Ireland: An Old Doctrine of Insurance Law Revisited

By Shane Kilcommins

At the invitation of the British Insurance Law Association Trust, Sir Andrew Longmore delivered the first Pat Saxton Memorial Lecture on March 5, 2001. His lecture was entitled "An Insurance Contracts Act for a New Century". In the lecture Sir Andrew suggested that the Marine Insurance Act, 1906, in England and Wales was a "brilliant synthesis of a maze of common law decisions". He went on to note: "Now, a century later, it is operating as too tight a straitjacket. The best way of celebrating Sir Mackenzie Chalmers considerable achievement would be to have an Insurance Contracts Act of say 2002 or even, if necessary, 2006 to mark the centenary of the 1906 Act so that it might be possible to enact sensible reform for insurance law as a whole." As regards the content of such legislation, Sir Andrew noted that there was an argument "for codification of insurance law in general", but believed it would be an "enormous task and invite yet further delay". Instead, he opined that it should be piecemeal in nature, beginning with the elusive doctrine of uberrimae fides. No doubt, the ghost of Jeremy Bentham, still flying the expositorial flag and ridiculing "dog law", would, at least partially, be pleased by such sentiments, but they may prove to be irksome to many others.

* Lecturer in Law, University College Cork.
2 Ibid.
3 Ibid at 364.
The focus of this article is not so much concerned with the relative merits and demerits of Sir Andrew's comments as they apply to England and Wales. Rather, it will expatiate on Ireland's experience of the Marine Insurance Act, 1906, and whether or not further legislative reform, of a sweeping or piecemeal nature, is a necessary requirement in that jurisdiction. In keeping with Sir Andrew’s desire to reform the duty of disclosure, this paper will also focus on the same duty, but from an Irish vista and only from the perspective of what need not be disclosed. To be more specific, the article will dwell on three aspects of this perspective: facts which an assured does not know, previous criminal information, and facts known to an insurer. It will be argued that there has been little or no sustained analysis of this area of law in Ireland. This is attributable, in part, to the lack of case-law arising in the Courts. What case law does exist however often raises more questions than it answers and significant lacunae remain in evidence. To this end, it will be submitted that the Marine Insurance Act, 1906, or the case law arising therefrom, is operating, in the absence of more protracted scrutiny, as too loose a straitjacket.

Two final points can be made before commencing the article. First, it is often said that the greater the extent of the case-law on a particular statute, the less effective the statute. For Ireland, at least, as regards the Marine Insurance Act, 1906, the converse, it is submitted, is true. Such an observation, however, cannot be employed as evidence of the need for sweeping or piecemeal legislative reform. Indeed, as regards the call for statutory reform of the duty of disclosure, it will be argued that in seeking to avoid the current uncertainty of Charybdis, one must be careful not to founder on the legislative rock of Scylla: any attempt to

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5 For a general analysis of the duty of disclosure in Irish insurance law, including the decisive influence, prudent insurer test of materiality, the absence of a requirement of actual inducement, and the emergence of one judicial pronouncement, albeit obiter, to the effect that a reasonable assured test may replace the prudent insurer test in circumstances where the particular underwriter is acting unreasonably, see Kilcommins, S. and Lind, C. Making sense of the cases on materiality and the duty of disclosure in Irish insurance law. The International Journal of Insurance Law Part 4, (1998): 263-278.

6 On waiver in Irish insurance law, see Kilcommins, S. and Lind, C. ibid at pp. 273-276.

7 Statutory microsurgery, though, may be very appropriate in Ireland as regards the duty of adults to disclose previous criminal information.
statutorily reform the duty of disclosure will, for example, encounter the difficulties of producing definitive propositions, and they are numerable in such a broad area of law; the questionable will of Parliament to do so; the position of the powerful insurance lobby as regards such reform; and, the length of time required before any reform is actually promulgated in law (it took 12 years in the case of the Marine Insurance Act, 1906). Other vehicles of reform, it will be submitted, need to be considered such as model laws and non-binding codes which would be informative in nature and could be employed to scrutinize all aspects of uberrima fides contracts including the broad range of lacunae that are currently palpable. Secondly, it would be unfair to build a "straw man" of Sir Longmore's arguments, so as the more easily to knock him over. His claims were made only in respect of the British market and were not intended for the ears of the Irish legislature. Nonetheless, given that the same enactment applies to both jurisdictions, it is interesting, from a comparative perspective, to examine the merits of legislative reform from an Irish viewpoint, albeit a narrow viewpoint in that it only focuses on particular types of facts that need not be disclosed. This article, then, will commence with an examination of facts, within the knowledge of an assured, which must be disclosed in Ireland, how basis of contract clauses may affect such knowledge, the inferences that can be drawn from the primary knowledge of an assured, what knowledge an assured can be "deemed" to know, the significance of an agent's knowledge as regards the duty, and the ramifications of the Irish Insurance Codes of Practice, 1992, and the European Communities (Unfair Terms in Consumer Contracts) Regulations, 1995.

**FACTS WHICH YOU DO NOT KNOW**

Section 18(1) of the Marine Insurance Act, 1906 provides that an assured must disclose to the insurer, before the contract is concluded, material circumstances which are known to him or her. Of course, the law does not excuse the non-disclosure of information which the assured

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has but has no reason to think relevant – what is material is that which would decisively influence the judgment of a prudent insurer in determining whether or not to take the risk and at what premium. Accordingly, in determining materiality, the assureds' opinion as to what they would pluck from the ambit of their knowledge is not relevant. Moreover, the law does not excuse innocent mistake or forgetfulness.

In respect of the latter, Clarke noted: "[T]he proposer may well be surprised by what the law expects of the human memory. The information that the proposer must disclose includes not only information actually in mind when contracting or information which, if prompted, the proposer would recall, but also information which the proposer once knew but has completely forgotten or which the proposer never actually knew at all but which was known to the proposer's agents. No allowance is made for age or forgetfulness: the person with a bad memory is expected to have a good notepad or a good organization."

The issue of the knowledge of an assured has been considered in England and Wales. In *Hearts of Oak Building Society v. Law Union and Rock Insurance Co. Ltd*, for example, the case concerned an application for a policy of fidelity guarantee to be issued by the respondent in respect of a solicitor employed by the claimant to receive mortgage moneys. In

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9 In Ireland, see *Chariot Insns Ltd v. Assicurazioni SPA and Coyle Hamilton Hamilton Philips Ltd* [1981] I.R. 225 at 226. In England and Wales, the test of materiality is that which a prudent insurer, if he or she had known the fact in question, would have taken into account when reaching his or her decision to accept the risk or what premium to charge. There is also a second limb to this test in that before a particular underwriter can avoid a contract for non-disclosure of a material fact, it must be shown that he or she was actually induced by the non-disclosure to enter into the policy on the relevant terms. See *Pan Atlantic Insurance Co. Ltd v. Pine Top Insurance Co. Ltd* [1994] 3 WLR 677; *St Paul Fire and Marine Insurance Co. v. McConnell Dowell Construction Ltd* [1995] 2 Lloyd's Rep 116.

10 See, for example, the judgment of Bayley J. in *Lindemau v. Desborough* (1828) 8 B & C 586, at 592.

11 See, for example, the judgment of Cockburn C.J. in *Bates v. Hewitt* where it was noted: "It is well established law that it is immaterial whether the omission to communicate a material fact arises from indifference or a mistake or from it not being present to the mind of the assured that the fact was one which it was material to make known." (1867) L.R. 2 Q.B. 595 at 607.


response to certain questions posed by the respondents, the claimant stated that the solicitor was required to send daily statements of cash received and to pay over such cash to the claimants as soon as it was received. Before the policy was renewed, the claimant discovered that the solicitor was not actually handing over the money as soon as it was received. This fact was not communicated to the respondent and the policy was duly renewed. The claimant suffered a loss of £6,731 7s. 6d. through the defaults of the solicitor and claimed indemnity under the policy. The respondents denied liability on the grounds inter alia that the answers to the questions in the application form were warranties as a result of a basis of contract clause which had been signed by the claimants. In holding for the claimant on the basis that the questions were merely statements of facts as to the duties of the solicitor and were not warranties that such duties would be strictly performed, Goddard J. noted that the claimant could not know whether the solicitor did actually receive money on a particular day. Indeed it was because the claimants did not know when the solicitor received money, and whether or not he would hand over the exact sums received, that they wished to insure against his possible defalcations – if they could have been certain that he would have handed over all moneys received, there would have been nothing to insure against. Accordingly, the claimants only had to disclose what they knew. Because the claimants did not know, at the inception of the policy, that in some instances the solicitor would not hand over money with the promptitude with which it was his duty to act, the policy could not be avoided. In interpreting the contractual nature of the policy and what the parties agreed, it was held that the claimants had only

14 Ibid at 623.
15 As noted, there was evidence to suggest that the claimants knew prior to renewal that the solicitor was not performing his duties as he should have been, though they did not suspect fraud. It was never, however, pleaded on behalf of the respondent that there was non-disclosure of a material fact at renewal. Rather it was argued that as the solicitor had not carried out his duties, the answers to the questions posed in the original policy – which became warranties as a result of a basis of contract clause – were false. It may have been more cogent, however, to pursue a line of reasoning which focused on the common law duty of disclosure at renewal rather than on the contractual nuances of the original policy. In other words, it should have been argued that as the claimants were aware that their solicitor was engaging in a dereliction of duties prior to renewal, this was a fact which they claimants ought to have disclosed at renewal given its materiality.
warranted the truth about the duties of the solicitor (of which they had knowledge), not that such duties would be strictly discharged (of which they had no knowledge).

In *Joel v. Law Union and Crown Insurance Company*, a case concerning both warranties and the common law duty of disclosure, the assured, an applicant for life assurance, in response to questions posed by the insurer’s doctor, answered that she had never suffered from mental derangement - in fact, though not aware of it, the assured had been in confinement for acute mania. She signed a declaration to the effect that the answers to the questions posed by the insurance company’s doctor were all true. The assured subsequently committed suicide and the executrix of her estate sought to claim under the life policy. The defendant insurers sought to resist the claims on two grounds: (a) that the accuracy of the answers to the questions were a condition precedent to the validity of the policy, and; (b) that there was non-disclosure of a material fact. In finding for the plaintiff, the Court of Appeal held that the questions posed by the doctor to the assured were not expressly made the basis of the contract and, therefore, were questions to be answered to the best knowledge and belief of the assured, but not questions which the assured would warrant the truth of. As the contract contained no express stipulation to the effect that representations made outside the proposal form assumed the status of conditions precedent to validity, it was not open to the insurers to argue that incorrect answers given to their doctor enabled them to repudiate liability regardless of causative effect. But the fact that the assured warranted the truth of her answers in the proposal form only did not mean that she was excused the duty to make full disclosure of all facts material to the risk when she was afterwards questioned by the insurer’s doctor. Although only the answers to questions in the proposal form were made the basis of the contract as a result of judicial interpretation of the contract, answers to questions posed outside the proposal form were representations which may or may not have been material depending on causative effect. In the particular circumstances of the case, it was held, given that the facts to be disclosed must be matters within the knowledge of the applicant, that there was insufficient evidence to prove that there had been a non-disclosure which

16 [1908] 2 K.B. 863.
would have rendered the policy voidable. In respect of knowledge and non-disclosure, Fletcher Moulton, L.J. noted the following:

The duty is a duty to disclose, and you cannot disclose what you do not know. The obligation to disclose, therefore, necessarily depends on the knowledge you possess. I must not be misunderstood. Your opinion of the materiality of that knowledge is of no moment. If a reasonable man would have recognized that it was material to disclose the knowledge in question, it is of no excuse that you did not recognize it to be so. But the question always is, Was the knowledge you possessed such that you ought to have disclosed it? Let me take an example. I will suppose that a man has, as is the case with most of us, occasionally had a headache. It may be that a particular one of those headaches would have told a brain specialist of hidden mischief. But to the man it was an ordinary headache undistinguishable from the rest. Now no reasonable man would deem it material to tell an insurance company of all the casual headaches he had had in his life, and, if he knew no more as to this particular headache than that it was an ordinary casual headache, there would be no breach of his duty towards the insurance company in not disclosing it. He possessed no knowledge that it was incumbent on him to disclose, because he knew of nothing which a reasonable man would deem material or of a character to influence the insurers in their action. It was what he did not know which would have been of that character, but he cannot be held liable for non-disclosure in respect of facts which he did not know.17

In Ireland, in *Elizabeth Ann Keating v. New Ireland Assurance Company plc.*18 the court had to consider whether or not an assured had to reveal material information to an insurer where that information was known to his doctors but not to him and where he had warranted the accuracy of the answers given in a proposal form. Mrs. Keating and her late husband had taken out a life insurance policy with the defendant insurer. At the medical examination conducted on behalf of the insurer, Mr. Keating informed the examiner that he had undergone an examination and treatment for what he believed to be epigastric discomfort. There was insufficient evidence to establish that he knew that the examination had,

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17 *Ibid* at 884.
in fact, revealed a condition of angina. In the proposal form for insurance, Mr. Keating had answered a question about whether or not he had ever had any affection of the heart in the negative. A declaration in the policy made the policy conditional on the truth and completeness of all disclosures made. When Mr. Keating died and Mrs. Keating made a claim under the policy, the insurer sought to repudiate liability on the basis that material facts had not been disclosed. Not only did the common law require disclosure, but the contract itself warranted full and honest disclosure. Because the trial court found that, on the facts, Mr. Keating did not know of his heart condition, Egan J. could go on to state that "non-disclosure can only be relevant to some fact of which the person has knowledge at the relevant time". In respect of the "legal basis" of the policy which required disclosure of all material facts of which the company "ought to be informed", the learned judge, echoing Fletcher Moulton J. in Joel, stated: "How can it be said that a person ought to disclose some facts which he does not know about? How can he do so?" Consequently, the insurer could not repudiate the agreement.

