SIC INSURANCE COMPANY LTD V KEN KWAME ASAMOAH – AN ASSAULT ON THE RULES GOVERNING ENFORCEABILITY OF INSURANCE CONTRACTS IN GHANA LAW?

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BACKGROUND

The Supreme Court decision in *SIC Insurance Company* v *Ken Asamoah*[1] deserves scrutiny in light of its potentially dire consequences or implications. Essentially, the decision strikes at the heart of two important pillars of the Common Law: the utmost good faith principle in contracts of insurance and the public policy doctrine which undergirds the doctrine of the enforceability of contracts. It is the authors' opinion that the decision could have potentially dire consequences for insurers because it could be used by insured persons as an instrument of fraud.

In the case, the Plaintiff/Respondent/Appellant (Appellant) sued the Defendant /Appellant /Respondent (Respondent) in the Hight Court, Tema for:

(1) Recovery of GH¢116,200 being the insured/claim/replacement cost in respect of a Chevrolet with registration number GN8866Z which was lost under a comprehensive insurance policy No. P/200/10/1001/2009/134 purchased from the Defendant.

(2) Interest of GH¢116,200.00 from April 2010 to date of payment at the commercial bank rate.

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Civil Appeal No J14/49/2018, (SC, 21 November 2018) Coram: Adinyirah (Mrs.), Anin Yeboah (as he then was), Baffoe Bonnie, Appau, Pwamang JJSCs. 4-1 majority decision, Anin Yeboah JSC (as he then was), dissenting. DK Nyamekor for the Plaintiff/ Respondent/Appellant. Bright Okyere-Adjekum (GA Sarpong & Co) for the Defendant/ Appellant/Respondent (hereinafter 'Ken Asamoah').

(3) Legal and Solicitor's costs.

The appellant, who was resident both in Ghana and the United States of America (USA), imported a Chevrolet SSR Sports car from the USA. The vehicle was discharged at the Tema Habour in or about February 2008. After the appellant had taken delivery of the vehicle, one Alhaji Iddrisu Yusuf expressed interest in buying same. The appellant sold the vehicle to him to be paid for later. The vehicle was registered in the name of said Alhaji Iddrisu Yusuf. Alhaji Iddrisu Yusuf, however, failed to pay for the vehicle. The appellant accordingly retrieved same from him. The appellant subsequently on 27 March, 2009 took a comprehensive insurance policy to cover loss or damage to the vehicle at an insured value of GH¢116,200.00, which was the cedi equivalent of US$83,000, the amount the appellant claimed he purchased the vehicle for. The appellant paid GH¢5,759.00 as premium to the respondent.

On 1st August 2009, armed robbers, according to the appellant, snatched the vehicle from the appellant's wife while she was driving it. Unfortunately, a report to the Police yielded no results whatsoever. The appellant put in a claim for the respondent to indemnify him. The respondent denied liability to indemnify the appellant. The appellant sued the respondent for the reliefs indicated above.

The respondent argued that the appellant had no insurable interest in the vehicle.[2] The respondent further contended that the insurable value which the appellant placed on the vehicle was inflated by the appellant, because the value which was placed on the vehicle by the Customs Excise and Preventive Service (CEPS), for the purpose of assessing the required import duty was much lower. The vehicle, which was said to have been purchased at US$83,000, was valued by CEPS at US$25,472.87. The respondent also alleged fraud on the part of the appellant and counterclaimed to avoid the contract of insurance between the parties on grounds of non-disclosure of a

[2] The Respondent argued that Alhaji Yusuf had taken a third-party insurance policy on the vehicle when the comprehensive insurance policy was subsisting. Appellant also pleaded that the said Iddrisu Yusuf transferred the vehicle to one Derrick Asante Amoako who in turn transferred same to Eb Accion Savings & Loans Company Limited on 30 October 2009. In other words, the Appellant had no interest in the vehicle at the time he took a policy cover on same.

material fact and/or representation of fact which was false in some material particular.

The trial High Court Judge, Anthony Oppong J (as he then was), held that the appellant had an insurable interest in the vehicle, and further that, the appellant had not involved himself in any fraudulent activity, which entitled the respondent to repudiate its obligation under the insurance contract. The High Court, accordingly, entered judgment for the appellant for the sum of GH¢116,200 plus interest at the Commercial Bank rate from April 2010 to date of final payment, as well as costs of GH¢8,000. The Court dismissed the respondent's counterclaim.

THE COURT OF APPEAL

Dissatisfied with the decision of the learned Trial Judge, the respondent appealed to the Court of Appeal.[3] The respondent canvassed several grounds of Appeal.[4] The Court of Appeal, however, distilled out of these, two main grounds, namely:

- Whether the Plaintiff had an insurable interest in the vehicle; and
- Whether the Defendant was entitled to avoid the contract of insurance on grounds of non-disclosure of a material fact and/or representation of fact which was false in some material particular?

The respondent appeared to have abandoned the insurable interest ground of appeal as its submissions before the Court of Appeal were silent on it.

