IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an Appeal under and in terms of Section 5 of the High Court of the Provinces (Special Provisions) Act No 10 of 1996 read with the provisions of Chapter LVIII of the Civil Procedure Code.

SC. CHC. Appeal No. 25/2011

H.C. (Civil) 248/2006(1)

Lakshman De Fonseka,
No. 180B, Koswatta Road,
Nawala,
Rajagiriya.

PLAINTIFF

Vs.

Eagle Insurance Co Ltd,
No. 75, Kumaran Ratnam Road,
Colombo 2.

DEFENDANTS

AND NOW BETWEEN

Lakshman De Fonseka,
No. 180B, Koswatta Road,
Nawala,
Rajagiriya.

PLAINTIFF-APPELLANT

Vs.

Eagle Insurance Co Ltd,
No. 75, Kumaran Ratnam Road,
Colombo 2.

DEFENDANT-RESPONDENT

A I A Insurance Lanka PLC,
No. 75, Kumaran Ratnam Road,
Colombo 2.

ADDED DEFENDANT-RESPONDENT

BEFORE: **S. THURAIRAJA, PC, J.**
KUMUDINI WICKREMASINGHE, J. &
JANAK DE SILVA, J

COUNSEL: Migara Doss with S. Gamage for the Plaintiff-Appellant

Dr. Romesh de Silva, PC with Shanaka Amarasinghe and Vasantha Kumara Niles instructed by Julius & Creasy for the Defendant-Respondent

WRITTEN SUBMISSIONS: Respondent-Appellant-Petitioner on 01st April 2021
Applicant-Respondent-Respondent on 27th April 2021

ARGUED ON: 29th February 2024

DECIDED ON: 14th June 2024

THURAIRAJA, PC, J.

1. The Plaintiff-Appellant abovenamed (hereinafter referred to as the 'Appellant') by Plaint dated 26th October 2006 instituted action against the Defendant-Respondent (hereinafter referred to as the 'Respondent') Eagle Insurance Co Ltd [Now *A I A Insurance Lanka PLC*] before the High Court of the Western Province (holden in Colombo) Exercising Civil Jurisdiction seeking *inter alia* to recover a sum of Rs. 45,000,000/- based on an insurance policy of which he was appointed the sole beneficiary.

BACKGROUND OF THE CASE

2. The Appellant sets out in his Plaint that Seneviwantha Wickramanayake Wijegunasekera Jasin Korale Arachchilage Chamil Goston (hereinafter 'the Deceased' or 'the Insured') contracted with the Respondent on or about 09th September 2004 for a life insurance policy,[1] insuring *inter alia* the life of the Insured.

3. The Policy provided that the Appellant would be entitled to a payment of Rs. 30,000,000/- in the event of death of the Insured by natural causes or a sum of Rs. 45,000,000/- in the event of death by accident.

4. The Deceased, despite being married at the time of effecting this Policy, had named the Appellant, his cousin, as the sole beneficiary in terms of the said Insurance Policy. As the Respondent submitted, it is indeed perplexing that the Insured opted to name his cousin as the sole beneficiary of a life insurance policy while his wife and mother were alive.[2]

5. Less than four months after effecting the said Insurance Policy, on 01st January 2005, the Insured had died consequent to injuries sustained in a motor accident. The Respondent

[1] Produced marked 'X1', p. 244 of the Brief

[2] Proceedings dated 02nd February 2009, pp. 22 and 28

pointed out the circumstances of the death as suspicious. Indeed, the evidence led at the trial reveals that the accident had occurred when the Deceased rode head-on into an oncoming lorry resulting in a collision. It is also evident from the record that the Magistrate ruled out any criminal negligence on the part of the lorry driver following an inquiry.

6. According to the Appellant, following this death, he had claimed on the Policy on or about 19th April 2005, which the Respondent Insurance Company refused to honour despite duly accepting the same.[3]

7. The Defendant-Respondent, by their answer dated 23rd May 2007, apart from questioning the circumstances surrounding the death, have averred that the Deceased had provided them with misleading information in the Proposal Form and the Questionnaire[4] in breach of the principle of *uberrimae fidei* when they entered into the Policy. The issues raised before the High Court specifically contain issues concerning *uberrimae fidei* on the part of the Insured.

8. By judgment dated 16th June 2011, the learned High Court Judge found in favour of the Defendant-Respondent holding that the Insured was in breach of the principle of *uberrimae fidei*.

9. Aggrieved by the said decision the Plaintiff-Appellant preferred this appeal. While the Petition of Appeal dated 11th August 2011 contains several questions of law, the Counsel for the Appellant confined his submissions to the following questions set out therein when the matter was taken up for argument:

[3] Petition of Appeal dated 11th August 2011, paras 4-6

[4] Produced marked 'D1' and 'D2', pp. 301 and 308 of the Brief

1. *"The Learned Judge of the High Court has erred in law in holding that the insured had been guilty of failure to exercise uberimai fidei [sic] whereas the Respondent Company failed and neglected to prove any of such allegations made against the insured in their answer."*
2. *"The said Judgment is contrary to the well-established principle of law of Evidence namely the burden of proof wherein the burden of proving an exception to repudiate a contract of insurance was vested with the Respondent Insurance Company. [sic]"*

10. The first question of law essentially requires this Court to inquire into whether there is sufficient material placed before the High Court to justify the finding of the learned High Court Judge as to the lack of *uberrimae fidei* on the part of the Appellant.

