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## THE COMMON LAW OF NON-DISCLOSURE IN GUYANESE INSURANCE LAW

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### INTRODUCTION

It is intended in this article to review the various aspects of the principle of non-disclosure in Insurance Law which arose in the recently reported Guyanese case of *Walter Pillay v. Guyana and Trinidad Mutual Life Assurance Co. Ltd.*<sup>1</sup>

In *Pillay*, the deceased who held a private student's pilot licence<sup>2</sup> applied to the defendant company for an insurance policy on his life with double indemnity and total disability benefits. In completing the proposal form upon which the policy was issued, the deceased failed to disclose that he was a student pilot and had actually flown as a pupil on various occasions before the contract of insurance was entered into. Again, in the proposal form the deceased was required to say whether he had any intention of going into the interior of the country, and whether he had any intention of serving with the Army, Navy or Air Force. To all these questions, the deceased answered in the negative. After the policy was issued the deceased went on a solo flight and was killed in a crash. On a claim under the policy, the insurance company sought to repudiate liability.

The issues arising out of this case as Bollers, C.J. of the Supreme Court of Guyana saw them were: (1) whether the fact that the deceased was learning to fly at the time the proposal was made was a material fact to the insurance policy in question; and (2) whether the questions in the proposal form had in essence limited the deceased's common law duty of disclosure.

It was held by the learned Chief Justice that:

- (i) The principles of English law relating to fire and life insurance prevail in Guyana.

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- (ii) The deceased's flying activity was a material fact to the issuing of the policy.
- (iii) The effect of the questions asked in the proposal form was sufficient to alert the assured to his flying activity, which he ought properly to have disclosed.
- (iv) The "basic clause" by which the assured warrants the answers in the proposal and Medical Examiner's form to be "the basis of the Contract", did not limit the proposer's common law duty to disclose all material facts within his knowledge.
- (v) Further, the questions asked in the proposal form did not amount to a waiver of the common law duty of disclosure — a principle not to be easily presumed.

#### COMMENTARY

In Guyana the law regulating insurance business is governed by the Insurance Act of 1970.<sup>3</sup> This Act sets up the machinery for the administration of insurance business in the country. In short, it regulates the process of registration, the winding up of insurance companies and the Association of Underwriters. It does not make provision for the substantive law governing insurance and the problem which arises therefore, is to ascertain first and foremost, the source of the law in the event circumstances arise involving as in the instant case, substantive principles of insurance law. It would appear then that in the absence of statutory enactment resort may be had to the common law. At this point also, it becomes necessary to find out why the Guyanese student of law would resort to the common law for an answer to a legal problem.

The answer to that question is not far-fetched. By virtue of s. 13 of the Civil Law Act:<sup>4</sup> "in every suit, action, and cause having reference to questions of fire and life assurance which are henceforth brought in the High Court, or in any other competent Court of this country, the law administered for the time being in the High Court of Justice in England, so far as that law is not repugnant to, or in conflict with any Act now in force in Guyana, shall be the law to be administered by the High Court or other competent Court."

Section 2(b) of the Civil Law Act also provides that the common law of England shall be the common law of Guyana.

It is therefore not surprising that the issues in this case which revolve around the common law duty of disclosure of material facts on the part of the insured and waiver of such duty by the insurer in relation to insurance contracts, are accordingly decided on the relevant common law principles.

### *Basis of the Duty*

Under the general principle of contract law the parties are expected to act in good faith but they are not bound to tell the other all the facts relating to the transaction.<sup>5</sup> The common law position is simply *caveat emptor*.

A contract of insurance, however, operates on a different basis. It is founded essentially on the basis that the parties will treat each other with utmost good faith — a duty required of the parties throughout the transaction — often expressed in the phrase *uberrima fides*.

This fundamental principle of insurance law is clearly stated by Lord Mansfield, C.J. in *Carter v. Boehm*<sup>6</sup> and further amplified by Jessel, M.R. in *London Assurance v. Mansel*<sup>7</sup> where the Master of the Rolls observed “. . . whether it is life, or fire, or marine assurance, I take it good faith is required in all cases.” This principle is now well established at common law.<sup>8</sup>

By the operation of this principle it is deemed that the insured alone possesses full knowledge of all facts material to the risk which he wishes to place with the insurer and the law therefore requires him to show *uberrima fide*. So that if the insured knows of any circumstances that may influence the insurer's opinion as to the risk he is to undertake, and as to whether he will take it, or what premium he will charge if he does take it, the insured must state what he knows. Consequently, there is an obligation on the insured to disclose all material facts known to him,<sup>9</sup> otherwise, the contract may be rescinded at the option of the insurer.<sup>10</sup> While there is no duty on the insured to disclose facts which he does not know or could not reasonably be expected to know,<sup>11</sup> he must disclose those facts which he ought to know.<sup>12</sup>

### *Material Facts*

In the instant case the Court has stated the law<sup>13</sup> that insurance is a contract *uberrima fide* and requires full disclosure of such material facts as are known to the insured. In order to ascertain what is a material fact

in the circumstances, Bolders, C.J. applied the test contained in the Marine Insurance Act, 1906 (U.K.),<sup>14</sup> which states: "every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium or determining whether he will take the risk."

