

CARTER V BOEHM CONSIDERED

Abstract: This article looks at the significance of Carter v Boehm in developing the duty of disclosure in insurance contracts and examines the evolution of that duty over the more than 250 years since the decision. Lord Mansfield espoused a narrow duty of disclosure in Carter, but a wider duty of disclosure developed in the English courts through the 19th and 20th centuries. A narrower duty is favoured by Ireland's Supreme Court. This article will argue that a narrower duty is more appropriate in the world of today where – unlike the world in which Carter v Boehm, and later related cases of the 19th and early-20th centuries, fell to be decided – means of communication have been revolutionised by the technological advances of the late-20th and early-21st centuries, such that insurers now generally have the means to acquire readily a great deal of the information that they need to know concerning a proposed policy. The article also briefly considers the changes made to the duty of disclosure in the consumer-law context by the Consumer Insurance Contracts Act 2019.

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Introduction

Insurance contracts are the classic example of a form of contract to which a duty of disclosure applies. Most textbooks point the reader to the judgment of Lord Mansfield in *Carter v Boehm*¹ as the case in which this duty was established. But while *Carter v Boehm* is perhaps the case in which a justification for that duty has long been described best, it is not correct to state that *Carter v Boehm* was the case in which the form of that duty, certainly as applied by the courts of England and Wales throughout much of the 19th and 20th centuries, was established. This article looks at the legal and practical significance of *Carter v Boehm* and the evolution of the duty of disclosure in the quarter-millennium since that case was decided. More particularly, it considers:

- (i) the factual background of *Carter v Boehm*, a case with a fascinating imperial factual matrix;
- (ii) (briefly) the career of Lord Mansfield, a man with a good claim to having founded modern British commercial law, and thus to having shaped commercial law throughout the countries of the former British Empire;
- (iii) the *ratio* and reasoning of Lord Mansfield's decision in *Carter v Boehm*;
- (iv) how Lord Mansfield's duty not to deliberately conceal evolved in later English case-law into an active duty of disclosure, a process which reached its apogee in the early-20th century, as compounded/reflected in part in the Insurance Act 1906;
- (v) the more nuanced, and arguably more correct, interpretation of *Carter v Boehm* by the courts of the United States;
- (vi) the interesting dichotomy of decisions by the Irish Supreme Court since the 1980s, with the more recent decisions of that court pointing to a retreat from a wide duty of disclosure to something more akin to the duty identified in *Carter v Boehm*;
- (vii) how statutory developments/proposals in the United Kingdom/Ireland appear to be running ahead of case-law in terms of ameliorating the duty of disclosure in certain contexts; and

¹ (1766) 97 ER 1162.

- (viii) some highlights of Ireland's recently enacted Consumer Insurance Contracts Act 2019 which effectively supplants the effect of *Carter v Boehm* (as interpreted in later case-law) in the realm of Irish consumer insurance contract law.²

The Facts of *Carter v Boehm*

Governor Carter had charge of Fort Marlborough, a still-standing British-built fort on the island of Sumatra, in what is now Indonesia. He decided that there was a danger of the fort being attacked. He therefore wrote to a brother in England and asked him to arrange for the fort to be insured for a year. Thereafter, the brother liaised with Mr Boehm who eventually agreed to insure the fort, the contingency being 'whether Fort Marlborough was or would be taken, by an European enemy, between October 1758, and October 1760'.³ The policy was signed in May 1760. As matters turned out, Fort Marlborough had been captured in April 1760 by French troops headed by the Comte d'Estaing, a notably successful 18th-century French general and admiral who, despite his services to the French nation and his initial sympathies for the French Revolution, was ultimately guillotined during the Reign of Terror. A claim under the insurance policy followed on, court proceedings ensued in London, the matter was tried by Lord Mansfield before a special jury of merchants in April 1766, and a verdict was returned for Governor Carter. Thereafter, an unsuccessful application was made for a re-trial on the basis that the circumstances by reference to which the insurance was effected had not been sufficiently disclosed to the insurer. It was this application for re-trial that yielded Lord Mansfield's renowned judgment. At the heart of the application was the insurer's contention that the insurance had been obtained by way of fraud, specifically through the concealment of circumstances that ought to have been disclosed, viz. the weakness of the fort and the probability of its being attacked by the French, factors which, it was proved, had been disclosed by Governor Carter in a couple of letters, one to his brother and another to the East India Company.

The Submissions in *Carter v Boehm*

Counsel for Governor Carter contended, *inter alia*, that: (i) there was no concealment of circumstances which ought to have been disclosed, (ii) the weakness of the fort and the probability of attack were universally known to every London insurer, (iii) the facts of the matter had been judged by a special jury of merchants, who were the proper judges of those facts, (iv) perhaps surprisingly, that the contract of insurance was in reality no more than a wager as to whether the French would think it in their interest to attack Fort Marlborough (and if they did, whether they would be able to get a ship up the river to do so), and (v) that it was a general rule of insurance 'that the insured is only obliged to discover facts; not the ideas or speculations which he may entertain, upon such facts'.⁴

Counsel for Mr Boehm contended, *inter alia*, that (i) an insurer has a right to know as much as the insured knows, (ii) all circumstances ought to be disclosed, including whatever increases the risk, (iii) Governor Carter's brother (a) ought to have revealed the weakness and indefensibility of Fort Marlborough, and (b) had admitted in evidence that he did not think Mr Boehm would have entered into the insurance policy had they known of the two

² No. 53 of 2019. The Act was signed into law by President Higgins on 26 December 2019. Its provisions fall to be commenced on such date/s as are appointed by ministerial order/s. At the time of writing (January 2020), no such order has yet been made.