On appeal to the Supreme Court, Walsh J. held that there could be no question of a failure to disclose information about which the plaintiff and the deceased were not shown (in evidence) to have any knowledge. Furthermore, he was not prepared to accept that there was a warranty of complete disclosure (even of unknown facts) because the language of the agreement did not make it clear and unequivocal that that kind of warranty was intended. Quoting Lord Mansfield in the English decision of Ross v. Bradshaw, Walsh J. said that any "such warranty could never mean that a man has not in him the seeds of some disorder. We are all born with the seeds of mortality in us". McCarthy J., in effect, agreed. The "insurer ... failed to establish either material non-disclosure or a

19 Ibid at 385.
20 Ibid at 386.
21 In other words, the wording of the agreement did not make it incumbent on those who sought to enforce the insurance policy to prove in the case of death that, at the time the insurance was effected, the assured was in such a good state of health as not to suffer from anything, either knowingly or unknowingly, which was dangerous to life.
22 (1761) 1 Wm Bl. 312.
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breach of warranty”, he said. In the former case, he upheld the view of the trial judge that a person cannot be required to disclose some fact of which he is unaware. It is simply not non-disclosure to fail to reveal information about which one has no knowledge. Moreover, the fact that the three doctors concerned did know that there was some problem with the heart of the deceased could not impute knowledge to the deceased. Nor would he interpret the condition relating to accuracy in the answers to questions as a warranty of all facts whether or not known by the insured. If such a warranty was to be included in the agreement, it had to be “expressed in clear terms without ambiguity … If there is any ambiguity, it must be read against the persons who prepared it”.24

In the same case, Walsh J. noted that “insurers may stipulate for any warranty they please and if an assured undertakes that warranty, although it may be something not within his or her knowledge, he or she must abide the consequences.”25 So, although under the common law duty of disclosure you cannot be expected to disclose a fact which is not within your knowledge, an insurer could, ex hypothesi, elect to stipulate, as a constituent element of the contract, for an absolute warranty as to the truth of something whether within or outside the knowledge of the assured. There are, however, a number of problems with such a clause in Ireland. First, it is casting the contractual nature of disclosure so broad as to frighten off most consumers who would, it is hoped, be too prudent to agree to such an unreasonable term. Secondly, such a panoplistic clause now runs the risk of being struck down by the Irish Insurance Federation’s Codes of Practice of 1992, which provide inter alia that insurers should not reject claims where the fact is not one in the knowledge of the proposer or is a fact which the proposer could not reasonably be expected to know.26 Thirdly, the clause may now also possibly fall foul of Regulation 4 of the European Communities (Unfair

24 Ibid at 394–395.
25 Ibid at 388.
26 See Regulation 3(a) Code of Practice on Life Assurance 1992; for similar provisions in respect of non-life assurance, see Regulations 1(d) and 3(a)(i) Code of Practice on Non-Life Insurance, 1992. As regards the Irish Insurance Codes of Practice and basis of contract clauses, see supra n. 39. For limitations, however, on the employment of the Codes of Practice and the European Communities Regulations, see supra n. 41.
Terms in Consumer Contracts) Regulations, 1995. I say "possibly" in respect of the Regulations given that they are somewhat limited in that the Courts are not permitted to assess the fairness of any term which defines the subject matter of the contract. It is likely, then, that most of the obligations imposed by warranties in an insurance policy may be seen as defining and controlling the risk run by the insurer and therefore fall outside the scope of the Regulations. This limitation, however, is subject to the proviso that the core terms are drafted in plain, intelligible language, thereby leaving it open to a court to ignore the special, non-reviewable status attached to core terms where there meanings are in doubt. In such circumstances, the term will be subject to the full force of the regulations. Moreover, and on the premise that basis of contract clauses, in particular, are "unintelligible to the majority of consumers", and given the asperity with which they have been viewed by the judiciary who have, on occasion, referred to them as "mean and contemptible", as resulting in assureds being "shockingly badly treated", and as a "vicious device", it is submitted that the aforementioned proviso affords some degree of latitude to the judiciary to bring such clauses -- where they relate to consumers -- within the realm of the regulations and, consequently, enable a determination of

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27 It provides: "A term shall not of itself be considered to be unfair by relation to the definition of the main subject matter of the contract or to the adequacy of the price and remuneration, as against the goods and services supplied, in so far as these terms are in plain, intelligible language". For a similar provision in England and Wales, see Regulation 6(2) (ex 3(2)) of the Unfair Terms in Consumer Contracts Regulations 1999.


29 On the other hand, Regulation 4 should make non-core terms more vulnerable to challenge: for example, terms which insist on policyholders giving immediate notice of an insured peril occurring would not presumably fall within it's ambit and could, accordingly, be challenged on the basis of their unfairness.


33 Zurich Insurance Company v. Morrison [1942] 1 All E.R. 529 at 537 per Lord Greene MR.
their unfairness vis-à-vis the significant imbalance in the parties' obligations.34

The significance of the Insurance Codes of Practice and the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 assume even greater gravitas in Ireland when one considers the formalistic and mechanical logic applied by the Irish judiciary, on occasion, to basis of contract clauses. In Patrick Keenan v. Shield Insurance Co. Ltd,35 for example, the following declaration at the foot of a proposal form was the subject of judicial deliberation: “I hereby declare that the above particulars are true and complete in every respect and that no material fact has been suppressed or withheld.” Essentially the basis of the argument reposed in the contractual construction of the declaration in the proposal form, with counsel for the assured arguing that the warranty as to the veracity of answers given only related to answers which withheld or suppressed a material fact. In other words, the two parts of the declaration — (a) that the answers are true and complete in every respect; and, (b) that no material fact had been suppressed or withheld — should be read together with the effect that the latter part (b), would be imported into and qualify the former. In the opinion of Blayney J., however, the declaration was composed of two separate and autogenous statements: “the first statement relates to the obligation of the plaintiff to give correct answers, since these are made the basis of the contract, and the second relates to the obligation at common law, arising from the nature of the contract of insurance to make full disclosure of all material facts”.36 Accordingly, the insurer could avoid the contract on the basis of breach of warranty. By contrast, in England and Wales, in the decision of Hair v. Prudential Assurance Company Ltd,37 the following warranty was the subject of judicial examination: “I wish to insure ... and warrant that all the information entered above is true and complete and that nothing

34 But for limitations on the employment of the Unfair Terms Regulations, see supra. n. 41.
35 Unreported, High Court. 13 February 1987.
36 Ibid at p. 5. The learned judge also noted: “If [counsel for the assured’s] contention were to be accepted it would involve treating the second part of the sentence as if it read 'and that in the answers to the questions no material fact had been suppressed or withheld'. I can see no justification for adding in this qualification and, accordingly, I must reject this submission”. Ibid.
materially affecting the risk has been concealed". In respect of the warranty, Woolf J. noted: "I am bound to say that if it was intended that an assured should answer matters even though he is not being questioned about them, I would expect a different form of statement from the one to which I have just made reference. I would have expected something to be said which clearly indicated to a proposer that, although they had not been asked any specific questions about the matter, if there was something which was relevant to the risk which they knew of, but which was not covered by the questions, they should deal with it, and leave a space for them to do so."38 Thus, it was held that a statement on a proposal form by which an assured warranted that his or her answers were true operated as an implied waiver to information about which specific questions had not been asked.

Though perhaps divaricating slightly, it is engaging to contrast the judicial interpretation of the basis of contract clause in Hair with that of Keenan given the similarity of expression but dissimilarity of construction of the clauses. In Hair, the conjunction "and" in the clause was read as being subordinating in design, thereby operating as an implied waiver of information about which specific questions had not been asked. In Keenan, by contrast, the conjunction "and" in the clause was read as operating to the principle of coordination, thereby allowing the perception that both parts of the clause were independent and cumulative. In choosing the more emended interpretation, there are, it is submitted, two competing demands at play. On the one hand, it is well recognized that the remedy for breach of warranties is ignominious and, accordingly, every effort should be made to construe them contra proferentes insurers where ambiguity exists as per Hair in England and Wales. On the other hand, the role of judicial construction is to give effect to the manifest intention of the parties as discernible from the clause and the entire instrument if needs be as per Keenan in Ireland. Applying the reasoning in Keenan to the basis of contract clause in Hair, the deduction that can be made therefrom is that if the warranty in Hair was to be construed as relating only to the answers about which the assured was being questioned, as Woolf J. did, it would involve treating the second part of the warranty as if it read "and that nothing materially affecting the risk in the answers to the questions posed in the proposal form

38 Ibid at 673.
has been concealed". As such, the Irish Courts currently have a formalistic precedent to the implied effect that the turn of the scale against the insurer in *Hair* was recherché in that the basis of contract clause in the case, though legally complex, was not ambiguous. The author's diffidence about applying such a logic to basis of contract clauses is grounded in the consideration that, even in the absence of ambiguity, such clauses may well be unintelligible to the majority of consumers who are not conversant with insurance rhetoric. It is tempered, to some extent, by the realization that the Irish Insurance Codes of Practice and, perhaps, the European Community (Unfair Terms in Consumer Contracts) Regulations 1995 – if it can be shown that the clause was not drafted in plain, intelligible language, a safeguard which, it is posited, is broader than the *contra proferentes* doctrine – may offer some redress to private policyholders and consumers respectively, though not to commercial assureds. What is clear, however, is that if the Irish courts continue to rely on such mechanical reasoning as applied in *Keenan* or the proposition in *Keating* that insurers can elect for any warranty they desire, the importance of the Insurance Codes, despite the

39 See Paragraph 1(b) of the Irish Insurance Codes of Practice (life provisions), 1992, which provide: "Neither the proposal form nor the policy shall contain any general provision converting the statements as to past or present fact in the proposal form into warranties except where the warranty relates to a statement of fact concerning the life to be assured under a 'life of another' policy. Insurers may, however, require specific warranties about matters which are material to the risk." Paragraph 3(b) of the provisions provide that "except where fraud is involved, an insurer will not reject a claim or invalidate a policy on grounds of breach of warranty unless the circumstances of the claim are connected with the breach and unless: (i) the warranty relates to a statement of fact concerning the life to be assured under a 'life of another' policy ... or (ii) the warranty was created in relation to specific matters material to the risk and it was drawn to the proposer's attention at or before the making of the contract". For similar non-life provisions, see 1(b) and 3(a)(iii) Irish Insurance Codes of Practice, 1992.

40 Such reasoning appears to be more evident in the High Court than in the Supreme Court.
fact that they do not enjoy binding force of law, and the European Community Regulations cannot be underemphasized.

In returning to the principal motif of this section, there is one further issue which merits discussion, at this juncture, in respect of Keating. It concerns the determination, and in particular the method of reasoning by which such a determination was reached, of whether or not James Keating had *actual knowledge* that he suffered from angina at a time when the duty of disclosure was pertinent. In the High Court, Egan J. held that "he [James Keating] did not know of this condition at the time of the execution of the policy". In the Supreme Court, Walsh J. stated: "It was not established in the High Court, and from the evidence there is no inference which must necessarily be drawn, that the deceased or his wife made any false statements as to the state of health of the late Mr. Keating or that they told anything other than what they believed to be the truth.... There was no evidence by which it could be held that he was aware of the fact that he had angina pectoris or that such condition was ever revealed to him by his medical advisers." McCarthy J. noted: "One cannot disclose what one does not know albeit this puts a premium on ignorance. It may well be that wilful ignorance would raise significant other issues; such is not the case here. If the proposer for life assurance has answered all the questions to the best of his ability and truthfully, his

41 It is hoped that Irish insurers, in the light of the Codes, would not now rely on a purely technical defence to defeat a *bona fide* claim. It should also be pointed out however that there is no certainty that the Codes will be complied with by insurers who are not members of the Irish Insurance Federation; this caution should not, however, be overemphasized given that a very sizeable percentage of insurance business in Ireland is undertaken by members of the Federation. See Kemp, M. The Irish Insurance Federation – A profile. *Irish Insurance Law Review*, 1(1) (2000): 20. It should also be pointed out that the Insurance Codes of Practice and the European Communities Regulations only apply to private policyholders and consumers respectively.

42 See also Regulation 6(1) of the Life Assurance (Provision of Information) Regulations, 2001 (S.I. No. 15 of 2001), enacted pursuant to the Insurance Act, 1989, as amended by the Insurance Act, 2000, which require suppliers of life assurance in Ireland to provide detailed information to clients resident in Ireland before they sign a proposal form in respect of life assurance including the circumstances in which a policy can be cancelled, and the consequences of failing to disclose material facts or providing incorrect information when completing the form.


44 *Ibid* at 389.
next of kin are not to be damnedified because of his ignorance or obtuseness which may sometimes be due to a mental block on matters affecting one's health.\textsuperscript{45} Though obiter, it is submitted that such a proposition conceals far more than it reveals. Given the aleatory nature of insurance contract law, and the need to prevent the suppression of information, a proviso that ignorance or obtuseness about facts – due for example to a mental block (which \textit{a priori} assumes that the assured had actual knowledge preceding the mental block) – need not be disclosed must, in the absence of further refinement, be of doubtful validity. As noted in \textit{MacGillivray}: “if a fact is material and within the knowledge of the assured..., the assured is under an absolute duty to disclose it... Mistake or forgetfulness affords no defence”.\textsuperscript{46} Moreover, there was little or no fastidious reflection in the judgments on the contested nature of the actual knowledge of the assured. On the one hand, it could be argued that inferences could be drawn from the actual knowledge of the assured on the following basis: all his medical advisers knew he had angina before the duty of disclosure arose;\textsuperscript{47} he spent two days in Baggot Street Hospital with a “well known” cardiologist; whilst there, he underwent extensive cardiac investigations including a stress ECG and an angiogram, for which he gave his consent (these investigations revealed a considerable narrowing of the arteries and that his condition was moderately severe); that a patient at the hospital “would normally get the gist of his condition from one of the team before his discharge and be given suitable advice”; that he was prescribed two drugs which were specific for angina; and, that Dr. Gearty at Baggot Street Hospital testified to the effect that “he should have known that the whole area of interest was the heart, and that we are dealing with X-ray pictures of the heart and we were treating him with tablets for the heart”. These, then, would have to be ranged against the following pleadings: that James Keating

\textsuperscript{45} \textit{Ibid} at 392.
\textsuperscript{46} \textit{Ibid} at 394. Paragraph 3(a)(iii) of the life provisions and 3(a)(i) of the non-life provisions of the Irish Insurance Codes of Practice do however provide that an insurer should not invalidate a policy unless it is a fact which the proposer could reasonably be expected to disclose.
\textsuperscript{47} The fact that his medical advisers knew that he had angina cannot be employed to \textit{impute} knowledge; albeit peripheral it could, however, be employed along with other issues raised to draw inferences from the actual knowledge of the assured.
believed he had epigastric discomfort which was disclosed to the insurer's medical examiner; that he also disclosed that he had stayed in Baggot Street Hospital with a doctor who would have been known to the insurer's medical examiner as a "well known cardiologist"; that his medical advisers did not advise him directly that he had angina before the duty of disclosure arose; that there could "possibly" be a weakness in the extent to which the routine (that patients receive a direction as to their condition) at Baggot Street Hospital was adhered to; that his discharge note from the hospital stated that the initial report was good and that a full report was to follow; and, that he did not know the nature or the purpose of the tablets he was prescribed.