Although that Act makes provision for marine insurance it would appear that this test is applicable to all classes of insurance<sup>15</sup> by virtue of the fact that s.18(2) of the Marine Insurance Act effectively enacted the common law definition of the subject.<sup>16</sup> But most often the courts refer to that section in every branch of insurance law, as if the Act applies with equanimity in every insurance case involving material facts without stating that all the section did was to re-define and codify the principles enunciated by case law. Apart from applying this statutory definition in *Pillay's Case*, Bolders, C.J. had previously applied it in order to ascertain what would amount to a material fact in the circumstances in *Marks v. First Federation Insurance Co.*<sup>17</sup>

Having now established that the definition is applicable to Guyana not by virtue of the U.K. enactment but by reason of common law principles, it remains now to be discovered whether the judgment in *Pillay's Case* is in accordance with common law authorities on the issue.

Examples of what the Courts regard as material facts in any given branch of insurance law can be multiplied. Suffice however, to illustrate with the following instances. In *Schoolman v. Hall*<sup>18</sup> — a case of jewelry insurance — it was held that the criminal record of the proposer was a material fact which ought to have been disclosed. Again on a life policy case,<sup>19</sup> it was held that a minor kidney trouble and attacks of pharyngitis which the proposer suffered from were material facts.

All facts are material which suggest that the proposed assured in effecting the insurance is actuated by some motive and not merely by ordinary prudence. The insured in one case<sup>20</sup> insured his warehouse on the very evening after the next-door shop had caught fire and spread to the warehouse. In an action on the policy the jury found that the insured should have disclosed the circumstances of the first fire. Consequently, the insurance company was entitled to avoid the policy on the ground of non-disclosure.

The consideration of what is a material fact also entails an understanding of the meaning of the expression "prudent insurer". This matter was considered in *Associated Oil Carrier Ltd. v. Union Insurance Society of Canton*<sup>21</sup> where it was held that a prudent insurer is not taken to know

the law. Dealing with this subject, Lord Atkin lucidly expressed the view that: "There seems no reason to impute to the insurer a higher degree of knowledge and foresight than that reasonably possessed by the more experienced and intelligent insurer carrying on business in that market at that time".<sup>22</sup>

It is then clear that the test is an objective one and Bollers, C.J. rightly pointed out in *Mark's case*<sup>23</sup> that "the test to be applied, whether a particular fact is one which ought to be disclosed, is not what the assured thinks<sup>24</sup> nor even what the insurer thinks<sup>25</sup> but whether a prudent and experienced insurer would be influenced in his judgment if he knew of it."

Although the Court must rule, as a matter of law, whether a particular fact is capable of being material and give direction as to the applicable test, the decision whether a fact is material or not is essentially a question of fact, dependent upon the matters proved in court.

In order to prove the materiality of facts expert witnesses may be called, that is, persons "actually engaged in the occupation of insurer,<sup>26</sup> and medical men."<sup>27</sup> Where the facts speak for themselves, of course, no expert evidence is necessary. However, the facts do not always speak for themselves.<sup>28</sup> In such a case if no expert evidence is offered it means that the Court may make use of its own knowledge as to whether a fact is material or not. This is evidenced by the statement of Scrutton, J. in a case where no expert evidence was tendered, ". . . I am therefore, left to form my own judgment on the questions from such knowledge as I have of insurance matters."<sup>29</sup>

It is submitted that the real danger in this matter is that not every judge has the necessary experience of the insurance business. Whereas the principle enunciated by Scrutton, J. may have worked smoothly in his own peculiar circumstances, based upon his wealth of experience in commercial law in general, the principle, if of general application may create bad precedents. Although there is no case on the point, the danger inherent in the Scrutton principle can hardly be underestimated.

It must be pointed out, however, that the problem did not arise in *Pillay* since expert evidence by the Company's secretary was accepted by the Court. The evidence was to the effect that it was a practice of the Company in cases where the proposer was engaged in flying activities to issue a policy at a higher premium with a "flying clause" attached.<sup>29a</sup>

On the basis of this expert evidence the learned Chief Justice rightly found that the insured's flying activities would influence the judgment of a prudent underwriter in fixing the premium or in determining whether or not he would take the risk.