11. The second question of law requires this Court to consider whether the learned Judge has erred as the which party carry the burden of proving the same.

THE LAW APPLICABLE TO THE INSTANT CASE

12. Section 3 of the *Civil Law Ordinance, No. 05 of 1852* [5] provides as follows with regard to the applicable law in life insurance cases:

> *"In all questions or issues which may hereafter arise or which may have to be decided in Sri Lanka with respect to the law of partnerships, corporations, banks and banking, principals and agents, carriers by land,* ***life and fire insurance,*** *the* ***law to be administered shall be the same as would be administered in England in the like case, at the corresponding period, if such question or issue had arisen or***

[5] Also known as the *Introduction of the Law of England Ordinance*

had to be decided in England*, unless in any case other provision is or shall be made by any enactment now in force in Sri Lanka or hereafter to be enacted:*

Provided that nothing herein contained shall be taken to introduce into Sri Lanka any part of the Law of England relating to the tenure or conveyance, or assurance of, or succession to, any land or other immovable property, or any estate, right, or interest therein."[6]

13. Accordingly, the law applicable with regard to issues arising out of life insurance policies is to be the English law of the corresponding period. As **Dr. Wickrema Weerasooria** explains, in **Insurance: General Principles, Law and Regulatory Practices,** *"…under section 3 of this legislation, all Insurance business activity relating "to Carriage by land, life and fire insurance" will be governed by English law".*[7]

14. The English law governing contracts of insurance has undergone significant changes in the recent past by virtue of the *Consumer Insurance (Disclosure and Representations) Act 2012* and the *Insurance Act 2015*. Despite this, the principle of *uberrimae fidei* remains a central principle, albeit subject to certain changes as to its scope and operation.

15. The matter before us relates to an insurance policy effected in 2004. The plaint of the Plaintiff-Appellant was filed in 2006, with the Commercial High Court delivering its judgment in June 2011. Thereafter, the Petition of Appeal was filed in August 2011. In this context, the reforms brought about by the 2012 and 2015 Acts do not concern us.

16. In spite of this, for the sake of clarity and completion, I shall advert to these changes in this judgment, although summarily, given the case before this Court is one concerned

[6] Emphasis added

[7] Dr. Wickrema Weerasooria, *Insurance: General Principles, Law and Regulatory Practice* (Stamford Lake 2017) at p. 98 para 5.18

with the law pre-amendment. I shall first examine the said reforms, so that, later on, we may attend to the law applicable to the instant case without interruption.

ENGLISH REFORMS IN BRIEF: WHAT IS NEW?

17. The Amendments in consumer insurance law were brought about following a joint report by the Law Commission of England & Wales and the Scottish Law Commission titled *Consumer Insurance Law: Pre-Contract Disclosure and Misrepresentation.*[8]

18. As the Law Commissions noted, the law at the time was somewhat complex and confusing. It was overly harsh, especially on the insured, and was unsuited to the consumer market of the twenty-first century.[9] The proposals were made to mitigate this harshness and bring about clarity and certainty.

19. The harshness is perfectly illustrated by cases such as ***Lambert v. Co-operative Insurance Society.***[10] In this, Mrs. Lambert insured her family jewellery under an 'all-risk' insurance. When she signed the proposal form, she did not disclose her husband's previous conviction for receiving stolen cigarettes. She was never asked for these details by the insurer. When she claimed for the lost jewellery, the insurer avoided the policy on the basis of failure to disclose. The conviction was material, as it would have influenced a prudent insurer. It mattered not that Mrs. Lambert, or a reasonable person in her position, would not have realised its materiality.

20. The new reforms to English law in regard to the presentation of risk are reflected in two distinct, yet related, regimes. Governing consumer insurance is the *Consumer Insurance (Disclosure and Representation) Act 2012,* which received Royal Assent on 8th March 2012

[8] LAW COM No 319; SCOT LAW COM No 219

[9] ibid at p. 24 para 2.59; p. 25 para 3.2(2); p. 27-28 para 3.9-3.13

[10] [1975] 2 Lloyd's Rep 485

and came into force on 06th April 2013. Non-consumer insurances are governed by the *Insurance Act 2015*, which received Royal Assent on 12th February 2015 and came into force on 12th August 2016.

