"HOW BONA DOES FIDES NEED TO BE IN CONTRACTS OF MARINE INSURANCE?"

A COMPARATIVE ANALYSIS OF THE ENGLISH AND THE SOUTH AFRICAN APPROACH TO MARINE INSURANCE CONTRACTS.

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(1) INTRODUCTION

1. The English Law of Marine Insurance embraces the concept of **Utmost Good Faith** (*Uberrimae Fidei*). The underlying motive for this is apparent in the requirement that an even higher standard of honesty than usual is necessary. The reason for this is that circumstances of a special nature exist which put the insurer at a far greater risk and at the mercy of the assured's[1] preparedness to disclose facts of a material nature.[2] In terms of section 18(6) of the English Marine Insurance Act of 1906:

'The assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him.'

2. The current South African Law position appears to recognize only **Good Faith** as a prerequisite in its law of marine insurance[3], consequent upon the landmark decision of Joubert JA in the case of *Oudtshoorn Municipality.* Albeit that the case did not deal with marine insurance, the principles enunciated therein would seem to equally apply to cases of marine insurance. The duty to disclose facts of a material nature exists only with respect to facts within the insured's actual knowledge[4], and in the words of Joubert JA:

'requires an insured to have actual or constructive knowledge of the material information prior to the conclusion of the contract.'[5]

It is a question of determining whether the failure to disclose certain relevant facts was done in good faith or in bad faith in South Africa, leaving no room for varying degrees of either. In Joubert's words, there is a duty on both the insured and the insurer:

'to disclose to each other prior to the conclusion of the contract of insurance every fact relative and material to the risk.....or the assessment of the premium.....Breach of this duty of disclosure amounts to *mala fides* or fraud, entitling the aggrieved party to avoid the contract.'[6]

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[1] Note the difference between the English terminology of 'assured', as opposed to the South African use of the term 'insured'.

2 Chorley & Giles': Shipping Law – Eighth Edition, 1995, p524.

3 *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality* 1985 (1) SA 419 (A).

4 Marnewick C: The Codification of the South African law of Marine Insurance, unpublished LLM thesis submitted to the Faculty of Law of the University of Natal, 1996, Chap 5, p14. Marnewick also points out at footnote 41, page 11, that the judgement may, however be *obiter* so far as marine insurance is concerned.

5 *Mutual and Federal*, at 436E.

6 *Mutual and Federal*, at 433 E-F.

Miller JA was so bold as to disagree with the sentiments of his learned brethren when he opined in the *Oudtshoorn* case that:

'The words '*uberrimae fidei*' must not, of course, be taken too literally. One may be less than honest but one cannot be more honest than honest. After the many years in which the term has been used in this context, it is not, I think, potentially misleading.'

The writer tends to disagree with Joubert's JA's decision to 'jettison' the notion of *uberrimae fides* from our law of insurance. This is particularly so insofar as it affects the way in which our courts will, when in future seized with matters of marine insurance, be required to base their decisions on what the writer terms, a very narrow interpretation of good faith. Joubert's JA's decision was based upon his apparent inability to identify the use of the term 'utmost good faith' in any previous Roman-Dutch law texts. Notwithstanding the fact that our own courts had, over the years built up a strong body of law that in fact embraced the notion of utmost good faith. In so doing, the writer submits that it had very much become a part of our law of insurance, and more particularly, our law of marine insurance. Joubert JA appears to have been too engrossed in wrestling with the idea that the Pre-Union Statute Revision Act 43 of 1977 apparently bestowed upon our courts a duty to rid themselves of their English Law roots in what appears to have been a purification campaign. In so doing, he preferred to disregard the fact that for 106 years prior to his earth shattering decision, our courts had adopted the sentiments of their English brethren. It came as a disappointment that the decisions of the English courts, that had been so famously codified by Sir McKenzie Chalmers, (who had scrutinized over 2000 reported cases as the law had developed over the previous 200 years) could be so swiftly removed from the South African legal system.

3. In marine insurance law, the risks that are apparent for the insurer are such that in determining the **materiality**[7] of the disclosure there is the requirement on the part of the insured that he should be especially vigilant in ensuring that every detailed fact of a potentially material nature should be conveyed to the insurer, so as to enable it to fix a premium. Fixed too in this requirement is for the parties not to misrepresent to each other facts of a material nature that may affect their respective risks.

4. A further distinction lies between the two legal regimes in their application of the test for determining the materiality of a non-disclosure or misrepresentation. The English courts have adopted the prudent insurer (and for that matter, the prudent insured) as their yardstick for determining the materiality of a non-disclosure or misrepresentation. The South African approach

[7] Emphasis that of the writer's.

is to place the reasonable man in the position of the insured and/or insurer in making the determination of the materiality of a non-disclosure, whilst a subjective test, using the actual insured in determining the materiality of a misrepresentation.

5. Legal systems around the world, and in England and South Africa in particular, have given scant regard to the failure to uphold the standards of good faith during the existence of a contract of insurance, and even more so, a contract of marine insurance.

6. Given the trend to head for a more structured system of law, the debate has arisen and continues to be hotly argued whether, in South Africa, like our English counterparts, we require a codification of our law of marine insurance. Such a statement of the law is argued, would lay to rest the apprehension with which our courts dapple with the notion of good faith.

This paper will proceed to deal, in greater detail, with the various issues enumerated above in the hope of clarifying to some extent the uncertainty that exists in the South African law of marine insurance, in particular in the area of good faith.

(2) THE DEVELOPMENT OF GOOD FAITH AS A CONCEPT IN THE ENGLISH LAW OF MARINE INSURANCE:

The roots of the doctrine of good faith in England are said to have emanated from the judgement of Lord Mansfield in *Carter v Boehm*[8], when he stated:

'Insurance is a contract upon speculation. The special facts upon which a contingent chance is to be computed lie most commonly in the knowledge of the insured only; the underwriter trusts to his representation and proceeds upon confident that he does not keep back any circumstance in his knowledge to mislead the underwriter into a belief that the circumstance does not exist, and to induce him to estimate the risk as if it did not exist.' [9]

Although not a marine insurance case, the judgement laid the initial foundations upon which a body of marine insurance law was later to be built.[10] Certain rules thus emanated from this landmark decision that dealt with good faith, disclosure and the materiality of such disclosure. They can be briefly stated as follows:

- 'the assured[11] must disclose all material facts which are in his actual or presumed knowledge';
- 'the duty of making disclosure is not confined to such facts as are within the actual knowledge of the assured. It extends to all material facts which he ought in the ordinary course of business to have known';
- 'where the fact could have been discovered by the assured if he had made reasonable inquiries, he is guilty of a breach of duty towards the insurer';[12]
- 'the keeping back of circumstances is a fraud, and therefore the policy is void. Although the suppression (of circumstance) should happen through mistake without any fraudulent intention, yet still the underwriter has been deceived and the policy is void, because the risk run is really different from the risk understood and intended to be run at the time of the engagement';[13]

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[8] [(1766) 3 Burr.1905].
[9] Griggs PJ: Marine Insurance – Is the Doctrine of Utmost Good Faith Out of Date? CMI Yearbook 1994, at p298.
[10] Griggs points out at p299 that good faith applied to all types of contracts, but in contracts of insurance especially, he wanted to root out fraud and to protect the insurer where a non-fraudulent omission materially affected the risk that was being insured.
[11] Note the reference in English law to the term'assured', and its corrollary in South African law to the term 'insured'.
[12] Marnewick, at p17 & 18.
[13] Griggs, at p298.

- Good faith was considered in an amplified notion, distinguishable from mere good or bad faith in ordinary contracts, although, and at that early stage, if an assured was not in bad faith, he could be considered to be in good faith.[14]

Likening the fort to be insured in the instant case to a ship, Lord Mansfield pointed out that the insurer laid its faith in the insured's representations as to the condition of the fort in the same manner as one would expect a ship that is insured to be in a seaworhty condition.[15] Although the notion of utmost good faith had not yet become developed in English Law[16], it can be implied from Lord Mansfield's choice of analogy that he regarded the risk of insuring a ship to be such that it required a significant amount of good faith on the part of the insured.

Ironically, the clock appears to have turned full circle in South African law with Joubert's *Oudtshoorn Municipality* decision in that the principles relating to good faith therein resemble those of the early English decisions such as *Carter v Boehm*. Stevens, D in his LLB research paper is however of the view that there exists no difference between Joubert JA's interpretation of good faith and the English version of utmost good faith. He points out that Joubert JA had at his disposal the vast body of law that had shaped the notion of utmost good faith and did not wish to interrupt the status quo in that regard, but merely decided to rather point out that the Roman-Dutch authorities preferred to phrase it in a simply stated notion of 'good faith'.[17]

Whereas in *Carter v Boehm*, the test for determining whether the insurer was entitled to avoid the policy was based upon the reason that the risk run was not the risk insured, it did not shape the test for materiality of non-disclosures. This evolved in time through a series of decisions that required that the duty to disclose material facts is based on the notion that the insurance contract is one of *uberrimae fides*.[18]

Hare[19] is quick to point out that the concept of good faith and the duty to disclose must not be confused. Whilst the insured (and insurer) should be encouraged to exercise good faith when disclosing certain facts that are material

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[14] Hare J, Shipping Law & Admiralty Jurisdiction in South Africa, p690.
[15] At 188A-B.
[16] Schoenbaum JS opines that the duty to exercise utmost good faith was in fact recognised by Lord Mansfield in *Carter v Boehm* in his book: Admiralty & Maritime Law, 1987 at Chapter 18-7. He also refers to the English case of *James Yachts Limited v Thames & Mersey Marine Insurance Co* [1977] 1 Lloyd's Rep. 206, where Ruttan J refers to the general principles enunciated in Carter v Boehm regarding the requirement to disclose all facts within the insured's knowledge, at 208.
[17] Stevens D, Maritime Law Research Paper, submitted to the Faculty of Law, Universty of Cape Town, at page 6.
[18] Marnewick , at p18; *China Traders Insurance Co v Royal Exchange Assurance Corporation* [1898] 2 QB 187, where Vaughan Williams LJ coined the phrase 'the greatest good faith'.
[19] Hare, at p688.

to determining the risk (and consequent premium to be charged), the requirement of good faith extends further in that its operation should be exercised throughout the duration of the insurance contract. The writer shall deal at a later stage in more detail with the duty to exercise good faith in a marine insurance contract, *stante contractu.*[20]

The old English decisions that refer to the concealment of facts, do not always mean that a material fact was intentionally withheld. Concealment then can be likened to what is nowadays referred to as non-disclosure. However, even in its earliest developmental stages, fraudulent non-disclosures entitled the aggrieved party to avoid the contract.[21]

In a dissenting judgement of Lord Cockburn, CJ, in the case of *Gandy v Adelaide Marine Insurance Company*[22], the learned judge stated:

> 'It must never be forgotten that insurance is a contract in which *uberrima fides* is required, and that the assured is bound to disclose every material fact known to him and unknown to the insurer, unless he is justified in believing such fact to be known to the latter.'

The position was reiterated soon thereafter by Lord Jessel in *London Assurance v Mansel*[23] when, without laying down the law (merely because concrete law had not been properly formulated at that stage, in statutory form at any rate) on the subject of good faith, suggested that it was a requirement to be exercised in any contract of insurance, be it life, fire or marine insurance. However, the learned judge pointed out that peculiar circumstances unique to the contract of marine insurance warranted additional disclosure, and which were not of application to normal contracts of insurance. Quoting from the law as it had been shaped through the cases, the learned judge referred to the decision of *Dalglish v Jarvie*[24] and, with reference to a contract of insurance, stated that a party to such contract had to exercise the utmost good faith in stating not only all matters that were within his knowledge, which he believes to be of a material nature in the insurance, but all which in point of fact are so. Anything concealed which he knew to be material constituted a fraud.

