OUTER HOUSE, COURT OF SESSION

[2019] CSOH 32

CA75/18

OPINION OF LADY WOLFFE

In the cause

WAYNE STEPHEN GARDNER YOUNG

Pursuer

against

ROYAL AND SUN ALLIANCE PLC

Defender

Pursuer: R Dunlop QC, E Campbell; Drummond Miller LLP
Defender: Barne QC, Morton (sol adv); BTO Solicitors LLP

3 April 2019

Introduction

[1] The pursuer and defender are, respectively, the insured and insurer under a policy of insurance entered into in March 2017 ("the policy") in respect of *inter alia* certain commercial premises at 92 to 96 Sauchiehall Street, Glasgow ("the first premises") and 98 to 104 Sauchiehall Street, Glasgow ("the second premises"). The first and second premises are hereinafter collectively referred to as "the premises". (This summary simplifies matters, as the defender avers that the policy was subject to a mid-term change in October 2017 and that the pursuer was co-insured with a company after-mentioned, but no point is taken in relation to those circumstances.) On 22 March 2018 a fire took hold and extensively

damaged the premises. It is averred that these require to be demolished. The sum sued for is £7,200,000.

The defender's declinature of pursuer's claim

[2] The defender has declined to meet the pursuer's claim and, indeed, seeks in terms of its third plea-in-law to avoid the policy by reason of nondisclosure on the part of the pursuer. (Other issues are raised in its defences, including the want of insurable interest of the pursuer in the second premises and the presentation by its brokers of a second market presentation (at the same time as the Market Presentation (as after-defined)) in relation to a hotel ("the Hotel Market Presentation"), but to which the defenders did not respond.)

The undisclosed information

[3] In short, the nondisclosure is said to be the fact that the pursuer had been a director of four companies which had been dissolved after an insolvent liquidation or had been placed into insolvent liquidation within the 5-year period immediately preceding commencement of the policy ("the undisclosed information").

Issue debated

[4] At debate on the pursuer's first plea-in-law, the pursuer moved for decree in terms of his first conclusion, namely for declarator that the defender was obliged to indemnify the pursuer in terms of the policy for damage to the premises and for loss of rent. Underlying this motion was the pursuer's contention that the defender had waived disclosure of the undisclosed information and that that issue could be determined at debate. The pursuer

otherwise sought a proof on the remaining issues (of insurable interest and *quantum*). The defender opposed grant of declarator and, for its own part, sought deletion of the pursuer's averments of waiver as irrelevant. It otherwise sought a preliminary proof on the issues of materiality and inducement.

[5] So far as parties' researches have disclosed, this is the first case to consider the duty under section 3(1) of the Insurance Act 2015 ("the 2015 Act") to make a "fair presentation" of the risk.

The documentation and communications between the parties prior to inception of the policy

[6] Parties were agreed that the issues debated could be resolved without proof. Both counsel referred to a number of productions, although these were not formally agreed by a joint minute. I set out the material terms of that documentation in this section of the opinion.

The Market Presentation

[7] The pursuer used insurance brokers, Boyd & Co Ltd ("Boyds"), to place the insurance. Boyds prepared a market presentation ("the Market Presentation") which it submitted to the defender under cover of an email. The Market Presentation is a 20 page document. Page 1 is the cover sheet. Page 2 contained "Client Details and General Information", which I will set out shortly. The remainder of the Market Presentation comprised eight presentations of between 2 and 3 pages each (described as "Core Premises Cover Sections") for eight different properties (of which the premises were the fourth and

fifth). These sections included details of the property (eg type, construction, number of storeys, heating etc) and any additional security details or risk management features. It suffices for present purposes to record that the declaration of "none" was made in relation to "Risk management features". Returning to page 2 of the Market Presentation, headed up "Client Details and General Information", this identified the client as the pursuer and a company known as "Kaim Park Investments Ltd" (hereinafter "Kaim"). Under the heading "Activities", the status of the entity, the business description and the trade of the client was described, respectively, as "Limited", "Property Development" and "Property Owner". (No distinction appears to have been drawn between the pursuer or Kaim in the foregoing.)

Entries in the Market Presentation said to constitute the undisclosed information

[8] Under the heading "Details" at page 2, the Market Presentation provided the date the business was established (stated to be 20 February 2013) and the identity of the previous insurer. There is then a passage in the left-hand column that reads:

> "Select any of the following that apply to any proposer, director or partner of the Trade or Business or its Subsidiary Companies if they have ever, either personally or in any business capacity:"

(For reasons that will become apparent shortly, I shall refer to this as "the Moral Hazard Declaration"). The answer opposite this, in the right-hand column, is simply "None". After an entry stating that the number of subsidiaries is "0", the same answer of "None" is provided in relation to the left-hand words "Material facts" ("the Material Facts Declaration"). These responses are the basis of the defender's contention that there was a breach of the duty to make a fair presentation of the risk.

[9] The Moral Hazard Declaration is, on first sight, a little cryptic. In its adjusted defences, the defender makes the following averments about this:

> "… the Market Presentation, in the section for 'Client Details and General Information', there is an entry in the following terms: 'select any of the following that apply to any proposer, director or partner of the Trade or Business or its Subsidiary Companies if they have ever, either personally or in any business capacity. The software used by Boyds provided seven options that could be ticked in response. One option was in the following terms: 'been declared bankrupt or insolvent or been the subject of bankruptcy proceedings or insolvency proceedings'.
>
> Had the Market Presentation been completed accurately, this response should have been selected. Boyds selected the 'None' option. The Hotel Market Presentation, in the 'Details' section, included an entry in the following terms: 'Material facts regarding directors and/or partners'. The software used by Boyds provided five options that could be ticked in response. One option was in the following terms: 'Involved in another company within 6 months before receivership/insolvency'. Had the Hotel Market Presentation been completed accurately, this response should have been selected. Boyds selected the 'None' option".

[10] In his pleadings, the pursuer's position in relation to the Hotel Market Presentation is that the Moral Hazard Declaration was correct, as "[n]o proposer, director or partner of the insured under the contract in question has ever been made bankrupt, insolvent, or subjected to such proceedings."

The email exchange subsequent to the Market Presentation

[11] A trading underwriter in the defender's "Property, Packages & Liability Trading Site" department responded by email, dated 24 March 2017 and addressed to a "Debbie Warwick" ("the defender's email"), as follows:

> "I refer to our recent discussions and have pleasure in attaching our Property Owners terms for your attention:
>
> Cover is of course subject to the terms conditions and limitations of our properties contract attached.

> Subjectivity:
> Terms have been based on your presentation of 13/2/17, our recent discussions and that adequate Risk Management features are in place ie
>
> Electrics Certified, Housekeeping being satisfactory, No outside storage within 10m of buildings and where Intruder Alarm Systems are in place that they are set in their entirety when premises are closed.
>
> *Insured has never*
>
> > *Been declared bankrupt or insolvent*
> > *Had a liquidator appointed*
> > *Been the subject of a County Court judgement*
> > *Been convicted of or charged with but not yet convicted of a criminal offence other than a motoring offence*
> > *Had insurance cover restricted, cancelled or declared void"*

The author proceeded to set out the annual premium, which stated that" [g]iven the nature of the portfolio and recent claims we would need to pitch our terms at £19k minimum + IPT". There was reference to pulling out the first and second premises, in which event the premium dropped to £11,570 (plus IPT). The three further headings of the email were "Risk Consultation" (though risk improvements would not be required "during this period of insurance"), the "Premium Breakdown" (with the premium broken down by reference to seven premises (premises 4 and 5 are the premises with which this claim is concerned)), and "Claims Enhancement" (which undertook a speedy processing of claims). The waiver argument turns of the words I have highlighted in italics, though parties focused on the first four lines (particularly the use of "Insured"). For ease of reference, I shall refer to this as "the defender's Moral Hazard stipulation".

[12] The Boyds' reply has not been produced but it is referred to in the defender's letter, dated 6 April 2018 (ie post-dating the fire), raising the issue of nondisclosure. That letter

referred to the "subjectivity" wording and quoted Boyds' response as "Had a quick look and all seems to be fine" ("Boyds' reply").

The pleadings

The pursuer's pleadings

Averments about the Market Presentation

[13] In his pleadings, the pursuer avers that Boyds' reply ("Had a quick look in all seems to be fine") was correct. This was because

> "the 'Insured' were to be the pursuer and a company controlled by him, [Kaim] (the latter because one of the properties to be insured was owned thereby). Neither the pursuer nor that company has ever been declared bankrupt or insolvent, or had a liquidator appointed."

[14] The pursuer also takes the point, in response to the defender's averments about Boyds' software (quoted at paragraph [9], above), that these averments are irrelevant and the software was unknown to the defender at the time of policy inception or prior to these proceedings. The pursuer avers that the Market Presentation contained no misrepresentation and that none was founded upon by the defender. Even on the hypothesis that the software drop-down menu was relevant, and could be construed as answering that query, it is averred that it was accurately answered in the negative. This was because no proposer, director or partner of the *insured* under the policy had ever been bankrupt or insolvent, or subjected to such proceedings.