21. By the *Consumer Insurance (Disclosure and Representation) Act 2012*, the duty of disclosure in consumer insurance has now been abolished. The Act, drafted with laudable clarity and intelligibility, in Section 2 provides as follows:

> *"**2 – Disclosure and representations before contract or variation***
>
> *(1) This section makes provision about disclosure and representations by a consumer to an insurer before a consumer insurance contract is entered into or varied.*
>
> *(2) It is the **duty of the consumer to take reasonable care not to make a misrepresentation to the insurer**.*
>
> *(3) A failure by the consumer to comply with the insurer's request to confirm or amend particulars previously given is capable of being a misrepresentation for the purposes of this Act (whether or not it could be apart from this subsection).*
>
> *(4) The **duty set out in subsection (2) replaces any duty relating to disclosure or representations by a consumer to an insurer** which existed in the same circumstances before this Act applied.*
>
> *(5) Accordingly—*
>
> *(a) **any rule of law to the effect that a consumer insurance contract is one of the utmost good faith is modified to the extent required by the provisions of this Act**, and*
>
> *(b) the application of section 17 of the Marine Insurance Act 1906 (contracts of marine insurance are of utmost good faith), in relation to a contract of*

marine insurance which is a consumer insurance contract, is subject to the provisions of this Act."[11]

22. As such, insofar as consumer insurance contracts are concerned, there is no longer a duty of disclosure. The insurer's right to avoidance depends on there being a misrepresentation on the part of the insured made without reasonable care. To this extent, it must be noted that the common law recognizes the possibility of treating conduct, omissions and half-truths as misrepresentations.[12]

23. The duty of the insured, under this new regime is *to take reasonable care not to make a misrepresentation*. Even where an insured has made a statement amounting to a misrepresentation, an insurer has a remedy only if there has been a 'qualifying misrepresentation' under Section 4 of the Act.

24. By virtue of these Acts, the place of the duty of disclosure within the doctrine of *uberrimae fidei* has now been significantly altered. The effects of these legislative reforms are helpfully summarised in **Colinvaux's Law of Insurance (Eleventh edition)**:

"…the Insurance Act 2015 has replaced the parallel duties of disclosure and the avoidance of misrepresentation for business policies with the new duty of fair representation. The most important change in the law is the modification of remedies, removing the right of avoidance and replacing it with a proportional response based upon the assured's state of mind and the effect of the breach of duty on the underwriting of the risk. The Consumer Insurance (Disclosure and

[11] Emphasis added

[12] vide on half-truths *Dimmock v. Hallet [1866] LR 2 Ch App 21; Nottingham Patent Brick & Tile Co v. Butler [1885] LR 16 QBD*. Concerning representation by conduct or omissions *Curtis v. Chemical Cleaning & Dyeing Co Ltd [1951] 1 KB 805; Gordon v. Selico [1986] EWCA Civ J0219-2, [1986] 278 EG 53, [1986] 18 HLR 219; Spice Girls v. Aprilia World Service [2002] EWCA Civ 15*

Representation) Act 2012, by contrast, has dramatically altered the law as it applies to consumer life assurance, in the following respects:

(1) There is no duty of disclosure.

(2) The sole duty of the assured I to answer questions honestly.

(3) The remedies for misrepresentation depend upon the assured's state of mind, but avoidance is automatically allowed only in the case of fraud.

(4) Special rules have been adopted for group life policies, the effect of the Act being to treat each individual life assured as a consumer even through the policy itself is taken out by a business.

(5) Any statement by the assured is to be treated as a representation and not a warranty, and thus has to be assessed by reference to the rules on misrepresentation. A false statement can no longer give the insurers the right to treat themselves as discharged from all liability.[13]

25. **MacGillivray on Insurance Law (Thirteenth Edition)** recapitulates the effect of *Consumer Insurance (Disclosure and Representation) Act 2012* as follows:

"…The aim is to provide for clear, coherent and understandable law so that insurers and consumers can fully understand their rights and obligations.

In short, the Act [Consumer Insurance (Disclosure and Representation) Act 2012] abolishes the consumer's duty to volunteer material facts and replaces this with a duty on consumers to take reasonable care not to make a misrepresentation during pre-contractual negotiations. If a consumer breaches this duty and this misrepresentation induces the insurer to enter the contract, the insurer will (in the circumstances set out more fully below) have a remedy. The nature of the insurer's

[13] Robert Merkin, *Colinvaux's Law of Insurance* (11th edn, Sweet & Maxwell) at p. 1111 para 19-031

remedy depends on the nature of the consumer's misrepresentation and, in particular, the consumer's state of mind:

(1) where a misrepresentation is honest and reasonable, the insurer must pay the claim. The applicant is expected to exercise the standard of care of a reasonable consumer, bearing in mind a range of factors, such as the type of policy and the clarity of the question. The test does not take into account the individual's own subjective circumstances (such as knowledge of English), unless these were, or ought to have been, known by the insurer;

(2) if, when answering questions posed by an insurer, a consumer answers carelessly, the Act provides that the insurer may have a remedy according to whether it would have entered into the contract on different terms. If it would not have entered into the contract at all, it may refuse all claims but it must return the premiums paid. If it would have entered into the contract on different terms, the contract may be taken to include those different terms. For example, if the insurer would have added an exclusion clause, the insurer need not pay claims which fall within the exclusion but must pay all other claims. If the premium would have been higher, the insurer must pay a proportion of the claim; and

(3) if a consumer makes a deliberate or reckless misrepresentation, the Act permits the insurer to avoid the policy and treat the contract as if it never existed and refuse all claims. The insurer would also be entitled to retain the premium, unless there was a good reason why the premium should be returned."[14]

26. While it is imperative that we remain watchful of the latest drifts in law, I do not think it necessary to digress any further than we already have from the matter at hand.

