07B; and

Compliance with the duty is complicated by having to discover what a notional prudent insurer would consider material¹⁰⁷ and the fact that the insured is not excused by truthfully answering questions put to him in proposal forms commonly used in all consumer insurances. The rule is that the assured is bound not only to make true answers to questions put to him, but also spontaneously to disclose any fact exclusively within his knowledge which is material for the insurer to know;¹⁰⁸ described as the insured's residual duty of disclosure.

Against this background, the Law Commission in England noted in its comprehensive report on the duty of disclosure, the shortcomings in the doctrine¹⁰⁹ agreeing in principle that inherent defects necessitated statutory reforms,¹¹⁰ but rejecting any notion of either a complete abolition of the duty¹¹¹ or abolition in relation to

for a call to expunge this limited requirement from American law see Harnett, 15 Law & Contemp. Prob. (1950) at pp.409-414.

¹⁰⁷ Merkin, "Uberrimae Fidei Strikes Again", (1976) 39 M.L.R. 478,479.

¹⁰⁸ Glicksman v. Lancashire & General Ass. [1927] A.C. 139; Greenhill v. Federal Ins. Co. [1927] 1 K.B. 65; Schoolman v. Hall [1951] 1 Lloyd's Rep. 139; Lee v. British Law Ins. [1972] 2 Lloyd's Rep. 49; Arterial Caravans v. Yorkshire Ins. [1973] 1 Lloyd's Rep. 169.

¹⁰⁹ Insurance Law, Non-Disclosure and Breach of Warranty, Law Com. No. 104, Cmnd. 8084 (1980) at paras. 3.17-3.22.

¹¹⁰ Ibid. paras. 3.23-3.30.

¹¹¹ Ibid. paras. 4.32-4.33.

consumers.¹¹² The Commission favoured a modified duty of disclosure whereby the insured would only be prejudiced if he has "conducted himself dishonestly or unreasonably". While retaining the old test of materiality as that of the prudent insurer, the insured would only need to disclose facts which a reasonable man in his position 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. The Commission would, however, not wish the court to take account of the individual applicant's idiosyncrasies, ignorance, stupidity, or illiteracy.¹¹³

This final qualification the Australian Law Commission was unable to agree with for reasons succinctly put as follows:

But it is a notorious fact that a reasonable man test would impose a standard which a great number of insureds would be unable to meet. It is not justified by the principle of uberrima fides. That principle requires utmost good faith, not compliance with the standards of the reasonable man... The proposed test makes the assumption that all insureds are equally capable of reaching the required standard. That is patently false. There are great differences among insureds in relation to education, culture, language and social and commercial experience which affect their ability to comply with the standard of the

¹¹² Ibid. paras. 4.34-4.40. Cf. Birds, [1982] J.B.L. 449 at p.453, where it is argued compelling reasons do not exist against abolishing the duty in respect of consumers.

¹¹³ Ibid. paras. 4.43-4.53. For a more detailed statement of the Commission's views see Merkin, "Insurance Law and the Law Commission", [1981] 3 L.M.C.L.Q. 347.

reasonable man.¹¹⁴

The Australian Commission was at pains to stress that the doctrine does not justify a rule requiring the insured to show more than the utmost good faith,¹¹⁵ and nothing short of achieving this result would suffice.

In Canada, recognition of defects in the doctrine meant that for some time there have been specific statutory provisions in some provinces modifying the uberrima fides principle. For instance, it is provided in relation to fire insurance in Manitoba that:

If any person applying for insurance ... misrepresents or fraudulently omits to communicate any circumstance which is material to be made known to the insurer...the contract shall be void as to any property in relation to which the misrepresentation or omission is material.¹¹⁶ (Emphasis added).

Also common in Canada and certain American States are provisions making life policies unavoidable for innocent material non-disclosures and/or misrepresentations if in force for a specified duration. The Manitoba enactment specifies a two year period in relation to life policies.¹¹⁷

¹¹⁴ Australian Law Reform Commission, Report No. 20, Insurance Contracts, para. 180.

¹¹⁵ Ibid. at para. 175.

¹¹⁶ The Insurance Act, R.S.M. 1970, s.142(1). For American statutory provisions avoiding for misrepresentation only on proof of intent to deceive see, Keeton, op. cit., p.380 footnote 1.

¹¹⁷ Ibid. s.161(2); compare s.122(4) Insurance Act 1980 (Trinidad and Tobago); s.4(1)(c) Insurance Law Reform Act 1977 (New Zealand). For a detailed discussion of statutory and judicial control of the uberrima fides principle in Canada see Hill, "The Doctrine of 'Uberrima Fides' and its application to Insurance Law in Canada", Law Reform Reconnaissance Programme (II), Legal Research Institute of

The Nigerian Law Reform Commission in its deliberations was of the view that the materiality of a fact as it affects a contract of insurance is generally within the special knowledge of the insurer and, for this reason, recommended it be mandatory for insurers to draw up proposal forms or applications for renewal in such a way as to elicit all information deemed necessary.¹¹⁸

The above recommendation is enacted in section 1(1) of the Insurance (Special Provisions) Decree of 1988 thus:

Where an insurer requires an insured to complete a proposal form or other application for insurance, the form shall be drawn up in such manner as to elicit all such information as the insurer considers material in accepting the application for insurance of the risk; and any information not specifically requested shall be deemed not to be material.

It is proposed to examine the above legislation as it affects the common law principles discussed earlier.

6.5.1 A Total Abolition or Attenuation of the Duty of Disclosure?

The approach to reform adopted in section 1(1) is not entirely new. A shortcoming of the duty of disclosure where proposal forms are completed is the potential to mislead an applicant into thinking that all duty imposed is discharged by truthfully and correctly answering specific questions asked unaware of a residual duty to disclose material facts not covered by express questions. With

the University of Manitoba.

¹¹⁸ Law Reform Journal No. 5 (1986) p.180.

this possibility, the retention of a residual duty becomes difficult to justify. Thus, it is observed that: "It is not immediately obvious why, in these days, if a proposer has completed a lengthy proposal form, he should be subject to a residual duty of disclosure, whatever in practice that might entail."¹¹⁹

Moreover, if the original justification for a duty of disclosure is the need to have the insurer well informed of material facts, it should follow that the asking and correct answering of proposal questions should satisfy this necessity without more. Thus Hasson, in his critical evaluation of the doctrine of *uberrima fides*, opined that the failure of an insurer to ask information customarily sought by insurers should be deemed a waiver of the information.¹²⁰ This view finds limited judicial support with Scrutton L.J. twice warning that by failing to put questions on material matters, insurance companies run the risk of the contention that failure to ask the question prevents them afterwards from relying on its non-disclosure.¹²¹

In Hair v. Prudential Insurance Co. Ltd.,¹²² Woolf J.

¹¹⁹ Birds, [1982] J.B.L. 449, 453.

¹²⁰ (1969) 32 M.L.R. at p. 635. See also Merkin, (1976) 39 M.L.R. at p. 479.

¹²¹ Newsholme Bros. v. Road Transport and General Ins. [1929] 2 K.B. 356, 363; McCormick v. National Motor & Accident Insurance (1934) 40 Com. Cas. 76, 78.

¹²² [1983] 2 Lloyd's Rep. 667, noted in [1984] J.B.L. 163. See also Adeyeye v. Liberty Ins. Co., para. 6.5.4, *supra*.

held that where an insured answers correctly specific questions in a proposal form warranting their truth, he was not bound thereafter to disclose any material fact outside the scope of the specific questions in the absence of a request in the proposal.¹²³ Recently, it was held that asking specific questions on whether premises were used as a hotel, inn or casino, *inter alia*, amounted to a waiver by the insurer of the disclosure of the fact that they were also used as a discotheque.¹²⁴ Section 1(1) of the 1988 Decree is consistent with these approach in providing that any information not specifically requested in the proposal shall be deemed immaterial and, therefore, not qualifying to be disclosed. The section puts the onus of asking facts considered material firmly on the insurer thereby abolishing a residual duty to disclose where proposal forms are used and, to that extent, attenuates the duty at common law rather than abolishing it.

The U.K. Law Commission, however, views this approach at reform as unnecessarily restrictive of the duty, resiling in its final report from the position taken in the working paper preceding the report.¹²⁵ Irrespective of

¹²³ See the ABI provision in para.1(d) of the revised Statement of General Insurance Practice that those matters which insurers have found generally to be material will be the subject of clear questions in proposal forms. For a critique of the provision see Lewis, (1986) 49 M.L.R. at pp.761-763.

¹²⁴ Roberts v. Plaisted [1989] 2 Lloyd's Rep. 341. (C.A.).

¹²⁵ The working paper had proposed that an insured completing a proposal form should be relieved of any further duty of disclosure, subject to a residual duty not deliberately to conceal known material facts; see Law Com.

proposal forms a residual duty was desirable, it was argued, because forms are designed to elicit information of a standard nature only and not all material information. It was also feared that abolishing the residual duty may encourage fraudulent and deliberate concealment with difficulty of proof, and that applications would become unduly lengthy and unwieldy.¹²⁶ These, surely, are legitimate concerns relevant to the Nigerian provision abolishing a residual duty to disclose on completion of proposal forms. It becomes necessary to examine the relevance of the claims in light of the new law.

Over the years, proposal forms have become increasingly lengthy and comprehensive in the questions asked. While conceding that information sought in them is of a standard type not covering all material matters which insurers may wish to know, it is true that questions are asked in light of the volume of experience possessed by insurers on information required in respect of any category of insurance. Unsurprisingly, previous convictions are asked where they may have a bearing on the risk e.g., in motor policies examined there is a question on driving convictions. That some forms on insurance of buildings examined require a sketch of the building to be insured is indicative of the detailed nature of information already sought, and it is unlikely the new provisions will alter significantly current practice. Assuming it does, however,

W.P. 73, para. 66.

¹²⁶ Law Com. 104, paras. 4.32, 4.33, 4.56-4.58.

one can usefully adopt the view that lengthier applications represent a more acceptable price to pay for the security of cover than leaving the policy open to avoidance for purely innocent concealments in the absence of express questions.¹²⁷

On fears that the law does nothing as a disincentive to fraudulent and deliberate concealment, it is inconceivable the lawmakers intended to destroy completely in insurance the utmost good faith described recently by the Supreme Court as the "legal basis on which insurance is based".¹²⁸ On the contrary, the intention appears to be the restoration of good faith in insurance based on honest and fair dealings. It should be borne in mind that above the duty to disclose and to refrain from misstating material facts, is the overriding duty to observe the utmost good faith of which the insured may be in breach by his actions. A man could hardly be said to have acted in good faith by effecting a fire cover on premises believing that they may be burned down and yet remain silent on this fact.¹²⁹

There is authority that a deliberate concealment amounts to fraud vitiating the policy.¹³⁰ However, on the

¹²⁷ Birds, [1982] J.B.L. 449, 453.

¹²⁸ National Ins. Corp. of Nigeria v. Power & Industrial Ltd. [1986] 1 N.W.L.R. 1 at p.28.

¹²⁹ This is one example used by the English Law Commission against abolishing a residual duty of disclosure by the use of proposal forms: Law Com. 104, para. 4.58.

¹³⁰ Dalglish v. Jarvie (1850) 2 Mac.&G. 231, 243.

difficulty of proving knowledge of material facts, it is submitted that facts which speak for themselves so as to establish their materiality¹³¹ are equally capable of giving rise to an inference of fraudulent conduct:

It is clearly just to require that nothing but a fraudulent non-disclosure shall avoid the policy. Nor does the rule result in practical hardship for the insurer for in every case where the undisclosed fact is palpably material to the risk, the mere non-disclosure is itself strong evidence of a fraudulent intent. Thus, if a man, about to fight a duel should obtain life insurance without disclosing his intention, it would seem that no argument or additional evidence would be needed to show the fraudulent character of the non-disclosure.¹³²

In any event, decided cases show that less blameworthy conduct than fraud is required to be in breach of good faith.¹³³

The most obvious limitation of section 1(1) is its application only where proposal forms are completed. The use of proposal forms is the most common method by which insurers elicit information relevant to the assessment of the risk. The forms are widely used in all consumer and certain commercial risks such as burglary and goods-in-

¹³¹ Glicksman v. Lancashire and Gen. Ass. [1925] 2 K.B. 593, 609.

¹³² Per Judge Taft in Penn. Mutual Life v. Mechanics Savings Bank, 72 F. 413 (1896). It was on similar circumstantial evidence that the judge in Bamidele v. Nigeria General Ins. (supra) found fraudulent collusion between the insured's representatives and insurer's agent vitiating the policy issued.

¹³³ See C.T.I v. Oceanus Mutual [1984] 1 Lloyd's Rep. 476; where Kerr L.J. spoke of the requirement of a "fair representation"; Banque Keyser Ullman v. Skandia Ins. Co. [1987] 1 Lloyd's Rep. 69, revsd. on other grounds in [1988] 2 Lloyd's Rep. 513.

transit insurances, but its use is less common in large commercial risks, and is virtually unused in marine insurance. In the latter cases, therefore, the common law continues to apply unmodified. Perhaps more importantly, in the absence of statutory or administrative compulsion, insurers are given the option to choose whether or not to use proposal forms, and by refraining from doing so in individual consumer contracts the section is evaded. Insureds falling in this category are left unprotected having to disclose all facts material for a prudent insurer to know. For these reasons, the duty of disclosure far from being abolished remains and, in the event, insurers are now better off not insisting on the completion of proposal forms.

Insurers form the practice of asking general in addition to specific questions in proposal forms. A personal liability form examined asks: "Are there any circumstances which could render the insurance more hazardous?". Given the new provisions, there is the likelihood that much more general questions asking the proposer to volunteer any information material to the risk would be asked. The U.K. Law Commission views the practice as fulfilling a useful purpose and, as such, saw no reason for abolishing it.¹³⁴ That the practice is unaffected by section 1(1) of the 1988 Decree is not in doubt, and it is unlikely the Director of Insurance will impose administrative restrictions on its use given his past

¹³⁴ Law Com. 104, para. 4.58.

record of non-interference, although one must await the outcome of his recent directive requesting insurers to forward redrafted insurance documents showing compliance with the new law. The consequence of general questions is to reintroduce a residual duty of disclosure where proposal forms are completed. Such reintroduction constitutes a serious limitation on the effectiveness of the new provisions and, for this reason, it is arguable the law may have done nothing to alter the common law in practice.

An objectionable feature of the approach under section 1(1) is the erroneous assumption that a duty of disclosure subsists only up to the time of completing proposal forms so that facts arising after the proposal is submitted need not be disclosed. The law is that the duty is incumbent on insureds up till the conclusion of the contract,¹³⁵ usually signified by the acceptance of the proposal form and not completion, or payment of premium. Under the 1988 Decree, it is arguable that facts arising after the proposal form is completed and known by the proposer to be material need not be disclosed. Such cases may be few and far between in practice, and if the undisclosed facts are patently material this may constitute deliberate concealment or fraud vitiating the policy. More likely in practice are situations where questions answered correctly at the time of completion are falsified before conclusion of the

¹³⁵ Re Yager and the Guardian Ass. Co. (1912) 108 L.T. 38; Canning v. Farquhar (1886) 16 Q.B.D. 727; M.I.A. 1961, s.20(1).

contract due to changed circumstances. Under the general law, such representations if uncorrected may amount to material misrepresentations vitiating the contract.¹³⁶ The new law, therefore, in the absence of warning, has the potential to give proposers a false sense of security that all obligation is discharged once proposal questions are answered correctly despite changed circumstances and, in this way, constitutes a trap.

6.5.2 Renewal of Original Cover

Everyone agrees that the assured is under a duty of disclosure and that the duty is the same when he is applying for a renewal as it is when he is applying for the original policy.¹³⁷

The above statement adequately sums up the law on renewals of original contracts of insurance subject to the qualification that the insured need not disclose what is known to the insurer, so that facts disclosed in the original application need not be repeated on renewal if unchanged.

Most indemnity policies are yearly contracts making them annually renewable so that every year there is a fresh obligation on the insured to disclose material facts arising. The U.K. Law Commission concedes that "it is most unlikely that the ordinary insured is aware of this somewhat technical rule of law", and that those aware are

¹³⁶ s.22(1). M.I.A. 1961.

¹³⁷ MacKenna J. in Lambert v. C.I.S. [1975] 2 Lloyd's Rep. 485, 487.

likely to find compliance difficult.¹³⁸ This is because insurers do not adopt the practice of requiring insureds to complete proposal forms afresh on every renewal, and Nigerian insurers do not form an exception. Accordingly, the U.K. Commission recommended, briefly, that the insured be warned in the notice inviting renewal that he is under an obligation to disclose to the insurer all material facts as defined in the reformed duty, and of the consequences of failure to comply with the warning.

The Nigerian Law Reform Commission appears to have recommended the use of completed applications eliciting material information on each renewal. Its rejection in the Decree is unsurprising in view of its apparent unattractiveness to the industry on account of the cost entailed. In effect, section 1(1), above, by limiting itself to cases where proposals are completed, and in the absence of any warning requirements excludes renewals of cover from its purview. As such, it also excludes a majority of insurance contracts to which the common law duty of disclosing all material facts would apply unaltered.

6.5.3 Cover Notes

A cover note is a separate, distinct and fully binding contract of insurance and is increasingly growing in popularity in Nigeria because of its informal nature and ease of acquisition in the absence of elaborate

¹³⁸ Law Com. 104, para. 4.70.

applications eliciting information.¹³⁹ These attractions may well prove to be the undoing of many insureds for the duty to disclose material facts applies to cover notes though the scope of the duty may be less.

In Mayne Nickless v. Pegler¹⁴⁰ Samuels J. was of opinion that since the insurer bears the same risk under a cover note as under a policy, there was no reason to differentiate the scope of the duty in both cases. Others, however, argue that compelling reasons exist for demanding a lower duty from the insured in cover notes.¹⁴¹

The circumstances under which interim contracts are concluded are dissimilar to those of a full contract. Proposal forms are not employed in the former and questions are generally not asked indicating the insurer's preparedness to undertake a higher risk for a shorter duration. As such, it is claimed only "those matters which would create a situation where no reasonable person would believe that an insurer knowing those facts would grant cover need be disclosed".¹⁴² The reasoning is not without judicial precedent. In the earlier Australian case of Johnson v. Guardian Assurance Co. Ltd. it was held that where an insurer issues a cover note and binds itself to

¹³⁹ For the use of cover notes see Chapter 2 para.2.4, *supra*.

¹⁴⁰ [1974] 1 N.S.W.L.R. 228,234,235.

¹⁴¹ Pash and Evans, "Cover Notes: Review of Mayne Nickless v. Pegler", (1981) 17 Adelaide L.R. 517 at 521.

¹⁴² Birds, "What is a Cover Note Worth?", (1970) 40 M.L.R. at 81.

the risk without asking any questions, undisclosed facts prior to cover were to be regarded as immaterial because:

It is open to an insurance company to obtain a properly filled in proposal before issuing any cover, but if it does not adopt this course and issues cover without asking any questions, it is really making a contract different from the usual contract.¹⁴³

Courts in Nigeria appear to accept as settled law that good faith is equally applicable to cover notes as it is to policies and there has never been any discussion of differences in the scope of disclosures. In Northern Assurance v. Idugboe,¹⁴⁴ the Supreme Court held that an insured under a cover note was in breach of duty by failing to disclose a previous insurer and misstating in the proposal preceding the issue of the cover note that he had never been declined insurance.¹⁴⁵ Similarly, in Ogbebor v. Union Insurance,¹⁴⁶ Irikefe J. was prepared to accept that misstatements in the proposal form and non-disclosure of facts could vitiate the cover note issued if established.

The desire to achieve a fair result led the U.K. Law Commission to recommend that application for interim cover would be a relevant factor in considering whether an insured has fallen short of the standard of a reasonable

¹⁴³ (1931) 31 S.R. (N.S.W.) 386 at p.390.

¹⁴⁴ [1966] 1 All N.L.R. 88.

¹⁴⁵ Quaere whether misrepresentations in the proposal form were directed at the cover note or induced its issue, which the agent of the insurer appears to have given without reference to the answers in the form.

¹⁴⁶ [1967] 3 A.L.R. Comm. 166..

man under the reformed duty adopted.¹⁴⁷

Regrettably, however, section 1(1) of the 1988 Decree limiting its reform provisions to cases where proposal forms are completed prior to cover, places a vast majority of contracts outside its ambit. In interim covers, therefore, the insured must disclose all material facts relevant to a prudent insurer in obtaining cover usually for a maximum duration of thirty days.

6.5.4 Misrepresentation in Proposal Forms

When proposal forms are used, it follows from the new provisions that all obligation on the proposer is discharged by truthfully and correctly answering questions asked. In such cases it appears the defence of non-disclosure would no longer be available except, perhaps, where general questions are asked. The available defences would be misrepresentation and breach of warranty constituted by the 'basis' clause where false answer(s) are given. In view of section 2(1) of the 1988 Decree requiring all warranties to be material, it is unlikely insurers would rely heavily on the 'basis' clause device in future.¹⁴⁸ Accordingly, misrepresentations are likely to assume new significance hence the desirability of considering this traditional contract defence in the context of the provisions of section 1(1).

Before proceeding, it is important to note that the

¹⁴⁷ Law Com. 104, para. 4.51,4.52.

¹⁴⁸ See Chapter 5 paras. 5.3.1 and 5.5.3, *supra*.

combined effect of sections 1(1) and 1(2) is to make insureds responsible for misstatements appearing in applications though recorded by the insurer's agent.¹⁴⁹ Furthermore, it appears section 1(3) which holds disclosure to the agent as disclosure to the insurer serves no purpose where applications are completed since a residual duty to disclose is abolished under section 1(1).

A sad consequence of the way insurers frame questions asked in applications is their potential to be misunderstood and mislead. A proposer might genuinely supply an accurate answer which turns out false viewed from the sense in which the insurer meant it and be penalised for the misstatement. Scrutton L.J. once said it is a great pity that insurance companies do not make questions plainer.¹⁵⁰ In Royal Exchange Assurance Co. v. Chukwurah,¹⁵¹ the insured supplied a negative answer to the question "Will the motor car be driven by any person who to your knowledge has held for less than one year a full licence?", though describing himself as a "learner" to an earlier question. In truth, his licence was barely a month old at the time of claim. The Supreme Court found the answer a false statement though the High Court had upheld the insured's contention that he understood the question as referring to other persons and inapplicable to him.

¹⁴⁹ See Chapter 4 para. 4.4, *supra*, for a fuller discussion.

¹⁵⁰ Glicksman v. Lancashire and Gen. Ass. [1925] 2 K.B. 593, 606. See generally, Chapter 5 para. 5.5.3, *supra*.

¹⁵¹ [1976] N.C.L.R. 191.

Aware of the ability of ambiguous questions to mislead, the courts protect insureds from the consequences of such ambiguities when necessary. The guiding principle was stated by Lord Shaw in Condolianis v. Guardian Assurance Co. that a contract would stand if the answer was made on a fair and reasonable construction of the question.¹⁵²

It is further held that before a statement is established as false for the purposes of misrepresentation, it must be considered as a whole and construed against the background of other information which insurers happen to have, and the circumstances in which it is made.¹⁵³ Perhaps, the result in Chukwurah might be different if the negative answer was considered in light of the earlier answer that the insured was a learner driver.

Again, it is surprising the insured in Chukwurah, above, was unprotected by the principle that an insurer issuing a policy without making inquiries despite incomplete and unsatisfactory answers in the proposal may be deemed to have waived the right to obtain full disclosure and correct answers.¹⁵⁴ Thus, in Adeyeye v.

¹⁵² [1921] 2 A.C. 125,130; this construction is enacted in s.23 Insurance Contracts Act 1984 (Australia).

¹⁵³ Anderson v. Pacific Fire (1869) 21 L.T. 408; St Margarets Trusts Ltd. v. Navigators and General Ins. (1949) 82 L.L.R. 752,762; The Dora [1989] 1 Lloyd's Rep. 69,89.

¹⁵⁴ This is enacted in s.21(3) Insurance ^{Contracts} Act 1984 (Australia); MacGillivray and Parkington, op. cit., para. 601; Roberts v. Avon Ins. [1956] 2 Lloyd's Rep. 240.

Liberty Assurance Co.,¹⁵⁵ the insured left unanswered a question on whether the vehicle proposed for insurance was on hire-purchase. In the ensuing action for indemnity, the insurer sought to avoid the policy for non-disclosure of the fact that the vehicle was obtained on hire-purchase. It was held that issuing a policy in spite of the incomplete application meant the insurer did not regard the fact as material and would be deemed to have waived its right to insist on full disclosure. Insurers must therefore be careful to insist on full answers under the new provisions.

A further problem arises from the fact that certain questions seek to extract value judgments and expert opinions to which no more than honest beliefs can be given by most proposers. This is more common in life applications where questions are asked about the applicant's health and medical history. In Joel v. Law Union and Crown Insurance, Fletcher Moulton L.J. remarked:

The commonest question is, "Have you any disease?". Not even the most skilled doctor after the most prolonged scientific examination could answer such a question with certainty, and a layman can only give his honest opinion of it.¹⁵⁶

For this reason, it was held in the case that it could not have been the intention to warrant answers to such questions. Similarly, in Akpata v. African Alliance Insurance,¹⁵⁷ Taylor C.J., following Joel, held that

¹⁵⁵ Unreported, Suit No. HOD/15/81 of 31/3/83, noted and criticised by Osipitan in (1984) 1&2 J.P.P.L. 121. See s.27 Insurance Contracts Act 1984 (Australia).

¹⁵⁶ [1908] 2 K.B. at p.863.

¹⁵⁷ [1967] 3 A.L.R. Comm. 264.

answers given by the insured on his health were correct in light of the information possessed by him and his doctors at the time they were supplied though it later turned out that the insured was in poor health at that time.

Noting the danger, the Law Commission (U.K.) recommended (at para.4.61) that an applicant would have discharged his duty in answering proposal questions if he does so to the best of his knowledge and belief after making such enquiries as are reasonable. Under this standard answers would be false and actionable misrepresentations if the insured acted unreasonably in entertaining the belief. The recommendation is reflected in para. 1(e) of the General Statement of Insurance Practice (U.K.) that insurers, so far as is practicable, will avoid asking questions which would require expert knowledge beyond that which the proposer could reasonably be expected to possess or obtain or which would require a value judgment on his part. There are, however, no equivalents of these provisions in the 1988 Decree.

Furthermore, the width of some questions could mean a slip in furnishing one particular detail renders the answer false. In Idugboe (supra), it appears naming just one insurer instead of all previous insurers amounted to a misrepresentation vitiating the policy. In Lawal v. Amicable Insurance,¹⁵⁸ a question in a goods-in-transit proposal asked the insured to give "Details of vehicles to which the insurance is to apply", and carrying goods in an

¹⁵⁸ [1982] 3 F.N.R. 283.

unlisted vehicle amounted to a misrepresentation allowing the insurer to avoid the contract without proof of materiality in the presence of a 'basis' clause. It is difficult to see how a commercial proposer could list all the vehicles in which goods would be transported, and any answer given can be no more than an opinion unactionable as a misrepresentation if honestly given. Courts have tried to protect insureds by placing limits on the width of questions asked.¹⁵⁹ Thus, it was held in Joel (supra) that no reasonable man would deem it material to tell an insurer of all the casual headaches he has had in his life, and that a question asking "what medical men have you consulted?" did not require the insured to give a list of all the doctors she had seen.

Moreover, it is held that if a statement is substantially accurate a trivial misstatement or an omission of immaterial details does not render it inaccurate.¹⁶⁰ In Faniyi v. Northern Assurance Co.¹⁶¹ two persons named Tanimowo Bamosu (this abbreviated surname appears in the report) and Kafaru Faniyi who were partners in business insured a vehicle describing themselves in the application as Banimosu Kafaru Faniyi, i.e. the surname of one and the other names of the partner. The insurer sought

¹⁵⁹ See Connecticut Mutual Life Co. v. Moore (1881) 6 App. Cas. 644; Yorke v. Yorkshire Ins. [1918] 1 K.B. 662.

¹⁶⁰ Morrison v. Musprat (1827) 4 Bing 60; Dawsons v. Bonnin [1922] 2 A.C. 413; Brewtnall v. Cornhill Ins. (1931) 40 L.L.R. 166.

¹⁶¹ [1966] L.L.R. 80. See also s.22(4) M.I.A. 1961.

to repudiate on the ground of misrepresentation or 'untrue disclosure'. The learned judge was of the view that these were trifling and immaterial inaccuracies, and as the insurer never disputed the identity of the insured they could not succeed on the claim.

It becomes more compelling in view of the silence of the new provisions on the standard of answers required for courts to apply the protectionary devices examined so that insureds are not deprived of claims on account of potential inaccuracies in answers supplied in all bona fide.

To recapitulate briefly, for innocent misrepresentations to be actionable, they must be of existing fact and not de futuro, nor of opinion, intention or belief, and must be material. We start with the proposition that false answers given in proposal forms under the new law must meet these requirements as there is no reason to hold otherwise. However, by using the 'basis' clause whereby the accuracy of information supplied is warranted and made a precondition of the validity of the policy, statements of intention, opinion or belief may be actionable misrepresentations if false, and materiality ceases to be a relevant factor as illustrated in Chapter 5 para. 5.3.1, *supra*.

Nowhere in the 1988 Decree is the use of the basis clause expressly forbidden which leaves insurers free to employ the device. However, it is submitted that since its effect is to convert representations into warranties, such warranties must pass the twin tests of materiality and

relevance prescribed by section 2(1), to provide a defence.¹⁶² Accordingly, where the basis clause is used materiality becomes an essential feature of misrepresentations under the new law. The issue goes further, however, as section 1(1) is drafted in language susceptible to two interpretations having important consequences on the claim depending on which is adopted. The section in requiring an insurer to draw up proposals "as to elicit all such information as the insurer considers material in accepting the application", and decreeing that "any information not specifically requested shall be deemed immaterial", makes one thing clear; that all information outside the proposal is immaterial. What is less clear is whether there is a corresponding implication that all questions asked are ipso facto material questions. If there is, it follows that any false statement may without more become a material misrepresentation vitiating the policy since the materiality of the question is agreed by its insertion. If so, then sadly enough, what was hitherto accomplished by the basis clause¹⁶³ is reintroduced without the necessity of expressly inserting the clause. And, the 1988 law would have done nothing to alter the general law as regards misrepresentations in insurance under which while the presumption is that matters dealt with in the

¹⁶² See Chapter 5 para. 5.5.3, *supra*, for further analysis.

¹⁶³ Thomson v. Weems (1884) 9 App. Cas. 671.

proposal form are material,¹⁶⁴ there is no corresponding presumption that matters not so dealt with are not.¹⁶⁵

6.5.5 Remedies for Breach of Good Faith

The decision of the English Court of Appeal in Banque Financiere v. Westgate Insurance Co.¹⁶⁶ conclusively, (at least for the time being), settles the issue that the only remedy for breach of the duty of good faith in so far as non-disclosure is involved, is avoidance of the contract ab initio by the injured party and the award of damages is unavailable.¹⁶⁷ This is the remedy provided by the Marine Insurance Act,¹⁶⁸ and the decision only extends it to non-marine insurances. The same consequence follows material misrepresentations. Agoro J. stating the position in non-marine cases held in American International Insurance Co. v. Dike thus:

The legal position, in my view, is that where...an insurance company elects to avoid or repudiate a policy of insurance, such avoidance

¹⁶⁴ "...the fact that a question of this sort was put showed that the insurance company thought it was material...": per Viscount Dunedin in Glicksman (supra) at pp.139,141. See also, Chitty on Contracts, (25th ed.) Vol. II para. 3686.

