IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

MUTUAL AND FEDERAL INSURANCE COMPANY LTD. .... Appellant

and

THE MUNICIPALITY OF OUDTSHOORN ..... Respondent

Coram: MILLER, JOUBERT, CILLIÉ, VILJOEN, JJA,
et GALGUT, AJA.

Date of Hearing: 30 August 1984

Date of Delivery: 16 November 1984

J U D G M E N T

JOUBERT, JA :-

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The contract of insurance was unknown to Roman law. That is probably the reason why Voet in his Commentarius ad Pandectas 22.2.3 contented himself, inter alia, with the following few observations concerning the contract of marine insurance :

> --- quo id agitur, ut merces & alia assecurata navigent periculo non domini, sed assecuratoris, pro periculo suscepto pretium recipientis. De hoc vero assecurationis contractu universa huc transcribere, quae circa modum assecurationis, personas assecurare valentes aut prohibitas, res assecurandas vel assecurationem respuentes, rerum assecurandarum aestimationem, conservationem, impensas, cessionem seu abdicationem, periculum, praemium assecurationis seu periculi pretium ac solutionem ejus, observanda veniant, consultum non censui.

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Videri ista possunt enarrata prolixe satis & accurate variarum regionum legibus superiori & hoc seculo conditis; ac in plerisque consensum, in paucis, iisque levioribus tantum, dissensum continentibus, praecipue, edicto nautico Philippi Hisp. Regis anni 1563 cap.ult. & edicto peculiari de assecurationibus anni 1570, lege municipali Medioburgensium anni 1600, Roterodamensium anni 1604, Amstelodamensium anni 1612 quae omnia simul juncta in vol. 1 placitor. Holl. à pag.820 ad pag. 876 ac tandem novissime, pariterque plenissime, edicto Ludovici XIV Galliarum Regis, anni 1681 in libello cui titulus, ordonnance de Louis XIV touchant la marine, livr. 3 tit.6. Quibus addendus Petri de Santerna Lusitani & Benevenuti Stracchae de assecurationibus liber.

(Horwood's translation : "The effect of this contract is that the merchandise and other articles insured (assecurata) travel by sea at the risk not of their owner but of the insurer (assecurator) who receives a price for the risk which he undertakes.

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I have decided not to deal with the incidents of this contract of insurance under which would fall to be discussed the formation of the contract, the persons who can or cannot insure, the property which is or is not insurable, its valuation and preservation, the expenses incurred upon it, the cession or abandonment of such property, the risk, the premium for the insurance (that is the price of the risk) and the payment of such premium.

All these matters can be seen and are dealt with in sufficient detail and accuracy in the statutes of several countries passed in this and the last century : these laws for the most part coincide and differ only in few points and those unimportant ones. See the Maritime Edict of Philip, King of Spain, 1563, last chapter; the special Edict on Insurance of the year 1570; the Municipal Laws of Middelburg, 1600;of Rotterdam, 1604; and of Amsterdam, 1612 (Placita Hollandiae Vol 1 pp. 820-876); and latest and most detailed of all the Edict of Louis XIV, King of France, of 1681, in the book called Ordonnance of Louis XIV touchant la marine, Book 3, title 6. See also the book De Assecurationibus of Petrus de Santerna Lusitanus and Benevenutus Straccha.*)

Voet's reference to the sources of the law of insurance in the Netherlands is by no means exhaustive. It is of great significance that he referred not only to the legislation of the Netherlands and France on marine insurance but also to the treatises of Petrus de Santerna and Benevenutus Straccha on the law of insurance as I shall presently demonstrate.

Marine insurance, the oldest form of insurance in its modern sense, traces its origin back to the medieval Law Merchant (Lex Mercatoria) as developed in the great trading centres and seaports of Italy and South Western Europe. Recent researches reveal that

policies of marine insurance were in use in Italy towards the end of the 14th century, as appears from the instructive article "Die ontstaan van versekering gerig op winsbejag" by Schalk van der Merwe in 1977 TSAR at pp. 227-234. Two outstanding treatises on the law of insurance were published during the 16th century. The one is Petrus de Santerna's pioneering treatise De Assecurationibus et Sponsionibus (1554) which is also to be found in Tractatus Universi Juris (also known as Tractatus Tractatuum), 1584, tomus 6 pars 1 folio 348 to 357. The other one is Benevenutus Straccha's famous treatise De Assecurationibus which has been included in Tractatus Universi Juris, tomus 6 pars 1 folio 357 to 377. These two treatises soon

acquired international fame and authority throughout Western Europe. It is therefore not surprising that Voet 22.2.3 referred to these two treatises as sources of the Roman-Dutch law of insurance. Fortunately the library of this Court has a complete set of Tractatus Universi Juris, 1584, 24 volumes. Mention should also be made of the work of the 17th century Italian jurist Roccus, Tractatus de navibus et naulo item de Assecurationibus notabilia, which was translated into Dutch with notes and annotations by Feitema in 1737 as Merkwaardige Aanmerkingen vervat in twee Tractaten over Scheepen en Vrachtgoederen alsmede over Assurantie ofte Verzekeringen. The library of this Court has a copy of this translation. During the 17th century the

Italian and Spanish jurists adopted the principles of marine insurance to insurance of transport by land (Holdsworth, A History of English Law, vol 8, 2nd ed., p. 276 footnote 7) and even to life insurance (assecuratio vitae hominis). See Benevenutus Straccha, op. cit., folio 360, nr. 46, Ludovicus Molina, Disputationes de Contractibus (1601) disputatio 507 nr. 7 and Sigmundus Scaccia, Tractatus de Commerciis et Cambio, (1669), §§ 1 quaestio 7 pars 2 nr. 19 et §§ 3 Glossa 3 nr. 52. According to the French jurist Antonius Faber (1557-1624), Codex Fabrianus, lib.5 tit.7 def. 3, a dowry (dos) could be insured. The jurists, however, experienced difficulty in finding for the contract of insurance an

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appropriate niche within the framework of the civil law's traditional classification of contracts as a numerus clausus. Attempts were made to regard it as emptio et venditio, locatio et conductio, contractus innominatus or contractus fideiussionis. See Sigmundus Scaccia, op.cit., §§ 1 quaestio 1 nr 129. The generally accepted view was that it was a species of the contract of sale in terms of which the insurer was the seller, the insured the purchaser, the risk or event insured against the merx and the premium the pretium. According to Roman-Dutch law, however, the contract of insurance is a contract nominate. (Van der Keessel, Theses Selectae 711 and Praelectiones ad. Gr. 3.24.1, 2.).