Averments of waiver

[15] In relation to the issue of waiver, the pursuer's position is that the email was concerned only with information regarding the bankruptcy, insolvency and liquidation of the insured and that that query was answered correctly (see the end of Article 5 of condescendence). The pursuer's averments on waiver are set out in Article 10(2):

> "There was no duty on the Pursuer to disclose his holding of directorships within companies which had had liquidators appointed. *Esto* that fact would have been material within the meaning of s.7(3) of the 2015 Act (which is denied for the reasons narrated hereinafter), the Defender in any event waived any entitlement to disclosure thereof by asking, in its email of 24 March 2017 as referred to above, whether or not the 'Insured' – i.e. the Pursuer or Kaim Park Investments Ltd – had ever been made bankrupt or insolvent, or had a liquidator appointed. By restricting that question to the 'Insured', and by not, as would have been simple, extending same to companies in which the Insured had been involved as Directors (or otherwise), the Defender waived any entitlement to disclosure of prior insolvencies or bankruptcies experienced by anyone other than the Insured themselves. In point of fact, neither the Pursuer nor Kaim Park Investments Ltd has ever been declared bankrupt or insolvent, *n*or had a liquidator appointed. The defender's averments in answer are denied. Explained and averred that the email dated 24 March 2017 pre-dated the commencement of the insurance policy and was plainly taken into account by the Defender as part of its decision to offer cover."

The defender's pleadings

[16] I have already set out, above, what the defender avers is the undisclosed information (see paragraph [3]) and its averments about the Boyds' software (see paragraph [9]).

Duty to make a fair presentation

[17] The defender has declined the pursuer's claim *inter alia* on the basis of the pursuer's failure to disclose the undisclosed information. The undisclosed information was material and the failure to disclose this was, it was said, a breach of the duty to make a fair presentation of the risk. The relative averments in Answer five are as follows:

> "A circumstance is a material circumstance if it would influence the judgement of a prudent insurer in determining whether to take the risk and, if so, on what terms. The undisclosed information was a material circumstance for the purposes of the 2015 Act. The existence of the insolvent liquidations in the Pursuer's prior and existing business relationships would have been influential to the judgement of a prudent insurer in determining whether to take the risk and, if so, on what terms."

At the end of Answer five the defender expands on the issue of materiality:

> "The fact that a proposer has been involved as a director in companies that have entered into insolvent liquidation is relevant to an insurer's assessment of risk. It can be an indicator of a wide range of failings on the proposer's part. For instance, it can be indicative of a lack of relevant knowledge or expertise, poor judgement, a propensity towards risk taking, an inability to organise finances or an inability to run a company properly with due regard to, amongst other things, regulations (including those directed to protecting life and property) and staff training. As a result of the Pursuer's failure to disclose the undisclosed information, the Defender was not provided with a fair presentation of the risk. Had the undisclosed information been provided to the Defender prior to policy inception, the Defender would not have entered into a contract of insurance at all on any terms." (I have removed the different fonts identifying the different stages of adjustment).

The defender's averments of waiver

[18] The defender responded to the pursuer's argument on waiver, as follows:

> "Not known and not admitted that neither the Pursuer nor Kaim Park Investments Limited has ever been declared bankrupt or insolvent, nor had a liquidator appointed. *Quoad ultra* denied. Explained and averred that the email dated 24 March 2017 did not set out questions for the Pursuer to respond to. It set out the basis on which cover was being offered to the Pursuer. The offer was made on the basis of *inter alia* Boyd's market presentation. The market presentation pre-dated the email of 24 March 2017. The market presentation contained an entry that, as hereinbefore condescended upon, should have prompted Boyds to disclose the Pursuer's involvement as director in companies that had entered insolvent liquidation. As such, the Pursuer's failure to disclose the undisclosed information was unconnected to, and did not rely on, the terms of email of 24 March 2017. The email of 24 March 2017 did not amount to a waiver of, or otherwise limit, the Pursuer's duty of fair presentation in respect of the undisclosed information."

Parties' submissions

Submissions on behalf of the pursuer

Outline of position

[19] Mr Dunlop QC, who appeared for the pursuer, outlined the pursuer's position as follows. It is not disputed that the policy between the pursuer and defender covers loss caused by fire. The only complete defence advanced by the defender (there is a partial defence regarding insurable interest) is that it was entitled to avoid any liability under the policy as a result of an alleged failure by the pursuer to disclose the undisclosed information, namely that he had been a director of four companies that had been dissolved after an insolvent event, or had been placed into insolvent liquidation, in the 5-year period prior to the commencement of the policy. Mr Dunlop QC submitted that the undisputed background discloses that the defender waived any entitlement to disclosure of prior insolvencies or bankruptcies by anyone other than the insured themselves. In these circumstances, the defence of waiver advanced was bound to fail and was irrelevant.

Waiver

[20] The pursuer's insurance was placed with the defender by Boyds, insurance brokers acting on his behalf. Boyds presented the defender with the Market Presentation. The defender responded with the defender's email, providing its quotation for insurance cover. In terms of the defender's email, the defender indicated that cover was subject, amongst other things, to confirmation of the following:

> "*Insured has never*
> *Been declared bankrupt or insolvent*
> *Had a liquidator appointed...*"

[21] On the same date, Boyds confirmed this to be accurate. Mr Dunlop QC submitted that was correct: the "insured" were to be the pursuer and a company controlled by him, Kaim. Neither the pursuer nor Kaim has ever been declared bankrupt or insolvent. It is not said by the defender that in answering this question the pursuer (or his brokers) responded untruthfully, and accordingly there is no defence of misrepresentation; rather, the defence is periled on assertions of material non-disclosure.

[22] Mr Dunlop QC turned to the legal principles. He submitted that it was well-established that an insured's obligation to disclose information on a subject matter can be restricted by the questions posed by an insurer. If questions are asked on a particular subject it may be inferred that the insurer has waived his right to information, either on the same matters but outside the scope of the questions, or on matters kindred to the subject-matter of the questions: *R&R Developments Ltd* v *AXA Insurance UK Plc* [2010] 2 All ER (Comm) 527 at paragraphs 39–42 (followed in Scotland in *Higherdelta Ltd* v *Covea Insurance Plc* [2017] Lloyd's Rep IR 650); *Doheny* v *New India Assurance Co* [2005] 1 All ER (Comm) 382 at paragraphs 14-21, 29, 37-38; *MacGillivray on Insurance Law*, 14th Edition at paragraphs 17-020. *Doheny* involved a misrepresentation, so the court's discussion of waiver was *obiter*. The cases discussed in *MacGillivray* disclosed that questions could widen or narrow the scope of disclosure. Furthermore, section 3(5) of the 2015 Act recognised that the duty of disclosure could also be restricted: section 3(5).

[23] Mr Dunlop QC stated that the defender's Moral Hazard stipulation (quoted in paragraph [11] above) was, no doubt deliberately, restricted to insolvency events experienced by the *insured*. It can reasonably be inferred, he suggested, that an insurer,

looking out for its own interests, will seek information tailored according to what it wishes to know. Where an insurer asks for information regarding the bankruptcy (for individuals) or insolvency (for corporate entities) of the insured, the reasonable assumption is that the insurer does not wish to know of bankruptcy or insolvencies affecting persons or entities other than the insured. The result, he argued, was that the defender had waived its entitlement to disclosure of insolvency events experienced by anyone other than the insured themselves, that being the same subject matter but beyond the scope of the question posed.

[24] Albeit there was no proposal form here, there was, he argued, a specific question regarding prior insolvency events. That specific question was, presumably deliberately, targeted solely at the personal or individual situation of the two insured, and not any prior corporate vehicle in which they had been involved. He referred to the following passage from *R&R Developments Ltd* (at paragraph 32):

> "It makes perfect sense to ask the insured about the directors' personal position, whether arising from their personal affairs or from any businesses in which they have been involved, without going further and asking about the position of the companies as well. The literal construction [of the question asked] makes good commercial sense. It is true that it **might** also make good commercial sense for the insurers to ask questions about the claims and insurance history of companies with which the directors had been involved, **but they have not done so and that is not particularly surprising**, since insolvency is not a risk which is insured against even as regards the insured and the directors, let alone remoter parties" (Counsel's emphasis added).

[25] If the situation of such prior corporate vehicles was indeed so important to the defender (as it has protested since the fire), it would have been very easy indeed for the defender to have asked a question about it. He referred to *Doheny* and to *R&R Developments Ltd* (at paragraph 33).

[26] Further, the defender, a substantial insurer, is taken to be aware of the case law Mr Dunlop QC referred to *MacGillivray on Insurance* (14th ed) 11-002 – 11-004 to support this

proposition. He submitted that this further point underlines the fact that the defender indicated what it considered material, so far as prior insolvency was concerned. It thus waived any entitlement to anything further in that regard. It cannot, in the face of a fire on premises which it was happy to insure on the basis of the specific question asked, now seek to "move the goalposts" and insist that, actually, it considered material a far wider disclosure of information regarding previous insolvency. Rather, the proper inference is that the insurer had no interest in the insolvency of any party other than the subject matter of the question: namely, the insured. He referred to *R&R Developments* at paragraph 42.