### *Non-Disclosure*

Having ascertained that the deceased's flying activity was a material fact, the next question is whether there was a non-disclosure of this fact. 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 to have known in the ordinary course of events.

In the Guyanese case of *Marks v. First Federation Life Insurance Co.*<sup>30</sup> it was held by the Chief Justice that the non-disclosure of a material fact avoided the policy. The material fact in that case was that the deceased had been hospitalised five months before the policy was issued, but he did not disclose that fact at the time the contract was being made.

Where the insured is engaged in peculiarly hazardous occupation that ought to be disclosed, for example, where the proposer in a life policy was described as a "gentleman" and he made no disclosure of the fact that he occasionally drove cars in races, it was held that the insurers were entitled to repudiate liability on the contract.<sup>31</sup>

In cases where the material fact is within the actual knowledge of the proposer a distinction must be drawn between non-disclosure and "concealment."<sup>32</sup> Strictly speaking concealment implies suppression of something which it is the duty of the assured to bring specifically to the notice of the insurer and not merely an inadvertent omission to disclose.<sup>33</sup> If, on the other hand, the failure to disclose is not due to design and the assured has no intention to deal otherwise than frankly and fairly with the insurers, the term "non-disclosure" may be more appropriate.

On this issue, Bollers, C.J. in *Pillay* was of the opinion that the mere mention of aeronautic voyages in clause (1) together with the nature of the question 5(a) and (b) of the proposal form showed that the deceased's flying activities were material fact which he ought properly to have disclosed. Moreover, he stated that

the deceased in this case cannot be properly described as innocent, as when he signed the proposal form two days after he had his fifth flying lesson and roughly two months after obtaining his student's pilot's licence his mind must have been adverted to

the risk. Also the circumstances that he had held two policies for comparatively small sums and in the midst of his flying activities he sought to effect his policy for a larger sum seems to raise the reasonable inference that he did so because he realised that he had become engaged in a hobby which can only be described as hazardous.<sup>34</sup>

In effect, it would seem that there was a concealment of material facts.

### 'Basis Clause'

A policy may contain an express stipulation defining the duty of disclosure and prescribing the manner in which it is to be performed.<sup>35</sup> The performance of the duty then becomes contractual<sup>36</sup> and if it is not performed, there is a breach of contract of insurance as distinguished from a breach of the duty of good faith.

Such a stipulation is often referred to as the 'basis clause.'<sup>37</sup> Where such a clause appears in the contractual document, that is, where he warrants that the statements made by him are true, it is a condition precedent the failure of which, either by fraud or innocent misrepresentation,<sup>38</sup> repudiates the insurance contract. Whether or not the representation is immaterial becomes irrelevant. Lord Eldon put the matter succinctly when he said in *Newcastle Fire Insurance Co. v. Macmorran*:<sup>39</sup>

It is a first principle in the law of insurance, on all occasions that where a representation is material it must be complied with, if immaterial, that immateriality may be enquired into and shown; but that if there is a warranty it is part of the contract that the matter is such as it is represented to be. Therefore the materiality or immateriality signifies nothing.<sup>40</sup>

Thus in *Dawsons v. Bonnin*<sup>41</sup> the proposer for an insurance of a lorry against fire stated that it was kept at "46 Cadogan Street, Glasgow". The proposal was made the basis of the contract. In fact the vehicle was garaged at a farm outside of Glasgow and it was destroyed by fire. In an action on the policy it was held by the House of Lords that the insurers were entitled to repudiate liability because of the misstatement by the proposer, even though it was not a material one.

It appears then that the effect of a 'basis clause' is to extend the duty of disclosure and to require from the proposed insured that the accuracy of all facts stated is more than that required by the duty of good faith. Indeed Cohen, L.J. in *Schoolman v. Hall* said:

While the insurers have stipulated that the answers to the fifteen questions 'shall be the basis of the contract', that only has the effect of preventing any argument as to the materiality of those questions should dispute arise, but it does not relieve the proposer of his general obligation at common law to disclose any material fact which might affect the risk . . .<sup>42</sup>

Again, Bollers, C.J. was right in holding that the 'basis clause' did not limit the proposer's common law duty of disclosure.