³ *Carter v Boehm* (n 1), 1167.

⁴ *Carter v Boehm* (n 1), 1163.

letters, (iv) as to the evidence from Governor Carter's side, that, *inter alia*, Fort Marlborough was not designed for defence against European enemies but a subordinate fort intended for defence against, presumably less well-armed, native inhabitants. Counsel for Mr Boehm contended that (a) the notion that a fort was not intended for defence against a particular enemy was absurd, (b) it fell to be presumed that a fort was intended for such purpose and, if not, such deficiencies as presented ought to have been identified, and (v) the fact that there was not adequate disclosure amounted to a fraudulent concealment, with the result that the insurer was not liable.

Lord Mansfield

Lord Mansfield, born William Murray, was a younger son of the 5th Viscount Stormont, a Scottish peer. After studying at Oxford University, Murray qualified as an English barrister. He befriended Alexander Pope, the foremost poet of early-18th century Britain, and through Pope met various people of consequence. However, Murray's luckiest break as a lawyer came about because of the Acts of Union of 1707 between Scotland and England.⁵ That led to Scottish cases coming to the House of Lords for final decision; and those cases required to be argued by a skilled barrister familiar with English and Scottish law. Mansfield was one such man. In 1742, Murray was elected to Parliament and thereafter served successively as Solicitor General and Attorney General. In 1756, he became Lord Chief Justice and was raised to the peerage, a remarkable achievement for a Scotsman in Hanoverian England whose parents were known to have been Jacobites, i.e. supporters of the anti-Hanoverian cause. As Lord Chief Justice, Mansfield was a notable success. His achievements included updating English merchant/commercial law by way of various seminal judgments, of which *Carter v Boehm* was one. When it came to insurance law, Lord Eldon, a sometime Lord Chancellor, later described Lord Mansfield as 'the establisher, if not the author, of a great part of this law'.⁶ When it came to commercial law more generally, Buller J stated in *Lickbarrow v Mason*⁷ that Lord Mansfield 'may be truly said to be the founder of the commercial law of this country'.⁸ The Anglo-Irish philosopher and politician, Edmund Burke (1729-97), observed of his contemporary that he was always careful to effect

the [a]melioration of the law, by making its liberality keep pace with justice and the actual concerns of the world; not restricting the infinitely diversified occasions of men, and the rules of natural justice, within artificial circumscriptions, but conforming our jurisprudence to the growth of our commerce and of our empire.⁹

In short, Lord Mansfield was both a judicial innovator and also a pragmatic man of the world.¹⁰

⁵ i.e. the Union with Scotland Act 1706 (an Act of the English Parliament) (c.11) and the Union with England Act 1707 (an Act of the Scottish Parliament) (c.7).

⁶ *Anderson v Pitcher* (1800) 126 ER 1216, 1218.

⁷ (1787) 100 ER 35.

⁸ *ibid.*, 40.

⁹ See *Report from the Committee of the House of Commons Appointed to Inspect the Lords Journals, in relation to their Proceeding on the Trial of Warren Hastings, Esquire* (1794), 620.

¹⁰ Although *Carter v Boehm* is one of the great mercantile decisions of Lord Mansfield, he is perhaps most renowned today for a case that has nothing to do with commercial law, that being his decision in *Somerset v Stewart* (1772) 98 ER 499, a decision that had profound consequences for the law of slavery in England and Wales. Somerset was a young African slave bought by Charles Stewart, a Scotsman, while Stewart was in Boston. On his return to England in 1769, Stewart brought Somerset with him. In England, Somerset came into contact with a number of freed slaves and with abolitionists. At some point, Somerset was baptised and acquired a number of abolitionist godparents. In 1771, Somerset ran away from Stewart.

Lord Mansfield's Judgment

The Substance of the Judgment

Turning to the substance of his judgment in *Carter v Boehm*, key points made by Lord Mansfield include the following:

- '[i]nsurance is a contract on speculation';
- 'The special facts, upon which the contingent chance is to be computed, lie most commonly in the knowledge of the insured only: the under-writer trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge...[so as] to mislead';
- 'The keeping back such circumstance is a fraud, and therefore the policy is void; because the risque run is really different from the risque understood and intended to be run, at the time of the agreement';
- The duty works both ways;
- 'The governing principle is applicable to all contracts and dealings';
- 'Good faith forbids either party by concealing what he privately knows, to draw the other into a bargain, from his ignorance of that fact, and his believing the contrary. But either party may be innocently silent, as to grounds open to both, to exercise their judgment upon';
- 'The insured need not mention what the under-writer ought to know; what he takes upon himself the knowledge of; or what he waives being informed of';
- 'The under-writer needs not be told what lessens the risque agreed and understood to be run by the express terms of his policy. He needs not be told general topics of speculation: as for instance – The under-writer is bound to know every cause which may occasion natural perils... . He is bound to know every cause which may occasion political perils.... He is bound to know the probability of safety, from the continuance or return of peace...the imbecility of the enemy...the weakness of their counsels, or their want of strength'.
- 'If an under-writer insures private ships of war...he needs not be told the secret enterprises they are destined upon; because he knows some expedition must be in view and, from the nature of the contract...he waives the information'.
- 'Men argue differently from different phenomena....[T]he means of information and judging are open to both' – this was in effect an acceptance of the argument by counsel for Governor Carter that it was a general rule of insurance that the insured is only obliged to discover facts; not the ideas or speculations which he may entertain, upon such facts.
- 'The reason of the rule which obliges parties to disclose, is to prevent fraud and to encourage good faith. It is adapted to such facts as vary the nature of the contract; which one privately knows, and the other is ignorant of, and has no reason to suspect'.

