FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2020] CSIH 25
CA75/18

Lord President
Lord Brodie
Lord Woolman

OPINION OF THE COURT

delivered by LORD BRODIE

in the Reclaiming Motion by

WAYNE STEPHEN GARDNER YOUNG

Pursuer and Reclaimer

against

ROYAL AND SUN ALLIANCE INSURANCE PLC

Defender and Respondent

Pursuer and Reclaimer: R Dunlop QC, E Campbell; Levy & McRae Solicitors LLP
Defender and Respondent: Barne QC, Morton (sol adv); BTO Solicitors LLP

19 May 2020

Introduction

[1] The pursuer and reclaimer is Wayne Stephen Gardner Young. He is the insured under a policy of insurance entered into in March 2017 in respect of certain commercial premises in Glasgow ("the premises"). Among the perils insured against was fire. The defender and respondent is the insurer under that policy, Royal and Sun Alliance Insurance plc.

[2] On 22 March 2018 the premises were extensively damaged by fire and required to be demolished. The pursuer has made a claim to be indemnified under the policy. The defender has declined to indemnify. By letter dated 6 June 2018 it avoided the policy from its inception on the basis that the pursuer had failed to disclose that he had been the director of four companies that had been dissolved after an insolvent liquidation or had been placed in insolvent liquidation in the five-year period prior to the commencement of the policy ("the undisclosed information").

[3] In this commercial action the pursuer concludes: (1) for declarator that the defender is bound in terms of the policy to indemnify him for loss and damage; and (2) for payment of the sum of £7,200,000. The defender pleads that it was entitled to avoid the policy and should therefore be assoilzied.

The issue

[4] The pursuer accepts that, in terms of section 3 of the Insurance Act 2015, before a contract of insurance is entered into, the insured must make a fair presentation of the risk; and that a fair presentation of the risk is one which makes disclosure of every material circumstance which the insured knows or ought to know. In terms of section 7(3) a circumstance is material if it would influence the judgement of a prudent insurer in determining whether to take the risk and, if so, on what terms. However, the pursuer contends that, in terms of section 3(5) of the Act, in the absence of enquiry, the insured does not require to disclose a circumstance if it is something as to which the insurer waives information. The pursuer accepts that he did not disclose the undisclosed information but he argues that the defender was not entitled to avoid the policy. He presented three propositions in his pleadings: the undisclosed information was something as to which the

defender waived information (waiver); it had no bearing on the risk (no materiality); and in any event had the undisclosed information been disclosed the defender would still have agreed to incept the policy (no inducement).

[5] Parties went to debate, effectively on the relevancy of the pursuer's averments of waiver. In her opinion of 3 April 2019 the Commercial Judge found that the pursuer's averments of waiver were irrelevant and excluded them from probation. By interlocutor of 12 April 2019 she allowed proof on the issues of no materiality and no inducement. The proof was fixed to commence on 27 August 2019. However, on 9 August 2019, the pursuer lodged a minute of admissions admitting that the undisclosed information was material and that had it been disclosed the defender would not have entered into the contract of insurance with the pursuer. The pursuer therefore conceded the issues of no materiality and no inducement. Accordingly, on 20 August 2019 the Commercial Judge discharged the proof on these issues and, given her previous decision on waiver, assoilzied the defender.

[6] The pursuer now reclaims (appeals). He contends that, following the debate, the Commercial Judge should have held that the defender's averments regarding waiver were irrelevant and granted decree of declarator.

[7] The sole issue in the case is therefore a narrow one. Did the defender waive its entitlement to be provided with the undisclosed information?

The facts as agreed

[8] The insurance was placed with the defender by insurance brokers acting for the pursuer, Boyd & Co Ltd ("Boyds").

[9] On 13 February 2017 Boyds emailed the defender, among other insurers, making the following request:

> "Please can you provide us with a quotation for the above prospect based on the information provided in the attached presentation. We require your proposed terms not later than 24th February."