[14] John Birds, Ben Lynch & Simon Milnes, *MacGullivray on Insurance Law: Relating to All Risks Other Than Marine* (13th edn, Sweet & Maxwell 2015) at para 19-004

UBERRIME FIDEI & THE DUTY OF DISCLOSURE IN INSURANCE

27. The axiom that contracts of insurance are contracts *uberrimae fidei* (contracts of utmost good faith) requires no special introduction to any mind even modestly familiar with insurance law. Developed over the course of centuries, this principle has taken root in common law, both English and Sri Lankan, as one of the most fundamental principles of insurance law. Undoubtedly, the principle applies to all kinds of insurance, including life insurance.

Pre-Reform English Law and the Sri Lankan Application

28. As observed by Lord Mansfield in the seminal case of ***Carter v. Boehm,***[15]

> *"… Insurance is a contract of speculation. The special facts, upon which the contingent change is to be computed, lie most commonly in the knowledge of the insured only: the under-writer trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge, to mislead the under-writer into a belief that the circumstance does not exist, and to induce him to estimate the risque, as if it did not exist.*
>
> *The keeping back such circumstance is a fraud, and therefore the policy is void. Although the suppression should happen through mistake, without any fraudulent intention; yet still the under-writer is deceived, and the policy is void; because the risque run is really different from the risque understood and intended to be run, at the time of the agreement.*

[15] [1766] 3 BURR. 1909, at 1164

The policy would equally be void, against the under-writer, if he concealed; as, if he insured a ship on her voyage, which he privately knew to be arrived: and an action would lie to recover the premium…

Good faith forbids either party by concealing what he privately knows, to draw the other into a bargain, from his ignorance of the fact, and his believing the contrary."

29. As the Respondent submitted, this dictum was referred to with approval by Senanayake, J. for the Court of Appeal in ***Asian Paint Industries Ltd v. Insurance Corporation of Ceylon Ltd.***[16]

30. Per Lord Atkin in ***Bell v. Lever Bros,***[17]

"Ordinarily the failure to disclose a material fact which might influence the mind of a prudent contractor does not give the right to avoid the contract. The principle of caveat emptor applies outside contracts of sale. There are certain contracts expressed by the law to be contracts of the utmost good faith, where material facts must be disclosed; if not, the contract is voidable. Apart from special fiduciary relationships, contracts for partnership and contracts of insurance are the leading instances. In such cases the duty does not arise out of contract; the duty of a person proposing an insurance arises before a contract is made, so of an intending partner."

31. As provided in **MacGillivray on Insurance Law (Thirteenth Edition),**

"Insurance is one of a small number of contracts based upon the principle of utmost good faith [Bell v Lever Bros Ltd [1932] A.C. 161 at 227; Banque Keyser S.A. v Skandia (UK) Insurance Co Ltd [1990] 1 Q.B. 665 at 769. The expression "uberrimae fidei" was in use in the late eighteenth century—Wolff v Horncastle (1789) 1 Bos. & P. 316 at

[16] [1992] 1 Sri LR 270 at 272

[17] [1932] AC 161 at 227

322…]… The principle governs all contracts of insurance and reinsurance, and it applies both before a contract is concluded (the pre-formation period) and during the performance of the contract (the post-formation period) [London Assurance Co v Mansel (1897) 11 Ch. D. 363 at 367; Cantieri Meccanico Brindisino v Janson [1912] 3 K.B. 452; Manifest Shipping Co Ltd v Uni-Polaris Co Ltd, The Star Sea [2001] 1 All E.R. (Comm) 193 at 198, 209-210…]

In the pre-formation period the principle of utmost good faith creates well-established duties owed by the insured and by his agent effecting the insurance to disclose material facts and to refrain from making untrue statements *when negotiating the contract…"* [18]

32. Section 41 of the *Regulation of Insurance Industry Act, No. 43 of 2000* provides as follows:

"No policy of long term insurance business shall after the expiry of two years from the date of the issue of the policy be called in question by any insurer on the ground that a statement made in the proposal or other document on the faith of which the policy was issued or reinstated, or in any report of a medical officer or referee, was inaccurate or false, unless the insurer shows that such a statement was made on a material matter or suppressed facts which it was material to disclose, and that it was fraudulently made by the policy holder and that the policy holder knew at the time of making it that the statement was false or that it suppressed facts it was material to disclose:

Provided that, nothing in this section shall prevent the insurer from calling for proof of age at any time, if it is entitled to do so under the policy conditions, and no policy shall be deemed to have been called in question merely because the terms of the

[18] John Birds, Ben Lynch & Simon Milnes, *MacGullivray on Insurance Law: Relating to All Risks Other Than Marine* (13th edn, Sweet & Maxwell 2015) at paras 17-002 and 17-003 (Emphasis added)

policy are adjusted on subsequent proof that the age of the life insured was incorrectly stated in the proposal."

33. While this section does not make specific reference to the term *uberrimae fidei*, it does, however, clearly indicate the requirement of *uberrimae fidei* in contracts of insurance.

