

PRINCIPLE OF *UBERRIMA FIDES* IN INSURANCE LAW**-TANYA KUKADE¹****Abstract**

Insurance contracts involve the placing of risk on the insurer in the interest of the insured for a certain event or upon the happening or not happening of such event, in other words it is a contract based upon speculation for a consideration known as premium. Since the very basis or purpose of insurance contracts is the transference of risk and its distribution the maintenance of good faith between the parties becomes of immense importance. Insurance law requires an additional duty of utmost good faith in consonance with the basic duty of disclosure as imposed by the law.

Key Words: insurance, good faith, consideration, utmost good faith

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Insurance contracts involve the placing of risk on the insurer in the interest of the insured for a certain event or upon the happening or not happening of such event, in other words it is a contract based upon speculation for a consideration known as premium. Since the very basis or purpose of insurance contracts is the transference of risk and its distribution.

In case of ordinary contracts the parties owe a mere duty of showing ordinary good faith and no further duty in order to inform the other party to make a sound decision as the implications of the Contract Act allow the party kept under the dark to avoid the contract on grounds of misrepresentation or concealment of facts or fraud.² Thus in such cases it is upon the parties to voluntarily enquire into the facts of every case in order to satisfy themselves of the nature of submissions made i.e the concept of Caveat emptor.

While insurance contracts imply a certain risk upon the insurer and thus require the insured to disclose all information or material facts relating to such risk in order to protect the insurer, thus requires an additional liability on the insured of utmost good faith or the duty of disclosure.³ The doctrine of *Uberrima fides* was introduced in the common law⁴ by Lord Mansfield in the case of *Carter v Boehm*⁵ and is now accepted as an important principle in Insurance Law in a narrow sense pertaining to the materiality of facts involved. Although Lord Mansfield intended to apply the said doctrine to all contracts. The said Latin phrase stands for ‘utmost good faith’ in insurance law contracts between the parties thereto necessitating the parties to voluntarily disclose to each other any such information considered material before the conclusion of the contract. Thus, imposing a higher duty on the parties since it is presumed that the person approaching the insurer has complete knowledge whereas the insurer only relies on such information produced to him for the purposes of granting of the insurance.

It can be deduced that the purpose of introducing the principle of utmost good faith was in furtherance of bringing under consideration the exact, actual as well as the potential risk

²M N Srinivasan, *Principles of Insurance Law* 211 (7th ed. Reprint, Wadhwa and Company, 2008).

³E.R. Hardy Ivamy, *General Principles of Insurance Law* 105 (3rd ed. London Butterworths, 1975).

⁴ The Doctrine of Utmost Good Faith under Common Law. LawTeacher.net. (Jul. 2019, 4:30 PM) <<https://www.lawteacher.net/free-law-essays/contract-law/the-doctrine-of-utmost-good-faith-under-common-law-law-essay.php?vref=1>>.

⁵*Carter v Boehm* 97 ER 1162, 1164 (1766).

involved which the insured seeks to transfer on the insurer prior to the contract being concluded who in turn may retransfer the said risk onto another insurer. A duty to disclose any such material information would make the contract void ab initio and would subsequently be treated as never to have existed.⁶

Equal duty on parties

The duty of utmost good faith imposes an obligation upon the approaching party to disclose all material circumstances in order to prevent the policy from lapsing. Thus, as a corollary it can be construed that the duty restricts or forbids the party from concealment of information or non-disclosure of material facts which he is deemed to have knowledge of in order to influence the decisions of the policy giver in terms of the premium to be charged, the acceptance or rejection of any given policy, the risk he is so incurring or indirectly to influence his opinion.⁷ The said duty is also passed on equally to the agents of the insurers as well as the insurers, to disclose any such information considered necessary to be disclosed to the approaching party, that which lies within the scope of knowledge of such individuals, thus imposing an equal duty upon the insurer in practical application of the principle of duty of utmost good faith.⁸

Scope of duty

The scope of the duty of disclosure by the approaching party to the insurer has been the subject matter of litigation in numerous cases in India⁹ and have been time and again decided in the favour of the insurer after giving due consideration to the disclosure clause in the insurance policy. Any non-compliance or non-disclosure would cast a shadow of doubt over the approaching party in cases of claims being made against the insurer.