Attached to the email were two documents. The title page of the relevant one was headed: Boyd Insurance, … Market Presentation, and related to the premises ("the Market Presentation").

[10] The Market Presentation was generated by use of a digital template and extended to 20 pages. It had a column at the left of each page listing topics or cues against which, at the right hand side, information could be entered with a view to describing the risk to potential insurers. On completion the document could either be printed off or sent as an attachment to an email.

[11] The first page of the Market Presentation was headed "Client Details and General Information". Among the cues under the sub-heading "Details" was the following:

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

The Commercial Judge referred to this cue as "the moral hazard declaration". The response given is "None". The next cue is "Number of subsidiary companies:" The response given to that is "0". The next cue is "Material facts". The response given is "None".

[12] The defender replied to the Market Presentation by email dated 24 March 2017. That email had the following attachments: (1) a letter of 24 March 2017, including a "Summary of Insurance Document" for the period 20/3/2017 to 19/3/2018; (2) RSA's Properties Insurance Specified Perils Policy Wording; and (3) RSA's Properties Fire & Perils Policy Summary.

[13] The defender's email of 24 March 2017 had a section headed "Subjectivity" (a likely typographical error intended as "Subject to") beneath which was the following text:

"Terms have been based on your presentation 13/02/17, our recent discussions and that adequate Risk Management features are in place ie

Electrics Certified, Housekeeping being satisfactory, No outside storage within 10m of buildings and where intruder Alarms Systems are in place that they are set in their entirety when premises are closed.

Insured has never

Been declared bankrupt or insolvent

Had a liquidator appointed

Been the subject of a county court judgement

Been convicted of or charged with but not yet convicted of a criminal offence other than a motoring offence

Had insurance cover restricted, cancelled or declared void

Annual Premium £19,000 + IPT

Commission has been based on 20%

Given nature of portfolio and recent claim we would need to pitch our terms £19k minimum +IPT".

[14] The defender's letter attachment included the following:

"Your quotation request dated 13/02/2017 for the above Proposer refers.

We have pleasure in confirming that we are able to offer the following terms as detailed below based upon RSA's *Properties* wording for the period of Insurance 20/03/17 to 19/03.18. We attach a copy of our Policy Summary, which outlines the cover provided by our standard Properties contract. Should require a copy of the full Policy wording, this is available on request.

Please note that this quotation is valid for 28 days from the date of this letter…"

[15] Boyds responded by email on the same day:

"Thanks Lynn,
Had a quick look and all seems to be fine,
I'll keep you updated."

[16] On 10 April 2017 Boyds sought to change the values of a number of properties for which cover had been sought and enquired as to whether a discount on premium levels could be offered. A discount was indeed offered, and cover was incepted on 10 April 2017. The defender submits that it made an offer to enter into a contract of insurance on the terms

and conditions set out in its email dated 24 March 2017, together with the attachments, by that stage, the defender having had already assessed, accepted and priced the risk. It is not clear that this information as to events subsequent to 24 March 2017 was made available to the Commercial Judge. At para [81] of her opinion she notes a submission from counsel for the defender that she should ignore the email of 24 March 2017 and proceed on the basis of the Market Presentation alone. The Commercial Judge was not prepared to do that without proof, given that this was a point in the proceedings where the no materiality and the no inducement lines of argument were still in issue. She observed that parties had made no submissions on the legal character of the defender's email, and whether it had the effect itself of concluding the contract, or operated as a counter offer, or had some other effect (eg as concluding the contract but imposing a suspensive condition or being suspensive of the conclusion of the contract). Parties had simply proceeded on the basis that a contract of insurance had been concluded between the parties, to which contract the Market Presentation and the defender's email of 24 March 2017 related.

Submissions

Pursuer and reclaimer

[17] The pursuer's grounds of appeal set out six respects in which it is contended that the Commercial Judge erred in her understanding of the law and its application to the facts, but the essential contention is that the Commercial Judge had erred in her construction of the defender's email of 24 March 2017. She ought to have construed it as waiving any entitlement to disclosure of the undisclosed information.