¹⁶⁵ Colinvaux, op. cit., para. 5-27, citing Schoolman v. Hall [1951] 1 Lloyd's Rep. 139; Merkin, (1976) 39 M.L.R. at 479,480.

¹⁶⁶ [1988] 2 Lloyd's Rep. 513.

¹⁶⁷ Steyn J. in the High Court held that where avoidance would be an inappropriate remedy for an insured suing for breach by the insurer, policy reasons combined to compel him to award damages: Banque Keyser Ullman v. Skandia Ins. Co. [1987] 1 Lloyd's Rep. 69, noted in [1986] J.B.L. 439.

¹⁶⁸ s.17 M.I.A. 1906 (U.K.); s.19 M.I.A. 1961 (Nigeria).

would have a retroactive effect of nullifying the contract ab initio.¹⁶⁹

Nullification ab initio returns the parties as far as possible to the position before contract as though the contract was never made. Thus, in the absence of fraud, all the insured is entitled to is a return of the premiums paid while the insurer is discharged from liability to settle any claim though the non-disclosure or misrepresentation is innocent. The Australian Law Commission was of the view that this legal position is unjustified. An insured might be in breach of the preferred duty of disclosure of the reasonable insured yet the resulting prejudice to the insurer would be much less than the potential damage to the insured in allowing the insurer avoid and pay nothing on the loss. In the words of the Commission:

It is quite plainly contrary to the true principle of uberrima fides to impose on the insured a burden which far exceeds the harm which he has done. The insurer should not be entitled to any redress which exceeds the loss which it has suffered.¹⁷⁰

This belief led the Commission to recommend a system of damages whereby claims are reduced by the loss suffered by the insurer. If the insurer would not have accepted the risk on any terms had it been aware of concealed facts, no sum is payable. Where the insurer would have demanded a

¹⁶⁹ [1978] N.C.L.R. 403 at pp.415-416. There is no equivalent of the U.K. Misrepresentation Act of 1967 in Nigeria, and as to whether this statute alters the remedy available on misrepresentations see footnote 21, above.

¹⁷⁰ Australian Law Reform Commission, Report No. 20, para. 194.

higher premium, damages are awarded by reference to the difference between the premium paid and a notional premium the insurer would have charged. Where the insurer would have stipulated different terms, damages are awarded by reference to the loss between its liabilities under the actual and notional contracts.¹⁷¹

The Nigerian Commission was similarly of the opinion that the "all or nothing" approach of the common law was unacceptable and recommended that the amount recoverable by the insured in the event of non-disclosure or misrepresentation should be reduced proportionately by the seriousness of the breach.¹⁷²

It may be difficult in practice to establish with any degree of certainty what an insurer would have done had it known of concealed facts with hindsight. In practice, the courts might be left with no option but to accept as true what the insurer involved claims it would have done, thereby leaving open room for manipulation prejudicial to the insured. The solution to this problem might be to adjust rights according to what prudent insurers would do but this is not entirely free from its own problems. As

¹⁷¹ Ibid. at para. 192 & 194; enacted in ss.28 & 29 of the Insurance Contracts Act 1984 for non-disclosure and misrepresentation. Notice that s.31 empowers the court to allow an insured recover the whole or an equitable sum of the claim in cases of fraudulent non-disclosure and misrepresentation where the insurer is not thereby prejudiced or the prejudice resulting is minimal.

¹⁷² Law Reform Journal, op. cit., p.180. The Commission offered no guidance as to how the calculations would be made. It may be that it favoured a broad judicial discretion in this regard.

Parker L.J. observed in a related context, this would;

...involve the Court in the task, perhaps years after the event, of endeavouring to ascertain what a prudent underwriter would have done, first in the light of the circumstances actually disclosed by the assured, and secondly, on the hypothesis that, in addition to those circumstances, the undisclosed circumstances had been disclosed. Such a task is on its face impractical.¹⁷³

Furthermore, a system of proportional reduction of claims or damages overlooks the justification for a duty of disclosure in the first place, which is to put the insurer in a proper position to evaluate the risk before deciding what steps to take to safeguard its position. This reason, coupled with the fact that a broad judicial discretion to reduce claims would introduce unnecessary uncertainties into the law, led the (U.K.) Commission to reject both notions and the proportionality principle favoured by the E.E.C. directive which essentially focused on where the effect of non-disclosure leads the insurer to increase premiums only.¹⁷⁴

When the 1988 reform Decree came to be passed, the recommended proportional reduction in claims was not enacted in relation to the disclosure provisions though something similar was enacted in relation to breach of warranties and conditions under section 2(3).

Arguments against a principle of proportional

¹⁷³ C.T.I. v. Oceanus Mutual [1984] 1 Lloyd's Rep. 476 at p.510. This argument was accepted by Stephenson L.J., at p.526.

¹⁷⁴ Law Com. 104, paras. 4.4-4.11.

reductions in claims may not be as compelling in the Nigerian context as they seem at first sight in view of the new provisions under which non-disclosure strictly speaking ceases to be a relevant defence at least where proposal forms are completed. In such cases, the possible breach of duty would be on account of misrepresentations. Given the trend of the law to distinguish genuinely innocent misrepresentations from the others, and confirmed by the discretion conferred on courts under section 2(2) of the 1967 Misrepresentation Act (U.K.) to grant damages in lieu of rescission, there is no apparent reason why this tendency to grant damages instead of avoidance should not be adopted in Nigeria under the new regime.

6.6 Conclusion

There is a certain inevitability in the conclusion that the new provisions may have done little in practice to displace or alter the common law. The limitation to cases where proposal forms are used means insurers are better off not insisting on the completion of applications, which they may well do, in which case common law principles continue to apply.

Consequently, administrative control by the Director of Insurance becomes important. The Director could insist on the use of proposal forms at least in consumer contracts, and would need to control the use of general questions and the framing of specific ones so that a residual duty to disclose material facts is not

reintroduced.

The exclusion of renewed contracts and cover notes results in a majority of contracts being governed by the common law, and it would appear that the new provisions demonstrate a lack of understanding of the width and scope of the duty of disclosure.

One may conclude by adopting the view that "while accepting that there is need for a disclosure requirement in certain exceptional cases, it is submitted that at its highest the test used should be that of the 'reasonable insured' along with a clear presumption of non-materiality".¹⁷⁵ It should be added that in a country with a significant proportion of illiterates, the test must be flexible enough to accomodate the peculiar circumstances of the insured without including idiosyncratic conduct.

¹⁷⁵ Merkin, (1976) 39 M.L.R. 479 at p.480.

CHAPTER 7

JUDICIAL CONTROL AND CONSTRUCTION OF INSURANCE CONTRACTS

7.1 Introduction

Legislative interference with insurance contracts is relatively recent in Nigeria. Most of the principles of insurance contract law have been established by the courts in cases, the Nigerian cases being specific applications of the common law of insurance developed in the English courts. The courts in Nigeria have, therefore, had a profound influence on the development of insurance law, and this work would be incomplete without an examination of this influence.

The reader so far may have formed the impression that judicial influence has been exerted more in favour of insurers thereby necessitating legislative intervention to redress the imbalance in favour of insureds. The impression is not entirely accurate. Judges have over the years applied principles designed to control the ability of insurers to deny payment. The control is aimed at conferring a measure of protection on insureds by securing the realisation of the primary aim of insuring which is to obtain an indemnity to the full extent in the event of a loss. The methods employed by the courts will be considered in this Chapter.

7.2 Insurance as a Contract of Indemnity

It is evident from the description of the nature of a contract of insurance given in Chapter 2 para. 2.2, supra, that the primary liability undertaken by the insurer is the payment of a sum of money or its equivalent to compensate for insured loss. This is generally expressed by saying that insurance is a contract of indemnity. Thus, in Ojo v. Nigeria Reliance Insurance Co., Afonja J., observed that:

It is a fundamental principle of insurance law that all insurance policies except those of life and personal accidents are contracts of indemnity. This means that in the event of a loss arising from an insured peril, the insured must be placed in the same position that he occupied immediately before the happening of the event insured against by being reimbursed to the tune of his actual financial loss. ...Where the insured has discharged his duty of establishing his claim, and has shown that the loss or damage was caused by an insured peril, the insurer must then discharge his obligations under the contract by indemnifying the insured in full, subject to the adequacy of the sum insured.¹

A number of important points flow from this statement of law.

Foremost is that the insured cannot recover more than the actual value of his loss and the maximum sum insured. Subject to this, the courts insist on a full indemnity. The second are the principles or bases of calculating the indemnity to which he is entitled or the measurement of loss.

The general principles adopted in calculating an

¹ [1983] 2 F.N.R. 313 at 318. It is argued that certain life and personal accident insurance having indemnity elements in them are, to that extent, contracts of indemnity; see Kimball and Davies, "The Extension of Insurance Subrogation", (1962) 60 Mich. L.R. 841.

insured's loss are sometimes qualified by express agreement. One important qualification is in respect of valued policies whereby the value of property insured is agreed in the policy and, in the absence of fraud, the agreed value is conclusive of the value of the property. Under a valued policy, the insured recovers the agreed value in the event of a total loss even though his actual loss may exceed this sum, or a proportion of the stated value in the event of a partial loss. Valued policies are more common in marine insurance and are rarely employed outside this field.²

Outside marine insurance, it is more common to have a maximum sum insured per loss above which the insured cannot recover even though his actual loss exceeds that sum. Whether a policy is valued or one stipulating a sum insured as the maximum amount recoverable in the event of a loss, is a question of construction depending on the intention of the parties. Thus, the fact that a value is placed on the property in the policy, as is nearly always the case, is not conclusive proof of the sum to which the insured is entitled nor that the policy is a valued one. In Akunne v. Arrowhead Insurance Co.,³ the insured sought a declaration that the value placed on his vehicle in the policy was the amount to which he was entitled for his loss. The judge, finding that the sum stated in the policy represented the

² See Great Nigeria Ins. v. Ladgroups Ltd. [1986] 4 N.W.L.R. p.72; s.29 Marine Insurance Act 1961.

³ [1975] 7 C.C.H.C.J. 1039.

maximum sum insured, held that under an indemnity policy the insured could not recover more than the total amount of his loss. And, that "It is the duty of the insured to prove his loss...The value placed on the motor vehicle at the commencement of the policy, that is, before the loss cannot be proof of the subsequent loss."

Where the value stated in the policy is intended to fix the maximum amount recoverable per loss, the amount to which the insured is entitled in the event of a loss would depend on the type of loss involved. In property insurance, where there is a total loss or complete destruction, the amount payable is the market value of the property at the time and place of loss. Where there is a partial loss or damage to property, the measure of indemnity is the difference between the value of the damaged property before and after the loss,⁴ or the cost of repairing the damage. The measurement, in either case, is frequently made subject to a provision for excess in the policy by which the insured is made to bear a certain amount or proportion of his loss.

The bases on which the insured's loss is calculated are intended to ensure that he is fully compensated only, and not to enable him profit from his loss. The courts have upheld this principle consistently. In Kayode v. Royal Exchange Assurance,⁵ the Supreme Court reversed the decision

⁴ MacGillivray and Parkington on Insurance Law, (8th ed.) para. 1563.

⁵ [1955-56] W.R.N.L.R. 154; [1958] W.R.N.L.R. 56 (S.C.).

of the lower court which awarded the pre-accident value of a damaged vehicle treating it as a total loss though evidence showed it was only partially damaged and the insurer had elected to repair as it was entitled to. In Okpalaugo v. Commerce Assurance Ltd.,⁶ a claim by the insured for either the cost of replacing his insured vehicle, or its market value before the accident was rejected by the trial judge because the vehicle was found to be damaged and not completely lost. It was further held that, in any event, the insured could not recover the whole of either of the amount claimed since they exceeded the maximum sum insured.

In Omotosho v. Gateway Insurance Co.,⁷ Savage J., rejected a claim for the sum insured in a motor policy finding that the loss suffered was partial. It was further held that even if the insured had suffered a total loss, he was not automatically entitled to the sum insured because the pre-accident value to which he would be entitled in such a case may be less than the sum insured. The conclusion is logical for (a) the vehicle might have been over insured, and (b) the market value of the vehicle may have fallen or the vehicle depreciated in value due to wear and tear since the insurance was obtained.

Most claims arising in Nigeria involve partial losses frequently described as damage to insured property. It appears from the cases that the courts are prepared to

⁶ [1976] N.C.L.R. 273.

⁷ 2 L.R.N. 293.

treat the amount of the insured's loss as the cost of repairing the damage so as to put the property in its pre-accident condition. Thus in Omotosho v. Gateway Insurance, (supra) it was held that:

Where there is an accidental damage to an insured vehicle, the insurer indemnifies the insured by paying for the cost of repairing the damaged vehicle, where of course, the damage is not a total loss.⁸

The learned authors of MacGillivray and Parkington on Insurance Law (8th ed.) submit that it is not an invariable rule that the insured is always entitled to the cost of repair. They concede, however, that courts lean in favour of this value for the reason that the insured will receive a greater sum under it than if the measurement proceeded on the alternative basis of the difference in the market value of the property before and after loss. Relying on Leppard v. Excess Insurance Co.,⁹ the authors contend that the cost of repairs may not be representative of the actual loss if there is no intention to repair.¹⁰

In all the cases coming before the courts in Nigeria, the insured has shown an intention to repair, and, as will be seen below, most actions are commenced upon the insurer's failure to repair after exercising its option to repair. The true loss in such cases would therefore be the

⁸ 2 L.R.N. 293 at 295. See also Alakija v. Mercury Ass. [1975] 9 C.C.H.C.J. 1301; Okpalaugo v. Commerce Ass. [1976] N.C.L.R. 273; Babalola v. Harmony Ins. [1982] 1 O.Y.S.H.C. 1.

⁹ [1979] 2 Lloyd's Rep. 91.

¹⁰ MacGillivray and Parkington, op. cit., paras.1566,1567.

amount required to reinstate the car to its pre-accident condition. Thus, in Ojo v. Nigeria Reliance, the full cost of repairs claimed by the insured to have been expended in repairing his damaged vehicle was awarded in the absence of "evidence that the repairs carried out on the vehicle did extend beyond the amount required to bring the vehicle to what it was before the accident",¹¹ as the judge observed.

Difficulties may arise where the cost of repairs is greater than the value of the property before the loss or even after it is repaired. In such a case, the insurer would wish to pay the lower sum. It has been observed that:

It is not uncommon, however, where the damaged vehicle could still be repaired but because the estimated high cost of the repairs might exceed the market value of the car after it had been repaired, for the insurer to decide to treat the case as a total loss and pay for the market value at the time of the accident.¹²

It appears that before the insurer can elect as described above, it must have a right to do so under the policy. Without an express right, it is submitted that economic considerations per se are insufficient to permit the insurer to treat the claim as a total loss and pay the lower sum representing the market value before damage. The court will allow the full cost of repair if (a) the insured genuinely intends to repair and (b) such a course is not

¹¹ [1983] 2 F.N.R. 313 at 320.

¹² Per Savage J. in Omotosho v. Gateway Ins. 2 L.R.N. at p.295.

eccentric or absurd.¹³ In Omotosho v. Gateway Insurance (supra) from which the above passage is quoted, the judge remarked that, "at the material time, it would have been wiser for the [insurer] to have dealt with this claim as a constructive total loss". This, however, did not prevent him from awarding the insured the full cost of repairs since the insured desired to have the vehicle repaired.

In upholding the principle that the insured must be fully indemnified within the limit of the sum insured, the courts are prepared to depart from unreasonable policy provisions restricting the insured's entitlement. In Ogbebior v. Union Insurance,¹⁴ Irikefe J., in awarding the pre-accident value of a six month old vehicle at the time of its complete destruction, rejected a clause in the policy providing for depreciation at the rate of 15% per month of the insured value because it was "unrealistic and somehow not intended for private vehicles such as the [insured's]". The judge also doubted "if the legislature ever intended that an insurance company should get away with so much".¹⁵ In Nasidi v. Mercury Assurance Ltd.,¹⁶

¹³ MacGillivray and Parkington, op. cit., para.1567, citing Reynold's v. Phoenix Ass. [1978] 2 Lloyd's Rep. 440.

¹⁴ [1967] 3 A.L.R. Comm. 166.

¹⁵ Ibid. at p.178. Quaere what legislature the judge had in mind as insurance contracts were totally unregulated at that time. Perhaps, his views and the common use of similar provisions informed the government in legislating some form of administrative control of policy terms in the 1976 Insurance Act. Unfortunately the Act has achieved little in practice. See Chapter 5 para. 5.5.2, *supra*.

¹⁶ [1971] 1 N.C.L.R. 387.

Wheeler J., rejected evidence from an insurer that the value of an insured lorry would have depreciated by as much as 25% within one year of its purchase and insurance.

In negotiating the settlement of his claim, it has been held that an insured must act reasonably,¹⁷ and he cannot insist on the insured property being treated as a total loss, and the payment of its pre-accident market value, when there is a damage and the insurer is prepared to repair satisfactorily.¹⁸ Furthermore, where the insurer refuses to settle the claim and pay the cost of effecting repairs consequent upon an accident, it is the insured's duty to effect repairs out of his own funds and claim reimbursement from the insurer. Thus, in a case where the insured vehicle was stolen and recovered by the police in an extensively damaged condition, it was held that:

...under the general law, the [insured], having reported the theft to the [insurers] and seeing that the [insurers] were unwilling to effect repairs promptly, was under a duty in law to mitigate his losses by repairing the vehicle and claiming the cost of repairs from the [insurers]. This rule imposes upon the [insured] the duty of taking all reasonable steps to mitigate the loss consequent on the breach, otherwise he will be debarred from claiming any part of the damage which is due to his neglect to take such a step.¹⁹

The reasoning above appears to be that an insured will be prevented from claiming from the insurer the cost of damage

¹⁷ Ode v. Mercury Ass. [1974] 4 E.C.S.L.R. 612.

¹⁸ Otuyalo v. Mercury Ass. [1972] 12 C.C.H.C.J. 94.

¹⁹ Per Nnaemeka-Agu J. in Okpalaugo v. Commerce Ass. [1976] N.C.L.R. 273,277. See also Ojo v. Nigeria Reliance [1983] 2 F.N.R. at 318.

resulting from depreciation consequent on the insured's failure to repair the damage insured against promptly. The case, however, does not establish whether the insured can claim the cost of minimising or averting a loss from the insurer.²⁰ In practice, most indemnity policies will allow such recovery if reasonably incurred, e.g., the cost of towing a vehicle to a safe place from the scene of an accident. However, it has been held that it is for the insured to prove such costs.²¹

Most indemnity policies on property will give the insurer a choice of two options in the event of damage. Clause 2 of the common motor vehicle policy provides that; "At its own option the Company may pay in cash the amount of the damage or may repair reinstate or replace the motor vehicle or any part thereof...". The effect of electing to repair or reinstate was stated by Wheeler J. in Abed Bros. Ltd. v. Niger Insurance Co.:

The insurers, by exercising their option, substitute a different mode of discharging their obligation under the policy. Their contract is no longer a contract to pay a sum of money, but a contract to reinstate the property insured. They cannot withdraw from it, and,...are liable for the consequences of a failure to perform it adequately.²²

²⁰ Cf. s.79 M.I.A. 1961 and the duty imposed on the marine insured to take all reasonable measures to minimise or avert a loss.

²¹ Alakija v. Mercury Ass. [1975] C.C.H.C.J. 1301 at p.1303.

²² [1976] N.C.L.R. 458 at 470, quoting Ivamy, General Principles of Insurance Law, (1st ed.) at p.385.

Most of the disputes have arisen on the insurer's failure to repair within a reasonable time²³ or satisfactorily after electing to repair. Here again, the courts insist that, in motor cases, nothing short of compensating the insured in full by restoring the vehicle to its condition before the accident would suffice. In Nicholas Bros. Ltd. v. Lion of Africa Insurance Co., Udo Udoma J., summed up the obligation on the insurer electing to repair thus:

It is clear...that when the [insurers] exercised their option to "repair" and "reinstate" the car in question, they undertook to make good the damage done so as to leave the car so far as possible as though it had not been damaged. This involves making good defects including renewal of parts where necessary and to restore the car to the status quo ante the accident.²⁴

It was held on the facts of the case, that the insurer had not discharged its obligation when it failed to install a new roof as the roof of the car insured was damaged beyond repairs. It follows from the dictum that once election is made the liability of the insurer is not limited by the amount insured. Similarly, in Kayode v. Royal Exchange Assurance,²⁵ the insurer was held in breach of the obligation to repair satisfactorily when the vehicle failed a roadworthiness test after the purported repairs carried out by the insurer.

Insured persons must, however, be careful when

²³ This aspect is considered in para. 7.3.2, *infra*.

²⁴ [1961] L.L.R. 86 at p.90.

²⁵ [1955-56] W.R.N.L.R. 154.

enforcing the insurer's obligation to repair under the reinstatement clause. It should be remembered that the insurance contract technically becomes a repair contract upon election. In Nigerian Enterprises Ltd. v. Norwich Union, the insured, dissatisfied with the repairs carried out, sued under a motor policy for the pre-accident value of the vehicle. Bellamy J., in dismissing the claim, refused to award the insured damages for the insurer's breach of its duty to reinstate although the latter was found liable since the repairs had not been properly done.

According to the learned judge:

Having opted for reinstatement, the [insurers] are bound to reinstate and if they fail to reinstate, they may be liable in damages to the [insureds] for breach of contract to reinstate... But, the [insurers] are not liable in the present action which is brought on the policy of insurance, although...they may well be liable...in some other action.²⁶

The Supreme Court subsequently emphasised the distinction between a claim for indemnity and one for damages for breach of contract in Abdallah v. Achou,²⁷ in the context of master and servant. In holding the respondent unable to claim wages due and earned by him in an action for damages for wrongful dismissal, Lewis J.S.C., quoted with approval from Mayne & McGregor on Damages (12th ed.) at para. 2 that: "Actions claiming money payable by the terms of a contract are for money which the defendant has promised by contract to pay. Illustrations

²⁶ [1962] L.L.R. 63 at p.66.

²⁷ [1975] N.C.L.R. 226.

are...actions to recover moneys payable under insurance policies. These are to be distinguished from actions for damages for breach of contract...".²⁸ In the result, it was held that salary earned was a debt to be claimed in a separate action, or, as an alternative or separate claim in the same action for wrongful dismissal.

It is curious that this rule of pleading should be allowed to defeat an insured's claim as it did in the Nigerian Enterprises case. The primary obligation of the insurer is to indemnify the insured under the policy. The contract to reinstate derives from the contract of indemnity, and electing to reinstate is only a way of discharging the obligation under the policy. As such, it is submitted that, it should not matter whether the insured's claim is framed in terms of indemnity under the policy or damages for breach of contract. In any event, it has been held that "as a matter of law, a claim under a contract of insurance is a claim for damages for breach of contract...".²⁹

It is noteworthy that subsequent decisions have not followed the approach in Nigerian Enterprises (supra). Most insurance claims are framed in terms of special and general damages, and though judges have frequently commented that

²⁸ Ibid. at p.229. See also Abed v. Niger Ins. [1976] N.C.L.R. 458.

²⁹ Donaldson M.R. in Edmunds v. Lloyd Italico & ors. [1986] 1 Lloyd's Rep. 326 at 327.

this manner of pleading is inapt in an action in contract,³⁰ the insured has not gone without remedy for that reason alone. If the court is satisfied that the claim is properly one of indemnity, the sum awarded is calculated according to the bases for measuring the insured's loss noted earlier. If, however, a breach of contractual obligation such as the insurer's failure to repair within a reasonable time or satisfactorily is involved, damages based on the loss naturally and ordinarily resulting from the breach, or within the contemplation of the parties are awarded to compensate the insured on general contract principles.

Apart from the insurer's contractual right to elect to reinstate, a statutory option to reinstate is given under limited circumstances by section 10 of the Insurance (Special Provisions) Decree of 1988. It is convenient to consider this option here. The section provides that:

- (1) Where a house or other building insured against loss by fire-
 - (a) is damaged or destroyed by fire, or
 - (b) if there is no reasonable ground to suspect that the owner, occupier or other person who insured that house or other building is guilty of fraud in respect of the insurance, or of wilfully causing the fire, the insurer who is liable to make good the loss may, on the request of any person entitled to or interested in the insured house or building, cause the insurance money payable to be laid out and expended [as prescribed in section 2 below].
- (2) ...towards re-building, re-instating or repairing of such house or other building so burnt down, demolished or damaged by fire...

It is not immediately clear why it was thought

³⁰ Abed v. Niger Ins. [1976] N.C.L.R. 458, 477, 478; Salami v. Guinea Ins. [1977] N.C.L.R. 161, 176, 177.

necessary to include this provision in the 1988 Decree. The temptation is to conclude that section 10 re-enacts section 83 of the Fires Prevention (Metropolis) Act 1774 applicable in England. However, it is arguable that the latter Act requires no re-enactment as it is a pre-1900 English statute of general application in Nigeria by virtue of the laws governing the reception of English statutes in Nigeria (see Chapter 1 para. 1.1, *supra*). This argument is inconclusive since, as shown below, the provisions of section 10 are not coterminous with those of the 1774 Act. This may explain the necessity for a specific provision which, though borrowing largely from section 83, modifies it in certain material ways.

Another reason for enacting a modified section 83 may be the desire for a comprehensive codification of all received English insurance statutes applicable in Nigeria given that section 83 has remained dormant, unnoticed and hardly utilised. This conclusion is supported by the inclusion of sections 3-5 in the 1988 Decree which re-enacts, in the main, the provisions of the Life Assurance Act of 1774 on insurable interest, and section 6 of the Decree which re-enacts the provisions of the Policies of Assurance Act of 1774 on the mode and regulation of assignment of policies of life assurance.

It is clear that section 10 applies only to insurance of buildings damaged or destroyed by fire. Otherwise, the exact scope of the section and the intention of the law makers are unclear.

In the first place, the word 'or' used at the end of section 10(1)(a) above, is inappropriate. It could not have been intended that an insurer should have a right to reinstate on the alternative grounds of either where the property is destroyed by fire or where the insurer has no reasonable grounds to suspect arson or fraud. It is submitted that the logically correct word is 'and', so that both grounds should exist as a precondition to the insurer's right to reinstate.

Assuming that the above proposition is correct and both grounds exist, the requirement of subsection 1(b) is that the insurer must have "no reasonable ground" for suspecting fraud or arson before it can exercise the option to rebuild or reinstate on the request of a person interested in the property. This contrasts with section 83 of the 1774 Act where suspicion of fraud or arson is made a legitimate reason for reinstating. The aim of the 1774 Act is stated in the opening words of section 83 as being "to deter and hinder ill-minded persons from wilfully setting their...houses...on fire with a view of gaining to themselves the insurance money, whereby the lives and fortunes of many families may be lost or endangered", and it has been judicially noted that the object of the provision is to "deter fraudulent people from arson".³¹

It has been argued that if the insurer suspects fraud or arson, he is more likely to refuse payment than to

³¹ Parker J. in Sinnot v. Bowden [1912] 2 Ch. 414.

insist on reinstatement³² and, to this extent, section 83 may serve no practical purpose. Perhaps, it was with a view to removing this objection to section 83 that section 10 of the 1988 Decree allows the insurer to reinstate only if there is "no reasonable ground" to suspect fraud or arson by the owner, thereby leaving unaffected the common law right to repudiate if fraud or arson is established. Assuming this view is correct, it is difficult to identify the mischief which a statutory provision authorising the insurer to reinstate where it does not suspect fraud or arson seeks to cure. The rationale behind section 83 appears sensible. Proving fraud or arson to justify repudiation is often difficult.³³ As such, a provision like section 83 allowing the insurer to reinstate where fraud or arson is suspected, but cannot be proven beyond reasonable doubt, is desirable to prevent fraudulent people from benefitting from their fraud.

The use of the word 'may' in section 10(1) shows that an insurer is not obliged nor bound to comply with the request to reinstate though made by a person interested and though fraud or arson is not reasonably suspected. If this view is correct, it is difficult to explain the intention behind the section. The provision is superfluous and unnecessary in light of express clauses giving insurers the option to pay or reinstate found in most indemnity policies including those on buildings. Section 10 can be contrasted

³² See MacGillivray and Parkington, op. cit., para.1695.

³³ See Chapter 6 para. 6.2, *supra*.

with 83 where insurers are "authorised and required" to reinstate upon the request of interested persons or upon the suspicion of fraud or arson.

It is accepted that a provision requiring insurers to reinstate buildings at the request of interested persons is practically desirable to bridge insurance gaps in dealings in real property. For instance, parties in a mortgagor/mortgagee,³⁴ landlord/tenant,³⁵ and vendor/purchaser³⁶ relationship could invoke the provision to require insurance money payable to be applied in reinstating damaged buildings when one party has insured and the other has not. However, section 10 in its present form which gives any of such persons only a right to ask for reinstatement but does not give reinstatement does not achieve the desirable result.

Finally, section 10(3) provides that:

Notwithstanding the provisions of subsection (1)...the insurer shall have the right to elect whether to reinstate the house or building damaged or destroyed by fire, or to pay the insured for the loss suffered but not exceeding the insured sum.

One effect of the provision is to preserve the insurer's contractual option even though a request is properly made and there are no suspicious grounds, thereby making it difficult to justify the inclusion of the whole section. However, the opening words; "Notwithstanding the provisions

³⁴ Sinnot v. Bowden [1912] Ch. 414.

³⁵ Vernon v. Smith (1821) 5 B.& Ald. 1; Wimbledon Golf Club v. Imperial Ins. Co. (1902) 18 T.L.R. 815.

³⁶ Cotton L.J. in Rayner v. Preston (1881) 18 Ch.D. 1.

of subsection (1)...", would suggest that even where there are grounds to suspect fraud or arson by the insured, an insurer may still elect whether to reinstate or pay the insured for the loss. Whatever intentions are behind section 10, the form in which the provision is drafted is misleading and may lead to absurd results.

Apart from the specific issues raised earlier, one may assume that in other respects sections 10 of 1988 and 83 of 1774 are the same so that words like "insurance money" and "persons interested" bear the same meaning in both provisions. Unlike contractual reinstatement, the insurer's obligation to reinstate under statute is limited to reinstating as far as the money due under the policy will allow. A person interested is one with a legal or equitable interest in the property only and not in the policy.³⁷ Finally, reinstatement is subject to the proviso in section 10(2) that if, within 60 days after the claim is agreed, the insured gives sufficient security to the insurer that the insurance money will be expended in reinstatement or that if, within that time, the money is settled and disposed of to and among the contending parties as the insurer may determine with the approval of the court on the application of either the insurer or interested parties, the insurer ceases to be able to exercise its power to reinstate.

³⁷ MacGillivray and Parkington, op.cit., at paras. 1687, 1691.