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3 *SIC Insurance Co Ltd* v *Ken Kwame Asamoah* Civil Appeal No H1/167/2016 (CA, 9 February 2017) Coram: Samuel K Marful-Sau (Presiding), Irene Charity Larbi (Mrs.), Tanko I O Amadu JJAs (hereinafter 'Judgment').

4 The appeal was on six main grounds as follows: (a) The Judgment is against the weight of the evidence; (b) The Court erred when it held that the death of Alhaji Iddrisu Yusufu made it possible for the car to be re-transferred to the Plaintiff; (c) The Court erred when it held that the Plaintiff had an insurable interest in the car; (d) The Court erred when it held that Defendant had full disclosure as to all relevant information relating to the car e. The Court erred when it held that the value of the car was not inflated; (f) The Court erred when it held that Plaintiff was not fraudulent; (g) The Court erred when it overruled Defendant's objection to the admission of the evidence of Plaintiff on full disclosure by Plaintiff to Defendant on the ownership of the car at the time the Policy was issued.

However, like the trial High Court, the Court of Appeal held that appellant had an insurable interest in the vehicle. Basing its decision on the evidence, Stroud's Judicial Dictionary[5] and *Royal Exchange Assurance v Taylor*,[6] the Court of Appeal, per Irene Charity Larbi JA, held:

> the fact that the Plaintiff parted with possession of the vehicle to Alhaji Iddrisu Yusuf subject to full payment for it could not deprive the Plaintiff of his insurable interest in it. Similarly, is the fact that the third-party insurance coverage taken earlier by Alhaji Iddrisu Yusuf was not a bar to the Plaintiff to have it comprehensively insured. This is because the Plaintiff had relation to, or concern in the vehicle the subject matter of the insurance which by the happening of any peril may be detrimental or prejudicial to him as the owner. Therefore, the trial Court did not err when it held that the Plaintiff had an insurable interest in the vehicle. Accordingly, the ground (c) of the main grounds of Appeal fails.[7]

However, basing its decision on the doctrines of *uberrima fidei* and public policy, the Court of Appeal unanimously reversed the decision of the learned trial Judge and set aside the contract of insurance. The reasoning of the Court of Appeal on the subject is so instructive as to warrant being quoted *in extenso*:

> at page 223 of the Record of Appeal is the Customs Declaration Form with declaration number 42008033881/0 for the vehicle. The value declared on this Form as the value of the vehicle is USD 25,472.87. Based on this amount, a Duty in the sum of GH¢5,906.96 was accessed by Customs, Excise and Preventive Services Ghana (CEPS). Nowhere on the Form does the figure $83,000 appear. The Plaintiff asserted in his testimony that he left the clearing of the vehicle to his agent and that he was not directly involved in the clearing. Apart from the Plaintiff's assertion which was challenged, no corroborative evidence was provided by the Plaintiff. However, on the Declaration Form it is clearly stated that **"The information and particulars herein entered**

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5 See *Stroud's Judicial Dictionary* (3rd ed) vol 2 para 15, 1484.

6 [1973] 1 GLR 226.

7 *Judgment* (n 3) 13.

electronically are true and correct and have been obtained from original of documents required for in the purpose of this entry”.[8]

It is obvious, therefore, that Customs, Excise and Preventive Service (CEPS) assessment of the Duty was based upon documents made available to it by either the Plaintiff or his Clearing Agent at the Port of Tema. There is no evidence on the record that the Plaintiff, becoming aware of this anomaly which he attributed to his Clearing Agent in respect of the lesser value declared for the vehicle prompted CEPS about it or made attempt to have it rectified. The Plaintiff took the benefit of his agent’s action and enjoyed the benefit of payment of a lesser Duty for a vehicle he alleges he bought for as much as USD83,000. That was not all, but there is no evidence on the record that this alleged anomaly was brought to the notice of the Defendant when the Plaintiff took the comprehensive insurance.

Instead, the Plaintiff represented to the Defendant that the vehicle valued USD 83,000 based upon Exhibit ‘C’ which Plaintiff referred to as receipt (See page 57-58 of the Record of Appeal) and the Defendant insured it under comprehensive cover at a value of GH¢116,200 the equivalent of $83,000.

This no doubt amounted to a misrepresentation of material fact by the Plaintiff to the Defendant which goes to the root of the contract of insurance based upon uberrimae fides which entitles the Defendant under [the policy] to avoid the policy. Indeed, if the actual value of the vehicle was $83,000 as alleged by Plaintiff, then a fraud had been perpetrated at first instance on the State by the declaration of a lesser value for it when it came to the payment of Customs duty to the State.

The combined effect of Sections 95 (a) and (c) and 25 (1) (d) and (f) and (2) of Customs Excise and Preventive Service (Management) Act 1993, PNDCL 330 is that the Plaintiff may be potentially

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[8] Emphasis added.