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The reception of the Italian Law Merchant, including the law of insurance, occurred throughout Western Europe and England during the 16th century. (Holdsworth, op.cit., vol 8, 2nd ed. p. 273-285). In the Netherlands this reception more or less co= incided with the reception of Roman law. The effect of this reception was according to Wessels, History of the Roman-Dutch Law, 1908, at p. 228-229 as follows: "There was no uniform law of insurance, and each maritime nation or town made its own regulations. Spain, Portugal and Holland and the Hanseatic towns were the first to elaborate a system of marine insurance, and it seems to be universally acknowledged that Holland contributed the most important share in the development

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of that branch of law throughout Europe." How was the Roman-Dutch law of insurance developed ? In the last chapter of his Ordonnantie, Statuyt ende Eeuwich Edict op 't faict van der Zeevaert, dated 30 October 1563, King Phillip II enacted for general application in the Netherlands his Ordonnantie op de Verseeckeringe oft Assurantie (I G. P.B. 821-829). This was followed by his enactment on 20 January 1570 of his Ordonnantie, Statuyt ende Policie op 't feyt van de Contracten van de Assurantien ende Verseeckeringen (1 G.P.B. 828-838) for general application in the Netherlands. Both ordinances dealt with marine insurance. Art. 32 of

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the Ordinance of 20 January 1570 contained the important prohibition against life insurance. A similar prohibition against life insurance was contained in article 10 of Louis XIV's Ordinance of 1681. In addition local laws (keuren) concerning marine insurance were made for Amsterdam, Rotterdam, Dordrecht and Middelburg. They are enumerated in Van der Keessel's Praelectiones ad Gr. 3.24. Wessels, op. cit., p 229 comments on them as follows : "These laws were constantly amended and amplified during the seventeenth and eighteenth centuries, and if we examine them we find that they contain all the fundamental principles of maritime insurance that are in vogue to-day in all the great commercial countries of Europe." An important

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innovation during the 17th century was the establishment of insurance tribunals (Kamer van Assurantie) in Amsterdam, Rotterdam, Dordrecht and Middelburg as courts of first instance with jurisdiction over matters con= cerning insurance. The members of these tribunals were experts in insurance matters. There was an appeal from their decisions to the Hof van Schout en Schepenen or directly to the Hof van Holland (or the Hof van Zeeland in the case of Middelburg). An appeal lay from the Hof van Holland, or the Hof van Zeeland, to the Hooge Raad. Decisions of the Hooge Raad on matters of insurance are to be found in Observationes Tumultuariae (4 volumes) and Observationes Tumultuariae Novae (3 volumes).

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The opinions of the Dutch jurists on insurance matters are included in the Hollandsche Consultatien and in Van den Berg's Nederlands Advysboek. I quote the following comprehensive survey of the Roman-Dutch authorities in The South African Maritime Law and Marine Insurance: Selected Topics, (1983) by Dillon and Van Niekerk (at p. 108-109);

> "The Roman-Dutch authorities of the sixteenth, seventeenth and eighteenth centuries dealt extensively with insurance law. Indeed, at the end of the eighteenth century the insurance contract was, after contracts of sale and lease, the most prevalent type of contract. Because of the needs of their time, the Roman-Dutch jurists concerned themselves almost exclusively with marine insurance.
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> The more well-known Dutch writers of this period, most of whom our Courts have in the

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past consulted on matters relating to marine insurance, were Grotius, Van Leeuwen, Voet, Van Bynkershoek, Van der Keessel and Van der Linden. Others which may be mentioned are Verwer, Lybrechts, Schorer and Barels. The legislative measures as well as the Dutch theses dating from this period may still prove to be of valuable assistance in the study of the Roman-Dutch law of marine insurance.

It has been pointed out, furthermore, that our *common* law is not what is usually regarded, in the strict sense, as Roman-Dutch law (that is the law of the province of Holland or even of the Netherlands) as it had developed at the end of the eighteenth century, but rather a European ius commune of this period. This view, no doubt particularly true of the mercantile law in general, is confirmed by the fact that the Dutch jurists, when dealing with insurance law, made copious reference to the works of authors from other European countries. There would in principle, therefore, not appear to be any obstacle in the way of consulting, as our courts have done in the past, the works of jurists such as Pothier,

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Emerigon, Straccha, Roccus, Santerna and others on the law of marine insurance."

Mention should also be made of the three works by Kersteman (1728-1793) viz. Academie der Jonge Practizyns, of Beredeneerde Consideratien over de Theorie ende Practycq in Zaaken van Rechtspleeging (1765), 18e hooftdeel, Hollandsch Rechtsgeleert Woordenboek s.v. Assurantie, and Aanhangsel tot het Hollandsch Rechtsgeleerd Woordenboek, vol.1, s.v. Assurantie. According to U. Huber (1636 - 1694), Praelectiones ad D. 1.3.14 and H.R. 3.21.76 the province of Friesland, owing to the small volume of its maritime trade, did not develop its own law of marine insurance but whenever it became necessary recourse was

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had to the law as applied in the province of Holland and West-Friesland although the law of the latter province was not per se binding on Friesland.

The Hooge Raad through its decisions and the Dutch jurists by means of their works collectively succeeded in moulding the principles of marine insurance as an integral part of Roman-Dutch law. By analogy with marine insurance, other forms of indemnity insurance were recognised by the Dutch jurists. Van der Keessel, Theses Selectae 716 (translated by Lorenz) describes the extension of the law of marine insurance to other forms of insurance thus:

"Although .....

> "Although originally insurances related chiefly to things exposed to the dangers of navigation and transport; yet they have since been ex= tended to buildings also and other goods, which are liable to destruction by fire; and indeed to everything wherein anyone has an interest, provided it can be accurately defined in the contract."

See also his Praelectiones ad Gr. 3.24.4. The principles of the Roman-Dutch law of marine insurance are indeed capable of application, with adaptation if necessary, to other forms of insurance to meet the requirements of our modern society. It is a characteristic of Roman-Dutch law as "a virile living system of law, ever seeking, as every such system must, to adapt itself consistently with its inherent basic principles to deal effectively with the increasing

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complexities of modern organised society". (dictum from the Privy Council judgment in Pearl Assurance Co. v. Union Government, reported in 1934 AD 560 at p 563).

The General Law Amendment Act 8 of 1879 (C) introduced the English law, (as it then existed) con= cerning fire, life and marine insurance into the Cape of Good Hope Colony. The General Law Amendment Ordinance 5 of 1902 (O) incorporated "the law administered by the Supreme Court of the Cape of Good Hope". This in effect introduced the English law (as it existed in 1879) concerning fire, life and marine insurance into the Orange Free State Colony. Both Act 8 of 1879 (C) and Ordinance 5 of 1902 (O) were repealed by section 1 of the Pre-Union Statute Revision Act 43 of 1977 with

the result that the English law (as it existed in 1879) concerning fire, life and marine insurance is no longer binding authority in the Cape Province or in the Orange Free State Province. The Insurance Act 27 of 1943 is largely a regulatory measure containing a few substantive provisions which directly or indirectly affect the law of insurance. Hence, the South African law of insurance is governed mainly by Roman-Dutch law as our common law.

I have already stated that the reception of the Italian Law Merchant, including the law of marine insurance, also occurred in England during the 16th century. At the end of the 16th century England was beginning to take her place among the great commercial countries of Europe.

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The importance of marine insurance was increased by the growth of England's foreign trade in the latter part of the 16th century. A Statute of 1601 (43 Elizabeth I c.12) established in London a special Court for the hearing of actions upon marine policies. This special Court, however, suffered from two grave defects. In the first place its jurisdiction was confined to insurance policies registered in the London Office of Insurances and did not extend to insurances made in other seaport towns. Secondly, it did not have exclusive jurisdiction in insurance cases. It waged a losing jurisdictional battle against the common law courts. Moreover, the London Office of Insurances

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disappeared in the 17th century. During the 17th century the law of marine insurance was in a very back= ward state. Consult Holdsworth, op.cit., vol. 8 (2nd ed.) p.289-293. Nicolas Magens, a German merchant resident in London, wrote in German a work on marine insurance which was published in Hamburg in 1753. His own English translation thereof was published in London in 1755 under the title, An Essay on Insurance, explaining the Nature of the various kinds of Insurances practised by the different Commercial States of Europe and showing their Consistency or Inconsistency with Equity and the Public Good. In 1756 Lord Mansfield (1705-1793) was appointed Chief Justice of the Court of King's Bench and he continued

in office until his resignation in 1788. His dis=
tinguished tenure of office was very important for the development of the common law. His permanent stamp upon Anglo-American law lies in commercial law. He adopted the principles of the Italian Law Merchant, including the law of marine insurance, into the common law and thus rendered the latter suitable for the great commercial expansion that was taking place. He succeeded in making the international law of marine insurance an integral part of the common law. He was well equipped for this task since he was learned in the civil law and in foreign systems of law. (Holdsworth, Sources and Literature of English Law, 1928, p 218). That explains why he could often in his judgments refer