[18] Mr Dunlop developed his submissions as follows. It is well-established that an insured's obligation to disclose information can be restricted by the questions posed by an

insurer. An insurer, as a result of asking certain questions, for example in a proposal form, may show that he is not interested in certain other matters and can therefore be said to have waived disclosure of them, the test being would a reasonable man reading the proposal form be justified in thinking that the insurer had restricted his right to receive material information and consented to the omission of the particular information in issue: *Doheny* v *New India Assurance Co.* [2005] 1 All ER (Comm) 382 at paras 17 to 21, under reference to *Schoolman* v *Hall* [1951] 1 Lloyds Rep 139. In *R&R Developments Ltd* v *AXA Insurance UK Plc* [2010] 2 All ER (Comm) 527 the insurance contract included a list of questions which included: "Have you or any …Directors either personally or in connection with any business in which they have been involved …[e]ver been declared bankrupt or are the subject of any bankruptcy proceedings or any voluntary or mandatory insolvency?" The question was answered in the negative. The insurers thereafter sought to rely on the fact that one of the directors of the insured had been the director of a company that had been placed in administrative receivership. The argument on material non-disclosure was rejected. The court ruled that there had been no failure to disclose: the proper inference for the insured to draw from the relevant question was that the insurer had no interest in the insolvency of any party other than the insured and its directors. The Commercial Judge had distinguished *R&R Developments Ltd* from the present case on the facts, as she had distinguished *Doheny*. She had been wrong to do so. *R&R Developments Ltd* was directly analogous.

[19] In *Economides* v *Commercial Union Assurance Co plc* [1997] 3 All ER 636, Simon Brown LJ (as he then was) said:

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

That, Mr Dunlop submitted, was unarguably correct. The point applied to the present case. The Commercial Judge had distinguished *Economides* for four reasons: that it concerned the interpretation of a proposal form, that it was a consumer contract, that it proceeded on the assumption that the subject matter of the question was material, and that the court was considering the truthfulness of the statements made. None of these reasons were sound; the present case falls squarely within the dictum of Simon Brown LJ. There was no difference in the principles to be applied as between, on the one hand, insurance contracts with consumers and, on the other, insurance contracts with non-consumers (see *Doheny* at para [20]).

[20] The Commercial Judge had wrongly taken as her starting point the assumption that the Market Presentation was intended as the totality of the information the pursuer had put forward in fulfilment of its duty to make a fair representation. The Market Presentation had been accompanied by an email inviting "any questions". The defender did in fact require further information by requesting confirmation of the various points set out in its email of 24 Mach 2017, to which the brokers responded, albeit tersely. To argue that the defender's email did not contain a question was to take a purely technical point; it made no sense and did not reflect the reality. There was no difference between asking a question and setting out an assumption for confirmation or otherwise. The flaw in the defender's position was that everything depended on the proposition that the process of giving information stopped with the delivery of the Market Presentation. It was not the case, as contended for by the defender, that the defender's email with its attachments was a detailed offer based on the Market Presentation that was capable of immediate acceptance; it was a conditional offer. Where in the Market Presentation had there been anything about storage arrangements or the bankruptcy of anyone? Nor was Boyds' email of the same date any more than a holding

response. It was ludicrous to suggest that the latter email, with its confirmation "all seems to be fine" was not part of the presentation of the risk. The email exchange occurred before the contract of insurance was entered into. That is the relevant *punctum temporis* (see 2015 Act section 3(1)). It was incorrect to argue that what was contended for was the conversion of an unfair presentation into a fair presentation, there was only one point in time when the presentation was to be judged: immediately before entering into the contract. Had the pursuer made a misrepresentation in the exchange of emails on 24 March 2017 it could not be argued that this could not be founded on by the defender and yet this was the logical conclusion of the argument that the defender's email was not part of the presentation of risk. The email exchange, including the "subjectivity" clause, was part of the presentation of risk. To contend that Boyds' email of 24 March 2017 was irrelevant was to ignore its importance as showing that the broker had relied on the defender's email by giving the reply that the brokers did.