Following his recapture, an aggrieved Stewart had Somerset imprisoned on-board the *Ann and Mary*, a ship that was due to sail for the West Indies, where it was intended that Somerset would be sold on. Before the ship quit port, Somerset's abolitionist godparents caused an application to be brought before the High Court challenging the lawfulness of Somerset's on-ship detention. Following one of the great show-trials of the day, Lord Mansfield in effect held slavery to be illegal in England and Wales. As a result of Mansfield's decision, it is estimated that many thousands of slaves were immediately freed in England and Wales, with some remaining on with their erstwhile 'masters' as paid servants. It was not the end of slavery in the British Empire, it is not even altogether clear that the decision completely ended the slave-trade in England and Wales. Even so, it was a major step towards righting the evil of slavery.

- ‘The question therefore must always be whether there was, under all the circumstances at the time the policy was under-written, a fair representation; or a concealment’.¹¹

Commentary

A number of observations may be made concerning Lord Mansfield’s judgment. Notably, he:

- (i) saw the case before him as being one concerning concealment, i.e. he took what was contended before him by the insurer to amount to a claim that some circumstances, which had been in the knowledge of Governor Carter and which had not been mentioned at the time the policy was underwritten, amounted to a concealment which ought to avoid the policy;
- (ii) does not appear to have been seeking in his judgment to lay down the rigorous duty of disclosure that *Carter v Boehm* was later purported to herald.
- (iii) considered the duty that he described to apply to all forms of contract. Thus, having identified the governing principle for which *Carter v Boehm* is renowned (and which is considered hereafter), Lord Mansfield expressly states that ‘[t]he governing principle is applicable to all contracts and dealings’.¹²
- (iv) placed the responsibility for obtaining material information with the insurer. The breadth of the duty imposed is striking to the point of unfair, given that the insurer was a private commercial entity. Yet, Lord Mansfield observes:

The under-writer at London, in May 1760, could judge much better of the probability of the contingency, than Governor Carter could at Fort Marlborough, in September 1759. He knew the success of the operations of the war in Europe. He knew what naval force the English and French had sent to the East Indies. He knew, from a comparison of that force, whether the sea was open to any such attempt by the French. He knew, or might know everything which was known at Fort Marlborough in September 1759, of the general state of affairs in the East Indies, or the particular condition of Fort Marlborough by the ship which brought the orders for the insurance.... He knew what probability there was of the Dutch committing or having committed hostilities. Under these circumstances, and with this knowledge, he insures against the general contingency of the place being attacked by an European power.¹³

- (v) took a strikingly narrow view of the insured’s duty. Governor Carter, Lord Mansfield held, could not consistent with his duties as governor broadcast the risk of attack, i.e. ‘disclose it, consistent with his duty’, noting in the next sentence that the insurer knew that the governor, ‘by insuring, apprehended the risk of attack. With this knowledge, without asking a question, he underwrote’;¹⁴
- (vi) acted, at least in part, on a concern that a rule concerning the prevention of fraud (the prohibition of deliberate concealment) should not be allowed to become a rule that facilitated a form of fraud (the undue enrichment of an insurer), observing in this regard that ‘What has often been said of the Statute of Frauds may, with more

¹¹ *Carter v Boehm* (n 1), 1164-1165

¹² *ibid.*

¹³ *ibid.*, 1167.

¹⁴ *ibid.*

propriety, be applied to every rule of law, drawn from principles of natural equity, to prevent fraud – ‘That it should never be so turned, construed, or used, as to protect, or be a means of fraud’;¹⁵

- (vii) appears to have taken the pragmatic view that as good faith is a mutual duty the problem of unfairness and how to resolve it was a problem shouldered by both parties, not one thrust unreservedly by the law unto the shoulders of an insured party.

Post-Carter v Boehm

England and Wales

Lord Mansfield’s judgment was based on the notion of deliberate concealment. However, the principles he identified evolved over time, most particularly in the 20th century, into a prohibition on non-disclosure, no matter how innocent, of a material fact. This evolution has been well-traced by Hasson,¹⁶ who points in this regard to, *inter alia*:

- *Friere v Woodhouse*.¹⁷ This was an action on a shipping policy where a matter had not been disclosed that had, however, been published in the Lloyd’s Lists. Burrough J held that:

This is not a concealment to vitiate the policy....What is exclusively known to the assured ought to be communicated; but what the underwriter, by far inquiry and due diligence, may learn from the ordinary sources of information need not be disclosed.¹⁸

As can be seen, this is a straightforward application of *Carter v Boehm*, and the rational body of principle that the judgment of Lord Mansfield comprises.

- *Lindenau v Desborough*.¹⁹ This was a colourful case, involving a life assurance policy effected on the life of the Duke of Saxe Gotha (the uncle-by-marriage to Prince Consort Albert’s father), a gentleman known to have ‘led a dissolute life’.²⁰ A question arose as to the extent of the duty of disclosure, the King’s Bench Division holding that in all cases of insurance, the underwriter should be informed of every material circumstance within the knowledge of the assured, the question being ‘whether any particular circumstance was in fact material? and not whether the party believed it to be so’.²¹ A legitimate question arises whether the quite peculiar facts of *Lindenau* offered a suitable basis on which to construct such a wide-ranging proposition.
- *Bates v Hewitt*.²² This was a shipping case in which the insured had taken out a policy of insurance on a cruiser that had once been owned by the Confederate States and thus was exposed to seizure by the United States. The insured party sought to

¹⁵ *ibid*, 1169.

