CV 6000

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

9/12

C.P. 681/89

BETWEEN QUINBY ENTERPRISES LIMITED (IN LIQUIDATION)

Plaintiff

[redacted]

AND THE GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPORATION PUBLIC LIMITED COMPANY

Defendant

Hearing: 24 March, 15, 20, 21, 22 September 1994

Counsel: M.A. Muir and Miss K.A. Ford
for plaintiff
M.G. Ring for defendant (on 24 March)
J.W. Turner and Miss K.A. Ford
for plaintiff
Mrs P. Courtney for defendant (on 15 September)
J.W. Turner and Miss K.A. Ford
for plaintiff
M.G. Ring and Mrs P. Courtney
for defendant (on 20, 21, 22 September)

Judgment: November 1994

28 NOV 1994

JUDGMENT OF BARKER J

Solicitors: Buddle Findlay, Auckland, for plaintiff
McElroys, Auckland, for defendant

INTRODUCTION:

This is a claim by a company in liquidation against an insurer under a policy of fire insurance. The proceeding had originally been the subject of an order under R.418 made by a Master with the consent of the parties. In an oral judgment delivered on 24 March 1994, I indicated that the R.418 procedure was inappropriate in this case; on that date, I heard the evidence of a plaintiff's witness a Mr Black; he had travelled from Wellington for the R.418 hearing and was in poor health. I had perforce to embark on the substantive hearing and after hearing this evidence, I adjourned the case for a further fixture. For various reasons, a further hearing could not be scheduled before 20 September 1994.

On 15 September 1994, I heard the evidence of a defence witness about to travel overseas. The hearing proper commenced on 20 September 1994, but, even then, certain witnesses were heard out of order by consent of all counsel because of the witnesses' other commitments. The order in which the witnesses were called was unsatisfactory; particularly since four witnesses were heard before the principal witness for the plaintiff, Mr King, gave his lengthy evidence. However, despite these difficulties, I have formed a clear view on the facts. I now outline the essential facts, resolving where necessary any conflicts.

INTRODUCTORY FACTS:

The principal actor in this drama is Mr Grant Norman King. He and his former wife were the initial equal shareholders in the plaintiff, Quinby Enterprises Limited ('Quinby') a company incorporated on 10 April 1986 with a share capital of $1,000. In 1983, Mr King operated several businesses at the Victoria Park Market and a photography business in Ponsonby. Prior to forming Quinby, he had sold these businesses with the exception of a jewellery shop at the Victoria Market under the name "Fragments". This shop continued to sell low-cost jewellery and stained-glass items; some of the merchandise was assembled by Mr King himself with the balance being purchased from sole traders who bought the jewellery directly from overseas manufacturers.

Mr King decided that the marketing of low-cost jewellery had a great potential, particularly if he conducted overseas buying expeditions himself. He considered that the jewellery would sell at a high mark-up, not only at the Victoria Park Market but also to other retailers. For this reason, he decided to form Quinby which from mid-1986 operated the "Fragments" jewellery shop.

Aided by a loan from DFC New Zealand Limited, Quinby's business expanded. In May 1987, new leased premises were established in Mt Eden, including a display room, a stock room and offices all for the selling of low-cost

jewellery. Other funds for the expansion - mainly from investors as will be described later - were used to purchase stock. Some $411,350 was received from various investors.

According to Mr King, Quinby paid $391,740 for the purchase of stock in the year ending 31 March 1988 and a further $115,675 in the period 1 April to 1 November 1988. Quinby had cash flow difficulties during this period and a number of its cheques were dishonoured. Mr King claimed that he spent so much time making and marketing jewellery that he paid insufficient attention to administration. He expected that substantial sales over the Christmas/New Year of 1988/89 would improve Quinby's financial position.

Quinby was insured with the NZI Insurance for a period commencing from 16 July 1987. This insurance had been arranged through a broker, Wayne Wilkinson Insurance Limited. The insurance included cover for plant and contents "all risks" for $25,000 and for stock at $510,000. This insurance cover was renewed by the insurer. Mr King claims he did not know of this renewal at the time when the renewal notice was sent to Quinby by the broker.