The development of the English law of Marine Insurance led to its eventual codification in the Marine Insurance Act of 1906. Its relevant provisions for purposes of this discussion are sections 17 and 18 which read as follows:

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[20] p26, infra.
[21] *Blackburn, Low & Co v Haslam* (1888) 21 QB. 144; Chorley & Giles, at p526.
[22] 1871 (QB), Aspinall's Reports of Maritime Cases, Vol 1, 188, at p192.
[23] 1879 11 ChD 363, at 367.
[24] 2 Mac & G. 231, at 243

'17. INSURANCE IS *UBERRIMAE FIDEI*
A contract of Marine Insurance is a contract based upon the utmost good faith, and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party; and

18 . DISCLOSURE BY ASSURED
(1) Subject to the provisions of this section, the assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured, and the assured is 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;
(2) Every circumstance is material which would influence the judgement of a prudent insurer in fixing the premium, or determining whether he will take the risk;
(3) In the absence of inquiry the following circumstances need not be disclosed, namely:-
(a) Any circumstance which diminishes the risk;
(b) Any circumstance which is known or presumed to be known to the insurer. The insurer is presumed to know matters of common notoriety or knowledge, and matters which an insurer in the ordinary course of his 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.
(4) Whether any particular circumstance, which is not disclosed, be material or not is, in each case, a question of fact.
(5) The term "circumstance" includes any communication made to, or information received by, the assured.'

Soon after its promulgation, and in the judgement of *Joel v Law Union and Crown Insurance Company*[25], Vaughan Williams LJ, in referring to the decision of *London Assurance v Mansel*, asserted that:

> '.....the principles which govern insurance matters, which are said to require the utmost good faith, *uberrima fides*, apply to all kinds of insurance. But the same judgement shews that there may be certain circumstances from the peculiar nature of marine insurance which require to be disclosed, and which do not apply to other contracts of insurance.'

The position was succinctly stated in *Rozanes v Brown* as to how the law had been developed in England into its codified form:

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[25] [1908] 2 KB 863 (CA) at p878

> 'It has been for centuries in England the law in connection with insurance of all sorts, marine, fire, life, guarantee and every kind of policy, that, as the underwriter knows nothing, and the man who comes to him to ask him to insure knows everything, it is the duty of the assured, the man who desires to have a policy, to make a full disclosure to the underwriters without being asked of all the material circumstances, because the underwriter knows nothing and the assured knows everything. That is expressed by saying that it is a contract of the utmost good faith – *uberrima fides*.'[26]

The duty to act in utmost good faith not only applies to the assured, but on an equal footing to the insurer. Per Farwell LJ in *Re Bradley and Essex and Suffolk Accident Indemnity Society*:

> 'Contracts of insurance are contracts in which *uberrima fides* is required, not only from the assured, but also from the company assuring.'[27]

In such concrete terms was the act worded that its need for amendment has hardly been warranted.[28] Its provisions have been steadfastly invoked to present day decisions and have assisted significantly in shaping the international ethic of marine insurance. The duty to disclose material facts and the duty to exercise utmost good faith go hand in hand in any English marine insurance contract. Their inextricable interdependancy is evident from the way in which the two requirements follow on from one another in the wording of the Act. It is however not the only overridng duty that needs to be exercised in the requirement of utmost good faith, but is rather one aspect of the overridng duty.[29]

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[26] *Rozanes v Brown* (1928) 32 LIL.Rep 98, at 102.
[27] [1912] 1 KB 415, CA, at 430.
[28] See however the decision of *Pan Atlantic Insurance Co Ltd & One Other v Pine Top Insurance* Co Ltd, infra, where five Law Lords found that the time had come to introduce a new provision to the 1906 Act to bring it into line with modern thinking.
[29] Per Kerr, J in *Container Transport International Inc. v Oceanus Mutual Underwriting Association (Bermuda) Ltd.* [1984] 1 Lloyd's Rep. 476, at 492.

(3) THE DEVELOPMENT OF GOOD FAITH AS A CONCEPT IN THE SOUTH AFRICAN LAW OF (MARINE) INSURANCE:

'Insurance contracts are contracts *uberrimae fidei:* it is the duty of the insured before the conclusion of the contract to disclose to the insurer every fact material to the risk, at least those which were known to the insured. Undoubtedly this **common law**[30]duty can be whittled down by the terms of the contract, but this is not the case here. The references to 'concealment' or 'witholding', in the excerpts above, only appear to express the common law.'[31]

The above quotation reflected the position of the South African common law as it had developed up until 1959, after having introduced into its embodiment of law the influence of the English rationale, with its associated yardstick of the utmost good faith. This yardstick was judged in accordance with a Roman-Dutch 'mix' that made further use of the 'reasonable man', as opposed to the English law's 'prudent insurer'. To quote once again from the same judgement:

'A fact is material which any reasonable man might suppose could in any way influence the insurers in considering and deciding whether they will enter into the contract; or which.....upon a consideration of the whole circumstance as disclosed in the evidence.....has been shown to be such a fact as a reasonable and cautious person unskilled in medical science and with no special knowledge of the law and practice of insurance would believe to be of any materiality or in any way calculated to influence the insurers in considering and deciding upon the risk.'[32]

Jansen, J once again reiterated his standpoint on the subject in *Meskin's*[33] case by stating that contracts generally should be struck in accordance with *bona fidei,*[34] but that some contracts are even said to be *uberrimae fidei* (referring most probably to contracts of insurance). This position was later confirmed with respect to insurance policies by the Appellate Division in *Pereira's* case.[35]Corbett, JA based the rationale for adopting the English *uberrimae fidei* rule on the need

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[30] Highlighting that of the writer's.

[31] Per Jansen, J in *Roome NO v Southern Life Association of Africa* 1959 (3) SA 638 (N), at p640; cf also *Fine v General Accident, Fire & Life Assurance Corp. Ltd.*, 1915 AD 213 at p218.

[32] Per Jansen, J again in Roome NO, who at 641 relied upon two English decisions of *Life Association of Scotland v Foster*, (1873 11 M. 351) and *Joel v Law Union & Crown Insurance Company*, 1908 (2) K.B. 863.

[33] *Meskin, NO v Anglo-American Corporation of South Africa Ltd & Another* 1968 (4) SA 793 (W) at p802.

[34] See also Jansens lengthy journey into the historical influence of Roman-Dutch law on *bona fidei* in ordinary contracts in *Tuckers Land and Development Corporation (Pty) Ltd v Hovis* 1980 (1) SA 645 (A). He concludes that, despite certain reservations by some of the old Roman-Dutch law commentators, it may be accepted that, generally, contracts were taken to be *bona fidei* in the Roman-Dutch law of the 18th century, and gave rise to *bona fidei.*

[35] *Pereira v Marine & Trade insurance Co Ltd* 1975 (4) SA 745 (A) at 756.

to apprise the insurer of all material facts relevant to his decision whether to undertake the risk, on whose special facts upon which the risk is to be determined generally lie within the knowledge of the insured. This view was also confirmed to some extent in *Fransba Vervoer*[36] albeit, mention was neither made of either good faith or utmost good faith. Here the court confirmed the established practice of courts in determining the materiality of a non-disclosure in an insurance contract. Depending on the facts of each individual inquiry, the court will determine whether certain facts were material to the assessment of the risk of the insured, and, using the reasonable man test, establish whether such facts should have in fact been disclosed. This is particularly so in respect of factual information that was exclusively within the knowledge of the insurance proposer (even if the proposer did not consider such factual information to have been material in nature). Herein lies the objective reasonable man test in South African law, to be discussed in greater detail later. This may lead to unreasonable hardship on the insured, who, acting in a lay person capacity, might not have considered such factual information to have been worthy of disclosure. This however needs to be weighed up against whether the insurer is entitled to rely on such failure to disclose as a ground for repudiating liability, on the basis that such information was material to its decision whether to accept the risk (and the premium upon which it was to be set) in the first instance. The onus lies on the insured in each case to establish that:[37]

- The fact not disclosed was material;
- It was within the knowledge of the insured;
- It was not communicated to them.

Joubert, JA then changed the entire course of legal history in his groundbreaking decision of *Oudtshoorn Municipality*. After embarking on an in depth analysis into the Roman-Dutch authorities, much in the same way as Jansen, J did in *Tuckers* case, he decided that South African law has no need for the further use of the term utmost good faith. There was according to Joubert, JA, room only for good faith in South African law. The difference in Joubert, JA's decision was that he had to do with a case of insurance, which, according to the decisions prior to this one, had required that utmost good faith should be exercised in contracts of insurance.

Surprisingly enough, one of the earliest Portuguese commentators, Pedro De Santarem[38], (who Joubert, JA referred to with authority as being one of the

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[36] *Fransba Vervoer (EDMS) BPK v Incorporated General Insurances Ltd* (1) 1976 (4) SA 970 (W).
[37] at p977
[38] Santerna, De Assecurationibus, 1552, Assurance according to Pedro De Santarem at p192.

sources of the Roman-Dutch law of insurance) had, as long ago as around 1500, in his treatise on insurance, established two fundamental principles of assurance:

1. That it should be a contract made in **complete**[39] good faith;

2. That it should not be the means for the assured to get rich, but simply to avoid loss.

Of even greater significance is the fact that Voet 22.2.3 relied heavily on the treatise of De Santarem as a source for his writings on the Roman-Dutch law approach to insurance.

Using the mechanism created by the Pre-union Statute Revision Act 43 of 1977, in which English law (as it existed in 1879), concerning fire, life and marine insurance was no longer binding authority in the Cape Province or in the Orange Free State, Joubert, JA found that the South African law of insurance was governed mainly by Roman-Dutch law as our common law.[40] With this in mind, the learned judge sought it fit and apposite to rid our courts of the large body of precedent that had been created around the concept of utmost good faith. He considered it to be purely English in its origin, emanating, in his view, from the English case law in 1850.[41]

The thrust of Joubert's decision is found at 433 where he decided:

'....there is no magic in the expression *uberrima fides*. There are no degrees of good faith. It is entirely inconceivable that there could be a little, more or most (utmost) good faith. The distinction is between good faith or bad faith. There is no room for *uberrima fides* as a third category of faith in our law..... *uberrima fides* is not a juristic term with a precise connotation. It cannot be used as a yardstick with a precise legal meaning.....In my opinion *uberrima fides* is an alien, vague, useless expression without any particular meaning in law. As I have

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[39] Emphasis that of the writer.

[40] In his discussion on 'The Insurance Contract as a Contract of Good Faith' in Vol 1 of 'The Development of the Principles of Insurance Law in the Netherlands from 1500 – 1800', Van Niekerk JP, at p187 points out that good faith has found more prominent significance in the context of insurance contracts than with other contractual scenarios. The main thrust of the Roman –Dutch writings during this period appears to have been to uphod the standards of good faith in order to prevent fraud. This does not, in the writer's view appear to volunteer a particularly high standard of good faith, nor a standard that is requisite in contracts of marine insurance especially. Davis D M explains also that Roman-Dutch writers referred to the insurance contract as a 'bona fide' contract, but in such terms as required that a high degree of bona fides was required, referring to such writers as Van der Linden 4.6.10, Grotius 3.24.6.20, Schorer Note 422, Voet 18.5.5, per Gordon & Getz: The South African Law of Insurance, 4th Ed, at p111.

[41] Hare points out in footnote 108, chapter 18-1 in fact that the concept appears to have been first mentioned in the United States in *M'Lanahan v The Universal Insurance Co* 26 US (1 Pet) 170, where Judge Story, in 1878 states:

> 'The contract of insurance has been said to be a contract *uberrimae fidei*, and the principles which govern it are those of an enlightened moral policy.'

indicated, it cannot be used in our law for the purpose of explaining the juristic basis of the duty to disclose a material fact before the conclusion of a contract of insurance. Our law of insurance has no need for *uberrima fides* and the time has come to jettison it.'