34. It is required for the insured to reveal material details as to the exact nature, extent and potential of the risks transferred to the insurer. To this extent, there is a duty of disclosure, which stemmed from the principle of *uberrimae fidei,* on a proposer who has knowledge of such material facts relating to the risks. Such facts may be relevant to the insurer in deciding whether or not to undertake the risk, and the premiums subject to which they may decide to undertake the risks.

35. This duty is at times referred to as the 'Pre-Contractual Duty of Disclosure'. While the duty is bilateral, there is no requirement to disclose what either party did not or could not know.[19] A party can be in breach of this duty where a party misrepresents a material fact or when such party remains silent as to a material fact and fails to disclose the same in effecting the policy.

36. In the instant case, the basis of avoiding the policy related to what the Respondent deemed a material misrepresentation on the part of the insured as to his income.

37. The Respondent relied on ***Pan Atlantic Insurance Company Ltd v. Pine Top Insurance Company Ltd*** [20] to argue that facts related to the Insured's income were 'material facts' vis-à-vis the principle of *uberrimae fidei*.

[19] vide *Joel v. Law Union and Crown Insurance Co.* [1908] 2 K.B. 863 (supra)

[20] [1994] 3 All ER 581; [1994] 3 W.L.R. 677

38. The Respondent submitted that the test for determining what constitutes a 'material fact' to be whether a prudent insurer *might be influenced in his judgment if he knew of such fact* and not what the Insured thinks as to what might be material, relying on the decision of the House of Lords in ***Pan Atlantic Insurance Case.*** This is indeed accurate insofar as this case is concerned, for this is one element of the test of materiality set out in the law prior to the reforms discussed hereinabove.[21] The other element of the test of materiality is the requirement of actual inducement.

39. As was further held in the ***Pan Atlantic Insurance Case,*** *"…before an underwriter could avoid a contract for non-disclosure of a material circumstance he had to show that he had actually been induced by the non-disclosure to enter into the relevant terms."* [22]

40. As such, for an insurer to avoid a contract of insurance, it is necessary for the insurer to establish non-disclosure of a material fact as well as actual inducement by such non-disclosure.

Burden of Proof & Standard of Proof

41. In ***Kiran Atapattu v. Janashakthi General Insurance Co. Ltd.,***[23] Saleem Marsoof J. held that,

> "***It is trite law that all contracts of insurance are governed by the duty of uberrimae fidei or utmost good faith****, and any fraudulent claims arising from self-*

[21] See also *Lambert v. Co-operative Insurance Society* [1975] 2 Lloyd's Rep 485; *Mayne Nickless Ltd v. Pegler* [1974] 1 NSWLR 228; *Marene Knitting Mills Ltd v. Greater Pacific General Insurance Ltd* [1976] 11 ALR 167. However, it is to be noted that this test of insurer objectivity, which considered what the prudent insurer may be influenced by instead of what a proposer (often the insured) may understand as material, now appears to be replaced in English law by a test of insured objectivity following the *Consumer Insurance (Disclosure and Representation) Act 2012*.

[22] [1994] 3 W.L.R. 677 at 678

[23] SC Appeal 30-31/2005, SC Minutes of 22 February 2013 at 6-7

induced loss including those caused with intent to commit fraud may be justifiably repudiated by the insurer. See, Lord Atkin in Beresford v Royal Insurance Co [1938] A.C. 586; See also, Heyman v Darwins [1942] A.C. 356…

***While it is clear that in such cases the burden of proof of establishing fraud falls on the insurer**, the question that arises in this appeal is whether the applicable standard of proof is the criminal standard of proof beyond reasonable doubt, or the civil standard of preponderance of probabilities, or something in between…"*

42. In the above case, the respondents failed and neglected to honour an insurance claim arising out of damage caused to a vehicle and musical instruments by fire on the basis that the vehicle had been deliberately set on fire by the appellant. The appeal to the Supreme Court was preferred from a High Court judgment which set aside an arbitral award given in favour of the said appellant. This Court was called upon to consider, *inter alia,* the standard of proof required for establishing fraud in civil proceedings.

43. While categorically finding that the burden of establishing fraud lies on the insurer, His Lordship rejected the finding of the High Court to the effect that the standard of proof applicable is the civil standard of preponderance of probabilities. As Marsoof J. observed:

"Explaining the principles enunciated by the courts in this regard, Phipson on Evidence (16th Edition - 2005) at page 156, emphasizes that-

> *…attention should be paid to the nature of the allegation, the alternative version of facts suggested by the defence (which may not be that the event did not occur, but rather that it occurred in a different way, or at someone else's hand), and the inherent probabilities of such alternatives having occurred.*

In the recent decision of this Court in Francis Samarawickrema v Dona Enatto Hilda Jayasinghe and Another, [2009] 1 SLR 293, the Supreme Court has adopted this approach, exploding the theory that fraud in a civil case has to be proved beyond reasonable doubt, subject of course to the to the qualification that in applying the standard of the balance of probabilities, the court should always bear in mind that, as Lord Nicholls observed in the dicta quoted earlier, that the more serious the allegation the less likely it is that the event occurred and hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. ***In my view, since the applicable degree of proof would depend on the seriousness of the charge, the question whether it is the criminal or civil standard of proof that would apply in a civil case involving a charge of fraud, would become difficult to answer without a meaningless play on semantics.****"*[24]

44. As it has been noted, the standard of proof necessary to establish a case would depend on the seriousness of the allegation. As this Court has previously noted, phrases such as 'balance of probability' or 'preponderance of probability' are umbrella terms which encompass a spectrum of standards.