By 25 September 1988, Mr King and his de-facto wife, a Ms Katherine Denz, now owned the shares in Quinby; the shares of Mr King's former wife had been transferred to

Ms Denz. They attended the Jewellers' and Watchmakers' annual trade fair at the Epsom Showgrounds. There they established a stall to promote Quinby's various ranges. Also at the fair was a stall staffed by a Mr Allan Black, a representative of Alexander Stenhouse Limited ('Stenhouse'), insurance brokers. This firm promoted through the Jewellers' Mutual Security Society Limited, "a jewellers business package insurance policy", the current underwriter for which was the defendant, General Accident Fire & Life Assurance Corporation Public Limited Company ('General').

Mr Black went around the stalls at the trade fair distributing brochures advertising the insurance. Mr King discussed with him the possibility of Quinby's becoming insured under this special arrangement. Mr Black supplied an indicative quotation for a total annual premium of $2159. Quinby was about to move from Mt Eden to bigger and better leased premises in Henderson, specially adapted for its use and into which it was to move on 20 October 1988.

Mr King advised Mr Black that he wished to take out cover over stock-in-trade $350,000, plant, fixtures and fittings $50,000 and cash on premises $5,000. Mr Black advised Mr King by letter on 17 October 1988 of the formal quotations which were subject to a security survey to be undertaken by Mr Miller, the insurer's risk assessment manager. After further discussions between

Messrs Black and King, cover took effect from 20 October 1988. Mr Miller then conducted his inspection and required improvements to be made; these were put in hand but not completed before the fire to which I later refer. Until the improvements were completed, the policy excess was agreed to be $5,000 instead of the usual $100.

Mr Black had required Mr King to fill out a questionnaire on a form provided by the brokers. The form of questionnaire had been used by Stenhouse for some two years previously. It had been "inherited" by the defendant from the previous insurer of the scheme. This form did not enquire about criminal convictions, nor did it contain any warning statement about the obligation of the insured to disclose matters affecting the risk to the insurer. I prefer Mr Black's evidence that the form was filled in at the trade fair, rather than Mr King's to the contrary, though a finding on this point is not material.

Mr Black acknowledged that at no stage did he ask Mr King about any previous convictions. He acknowledged that Stenhouse had pioneered schemes covering a particular industry. He considered that Quinby had been his client and had relied upon his expertise. He noted that the insurer would normally rely on the broker to elicit relevant indemnity information from the insured. He had worked with the defendant for 23 years before joining Stenhouse and opined that the defendant trusted his judgment.

The form asked specific questions about past claims history, the nature and value of assets and the security of premises. There were no questions relating to financial matters only questions as to the value of assets sought to be covered. There was a section of the form relating to "fidelity" which related to cover for theft by employees - cover Quinby did not seek. Mr King put "N/A" to these questions. Unlike as in some of the reported cases, there was no general question inviting the disclosure of material facts nor any declaration that the insured had not "withheld any information likely to affect acceptance of the proposal".

The questionnaire ended with a declaration: "I have read the above and agree that to the best of my knowledge and belief it represents a true and complete statement".

In the early hours of 1 November 1988, Quinby's premises at Henderson suffered major fire damage. Stock, fittings and fixtures were destroyed. Most of the stock was completely melted; none could be salvaged or sold. A boat and a motor vehicle stored on the premises and belonging to Mr King were damaged by the fire. The boat was uninsured; a damage claim for the vehicle was met by another insurer. Fire investigators concluded that the probable cause of the fire was the overheating of a Kambrook multiple outlet electrical junction box.

Loss adjusters were instructed by the defendant; their representative was a Mr Turkington. In addition, a Mr Rod Sutton an employee of a firm of private investigators and a former police officer - was instructed to investigate the claim on behalf of the defendant. In a series of lengthy interviews, Mr Sutton obtained a written statement from Mr King which will be discussed in some detail. Mr King had subsequent discussions with a staff solicitor employed by the defendant's solicitors, a Mr Peter Leman.

The defendant declined Quinby's claim on 8 December 1988 for the principal but not exclusive reasons: (a) Mr King failed to disclose previous convictions when taking out the insurance; and (b) he lied to Mr Sutton about non-insurance before the fire. Mr King and his solicitors quickly sent letters of protest to the defendant's solicitors.

Quinby continued to trade at Victoria Park Market; it had no funds with which to replace the stock to meet Christmas retail orders. Consequently, the wholesale side of the business closed down. The revenue generated at the Market shop was insufficient to pay its debts with the result that, on 7 February 1990, Quinby was wound up by order of the Court. Mr King had personally guaranteed the DFC loan. He was unable to pay the guarantee and was adjudicated bankrupt on 10 October 1991.