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to European works on marine insurance (Dillon and Van Niekerk, op.cit., p 109 footnote 45). It is obvious that both Roman-Dutch and English law of marine insurance stem from the same original sources. The reported decisions of the courts of law and equity became the main source of the English law of marine insurance. In 1774 the Life Assurance Act (14 Geo. 3 c.48) was passed. For purposes of this judgment it is not necessary to consider its provisions. Suffice it to say that towards the end of the 18th century marine insurance was still by far the most important form of insurance while life and fire insurance were also in vogue. In 1787 James Allan Park published his work on insurance, entitled A System of the Law of Marine

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Insurance with three chapters on Bottomry, on Insurances on Lives and on Insurances against Fire. It was the first book written by an English lawyer on the law of insurance. The next important step was when the Marine Insurance Act 1906 (6 Edw. 7 c.41) was passed. It codified the existing principles of marine insurance as developed by the courts of law. Despite the fact that the courts of law apply principles of marine insurance to non-marine insurance there still remain important differences between them as can be ascertained from Raoul Colinvaux, The Law of Insurance, 4th ed at p 13-14.

Section 17 of the English Marine Insurance Act 1906 provides :

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> "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."
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> (My underlining).

The phrase "utmost good faith" is also known by its Latin equivalent as uberrima fides. According to section 17 a contract of marine insurance is a contract of utmost good faith or a contract uberrimae fidei. The origin of the phrase uberrima fides is doubtful but it would seem that it made its appearance in English case law in 1850. See A.N. Oelofse's unpublished doctoral thesis Die Uberrima Fides - Leerstuk in die Versekeringsreg, University of Stellenbosh (1983) at p 2 and the authorities cited in footnote 5.

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Without investigating our own law on this aspect our courts have under influence of English law attached to a contract of insurance the label uberrimae fidei e.g. Fine v. General Accident Fire & Life Assurance Corporation Ltd., 1915 AD 213 at p 218, Colonial Industries Ltd. v. Provincial Insurance Co. Ltd., 1922 AD 33 at p 40, Bodemer N.O. v. American Insurance Co., 1961 (2) SA 662 (A) at p 668, Pereira v. Marine and Trade Insurance Co. Ltd., 1975(4) SA 745 (A) at p 755 F.

The Romans were familiar with bona fides and mala fides but they never knew uberrima fides as another category of good faith. I have been unable to find any Roman-Dutch authority in support of the proposition that a

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contract of marine insurance is a contract uberrimae fidei. On the contrary, it is indisputably a contract bonae fidei. Art 22 of the Ordinance of 20 January 1570 explicitly enacts :

> "Ende alsoo dese Contracten van verseeckeringen oft asseurantien, gehouden ende geestimeert worden, voor Contracten van goeder trouwen, daar inne egeen fraude oft bedroch en behoorde te intervenieren oft geschieden ----------"
> (My underlining).

See also Ludovicus Molina, op.cit.,disputatio 507 nr. 3, Perezius (1583-1672) ad Cod. 11.5.22, Van der Schelling's (1691-1751) note 2 on Van Zurck's Codex Batavus s.v. assurantie § 23, Van der Keessel (1738-1816) Theses Selectae 712 and Praelectiones ad Gr. 3.24.1 and 20, Van der Linden (1756-1835) 4.6.10. There

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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 to the risk (periculum or risicum) 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 conclusion of the contract of insurance. Breach of this duty of disclosure amounts to mala fides or fraud, entitling the aggrieved party to avoid the contract of insurance. This duty of disclosure received very extensive treatment in the Roman-Dutch authorities. Consult Benevenutus Straccha, op.cit., folio 377, Glossa 26 nrs 2,4,5,6; Sigmundus Scaccia, op.cit.,

§1 quaestio 1 nrs. 132, 156 to 169, §1 quaestio 7 pars 2 ampl. 10 nrs. 17, 19 to 22; Roccus, op. cit., arts. 51, 78, 84; Ludovicus Molina, op. cit., disputatio 507 nrs. 3 to 6; Perezius ad Cod. 11.5.23; Art. 11 of the Ordinance of 20 January 1570; Van Zurck, op.cit., nr 9; Schorer ad Gr. 3.24.6 nr. 15; Van der Keessel, Theses Selectae 722 to 724 and Praelectiones ad Gr. 3.24.5 and 20; Van der Linden 4.6.4 nr. 3; 1 Hollandsche Consultatien c. 234; 2 Hollandsche Consultatien c. 322; 3 Hollandsche Consultatien c. 175; and numerous decisions of the Hooge Raad e.g. 2 Observationes Tumultuariae 1357, 1873; 3 Observationes Tumultuariae 2647, 4 Observationes Tumultuariae 3168, 3287 and 3 Observationes Tumultuariae Novae 1248. The

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duty of disclosure is the correlative of a right of disclosure which is a legal principle of the law of insurance. Wessels, Law of Contract in S.A., 2nd ed., vol. 1 para. 1039 makes the following significant observation concerning the law of insurance:

"At the same time it must be understood that this part of our law is based upon principles well known to the Civil Law. It was by extending the principles of the Aedilitian Edict and of the law of dolus malus that the European jurists and judges have elaborated the law of marine and other insurances. At the root of the aedilitian actio redhibitoria lies the principle that a contract of sale can be avoided if the subject matter

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contains a latent defect unknown to the purchaser, which would have affected his judgment in buying it had he known of its existence." The duty of disclosure is imposed ex lege. It is not based upon an implied term of the contract of insurance. Nor does it flow from the requirement of bona fides. Oelofse, op. cit., at p 286 : "Blykbaar moet die goeie trou-gedagte bloot as 'n verskyningsvorm van die gewone beginsels met betrekking tot bedrog gesien word." By our law all contracts are bonae fidei (Ludovicus Molina, op. cit. disputatio 259 nr 4 : namque bona fides in omnibus contractibus esse debet; Wessels, op.cit., paras. 1976, 1996; Tuckers Land and Development Corporation (Pty) Ltd. v. Hovis,

1980 (1) SA 645 (A) at p 652 A). Yet the duty of disclosure is not common to all types of contract. It is restricted to those contracts, such as contracts of insurance, where it is required ex lege. Moreover, 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. Oelofse, op.cit., at p 2: "Streng gesproke kan daar nie grade van goeie of kwaaie trou wees nie. Iemand tree òf te goeie trou òf te kwaaie trou op." Compare

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Spiro, Uberrima Fides, in 1961 T.V.H.R.-H.R. p 196-202. Uberrima fides is not a juristic term with a precise connotation. It cannot be used as a yardstick with a precise legal meaning. ROBERTS A.J. correctly held in Iscor Pension Fund v. Marine and Trade Insurance C o. Ltd. 1961 (1) SA 178 (T) at p 184 that "the claim that uberrima fides is a necessary and inseparable concomitant of insurance is misleading". In my opinion uberrima fides is an alien, vague, useless expression without any particular meaning in law. As I have 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.

Section 18 of the English Marine Insurance Act 1906 provides :

"(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 judgment 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

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(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;

(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."