7.3 The Settlement of Insurance Claims

7.3.1 The Background and Statutory Provisions

It is perhaps no exaggeration to say that the greatest single factor giving rise to the mistrust of insurers in Nigeria is their attitude when called upon to settle claims. The view is expressed that:

It is common knowledge that insurance companies in Nigeria have a poor image. Members of the public would avoid insurance like the plague if the law had not made it compulsory for members of the public to carry third party liability insurance. The reason for this distrust is said to be the readiness of insurers to accept premiums and their unwillingness to settle claims when the need arises.³⁸

Apart from relying on breach of policy conditions, non-disclosure and misrepresentation to escape liability, insurers exhibit a general apathy when called upon to pay.³⁹ Cases abound where insurers take no steps either to repudiate or settle after receiving notice of claims. In some cases, the insured is only aware that liability is contested after a writ is issued to compel the insurer to

³⁸ Agomo, "Some Thoughts on the Attitude of Insurers Towards Insurance Claim", The Lawyer, (1985) Vol. 15 at p.66. For an earlier condemnation see Diatchavbe, "Raw Deals from Insurance Contracts", Daily Times, May 1981, p.3, where the writer in despair called on the government to abolish compulsory motor insurance since insurers would not freely honour the obligations on it.

³⁹ Insurers advance several unconvincing reasons why claims are not promptly settled in a bid to exculpate themselves from blame, see Irukwu, "The Settlement of Insurance Claims in Nigeria" (1972) I IIN Conference Papers 56; Onwubuya, "The Handling of Motor Insurance Claims in West-Africa: Problems and Possible Solutions", (1978) IV WAICA Jornal 110; Kiladejo; "Settlement of Life Assurance Claims: Problems and Documentation", (1987) XI WAICA Journal 185.

pay.⁴⁰ Public confidence was so shaken by insurance practice in claims settlement that Agoro J. found it necessary to comfort insureds in Thawardas v. British India General Insurance, when he observed that:

The essence of the insurance contract is that the insurer agrees, in return for the premium paid...to indemnify or compensate the insured in the event of a loss. Therefore an insured person who has suffered a genuine loss within the meaning and intention of the policy need not feel reluctant or apologetic in approaching his insurance company for the settlement of his claim.⁴¹

In the case itself, the insured had been kept waiting for some 30 months after reporting the loss of cargo insured under a marine contract and, thereafter, only to be met by the unsuccessful defence that he lacked an insurable interest because the goods were insured in his business name. Agoro J. had also cautioned (at p.312) that "an insurance company which indulges in delaying tactics or which makes it a habit to avoid its obligation is not doing its business reputation any good".

Uncomplimentary remarks by judges at insurance attitude in claims settlement is not uncommon. In Abed Bros. Ltd. v. Niger Insurance,⁴² Wheeler J., described the insurer's conduct in settling the insured's claim as "tardy" when it took 27 months to repair the insured

⁴⁰ See Egbejobi v. Mercury Ass. [1985] H.C.N.L.R. 276, where there was no reaction from the insurer until a defence was filed some 30 months after notification of a third party claim.

⁴¹ [1974] N.C.L.R. 304 at 309.

⁴² [1976] N.C.L.R. 458 at p.472.

vehicle having elected. On appeal, the Supreme Court thought the remark "was rather polite". The court noted that "the conduct of the [insurer] was tantamount to negligence for...a prudent insurer would not have acted in such an apparent attitude of indifference...in the discharge of its obligation to repair".⁴³ In Anyaegbunam v. Crystal Brokers & anor.,⁴⁴ the insured sued his broker and insurer for failing to settle his claim. The vehicle was involved in an accident in mid 1974 and up till proceedings were instituted in 1977, the claim remained unsettled though the insurer was immediately notified of the loss by the broker. Judgment was entered against the insurer only, because, as the judge observed, "the failure to have the [insured's] claim settled arises from the nonchalant attitude adopted by the insurer". The judge also noted "the callous indifference with which the [insurer] treated the claim".

The Motor Vehicles (Third Party Insurance) Act of 1950 in prescribing compulsory third party liability cover for death and bodily injury arising from the use of motor vehicles enacted steps to ensure that third parties are not prejudiced by insurers' evasive practice in settling claims. Firstly, sections 8 and 9 invalidate certain policy conditions, which an insurer may use, in relation to third party claims.⁴⁵ Secondly, section 10(1) obliges an insurer

⁴³ [1976] N.C.L.R. 37 at p.47.

⁴⁴ [1977] N.C.L.R. 135.

⁴⁵ See Chapter 5 para. 5.5.1, *supra*, for more detail.

to settle the amount of any judgment (including costs and interests) awarded against the insured in favour of the third party, or, as the Act puts it, "the persons entitled to the benefit of such judgment". The obligation to pay is maintained "notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy". There is no obligation to pay however, unless, *inter alia*, before or within seven days of the commencement by the third party of proceedings against the insured, notice of the action is given to the insurer.⁴⁶ Likewise, where the insurer has obtained a declaration that the policy was obtained by the non-disclosure or misrepresentation of a material fact, or where the policy is cancelled by mutual consent, the insurer ceases to be liable.⁴⁷ Finally, section 10(4) entitles an insurer to recover any excess sum above the amount covered by the policy from the insured.

In Perera v. Motor & General Insurance Co.,⁴⁸ Jones S.P.J. held that section 10 imposed a statutory, as opposed to a contractual, liability on insurers to pay persons who obtained judgment against the persons insured on a claim covered by the policy. Accordingly, the section gives a third party a direct right of action against the insurer to enforce the liability.

The courts have been quite generous in the

⁴⁶ s.10(2)(a).

⁴⁷ ss.10(3) and 10(2)(c) respectively.

⁴⁸ [1971] 2 All N.L.R. 261 at 265.

interpretation of section 10(2)(a) requiring the giving of notice of proceedings to insurers. In Martins v. National Employers' Mutual,⁴⁹ Lambo J., held that the notice may properly be given by the third party as validly as by the insured. It was further held that two letters written by the third party's solicitor giving details of the accident and vehicle satisfied the statutory requirements. On appeal, the decision was affirmed by the Supreme Court although the court disagreed that the second letter constituted sufficient notice inasmuch as the solicitor had threatened to carry out his further instructions without expanding on what those instructions were.⁵⁰ Similarly, it was held in Perera (supra) that two letters addressed to the insurer by the third party's solicitor claiming that unless a settlement was reached, the solicitor had instructions to issue writs against the insured, satisfied the requirements on notice. On a claim by the insurer that the posted letters were not received, Jones S.P.J., relying on the decision of the Supreme Court in Martins (supra), were a similar defence was raised, held that proof that a letter was properly addressed and posted is, *prima facie*, evidence that it was delivered to the addressee.

Though the courts tried to ensure that third parties were not prejudiced in the settlement of claims by insurers' indifference, there was still prejudicial conduct outside the scope of the 1950 Act as there were limitations

⁴⁹ [1969] N.C.L.R. 49.

⁵⁰ [1969] N.C.L.R. 365 at p.395 (S.C.).

on its application. That Act imposed a liability to settle without stipulating the period within which the liability should be discharged. More importantly, the Act applies only to third party motor liability for death or bodily injury, thereby excluding other forms of liability insurance from its purview.⁵¹

It appears it was with a view to providing for the above shortcomings that section 43 was included in the Insurance Act of 1976. The section provides that:

Where civil proceedings are taken in court in respect of any claim under a policy of insurance and judgment is obtained against any person insured by a policy of insurance...the insurer shall...pay to the persons entitled to the benefit of any such judgment the sum payable (including cost and interest on such sum) not later than 30 days from the date of...judgment.

The provision is made subject to conditions as to the giving of notice of proceedings, cancellation of policy, and avoidance for non-disclosure and misrepresentation as contained in section 10 of the 1950 Act.

The provisions of section 43 were aptly stated by Mohammed C.J. in Kano v. Nigerian Safety Insurance Co. as "primarily intended to protect the interests of the Nigerian public against insurers who are wont to delay in the settlement of claims and in consequence cause hardship to genuine claimants against them".⁵² The learned judge

⁵¹ It was held in Adeoye v. West-African Provincial Ins. [1970] N.C.L.R. 409 that s.10(1) of the 1950 Act does not apply to liability incurred on the damage of a third party's property. See also Lion of Africa Ins. v. Anuluoha [1972] N.C.L.R. 74; Sese v. Sentinel Ass. Co. Ltd. [1986] 3 N.W.L.R. 673.

⁵² 3 L.R.N. 329 at p.331.

disagreed with the earlier holding in Salihu v. Nigerian Safety Insurance Co.⁵³ to the effect that section 43 of the 1976 Act impliedly overruled section 10 of the 1950 Act since the former was subsequent in time. With respect, there can be no question of one statute impliedly overruling the other since both are not coterminous. Section 10 relates only to third party motor claims arising from death or bodily injury while section 43 is not so limited, and deliberately so it is submitted. Furthermore, section 43 in order to plug a loophole prescribes a time limit of 30 days within which all third party liability claims (including motor) must be settled.

Both sections 10 of the 1950 Act and 43 of the 1976 Act are designed to protect third parties who have obtained judgments against insureds. As such, they do not enure for the benefit of insureds. In Oginni v. Motor & General Insurance Co.,⁵⁴ the insured, against whom judgment had been obtained by a third party for injuries sustained from the insured's negligent driving, sued the insurer purportedly under the statutory provisions for an indemnity against the judgment. The claim was dismissed on the ground that the insured could not rely on the provisions which were held to apply only to "persons entitled to the benefit of [any]

⁵³ Unreported, Suit No.KWS/23/79, discussed in 3 L.R.N. 329.

⁵⁴ 3 L.R.N. 63

such judgment" against the insured.⁵⁵ Similarly, in Kano v. Nigerian Safety Insurance Co. (supra) it was held (at p.332) that "s43 of the Decree, like s10 of the Act, relates to enforcement of judgments against insurers. It does not relate to the situation in this case where the [insured] is claiming directly against his insurer".

A measure of protection from the indifferent attitude of insurers in settling claims is provided for insureds under motor policies by section 44 of the 1976 Insurance Act. The section stipulates that the insurer shall do one of two things not later than 90 days from the date a claim is made under a policy in relation to motor vehicle accidents: (a) where the insurer accepts liability, it shall settle the claim not later than the stipulated period, (b) where it does not accept liability, it shall deliver a statement disclaiming liability to the insured or his representative not later than the stipulated period.

In order to expedite the settlement of claims, a bottleneck which insurers insisted on as a precondition of settling motor accident claims is removed by section 45 of the 1976 Act. The section provides that it shall not be necessary for any claimant to deliver a police report on an accident to the insurer where no death or bodily injury is

⁵⁵ It is not clear from the report that the insured based his action only on the statutory provisions. His writ and statement of claim reveal he was claiming under a contractual liability undertaken by the insurer in the policy to indemnify him against third party claims. As such it was, with respect, unnecessarily harsh to dismiss the claim without considering the contractual liability.

involved (s.45(1)). It is further provided that it is sufficient proof of an accident for a party to deliver a statement of the facts of the accident to the insurer together with the statement of an eyewitness if any (s.45(2)).

No convincing explanation can be advanced for why the 1976 Act limited its claim settlement provisions to motor vehicle and third party liability claims only. Though it is conceded that evidence from the law reports reveals that the majority of litigation arising from the failure of insurers to settle claims promptly, or at all, involve motor claims, this is inconclusive of the fact that other classes of insured persons have not suffered at the hands of insurers in the settlement of claims. Between 1979 and 1985, insurers paid out the most on motor insurance.⁵⁶ However, between 1975 and 1982 insurers received the highest premium income from motor insurance. This trend was reversed in 1983 when motor insurance was pushed to third place, with life and general accident insurance respectively accounting for the highest premium income between 1983 and 1986.⁵⁷ It follows that the possibility of more claims from insureds in these latter categories increases, with a consequent increase in the likelihood of prejudice from insurers conduct in paying. In any event, there is no evidence to suggest that the 1976 provisions

⁵⁶ Nigerian Insurance Year Book (1987) Tables I,II&III, pp.183-184.

⁵⁷ Ibid., Table II p.184.

have improved the plight of third parties or motor insureds. At least, post 1976 cases discussed below tend to establish the contrary.

The statutory provisions, while imposing on insurers an obligation to settle certain claims within a specified time, are inexplicably silent on the consequences of failure to comply. This may explain why insureds have not sought to rely on the provisions in litigation. The only sanction against an insurer failing to pay claims within the statutory period is contained in section 7(1)(n) of the 1976 Act which empowers the Director to cancel the registration of an insurer which "persistently fails to pay claims promptly". There is no reported instance where the power has been invoked, and one may dismiss it as offering no real help to insureds or third parties. It is submitted, however, that the failure of an insurer to comply with the provisions may amount to a breach of statutory duty and damages may be recovered in an action by an insured for the breach.

7.3.2 Consequential Losses, Exemption Clauses and Fundamental Breach

Some courts were not going to stop at expressing displeasure at insurers' conduct in order to compel them to act prudently in settling claims. Reminding insurers of the client-losing consequence of shabby treatment of insureds in claims settlement, as Agoro J. had done in Thawardas (supra), appears to have had little effect at ensuring a

change in attitude. Compulsory insurance, the public interest in encouraging insurance, and lack of any alternative to private insurance serve to guarantee a steady supply of clients notwithstanding poor customer satisfaction. The statutory provisions may, at best, have improved things marginally though this is not borne out by the cases. The failure of the supervisory authorities to monitor compliance effectively and take steps to control erring insurers meant they had little practical effect.

It is evident that an insured deprived for any significant length of time of insurance moneys is bound to suffer hardship. The gravity of the hardship would depend to a greater or lesser extent on the type of loss involved, the private or commercial capacity of the insured and his means. It is against this background that the methods adopted by the courts to ensure that, as far as possible, the insured does not suffer unduly from an insurer's failure to settle claims promptly, are considered.

For the avoidance of repetition, the problem arising in most of the cases is similar. The insured makes a claim on the insurer who fails to settle within a reasonable time. In addition to suing for the insured loss, the insured claims consequential losses suffered as damages for the insurer's breach of contract. The insurer in defence relies on a clause in the policy limiting its liability to the insured loss only and specifically excluding liability for consequential loss. The question arises whether the insurer is entitled to get round the latter claim this way.

The earliest reported case on the issue is Kayode v. Royal Exchange Assurance.⁵⁸ A commercial vehicle insured after a month of purchase was damaged in an accident which the insurer elected to repair. The vehicle spent 8 months with the repairers and up to the time of the action it had not been satisfactorily repaired having failed a roadworthiness test. Taylor J., held that 4 months was a reasonable time within which the vehicle should have been repaired and awarded the insured loss of profits for 4 months during the period of unreasonable delay. The exemption clause relied on by the insurer to defeat the claim for consequential loss was held inapplicable as a matter of construction since it was read to apply only when the vehicle was not damaged as a result of burst tyres, and the insured's vehicle had been so damaged. On appeal, the decision was reversed by the Supreme Court partly because the exemption clause did not permit of Taylor J.'s interpretation. Abbot F.J. delivering the judgment of the court observed:

...compensation for loss of use is specially excepted.. and the rights of the insured are limited by those exceptions. It seems that to permit the insured to obtain compensation for loss of use...in an action for breach of [the contract] by failing to repair within a reasonable time is a negation of the parties intention when they entered into [the contract].⁵⁹

The next important case is Bida v. Motor & General

⁵⁸ [1955-56] W.R.N.L.R. 154.

⁵⁹ [1958] W.R.N.L.R. 56 at p.59 (S.C.).

Insurance,⁶⁰ where the insurer repudiated liability following the destruction of a commercial vehicle by fire alleging non-disclosure of the fact that the vehicle was second hand at the time of insuring. Bello Ag.C.J., found that the vehicle was a new one and held that the insurer had wrongfully repudiated. On the exemption clause relied on by the insurer to defeat the insured's claim for loss of earnings for a period of 6 months, it was held (at p.280) that: "Having repudiated the contract to defeat the [insured's] claim for indemnity, the [insurers] cannot at the same time approbate it and take shelter under the exceptions clause." The judge distinguished Kayode (supra), and held that the insurer's wrongful repudiation amounted to a breach of contract. Applying Hadley v. Baxendale,⁶¹ loss of earnings for 3 months was the loss flowing from the insurer's breach since it knew the vehicle was used for commercial purposes.

Though Bello Ag. C.J. had broken new ground in Bida, its effect was uncertain. The case was a first instance decision and no one could predict if it would be followed. In both Akunne v. Arrowhead Insurance⁶² and Alakija v. Mercury Assurance,⁶³ it was held that clauses exempting consequential loss operated to defeat the claim of insured

⁶⁰ [1972] N.C.L.R. 270.

⁶¹ (1854) 156 E.R. 145.

⁶² [1975] 7 C.C.H.C.J. 1039. See also Otuyalo v. Mercury Ass. [1972] 12 C.C.H.C.J. 94.

⁶³ [1975] 9 C.C.H.C.J. 1301.

persons under private motor policies for the cost of alternative transport during the period their vehicles were out of use due to the insurers failure to settle the claims promptly. In the former case, the judge noted that the fact that the policy was described as 'comprehensive' was immaterial.

The high point in the attempt to make insurers liable for losses suffered as a result of unreasonable delay in the settlement of claims came in Abed Bros. Ltd. v. Niger Insurance.⁶⁴ The insurer elected to repair the damage to a vehicle which to its knowledge was used in the insured's haulage business. It took nearly 2 years to effect complete repairs. The insured claimed damages for loss of profits at £600 per month for the period the vehicle was out of use, and the insurer in defence relied on clause 2 of the policy excluding liability for "consequential loss, depreciation, wear and tear etc." Wheeler J., in a lucid judgment, held that since the policy was silent on the time for repairs, a reasonable time would be implied. A reasonable time under the circumstances was 6 months whereas the insurer was found to have been guilty of unreasonable delay for a period of 23 months for which the damages claimed by the insured were awarded since this was the loss flowing directly and naturally from the insurer's breach of contract. The learned judge held that, as a matter of construction, the exemption clause did not protect the insurer from the consequences of breach of the repair

⁶⁴ [1976] N.C.L.R. 458.

contract to which the policy had been transformed, and happening outside the period of the insurance.

On appeal, Bello J.S.C., (now in the Supreme Court) found the opportunity to impose the checks commenced in Bida on insurers. Delivering the only judgment, he held that it was a fundamental term (howbeit implied) that repairs were effected within a reasonable time. Failure to comply amounted to a fundamental breach by the insurer. The judge, however, stated the effect of this fundamental breach on the exemption clause in rather ambivalent terms. Quoting from Lord Upjohn in the Suisse Atlantique⁶⁵ case, he held (at p.48) that "the question whether an exemption clause...in a contract is applicable where there is a fundamental breach of the contract is one of the true construction of the contract". The construction of Wheeler J., was upheld though he had not decided the case as one of fundamental breach. On the other hand, having cited Harbutt's "Plasticine" Ltd. v. Wayne Tank & Pump Ltd.⁶⁶ and Farnworth Finance Ltd. v. Attryde,⁶⁷ Bello J.S.C. concluded the judgment:

We accordingly hold that the implied term to repair the motor vehicle within a reasonable time was a fundamental term of the policy and that, having committed a breach of that fundamental term, the [insurer] cannot rely on the limitation of liability and exceptions clauses under the policy to absolve itself from the consequences of

⁶⁵ [1967] 1 A.C.361.

⁶⁶ [1970] 1 Q.B. 447. (C.A.).

⁶⁷ [1970] 1 W.L.R. 1053. (C.A.).

its breach.⁶⁸

The judge got round the earlier Supreme Court decision in Kayode by distinguishing it on the ground that there had been no fundamental breach in that case.

Though the author of the standard contract text in Nigeria concludes that the court was adopting the principle of fundamental breach as a rule of law,⁶⁹ this is by no means certain from the dicta used. The result of the decision may be fair and just, but applying a doctrine of fundamental breach or breach of a fundamental term is not without difficulties. In the first place, (as discussed in Chapter 5 para. 5.5.3, *supra*), it appears that developments in the general law of contract seek to avoid the classification of terms as fundamental to the contract except conditions. Furthermore, judicial implication of terms into a contract is said to depend on the intention of the parties, and is done either because the parties thought the term so obvious as to assume it was part of the contract without saying so, or because it is necessary to give business efficacy to the contract.⁷⁰ It does not necessarily follow, however, that the parties would have made the term fundamental to the contract as the Supreme Court did. Perhaps more significantly, to the extent that the Supreme Court laid down as an absolute rule that a party in breach of a fundamental term cannot rely on an

⁶⁸ [1976] N.C.L.R. 37 at pp.50-51.

⁶⁹ Sagay, Nigerian Law of Contract, (1985) pp.154-155.

⁷⁰ Chitty on Contracts, (26th ed.) paras. 903,904.

exemption clause no matter how widely drawn, the subsequent decision in Photo Production Ltd. v. Securicor⁷¹ appears to be generally agreed as having struck the death blow to this notion. Indeed, the Supreme Court relying on the case recently made it clear in Narumal & Sons Ltd. v. Niger Benue Transport Ltd.,⁷² that in each case, the question is one of construction of the contract to determine whether an exemption clause is intended to exempt liability for the consequences of a fundamental breach of contract. The case itself related to a breach of the warranty of seaworthiness of a vessel, but the principle stated appears to be of general application.

Inasmuch as the approach of construing the exemption clause adopted by Wheeler J., accords with current law, it has its own problems. The judge had earlier held that upon the insurer's election, the contract became one of repair. There is nothing to show that the terms of this contract are those contained in the policy. It is doubtful if this is possible as both contracts impose different obligations which explains the necessity for implying terms in the repair contract. If the exemption clause was not part of the repair contract, it should not have been construed in the first place in relation to that contract.

There is uncertainty in the effect of Abed on

⁷¹ [1980] A.C. 827. See Chitty, op.cit., paras.960,962.

⁷² [1989] 2 N.W.L.R. 730. Note that Bello C.J.N. (now Chief Justice of Nigeria) was absent from the panel, and Abed was not considered in the case.

subsequent cases. In Mercury Assurance Co. v. Anozie,⁷³ the Court of Appeal reversed the trial judge to hold that the standard clause exempting liability for consequential loss in a private motor policy applied to defeat the insured's claim for the cost of alternative transport upon the insurer's refusal to settle the claim. In Industrial Insurance Ltd. v. Aigbegue,⁷⁴ the trial court's decision was again reversed to hold that a claim for loss of profits for a period of 26 months during which the insurer purported to be effecting repairs on a commercial van was outside the liability undertaken in the cover note issued which was held to be limited to the loss suffered by the vehicle itself. The Court of Appeal held that "In the event of the insurer delaying payment,...what is open to the [insured] is a claim for interest on the sum assured, and that, the court has a discretion to grant." In neither case was Abed referred to by the Court of Appeal.

The award of interest being discretionary makes it of limited aid to insureds. In Anyaegbunam v. Crystal Brokers,⁷⁵ the discretion was refused because the judge held that the insured was adequately compensated for the insurer's delay in paying since the sum insured was awarded without making allowance for depreciation. More

⁷³ [1977] N.C.A.R. 406.

⁷⁴ Unreported, Appeal No.CA/B/55/84 contained in (1987) 2 Nig. Bul. C.L. 115.

⁷⁵ [1977] N.C.L.R. 135. See also Alagbe v. United Nigeria Ins. 3 L.R.N. 20, where the claim for interest failed.

importantly, interest rates awarded by the courts are calculated between 4 and 5 per cent.⁷⁶ The inadequacy is obvious when compared with commercial rates to which the insured would be entitled if the insurance money was in his possession, or the profits earned if his vehicle had been repaired promptly.

The High Court decisions make a worse case for the uncertainty in the law. In Iyanda v. Midland & Mansfield Insurance,⁷⁷ Aboderin J., relied on Abed to hold that delay of 4 months in effecting repairs to a damaged vehicle was unreasonable and amounted to a fundamental breach preventing the insurer as a matter of law from relying on the exemption clause to defeat the claim for loss of profits. Similarly, Savage J., in Omotosho v. Gateway Insurance (supra), held (at p.295) that the insurer's "Failure to have the damaged car repaired is a breach of the policy. It is a fundamental breach and there can be no question of limitation clause in that regard." However, the insured's failure to prove the loss suffered prevented recovery. In Ojo v. Nigeria Reliance,⁷⁸ it was held that the insurer's repudiation of liability "without the slightest endeavour to investigate the cause of the accident" amounted to a "complete disregard for the rights

⁷⁶ In National Employers' Mutual v. Martins [1969] N.C.L.R. 365, the Supreme Court upheld interest awarded at 4%.

⁷⁷ Unreported, Suit No.I/271/79, contained in (1985) 1 Nig. Bul. C.L. 39.

⁷⁸ [1983] 2 F.N.R. 313 at p.320. Note that Abed was not considered.

and losses of the [insured]", and a breach of the contract of insurance. The clause exempting consequential loss was found to be ambiguous and inapplicable to the claim for loss of profits which was awarded. On the other hand, in Edema v. Express Insurance Co.⁷⁹ it was held that the clause exempting liability for consequential loss defeated the claim for expenditure incurred during the period the insured vehicle was out of use following the insurer's wrongful repudiation.

Admittedly, the Nigerian courts appear more sympathetic to insureds when the insurer's conduct has caused loss of business profits as opposed to insureds claiming under private motor policies. It should be conceded, however, that both category of insureds suffer losses which is only one of quantum.

The Australian Law Reform Commission felt a disincentive was necessary for insurers delaying the settlement of claims. To this end, a mandatory payment of interest at commercial rates in both life and general insurance from the date the delay became unreasonable was recommended.⁸⁰ As the Commission noted, the advantage was that insureds would be entitled to interest without resorting to litigation, and the commercial rates removed a deficiency from interest awarded by the courts.⁸¹ The

⁷⁹ Unreported, Suit No.I/36/81, contained in (1985) 1 Nig. Bul. C.L. 76.

⁸⁰ Australian Law Reform Commission, Report No.20, paras.323-324, enacted in s.57 Insurance Contracts Act 1984.

⁸¹ Ibid., at para.320.

Commission further recommended that the principle of utmost good faith should apply throughout the contract, and an insurer unreasonably delaying the settlement of a claim is in breach of this duty and liable to the insured for damages suffered from the breach.⁸²

The response of the courts in America to unreasonable conduct by insurers in the negotiation and settlement of claims was to develop the principle of good faith which applied throughout every contract of insurance, into a tort of bad faith.⁸³ An insurer acting unreasonably in settling claims is liable for this tort, and damages awarded may be punitive or exemplary and may include sums for inconvenience and mental distress suffered by the insured.

The courts in Nigeria by a combined process of construing exemption clauses in policies against the insurer and applying a doctrine of fundamental breach as a rule of law have achieved fairness in a significant number of cases. However, insureds have been without remedy in an equally significant number of cases. There may come a time when clauses would be so widely and clearly drafted as to exempt insurers from liability for losses arising from their conduct in settling claims that the courts would be powerless to act.

⁸² Ibid., at para.328, enacted in s.13 Insurance Contracts Act 1984.

⁸³ See generally, Parks and Heil, "Insurers Beware: 'Bad Faith' is in Full Bloom", (1973) 9 Forum 63; Barry, "An Independent Duty of Good Faith and Fair Dealing in Insurance Contracts - Gruenberg v. Aetna Insurance Co.", (1974) 11 San Diego L.R. 492.

Ultimately, it would be necessary for a way to be found in exercising the Director's power under section 14 of the Insurance Act of 1976 to approve all policy terms so as to ensure that prejudicial exemption clauses do not find their way into insurance contracts particularly individual contracts. Inasmuch as the Nigerian Law Reform Commission recognised that "the conduct of some insurers in the handling of claims is a major area for concern", it is unfortunate the only solution proffered is that the office of the Director should be charged with the responsibility for adjudicating small claims with an upper limit of N1,000.⁸⁴ It is doubtful if such claims are ever made in practice. In any event, the 1988 Insurance Decree is completely silent on the settlement of claims.

7.4 Waiver and Estoppel

The courts have frequently applied the principles of waiver and estoppel to control the ability of insurers to rely on rights which would otherwise be open to them particularly the breach or performance of warranties and conditions.

In Egbejobi v. Mercury Assurance & ors.,⁸⁵ Oyefeso J., adopted the definition of waiver given by Lord Hailsham in Manning v. Wright:⁸⁶

Waiver is the abandonment of a right... When a

⁸⁴ Law Reform Journal (1986) No.5 at p.182.

⁸⁵ [1985] H.C.N.L.R. 276 at 284.

⁸⁶ [1972] 2 All E.R. 987 at 999.

contract is broken the injured party in condoning the fault may be said either to waive the breach or to waive the term in relation to the breach. What in each case he waives is the right to rely on the term for the purpose of enforcing his remedy for the breach.

The learned judge further held that waiver may be express or implied but must amount to an unambiguous representation relied on by the party to whom it is made.

In Salami v. Guinea Insurance Co., Akpata J., described the nature of a promissory estoppel as follows:

When one party has, by his own words or conduct, made to the other a clear and unequivocal promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has...acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to their previous legal relations as if no such promise or assurance had been made by him.⁸⁷

Waiver and estoppel frequently overlap in practice and are used interchangeably in the cases. Indeed, there is the high authority of Lord Denning suggesting that both are different terms describing the same equitable rule.⁸⁸ Some of the cases in which the concepts have been applied are examined below.

In Oghene & Sons Ltd. v. Royal Exchange Assurance,⁸⁹ the insurer relied on a breach of warranty by the insured to keep proper books of account and stock sheets showing an accurate record of stocks, and to produce evidence of

⁸⁷ [1977] N.C.L.R. 161 at 174.

⁸⁸ Charles Rickards v. Oppenheim [1950] 1 K.B. 616, 623; W.J. Alan & Co. Ltd. v. El Nasr Export [1972] 2 Q.B. 189 at 212. Cf. MacGillivray and Parkington, op. cit., paras. 822-824.

⁸⁹ [1967] N.C.L.R. 313.

stocks prior to loss. It was found that the insurer's agent had visited the factory and gone through the books kept, and the local manager had also carried out a visit without asking for the books. Rhodes-Vivour J., held that the insurer by its agents conduct had waived its right to call for the production of the books.

An insurer undertaking the defence of its insured against third party claims may be deemed to have waived its right to rely on the insured's breach of condition. Thus, participating throughout third party proceedings and cross-examining the third party and his witnesses in a claim against the insured was held a waiver by the insurer of the right to rely on the insured's breach of condition requiring arbitration in United Nigeria Insurance v. Oloko.⁹⁰ However, it has been held that the insurer's conduct of filing a defence to the insured's action without more, does not amount to a waiver by the insurer of the right to rely on the insured's breach of condition to refer to arbitration as a defence to the claim.⁹¹

When a claim is made and the insurer discovers a breach of condition entitling it to repudiate liability, its conduct in handling the claim may amount to a waiver depending on the circumstances. In Unity Life & Fire Insurance Ltd. v. Banire,⁹² the insurer sought to rely on the insured's breach of condition by failing to deliver a

⁹⁰ [1981] 3 C.A. 241.

⁹¹ Jebara v. Mercury Ass. [1971] 1 N.C.L.R. 1.