¹⁶ Hasson, R. ‘The Doctrine of *Uberrima Fides* in Insurance Law – A Critical Evaluation’ (1969) 32 *MLR* 615. See also Lowry, J., ‘Whither the Duty of Good Faith in UK Insurance Contracts’ (2009) 16 *Conn. Ins. L.J.* 97.

¹⁷ (1817) 171 ER 345.

¹⁸ *ibid*.

¹⁹ (1828) 108 ER 1160.

²⁰ *ibid*.

²¹ (1828) 108 ER 1160, 1162.

²² (1866-67) LR 2 QB 595.

contend that the insurer knew or ought to have known was once a Confederate cruiser. On appeal, Cockburn CJ, held, *inter alia*, as follows:

No proposition of insurance law can be better established than this, viz. that the party proposing the insurance is bound to communicate to the insurer all matters which will enable him to determine the extent of the risk against which he undertakes to guarantee the assured. It is true, if matters are common to the knowledge of both parties, such matters need not be communicated. It is also true that when a fact is one of public notoriety...and the materials for informing the judgment of the underwriter are common to both, the party proposing the insurance is not bound to communicate what he is fully warranted in assuming the underwriter already knows. Short of these things, the party proposing the insurance is bound to make known to the insurer whatever is necessary and essential to enable him to determine what is the extent of the risk against which he undertakes to insure.²³

As can be seen, this represents a radical evolution, it might even be described as a re-casting, of the comprehensive, rational body of principles identified by Lord Mansfield in *Carter v Boehm*. This is because it sees a move to an active duty of disclosure, rather than a *Carter v Boehm*-style duty not deliberately to conceal. Hasson somewhat caustically observes of the Lord Chief Justice's opinion in *Bates* that 'It is perhaps significant that no authority is cited in the entire opinion',²⁴ noting the 'heroic' but ultimately unavailing effort of Mellor J in his separate judgment to reconcile the decision in *Bates* with that of Lord Mansfield in *Carter v Boehm*.²⁵

- *London Assurance v Mansel*.²⁶ This was a life assurance case in which the proposal form contained a question 'Has a proposal ever been made on your life at any other office or offices?' To this the party who made the proposal indicated that he was assured in two other offices. This did not accurately answer the question posed and it later turned out that various other proposals had been made and declined. This was held to be a material concealment of fact, with the result that the contract could be set aside, Jessel MR, holding, *inter alia*, as follows:

[I]f a man purposely avoids answering a question, and thereby does not state a fact which it is his duty to communicate, that is concealment. Concealment properly so called means non-disclosure of a fact which it is a man's duty to disclose, and it was his duty to disclose the fact if it was a material fact. The question is whether this was a material fact? [Jessel MR went on to hold that it was.]²⁷

The particular significance of *Mansel* is that in concluding in that case that there was a wide duty of disclosure on an insured party, Jessel MR, among the greatest commercial law judges of his time, relied on some not very convincing authorities to support this proposition. Moreover, even at this relatively late stage, the wide duty of disclosure was still not generally accepted by the English courts. Thus, at the end of the 19th century, in *Hambrough v Mutual*

²³ *ibid*, 604-05.

²⁴ (1866-67) LR 2 QB 595, 620.

²⁵ *ibid*.

²⁶ (1879) 11 ChD 363.

²⁷ *ibid*, 370.

Life Insurance Company of New York,²⁸ Lopes LJ (1828-99) expressed the view that, absent fraud, mere silence by an insured with regard to a material fact did not avoid a policy. This was an approach which was entirely consistent with the notion of deliberate concealment on which Lord Mansfield relied in *Carter v Boehm* and not at all consistent with the world view adopted by Jessel MR in *Mansel*.

A 'firming up' of the duty of disclosure came in the early-20th century, most notably in *Joel v Law Union and Crown Insurance*,²⁹ a case with rather sombre facts. There Ms Morrison, in 1902, made certain declarations in a proposal for a life assurance policy that were declared by her to be true, the proposal and said declaration being said to form a part of the insurance contract. Subsequently, before the policy was executed, she was asked (i) if she had ever suffered from mental derangement (she denied this, which was untrue – she had in fact been confined in an asylum during an episode of acute mania; however, at trial the jury held that Ms Morrison had no knowledge that she had been insane); (ii) the names of any doctors whom she had consulted (she omitted the name of one doctor, the jury later holding that although she knew the name of the doctor, she was not aware that communication of this fact was material). Ms Morrison signed a further declaration, stating these facts to be true but this declaration did not include a statement that the answers were to form a part of the contract. Thereafter, in 1906, while of unsound mind, Ms Morrison took her own life. Subsequently, the defendant assurers refused to pay out on the policy given the non-disclosure and misstatement. In the King's Bench Division, the insurers succeeded; but on appeal a new trial was ordered, it being held, *inter alia*, by the Court of Appeal, that the answers to the second declaration were not a part of the contract and that, in the absence of evidence from the doctor who elicited the second declaration as to what had transpired between him and Ms Morrison, the second declaration did not suffice to show such non-disclosure as would render the policy voidable, absent fraud. However, the case is best-known not so much for its conclusion as for the relatively tough gloss placed by Fletcher Moulton LJ on the extent of the duty of disclosure:

The insurer is entitled to be put in possession of all material information possessed by the insured....There is...something more than an obligation to treat the insurer honestly and frankly, and freely to tell him what the applicant should know. That duty, no doubt, must be performed, but it does not suffice that the applicant should bona fide have performed it to the best of his understanding. There is the further duty that he should do it to the extent that a reasonable man would have done it; and, if he has fallen short of that by reason of his bona fide considering that matter not material, whereas the jury, as representing what a reasonable man would think, held that it was material, he has failed in his duty, and the policy is avoided....The disclosure must be of all you ought to have realized it to be material, not of only that which you did in fact realize to be so.³⁰

In the same year that the decision in *Joel* was reported, provision was also made in the Marine Insurance Act 1906, s.18(2), that partly codified the duty of disclosure, providing that: 'The proposer has a duty to disclose all material facts which would influence the judgment of a prudent insurer in fixing the premium or determining whether he will take the risk'.

²⁸ (1895) 72 LT 140, 141.

²⁹ [1908] 2 KB 863.

³⁰ *ibid*, 883-4.

United States of America

As can be seen from the preceding section, throughout the 19th century and on into the 20th century, the courts of England, buttressed eventually by the Act of 1906, fashioned a duty of disclosure which, as Hasson rightly observes: ‘far from representing a restatement of classical doctrine as set out in decisions such as *Carter v Boehm*, sets out an entirely different principle, one largely fashioned during the... [twentieth] century’.³¹ By contrast, the 19th-century courts of the United States, in preferring a narrow duty of disclosure in cases such as *Penn Mutual Life Insurance Co. v Mechanics Savings Bank & Trust Co.*,³² a case notable for its having been decided in the US Court of Appeals by the future President (and later Chief Justice) Howard Taft, were arguably more correct in their application of *Carter v Boehm*.³³ Thus, in *Penn Mutual*, Taft J held, *inter alia*, that (i) the strict rule in marine insurance cases requiring full disclosure of all material matters, and avoiding the policy even in cases of mistake was not applicable, in the United States, to cases of life assurance, (ii) an applicant for insurance who fully and truthfully answers all questions put to him by an insurer is entitled to assume that in its questions the insurer has covered all matters deemed material to it, (iii) all that is required is that there be no suppression of facts with the intention to mislead.

Ireland

Case-Law

In post-independence Ireland, a high-water mark for the wide duty of disclosure, similar to that settled upon, e.g., in *Joel*, was arrived at by the Supreme Court in *Chariot Inns Ltd Assicurazioni Generali SPA*.³⁴ In that case, Chariot Inns Ltd had suffered a loss and received an insurance pay-out, when certain stored furnishings were damaged when a fire occurred at a Dublin City premises where the furniture was being stored, which premises was owned by an associated company, Consolidated Investment Holdings Ltd. When Chariot Inns Ltd later sought to effect, *inter alia*, fire insurance on entirely separate premises, one of the questions in the proposal form asked Chariot Inns Ltd to give ‘its claim experience for loss over the last 5 years’. Remarkably, despite Chariot Inns Ltd having received an insurance pay-out in respect of the damaged furniture at the Dublin City premises, its answer to this question was ‘None’. Equally remarkably, perhaps, the Supreme Court concluded that this answer was ‘literally correct’.³⁵ The only way in which this answer could have been correct, literally or otherwise, is if the question in the proposal form as to claims history was confined to claims history with the company to which the insurance proposal was being made. However, the question as quoted in the judgment is not so confined in its own terms, nor does any obvious reason present why it would/should be read to be so confined. Regardless, the Supreme Court concluded that although the answer was literally correct, there had, in this regard, been a failure to disclose ‘matters which would reasonably have affected the judgment of a prudent insurer in deciding whether to take the risk or in fixing the premium’,³⁶ this being in breach of ‘the generally accepted test of materiality in all forms of insurance against risks when property of any kind is involved... [being that] stated in s.18(2) of the Marine Insurance Act 1906’.

³¹ [1908] 2 KB 863, 632-33.

³² 72 F. 413 (1896). See also *Sebring v Fidelity Phoenix Insurance Co* 255 NY 382 (1931).

³³ See generally Hasson, R., ‘The Special Nature of the Insurance Contract: A Comparison of the American and English Law of Insurance’ (1984) 47 *MLR* 505.

³⁴ [1981] 1 *ILRM* 173.

³⁵ *ibid*, 177.

³⁶ [1981] 1 *ILRM* 173, 178.

The judgment in *Chariot Inns* appear to have proven something of a challenge for the Supreme Court in its later decisions, most notably in the judgments of McCarthy J in *Aro Road & Land Vehicles Ltd v Insurance Corporation of Ireland*³⁷ and *Keating v New Ireland Assurance plc* (both considered hereafter).³⁸ In *Aro Road*, McCarthy J describes and constrains *Chariot Inns* as ‘a case in which there was a proposal form, there were questions asked by the insurer and...there was a non-disclosure of a matter material to the risk’,³⁹ and thus not like the case before him. *Chariot Inns* has also to some extent been overtaken by time. So, for example, in the United Kingdom changes to the law under the Consumer Insurance (Disclosure and Representations) Act 2012⁴⁰ and the Insurance Act 2015⁴¹ have had the result that there has been a notable softening of the position that pertained in the United Kingdom throughout much of the twentieth century *vis-à-vis* the duty of disclosure. In a similar vein, the recently enacted, Sinn Féin-sponsored, Consumer Insurance Contracts Act 2019, substantively transforms Irish consumer insurance law and is briefly considered in the next section below. When commenced, the Act of 2019 will supplant the judgment in *Carter v Boehm* in the realm of consumer insurance contracts in Ireland. To the extent that it does not apply, the judgments of McCarthy J in *Aro Road* and *Keating* fall perhaps to be viewed as offering a better sense as to the more general future evolution of the duty of disclosure in Ireland, which may well involve a general reversion to something like the position reached by Lord Mansfield in *Carter v Boehm*. Certainly, the post-*Chariot Inns* decisions of the Supreme Court can be contended to show a certain fealty to the principles identified in *Carter v Boehm*.