In determining whether or not it could be inferred from the primary knowledge of James Keating that he had actual knowledge of his condition, it is submitted that the absonant issues should have been construed in the light of the following question: would a reasonable man with no special knowledge of any kind have failed to appreciate that he was possessed of knowledge and information in relation to his health, and his condition of angina in particular, which were of materiality? No dissection or exposition of this kind was forthcoming in the High Court or Supreme Court: it was simply posited that there was no evidence by which it could be held that he was aware of the fact that he had angina. Of course, the answer to the posed question might well be that no inference could be drawn from the primary knowledge of James Keating which would reveal that he knew of his condition. The call for more compelling and plausible reasoning, however, is directed for the most

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48 Of course the Supreme Court was extremely reluctant to interfere with the finding of primary fact made in the High Court once there was evidence to support the finding made. See, for example, *Dunne v. National Maternity Hospital* [1989] I.R. 91. It could be argued, however, and with only a slight element of mischief, that there was a lack of clarification on evidence tendered, viz where the fault lay in taking down Dr. Gearty's name incorrectly, and the significance of the false reply to the question concerning the names and addresses of doctors attended in the proposal form. See *supra* n. 125. This elusiveness was compounded by the fact that Egan J. in the High Court never referred in the course of his judgment to the significance of the drugs prescribed for angina or that Dr. Gearty at Baggot Street Hospital testified to the effect that the assured "should have known that the whole area of interest was the heart, and that we were dealing with X-ray pictures of the heart, and we were treating him with tablets for the heart".
part at the manner⁴⁹ in which the decision was reached rather than the actual decision – though, by implication, its foundations look more unsteady. Indeed concern about the unsystematic analysis of the question of knowledge, and in particular the inferences that could be drawn from the actual knowledge of the assured, assumes even greater gravitas when it is borne in mind that the said question was the pivotal consideration – around which the other issues oscillated – in the case: once it was established that the assured did not have actual knowledge of his condition, common law non-disclosure was rendered otiose; similarly, the warranty, which made the policy conditional on the truth and completeness of all disclosures made, could be construed against the insurers on the basis that they had not expressed in unequivocal language that the assured was required, inter alia, to disclose facts of which he was unaware.⁵⁰ In addition, a more systematic and considered analysis may have afforded the Supreme Court the opportunity to expressly approve of a less objective threshold as regards inferences that could be drawn from the primary knowledge of consumers – the outcome of the case may have been the same, but, by expressly enshrining this less objective criterion, juristic clarity would have been enhanced.

At common law, and as noted, an assured must disclose to the insurer, before the contract is concluded, material circumstances which are within his or her actual knowledge.⁵¹ What, though, of material facts

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⁴⁹ This argument, to some extent, calls to mind a story recounted by Jerome Frank in *Courts on Trial* in 1950: “You will perhaps recall the famous English judge who gave this advice to a newly-appointed member of the bench. ‘State your conclusions but never your reasons. Your conclusions will probably be right; your reasons will usually be wrong.’” Frank, J. “Courts on Trial: Myth and Reality in American Justice,” Princeton University Press, Princeton, 1950: p. 387.

⁵⁰ See also, in Ireland, *Olive Curran v. Norwich Union Life Insurance Society Unreported (H.C.) 30 October, 1987* where it was stated that a proposer for life assurance had to disclose, *inter alia*, that continuing medication had been prescribed for him by his family doctor. It appears, however, that routine visits to a doctor need not be disclosed. As noted by Davies J. in *Lee v. British Law Insurance Co. Ltd [1972]* 2 Lloyd’s Rep. 49 at 55, the assured must only disclose the fact of a routine visit to a doctor if there was “something that should have stuck in his mind and was quite different from the ordinary routine visits that one makes”.

⁵¹ This is a relatively straightforward question of fact in respect of natural assureds. It becomes more tortuous when the question of knowledge is examined from a corporate vista in that the knowledge of the persons who constitute the knowledge of the company for the purpose of disclosure need to
which the insured ought in the ordinary course of business to have known but fails to disclose because he or she did not know of them? The answer appears to be that the duty of making disclosure is not simply confined to such facts as are within the actual knowledge of the assured — it extends to all material facts which the assured "ought in the ordinary course of business to have known", and he cannot escape the consequences of not disclosing them on the ground that he did not know them. In other words, a certain level of presumed or constructive knowledge can be imputed to the insured seeking cover in the course of business. Such an imputation, however, will not ordinarily apply to ordinary consumer insurance. As McCarthy J. noted in Keating: "The insurer might well contend that the deceased ought to have known that there was some problem arising with his heart; the onus, however, of proving that he did know lies upon the insurer; it is not sufficient to prove that he ought to have known". In England or Wales, however, an attempt was made by Roskill J. in Godfrey v. Britannic Assurance Company Ltd to impute knowledge to an assured in an ordinary consumer insurance contract. Here the assured was asked the following question in a life assurance proposal form: "Have you suffered from any illness or accident or received medical advice or treatment, with or without an operation". The assured responded that he had lost four fingers on his left hand in an accident but had no other illnesses or

be identified. In MacGillivray it was submitted that the knowledge of those who represent the "directing mind and will of the company and who control what it does, is to be identified as the company's knowledge, whether or not they are responsible for arranging the insurance cover in question". Legh-Jones, N. (ed.). "MacGillivray on Insurance Law," Sweet and Maxwell, London, 1997: p. 392. See, for example, Regina Fur Co. v. Bosom [1957] 2 Lloyd's Rep. 466.

52 Section 18(1) of the Marine Insurance Act, 1906.

53 There is, however, one occasion where an assured who is seeking insurance outside the course of business may have knowledge imputed to him or her. This will arise "only where a person with actual knowledge can properly be described as an agent of the assured with a legal duty either express or implied to communicate his knowledge to the assured. If, therefore, the assured entrusts the management or safekeeping of the insured property to an employee or agent and the latter is aware of circumstances affecting that property which are material to the proposed insurance, the assured will be treated as knowing what his employee or agent knew whether or not he receives the relevant information". MacGillivray, op. cit. n. 51 at p. 394.


accidents. The court accepted that the assured had no indication at all at the time of completing the proposal form that he had a kidney complaint of some substance. In the months leading up to signing the proposal form, however, the assured had been told by his doctors that he had minor kidney trouble and should lead a careful life, tests at Westminster Hospital revealed no change in that condition, and an X-ray revealed that he had a lung infection. The court held that these were material facts – of which the assured had actual knowledge by inference – non-disclosure of which enabled the insurer to avoid the policy. Roskill J., however, went on to state *obiter* that even if it was accepted that the assured did not have knowledge of the material facts outlined, nevertheless they were facts which “he ought to know and therefore must be treated as having known”.  

The proposition that such an imputation can apply to ordinary insurance contracts in England must however be viewed as extremely doubtful. More recently, Simon Brown L.J. in *Economides v. Commercial Assurance Co. PLC* stated:  

"It is clearly established that an assured . . . effecting insurance cover as a private individual and not in the 'ordinary course of business' must disclose only material facts known to him; he is not to have ascribed to him any form of deemed or constructive knowledge."

What, then, of those facts which fall within the ambit of the “ordinary course of business”. In England and Wales, in the marine insurance case of *Proudfoot v. Montefiore*, for example, the plaintiff effected a policy of insurance on a cargo of madder shipped on board a vessel called the *Anne Duncan* from Smyrna to Liverpool. The cargo was purchased and shipped by one Rees in the course of his employment as an agent of the plaintiff. On January 12, 1861, he sent a letter containing the invoice and weights of the shipment to the plaintiff. On January 19, 1861, he forwarded a letter to the plaintiff enclosing the bill of lading. The ship sailed from Smyrna on January 21, 1861 but was wrecked on 23rd with total loss of cargo. Knowledge of the loss was communicated to Rees on January 24. Two days later, Rees communicated by letter to the plaintiff of the loss of the vessel, and also explained that he did not dare telegraph “for when once you had the intelligence in hand you were prevented

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56 *Ibid* at 532.
58 (1867) L.R. 2 Q.B. 511.
from insuring”. On January 31, the plaintiff, having received the letters sent on January 12 and 19, but prior to receipt of the letter of January 26, gave instructions to effect the policy. There was no evidence of fraud or undue concealment by the plaintiff of a material fact within his knowledge. The question then arose as to whether the plaintiff assured was deemed to have constructive knowledge of the loss as a result of the conduct of his agent. It was held that the agent failed in the ordinary course of employment to communicate information to his principal as to the state of the ship and cargo. Accordingly, and though the principal had no knowledge of the fact that the cargo had been lost, the policy was void on the ground of non-disclosure of a material fact by the agent of the insured. As Cockburn C.J. noted with characteristic acuity: “[I]f an agent, whose duty it is, in the ordinary course of business, to communicate information to his principal as to the state of a ship and cargo, omits to discharge such duty, and the owner, in the absence of information as to any fact material to be communicated to the underwriter, effects an insurance, such insurance will be void, on the ground of concealment or misrepresentation. The insurer is entitled to assume, as the basis of the contract between him and the assured, that the latter will communicate to him every material fact of which the assured has or, in the ordinary course of business, ought to have knowledge.”

In Australia and New Zealand Bank Ltd v. Colonial Eagle and Wharves Ltd; Boag McNair J. was prepared to accept that section 18 of the Marine Insurance Act of 1906 could be applied to non-marine insurance, noting that this was the trend in textbooks such as MacGillivray. The case arose as a result of the misdelivery by the defendants in 1957 and 1958 of 246 bales of wool which were kept in their warehouse. The plaintiff bank had sent the wool – which they were holding as security – to the defendants warehouse with instructions that the bales were not to

59 Ibid at 521–522.
61 He also recognized that there were some strong judicial dicta to the contrary and alluded in particular to the judgment of Fletcher Moulton J. in Joel v. Law Union Crown where he stated that “you cannot disclose what you do not know”. Supra n. 7. McNair J. argued, however, that this dictum of Fletcher Moulton J. could not be pressed too far since in the case no question of the knowledge of any servant or agent was involved. See also Summer v. New India Assurance Co. Ltd [1995] I.R.L.R. 240.
be released except on the bank's authority or the production of the bank's delivery orders. The defendants, however, delivered 246 bales of wool to the importer without the bank's authority. The bank had not recovered the advances it had made to the wool importer against these bales and it successfully sued the defendants for the resulting loss. The defendants now claimed that sum from a third party, Mr. Boag, a representative Lloyd's underwriter, under two Lloyd's all-risk policies for the years 1957 and 1958. The third party insurer, however, denied liability alleging, inter alia, that it was entitled to repudiate liability on the grounds of non-disclosure of a material fact. It appears that it had been a custom of one of the employees of the defendants to allow important customers to take delivery of orders without bank releases first being obtained. The third party insurer now claimed that this constituted non-disclosure of a material fact by the defendants in that they ought to have known that their system of operation was such that the goods held by them to the order of one person – such as the bank – could be and were habitually released by them without the knowledge, consent or order of that person to another person (in this case to the wool importer).

Although it was conceded that nobody in authority had knowledge of this practice, it was known to an employee, the chief entry clerk, and this knowledge could be imputed to the company because it is knowledge it would have known if it had made such inquiries as to its system of operation as a reasonably prudent wharfingering company in the ordinary course of business would have made. In respect of this submission, McNair J. stated:

I have been referred to no authority to suggest that the board of the company proposing to insure owe any duty to carry out a detailed investigation as to the manner in which the company's operations are performed, and I know of no principle in laws which leads to that result. If a company is proposing to insure wages in transit, I cannot believe that they owe a duty to the insurers to find out exactly how the weekly wages are in fact carried from their bank to their premises, though clearly they must not deliberately close their eyes to defects in the system and must disclose any suspicions or misgivings they have. To impose such an obligation upon the proposer is tantamount to holding that insurers only insure persons who conduct their business prudently, whereas it is commonplace that one of the purposes of insurance is to cover yourself against your own negligence or the negligence of your servants. As to the facts, it seems to me that any
reasonable inquiries the board could be expected to make would only have revealed, as was proved to be the fact, that the system in operation for many years had in fact worked satisfactorily in the sense that no difficulty had arisen and no claim had been made.\footnote{62}{1960] 2 Lloyd’s Rep. 241 at 252.}

In the light of this dictum by McNair J. in \textit{Australia and New Zealand Bank Ltd, Arnould} noted: “The test of what ‘ought to be known’ by the assured is not, therefore, an objective test of what ought to be known by a reasonable, prudent assured carrying on a business of the kind in question, but a test of what ought to be known by the assured in the ordinary course of carrying on his business in the manner in which he carries on that business.”\footnote{63}{Mustill, M. and Gilman, J. “Arnould’s Law of Marine Insurance and Average,” Stevens & Sons, London, 1981: p. 488.} In \textit{MacGillivray}, it is similarly suggested: “The assured is deemed to know only what he would be expected to know in the ordinary course of his own business, making allowance for its imperfect organization, prior to the conclusion of the insurance. Therefore he is not deemed to be aware of matters which should be known in the course of a well run business, which he would have found out if he had re-organized his schedule or business system at the time in question.”\footnote{64}{\textit{MacGillivray} \textit{ap. cit.} n. 51 at p. 393.} In contradistinction to \textit{Arnould} and \textit{MacGillivray}, Clarke submitted the following in respect of what “ought to be known”. He stated: “It would be odd, if the law applied an objective standard to inferences that the proposer draws from what he knows, as well as an objective standard of materiality by reference to the prudent insurer or sometimes, the reasonable insured, and yet allowed the proposer to conduct his business in such a negligent way that facts never come to his attention in the first place, so that the objective rules are never allowed to bite. It is submitted that he is taken to know what he should know in the ordinary course of his kind of business.”\footnote{65}{Clarke, M. “The Law of Insurance Contracts,” LLP, London, 1994: p. 582.} Nevertheless, Diamond J., in the English decision of \textit{Sinner v. New India Assurance Co. Ltd}, approved of \textit{Arnould} and adopted a test – in respect of the ambit of the presumption “deemed to know” – of what ought to be known by the assured in the ordinary course of carrying on his business in the manner in which he carries on that business. Though at a surface level such a proposition lacks a certain symmetry, as alluded to by Clarke, it is
submitted that it should be adopted in Ireland on the grounds that it tends towards a less objective threshold which, given the harshness of the remedy for non-disclosure, can only be commended. Moreover, given the Irish Supreme Court decision in *Keating* which – impliedly – tends towards a less objective standard as regards the inferences that can be drawn from the primary knowledge of the consumer assured, the assymetrical qualities of the proposition are not, it is submitted, as great as may first be thought.