The present proceedings, issued in March 1989, have been continued by the Official Assignee as liquidator - presumably with funding obtained from the creditors. An application for security for costs by the defendant was made but not pursued.

After extensive evidence as to quantum had been prepared, counsel were able to agree that, should liability against the defendant be established, the amount of the quantum should be $300,000.

DEFENCES:

There is no dispute that the policy in question was taken out by the plaintiff with the defendant and that, apart from the defences raised, the policy would otherwise be in full force and effect. The defences are -

First, material non-disclosure on the part of Mr King when taking out the insurance of the following matters -

(a) Mr King's four convictions for receiving stolen motor vehicles in 1982 for which he was sentenced to 6 months' imprisonment;
(b) Quinby's shortage of funds and a downturn in sales from June 1988;
(c) Quinby's alleged default if payments to investors and liability to make payment by November 1988 of $450,000;

(d) As of 20 October 1988, Quinby owed $25,000 to trade creditors;

(e) Quinby had failed to declare certain sums to the Inland Revenue Department;

(f) Mr King had committed offences under Ss.246 and 250 of the Crimes Act 1961 and/or S.59 of the Securities Act 1978 by placing advertisements in newspapers offering securities to the public not accompanied by a registered prospectus; in particular, receiving money for one purpose and misappropriating it to another purpose.

The plaintiff by way of response denies that it was under any duty of disclosure; it asserts that, in any event, the defendant insurer waived or is estopped from asserting its right to require disclosure of all or any of these matters. It further alleges that, by not advising the plaintiff of the responsibility of disclosure and of other matters, the defendant was guilty of "false and misleading conduct" under S.9 of the Fair Trading Act 1986.

Secondly, the defendant claims that Mr King made false statements to its investigator Mr Sutton concerning previous insurance and about the financial involvement of a Mr Simonetta with Quinby.

Each of these matters requires some factual findings which I now proceed to give. In areas of conflict, I

have not favoured the evidence of Mr King whom I did not consider a satisfactory witness. I found many of his explanations totally unconvincing, particularly those concerning his attempts to attract money from the public. On occasions he gave contradictory accounts. For example, his description of the injection of money into Quinby by Mr Simonetta; he told Mr Sutton and Mr Leman that it was a return to him on capital invested; in his evidence he said it was a loan.

MR KING'S PREVIOUS CONVICTIONS:

In June 1982, Mr King was self employed as a panelbeater and carpainter in Otahuhu. He claims that he was asked to re-spray two Volkswagen cars prepared for painting by two brothers, alleged members of a gang who subsequently brought to him other vehicles to paint. On one of these, Mr King noted that the engine and chassis numbers had been ground off. He was told by his customers that the four vehicles on which he had worked were "hot". He went to the Police and was charged with receiving stolen property.

On 11 November 1982, in the District Court at Otahuhu, Mr King was convicted after a defended hearing on two of the charges; he then changed his plea in respect of the other two. He was later sentenced to 6 months' imprisonment. He was represented at the time by a solicitor, Mr Gedye, although he later was to tell Mr Leman that he had not

had a solicitor. He claims he was advised that an appeal would take six months and would be unlikely to succeed. In the event, Mr King did not appeal and served his sentence.

I have only Mr King's word concerning the alleged lack of seriousness in this offending. As indicated, I did not find him an impressive witness. Although the offending took place before the enactment of the Criminal Justice Act 1985, it seems clear that the District Court Judge must have taken a reasonably serious view of the charges - otherwise he would not have sent a first offender to prison for receiving. Although there may well have been difficulties associated with obtaining a record of the proceedings from the Otahuhu District Court so long ago, I should have been happier to have read a transcript of the Judge's sentencing remarks or heard from the solicitor who appeared for Mr King. However, on the limited material available, I can only infer that, despite Mr King's presentation of almost technical offending of little criminality, the offending was reasonably serious because of the grave penalty imposed on a first offender.