[21] The Commercial Judge had stated in her opinion that the case law on the construction of proposal forms (such as what was to be found in *Doheny* and *R&R Developments*) may require to be approached with a degree of circumspection in a case such as the present, which did not involve a conventional proposal form. This was wrong. The only question under the 2015 Act was whether there had been a fair presentation of risk and, more particularly, whether the insurer had restricted his right to receive the information in issue. The form which the pre-inception communications took was irrelevant; there was no "magic" in a proposal form. The question was whether the insurer had narrowed the scope of the inquiry. As part of her reasoning the Commercial Judge had held that the 2015 Act had shifted the burden of identifying what is material to the insured. There was no discernible basis for any such legislative intent.

[22] Neither was there a basis for the Commercial Judge's suggestion that the pursuer's argument would require insurers, faced with a brief presentation, to ask a large number of questions lest it be argued that they had waived the right to receive information on any matter on which they had not sought assurance. If an insurer, given a presentation which contains no misrepresentation but leaves certain questions unanswered (as was the case here) chooses to seek further information in a way that narrows the scope, it thereby waives any entitlement to information falling outwith the scope of its own inquiry.

[23] The Commercial Judge had erred by importing the wording from the Market Presentation which she had chosen to describe as "the moral hazard declaration" (ie "any proposer, director or partner of the trade or business or its subsidiary companies have never either personally or in any business capacity") into the email of 24 March 2017, with the result that the email was to be understood, by imposing a "moral hazard stipulation", as directed to eliciting the content of the declaration. This had not been argued for by either party, as the defender accepts, and therefore for that reason alone the Commercial Judge's decision was open to review. Such a construction was not reasonable. The terms of the email were clear and simple. Had the defender truly wished confirmation that no insolvency events had been experienced by the insured or any other entities through which they had previously traded or been associated, it would have been very simple to say so. In any event, had the wording been incorporated that would have been to import an ambiguity as to what was intended and it is settled law that an insurer cannot pose ambiguous questions and then complain about the answers given in response.

[24] Were it correct to construe the email of 24 March 2017 as including the moral hazard stipulation (and therefore as a request for confirmation that the insured and any proposer, director or partner of the trade or business or its subsidiary companies have never either

personally or in any business capacity: been declared bankrupt or insolvent or had a liquidator appointed) then the Commercial Judge was nevertheless wrong to have concluded that this did not waive the requirement to disclose the undisclosed information. On the Commercial Judge's (erroneous) construction, the pursuer's response would have amounted to a misrepresentation, which had never been argued, but the prior insolvency of a company of which the pursuer was a director does not mean that the pursuer had either personally or in any business capacity, been declared bankrupt or insolvent or had a liquidator appointed (see *R&R Developments* at paras 29 to 36). Restricting the request for confirmation in that way is to waive the right to rely on non-disclosure of insolvencies not experienced personally by the insured. On the Commercial Judge's view of the meaning of the email, the defender had made it plain that it was not interested in insolvencies of the corporate vehicles through which the insured had been trading.

[25] As for an argument, based on traditional concepts of waiver as discussed in cases such as *Armia Ltd* v *Daejan Developments Ltd* 1979 SC (HL) 56, that the essential element of reliance was missing, Mr Dunlop submitted that albeit the term "waiver" had been used to describe the situation where an insurer has narrowed the scope of the inquiry, that did not import the entirety of the law as developed in other contexts. "Waiver" was a convenient label but the concept could be put in different ways (see *Doheny* at para 19). In any event, as already argued, there was reliance here in the pursuer answering the question in the email as it was posed. There was no suggestion that the law of Scotland should be different from that of England in this context. The position therefore should be as was figured in *Doheny* and as was patent in *R&R Developments*. Waiver was an elastic concept born of equity. It would not be fair to allow an insurer to complain of limitations on the scope of disclosure which it itself had imposed.