What is irrefutable, in any event, from the cited passage of McNair J. in *Australia and New Zealand Bank Ltd* is that no special inquiries as to facts outside the knowledge of the assured need to be undertaken for the insurer; of course if an assured turns a blind eye – sometimes referred to as “Nelsonian blindness” – and desists from an investigation of material circumstances of which he or she was suspicious or had good reason to believe existed, he or she is to be regarded as knowing whatever such a reasonable inquiry would have revealed.66 This begs the question, however, about the consequences of knowledge discovered of the risk as a result of an investigation by the assured which would normally exceed that expected by an insurer in respect of disclosure. In such circumstances, and where the insurer is unaware of the investigation, is there an obligation on the assured to disclose the findings to the insurer? Though there is a dearth of judicial dicta on the vexed question, Clarke submits, correctly in the author’s view, as follows: “The law is normally reluctant to reward diligence with the crown of heavier duties than those generally imposed on the reasonable man in his position, lest it discourage the voluntary investigation of risks which might better prevent loss. However, in insurance law, it appears that, if the proposer has arranged an investigation, the results of that investigation must be made known to the insurer, whether the insurer could have expected the

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66 See also *Blackburn, Law and Co. v. Vigors* (1887) 12 App. Cas. 531 at 537. See also *Sinner v. New India Assurance Co. Ltd* where Diamond J. noted: “It is clear that knowledge includes not only ‘any communication made to, or information received by the assured’, but also the kind of knowledge expressed in the phrase turning a ‘blind eye’. If the assured, suspicious of material circumstances which ought to be disclosed, turns a blind eye and refrains from enquiry, he is to be regarded as knowing whatever such enquiry would have revealed”. [1995] L.R.I.R. 240 at 252.
proposer to make the investigation or not."\textsuperscript{67} As such, it is submitted that an insured is only expected to know what ought to be known by him or her in the ordinary course of carrying on a business in the manner in which he or she carries on that business; if, however, an insured has carried out an investigation – which is of a special and detailed kind beyond what ought to be known by a reasonable insured in that kind of business – the fruits of that investigation should be disclosed if they unearth material circumstances.

Moreover, though confirming the proposition laid down by Cockburn C.J. in \textit{Proudfoot} that the insurer is entitled to assume on the basis of the contract between the underwriter and the assured that the latter will communicate every material fact that he or she has or ought to have knowledge of in the ordinary course of business, the learned judge in \textit{Australia and New Zealand Bank Ltd} was not disposed to the view that the case was governed by the principle that the knowledge of the agent was the knowledge of the principal: "to lay down as an abstract proposition of law that every agent, no matter how limited the scope of his agency, would bind every principal even by his acts is obviously and upon the face of it absurd".\textsuperscript{68} On the facts of the case, McNair J. held that the employee did not fall within the limited class of agents who can impute knowledge to the proposers of insurance, in that his duties were almost entirely clerical and he had no executive authority. But even if, \textit{ex hypothesi}, the employee fell within the class of persons whose knowledge is to be imputed to his principal, he was – in accordance with the dictum of Lord Atkin in \textit{Bell v. Lever Brothers}\textsuperscript{69} – under no duty to report his own dereliction of duty, and his knowledge of that dereliction is not to be imputed to his principals. The reason for this may be simply stated: it cannot be supposed that in the ordinary course of business an agent will

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67 Clarke, \textit{op cit} n. 65 at p. 581.
68 \textit{Ibid} at p. 252.
69 "The servant owes a duty not to steal, but, having stolen, is there superadded a duty to confess that he has stolen? I am satisfied that to imply such a duty would be a departure from the well established usage of mankind and would be to create obligations entirely outside the moral contemplation of the parties concerned". \textquoteright{}[1932] A.C. 161 at 228.
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disclose his or her own fraud or, as in the *Australia and New Zealand Bank Case*, misconduct to his or her principal.  

In respect of the agents' knowledge being that of the assured, it has been suggested in England and Wales that there are three different situations in which it will arise. First, there is a class of agent — the agent to know — on whom an assured relies for information. Secondly, there is a class of agent who is in such a "predominant position" in relation to the assured that his or her knowledge can be regarded as the knowledge of the assured. These two categories of agent, according to English law, fall within the ambit of section 18 of the Marine Insurance Act, 1906, which stipulate what the assured must disclose to the insurer. The function of the agent under this section is to keep the assured informed.

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70 In *PCW Syndicates v. PCW Reinsurers* [1996] 1 Lloyd's Rep. 241, it was submitted that because section 19(1) of the Marine Insurance Act, 1906 does not proceed by the route of imputing, attributing, or deeming the knowledge of the agent to be the knowledge of the principal, the *Hampshire Land* principle — which provides that if an agent is acting in fraud of his or her principal and the matter is relevant to the fraud, that knowledge, as an exception, is not to be imputed to the principal — cannot apply to agents to insure on the basis that the agent to insure must disclose every material circumstance that he or she knows, and that includes his or dishonesty. Staughton L.J., with Rose L.J. concurring, however, grounded his argument on the premise that the *Hampshire Land* principle was not confined to cases where the agent's knowledge is by law to be imputed or attributed to the principal; rather it extended to any case where the principal's rights are affected if the agent does not make a disclosure to a third party (at 254-255). As an "alternative route", the learned judge further submitted, with Rose L.J. again concurring, that an agent who commits a fraud on his principal is not an agent for that purpose and section 19 is restricted to knowledge acquired by an agent to insure *qua* agent for the assured (at 256-257).

71 *Proudfoot*, however, does not appear to be based on any *imputation* of the knowledge of the agent to the assured; the principle is rather different, namely that both parties *contract* on the basis that all material facts — known to the assured or those which would have been known to the assured if the agent to whom he or she employed had communicated the facts to the assured in the ordinary course of business — which ought in due course to have been made known to the insurer before the contract is effected have been disclosed”.

72 For example, a director of a company in *Regina Fur Company Limited v. Bosson* [1957] 2 Lloyd's Rep. 466 was in such a predominant position in respect of the company, given the scope of his operations and his ability to direct the company's mind and will, that his knowledge could be imputed to the company. See also *Arab Bank PLC v. Zurich Insurance Company* [1991] 1 Lloyd's Rep. 262 at 282.
in the ordinary course of matters of the subject matter to be insured. Thirdly, there is a category of agent, the "agent to insure", who effects the relevant insurance for the assured. By virtue of section 19 of the Marine Insurance Act, 1906, such agents to insure must disclose to the insurer every material circumstance known to the agent, who is deemed to know every circumstance that ought either to be known or to have been communicated to the agent, and also every material circumstance that the assured should disclose, unless discovered too late to be communicated to the agent. The section only encompasses those agents employed to effect the relevant insurance. An agent to insure, therefore, owes the insurer a duty of disclosure quite distinct from the duty owed by the assured under section 18. Because the agent to insure is not employed to provide information to the assured, the insurer is not entitled to contract on the basis of imputation of knowledge to the principal; to do so would be to render section 19 otiose. Rather the insurer contracts on the basis that the agent to insure, being someone so authorized to act, has disclosed all facts within that person’s knowledge. Indeed Lord Macnaghten gave the following explanation of an insurer’s right to avoid in the event of non-disclosure by an agent to insure: “But that is not because the knowledge of the agent is to be imputed to the principal but because the agent of the assured is bound as the principal is bound to communicate to the underwriter all material facts within his knowledge”.74

To date in Ireland, there has been little or no polemicizing about the principal/agent nexus in the light of sections 18 and 19 of the Marine Insurance Act, 1906; nor has there been any considered deliberation of the status of section 19 as viewed against the backdrop of section 18. Moreover, there has been no consideration of the Hampshire Land

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principle or the "alternative route" – submitted by Staughton L.J. in *PCW Syndicates* to the effect that section 19 is restricted to knowledge acquired by the agent to insure *qua* agent for the assured – as it relates to fraud or misconduct committed by an agent against his or her principal. This vacuum is largely attributable to the lack of case-law arising in this jurisdiction; what cases do exist, however, pay laconic attention to the questions in issue.

In *Chariot Inns Ltd v. Assicurazioni Generali S.P.A. and Coyle Hamilton, Hamilton Phillips Limited* for example, the plaintiff company purchased a licensed premises at Ranelagh in Dublin. The directors and shareholders of the company were a Mr. and Mrs. Wootton. The directors took the decision to run the premises as a public-house and also to provide cabaret entertainment. This made it necessary to build a large room at the back. There were furnishings in the existing building; as the extension could not be completed without removing them, a decision was made to store them at No. 82 Lower Leeson Street, Dublin. These premises were owned by consolidated Investment Holdings Limited, whose shares had been purchased by a Mr. Wootton and a Mr. Mockler, but had been registered in the maiden names of their wives. The defendant insurance brokers placed the insurance of their Leeson Street premises with Sun Alliance and London Insurance Group. The Leeson Street premises and furnishings of the plaintiff company – which Consolidated Investment Limited held as bailees – were badly damaged in a fire. The insurers of that building paid an agreed sum to Consolidated Investment pursuant to the policy obtained by the company: the agreed sum included £8,000 in respect of the plaintiff's furniture.

In respect of the Ranelagh premises, the plaintiff wanted cover against fire risk, employer's liability, liability to the public and loss of profits. Separate proposal forms for each type of insurance were sent by the defendant insurers to the defendant brokers. During a meeting between a Mr. Harte of Coyle Hamilton brokers (the agents to insure) and the plaintiff, there was a discussion about the fire at the Leeson Street premises. Mr. Harte informed the plaintiffs that it was totally unnecessary to disclose this information on the proposal form because "we were dealing with a separate company and only had to show what
was relevant to the Chariot Inn”.76 In the proposal form the following statement appeared: “Give claims experience for loss over the last five years (i.e., date, nature of loss, amount paid, or outstanding). If none in any claim, say so”. The answer written by Mr. Harte was “none”. The plaintiff director warranted expressly that the statements made in the proposal form were true and complete. In May 1978, a serious fire occurred at the plaintiff’s Ranelagh premises. In June 1978, the defendant insurers repudiated liability because of the non-disclosure of the fire at the Leeson Street premises. The plaintiffs claimed in the High Court, as against the defendant insurer, a declaration that at all material times the policy issued by the defendant insurer in respect of the Ranelagh premises was a valid policy of insurance. The plaintiffs also claimed damages from the defendant insurance broker for negligence and breach of contract.

In the High Court, Keane J. held that since the plaintiffs had not obtained insurance for damage to its furniture caused by the fire at the Leeson Street building and had not claimed against any insurance company in respect of that damage (the insurance of these premises was effected, and the claim was presented, by Consolidated Investment Limited), the statement in the proposal form was accurate and there had been no breach of warranty.77 Nevertheless, the plaintiff assureds still owed to the defendant insurer a common law duty to disclose, prior to acceptance of the risk by the defendant insurer, every material circumstance which would influence the judgment of a prudent insurer in fixing the premium or in determining whether or not to take the risk involved. In confining the determination of this matter to the possible existence of a moral hazard,78 the trial judge concluded that non-disclosure of the fire at the Leeson Street premises did not constitute a material fact which the plaintiffs were bound to disclose.79 As a result, the insurance policy was valid and the claim against the defendant brokers was dismissed.