ALLEGED DISHONESTY OF MR KING:

On being questioned in cross-examination about the matters which I now discuss, Mr King was warned by me that he was not obliged to answer any questions if to do

so would incriminate but that, if he wished to decline to answer for this reason, he should say so. Mr King availed himself of this right on a number of occasions. In 1987, Mr King considered that Quinby required working capital for building up its trading stock. On a visit to the offices of the ill-fated Landbase Securities Limited ('Landbase') (see (1989) 3 BCR 296), he obtained a form of "Investment Authority" calculated to attract money from the public for placement in a contributory mortgage scheme. He inserted advertisements in newspapers seeking investments and inviting investors to write for a brochure.

He prepared a brochure which he referred to in an accompanying letter as a "prospectus", entitled "Quinby Enterprises Limited - High Interest Investments". This document referred to Quinby's "Property Investment Division". The brochure offered: (a) a contributory mortgage scheme whereby investors would combine funds to enable registered mortgages to be secured over specific properties within approved lending limits; and (b) "general financing" where investors' advances would be secured by a registered debenture over Quinby which was said to be involved in financing motor vehicles, boats, bridging finance and import/export financing. Borrowers from Quinby were required to provide security.

Accompanying the "prospectus" was a letter signed by Mr King advising current interest rates which were "reviewed

at a board meeting each Friday". The rates in the letter produced as a sample ranged from 29.5% for 12 months to 25.5% for 36 months.

Four persons who received the "prospectus" then invested a total of $25,000 on the basis of the Landbase derived form. The effect of the form was that the investors thought that their money was being sent for investment by Quinby in contributory mortgages; in fact, it found its way into Quinby's bank account. The form advised investors that pending a mortgage advance the money would be held on deposit on the investor's behalf with any bank or institution approved for the investment of trust moneys.

I have seen and heard Mr King in evidence and have studied the documents relating to the "investment" by members of the public. I am mindful that this is a civil case and that serious allegations of a criminal nature have to be proved to a high standard. Nevertheless, I have no reasonable doubt that the scheme by which Mr King attempted to raise money from the public to support Quinby's ventures was dishonest; it possibly contravened several sections of the Crimes Act and also the Securities Act.

I found his explanation that he was "out of his depth and naive" totally unconvincing. He claimed he had operated without legal advice. I find this statement hardly

surprising since no lawyer could possibly countenance this sort of activity.

The result is that some unsuspecting investors are now lamenting because they took advantage of Mr King's offer of a high interest return on their investment. His activity, unlike Landbase's, did not include any attempt to find mortgage investments or loans to be made to others on proper security.

In November 1987, Mr King was visited by two officials of the Justice Department, Commercial Affairs Division. Neither of these gentlemen was called as a witness, as one might have expected. In the list of agreed documents, was a memorandum recording their visit and their instruction to Mr King to cease the advertisements and to repay the moneys to the investors.

Mr King claimed after the visit that he ceased the advertisements; he did continue to receive money for Quinby but without reference to a prospectus or contributory mortgages. The majority of these investors had answered the original advertisements and had offered to advance further moneys to Quinby. The total sum allegedly advanced from investors to Quinby - including $270,000 allegedly from Mr Simonetta - between October 1987 and August 1988 was $411,350.

The memorandum made by the Justice Department officials states that prosecution was not envisaged because of the "small scale" of the activities. They advised Mr King that no action would be taken provided he refunded all money to investors and ceased advertising for funds. Nevertheless, I fail to understand why the matter was not reported to the Police. It is hard to find other than criminal behaviour at the expense of gullible members of the public - doubtless persons attracted by a high interest-rate offered.

Mr King admitted in evidence that he did not repay the investors who had invested as a result of his advertisements; he claimed that various investors had agreed that their money should no longer be held for contributory mortgage purposes but should stay on as an investment in Quinby. I find this explanation unconvincing; there was no evidence called from any of these investors to support what Mr King had said. Mr King disputed the record made by the officials to the effect that he agreed to repay the money. I do not accept his evidence on that point.

Even if investors did agree to leave the money in Quinby - clearly their chances of early repayment were slight - that fact does not excuse the initial acts of dishonesty in issuing a false "prospectus" and receiving money for one purpose and using it for another.

QUINBY'S FINANCES:

Quinby's total proved debts at the time of its liquidation, some 15 months after the fire, amounted to almost $750,000. Included in the proofs filed with the Official Assignee was one from a Mr Joseph Simonetta, a United States citizen claiming a loan to Quinby for some $400,000.