### *Waiver*

The principle of waiver is simply this:

. . . if one party by his conduct leads another to believe that the strict rights arising under the contract will not be insisted upon, intending that the other should act on that belief, and he does act on it, then the first party will not afterwards be allowed to insist on the strict rights when it would be inequitable for him to do so.<sup>43</sup>

Waiver of information as to facts, *prima facie* material for the insurer to know, is not to be inferred too readily. It is of great importance that the general duty of disclosure should be maintained and not whittled away by alleged waiver.<sup>44</sup>

In order to establish waiver by the insurers it must at least be shown that they have received information such as would put an ordinary, careful insurer on inquiry and they have nevertheless failed to make any such inquiry. But merely to omit to make an inquiry, where there is nothing to suggest the possibility or necessity of doing so, cannot be held to be waiver.<sup>45</sup>

However, the extent to which questions asked have altered the common law duty seems to be unsettled. Indeed, Professor Ivamy<sup>46</sup> makes two assertions which seem to contradict<sup>47</sup> each other: (i) where questions whether written or verbal are asked by the insurers, the assured's duty of disclosure is to some extent altered; (ii) notwithstanding the questions, the common law duty of disclosure remains, and the proposer must disclose material facts which are not covered by the questions.

Bollers, C.J., in deciding the issue of waiver, came to the conclusion that Ivamy's second assertion represents the law, and that the only instance where questions asked serve to define the limits of what is material is

when requiring information of specific sort, thereby relieving the assured of the duty of disclosing facts which are not within his scope. If the question had not been asked though such facts would have to be disclosed by the assured in the ordinary discharge of his duty.<sup>48</sup>

The observations of Vaughan Williams, L.J. is pertinent here:

I think also that the insurance office may, by the requisition for information of a specific sort, which it makes of the proposer, relieve him partially from the obligation to disclose by an election to make enquiries as to certain facts material to the risk to be insured against itself.<sup>49</sup>

An example of the effect of questions requiring specific information is to be found in *Jester Barnes v. Licences and General Insurance Co. Ltd.*,<sup>50</sup> where MacKinnon, J. said that if an insurance company had asked a proposer the question "have you or your driver during the past five years been convicted of any offence?" and the proposer had said "no," and that was true, he would have come without any hesitation to the conclusion that the company was not entitled, after asking that question and receiving that true answer, to take it to mean that he had been convicted eight years ago and that was a material fact. Consequently, if from the question asked in a proposal form, it is plainly indicated that certain matters are regarded by the insurers as material, the questions cannot be answered merely to the letter. However correct the answers may be, all information in which the insurers are interested must be given.<sup>51</sup>

The scope of the question asked depends on the language in which it is framed<sup>52</sup> and partly on the circumstances to which it is intended to relate. The statement must be considered as a whole and a fair and reasonable construction must be given. If the statement is substantially accurate,<sup>53</sup> a trivial misstatement<sup>54</sup> or an omission of immaterial details<sup>55</sup> does not render it inaccurate. Thus, where the assured having two occupations is asked to state his occupation, his answer is not inaccurate because he states one of them only and omits to state the other<sup>56</sup> unless the fact that he has two occupations is material to the risk.<sup>57</sup>

On the question of fair and reasonable construction, Lord Shaw of Dunfermline said:

In a contract of Insurance it is a weighty fact that the questions are framed by the insurers and that if an answer is obtained to such a question which is upon a fair construction a true answer, it is not open to the insuring company to maintain that the

question was put in a sense different from or more comprehensive than the proponent's answer covered . . .<sup>58</sup>

Thus in *Connecticut Mutual Life Assurance v. Moore*<sup>59</sup> a question in the proposal for a policy of life assurance stated: "Have you had any other illness, local disease or personal injury? And if so, of what nature, how long since and what effect upon general health." The answer given was "no." It was held that a reasonable construction must be put on the question which must be assumed to refer to serious illness only.

Again, where a question in a proposal form for life assurance said, "What medical men have you consulted? When? and What for?" it was held that this did not mean that the insured had to give a list of all the doctors she had seen in her life. She had only to give a list which was sufficient for practical purposes.<sup>60</sup>

In deciding the issue in *Pillay Bollers*, C.J. said "whether the question through their [sic] form is an invitation to the proposer to limit himself to a particular subject matter, or to a particular ambit within that subject-matter depends on the nature of the questions asked in the proposal form."<sup>61</sup> The learned Chief Justice was not prepared to accept the submission that the circumstance of the present case fell within the principle enunciated by Vaughan Williams, L.J. as already stated. Furthermore, the Chief Justice did not agree that the questions asked in the proposal form referred to flying and were sufficient to put the insurer upon inquiry, since in so far as the insurer was concerned flying activities alone could not have been implied from these questions. The deceased could have travelled to the interior otherwise than by flying or served in the Army, Navy or Air Force without flying.