In *Aro Road*, an insurer sought to avoid certain transport insurance on the basis that the managing director had once been convicted of certain offences.⁴² However, the insurer had allowed the agent that issued the insurance to operate in a remarkably casual manner whereby, to borrow from the judgment of Henchy J it was sold ‘to virtually all and sundry who ask for it, with minimal formality or inquiry, and with no indication that full disclosure [was]...to be made of any matter which the insurers may ex post facto deem to be material’.⁴³ In his judgment, McCarthy J, reflecting the consensus of the Supreme Court, indicated in this regard that ‘If no questions are asked of the insured, then, in the absence of fraud, the insurer is not entitled to repudiate on grounds of non-disclosure’.⁴⁴ More generally, as to the duty of good faith, McCarthy J accepted that the applicable test when it came to disclosure was utmost good faith,⁴⁵ but also observed that ‘Good faith is not raised in its standard by being described as the utmost good faith’⁴⁶ (a somewhat striking proposition if one takes the stance that words have, and are intended to have, meaning).

Having distinguished *Chariot Inns* as a case concerned with a proposal form and insurance effected on foot of it (and thus not like the case before him), McCarthy J turned to *Carter v Boehm*, noting where Lord Mansfield ‘in terms free from exaggeration’⁴⁷ – an observation

³⁷ [1986] IR 403.

³⁸ [1990] 2 IR 383.

³⁹ [1986] IR 403, 412.

⁴⁰ c.6.

⁴¹ c.4. The Act of 2015 reflects a certain softening of position in the commercial context that had already been apparent in cases such as *Garmat Trading & Shipping (Singapore) Pte Ltd v Baominh Insurance Corporation* [2012] EWHC 2578 (Comm).

⁴² Kilcommins, S. in ‘The Duty to Disclose Previous Criminal Information in Irish Insurance Law’ 37 *Ir. Jur.* (NS) 167, 168, makes the interesting point that, in England and Wales, *Aro Road* ‘would not have reached the courts...as a result of section 4(3)(a) of the Rehabilitation of Offenders Act 1974’.

⁴³ *Aro Road* (n 49), 409.

⁴⁴ *ibid*, 414.

⁴⁵ *ibid*, 412.

⁴⁶ *ibid*, 413.

⁴⁷ *ibid*.

which would appear to entail an element of criticism of the evolutionary process that had transpired in the case law post-*Carter v Boehm* – had observed, *inter alia*, that ‘[t]he reason of the rule which obliges parties to disclose, is to prevent fraud and to encourage good faith’,⁴⁸ the rule ‘is adapted to such facts as vary the nature of the contract; which one privately knows, and the other is ignorant of, and has no reason to suspect’,⁴⁹ the relevant question thus always being ‘whether there was, under all the circumstances at the time the policy was under-written, a fair representation; or a concealment’.⁵⁰ In terms which bear a striking similarity to the type of conclusion reached by Taft J in *Penn Mutual*,⁵¹ though that case is not referenced in *Aro Road*, McCarthy J. then went on to observe:

I do not know how the average citizen is to know what goes on in the insurer’s mind, unless the insurer asks him by way of the questions in a proposal form or otherwise. I do not accept that he must seek out the insurer and question him....The proposal form will ordinarily contain a wide ranging series of questions followed by an omnibus question as to any other matters that are material.⁵²

It is difficult to see in this approach anything other than an application of the type of reasoning espoused, ‘in terms free from exaggeration’, by Lord Mansfield in *Carter v Boehm*.

In *Kelleher v Irish Life Assurance Co Ltd*⁵³ certain proposal forms concerning a promotional life assurance offer were read by the Supreme Court as excluding the requirement of full disclosure of an applicant’s medical health, the insurance company having contended that, notwithstanding the special promotional offer, it was an express or implied condition of the contract of insurance that failure to disclose a material fact would constitute grounds for the rejection of a subsequent claim. *Carter v Boehm* is briefly touched upon by Finlay CJ in his judgment for the Supreme Court,⁵⁴ and, although not stated by Finlay CJ to be such, *Kelleher* can be seen as a fairly straightforward application of two of the points of principle identified by Lord Mansfield in *Carter v Boehm*, *viz*:

- (1) ‘The special facts, upon which the contingent chance is to be computed, lie most commonly in the knowledge of the insured only: the under-writer trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge...[so as] to mislead’,⁵⁵ and
- (2) ‘The insured need not mention what the under-writer ought to know; what he takes upon himself the knowledge of; or what he waives being informed of’.⁵⁶

As to (1), given the contractual interpretation adopted by the Supreme Court, there was no ‘keeping back’. As to (2), *Kelleher* seems a case involving exactly the form of waiver of the type contemplated by Lord Mansfield in *Carter v Boehm*.

⁴⁸ *Carter v Boehm* (n 1), 1165.

⁴⁹ *ibid*.

⁵⁰ *ibid*.