45. With regard to which party carry the burden of proof, the Appellant submitted ***Janashakthi Insurance Co. Ltd v. Umbichy***[25] where it was held that,

"Under the general law of insurance the burden of proving that a warranty has been broken lies upon the insurers. The burden of proof of breaches of conditions was on the insurer in accordance with the ordinary rule that the onus of proving a breach of

[24] ibid p. 10

[25] [2007] 2 Sri LR 39 at 40

a condition of an insurance policy which would relieve the insurer from liability in respect of a particular loss was, unless his policy otherwise provided, on the insurer…

I do not believe there to be any doubt regarding the fundamental position of Insurance Law that burden of proof related to an alleged breach of warranty lies on the insurer alleging it – I cannot accept the contention of the defendant-appellant that the burden of proving compliance with the "Institute Classification clause" lies with the plaintiff-respondent."

46. I must note that this submission by the Appellant has failed to sufficiently appreciate the nature of this duty of disclosure in insurance, which is not an implied term but a principle of law.[26] Although we do often encounter terms or memorandums recognizing this duty in insurance contracts, it is not a strict necessity.

47. Be that as it may, in line with the authorities I have discussed earlier, I do accept the contention that the burden of proof lies with the Respondent. If I were to better articulate this position in general terms, the burden of proving an alleged breach of the principle of *uberrimae fidei* lies with such party seeking to avoid the contract on that basis, for the duty is bilateral.

48. The Appellant's position in this regard was that the Respondent has failed to discharge this burden. The learned President's Counsel for the Respondent in his submissions highlighted several contradictions in the evidence presented by the Appellant before the High Court *per se,* as well as *inter se* vis-à-vis the information furnished by the Insured to the Insurer for the purpose of effecting the Policy.

49. On the strength of this evidence, the Respondent maintained throughout that the Deceased/Insured had acted in breach of the principle of *uberrimae fidei* and that, for

[26] vide *Khoury v. GIO (NSW)* [1984] 165 CLR 622 at 637

this reason, the Respondent Insurer is not obligated to honour the Policy effected. I shall now advert to the evidence relied upon by the Respondent in this regard.

50. As submitted by the Respondent in their written submissions, the wife and mother of the Insured were alive at the time of effecting the Police.[27] Furthermore, the fact that death occurred within a relatively short period after obtaining a large insurance policy, in which the Deceased's cousin (the Plaintiff-Appellant) was named as the sole beneficiary, as well as the circumstances surrounding his death are sure to raise eyebrows. However, such suspicious circumstances alone are insufficient to establish a lack of *uberrimae fidei* on the part of the Insured.

51. As the Appellant has revealed before the High Court, in his cross-examination, the Insured was employed as a 'Personal Assistant' to the Appellant from 1988 up until his death.[28] At one point in his testimony, the Appellant states that the Insured was paid a salary of approximately Rs. 25,000/-[29] a month while in other instances he states that the Insured received a salary of Rs. 15,000/- a month.[30] While this on its own may not amount to a serious enough discrepancy to avoid the entire policy, it only marks the beginning of some serious contradictory statements and admissions as to the deceased's income and financial positioning at the time.

52. Produced marked **'D1'** is the 'Proposal Form' submitted by the Insured to the Insurer (Defendant-Respondent Company) in order to obtain the Insurance Policy in question.

[27] The Plaintiff-Appellant has admitted this, as recorded in Proceedings dated 02nd February 2009, pp. 22 and 28

[28] Proceedings dated 02nd February 2009, p. 2

[29] ibid

[30] ibid, pp. 2, 11, 27

Produced marked **'D2'** is the 'Personal Assurance Questionnaire' submitted by the Insured to the Insurer.

53. While both these documents call for details of occupation, the Insured has not mentioned his employment as a 'Personal Assistant' in either. In this regard, during cross-examination, the Appellant admits that the Insured had not produced accurate details of his occupation.[31]

54. Furthermore, according to the Appellant's testimony, the Insured had carried out his business while working as his Personal Assistant. In this regard, on page 9 of the Proceedings dated 02nd February 2009, where the Plaintiff-Appellant was cross-examined as to the details of occupation furnished in **'D1'**, it is recorded as follows:

> "*Q. You stated that he was working in your office as your personal assistant?*
>
> *A. Yes.*
>
> *Q. It is not stated here?*
>
> *A. He had his own business as well.*
>
> *Q. Answer my question. On the last occasion you said that from 1998 till the date of his death he was working as a personal assistant in your business?*
>
> *A. And in the meantime he had his own business as well. He had his own company as well.*
>
> *Q. Answer my question. My question is, in your evidence did you or did you not testify under oath that the deceased was under you as your personal assistant?*
>
> *A. He was working as a personal assistant; he had his own business as well.*

[31] ibid, pp. 9-10

Q. Answer my question, did you say so.

A. Yes, I said so.

Q. In this for P1[32] [sic] which calls for his occupation, has he mentioned anywhere that he was working as your personal assistant?