The effect of this judgement was not just to take the South African law of insurance back to the pre-1879 days, but by a further 100 years. The reason being is that the concept of good faith as it was described in *Carter v Boehm* by Lord Mansfield in 1766 was reflected in a similar way by Joubert, JA in *Oudtshoorn Municipality.*

A more positive note to be extracted from Joubert, JA's judgement is the supposition that the intention of the majority judgement was to create a stringent requirement relating to misrepresentation in the context of insurance contracts, not to be clouded by adjectives used to describe the requirement of good faith.[42]

Hare[43] opines that Joubert, JA correctly concluded that the term 'utmost good faith' was a creation of the English legal system, and that Joubert, JA's decision to rid our legal system of the term 'utmost' from good faith remains binding, certainly insofar as non-marine insurance matters are concerned. He goes on to point out that in relation to marine insurance matters, it is debatable whether Joubert, JA's judgement would be of application in its decision to rely merely on the concept of 'good faith'. A court would need to recognize the influence of the English common law as it shaped our own system of law between the period 1879 to 1977, and therefore, seized with a situation of marine insurance, it would be advisable to retain the concept of 'utmost good faith', albeit only in the areas of disclosure and misrepresentation. He quotes from a passage of Prof Schoenbaum's[44] work that I believe to be apposite to repeat in the current context:

> 'the doctrine of utmost good faith still has utility in marine insurance because it fosters a high standard of care, economic efficiency and lower premiums for assured's. Furthermore, since the marine insurance industry is international in scope and because of recent developments at the World Trade Organization to remove

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[42] Van der Merwe, S: Insurance & Good Faith: Exit Uberrima Fides – Enter What? 1985 THRHR 456, at 459. In his opinion, Joubert, JA also extended the ambit of Roman-Dutch authority to inlude sources that were not strictly Roman or Dutch in oigin. The influence of the Italian law merchant, at the end of the 18th century moulded what was rather a European ius commune for this period, of which English law had also become a part in sculpturing our common law. There was thus no reason to suggest that the effect of the judgemnet was to reverse previous decisions merely because they were tainted by English law.

[43] Chapter 18-5 at 692.

[44] Schoenbaum: Misrepresentation, Non-disclosure, and the Duty of Utmost Good Faith in Marine Insurance Law: A comparative analysis of American and English Law Journal of Maritime Law and Commerce, Volume 29 No1 1998 1-39.

> barriers to trade in services is likely to become more so, its efficient operation would be enhanced by a harmonization of the divergences that have crept into English and American law.'

Support for Hare's view was found, although the concept of good faith was not discussed, in the decision of *Shooter's Fisheries*[45], where it was held that, in interpreting the law in relation to marine insurance policies, the law to be applied was Roman-Dutch law, but that English decisions were of assistance and had persuasive authority. The provisions of the Admiralty Jurisdiction Regulation Act 103 of 1983 were invoked on the basis that the question to be determined before the court was a maritime claim as defined by section 1 of the act.[46]

If one has regard to section 6 of the lastmentioned act, then it becomes apparent that the concept of utmost good faith may still hold its rightful place in the South African law of marine insurance. Subsection 1 provides that:

> 'Notwithstanding anything to the contrary in any law or the common law contained a court in the exercise of its admiralty jurisdiction shall:
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> (a) with regard to any matter in respect of which a court of admiralty of the Republic referred to in the Colonial Courts of Admiralty Act, 1890, of the United Kingdom, had jurisdiction immediately before the commencement of this Act, apply the law which the High Court of Justice of the United Kingdom in the exercise of its admiralty jurisdiction would have applied with regard to such a matter at such commencement, in so far as that law can be applied;
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> (b) with regard to any other matter, apply the Roman-Dutch law applicable in the Republic.'

It follows then that if the Colonial Courts of Admiralty had jurisdiction to apply the principles of 'utmost good faith' to contracts of marine insurance, prior to the commencement of operation of the Admiralty Jurisdiction Regulation Act 103 of 1983, then such principles could be retained and administered by our own courts. Our courts would need to then have regard to the fact that the English common law (which recognized 'utmost good faith') was applied in South Africa

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[45] *Incorporated General Insurances Limitedv Shooter t/a Shooter's Fisheries* 1987 (1) SA 842 (A). The court's dilemna in deciding which law to apply was made easier by the then applicable provisions of section 63(1) of the Insurance Act 27 of 1943, which required that South African law was to apply to insurance policies issued in South Africa after 1 January 1924. The policies in dispute were domestic policies, entitling the court to determine questions of law arising therefrom in accordance with South African legal principles.

[46] Note that a matter involving marine insurance is specifically incorporated in section 1(u) which reads:" 'maritime claim' means any claim for, arising out of or relating to: marine insurance or any policy of marine insurance, including the protection and indemnity by any body of persons of its members in respect of marine matters."

in both the Cape of Good Hope Colony and the Orange Free State Colony during the period 1879 to 1977[47]. A so-called loophole is potentially created to circumvent the draconian measures that were pronounced by the Appellate Division in the *Oudtshoorn Municipality* case.[48] Regard must however be had to the fact that South African court decisions[49] that did take cognizance of the concept of utmost good faith, were doing so in terms of their inherent jurisdiction and not in terms of their Admiralty jurisdiction, as required by section 2(2)[50]of the Colonial Courts of Admiralty Act of 1890.

Makupula[51] offers two further opposing views with respect to the effect of section 6 on marine insurance claims, which he sourced from the works of Staniland, H[52], and Van Niekerk, J P[53], respectively:

'(1) Since neither the South African writers nor the judges have tested these arguments [marine insurance could be a jurisdictional head but for the writ of prohibition], the application of Roman-Dutch law in terms of section 6(1)(b) is not settled as it may seem, for it appears to be based upon an untested assumption: that the Admiralty Court never exercised jurisdiction over contracts of marine insurance.

(2) ...if marine insurance contracts do not fall within the ambit of section 6(1)(a), they must be taken to fall within the ambit of section 6(1)(b) so that the common law[54] will continue to apply to them. Marine insurance contracts fall within the ambit of section 6(1)(b) of AJRA and in respect of

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[47] Hare, chapter 18-5, at page 692. See also Makupula, H N, in his unpublished master's thesis entitled: 'The Mar 91 Refashioning of the SA Law of Marine Insurance?', submitted to the Faculty of Law, University of Cape Town, at pages 4 to 10.

[48] See the obiter opinion of Van Zyl J in *Trust Bank Van Afrika Bpk v President Versekeringsmaatskappy Bpk en 'n Ander* 1988 (1) SA 546 (W), at 552, in referring to Joubert JA's decision to rid South African law of the use of the term *uberrima fides*. In his view, that did not mean that Joubert JA intended for English insurance law principles to be discarded as a source of South African insurance law.

[49] See for example *Roome, NO v Southen Life Association of South Africa supra*; *Meskin, NO v Anglo-American Corporation of SA Ltd and Another, supra*; *Pereira v Marine & Trade Insurance Co Ltd supra*, where, despite being insurance matters, did not require the courts to exercise their Admiralty jurisdictions.

[50] The relevant section reads: 'The jurisdiction of a Colonial Court of Admiralty shall, subject to the provisions of this Act, be over the like places, persons, matters and things, as the Admiralty jurisdiction of the High Court in England, whether existing by virtue of any statute or otherwise, and the colonial Court of Admiralty may exercise such jurisdiction in like manner and to as full an extent as the High Court in England, and shall have the same regard as that Court to international law and the comity of nations.'

[51] Makupula, at page 6.

[52] Staniland, H: 'What is the law to be applied to a Contract of Marine Insurance in terms of Section 6(1) of the Admiralty Jurisdiction Regulation Act 105 of 1983?', (1994) (6) S A Mercantile Law Journal No: 1 16, @ 25.

[53] Van Niekerk, J P: Marine Insurance Claims in the Admiralty Court. A historical conspectus (1994) (6) S A Mercantile Law Journal No: 1, @ 26.

[54] See footnote 42 supra, where Van der Merwe, S points out that our common law has been shaped by numerous influences of not strictly a Roman-Dutch nature, and could be said to include English law doctrines.

claims on these contracts a South African court in the exercise of its admiralty jurisdiction must apply the Roman-Dutch law applicable in South Africa.'

In coming to his conclusion, Staniland conducted an extensive search of the Admiralty court records, and although, at any early stage (in 1547 and 1548)[55]it appeared that the Admiralty courts did exercise jurisdiction over cases involving marine insurance, these cases were later not brought before the court for fear of prohibition. In that the Colonial Court of Admiralty, in terms of section 2(2) of the 1890 Act, exercised jurisdiction over the same subject matter as the High Court of England, it could be argued that, were the High Court of Justice in the United Kingdom to have exercised jurisdiction over matters of marine insurance prior to 1890, then English law of marine insurance, and not Roman-Dutch law is to be applied. The inquiry needs to be taken a step further however as it has been contended that section 6(1) of the 1983 act and section 2(2) of the 1890 act incorporated only the Probate, Divorce and Admiralty divisions of the High Court of Justice. A perusal of these reports brought Staniland to the conclusion that matters of marine insurnce had not been determined prior to 1890. Therefore section 6(1) would have it that Roman-Dutch law would apply to matters of marine insurance.

On the other hand, Van Niekerk[56]concludes that if it were established that English Admiralty courts did in fact exercise jurisdiction prior to 1890 over matters of marine insurance, then sub-section (a) of section 6(1) would apply. If this is the case, then our courts would be obliged to recognize the law as applied by the Courts of England in matters of marine insurance as at 1983, including, but not limited to the English Marine Insurance Act of 1906.

It appears thus that there exists much confusion and uncertainty on the future of the expression 'utmost good faith' in the South African law of marine insurance. The position is complicated by a multitude of factors, influenced by both the ambiguity of current legislative provisions and the failure of our courts to pronounce any definitive means with which, in marine insurance circles, it should be followed or not. It remains to be seen if, when seized with a case in which our courts are forced to decide on issues of good faith in a marine insurance scenario, whether they will follow the English or the *Oudtshoorn Municipality* approach. The shipping fraternity would most probably favour the use of higher degree of good faith than mere good faith. The risks apparent in marine insurance are, by and large, higher then those experienced in other forms of insurance. It was not without due consideration that the English courts have considered it fit to denote a higher degree of good faith in the marine context.

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[55] Admiralty Court Records, file 27 number 147, which makes reference to the case of *Broke v Maynard and Cavalchant v Maynard.*

[56] Supra, footnote 53, at page 62.

One feels that it would serve the interests of the marine insurance industry were our courts to retain the well formulated principles that have been cultivated by the English legal system. By virtue of the fact that it remains uncertain whether our courts are bound to follow the *Oudtshoorn Municipalty* approach in a maritime context, one would hope that judicial discretion be exercised in favour of the English approach.

(4) THE TEST FOR MATERIALITY:

Intrinsically linked to the test discussed below of 'the prudent insurer versus the reasonable man'[57], is the measure for determining the materiality of a non-disclosure, or a disclosure that is not representative of the true state of affairs (i.e. misrepresentation).[58]

Staring[59] poses the following pertinent question in his search for a determination of the materiality of a misrepresentation or non-disclosure:

> 'which (facts) are material and which are not is an issue at the core of almost every disclosure dispute, bringing into focus two questions about the test of materiality: (1) by whose mind is it to be tested, that of the actual underwriter or a hypothetical prudent one; and (2) what effect upon that mind is critical.'