[27] This, he submitted, leads to an entirely sensible result. As Simon Brown LJ (as he then was) said in *Economides* v *Commercial Union Assurance Co Plc* [1997] 3 All ER 635, if

> "material facts duly are dealt with by specific questions in the proposal form and no sustainable case of misrepresentation arises, it would be remarkable indeed if the policy could then be avoided on grounds of non-disclosure."

[28] For these reasons, the defence is therefore irrelevant. Decree should be pronounced as first concluded for.

Submissions on behalf of the defender

[29] Mr Barne QC, who appeared on behalf of the defender, began by noting that the debate, fixed on the pursuer's motion, was to address the issue of waiver. In particular, the Court was being asked, as a matter of relevancy, to determine from the documents and pleadings whether or not the defender waived the right to receive disclosure of the undisclosed information. The defender avers in Answer five that, "The undisclosed information was a material circumstance for the purposes of the [Insurance Act 2015]" (see paragraph [17] above). For the purposes of the debate, this averment must be taken

pro veritate. It is clear from the defender's Note of Argument that it was not clear whether the pursuer was relying on the waiver which is said to arise when the proposer discloses information such as to give rise to a duty on the part of the insurer to investigate further. This was not, in fact, advanced by Mr Dunlop QC. Accordingly, I do not record Mr Barne's submissions on these matters.

Outline of defender's position

[30] Mr Barne QC submitted that the pursuer's averments in relation to waiver are irrelevant, failing which the matter cannot be determined at debate. In short, it is the defender's position that:

1. The pursuer was in breach of its duty of fair presentation by not disclosing the undisclosed information in the Market Presentation.
2. The defender's email post-dated the pursuer's breach of the fair presentation duty and did not amount to a waiver of the pursuer's duty to disclose the undisclosed information.
3. In particular, the defender's email did not give rise to a waiver because:
    (i) The pursuer makes no averments to the effect that the pursuer relied on the reply email. This reflects the fact that, had the Market Presentations (including the Hotel Market Presentation) been correctly completed, the undisclosed information would have been disclosed. The non-disclosure is causally unrelated to the reply email; and
    (ii) Further, and in any event, the defender did not know about the prior breach of the duty of fair presentation and, as such, could not have waived its

consequences since there must be knowledge of the right before it can be waived.

Background

[31] Mr Barne QC referred to the documentation, whose terms I have summarised above, at paragraphs [7] to [11]. Mr Barne QC noted that, following a recovery of documents, it has become clear that one of the options that could have been selected was in the following terms: "Involved in another company within 6 months before receivership/insolvency". The undisclosed information should have been disclosed as part of the Market Presentation in compliance with the pursuer's duty of fair presentation. Furthermore, the undisclosed information should have been disclosed in response to the specific entries. Mr Barne QC also explained that on 10 April 2017 the pursuer sought to change the values of a number of properties for which cover had been sought and enquired as to whether a discount on premium levels could be offered. It was, and cover was incepted on 10 April 2017. (This explanation goes beyond the defender's averments in answer 1.)

The 2015 Act

[32] Mr Barne QC turned to the section 3 of the 2015 Act. Section 3(1) introduced the requirement on the insured (at this stage, the person or party who would be the insured if the contract were entered into) to make to the insurer a "fair presentation of the risk" before the contract was entered into. The duty of fair presentation attaches before the insurance contract is entered into. The duty of fair presentation replaced the existing duties in relation to disclosure and representations contained in sections 18, 19 and 20 of the Marine Insurance

Act 1906 Act ("MIA1906"). However, he submitted, it retained essential elements of those provisions. Section 3 is designed to ensure that an insured provides insurers with the information they require to decide whether to insure a risk, and on what terms.

[33] Section 3(3) sets out the three elements of a "fair presentation of the risk". The first element of a fair presentation is a duty of disclosure, introduced in section 3(3)(a) and further defined in section 3(4). This provides two ways to satisfy the duty of disclosure. The first way to satisfy the duty is set out in section 3(4)(a) and effectively replicates the disclosure duty in section 18(1) of the 1906 Act. Its key features are that the insured must disclose "every material circumstance" which the insured "knows or ought to know".

[34] As in section 18(3) of MIA 1906, section 3(5) of the 2015 Act provides exceptions to the insured's duty of disclosure. The exceptions do not apply to the requirement to make the disclosure in a clear and accessible manner, nor to the duty not to make misrepresentations. In the absence of inquiry, anything which is the subject of an exception does not have to be disclosed by the insured to the insurer.

The pursuer's case as pleaded

[35] Mr Barne QC turned to the pursuer's pleadings. He noted that in Article 5 of condescendence, the pursuer pled the following:

> "Explained and averred that the market presentation put the defender on notice of matters for further inquiry. The defender did in fact make further inquiry, as hereinbefore condescended upon, prior to the inception of the policy."

In this averment, the pursuer appears to place reliance on the terms of section 3(4)(b) of the 2015 Act.

[36] He noted that, in these averments, the pursuer appears to place reliance on the terms of section 3(5)(e) of the 2015 Act. However, the pursuer's pleadings do not identify what it was in the Market Presentation that "put the defender on notice of matters for further inquiry". There is, he submitted, therefore no averred basis for the pursuer to argue that the Market Presentation disclosed sufficient information with the result that the pursuer's duty of fair presentation in relation to the undisclosed information was discharged in terms of section 3(4)(b) of the 2015 Act.

[37] Accordingly, although the pursuer's pleadings appear to rely on two separate subsections of section 3, it would appear that the pursuer is in fact advancing a single argument: that the terms of the defender's email of 24 March 2017 was such that the defender is barred from relying on the pursuer's failure to disclose the undisclosed information. (As noted above, this is consistent with the way in which Mr Dunlop QC advanced his case.)

The law prior to the 2015 Act

[38] Mr Barne QC noted that in terms of the pursuer's Note of Argument, lodged in advance of the procedural hearing, the pursuer's argument on waiver is advanced not only on the basis of the 2015 Act but also at common law. The 2015 Act superseded the 1906 Act and codifies the common law. Mr Barne QC noted that the pre-existing law in the UK is based on principles developed in the eighteenth and nineteenth centuries and codified in the 1906 Act. Although the 1906 Act appears to apply only to marine insurance, most of its principles have been applied to non-marine insurance on the basis that MIA 1906 embodies the common law (which itself is mostly based on principles developed in marine cases). He

referred to paragraphs 1.16 and 4.3 of the joint report of the Law Commissions, "Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims; and Late Payment" (Law Com No 353/Scot Law Com No 238) ("the 2014 Joint Report of the Law Commissions"). The pre-existing law on the duty to disclose material circumstances was also summarised by the authors of *Chitty on Contracts* (33rd ed) at paragraph 42-34, which was in the following terms:

> "Where the insurer asks the assured to answer specific questions, the parties are taken to have agreed that the facts involved in answering the questions are material, but this does not affect the duty to disclose material circumstances not covered by the questions, unless the way they are drafted has this effect, and except insofar as the failure to ask a particular question may make it difficult for the insurers afterwards to assert that the circumstances which would have been elicited were material."

The same authors also discuss the exceptions to the duty (at paragraph 42-36):

> "There are four traditional exceptions to the duty of disclosure (at least insofar as it rests on the assured's shoulders). Thirdly, the assured is not obliged to disclose circumstances where the insurer has waived disclosure of such circumstances. For example, if the insurer forbears to ask questions after disclosure of circumstances have put him on inquiry, he may be taken to have waived the right to disclosure of the circumstances which such inquiry would have disclosed; but the doctrine is not applicable to circumstances which are so unusual or special that their non-disclosure would distort the presentation of the risk, since the duty to disclose would otherwise be undermined. Similarly, the question which the insurer may ask the assured (usually in a proposal form) may be so framed as to indicate that the insurer does not require further information on the matters in question, thus relieving the assured from doing more than answering the specific questions."

[39] As noted in the last sentence of the extract from *Chitty* just quoted, under the pre-existing law the duty of disclosure could be circumscribed by the manner in which the insurer asks the insured certain questions. In those circumstances, the insured, in answering the specific questions in the proposal form, did not breach the duty of disclosure by not providing additional information. This is because the insurer was taken to have accepted

that the additional information was not material. Mr Barne QC referred to *Doheny* as an example of this. Longmore LJ endorsed (at paragraph 19) the test set out in paragraphs 17-19 of the sixth edition of *MacGillivray*:

> "Whether or not such waiver is present depends on a true construction of the proposal form, the test being, would a reasonable man reading the proposal form be justified in thinking that the insurer had restricted his right to receive all material information, and consented to the omission of the particular information in issue?"