> liable for the offence of forgery and falsification having regard to the value declared for the vehicle which as a result attracted a lesser Customs Duty and which upon conviction would have made him liable to a term of imprisonment not exceeding one year or both a fine and imprisonment as well as forfeiture of the vehicle. When such fraud against the State and or violation of statute is brought to the attention of the Court, the Court cannot ignore it.'[9]

The Court relied on a plethora of decisions of the Supreme Court and other Courts to buttress its holding.[10] It quoted with approval *dicta* of Atuguba JSC (as he then was) in *Network Computer System v Intelsat Global Sales & Marketing Ltd*[11] and Date-Bah JSC (as he then was) in the *Lotto Operators* case[12] to buttress its opinion. In the *Network Computer System* case, Atuguba JSC posited:

> A court cannot shut its eyes to the violation of a statute as that would be contrary to its raison d'etre. If a court can *suo motu* take up the question of illegality even on mere public policy grounds, I do not see how it can fail to take up illegality arising from statutory infraction which had duly come to its notice.[13]

Similarly, Date-Bah JSC in the *Lotto Operators* case was equally emphatic in stating that:

> No Judge has authority to grant immunity to a party from consequences of breaching an Act of Parliament… The judicial oath enjoins Judges to uphold the law, rather than condoning breaches of Acts of Parliament by their Orders. The end of the

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[9] ibid 14-17.

[10] *Network Computer System Ltd v Intelsat Global Sales & Marketing Ltd* [2012] 1 SCGLR 218 (hereinafter Network Computer System case); *Republic v High Court (Fast Track Division) Ex-Parte National Lottery Authority (Ghana Lotto Operators Association & Ors Interested Parties)* [2009] SCGLR 390 (hereinafter Lotto Operators case); *Asare v Brobbey* [1971] 2 GLR 331, 338, CA; *Geismar v Sun Alliance and London Insurance Ltd and Ors* [1977] 3 All ER 570.

[11] [2012] 1 SCGLR 218.

[12] [2009] SCGLR 390.

[13] *Network Computer System case* (n 11) 230.

> judicial oath set out in the second schedule of the 1992 Constitution is as follows: - 'I will at all times uphold, preserve, protect and defend the Constitution and law of the Republic of Ghana.' This oath is surely inconsistent with any judicial order that permits the infringement of an Act of Parliament.[14]

In light of the foregoing, the Court of Appeal unanimously allowed the appeal in part in these terms:

> From the sequence of events which emerged from the evidence of the Parties, it was after the vehicle had been cleared from the port that the comprehensive insurance cover was taken by the Plaintiff. From the Customs and Excise Declaration Form the vehicle was valued at $25,472.87 and a Duty of GH¢5,905.98 was accessed and paid for the vehicle.
>
> It is obvious that if a value of $83,000 had been declared as the value of the vehicle by the Plaintiff's Clearing Agent, the Duty that would have been accessed by Customs, Excise & Preventative Service would have been higher. It would, therefore, be against **public policy** for this Court to insist that the Defendant should indemnify the Plaintiff by paying GH¢116,200 being the equivalent of the $83,000 the Plaintiff claims to be the cost of the vehicle. A declaration of a lesser value of the vehicle to CEPS is a clear infraction of PNDCL 330 which cannot be sanctioned by this Court. It is for this reason that the Defendant is given reprieve to avoid the contract of insurance entered between the Plaintiff and Defendant in respect of vehicle the subject matter in the Suit. For these reasons the appeal is allowed in part and the contract of insurance entered into between Plaintiff and Defendant in respect of Chevrolet SSR Sports (Pick-Up) Car with Registration No. GN. 8866-Z covering the period 27th March, 2009 up to March, 2010 is hereby Set Aside.[15]

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14 *Lotto Operators case* (n 12) 402.

15 *Judgement* (n 3) 20-22.

The Judgment, from the perspective of the common law rules and the doctrines of *uberrima fidei* and public policy, would appear to be unassailable. However, the appellant, who felt aggrieved by the Court of Appeal decision, appealed to the Supreme Court.

THE SUPREME COURT

Before the Supreme Court, the appellant relied on the following grounds of appeal:

(1) The Judgment is against the weight of evidence and,

(2) The Court below erred when it held that the appellant misrepresented the value of the vehicle insured by the respondent for which reason the contract of insurance between appellant and the respondent is vitiated; the error lying in the fact that the Court below failed to take into account the nature of misrepresentation and that it was separable from the contract of insurance.[16]

The respondent did not cross-appeal against the Court of Appeal's holding that the appellant had an insurable interest in the vehicle. Accordingly, the main issue that fell for determination was whether or not the Court of Appeal was right in annulling the contract between the Parties. The Supreme Court, by majority reversed the Court of Appeal's unanimous decision.