In order to determine the materiality of facts for purposes of disclosure section 18(2) of the English Marine Insurance Act 1906 adopted the prudent or reasonable insurer test which had been established in relation to

marine insurance as long ago as 1832 (Elton v. Larkins, 5 Car. & P. 385). This test had become the dominant test of materiality in English case law by the end of the 19th century. See R.A. Hasson, The Doctrine of Uberrima Fides in Insurance Law - A Critical Evaluation, in vol. 32 (1969) Modern Law Review p. 615-637. According to this test the criterion is the objective judgment of an hypothetical prudent or reasonable insurer and not the subjective judgment of the insurer in a particular case. This test has been criticised as too harsh on an insured since it takes account only of facts material to the insurer. See the Journal of Business Law, March 1984,p 109.

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It is not surprising therefore that the prudent or reasonable insured test made its appearance sporadically in the field of non-marine insurance. This test is more favourable to an insured since the standard of judg= ment is the objective judgment of a prudent or reasonable insured and not the subjective judgment of the insured in a particular case. In its report of 1957 the Law Reform Committee in England recommended that "for the purpose of any contract of insurance no fact should be deemed material unless it would be considered material by a reasonable insured". The Law Commission in its report of 1980, according to Birds, Modern Insurance Law, (1982) at p 102-103, urged "that while the test

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of materiality remain broadly the same, questions expressly asked being presumed to be material, the proposer should be bound to disclose only those material facts which he knows or ought to know which a reasonable man in his position would disclose, having regard to the nature and extent of the insurance cover which is sought and the circumstances in which it is sought". See also Oelofse, op. cit., p. 78-79. In Lambert v. Co-operative Insurance Society Ltd., (1975) 2 LLR 485 (CA), a case concerning all risks insurance, i.e. non-marine insurance, the Court of Appeal held that the prudent or reasonable insurer test of materiality was applicable as a general rule of insurance law to all forms of insurance. In the light of the recommendations referred to above it is at this stage

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uncertain what the future holds for the prudent or reasonable insurer test of materiality in England.

Let us now turn to consider the test of materiality in our law. In Fine v. The General Accident, Fire & Life Assurance Corporation Ltd., 1915 AD 213 an appeal from the W.L.D. on a fire insurance policy came before this Court. Neither Act 8 of 1879 (C) nor Ordinance 5 of 1902 (O) was applicable. As regards the test of materiality and its application the approach by SOLOMON J.A. (at p 220-221) was as follows : "And in Joel's case FLETCHER MOULTON L.J., says: 'If a reasonable man would have recognised that it was material to disclose the knowledge in question, it is no excuse that you did not recognise it to be so'. And that after all appears to be the true

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test, would a reasonable man consider that the fact was one material to be known by the insurer, or a fact that in the words of LORD BLACKBURN 'might influence the underwriter's opinion as to the risk he is incurring'. And if that be the test, can there be any doubt that a reasonable man would consider the fact, that there had been a cancellation of a previous contract, material, unless at the same time a satisfactory explanation had been given of that fact." (My underlining). Joel v. Law Union & Crown Insurance Co., (1908) 2 K.B. 863 (CA) concerned a life insurance policy. It is significant that SOLOMON J.A. applied the reasonable man test without reference to the prudent or reasonable insurer. He did not purport to apply the prudent or reasonable insurer

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test of the English marine insurance law. In Colonial Industries Ltd. v. Provincial Insurance Co.Ltd., 1922 AD 33 this Court heard an appeal from the C.P.D. on two policies of fire insurance. According to the provisions of Act 8 of 1879 (C) the English law (as it existed in 1879) concerning fire insurance was applicable. The approach to the question of materiality by DE VILLIERS J.A. (at p 42) was as follows: "The only question that remains is: 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. Tate v. Hyslop, (1885, 15 Q.B.D. at p 368)."

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The latter case dealt with marine insurance. DE VILLIERS J.A. applied the prudent or reasonable insurer test of the English marine insurance law. In view of the repeal of Act 8 of 1879 by sec. 1 of Act 43 of 1977 the judgment of DE VILLIERS J.A. on the materiality test is no longer binding on this Court. In Roome N.O. v. Southern Life Association of Africa, 1959(3) SA 638 (D & CLD) JANSEN J. (at p 641 F) had occasion to apply the reasonable man test to determine materiality. In Fransba Vervoer (Edms) Bpk. v. Incorporated General Insurances Ltd., 1976(4) SA 970 (W) McEWAN J. (at p 978) in effect applied a double test which is a combination of the prudent or reasonable insurer test as well as the prudent or reasonable insured test.

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What is the position in Roman-Dutch law ? I am unable to find any support in the Roman-Dutch law for either the prudent or reasonable insurer test or the prudent or reasonable insured test. It is implicit in the Roman-Dutch authorities and also in accordance with the general principles of our law that the court applies the reasonable man test by deciding upon a consideration of the relevant facts of the particular case whether or not the undisclosed information or facts are reasonably relative to the risk or the assessment of the premiums. If the answer is in the affirmative the undisclosed information or facts are material. The court personifies the hypothetical diligens paterfamilias i.e. the reasonable man or the average prudent person. (Weber v. Santam Versekerings=

/maatskappy...

maatskappy Bpk., 1983 (1) SA 381 (A) at p 410H to 411D). The court does not in applying this test judge the issue of materiality from the point of view of a reasonable insurer. Nor is it judged from the point of view of a reasonable insured. The court judges it objectively from the point of view of the average prudent person or reasonable man. This reasonable man test is fair and just to both insurer and insured inasmuch as it does not give preference to one of them over the other. Both of them are treated on a par.

The facts of the present case are set out fully in the judgment of my Brother MILLER. By a strange quirk of fate the height of the pole with which the light aircraft of Mr Noakes collided on the night of

23 October 1971 was never measured prior to the conclusion of the contract of insurance. Nor was it measured prior to the collision. The several complaints in writing by Gillis on behalf of the Oudtshoorn Aero Club to Schultz, the Town Clerk of the respondent municipality, that the proximity of the high-tension overhead line to runway 21 of the Oudtshoorn Aerodrome constituted a hazard to flying aircraft evidently achieved no more than the placing of white markers on the pole for daytime flying. In 1969 the respondent municipality appointed Schultz manager of the Oudtshoorn Aerodrome. Until the end of 1969 the latter was normally used for daytime flying by aircraft. A new development took place when night flying was authorised during or about April 1970. In

/his .....

his letter, dated 14 April 1970, to the airport manager Gillis advised him to inform the Divisional Controller of Civil Aviation that a single electric flare path had been installed on runway 21 only and that "caution should be exercised on the approach for high tension wires". On 8 June 1970 Schultz in his capacity as airport manager duly conveyed by letter the recommendations of Gillis to the Divisional Controller of Civil Aviation.

I am satisfied that when the respondent municipality negotiated the insurance policy with the appellant insurer during June 1970 the undisclosed information that the close proximity of the high tension overhead line to the Oudtshoorn Aerodrome constituted a hazard to night flying

/which .....

which necessitated the exercise of caution on approaching the flare path of runway 21 at night was reasonably relative to the risk or the assessment of the premiums. Such undisclosed information was therefore material.

Our law requires an insured to have actual or constructive knowledge of the material information prior to the con= clusion of the contract of insurance. (de Groot 3.24.5, Van der Linden 4.6.4 nr 3). Schultz in his capacity as chief executive and administrative officer (Town Clerk) of the respondent municipality at all relevant times prior to the conclusion of the contract of insurance had actual knowledge of the undisclosed information. It follows that the court a quo should have upheld the appellant's

/defence ....

defence of non-disclosure of material facts. The appeal succeeds. I agree with the orders proposed by my Brother MILLER.

C.P. JOUBERT. J.A.