The Court in *Doheny* found *obiter* that the question in the proposal form, had it meant what the insured argued it meant, would have resulted in a waiver of additional information. However, he submitted, it is important to note that the Court did not consider the basis of the waiver to be section 18(3)(c) of the 1906 Act (being the predecessor of section 3(5)(e) of the 2105 Act). This was because section 18(3)(c) - like section 3(5)(e) - only applied "in the absence of inquiry". The Court in *Doheny* considered the proposal form to be "a focused and detailed inquiry running to six pages". The waiver in the *Doheny* case was therefore not referable to section 18(3)(c).

[40] The position under the 2015 Act is he suggested, less clear in relation to this type of "waiver". However, he submitted that the important point to note is that the approach adopted in the *Doheny* case does not apply in the present case. The defender did not ask the pursuer questions in the email of 24 March 2017. Accepting *pro veritate* that the undisclosed information was a material circumstance, by the date of the defender's email of the pursuer was already in prior breach of the duty of fair presentation by failing to disclose the undisclosed information in the Market Presentation. There can be no question of the defender knowing about, and then waiving, the pursuer's prior breach.

Waiver

[41] Turning to the doctrine of waiver, Mr Barne QC submitted that waiver can be express or implied. Waiver involves the abandonment of a right. Whether or not there is waiver is a question of fact. The party relying on waiver need not have suffered prejudice by reliance on the waiver. There must, however, have been a conduct of affairs on the basis of the waiver; in other words, there must be reliance. *AWG Group Limited* v *HCP II Properties 101 GP Limited* [2017] CSOH 69 at paragraphs 14 to 18. The party relying on waiver bears the onus. The pursuer's case is based on implied waiver.

[42] The law of waiver has recently been considered by Lord Doherty in the case of *AWG Group Limited* v *HCP II Properties 101 GP Limited* [2017] CSOH 69 particularly at paragraphs 14 to 18. See also *Fieldoak Limited (in receivership)* v *Citywide Glasgow Ltd* 2017 CSOH 138 at paragraphs 110ff. Lord Doherty undertakes an extensive review of the authorities and confirms that, for any argument on waiver to succeed, the party relying on it must be able to aver and prove reliance. In doing so, he followed the approach of Lord Fraser in *Armia Ltd* v *Daejan Developments Ltd* 1979 SC (HL) 56 at page 69:

> "In the present case the reason why the plea of waiver fails is not that the respondents suffered no prejudice (although in my opinion that is true) but that the appellants never abandoned their right to refuse the title offered, and the respondents never conducted their affairs on the basis that they had."

[43] Waiver has typically only been found to have occurred in the reported cases relating to pre-contractual disclosure obligations where the category of information which the insurers are said to have dispensed with can be "clearly and narrowly defined". *Noblebright Ltd* v *Sirius International Corporation* [2007] Lloyds Rep 584 at 65.

Applying these principles to the pursuer's case

[44] Turning to apply the foregoing principles to the pursuer's case, Mr Barne QC submitted that it was important to note that the case law on waiver in relation to pre-contractual disclosure obligations predominantly addresses the situation where the insured has completed the insurer's proposal form and responded to specific questions designed to allow the insurer to assess the risk. In other words, the waiver has occurred because the insurer is deemed to have defined the nature and extent of the information it wishes to receive. That is not the situation in the present case.

[45] The starting point is that waiver of information as to facts material to the risk is not to be inferred too readily, or else it might subvert the insured's duty to disclose them in good faith. *MacGillivray on Insurance Law* (14th ed), paragraph 17-089. It has also been noted that:

> "The cases on these matters [i.e. implied waiver] are not, however, fully consistent, for the simple reason that the notion of waiver in such circumstances cannot easily be reconciled with the principle that spontaneous disclosure is required of the assured. The burden of proving waiver is borne by the assured."; *Colinvaux's Law of Insurance* (11th ed), paragraph 7-161.

No inquiry/too late

[46] Mr Barne QC submitted that the key point for the defender is that, in the defender's email, the defender was not making any "further inquiry" of the pursuer. The defender's email itself included a quotation for the applicable premium. The risk had been priced. As is noted in the accompanying letter, the period of insurance was, at that stage, to be from 20 March 2017 to 19 March 2018. The insurer was not awaiting any further information in order to price the risk.

[47] The case of *Container Transport International Inc* v *Oceanus Mutual Underwriting Association (Bermuda) Ltd* [1984] 1 Lloyd's Rep 476 *("CTI")* is unusual since it, too, related to a case where insurance was offered on the basis of a market presentation rather than on the basis of the insurer's proposal form. After noting the facts, Mr Barne QC noted that the court found that there was nothing in the brokers' presentation which would have prompted a reasonable insurer to make further enquiries. The insurer was entitled to take the summaries at face value, and no waiver arose. As Parker LJ put said at pages 511 to 512:

> "So long as [the] summary is fair, the insurer cannot complain that the full details of the experience were not disclosed. He must however be entitled to assume that the summary is fair. From this follows that, if he then proceeds to negotiate on the basis of the summary without enquiry as to its accuracy, he waives nothing. He can assume both that it is accurate as far as it goes and that, if it covers only part of the past experience, there is nothing in the part omitted which would vitiate the summary."

A similar point was made by Kerr LJ:

> "The judge clearly recognised the importance of a fair presentation, though I find myself in disagreement with his conclusions, to which I come later. However, if I may respectfully say so, the error which he made in many passages of his judgment, is, first, that he appears to have failed to appreciate that, due to the overriding nature of the duty to disclose material facts, the fairness of the broker's presentation in summary form must necessarily be assessed <u>before</u> the underwriter's reaction to such presentation can properly be taken into account."

This point was endorsed by Stephenson LJ:

> "I have also to endorse the comments of Lords Justices Kerr and Parker on the error of the judge's reliance on Mr. Lee's approach to this insurance. It ignores the underwriter's right to be informed of all material circumstances <u>before</u> he decides what is the appropriate approach..."

[48] He submitted that as the *CTI* case made clear, the fairness of an insured's market presentation must be assessed before the underwriter's reaction is taken into account. As

similar point was made by Gibson LJ in *WISE* v *Grupo Nacional* [2004] 2 Lloyd's Rep 483 at [130]:

> "If there was a fair presentation of the risk and the reasonably careful reinsurers would have been put on inquiry but failed to make an inquiry which they could have made easily, they will be treated as having waived disclosure of what they would have discovered had they made that inquiry. However the court should not subvert the duty of the assured to make a fair presentation of the risk by finding that the reinsurers were put on inquiry and failed to discover for themselves the material information save in a clear case."

This is, Mr Barne QC submitted, because the underwriter's entire approach to pricing the risk, and the overall approach to be taken to the insured's request for cover, may have been formulated on the basis of an unfair presentation. Accordingly, he submitted, the pursuer's case on waiver fails because, contrary to what is asserted by the pursuer, there was no "further inquiry". In the circumstances of this case, the fairness of the pursuer's presentation must be assessed before the defender responded by providing a quotation.

No "non-inquiry" waiver

[49] Mr Barne QC stressed that, on his analysis, this is not a case of a "non-inquiry" waiver. There is nothing that put the defender on notice in respect of the undisclosed information. In any event, this form of waiver has been superseded by the terms of section 3(4)(b) of the 2015 Act.

No waiver in terms of section 3(5)(e) of the 2015 Act

[50] Mr Barne QC argued the pursuer's case could only possibly gain any traction if the defender's email is construed as containing a "further inquiry". The defender's position is that it did not contain any such inquiry. But if the defender's email was construed as containing a

further inquiry, then, following the *Doheny* case, in the circumstances of the present case, there was no waiver.

No reliance

[51] Mr Barne QC queried whether the form of implied waiver ultimately relied on *obiter* by the Court in the *Doheny* case survives the codification of insurance law in terms of the 2015 Act. But even if it does, the pursuer's case is irrelevant because there are no averments of reliance.

[52] In the present case, there can be no suggestion that the pursuer relied on the defender's email in not disclosing the undisclosed information. Had the Market Presentations been completed accurately, the undisclosed information would have been disclosed. He submitted that the failure to disclose this information preceded, and was causally unrelated to, the defender's email. A plea of waiver would only be available in the event that the pursuer had, as a result of the defender's request for information, been led to believe that only a limited disclosure was required. In *Orakpo* v *Barclays Insurance Services Ltd* [1995] LRLR 443, the proposal form required the assured to tick "yes" or "no" boxes. The assured, faced with a question as to the condition of his house, ticked the box indicating that the house was sound, an answer only partly true as the house was badly affected by dry rot. The assured's defence to a claim of misrepresentation was that the proposal form did not allow a full answer to be given. The Court of Appeal, rejecting this defence, ruled that "an honest man could have overcome that problem".

[53] In any event, adopting the test endorsed by the Court in the *Doheny* case, there is nothing in the defender's email that would justify a "reasonable man" thinking that "the

insurer had restricted his right to receive all material information, and consented to the omission of the particular information in issue". There is nothing in the defender's email that impinges on or restricts the duty of fair presentation. The "reasonable man" would not, having regard to the defender's follow-up email, be justified in thinking that the defender (i) had restricted its right to receive all material information, and (ii) consented to or waived the prior failure by the pursuer to disclose the undisclosed information.