⁵¹ (n 32).

⁵² *Aro Road* (n 49), 413.

⁵³ [1993] 31.R. 393.

⁵⁴ *ibid*, 400.

⁵⁵ *Carter v Boehm* (n 1), 1164.

⁵⁶ *ibid*, 1165.

In *Keating v New Ireland Assurance plc*,⁵⁷ the facts before the Supreme Court were somewhat unusual in that the life assurer in that case claimed in effect that the person whose life was assured ought, in his application, to have disclosed a fact of which he was entirely unaware (that he was suffering from angina). More particularly the insurer contended, *inter alia*, that the declaration that the answers in the proposal were ‘true and complete’ yielded a warranty by the insured that the proposers (there were two) were each a good life irrespective of their knowledge of the subject. Walsh J conceded that such a warranty, though it did not present on the facts of the case, was contractually possible and would have required a claimant to prove that at the time of the insurance the deceased was not suffering from anything dangerous to life (a lesser ailment that was troublesome or inconvenient not sufficing to breach such warranty).⁵⁸ Although the life assurer would likely not have succeeded even under a wide duty case such as *Joel or Chariot Inns*, McCarthy J, in his judgment, joined by the other members of the Supreme Court, applied a considerably more insured-friendly test than the ‘reasonable man’ test. Thus, McCarthy J observed:

The insurers were not informed of...material facts; was it a non-disclosure? One cannot disclose what one does not know, albeit that this puts a premium on ignorance. [It might also be contended to recognise the natural limits to good faith and/or what a reasonable man could do]. It may well be that wilful ignorance would raise significant other issues; such is not the case here. If the proposer for life insurance has answered all the questions asked to the best of his ability and truthfully [again there are shades of *Penn Mutual* in this observation, though that case is not referenced by McCarthy J], his next-of-kin are not to be damnified because of his ignorance or obtuseness which may be sometimes due to a mental block on matters affecting one’s health.⁵⁹

Carter v Boehm does not get a direct mention in the judgments in *Keating*; however, McCarthy J did cross-refer to his own judgment in *Aro Road*, where, of course, he did treat directly with Lord Mansfield’s judgment.⁶⁰ Regardless, *Keating* can be seen to be entirely consistent with two of the points of principle identified by Lord Mansfield mentioned above, *viz*: that (1) the special facts on which a contingent chance is computed lie most often in the knowledge of a prospective insured, and thus involves reliance on his not ‘keeping back’ back matters so as to mislead, and (2) good faith forbids either side to an insurance contract from ‘drawing in’ (luring) the other side into a contract through concealment of pertinent facts. There was, in *Keating*, no ‘keeping back’ or ‘drawing in’ of the type that had concerned Lord Mansfield in *Carter v Boehm*.

The Consumer Insurance Contracts Act 2019

A detailed consideration of this recently enacted measure is properly the subject of a separate article. However, the Act of 2019 is so recent and significant a development in Irish consumer/insurance law that it would be remiss not to highlight some of the principal changes that it makes as regards the duty of disclosure and otherwise. At this early stage any observations made are necessarily tentative and any ostensible issues presenting may not materialise in practice. The Act makes provision in respect of:

⁵⁷ *Keating v New Ireland Assurance plc* [1990] 2 IR 383.

⁵⁸ *ibid*, 388-89.

⁵⁹ *Keating v New Ireland Assurance plc* (n 57), 392. On McCarthy J’s approach to the interpretation of insurance contracts within the context of contractual interpretation more generally, see Wade, G., ‘A Matter of Interpretation: Constructing and Interpreting Commercial Contracts under the Common Law and the Convention on the International Sale of Goods’ (2015) 4 *Global J. Comp. L.* 1.

⁶⁰ *ibid*.

Insurable interest.⁶¹ Save for contracts of indemnity, a consumer claim under an otherwise valid insurance contract cannot be rejected for want of interest in the subject-matter.⁶² The extent of the interest required in contracts of indemnity is expressly specified.⁶³

Pre-contractual duties.⁶⁴ The principle of utmost good faith and any duty of disclosure of a consumer that applied before the commencement of the section are replaced by the duties established in s.8. Most notably, ‘The pre-contractual duty of disclosure of a consumer is confined to providing responses to questions asked by the insurer, and the consumer shall not be under any duty to volunteer any information over and above that required by such questions’.⁶⁵ What is not clear is what there is to stop an insurer effectively widening the pre-contractual duty of disclosure to the maximum extent by asking a consumer a general question such as ‘Is there any fact known to you and which has not been disclosed by virtue of the other questions asked in this proposal form which a reasonable person would consider material to our decision whether or not to insure you?’

Remedies for misrepresentation.⁶⁶ Provision is made as to the remedies for misrepresentation, depending on whether the misrepresentation is innocent, fraudulent or negligent.

Cooling-off period.⁶⁷ The Act expands the existing ‘cooling-off’ rights of consumers, establishing a general 14-day cooling-off period, which may be invoked ‘by giving notice...within 14 working days after the date when the consumer is informed that the contract is concluded’;⁶⁸ so it behoves prudent insurers not to tarry in so informing consumers.

Post-contractual duties.⁶⁹ Perhaps the most interesting aspects of the Act when it comes to post-contractual duties concern ‘alteration of risk’ clauses and ‘material change’ provisions. ‘Alteration of risk’ clauses will be void where they purport to apply in situations ‘where there is a modification only of the risk insured’.⁷⁰ The term ‘modification’ appears to bear its ordinary dictionary meaning but is sufficiently vague as to seem likely to prompt disputes. Additionally, any clause in a consumer insurance contract that refers to a ‘material change’ will be taken to refer ‘to changes that take the risk outside that which was within the reasonable contemplation of the contracting parties when the contract of insurance was concluded’.⁷¹ There would seem to be scope for considerable dispute over what was within the ‘reasonable contemplation’ of the parties.