It should also be noted that the answers given to the questions, both being in the negative, were not inconsistent.<sup>62</sup> It is therefore not surprising that Bollers, C.J. found that the answers given could not put the insurer on inquiry.<sup>63</sup>

However, it must be pointed out that the learned C.J. did not consider in his judgment the plaintiff's submission that, the conduct of the insurers in setting out the policy in terms of clause (1) were such that a reasonable layman could infer that no other information was required. Clause (1) of the proposal form signed by the deceased made it clear that the double indemnity cover would cease to operate if the deceased came to his death while engaged as a passenger or otherwise in an aeronautic voyage. The deceased so dying, the double indemnity did not operate. Implicit in this,

though, is the fact that the ordinary life cover would operate if the deceased died as a passenger or otherwise in an aeronautic voyage.

Therefore, the very fact that the insurers excluded death of passengers or otherwise in aeronautic voyages shows that any flying activity which the deceased may engage in was recognised as a material fact in relation to the double indemnity and ought to have put the insurer on guard to ask further questions on flying with relation to the ordinary life cover. The insurers asked no such question even though with respect to the ordinary life cover they usually attached a flying clause before issuing it to persons occupied in flying activities. How then would the insured know of the practice of attaching a flying clause? It seems reasonable for the insured to assume that the insurer having exempted flying activities upon the double indemnity did not consider it material with respect to the ordinary life cover.

It is submitted that this is an "appropriate case" whereby the common law could have been moulded to suit the needs of our society.<sup>64</sup> In the context of West Indian society it is unfair to the insured for an Insurance Company to produce a proposal form like the one in question. That is, one where the company's interest is protected by clause (1) while the innocent insured is left to figure out which information not asked for in the proposal form, must be given or else be faced with a void policy. Or is the proposer required to consult an insurance lawyer every time he wishes to take out an insurance policy?<sup>65</sup>

## CONCLUSION

There is no doubt that Bollers, C.J. applied the strict common law principles in coming to this decision which in effect places a heavy burden upon the insured to disclose all material facts known to him while on the other hand it is reluctant to find that the insurer had waived this common law duty. These strict principles would appear to suggest that the common law in this area has developed in such a way that insurers are inevitably favoured by its operation — a point fully substantiated by case law.

There are however, expressions of sympathy for the insured by judges<sup>66</sup> who recognize the harshness of the operation of the common law principles. But as these expressions stop short of bringing about any change in the law, they can only be described as lip-service to this perennial problem.

A rather striking illustration<sup>67</sup> of the above proposition becomes crystal clear from the statement of Swift, J. in *Mackay v. London & General Insurance* when he said:

I am extremely sorry for the plaintiff in this case. I think he has been very badly treated, shockingly badly treated. They have taken his premium. They have not been in the least bit misled by the answers which he has made. They would never have refused to take his money. But I cannot help the position. Sorry as I am for him there is nothing that I can do to help him. The law is quite plain.<sup>68</sup>

In turn, some of the sympathetic pronouncements by judges in certain instances have proved misleading as to what the law is. For instance, in *Zurich General Accident & Liability Ins. Co. Ltd. v. Morrison* where no question in the proposal form was directed as to whether the proposer had failed to pass a driving test, Goddard, L.J. said:

. . . the underwriter exhibits to them (i.e. the proposer) a long catechism in which he puts questions on matters which may affect any proposer . . . and I cannot help thinking that if it is material for the underwriter to know whether or not the proposer has failed in a test he would ask the question.<sup>69</sup>

In at least two instances Scrutton, L.J. made observations which were purely *obiter*. In *Newsholme Bros. v. Road Transport & General Ins. Co. Ltd.* he said:

The insurance companies also run the risk of the contention that matters they do not ask questions about are not material, for, if they were, they would ask questions about them.<sup>70</sup>

Again, in *McCormick v. National Motor Accident Union Ltd.* in considering the circumstance where an insurer has not asked a question about a particular fact in the proposal form the Lord Justice said:

Well there is a material fact which you did not ask a question about, and as you did not ask a question about it you cannot say that it was material and ought to have been disclosed.<sup>71</sup>

As has been pointed out, the above statements of Scrutton, L.J. were merely *obiter dicta*. But Professor Ivamy<sup>72</sup> seems to have treated them as if they represented the law on the issue. After making his second assertion,<sup>73</sup> to the effect that notwithstanding the questions asked the common law duty still remained, he went further to say:

If the insurance company does not ask a question about a particular fact in the proposed form it runs a risk . . .<sup>74</sup>

It is submitted that the learned Professor's propositions, to say the least, are not only contradictory but also confusing and one wonders whether they represent the law. Propositions of law cannot be framed around pronouncements made by the way, whereas the ultimate decisions do not reflect them. The unsatisfactory nature of this branch of the law is not in doubt; the *dicta* and the Professor's thesis heighten the problem.