⁹² [1981] 3 C.A. 46.

notice in writing of the loss even though the insurer was orally notified. Kazeem J.C.A., relying on Globe Savings v. Employers' Liability Assurance Co.,⁹³ held that the conduct of appointing assessors to investigate and negotiate the claim amounted to an act which could be justified only on the footing that the policy was in force, and hence a waiver of the breach.⁹⁴

The plea of waiver, however, failed in Egbejobi v. Mercury Assurance Ltd.,⁹⁵ where the insured contended that ordering an inspection of a third party's damaged vehicle and obtaining an assessor's report amounted to a waiver of the breach of condition to notify the insurer of the accident within 30 days and not to admit liability for any accident. Oyefeso J., distinguishing Banire (supra), held that the insurer's conduct did not "amount to a 'positive and intentional act' which can be justified only on the footing that the policy is in full force". The act, according to him, was "a preliminary step towards denying or accepting liability".⁹⁶

Just as the insurer's conduct may amount to a waiver of a breach, it may also amount to a waiver of the future

⁹³ (1900) 13 Man. R. 531.

⁹⁴ At pp.52-53. Nnaemeka-Agu J.C.A. relied on Oduah v. Lion of Africa Ins. Unreported, Appeal No.SC.358/1964, where the Supreme Court upheld a decision to the effect that the conduct of an insurer in negotiating the settlement of a third party claim amounted to a waiver of the absence of written notice of loss.

⁹⁵ [1985] H.C.N.L.R. 276.

⁹⁶ Ibid., at p.284.

performance of a condition by the insured. In Lawal v. Amicable Insurance,⁹⁷ the insured warranted in a goods-in-transit policy to render monthly statements of the value of goods carried. The insurer repudiated liability relying on breach of the warranty among others. It was held that the conduct of the insurer in accepting renewal premiums for 3 successive years with knowledge that the insured was not complying with the warranty raised an estoppel as well as waiver by inducing the insured to believe that the warranty need not be performed, and that the insurer's accrued rights would not be enforced.

An interesting application of the principles of waiver and estoppel is found in Amoo v. International Insurance Co. Ltd.⁹⁸ The insured warranted in a burglary policy to keep proper books of account and stock sheets. The insurer stated the reason for repudiating liability to be its dissatisfaction with the way the insured's books were kept. In the ensuing action, the insurer raised the defence of non-disclosure and failure to secure the doors of the shop with cross bars as warranted. The trial judge held that the insurer was estopped from relying on defences other than that given for the repudiation. Relying on Toronto Rly. v. National British and Irish Millers Insurance,⁹⁹ and Kelly v.

⁹⁷ [1982] 3 F.N.R. 283.

⁹⁸ Unreported, Suit No.I/13/80, contained in (1985) 1 Nig. Bul. C.L. 74.

⁹⁹ (1914) 111 L.T. 555

Hochelaga Fire Insurance,¹⁰⁰ he held that: "If an insurer expressly repudiates liability on a specific ground after he is in possession of all relevant particulars, breach of other conditions must be regarded as waived".

In the context of non-disclosure and misrepresentation, it has been held that an insurer issuing a policy with knowledge of incomplete and unsatisfactory answers in the proposal form is deemed to waive its right to insist on an accurate disclosure, and is estopped from setting up the non-disclosure or misrepresentaion as a defence.¹⁰¹ Section 1(1) of the 1988 Insurance Decree requires an insurer to elicit all material information in the proposal form, and provides that any information not requested is deemed immaterial. Since it is the insurer's choice to ask questions, facts outside the proposal form are regarded as waived by the insurer. Finally, in Ogbebor v. Union Insurance,¹⁰² it was held that the insurer is estopped from relying on false statements recorded in a proposal form by its agent to nullify the contract when the form is signed in blank by the proposer.

¹⁰⁰ (1886) 24 L.C.J. 298.

¹⁰¹ Adeyeye v. Liberty Ass. Unreported, Suit No.HOD/13/81, noted in (1984) 1&2 J.P.P.L. 121. See Chapter 6 para. 6.5.4, *supra*. The principle applies to warranties created by the 'basis' clause.

¹⁰² [1967] 3 A.L.R. Comm. 166, see Chapter 4 para.4.2, *supra*.

7.5 The Burden of Proof

The onus of proving that the loss was caused by a peril insured against lies on the insured. "Where the insured has discharged his duty of establishing his claim, and has shown that the loss or damage was caused by an insured peril, the insurer must then discharge its obligation under the contract by indemnifying the insured in full."¹⁰³ The assured is not, however, required to prove the cause of the loss conclusively.¹⁰⁴ All that he need do is to establish a *prima facie* case that the proximate cause of the loss falls within the insured perils.¹⁰⁵

On the other hand, Kazeem J.C.A., in Unity Life & Fire Insurance v. Banire (supra), quoted Lord Goddard C.J. in Bond Air Services Ltd. v. Hill¹⁰⁶ that it is;

...axiomatic in insurance law, that, as it is always for an insurer to prove an exception, so it is for him to prove the breach of condition which would relieve him from liability for a particular loss.

The principles of proof were applied in Akinjola v. Express Insurance Co.,¹⁰⁷ where the insured claimed for a loss occasioned by the disappearance of his driver with a vehicle insured against loss by theft, among others. The

¹⁰³ Afonja J., in Ojo v. Nigeria Reliance [1983] 2 F.N.R. at p.318.

¹⁰⁴ Ivamy, General Principles of Insurance law, (5th ed.) p.415.

¹⁰⁵ MacGillivray and Parkington, op. cit., para.1556; see paras. 1551- 1555 for the rules governing the determination of the proximate cause of loss.

¹⁰⁶ [1955] 2 Q.B. 417 at 427.

¹⁰⁷ Unreported, Suit No.AG/2/79.

insurer argued it was not liable for a loss happening through the dishonesty of the insured's servant and relied on a clause excluding liability for any claim "arising from any contract and liability". The trial judge, finding as a matter of construction that the clause did not relate to a loss by theft, held the insurer had not discharged the burden of bringing the claim within the exception. However, it was also held that the insured had not adduced any credible evidence to prove the theft as he was bound to.

Of significant benefit to insureds is that the courts have, in appropriate cases, applied the onus of proof to control insurers in their reliance on exemption clauses and breach of terms to defeat claims, by holding that an insurer has not discharged the burden of proof incumbent on it. In Nigerian Enterprises Ltd. v. Norwich Union,¹⁰⁸ the insurer repudiated liability alleging that an employee driving the insured vehicle at the time of accident was unlicensed, and in breach of a condition in the policy. Reliance was placed on the claims form submitted by the insured wherein questions on the particulars of the driver's licence were left unanswered, as proof of the breach. Bellamy J., held this insufficient to discharge the onus of proving the breach incumbent on the insurer. The case was relied on in Ojo v. Nigeria Reliance (supra). Having found that the insured vehicle was damaged in an accident caused by a burst tyre and brake pipe, it was held that the insurer had not discharged the burden of

¹⁰⁸ [1962] L.L.R. 66.

bringing itself within a clause exempting liability for "mechanical or electrical break downs, failures and breakages".

In Amoo v. International Insurance Co. (supra), in rejecting the insurer's contention that the insured was in breach of warranty to keep proper books of account, the trial judge stated the degree of proof necessary to discharge the insurer's burden as follows:

It is not sufficient for an insurance company merely to assert that it was not satisfied. It should be able to satisfy the court as an expert why it was not satisfied. I have myself examined the record book and I am satisfied that it contained records of stock received and record of sales shown separately for each month...All that the warranty required was 'Accounts and stock sheet or stock books'.¹⁰⁹

An important application of the principles on proof to protect the insured is found in Mokwe v. Royal Exchange Assurance Co.¹¹⁰ where armed robbers entered a shop insured against loss by burglary carrying away all the stock. At the time of the burglary there was fighting between the federal troops and secessionist rebels in Onitsha where the shop was situate during the Nigerian civil war. The insurer relied on a clause in the policy exempting liability for "loss or damage occasioned by or happening through or in consequence of...civil war, riot or civil commotion or loot...". Applying Motor Union Insurance Co. v. Boggan,¹¹¹ Nnaemeka-Agu J., held (at p.285) that "the onus of proving

¹⁰⁹ See (1985) 1 Nig. Bul. C.L. 76.

¹¹⁰ [1974] 4 E.C.S.L.R. 280.

¹¹¹ [1923] All E.R. Rep. 331.

that the claim is within the exception, so as to be excluded from the general effects of the operative words of the policy is on the insurers". And, that the onus would be discharged only if the insurer could "prove not only that there was civil war at Onitsha on the material date and time, but also that the loss complained of was as a result of or in consequence of or happened through civil war or was otherwise connected with it". The insurer's failure to adduce any evidence at the trial meant the onus was not discharged.

The onus of proving that the assured has failed to perform the duty of disclosure or has made a misrepresentation or has broken a condition relating to disclosure lies upon the insurers.¹¹² In Bida v. Motor & General Insurance,¹¹³ the insurer repudiated liability on a motor claim alleging the non-disclosure of the age of the vehicle in the proposal form. It contended that it was for the insured to prove the disclosure by producing the form. Bello Ag. C.J., held that the burden was on the insurer to prove the non-disclosure relied on, and that if at all the non-production of the form would have an adverse effect on the claim, the insurer must suffer it. Finally, it has been held that it is for an insurer alleging fraudulent claims,¹¹⁴ or fraudulent non-disclosure and

¹¹² Ivamy, op.cit., p.178 and the cases cited therein.

¹¹³ [1972] N.C.L.R. 270.

¹¹⁴ Jamal Transport Ltd. v. African Ins. [1971] N.C.L.R. 145.

misrepresentation¹¹⁵ to plead it specifically and prove it beyond reasonable doubt. In both cases, the insurers failed to discharge the burden and the defence failed.

7.6 The Construction of Insurance Contracts

7.6.1 General Points

The power of the court to control insurers by a process of construction of insurance contracts cannot be too strongly emphasised. It is a fact that insurance contracts are drawn exclusively by insurers and in most cases the insured must take it as it is. This gives insurers the latitude to include unfair and onerous provisions. Furthermore, there is no requirement that the terms of the contract be consolidated in one document. In practice, contractual terms are found in the proposal form, cover note, the policy, and even the certificate issued to motor insured persons pursuant to the Act of 1950. This makes precise ascertainment of terms with which the insured is expected to comply difficult. The problem is accentuated by the fact that in the majority of cases, documents evidencing the contract (particularly the policy) are not delivered to insured persons. Whereas, it has been held that the policy is incorporated in the proposal form (or cover note) if referred to in the latter, and that a proposer is deemed to have contracted on the insurer's

¹¹⁵ American International Ins. v. Nzayi, Unreported, Appeal No. FCA/L/33/84. See Chapter 6 para.6.2, *supra*.

standard terms in the absence of his policy.¹¹⁶

Additionally, a significant number of insureds in possession of contractual documents find it difficult to understand the technical language in which they are drafted, or to read the tiny prints in which they are framed.¹¹⁷ Several suggestions have been advanced, including drawing up documents in the major ethnic languages,¹¹⁸ but none has been so far implemented.

The power of the Director in section 14 of the 1976 Insurance Act to approve all contractual terms by which some measure of control of unfair terms, wordings, and possibly print, could have been achieved is left unutilised.¹¹⁹ The Law Reform Commission was of the view that the situation should be ameliorated by "couching proposal forms, policy documents and renewal forms in highly simplified language", and also the prescription of type, size and colour of print.¹²⁰ Regrettably, the only relevant provision of the 1988 Insurance Decree enacted to implement the Commission's views, is that: "The proposal form or other application form for insurance shall be printed in easily readable letters".¹²¹ It is against this

¹¹⁶ See generally, Chapter 2, *supra*.

¹¹⁷ Ibid.

¹¹⁸ Osu, "The General Marketing of Insurance: Strategies, Problems and Solutions", (1987) XI WAICA Journal p.207.

¹¹⁹ See Chapter 5 para. 5.5.2, *supra*.

¹²⁰ Law Reform Journal (1986) No.5 pp.181-182.

¹²¹ s.1(2) Insurance (Special Provisions) Decree 1988.

background that the principles employed by the courts in construing insurance contracts are examined.

7.6.2 The Principles of Construction

Before discussing the general principles, two important and equally competing statements of judicial attitude to insurance contracts should be noted. The first is that of Kassim J., in Narsons Ltd. v. Lion of Africa Insurance Co.:

A warranty in a contract of insurance must, like a clause in any other commercial contract, receive a reasonable interpretation and be read if necessary with such limitations and qualifications as will render it reasonable.¹²²

The second is that of Adekola J., in Lawal v. Amicable Insurance:

It is trite law that it is not the court's function, by a process of construction to make for the parties a reasonable contract which they have not made for themselves. If the words used by the parties in the terms of their contract of insurance are clear, precise and unambiguous, effect must be given to them, however unreasonable the result may be.¹²³

The general principles of construing insurance contracts were summarised in Ojo v. Nigeria Reliance Insurance Co., thus:

An insurance policy is interpreted like any other contract or written instrument. The terms, words and phrases used in the policy must be understood in their natural, ordinary and popular sense. The words must be given the meaning which an ordinary man of reasonable intelligence would give them, unless such words are technical terms, in which case they must be given their technical meaning.

¹²² [1969] N.C.L.R. 185 at 186.

¹²³ [1982] 3 F.N.R. 283 at 291.

However, the whole policy must be read so as to ascertain the intention of the parties as indicated by the words and phrases they have used in the policy.¹²⁴

It is proposed to consider how the various principles in the summary have been applied in particular cases hereunder.

(i). Ascertaining the intention of the parties

It is said that the cardinal rule of construction is that the intention of the parties must prevail.¹²⁵ This intention is to be ascertained not only from the policy, but from all the documents forming the contract. Thus, it has been held that where a proposal form is made the basis of the contract, "the effect is that the proposal form and the policy shall be read as one."¹²⁶ Where the proposal form or cover note issued incorporates the policy by reference, the terms of the policy will be construed as part of the contract even though the policy is not issued.¹²⁷ The indorsements on the policy¹²⁸ and documents included in it form part of the contract to be construed with the policy.

¹²⁴ [1983] 2 F.N.R. 313 at 319, per Afonja J.

¹²⁵ Ivamy, op.cit., p.333.

¹²⁶ Okagbue J. in Ilonzo v. Universal Ins. [1972] 2 E.C.S.L.R. 611,613; Akpata v. African Alliance [1967] 3 A.L.R. Comm. 264.

¹²⁷ Northern Ass. v. Wuraola [1969] N.C.L.R. 4; Yorkshire Ins. v. Haway [1969] N.C.L.R. 464; Babalola v. Harmony Ins. [1982] 1 O.Y.S.H.C. 1.

¹²⁸ Thawardas v. British India General Ins. [1974] N.C.L.R. 303,309.

In Lawal v. Amicable Insurance (supra), the policy of insurance provided cover for goods-in-transit under certain circumstances and exempted liability in others. A memorandum attached to the policy further defined the risk undertaken by limiting the insurer's liability to "loss or damage arising out of accidental collision, overturning or fire damage" to the carrying vehicle. The memorandum was construed as part of the contract so that the insurer was not liable for a loss by armed robbery.

In Ogbebior v. Union Insurance,¹²⁹ one of the defences raised by the insurer was that the damaged vehicle was driven by an employee of the insured in breach of conditions. The policy was construed with the certificate of insurance issued to hold that the defence was not open to the insurer since the certificate expressly listed any person driving with the insured's permission as one entitled to drive.

In ascertaining the parties' intention, the entire policy must be construed. Thus, in Akunne v. Arrowhead Insurance,¹³⁰ where the insured claimed to be entitled to an indemnity for consequential losses suffered under a motor policy described as 'comprehensive', it was held that the liability undertaken by the insurer must be found in reading the whole policy "regardless of the use of the word

¹²⁹ [1967] 3 A.L.R. Comm. 166 at p.177.

¹³⁰ [1975] 7 C.C.H.C.J. 1309.

'comprehensive' to describe its ambit".¹³¹ The claim was defeated by a clause exempting liability for consequential loss.

(ii). The natural, ordinary and popular meaning of words

The terms used in the policy must be understood in their natural, ordinary and popular sense where they are clear and unambiguous and the context permits. The rationale is that the parties, as reasonable men, intended to use words and phrases in their commonly understood and accepted sense.¹³²

In Edema v. Express Insurance,¹³³ a motor policy excluded liability "in respect of any accident resulting in a claim reported after 30 days of the occurrence of such an accident". It was held that loss by theft did not come within the generally accepted meaning of the word "accident", so that the insured was not bound to report the theft within the period.

In Ohamweh v. International Insurance Group, a motor policy covered loss or damage by 'theft', *inter alia*. The insurer contended that a loss by armed robbery did not come within the meaning of 'theft'. In rejecting the contention, the judge was content to decide the case on the ordinary meaning of the word 'theft', and not whether theft included

¹³¹ Ibid., at p.1041. Cf. Gerhardt v. Continental Insurance Companies [1967] 1 Lloyd's Rep. 380.

¹³² MacGillivray and Parkington, op.cit., para.1076.

¹³³ Unreported, Suit No.I/36/81, contained in (1985) 1 Nig. Bul. C.L. 76,79.

armed robbery in criminal law. Thus, it was held that "armed robbery is merely an aggravated form of theft...There is no indication in the policy that the word 'theft' is used in any other sense than its simple ordinary meaning. Theft simply means the taking of another's property with an intention to permanently deprive the owner of such property and without the owner's consent".¹³⁴

Similarly, in Akinjola v. Express Insurance (supra), it was argued that cover for loss by 'theft' granted in section 1(1)(b) of a motor policy excluded theft by the insured's employee. The trial judge in rejecting the argument observed that the section is "clear and unambiguous. It says that the insurer will indemnify an insured against any theft of his motor vehicle. It does not limit the theft to only that committed by non-employees of an insured. It talks of theft generally."

(iii). The reasonable and purposive interpretation

The words and clauses in the policy would be interpreted so as to produce a reasonable result, and in light of the purpose which they are intended to serve. As the object of the parties is to make a contract of insurance, any construction which defeats that object or renders the contract practically illusory is to be rejected. Ogbebior v. Union Insurance (supra) is

¹³⁴ The case is reported in (1987) XI WAICA Journal at p.214. See Dobson v. General Accident Ass. [1989] 3 All E.R. 927, where the English Court of Appeal construed 'theft' in an insurance policy according to its criminal law meaning under the Theft Act 1968.

illustrative of this principle. A clause stipulating for depreciation of the insured vehicle at the rate of 15% per month was rejected as "unrealistic and...not intended for private vehicles" because, as the judge found, applying the clause would mean the 6 month old vehicle at the time of loss would have no value at all contrary to the intention of the parties.

In Martins v. National Employers' Mutual,¹³⁵ Lambo J. held that the purpose of a condition requiring the notification of third party proceedings was to give the insurer a reasonable opportunity of investigating the claim, and not to enable it escape liability. The condition was construed to give effect to this object so that a third party's solicitor's letter intimating the insurer of an accident satisfied the requirements.

The approach in Ogbebor and Martins, above, contrasts with that of Adekola J. in Lawal (supra), where it was held that effect must be given to unambiguous words no matter how unreasonable the result may be. It is submitted, however, that the latter approach represents an exception rather than the rule.¹³⁶ Indeed, the learned judge resiled from applying the literal interpretation advocated when eventually he held that a clause, described as a "Declaration warranty" in the policy, whereby the insured warranted to declare the value of goods carried monthly,

¹³⁵ [1969] N.C.L.R. 46 at 56, affirmed in [1969] N.C.L.R. 395.

¹³⁶ See Narsons v. Lion of Africa Ins. [1969] N.C.L.R. 185.

was not a condition precedent to the insurer's liability entitling it to repudiate. Instead, the clause was held to be "a collateral warranty, a breach of which entitles the insurer to claim damages only", and was inserted for the sole purpose of adjusting premiums.¹³⁷ Finally, in the broader context of awarding sums for the insured's loss, Nnaemeka-Agu J., had cautioned himself that: "I must also not forget the fact that this is an insurance claim and the law should be applied as much as is reasonably possible to protect the insured."¹³⁸

(iv). The technical meaning of words

When technical words are used in an insurance policy they will be given their technical meaning and words having a recognised technical meaning in law will be given the strict technical meaning. In Mokwe v. Royal Exchange Assurance (supra), where a burglary policy excepted liability for loss or damage happening through "war invasion act of foreign enemies...civil war riot or civil commotion..", Nnaemeka-Agu J. adopted the definition of 'war' given by Mathew J. in Driefontein Consolidated Gold Mines Ltd. v. Janson.¹³⁹ The judge observed that "the term 'war' in a policy of insurance, includes civil war, unless the context makes it clear that a different meaning should

¹³⁷ [1982] 3 F.N.R. 283 at 294.

¹³⁸ Okpalaugo v. Commerce Ass. [1976] N.C.L.R. 273, 279-280.

¹³⁹ [1900] 2 Q.B. 339 at 343.

be given to the word". In the result, it was held that fighting between federal and rebel troops constituted civil war under the policy. The learned judge also adopted the construction of 'riot' given by the House of Lords in Motor Union Insurance v. Boggan¹⁴⁰ and London and Lancashire Fire Insurance v. Bolands.¹⁴¹

(v). The contextual and circumstantial interpretation

The meaning of a word is to be ascertained with reference to its context and the circumstances of the case, and the ordinary meaning may be restricted thereby. This principle of construction was applied in Oghene & Sons Ltd. v. Royal Exchange Assurance, where a factory was insured against loss by 'tornado'. One of the buildings of the factory located in the Delta area of Nigeria was destroyed by strong winds which the insurer argued did not constitute a 'tornado'. Rhodes-Vivour J., observed that:

The policy having been taken out here in the federation of Nigeria, it must be taken as agreed by both parties that the term "tornado" must be that peculiar to this part of the world as distinct from that in the West Indies or in the United States of America...¹⁴²

In rejecting the insurer's argument, the winds were held to amount to 'tornado' as peculiar to West-Africa.

In Onuh v. United Nigeria Insurance, Phil-Ebosie J. adopted a dictum of Cockburn C.J. in R v. Justices of

¹⁴⁰ [1923] All E.R. Rep. 331.

¹⁴¹ [1924] A.C. 836.

¹⁴² [1967] N.C.L.R. 313 at p.318.

Berkshire,¹⁴³ in interpreting the word 'immediate' in a clause requiring the giving of notice of loss in a burglary policy.

It is impossible to lay down any hard and fast rule as to what is the meaning of the word 'immediately' in all cases. The words 'forthwith' and 'immediately' have the same meaning. They are stronger than the expression 'within a reasonable time' and imply prompt vigorous action, and without any delay, and whether there has been such action is a question of fact, having regard to the circumstances of the particular case.¹⁴⁴

In the circumstances of the case, it was held that six weeks unexplained delay in reporting the loss did not constitute immediate notice.

In Okpalaugo v. Commerce Assurance,¹⁴⁵ a motor vehicle insured under a comprehensive cover had been stolen and subsequently recovered by the police in a damaged condition. In determining the measurement of the insured's loss, the trial judge had to find whether the vehicle had been totally lost by the theft as the insured argued, or only damaged by the thieves. The dictum of Bankes L.J. in Moore v. Evans¹⁴⁶ was adopted that "Mere temporary deprivation [of a thing insured] would not under ordinary circumstances constitute a loss", and that of Roche J. in Holmes v. Payne¹⁴⁷ that:

...if a thing has been mislaid and is missing or

¹⁴³ (1878) 4 Q.B.D. 469 at 471.

¹⁴⁴ [1975] N.C.L.R. 413 at 427.

¹⁴⁵ [1976] N.C.L.R. 273.

¹⁴⁶ [1917] 1 K.B. 458 at 471.

¹⁴⁷ [1930] 2 K.B. 301 at 310.

has disappeared and a reasonable time has elapsed to allow of diligent steps and of recovery and such diligent search has been made and has been fruitless, then the thing may properly be said to be lost.

It was held that under the circumstances, since the insured's steps had led to recovery, the vehicle was not lost.

Lastly, in Abili v. United Nigeria Insurance,¹⁴⁸ the insurer elected to repair a damaged vehicle, and delivered it to a firm of repairers for this purpose. The firm abandoned its workshop at the outbreak of the civil war to the knowledge of the insurer and, in consequence, the parts of the vehicle were looted for which the insured claimed damages. The insurer relied on the insured's breach of condition requiring the submission of "all differences arising out of the policy" to arbitration as a defence. It was held that the words applied only to claims relating to the insured's use of the car and for losses which the insurer granted cover under the policy. As such, the clause was held inapplicable to the insured's claim which was for breach of the insurer's duty of care as bailee of the car.

The case above is also significant as illustrating the degree of control which some courts are prepared to exercise over insurers. It was held that an insurer is a bailee of a vehicle delivered to it for repairs. Accordingly, the insurer is under a duty to take reasonable care of the vehicle to the extent which "a careful and

¹⁴⁸ [1969] N.C.L.R. 196.

vigilant man would exercise in the care of his property". The insurer was held in breach of the duty and liable for the resulting damage in failing to secure the safety of the vehicle after it knew the vehicle had been abandoned.

(vi). Ambiguities will be construed against the insurer

The rule and its justification were stated in Ojo v. Nigeria Reliance, thus:

...where there is an ambiguity or doubt in the language used in a policy, or one clause therein is in conflict with another, the interpretation most favourable to the insured is to be accepted. It is the rule of construction that a document has to be construed strictly against its maker in such circumstances; and it is common knowledge that almost invariably, insurance policies are prepared by the insurers. This rule is devised so as to deprive the insurer of any undue advantage he might gain from his position as the maker of the policy.¹⁴⁹

The rule is helpful to insureds in light of the fact that the phraseology employed in policies is cumbersome. The problem is made worse in Nigeria by the manner in which insurers define the risk undertaken and exclude liability. For instance, clause 1(1) of the common motor policy provides liability for loss or damage, *inter alia*, "by accidental collision or overturning or collision or overturning consequent upon mechanical break down or consequent upon wear and tear." Clause 1(2) then limits the insurer's liability as follows:

"The company shall not be liable to pay for; (i) consequential loss, depreciation, wear and tear, mechanical

¹⁴⁹ [1983] 2 F.N.R. at p.319.

or electrical breakdowns, failures and breakages, (ii) damage to tyres unless the motor car is damaged at the same time."

Interpreting these clauses has posed problems for the courts, particularly the construction of clause 1(2)(i) when the insured claims additionally for loss of profits or expenses incurred following the insurer's wrongful repudiation or delay in settling the claim.¹⁵⁰

In Ojo v. Nigeria Reliance (supra), clause 1(2) was held to conflict with 1(1), and construing the ambiguity against the insurer, it was held that 1(2) excluded liability for consequential loss arising from depreciation etc., and did not apply to exclude losses suffered from the insurer's unreasonable conduct in settling the claim. In Abed Bros. Ltd. v. Niger Insurance, clause 1(2) was held inapplicable to losses arising from the insurer's breach of its obligation to repair within a reasonable time. Wheeler J., held that "any ambiguity regarding these provisions must be resolved against the insurers in accordance with the well established rule of construction known as the contra proferentem rule that any doubt as to the meaning and scope of a policy of insurance should be construed against the insurers".¹⁵¹

¹⁵⁰ See the discussion in para.7.3.2, supra, and notice the contrasting interpretations given to these clauses by Taylor J. in Kayode v. Royal Exchange Ass. [1955-56] W.R.N.L.R. 156, and the Court of Appeal in Mercury Ass. v. Anozie [1977] N.C.A.R. 406.

¹⁵¹ [1976] N.C.L.R. 458 at 479; affirmed in [1976] N.C.L.R. 37.

However, it was held in Lawal v. Amicable Insurance (supra), that the contra proferentem rule will only be applied where there is a real ambiguity, and will not be used to create ambiguities where the words are clear. In the case, the words in a memorandum attached to the policy limiting liability in a goods-in-transit contract to loss arising out of "accidental collision, overturning or fire damage to the carrying vehicle" were held to be clear, and excluded loss by armed robbery. This was so even though a clause in the policy itself covered loss or damage to goods "whilst in transit on land, rail or inland waterways within the federation of Nigeria by the conveyance or during loading or unloading in connection with such transit...". The insured's attempt to persuade the court that the apparent conflict in the clauses necessitated the application of the contra proferentem rule was unsuccessful.

In conclusion, one cannot contest the opinion that applying any of the above rules of construction to the same facts may produce different results.¹⁵² It seems that whichever rule, or a combination of them, a court chooses to apply to the claim before it will depend on the justice of the case and which party is considered to be deserving of more protection. It cannot be denied, however, that Nigerian courts have applied the rules more in order to protect insured persons.

¹⁵² Birds, op.cit. pp.164,166. See further, Merkin, "Judicial Construction in Deep Water", (1977) 40 M.L.R. 486.

7.7 Unconscionable Bargains and Exercise of Rights

"...there is the vigilance of the common law which, while allowing freedom of contract, watches to see that it is not abused".¹⁵³ However, writers are not agreed as to the exact basis by which the law ensures that unfair bargains are not enforced and a contracting party is not allowed to enforce his strict legal rights where it would be inequitable to do so. Lord Denning appears to favour a broad principle of unconscionability or 'inequality of bargaining power' by which "English law gives relief to one, who without independent advice, enters into a contract on terms which are very unfair...when his bargaining power is seriously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of another."¹⁵⁴

Treitel, noting that "Equity can give relief against unconscionable bargains in certain cases in which one party is in a position to exploit the particular weakness of the other", doubts the availability of a general principle of inequality as a ground for setting aside agreements in English law.¹⁵⁵ Criticisms of the principle are premised on the fact that it represents an unnecessary judicial interference with freedom of contract which is best left

¹⁵³ Denning L.J. in Gillespie Bros. v. Roy Bowles Transport [1973] Q.B. 400, 416, reiterating his remarks in John Lee & Sons v. Rly. Executive [1949] 2 All E.R. 581, 584.

¹⁵⁴ Lloyds Bank v. Bundy [1974] 3 All E.R. 757 at 765.

¹⁵⁵ Treitel, The Law of Contract, (1987) pp.318, 319-320.

for the legislature,¹⁵⁶ and its potential for uncertainty in the law, "sloppy analysis, flacid reasoning, and ultimately incorrect conclusions".¹⁵⁷

The doctrines of misrepresentation, undue influence or pressure and duress are well defined in the law of contract, and it is argued that the English courts would rather be confined to these principles in setting aside bargains than to recognise a broad principle of unconscionability. However, the approach of the English courts to freedom of contract has been shown to contrast with the practice in Canada, Australia and New Zealand where principles such as unconscionability and inequality of bargaining power by which weaker parties are protected from onerous bargains formed in circumstances considered inappropriate, are well developed in the general law of contract. This is despite significant consumer protection legislation in those jurisdictions.¹⁵⁸

In the context of insurance, agreements to compromise or settle claims may be set aside by the English courts if obtained by misrepresentation, duress, undue influence or pressure as was the case in Horry v. Tate & Lyle Ltd.¹⁵⁹

¹⁵⁶ Lord Scarman in National Westminster Bank v. Morgan [1985] 1 All E.R. 821 at 830.

¹⁵⁷ Tiplady, "The Judicial Control of Contractual Unfairness", (1983) 46 M.L.R. 601 at 614.

¹⁵⁸ See the instructive article by Enman, "Doctrines of Unconscionability in Canadian, English and Commonwealth Contract Law", (1987) 16 Anglo-Am. L.R. 191.