According to Mr King, he first met Mr Simonetta in November 1987 when the latter was visiting Auckland. Mr Simonetta had recently sold a restaurant in California at a considerable profit and was looking for an appropriate investment. After talking to Mr King and inspecting Quinby's premises, he offered to lend Quinby $310,000 unsecured at an interest rate of 30%.

This is not what Mr King told Mr Sutton after the fire. On that occasion, he said, that in 1985, Mr Simonetta had asked Mr King if he were interested in investing in a restaurant. At that stage, Mr King had received $115,000 in cash allegedly from the sale of his businesses at the Victoria Park Market; he told Mr Sutton that he had invested $55,000 in Mr Simonetta's restaurant. Mr King said he had drawn up an agreement which was burnt in the fire. It had not been prepared through a solicitor because he did not want the Inland Revenue to know his cash situation. In November 1987, as Mr King told Mr Sutton, $270,000 paid into Quinby's

bank account had been the result of Mr Simonetta's returning to him a share of the profits on the sale of the restaurant in the United States.

Mr King claims that the written statement was extracted by Mr Sutton under conditions of oppression and that is the reason for any inconsistencies. However, on 2 December 1988, Mr King in a discussion with Mr Leman embellished the story about Mr Simonetta. Mr King agreed in cross-examination that Mr Leman had gone through the statement paragraph by paragraph. Mr King suggested to Mr Leman that exchange-rate fluctuation provided a reason for the large profit. In a fax to the defendant's Christchurch office, sent some days after the statement had been signed, Mr King did not challenge the accuracy of Mr Sutton's statement; nor did he attempt to do so in a fax sent to the defendant's solicitors on 8 December 1988; nor was any challenge to the statement made in a letter from Quinby's solicitors to the defendant's solicitors on 20 December 1988.

Mr King had also told a bank manager, according to bank diary notes produced by consent, that he had put $300,000 of his own money into stock. In cross-examination, Mr King did not accept the bank manager's recollection.

The first indication that the initial story about Mr Simonetta as recorded above was not correct was when the brief of evidence was produced to the defendant's

solicitors on 12 September 1994; various documents were then produced from the Official Assignee's office including a proof of debt lodged by Mr Simonetta. These documents suggest a loan by Mr Simonetta to Quinby at 30%, due for payment by Quinby on 11 November 1988. Mr King stated in evidence, somewhat limply, that he believed that this loan would be "rolled over".

Stripped of unnecessary detail, the fact is that at the time the insurance cover with the defendant was taken out, Quinby's liabilities far exceeded its assets. Mr King acknowledged in evidence that Quinby's only real asset was its stock and fittings; and that the moneys owing to the investors (including Mr Simonetta) of over $400,000 could not be paid immediately; this must be so when one considers that interest at around 30% was owing on most of these investments. However, Mr King was confident that if the fire had not occurred, Quinby would have traded out of its difficulties. He emphasised that there was a 100% markup on most of the jewellery items. Nevertheless, I think this confidence was misplaced.

Quinby's and Mr King's tax liabilities at relevant times are unclear. If the transaction with Simonetta had happened as told to Mr Sutton by Mr King, then there could be an income tax liability; Mr King's (or Quinby's) alleged share of the proceeds would be premium or interest received in return for the $55,000 invested.

Tax liability would not normally accrue from the sale of a capital asset such as a business.

However, any uncertainty about the tax liability by Quinby or Mr King is of insignificant pejorative effect compared to Mr King's attempts to obtain money from the public.

MR KING'S STATEMENT TO MR SUTTON:

Mr Sutton had resigned from the Police force after 30 years' service in the United Kingdom and in New Zealand. For some of that time, he had been employed in the Drug Squad. Mr King and Ms Denz both claimed that Mr Sutton was overbearing and aggressive in his questioning of them. He was said to have been insensitive and unsympathetic to Mr King, who claimed to be in a state of nervous shock and exhaustion and emotional lability because of the loss of Quinby's business. Mr King said he had suffered a stroke in 1986; he was suffering from high blood pressure at the time of the interview and claimed he could neither sleep nor eat.

Both he and Ms Denz claim that Mr Sutton questioned them both relentlessly and at length - at times reducing Mr King to tears; Mr Sutton refused to believe the story about Mr Simonetta and claimed that Quinby's large injections of money were derived from "drug money". No medical evidence of Mr King's condition was adduced.