The Supreme Court's decision reversing that of the Court of Appeal may be viewed from two angles: the test of materiality in contracts of insurance and the requirement for the enforceability of such contracts. These are discernible from the decision of the majority per Baffoe-Bonnie JSC:

> Under a contract of insurance, the assured is under a duty to disclose all material facts relating to the insurance which he proposes to effect. In addition, he must make no misrepresentation regarding such facts. Usually, these duties are modified by the terms of the contract. Whether a material fact is relevant depends upon the particular circumstances of the particular case**… The**

[16] *Ken Asamoah* (n 1) 3 (emphasis added).

test for determining the materiality or otherwise of a fact for purposes of disclosure is what will guide a prudent insurer in determining whether he will take the risk, and if so, at what premium and on what conditions. In the case before us, is the fact of the value given and the customs duty paid thereon, relevant to the comprehensive insurance? Would its disclosure or non-disclosure have affected the insurance company's preparedness to enter into the agreement on the same terms and conditions? Our answers to both questions are in the negative. In a contract of insurance of this nature, it definitely is material to disclose to the insurance company if, for example, the vehicle had been previously involved in a serious accident; or if the vehicle was originally left wheel drive and same has been converted to right wheel; or if the vehicle has undergone massive body or engine repairs, etc. In all such cases, it can be seen that disclosure is essential because, they are likely to increase the risk the insurance company is undertaking. But even then, its non-disclosure would not lead to annulment of the contract if the event that triggers the claim is unrelated to the undisclosed facts, as in this case, where the claim is for the snatching of the vehicle by armed robbers. The customs duty paid on the vehicle was based on the assessment done by the CEPS relative to what they assessed to be the value of the vehicle at the time the vehicle was being cleared from the port. It had nothing to with the value placed on the property by the assured, and for which the insurance company computed and asked the assured to pay a premium. **We hold that, in simple terms, going by the classical definition of Contract of Insurance, SIC Insurance Company Ltd, undertook, in return for the agreed consideration of the amount of GHC5,759.00, to pay to Ken Kwame Asamoah, an amount of GHC116,200 on the happening of certain events including armed robbery. Ken Kwame Asamoah, paid the GHC5,759.00 premium. The event for which the policy was**

> **taken has occurred. It is now time for SIC to make do their promise!**[17]

In the view of the Supreme Court, therefore, if the respondent company was apprised of the fact that the said vehicle, which was said to have been purchased in Canada for $83,000 was valued by the Customs authorities at $25,472.87, the respondent would not have questioned these widely conflicting values, but would have gone ahead to insure the vehicle. In other words, the different values would not have been material to the respondent as a prudent insurer!

That conclusion on the part of the majority is, with respect, problematic. There is a wealth of difference between $25,000 and $83,000. Certainly, and in our humble view, any prudent insurer faced with these conflicting values would consider whether it is worth assuming such risk. In any event, the inflated value, when discovered by the respondent, was precisely the ground it canvassed in the High Court as justification for the avoidance of the contract, namely, non-disclosure of a material fact and/or representation of fact which was false in some material particular. In light of this clearly articulated position, it is our view that, their Lordships, with respect, erred in arriving at this conclusion.

The Supreme Court's position that the respondent as an insurer ought to honour its obligations on the occurrence of the event for which the policy was taken, ordinarily should not be faulted. Indeed, there ought to be legitimate expectation on the part of persons entering into contracts of insurance that they will be properly and/or adequately compensated in the event of the happening of the event for which the policy was taken. The fulfilment of this expectation should bolster confidence in the insurance industry. In fact, the problem of many a policy holder is the trouble they go through to obtain compensation from insurers in the event of loss or damage to their vehicles.

In this regard, one can appreciate the position of Baffoe Bonnie JSC, that, **'Ken Kwame Asamoah, paid the GHC5,759.00 premium. The event for which the policy was taken has occurred. It is now time for SIC to make do their promise.'**[18] His Lordship was echoing the time-honoured principle

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[17] ibid 8-10 (emphasis added).
[18] ibid 10 (emphasis added).

that obligations assumed under contractual arrangements ought to be fulfilled, a principle that has attained universal recognition and/or acceptance under the maxim, *pacta sunt servanda.* However, with respect, the Courts should be concerned about the enforcement of validly concluded contracts, not those that are vitiated, such as the instant one, which offends the *uberrimae fidei* principle or is contrary to public policy. The Judgment of the majority was thus, with respect, rather simplistic. In the words of Baffoe-Bonnie JSC:

> **we find it very difficult to see how a simple contract of insurance covering a vehicle has occasioned such an incursion into the jurisprudence of fraud perpetration on the state on the grounds of some allegations of under declaration of value for purposes of payment of customs duty. Shorn of all the red herrings thrown about by the Respondent, this was a simple contract of insurance….**[19]

In his concurring Judgment, Pwamang JSC was of the opinion that assuming there was such evidence proving that the Plaintiff had intentionally and deliberately evaded paying the appropriate customs duty, he would have agreed with the Court of Appeal that the Plaintiff's claim be dismissed on the basis of the principle of *'ex dolo malo non oritur actio', meaning,* 'a right of action cannot arise out of fraud', and accordingly, no court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. In his considered opinion, there was not sufficient evidence of breach of the Customs, Excise and Preventive Service (Management) Act, 1993 (PNDCL 330) in this case and the conclusion reached by the Court of Appeal was indeed against the weight of the evidence as argued by the Plaintiff.[20]

Regrettably, his Lordship arrived at this conclusion without subjecting the Court of Appeal's reasoning and finding to any serious critique. An appellate court in setting aside findings of fact made a lower court ought to do so on well-established grounds. Indeed, an appellate court ought not to disturb the findings of facts made by the trial court, unless those findings are not supported

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[19] *Ken Asamoah* (n 1) 5 (emphasis added).