¹⁵⁹ [1982] 2 Lloyd's Rep. 416, noted in (1983) 46 M.L.R. 99. See also Saunders v. Ford Motor Co. [1970] 1 Lloyd's Rep. 379.

The decision of the Supreme Court in Achonu v. National Employers' Mutual¹⁶⁰ is consistent with this approach. The insured, who appeared to have just returned home after the civil war, was offered a sum far less than he was entitled for the damage to his vehicle. The insurer had made it known that the Cheque was in full and final settlement of the claim, and sent a reminder to the insured that he was free to return the cheque if the conditions were unacceptable. The insured proceeded, however, to negotiate the cheque and later claimed for his full loss under the policy. In dismissing the claim, it was held that in the absence of any unfair pressure, ignorance or misunderstanding of the nature of the transaction or its circumstances by the insured, the settlement was binding on him. As the court noted, the insured had not alleged undue influence, and it was difficult to understand the basis of his claim. In any event, it is doubtful if he would have succeeded on a claim of undue influence on the facts having been given ample opportunity to reject the offer.

In the Canadian cases of Pridmore v. Calvert¹⁶¹ and Beach v. Eames,¹⁶² release documents signed by insureds agreeing to accept sums far less than they were entitled, were set aside because of the parties' inability to contract on an equal footing arising from the inequality in bargaining power between the insureds and agents for the

¹⁶⁰ [1976] N.C.L.R. 64.

¹⁶¹ (1975) 54 D.L.R. (3d) 133.

¹⁶² (1978) 82 D.L.R. (3d) 736.

insurers. In Horry (supra) Pain J., refused to apply the principle of inequality as a ground for setting aside the release preferring instead to rely on undue influence.

In Nigeria where legislation controlling unfairness in contracts is virtually non-existent, the role of the courts, by whatever principle, in preventing unfair bargains and inequitable exercise by the insurer of contractual rights is significant.¹⁶³ It has been argued, relying on the Supreme Court decision in Abed, that the adoption of the doctrine of fundamental breach as a rule of law in Nigeria is a desirable development in preventing reliance on unreasonable exemption clauses in the absence of statutory control.¹⁶⁴

The extent to which some insurers may go in compromising claims or obtaining releases makes judicial control desirable.¹⁶⁵ In Akene v. British American Insurance Co.,¹⁶⁶ the beneficiary named in a policy of life insurance taken out by his deceased father was offered £500 in full settlement of his claim whereas the sum insured was £1,900.

¹⁶³ s.14 of the Insurance Act 1976 prescribing the prior approval of contractual terms by the Director is unimplemented. In any event, it does not apply to compromise agreements.

¹⁶⁴ Sagay, Nigerian Law of Contract, (1985) at p.155. It is doubtful if this opinion accurately represents the law in Nigeria in view of subsequent developments after Abed. See para. 7.3.2., above.

¹⁶⁵ s.15(1) of the Motor Vehicles Act of 1950 provides that no settlement made by an insurer in respect of compulsorily insured third party liability claims shall be valid unless the third party is a party to the settlement.

¹⁶⁶ Contained in Sagay, A Casebook on the Nigerian Law of Contract, (1983), p.417.

The offer was made on the pretext that the insurer was not liable to pay anything to the beneficiary since he was not privy to the contract. This argument was rejected in the ensuing action, and the full sum was awarded. In American International Insurance v. Nzayi,¹⁶⁷ it was revealed that the personal representative of a deceased insured had been visited by agents of the insurer who forced her to sign prepared documents abandoning the claims under two life policies taken by the insured. The decision of the trial court rejecting the documents in evidence because they were obtained by "force, threat and duress" was upheld on appeal. The facts of some cases may not be so clear as to succeed on the traditional defences of duress or undue influence, and, it is in such cases that a broad principle of unequal bargains or unconscionability may aid insureds.

Certain dicta of the Supreme Court in National Insurance Corporation of Nigeria v. Power & Industrial Engineering,¹⁶⁸ may indicate a new approach in restricting the insurer's ability to repudiate liability on equitable grounds. On a claim for loss of goods, the insurer relied on non-disclosure of the sailing of the carrying vessel before the insurance was obtained, and denied the existence of a marine contract with the insured covering the loss as defence. In the Supreme Court particular emphasis was placed on the absence of a policy issued by the insurer evidencing the contract as required by section 24 of the

¹⁶⁷ Unreported, Appeal No.FCA/L/33/82 (C.A.).

¹⁶⁸ [1986] 1 N.W.L.R. 1. See Chapter 2 para. 2.6, *supra*.

Marine Insurance Act of 1961, to escape liability. All the judges were unanimous that the marine open cover and certificate of insurance issued by the insurer constituted the policy within the meaning and intendment of section 24. Aniagolu J.S.C. held, in addition, that as the insurer had orally agreed to insure before any documents were issued, it would be inequitable to allow the insurer to escape liability on the ground of the absence of a policy because equity "does not envisage sharp practice and undue advantage of a situation", and "frowns at the unconscionable use of a person's right at common law." The learned judge further observed that "equity will impute an intention that the [insurer] far from scuttling away from its valid obligation to the [insured] will fully honour its agreement to indemnify the [insured] upon its loss."¹⁶⁹ It should be emphasised that Aniagolu J.S.C. was the only judge who relied on equitable principles and the case does not necessarily establish a new principle.

7.8 Conclusion

On the whole, courts in Nigeria have done their best to fulfil the reasonable expectations of insureds in entering into insurance contracts. In certain cases the construction of words used in contracts has often been strained to achieve this. While a broad statutory provision avoiding unreasonable provisions in policies may be desirable, it presupposes that disputes would end up in the

¹⁶⁹ Ibid., at p.29.

courts. It appears that the ultimate protection for insureds would be to find a way whereby the Director's powers to approve policy terms would be utilised. In the meantime, however, the courts may have to fulfil this role.

CHAPTER 8

GOVERNMENTAL REGULATION AND SUPERVISION OF INSURANCE

8.1 Introduction

In many countries, governments have deemed it appropriate to regulate the business of insurance generally and those who transact it specifically. Various reasons have been advanced why regulation is needed. These reasons may be condensed broadly into two.

The first is the necessity to protect those buying insurance. Large sums of money are paid to insurers by purchasers of insurance. Unlike other contracts, the sums are paid in exchange for a promise to be fulfilled at a future but uncertain date. In order to ensure that insurers are in a position to fulfil their promises, it is desirable to establish a system whereby those with dishonest motives are prevented from entering the business, and those already in it attain a level of financial probity to avoid failures.

Secondly, in developing countries, it is economically and politically expedient that the large sums accumulated by insurers are invested in the local economy for development purposes. Consequently, it is desirable that a healthy commercial environment is created so as to attain fair trading practices and secure the continued growth of an important industry.

The early history of the Nigerian insurance market precipitating governmental regulation is considered in

Chapter 3 para. 3.3, supra, in relation to intermediaries. The first regulatory enactments were the Insurance Companies Act of 1961 and the Insurance (Miscellaneous Provisions) Act of 1964. The former did not come into force until 1968 when the regulations giving effect to its provisions were made. The 1961 and 1964 Acts have been repealed by, and certain provisions re-enacted in, the Insurance Act of 1976. It is not intended to consider the provisions of the repealed enactments here except for the purpose of comparison.

The 1976 Insurance Act is now the principal legislation regulating insurance and those transacting insurance business in Nigeria, and some of its provisions have been considered in the course of the earlier Chapters. The aim of this Chapter is to examine the regulatory framework as it relates to insurance companies only, rather than to insurance contracts. Other statutory enactments passed with the aim of enhancing the protection of policyholders and securing the development of a strong insurance market are also considered. Finally, the Chapter concludes with an examination of what is, arguably, the legislative provision having the most significant impact on the common law, i.e. the rights of third parties against insurers.

8.2 The Regulatory Provisions of the 1976 Insurance Act

The Act came into operation on the 1st of December 1976, and it is provided in section 35 that there shall be

appointed by the Federal Service Commission a Director of Insurance and such other public officers as may be necessary for the administration of the Act. Responsibility for insurance matters is now with the Minister in charge of the Federal Ministry of Finance and Economic Development as opposed to the Ministry of Trade under the 1961 Act.

The 1976 Act, by section 1, is made applicable to all those transacting insurance business except:

- (a) a friendly society established with no share capital for the purpose of aiding its members or their dependants where the society does not employ any person whose main occupation is the canvassing for members or collection of subscriptions from members,
- (b) a pensions fund,
- (c) a reinsurer established outside Nigeria engaged solely in reinsurance transactions with insurers authorised in Nigeria under the Act.

The exemption of friendly societies is designed to remove from the purview of the Act the traditional system of insurance practised in many parts of the country whereby groups of people contribute sums to a fund on a weekly or monthly basis. The sums so contributed are then given to members in turn or a certain proportion is given to a member in financial difficulty.

Section 3(2) prohibits the carrying on of insurance business in Nigeria unless the insurer is registered under or pursuant to the Act. Under section 3(3), those already transacting insurance business before the Act were given a

period of 3 months within which to apply for registration. An insurer ceases to be capable of carrying on business at the expiration of 6 months of the commencement of the Act unless it was registered within that period. The requirements to be satisfied before registration is granted are considered below.

8.2.1 Pre-registration Requirements

The 1976 Act divides insurance business into two categories for the purposes of registration. These are life and non-life insurance business. The latter is sub-divided into fire, accident, motor vehicle, workmen's compensation, marine, aviation, transport, and miscellaneous insurance business not falling under any of the listed heads. Life and non-life business are subject to different applications for the purposes of registration¹ and the distinction is maintained throughout the Act although an insurer is allowed to transact both classes of business.

Only the following bodies may apply for registration:

- (a) a limited liability company incorporated under the Companies Act of 1968;
- (b) a co-operative insurance society duly registered under the relevant law, and
- (c) a mutual insurance company formed by seven or more persons subscribing their names to a memorandum of association with the aim of using any profit derived from their operations to reduce the cost of insurance undertaken

¹ s.4(1).

by its members.²

Under section 8, no insurer shall carry on insurance business unless it has, and maintains at all times, a paid up share capital of not less than N500,000 in the case of life insurance and not less than N300,000 in the case of non-life insurance. One seeking to transact reinsurance business must have a share capital of not less than ten times the amount specified above depending on the class of reinsurance business.

As a precondition to registration, an applicant is expected to deposit the paid up share capital required with the Central Bank of Nigeria. This deposit is referred to in section 9(1) as a "statutory deposit". Once registration is granted, however, the Director shall cause to be released to the insurer half of the statutory deposit (in respect of each class of business for those carrying on a composite business) while the other half is retained in the Central Bank. The whole sum is returnable if registration is refused or subsequently cancelled.³ The Director is empowered under section 10 to approve the withdrawal of a maximum sum of 25% of the statutory deposit to meet a substantial loss suffered by an insurer which "it cannot reasonably meet from its own resources". Any sum so withdrawn shall be replaced not later than 30 days of the withdrawal. It is also provided that the statutory deposit shall be available in the event of the cancellation of the

² s.3(1) and (4).

³ s.9(2).

insurer's registration or its winding up for the discharge of its liabilities arising out of policies and remaining undischarged at the time of winding up.

The requirements of a paid up share capital and statutory deposit have been attacked at various times.⁴ The main objections raised are that it is out of date as a tool of government regulation and creates an unnecessary barrier to entry into the market. More significantly, that it ties down funds which could be put to better use by insurers, and may serve to worsen rather than improve the financial security of an insurer. Finally, that the current level of the statutory deposit is an illusory safeguard since it bears little or no relation to the liabilities of an established insurer.

It has been suggested that in place of the statutory deposit there should be introduced a margin of solvency requirement whereby the assets of an insurer should exceed its liabilities by a given amount or percentage.⁵ A phased system of share capital payment has also been suggested. By this system, only a certain percentage is required to be paid up at the time of registration, and the remainder is

⁴ Falegan, "The Nigerian Insurance Industry: A Proposal for Reform", (1982) 16 J.W.T.L. 189 at 197-198; Ogunrinde, "The Claims Settlement Provisions of the Nigerian Insurance Act of 1976: A Solution to What Problem?", (1985) 19 J.W.T.L. 170 at 176-177; Agomo, "Legal Controls of the Insurance Industry and its Implications for the National Economy", Essays in Honour of Judge T.O. Elias (Faculty of Law, University of Lagos, 1987) p.227 at 231.

⁵ Ibid. The margin of solvency requirement is that provided in the repealed 1961 Act, and its reintroduction is favoured by the Nigerian Law Reform Commission: see Law Reform Journal (1986) p.179.

paid up in stages within a given period of time after registration.⁶

The arguments are persuasive and there is little doubt that the present statutory deposit has arguments for and against its retention. To the extent that it discourages the proliferation of mushroom companies without reasonable financial bases, it is worthwhile. However, it should be conceded that the current level of the deposit (which has remained unchanged since 1976) taken alone may not make a significant contribution to the overall solvency of an insurer, and is likely to provide little security in the hands of the government in the event that an insurer becomes unable to meet its obligations. This objection should, however, be viewed in the context of additional requirements of reserves and investments considered in para. 8.2.2, below.

Once the above requirements are met, an application for registration shall be made to the Director in the prescribed form and accompanied by such particulars as the Director may require. By section 5, the Director shall register an applicant by issuing a certificate of registration and publishing a notice of registration in the Gazette if he is satisfied on all of certain matters, among others, that:

(i) the class of insurance business will be conducted in accordance with sound insurance principles;

⁶ Akhile, "Insurance Law, Regulation and Practice in Nigeria - Have they Achieved the Goals?", [1987] IIN Journal 43 at pp.46-47.

- (ii) there are adequate reinsurance arrangements;
- (iii) the proposal forms, terms and conditions of policies are in order and acceptable;
- (iv) there is at least one competent and professionally qualified person to man each department of insurance business;
- (v) the directors and shareholders are persons who have not been involved in or guilty of fraud;
- (vi) the name of the applicant is not likely to be mistaken for the name of any other insurer who is or has been an insurer, or so nearly resembling that name so as to be calculated to deceive;
- (vii) that it is in the interest of public policy that the applicant is registered.⁷

If the Director is not satisfied on any of the matters on which he is required to be satisfied, he shall give a notice in writing of his intention to reject the application.

An appeal procedure to the Minister of Finance against the decision of the Director refusing registration is contained in section 6. An aggrieved applicant is required to lodge a notice of appeal with the Minister stating the grounds on which it is made within 60 days of the Director's refusal. The Minister is required to give a decision on the appeal within 30 days of its receipt by him.

The discretion of the Director in registering or

⁷ s.5(2).

refusing registration is wide and, perhaps, deliberately drafted in general terms. Nowhere in the Act is the Director obliged to give his reasons for rejecting an application, or are what matters he should bear in mind in exercising his discretion stated. For instance, what is the criterion for being a 'competent and professionally qualified person' so as to be an employee? Furthermore, what is the test of the 'interest of public policy' to be served before the requirement is satisfied? It is arguable that some of the requirements may be meaningless in practice, e.g. how is the Director to be satisfied as a pre-registration requirement that the business 'will be conducted in accordance with sound insurance principles', when the applicant is not yet in business?

The vague nature of the requirements convey the undesirable impression that registration, in some cases, may be subject to the whims of the Director. However, it is hoped that the appeal procedure to the Minister and principles of administrative law and judicial review of administrative actions would provide checks on the use of the Director's powers and discretions.

An indication of judicial attitude to the Director's powers and discretions is discernable from Excelsior Insurance Co. Ltd. v. The Registrar of Insurance.⁸ The dispute arose over the Registrar's refusal to register an applicant under the provisions of the repealed Insurance Companies Act of 1961. The applicant, contending it had

⁸ [1976] N.C.L.R. 388.

satisfied all the pre-registration requirements of the Act, applied for an order of mandamus to compel its registration by the Registrar. The Registrar's refusal to consider the application was based on the ground that the applicant should await the passing of the 1976 Insurance Act which was anticipated. Belgore J., in granting the order, held that once an applicant satisfies the registration requirements, the Registrar was obliged to register him. It was further held that in relation to matters within the Registrar's discretion, the court will not substitute its own opinion where the discretion is exercised unless the Registrar has "manifestly acted unreasonably or has been influenced by extraneous matters in arriving at his conclusion". The reason advanced for refusing registration was an extraneous matter not within his discretion under the existing law.

The case is also important for a second reason. It was held that the appeal procedure to the Minister laid down under section 8 of the 1961 Act, and similar to section 6 of the 1976 Act, above, did not preclude an aggrieved applicant from seeking his remedy in court without utilising the procedure. The procedure was held to be an administrative remedy which was alternative to other remedies an aggrieved applicant could pursue.

8.2.2 Post-registration Requirements

Once an insurer is registered, the 1976 Act contains provisions regulating it in the conduct of insurance

business. The more important of these are considered under specific subheadings below.

(i) Appointment of chief executive

Section 12(1) requires the consent of the Director to the appointment by an insurer of a chief executive whether designated as the managing director, executive chairman or otherwise. The Director must consent or object within 30 days of an insurer notifying him of the proposed appointment. Where the Director objects, the insurer has a right to appeal to the Minister whose decision is made final and subject to no further appeal.⁹ An insurer and its purported chief executive are liable to a fine of N10 for every day the insurer transacts business without the Director's approval of the appointment.¹⁰

A chief executive is not defined in the Act, but it would appear that the word covers anyone responsible for the ultimate day to day running of the insurer.

Though the provision is designed to ensure that those managing insurance companies are of good repute and integrity, the Act is silent on the criteria for approving a proposed appointee. The Director once remarked that "...a good Chief Executive should not have anything less than ten years experience in an insurance company".¹¹ This may be

⁹ s.12(3) and (4).

¹⁰ s.12(5).

¹¹ Okwor, "Insurance Decree of 1976 Analysed", (1978) IV WAICA Journal 167 at 172.

the guiding factor in exercising his discretion.

(ii) Accounts, audit and returns

Every insurer is required to submit to the Director in each financial year, among other documents, a balance sheet duly audited showing the financial position of its business at the close of that year together with a copy of the profit and loss account to be presented to its shareholders at its annual general meeting, and a revenue account applicable to each class of its business.¹² These documents are required to be audited annually by an auditor approved by the Director, but excluding employees, managers or directors of the insurer. The auditor shall issue a certificate to the effect that the insurer has properly kept its books and records, and that the documents give a true and fair view of the financial position of the insurer.¹³

Insurers transacting life insurance business are required to submit additional documents to the Director. These are: the report of an actuary and a valuation report of its insurance business, a summary and valuation of its life policies, and, a table showing premiums, policy reserve values and guaranteed surrender values (s.19(2)). The Director is empowered under section 19(3) to require an insurer transacting life insurance business to cause an actuary to make an investigation into its financial

¹² s.19(1).

¹³ s.20.

condition and report his findings to him.

Members of the public are given access to documents in the Director's custody, and any person may inspect or make copies of them on paying the prescribed fee (s.57(1)). Finally, insurers are prohibited under section 19(6) from distributing dividends until the Director certifies in writing his receipt of the stipulated returns. Penalty for non-compliance is provided in section 52(1) as a fine of N2,000.

According to the Director, "The periodic or annual examination of the financial conditions and affairs of insurance companies, is designed to detect the problem companies early enough, so that regulatory or punitive measures can be taken before serious damage is done to policyholders and claimants".¹⁴ However, his failure to publish regular reports on the operations of his department makes the ascertainment of the effectiveness of the provisions difficult. It has been observed, however, that "as of September 1982, only twenty of the eighty-two insurance companies in Nigeria made returns to the insurance department and no penalties were exacted in connection with this".¹⁵ If this view reflects the current trend, one may conclude that the provisions serve no practical purpose.

¹⁴ Okwor, (1978) IV WAICA Journal at p.176.

¹⁵ Okediji, "Government Participation in the Nigerian Insurance Market: Regulatory or Competitive", (1986) 20 J.W.T.L. 540,549.

(iii) Reserves

By section 17, every insurer is required to set up and maintain the following reserves referred to as "technical reserves":

(a) Non-life insurance business -

(i) Reserves for unexpired risks; excluding marine insurance, the amount of the reserve is a sum not less than 45% of the total net premium. For marine insurance, the amount should not be less than 75% of the net premium.

(ii) Reserves for outstanding claims; the amount should be equal to the total estimated amount of all outstanding claims plus an amount representing 20% of the estimated figure for outstanding claims in respect of claims incurred but unreported at the end of the preceding year.

(iii) Contingency reserves; the amount should not be less than 3% of the total premiums or 20% of net profits (whichever is greater).

(b) Life insurance business -

(i) General reserve funds; this is credited with an amount equal to the net liabilities on policies in force at the time of the actuarial valuation.

(ii) Contingency reserve; this is credited with an amount equal to 1% of premiums or 10% of profits (whichever is greater). The reserve shall accumulate until it reaches the amount of the insurer's minimum paid up capital.

(iv) Investments

Under section 18, every insurer shall at all times

invest and hold invested in Nigeria assets equivalent to not less than the amount of the funds in its class of business as shown in its accounts.¹⁶ The investments which an insurer may make are further prescribed. These are:

- (a) securities created or issued by or on behalf of the Federal or State Governments, or statutory Corporations, and the debentures and fully paid up shares of any public company registered under the Companies Act of 1968;
- (b) shares in or other securities of a society registered under any Nigerian law relating to co-operative societies;
- (c) loans to building societies approved by the Minister;
- (d) loans on real property, machinery and plant in Nigeria;
- (e) loans on life policies within their surrender values; and
- (f) cash on deposit in, or bills of exchange accepted by, licensed banks.

An insurer is not treated as satisfying the requirements on investments unless a minimum of 25% of its total assets is invested in group (a) investments, above. A life insurer cannot invest more than 25% of its assets in real property and in the case of a non-life insurer, not more than 10%.

The investment policy of the Act appears directed at three main aims. The most obvious is to ensure the financial stability of insurers by stipulating supposedly safe and prudent areas of investment particularly a greater spread in government securities. Secondly, is the

¹⁶ Insurers carrying on composite business are required under s.16 to keep separate funds and accounts for the life and non-life business.

prevention of capital outflow from the domestic economy in view of the early domination of the market by foreign owned companies. The last aim is to free the funds accumulated by insurers for use in economic development. Thus, the total investments held by insurers in 1985 stood at approximately N1.3 billion.¹⁷

The provisions on investments have not been without critics. It is argued that the prescription of areas of investment is unnecessarily restrictive and leads ultimately to the undesirable effect of a lower yield on returns to insurers and, consequently, to insureds on life investments and benefits enjoyed under certain policies.¹⁸

The arguments are strong, but it should not be overlooked that there is a public interest to be served in preventing highly risky and speculative investments by insurers. It is submitted that section 18(2)(g) which allows insurers to make "such other investments as may be prescribed", secures a sufficient element of flexibility in the scope of permissible investments. However, the conclusion is inevitable that the government is guaranteed a steady and cheap source of capital arising from the 25% minimum investment in government securities required. Returns on these securities are notably lower than returns in some other areas. In 1985, government securities represented 37% of the total investments held by insurers,

¹⁷ Insurance Year Book (1987), Table V p.187.

¹⁸ Agomo, footnote 4, above; Akhile, footnote 6, above.

and amounted to N334 million.¹⁹

(v) Amalgamation and transfers

By section 21 of the Act, a proposed amalgamation with, transfer to, or acquisition from an insurer carrying on life or workmen's compensation business of the whole or any part of that business must be sanctioned by the Federal High Court upon the application of the insurers concerned. The court may sanction the arrangement if no sufficient objection to it has been established. It shall be a sufficient objection, however, if one-fifth or more of any of the policyholders of the insurers involved object to the arrangement (s.21(5)).

A notice of intention to make an application together with a statement on the nature of the amalgamation or transfer shall be published in the Gazette and served on the Director no less than 3 months before the application is made. Furthermore, a draft of the deed of amalgamation or transfer, balance sheets in respect of the business of the insurers concerned, actuarial reports in respect of the life business of the insurers, and a report on the proposed amalgamation or transfer prepared by an independent actuary, shall be kept for inspection at the principal and branch offices of the insurers involved (s.21(3)).

8.2.3 Requirements on Exit from the Market

Provisions are contained in the 1976 Insurance Act

¹⁹ Insurance Year Book (1987), Tables I&V pp.175,186.

regulating insurers in the manner of ceasing to carry on business, and during the transitional period between operating in the market and final exit for reasons such as cancellation of registration and liquidation. The provisions are aimed at ensuring that the insurer leaves with the minimum possible prejudice to those having legitimate claims on it, and are considered below.

(i) Cancellation of certificate of registration

Broad powers of intervention are conferred on the Director to step into the running of an insurer's business which may lead in extreme cases to the cancellation of an insurer's certificate of registration. The powers are considered in para. 8.3.1, below, but suffice it for present purposes that upon cancellation, an insurer ceases to be authorised to carry on business.

Section 40(1) provides that where the certificate of an insurer is cancelled, the Director may appoint a receiver to take charge of its assets and to collect and gather in all other assets due to the insurer, and administer the same as expeditiously as possible for the benefit of its policyholders and creditors. The receiver is then required to apply to the court for the insurer to be wound up (s.40(2)).

(ii) Winding up

A petition for the winding up of an insurer may, additionally, be presented to the court by:-

(a) not less than fifty policyholders each having a policy that has been in force for not less than 3 years on the grounds, *inter alia*, that the company is unable to pay its debts or that it is just and equitable that the company should be wound up²⁰

(b) the Director on the grounds, *inter alia*, that the insurer has failed to comply with the requirements of section 7(1) (discussed below), that the registration of the insurer has been cancelled, and that the insurer is insolvent.

It is provided that when a petition for winding up of an insurer is presented, the Companies Act of 1968 shall have effect as if the petition were presented under it. However, no life insurer shall be voluntarily wound up except for the purpose of effecting an amalgamation or transfer.²¹

Special arrangements are made upon the winding up of a company transacting life insurance in section 41. It is provided that the liquidator shall, unless the court otherwise orders, carry on the life insurance business with a view to its being transferred as a going concern to another insurer whether an existing one, or one formed for that purpose. The liquidator may agree to the variation of any contracts of insurance in existence when the winding up order is made, but he shall not effect any new contracts.

²⁰ The grounds are stated in s.23(a) of the 1976 Act to be those specified in ss.209-210 of the Companies Act 1968.

²¹ ss.23(b) and 24.

The additional conditions in respect of life insurance emphasises the importance which is reflected throughout the Act of that class of insurance because of its long term nature. However, in providing that only policyholders "having a policy that has been in force for not less than three years" may petition for winding up, it is arguable the Act may have achieved the unintended result of confining this right to those insured under life and other long term contracts. Most indemnity policies are annual and the requirement may not be satisfied after three or more renewals. Moreover, allowing the Director to petition for winding up on an insurer's failure to "comply with the requirements of section 7(1)" appears to be a drafting error. That section does not impose requirements on insurers, but only entitles the Director to cancel the certificate granted on any of specified grounds.

8.3 Methods of Government Regulation and Supervision

The methods adopted by the government in regulating and supervising insurers are through the establishment of a department responsible for insurance regulation and headed by the Director of Insurance, participation by the government in the business of insurance, and allowing insurers a measure of self-regulation.

8.3.1 Powers of the Director of Insurance

Apart from the specific powers and duties of the Director discussed earlier, the 1976 Act vests additional

powers in the Director aimed at enabling him to detect insurers in financial difficulties promptly and take appropriate remedial steps. The powers are further aimed at ensuring that insurers conduct their business in such a way as to secure financial stability at all times. Some of these powers are considered below.

(i) Power of investigation

Section 37(1) obliges the Director once every two years to authorise any person to conduct an examination of every insurer "for the purpose of satisfying himself that the provisions of [the] Act are being complied with". The investigator is required to report to the Director on completing his investigations, and is empowered to check the books, accounts and correspondence connected with the insurer's business, to verify the investments and statutory reserves of the insurer and the legality of any insurance business transacted (s.37(2) and (3)).

On receiving the report, the Director is authorised to take "such action as may be necessary in the circumstances to ensure compliance with the relevant provisions of [the] Act or such action as is provided for in the other provisions of [the] Act".²² The Director may cancel the certificate of an insurer refusing to submit to an investigation or refusing to furnish information required for the investigation. Generally, any person wilfully obstructing, interfering with, assaulting or resisting any

²² s.37(3).

public officer in the performance of his duties under the Act commits an offence, and is liable to a fine of N500 or 3 months imprisonment upon conviction (ss.37(4) and 51).

(ii) Power of suspension

Upon receiving the report of the investigation considered above, if it appears to the Director that an insurer;

- (a) is in an unsound condition or that its method of transacting its business renders its continued operations hazardous to existing and potential policyholders, or
- (b) has failed to maintain the statutory reserves, or
- (c) has failed to maintain adequate management control, or
- (d) has failed generally to comply with the provisions of the Act which failure cannot be corrected within a reasonable time,

he may suspend the insurer from undertaking any new business for such a period as would enable the insurer to remedy the situation.²³

By section 39(1), the Director may appoint an interim manager to take control of a suspended insurer unable to remedy the situation complained of within the time prescribed by the Director. The interim manager has, in addition to specific powers, all the powers "necessary to restore the viability of the insurer concerned", and shall make periodic reports to the Director as are directed (s.39(2) and (4)).

²³ s.38.

If the Director is satisfied that the affairs of the insurer "have been restored on sound insurance basis", he shall terminate the appointment of the interim manager. However, if it appears that the continuation in business of the insurer is hazardous to policyholders, he shall cancel the certificate of the insurer.

(iii) Power of cancellation

The Act contains no less than 18 grounds in section 7(1) on which the Director may cancel an insurer's registration. These include:

- (a) that the class of insurance business is not being conducted in accordance with sound insurance principles;
- (b) that a judgment obtained in any court of competent jurisdiction in Nigeria against the insurer remains unsatisfied for 30 days;
- (c) that the insurer is carrying on simultaneously with insurance business any other business which is detrimental to its insurance business;
- (d) that the insurer has failed to maintain adequate reinsurance treaties;
- (e) that the insurer lacks expertise;
- (f) that the insurer persistently fails to pay claims promptly; and, (g) that the insurer acts in a manner without the approval of the Director in cases where the Act requires such approval.

The Director must give a notice in writing of his intention to cancel to the insurer. Again, it appears he is

not obliged to state his reasons in the notice although he would be compelled to give his reasons in court if the cancellation is challenged. An insurer receiving the notice has a right of appeal to the Minister under section 6 (considered in para. 8.2.1, above). If no appeal is made within 60 days of the notice, the Director shall cancel the registration with the approval of the Minister. This position can be contrasted with the power to refuse to register an applicant for which the Minister's concurrence is not required.

The grounds on which the Director may exercise his power of cancellation are noticeably wide and some are drafted in vague terms. It follows that matters capable of influencing his discretion are equally wide. The desirability of the right of appeal to the Minister, the latter's concurrence in the cancellation, and principles of judicial review of administrative actions providing adequate checks on the Director's exercise of his power to cancel is more important in relation to cancellation than registration. The exposure of an insurer in business for many years to sudden cancellation would have serious effects on its shareholders and public confidence in the industry even if existing policyholders are well provided for.