[26] The reclaiming motion should accordingly be granted.

Defender and respondent

[27] Mr Barne invited the Court to refuse the reclaiming motion. There was an over-riding duty on the part of an insured to make a fair presentation of the risk in order to allow the insurer to price that risk and to provide terms. The defender had been entitled to regard the Market Presentation as making such a presentation. In response it offered terms. It was submitted on behalf of the pursuer that the defender had asked questions. That was not so. The Commercial Judge had correctly characterised the key issue in the case as being whether the matters relied on by the pursuer in the defender's email of 24 March 2017 constituted the kind of enquiry which might instruct waiver; and she had been correct to conclude that the email did not instruct such a case. The defender did not argue that a proposal form was imbued with any "magic". Waiver might arise by reliance on something other than a proposal form, but there had been no waiver of the relevant right in this case. The cases principally relied on by the pursuer, *Doheny* and *R&R Developments*, were not apposite to the facts of the present case. *Economides* was too widely stated.

[28] In summary, the defender's case was as follows. (1) The undisclosed information was a material circumstance that should have been disclosed in the pursuer's market presentation, and had it been disclosed the defender would not have offered cover. This is now accepted by the pursuer. (2) There was no proposal form in this case and accordingly the defender did not define in advance the information which it wished to receive. (3) There was nothing in the correspondence passing between Boyds (on behalf of the pursuer) and the defender that amounted to a relevant waiver of the obligation on the pursuer to disclose the undisclosed information. (4) In particular there was nothing in the defender's email of

24 March 2017 which clearly and unequivocally waived disclosure of the undisclosed information. (5) In any event, the pursuer does not offer to prove it relied on the defender's email of 24 March 2017 in failing to disclose the undisclosed information.

[29] There were four key points that the court should keep in mind from the relevant factual background. There was no proposal form. The original inquiry from Boyds, by email of 13 February 2017 requested a quotation "based on the information provided in the attached presentation". It was therefore clear that the pursuer had provided all the information that it intended to provide. The defender's email of 24 March 2017 with its four attachments extending over 62 pages was a direct response to that inquiry. It comprised an extensive and detailed offer that was open for immediate acceptance. No further information was requested or anticipated. That was because, by the stage the offer had been made, the defender had already assessed, accepted and priced the risk. Boyds' email in response was not part of the pursuer's presentation of risk; it was a holding response to the offer that had been made. Furthermore, on the pursuer's analysis, the pursuer's holding response was irrelevant as by this stage the defender is said to have waived its right to receive the undisclosed information.

[30] Waiver in insurance law is not to be treated as legally distinct from waiver in other areas of the law; the fundamentals are the same. At its heart waiver involves the unequivocal abandonment of a right (see *Armia Ltd* v *Daejan Developments Ltd*, at 67 and 72; *Argo Systems FZE* v *Liberty Insurance (Pte) (The Copa Casino)* [2012] Lloyd's Rep IR 67 at para 41; *Involnert Management Inc* v *Aprilgrange Ltd* [2015] EWHC 2225 (Comm) at para 161). It is not readily to be inferred (see *Container Transport International Inc* v *Oceanus Mutual Underwriting Association (Bermuda) Ltd* [1984] 1 Lloyd's Rep 476 at 511; MacGillivray on *Insurance Law*, 14th edit, para 17-089). Waiver also requires reliance (see *Armia Ltd* v *Daejan*

Developments Ltd at 69 and 71; *Argo Systems FZE* v *Liberty Insurance (Pte)* at para 39, *Noblebright Ltd* v *Sirius International Corporation* [2007] Lloyds Rep IR 584 at para 8). Where, depending on the nature of the questions, an insured completes an insurer's proposal, reliance will be inferred. Where, however, a proposal form has not been used, reliance must be averred and proved.