76 Ibid at 229.
77 Ibid at 206.
78 The learned judge believed there was no question of the physical nature of the risk being affected by the circumstances of the Leeson Street fire. Ibid at 215.
79 This conclusion was arrived at despite the unanimous view of the three experts on insurance business who gave evidence to the effect that the fire at the Leeson Street premises and the damage to the plaintiffs’ goods were material to the risk.
In the Supreme Court, however, this decision was reversed. Kenny J., with Henchy J. and Griffin J. concurring, held that the "circumstances in which the goods were stored in the Leeson Street premises and the fact that the plaintiffs ultimately got payment in respect of them were, in my view, matters which would reasonably have affected the judgment of a prudent insurer in deciding whether to take the risk or in fixing the premium, particularly as Mr. Wootton was a director of, and managed and controlled the plaintiff company and Consolidated Investment". The insurer was accordingly entitled to avoid the policy of insurance. In respect of the liability of the insurance brokers, it was held: "An insurance broker owes a contractual duty to his client to possess the skill and knowledge which he holds himself out to the public as having, and to exercise this in doing the client's business. He is also liable in tort if he fails to exercise that skill and knowledge. Mr. Harte ... should have known that the fire at Leeson Street and the subsequent payment of £8,000 to the plaintiffs were material to the risk which the defendant insurers were being requested to undertake". What is curious about he decision is that although the insurers were entitled to avoid the contract on the basis of non-disclosure of a material fact, no attempt was made to examine this non-disclosure in the light of section 19 (or indeed section 80 of the Insurance Act 1981). In respect of the duties of an agent of the insurer in filling out a proposal form, see John B Farrell v. South East Lancashire Insurance Company Ltd [1933] IR 36 at 44 where it was held that the clerk of an insurance broker who filled in a proposal form for the proposer was not acting on behalf of the defendant insurance company or of the insurance broker but in the character of a "mere amanuensis", "as a friend of the proposer". Once the proposer signed the basis of contract clause, and a statement in the proposal form was proven to be untrue, the defendant insurers had the right to avoid the policy. See also Taylor v. Yorkshire Insurance Company [1913] 2 I.R. 1 at 17 where an insurance intermediary was taken to be an agent of the assured in filling up answers in a proposal form. Quoting Mr. Justice Wright in Biggar v. Rock Life Assurance Company [1902] 1 K.B. 516, Palles C.B. noted: "Although he [the agent] may have been an agent to put the answers in form, the agent of an insurance company cannot be treated as their agent to invent the answers to the questions on the proposal form; and that, if he is allowed by the proposer to invent the answers, and to send them as the answers of the proposer, the agent is, to that
18) of the Marine Insurance Act of 1906, and, in particular the rule that an agent, must disclose facts known to him or her, whether or not also known to the assured.83

More recently, in International Commercial Bank PLC v. Insurance Corporation of Ireland PLC and Meadows Indemnity Company Ltd84 the plaintiff bank agreed to lend to a company known as Amaxa S.A. a sum of 11.5 million Swiss Francs by virtue of a loan agreement entered into between the parties on February 9, 1984. On the same date, the defendant insurers, in consideration of the bank making the loan to Amaxa, undertook to indemnify the bank for 100 percent of the amount of the loan. This indemnity was granted to the bank by the defendant insurers by way of a credit guarantee insurance agreement in writing for a period of seven years, subject to the payment of an annual premium by Amaxa. The bank lent the money to Amaxa pursuant to the loan agreement and when the company defaulted on the loan in 1987, the bank called on the defendants to pay the sum due. It was contended on behalf of the defendant insurer that the credit guarantee insurance agreement was a contract of insurance -- and not of guarantee -- and so a contract 

uberimae fidei. It was argued that the bank had a duty to disclose and had failed to disclose to the insurer all facts material to the risk, namely, that the purpose of the loan was to acquire a 100 percent interest in a hotel in Greece. It was doubtful in Greek law, as it applied to foreign companies owning land, if the loan could be applied for the stated purpose. It was contended by ICI, the defendant insurers, that this was a fact which the bank knew -- the fact was known by the brokers (Leslie and Godwin) who initially acted for Amaxa, but also for the bank, it was

extent, the agent, not of the insurance company, but of the proposer.” Section 51 of the Insurance Act, 1989, now provides, however, that an insurance agent shall be deemed to be acting as the agent of the undertaking to whom a proposal of insurance is being made when, for the purpose of the formation of the insurance contract, he or she completes, or helps the proposer complete, a proposal for insurance.

83 As per PCW Syndicates v. PCW Reinsurers [1996] 1 Lloyd’s Rep. 241 at 258, it is submitted that section 19 is comprised of three rules: (1) The agent is bound to disclose what the assured knows, unless it comes to the assured’s attention too late for communication to the agent; (2) the agent must disclose facts known to him or her, whether or not also known to the assured; (3) the agent also has a duty to disclose facts which in the ordinary course of business he or she should have known, whether or not within the knowledge of the assured.

argued, when it obtained the insurance. The submissions made on behalf of the plaintiff were that the contract between the plaintiff and the defendant was one of guarantee; secondly, that even if the contract was one of insurance, the brokers who had procured the defendant’s involvement had not acted as agents to insure for the bank — ergo, the plaintiff could not have been affected by non-disclosure on their part.

In the High Court, Blayney J. held that the contract entered into between the plaintiff and the defendant was not one which required uberrimae fides on the part of the bank and was in substance a guarantee rather than a contract of insurance; this was sufficient to determine the plaintiff’s claim against the defendant. Blayney J., however, went on to suggest obiter that even if he had come to the determination that the agreement was a contract of insurance, the defendant insurer’s claim would still have failed for two reasons. First, the insurance was not procured on behalf of the bank but on behalf of Amaza.85 Secondly, and even if the brokers were acting on behalf of the bank, material circumstances known to the agent effecting the insurance were still not disclosable, according to the learned judge, unless knowledge of them was acquired in his or her capacity as agent for the assured.86 In proposing the latter reason, Blayney J. cited paragraph 811 of the seventh edition of MacGillivray and Parkinton on Insurance Law as being the correct law: “It is not all knowledge in the possession of an agent to effect an insurance which is imputed to and effects the assured, but only that which the agent acquired in the course of his agency while preparing to effect the particular insurance, so that the assured would not be deemed to know things which the agent had heard about earlier in connection with other insurances”87 (my emphasis). This decision as it applies to “agents to insure” is interesting for three reasons. First, no reference was made in the text of the judgment to section 19 of the Marine Insurance Act, 1906, thereby further contributing to its nebulous status. Secondly, and though obiter, in adopting MacGillivray, Blayney J. appears to view as correct the proposition that knowledge of an agent to insure can be

85 Ibid at 740.
86 Even if, ex hypothesi, Leslie and Godwin were the bank’s agents to insure, they could only have become so after the January 23, 1984. There was no evidence that knowledge of the problem of a foreign company purchasing Greek land was acquired by the broker’s after this date.
imputed to the assured. If one proceeds with this view as a correct proposition of law, this raises interesting questions about the status and utility of section 19, particularly as it relates to section 18, of the Marine Insurance Act, 1906. Thirdly, the proposition in MacGillivray that material circumstances known to the agent effecting the insurance are not disclosable unless knowledge of them was acquired in his or her capacity as agent for assured appears to be at variance with recent dicta in England and Wales. In El Ajou v. Dollar Land Holdings PLC and another 88 Hoffman L.J. noted: “an insurance policy may be avoided on account of the broker’s failure to disclose material facts within his knowledge, even though he did not obtain that knowledge in his capacity as agent for the insured”. Similarly, in Societe Anonyme d'Intermediaries Luxembourgeois v. Farex Gie 89 the same judge offered the following proposition in respect of the obligation to disclose under section 19: “The insured and his agent are under a duty to disclose every material circumstance of which they have knowledge, irrespective of the way in which that knowledge was acquired.” 90 (my emphasis). More importantly perhaps from a jurisdictional vista, the proposition also appears to be at variance with the obiter dictum of Gibson J. in Taylor v. The Yorkshire Insurance Company Limited 91 – a pre-1922 Irish case not referred to by Blayney J. – where it was stated: “Sections 19 and 20 [Marine Insurance Act, 1906] deal with knowledge of the assured’s (not the insurer’s agent) agent, in marine insurance usually a broker, whose knowledge, from his position, would be understood by the parties to be applicable to the particular insurance, though it might have been acquired before the actual contract… Where a broker is employed – whether in marine insurance or otherwise – the principal may be affected by knowledge which the nature of the broker’s business would naturally enable the latter to possess, but in all such cases the notice is closely connected in point of time with the

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89 [1995] 1 IRLR 116 at 149.
90 These dicta are also at odds with the “alternative route” posited by Staughton L.J. in PCW Syndicates.
91 [1913] 2 I.R. 1 at 31–33.
particular contract: *Blackburn v. Vigors; Blackburn v. Haslam.*” (my emphasis).92

In summation, a number of delphic issues require closer exploration regarding what an assured must disclose to an insurer in Irish law. First, the Irish courts need to revisit the tenebrous proposition that insurers may stipulate for any warranty they please, particularly in the light of the formalistic approach adopted in *Keenan*, and the introduction of the Irish Federation Codes of Practice, 1992, and the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995. Secondly, in *Keating*, McCarthy J. appeared to indicate in his judgment that an assured’s ignorance or obtuseness about material facts would constitute a defence to non-disclosure. Though, in part, the proposition may potentially be of significance in balancing up the dyadic relationship between the insurer and the assured *vis-à-vis* the duty of disclosure, further judicial deliberation is required before any discussion of its merits can commence. In particular, McCarthy J.’s *obiter* statement appears too sweeping in scope and traverses, without punctilious consideration, strong persuasive authorities to the contrary – as noted, it is long established in England and Wales that it is not a defence for an assured to claim that a fact was not disclosed on the basis of forgetfulness. Aside from its external ramifications, the proposition itself is question-begging. When, for example, does ignorance or obtuseness cease and willful ignorance and the suppression of information commence? Will such a determination be objective or subjective? Will the standard required be lower in respect of consumer assureds? Thirdly, in the same case, an

92 Gibson J. appears to be drawing a distinction between information received by an agent to insure for the assured where knowledge can be acquired before the actual contract (though any previous knowledge which might be carried forward into the contract period should be closely connected with the contract) and information received by an agent to insure for the insurer in which case the following principle applies: “[A]ntecedent knowledge obtained before the agency, or casual information detached from the contract, cannot be imputed. This appears to be now the received view of the profession as appears from the test writers such as Evans on Principal and Agent (where the law is well summarized); Bowstead; and Lord Hasbury’s Laws of England.” *Ibid.* at 31. In *Blackburn, Low and Co. v. Vigors*, as cited by Gibson J., Lord Watson stated: “when an agent to insure is brought in to contract with an insurer, the latter transacts on the footing that the agent has disclosed every material circumstance within his *personal knowledge*, whether it be known to his principal or not”. (1887) 12 App. Cas. 531 at 541.
opportunity was presented to the Supreme Court to examine the law as regards inferences that could be drawn from primary facts. The lack of considered analysis, however, resulted in the loss of the chance to proselytize about the threshold required as regards inferences that could be drawn from the primary knowledge of consumers. Fourthly, as regards material facts which ought to be disclosed in the ordinary course of business, the Irish courts have not been afforded the opportunity to determine whether the Arnould or Clarke test applies – the former proposition, for the reasons stated, it is submitted, should be adopted if the opportunity presents itself to the Irish courts. Finally, there has been little or no deliberation by the Irish courts of the principal/agent nexus in the light of sections 18 and 19 of the Marine Insurance Act, 1906, even where, on occasion, the pertinent issues offered such an opening. What statements are in evidence, it is submitted, create rather than dissipate such uncertainty. If, for example, one accepts that knowledge of an agent to insure can be imputed to the principal, what status should be given to section 19 of the Act. Moreover, there are currently two antithetical views of when knowledge of an agent to insure is disclosable: first, it has been submitted that it is disclosable if it is acquired by the agent in his or her capacity for the assured, as per the obiter dictum of Blayney J. in International Commercial Bank, and, secondly, it has been submitted that it is disclosable if the knowledge that was acquired is closely connected with the particular contract, as per Gibson J. in Taylor, a pre-1922 decision in Ireland.

PREVIOUS CRIMINAL INFORMATION

In respect of the duty to disclose previous criminal information, the law in Ireland, particularly as it relates to adults, remains unsettled. Excluding the fact that petty old convictions of 20 years standing need not be recounted, which in part amounts to judicial incorporation of the reasoning behind the Rehabilitation of Offenders Act in the UK, that

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93 In England and Wales, see PCW Syndicates v. PCW Reinsurers [1996] 1 Lloyd's Rep. 241 at 255 where Stoughton L.J. noted: "It is established that section 19 does not proceed by the route of imputing, attributing, deeming the knowledge of the agent to be the knowledge of the principal."
what is material to disclose is that a crime has been committed, and that
offences committed before a person reaches 18 will become spent three
years after a finding of guilt (with certain exceptions), little else can be
proclaimed with certitude. In particular, there has been no deliberation
on the need for a direct relationship between the offences committed and
the risk posed, the status of moral hazard as it relates to previous
criminal information, the need to disclose charges pending trial where
the proposer is innocent of the charges, and the standing of criminal
information as it relates to associates of the proposer. The purpose of this
section is to map out the law as it relates to the disclosure of previous
criminal information in Ireland, to highlight gaps that may produce
coercive effects, and to suggest avenues of reform that may be taken to
palliate such effects.

In *Aro Road and Land Vehicles v. The Insurance Corporation of
Ireland*, a case which would not have reached the courts in England and
Wales as a result of section of the Rehabilitation of Offenders Act, 1974,
the Irish courts had to consider the doctrine relating to non-disclosure in
the light of previous criminal convictions. In July 1981, the plaintiff
company agreed to sell and deliver goods to a firm in Maize, Co. Antrim.
At the request of the plaintiff, the goods were to be delivered by C.I.E.
The goods were to be transported at the plaintiff's own risk, and it was
suggested by the carriers that the goods be insured. The carriers, acting as
agents for the defendant insurance company, arranged insurance cover.
The only information given to the plaintiff relating to the terms of the
insurance was the extent of the cover; the only information sought by the
underwriters was the names and addresses of the consignor and
consignee and the nature and value of the goods. No opportunity was
given to the plaintiff to provide the defendant with additional
information. The goods were to be delivered in four separate consign-
ments. Three arrived safely, but the fourth was hijacked, set on fire, and
destroyed. The plaintiff issued proceedings seeking an indemnity under
the policy for the loss. The defendant sought to repudiate liability on the
basis that the plaintiff company had failed to disclose the fact that the
managing director had been convicted on 10 counts of receiving stolen
motor parts and sentenced to 21 months of imprisonment in 1962.

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In the High Court, Carroll J., while personally of the opinion that the assured's non-disclosure was immaterial, deferred to the expert opinion given – which she considered transcended her own personal opinion – which suggested that a reasonable and prudent underwriter would regard the matter of previous convictions as material and would have regarded its non-disclosure as a good reason for refusing to underwrite the risk. Accordingly, the learned judge held that the insurer was entitled to avoid the policy in question and to repudiate liability. In the Supreme Court, it was held that the trial judge, as sole and final arbiter, had erred in substituting the view of an underwriter for her own view in determining the question of what a reasonable underwriter was entitled to have disclosed: “[I]n disputes concerning professional competence, a profession is not to be permitted to be the final arbiter of standards of competence. In the instant case, the assurance profession is not to be permitted to dictate a binding definition of what is reasonable”.

Accordingly, the Supreme Court held inter alia – in an ethereal and unsettled attempt at incorporating the considerations which, in part, kindled the enactment of the Rehabilitation of Offenders Act, 1974 in the UK – that petty old convictions of almost 20 years standing may remain unrevealed.