In the United States the tendency has been to take the view that if the assured answers all the questions put to him fully and frankly he has no further duty of disclosure.<sup>75</sup> But in the words of Mr. Justice Stone in *Stipitch v. Insurance Co.*:

Concededly the modern practice of requiring the applicant for life insurance to answer questions prepared by the insurer has relaxed the rule to some extent, since information not asked for is presumably deemed immaterial. But the reason for the rule still obtains and with added force . . .<sup>76</sup>

Since the law in this area has been of the common law judges own making, it is time they, the judges, stopped paying lip-service to the problems which they have created and get down to finding solutions, with a view to eradicating the injustice which has persisted in Insurance Law to the detriment of the insured. As an analogy, one may take the recent unanimous judgment of the English Court of Appeal in *Stone v. Reliance Mutual Insurance Society Ltd.*, where Lord Denning, M.R. considered that in the circumstances:

. . . it would have been most unjust if the Company had been allowed to repudiate liability . . .<sup>77</sup>

which is exactly what they have been allowed to do in previous cases.

In the absence of judicial creativity, it is hoped that the Legislature can provide a fair and equitable solution to these problems. Meanwhile, one finds that the legislators' pre-occupation has been with the statutory regulation of insurance companies and the insurance business in general, in apparent oblivion of the rigours of the substantive principles of Insurance Law.<sup>78</sup>

## NOTES

<sup>1</sup>(1972) 18 WIR 220.

<sup>2</sup>Under the Cononial Air (Navigation) Act 1961, Guyana.

<sup>3</sup>No. 25 of 1970.

<sup>4</sup>Cap. 6:01 *Laws of Guyana*, 1972.

<sup>5</sup>In the contract of sale of land, for example, there is no requirement on the part of the vendor to disclose all the facts relating to the land in question. See Megarry & Wade: *The Law of Real Property*, (3ed.) at p.599. This common law rule has however been subjected to two exceptions in cases involving the sale of goods, see s.15 of the Sale of Goods Act (as to implied conditions of fitness), Cap. 90:10, *Laws of Guyana* (1972).

<sup>6</sup>[1766] 3 Burr 1905 at p.1909 (a marine insurance case).

<sup>7</sup>[1879] 11 Ch.D 363 p.367.

<sup>8</sup>See generally, E.R.H. Ivamy, *General Principles of Insurance Law*, 3rd ed. (1975), Chap. 12 where the cases are collected and discussed.

<sup>9</sup>*London General Omnibus Co. Ltd. v. Holloway* [1912] 2 KB 72.

<sup>10</sup>*Brownlie v. Campbell* [1880], 5 App. Cas. 925 at p.954 per Lord Blackburn.

<sup>11</sup>See *Joel v. Law Union and Crown Insurance Co.* [1908] 2 KB 863, at p.884, per Fletcher Moulton, L.J.: "The duty is a duty to disclose you cannot disclose what you do not know".

<sup>12</sup>*Godfrey v. Britannic Assurance Co. Ltd.* [1963] 2 Lloyd's Rep. 515.

<sup>13</sup>See (1972) 18 WIR 220 at p.223.

<sup>14</sup>S.18(2).

<sup>15</sup>Per Scott, L.J. in *Locker and Woolf Ltd. v. Western Australia Insurance Co. Ltd.* [1936] 1 KB 408.

<sup>16</sup>See *Rivas v. Gerussi* [1880] 6 QBD 222 at p.229, per Lord Esher; *Tate v. Hyslop* [1885] 15 QBD 368 at p.379 per Lord Bowen.

<sup>17</sup>(1963) 6 WIR 185.

<sup>18</sup>[1951] 1 Lloyd's Rep. 139 (burglary insurance).

<sup>19</sup>*Godfrey v. Britannic Assurance Co. Ltd.*, *supra*.

<sup>20</sup>*Bufe v. Turner* [1815] 6 Taunt, 338.

<sup>21</sup>[1917] 2 KB 184.

<sup>22</sup>*Ibid.*, at p.192. In some cases, the test adopted is that of the "reasonable insurer." Ivamy submits that the words "reasonable" and "prudent" are interchangeable. See his *General Principles op.cit.*, p.112.

<sup>23</sup>*Supra*, note 17.

<sup>24</sup>*Zurich General Accident and Liability Insurance Co. Ltd. vs. Morrison* [1942] 2 KB 53 per MacKinnon, L.J. at p.60.

<sup>25</sup>*Re Yager and Guardian Assurance Co. Ltd.* [1912] 108 L.T. 38 per Channel, J. at P.44.

<sup>26</sup>*Yorke v. Yorkshire Insurance Co. Ltd.* [1918] 1 KB 662 at p.670. In *Horne v. Poland* [1922] 2 KB 364 and *Trading Co. L. & J. Hoff v. De Rougemont* [1929] 34 Com. Cos. 291. In both these cases evidence of underwriters were admitted.