[31] The form of waiver relied on by the pursuer in this case might be referred to as "question limiting waiver". The defender accepts the formulation of the test for question limiting waiver given by MacGillivray in its 14th edit at 17-020. Waiver will only arise where, viewed objectively, the insured has not provided material information by reason of his reliance on the fact that, by the questions it has asked, the insurer has in advance shown itself clearly to be uninterested in that information. It was not the case that a different approach was to be adopted depending upon whether the insurance was incepted on the basis of a proposal form or a market presentation; that the risk had been presented by way of the insurer's proposal form was not a *sine qua non* for the operation of waiver. The Commercial Judge had not taken that approach. However, in the present case the defender had not defined in advance the information it wished to receive. The Market Presentation had not disclosed the undisclosed information. The undisclosed information was material. The Market Presentation was intended to fulfil the pursuer's duty of fair presentation in its entirety. The pursuer had disclosed all the information he intended to disclose. The defender's email of 24 March 2017 was a direct response to the pursuer's invitation to provide a quotation based on the Market Presentation. By offering terms the defender did not expressly or impliedly waive disclosure of information not disclosed in the Market Presentation. Neither the defender's email nor its attachments were seeking to elicit further information or to ask a question. The fairness of the presentation of risk should be assessed

before the underwriter's reaction is taken into account. The pursuer's approach must be to argue that an unfair presentation was rendered fair by the very offer that was based on an unfair presentation. Such an approach was illogical. No reasonable reader of the defender's offer could divine in it an implied representation that disclosure of any material circumstance was being waived. The pursuer had no averments of reliance on the email in deciding not to disclose the undisclosed information. The pursuer's case on waiver failed.

[32] The pursuer's approach proceeds on a misunderstanding of the "subjectivity" wording in the defender's email of 24 March 2017. It formed part of the terms or stipulations of the defender's offer; it did not waive the disclosure of information. In particular, it included terms that served as a pre-condition of liability under the contract because the contract had been priced on the basis that the assumptions in those terms were accurate. The most that could be said was that if the assumptions or stated state of affairs in the subjectivity wording were known by the insured to be incorrect, they should be corrected. The defender's offer did not state (or imply) that any other material circumstances which could possibly be related to those stipulations was waived or was of no relevance. The offer was made subject to those terms on the understanding that there had been a fair presentation of the risk.

[33] There was an alternative way of demonstrating that the pursuer's case on waiver was unsound. Waiver involves abandonment of a known right:

> "a voluntary, informed and unequivocal election by a party not to claim a right or raise an objection which it is open to that party to claim or raise" (see *Millar* v *Dickson* 2002 SC (PC) 30 at para 33).

The defender had not known that there had been any breach of the duty of fair presentation. It could not, therefore, make an informed decision to waive that breach.

[34] Before the Commercial Judge, the defender did not argue that the "Moral Hazard declaration was incomplete" or that wording from the Moral Hazard declaration should be read into the "Moral Hazard stipulation" in the email of 24 March 2017. It is the defender's position that, properly construed, the Market Presentation confirmed that there was no disclosure of material circumstances relating to moral hazard. If the defender is wrong on that, then the defender adopts the Commercial Judge's reasoning at paras 89 to 92 of her opinion. On either approach, the defender supports the Commercial Judge's ultimate conclusion at para 92 that this is not a "'clear' case of waiver."

[35] It is accepted that, as was said on behalf of the pursuer, no case of misrepresentation is pled. However, contrary to what was submitted on behalf of the pursuer, misrepresentation does not form part of the Commercial Judge's analysis. The Commercial Judge's point was that the stipulation, as she construed it, was not restricted only to the pursuer but included entities with which the pursuer was involved "in any business capacity". On this approach, the stipulation did not waive information about insolvencies that had occurred with entities with which the pursuer had an involvement "in any business capacity". On this approach, the Commercial Judge was correct to reach that view.