A. It is not mentioned.

Q. That is not correct. That is not precise. This application is not precise, you admit that. It does not state that he is your personal assistant?

A. Correct."

55. Thereafter, the Plaintiff-Appellant further testifies that the Insured earned *"about 2 to 3 lakhs a month"*[33] from this business of "*importing raw material for polymer industry*"[34] and supplying the same exclusively to the Appellant's business. As the learned President's Counsel for the Respondent has pointed out, it is indeed quite puzzling why an entrepreneur earning approximately Rs. 200,000-300,000 per month would find it necessary to work as a 'Personal Assistant' for a mere Rs. 15,000.

56. In the **'D2'** Questionnaire, the Insured has provided his annual income for the years 2002 and 2003 as Rs. 2 million and Rs. 3.6 million, respectively. However, according to the testimony of the Plaintiff-Appellant, the Insured only started his business around May-June 2004 and did not have his own business prior to that.[35] Furthermore, the Insured

[32] This is in fact a reference to 'D1', which is erroneously recorded as 'P1'

[33] Proceedings dated 02nd February 2009, p. 10

[34] ibid, p. 12

[35] ibid, p. 11-12

had been totally dependent on the Salary of Rs. 15,000/- received from the Appellant, until he started his own business.[36] It is recorded as follows:

"Q. When did he start his business?

A. I cant remember.

Q. Roughly?

A. May-June 2004.

Q. He started his business in May or June of 2004, is that correct?

A. Correct.

Q. So, prior to May or June of 2004, he did not have his own business?

A. Yes.

Q. What is the business that he started?

A. He was importing raw material for polymer industry.

Q. To whom did he sell?

A. He was selling for me.

Q. He sold the raw materials to you?

A. Yes.

Q. So, he was an importer of raw materials, he imported it and sold it to you?

A. Yes.

Q. The was no value addition done by the deceased?

[36] ibid, p. 24

A. No value addition."[37]

57. Clearly, then, the annual income of the Insured for the years 2002 and 2003 as he has submitted in the '**D2'** Questionnaire could not be accurate. In fact, the Plaintiff-Appellant admits this information to be false:

"Q. And you said that the only employment he had up to 2004 was the Rs. 15,000/- which he received as personal assistant, did you not say so?

A. Yes, I said so.

Q. Therefore, what is stated in D2, to say that in the year 2002, he earned Rs. 2M from his own trade is false?

A. It must be.

Q. It is false?

A. Yes.

Q. You admit that?

A. Yes.

Q. Similarly when he says, that in the year 2003, he earned Rs. 3,600,000/- from his own trade, that is false, correct?

A. Correct.

Q. So, he has given a false and fraudulent document to the Defendant Company that is in his questionnaire, correct?

A. Correct."[38]

[37] ibid, pp. 11-13

[38] ibid, pp. 27-28

58. Both these documents marked **'D1'** and **'D2'** contain signed declarations by the Insured as to their truthfulness. The fact that these statements provided by the Insured form part of the proposal is clearly indicated in the said declarations. The Plaintiff-Appellant, too, accepts this fact.[39] Furthermore, the declaration in **'D1'** clearly states that the contract shall be absolutely null and void if any averment therein is untrue.

59. Produced marked **'D3'** is a letter by A.G. Sarma & Co. (Chartered Accountants) dated 25.08.2004 addressed to the Manager, Underwriting Department, Eagle Insurance Co. Ltd. The Insured has submitted the said document with his proposal. The letter states that Mr. S.W.W.J.K.A.C. Goston earns Rs. 600,000/- monthly, which clearly stands contrary to the testimony of the Plaintiff-Appellant. It further states that Mr. Goston's successful company which imports "Raw Polima Material to Sri Lanka"[40] has a monthly turnover of Rs. 6 million to 8 million. Moreover, it states therein that this company is a sister company of the highly reputed "Polyfilms Ceylon Ltd" which brings a turnover of approximately Rs. 30 million per month.

60. The Plaintiff-Appellant has testified admitting all such information to be untrue. In this regard, on pp. 17-19 of the Proceedings dated 17th June 2009 it is recorded as follows:

> *"Q. Shown D3, in D3, Mr. Sharma has said that Boston [sic] is self-employed with his successful company with a turnover of 6 to 8 million. On the last occasion I questioned you about that. This company is a sister company of Poly Films (Ceylon) Limited. That is incorrect?*
>
> *"A. Yes, that is incorrect.*

[39] ibid, p. 31

[40] As provided in the letter marked 'D3'

Q. So, what is stated in D3 by Mr. Sharma is an incorrect statement to the extent that the company of Mr. Boston [sic] is not a sister company of Poly Films (Ceylon) Limited?

A. That is correct.

Q. You stated that your monthly turnover was about Rs. 150 million?

A. It is correct.

Mr. Gunasekera: Annual turnover.

Q. I am sorry, annual turnover. You said that Poly Films had an annual turnover of about Rs. 150 million?

A. Yes.

Q. That is roughly about Rs. 15 million a month?

A. Yes.

Q. In this statement it is stated that Poly Films has a turnover of approximately Rs. 30 million per month. It is stated there?