Claims handling.⁷² Duties are imposed on consumers and insurers when it comes to claims handling. Two notable duties are that where a consumer breaches a contract by not complying

⁶¹ See s.7.

⁶² s.7(1) and (2).

⁶³ Per s.7(2), ‘[T]he interest required shall not extend beyond a factual expectation either of an economic benefit from the preservation of the subject matter, or of an economic loss on its destruction, damage or loss that would arise in the ordinary course of events’. The concept of what is the ‘ordinary course of events’ would seem to entail the potential for dispute.

⁶⁴ See s.8.

⁶⁵ s.8(2). See also in this regard the decision of the High Court in *Earls v The Financial Services Ombudsman and anor* [2015] IEHC 536, as considered by Garvey J in ‘*Earls v The Financial Services Ombudsman and Anor*’ (2015) 2 *Ir.Bus. L. Rev.* 109.

⁶⁶ See s.9.

⁶⁷ See s.11.

⁶⁸ s.11(1).

⁶⁹ See s.15.

⁷⁰ s.15(4)(b).

⁷¹ s.15(5).

⁷² See s.16.

with a specified notification period and that ‘does not prejudice that insurer’, the insurer cannot refuse liability on that ground alone.⁷³ Implicit in this provision seems to be the assumption that a breach of contract per se would not necessarily be prejudicial to an insurer, notwithstanding that it represents a breach of the bargain struck between the parties. Insurers are also under a duty to ‘pay any sums due to the consumer in respect of the claim within a reasonable time’,⁷⁴ with there being some potential perhaps for dispute over what is a ‘reasonable time’.

Proportionate remedies, etc.⁷⁵ Potentially challenging provision is made in the Act in respect of fraudulent claims. Thus, for example, s.18(2) provides that ‘A valid claim made under a policy is not affected where, under the same policy, the consumer makes a subsequent fraudulent claim or where fraudulent evidence or information is submitted or adduced in its support’. The reference to ‘its support’ arguably refers back to the ‘valid claim’; after all, a claim in which fraudulent evidence or information is submitted or adduced would seem to be inherently fraudulent making the ‘or where...support’ text ostensibly redundant if the intention is to refer to fraudulent claims. Thus, the effect of the provision, arguably, is that a valid claim is ‘not affected’ where fraudulent evidence or information is submitted or adduced in its support. As against this interpretation, such a reading would seem difficult to reconcile completely with the avoidance provisions available to insurers under ss.9(5) and 18(1) of the Act when confronted with consumer fraud or false or misleading consumer-provided information.

Third party rights.⁷⁶ Extensive provision is made as regards third-party rights to claim under an insurance contract in defined instances.

Scope and Commencement.⁷⁷ The various provisions of the Act of 2019 will come into effect on such day(s) as is (are) appointed by ministerial order.⁷⁸ At the time of writing (January 2020) no such order(s) has (have) yet been made. In general, each provision of the Act applies to all ‘life and non-life contracts of insurance entered into, and variations [of same]...agreed, between an insurer and a consumer after the commencement of the provision concerned’.⁷⁹ Various insurance-types fall outside the scope of the Act, such as reinsurance, certain insurance contracts involving SPVs, and certain non-life insurance.⁸⁰ Section 20 of the Act makes clear that in addition to the protections available under the Act of 2019, consumers can also invoke the European Union law-inspired European Communities (Unfair Terms in Consumer Contracts) Regulations 1995.⁸¹

Conclusion

In *Carter v Boehm* Lord Mansfield espoused a narrow duty of disclosure. A wider duty of disclosure enjoyed a general but not unfailing ascent in the English courts throughout the 19th century and complete ascendancy for much of the 20th century. With the recent enactment of the Consumer Insurance Contracts Act 2019, the decision in *Carter v Boehm* (as

⁷³ s.16(3).

⁷⁴ s.16(8).

⁷⁵ See s.18.

⁷⁶ ss.21 and 22.

⁷⁷ ss. 2 and 27.

⁷⁸ s.27(2).

⁷⁹ s.2(1).

⁸⁰ s.2(2).

⁸¹ European Communities (Unfair Terms in Consumer Contracts) Regulations 1995, SI 1995/27.

interpreted in later case-law) has effectively been supplanted in the realm of consumer insurance law in Ireland. Otherwise, except for the decision in *Chariot Inns*, a narrower duty appears in any event to be favoured by Ireland's Supreme Court. A narrower duty also seems more appropriate in the world of today where – unlike the world in which *Carter v Boehm*, and later related cases of the 19th and early-20th centuries, fell to be decided – means of communication have been revolutionised by the technological advances of the late-20th and early-21st centuries, such that insurers now generally have the means to acquire readily a great deal of the information that they need to know concerning a proposed policy. More generally, and a point perhaps of interest as regards judges as decision-makers, *Carter v Boehm* shows that, contrary perhaps to popular perception, the law, when it comes to adjudication, is not a matter of exact measurement, nor is it immutable. Rather, it is the subject of interpretation, with the prevailing sense as to where the truth of the law lies often varying over time, with judges falling at different times on different sides of the line that marks the prevailing view at any one time. Even the law is relative.