The vagueness of approach in this decision, as it relates to the relevance of criminal information to the formation of insurance contracts, has left many questions unanswered. What, to begin with, of the need for a nexus between the offences committed and the risk posed?

\[95\] Ibid at 442 per McCarthy J. The relevant principle had previously been stated by Kenny J. in Chariot Inns, a case which the trial judge in Aro Road relied upon – though evidently only in relation to other issues – as part of her judgment: “The standard by which materiality is to be determined is objective and not subjective. In the last resort the matter has to be determined by the court: the parties to the litigation may call experts in insurance matters as witnesses to give evidence of what they would have regarded as material, but the question of materiality is not to be determined by such matters.” Chariot Inns v. Assicurazioni Generali [1981] I.R. 199 at 225. For the conclusiveness of expert testimony in Ireland, see Kellifer, D. Expert evidence in Ireland. Irish Law Times 14 (1996): 42–45. In England and Wales, see also Reynolds and Anderson v. Phoenix Assurance Co. Ltd and Others [1978] 2 Lloyd’s Rep. 440 at 457–458 per Forbes J.


\[97\] In England and Wales, see Roselodge v. Castle [1966] 2 Lloyd’s Rep. 113 at 132.
there is no nexus between a conviction for an offence and the risk posed, will the offence, or conviction for the offence, nevertheless be material if it affects the moral hazard? In England and Wales, some judicial support is palpable for the view that a conviction for an offence unrelated to the risk may be material if it falls under the rubric of moral hazard. More recently, support for the broadness of this view has been circumscribed. In Reynolds and Anderson v. Phoenix Assurance Co. Ltd, for example, it was held that a conviction for receiving stolen goods was not material to a fire policy. Similarly in Deutsche Rückversicherung v. Walbrook Insurance Co. Ltd, where the plaintiff reinsurers sought to avoid a contract, inter alia, for non-disclosure on the grounds that the reinsured's agents acted fraudulently in misappropriating overriding commission that should have been credited to the reinsured, Philipps J. held: "I see the force of the argument that reinsurers are likely to be disinclined to accept risks from brokers or agents who have behaved dishonestly, but where the dishonest conduct has no impact on the risks being reinsured, I question whether it can entitle the reinsurers to avoid contracts placed by such brokers or agents on the grounds of non-disclosure. The doctrine of non-disclosure is founded in equity. Avoidance in circumstances such as those in this case is liable to have results that are inequitable." Abridging the pertinent propositions as they relate to the disclosure of previous convictions in England and Wales — propositions which should be of strong persuasive value in the Irish courts — it is submitted that the assured must disclose an offence, which involves a level of criminality which is antipathetic to standards of honesty and integrity and which have a direct connection to the risk posed, or, would by its constitution and temporal closeness (but excluding offences which fall within the

101 Knowledge of this fact, it was claimed, was imputed to each of the reinsureds by virtue of the fact that the directing minds of the agency were the directing minds of those reinsurance companies in relation to reinsurance.
ambit of the Rehabilitation of Offenders Act, 1974) to the proposed insurance, reveal to an insurer, having regard to the nature of the risk, the probability of recurring dishonest conduct by the assured.103

To date, the examination of previous criminal information has only focused on convictions for criminal offences. What of charges pending trial and association? In England and Wales, in March Cabaret v. London Assurance,104 to the argument that an assured was only bound to disclose his arrest and committal for trial in keeping with his right to silence and privilege against self-incrimination, May J. noted:

I was concerned at one stage in this case about how one could reconcile the presumption of innocence and the privilege of non-incrimination with the duty of disclosure... After argument I realize that my doubts were based upon a fallacy. One must remember that there is no estoppel by acquittal save as between the Crown and the person acquitted. There is nothing to prevent one party to civil proceedings, if the fact be material and relevant, attempting to prove that another party to those proceedings has in truth committed the crime of which that other party has been previously acquitted in a criminal court... Thus even if [the assured] had been acquitted prior to renewal... there would... have been nothing to prevent insurers attempting to prove that he had committed the offence. If they had succeeded and if [the assured] had, as here, failed to disclose that he had committed the offences, then this would, notwithstanding his acquittal, have been a material non-disclosure entitling insurers to avoid the policy. No one has a right to a contract of insurance, and if a proposer has committed a criminal offence which is material and ought to be disclosed he must disclose it, despite the presumption of innocence which is only a presumption, and despite the privilege of non-incrimination, which is only a privilege -- or he must give up the idea of obtaining insurance at all.105

The learned judge went on to suggest: "There is one thing I would like to add; had it been material I would have been prepared to hold in this case that in any event... [the assured] ought to have disclosed his arrest,

103 See MacMillan op. cit. n. 51 at 412.
charge and committal for trial at the date of renewal even though in truth he was innocent.”

In respect of this last submission, that a proposer for insurance ought to disclose the fact of his arrest, charge and committal for trial at the date of renewal, even though he was innocent of the charges, Forbes J. stated in Reynolds and Anderson v. Phoenix:

With the greatest respect to Mr Justice May, I must decline to follow him in this suggestion. The object of requiring disclosure of circumstances which affect the moral risk is to discover whether the proposer is a person likely to be an additional risk from the point of view of insurance. The most relevant circumstance for disclosure is therefore that he actually committed an offence of a character which would in fact influence the insurer’s judgment. The proposer is bound to disclose the commission of that offence even though he has been acquitted or even if no one other than he has the slightest idea that he committed it: the material circumstance is the commission of the offence. A conviction for a criminal offence is itself, it seems to me, also material...even though the proposer may protest his innocence or in fact has not committed the offence; for a responsible insurer is himself entitled to assume that prima facie the proposer was rightly convicted and has therefore in fact committed the offence. If therefore an allegation of a relevant criminal offence is made and the allegation is true the proposer must disclose it not because the allegation has been made but because the offence has been committed; it is not then the allegation which must be disclosed but the underlying fact that a crime has been committed.

In Ireland in Dermot Latham v. Hibernian Insurance Company Ltd and Peter J. Sheridan and Company Limited Blayney J., as discussed, approved broadly of Reynolds and Anderson v. Phoenix Assurance Company Limited and Others: “In that case [Reynolds and Anderson] it was held that the material circumstance was not the fact that a party had been charged with an offence, but that he had committed the offence. What had to be disclosed was the underlying fact that a crime had been committed.” Interestingly, in the English case of Inversiones

Manria S.A. v. Sphere Drake Insurance Co. Plc (The Dora),\textsuperscript{109} Philipps J. submitted obiter that he preferred the reasoning of May J. in March to that of Forbes J. in Reynolds and, accordingly, charges of smuggling, whether or not they were well founded, should have been disclosed.\textsuperscript{110} Given the broadness of application of Reynolds in Ireland, it is unclear whether the proposer for insurance must disclose his or her arrest, charge and committal for trial even if the allegations are unfounded, or, only if the offence has been committed. It is submitted that the former proposition is anomalous and casts the net too widely. Moreover, and as regards England and Wales, the proposition is inconsistent with the telos of the Rehabilitation of Offenders Act, 1974: applying such a proposition, a proposer for insurance could, ex hypothesi, have to disclose spurious and baseless allegations but would be excused from having to disclose a spent conviction "of comparatively recent date" under the 1974 Act. Accordingly, the latter proposition is to be preferred.\textsuperscript{111} Syllogistically assimilating these various points, the law as it currently endures requires, or should require, a proposer for insurance to disclose the facts of an arrest, charge or committal for trial for an offence -- where the offence has been committed -- and, it appears, the commission of an offence for which the proposer was acquitted or which remains undetected at the time of proposing the risk.

Finally, not only are an applicant's own convictions capable of being construed as material, so too are those of persons with whom he or she associates\textsuperscript{112} -- though presumably there should be a nexus between the offences and the risk insured against or would indicate a likelihood of continuing dishonesty as it related to the risk. Although there is no authority precisely to this effect, such a proposition also applies, \textit{mutatis mutandis}, to other kinds of criminal information as it relates to associates of the assured including arrest, charge, and committal for trial (where well founded) and where the offence has been committed but which

\textsuperscript{110} See also Clarke, \textit{op. cit.} n. 98 at 104.
\textsuperscript{111} But see the dictum of Colman J. in \textit{The Moonacre}: "if the proposer is in possession of information which, if true, would be material to the risk and he fails to disclose it, the insurer will be entitled to avoid the policy even if the information in the possession of the assured is subsequently found to have been completely untrue". [1992] 2 Lloyd's Rep 501 at 521.
remains undetected or in respect of which the associate has been acquitted. The issue of association as it relates to previous criminal information has never been dealt with by the Irish courts. The opportunity did however present itself in Latham but Blayney J. declined to deliberate on the matter. As noted, the plaintiff and Oliver Byrne obtained a 35 year old lease for a property in Dublin in May 1983 and opened a 24 hour grocery shop. Insurance cover was obtained from Hibernian Insurance Company, initially in the names of the plaintiff and Oliver Byrne. Before the policy was renewed in August 1984, it was completed in the plaintiff's own name. The material facts were that the plaintiff had on November 22, 1983 committed an offence of receiving stolen goods – and had admitted doing so – which ought to have been disclosed at renewal. Similarly Oliver Byrne had been arrested and charged with the same offence at the same time as the plaintiff. Moreover, it was adduced in evidence that even though Oliver Byrne was not a party to the renewal of the insurance policy, he had a private arrangement with the plaintiff under which he would receive 50 percent of any claim which was recovered from the insurer. The case was decided on the basis that the plaintiff had failed to disclose that he had committed the relevant offence and had admitted it. The question it begs, however, is whether or not the plaintiff's association with Byrne, as it related to the property in question, and the fact of the latter's arrest and charge for the same offence, was also a material fact which ought to be disclosed. Presumably such a fact would be material provided there was some form of continued association in respect of the insured property.\footnote{On this point, it should be noted that Oliver Byrne was joined as a plaintiff, along with Latham, in the claim against the defendant brokers for negligence and breach of contract. See Dermot Latham v. Hibernian Insurance Company Limited and Peter J. Sheridan and Company Limited. Unreported, High Court, December 4, 1991, per Blayney J.}

As noted, no reference was made to the issue in the judgment. Indeed the prestriction of the judgment as it relates to previous criminal information is heightened by the fact that Blayney J., in response to a submission by counsel for the plaintiff that the mere charge and arrest of the plaintiff was not a material fact which ought to be disclosed, suggested as follows: "it is not necessary in the circumstances to consider another issue which was raised in the course of the argument, namely, whether the mere charge and arrest of the plaintiff was a material fact
which ought to have been disclosed. It was part of the plaintiff's submission that it was not. Since it is not necessary to consider the issue I make no finding in respect of it.\footnote{Dermot Latham v. Hibernian Insurance Company Limited and Peter J. Sheridan and Company Limited Unreported, High Court, March 22, 1991 at pp. 9–10.} Given that the learned trial judge approved of Reynolds and Anderson as it related to the disclosure of the fact of having committed an offence – as opposed to having been charged with an offence – it would not be difficult to refine the principle further, in a manner consistent with Reynolds and Anderson, by suggesting that a charge and arrest would \textit{stricto sensu} be material if, and only if, the assured knew them to be well-founded.

The law as it relates to disclosure of criminal information by adults in Ireland is latently coercive by virtue of its ambiguity. Beyond the fact that petty old convictions of 20 years standing need not be recounted, and that what is material to disclose is that a crime has been committed, little else can be expressed apodictically. Within such a broad and potentially oppressive net there remains a vast grey area of undetermined issues. These include whether or not there is a requirement of a nexus between offences committed and the risk posed (and if so the threshold of proof in respect of the establishment of such a nexus); the status of criminal information \textit{vis-à-vis} the moral hazard; the circumstances in which a proposer for insurance will be required to disclose his or her arrest, charge and committal for trial; whether or not a proposer will be obliged to disclose offences which remain undetected or for which he or she has been acquitted, and; the standing of previous criminal information as it relates to associates of the proposer. What is perhaps most striking about Irish law as regards previous criminal information in respect of adults is the lack of expungement provisions -- this exacerbates current ambiguity in the common law realm. Indeed, every EU country, with the exception of Ireland, makes available some form of spent conviction scheme as regards a person's criminal record.\footnote{See NIACRO. \textit{Regulating the Yellow Ticket}. 1996. Print 'n Press Ltd, Belfast.} In England and Wales, for example, section 4(3)(a) of the Rehabilitation of Offenders Act 1974 provides that an applicant for insurance is never bound to disclose a conviction which has become spent under the terms of the Act. This legislation has however been the subject of criticism and is under
review. For example, under the current Act, a sentence of imprisonment of more than 30 months can never be expunged. Moreover, section 7(3) of the Act gives the Court a discretion to admit evidence as to previous criminal convictions which fall within the ambit of the legislation in circumstances where it is satisfied that “justice cannot be done in the case except by admitting or requiring evidence relating to a person’s spent convictions”. Though the provisions in the United Kingdom are currently quite restrictive, particularly as they relate to sentences of more than 30 months, reform in Ireland – by way of further judicial incorporation or, more appropriately, statutory enactment – along the lines of a careful consideration of the review group’s recommendations in the UK, when published, would at least provide a reference point, a source of empowerment, for adults with previous criminal information in this country. Such reform would, even at baseline level, offer the potential to alleviate some of the harshness created by the current anomalous state of the law in this country.

FACTS WITHIN THE KNOWLEDGE OF THE INSURER

The purpose of this final section is to outline the law as it relates to facts which are known or presumed to be known to the insurer. Specifically, it will attempt to examine issues such as the insurer’s means of ascertaining information, whether or not such means will apply equally to trade practices and events and acts which affect trade practices,
the impact of an assured's false representations on the presumption of knowledge of an insurer, the status of conjecture or rumor, and when the acquisition of the knowledge of an agent of the insurer must occur in order to impact on the insurer.