Mr Sutton acknowledged that his experience in the Drug Squad inclined him to suspect that large injections of money just do not happen to companies like Quinby; he thought there might have been some drug money involved. Mr Sutton asked Mr King about his previous convictions and was told about the receiving convictions. Mr King claimed that Mr Sutton already knew about these convictions because he was said by Mr King to have had a Wanganui computer printout. I do not accept Mr King's assertion in this regard.

Mr Sutton struck me as a quiet but persistent operator with considerable experience in the art of interrogation. He could be unbending. I thought that his style was anything but flamboyant. I have no doubt that he was persistent.

Mr King claimed that Mr Sutton would not allow him to change the statement once Mr Sutton had prepared it from notes taken at interview. Mr Sutton insisted that he had transcribed a true statement of what he had been told by Mr King; he had had many years' experience in preparing written statements of suspects. This was his first assignment for the security firm; no doubt he was eager to impress his new employer.

I find that Mr Sutton's Police training led him to treat Mr King as if he were a suspect; in fairness to Mr Sutton, one must note that he would have started off with

a natural suspicion about this claim, coming as it did so shortly after the property had been insured and made by a person with previous convictions for dishonesty which had not been revealed to the insurer. Moreover, the arrival of large sums of money into the insured's bank account advanced without security and accompanied by a somewhat implausible explanation, would have fuelled any ex-policeman's suspicions. I find that Mr Sutton recorded accurately the principal matters as told to him by Mr King.

Mr King claimed that, after Mr Sutton had refused to alter the statement, Mr Sutton insisted that Mr King take the statement to a Deputy Registrar of the High Court for swearing. Mr King did duly swear to the truth of the statement before a Deputy Registrar of this Court, even though he said in evidence that the statement was partly untrue and even though Ms Denz warned him not to sign it. He claimed that he nevertheless did so, under duress, thinking that, if he did sign the statement, his claim would be paid promptly.

I find as a fact that Mr Sutton had no authority to promise, and did not promise, that Quinby's claim would be paid if the statement were signed. Mr Sutton struck me as a cautious individual who would easily have recognised that he was merely an investigator and that any decision as to liability would have to have come from the insurer. I find that although he did endeavour

accurately to record what Mr King had told him, he may not have been very susceptible to alterations by Mr King.

Likewise, I do not find that Mr Turkington, the fire adjustor, made any sort of promise. He was a very experienced adjustor. One imagines that a loss adjustor would not continue to receive many instructions if he or she were to seek to bind the insurer in the circumstances suggested by Mr King.

The other aspect of the statement, apart from the Simonetta and tax portions and a number of matters of no great substance, is the suggestion that Mr King lied to Mr Sutton about the reasons why Quinby did not have insurance between 16 July 1988 when the NZI cover ran out and 16 October 1988 when the insurance under consideration was taken out. He told Mr Sutton that he did not renew because he was dissatisfied with NZI. He had told another fire investigator that he had forgotten to renew the NZI cover because of his then domestic situation; he had later admitted this latter statement was untrue but that he thought that if he told Mr Black he was currently uninsured, such a statement would have prejudiced his chances of gaining cover under the jewellers' association policy.

Mr King stated that, shortly after he signed the statement with Mr Sutton, he discovered for the first time that Wayne Wilkinson had renewed the NZI policy.

Mr King claimed that Mr Sutton had "got it wrong" when he recorded Mr King's reason why he did not renew the insurance was that he was upset because of marital problems. I do not regard this matter of particular importance; it merely demonstrates the unsatisfactory and shifting nature of Mr King's evidence.

After the statement was taken by Mr Sutton, Mr King sent a fax to the defendant in Christchurch. Whilst taking issue with some of the less important points in the statement, significantly, he did not seek to change the evidence concerning Mr Simonetta's alleged involvement with Quinby; nor, as previously stated, did he do so subsequently when interviewed by Mr Leman.

Mr King told Mr Leman that he did not notice the expiry date on the NZI cover and that he did not renew the NZI cover because, in May 1988, after he and his wife had parted, he went to live in Quinby's premises. He admitted to Mr Leman that he had told Mr Sutton he did not realise that cover had expired because he thought he would have more credibility if the insurer knew there was a period of non-insurance shortly before he had taken cover.

I generally prefer the evidence of Mr Sutton and find that he correctly recorded in the statement the substance of what Mr King told him. I reject Mr King's suggestions that the statement was not made voluntarily.