[20] ibid 14; Appau and Adinyira JJSCs concurred with the decisions of Baffoe-Bonnie and Pwamang JJSCs.

by the evidence on record.[21] Where, as in this case, the Court of Appeal, in our humble view, rightfully drew the necessary inferences from the undisputed facts on record, it was the duty of His Lordship to have demonstrated where the Court of Appeal went wrong. Merely stating that there was insufficient evidence of the breach of the statute (PNDCL 330) was not enough. In our opinion, the Court of Appeal's findings ought not to have been disturbed by His Lordship.[22]

We argue that the Majority decision is problematic. It is trite that a contract, which *ex facie*, contains all the essential elements of a contract, namely, offer, acceptance, consideration, and intention to create legal relations among other elements, may nevertheless be rendered unenforceable because of a vitiating factor, which in this case is the breach of the principle of *uberrimae fides* or public policy.

UTMOST GOOD FAITH IN INSURANCE CONTRACTS

Contracts of insurance are considered special types of contracts which impose a duty of utmost good faith on the person applying for the insurance cover. Contracts of insurance are conceptually different from other contracts, especially regarding what may constitute the material terms of the contract. The duty to make a full, accurate and frank disclosure of the relevant facts that affect the subject matter does not apply only to the insured, but also to the insurer in some cases. Both are required to make full and frank disclosures of material facts. In the case of *Carter v Boehm,*[23] Lord Mansfield described good faith in these terms:

> Good faith forbids either party by concealing what he privately knows, to draw the other into a bargain from his ignorance of that fact and from his believing the contrary. The policy will be equally void against the underwriter if he concealed as if he insured a ship on her voyage which he privately knew to be arrived, an action would lie to recover the premium.[24]

21 *Asante v Scanship Ghana Ltd* [2013-2014] 2 SCGLR 1296, 1297.
22 ibid 1298.
23 [1766] 3 Burr 1905.
24 ibid 1909; See *Halsbury's Laws of England* (3rd ed) 110.

Parties to an insurance contract are thus enjoined to disclose all material facts related to the transaction. English cases have defined a material fact as one that influences the judgment of a prudent insurer in considering whether to enter into a contract at all or to enter it at one rate or another. Thus, in all cases, the question to be answered is whether before or at the time the contract was concluded, there was fair representation or concealment of material facts.

DUTY TO DISCLOSE UNDER GHANAIAN LAW

The duty to disclose in Ghana is spelt out in Section 214(3) (c) of the Insurance Act, 2006 (Act 724). It provides that, '*a party to a contract of insurance shall not be obliged to disclose a fact about which a question is not asked by the insurer or the insurer's Agent.*'[25] This implies that when no questions are asked in respect of the subject matter of the policy, then there lies no duty to disclose on the party to be insured. A reading of this provision in isolation would give the impression that the insured is absolved of any obligation to disclose material facts if questions are not asked. However, according to Section 214(3)(d), once it is established that a party to a contract of insurance has withheld any information which would be prejudicial to the insurer, the insurer can rescind the contract.

This is especially so where the concealment is done with the aim of avoiding rejection of the risk by the insurer or payment of a higher premium by the prospective insured.[26] In sum, the law on disclosure in insurance contracts is captured as follows: there is no duty on the prospective insured to disclose information in respect of the subject matter, unless specifically asked a question by the insurer in respect of such. However, an insurer can rescind an insurance contract on the basis:

1. That there was a failure to disclose a fact which the insured knows, believes or has reason to believe is material to the contract.

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[25] Emphasis added.

[26] Section 214(3)(d) provides: 'a party to a contract of insurance may despite paragraph (c), rescind the contract where the other party, with the intent to avoid the rejection of the risk by the insurer or the payment of a higher premium, conceals from, or fails to disclose to the party to the contract, a fact which that other party knows or believes or has reasons to believe to be material to the contract'.

2. That this failure to disclose was driven by an intention to avoid the rejection of the risk by the insurer or that there was an intention to avoid payment of a higher premium by the insured.

In the case of *Guardian Assurance Co Ltd v Osei*[27] the defendant, Osei, insured a motor vehicle with Lion of Africa Insurance Co. Ltd, a predecessor company of the plaintiff company. To a question in the proposal form, 'Are you the owner of the vehicle?', the defendant replied 'yes.' As a matter of fact, the vehicle belonged to one Kwasi Manu who denied authorising the defendant to insure the motor vehicle in his (defendant's) own name. On the discovery of this fact, the plaintiff brought an action seeking a declaration that the policy of insurance taken out by the defendant was null and void for non-disclosure of a material fact relating to the ownership of the insured vehicle.