The English position is to hold that a circumstance is material if it would influence the judgement[60] of a prudent insurer in determining the premium to be charged, or establishing whether he will take on the risk.[61]It is not relevant whether the non-disclosure or misrepresentation would have an influence on the mind of the particular insurer or whether the assured himself considered the information to be material in nature.[62]

The relevant extracts of the 1906 Act are sections 20(1), section 20(2), section 20(4), section 20(5), and section 20(7) which read respectively as follows:

> '1. 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. If it be untrue the insurer may avoid the contract;

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[57] Infra, p22.

[58] Ivamy ERH, in Marine Insurance, 1969, at 72 distinguishes between non-disclosure and misrepresentation as:

> 'whereas in non-disclosure the undisclosed fact would tend to show the risk to be greater than it would otherwise seem to be, in cases of misrepresentation the fact so stated would make the risk appear smaller than it was in reality.'

[59] Staring GS: Marine Insurance – Is the Doctrine of Utmost Good Faith out of date? CMI Yearbook 1994, at p291.

[60] MacGillivray states that the word 'judgement' does not mean 'final decision' but rather refers to the 'formation of an opinion'. He points out therefore that a fact may be material, although, if it be disclosed, it would not have resulted in the insurer declining the risk or stipulating an increase in the premium- Insurance Law, 9th Ed, 1997, at p403.

[61] Davis DM: The Law of Insurance, 4th Ed, at p113; Section 18(2) of the 1906 Act.

[62] Ivamy ERH, in General Principles of Insurance, 6th Ed, p143. See however the decision in *Pan Atlantic*, infra.

2. A representation is material which would influence the judgement of the prudent insurer in fixing the premium, or determining whether he will take the risk;

4. A representation as to a matter of fact is true, if it be substantially correct, that is to say, if the difference between what is represented and what is actually correct would not be considered material by a prudent insurer;

5. A representation as to a matter of expectation or belief is true if it be made in **good faith**[63];

7. Whether a particular representation be material or not is, in each case a question of fact.'

Joubert JA's test for materiality in the *Oudtshoorn Municipality* decision was to assert that:

> 'there is a duty on both insured and insurer to disclose to each other prior to conclusion of the contract of insurance every fact **relative and material**[64] to the risk (*periculum* or *risikum*) or the assessment of the premium. This duty of disclosure relates to **material** facts of which the parties had actual knowledge or constructive knowledge prior to the conclusion of the contract of insurance.'

The aggrieved party is afforded a remedy in South African law analogous to the the delictual test for wrongfulness. If it can be established that a misrepresentation, for instance was wrongful, in the sense that it caused the aggrieved party to be misled to the extent that it materially affected his position in the context of the contract, then there is a remedy. In decisions dealing with misrepresentation by virtue of a non-disclosure, the South African courts do not refer to an all encompassing duty to disclose facts generally, but rather, to disclose facts that are material.[65] Failure to disclose facts that are material constitutes bad faith in relation to such non-disclosure. The test used to determine whether non-disclosure or misrepresentation was material or not is said to be objective:

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[63] Emphasis that of the writer's

[64] Emphasis that of the writer's.

[65] Joubert WA: The Law of South Africa, Vol 12, p121. See however the more recent decision of *Qilingele v SA Mutual Life Assurance Society* 1993 (1) SA 69 (SCA), infra, at p41, in the context of the materiality of a misrepresentation in the interpretation of the then Section 63(3) of the Insurance Act 27 of 1943.

> 'facts are material if they are of such a nature that knowledge of the facts would probably influence a representee in deciding whether to conclude the contract and on what terms.'[66]

In determining the criterion for establishing what the influence would be in the mind of the representee referred to above, the South African courts have adopted the use of the reasonable man test.[67]

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[66] Joubert WA, at p 122.
[67] See infra, p22.

(5) THE PRUDENT INSURER VERSUS THE REASONABLE MAN:

A second significant refurbishment of the South African legal approach to insurance law that took place in the *Oudtshoorn Municipality*[68] case was the disposal of the English reasonable or prudent insurer test, and the replacement in its stead of the reasonable man test.[69]The test is relevant to the determination of the materiality of facts to be disclosed. It had been generally accepted as being the test to be used in South African law for determining the materiality of both misrepresentation and non-disclosure in contracts of marine insurance.[70] In *Colonial Industries*[71], a case dealing with fire insurance, De Villiers, JA, in showing approval for the English law position posed the folowing question:

> '.....were the facts material? To this there can be but one answer, if we bear in mind that every fact is material which would affect the minds of prudent and experienced insurers in deciding whether they will accept the contract, or when they accept it, in fixing the amount of premium to be charged.....I would have no hesitation in saying that the facts concealed.....from the Defendant were most material, and should, in a contract of insurance which demands the **utmost good faith**[72], have been disclosed by him.'

Joubert, JA's reason for no longer making use of the English approach was once again because he believed it was exclusively an English law approach which was no longer of a binding effect on South African law. The preferrred Roman-Dutch method of using the reasonable man (the so-called *diligens paterfamilias*) to determine the materiality of the non-disclosure was adopted as the suitable yardstick. According to Joubert JA, it is by means of a consideration of the relevant facts of a particular case that will be used to assess whether such undisclosed information was reasonably relevant to fixing a premium in accordance with the risk taken. Van der Merwe[73] points out that the use of the reasonable man test is not quite as clear cut as it seems. Essentially, in a situation of determining the materiality of a non-disclosure or misrepresentation, one has to do with the lawfulness or unlawfulness thereof. The test to be applied in this determination, according to the majority judgement in *Oudtshoorn Municipality*, is objective. However, a clear distinction needs to be drawn between the delictual elements of wrongfulness and fault as they apply to misrepresentation, and the use of the reasonable man in such a context, as

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[68] Supra, footnote 3, at 435F-G.
[69] Van de Merwe, S, at 460.
[70] Hare, J, at 18-5.1.1. He refers to the direct application of the test by De Villiers JA in *Colonial Industries Limited v Provincial Insurance Company Limited* 1922 AD 33.
[71] Supra, footnote 69.
[72] Emphasis that of the writer's.
[73] Van der Merwe S, at 461.

compared with the reasonable man in the context of non-disclosure in insurance. Joubert JA appears to have fudged the two distinctions when he made reference to McEwan J's decision in *Fransba Vervoer*[74], where he referred to the test applied in that case as a combination of the reasonable insurer and the reasonable insured. The test, according to Van der Merwe, was rather, in fact, formulated with two stages i.e. whether the facts giving rise to the alleged hazard were material and, if so, whether or not a reasonable man in the position of the insured would have disclosed them. In other words, a distinction is drawn between the materiality of facts, and the decision whether to disclose them. Hare[75] supports the use of a two stage inquiry, albeit of a slightly different focus, in making the relevant determination. He points out that in the first instance, the insurer should bear the onus of proving satisfactorily that his colleagues, as reasonable, prudent, or responsible underwriters would have found cause to refuse taking on the risk, alternatively would have charged a higher premium. In the second instance, the court would need to establish whether a reasonable person in the position of the insured should have known how the insurer would have reacted to the risk, or would have fixed a different premium, had he been aware of the non-disclosed information. The first inquiry takes on a more subjective focus whilst the second can be viewed in a more objective light.

The English prudent insurer test was codified by means of section 18(2) of the 1906 Act and can be found to have its roots in such early decisions as *Seaman v Fonereau*[76]. It was held that the insurer was entitled to resist liability on the basis of a non-disclosure of material information. Of further relevance is the non-requirement for the facts that were not disclosed to have any bearing on the subsequent loss suffered. What is important is for the information to merely be of a material nature, whereupon the right to repudiate then becomes absolute.[77]The test to be used is objective in that the particular insurer's attitude to the non-disclosure is irrelevant. What is relevant is whether **a prudent insurer**[78] would be influenced in any way by the failure on the part of the insured to disclose the factual information. Hence, even though the specific underwriter may not have been swayed by the non-disclosure or the misrepresentation, if it is found that a prudent insurer would have, then such facts are considered material and entitle the aggrieved party to resile.[79] The English jurists were not unsurprisingly displeased with the harshness of the law as it stood after the *C.T.I.* case, and on an appeal to the House of Lords, sought to change the law, and add a new dimension to the Marine Insurance Act of

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[74] *Fransba Vervoer (Edms)Bpk v Incorporated General Insurances Ltd* 1976 (4) SA 970 (W).
[75] Hare J, at p697.
[76] (1743) 2 Stra.1183;93 E.R. 1115.
[77] Grime R, at p374.
[78] Emphasis that of the writer's.
[79] *C.T.I. International Inc. v The Oceanus Mutual Underwriting Association (Bermuda)* [1984] 1 Lloyds Rep.476, C.A.

1906.[80]Lord Mustill, in *Pan Atlantic*[81] criticized the *C.T.I.* decision in the following way:

1. 'The law...deprives the assured of recovery for a genuine loss by perils insured against even if the misrepresentation or non-disclosure had no bearing on the risk which brought about the loss;
2. The law....deprives the assured of the whole of his recovery even if full and accurate disclosure would have done no more than cause the actual underwriter, or the hypothetical prudent underwriter, to insist on one rate of premium rather than another;
3. The law fails to take account of whether a reasonable person seeking insurance would appreciate that a particular circumstance was material and ought to be disclosed;[82]
4. The doctrine of the *C.T.I.* case demands more of the assured than is feasible in modern trading conditions;
5. The effect of *C.T.I.* has been to deter overseas interests from placing risks on the London market;
6. The Court of Appeal in the *C.T.I.* case set the standard of materiality too low. The law ought to be that a circumstance is material only if its disclosure would decisively have influenced the mind of the prudent underwriter: if it would have made all the difference to whether he wrote the risk, and if so, at what premium. Alternatively, even if a circumstance can be material without being decisive, the law ought to require a greater potential effect on the mind of the hypothetical underwriter than was acknowledged in the *C.T.I.* case;
7. The decision in the *C.T.I.* case that a defence of misrepresentation or non-disclosure can succeed even if the actual underwriter's mind was unaffected is contrary to commonsense and justice;
8. If the actual underwriter would not have been influenced by the information it cannot have been material, and hence the assured was under no duty to disclose it;
9. The court in *C.T.I.* failed to appreciate the importance of *Ionides v Pender* (1874) LR (QB) 531 and associated cases.'[83]

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[80] See Hare J's reference to the English courts re-examination of the test for materiality at chapter 18-5.1.1, at footnote 123.

[81] *Pan Atlantic Insurance Co Ltd & Another v Pine Top Insurance Co Ltd 1994* (3) AllER 581 at 597-600.

[82] Note the similarity here to the South African law postion of the reasonble man in the position of the insured and/or insurer, per Joubert JA in *Oudtshoorn Municipality*, when deciding that the courts are to decide the issue of materiality neither from the position of the hypothetical reasonable insurer, nor from the position of the hypothetical reasonable insured, but rather, objectively from the position of the average prudent person or reasonable man (at 435F-I).

[83] In *Ionides'* case, the court agreed that it would be too much to put on the assured the duty of disclosing everything which might influence the mind of the underwriter. However, the court at the same time found that all should be disclosed which would affect the judgement of a rational underwriter governing himself by the principles on which underwriters do in practice set.

The House of Lords has now seen it fit to focus the favour more in the direction of the insured in marine insurance contracts where the insurer elects to reject the policy on grounds of misrepresentation or non-disclosure. The five Law Lords came to the conclusion that the 1906 Act (more particularly, section 18(1) and 20(2) thereof) had not gone far enough in codifying the law as it currently exists insofar as the position of the actual insurer is concerned.[84] In the words of Lord Lloyd:

> 'Did the misrepresentation or non-disclosure induce the actual insurer to enter into the contract on those terms?'