A. Yes, that is correct.

Q. According to your evidence it is an incorrect statement?

A. Yes.

Q. So, that is the second incorrect statement in this audit letter?

A. That is correct."

61. While the inaccuracy of the information contained in this letter marked **'D3'** is undeniable, the learned Counsel for the Plaintiff has raised some objections as to the relevancy of this document and the contents therein and has submitted that the document should be marked subject to proof. Per contra, the contention of the learned

President's Counsel for the Defendant-Respondent is that no further proof is necessary as it was submitted by the deceased to the Insurer.

62. I am inclined to agree with the learned President's Counsel. Insofar as the document is relied upon in relation to the question of whether the Insured had furnished untrue information to the Insurer, no further proof is required, as the Insured has submitted this document with the proposal.

63. With regard to the letter marked **'D3'**, the Plaintiff-Appellant, during cross-examination, accepted the same to be fraudulent. Proceedings dated 17th June 2009 at pp. 39-40 records as follows:

> *"Q. I showed you a document issued by Mr. Sharma, correct?*
>
> *A. Correct.*
>
> *Q. That document is also a fraudulent document on the face of it?*
>
> *A. Yes.*
>
> *Q. And Mr. Boston [sic] has submitted that document to get the Insurance Policy from the Defendant Company, and that is also fraudulent document?*
>
> *A. Yes.*
>
> *Q. So, Mr. Boston [sic] has got the Insurance Policy from the Defendant Company based upon a fraudulent document?*
>
> *A. Yes."*

64. It is very clear from the evidence before us that the Insured had furnished untrue information with regard to material facts, i.e. income and financial status of the Insured, at the time of entering into the Insurance Policy with the Defendant-Respondent Insurer.

65. The Defendant-Respondent has established the materiality of the financial status of a proposer through the affidavit dated 17th November 2009 of Susil Ranjith Palihakkara, General Manager Operations-Life Insurance of the Defendant Company at the time. He has explained therein the relevance of financial status for two reasons. Firstly, to ensure the ability of a proposer to pay the premia over the agreed upon period of time. Secondly, to ensure that benefits accrued under a policy are proportionate to the loss suffered by the assured.

66. While life insurance policies are not contracts of indemnity, they are not meant to be wagers. Accurate information on the financial status of a proposer is no doubt vital for an insurer in considering whether such a proposer is able to pay the premia accompanying the sum assured. And it is very clear that in the instant case if the Insured disclosed his true financial status, which is very clearly established to be much lower than what he had represented in the proposal form, the Insurer would not have issued a policy with a monthly premium contribution of Rs. 104,417/-

67. The Defendant-Respondent has sufficiently established a fraudulent misrepresentation on the part of the insured, for it is inconceivable that a person could innocently or negligently misrepresent their own income to be so drastically different. Therefore, it has been clearly established by the evidence led by the Defendant-Respondent that the Insured had acted in good faith.

68. Even under the new English legal regimes, which impose less stringent duties on a proposer, a misrepresentation of this nature would enable an insurer to avoid the contract of insurance. Accordingly, I answer the first question of law in the negative.

69. With regard to the second question of law, as I have adverted to earlier in the judgment, I am in agreement with the contention that the burden of establishing the breach of

uberrimae fidei in the instant case lies with the Defendant-Respondent as it is the Defendant-Respondent that alleged lack of *uberrimae fidei* on the part of the Insured.

70. While the learned High Court Judge has not specifically considered where the burden of proof lies, I cannot agree that the learned Judge has reasoned in ignorance or in a manner contrary to the aforementioned position.

71. The High Court Judgment, taken as a whole, does not place any burden on the Plaintiff. The learned Judge after careful consideration of the submissions made and evidence led by both parties has come to a conclusion that there was sufficient evidence before the court to satisfy the Insurer's contention that the Insured had not acted in utmost good faith. I do not see a reason to disturb this finding as it appears well-founded on the face of the record.

72. Therefore, the second question of law, too, is answered to the negative. The Appeal is accordingly dismissed. Parties shall bear their own costs.

Appeal Dismissed.

Judge of the Supreme Court

KUMUDINI WICKREMASINGHE, J.

I agree.

Judge of the Supreme Court

JANAK DE SILVA, J.

73. I have had the benefit of reading in draft the judgment proposed to be delivered by my brother Justice Thurairaja, P.C. wherein he answers the two questions of law in the negative.

74. I am in agreement with the following conclusions:

    (a) All contracts of insurance are governed by the duty of *uberrimae fidei* or utmost good faith.

    (b) The burden of proving breach of *uberrimae fidei* in a contract of insurance lies with the party seeking to avoid the contract of insurance on the basis of *uberrimae fidei*.

    (c) The Defendant-Respondent has proved that the Plaintiff-Appellant has breached the duty of *uberrimae fidei* or utmost good faith.

75. For the aforementioned reasons, the two question of law are answered in the following manner:

    Question of Law No. 1: Negative

    Question of Law No. 2: The Defendant-Respondent has proved that the Plaintiff-Appellant has breached the duty of *uberrimae fidei* or utmost good faith.

76. For the foregoing reasons, the appeal is dismissed. Parties to bear their costs.

Judge of the Supreme Court