The court held that a contract of insurance was one of the utmost good faith (uberrimae fidei) and the proposer or prospective insured person must make full and true disclosure of material facts which would guide a prudent insurer in determining whether to assume a risk, and if so, at what premium and on what conditions. The court further held that a statement as to the ownership of an insured vehicle was a material fact, non-disclosure of which rendered the insurance contract void. Also, in the case of *Looker v Law Union Insurance Company*,[28] Looker, who applied for a life policy, was badly ill from an attack of pneumonia, but he did not disclose this fact to the insurance company. After the policy was issued, he died of the illness. The court held that the insurance company could refuse to honour the policy because of non-disclosure of a material fact.

Furthermore, in the case of *Norwich Union Fire Insurance Society Ltd v Tabbica and Sons,*[29] a party to be insured, while filling the proposal form, left blank the portions of the form that asked if the goods were subject to any hire purchase agreement. It turned out that the goods were indeed subject to one. The court held that since the parties incorporated into the proposal form, questions such as whether the vehicle was subject to a hire-purchase agreement, the answers given to the questions were material. It further held

[27] [1966] GLR 762 (emphasis added).
[28] [1928] 1 KB 554.
[29] [1967] GLR 226-230.

that the effect of non-disclosure of a material fact, such as in the instant case rendered the contract of insurance voidable at the election of the aggrieved party. The plaintiff's (insurer's) action was however dismissed based on the fact that the omissions and cancellations in the proposal form should have put the insurers on their guard to make immediate inquiries. Such failure amounted to a waiver of their right to fuller and more precise information.

The consequence of non-disclosure was also further demonstrated in the unreported case of *Grafitec Ltd v Phoenix Insurance Co Ltd.*[30] The plaintiff had insured its building, where it stored its goods against burglary. The plaintiff had, however, kept some of its goods outside the insured building, but within the same compound in which the insured building was situated. According to the plaintiffs, the premises had been burgled and 58 pieces of galvanized billboards had been stolen. The plaintiffs put in a claim. The defendants contended that the Plaintiff was in breach of the duty to disclose material facts under the contract by withholding information that some of the property intended to be part of the insured property was kept in the open yard and not inside the building as required by the Policy. On the issue of whether or not the billboards were stolen from a locus or premises that was covered by the policy, the court in its judgment stated that:

> The doctrine of uberrimae fidei and the duty of full disclosure has consequences on a claim by the insured. Did the plaintiff disclose all the facts as to where the signages/billboards were located? Were they supposed to be within the constructed factory premise (the building - item one), or they were in the outer perimeter in the open yard? Did the non-disclosure taint the claim? The law imposes an onerous duty of disclosure on proposers because they are supposed to have a detailed knowledge of the risk which is not available to insurers. It was the duty of the insured to disclose the location of the billboards. On the facts and on their own admission, the items were not in the enclosed premises and therefore fell out of the insurance cover.

[30] *Grafitec v Phoenix Insurance Co Ltd,* Commercial Division, Suit No Ins/3/06 (CA).

Another case that discussed extensively the doctrine of utmost good faith and the importance of disclosure is the case of *West African Examinations* Council *v. State Insurance Corporation (WAEC)*.[31] In that case, WAEC took out a marine insurance policy for ¢33,880.00 to cover the shipment of examination papers from the United Kingdom to Accra. The question papers arrived at Tema in boxes, and before being cleared from the harbour, four boxes had been broken into by a stranger. The contents of three boxes were found to be intact, but from the fourth box, four copies of question paper booklets for the Common Entrance Examination in English and arithmetic were missing. The Council sued the insurers under the policy for the cost of reprinting and replacing all the booklets containing questions in English and arithmetic plus other expenses. The claim was within the amount insured for. The insurers resisted the claim and offered to pay ¢1.10 being the cost of the four missing booklets and the cost of the Lloyd's Survey Report. The court held in favour of WAEC stating as follows:

> The uberrimae fidei rule forbids either the insured or the insurer from concealing what he privately knows, so as to draw the other into a bargain from ignorance of that fact, and his believing the contrary. Silence is not the same thing as concealment. (aliud est celare; aliud, tacere); also a material concealment is a concealment of facts which, if communicated to the insurer, would induce him either to refuse the offer to insure or to effect the insurance at a larger premium than the ordinary premium; and active concealment, which is a deceit, is equivalent to a positive statement that the fact does not exist; but there should be no misrepresentation of a material fact. Of course, a policy may be void for concealment: vide Anderson v. Thornton (1853) 8 Exch. 425.

The duty of disclosure not only applies to negotiations preceding the formation of the contract, but full disclosure must be made up to the moment when a binding contract is concluded. What constitutes a material fact is also indicated in Section 214(3) (e) of Act 724 which provides that, 'a fact is to be considered as material if in the circumstances it would be considered

[31] [1977] 2 GLR 467-487.

material by a reasonable person'. Whether a material fact is relevant depends on the particular circumstances of the case. It does not necessarily follow that because a fact has been held to be immaterial in one case, a similar fact may not be material in another.