Once it has been established that the misrepresentation or non-disclosure was material to establishing the risk, there is then a rebuttable presumption that the insurer was induced. One sees emanating from the Pan Atlantic decision a more subjective test being applied in the first instance, with the onus resting upon the actual insurer to prove material misrepresentation or non-disclosure, followed by a shift of onus back onto the insured to disprove the allegations.[85]

Broadly speaking, the basis upon which the South African courts and the English courts approach the duty to disclose leads to the same result.[86] Marnewick points out that had a case dealing with materiality come before the South African courts in a marine insurance context in the Cape during the existence of the General Law Amendment Act of 1879, or in the Free State during the existence of the General Law Amendment Ordinance of 1902, then they would have had to apply the English prudent insurer test. On the other hand, he postulates that in Natal and the Transvaal, the courts would have had to decide on whether to invoke the reasonable man test.[87] Hare postulates that the English prudent insurer test had become settled law in South Africa between the period 1879 to 1977, which supports an argument in favour of distinguishing the rationale underlying the *Oudtshoorn Municipality* decision from the pre-existing law emanating from the *Colonial Industries* decision.[88] It is, however, the manner in which the two systems have regarded the requirement to exercise good faith in the context of disclosure and misrepresentation that continues to set the two systems apart.

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[84] Griggs P, at p301.
[85] Hare J, chapter 18-5.1.1, at footnote 123.
[86] Marnewick C, chapter 5, 2.2.4, at p12.
[87] Marnewick C, chapter5, 2.2.7, at p15.
[88] Hare J, chapter 18-5.1.1, at p696. See also Nicholas AJA in *Anderson Shipping (Pty) Ltd v Guardian National Insurance Co Ltd* 1987 (3) SA 506 (A), at 517, where the learned judge makes reference to the English law position as set out in Ivamy's Halsbury's Laws of England, where a proposer for insurance is bound to disclose 'not merely what he actually knows but also what was ascertainable by him by means of such enquiries as reasonable business prudence required him to make', and continues to make the point that for the purposes of the present judgement, the assumption shall be made that such a rule forms part of South African law.

(6) THE REQUIREMENT TO UPHOLD STANDARDS OF GOOD FAITH *STANTE CONTRACTU*:

(a) THE ENGLISH POSITION:

In its early stages, uncertainty existed as to the extent to which good faith needed to be exercised after the conclusion of the marine insurance contract. The position was later clarified to some extent by the wording of the 1906 Act, and more particularly by section 17 which, on closer interpretation requires good faith to be exercised throughout the contract. The distraction to this rule is found in the wording of section 18(1), which requires disclosure on the part of the assured before the contract is concluded. However, as Hare points out, it is important to distinguish between the duty of disclosure and the duty to exercise good faith.[89]It is the requirement to exercise good faith during the currency of the contract of marine insurance, determined moreover by ensuring that material information is shared between the parties to the contract, prior to its conclusion, and extending up until the time of its termination, that has not quite enjoyed the degree of judicial support that it quite deserves. Many cases have arisen around the question of disclosure at the initial stage, immediately prior to the conclusion of the marine insurance contract, and the law appears to be more or less settled on this point.[90]Greater focus and attention needs however to be paid to the position *stante contractu* so as to ensure that a strong body of law is created for the sake of certainty in the field of insurance generally. Ships at sea are constantly subject to the forces of nature and its ominous perils. Measures to safeguard the interests of the insurer, and to a lesser extent, those of the assured are essential to creating harmony between the parties to the contract. After all, the premium charged is not just a once-off payment but continues for the entire period that the assured receives cover. Surely then, the parties should be entitled to respectively know and be made aware of material circumstances that might potentially alter the status of their risks. (i.e. the subject matter of insurance on the one hand; and the knowledge on the other hand that the subject matter will enjoy cover if and when claimed).

The early position can be exemplified by the decision of *Morrison v The Universal Marine Insurance Company (Limited)*[91] which is of interest in the present discussion. The Plaintiff was the owner of the ship, C, who had effected through his broker, an insurance upon the chartered freight of the ship with underwriters, the Defendant, who had initialed the 'slip'. The Plaintiff had paid the premium set, whilst the Defendants had not been aware at the time that the Plaintiff and the broker had been informed by means of a telegram that the C had probably

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[89] 18-5, at p688.

[90] See however the decision of *Pan Atlantic*, supra.

[91] 1872 (Court of Exchequer), per Aspinall's Reports of Maritime Cases, Vol 1, 508 and Vol 8 (Court of Exchequer) 40.

become lost. When the Defendants became aware of the C's loss, they communicated such knowledge to the broker but did not object to the insurance on account thereof. The following day the Defendant then stamped the policy of insurance, in accordance with the slip. Five days later, news arrived confirming the total loss of the C, whereupon the Defendant repudiated liability on the basis that the Plaintiff had failed to disclose the telegram to it.

By that stage of the development of the law of marine insurance, it had become a common trade practice, that, until the 'slip' is initialed, the matter is still one subject to negotiation, but after the 'slip' is initialed, the contract is considered concluded. A policy was then issued in accordance with the slip, no matter what happened after the slip was initialed. The broker's failure to disclose to the underwriters the information, which was considered by the court to be material, after the slip had been initialed was a non-disclosure which the court believed sufficient to entitle the underwriter to elect to treat the policy as void. Although the information which the broker had failed to disclose had appeared in Lloyd's List, the court held that the broker was not entitled to assume a knowledge by the underwriters of the contents of Lloyd's List. There appears from this case an emergence, albeit that the court did not express an opinion in such specific terms, of the requirement that utmost good faith should be exercised even after the contract of marine insurance has been entered into. The court's main pre-occupation in this case was the requirement to disclose information of a material nature at the initial phases of contractual formulation (i.e. offer and acceptance) and the length of time taken after the contract's conclusion for the resiling party to decide whether or not it would accept the risk for which it issued cover. Implicit in this inquiry, was the assertion that the party that withheld the material information (and thus failed to exercise utmost good faith) should have continued to ensure that such information, which obviously affected the insurer's risk, was in fact disclosed, even after the slip was initialed.

In a contract of re-insurance, the English courts sought to reinforce the requirement that utmost good faith should be exercised. In looking at the nature of insurance contracts generally, it was found that a person who reinsures comes under the duty to do everything under the greatest of good faith, which attaches not only at the outset, when making the contract of insurance, but also when carrying out the contract of insurance. In so doing the insured is called upon to do everything within his power to bring facts to the attention of the underwriter during the currency of the contract in respect of which facts the underwriter is called upon to pay.[92]In the *China Traders* case, Vaughan Williams LJ stated the following:

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[92] Per Williams, LJ in *The China Traders Insurance Company v Royal Exchange Assurance Corporation* [1898] 2 QB 187.

> 'A re-insurer is himself an assured who takes upon himself the duty, not only before but after the contract comes into operation, to act with the greatest good faith.'[93]

The lastmentioned case dealt with the failure on the part of the insured to produce all papers that were in his possession, and to account for those that he was unable to produce, relating to the ship in question, in order for the insurer to assess its liability in terms of a contract of re-insurance. The failure on the part of the insured to so discover the ships papers was considered by the court to be contrary to the principles of utmost good faith ('greatest good faith'). The subsequent wording of section 17 of the 1906 Act embodied thus the requirement on the part of parties to a contract of marine insurance to exercise utmost good faith not only prior to the stage of contracting, but pursuant thereto.[94]

The provisions of section 17 of the Marine Insurance Act of 1906 can be interpreted more widely than the rules of misrepresentation and non-disclosure prior to the conclusion of the contract.[95]In the Litsion Pride[96], it once again became evident that the duty to 'behave well' continued throughout the contract of marine insurance and included the duty to make proper disclosures and not to mislead the insurer. In so doing, the fraudulent behaviour of the insured whilst

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[93] At 193.

[94] Joubert WA, The Law of South Africa, Vol 12, at p105 cautions however that the duty to act in good faith *stante contractu* must not be confused with the duty to exercise good faith at the time of renewal of the insurance contract. At the time of renewal, one is dealing in fact with the conclusion of a new contract, so the pre-contractual requirement of exercising good faith once again applies. For example, in a South African case of *Whyte's Estate v Dominion Insurance Company of South Africa* 1945 TPD 382, at 400, Ramsbottom J stated the following:

> 'The duty of disclosure attaches to the renewal of a policy to the same extent as to the making of the original policy; and the renewed insurance is equally liable to be avoided by reason of a breach of this duty. A new proposal form is not, in practice, used in connection with renewals, and the insurers rely for their guidance upon the statements contained in the original proposal. Consequently the position is the same *as if the statements were made afresh* before each renewal and the insurers are entitled to assume that they are still accurate. If therefore, owing to any change of circumstances during the preceding period of insurance they have become inaccurate it is the duty of the assured to correct them, and he must *further* disclose any facts which have become material during the same period.'

[95] Grime R: Shipping Law, 2nd Edition, 1991, at p377. See also Ivamy, Marine Insurance, 1969, at p66, where he correctly points out that the duty of disclosure is limited in duration and extends to a period, in terms of section 18(1), before the contract is concluded. Thus we see in *Willmot v General Accident Fire and Life Assurance Corporation* (1935), 53 L1L. Rep.156, K.B.D., the court holding that a non-disclosure of a material fact after the conclusion of the contract did not exonerate the insurer from liability. Had it been warranted in terms of the policy that certain conditions would be adhered to then the insurers right of repudiation would have been considered differently. For an in depth study on the duration of the duty to disclose, see also Oelofse NO's doctoral thesis submitted to the University of Stellenbosch, entitled 'Die Uberrima Fides – Leerstuk in die Versekeringsreg', 1983, at p98.

[96] *Black King Shipping Corp. v Massie* [1985] 1 Lloyds Rep. 437.

being covered in terms of the insurance contract entitled the insurer to resile from its obligations because the insured had failed to exercise good faith.[97]

In his judgement, Hirst J pointted out:

> '...In my judgement the authorities in support of the proposition that the obligation of utmost good faith in general continues after the execution of the insurance contract are very powerful.'[98]

The learned judge went on to say that even when fraud was not the case, the authorities are consistent in asserting that the doctrine remains applicable to non-fraudulent non-disclosure of material facts consistent with the provisions of section 18(2) of the 1906 Act. He did however go on to make the point[99] that, in comparison to the pre-contractual situation, the precise ambit of the duty of utmost good faith in the context of making claims **remains undeveloped**[100]. He could find no case where the duty of utmost good faith had been considered outside the context of fraud in relation to claims. The case in question dealt with the fraudulent breach by the insured of a warranty in which the assured withheld information on the voyage of the ship, '*the Litsion Pride*' that was insured for war risks liability. The court held that on the issues of fraud and bad faith, the owners of the ship intended to run the risk of trying to slip in and out of the Persian Gulf, during the Gulf crisis, hoping that they would remain undetected, so as to avoid having to pay an additional premium, as stipulated in the policy.

In coming to its findings, the court made particular reference to three previous decisions, namely, *the Britton*[101], *the Style*[102], and *the Liberian*[103] cases, which I shall proceed to deal with individually:

- *BRITTON V ROYAL INSURANCE CO:*

In respect of a fraudulent claim, Willes J held that contracts of insurance require 'perfect good faith' on both sides, and that even more so, such 'perfect good faith' should be **maintained**[104]. He considered it to be most dangerous to allow parties to commit a fraud and then be entitled to recover the value of the goods insured;

- *OVERSEAS COMMODITIES LTD V STYLE:*

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[97] Grime R, at p378.
[98] At 511.
[99] At 512.
[100] Emphasis that of the writer's.
[101] Britton v The Royal Insurance Company (1866) 4 F. & F. 905.
[102] Overseas Commodities Ltd v Style [1958] 1 Lloyds Rep. 546.
[103] Liberian Insurance Agency Inc. v Mosse [1977] 2 Lloyds Rep. 560.
[104] Emphasis that of the writer's.