[54] In the present case, the defender's follow-up email was the defender's response to the information that had been provided. The defender was confirming the basis on which it was offering its Property Owners policy at an annual premium of £19,000 plus IPT. The defender was not seeking further information to allow it to decide "what is the appropriate approach" (per Stephenson LJ in the *CTI* case).

No knowledge of prior breach

[55] For the purposes of the debate, the undisclosed information is treated as a material circumstance. Accordingly, the pursuer was in breach of the duty of fair presentation in submitting the Market Presentation and asking for a quotation on the basis of it without disclosing the undisclosed information. As at 24 March 2017, the defender did not know of that prior breach and therefore cannot be taken to have impliedly waived the pursuer's breach of that obligation. Under reference to E Reid and J Blackie, *Personal Bar* (2006), at paragraph 3-11, Mr Barne QC submitted that waiver, implied or express, is the abandonment of a known right. He referred to Lord Bingham in *Millar* v *Dickson* 2002 SC (PC) 30 for the observation (at paragraph 31)

> "In most litigious situations the expression 'waiver' is used to describe a voluntary, informed and unequivocal election by a party not to claim a right or raise an objection which it is open to that party to claim or raise."

In the course of oral submissions, Mr Barne also referred to paragraphs 15-02 and 15-04 of *Personal Bar*.

Conclusion

[56] Mr Barne QC invited the court to repel the pursuer's motion and to grant the defender's motion.

Discussion

The issues

[57] The principal issue in this case is whether the pursuer breached the duty under section 3(1) of the 2015 Act to make a fair presentation of the risk and, as a subsidiary issue, in the event that the undisclosed information was material, whether the defender insurer nonetheless waived disclosure of that information.

[58] So far as Counsel's researches could ascertain, this is the first case under part 2 of the 2015 Act to address these issues. It is appropriate, therefore, to begin with a consideration of the 2015 Act, before turning to parties' submissions and the cases they referred to on the issue of waiver.

The 2015 Act

[59] The 2015 Act, which applies only to non-consumer insurance contracts, followed the 2014 Joint Report of the Law Commissions. It marks a significant departure from the

former law in certain respects, including the abolition of any rule entitling avoidance of an insurance contract for breach of the duty of utmost good faith: section 14(1) of the 2015 Act. The defining feature, formerly, of a contract of insurance as being one of utmost good faith (and the obligations of disclosure that entailed) is also modified by the 2015 Act and by the Consumer Insurance (Disclosure and Representation) Act 2012 ("the 2012 Act"): see section 14(2) of the 2012 Act. Equally significant is the creation in part 2 of the 2015 Act of the statutory obligation of an insured to make a "fair presentation of the risk" to the insurer ("the fair presentation duty"), and which replaces the duty of disclosure at common law and as articulated in section 18 of the MIA 1906: sections 21(2) and (3) of the 2015 Act.

The duty to make a fair presentation of the risk

[60] The 2015 Act imposes a duty on the prospective insured to make a "fair presentation" of the risk for of which insurance is sought. This replaces the common law rules (as also, in part, articulated in some provisions of MIA 1906) imposing a duty to disclose every material circumstance. In their Joint Consultation Paper, *Insurance Contract Law: The Business Insured's duty of Disclosure and the Law of Warranties* (Law Com Consultation Paper No 204; Scottish Law Com Discussion Paper No 195) ("CP3"), the two Law Commissions noted (at paragraph 5.12ff) that what is required to comply with the duty to make a "fair presentation of the risk" is more limited than the common law requirements of disclosure, and which itself had a sound basis in the case law. As an illustration of the courts' discussion of the articulation of the duty in terms of a fair presentation, the Law Commissions cited Clarke J's observations in *Garnat Trading & Shipping (Singapore) Pte*

Limited and Another v *Baominh Insurance Corporation* [2010] EWHC 2578 (Comm); [2011] 1 Lloyd's Rep 589:

> "A minute disclosure of every material circumstance is not required. The assured complies with the duty if he discloses sufficient to call the attention of the underwriter to the relevant facts and matters in such a way that, if the latter desires further information, he can ask for it. A fair and accurate presentation of a summary of the material facts is sufficient if it would enable a prudent underwriter to form a proper judgement, either on the presentation alone, or by asking questions if he was sufficiently put upon enquiry and wanted to know further details, whether to accept the proposal and, if so, on what terms."

[61] The Law Commissions returned to this issue in their Joint Consultation Paper, "Insurance Contract Law: Misrepresentation, Non-Disclosure and Breach of Warranty by the Insured (Law Com Consultation Paper No 182; Scottish Law Com Discussion Paper No 134)("CP4") at paragraph 5.50. In CP4 the two Law Commissions also identified (at paragraph 5.6) five problems with the current law. The first of these was that the duty of disclosure was poorly understood and the fourth was that the law (eg as embodied in MIA 1906) gave rise to too many disputes and encouraged "underwriting at claims stage".

Section 3 of the 2015 Act

[62] The key provision in part 2 of the 2015 Act is section 3, which defines the fair presentation duty, is in the following terms:

> "3 **The duty of fair presentation**
>
> (1) Before a contract of insurance is entered into, the insured must make to the insurer a fair presentation of the risk.
>
> (2) The duty imposed by subsection (1) is referred to in this Act as 'the duty of fair presentation'.
>
> (3) A fair presentation of the risk is one—
> (a) which makes the disclosure required by subsection (4),

(b) which makes that disclosure in a manner which would be reasonably clear and accessible to a prudent insurer, and
(c) in which every material representation as to a matter of fact is substantially correct, and every material representation as to a matter of expectation or belief is made in good faith.

(4) The disclosure required is as follows, except as provided in subsection (5)—
(a) disclosure of every material circumstance which the insured knows or ought to know, or
(b) failing that, disclosure which gives the insurer sufficient information to put a prudent insurer on notice that it needs to make further enquiries for the purpose of revealing those material circumstances.

(5) In the absence of enquiry, subsection (4) does not require the insured to disclose a circumstance if—
(a) it diminishes the risk,
(b) the insurer knows it,
(c) the insurer ought to know it,
(d) the insurer is presumed to know it, or
(e) it is something as to which the insurer waives information.

(6) Sections 4 to 6 make further provision about the knowledge of the insured and of the insurer, and section 7 contains supplementary provision."

[63] There are several elements to the fair presentation duty:

1) certain matters must be disclosed (*per* section 3(3)(a)), and set out in s 3(4);
2) the manner of presentation must be 'reasonable clear and accessible' to a prudent insurer' (*per* s 3(3)(b)); and
3) every material presentation as to a matter of fact must be substantially correct and every presentation of a matter of expectation or belief must be made in good faith (*per* section 3(3)(c))."

[64] As will be clear from the circumstances set out above, the principal issue in this case is the alleged non-disclosure of the undisclosed information, which engages the first of these elements. For present purposes it suffices to focus on section 3(4)(a), requiring the disclosure of "every material circumstance" which the insured knows or ought to know. (In this case, neither party raised any issue as to the pursuer's knowledge of the undisclosed information. Accordingly, I pass over sections 4, 5 and 6 of the 2015 Act, which make

provision for actual or deemed knowledge of the insured and the insurer. Similarly, no issue arose as to the inaccuracy of what was represented, and for which further provision is made in section 7(5)).

[65] Section 7(3) of the 2015 Act provides that a circumstance is "material" if it would "influence the judgement of a prudent insurer in determining whether to take the risk and, if so, on what terms". Examples are provided in section 7(4) of things that may be material circumstances. This includes (in section 7(4)(c))

> "anything which those concerned with the class of insurance and field of activity in question would generally understand as being something that should be dealt with in a fair presentation of risks of the type in question".

As this is a debate, the materiality of the undisclosed information is presumed. Accordingly no evidence would be led at this stage for the purpose of this subsection.

[66] The fair presentation duty arises and must be discharged before the insurer accepts the risk, and section 7(6) provides for withdrawal or correction of a representation before the contract of insurance is entered into. Returning to subsections 3(4) and (5) of the 2015 Act, it is important to note that there is no duty to disclose something as to which the insurer "waives" information: section 3(5)(e). (This reflects section 18(3)(c) of MIA 1906.) Waiver therefore remains part of the legal landscape mapped out by the 2015 Act. The pursuer's fall-back position in this case is that, by reason of the narrow scope of the defender's Moral Hazard stipulation in the defender's email (see paragraph [11], above), the defender waived the obligation to disclose the undisclosed information. Mr Barne QC disputes that this was an "enquiry" by the defender.

Waiver in the context of insurance law

[67] It was not suggested by either Senior Counsel that the 2015 Act altered the prior law on waiver. Under the pre-2015 Act case law, waiver typically arose in an insurance context in two ways:

1) The first was where the prospective insured submitted information which contained something that would prompt a reasonably careful insurer to make further enquiries, and the insurer fails to do so. The insurer cannot thereafter rely on the information that would have been elicited by its further enquiry to avoid the contract. The insurer has waived the information that further enquiries would have revealed. An example of this may be found in the case of *WISE (Underwriting Agency) Ltd* v *Grupo Nacional Provincial SA* [2004] 2 All ER (Comm) 613 (at paragraph 63). Section 3(4)(b) of the 2015 Act provides for this form of waiver. That is one form of waiver in an insurance context.