Decision

[36] This case turns on the construction of a single email. The applicable law, although generously cited by parties, is uncontroversial.

[37] The context is the nature of the commodity which is insurance: the contractual reallocation of risk for a price; and the market for that commodity. This is discussed in chapter 3 of the joint report of the Law Commissions Insurance Contract Law, Law Com No 353/ Scot Law Com No 238 of July 2014 which was the basis of the 2015 Act. A

prospective policy-holder knows his business and therefore the risk he wishes to insure. By contrast the insurer knows which facts are relevant to assessing and pricing that risk and determining the terms upon which it will take it. The onus is therefore on the prospective policy-holder to disclose sufficient relevant information to allow the insurer to offer terms, or, to put it otherwise, to make to the insurer "a fair presentation of the risk".

[38] As has already been mentioned, a duty to make to the insurer a fair presentation of the risk before the contract is entered into is imposed on the insured by section 3(1) of the 2015 Act. A fair presentation of the risk is one which makes disclosure, in a manner which would be reasonably clear and accessible to a prudent insurer, of every material circumstance which the insured knows or ought to know or, failing which, which gives the insurer sufficient information to put a prudent insurer on notice that it needs to make further enquiries for the purpose of revealing these material circumstances (section 3(3) and (4)). A circumstance is material if it would influence the judgement of a prudent insurer in determining whether to take the risk and, if so, on what terms (section 7(3)).

[39] Accordingly, a proposer seeking the insurance of a risk must assume that any prospective insurer will wish to know every relevant circumstance which would influence the judgement of the notional prudent insurer, and if the proposer is to discharge his duty to make a fair presentation, he must therefore disclose everything that the notional prudent insurer would want to know. A failure to discharge this duty to make a fair presentation will allow the insurer to avoid the policy for material non-disclosure.

[40] Now, for whatever reason, a particular insurer may consider that it does not need or want to know everything which the notional prudent insurer would want to know. If it communicates that fact to the insured, it can hardly complain that it has not received a fair presentation of the risk if the information which it indicated that it was not interested in is

not disclosed. Recognition of such a consideration long preceded the enactment of the 2015 Act. It is however specifically accommodated by the statute. In terms of section 3(5)(e) the duty of fair presentation does not require the insured to disclose a circumstance if "it is something as to which the insurer waives information." That is what the pursuer contends happened here. He maintains that the defender, by setting out in its email of 24 March 2017 the stipulation that the *insured* had never been declared bankrupt or insolvent or had a liquidator appointed, had indicated that it was not concerned to know about the pursuer's previous experience with insolvent companies. Accordingly, that information did not need to be disclosed. Had the defender been concerned to know about the pursuer's previous experience of corporate insolvency, it should have made an enquiry about that. The pursuer does not say that the defender expressly communicated that it was not concerned to know the undisclosed information. He contends that it did so by implication; by showing that it was interested in one aspect of the pursuer's experience of insolvency, the defender was impliedly showing that it was not interested in others and thereby restricted the pursuer's duty of disclosure.

[41] It is clear that an insurer can impliedly waive an insured's duty to disclose certain information by virtue of the questions it asks. A usual way of asking questions is by means of a proposal form, and cases about proposal forms and statements about proposal forms feature in the authorities. For example, the pursuer founds on what was said by Simon Brown LJ in *Economides* v *Commercial Union Insurance Co plc* at 648j:

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

Chitty *on Contracts* (33rd edit) states the principle at para 42-036 as follows:

> "… the question which the insurer may ask the assured (usually in a proposal form) may be so framed as to indicate that the insurer does not require further information on the matters in question, thus relieving the assured from doing more than answering the specific questions."