In a marine insurance policy in which canned pork was insured against all risks, the assured had in terms of a warranty, warranted that all tins would be marked with a code verifying the date of manufacture of the tins. In his judgement, McNair J held that the doctrine of utmost good faith was applicable in a situation where the assured was obliged to explain any discrepancies in the markings of the tins, which they had failed to do;

- *LIBERIAN INSURANCE AGENCY INC. V MOSSE:*

In a case that dealt with material non-disclosure of information relating to the description of the goods that were insured for a voyage from Hong Kong to Monrovia, Donaldson J held that the assured's failure to (a) disclose that the cargo included 823 cartons as contrasted with wooden cases; and (b) disclose that a significant proportion of the enamelware insured had been touched up by overpainting, was sufficient to entitle the insurer to avoid the policy. There was accordingly an ongoing duty on the part of the assured to uphold the standards of utmost good faith by providing the insurer with information material to the risk against which the goods were insured.

Finding support from the lastmentioned case, Griggs[105] takes the view that people are mistaken in believing that the duty to exercise utmost good faith only extends to the time of conclusion of the contract. He points out that the extended duty to exercise good faith during the running of the contract is just as applicable at the time of insurance renewal.

In *The Star Sea* case[106]the English Court of Appeal quoted with approval a passage from the book 'The Law of Insurance Contracts'[107]:

> '.....the duty (of utmost good faith).....continues throughout the contractual relationship at the level appropriate to the moment. In particular, the duty of disclosure, most prominent prior to contract, revives whenever the insured has an express or implied duty to supply information to enable the insurer to make a decision. Hence it applies if cover is extended or renewed. It also applies when the insured claims insurance money.....The degree of disclosure, however, varies according to the phase of the relationship. It seems that the level....appropriate to a claim is different.....'

There was however no attempt by the court to define the level of disclosure appropriate to a claim. There is no obligation on the part of the assured to furnish the insurer with information about circumstantial changes that affect the

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[105] Griggs P, at p304.

[106] *Manifest Shipping Company Limited v Uni-Polaris Shipping Company Limited & Another* [1997] 1 Lloyd's Rep. 360.

[107] Clarke M: The Law of Insurance Contracts, Lloyds of London Press, 2nd Ed.

risk covered, unless such changes take the risk outside the ambit of risks which the insurer could reasonably be expected to have contemplated.[108]

It has however been held in a life insurance case[109] that the non-disclosure of a particular fact which was not considered to be material at the time of contracting, but later became material, bringing about the claim, did not affect the validity of the policy. (i.e. it was not regarded as being a fact upon which there was a duty to disclose at the time of contracting)[110]

Rose FD[111] moots the proposition that damages should be an alternative appropriate remedy to parties, particularly the insurer, in instances of failure to uphold the standards of utmost good faith. This remedy could act as an appropriate alternative to avoidance and/or return of the premium as encoded in the 1906 Act. With reference specifically to the fact that the 1906 Act does not constitute a complete codification of the law of insurance, and the fact that Lord Chalmers, its draftsman, did never intend for it to be so, Rose suggests that the 1906 Act does not provide for a possible remedy to a party in the context of breach of an express warranty of non-disclosure. The latter situation would presumably arise during the currency of the insurance contract. Perhaps the English courts have been too concerned at preserving the encoded principles enunciated by the 1906 Act, without paying any particular attention to its potential shortcomings, particularly in the area of guarding against the failure to exercise good faith *stante contractu.* The repercussions of this failure are far more far-reaching than immediately anticipated.

In *Banque Keyser Ullman v Skandia*[112] , Steyn J suggested, when confronted with the prospect of granting damages for failure to uphold standards of utmost good faith:

> 'Plainly, the problem confronting me is a novel one. Occasionally, judges have to apply an existing remedy to a new situation when a right already recognised by the law is not adequately protected.....In my judgement justice and policy considerations combine in requiring me to rule that in principle an insured can claim damages from an insurer arising from loss suffered by the insured as a result of a breach of the obligation of the utmost good faith by the insurer.'[113]

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[108] *Kausar v Eagle Star Insurance Company Limited*, 'The Times', 1 July 1996.
[109] *Watson v Mainwaring* (1813) 4 Taunt 763.
[110] Ivamy ERH: General Principles of Insurance Law, 6th Ed, at p148.
[111] Rose FD (Ed): New Foundations for Insurance Law – Current Legal Problems, Faculty of Laws, University College, London, 1987, at p52.
[112] [1987] 1 Lloyd's Rep. 69.
[113] At p96.

England, as one of the original seafaring nations of the world, has made enormous strides in shaping the international approach to marine insurance law. It still, despite the sentiments expressed by Joubert JA in *Oudtshoorn Municipality*, has a predominant influential and persuasive impact on the South African judicial framework. Although our judges prefer to make reference to the Roman-Dutch authorities for a more decisive impact, the English law is often used to provide guidance where the Roman-Dutch law is lacking. If the English law is also found wanting in particular areas, then its impact on South African jurisprudential thinking is even less profound. Its is precisely in the area of utmost good faith and its exercise *stante contractu* that is in particular dire need of development, and perhaps even statutory reformation[114] in the English context. Its lack of clarity has led to some dubious decisions that have sent some uncertain signals into the highly commercial marine insurance marketplace, giving rise, with justification, to a considerable amount of concern.[115]Too much emphasis appears to have been placed on the requirement to uphold standards of good faith *stante contractu*, in order to prevent fraud. Too little emphasis has placed on shaping the body of law that needs to be established, like in its pre-contractual phase, of simply ensuring that those self-same standards of utmost good faith are upheld during the performance part of the contract.

(b) THE SOUTH AFRICAN POSITION:

The position in South Africa is even more alarming than in England, with respect to upholding standards of good faith, let alone utmost good faith, *stante contractu.*

The question arose in the Appellate Division in *Perreira's*[116] case where it was contested by the insurer that the duty of disclosure persisted after the conclusion of the contract of insurance, and had an affect on all the dealings which the insured had with the insurer, including, but not limited to the completion of the claim form.[117] In answering this question, Corbett JA expressed the view that he knew of no authority, which proposes that the duty of disclosure (and its concomitant duty to exercise good faith)[118] should persist after the conclusion of the contract of insurance. The learned judge found authority in certain South African textbooks[119] which indicated that the converse was applicable insofar as

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[114] Rose FD points out on Chalmers' codification of the law:
'In any event it must be born in mind that a Victorian draughtsman, however imminent, might see things in too restrictive a light, or even might simply err.'

[115] See *Videtsky's* case, infra.

[116] *Perreira v Marine & Trade Insurance Co Ltd*, at 755-756.

[117] Davis DM, at p128.

[118] Bracketed area included by the writer.

[119] Gordon, SA Law of Insurance, 2nd Ed, p112; Lee & Honore, Law of Obligations, sec. 590; Halsbury, 3rd Ed, Vol 22, sec 202; Shawcross, Motor Insurance, 2nd Ed, p645.

the parties being duty bound to disclose information of a material nature after the conclusion of the contract. Although he was not required to decide specifically on the point of whether the pre-contractual duty of disclosure continued into the contract itself, (owing to the fact that the information that was allegedly not disclosed was not material to the risk), the case did however give a clear indication of the South African courts' approach to dealing with the question of whether it was necessary to uphold standards of good faith *stante contractu.*

The position was sadly confirmed in the more recent decision of *Videtsky*[120], where Flemming J, with reference to the lastmentioned decision, found additional support in the text of Joubert (ed) Law of South Africa vol 12 ('Insurance') para 120 at 103, to assert that South African Law does not have authority for the proposition that the duty to display good faith (or utmost good faith) exists on the part on an insured in submitting a claim form in terms of an issued policy of insurance.[121]

The court in *Videtsky's* case had to decide whether, unless otherwise agreed, there exists an *ex lege* duty on the part of the insured who submits a claim not to go beyond the truth and to disclose material facts relative to the assessment of the duty to make payment. Flemming J posed the following question:

> '.....whether an insured loses his claim to payment if he acts fraudulently when promoting a claim which may well be a fully justified and sound claim.'

Despite his preparedness to accept the influence of English law on our law of insurance[122], the learned judge could still find no support for there being a developed body of law that required of him to find in favour of the insurer. As a single judge in a local division of the High Court, he believed that it was not his prerogative to create new law on issues of public policy that may require the safeguarding of the insurer's interests beyond the initial conclusion of the contract. What appears somewhat questionable was the court's preparedness to accept the inclusion of the English notion of utmost good faith, but its election not to uphold the standards thereof beyond the conclusion of the contract of insurance. The signal that was essentially created by this judgement is that the insurer is placed at the mercy of the insured, who is entitled to submit a valid claim, tainted with fraudulent representations, and still be entitled to claim on the policy. The proverbial floodgates have been opened to insurers and insureds alike to conduct themselves after the insurance contract is concluded in a

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[120] *Videtsky v Liberty Life Insurance Association of Africa Ltd* 1990 (1) SA 386 (W).
[121] at 389 and 392.
[122] 'I will, ...as a starting point, take at face value the proposition that English law on the subject is a good indication of what South African law is', at 391.

manner lacking in good faith, and still be comforted by the knowledge that our courts would not step in to provide relief for the aggrieved party.[123]

Joubert WA[124]suggests that the argument in favour of there being a continuing duty to exercise good faith is that an insurer necessarily depends on the honesty of the insured when he submits a claim under the policy. However, and on the other hand, he opines that there is strong argument that the relationship of trust which exists between the parties after the conclusion of the contract is not as close as, for example in the situation of partnership, or mandate. He states that there is no compelling reason to assist the insurer with a remedy of entitling him to repudiate liability merely because a fraudulent claim has been submitted. He suggests that other remedies exist in such a scenario, entitling the insurer to avoid liability on the contract, either because the risk in point has not yet materialised but for the commission of the fraud, or, as in a contract of indemnity insurance, the insured is not entitled to compensation in excess of his actual loss. Moreover, and because of South African law's adherence to the principle of parties being free to contract in any way that they so choose,[125]the contract can invariably be drafted at the instance of the insurer so as to include special reference to a remedy in the event of the insured's failure to uphold specific standards of good faith.[126]

Therefore, in order to cover themselves for situations arising in which the insured may discontinue exercising good faith after the conclusion of the contract, insurers provide for clauses in their policies that guard against their risk being undermined. As an example:

> 'Should there be any material change in the circumstances or nature of the risks which are the basis of this contract, the insured shall give immediate notice thereof to the company and no calim arising subsequent to such change shall be recoverable hereunder unless such change has been accepted by the company.'[127]

This practice of regulating extended risk by means of contractually incorporated clauses is widely accepted and can be determined by means of describing the limit of the risk in terms of the current contract[128] or by means of a warranty.[129]

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[123] Hare J, chapter 18-5, p688.
[124] The Law of South Africa, Vol 12, par 120, at p104.
[125] So long as the contract, or parts therof are not in breach of accepted standards of public policy.
[126] Joubert WA, at p105.
[127] *Nel v Santam Insurance Co Ltd* 1981 (2) SA 230 (T).
[128] See also *Perreira v Marine & Trade Insurance*, Corbett JA at 756:
> '...conditions of the policy define and are intended to define the full extent of the insured's duty to furnish information concerning the accident, loss or damage and.....there is no room for any superadded duty to disclose.'
[129] Oelofse AN, at p462.

Our courts have supported the inclusion of clauses into insurance contracts in order to protect the respective rights of the parties in that such clauses provide to the parties a written expression of their rights which are then clearly and unequivocally enforceable in terms of the written contract.[130]In *Lehmbecker's* case, the court refrained from deciding whether such written expression in a contract was co-extensive with the rights exercisable by insurers in terms of the common law. This is comparable with the previous decision of *Roome*[131] in which the court, in specifically holding that it had become a part of South African common law to disclose all material facts prior to entering into the contract of insurance, the contract itself is also usually an expression of the common law. In the latter case the deceased's failure to disclose true facts relating to a proposal form amounted to a breach of a warranty, entitling the insurer avoid liability.