2) The other form in which waiver arises is where the insurer asks a "limiting" question, ie one from which a prospective insured may reasonable infer that the insurer has no interest in knowing, and has waived, information falling outside the scope of the question or questions, even if that information was otherwise material. The classic example is where the proposal form asks about convictions within the last 5 years and which can instruct waiver of information about convictions more than 5 years ago. *Doheny* was one of the cases cited by the parties for its discussion (albeit *obiter*) of this second form of waiver.

These two forms of waiver are also discussed in the 2014 Joint Report of the Law Commissions at, respectively, paragraphs 4.21 to 4.27 (waiver by omission) and

paragraphs 4.28 to 4.30 (limited questions) as well as in one of the leading textbooks, *Colinvaux's Law of Insurance* (11th ed) at paragraphs 7-163 to 7-164 (limited questions) and at paragraphs 7-167 to -171 (failure to make further inquiries).

[68] Two other features of the pre-2015 Act case law on waiver should be noted, namely, that waiver is not readily to be inferred (*per MacGillivray* at paragraph 17-089; in *Doheny* Parker LJ stated that an assured must show a "clear case" (at p 511)) and the person asserting waiver (here, the pursuer) bears the onus of establishing waiver. The latter proposition reflects Scottish procedure and practice, requiring the party who asserts a state of affairs to aver and prove it.

[69] Both parties referred to *Doheny*, and it is convenient to consider the discussion of waiver in that case. In *Doheny* the claimants completed two proposal forms for insurance, for themselves personally and also for a company of which they were directors. The proposal form in that case contained a specific declaration that

> "No director/partner in the business, or any Company in which any director/partner have had an interest, has been declared bankrupt, and the subject of bankruptcy proceedings or made any arrangement with creditors".

The claimants did not disclose in the proposal forms that they had been directors and shareholders in companies which had been the subject of insolvency proceedings. The claimants challenged the insurer's rejection of the claim and argued that the declaration applied only to individuals and not companies. The Court of Appeal approached this as a matter of the proper construction of the declaration, construed against the intention of the parties that any insolvency on the part of the claimants or any company in which they had previously had an interest, should be declared. It found that as the words "made any arrangement with creditors" was equally habile to cover corporate as well as personal

insolvency, then other parts of the declaration must also have been intended to be applicable to companies in which the claimants had been concerned. Furthermore, the court held that a reasonable insured would have concluded that the insurers were interested in the solvency not only of themselves as individuals but also of any corporate vehicle used by them. On that basis, the court concluded that there had been a breach of the declaration and that the insurers were entitled to decline liability.

[70] There is an extended discussion of the concept of waiver in the opinion of Longmore LJ (at paragraphs 14 to 21). That passage includes the observation to the effects that, as a result of asking certain questions, an insurer may show that it is not interested in certain other matters and can be taken to have waived disclosure of those other matters. Longmore LJ refers to the then current edition of *MacGillivray* (at paragraph 17-17 (paragraph 17-20 in the 2018 14th edition)) and its treatment of the well-known case of *Hair* v *Prudential Assurance Co Ltd* [1983] Lloyd's Rep 667. (The passage in *MacGillivray* is headed "Effect of questions in proposal form".) Longmore LJ's observations are as follows:

> "**Waiver**
> 14. Anything I say on this topic will be *obiter* only, but since it was attractively and forcefully argued by Mr David Turner on behalf of insurers that the decision of Woolf J in *Hair* v *Prudential Assurance [1983] 2 Lloyds Rep 667* should be confined to consumer as opposed to business insurance and that the passage of MacGillivray's Insurance Law (7th ed Para 626, now 10th ed Para 17–19) on which Woolf J relied is expressed too broadly, his argument should at least be noticed.
> 15. The argument is as follows: — (1) The concept of waiver of disclosure of information derives from section 18(3)(c) of the Marine Insurance Act 1906 which provides: — 'In the absence of inquiry the following circumstances need not be disclosed, namely…(c) any circumstance as to which information is waived by the insurer'; (2) in this context it has been held that the assured can only rely on waiver in a clear case *CTI* v *Oceanus [1984] 1 Lloyds Rep 476*, 511–2 per Parker LJ. In particular, an insurer who fails to ask a question will not have waived his right to have a fair presentation made to him unless there was a suspicion that circumstances existed which might vitiate the presentation, see *WISE (Underwriting Agency) Ltd* v *Grupo Nacional Provincial [2004] EWCA Civ 962, 20th July 2004*; (3) Since *CTI* v

Oceanus and *WISE* v *GNP*, there is no place for a separate doctrine of waiver as set out in the current para 17–19 of MacGillivray based on any implication that, because an insurer asked certain questions he was not concerned to have answers to questions on related subject matter; (4) *Hair* v *Prudential Assurance* should now, therefore, be overruled or, at least, confined to cases which can correctly be called consumer insurance.

16. In my view this argument breaks down at its first stage. The relevant sub-section of the 1906 Act is premised on the fact that no inquiry is made — the statutory prefatory words are 'In the absence of inquiry'. The proposal form in the present case is, however, an inquiry. It is, moreover, a focussed and detailed inquiry running to six pages.

17. There can be no doubt that, when a proposal form is submitted to the insured who answers the relevant questions, authority has laid down that an insurer as a result of asking certain questions may show that he is not interested in certain other matters and can, therefore, be said to have waived disclosure of them. The matter is variously put in the authorities but they are, in my view, accurately summarised in the passage of MacGillivray part of which was relied on in 1983 by Woolf J in Hair's case and still reads as follows*:* —

> **'17-17 Effect of questions in proposal form**
>
> '17-17 The questions put by insurers in their proposal forms may either enlarge or limit the applicant's duty of disclosure. As a general rule the fact that particular questions relating to the risk are put to the proposer does not *per se* relieve him of his independent obligation to disclose all material facts. Thus, if a burglary insurance proposal form asks questions chiefly concerned with the nature of the proposer's premises and the business carried on there, this will not of itself relieve him of his duty to disclose material facts relating to his personal experience, such as the possession of a criminal record.
>
> 17-18 It is possible that the form of the questions asked may make the applicant's duty more strict. The applicant may well be reminded by a particular question that the general duty of disclosure enjoins him to state material facts in his possession relating to the subject-matter of the question but outside its ambit.
>
> 17-19 It is more likely, however, that the questions asked will limit the duty of disclosure, in that, if questions are asked on particular subjects and the answers to them are warranted, it may be inferred that the insurer has waived his right to information, either on the same matters but outside the scope of the questions, or on matters kindred to the subject matter of the questions. Thus, if an insurer asks, 'How many accidents have you had in the last three years?' it may well be implied that he does not want to know of accidents before that time, though these would still be material. If it were asked whether any of the proposer's parents, brothers or sisters had died of consumption or been afflicted with insanity, it might well be inferred that the insurer had waived similar information concerning more remote relatives, so that he could not avoid the policy for non-disclosure of an aunt's death of consumption or an uncle's insanity. Whether or not such waiver is present

> depends on a true construction of the proposal form, the test being, would a reasonable man reading the proposal form be justified in thinking that the insurer had restricted his right to receive all material information, and consented to the omission of the particular information in issue?'

18. Mr Turner drew our particular attention to the judgment of Asquith LJ in Schoolman v Hall [1951] 1 Lloyds Rep 139 where it was held that detailed questions about the trading nature of the insured's business did not waive the obligation on the part of the insured to disclose that he had had criminal convictions. Asquith LJ formulated the principle in the following words: —

> 'It is unquestionably plain that questions in a proposal form may be so framed as necessarily to imply that the underwriter only wants information on certain subject-matters, or that within a particular subject-matter their desire for information is restricted within the narrow limits indicated by the terms of the question, and, in such a case, they may pro tanto dispense the proposer from what otherwise at common law would have been a duty to disclose everything material.'

The dispensing of the duty to disclose is here put in terms of 'necessary implication' from the questions asked. Cohen LJ preferred the formulation of Mathew J in Laing v Union Marine Insurance Company (1895) 1 Com Cas 11 at page 15 that the insured is not bound to give information

'which the underwriter waives as to which the assured may reasonably infer that the underwriter is indifferent.'

Birkett LJ contented himself with relying on the 3rd edition of MacGillivray where it was said merely that 'the form and nature of the questions, or the declaration by the assured, or the conditions in the policy may substantially modify the duty of disclosure'.

19. These extracts only show that different judges sometimes formulate the same concept in somewhat different terms. In that particular case none of the Lords justices had any difficulties in deciding that, whatever the words of the declaration, they did not excuse the failure to disclose a criminal conviction. Taking into account the different formulations in that case and the other cases cited by MacGillivray, I see no reason to qualify the test set out in the last sentence of paragraph 17–19 which has existed in its present form since, at least, the 6th edition of that work.