Section 18(3)(b) of the Marine Insurance Act, 1906 provides that in the absence of enquiry any circumstance which is known or presumed to be known to an insurer need not be disclosed. As Lord Mansfield noted in respect of the actual knowledge of an insurer in *Carter v. Boehm*:\(^{119}\)

"There are many matters, as to which the insured may be innocently silent – he need not mention what the underwriter knows – *Scientia utrinque par pares contrahentes facit*. An underwriter cannot insist that the policy is void, because the insured did not tell him what he actually knew; what way soever he came to the knowledge.” The principle applies where knowledge is received by an agent of the insurer, provided it was received in the ordinary course of his or her duty.\(^{120}\) In respect of presumed or constructive knowledge, it has been suggested: “The insured need not mention what the underwriter ought to know . . . He needs not be told general topics of speculation: as for instance – The underwriter is bound to know every cause which may occasion natural perils; as the difficulty of a voyage – the kind of seasons – the probability of lightning, hurricanes, earthquakes, etc. He is bound to know every cause which may occasion political perils; from the ruptures of the States from war, and the various operations of it. He is bound to know the probability of

\(^{119}\) (1766) 3 Burr 1905 at 1910. See also the dictum of Cockburn C.J. in *Bates v. Hewitt* (1867) L.R. 2 Q.B. 595 at 604–605: “It is true, if matters are common to the knowledge of both parties, such matters need not be communicated . . . If, indeed, the insurer knows the fact, the omission on the part of the assured to communicate it will not avail as a defence in an action for loss; not because the assured will have complied with the obligations which rested on him to communicate that which was material, but because it will not lie in the mouth of the underwriter to say that a material fact was not communicated to him, which he had present to his mind at the time he accepted the insurance; the law will not lend itself to a defence based upon fraud; it will not allow the underwriter to say, 'I have taken the premium with the knowledge of the particular fact, but because the assured has not communicated it to me I will not make good the loss'. Therefore, if the fact be known to the underwriter, he cannot avail himself of the circumstance that it was not communicated by the assured; but putting that aside, it is the duty of the assured to make known to the insurer whatever is material with regard to the extent of the risk.”

\(^{120}\) *Pinn v. Lewis* (1862) 2 F & F 778.
safety, from the continuance or return of peace; from the imbecility of the enemy, through the weakness of their counsels, or their want of strength, etc." In Foley v. Tabor, for example, it was held that actual knowledge was not essential if the insurer had the means of knowing the fact in question. Applying Foley in Ireland, Davitt P. held in Krelinger and Fernau Limited v. Irish National Insurance Company Limited:

Insurance companies must surely be presumed to have some knowledge of the trade and business of the persons whose contracts they cover. While the duty to make full disclosure of all matters material to the risk rests upon the insured, and it does not fall to the insurer to relieve him of that duty by making inquiries, the converse is to this extent true, that the insured does not have to conduct the insurer's business for him. Where the contract, the performance of which the insurer is asked to cover, contains a clear intimation that a matter which is specifically referred to but not fully set out, is of importance, and full information is to be had for the asking, it would seem quite unreasonable and unjust to allow the insurer to repudiate liability on the grounds that he did not know and was not told the details of something which he was in fact told about.

This point in Krelinger that a clear intimation of a matter by an assured, though not fully set out, may prevent an insurer from repudiating liability raises interesting questions about the Keating case, as discussed. James Keating had informed the defendant insurer's medical examiner on May 28, 1985 (two weeks before the life policy was executed) that he spent two days with Dr. Geraghty (sic) in Baggot Street Hospital. He also disclosed the name of his own G.P. Though conjectural, it is submitted that it could have been argued that the assured had given a clear intimation of the matter in question and, accordingly, it would be unreasonable and unjust to allow the insurer to

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122 (1861) 2 F & F 663 at 762. As Erle C.J. noted: "Actual knowledge is not essential if the insurer knew he had the means of knowing the fact and it was within his knowledge. If, for example, he knew he could learn the exact cargo [of a ship] at Lloyd's [Shipping list], and chose not to ascertain it ..., it was within his knowledge."
124 See supra n. 18.
125 It was actually Dr. Garty; it is not clear whether the medical examiner took this down incorrectly or if it was stated incorrectly by the assured.
repudiate liability on the grounds that it was not disclosed. In other words, the assured had put the insurer in a position to obtain the information, but that the insurer had not taken the "further step" and must be taken to have waived the right to disclosure of this information. In the High Court, Egan J. thought this point to be of no importance.\textsuperscript{126} Though resting his decision on the premise that the assured did not have actual knowledge of his angina, Walsh J. did note in passing in the Supreme Court: "It seems to me quite clear that the medical examiner on behalf of the insurance company did not follow up all the names given to him to the point of ascertaining from them precisely what, if any, condition they had discovered."\textsuperscript{127} What is surprising is that neither the High Court nor the Supreme Court made any reference to \textit{Krelinger} and the principle contained therein. Two notes of caution should however be appended to the argument that the assured had put the insurer in a position to obtain the requisite information. First, the name taken down of the specialist in Baggot Street Hospital was, as noted, Dr. Geraghty as opposed to Dr. Gearty. Secondly, in the proposal form, in reply to the question, "Names and Addresses of Doctors attended", a representative of the insurance company, on foot of information given to him by the assured or of his own volition, answered "none".\textsuperscript{128} If, \textit{ex hypothesi}, the insurer could demonstrate that the mistake in Dr. Gearty's name was attributable to the assured, and, that the answer in the proposal form was not given on the basis of a medical examination that was to follow, then it may have been open to the insurer to claim that it was not in a position to take the further step, and so could not be held to have waived the right to disclosure of that information.

Indeed, if it could have been established by the insurer that it had not waived the right to disclosure in the proposal form (this whole issue is rather veiled in the judgments), it could have been argued that the answer "none" to the question of what doctors had been attended

\textsuperscript{126} "It would not have mattered, in my opinion, that the company could have ascertained the true position if they had sought information (with James Keating’s consent) from either Dr. Kidney [the assured’s G.P.] or Dr. Gearty as is often done in such cases." [1990] 2 I.R. 383 at 385–386.

\textsuperscript{127} \textit{Ibid} at 387.

\textsuperscript{128} It is not clear if the question was answered in this way because a medical examination had been arranged by the insurers, with the effect that no answer to this question was required by the insurer.
purported to be true and complete (the assured warranted as much). Once it was established to be untrue, a material non-disclosure, or at the very least a breach of warranty, occurred. Apropos of which, a close reading of the text of Egan J.’s judgment in the High Court appears to indicate that the questions in the proposal form were answered by the representative of the insurer “on foot of information given to him by the plaintiff and the deceased husband”129 as opposed to of his own volition, and, for whatever reasons (a view taken by McCarthy J. and Walsh J. in the Supreme Court). It could also have been argued that the assured did not discharge the common law obligation of disclosure or, needless to say, satisfy the warranty by answering a similar question correctly130 at a subsequent medical examination. In this regard, it is surprising that the representative of the insurance company was not called to give what would appear to have been crucial evidence as to his reasons for writing “none” in response to the aforementioned question in the proposal form. Though speculative, it may be an indication of the willingness of the insurer to concede to waiver of questions in the proposal form. This failure to testify, however, does not explain Egan J.’s finding in the High Court that the answers were written on foot of information given by the assured and his wife; nor does it adequately explain the Supreme Court’s alternative finding that the answers were written autonomously of the assured’s information. It also begs certain other questions: was the insurance representative, for example, of sufficient authority to be actually or ostensibly authorised to waive disclosure?131 How was Keating to be distinguished from Taylor v. Yorkshire Insurance Company – as adopted by the Supreme Court in Farrell132 – where it was provided that

130 It was not strictly speaking the same question: “what is the name and address of your present [medical] attendant”?
132 John B. Farrell v. South East Lancashire Insurance Company Ltd. [1933] I.R. 36. Kennedy C.J stated: “The [insurance clerk] filled in the blanks for particulars in the proposal form, acting in a friendly way on behalf of [the assured], in the character of a mere amanuensis writing in to the best of his ability the particulars from the information given him by the [assured]... But the assured chose to trust him with the doing of the task, and, adopting it as his own, signed it, vouching the truth of the matters stated. Is there any doctrine or principle of law which compels the Court in face of that state of facts to hold as a matter of
in filling up answers in a proposal form, the agent of an insurer was taken to be the assured's agent and the assured was bound by the declaration he signed as if he read it and knew the answers it contained? As Palles C.B. noted: "The agent of an insurance company cannot be treated as their agent to invent the answers to the questions in the proposal form: and that, if he is allowed by the proposer to invent the answers and to send them as the answers of the proposer, the agent is, to that extent, the agent not of the insurance company, but of the proposer." Given the dearth of case-law on the duty of disclosure in Ireland, it is submitted that it was unfortunate that the opportunity was passed over in Keating to ruminate over the issues as set out.

Returning to the issues in hand, it has been suggested in respect of what the assured can assume to be within the knowledge of the insurer that the underwriter is presumed to know the usages of the particular trade – provided it is a known and established trade where usage would generally be known to all engaged in the trade – insured and these, accordingly, need not be represented to the underwriter. In Leen v. Hall, a castle in Ballyheigue, Co. Kerry, was insured against damage from risks, civil commotion, war, rebellion and fire. The castle was destroyed by fire on the night of May 27, 1921 by insurrectionists during

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law that [the insurance clerk] was the agent of the [insurance] Company. . . The opinion of Palles C.B. in Taylor v. Yorkshire Insurance Company will be accepted as stating the law on this matter as regards agents of insurance companies in this country and I respectfully adopt it." Ibid at 44.

133 [1913] 2 I.R. 1 at 17. Though the facts in Keating arose before its enactment, section 51(1) of the Insurance Act, 1989, amends the law in this area to the effect that an insurance agent shall be deemed to be acting as the agent for the insurer when he or she helps a proposer to contemplate a proposal for insurance. Section 51(4) provides, however, that an insurance agent will not be responsible for any false statements supplied to him by the proposer of an insurance policy or any information withheld by the proposer from such an agent.

134 "Thus in motor insurance an assured who owns a very fast motorcar of a particular make need do no more than declare the usual description of the vehicle, but if he has altered the specification in any way so as to increase the speed that, it is submitted, should be disclosed." See MacGillivray op. cit. n. 51 at p. 421. See also Societe Anonyme d'intermediaries v. Fairey Gic [1995] 2 Lloyd's Rep. 116 at 156 per Saville L.J. See also Kingscroft Insurance Company Ltd. And others v. The Nissan Fire and Marine Insurance Company Ltd. [1999] Lloyd's Rep. 603.

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the War of Independence. In an action on the policy, the insurer pleaded that the assured *inter alia* had not disclosed that the castle had been occupied by the Auxillaries and employed for the internment of Sinn Fein prisoners. The jury found that it was not necessary to disclose these facts since underwriters had been effecting such types of insurance in Ireland since November 1920; accordingly, underwriters must have known that premises of the kind in question might probably have been occupied by the crown forces or employed for the internment of Sinn Fein prisoners.

One should be cautious of the view, however, that an insurer will be presumed to have knowledge of matters simply because he or she had the means of ascertaining such knowledge by appropriate enquiry. In *Bates v. Hewitt*, for example, a vessel of war, the *Georgia*, obtained notoriety in 1863–64 as a cruiser in the service of the Confederate states. In May 1864, the vessel was dismantled in Liverpool port — also a matter of public notoriety — and was purchased by the plaintiff and converted into a merchant vessel. The defendant insurer was aware that the *Georgia* had been a Confederate vessel of war and that it had been purchased at Liverpool and fitted out for merchant service. In August, 1864, the plaintiff, through his broker, effected a marine insurance policy on the *Georgia SS*. The defendant insurer underwrote the risk, having forgotten that the vessel was previously a Confederate steamer. The vessel sailed from Liverpool on August 8, and was captured by a frigate of the United States on August 15. The defendant insurer repudiated liability on the basis that the assured had failed to disclose that the *Georgia SS* was previously in Confederate service, and was therefore liable to capture by the United States. In holding for the insurer, Cockburn C.J. noted:

I think that we would be sanctioning an encroachment on a most important principle, and one that is vital in keeping up the full and perfect faith which there ought to be in contracts of marine insurance, if we were to hold that a party — who is under an obligation to communicate the material conditions and facts which constitute the basis of the contract into which he invites another to enter — may speculate as to what may or may not be in the mind of the underwriter, or as to what may or may not be brought up to his mind by the particulars disclosed to him by the assured, if those particulars fall short of the fact which the assured is bound to communicate. If we were to sanction such a course, especially in these days, when parties frequently forget the old rules of mercantile faith and honour which
used to distinguish this country from any other, we should be lending ourselves to innovations of a dangerous and monstrous character, which I think we ought not to do.\(^{136}\)

This decision appears to draw a distinction between knowledge of a trade practice, which the insurer will be presumed to know, and knowledge of particular facts and events which an insurer will be presumed not to know – if forgotten at the time of issuing the policy – on the grounds that it would constitute an unwarranted encroachment on the sanctity of the doctrine of utmost good faith as laid out in *Carter v. Boehm*. Clarke submits, correctly in the author’s view, that such a distinction is tenuous and doubts whether it can be “practically made”.\(^{137}\) This corrigendum, according to Clarke, can be contrasted with the Canadian case of *Canadian Indemnity Co. v. Canadian Johns-Manville Co. Ltd.*\(^{138}\) Here, an insurer issued a comprehensive liability policy to a manufacturer of asbestos. The policy was issued in 1970 and renewed in 1973. Studies had been published in 1965, 1968 and 1969, demonstrating the dangers of asbestos to health. Following a claim, the insurer repudiated liability on the grounds that the assured failed to disclose material facts. In particular, it was claimed that the assured failed to bring the relevant studies to its attention, especially as they related to the incidence of respiratory disorders and the mortality rates of workers in asbestos related industries. According to counsel for the insurer, the effects of articles 2485 and 2486 of the Civil Code of Lower Canada\(^{139}\) was to

\(^{136}\) (1867) LR 2 Q.B. 595 at 606–607. See also Mellor J, who noted: “I think the verdict entered for the defendant must stand. It is of the greatest importance to abide by the cardinal rules which have prevailed on this subject since the judgment delivered by Lord Mansfield in the case of *Carter v. Boehm*; and it would be most dangerous as it appears to me, to allow these well established rules to be fritted away by the introduction of doubtful equivalents. I cannot help thinking that to enable a person proposing an insurance to speculate upon the maximum or minimum of information he is bound to communicate, would be introducing a most dangerous principle into the law of insurance.” *Ibid* at 608.

\(^{137}\) Clarke *op. cit* n. 65 at 588.

\(^{138}\) (1990) 72 D.L.R. (4th) 478 (Sup Ct.)