<sup>27</sup>*Godfrey v. Britannic Assurance Co. Ltd.*, *supra*, where the evidence of a doctor was admitted.

<sup>28</sup>*Glicksman v. Lancashire and General Assurance Co. Ltd.* [1925] 2 KB 593 at 609. *per* Scrutton, L.J.

<sup>29</sup>*Glasgow Assurance Corporation Ltd. v. Symondson* [1911] 16 Com. Cas. 109 at p.119.

<sup>29a</sup>In the unreported Trinidad case of *Motor & General Insurance Co. Ltd. v. Ali, Prayag and Sukhbir*, No.1877 of 1967 decided by McMillan, J. in December, 1973, expert evidence of an Insurance Consultant was admitted to show that a conviction for violence was a material fact which a proposer for a motor vehicle insurance ought to disclose.

<sup>30</sup>*Supra*, note 17

<sup>31</sup>*Equitable Life Ass. Society v. General Accident Ass. Corp.* [1904] 12 S.L.T. 348.

<sup>32</sup>*London Assurance v. Mansel* [1879] 11 Ch.D 363 (life assurance), *per* Jessel, M.R. at p.370: "Concealment properly so called means non-disclosure of a fact which it is a man's duty to disclose, and it is his duty to disclose the fact if it is a material fact".

<sup>33</sup>See *Lee v. British Law Insurance* [1972] 2 Lloyd's Rep. 49.

<sup>34</sup>Bollers, C.J. at (1972) 18 WIR at p.226-227.

<sup>35</sup>The stipulation may appear for the first time in the policy; *Cazenove v. British Equitable Ins. Co.* [1860] 29 LJCP 160; *MacDonald v. Law Union Ins. Co.* [1874] LR 9 QB 328. If the stipulation appears only in the proposal form it forms no part of the contract, unless it is incorporated in the policy.

<sup>36</sup>*Anderson v. Fitzgerald* [1853] 4 HL Cases 484, *per* Parke, B. at p.496: "The proviso is clearly a part of the express contract between the parties, and on the non-compliance with the condition stated in the proviso the policy is unquestionably void". See also *per* Reading, L.C.J. in *Stebbing v. Liverpool and London and Globe Ins. Co.* [1917] 2 KB 433 at p.437.

<sup>37</sup>The practice of making the accuracy of the statements in the proposal form the basis of the contract was alluded to by Lord Wright in *Provincial Ins. Co. Ltd. v. Morgan and Foxon* [1932] 38 Com. Cas. 92 (HL) at p.98.

<sup>38</sup>Where the assured qualifies his answers by stating that they are correct to the best of his belief, then if there is an innocent misrepresentation, the insurer must be presumed to have waived a full or more complete answer. See *MacDonald v. Law Union Ins. Co.* (1874) L.R. 9 QB 328; *Jones v. Provincial Ins. Co.* [1857] 3 C.B.N.S. 65 (life assurance) *per* Cresswell, J. at p.86; *Fletcher-Moulton, L.J. in Joel v. Law Union and Crown Insurance Co.* [1908] 2 KB 863 (life assurance) at p.885.

<sup>39</sup>[1815] 2 Dow 255 at p.256.

<sup>40</sup>This rule is well settled. See *Anderson v. Fitzgerald* [1853] 4 HL 484 and the judgments of Lord Blackburn and Lord Watson in *Thomson v. Weems* [1884] 9 App. Cas. 671. See also *Condogianis v. Guardian Ass. Co.* [1921] 2 AC 125; *Mackay v. London General Insurance Co. Ltd.* [1935] 51 Lloyd's Rep. 201 (where the answers given were immaterial the policy was, nevertheless, held to be avoided since the assured had warranted the truth of his statement).

<sup>41</sup>[1922] 2 AC 413, HL.

<sup>42</sup>[1951] 1 Lloyd's Rep. 139 (CA) at p.142.

<sup>43</sup>Denning, M.R. in *Lickiss v. Milestone Motor Policies* [1966] 1 W.L.R. 1334 at p.1338. See further *Plasticmodia v. Davidson* [1952] 1 Lloyd's Rep. 527.

<sup>44</sup>*Per* Scrutton, L.J. in *Greenhill v. Federation Ins. Co.* [1927] 1 KB 65, at p.85.

<sup>45</sup>Information is not necessarily waived by insurer accepting without comment incomplete answers to questions which they have put to the assured — *London Assurance v. Mansel* [1879] 11 Ch.D. 363.

<sup>46</sup>Ivamy, *op.cit.*, at pp. 147-148.