20. Nor do I see any reason to confine the reasoning of that paragraph to what may be called insurance contracts with consumers as opposed to business insurance contracts. It is not desirable in principle that the law about inferences from proposal forms or declarations should differ in the one sort of contract from the other.

21. So I turn to the particular facts of our case. My somewhat tentative view is that, if (contrary to the view expressed above) the true construction of the declaration is that it only applies to insolvency of individuals despite the presence of the concept of a corporate entity in the very clause itself, the insurer has made it plain that he is not interested in insolvencies of the corporate vehicle through which the insured is trading. I cannot be sure that I am not being over-influenced by (as I see it) the oddity of the construction of the declaration which is the necessary starting-point for

> the waiver inquiry. That is why my *obiter* conclusion has to be expressed in tentative terms."

[71] The first type of waiver discussed, of the insurer failing to follow up a matter of which it was put on notice, does not here arise. The instant case concerns the second type of waiver. Classically, that form of waiver was considered in the context of a series of question contained in the proposal form and which was described in *Doheny* to be an "enquiry", even a "focused and detailed enquiry" (at para 16). This is explicable as the doctrine was developed by the courts to control the unfairness arising when a proposer answered in good faith all of the questions on an insurer's proposal form only to discover, after a claim was made, that the insurer also considered other matters to be material but for which no prompting question had been included in the proposal form. (This illustrates the first of the problems of the current law identified by the Law Commissions in CP4, referred to above, at paragraph [61].)

[72] It respectfully seems to me that the focus of the discussion in *Doheny* was to consider and reject the argument, made on behalf of the claimant, that the wording of the declaration was sufficiently narrow as to waive any obligation to disclose the corporate insolvencies of the companies with which the claimants had been connected (see paras 16 to 17). The court affirmed the test to be applied (set out above, at paragraph 19 of its judgment). The observations in *Doheny* are clearly predicated on the proper interpretation of the question concerned construed in the context of the proposal form. That the question was not considered in isolation, but in the context of the proposal form, is perhaps even clearer in the observations of Staughton LJ in the same case, at paragraph 37. In that passage he noted the reference to insolvencies of a company elsewhere in the proposal form and which was

sufficient to displace the contention that a reasonable man reading the proposal form would be justified in thinking that the insurer had consented to the omission of reference to the insolvency of a company in which the claimant had an interest. Neither party addressed me on whether this formulation (at para 17 of *Doheny*) was consistent with the statutory expression of waiver in the 2015 Act. For my own part, in the context of insurance, and as distinct from waiver or personal bar as it arises in Scots law in other contexts, I am inclined to approach this on the basis that the 2015 Act did not seek to innovate on or alter the existing law on what constitutes waiver in the context of insurance contracts and the test affirmed by the Court of Appeal remains good law (even if it potentially falls to be applied to other communications (beside proposal forms) from an insurer).

The parties' submissions on other forms of waiver

[73] As noted above, parties referred to other, non-insurance, cases on waiver (eg *Armia Ltd*, *AWG Group Limited* and *Fieldoak Limited (in receivership,* referred to in paragraphs [41] and [42], above, or other elements of that form of waiver (eg reliance). For completeness, I should record that the submissions about waiver in other contexts, with its associated requirements of reliance by the counterparty or knowledge of the circumstances instructing waiver being necessary on the part of the other, are not part of the particular meaning of waiver as understood and applied in insurance law. I therefore need not comment on those other cases.

The non-waiver caselaw

[74] For completeness, I should address the case of *Economides* v *Commercial Union Assurance Co plc* [1997] 3 All ER 635, to which Mr Dunlop QC referred for the observation of Simon Brown LJ (as he then was) at page 45g-j. In particular, he relied on the sentence that,

> "[w]here, as here, material facts duly are dealt with by specific questions in the proposal form and no sustainable case of misrepresentation of rises, it would be remarkable indeed if the policy could then be avoided on grounds of non-disclosure."

Several features of this case must, however, be noted. First, the case concerned the interpretation of a conventional proposal form comprised of questions posed by the insurer. Secondly, it concerned a consumer contract and to which, as is clear from the same paragraph in which this sentence is found, the Association of British Insurers' Statement of General Insurance Practice ("the ABI SGIP") was relevant and considered by the Court of Appeal. Thirdly, that part of the ABI SGIP quoted by the Court of Appeal equated what was "material" with the specific questions contained in the proposal form (and which may be seen as clarifying the scope of the duty of disclosure in favour of consumer insures). In other words, the Court was not on a matter of law determining that the subject matter of the question was necessarily material, it was simply proceeding on that as a given. Fourthly, in that case the Court of Appeal was considering the truthfulness of a representation made. It was in relation to *that* circumstance, that the court expressed the view that the test for non-disclosure was the same for misrepresentation, being a test of "honesty" and whether the insured had "reasonable grounds" for his belief in the accuracy of his valuation. Accordingly, this is the relevant context in which to place the sentence Mr Dunlop QC founds on, and the Court of Appeal's observation that it would be "remarkable" if the policy

could be avoided on the grounds non-disclosure. None of those features is present in this case. The instant case concerns a non-consumer contract to which a new statutory test of non-disclosure falls to be applied, and which does not concern the accuracy or completeness of a positive representation, much less one made in response to questions in a proposal form. Finally, no issue of waiver arose in the case of *Economide*, whereas the issue at debate in the instant case is whether the parts of the defender's email the pursuer relied on constituted a waiver (in the second form discussed) by the defender of disclosure of the undisclosed information.

The question focused

[75] The question, then, is whether the matters relied on by the pursuer in the defender's email constituted the kind of enquiry instructing waiver in this case. Neither party sought to identify any context against which the documentary materials fell to be construed. For the purposes of this debate, the court was being asked to construe the Market Presentation and the email (and only those documents) without reference to any factual matrix or prior dealings between the parties. Neither party argued that the email was ambiguous or that it fell to be construed *contra proferentem*.

[76] For this second type of waiver, the test to be applied in construing an insurers' questions is to ask: would a reasonable person reading the proposal form be justified in thinking that the insurer had restricted its right to receive all material information and consented to omission of the particular information not disclosed? (*per Doheny* at paragraph 19, *R&R Developments Ltd* at paragraph 40, and *MacGillivray* at paragraph 17-020).

[77] I turn now to consider the documentation proffered.

The documentation

The Market Presentation

[78] The starting point is that the Market Presentation presented in this case was intended to be the totality of the information the pursuer placed before the insurers in fulfilment of his duty to make a fair presentation. In other words, this is not a case where the insurers were faced with several documents submitted by the insurer which, collectively, would constitute the fair presentation and where discrepancies between them might invite further enquiry. (It follows that, while Mr Dunlop QC's submission that a proposer's duty of fair presentation need not be confined to one document is correct as a generality, the defender's email was not part of the *pursuer's* presentation of the risk and so *that* argument is not a sound basis for taking the email into account, as he urged.) Furthermore, as ultimately presented, neither party argued that this case falls into the category of cases where, by reason of some feature of the presentation, the insurer was placed under a duty to make further enquiry and, having failed to do so, that that constituted waiver of whatever further information might have been disclosed by such an enquiry (ie a case falling within section 3(4)(b)).

[79] The defender was here faced with the Market Presentation in which the client name was stated to be both a limited company (Kaim) and the pursuer as an individual. This is reinforced by the status of the entity as having been given as "limited", and which was only partly correct. That part of the Market Presentation in respect of which it was said the undisclosed information should have been disclosed was the entry:

> "Select any of the following that apply to any proposer, director or partner of the Trade or Business or its Subsidiary Companies if they have ever, either personally or **in any business capacity**" (emphasis added)
>
> together with the relevant option which the defender contends should have been selected (but which was not known to it at the time it considered the Market Presentation)
>
> "been declared bankrupt or insolvent or been the subject of bankruptcy proceedings or insolvency proceedings"'

[80] While parties wish to reserve the question of materiality, it is nonetheless necessary to give some consideration to the critical wording, including the opening part of this declaration, as part of the exercise of construction the parties have asked the court to undertake. This is not for the purpose of determining the question of materiality, on which I express no view, but to understand the nature of the material and the proposer's presentation, and to which the defender's email was a response. The difficulty for the insurer faced with the Market Presentation was that it was not aware of the options in the drop down menu (a point the pursuer has emphasised, to argue that the defender's case lacked the element of reliance necessary for waiver in a non-insurance context). The phrase highlighted, **in any business capacity**, is *prima facie* a very broad formulation, but, as presented in the Market Presentation, it was a statement of affairs without a conclusion. Without further information, that sentence was virtually meaningless. I therefore turn to consider the defender's email.