\(^{139}\) Article 2485 stated: “The insurer is obliged to represent to the insurer fully and fairly every fact which shows the nature and the extent of the risk, and which may prevent the undertaking of it, or affect the rate of the premium.” Article 2486 read: “The insured is not obliged to represent facts known to the insurer or which from public character or notoriety he is presumed to know.”
require a strict full disclosure of all material facts unless they were notorious in the sense that they were known to the general populace. Relying on Carter v. Boehm – which was cited as a pre codification authority that circumscribed the interpretation that could be given to the provisions of the Code – it was submitted on behalf of the insurers that notorious facts or events had to come within the realm of natural or political perils that were known to all before they could be presumed to be known to the insurer. Echoing Hasson, Gonthier J., delivering the judgment of the Supreme Court, rejected such a narrow interpretation of Carter v. Boehm. According to the learned judge, the standard by which the notoriety of an undisclosed fact was to be assessed, be it in respect of a trade practice or particular acts or events, was that “of the reasonably competent underwriter insuring similar risks in the industry covered by the policy”. On the facts, Gonthier J. suggested that he “found it difficult to believe that a reasonably competent insurer in the asbestos industry in 1970 would not have been aware of the type of risks alluded to in the [studies]”. The assured, accordingly, was entitled to assume that the insurer had a basic professional knowledge of the risk covered.

On the basis that it is only of persuasive authority, the nebulous distinction made in Bates – and the narrow interpretation accorded therein to Lord Mansfield’s dictum in Carter v. Boehm – should be rejected in Ireland. The more synthesized view, as outlined in Canadian Indemnity Co., of practices of the trade context in which the insurer operates, together with notorious events and acts which affect such trade practices, provides, it is submitted, a better juristic symmetry in respect of presumed knowledge as it applies to insurers. Though such a position does represent an intrusion into the doctrine of utmost good faith, it is not unwarranted given that it is in keeping with a wide, and indeed more emendated, interpretation of Carter v. Boehm. Nor does the inclusion of events and acts within the penumbra of presumed knowledge provide a carte blanche for assureds to assume knowledge on the part of underwriters. As Gonthier J. noted: “The insurer will not be presumed always to know a fixed level of information regarding any and all industries which it might insure. The insurer will be presumed to know only those facts which are publicly available and which would be

140 (1990) 72 DLR (4th) 478 at 506.
141 Ibid at 512.
notorious to the reasonably competent underwriter insuring similar risks in that industry. It may be that an industry which is relatively new and secretive, such as the nuclear industry in the early years of its existence, a reasonably competent underwriter would be presumed to know little, and the insured will not be entitled to assume that the underwriter knows facts which are commonly known in the industry but hidden from those outside. As insurers become more familiar with the industry and as information becomes more publicly available, the insured will be able to assume that the underwriter is already aware of certain facts which are material to the risk, specifically those facts which would be notorious to the reasonably competent insurer.”142

Other safeguards also exist. For example, it is well established that the presumption of knowledge on the part of the insurer can be rebutted by false representations by which he or she is misled.143 Nor will information of rumor or conjecture about a fact in question, received by an insurer, entitle an assured – who had definite knowledge of the fact – to argue that the insurer knew the fact.144 Thirdly, an assured cannot assume knowledge on the part of an insurer if the undisclosed fact is not known generally and, more particularly, it is not something which other insurers in the same business would know.145 Presumably such propositions would be adopted by the Irish courts should they arise for deliberation. Finally, and in Ireland, it has been held that the

142 Ibid at 508.
143 In Mackintosh and Dwyer v. Marshall (1843) 11 M and W 116 at 123–125, Lord Abinger C.B. noted: “[I]f no evidence is given of anything tending to mislead the underwriter, and the fact is stated in the [Lloyd’s] list, yet he is presumed to be acquainted with the fact; but where a representation is made to him which is not consistent with the truth, it is no answer to that to say that he might have found out the truth if he had searched Lloyd’s list, because he trusts to the representation.” See also Foley v. Tabor (1861) 2 F & F 663 at 672.
144 See Lindenau v. Desborough (1828) 8 B & C 586 at 591 per Lord Tenterden C.J. This may, in some instances, involve a balancing act. If such rumours or conjecture could raise in the mind of a reasonable insurer a suspicion that other circumstances existed which would or might vitiate the presentation made, and the actual insurer fails to make further enquiries, that information may be waived by the insurer.
145 In Harrower and Others v. Hutchinson (1870) L.R. 5 Q.B. 584 at 592 Kelly C.B. noted: “It is upon the principle that facts comprised in the general usages of trade need not be communicated. But in order to dispense with communication of anything done according to usage, such usage must be generally and universally known to all engaged in the trade.” See also Maris Rich (now Glencore
acquisition of knowledge by an agent of an insurer must occur in the ordinary course of duty. As Palles C.B. noted in *Taylor v. Yorkshire Insurance Company Limited*: "I content myself by saying that, as a general rule, the notice imputed to the principal is limited to that acquired by the agent [of the insurer] whilst he was agent, and acquired in the matter in relation to which he was agent.

In a more recent Irish case, as discussed, *Dermot Latham v. Hibernian Insurance Company Limited and Peter J. Sheridan and Company Limited* the plaintiff obtained a lease for 35 years on a premises in Ringsend in Dublin and subsequently opened a grocery shop on the ground floor. Insurance cover was obtained from the defendant insurers in August 1983 and the policy was renewed the following year. Prior to renewal, however, the plaintiff had been arrested and charged with receiving stolen goods (the goods in question being cigarettes to the value of £17,000) on November 22, 1983 and had admitted the committal of the offences to investigating Gardai. This fact had not been disclosed at renewal of the policy and the defendant insurer claimed that it was entitled to avoid the policy. Two questions arose for consideration in the court.

First, it was claimed by counsel for the plaintiff that the fact that the assured had pleaded guilty did not necessarily indicate that he had committed the said offence. This...
submission was rejected and Blayney J. went on to hold, relying on the
English court of Appeal case of Reynolds and Anderson v. Phoenix
Assurance Co. Ltd and Others\(^{150}\) and the testimony of two experienced
underwriters, that the fact that a person committed such an offence, and
had admitted it, "would necessarily influence the mind of a prudent
insurer".\(^ {151}\) Secondly, counsel for the plaintiff claimed that the defendant
insurer had knowledge of the relevant fact from two other sources. To
begin with, it was claimed that an inspector of the defendants had visited
the shop in January 1984 and had been informed about the plaintiff's
arrest. The inspector denies this and Blayney J. accepted his testimony.
It was also claimed by the plaintiff's daughter that at a rehearsal of a show
in November 1983, an insurance clerk of Hibernian had commiserated
with her over her father's arrest.\(^ {152}\) The learned judge was not satisfied
the plaintiff's daughter was a truthful witness. Even, however, if he had
accepted her evidence, this knowledge would not still have been the
knowledge of the defendant insurer:

In my opinion this is clear from the following passage in MacGillivray
and Parkington on Insurance Law (\(^ {7}\) \text{th} \text{edn}) paragraph 674: "It is
obvious that the insurers cannot complain of having been mislead by
the assured's concealment when from some other source they had
received knowledge of the facts which they say were not commu-
nicated. This would seem to apply even to fraudulent concealment by
the assured, since the concealment could not have influenced the
insurer's judgment. This principle applies where knowledge is received
by an agent of the company, but is subject to the general limitation
that the agent must have received it in the course of his duty and
employment. It is clear in the present case that if [the insurance clerk]
received knowledge of the fact that the plaintiff had been arrested and
charged, he did not receive such knowledge in the course of his
employment but in the course of socializing with his friends.

\(^{152}\) It was submitted that her boyfriend had told a group of friends of the plaintiff's
arrest and the insurance clerk was amongst those he had told.
Knowledge received by him in such circumstances could not be imputed to his employees."153

Though it is not denied that the proposition submitted by MacGillivray is correct as it relates to agents of the insurer, it is surprising that Blayney J. choose MacGillivray as authority when he could have relied on the more persuasive, though similar, dicta of Palles C.B. and Gibson J. in Taylor v. Yorkshire Insurance Company. In doing so, he could have availed of the opportunity to opine on the distinction drawn by Gibson J. between information received by agents of the insurer and agents of the assured; such an enquiry may have been particularly apposite in the light of his judgment in the same year in International Commercial Bank PLC v. Insurance Corporation of Ireland PLC and Meadows Indemnity Co. Ltd.154

In Ireland, there has been little prolonged reflection regarding the law on information known or presumed to be known to insurers as provided for under section 18(3)(b) of the Marine Insurance Act, 1906. This chasm is attributable, for the most part, to the lack of case law arising in this jurisdiction; when opportunities did however present themselves, they were often either passed up, or, passed over by reliance on the propositions of leading textbook writers in the field. More particularly, there has been a failure, specifically in Keating, to tease out the proposition in Krellinger that a clear intimation of a matter by an assured, though not specifically set out, would constitute waiver of that information by an insurer in circumstances where he or she failed to investigate the matter further. Moreover, in Latham, Blayney J. slavishly adopted the proposition of MacGillivray to the effect that any knowledge of received by an agent of an insurance company must have been received in the ordinary course of duty. Though the author does not have any difficulty with this proposition, it is lamentable that the learned judge ignored the dicta of Gibson J. and Palles C.B. in the pre-1922 Irish decision of Taylor – this oversight resulted in the loss of the chance to examine the distinction drawn by Gibson J. in the said case. Indeed this laxity as regards Taylor is heightened by the fact that so few duty of disclosure cases arise for consideration in Ireland. Finally, the opportunity has not yet presented itself to the judiciary to consider the odious distinction made in Bates between knowledge of a trade practice

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154 See op. cit. n. 84.
and particular facts and events. Should it arise, it is respectfully submitted that the Irish courts should adopt a line of reasoning more in keeping with that posited by Gonthier J. in *Canadian Indemnity Co.*

**CONCLUSION**

In an article written in 1990, the leading writer of insurance law in Ireland, Professor Henry Ellis, suggested that statutory based reform of the common law doctrine of *uberrima fides* seemed imminent.\(^{155}\) To an extent his prophecy has rung true given that the Insurance Act 1989 has been brought into force, the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 and the Life Assurance (Provision of Information) Regulations 2001 have been enacted, and voluntary Codes of Insurance Practice have been adopted. However, and as I have sought to demonstrate in this circumscribed analysis of *uberrima fides* contracts in Ireland, the need for reform continues to remain essential at a number of levels. To begin with, immediate attention should be drawn to the whole area of commercial contracts of insurance which currently fall outside the ambit of the Insurance Codes of Practice. Similarly, and given its coercive effects, focus needs to be brought to bear on the amorphous grey area of previous criminal information as it relates to the duty of disclosure. In this regard it should be possible to extend the non-life Insurance Codes of Practice to include commercial as well as consumer assureds (particularly as regards basis of contract clauses) to palliate the former defect, and to introduce expungement provisions to remedy the latter. Such microsurgery could, it is submitted, be catered for in the legislative domain given the specificities and insularities involved. So much for Charybdis, but what of Scylla?

In examining the duty of disclosure from the narrow perspective of what need not be disclosed, a whole array of unsettled and undetermined issues have been raised in this article. These include: propositions as regards ignorance or obtuseness about material facts; inferences that can be drawn from primary knowledge; the test of what ought to be known in the ordinary course of business; the principal/agent nexus in the light of

\(^{155}\) Ellis, *H. op. cit.* n. 96 at pp. 45-50.
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sections 18 and 19 of the Marine Insurance Act, 1906; the manner in which an agent to insure receives information; and the distinction drawn between trade practices and events and acts. When coupled with much broader principles, that are equally if not more unsettled and contentious, which fall for consideration under the rubric of *uberrima fides* contracts – including the prudent insurer’s test of materiality, the continuing nature of the duty, the “all or nothing” effects of non-disclosure, waiver, the insurer’s duty of disclosure, and moral hazard – it seems highly unlikely that such a myriad of ambiguous issues could be catered for within the confines of a single piece of legislation. So how then do we circumnavigate Scylla?

To begin with, one could hold out for the harmonization of the substantive law of insurance contracts within the European Union. This is unlikely, however, to happen anytime soon given the cautious and piecemeal nature of convergence between European legal systems to-date. As Lord Goff recently noted in England: “Of course there will be some [who believe] that uniformity of our private law across Europe is in itself a desirable objective... It is not indeed beyond the bounds of possibility that such a development will occur one day; but I believe that if the members of this school rush their fences, this will prove to be counter-productive. Uniformity as an end in itself is an ideal which is not shared by all. It must not be forgotten that in the United States which is, as we know, a federal state, variations in the private laws of 50 states of the Union are tolerated, the most notable example being the laws of the State of Louisiana which have their origins in the civil law. The American Law Institute’s Restatement of the Law is designed to do no more than influence the states to move in the direction of a more unified system.” Perhaps, and though not intended, the answer (or at least an avenue of enquiry) lies in the quote, particularly as it relates to restatements. It is respectfully submitted that reform of the duty of


158 Lord Goff. *op. cit.* n. 4. at pp. 239–249.
disclosure in Ireland, aside from the legislative changes posited, should be by way of a set of unofficial, non-binding rules – to be drawn up by a working group of academics, legal practitioners, underwriters, and consumer and commercial representatives – in the form of model laws or restatements. Such restatements or models, which could be accompanied and supported by comments and comparative notes, would operate by consensus and not coercion. In tabulating the various propositions of law, the working group could look to, and draw upon, the templates of others including the Lando Commission on Principles of European Contract Law159 and the Working Group which has been established on European Insurance Contract Law, the aim of which is to work out “common principles of European insurance contract law, relying on comparative studies of the national laws of EU member states, some member states of the European Economic area and Switzerland”.160 These restatements or model laws on uberrima fides, when formulated, could be adopted by the Irish Insurance Federation or by contracting parties as the basis of their transactions. Of course, reform of this nature is not without problems. Restatements undoubtedly would require extensive research and compromise to agree propositions of law; nor can it be guaranteed that they would meet with widespread approval or compliance. Nonetheless, and as Professor Clarke has stated: “Model laws and restatements, in both their development and their function are without many of the disadvantages of compulsory codes. They also lack teeth. They neither bark nor bite, but their function is not to chivvy or direct the flock ... into any particular line. Their role is to inform and be available – available for voluntary adoption by those who find them useful.”161 On the basis of the maxim that half a loaf is better than no bread, any vehicle of reform of the duty of disclosure, which is instructive and accessible, must be welcomed in Ireland.

159 see http://www.cbs.dk/departments/law/staff/o1/commission_on_ecl/members.htm
160 See http://www.uibk.ac.at/c/c305/restatement/portal.html