Similarly, the scope of insurer's duty towards the insured or assured is rarely discussed by the courts.¹⁰ The reason for the same being the presumption that the approaching party alone has complete knowledge of the relevant facts based on which he seeks cover.

⁶P. Sarojam v. Life Insurance Corporation of India, AIR 201, 203 (Ker: 1960).

⁷Brownlie v. Campbell, 5 App Cas 925, 954 (Cas: 1880).

⁸Life Insurance Corporation v. Shakuntalabai, AIR 68 (AP: 1975).

⁹Kumar v. AGF Insurance Ltd. 4 All ER 788 (1998).

¹⁰M N Srinivasan, Principles of Insurance Law 219 (7th ed. Reprint, Wadhwa and Company, 2008).

Legal Basis of duty

The principle of good faith imposes a duty on both parties i.e the insured and the insurer in the contract of Insurance prior to the conclusion of such contract thus it may be construed or implied that the duty of disclosure exists prior to the contract and does not arise from the same. The basis of the said duty lies in the jurisdiction exercised by the Courts of Equity.¹¹ Thus, in legal terms the duty of utmost good faith is construed on the basis of equity principles in order to prevent any wrongful gain or wrongful loss to either party in the contract. In terms of the Indian Contract Act, 1872 it has been stated that mere silence of the party does not constitute a fraud or misrepresentation in the absence of duty to speak, as provided under Section 17 of the Act. Although, the Contract Act provides for the voidability of contracts in case of wilful misrepresentation.

While the Indian Marine Insurance Act, 1963 provides that the insured must disclose all material information or facts falling in the ordinary course of business of such person to the insurer before the conclusion of the contract. In case of failure to do the same, the insurer would be eligible to avoid the contract under question, as provided under Section 20 of the said Act.¹²

Lord Atkin quoted in a landmark judgment that,

“There are certain contracts expressed by law to be contracts of the utmost faith where material facts should be disclosed. If not, the contract is voidable. In Insurance cases the duty does not arise out of the contract; the duty of the person proposing the insurance arises before the contract is made.”¹³

Similarly, non-disclosure or breach of duty of disclosure or utmost good faith also attracts penal consequences. Under 133(1) of the Financial Services Act, 1986, any person who dishonestly conceals any material facts is guilty of an offence if he does this for the purpose of inducing another person to enter into or to refrain from entering into a contract of insurance with the

¹¹Nargis Yeasmeen, Consequences of Non-Disclosure in the Contract of Insurance31, IOSR Journal of Business and Management (IOSR-JBM), ISSN: 2319-7668. Vol.17, Issue 6.Ver. III, 29-36, (June. 2015).

¹²Banque Financiere v. Westgate Insurance, All ER Rep 952, 990 (1989) (Approved on appeal in (1990) 2 All ER Rep. 947. 950 HL).

¹³Bell v. Lever Bros. Ltd., All ER Rep (1st) 32, 1932 A.C. 161 227.

insurer. The commission of the said wrong attracts a minimum of 7 month imprisonment or fine or both. Non observance of the principle allows the party to avoid its enforcement.

Analysis

The principle of utmost good faith has been invariably retained and applied till date and can be construed as imposing an unreasonably heavy obligation on the approaching party with respect to the scope of disclosure of information although, on the flipside such disclosures become necessary in determining the existing or potential risk that would be incurred by the insurer under the contract. The possibility of an innocent failure to provide for certain material facts has been completely left unaddressed by the courts.

Conclusion

In contracts relating to insurance as the subject matter, the duty of utmost good faith are implied in the contract between the parties placing them under a special obligation towards each other to make full disclosure of the material facts as well as to refrain from making any wilful misrepresentations thus differentiating the caveat emptor principle from the scope of insurance contracts.¹⁴ The duty of utmost good faith is independent from the general duty of good faith imposed by contract law. The duty is implied although it may be extended or restricted by altering the terms of the contract.¹⁵

¹⁴Lakshmi Ins. Company v. BibiPadmawati, AIR Pun 253, 260, (1961).

¹⁵M N Srinivasan, Principles of Insurance Law 222 (7th ed. Reprint, Wadhwa and Company, 2008).