The defender's email

[81] Mr Barne QC urged me to disregard the defender's email and to proceed on the basis that the insurer had assessed and accepted the risk on the basis of the Market Presentation

alone. That, with respect, is a contention of fact which would require proof. It suffices to note that Mr Dunlop QC did not accept that contention. Parties made no submissions on the legal character of the defender's email, and whether it had the effect itself of concluding the contract, or operated as a counter offer, or had some other effect (eg as concluding the contract but imposing a suspensive condition or being suspensive of the conclusion of a contract). It follows that I do not express any view on that matter. Parties simply proceeded on the basis that a contract of insurance had been concluded between the parties and to which the Market Presentation and the defender's email related. The Court proceeds on that basis but without, at this stage, determining at what point the contract of insurance was concluded.

[82] It suffices for present purposes to note that the defender's email potentially introduces a number of contingencies. The defender's proposed terms were included as an attachment to the email (the proposed terms have not been produced) and the proposed premium for the each of the properties was offered (under the heading "Premiums Breakdown"). There was the possibility, therefore, that the pursuer might not have wished to accept insurance on the terms proposed or at the *premia* offered, or to proceed with all of the properties proposed.

[83] Another feature that is suggestive that the defender's email was contingent, was the heading "Subjectivity" and the matters raised under that heading. "Subjectivity" may not have been the correct word but it clearly meant "subject to": even Mr Dunlop QC contended for this reading. Accordingly, this part of the defender's email is stating that the defender's terms were "subject to" satisfaction of the stipulations (to use a neutral word) under this heading. These included the matters set out as "Management" features, namely,

an electrical certificate, satisfactory housekeeping, an exclusion zone of 10m for any outside storage and the use of any the alarm system while the premises were closed. Some of these might be conditions of a continuing character (eg the use of any alarm); others might have required to have been satisfied prior to or by the inception of the contract (eg electrical certification).

[84] The next matters to which the defender's terms were "subject to" (under the heading of "Subjectivity") were the matters going to moral hazard. In the context of insurance contracts, it is well established that there are a category of facts recognised as affecting moral hazard and which, if present, may present an increased risk. As a generality, the case law has confirmed that such matters require to be disclosed even in the absence of a specific question to elicit these matters. On the case law, it is uncontroversial that matters going to moral hazard, such as previous convictions or the prior insolvency of a prospective insured and the associated vehicles through which it may have previously traded, may be material and (if proved to be so) require be disclosed. This is amply illustrated in cases such as *O'Connor* v *Bullimore Underwriting Agency Ltd* 2004 SCLR 346 at paragraph 54, *per* Lord Macfadyen, *R&R Developments Ltd* and *Doheny*.

[85] Parties argued this issue in a relatively formal sense, by focusing on whether the Moral Hazard stipulation was or was not a "question". Mr Dunlop QC argues that the stipulation is a limiting question; Mr Barne QC's reply was that this was not "an enquiry". Neither considered it in any wider context, either of the remainder of the defender's email, or the Market Presentation, to which the defender's email was a response. I am not persuaded that the part of the Moral Hazard stipulation both parties referred to is a

"question" or "enquiry", or should be construed as such. However, in my view, that conclusion is not itself a basis to resolve the issue (as both parties approached it).

[86] It respectfully seems to me that the case law on the construction of proposal forms, including the application of waiver in its second form (ie by limiting questions) may require to be approached with a degree of circumspection in a case such as the present. The observations in the cases and the discussion in *MacGillivray* (at paragraph 17-018ff) cited to the Court are predicated on the use of a conventional proposal form proffered by the insurer and to which an insured responds. By contrast in this case, and in common with *CTI*, the prospective insured initiated the approach in the form of the Market Presentation, the scope of which the prospective insured controlled. In the conventional proposal-type case, there may be greater scope for applying the doctrine of waiver, as the insurer controls the scope of the information it seeks; it signals (via the questions asked) what it regards as material and, by implication, it *may* be taken as waiving matters outside the scope of the questions posed. The second type of waiver was developed to control unfairness that might flow from an insurer invoking some other matter, beyond the scope of the proposal questions, as material. (Although the law has never been that materiality was confined to the questions on a proposal form). The 2015 Act shifted the burden of identifying what is material to the insured in the form of the duty to make a fair presentation of the risk. One consequence is that that may affect the application of this second type of waiver, not least because there is no longer a proposal form ("the extended enquiry") that falls to be construed (and which is the context in which this form of waiver arises). There is, therefore, no *in limine* identification by the insurer of the scope of what it considers material and which could form the basis of this form of waiver.

[87] While proposal forms were characterised as an "enquiry", no like presumption operates in respect of an insurer's response to a proposer's initial presentation. Accordingly, consideration requires to be given to what is the form or purpose of an insurer's response to a proposer's market presentation. An insurer's response may take a variety of forms. It may be a question eliciting further information; it may be a limiting question waiving matters outwith the scope of that question. It may, however, be confirming or clarifying the particular information presented. It may be a stipulation as to a state of affairs to exist at inception or to be maintained during the policy term. If such responses are uncritically construed as "enquiries" defining or limiting the scope of what the insurer considers is material, then one of the aims underlying the reforms of simplifying the process of presenting and assessing any risk would be defeated, if it required insurers, faced with a brief presentation, defensively to ask a large number of questions lest it be argued that it waived any matter on which it did not seek a specific assurance.

[88] Returning to the documents of this case, the correct approach is to construe the part of the email the parties focused on (ie the Moral Hazard stipulation) in the relevant context. This includes the Market Presentation, to which the defender's email was a response, as well as the particular context of the Moral Hazard stipulation within the defender's email. Starting with the Market Presentation, the insurer was not aware of the options in the drop down menu of the broker's internal software programme available to complete either the "Select any…" entry to complete the Moral Hazard declaration or the separate declaration of material facts.

[89] In the form in which it appeared, the Moral Hazard declaration was incomplete, in sense that the insurer could not know the subject-matter of that declaration; it did not know

to what, precisely, the answer of "None" related. The Moral Hazard declaration in the Market Presentation was, as it were, a sentence with a known subject but an unknown predicate. The insurer only knew the 'subject' of the Moral Hazard declaration, which concerned "any proposer, director or partner of the Trade or Business or its Subsidiary Companies if they have ever, either personally **or in any business capacity**" (emphasis added). If one strips out the references to the company (ie the proposed co-insured Kaim), as it related to the individual proposer (the pursuer), the proposed Moral Hazard declaration bore to cover the pursuer's involvement "either personally or in any business capacity". That is, as already observed, *prima facie* of very wide scope and habile to include other entities with which the defender was involved "in any business capacity". What the defender could not divine was the state of affairs asserted to be 'None'.

[90] The defender's response, in the form of the Moral Hazard stipulation was, in my view, directed to eliciting the content of the declaration. In particular, it did so in the form of a stipulation addressing the critical features going to moral hazard (insolvency, prior convictions and an adverse insurance history) to ensure that a certain state of affairs subsisted in respect of these elements going to moral hazard. In particular, it was a stipulation *inter alia* that the "proposer…either personally or in any business capacity" (the object of the Moral Hazard declaration) has "never been declared bankrupt or insolvent had a liquidator appointed". This part of the defender's email, the Moral Hazard stipulation, was not concerned with or altering the 'subject' of the Moral Hazard declaration (this was known to the insurer). In my view, the reference to the "Insured" was shorthand for covering both Kaim and the pursuer, and the longer formulation ("any proposer, director….

or in any business capacity") reflected in the opening phrase of the Moral Hazard declaration.

[91] This analysis of the Moral Hazard stipulation, as a stipulation that a certain state of affairs existed, is also consistent with other features of the email under the "Subjectivity" heading which I have described (see para [83], above). The Moral Hazard stipulation appeared among the list of other matters which the insurance offered was "subject to" and in respect of which the insurers were requiring that a state of affairs be achieved (eg the electrical certification) or be maintained during the currency of the policy (eg use of the alarm). None of these other matters was posing questions or eliciting further information.

[92] Having regard to the wider context (ie the defender's email as a response to the Market Presentation), and construing the Moral Hazard stipulation in the context of the "Subjectivity" part of the defender's email, in my view the proper interpretation of this part of the defender's email is that it operated as a condition or stipulation of the kinds of moral hazards that required to be addressed. In my view, read in this context, no reasonable reader of this Moral Hazard stipulation would understand it as waiving that part of the Moral Hazard declaration relating to "any other business capacity" in which the pursuer might have acted. In the context of the remainder of the email I have already described, and coming as it does as a response to the Market Presentation, I do not accept the pursuer's argument that this part of the email instructs a case of waiver. In any event, in the circumstances I have identified, this is not a "clear" case of waiver. It follows that the pursuer's motion for declarator does not succeed on the single basis on which it was advanced for the purposes of the debate. As parties have approached the issue of waiver as one to be resolved solely on the basis of the documents, and without proof of any surrounding circumstances, in the light

of the decision I have reached, there is little utility reserving that issue to form part of any subsequent proof.

Decision

[93] Accordingly, I shall find that the pursuer's averments of waiver are irrelevant and fall to be excluded from any probation. All other matters remain outstanding. I shall put the case out by order to confirm the terms of the interlocutor and the appropriate procedure to be adopted in respect of the remaining issues.