<sup>47</sup>Further discussed in the conclusions to this paper.

<sup>48</sup>*Per* Asquith, L.J. in *Schoolman v. Hall* [1951] 1 Lloyd's Rep. 139 at p.143.

<sup>49</sup>*Joel v. Law Union and Crown Insurance Co.* [1908] 2 QB 863 at p.878.

<sup>50</sup>[1934] 49 Lloyd's Rep. 231 at p.237 (motor insurance).

<sup>51</sup>In *Glicksman v. Lancashire and General Assurance Co. Ltd. supra*, the question in the proposal form was whether any company had declined to accept the proposer's burglary insurance. The proposers who were partners answered the question in the negative but the proposal of one of them when trading alone had been refused. This was held to be concealment of material facts.

<sup>52</sup>*Connecticut Mutual Life Ass. Co. of Hertford v. Moore* [1881] 6 App. Cas. 644.

<sup>53</sup>*Fowkes v. Manchester and London Ass.* [1863] 2 B & S 917 (life assurance); *Yorke v. Yorkshire Ins. Co.* [1918] 1 KB 662 (life assurance).

<sup>54</sup>*Dawsons v. Bonnin* [1922] 2 AC. 413.

<sup>55</sup>*Morrison v. Muspratt* [1827] 4 Bing 60 (life assurance). *per* Burroughs, J. at p.63; "advantage ought not to be taken of omission of trifling circumstances".

<sup>56</sup>*Perrins v. Marine & General Travellers Insurance Society* [1859] 2 E&E 317 (accident insurance) where an iron-monger described himself as an esquire the rate of premium being the same for both, held no non-disclosure of material fact.

<sup>57</sup>*Biggar v. Rock Life Ass. Co.* [1902] 1 KB 516 (accident insurance).

<sup>58</sup>*Condogianis v. Guardian Ass. Co.* [1921] 2 AC 125.

<sup>59</sup>*Supra*, note 52.

<sup>60</sup>*Joel v. Law Union and Crown Insurance Co. Ltd., supra*.

<sup>61</sup>[1972] 18 WIR p.220 at 226.

<sup>62</sup>*Per* Lord Watson in *Thompson v. Weems* [1889] 9 App. Cas. 671 at p. 694.

<sup>63</sup>Example of insurer being put on inquiry by inconsistent statements could be found in *Keeling v. Pearl Assurance Co.* [1923] 129 L.T. 573. There was an inconsistency between the date of birth and age which the proposer had given in the answer to a question in a proposal form for life insurance. The insurance company with knowledge of this inconsistency issued a policy. It was held that the inconsistent answers operated as a waiver.

<sup>64</sup>Bollers, C.J.'s attention was drawn to his *dictum* in the case of *Peter Persaud and Others v. Plantation Versalittiles and Schoon Ord., Ltd.* [1970] 17 WIR 107, where he said that "after independence the judges of this country would no longer consider themselves hidebound by English decisions but would . . . in appropriate case . . . mould the common law to suit the needs of our every-changing society".

<sup>65</sup>See *Joel v. Law Union n Crown Ins. Co. Ltd.*, *supra*, at p.890 where in the construction of a Medical Examiner's form, Fletcher Moulton, L.J. said: "... in my opinion a man ought to take his lawyer with him when he goes to be examined".

<sup>66</sup>For commentaries see "The Doctrine of *Uberrimae Fides* in Insurance Law—A Critical Evaluation" by R.A. Hasson in [1969] 32 M.L.R. 615.

<sup>67</sup>See also *Joel v. Law Union*, *supra*, per Fletcher-Moulton, L.J.

<sup>68</sup>51 Lloyd's Rep 201 at p.202.

<sup>69</sup>[1942] 2 KB 53 (C.A.) at p.64.

<sup>70</sup>34 Lloyd's Rep. 247.

<sup>71</sup>[1934] 40 Com. Cas. 76 at p.78.

<sup>72</sup>Ivamy, *op.cit.*, p.148.

<sup>73</sup>Both propositions have already been stated in this article.

<sup>74</sup>Ivamy, *op.cit.*, at p.148.

<sup>75</sup>See e.g. *Penn Mut. Life Ins. Co. v. V. Mechanics' Savings Bank and Trust Co.*, 72 Fed. Rep. 413, (1896).

<sup>76</sup>277 U.S. 311 (1927).

<sup>77</sup>[1972] 1 Lloyd's Rep. 469.

<sup>78</sup>*Cf. in* Trinidad and Tobago where the enactment of the Insurance Act, 1966 as amended in 1973 has brought about certain changes in the substantive principles of insurance law, for example, the principles relating to insurable interest, agency and misrepresentation have been clarified.