The courts, however, are careful not to interfere unnecessarily with the Director's powers and discretions. To do so may undermine his authority within the industry as its principal regulator. Thus, in Excelsior Insurance Co.

v. The Registrar of Insurance (supra), it was held that the court will not substitute its opinion for the Registrar's exercise of his discretion unless he has "manifestly acted unreasonably or has been influenced by extraneous factors in arriving at his conclusion". Furthermore, it was held in Johnson & Co. Ltd. v. The Director of Insurance,²⁴ that the court would not compel the Director to register one as a broker where the applicant fails to satisfy any one of the pre-registration requirements laid down by the Act. The same principle would apply to insurers.

Finally, it is provided in section 35(3) that it is the duty of the Director and the officers under him "not to interfere unreasonably with the affairs of persons" affected by their activities in the exercise of the powers vested by the Act. It should be observed that the Director's failure to publish reports on the activities of his department makes it impossible to evaluate how the power of cancellation has been utilised although it is gathered that up to 19 certificates may have been cancelled so far.

Though the powers conferred on the Director to regulate the insurance industry are wide, it is submitted that they are nonetheless specific. There is no general section in the 1976 Act authorising the Director to take any steps or make regulations generally as may be appropriate for his supervisory role. Instead, it is provided in section 61 that "the [Minister] may make

²⁴ [1977] 3 F.R.C.R.127.

regulations generally for the purposes of [the] Act...". It is arguable that the absence of a comparable general power in the Director has made his supervisory role more difficult to an extent. Thus, certain desirable steps which the Director has had to take to maintain proper regulation may be ultra vires his powers in reality. A few of these steps and the problems which he has encountered in implementing them will be examined.

Perhaps, the most significant problem which the Director has faced in discharging his functions relate to his attempts at putting an end to the practice whereby large sums of premiums paid to insurance intermediaries are withheld from insurers (see Chapter 3 para. 3.6 and Chapter 4 para. 4.5, *supra*).

The Director's first cure for the problem was to recommend to insurers the adoption of a standard "Payment of Premium Warranty" (PPW) clause in policies. Under the clause, the insured is made to warrant that premiums collected by registered brokers would be received by the insurer within 60 days of the commencement of insurance, while those collected by agents would be received within 30 days otherwise the policy would become null and avoid ab initio.

The proposal provoked strong objections from the public and some brokers, and justifiably so. It was argued, among others, that the proposal would penalise innocent persons who paid premiums in good faith instead of the intermediaries who indulge in withholding premiums.

Furthermore, that the proposal was outside the Director's power. Sections 26 and 28 of the Act prescribe a time limit of 15 and 30 days respectively for agents and brokers within which to forward premiums collected to insurers. The Director is empowered to cancel the registration or licence of non-complying intermediaries. The compromise solution reached in the end was that the PPW clause was adopted by members of the Nigerian Insurance Association (NIA) only.

Dissatisfied with the levels of premiums unremitted by brokers in spite of the PPW clause, the Director mandated that all brokers shall with effect from 20th February 1987, support their applications for the annual renewal of registration with written evidence signed by the chief executive of every insurer with which business is placed to the effect that all premiums collected during the preceding year have been paid over.²⁵ Objections were raised to the demand by some brokers on the ground that it was outside the Director's power. It was argued that Regulation 19(b) of the 1977 Insurance Regulations made by the Minister pursuant to the 1976 Act, laid down the procedure for the renewal of registration by brokers, and the Director was without power to alter it. In fact, some brokers have refused to comply and are challenging the validity of the Directive in the courts.

Finally, the Director has directed that all registered brokers transacting, or intending to transact, the business

²⁵ See Circular Letter IDS 291/14 of 20.1.87; Chapter 3 para. 3.6, supra.

of reinsurance broking must apply specifically to be authorised by him to transact that business. The necessity for this, according to the Director, is because "...not all registered insurance brokers could competently appreciate the technicalities of reinsurance business...as the limited conditions for registration as an insurance broker are not high enough to enable all registered insurance brokers to transact reinsurance brokerage".²⁶

The Director's fears appear well founded, but it is arguable he is acting ultra vires though the point has never been taken. The pre-registration requirements for brokers are laid down in the 1976 Act and the provisions do not distinguish between insurance and reinsurance broking (see Chapter 3 para. 3.4.2, *supra*). Section 62 defines an "insurance broker" as "a person registered pursuant to section 27 of this Act and includes an adjuster". It is provided in the same section that "insurance business includes reinsurance business and references to contracts and business of insurance shall be construed accordingly". These provisions support the view that it is not the aim of the Act to distinguish between insurance and reinsurance brokers so far as registration is concerned as the Director appears to do.

There is a general consensus, however, that the greatest constraint on the Director's ability to regulate and supervise the insurance industry effectively is the set up under which he operates. The 1976 Act lumps together

²⁶ see Circular Letter IDS 291/9 of 20.12.84.

under the supervisory jurisdiction of the Director, insurers (including reinsurers), brokers, loss adjusters and agents. The consequence of this coupled with the inadequacy of skilled staff in the Insurance Division which the Director has complained about on several occasions,²⁷ is to over burden his office thereby straining effective supervision.

It has been observed in connection with the Director's inability to implement the provisions of section 14 requiring his approval of all contractual clauses that:

Although the State has admirably insisted on the thorough supervision of insurance documents in order to ensure that they are reasonable, fair and just and has charged the Director of Insurance with the onerous duty to execute the supervision, regrettably it has not sufficiently provided the Director with the wherewithal for the effective discharge of this function.²⁸

On the failure of the claims settlement provisions of the Act to achieve the desired objectives, it is observed that:

The positive features of the claims settlement provisions of the Act are being undermined by the fact that they are not properly enforced. Any law that is not enforced is not worth the paper on which it is written. To solve the problem, the insurance division...should be properly equipped to carry out its supervision more effectively.²⁹

Finally, on the wider aspect of insurance regulation in Nigeria, it is observed that:

²⁷ Okwor, (1978) IV WAICA Journal at p.177; Okwor, Law Reform Journal (1986) at p.112.

²⁸ Anifalaje, (1984) 1&2 J.P.P.L. 81 at 93. See Chapter 5 para. 5.5.2, *supra*.

²⁹ Ogunrinde, (1985) 19 J.W.T.L. 170 at 177.

The problem of insurance regulation in Nigeria is... one of inefficiency caused by the lack of adequate supervision on the part of the regulatory authorities. This stems from, among other things, a lack of adequately trained, experienced and qualified personnel in the supervisory department...

It is generally recognized that a reorganization of the office of the Director of Insurance...is needed in order to correct these defects; otherwise insurance regulation will remain superficial and rather ineffective.³⁰

An illustration of this inadequacy is the fact that an investigation unit to examine the operations of insurers and brokers at the Director's request was not set up until 1986; ten years after the Act was passed.³¹

The Nigerian Law Reform Commission in recognition of the problem recommended "as a means of achieving effective, efficient and continuous control over insurance companies, brokers and agents", the establishment of a "specialised supervisory body consisting of highly qualified technical personnel". According to the Commission, "The body would be given broad powers of intervention without encroaching on the functions of the courts. It was hoped that such informal intervention would speed up the settlement of disputes between parties to an insurance contract. This would also reduce the onerous responsibilities placed on the Director of Insurance by the Insurance Act of 1976".³² So far, the recommendation has not been acted upon by the government.

³⁰ Okediji, (1986) 20 J.W.T.L. 540 at 549-550.

³¹ See Circular Letter IDS 291/13 of 30.9.86.

³² Law Reform Journal (1986) at p.180.

8.3.2 Government Participation in Insurance Business

Social, economic and political factors account for the decision of the Nigerian government to participate directly in insurance business.

Domination of the local insurance market by foreign companies (particulary British companies) characterised the early history of the Nigerian insurance industry. Until 1968, most of those transacting insurance in Nigeria were branch offices of British insurers. The branch offices performed mainly administrative functions such as collecting premiums and proposals, and forwarding them to the head offices in the U.K. where the underwriting was done. With the enactment of the Companies Act of 1968, all foreign companies in Nigeria were required to incorporate in the country so as to evolve a separate legal personality from the parent. However, the locally incorporated companies largely remained wholly owned subsidiaries of foreign parents.

It is reported that in 1969, out of a total of 41 insurers in Nigeria, 3 out of 17 foreign companies controlled 60% of the market.³³ The primary motives of the foreign insurers were the maximization and transfer of profits out of the local economy to the parent country. Additional effects were that the foreign companies were generally not interested in entering into less profitable classes of insurance though these classes fulfilled an important social function. Furthermore, the training of an

³³ Falegan, (1982) 16 J.W.T.L. 189.

indigenous skilled manpower base was outside the priority of foreign insurers. Nigerians mainly occupied clerical positions in the firms.

The method adopted by the government to try and break the foreign monopoly was first to set up the National Insurance Corporation of Nigeria (NICON). The Corporation was established by the National Insurance Corporation of Nigeria Act of 1969 with a share capital of N2 million wholly owned by the Federal Government. Section 4(1) of the NICON Act empowers the Corporation to "carry on any class of insurance business, and to insure and reinsurance against loss of any kind arising from any risk or contingency and in respect of any matter whatsoever", within or outside Nigeria. Additional powers include:

- (i) to insure any property of the Government of the Federation or the Government of any State, or of any statutory Corporation;
- (ii) to accept on reinsurance any part of risks undertaken by any other person and to retrocede any part of such risks;
- (iii) to act as insurance agent or insurance broker in relation to any insurance, and in particular in relation to the insurance mentioned in (i), above.

In practice, all Federal and most State Government insurances are placed with the Corporation. Section 8 of the 1969 Act obliges all registered insurers in Nigeria to reinsurance with NICON an amount equal to 10% of the sum insured in every policy issued or renewed by them.

Other aims of the government in establishing NICON apart from the desire to break foreign monopoly and stimulate indigenous participation in insurance were; (a) to secure the retention in Nigeria of a proportion of reinsurance premiums paid abroad in the absence of local reinsurance facilities, (b) to aid the development of an indigenous skilled manpower base in insurance; to this end, section 4(3)(b) authorises NICON to "assist in organising training schemes for employees of any registered insurer", and (c) to regulate the insurance industry by providing a framework within it by which acceptable business standards could be set by a market leader. After 20 years in the market, it could be said that these objectives have been largely achieved. NICON is presently the biggest direct insurer in Nigeria grossing N170.9 million in premium income representing 24.5% of the total market share in 1986.³⁴

The establishment of NICON in 1969 did not put an immediate stop to foreign domination of insurance. It is reported that by 1974, 14 foreign insurers out of a total of 70 companies controlled 53% of the gross premium income of the market.³⁵ The result was that the problem of transfer of insurance funds out of the local economy persisted.

The opportunity to rectify the situation came with the passing of the Nigerian Enterprises Promotion Act of 1977,

³⁴ Nigerian Insurance Year Book (1987) Table 1X p.191.

³⁵ Falegan, (1982) 16 J.W.T.L. at p.189.

repealing the earlier Act of 1972, as part of the government's efforts to indigenize the main sectors of the Nigerian economy.³⁶ Insurance is listed as a Schedule II business in the 1977 Act. The effect of this is that foreign share ownership in an insurance company is limited to a maximum of 40% with a minimum of 60% in Nigerian hands. To effectuate the provisions of the Act, the Federal and State Governments bought substantial shares in foreign owned insurance companies operating in Nigeria.

As at September 1988, there were 91 registered insurance companies in Nigeria. Of this figure, 20 companies controlled 83.2% of the market based on 1985 returns. Of the 20, 2 are wholly owned by the Federal Government, 3 are wholly owned by State Governments, and 2 are wholly owned by Nigerians. Not less than 45% of the shares in 8 of the remaining 13 companies are owned by the government (Federal and State).³⁷

The significant direct government involvement in insurance business in Nigeria has been criticised. In particular, the dominant position occupied by NICON in the industry and its monopoly of government insurances have been condemned.³⁸ It has been argued that government participation in insurance has resulted in the substitution of foreign monopolies for a monopoly by the government, and

³⁶ See generally, Osunbor, "A Decade of Indigenisation in Nigeria: The Quest for Economic Self-Determination", Essays in Honour of Judge T.O. Elias, (1987) p.197.

³⁷ Nigerian Insurance Year Book (1987) Table VIII p.190.

³⁸ Akhile, [1987] IIN Journal 43 at p.46.

may have resulted in nationalisation through the back door. Moreover, that the monopoly enjoyed by the government has effectively strangulated competition within the industry to the detriment of the policyholder.³⁹ The most significant criticism, perhaps, is that by participating in insurance and thereby competing for a share of the market, the government has abdicated its role as a regulator for one of competitor. Finally, it is suggested that the government should divest from the industry and concentrate on its regulatory role, and if at all it must participate in insurance, such participation should be limited to fulfilling the social insurance needs of the country not met by private insurers.⁴⁰

The arguments are strong and encompass social, economic and political considerations not covered in a work of this nature. However, the critics would concede that direct participation by the government in insurance in Nigeria has had the effect of significantly restoring public confidence in an industry with an uncomplimentary image.

8.3.3 Self Regulation by Insurers

The principal platform by which insurance companies seek to regulate their activities is through membership of the Nigerian Insurance Association (NIA). The Association

³⁹ Falegan, (1982) 16 J.W.T.L. at pp.199-201; Okediji, (1986) 20 J.W.T.L. at pp.545-549.

⁴⁰ Ibid.

was established in 1971 with the following broad objectives:

- (a) the protection, promotion and advancement of the common interest of insurers transacting business in Nigeria;
- (b) the guidance and assistance of members in complying with statutory regulations, and the laying down of minimum standards of conduct; and,
- (c) the creation of a better understanding of insurance by all sections of the community including the furtherance of knowledge and research in insurance.

As at September 1988, the Association had a total membership of 59 out of 91 registered insurers. Notably all insurers in which the government has an interest are members. The Association operates through committees including Life Offices, Fire Offices, Marine Offices and Accident Offices Committees. The Association has recently taken up important matters affecting the business of insurance with the Director. These include the review of premium rates chargeable for motor insurance, and the review of the paid up share capital and equity structure of insurers.

It is arguable that the significant presence of government owned companies in the Association makes it little more than the forum for implementing the government's regulatory policies, and protecting the government's interest in insurance. An illustration is the exemption of government insurances from the application of the "Payment of Premium Warranty" of no premium no cover

adopted by the Association. Furthermore, the absence of a significant proportion of insurers from its membership makes the Association incapable of regulating all those transacting insurance business in the market.

8.4 Security of Cover

The provisions of the 1976 Insurance Act requiring a paid up share capital and statutory deposit, the keeping of technical reserves and prescribed investments, among others examined above, are geared at ensuring that the cover granted to policyholders is secure and the possibility of insolvency is made remote. Other methods by which this security is enhanced are considered below.

8.4.1 Reinsurance

It has been observed that "one of the major hazards facing an insurance company is the risk of catastrophe. The classic cure for this financial risk is to spread and transfer part of the risk by means of reinsurance".⁴¹

Section 5(1) of the 1976 Act lays down as a condition of registration that the Director must be satisfied that "the arrangements relating to reinsurance treaties in respect of all the classes of insurance business transacted are adequate and valid". Section 7(1)(j) allows the Director to cancel the registration of an insurer where "the insurer has failed to maintain adequate and valid

⁴¹ Ellis and Wiltshire, Regulation of Insurance in the United Kingdom and Ireland (London, Kluwer Publishing) at p.A.2-04.

reinsurance treaties". These provisions emphasise the importance of reinsurance as a means of enhancing the financial security of insurers within the industry.

However, large sums of foreign exchange were spent by direct insurers in Nigeria on reinsurance in overseas markets due to the unavailability of reinsurance facilities in Nigeria. The first attempt at developing an indigenous reinsurance market was the establishment of NICON in 1969 and the compulsory 10% cession of all risks insured in Nigeria to it. Despite the establishment of NICON, however, it is noted that 75% of a gross market premium income of N200 and N300 million for 1976 and 1977 respectively was paid to overseas reinsurers during the period.⁴² Thus, in response to a campaign by the United Nations Conference on Trade and Development (UNCTAD) for developing countries to reduce the outflow of their limited foreign exchange used in the payment of reinsurance premiums overseas, the Nigeria Reinsurance Corporation (Nigeria Re) was established by the Nigeria Reinsurance Corporation Act of 1977 with a share capital of N10 million fully owned by the Federal Government.

Section 2(1) of the 1977 Act empowers the Corporation "to carry on reinsurance business of any class of insurance business...and to reinsure against loss of any kind arising from any risk or contingency in respect of any matter whatsoever", within or outside Nigeria. The Corporation

⁴² The Risk Bearer (A Journal of the Nigeria Reinsurance Corporation, 1989) p.2.

commenced business on the 1st of January 1978 and section 7(1) mandates every registered insurer to reinsure with it 20% of the sum insured in respect of every insurance policy issued or renewed after that date, and to pay the Corporation 20% of the premium received by the insurer. In respect of reinsurance above the compulsory cession, section 7(2) provides that the "Corporation shall have the right of first refusal of any reinsurance business in Nigeria before such business is placed in the international reinsurance market". With the establishment of Nigeria Re, the provisions of the NICON Act of 1969 relating to the compulsory 10% cession to NICON were repealed by section 7(5) of the 1977 Act, thereby allowing NICON to concentrate on its direct insurance business. Finally, section 6 of the 1977 Act makes both Nigeria Re and NICON subject to the provisions of the 1976 Insurance Act so that they come under the Director's supervision.

After 11 years in business, the Corporation has strengthened the Nigerian insurance market appreciably, and its contribution to the economy is significant. Based on 1986 figures, its gross premium income was N115.3 million, underwriting profit was N23.8 million and total investments stood at N75.9 million. The Corporation established a training school in 1979 which trains its staff and those of other insurers. It also serves as the channel for collating statistical information on the insurance market.

As at September 1988 there were 4 other reinsurance companies registered in Nigeria. However, it is

unsurprising that Nigeria Re is the leading reinsurer. Its advantage lies in the security which full Federal Government ownership engenders within the industry.

8.4.2 The Insurance Special Supervision Fund

The 1976 Insurance Act contains provisions empowering the Director to intervene in the business of an insurer in difficulty. The Director is empowered to suspend an insurer from underwriting new business and appoint an interim manager to take over the management. Where the registration of an insurer is cancelled, the Director should appoint a receiver to administer its affairs pending liquidation. Finally, the Director, among others, can petition for the liquidation of an insurer.

The provisions which seek to effect an orderly exit from the market overlook one important point. In most cases, an insurer is compelled to leave the market because of financial failure resulting in its inability to meet obligations to policyholders. Where the remaining 50% of the statutory deposit held by the Central Bank is inadequate, the 1976 Act is silent on the source of funds with which to satisfy policyholders claims by the interim manager, receiver and liquidator as the case may be. The failure to settle claims arising from the insolvency of an insurer would inevitably have adverse implications on the industry as a whole.

It would appear it was in recognition of this problem that the Insurance Special Supervision Fund Decree of 1989

was passed. Section 1 of the Decree established the Insurance Special Supervision Fund made up of such sums as the Federal Government may provide annually, and a levy prescribed by the Minister of Finance based on the gross premium income of all registered reinsurers and insurers, the gross commission of all registered brokers, and the gross fees of all registered loss adjusters. The levy is payable on or before the 31st of July each year except this is extended by the Minister (ss.1(3), 2 and 4).

The Fund is held by the Central Bank but is placed under the control of the Federal Ministry of Finance, and is administered by a committee comprising the Director of Insurance as chairman and six other members (s.3(1)). The Director is required to assess any person liable to contribute, the sum payable for the year, and to furnish such person with details of the assessment. A person aggrieved at the assessment is entitled to appeal to the Minister within 28 days of the assessment, but the decision of the Minister is made final and cannot be the subject of any action or proceeding in any court or tribunal (ss.7 and 8). Section 10 empowers the Director to cancel the registration of a reinsurer or an insurer, and to cancel or refuse to renew the certificate of a broker or loss adjuster failing to meet its payment to the Fund. Such failure is made an offence under section 12(1) punishable on conviction by a maximum fine of N50,000.

The 1989 Decree is, however, curiously vague on the uses of the Fund. Section 3(2) provides that "The Fund

established by this Decree shall be used for the purposes of strengthening insurance supervision in Nigeria and for such other insurance purposes as may be determined by the Minister from time to time". The explanatory note at the end of the Decree improves on this provision marginally by adding "...and for such other purposes as the Minister...may deem necessary to improve the effective development of insurance and its administration in Nigeria". The Minister is empowered by section 13 to make "such regulations as may, in his opinion, be required for the purpose of giving full effect to the objectives of [the] Decree". In the absence of any regulations so far, the specific purpose for which the sums of the Fund would be applied remain secret.

The desirability of a security fund in Nigeria to compensate insureds for losses suffered as a result of an insurer's inability to pay claims, such as that established under the United Kingdom's Policyholders Protection Act of 1975, has been emphasised for some time. In his submission to the Law Commission, the Director observed that: "The establishment of a Security Fund, by all registered insurance associations, for the purpose of dealing with approved claims which remain unpaid by reason of the insolvency or cancellation of registration of an insurance company, will be an added improvement and protection of the policyholders' interest".⁴³ There have been similar

⁴³ Okwor, Law Reform Journal (1986) p.108.

calls⁴⁴ for the establishment of a Fund out of which the claims of accident victims of uninsured motorists and untraced drivers would be met, such as the scheme operated by the Motor Insurers Bureau (U.K.).

The silence of the 1989 Decree on the uses of the Fund makes it difficult to ascertain whether it was established to fulfil either of the roles above or both. Consequently, it is impossible to ascertain at the moment the class of its beneficiaries. It is hoped that regulations will soon be made stipulating the use of the Fund, and that when this is done, it will provide in some way for both claimants on insolvent insurers and victims of uninsured and unidentifiable motorists.

8.5 Rights of Third Parties Against Insurers

...in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a *jus quaesitum tertio* arising by way of contract. Such a right may be conferred by way of property, as for example under a trust, but it cannot be conferred on a stranger to a contract as a right to enforce the contract *in personam*.

The above dictum of Viscount Haldane in Dunlop Pneumatic Tyre Co. Ltd. v. Selfridge & Co. Ltd.,⁴⁵ represents the current exposition of the doctrine of privity of contract.

Thus, at common law, a third party who is a stranger to a contract cannot acquire any rights under it, and no

⁴⁴ See Chapman, "Motor Insurance in West-Africa - Problems and Possible Solutions", (1976) II WAICA Journal 36 at p.44.

⁴⁵ [1915] A.C. 847 at 853.

one can sue on a contract except those who are parties to it and (if the contract is not under seal) from and between whom consideration proceeds. And, in equity, while a party to a contract can constitute himself a trustee of a right under the contract for a third party who is a stranger to the contract, and so confer such rights on the third party enforceable in equity, yet the action must be brought by the trustee in his own name, unless he refuses to sue, when the third party can sue joining the trustee as a defendant.⁴⁶

Applying the doctrine of privity in insurance meant that though a policy is taken out by a person to cover his liabilities to third parties, and though the normal operation of a liability policy is to benefit the third party to whom liability is established, in the event that the liability occurs, the third party as a stranger to the contract between the insured and insurer cannot sue on it to enforce it against the insurer. Recognition of the potential for hardship on the third party created by a strict application of the doctrine of privity in insurance has led to statutory and judicial relaxations of the principle in certain cases.

The first relaxation is contained in the Motor Vehicles (Third Party Insurance) Act of 1950 which prescribes the compulsory insurance of liabilities to third parties for death or bodily injury arising out of the use of a motor vehicle. Section 11(1) of the Act provides in

⁴⁶ New India Ins. Co. v. Odubanjo [1971] 1 N.C.L.R. 363.

relation to the insurance obtained pursuant to the Act that:

- (a) in the event of the insured becoming bankrupt or making a composition or arrangement with his creditors;
- (b) in the event of the insured being a company [being wound up or subject to receivership] if either before or after either event any such liability is incurred by the insured his rights against the insurer under the policy in respect of that liability shall, notwithstanding anything in any written law contained, be transferred to and vest in the third party to whom the liability was incurred.

Section 11(2) transfers the insured's rights to the third party in the event of the insured dying bankrupt while owing a debt in respect of a liability to a third party against which he was insured. By section 11(3), any condition in a policy purporting to avoid directly or indirectly the provisions of the section is rendered of no effect. An insured who becomes insolvent is obliged under section 12(2) to inform the third party to whom he is liable of any relevant insurance, and any condition in the policy purporting to avoid the contract upon the giving of such information is rendered ineffective. By section 13, no agreement made between the insurer and the insured after a liability has been incurred to a third party and after the commencement of bankruptcy or liquidation shall be effective to defeat or affect the rights transferred and vested in the third party. However, the provisions are excluded where a company is wound up voluntarily for the purposes of reconstruction or of amalgamation with another company.

The sections of the 1950 Act, referred to above, which

relate to compulsorily insured third party motor liabilities only, are extended by the Third Parties (Rights Against Insurers) Act of 1956 to policies covering the insured for any form of liabilities to third parties. The latter Act, which is based on the Third Parties (Rights Against Insurers) Act 1930 (U.K.), excludes from its purview under section 2(6)(c) contracts of insurance to which the Motor Vehicles Act of 1950 applies.

The essence of the 1950 and 1956 enactments is to place a third party in the shoes of the insured upon the latter's insolvency so that the former can claim directly against the insurer under the policy to satisfy the liability incurred by the insured.⁴⁷ However, there is no reported case in Nigeria where the insolvency provisions of either Act have been invoked.⁴⁸

What has generated a substantial amount of litigation between third parties and insurers in Nigeria, are the provisions of section 10 of the Motor Vehicles Act of 1950 obliging the insurer to satisfy a judgment obtained by the third party against the insured in respect of liability for death or bodily injury arising from the use of a motor

⁴⁷ Thus, the third party gets no higher rights than those available to the insured under the policy; see Bell v. Lothiansure Ltd. (In Liquidation), The Times, 2 February 1990; Firma C. Trade SA v. Newcastle protection and Indemnity Association, Socony Mobil Oil Inc. v. West of England Shipowners Mutual Ins. Association (London) Ltd., The Times, 19 June 1990.

⁴⁸ Recent English House of Lords decisions have, however, exposed limitations as to the practical effectiveness of the 1930 Act as far as third parties are concerned. See Bradley v. Eagle Star Insurance Co. [1989] 2 W.L.R. 568, and the Firma and Socony Cases, above.

vehicle and required to be insured. Section 43 of the Insurance Act of 1976 imposes the same obligation on insurers covering all forms of liabilities (see Chapter 7 para. 7.3.1, *supra*).

Both enactments are silent on the circumstances in which the third party is permitted to move against the insurer, and this has had to be clarified by the courts. For the avoidance of repetition, the problem arising in the cases is similar. The third party in the same action against the insured for damages for the latter's negligence, usually causing death or bodily injury, joins the insurer, and the question arises as to the propriety of his action. In support, the third party relies on section 10(1) of the 1950 Act as giving him the right to join the insurer in a case involving motor accident since the latter is required by the provision to satisfy his judgment against the insured. On the other hand, the insurer seeks to be struck out of the suit contending that the third party has no reasonable cause of action against it and, more particularly, that there is no privity of contract between it and the third party. The argument is maintained even though insurers in practice frequently conduct the defence of insureds against claims by third parties. Where the insurer's arguments succeed, the difficulty created is that the third party is compelled to initiate two suits; one against the insured to establish his liability and the second against the insurer where the latter denies liability to the insured or fails to pay the judgment sum

as frequently happens in practice.

In most cases, a resolution of the dispute revolves around the application of the common law doctrine of privity of contract, and statutory provisions and rules of court regulating the joinder of parties to an action.

In Sun Insurance Office Ltd. v. Ojemuyiwa, the insurer applied for leave to appeal against a High Court decision given against its insured for damages for the death of a third party. The insurer was not a party to the action in the lower court but based its application on section 117(6) of the then 1963 Constitution which permitted a right of appeal to be exercised by "...any other person having an interest in the matter" with leave of court. In granting the application on the ground that the insurer was an interested party, Bairamian J.S.C., delivering the judgment of the Supreme Court, observed obiter:

The remaining reflection is that as in Nigeria civil cases are tried by a judge alone, there is no need to conduct these fatal accident cases in a world of make-believe. At present it is usual to name the owner of the vehicle and his driver as the defendants to a suit claiming damages, and to leave the insurers, who control the defence, formally out of the suit; we would ask the solicitors of the parties to consider whether in these third party insurance cases it would not be better to have the insurers also joined.⁴⁹

As the cases examined hereinafter would suggest, the remark appears to have been taken by third parties as a mandate to join insurers in all actions for damages for negligence against the insured. This was the position in

⁴⁹ [1965] 1 All N.L.R. 1 at p.5.

Anifowoshe v. Jegede.⁵⁰ In striking out the insurer from the suit, Sowemimo J. held that there was no privity of contract between an insurer of third party risks and a third party to warrant the latter joining the insurer in an action to establish the liability of the insured. His Lordship relied on dicta of Denning M.R. in Post Office v. Norwich Union Fire Insurance Society Ltd.,⁵¹ where it was held that under section 1 of the Third Parties (Rights Against Insurers) Act of 1930 (U.K.), a third party's right to sue an insurer does not arise until the liability of the insured wrongdoer is established and the amount ascertained.⁵² Accordingly, it was held in Anifowoshe, above, that section 10 of the Motor Vehicles Act had the same effect.

Bello J., however, saw the matter differently in Onoche v. Audu,⁵³ where he refused to strike out the insurer joined by the third party in an action against the insured. Relying on Order IV, rule 5(1) of the Supreme Court (Civil Procedure) Rules of 1948, applicable in Northern Nigeria, which empowered the court to join parties in an action "...who may be likely to be affected by the result" of the action, he held that the court had a

⁵⁰ [1968] N.C.L.R. 482.

⁵¹ [1967] 2 Q.B. 363 at 374.

⁵² This holding was recently affirmed by the House of Lords in Bradley v. Eagle Star Insurance Co. [1989] 2 W.L.R 568. See Michel and Congdon, "Third Party Rights Against Insurers", [1989] 4 L.M.C.L.Q. 495.

⁵³ [1968] N.C.L.R. 111.

discretion to permit the third party to join the insurer in a suit against the insured since section 10(1) of the 1950 Act imposed a statutory liability on the insurer to satisfy the judgment obtained against the insured. Secondly, relying on section 32 of the High Court Law 1963 which empowers the court to grant all such remedies whatsoever in an action before it so that "...all matters in controversy between the parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of those matters avoided", it was held that the insurer could properly be joined in the action so that any question of its liability to satisfy the judgment under section 10(1) of the Motor Vehicles Act "could be tried in the same proceedings as the action in which the liability of the insured will be determined" so as to prevent multiple suits. Thirdly, that the dictum of Bairamian J.S.C., quoted above, showed that it was desirable in Nigeria to join insurers in actions against insureds. Fourthly, that section 10 of the 1950 Act does not specifically, nor by implication, bar the joinder of an insurer by the third party in the action against the insured. On the argument that such a joinder would be inconvenient for insurers, his Lordship observed: "It is common knowledge that insurers have always been controlling such proceedings even though they have not been made parties to the suits".⁵⁴

The first opportunity to test the ratio above, came in

⁵⁴ Ibid. at p.118.