Whilst the test employed in South African law to determine whether undisclosed facts are material or not at the conclusion of the contract so as to entitle the insurer to avoid liability in terms of the policy, is that of the reasonable man[132], the test for the determination of materiality of undisclosed facts at the time of submitting a claim has been more recently considered by our courts in a different light.[133] The insurer's principle concern when considering a claim is whether to accept liability and the nature and scope of the duty to pay thereunder. When clauses are specifically written into insurance contracts, the test to be applied is to determine whether the non-disclosure was material entailing an interpretation of the clause in question, in the light of the contract as a whole, against the background of evidence adduced by both parties to the dispute.[134] In other words, the courts employ a subjective test of analysing the materiality of a clause in the light of the particular contract in dispute.[135] This places in jeapordy, in the writer's view, the freedom of parties to insert clauses to protect themselves against false or fraudulent claims. The parties never remain secure in the knowledge that the terms of the contract will come to their assistance when the need so arises. If it is determined by the court that the misrepresntation or non-disclosure is not material to the claim that has been submitted, then the matter rests there, notwithstanding any amount of contractual wording that may have been inserted in order to prevent one or the other party from behaving contrary to the principles of good faith. In *Fourie's* case, the court held that even

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[130] *Lehmbecker's Earthmoving and Excavators (Pty)Ltd v Incorporated General Insurances Ltd* 1984 (3) 513 (A) at 523E-G.

[131] *Roome N.O. v Southern Life Association of South Africa* 1959 (3) 638

[132] Per Joubert JA in *Oudshoorn Municipality.*

[133] *Fourie v Sentrasure Beperk* 1997 (4) SA 950 (NC); see also the decision of *Qilingele v SA Mutual Life Assurance Society* 1993 (1) SA 69 (SCA). The decision in the latter case was criticised by Van Niekerk, SAMLJ, Vol 10, 1998, at p375.

[134] See Van Niekerk J P: Information and Disclosure in the Insurance Context: An overview of the Current Position and Recent Developments, SA Mercantile Law Journal, Vol 11, 1999, at p185.

[135] See also Hare J's criticism of section 53 of the Short Term Insurance Act of 1998, at p701.

if it were to apply an objective test of the reasonable man in establishing the materiality of the misrepresentation, it would lead to the same result.[136]

Interestingly enough, in a more recent provincial division decision a South African court[137], presided over by two judges on appeal from a magistrates court decision, took the bold step of ruling in the fashion of the English legal approach, in a motor vehicle insurance claim, that:

1. .....the Appellant's claim for damage to his vehicle was not affected by the false statement in his claim form, i.e. it would not make the claim a fraudulent one. The fact that the statement was knowingly made could not have influenced the respondent as a **prudent insurer**[138], to accept, reject or compromise the claim of the Appellant.[139]
2. .....that the contract of insurance was a contract which demanded the **utmost good faith** from both the parties, but it would be condoning a breach of good faith on the part of the Respondent if the court were to non-suit the Appellant because in making a legitimate claim he knowingly made a fraudulent claim which did not affect the Respondent's position to its prejudice at all, i.e. it was not material. The statement made by the Appellant did not exaggerate the claim nor did it have the effect of bringing the claim with the purpose of seeking to recover something under the policy to which he was not entitled.[140]

The case in question involved the submission of a claim in terms of an existing policy, which contained a clause providing for the forfeiture of the benefits in terms of the policy:

> '....if any claim under this policy be in any respect fraudulent, or if any fraudulent means or devices be used by the insured....to obtain any benefit under this policy.'

It seems that the court in coming to its finding appears to have done one of numerous things:

1. It regrettably confirmed the uncertainty created in the marketplace by the decision of *Videtsky* by allowing an insured to succeed after submitting a claim with fraudulent content;
2. It purported to agree with the strict foundations of good faith created and the test to be applied by English law pre-*Oudtshoorn Municipality*, and yet

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[136] At 981B-C.
[137] *Strydom v Certain Underwriting Members* 2000 (2) SA 482.
[138] Emphasis that of the writer's.
[139] At 486F-G.
[140] At 486G-J.

failed to recognise that such standards should be strictly adhered to in the completion of the entire claim form;

3. It has not brought our law any closer to appreciating an understanding of the overall notion of upholding standards of good faith *stante contractu,* short of outright fraud;
4. It considered that because the actual statement made by the insured was not material insofar as it affected the actual risk over which the insurer had issued the policy, the insured's failure to uphold standards of good faith (in whatever degree), was irrelevant.

It is the writer's view that the requisite standard of good faith which has been commonly accepted by our courts since *Oudtshoorn Municipality* should be even more stringently applied after the conclusion of the insurance contract. The parties have effectively sealed their commitment to each other by virtue of the contract. They were obliged to divulge information to each other at the inception of their contractual relationship in order that they could be comfortably *ad idem* as to the precise nature of their obligations towards one another, and so should this status quo remain. It would in the writer's view defeat the entire object of their contractual goodwill towards each other, if at a later stage, the parties were allowed to behave less faithfully towards each other than they did in order to reach agreement in the first place. It creates a mockery of our basic entrenched principles of contract to consider it ethically correct to expect a lower standard of good faith to be exercised after the parties are, so to speak 'in bed with one another'. The intimacy of their contractual relationship has effectively grown that much closer. They should, in the same vain be expected to be more vigilant in their endevours to adhere with strict compliance to their respective duties of good faith. If therefore, the parties elect, at the inception stage, to insert clauses to ensure that such duties are upheld, then particular heed needs to be taken of the fact that the extra precaution was in fact taken to guard against the inherent human tendency to slacken off once the deal has been struck.

Our courts have not yet been bold enough in their assertions to uphold standards of good faith *stante contractu.* Like the English courts, from which they borrow much of their persuasive authority, they tend to cast greater emphasis on the need to ensure that standards of good faith are adhered to at the inception stage. The failure to create a body of precedant to ensure that the practice of good faith endures beyond the inception stage continues to send tremours rippling through the marketplace. Parties can only be assured of limited security in the form of prevention against fraudulent cliams. Beyond that it appears to be a free for all, that can only be individually tested on a case by case basis. This highly unsatisfactory state of affairs requires urgent judicial intervention in the form of either legislative authority or strong judicial precedant. The writer favours the former approach in that it will provide our courts with stronger support in the development of a body of case law which at

this stage has been somewhat lacking.[141] It is particularly in the area of marine insurance where the insurer's risk is that much higher than land based insurance that good faith needs to be stringently enforced at all times, both prior to and more paricularly in the context of the current discussion, during the existence of the contract. The existing legislative provisions on the topic are briefly canvassed by section 53(1) of the Short Term Insurance Act No 53 of 1998, and shall be discussed in greater detail in the next section of this discussion. It suffices to say however that there exists no currently enforceable legislative provision, notwithstanding the content of section 53(1) that seeks to ensure the continued exercise of good faith after the conclusion of the contract of insurance.

[141] This view is supported by Van Niekerk J P: Non-disclosure, misrepresentation and breach of warranty in South African Insurance Law: Some Tentative suggstions for Reform, TSAR, 1994-4, at p585.

(7) THE NEED FOR CODIFICATION OF THE SOUTH AFRICAN LAW OF MARINE INSURANCE:

It is arguable that if the South African shipping fraternity were more active in the world framework, then there would be stronger cause for the need to specifically legislate in the area of marine insurance. Because our own shipping industry is so small, comparatively speaking, the public demand has never been that great to bring about legislative change in this area of the law. Our courts have to date, for example, never been confronted by a case in which the minds of the judiciary have needed to be cast upon such questions as: the need to exercise good or utmost good faith at the time of concluding or during a contract of marine insurance. Moreover, policies of marine insurance often provide for a 'choice of law clause', in terms whereof, the parties to the contract are at liberty to decide what law is to apply to the contract in the event of a dispute arising.[142] Problems may however arise when a South African court is eventually seized with a matter of marine insurance, in which the question of good faith needs to be addressed. As already indicated[143], there is little certainty on exactly which law is to apply (English or Roman-Dutch) in such a scenario. One fears that if the courts were to apply Roman-Dutch principles to the specific issues that have been addressed in this paper to questions of marine insurance, one might very well not achieve an equitable result that would be pleasing to the minds of the shipping industry, both locally and internationally. In order to achieve some form of stability and conformity with accepted international principles relating to good faith and marine insurance, it is submitted that our legislature has a moral and commercial duty to produce such an internationally compliant piece of legislation.

(a) The Present Statutory Position:

The present legislative position is regarded as highly unsatisfactory. The old section 63(3) of the Insurance Act 27 of 1943 has been re-enacted in its exact terms in the new Long Term Insurance Act 52 of 1998 (see section 59(1)) and in the Short Term Insurance Act 53 of 1998 (see section 53(1)).[144] The relevant section reads as follows:

> 'Notwithstanding anything in a .....policy contained, whether entered into before or after the commencement of this Act, ...-
> (a) the policy shall not be invalidated;
> (b) the obligation of the.....insurer therunder shall not be excluded or limited; and
> (c) the obligation of the policyholder shall not be increased,

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[142] Joubert, W A, at p295.
[143] Supra, pages 15-17.
[144] For a detailed criticism, see Van Niekerk, J P: SAMLJ, Vol 11, 1999, at p178.

> on account of any representation made to the insurer which is not true, whether or not the representation has been warranted to be true, unless **the representation is such as to be likely to have materially affected the assessment of the risk**[145] under the policy concerned at the time of its issue or at the time of any renewal or variation thereof.'

Van Niekerk J P[146] submits that the preferred interpretation of the section is to be found in *Pillay's* case[147], in which the court found that the correct test to apply for determining the materiality of misrepresentations that were warranted to be true was the same as the test to be applied in the case of non-disclosure. In other words, it was an objective inquiry of the reasonable man, in terms whereof a parallel was drawn between the test applied for a misrepresentation by commission and a misrepresentation by silence. In so doing, the requirement to exercise good faith, in the context of South African law, was determined in accordance with the yardstick of the reasonble man, who, in turn was used to establish the materiality of the non-disclosure/misrepresentation.

The position was however sadly interrupted by the decision of *Qilingele*[148], in which the court ruled, on a direct interpretation of the section that it was a subjective test that was required, and in terms whereof misrepresentations were not likened to non-disclosures, but rather, distinguished.[149]Van Niekerk J P asserts that the main criticism to be leveled against the decision is that the test to be applied in cases of misrepresentations is no longer objective[150]. He points out that the reaction of the specific insurer is not relevant to the determination of the materiality of a misrepresentation, or whether, in the delictual sense, it is unlawful. The effect of *Qilingele*, according to Van Niekerk J P, has been to render the insured completely defenseless against the insurer in cases of misrepresentations. The insured need merely establish that he would have been influenced in his assessment of the risk by the incorrect information, as represented by the insured. The failure of *Qilingele*, can, in Van Niekerk J P's view, be attributed not only to 'an insensitive interpretation of section 63(3)', but rather, and in addition, if not assisted by a poorly drafted piece of legislation. Hare J opines, in concurrence with the views expressed by Van Niekerk J P, whilst referring to the decision of Schutz JA in *Clifford's*[151] case, that the intended purpose of the legislator did not achieve the right result in its wording of section

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[145] Emphasis that of the writer's.
[146] SAMLJ, Vol 10, 1998, at p375.
[147] *Pillay v South African National Life Assurance Co Ltd* 1991 (1) SA 363 (D) at D-E.
[148] *Qilingele v SA Mutual Life Assurance Society* 1993 (1) SA 69 (SCA).
[149] Hare J, at p701.
[150] SAMLJ, Vol 10, 1998, at p376.
[151] *Clifford v Commercial Union Insurance Co of Soth Africa* 1998 (4) SA 150 (SCA).