CILLIÉ JA)
VILJOEN JA) Concur
GALGUT AJA)

Bib

127/84

240/82

N v H

MUTUAL AND FEDERAL INSURANCE COMPANY LIMITED

and

THE MUNICIPALITY OF OUDTSHOORN

MILLER, JA:-

240/82

N v H

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

MUTUAL AND FEDERAL INSURANCE COMPANY LIMITED Appellant

and

THE MUNICIPALITY OF OUDTSHOORN Respondent

CORAM: MILLER, JOUBERT, CILLIè, VILJOEN, JJA, et GALGUT, AJA

HEARD: 30 AUGUST 1984

DELIVERED: 16 NOVEMBER 1984

J U D G M E N T

MILLER, JA :-

This litigation stems from an accident which occurred at about 7.45 pm on 23 October, 1971,

when / .....

when a Piper Cherokee Aircraft coming in to land on a runway at the aerodrome at Oudtshoorn, crashed to the ground as a result of colliding, while still in descent, with the top of a pole carrying electric power lines. The pilot was killed, certain passengers injured and the aircraft virtually reduced to a wreck. At that time the aerodrome was owned by the respondent ("the Municipality") and controlled by it under licence issued in terms of air navigation regulations made under authority of the Air Navigation Act, No 74 of 1962. The pole carrying the power lines had been erected by the Municipality in 1964, in a street immediately outside the boundary of the aerodrome. The owner of the aircraft, Mr D Noakes, sued the Municipality in the Cape Provincial

Division of the Supreme Court for payment of damages suffered by reason of the destruction of the aircraft. The gist of the cause of action was that the Municipality, in breach of its duty to take proper care for the safety of aircraft coming in to land at the aerodrome at night, had negligently erected, and continued to retain, the relevant pole "foul of the approach surface" of the runway and had failed to provide such pole with adequate lighting. The Municipality unsuccessfully resisted the claim, the Court finding that causal negligence on the part of the Municipality was established. The plaintiff was awarded damages in the sum of R13 850. (See Noakes v Oudtshoorn Municipality 1980(1) SA 626 (C).)

At all / .....

At all relevant times the Municipality held a public liability insurance policy issued by a company known as "Mutual Brand". It was common cause in the Court a quo and in this Ccurt that the appellant, having taken over certain obligations of "Mutual Brand", was the company responsible for payment of any moneys that might be due to the Municipality in terms of the indemnity given by the policy. The Municipality accordingly sued the appellant in the Witwatersrand Local Division of the Supreme Court. It claimed not only payment of the sum of R13 850 which it was by law required to pay to Noakes, but also an order declaring that the policy was valid and in force on 23 October 1971 and that the appellant was obliged to indemnify the Municipality in terms of the

pclicy in respect of all sums for which it, the Municipality, was legally liable as a result of the accident in question, up to a maximum total of R200 000. The declaratory order was no doubt sought in anticipation of claims against the Municipality by others who might have suffered loss as a result of the crash on 23 October. The matter came before McEWAN, J, who, in a full, detailed judgment in which the several problems that arose were carefully discussed, granted the orders sought by the Municipality. The appeal is against the whole of the orders made.

It is not disputed that the terms of the policy of insurance, which was first issued in August 1970 and renewed in July 1971, are sufficiently wide to cover

claims of the nature of those with which this case is concerned. Nor has the question of the Municipality's legal liability on the ground of its negligence to compensate those who suffered damage in consequence of the crash, been in issue in this case. The appellant's answer to the claims made against it was that it was entitled to, and did, repudiate liability to the insured because of the latter's failure to disclose to the insurer, prior to the issue of the policy or prior to renewal thereof, certain material facts. In the alternative, the appellant pleaded (I summarize) that condition 2(a) of the policy expressly provided that the insured would at all times take reasonable precautions to prevent accidents and to ensure compliance with all statutory

requirements and regulations. It was alleged that such condition was a condition precedent to liability under the policy; that the Municipality had not fulfilled the condition in that it had been negligent and had not exercised reasonable care to ensure compliance with all statutory requirements in respect of the aerodrome and, therefore, that it was not entitled to recover on the policy.

This alternative defence was apparently argued in the Court a quo, which rejected it. McEWAN, J, gave cogent reasons for such rejection, in the course of which he referred to and relied upon, inter alia, Woodfall and Rimmer Ltd v Moyle and Another (1941) 3 All E R 304 and John Dwyer Holdings v Phoenix Assurance Co 1974(4) SA

231 (W). In both of those cases there was discussed the proper approach of the Courts to a condition similar to condition 2(a), which appeared in a policy the specific object of which was to indemnify the insured in respect of the consequences of negligence on his part. (See, in particular, in Woodfall's case, the observations of Lord Greene, M R, at p 307 H - 308 A and at p 309 G - p 310 C; also per GODDARD, LJ, at p 311 C - E.) On appeal to this Court, Mr Browde, for the appellant, although he did not expressly abandon the defence founded upon condition 2(a), informed us that he would not advance any argument in support of it, and indeed, he did not. I think that in the cir= cumstances of this case his decision not to persevere in the alternative defence was correctly and wisely made.

The sole issue before us, then, is whether the Court a quo ought to have found that the Municipality's claims failed because of fatal non-disclosure of material facts, as Mr Browde contended, or whether, as Mr Burger for the Municipality contended, the admitted non-disclosure related to matter which was not material and therefore did not serve to vitiate the claims on the policy. Unfortunately, the issue is very much more easily stated than resolved.

The defence founded upon alleged non-disclosure of material facts was formulated in the plea, as amended, in these terms:

> "10. When applying for the said policy of insurance, the Plaintiff was under a duty to disclose to the Defendant all facts material to the risk to be under= taken by the Defendant.

11. (a) In breach of its aforesaid duty, the Plaintiff failed to disclose to the Defendant certain facts, documents and their contents, which facts, documents and their contents were material to the risk to be undertaken by the Defendant.

(b) The facts which were material to the risk were:

(i) That the electric pole on the approach to runway 21 was of a height (having regard to its position in the approach area) which breached the Air Navigation Regulations:

(ii) That the said pole had no warning light as prescribed by the Air Navigation Regulations;

(iii) That the Plaintiff had from time to time received complaints about and was involved in a debate con= cerning the effect of the said pole on landing aircraft;

(iv) That the Plaintiff had from time to time been warned that the said

pole constituted a danger to aircraft particularly at night and/or was of a height which in the circumstances breached the Air Navigation Regulations:

(v) That the said pole was a hazard to aircraft.

(c) The said complaints, debate and warnings were contained in one or more or all of the documents now contained in the bundle which has been agreed upon between the parties. In rela= tion to such documents the Defendant contends that they and their contents should have been disclosed individualy, alternatively in their entirety, and that the failure to disclose them either individually or in their entirety was material.

12. In the circumstances the Defendant is en= titled to avoid the said policy which it hereby does."

It is necessary, I think, briefly to sketch the history of the aerodrome in order to provide some background

to the correspondence and the allegations of non-disclosure. The Oudtshoorn aerodrome was for several years under the control of the military authorities and almost exclusively used for military purposes, more especially during World War II when it was the home of No 45 Air School. The Municipality took over its control in 1948 and it was thereafter, under proper licence, in use for both civil and military aviation. In the years following the Municipality's assumption of control a daily passenger service was operated from the aerodrome for which purpose several different types of aircraft were used. At one stage, South African Airways operated a service to and from the aerodrome in association with a concern known as Cape Air. It appears from the evidence

of Mr Schultz, who entered the employ of the Municipality in 1948, became Town Clerk in 1956 and still occupied that position at the time of the trial, that these services were regularly operated almost throughout the 1950's and that no complaints were received by the Municipality regarding the condition of the aerodrome or its safety. Indeed, the Municipality was concerned to maintain a very high standard so that the aerodrome might be upgraded to the status of a regional airport. In that regard there was competition with the nearby Municipality of George, which apparently also aspired to regional status for its airport. In the end George won, but it is implicit in Mr Schultz's evidence that it was not for want of proper maintenance and improvement

of the Oudtshoorn aerodrome that George was preferred by the authorities. It was also explained by Mr Schultz that throughout the years the Municipality enjoyed an excellent relationship with and gave full co-operation to the civil aviation authorities.