In sum, the doctrine of utmost good faith and disclosure is so fundamental to insurance contracts that the failure to disclose a material fact entitles the insurer to repudiate the contract.

ILLEGALITY AND PUBLIC POLICY

As pointed out, a contract may be complete in all respects, but will be held unenforceable if its purpose or object is illegal or contrary to the policy of the law. Common Law forbids the enforcement of contracts which offend public policy. A contract may be illegal because it involves the doing of something which is unlawful, is prohibited by statute or because it involves the doing of something which is considered to be against the public good or public interest.[32] Where a contract violates a statute, it is illegal and unenforceable.[33] Also, where an act done can imperil public policy considerations, the court will not enforce it.[34] In *John Akparibo Ndebugre v The Attorney General & 2 Ors,*[35] the court said, regarding public policy:

> As was eloquently and classically put by Lord Mansfield CJ in Holman v Johnson [1775-1802] I All ER 98 at 99, 'The objection that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy which the defendant has the advantage of, contrary to the real justice, as

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32 See Christine Dowuona-Hammond, *The Law of Contract in Ghana* (Frontier Printing & Publishing 2011) 250.

33 See *CCWL v Accra Metropolitan Assembly* [2007-2008] 1 SCGLR 409, 425-435.

34 See *Republic v High Court (Commercial Division), Accra Ex parte A-G (NML Capital Ltd & Republic of Argentina Interested Parties)* [2013-2014] 2 SCGLR 990.

35 See *John Akparibo Ndebugre v The Attorney General & 2 Ors,* Suit No J1/5/2013 (SC, 2016). Coram Atuguba JSC (Presiding), Adinyira (Mrs.) JSC, Anin Yeboah JSC, Baffoe-Bonnie, JSC, Gbadegbe JSC, Akoto-Bamfo (Mrs.) Benin JSC.

> between him and the plaintiff, by accident; if I may so say. The principle of public policy is this: Ex dolo malo non oritur actio. No court will lend its aid to a man who founds his cause of action on an immoral or an illegal act. If, from the plaintiffs own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is on that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. This plainly means that at law a party is free (though there are some exceptions, not relevant here), to resile from an illegal contract and cannot be compelled to comply with the same…[36]

In light of the foregoing, there can be no doubt that contracts that *ex facie* have been validly entered into may be rendered unenforceable by a vitiating factor such as misrepresentation amounting to a violation of the *uberrimae fidei* rule or on grounds of illegality and public policy under the common law, which forms part of the laws of Ghana.[37] The Supreme Court, by taking a rather simplistic view of the insurance contract in *Ken Asamoah* and deliberately ignoring the *uberrimae fidei* and public policy grounds so admirably addressed by the Court of Appeal, with respect, fell in error. In this regard, the dissenting Judgment of his Lordship, Anin Yeboah JSC (as he then was) ought to be preferred.

THE DISSENTING JUDGEMENT

His Lordship, Anin Yeboah, JSC (as he then was) alluded to the facts of the case and the grounds of Appeal canvassed by the Plaintiff. Since an appeal is in the nature of a rehearing, His Lordship examined the findings of facts as made by both the High Court and Court of Appeal and concluded that the undisputed facts material for the determination of the issues as found by the learned High Court Judge were all affirmed by the Court of Appeal. For example, the price at which the appellant bought the vehicle, the import duty

[36] ibid 15; See also Atuguba, Date-Bah JJSC (n 9) and (n 10).
[37] See The Constitution of the Republic of Ghana, 1992, art 11.

paid at the Tema Port, and the value of the vehicle given by the appellant to the respondent before the insurance contract was entered into.[38]

Having concluded that the Plaintiff had an insurable interest in the contract, the main issue left for determination in his opinion, was whether or not the Defendant (Respondent) was right in avoiding the contract. In resolving the issue, His Lordship, significantly, drew a distinction between insurance contracts and other contracts, a matter that appeared to be lost on the Majority. In that regard, His Lordship pertinently observed:

> In resolving this issue, I think I must remind myself that contracts of insurance and other contracts are conceptually different. What may be the material term and requirements in an ordinary contract may be different from a contract of insurance? A contract for the sale of an immovable property, for example, imposes obligations on the vendor to a limited extent only by showing good title to the subject-matter of the contract. The purchaser is required to make his reasonable searches and, in some cases, even conduct further inquiries to ascertain whether the subject matter is free from encumbrances…… In contract of insurance, utmost good faith is required of the proposer to disclose material facts to the insurer. Even though both the proposer and the insurer must make accurate statements, the proposer on whose representations the insurer usually would rely on, may in the appropriate cases be culpable for non-disclosure or misrepresentation. Since contracts of insurance are written the extent of disclosure may usually appear in the contract itself. [39]

His Lordship then reviewed the policy (Exhibit A) and, like the Majority, held that 'this was basically the contract executed between the parties.'[40] However, unlike the Majority, and in consonance with the *uberrimae fidei* principle, His Lordship found that the conditions as stated in the policy (Part F of Exhibit A) imposed a strict duty of disclosure on the Plaintiff (Appellant) as the proposer

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38 *Ken Asamoah* (n 1) 16-17.
39 See *Ken Asamoah* (n 1) 19.
40 ibid 20.

to the Defendant insurer. In other words, the matters contained in the policy were material facts and required full disclosure.