Dede v. United Arab Airlines,⁵⁵ where the insurer applied to be struck out of an action initiated by a third party. Holden J., in granting the application, refused to follow Onoche, above, or the dictum of Bairamian J.S.C. in Ojemuyiwa (supra) partly because the dictum was obiter and was made before the Post Office case (supra) was decided. The learned judge held that an insurer under the Motor Vehicles Act is a total stranger to a third party entitled to claim against the insured, and to his right of action. Secondly, that the insurer is under no liability to the third party under section 10(1) until judgment has been obtained against the insured who has failed to pay the judgment sum. Thirdly, that an insured under a policy of compulsory third party insurance may apply to join the insurer in an action against him if he apprehends a dispute as to the insurer's liability to indemnify him under the policy. Finally, that an insurer under such a policy may apply to be joined in an action against the insured, if he intends to dispute his liability to indemnify the insured.⁵⁶

The next important case is the decision of the High Court in Olusanya v. Akintola.⁵⁷ It was held in the case that an insurer cannot be joined by a third party in an action for damages for injuries caused by the negligence of the insured since the insurer "is not, by any stretch of

⁵⁵ [1969] N.C.L.R. 58.

⁵⁶ These principles were restated in Alagbe v. Sunmonu [1971] 1 N.C.L.R. 320.

⁵⁷ [1970] N.C.L.R. 232.

imagination, a tortfeasor". It was held further, that no dispute could arise between a third party and an insurer required to satisfy compulsorily insured liabilities under section 10(1) of the 1950 Act until after the disposal of the action by the third party against the insured.

According to Adefarasin J.:

...there appears to be a thinking amongst legal practitioners that the Supreme Court decision in [Ojemuyiwa (supra)] was an authority for joining an insurance company in every running-down case in which the [insurer] could be liable for contribution or indemnity. This thinking, to my mind, is a complete misunderstanding of the obiter dictum of Bairamian J.S.C. ...⁵⁸

The opportunity for the Supreme Court to pronounce on the law regarding a third party's right to join the insurer in the same suit against the insured to establish the latter's liability arose in New India Assurance Co. Ltd. v. Odubanjo.⁵⁹ It was held that, at common law, there being no privity of contract between the third party and the insurer, the former had no right to sue the insurer. However, the claim related to the insured's liability to a third party for damage to the latter's property, and not third party death or bodily injury required to be compulsorily insured. To that extent, the court held that since section 10 of the Motor Vehicles Act was irrelevant to the claim, it was unnecessary to consider whether that

⁵⁸ Ibid., at p.235. The case and the remarks were relied on in Shodipo v. Kuti [1971] 1 N.C.L.R. 286 and Fasegha v. Akinwumi [1971] 1 N.C.L.R. 329, to strike out insurers who were held to have been wrongly joined by third parties.

⁵⁹ [1971] 1 N.C.L.R. 363; applied in Ajufo v. Ajarbor 1 L.R.N. 295. (S.C.).

provision altered the common law. It was, however, observed obiter that had the claim fallen under section 10, the holding of Denning M.R. in the Post Office case (supra) to the effect that the insured's liability must first be established and ascertained before the third party could sue the insurer applied.

The Supreme Court warned in Odubanjo, above, that too much meaning should not be read into the earlier dictum in Ojemuyiwa (supra) because it was obiter and the case turned upon the interpretation of a statutory provision. Furthermore, that the remarks in the latter case did not direct any cause of action and, that in so far as the observations were directed at the insured's counsel so that he could consider joining the insurer in the action against the insured so as to avoid a multiplicity of suits, the judges were in agreement with it.

The finding that section 10 was inapplicable in Odubanjo (supra) meant the case was distinguishable from cases involving death or bodily injury arising from motor vehicles and to which section 10 of the 1950 Act applied. Bello S.P.J. precisely distinguished the case for this reason 2 months later in Mohammed v. Akintoye.⁶⁰ The learned judge restated his earlier reasoning in Onoche (supra) on the desirability of joining the insurer so that all issues of liability of the insurer could be tried in the action commenced by the third party. He further held that where the third party failed to join the insurer, the court

⁶⁰ [1971] 2 N.C.L.R. 319.

should do so suo motu. Finally, he went a step further by holding that section 10 of the Motor Vehicles Act "confers a right of expectancy on the [third party] and that he is entitled to seek for its declaration in the same suit from which the right may mature".⁶¹

The proposition that the third party was entitled to a declaration of his right of expectancy in the suit against the insured before the latter's liability is established was doubted by Wheeler S.P.J. in Audu v. Barau.⁶² The learned judge adopted the view favoured by the majority of judicial opinion that the third party acquires no enforceable rights against the insurer under section 10(1) of the 1950 Act until the insured's liability to him is determined and, before then, could not sue the insurer to satisfy a judgment which had not yet been given in his favour. Furthermore, it was held that since there was no issue yet of substance between the third party and the insurer in the suit against the insured, it was impossible to say that the insurer "may be likely to be affected" by the proceedings between the third party and insured to justify joining the insurer under Order IV, Rule 5(1) of the Supreme Court (Civil Procedure) Rules 1948. The judge, (at p.469), regretted "having to reach a different conclusion from that reached by such a distinguished judge as Bello, S.P.J., for whose views...[he had] the highest regard".

⁶¹ Ibid. at p.326.

⁶² [1973] N.C.L.R. 463.

However, in Brizino v. Alabi,⁶³ Bello Ag. C.J. was unprepared to depart from his earlier view on the desirability of joining the insurer in the action against the insured to determine the latter's liability to a third party. The learned judge admitted that the majority of decisions were against such a joinder, and that the only dissenting opinion was his "lonely voice" in Onoche and Mohammed (supra), but maintained his stand in those cases "with all the respect and humility to the learned judges of the High Courts holding the view that such joinder is not permissible in Nigeria". Bello Ag. C.J restated the policy reasons behind his view as follows:

I need not emphasise that the non-joinder of the insurers calls for the multiplicity of legal proceedings. The [third party] obtains judgment against the insured who appeals to the Supreme Court and fails. The insurers then refuse to pay and the [third party] will be compelled to start fresh proceedings against the insurers which may ultimately end in the Supreme Court. In addition to the multiplicity of proceedings, this practice amplifies "justice delayed". The [third party] may not enjoy the reward of his sufferings for years...

Furthermore, as a matter of common sense it may appear ridiculous to deny the [third party] joining the insurers as a party...when subsequently they may be permitted leave to appeal against the very judgment in the case to which they are said they could not be joined as a party. To my mind, whatever interest they may protect at their appeal they may as well protect it at the hearing of the suit in the lower court.⁶⁴

In the meantime, some courts had similarly gradually

⁶³ [1975] N.N.L.R. 199.

⁶⁴ Ibid. at pp.202-203. See also his views in Iwooh v. Akanbi [1975] N.N.L.R. 125, though it was the insured applying in the case to join the insurer in the action.

relaxed the doctrine of privity of contracts. In Sule v. Norwich Union,⁶⁵ it was held, based on the interpretation of sections 6(1)(b), 6(3) and 10 of the 1950 Motor Vehicles Act, that a driver permitted by the insured to drive his motor vehicle, though not a party to the policy issued, derives from the policy and the above statutory provisions of the 1950 Act, a right to claim directly against the insurer an indemnity in respect of his liability for personal injuries to a third party which the policy purports to cover in respect of a permitted driver.

In Bentworth Finance Ltd. v. Royal Exchange Assurance,⁶⁶ the plaintiff, as owner, entered into a hire purchase agreement with the hirer under which the latter agreed to insure the hired vehicle and that any moneys payable under the insurance should be paid to the owner who was authorised to give a valid discharge to the insurer. In compliance with the agreement, the hirer insured the vehicle under a policy containing an indorsement to the effect that (a) the owner owned the vehicle which was subject to hire purchase, and (b) any moneys payable under the policy would be paid to the owner. The owner paid the insurance premiums and debited these to the hirer, and a duplicate copy of the policy was issued by the insurer to

⁶⁵ [1971] 1 N.C.L.R. 271, applying Williams v. Baltic Ins. Association [1924] 2 K.B. 282.

⁶⁶ [1971] N.C.L.R. 157. Cf. Briscoe (R.T.) v. Universal Ins. Co. Ltd. [1966] 2 A.L.R. Comm. 263.

the owner. In the ensuing action, the insurer contended that as there was no privity of contract with the owner, the latter could not sue on the policy. It was held that it was the hirer's intention to insure his interest as well as the owner's. As such, the owner was held to have a concurrent interest in the policy which it could enforce directly in its name against the insurer. It was further held that by issuing a duplicate of the policy containing the hire purchase indorsement to the owner, the insurer was estopped from denying the owner's right to enforce the policy in its name.

In Akene v. British American Insurance Co.,⁶⁷ a deceased took out a policy of life insurance during his lifetime. His son was named in the policy as the beneficiary to whom the sums due should be paid in the event of the insured's death before the date of maturity. On the insured's death, the son sued the insurer for the total sum due under the policy having rejected the insurer's offer of a much lower sum. It was contended that as there was no privity of contract between the insurer and the son, the latter could not sue to enforce the policy. Ogbobine J., rejecting the contention, held that the contract created a trust in favour of the son as beneficiary and the son could, in equity, enforce the trust directly against the insurer to recover the sums due on the policy. It was further held that the case was a proper

⁶⁷ Unreported, Suit No. UCH/37/71, contained in Sagay, A Casebook on the Nigerian Law of Contract, (1983) p.417.

exception to the common law doctrine of privity of contract.

Most recently, however, the Court of Appeal in United Bank for Africa Ltd. v. Achoru,⁶⁸ restated the preponderance of judicial opinion to the effect that in cases involving motor vehicle accidents, a third party in an action against the insured for damages for negligence causing personal injuries has no claim against the insurer, and cannot join the latter as a co-defendant in the suit.

It was with a view to clarifying the uncertain state of the law and, perhaps, to give effect to Bello Ag. C.J.'s policy reasons that section 11 of the Insurance (Special Provisions) Decree of 1988 was enacted. The section provides that:

Where a third party is entitled to claim against an insured in respect of a risk insured against, he shall have a right to join the insurer of that risk in an action against the insured in respect of the claim: provided that before bringing an application to join the insurer, the third party shall have given to the insurer at least thirty days notice of the pending action and of his intention to bring the application.

A few important points arise from the above provision.

In the first place, though the third party is required to bring an application to join the insurer, it would appear the court has no discretion either to grant or refuse the application since the section gives the third party "a right to join the insurer". As a matter of procedure, however, it appears the third party cannot simply include the insurer in the writ against the insured.

⁶⁸ [1987] 1 N.W.L.R. 172 at 181.

He would need to bring an application to join the insurer either before or after the writ has been issued against the insured only.

Secondly, the section does not affect the rights or defences available to the insurer against the insured as permitted by the provisions of the 1988 Decree generally. The above provision allows for a situation where those rights are determined in the same action where the insured's liability to the third party is determined. In practice though, a joinder by the third party is likely to affect a number of defences open to the insurer against the insured. For example, it may no longer be open to an insurer to rely on the insured's breach of condition to refer all disputes to arbitration since the insured may be willing to do this though the insurer has been brought to court by a third party. Furthermore, the notice of proceedings required to be given by the third party under section 11 may always satisfy the condition requiring notification of loss or proceedings contained in most liability policies unless compliance with that condition is made personal to the insured or is required 'immediately' or 'as soon as possible'.

Finally, section 11, to a significant extent, may render redundant sections 10 of the Motor Vehicles Act of 1950 and 43 of the Insurance Act of 1976. The latter provisions give third parties a direct right of action against the insurer to satisfy judgments obtained against insureds. Under section 11, it would appear that the third

party no longer has to wait until judgment against the insured is given in his favour before he can sue the insurer.

One positive feature of the new provision is that it may encourage insurers to settle third party claims promptly and out of court once a notice of intention to join is given by the third party. This is because an insurer allowing itself to be named too often as a party to litigation would bring bad publicity upon the insurer involved.

8.6 Conclusion

It has been observed that, to a significant extent, the Insurance Act of 1976 has "been successful in laying the foundation for the healthy growth and development" of the insurance industry in Nigeria.⁶⁹ While there is little reason to doubt the statement, the problem lies in enforcing the provisions of the Act. It is acknowledged that the Director's office as presently constituted is incapable of ensuring the effective supervision of reinsurers, insurers, brokers, loss adjusters, and agents employed by insurers. There is, therefore, the need either to reduce the responsibilities of the Director's office, or develop it to a level commensurate with those responsibilities.

There is also a need for a public complaints department which is presently lacking in the Director's office and for

⁶⁹ Akhile, [1987] IIN Journal at p.45.

the regular publication of a report containing the regulatory activities of the Director.

Lastly, the only desirable feature lacking in the country is an alternative mode of adjudicating small claims which is less formal, less expensive, and less time consuming than the courts and arbitration; such as the Insurance Ombudsman Scheme in the United Kingdom.

CHAPTER 9

CONCLUSION

This Chapter concludes the thesis by restating some of the specific suggestions, recommendations and conclusions made in the earlier chapters.

It is shown in Chapter 2 that the practice whereby insurance policies are not delivered to persons insured is undesirable and has led to harmful results. The problem is compounded by the multiplicity of documents in which contractual obligations may be contained such as the proposal form, cover note, certificate of insurance and the insurance policy. The suggested solution is either for a copy of the policy in the class of insurance applied for to be delivered at the time the application is made, or soon after the contract is concluded. In the former case, any change in the terms of the standard policy must be notified to the insured soon after the contract is concluded. The suggestions should apply to cover notes coupled with the additional requirement that all obligations with which the insured is expected to comply should be consolidated in one document only, i.e. the policy of insurance, and notice of any amendments to it should similarly be given.

Chapter 3 examines the regulatory framework for the control and supervision of insurance intermediaries, and it is shown that the Insurance Act of 1976 contains significant provisions regarding this. Perhaps, the most notable shortcomings in the 1976 Act are the lack of

minimum standards of educational qualification and training for agents employed by insurers, lack of provisions securing the independence and impartiality of brokers, and lack of adequate provisions controlling intermediaries in the holding of clients moneys. On a wider note, it would appear that placing agents and brokers under the supervisory umbrella of the Director of Insurance has so far resulted in an ineffective overall supervision of insurance intermediaries. It is suggested that a limited form of occupational self-regulation should be granted brokers. Under this, the Director would retain the ultimate power to register and revoke the registration of brokers after a case has been made either way by the self-regulatory body. This would leave the Director better placed to concentrate on his other supervisory functions.

The application of the principles of the common law on agency to insurance intermediaries and legislative intervention in these principles are examined in Chapter 4. It is observed that the common law principles could be complex and do not always operate to protect the interests of the insured where those interests deserve to be protected. The common law largely regulates the rights of the insured and insurer partly by arrangements made between the insurer and intermediary (of which the insured is unlikely to be aware) and partly by reference to the impression conveyed to the insured by the insurer, whereas most insured persons deal with intermediaries as personifying the insurer. Specifically, the absolute rule

(as it now appears to be in Nigeria) that an agent completing a proposal form acts as the agent of the insured has operated against insured persons in a significant number of cases. Surprisingly, however, the Insurance (Special Provisions) Decree 1988 expected to reverse the rule has, instead, given statutory force to it. Furthermore, the principle that a broker acts as agent of the insured in all matters relating to the placement of insurance is out of step with modern insurance practice. It is suggested that overall responsibility for the acts of agents employed by insurers, whether in completing proposal forms, advising and making representations on the scope of policies, receiving disclosure of facts, and in collecting premiums should be placed on insurers. This, it is believed, would enhance the control exerted by insurers and lessen supervision by the Director of agents. The unique role of the broker and his ability to act for both insurer and insured depending on the matter involved must be clearly recognised.

It is shown in Chapter 5 that the single most important reason why persons insured have been denied an indemnity upon loss is on account of warranties and conditions in insurance contracts. The central problem surrounds the effect on non-compliance with contractual obligations. As regards warranties, it is clear that the insurer can repudiate the contract upon breach irrespective of materiality, the relevance of breach to the loss sustained, the insured's situation and his ability to

comply, and notwithstanding the fact that the insurer is not prejudiced by the breach. The same consequence would seem to follow most obligations expressed as conditions by virtue of the 'condition precedent' clause contained in most policies. Regrettably, the Insurance (Special Provisions) Decree 1988 passed to correct these shortcomings is poorly drafted and its effect is yet uncertain. The simple solution would be to prevent insurers from relying on the breach of obligation however described where the breach is not causative of the loss and where no prejudice is suffered by the insurer or where the resulting prejudice is minimal. Finally, it is necessary for the Director's power to approve all policy terms conferred by the 1976 Act to be utilised. It is suggested as a minima that the Director should prescribe standard policy provisions for the most popular classes of consumer insurance. The standard provisions could be drawn up in consultation with insurers and representatives of consumer interests.

The uberrimae fidei principle fundamental to all insurance is considered in Chapter 6. The most significant problem here relates to the insured's duty of disclosure and the test of materiality in fulfilling the duty in light of recent English decisions. The solution adopted by the Insurance (Special Provisions) Decree 1988 is to regard the duty as satisfied where the insured answers questions contained in proposal forms accurately. This approach oversimplifies the problem and leaves a vast number of

contracts uncatered for, such as original contracts concluded without proposal forms, cover notes and renewal of original contracts. It is suggested that the test of materiality in any case should be that of the reasonable insured, but flexible enough to accommodate the peculiar circumstances of some insureds without including idiosyncratic conduct. This addition is necessary to achieve justice in a country with a significant number of illiterates.

In Chapter 7 is discussed the role of the courts in regulating insurance contracts. Notably, the courts insist upon a full indemnity for the insured within the limits of his policy under contracts of indemnity, and would resist any attempt by the insurer to offer less than a full compensation for loss suffered. Though there may be no general principle of the common law against agreements formed in circumstances where the parties are unequal in bargaining power, it would appear there is a subconscious recognition by the courts that in a significant number of cases there is disparity in bargaining strengths between insureds and insurers. As such, the courts have developed and applied certain principles to protect the insured (and third parties to whom he is liable) from unfair practices and exercise of rights by insurers where necessary. These principles include preventing the insurer from relying on exclusion or limitation clauses where it has committed a serious breach of contract, holding that the insurer has waived its rights or is estopped from relying on them in

certain circumstances, placing the burden of proving a breach of the insured's obligation on insurers, and applying the canons of construing insurance contracts to aid insureds. In so doing, it would appear to a large extent that the courts have had to fulfil the role which the Director has so far failed to do in spite of his power under the 1976 Insurance Act in controlling unfairness in insurance contracts.

Finally, Chapter 8 examines the regulatory framework for the control and supervision of insurance companies. The problem is not the lack of adequate regulatory provisions but, rather, one of the inability of the regulatory authorities to implement the statutory provisions and monitor compliance effectively. Supervision of agents, brokers, loss adjusters, insurers, reinsurers and insurance contracts is placed primarily with the Director of Insurance. It is submitted that placing responsibility for the acts of agents on insurers, establishing a scheme for self-regulation by brokers, and the establishment of an independent body to supervise insurance contracts as suggested by the Law Reform Commission would enable the Director to concentrate on the supervision of insurers and reinsurers effectively. Furthermore, it is hoped that the office of the Director would be developed to a level commensurate with his duties.

TABLE OF ABBREVIATIONS OF NIGERIAN LAW
REPORTS AND JOURNALS

A.I.I. N.L.R.	- All Nigeria Law Reports.
A.L.R. Comm.	- African Law Reports (Commercial).
C.A.	- Reserved Judgments of the Court of Appeal.
C.C.H.C.J.	- Certified Copies of the High Court Judgments (Lagos State).
E.C.S.L.R.	- East-Central State Law Reports.
F.N.R.	- Federation of Nigeria Report.
F.R.C.R.	- Federal Revenue Court Reports.
H.C.N.L.R.	- High Court of Nigeria Law Reports.
I.I.N	- Insurance Institute of Nigeria.
J.A.L.	- Journal of African Law.
J.P.P.L.	- Journal of Private & Property Law.
L.R.N.	- Law Reports of Nigeria.
M.R.N.L.R.	- Mid-Western Region of Nigeria Law Reports.
N.B.J.	- Nigerian Bar Journal.
N.C.A.R.	- Nigerian Court of Appeal Reports.
N.C.L.R.	- Nigerian Commercial Law Reports.
Nig. Bul. C.L.	- Nigerian Buletin of Contemporary Law.
N.J.C.L.	- Nigerian Journal of Contemporary Law.
N.L.J.	- Nigeria Law Journal.
N.M.L.R.	- Nigeria Monthly Law Reports.
N.R.N.L.R.	- Northern Region of Nigeria Law Reports.
N.W.L.R.	- Nigeria Weekly Lawe Reports.
O.Y.S.H.C.	- Selected Judgments of the High Court of Oyo State.
U.I.L.R.	- University of Ife Law Reports.
WAICA	- West-African Insurance Companies Association.
W.R.N.L.R.	- Western Region of Nigeria Law Reports.

TABLE OF CASES

Abed Bros. Ltd. v. Niger Insurance Co. Ltd. [1976] N.C.L.R. 458 (H.C.), [1976] N.C.L.R. 37 (S.C.). ...47, 243, 329, 332, 333, 340, 352, 383.

Abdallah v. Achou [1975] N.C.L.R. 226. ...331.

Abili v. United Nigeria Insurance Co. Ltd. [1969] N.C.L.R. 196. ...381.

Abumere v. The Commissioner of Police [1980] 2 C.A. 179. ...82.

Achonu v. National Employers' Mutual [1976] N.C.L.R. 64. ...387.

Adeoye v. West-African Provincial Insurance Co. Ltd. [1972] N.C.L.R. 74. ...344.

Adeyeye v. Liberty Assurance Co. Ltd. Unreported, Suit No. HOD/15/81. ...295, 308, 365.

Adimora v. Ajufo [1988] 3 N.W.L.R. 1. ...256.

Ado. v. Nigeria General Insurance Co. Ltd. [1980] 4-6 C.C.H.C.J. 27. ...46, 47, 57, 259, 263, 281.

African Insurance Brokers v. Veritas Insurance Co. Ltd. [1985] H.C.N.L.R. 141. ...138.

Ajala v. American Life Insurance Co. [1972] N.C.L.R. 95. ...177.

Ajufo v. Ajabor 1 L.R.N. 295. ...443.

Akangbe v. West-African Provincial Insurance Co. Ltd. [1975] 1 N.M.L.R. 215. ...201.

Akene v. British American Insurance Co. Ltd., Unreported, Suit No. UCH/37/71, contained in Sagay, A Casebook on the Nigerian Law of Contract, (1983) p.417.388, 448.

Akpata v. African Alliance Insurance Co. Ltd. [1967] 3 A.L.R. Comm. 264. ...188, 193, 270, 281, 308, 373.

Akinjola v. Express Insurance Co. Ltd., Unreported, Suit No. AG/2/79. ...366, 376.

Akunne v. Arrowhead Insurance Co. Ltd. [1975] 7 C.C.H.C.J. 1039. ...322, 351, 374.

Alagbe v. Sunmonu [1971] 1 N.C.L.R. 320. ...442.

Alagbe v. United Nigeria Insurance Co. Ltd. 3 L.R.N. 20. ...356.

Alakija v. Mercury Assurance Co. Ltd. [1975] 9 C.C.H.C.J. 1301. ...325, 329, 351.

Alan (W.J.) & Co. v. El Nasr Export [1972] 2 Q.B. 189. ...361.

Amaechi v. Norwich Union Fire Insurance, Unreported, Suit No. LD/1958. ...199.

American Airlines Inc. v. Hope [1974] 2 Lloyd's Rep. 301. ...138.

American International Insurance Co. Ltd. v. Dike [1978] N.C.L.R. 402. ...156, 157, 195, 264, 281, 314.

American International Insurance Co. Ltd. v. Nzayi, Unreported, Appeal No. FCA/L/33/82. ...261, 370, 389.

Amoo v. International Insurance Co. Ltd. (1985) 1 Nig. Bul. C.L. 74. ...364, 368.

Anderson v. Fitzgerald (1853) 4 H.L. Cas. 484. ...192, 273, 275.

Anderson v. Pacific Fire and Marine Assurance Co. (1869) 21 L.T. 408. ...308.

Anglo-African Merchants v. Bayley [1970] 1 Q.B. 311. ...138, 142.

Anifowoshe v. Jegede [1968] N.C.L.R. 482. ...440.

Anyaegbunam v. Crystal Brokers [1977] N.C.L.R. 135. ...103, 104, 138, 341, 356.

Armagas Ltd. v. Mundogas, The Ocean Frost [1986] 2 Lloyd's Rep. 109. ...130.

Arterial Caravans Ltd. v. Yorkshire Insurance Co. [1973] 1 Lloyd's Rep. 169. ...291.

Asfar & Co. v. Blundell [1896] 1 Q.B. 123. ...271.

Atu v. Face-to-Face Million Dollar Pools (1974) 4 U.I.L.R. 131. ...52.

Audu v. Barau [1973] N.C.L.R. 463. ...445.

Ayrey v. British Legal & United Provident Assurance Co. [1918] 1 K.B. 136. ...153.

Babalola v. Harmony Insurance Co. Ltd. [1982] 1 O.Y.S.H.C. 1. ...27, 37, 40, 43, 132, 176, 178, 259, 325, 373.

Bamidele v. Nigeria General Insurance Co. Ltd. (1973) 3 U.I.L.R. 418. ...146, 176, 180, 257, 264, 280, 299.

Bank of Credit and Commerce International v. Aboody [1989] 2 W.L.R. 759. ...288.

Bank Leumi v. British National Insurance Co. Ltd. [1988] 1 Lloyd's Rep. 71. ...273.

Bank of Nova Scotia v. Hellenic Mutual War Risks Association (Bermuda) Ltd., The Good Luck [1989] 3 All E.R. 628. ...188, 268, 269.

Banque Financiere S.A. v. Westgate Insurance Co. Ltd. [1988] 2 Lloyd's Rep. 513. ...268, 288, 314.

Banque Keyser Ullman v. Skandia Insurance Co. [1987] 1 Lloyd's Rep. 69. ...299, 314.

Bates v. Hewitt (1867) L.R. 2 Q.B. 595. ...276.

Bawden v. London, Edinburgh and Glasgow Assurance Co. Ltd. [1892] 2 Q.B. 534. ...146, 151, 155, 157.

Beach v. Eames (1978) 82 D.L.R. (3d) 736. ...387.

Becker v. Marshall (1922) 12 L1.L.R. 413. ...278, 279.

Bell v. Lothian sure Ltd (in liquidation), The Times, 2 February 1990. ...437.

Bendel Insurance Co. Ltd. v. Edokpolor [1989] 4 N.W.L.R. 725. ...61.

Bentworth Finance Ltd. v. Royal Exchange Assurance Co. [1971] 1 N.C.L.R. 157. ...447.

Berger v. Pollock [1973] 2 Lloyd's Rep. 442. ...280.

Bida v. Motor & General Insurance [1972] N.C.L.R. 270. ...40, 350, 369.

Bigger v. Rock Life Assurance Co. [1902] 1 K.B. 516. ...147, 155.

Black King Shipping Corp. v. Massie, The Litsion Pride [1985] 1 Lloyd's Rep. 437. ...258, 268, 269.

Blackburn, Low & Co. v. Vigors (1887) 12 App. Cas. 531. ...268, 269.

Blackley v. National Mutual Life Association of Australasia [1972] N.Z.L.R. 1038. ...167.

Blanchette v. C.I.S. Ltd. (1973) 36 D.L.R. (3d) 561. ...155.

Blay v. Pollard and Morris [1930] 1 K.B. 628. ...55.

Bond Air Services Ltd. v. Hill [1955] 2 Q.B. 417. ...366.

Borhanuddin v. American International Insurance Co. Ltd. [1986] L.R.C. (Comm.) 113. ...64.

Bradley v. Eagle Star Insurance Co. Ltd. [1989] 2 W.L.R. 568. ...437, 440.

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Brockelbank v. Sugrue (1831) 5 C.&P. 21. ...141.

Brownlie v. Campbell (1880) 5 App. Cas. 925. ...284.

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Firma C. Trade SA v. Newcastle Protection and Indemnity Association, Socony Mobil Oil v. West of England Shipowners Mutual Insurance Association (London) Ltd., The Times, 19 June 1990. ...437.

Foley v. Tabor (1862) 2 F.&F. 778. ...271.

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Fraser v. Furman [1967] 2 Lloyd's Rep. 1. ...210.

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General Accident Insurance Corp. v. Cronk (1901) 17 T.L.R. 233. ...55.

Gerhardt v. Continental Insurance Companies [1967] 1 Lloyd's Rep. 380. ...375.

Gillespie Bros. v. Roy Bowles Transport [1973] Q.B. 400. ...385.

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Hadley v. Baxendale (1854) 156 E.R. 145. ...351.

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Hayter v. Nelson & Ors., The Times, 29 March 1990. ...215.

Hely-Hutchinson v. Brayhead Ltd. [1968] 1 Q.B. 549. ...129.

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Kelly v. Hochelega Fire Insurance (1886) 24 L.C.J. 298. ... 364, 365.

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Lindenau v. Desborough (1828) 8 B.&C. 586. ...276.

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Lynch v. Dunsford (1811) 14 East. 494. ...277.

McCormick v. National Motor & Accident Insurance Union Ltd. (1934) 40 Com. Cas. 76. ...295.

McCutheon v. David McBrayne [1964] 1 W.L.R. 125. ...66.

Mackenzie v. Coulson (1869) L.R. 8 Eq. 368. ...263.

Mackie v. European Assurance Society (1869) 21 L.T. 102. ...37, 132.

MacMillan v. Accident Insurance Co. 1907 S.C. 484. ...158.

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Medical Defence Union v. Department of Trade and Industry [1979] 2 W.L.R. 686. ...20.

Merchants' and Manufacturers' Insurance Co. v. Hunt [1941] 1 K.B. 295. ...268, 275.

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Morrison v. Musprat (1827) 4 Bing. 60. ...311.

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Williams v. Baltic Insurance Association of London [1924] 2 K.B. 282. ...447.

Wilson v. Avec Audio Visual Equipment Ltd. [1974] 1 Lloyd's Rep. 81. ...182.

Wimbledon Golf Club v. Imperial Insurance Co. (1902) 18 T.L.R. 815. ...337.

Wing v. Harvey (1854) 5 De G.M.&G. 265. ...153.

Woolcott v. Excess Insurance Co. [1979] 1 Lloyd's Rep. 231. ...142, 174.

Woolfall & Rimmer v. Moyle [1942] 1 K.B. 66. ...237.

Wyndham Rather v. Eagle, Star and British Dominions Insurance Co. (1925) 21 L.L. Rep. 214. ...41.

Yager and Guardian Assurance Co., Re (1912) 108 L.T. 38. ...276, 301.

Yorke v. Yorkshire Insurance Co. [1918] 1 K.B. 662. ...311.

Yorkshire Insurance Co. Ltd. v. Haway [1969] N.C.L.R. 464. ...32, 39, 46, 47, 212, 222, 373.

Zabian v. New India Assurance Co. Ltd. [1964] 1 A.L.R. Comm. 4. ...161.

Zurich General Accident v. Morrison [1942] 2 K.B. 53. ...279.