As I have mentioned, the pole carrying high tension electricity wires was erected in 1964. Its erection was preceded by correspondence with the Government's department of transport, which, by letter dated 24 April 1964, and signed by one Krige, approved the proposed work according to the plan which had been furnished by the Municipality. In terms of the relevant regulations and having regard to the gradient of the approach surface to the runway, the pole ought not to have

exceeded 25 feet in height; in fact (and this was common cause) it was a fraction over 30 feet high and therefore was not in accordance with the requirements. The evidence was to the effect that neither the Town Council nor the Town Clerk knew of this irregularity. Schultz said that he was at the relevant time aware of the restriction in respect of the height of the pole but was under the firm belief that it was in fact 25 feet high. I shall return to this aspect of the matter in due course. The pole was also the subject of complaints or warnings conveyed to the Municipality through the Town Clerk by one Gillis, who initially wrote on behalf of the "Flying Club" of Oudtshoorn and later on behalf of the "Oudtshoorn Aero Club" (Aero Club). On 29 April 1968

the Aero Club, through Gillis, requested the Town Clerk in writing to arrange a meeting for the purpose of discussing, inter alia, "the removal of the high tension wires on the approaches to the main runway". The responsible standing committee of the Town Council had previously met by request on 16 May 1967, to discuss what was described in the notice as "the extremely dangerous position of certain high tension overhead line poles situated in Park Road at the approach to the main runway of the local aerodrome". It was also said in the notice of such meeting that the poles constituted "a hazard" to pilots. In consequence of this, authority was granted for an investigation of "the most effective means" of marking the poles so that the "hazard" be

clearly / .....

clearly discernible to pilots. Approval was sub= sequently granted on 17 July 1967 for the purchase of 6 white markers which, it would appear, the Council considered would serve to remove the "hazard". White markers were duly installed.

On 22 May 1968 Gillis, again on behalf of the Aero Club, wrote to the Civil Division of the transport department in these terms:-

> "About 2/3 years ago you approved the erection of 30 feet high tension wires directly across the glide path of the Oudtshoorn Airport. As a matter of interest, I should very much like to know why you do not consider this a danger to aircraft. At the moment the Oudtshoorn Flying Club is trying to get the Council to remove these wires, but they maintain that once your department has approved of the erection, it must obviously be no hazard to aircraft.

Furthermore / .....

> Furthermore, it would be appreciated if, without prejudice, you would advise us if an aircraft flew into these wires - they are not clearly visible from the air - who would be to blame."

No reply to the letter of 22 May was received by the Aero Club until 22 October 1968, when the Secretary for Transport informed the Aero Club that to the best of his department's knowledge, "no complaints regarding the power line had been made by S A Airways whose aircraft regularly used the aerodrome or by any other itinerant pilot/ operator", but that, nevertheless, an official of the Department would visit Oudtshoorn "in the near future" for the purpose of inspecting the aerodrome and, if necessary, to carry out "flight tests" and to "discuss the whole situation with all concerned". Arrangements

were in due course made between the Municipality and the Department for the arrival of the latter's repre= sentative at the Oudtshoorn aerodrome at 2 pm on 5 November 1968. The official did not arrive at the appointed time, nor at any time thereafter, and for reasons which need not be gone into neither the proposed inspection nor the flight tests took place. In a letter to the Municipality dated 10 December 1968, however, the Secretary for Transport explained that the main purpose of the aborted visit of its representative had been to establish whether the poles and power line really constituted "'n hindernis". It was suggested in this letter that the Municipality's Engineers' Depart= ment should determine the elevation angles of the poles

within the approach area to the runway. It was also suggested that the poles be clearly marked. The Secretary for Transport also mentioned in his letter to the Aero Club that if the power line were "found to be an obstruction" certain steps would need to be taken, one of which was "conspicuous marking" of the power line. As I have mentioned, six white markers had already been installed.

In June 1969 the Municipality was asked by the Department of Transport to appoint an aerodrome manager. Mr Schultz was duly appointed and thenceforth discharged his duties as such in addition to his duties as Town Clerk. There appears to have been a distinct lull during 1969 in regard to complaints or discussions or warnings relative

to the / .....

to the alleged "hazard" constituted by the poles and overhead wires at the aerodrome. After the aborted visit of an official of the Department and the sub= sequent correspondence thereanent which ended in December 1968, nothing deserving of mention appears to have happened or been written or debated in connection with the condition of the aerodrome until February 1970, when the Aero Club informed the aerodrome manager in writing that it proposed to instal an electric flare path on the main runway.

On 14 April 1970 the Aero Club addressed a letter to the aerodrome manager in these terms:-

"As you / .....

"As you are aware the runway lights have now been handed over to the Municipality of Oudtshoorn.

We would therefore advise you to kindly send the Divisional Controller of Civil Aviation, Private Bag 193, Pretoria, a registered letter containing the following:-

1. A single electric flare path has now been installed on runway 21 only on the Oudtshoorn Airport.

2. Caution should be exercised on the approach for high tension wires.

3. The windsock has been illuminated at night and works in conjunction with the electric flare path.

4. Any member of the Oudtshoorn Aero Club can be contacted to switch on the lights.

5. The lights will only be switched on upon request.

6. The Municipality should give a tele= phone number in addition to 4 above, where pilots can contact some suitable person to switch on the lights.

7. Pilots should be warned through the Division of Civil Aviation that only runway 21 is illuminated."

By / .....

By letter dated 8 June 1970 the aerodrome manager faithfully conveyed the terms of the Aero Club's letter to the Divisional Controller of Civil Aviation, who, in response thereto, thanked and congratulated the Municipality and the Aero Club on their initiative and interest regarding the aerodrome and assured the aerodrome manager that "details of the new facility will be published in the next notice to Airmen - for general information".

On 30 July 1970 the Department, in accordance with its undertaking to the aerodrome manager issued a "notam" relative to the Oudtshoorn airport for the information of all pilots. Such notam included the following:

> "Warning: Owing to a powerline crossing a portion of the Northerly approach area, caution is needed when coming in to land at night on runway 21."

It was / .....

It was not long before the issue of this "notam" that the Municipality sought tenders for insurance in respect of its various activities. On 6 July 1970 the "Mutual Brand" company wrote to the Municipality to the effect that although it was prepared to undertake the insurance in respect of various others of the Municipality's enterprises, it was not willing to undertake public liability insurance in respect of the Oudtshoorn aerodrome. But, as we have seen, this initial declinature notwithstanding, the company issued a policy, which included the desired public liability insurance, on 20 August 1970. It is not in dispute that the Municipality's application for such insurance did not contain reference to the complaints or warnings

or discussions concerning the pole and overhead electric wires which were in some quarters regarded as a possible hazard or obstruction to aircraft coming in to land at the Oudtshoorn aerodrome. It was not, nor could it, reasonably have been contended (save only in regard to the height of the pole) that the Municipality had no knowledge of what I may conveniently and compendiously call "the ado" about the pole and the overhanging electric wires. Nor is there any evidence to suggest that the appellant had knowledge of those matters from some other source. In these circumstances Mr 'Browde contended that notwithstanding that nothing concrete had been proved in regard to the alleged danger or hazard presented by the pole and overhead wires, it was the duty of the

Municipality at least to disclose to the would-be insurer the facts that there had been allegations of danger and that the proposed thorough investigation of such allegations had not yet been finally concluded. Mr Burger strongly resisted that contention; he submitted that by the time the application for insurance was made in 1970, the complaints or warnings of Mr Gillis on behalf of the Aero Club during 1967 and 1968 had become matters of the past, especially after the installation by the Municipality of the six markers. If I may attempt to describe as briefly as possible the pith of Mr Burger's contention, it was that the Municipality's duty did not extend to disclosure of long past fears which had been allayed.