His Lordship concurred with the Court of Appeal that nowhere on Exhibit C, the Bill of Sale:

> was the amount of US$83,000 stated as the amount paid by the Appellant for the vehicle. On the Customs Declaration Form, the value declared on it was US$25,472.87 and it was based on this amount so declared that a duty of GH¢5,905.96 was assessed by Customs, Excise and Preventive Service, Ghana (CEPS). Nowhere on the Customs Declaration Form does the sum of US$83,000 appear. The Court of Appeal found that the assessment of the duty paid was based exclusively on the documents made available by the Appellant or his agent, and that upon the Appellant becoming aware, no attempt was ever made by him to correct this serious error which indeed had denied the state some revenue. The Appellant, however, on entering into the contract represented to the Respondent, that the value was US$83,000 which was exclusively within his knowledge and indeed relied upon by the Respondent.

In light of the foregoing, His Lordship agreed with the unanimous decision of the Court of Appeal that:

> This no doubt amounted to a misrepresentation of material fact by the Plaintiff (Appellant) to the Defendant (Respondent) which goes to the root of the contract of insurance based on uberrimae fides which entitles the Defendant (Respondent) under Exhibit 'A' part 'F' to avoid the policy'. The Court of Appeal even proceeded to hold that the declaration of the value by Appellant to be US$83,000 amounted to perpetration of fraud against the state when he paid a lesser amount to the customs officials. In this appeal, the onus was squarely on the Appellant to show where the Court of Appeal erred on the facts or the law or finding that the non-disclosure of the material facts was sufficient for the Respondent to avoid the contract. In my opinion, the Appellant has not been able to convince this Court that the non-disclosure

> of the actual price was not a material fact to enable the contract to be avoided.[41]

Similarly, on public policy, His Lordship concurred with the Court of Appeal:

> Another point which was advanced by the Court of Appeal was the application of public policy to the case when it applied Sections 95 (a) and (c) and 251 (1) (d) and (f) and (2) of Customs, Excise and Preventive Service (Management) Act 1993, PNDCL 330 to conclude against the Appellant for having engaged in forgery and falsification having regard to the value declared. According to the Court of Appeal, as the whole transaction at the instance of the Appellant was fraught with illegality, it was bound to raise it,[42]… Illegality, once brought to the attention of the Court, overrides all questions of pleadings. The Court of Appeal was of the firm opinion that as it would be against public policy for the Appellant to take any benefit out of the contract of insurance the Respondent was right in avoiding the contract…In my view, I think that the conduct of the appellant was in clear violation of the law referred to above and should not benefit from his illegality. I think the above reasons suffice to dismiss the appeal which is accordingly dismissed.[43]

The judgment of His Lordship, which distinguished insurance contracts from other contracts and emphasised the role of good faith (*uberrimae fide*) and vitiating factors in insurance contracts ought to be preferred to the approach adopted by the Majority which, apart from being simplistic, also ignored the role of illegality and public policy in the enforcement of contracts. Meanwhile the role of these vitiating factors in the enforcement of contracts had been so eloquently adumbrated by Atuguba and Date-Bah JJSCs in previous decisions

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41 ibid 22.

42 ibid; Reliance was placed on local cases like *Republic v High Court (Fast Track Division), Accra; Ex Parte National Lottery Authority (Ghana Lotto Operators Association & Ors Interested Parties)* [2009] SCGLR 390. Once illegality is apparent on record a court of law must consider it.

43 See *Ken Asamoah* (n 1) 21-22.

of the Court. In our opinion, *Ken Asamoah* is certainly bad law. Fortunately, the Supreme Court can depart from its previous decisions.

CONCLUSION

The decision in *Ken Asamoah* is regrettable in as much as it ignores the *uberrimae fides* principle, illegality and public policy as vitiating factors in the enforceability of insurance contracts. Indeed, the Supreme Court did not pay any attention to the effects of these three pillars of the common law on contracts of this nature. Be that as it may, the decision of the Supreme Court is binding until departed from by the apex Court in the future. Our humble view is that the decision could be used as an engine of fraud by plaintiffs, not only against the revenue agencies, but also the insurance industry. Indeed, it could have dire implications for the insurance industry. By this Supreme Court decision, it does not matter what value is declared for tax purposes on vehicles by importers. If insurance claims are made based on bloated values, as happened in this case, the state would have lost twice: the revenue lost through under-declaration for tax purposes and higher insurance claims emanating from the inflated values of such cars, where, as in this instance, the insurer is a state-owned corporation. Insurance companies may have to insist on sighting the relevant documents showing the value placed on the vehicle by the CEPS, and the taxes paid on same as conditions precedent for insuring imported vehicles.