And the current edition of MacGillivray (14th edition, 2019), repeating the text of the 10th edition of 2002, which was approved by Longmore LJ in *Doheny* v *New India Assurance Co.* at para [17], has this:

> "17-018 **Effect of questions in proposal form**. The questions put by insurers in their proposal forms may either enlarge or limit the applicant's duty of disclosure
>
> …
>
> 17-19 It is possible that the form of the questions asked may make the applicant's duty more strict.
>
> …
>
> 17-020 It is more likely, however, that the questions asked will limit the duty of disclosure, in that, if questions are asked on particular subjects and the answers to them are warranted, it may be inferred that the insurer has waived his right to the information, either on the same matters but outside the scope of the questions, or on matters kindred to the subject-matter of the questions.
>
> …
>
> Whether or not such waiver is present depends on a true construction of the proposal form, the test being, would a reasonable man reading the proposal form be justified in thinking that the insurer had restricted his right to receive all material information, and consented to the omission of the particular information in issue?"

[42] The significance of a proposal form is that by directing the insured to provide material information by the means of answering specific questions the insurer has taken control over the process of communicating information between it and the proposer. It has chosen the matters as to which it wishes information by asking questions directed at that information and, by implication, the matters as to which it does not wish information, by not asking questions which are so directed. That is not to say that the only way in which an insurer can waive information is by using a proposal form. Mr Barne accepted that. However, where it is contended, as here, that the insurer impliedly waived its entitlement to

disclosure of material information by reason of the terms in which parties communicated with each other, the expectation will be that there will be something in the nature of an enquiry by the insurer directing the insured to provide certain information but no other information. We took Mr Dunlop to accept that. He submitted that by including the text "Insured has never Been declared bankrupt or insolvent Had a liquidator appointed" the defender was inviting the pursuer to confirm the accuracy of that statement and by restricting itself to that question demonstrating that it was not concerned to know about the pursuer's wider experience of insolvency including the undisclosed information.

[43] We do not consider that a reasonable reader of the email of 24 March 2017 would understand it in the way suggested by Mr Dunlop. Neither the generality of the email nor the wording relied on by the pursuer are couched in the form of an enquiry. The whole tenor of the email indicates that the defender has got beyond the stage of enquiry or looking for a more complete presentation of the risk. The email indicates that the defender considers that the presentation of the risk has been sufficient and that the defender has assessed and priced it, as the risk is further defined by the stated terms, conditions and limitations. For the pursuer to succeed with his plea of waiver he has to establish that the defender, which had an entitlement to disclosure of information which included the pursuer's more general experience of insolvency, is to be held to have (inadvertently, because the no inducement line of argument has been abandoned by the pursuer) waived that entitlement by confirming that there would be no cover in the event that the policy-holders had a direct experience of insolvency. We do not accept that contention. It is simply not a reasonable interpretation of the communications between the parties. The pursuer's brokers had made a presentation of the risk by means of the Market Presentation which they sent under cover of an email of 13 February 2017. That email requested that the defender "provide us with a

quotation for the above prospect based on the information provided in the attached presentation". The defender responded with an offer to insure on a variety of terms and conditions. As Mr Barne submitted, that offer was capable of immediate acceptance. It is true that it was a conditional offer but it was not an enquiry. An element which was essential if the pursuer's argument was to get off the ground was absent.

[44] We see the force of the defender's submission that a party can only waive a right or entitlement if it is aware that it has it, whereas here the defender was not aware that it was entitled to more by way of disclosure of information than it had received; and the defender's further submission that here the pursuer does not offer to prove that he actually relied on the terms of the email of 24 March 2017 in withholding further disclosure. However, it is sufficient for a determination of the reclaiming motion that we find that a reasonable reader of the email would not have understood it as containing an enquiry that was to be construed as an expression of limited concern about the pursuer's past experience of insolvency such as to exclude the undisclosed information from what was required to be disclosed for a fair presentation of the risk. In all the circumstances as admitted by the pursuer, the defender was therefore entitled to avoid the policy.

[45] The reclaiming motion is accordingly refused.