63(3). It is, in his view, sufficiently clear to have intended the use of a subjective test,[152] when in fact, an objective test is what is required.

In *Clifford's* case the court failed to overturn the ruling made in *Qilingele*, but rather expressed an opinion on the incorrectness thereof. Schutz JA felt that the effect of the latter decision was to dispose of the traditional common law method of establishing materiality, and to replace it with a test that recognised two forms of misleading, one by means of a positive statement, the other by means of an ommission to state, the former now being subjected to a subjective test. In his criticism of the manner in which *Qilingele* interpreted Section 63(3), Schutz JA remarked:

> 'The manifest purpose of the provision is to improve the lot of the insured, not to worsen it or give with the one hand and take away with the other. An interpretation of the provision which involves an apparent amelioration of the insured's position but brings with it a benefit for the insurer which the common law steadfastly refused to give him is, in my view, inherently suspect.....'[153]

What is of even further relevance, in the present discussion, is that the requirement of good faith has been severely comprimised by the combination of a poorly worded enactment and failure on the part of the judiciary to clarify the glaring exposure to abuse to which an insured may be rendered.[154] The basic tenets of exercising good faith, be it in the Roman- Dutch eyes of the reasonable man, or in the Englishman's eyes of the prudent insurer appear to have escaped from the minds of our lawmakers and courts. Whilst it may be that the legislator was trying to be overly cautious in couching his wording with particular phrasiology, he inadvertantly, one hopes, ommited to take cognizance of the lacunas that would flow from its interpretation. Perhaps, assuming for a moment that the *Oudtshoorn Municipality* decision is still good law, it would have been more 'prudent' on the part of the legislator to have included such wording as 'good faith' and 'reasonableness', so as to narrow the interpretation of the provision with a more desirable and equitable result.

A further criticism of the current statutory position is the omission on the part of the legislator to include a provision on the duty to disclose. [155]The common law duty of disclosure would therefore prevail, and in terms whereof the onerous

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[152] Cf Van Niekerk J P, at 379:

> '.....it is less than apparent thatthat section 63(3) is actually concerned with the obvious requirement of inducement.'

[153] At 158H-I.

[154] Schulze W G criticizes the two Long and Short term Insurance Acts as being drafted at the dictated will of the insurance industry and not as a model of pro-consumer legislation, in keeping with international standards. SAMLJ, 1999, Vol 11, p177.

[155] Van Niekerk J P: SAMLJ, 1999, Vol 11, at p186.

duty on the part of the prospective insured, pre-contractually, remains the operative yardstick.[156] Much criticism of the common law approach to this duty is to be found. Van Niekerk J P[157] points out that the breach of the duty to disclose, which, in turn, is governed by the test for wrongfulness in the delictual sense has unjust and inequitable results. It places upon the insured, who is judged in the eyes of the community, a singular duty to make known all information which may be seen to be objectively material to the risk that is to pass to the insurer. It is Van Niekerk J P's view that the more reasonable approach would be to expect rather of the insurer to make all necessary inquiries that he considers relevant to the assessment of the risk in a carefully couched proposal form. This should then form the extent of the duty to disclose. It is doubtful however whether this approach too, would lead to the desired equitable result. There may be certain information that is particularly unique to the knowledge of the insured, especially in the marine insurance context, that may be material to the assessment of the risk. One feels that any legislative intervention in this area should take cognizance of the reciprocal duties, both on the part of the insurer and insured, and which may not be included in the questions raised by the insurer in the proposal form to ensure that information of a material nature is divulged.

(a) The Draft Bill on Marine Insurance:

There has been mooted for some time now that South Africa should introduce its own unique piece of marine insurance legislation. Advocate D Shaw (Q.C.) has been the author behind a redrafted draft bill that has stark similarities to the English Act of 1906. The relevant sections of the draft, in the context of this discussion are sections 17, 18, 19 and 20. The similar provisions that are to be found in the English Act are sections 17, 18, 19 and 20 respectively. The relevant provisions of the Bill read as follows:

> '(17) Insurance is bonae fidei:
>
> (1) A contract of insurance is a contract based upon good faith, and, if the requisite degree of good faith be not observed by either party, the contract may be avoided by the other party;
>
> (2) In particular, without derogating from the generality of sub-section (1), a contract may be avoided by the insurer if the assured or his agent fails to make disclosure in accordance with sections 18 and 19.
>
> (18) Disclosure by the Assured
>
> (1) subject to the provisions of this section, the assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured,

[156] Van Niekerk J P, supra, at p182.
[157] Van Niekerk, J P, supra at p183.

and the assured is 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;

(2) (a) every circumstance is material which would influence the judgement of a reasonable insurer in fixing the premium, or determining whether he will take the risk;

(b) A circumstance may be material even if it affects only questions of legality, solvency or moral risk;

(3) In the absence of inquiry the following circumstances need not be disclosed, namely:

(a) Any circumstance which diminishes the risk;

(b) Any circumstance which is known or presumed to be known to the insurer. The insurer is presumed to know matters of common notoriety or knowledge, and matters which an insurer in the ordinary course of his 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;

(4) Whether any particular circumstance, which is not disclosed, be material or not is, in each case, a question of fact;

(5) The term 'circumstance' includes any communication made to, or information received by, the assured.

19. Disclosure by agent effecting insurance:

Subject to the provisions of the preceding section as to circumstances which need not be disclosed, where an insurance is effected for the assured by an agent, the agent must disclose to the insurer:

(a) Every material circumstance which is known to himself, and an agent to insure is deemed to know every circumstance which in the ordinary course of business ought to be known by, or to have been communicated to him; and

(b) Every material circumstance which the assured is bound to disclose, unless it came to his knowledge too late to communicate it to the agent.

20. Representations pending negotiation of contract:

(1) Every 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 in all material

respects. If it be untrue in any material respect the insurer may avoid the contract;

(2) A representation is material which would influence the judgement of a reasonable insurer in fixing the premium, or determining whether he will take the risk;

(3) A representation may be either a representation as to a matter of fact, or as to a matter of expectation or belief;

(4) A misrepresentation as to a matter of fact is true in all material respects if it be substantially correct, that is to say if the difference between what is represented and what is actually correct would not be considered material by a reasonable insurer;

(5) A representation as to a matter of expectation or belief is true in all material respects if it be made in good faith and correctly reflects in all material respects the relevant expectation or belief;

(6) A representation may be withdrawn or corrected before the contract is concluded;

(7) Whether a particular representation is material or not is, in each case, a question of fact.'

The wording of the draft has favoured the law as it has been pronounced in *Oudtshoorn Municipality* by retaining the duty to exercise good faith rather than utmost good faith. Of further interest is the addition of a further clause in section 17, which states that the insured may avoid the contract in particular, if the insured fails to exercise good faith at the time of disclosure. This disclosure requirement, like its English counterpart, has been limited to the period of time immediately prior to the conclusion of the contract. What is particularly relevant is the specific inclusion of the second subsection to section 17. Its interpretation may be such as to suggest that the importance of exercising good faith is really only of particular relevance when the insured is required to disclose information to the insurer at the period immediately prior to the inception of the contract.

One visualizes potential problems arising with respect to the following areas of concern:

- No provision has been for the exercise of good faith *stante contractu*. One would expect the time to have arrived for any statutory enactment to now take cognizance of the need for both parties to respect each others rights to be treated with the same degree of goodwill during the contract as is expected immediately prior to its inception. Although such duties have been imposed by specific contractual terms, subject to interpretation on a case by case basis[158], this piecemeal handling of an essential feature to any insurance

[158] Van Niekerk J P: SAMLJ, Vol 11, at p185.

contract, one feels, deserves statutory intervention. It is particularly in the area of marine insurance, where the hazardous perils of the sea continue to play havoc on the ship and its cargo that one would expect the lawmaker to insist upon the extended duty to exercise good faith for the entire period of the contract that the owner of the ship and its cargo enjoys cover.

- No specific duty of disclosure has been placed upon the insurer to either elicit the relevant information necessary for it to assess the relevant risk or to itself make disclosure of material information;

- South African common law principles of determining materiality of non-disclosure have been included by specific wording[159], and serves to further entrench the disparity between the rights of the insured as opposed to those of the insurer.[160]

- 'the reasonable insurer' has been used at section 18(2)(a). This is a further development of the notion of the reasonable man, because it introduces an element of subjectivity into the inquiry, visualized through the eyes of the insurer, who, naturally, would have his own hidden agendas for avoiding risk due to non-disclosure;

- Representations (or its corollary, misrepresentations) have thankfully, albeit still to a limited extent, been clarified by section 20, which is a significant improvement on section 53(1) of the Short Term Insurance Act 53 of 1998. However, neither section has addressed the issue of misrepresentations that may arise *stante contractu*, and, like the subjective test introduced by section 53(1), section 20 also favours the determination of the materiality of the misrepresentation through the eyes of the so-called 'reasonable insurer';

- The determination of the materiality of a non-disclosure or misrepresentation, as the case may be, through the eyes of the reasonable man in the position of the insurer, leads, for various reasons as suggested above, to inequitable results. A test for materiality should rather incorporate the two test approach as previously discussed.[161]

- Ironically, and although the wording of the above quoted sections starkly resemble the wording of the English 1906 Act, the use of specific of phraseology presupposes the adoption of South African law in the choice of the applicable law[162]. If this were the case, then the influential and persuasive nature of English law would be further diminished through the

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[159] The use of the words 'reasonable insurer' at section 18(2)(a).
[160] See Van Niekerk J P's criticism in this regard at p42, supra.
[161] Supra, at p23.
[162] As required by section 6(1)(a) and (b) of the Admiralty Jurisdiction Regulation Act 105 of 1983.

continued invocation of Roman-Dutch law principles. These principles purportedly fail to recognize utmost good faith as an element of insurance law[163]. This is despite the particular relevance thereof in the area of marine insurance that has been progressively expressed, not without justification, throughout the English, as well as the early South African decisions.

[163] Per Joubert JA, in *Oudtshoorn Municipality.*

(8) CONCLUSION:

This discussion has sought to elucidate some of the differences that exist between the English and the South African law approach to dealing with good faith in the context of marine insurance contracts. Within this difference there has been the added disruption of seeking to create in our law our own brand of Roman-Dutch culture. Such efforts have by and large been more disruptive than constructive. One cannot ignore the very real influence that English law has had in shaping South African law during the colonial and union eras, and this is particularly so in the area of insurance. South Africa needs to learn and arm itself with a strong repertoire of legal principles and it would serve no purpose in insisting on making use of age-old principles to explain modern marine insurance trends. The haphazard manner in which our courts have scantily applied different principles to explain their interpretation of the law has served to exemplify exactly how grey this area of our law has become.

An effective cleansing mechanism would appear to be the promulgation of a new piece of legislation that caters specifically for the needs of the marine insurance industry. The time has come, in the writers view, to bring back some of the valuable input of English law, which, for all intents and purposes, has been the flagship of international marine insurance thinking. Considering the specialized niche which the law of marine insurance occupies, and the particular need to ensure that it retains its international flavour in the world of international trade, one would expect the lawmaker to be more open minded in accepting the significance of established legal principles such as that of utmost good faith.

Our new democracy prouds itself with a constitution that upholds standards of equality that are based on standards invoked by the most developed of nations. Equally as important is the perseverance of that trend with all future legislative enactments. The beauty about new law is just that – it is new. Unlike judicial precedent, it does not need to rely on its predecessors for help and guidance. The legislator is free to use his drafting skills to create good law where it has been otherwise lacking. What is therefore desirous is the promulgation of a piece of legislation that generates certainty and eliminates confusion, that fills the gaps where they have been otherwise gaping, and which promotes strength and stability in the insurance market, both locally and internationally.

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