It is / .....

It is part of our law that a person making a proposal for insurance is under a duty to disclose to the insurer material facts of which he has knowledge - material, that is, to the question of "estimating the risk", which in turn would involve the question of acceptance or refusal of the proposed insurance and in the case of acceptance, the question of the premium to be charged. That there is such a duty of disclosure was at no stage in dispute between the parties to this litigation, nor was its existence in any way challenged, which is not surprising for it has long been recognised and accepted by this Court as being part of our law. In Fine v General Accident Fire and Life Assurance Corporation Ltd 1915 A D 213 at p 218, SOLOMON, JA, said that it was "well-settled law

that insurance policies are contracts uberrimae fidei"

and at p 219 he quoted with apparent approval this

dictum by FLETCHER MOULTON, LJ, in Joel v Law Union and

Crown Insurance Co (1908, 2 KB at p 833):

> "The insurer is entitled to be put in possession of all material information possessed by the insured."

In / .....

In Colonial Industries Ltd v Provincial Insurance Co Ltd 1922 AD 33 at p 40, after quoting from a judgment by Lord Blackburn that "in policies of insurance ..... there is an understanding that the contract is uberrimae fidei, that if you know any circumstance at all that may in= fluence the underwriter's opinion as to the risk he is incurring ..... you will state what you know", DE VILLIERS, JA, added:

> "Although this was not an insurance case there is no doubt that this is a correct exposition of the English law with which our law agrees".

And more recently CORBETT, JA, has said:

> "Insurance policies are, admittedly, contracts uberrimae fidei and this casts upon the insured, or strictly the proponent for insurance, the duty to disclose to the insurer, before con= clusion of the contract, all facts material to the risks which are known to the insured."

(Pereira v Marine and Trade Insurance Co Ltd 1975 (4) SA 745 at p 755 F.) The need for honest disclosure of known facts relative and material to the risk, in the interest of fairness to the insurer, has been recognized for very many years. The cases which testify thereto in the English law reports are legion and many of such cases, right up to the present day, refer back for their source to the dicta of Lord Mansfield in Carter v Boehm (1766) 3 Burr 1905, and reported at 97 E R 1162. 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 very many years in which the term has been used in this context, it is not, I think, potentially misleading. McGillivray and Parkington

accept / .....

accept it as a "convenient though not strictly accurate expression". (Insurance Law, 7th Ed, para 614 at p 251.)

Only "material" facts are required to be disclosed but in the course of the years problems have arisen regarding the proper test of materiality. In Lambert v Co-operative Insurance Society Ltd (1975) 2 Lloyds Rep 485, the Court of Appeal was asked to hold

that the criterion of materiality was what "a reasonable insured" would consider to be material in regard to the risk. The Court declined to do so; it held that the existing law in England was this: "what is material is that which would influence the mind of the prudent insurer ....." In the course of his judgment, however, MACKENNA, LJ, drew attention to the fact that in 1954 the Law Reform Committee, "a very respectable body including at that date Lord Justice Jenkins, Lord Justice Parker, Mr Justice Devlin, Mr Justice Diplock and other famous men", had recommended that the law relating to the materiality of matters not disclosed should be changed so as to require that "for the purpose of any contract of insurance no fact should be deemed

material / .....

material unless it would have been considered material by a reasonable insured". (See p 488 col 1 and p 489 col 2.) At the end of his judgment Lord Justice MACKENNA said: (at p 491 col 1)

> "I would only add to this long judgment the expression of my personal regret that the Committee's recommendation has not been implemented. The present case shows the unsatisfactory state of the law."

Both LAWTON, LJ, and CAIRNS, LJ, shared the misgivings of MACKENNA, LJ, in regard to the existing test of materiality in England and to have been alive to the "injustices" which might flow therefrom. (See p 492, col 2 and p 493.)

In argument before us Mr Browde referred to what is in all probability the most recent decision of

the Court of Appeal in England on this subject.

It is the case of Container Transport International Inc and Reliance Group Inc v Oceanus Mutual Underwriting Association (Bermuda) Ltd, reported in the May 1984, issue of Lloyds Rep (Vol 1, part 5, p 476). The Court affirmed that an insurer was entitled to avoid a contract under s 18(1) of the Marine INsurance Act, 1906 "if there was undisclosed before the contract was concluded any circumstance which a prudent insurer would take into account when reaching his decision whether or not to accept the risk or what premium to charge: the yardstick was "the prudent insurer and not the particular insurer ..." Here, too, reference was made (by KERR, LJ,) to the report

of the / .....

of the Committee referred to in Lambert's case and to a recommendation following upon a later investigation (1979/1980) to the effect that there should be no change in regard to marine insurance but that in regard to insurance other than marine ..... "the standard of materiality ..... should be determined by reference to what a 'reasonable assured' would expect to be material" (p 491.) The decisions of the English Courts have by no means been consistent in this regard. More than forty cases were referred to in the judgments delivered in the Oceanus case, reflecting various shades of opinion.

It will be noted that the recommendations referred to in the judgments in Lambert's case and in

use
the Oceanus case the words "the reasonable insured" when describing the test recommended. This very clearly predicates an objective test, which immediately introduces the familiar "reasonable man". In order to avoid any possible confusion I wish to make it clear that what=ever other possible connotations the term "the reasonable insured", as used in the said recommendations, may suggest, I use those words (or the words "the reasonable proponent") in the context of this judgment in the sense of "a reason=able man in the situation of the insured and possessed of knowledge of all the facts and circumstances known to the insured". It seems to me that in the relevant context nothing more or less than that is conveyed by the words "the reasonable insured".

I have / .....

I have been concerned to refer in some detail to the prevailing law in England on this subject because it was Mr Browde's contention that the English law corresponded with ours not only in regard to the requirement of disclosure of material facts but also in regard to the test of materiality. I also understood Counsel to suggest that dicta in this Court, and more particularly the dictum of DE VILLIERS, JA, in the Colonial Industries case, (1922 AD at p 42) reveal acceptance of the test prevailing in English law. The passage relied upon reads as follows:

> "The only question that remains is: 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."

This passage stated the general principle underlying the requirement of disclosure but I am not convinced that it was intended to deal specifically with the question whether the determinant of materiality related to the expectations of the prudent insurer only, to the total exclusion of what a "reasonable insured" would regard as material for the insurer's purposes and therefore to be disclosed. In Fine's case, supra, SOLOMON, JA, said (at p 218)

> "..... the question is narrowed down to this, was this a fact material to be known by the defendant company in estimating the risk"

and later, at p 220, referred with obvious approval to a

dictum by FLETCHER MOULTON, LJ, in Joel v Law Union and Crown Insurance Co (1908, 2 K B 863 at p 884) to the effect that if a reasonable man would have recognized that it was material to disclose the knowledge in question there was no excuse for not disclosing it. In Fransba Vervoer Bpk v Incorporated General Insurances Ltd 1976(4) SA 970 (W) at p 978, McEWAN, J, after considering several decisions of the Courts, including Fine's case and the Colonial Industries case, said:

> "It seems to me, therefore, that one should be careful not to say that the test of the reasonable insured, which has been accepted by our Courts, has gone by the board, and to recognize the possibility that no matter how material certain information may be from the point of view of the insurance company, the Court may still find that a reasonable proposer

> for insurance could not be expected to have realized that the information was material and consequently that he was therefore not bound to disclose it."