TABLE OF STATUTES

Australia

Insurance (Agents and Brokers) Act 1984 (Commonwealth of Australia).

Insurance Contracts Act 1984 (Commonwealth of Australia).

Insurance Act 1902 (New South Wales).

Canada

Insurance Act, R.S.M. 1970 (Manitoba).

New Zealand

Insurance Law Reform Act 1977.

Nigeria: Federal Enactments

[Cap. indicates the Chapter in the 1958 Laws of the Federation of Nigeria]

Arbitration Act, Cap. 13.

Illiterates Protection Act, Cap. 83.

Law (Miscellaneous Provisions) Act, Cap. 89.

Moneylenders Act, Cap. 124.

Motor Vehicles (Third Party Insurance) Act, Cap. 126.

Third Parties (Rights Against Insurers) Act, Cap. 196.

Insurance Companies Act 1961.

Marine Insurance Act 1961.

Insurance (Miscellaneous Provisions) Act 1964.

Companies Act 1968.

Architects (Registration, etc.) Act 1969.

Banking Act 1969.

National Insurance Corporation of Nigeria Act 1969.

Nigerian Enterprises Promotion Act 1972.

Estate Surveyors and Valuers (Registration, etc.) Act 1975.

Legal Practitioners Act 1975.

Insurance Act 1976.

Insurance Regulations 1977.

Nigeria Enterprises Promotion Act 1977.

Nigeria Reinsurance Corporation Act 1977.

Price Control Act 1977.

Insurance (Special Provisions) Decree 1988.

Insurance Special Supervision Fund Decree 1989.

Nigeria: Constitutional Enactments
Constitution of the Federation of Nigeria 1963.

Constitution of the Federal Republic of Nigeria 1979.

Constitution (Suspension and Modification) Decree 1984.

Constitution (Suspension and Modification) (Amendment) Decree 1985.

Nigeria: Regional and State Enactments
Law of England (Application) Law, Cap. 60, 1959 Laws of Western Nigeria.

Property and Conveyancing Law, Cap. 100, 1959 Laws of Western Nigeria.

High Court Law, Cap. 61, 1963 Laws of Eastern Nigeria.

High Court Law, Cap. 49, 1963 Laws of Northern Nigeria.

Law (Miscellaneous Provisions) Law, Cap. 65, 1973 Laws of Lagos State.

Trinidad and Tobago
Insurance Act 1980.

United Kingdom

Life Assurance Act 1774.

Fires Prevention (Metropolis) Act 1774

Policies of Assurance Act 1867.

The Married Women's Property Act 1882.

Marine Insurance Act 1906.

Third Parties (Rights Against Insurers) Act 1930.

Road Traffic Act 1930.

Road Traffic Act 1972.

Policyholders Protection Act 1975.

Insurance Brokers (Registration) Act 1977.

S.I. 1979 No. 489.

Insurance Companies Act 1982.

Financial Services Act 1986.

United States of America

Insurance Code 1952 (Texas).

BIBLIOGRAPHY

Books

Achike, O. **Commercial Law in Nigeria**, Enugu, Fourth Dimension Publishers, 1985.

Allott, A. **Essays in African Law**, London, Butterworths, 1960.

Allott, A. **New Essays in African Law**, London, Butterworths, 1970.

Atiyah, P.S. **The Rise and Fall of Freedom of Contract**, Oxford, Clarendon Press, 1979.

Birds, J. **Modern Insurance Law**, London, Sweet & Maxwell, (2nd ed.) 1988.

Clayton, G. **British Insurance**, London, Elek Books, 1971.

Cockerell, H. and Shaw, G. **Insurance Broking and Agency**, London, Witherby, 1979.

Colinvaux, R. **The Law of Insurance**, London, Sweet & Maxwell, (5th ed.) 1984.

Ellis, T.H. and Wiltshire, J.A. **Regulation of Insurance in the United Kingdom and Ireland**, London, Kluwer Publishing, (Looseleaf) 1983.—

Ezejiofor, G. Okonkwo, C.O. and Ilegbune, C.U. **Nigerian Business Law**, London, Sweet & Maxwell, 1982.

Finsinger, J. Hammond, E. and Tapp, J. **Insurance: Competition or Regulation?**, London, Institute of Fiscal Studies, 1985. (IFS report series; no. 19).

Finsinger, J. and Pauly, M.V. **The Economics of Insurance Regulation: A Cross National Study**, Basingstoke, Macmillan, 1986.

Goff, R. and Jones, G. **The law of Restitution**, London, Sweet & Maxwell, (3rd ed.) 1986.

Guest, A.G. (Ed.) **Chitty on Contracts**, London, Sweet & Maxwell, (25th ed.) 1983.

Guest, A.G. (Ed.) **Chitty on Contracts**, London, Sweet & Maxwell, (26th ed.) 1989.

Hindley, B. **Economic Analysis and Insurance Policy in the Third World**, London, Trade Policy Research Centre, 1982.

Hodgin, R.W. **Insurance Intermediaries and the Law**, London, Lloyd's of London Press, 1987.

Hodgin, R.W. **Protection of the Insured**, London, Lloyd's of London Press, 1989.

Hudson, R. and Ivamy, E.R.Hardy (Eds.) **Butterworths Insurance Law Handbook**, London, Butterworths, 1986.

Irukwu, J.O. **Insurance Law and Practice in Nigeria**, Ibadan, Caxton Press, 1967.

Ivamy, E.R.Hardy **General Principles of Insurance Law**, London, Butterworths, (5th ed.) 1986.

Keeton, R.E. **Insurance Law - Basic Text**, St. Paul, Minnesota, West Publishing Co., 1971.

Lawson, R.G. **Exclusion Clauses**, London, Oyez Longman, 1983.

Lloyd, Sir Dennis, **The Idea of Law**, Harmondsworth, Penguin, 1981.

Lord Hailsham of St. Marylebone, (Ed.) **Halsbury's Laws of England**, London, Butterworths, 1973 -.

Markesinis, B.S. and Munday, R.J.C. **An Outline of the Law of Agency**, London, Butterworths, (2nd ed.) 1986.

Obilade, A.O. **The Nigerian Legal System**, London, Sweet & Maxwell, 1979.

O'Dowd, A. and Birds, J. (Eds.) **Encyclopedia of Insurance Law**, London, Sweet & Maxwell, 1983.

Okonkwo, C.O. (Ed.) **Introduction to Nigerian Law**, London, Sweet & Maxwell, 1980.

Omotola, J.A. (Ed.) **Essays in Honour of Judge T.O. Elias**, Lagos, Faculty of Law University of Lagos, 1987.

Orojo, J.O. **Nigerian Commercial Law and Practice**, London, Sweet & Maxwell, 1983.

Parkington, M. (Ed.) **MacGillivray and Parkington on Insurance Law**, London, Sweet & Maxwell, (8th ed.) 1988.

Parry, Sir David Hughes, **The Sanctity of Contracts in English Law**, London, Sweet & Maxwell, 1986.

Prausnitz, O. **The Standardization of Commercial Contracts in English and Continental Law**, London, Sweet & Maxwell, 1937.

Reynolds, F.M.B. (Ed.) **Bowstead on Agency**, London, Sweet & Maxwell, (15th ed.) 1985.

Sagay, I.E. **A Casebook on the Nigerian Law of Contract**, Abingdon, Oxon., Professional Books, 1983.

Sagay, I.E. **Nigerian Law of Contract**, London, Sweet & Maxwell, 1985.

Treitel, G.H. **The Law of Contract**, London, Stevens, (7th ed.) 1987.

The Nigerian Insurance Yearbook, Published by the Nigerian Reinsurance Corporation, Lagos, 1987.

Umoh, P.U. *Precedent in Nigerian Courts*, Enugu, Fourth Dimension Publishers, 1984.

Articles

Ademola, W.G. "Principles and Practice of Life Assurance Marketing in Nigeria", [1986] IIN Journal 24.

Adeyemi, M.O. "The Legal Status of Insurance Agents", Nigerian Commercial Laws, (1984), Department of Commercial Law, Ahmadu Bello University, Zaria, at p.213.

Adeyemo, A.A. "Judicial Interpretation of Illiteracy Protection Law", (1976) 13 N.B.J. 37.

Agomo, C.K. "The Role of Agents in Insurance Contracts: Case for a Different Approach in Nigeria", Unpublished Paper.

Agomo, C.K. "Some Thoughts on the Attitude of Insurers Towards Insurance Claim ", The Lawyer, (1985) Vol. 15 at p. 66.

Agomo, C.K. "Legal Controls of the Insurance Industry and its Implications for the National Economy", Essays in Honour of Judge T.O. Elias, (1987), Faculty of Law, University of Lagos, at p.227.

Akhile, E.T. "Insurance Law, Regulation and Practice in Nigeria -Have They Achieved the Goals?", [1987] IIN Journal 43.

Akinkugbe, O.O. "Governmental Control of Insurance Companies in Nigeria: A Critique", (1976) 10 N.L.J. 56.

Anifalaje, J.O. "State Intervention in Contracts of Insurance in Nigeria: A Reform Without Substratum", (1984) 1 & 2 J.P.P.L. 81.

Baer, M.G. "The Distinction Between Breach of Condition and a Restrictive Definition of the Risk: A Reply to Professor Rendall", (1978) 2 Can. Bus. L.J. 485.

Barry, R. "An Independent Duty of Good Faith and Fair Dealing in Insurance Contracts - Gruenberg v. Aetna Insurance Co.", (1974) 11 San Diego L.R. 492.

Birds, J. "Warranties in Insurance Proposal Forms" [1977] J.B.L. 231.

Birds, J. "The Statement of Insurance Practice - A Measure of Regulation of the Insurance Contract" (1977) 40 M.L.R. 677.

Birds, J. "What is a Cover Note Worth?", (1977) 40 M.L.R. 79.

Birds, J. "The Reform of Insurance Law", [1982] J.B.L. 449.

Birds, J. "Warranties and Waiver of the Duty of Disclosure", [1984] J.B.L. 163.

Birds, J. "Insurer's Duty of utmost Good Faith; Damages for Non-Disclosure", [1986] J.B.L. 439.

Birds, J. "Self-Regulation and Insurance Contracts", New Foundations for Insurance Law, (1987).

Blair, M.C. "The Conversion of Guarantee Contracts", (1966) 29 M.L.R. 522.

Borrie, G. "Consumerism and Insurance" (1982) 70 Journal of the Insurance Institute of London 90.

Boul, L.P. "Some Reflections on the Present State of African Insurance Markets", (1975) IV IIN Conference Papers 183.

Brooke, H. "Materiality in Insurance Contracts", [1985] L.M.C.L.Q. 437.

Cadmus, G.K. "The Role of Intermediaries in the Insurance Industry in Nigeria", (1973) II IIN Conference Papers 88.

Chapman, A.C.K. "Motor Insurance in west-Africa: Problems and Possible Solutions", (1976) II WAICA Journal 36.

Clarke, M. "Notice of Contractual Terms", (1976) 35 C.L.J. 51.

Colenutt, D. "The Regulation of Insurance Intermediaries in the United Kingdom", (1979) 46 Journal of Risk and Insurance 77.

Diatchavbe, O. "Raw Deals From Insurance Contracts", Daily Times, May 18 1981, p.3.

Egoh, "Foul Charges on the Insurers", Daily Times, June 20 1981, p.3.

Elias, T.O. "Colonial Courts and the Doctrine of Judicial Precedent", (1955) 18 M.L.R. 356.

Emole, O. "Insurance Intermediaries: Agents for the Insured or Insurer", (1985) 20 N.B.J. 18.

Enman, S.R. "Doctrines of Unconscionability in Canadian, English and Commonwealth Contract Law", (1987) 19 Anglo-Am. L.R. 191.

Evans, R.C. "The Role of Expert Evidence as to Materiality in Insurance Contracts", (1984) 12 Australia Bus. L.R. 4.

Falegan, J.I. "State Regulation of Insurance in Nigeria", [1982] J.B.L. 251.

Falegan, J.I. "The Nigerian Insurance Industry: A Proposal for Reform", (1982) 16 J.W.T.L. 189.

Falegan, J.I. "Insurance Brokers: Blueprint for Effective Supervision", [1984] IIN Journal 46.

Falegan, J.I. "Government Supervision and Control of Insurance Business: Too Much or Too Little?", (1986) Law Reform Journal 113.

Farnsworth, J.W. "Some Notes on the Early Nigerian Insurance Scene", (1975) IV IIN Conference Papers 203.

Findlay, I.H.F. "Uberrima Fides - Words from a Dead Language?", (1980) 68 Journal of the Insurance Institute of London 21.

Forte, A.D.M. "The Revised Statements of Insurance Practice: Cosmetic Change or Major Surgery?" (1986) 49 M.L.R. 754.

Freemon, B.G. "Reasonable and Forseeable Damages for Breach of an Insurance Contract" (1985-86) 21 Tort and Insurance Law Journal 108.

Fridman, G.H.L. "Establishing Agency", (1968) 84 L.Q.R. 224.

Graves, C.H. "Regulation of Insurance Under the 1976 Insurance Decree", (1977) V IIN Conference Papers 174.

Gray, J. "Insurance Intermediaries and the Financial Services Act 1986", New Foundations for Insurance Law, (1987) p.19.

Hale, R.L. "Bargaining, Duress and Economic Liberty", (1943) 43 Col. L.R. 603.

Harnett, B. "The Doctrine of Concealment: A Remnant in the Law of Insurance", (1950) 15 Law & Contemp. Prob. 391.

Harris, W.C. "State Intervention in Insurance", (1973-74) 62 Journal of the Insurance Institute of London 45.

Hasson, R.A. "The Doctrine of Uberrima Fides in Insurance Law - A Critical Evaluation", (1969) 32 M.L.R. 615.

Hasson, R.A. "The 'Basis of the Contract Clause' in Insurance Law", (1971) 34 M.L.R. 29.

Hasson, R.A. "The Special Nature of the Insurance Contract: A Comparison of the American and English Law of Insurance", (1984) 47 M.L.R. 505.

Hill, D. "The Doctrine of 'Uberrima Fides' and its Application to Insurance Law in Canada", Law Reform Reconnaissance Programme (II), Legal Research Institute of the University of Manitoba.

Irukwu, J.O. "The Settlement of Insurance Claims in Nigeria - Some Social Legal and Psychological Problems", (1972) IIN Conference Papers 56.

Irukwu, J.O. "The Nigerian Insurance Industry, Developments Since 1960 Focusing on the Growth of the Industry", Unpublished Paper.

Irukwu, J.O. "The Development of Insurance in Nigeria from 1900-1975", (1975) I WAICA Journal 12.

Irukwu, J.O. "Insurance Education and Training in West-Africa - Past, Present and Future Trends", (1975) I WAICA Journal 46.

Irukwu, J.O. "Life Insurance in Africa", (1976) II WAICA Journal 50.

Irukwu, J.O. "The Duties and Responsibilities of the Nigerian Insurance Professional Today", (1983) VIII WAICA Journal 122.

Isiekwene, P.N. "Rights and Duties of the Insurance Companies with Respect to the Insuring Public", (1986) Law Reform Journal 45.

Kargbo, B. "Universities and Insurance Education in West-Africa", (1975) I WAICA Journal 53.

Keeton, R.E. "Insurance Law at Variance with Policy Provisions", (1970) 83 Harv. L.R. 961.

Kessler, F. "Contracts of Adhesion - Some Thoughts About Freedom of Contract", (1943) 43 Col. L.R. 629.

Khan, K. "A New Test of Materiality in Insurance Law", [1986] J.B.L. 37.

Kiladejo, F. "Settlement of Life Assurance Claims, Problems and Documentation", (1987) XI WAICA Journal 185.

Kimball, S.L. and Davis, D.A. "The Extension of Insurance Subrogation", (1962) 60 Mich. L.R. 841.

Kimball, S.L. and Pfennigstorf, W. "Legislative and Judicial Control of the Terms of Insurance Contracts: A Comparative Study of American and European Practice", (1963-64) 39 Indiana L.J. 675.

Kimball, S.L. and Pfennigstorf, W. "Administrative Control of the Terms of Insurance Contracts: A Comparative Study" (1964-65) 40 Indiana L.J. 143.

Leigh-Jones, P.N. and Pickering, M.A. "Harbutt's 'Plasticine' Ltd. v. Wayne Tank and Pump Co. Ltd.: Fundamental Breach and Exemption Clauses, Damages and Interest", (1970) 86 L.Q.R. 513.

Lewis, R. "Insurers' Agreements not to Enforce Strict Legal Rights: Bargaining with Government and in the Shadow of the Law", (1985) 48 M.L.R. 275.

Lijadu, O. "Governmental Control of the Operations of Insurance Companies" (1972) I IIN Conference Papers 77.

Lijadu, O. "Governmental Control of the Operations of the Insurance Industry in Developing Countries", (1975) I WAICA Journal 34.

Lijadu, O. "The Development of Support Services: Last Decade and Future Expectations", (1983) VIII WAICA Journal 53.

Matthews, P. "Uberrima Fides in Modern Insurance Law", New Foundations For Insurance Law, (1987) p. 39.

McGillivray, W.R. "Insurers and the Public", (1973) II IIN Conference Papers 136.

McNesty, E.C. "The Development of Insurance in Nigeria", (1973) II IIN Conference Papers 37.

Mensah, E. "Insurance Policy Conditions in Africa", (1975) IV IIN Conference Papers 99.

Merkin, R.M. "Uberrimae Fidei Strikes Again" (1976) 39 M.L.R. 478.

Merkin, R.M. "Judicial Construction in Deep Water", (1977) 40 M.L.R. 486.

Merkin, R.M. "Insurance Law and the Law Commission", [1981] 3 L.M.C.L.Q. 347.

Merkin, R.M. "Personal Injury Compensation: Slightly Sugaring the Pill?", (1983) 46 M.L.R. 99.

Merkin, R.M. "Transferred Agency in the Law of Insurance", (1984) 13 Anglo-Am. L.R. 33.

Michel, K. and Congdon, S. "Third Party Rights Against Insurers", [1989] 4 L.M.C.L.Q. 495.

Nwogugu, E.I. "An Examination of the Position of Illiterates in Nigerian Law", [1968] 12 J.A.L. 32.

Nwokolo, F.C. "The Need for a Comprehensive Reform of Insurance Law and Practice in Nigeria", Law Reform Journal (1986) p. 23.

Ogunlana, F.O. "The Development of High-Level Manpower for the Insurance Industry in Africa", (1973) II IIN Conference Papers 145.

Ogunlana, F.O. "Role of the Insurance Industry in Nigeria's Economic Survival", [1986] IIN Journal 8.

Ogunrindle, R.O. "The Claim Settlement Provisions of the Nigerian Insurance Act 1976: A Solution to What Problem", (1985) 19 J.W.T.L. 170.

Ogunrindle, R.O. "Insurance Agents and Productivity", [1983] IIN Journal 33.

Okediji, O. "Government Participation in the Nigerian Insurance Market, Regulatory or Competitive", (1986) 20 J.W.T.L. 540.

Okwor, E. "Insurance Decree Analysed", (1978) IV WAICA Journal 167.

Okwor, E. "Government Control of Operations and Investments by Insurance Companies", Law Reform Journal (1986) 106.

Okwor, E. "The Broker and the Insurance Industry", (1987) XI WAICA Journal 151.

Olawoyin, G.A. "Northern Assurance Company Limited v. Idugboe - A Penalty for Illiteracy?", (1973) 11 N.B.J. 81.

Olawoyin, G.A. "Governmental Control of Insurance Business in Nigeria", (1974) 8 N.L.J. 80.

Onwubuya, J.C. "The Handling of Motor Insurance Claims in West-Africa - Problems and Possible Solutions", (1978) IV WAICA Journal 110.

Oredugba, O. "A Critical Examination of the Marketing of Life Insurance in West-Africa", (1983) III WAICA Journal 197.

Osipitan, T.O. "Insurance Contracts and the Principle of Utmost Good Faith: The Case of S.K. Adeyeye v. Liberty Assurance Co. Ltd.", (1984) 1 & 2 J.P.P.L. 121.

Osu, A.F. "The General Marketing of Insurance: Strategies, Problems and Solutions", (1987) XI WAICA Journal 202.

Osunbor, O.A. "American International Insurance Co. Ltd. v. Dike: Yet Another Penalty for Illiteracy", (1981-83) 9/13 N.J.C.L. 91.

Osunbor, O.A. "A Decade of Indegenisation in Nigeria: The Quest for Economic Self Determination", Essays in Honour of Judge T.O. Elias, Faculty of Law, University of Lagos (1987), p. 197.

Peet, "Social Responsibility of Insurance Companies", (1974/75) 63 Journal of the Insurance Institute of London 40.

Parks, J.E. and Heil, R.J. "Insurers Beware: 'Bad Faith' is in Full Bloom", (1973) 9 Forum 63.

Pash, R.J. and Evans, T.C. "Cover Notes: Review of Mayne Nickless v. Pegler", (1981) 7 Adelaide L.R. 517.

Rakoff, T.D. "Contracts of Adhesion: An Essay in Reconstruction", (1983) 96 Harv. L.R. 1174.

Sagay, I.E. "The Illiterate and Contractual Obligations in Nigeria", (1984) 1 & 2 J.P.P.L. 17.

Schmithoff, C.M. "The Unification or Harmonisation of Law by Means of Standard Contracts and General Conditions", (1968) 17 I.C.L.Q. 551.

Siegrist, R.W. "Development of Insurance in Africa: Todays Situation in the Insurance Industry", (1983) VIII WAICA journal 95.

Slawson, W.D. "Standard Form Contracts and Democratic Control of Law Making Power", (1971) 84 Harv. L.R. 529.

Spencer, J.R. "Signature, Consent and the Rule in L'Estrange v. Graucob", (1973) 32 C.L.J. 104.

Talabi, K. "Brokers Liability for Insurance Premium", Unpublished Paper.

Tedeschi, G. "Assured's Misrepresentation and the Insurance Agent's Knowledge of the Truth", (1972) 7 Israel L.R. 475.

"The Role of Insurance and Reinsurance Brokers in Africa - A Report", (1975) I WAICA Journal 67.

Timmins, J.F. "Misrepresentation in Insurance Proposal Forms Completed by Agents", (1974) 7 Vict. Uni. of Wellington L.R. 217.

Tiplady, D. "The Judicial Control of Contractual Unfairness", (1983) 46 M.L.R. 601.

Waddams, S.M. "Unconscionability in Contracts", (1976) 39 M.L.R. 369.

Weinberg, M.A. "Professionalism in Life Assurance Salesmanship", (1981) 69 Journal of the Insurance Institute of London 19.

Wilson, N.S. "Freedom of Contract and Adhesion Contracts", (1965) 14 I.C.L.Q. 172.

Worley, N.G. "Marketing Life Assurance", (1978-79) 67 Journal of the Insurance Institute of London 43.

Yerokun, O. "Evaluation of Insurance Law in Nigeria", Nigerian Commercial Laws, (1984) p.192.

Yerokun, O. "Vicarious Liability - Who is Whose Agent under Insurance Law and Practice", Law Reform Journal (1986) p.92.

Law Commission Reports, Working Papers and Official Reports

Australia

The Law Reform Commission Report No. 16, Insurance Agents and Brokers, Canberra, Australian Government Publishing Service, 1980.

The Law Reform Commission Report No. 20, Insurance Contracts, Canberra, Australian Government Publishing Service, 1982.

New Zealand

Report of the Contracts and Commercial Law Reform Committee, Aspects of Insurance Law.

A Report by the Contracts and Commercial Law Reform Committee, Aspects of Insurance Law (2), 19th May, 1983.

Nigeria

Law Reform Journal, Issue No. 5, July 1986, Published by the Nigerian Law Reform Commission, Lagos.

United Kingdom

Fifth Report of the Law Reform Committee, **Conditions and Exceptions in Insurance Policies**, Cmnd. 62, (1957), London, H.M.S.O.

Department of Trade, **Insurance Intermediaries**, Cmnd. 6715, (1977), London, H.M.S.O.

The Law Commission Working Paper No. 73., **Insurance Law: Non-Disclosure and Breach of Warranty**, (1979), London, H.M.S.O.

Insurance Law: Non-Disclosure and Breach of Warranty, Law Commission No. 104, Cmnd. 8084, (1980), London, H.M.S.O.

INSURANCE (SPECIAL PROVISIONS) DECREE 1988



Decree No. 40

[12th October 1988]

Commencement.

THE FEDERAL MILITARY GOVERNMENT hereby decrees as follows—

Disclosure

1.—(1) Where an insurer requires an insured to complete a proposal form or other application form for insurance, the form shall be drawn up in such manner as to elicit all such information as the insurer considers material in accepting the application for insurance of the risk ; and any information not specifically requested shall be deemed not to be material.

Proposal to contain request for all material facts.

(2) The proposal form or other application form for insurance shall be printed in easily readable letters, and shall state, as a note in a conspicuous place on the front page, that "An insurance agent who assists an applicant to complete an application or proposal form for insurance shall be deemed to have done so as the agent of the applicant."

(3) A disclosure or representation made by the insured to the insurance agent shall be deemed to be disclosure or representation to the insurer, provided the agent is acting within his authority.

(4) In this section, the expression "insured" includes an application for insurance.

Warranty and Conditions

2.—(1) In a contract of insurance, a breach of a term whether called a warranty or a condition shall not give rise to any right by or afford a defence to the insurer against the insured unless the term is material and relevant to the risk or loss insured against.

Only material and relevant terms to give rise to a right.

(2) Notwithstanding any provision in any written law or enactment to the contrary, where there is a breach of a term of a contract of insurance, the insurer shall not be entitled to repudiate the whole or any part of the contract or a claim brought on the grounds of the breach unless—

- (a) the breach amounts to a fraud ; or
- (b) it is a breach of a fundamental term (whether or not it is called a warranty) of the contract.

(3) Where there is a breach of a material term of a contract of insurance and the insured makes a claim against the insurer and the insurer is not entitled to repudiate the whole or any part of the contract, the insurer shall be liable to indemnify the insured only to the extent of the loss which would have been suffered if there was no breach of the term.

(4) Nothing in this section shall prevent the insurer from repudiating a contract of insurance on grounds of a breach of a material term before the occurrence of the risk or loss insured against.

Insurable interest in life or other Insurance

No insurance to be made on lives, etc. by person having no interest.

3.—(1) Any insurance made by any person on the life of any other person or on any other event whatsoever shall be null and void where the person for whose benefit, or on whose account the policy of insurance is made has no insurable interest in the insurance or where it is made by way of gaming or wagering.

(2) A person shall be deemed to have an insurable interest in the life of any other person or in any other event where he stands in any legal relationship to that person or other event in consequence of which he may benefit by the safety of that person or event or be prejudiced by the death of that person or the loss from the occurrence of the event.

(3) In this section, the expression "legal relationship" includes the relationship which exists between persons under Islamic law or Customary law whereby one person assumes responsibility for the maintenance and care of the other.

(4) The provisions of subsection (1) of this section shall not invalidate a policy for the benefit of unnamed persons from time to time falling within a specified class or description if the class or description is stated in the policy with sufficient particularity to make it possible to establish the identity of all persons who at any given time are entitled to benefit under the policy.

No policies on lives without inserting the names of persons interested.

How much may be recovered where the insured has interest in life, etc.

Assignee of life Policies may sue in their own names.

Notice of assignment to be given.

4. It shall not be lawful to make any policy of insurance on the life of any person or other events without inserting in such policy the name of the person interested in it, or for whose benefit or on whose account the policy is made.

5. Subject to the provisions of any other written law or enactment where a person has an insurable interest in the life or event insured, he shall not be entitled to receive or recover from the insurer an amount greater than that of the value of the interest of the insured in such life or other event.

Assignment of Policy of Life Insurance

6. Any person who is entitled by assignment or other derivative title to a policy of life insurance and has at the time when action is brought on the policy the right in equity to receive and to give an effectual discharge to the insurer liable under such policy for money thereby assured or secured shall be entitled to sue in the name of such person to recover such money, but the assignee shall not have a better title than the insured.

7.—(1) No assignment of a policy of life insurance shall confer on the assignee or his personal representatives any right to sue for the amount of such policy or the insured money, unless and until, a written notice of the date and purport of such assignment is given to the insurer liable under the policy at their original place of business.

(2) The date on which the notice is received shall regulate the priority of all claims under the assignment.

(3) A *bona fide* payment made in respect of any policy by any insurer before the date on which the notice shall have been received shall be valid against the assignee giving such notice.

8. An assignment of a policy of life insurance may be made by endorsement on the policy or by a separate instrument in the following words to that effect, namely, "I _____ of _____, in consideration of _____ do hereby assign unto _____, his executors, administrators, and assignees, the (within mentioned) policy of insurance granted, _____ (there described the policy).

In witness whereof I have hereunto set my Hand and Seal this _____ day of _____ 19 _____."

Assignment by endorsement or separate instrument.

9. An insurer to whom notice of assignment is duly given of the assignment of any policy under which it is liable, shall, upon request in writing by any person by whom any such notice was given or his personal representative, deliver to him an acknowledgement of receipt of the notice and such an acknowledgement if signed by a person duly authorised by the insurer shall be conclusive evidence as against the insurer of its having duly received the notice.

Notice of assignment to be acknowledged.

Action and Claim in Fire Insurance

10.—(1) Where a house or other building insured against loss by fire—

(a) is damaged or destroyed by fire, or

(b) if there is no reasonable ground to suspect that the owner, occupier or other person who insured that house or other building is guilty of fraud in respect of the insurance, or of wilfully causing the fire,

the insurer who is liable to make good the loss may, on the request of any person entitled to or interested in the insured house or building, cause the insurance money payable to be laid out and expended as set out in subsection (2) of this section.

Money insured on houses burnt, how to be applied.

(2) The insurance money payable under subsection (1) of this section shall be laid and expended towards re-building, re-instating or repairing of such house or other building so burnt down, demolished, or damaged by fire, unless the party or parties claiming such insurance money shall, within sixty days after the claim is agreed, give security to the satisfaction of the insurer that the insurance money will be laid out and expended as stated herein or unless the insurance money is, at that time, settled and disposed of to and among all the parties entitled as the insurer may determine with the approval of the court on the application of the insurer or any of the interested parties.

(3) Notwithstanding the provisions of subsection (1) of this section, the insurer shall have the right to elect whether to reinstate the house or building damaged or destroyed by fire, or to pay the insured for the loss suffered but not exceeding the insured sum.

Third party rights against insurer

11. Where a third party is entitled to claim against an insured in respect of a risk insured against, he shall have a right to join the insurer of that risk in an action against the insured in respect of the claim : provided that before

Rights of a third party against the insurer.

bringing an application to join the insurer, the third party shall have given to the insurer at least thirty days notice of the pending action and of his intention to bring the application.

Citation. 12. This Decree may be cited as the Insurance (Special Provisions) Decree, 1988.

MADE at Lagos this 12th day of October 1988.

GENERAL I. B. BABANGIDA,
President, Commander-in-Chief
of the Armed Forces,
Federal Republic of Nigeria

EXPLANATORY NOTE

(This note does not form part of the above Decree but is intended to explain its purport)

The Decree provides amongst other things for insurance proposal forms to contain requests for full disclosure of material facts by an insured in order for the insurer to accept the risk on the facts so disclosed.