(See also per JANSEN, J, (as he then was) in Roome NO v Southern Life Association of Africa 1959(3) SA 638 (D & CLD at p 641 F-G.)

The object of devising a means or criterion for determination of the materiality of undisclosed facts must surely be to ensure, as far as is possible, that justice is done to both parties. The insurer is to be protected against non-disclosure which could gravely prejudice him but at the same time the insured ought not to be unfairly required to forfeit his rights under a policy which he entered into in good faith in accordance with his (objec= tively regarded) reasonable belief that all that was material had been disclosed. If I might return momentarily to Carter v Boehm and to Lord Mansfield, the following passages at p 1165 of

97 E R are not without interest and significance in relation to this topic:-

> "The insured need not mention what the under-writer ought to know; what he takes upon himself the knowledge of; or what he waves being informed of .....
>
> Men argue differently, from natural phenomena, and political appearances: they have different capacities, different degrees of knowledge, and different intelligence. But the means of information and judging are open to both: each professes to act from his own skill and sagacity; and therefore neither needs to communicate to the other.
>
> The reason of the rule which obliges parties to disclose, is to prevent fraud, and to encourage good faith. It is adapted to such facts as vary the nature of the contract; which one privately knows, and the other is ignorant of, and has no reason to suspect.
>
> The question therefore must always be 'whether there was, under all the circumstances at the time the policy was under-written, a fair representation; or a concealment; fraudulent, if designed; or, though not designed, varying

materially the object of the policy, and changing the risque understood to be run'."

The test which makes the expectations of the reasonable insurer the yardstick of materiality may often redound very harshly to the insured's disadvantage. That has been clearly recognized in cases relating to insurance other than marine insurance, in respect of which the English legislation defines what is material. It is not difficult to visualize circumstances in which the reasonable proponent for insurance, having knowledge of a particular fact but lacking the expe= rience and expertise of the insurer in the particular field concerned, does not and could not reasonably be expected to realize or suspect that such fact may have a special signi= ficance for the insurer. (See the example given by FLETCHER MOULTON LJ, in Joel's case, supra, at p 884). Such a notional proponent would, if

the / .....

the test of the prudent insurer's expectations only were applied, be most unfairly exposed to the risk of forfeiture of his rights under the policy. By applying the test of what the reasonable insured would disclose as material, the risk that he might be unfairly deprived of his rights under the policy would be substantially reduced, if not entirely eliminated. And this would not necessarily be achieved at the expense of the insurer, for he could avail himself of the opportunity he always has to require the proponent, prior to conclusion of the contract, or renewal thereof, to answer questions relating to aspects with which the reasonable insurer would realize that the layman (the insured) would in all probability be unfamiliar. The protection which the simple expedient of careful question=

ing could afford the insurer is suggested in an article by R A Hassan (1969) in Modern Law Review (Vol 32, 615.)

It must also be remembered that in cases of non-disclosure the principal inquiry relates to the acts or omissions of the insured. It is he who is under a duty to disclose material facts; it is he who is alleged to have failed to do so. It appears to me, therefore, that when in a case of this kind the question before the Court is whether undisclosed facts were material in the sense indicated above, the Court's function is objectively to decide in the light of all the relevant circumstances whether "the reasonable insured" (i e a reasonable man in the same situation and with knowledge of the same facts and circumstances) would have regarded the facts as

material / .....

material. Such an approach is in full accordance with the general principles of our law. In Weber v Santam Versekeringsmaatskappy Bpk 1983(1) 381 at 411, JOUBERT, JA, quoted with approval the following observation of Lord Wright in Fibrosa Spolka Akcynja v Fairbairn Lawson Combe Barbour Ltd (1942) 2 All E R 122 (HL) at p 140 G:-

> "The Court is thus taken to assume the role of the reasonable man, and decides what the reasonable man would regard as just on the facts of the case. The hypothetical 'reasonable man' is personified by the Court itself. It is the Court which decides."

I turn / .....

I turn now to consider which, if any, of the facts relied upon by the appellant, a reasonable insured would, in the existing circumstances, have regarded as material to the insurer's risk and therefore to be disclosed. In so far as the communications of the Aero Club and the discussions and other correspondence which took place during 1967/8 relative to the pole and overhead electric wires are concerned, I consider that there is substance in Mr Burger's contention that nothing concrete was established and that the warnings of danger, if such they were, appeared during the interregnum from 1969 to mid - 1970 to have lost significance. It may be that at that stage, during what I have called the interregnum, the reasonable proponent for public liability

insurance would not have considered it necessary to disclose to an insurer that there had been warnings of possible danger but that the Municipality having taken certain steps (viz. the provision of markers) the warnings had not thereafter been persisted in and that all appeared to be well. The one positive fact, namely, that the height of the pole was in excess of what was prescribed, was not known to the Municipality at that time, nor to the Department of Transport or the Civil Aviation authorities, who had approved of the plans and the erection of the pole, and therefore could not be disclosed. If the application for insurance had been made at that time, it might well be (but I express no firm opinion on the point) that a contention that there

was no call to disclose the correspondence and discussions which had taken place would have been upheld; the reasonable proponent for insurance might well have considered that such correspondence and discussions were not material to the question of the risk or the premiums to be charged in the event of a contract of insurance being concluded.

But perhaps unfortunately for the Municipality, the application for insurance was not then made, but only later, during or about June 1970. The materiality must be determined by reference to that later time. (See Hardy Ivamy, General Principles of Insurance Law, 4th Ed, p 142.) What happened at such later time was that, to the knowledge of the Municipality, a flare path was

installed / .....

installed on runway 21 at the aerodrome which was thus available for aircraft doing night-flying. Furthermore, the information was given to the Municipality not merely to serve as a courtesy notification, but also, and perhaps predominantly, to draw attention to sources of possible danger and to ensure that those who might use the aerodrome at night were properly warned. It is significant that the warning contained in the numbered paras 1 and 2 of the letter dated 14 April 1970 to the Airport Manager (reproduced earlier herein) harked back to the need for care when approaching runway 21 because of "high tension wires". In effect the "hazard" of the pre-interregnum period was revived. It goes without saying that the hazard would be likely to be regarded as

intensified rather than diminished when runway 21 was approached at night. The letter also requested the Airport Manager to notify the Controller of Civil Aviation accordingly and that body thought fit to issue for the information of all pilots, the warning I have reproduced earlier herein.

With all that information before him I consider that the reasonable proponent would highly probably have considered that this new element of risk would be not only a relevant factor but one of some importance to an insurer who was considering whether to accept the proposed insurance and if so what premium to fix.

I have come to this conclusion only after giving anxious consideration to the possibility that the

reasonable proponent might have regarded the warning notice to pilots as being no more than a routine procedure, predicating no new risk or need for caution, but I am satisfied that a conclusion to that effect would not be realistic.

In the result I am driven to the conclusion that the facts I have specified ought to have been disclosed to the appellant and that the failure to do so affords the appellant the right to avoid the Municipality's claims. The appellant has chosen to enforce that right.

The appeal is allowed with costs, which shall include costs in respect of two Counsel.

The order / .....

The order of the Court a quo is set aside and there is substituted therefor an order entering judgment for the defendant with costs, which shall include costs in respect of two Counsel.

S MILLER

JUDGE OF APPEAL

GALGUT, AJA - concurs