In the crucial point about the Simonetta money, I note that Mr King did not correct this aspect of the statement in his fax to the defendant, nor in his interview with Mr Leman at which the statement was fully traversed.

INSURANCE EVIDENCE:

The plaintiff called a Mr Cressey, a broker and currently regional manager for Wilkinson Insurance Brokers Limited (formerly Wayne Wilkinson). This witness considered that, in October 1988, the insurance market was "soft" and that insurers were underwriting a wide variety of risks at relatively low premiums. The market had hardened since then and some risks acceptable then would now be uninsurable. Mr Cressey considered that it would have been possible in late 1988 for a competent insurance broker to have obtained cover for Quinby, even if Mr King's convictions had been disclosed on the questionnaire and that Mr King's explanation of the convictions would have been accepted.

Mr Cressey's evidence was given before Mr King's cross-examination; it therefore suffers from Mr Cressey being unaware of the larger extent of Mr King's dishonesty. It was implicit in Mr Cressey's evidence that the convictions should have been disclosed to the insurer even if their relevance was not relied upon greatly in fixing the premium or accepting or declining cover.

I was more impressed with the evidence of Mr Bell, senior risks manager for the Sun Alliance Insurance. He has had many years experience as an underwriter. Mr Bell displayed a conservative view over the relevance of previous convictions. He explained the underwriter's dilemma in these terms. An underwriter has to consider both the physical and the moral risks. Concerns about the physical risk can be satisfied by inspection of the premises (as was done here); the moral risk is equally important. An insured in financial difficulties will often see a fire, the cause of which cannot be proved, as a way of recouping capital. Obviously, fires which take place shortly after cover is arranged not surprisingly generate considerable suspicion.

When insuring a small private company such as Quinby, the record of the directors and shareholders is important. An insurer has regard to previous convictions, particularly ones for dishonesty. It has regard to the age of the convictions, and most importantly, to the sentence imposed as being a reflection of the way in which the Court regarded the seriousness of the crime. Here, where imprisonment was imposed, there was a clear suggestion that the crime was regarded as serious. In Mr Bell's view, a prudent underwriter would have had regard to the conviction, the hopeless financial situation of Quinby and the fact of Mr King's dishonesty. In Mr Bell's view, there would be no question but that cover would have been declined for Quinby.

Mr Kennedy, the underwriter for the defendant, spoke of how the defendant had inherited this jewellers' scheme, promoted by Stenhouse from another insurer. Stenhouse's forms were used. He placed greater emphasis than did Mr Bell on the role of the broker. All of the industry witnesses indicated that it was unethical for the insurer to approach an insured direct; they relied completely on the broker to ascertain matters relating to the insured. They claimed that brokers should know the right questions to ask.

Mr Bell was of the view that it was impractical to expect an insurer to identify to an insured all the facts which might be material to the particular risk. To do so would force underwriters to embark on extensive enquiries without any knowledge as to where the relevant areas could lie and might force insureds to respond to extensive questioning in personal areas which did not yield any material facts.

Mr Scholes, the New Zealand Claims Manager for Cigna Insurance, highlighted the problems faced by the insurance industry through fraudulent claims. He indicated that the job of the specialist investigator, such as Mr Sutton, would be to investigate the circumstances of the loss thoroughly and obtain background information on the insured. In Mr Scholes' view, any insurer would become suspicious of a substantial fire claim where the insured has only

recently obtained cover; he indicated the perfectly understandable insurer's reaction that once an insured has been caught out in a lie there is a cloud of unreliability over the insured's whole claim.

THE DEFENCE OF NON DISCLOSURE OF MATERIAL MATTERS:

Counsel's submissions were extremely comprehensive and the number of authorities provided can only be described as plethoric. As a general comment, one can see Courts striving to move away from the hard line handed down from an earlier age which stressed the obligations of the insured and generally favoured insurers. There is now a growing underlying realisation by the Courts that, in the modern marketplace, insurers have duties as well as insureds. Particularly, is there some sympathy for an insured where, as here, there were no suspicious circumstances attending the loss and the insurer relies on lack of information provided by the insured when the contract was formed as the ground for avoiding liability.

The more liberal line is encapsulated in the judgment of Kirby P in **Barclay Holdings (Aust.) Pty Ltd v British National Insurance Co Ltd & Anor** (1987), 8 NSWLR 514, 518, 519 in these two quotations -

(a) "...in modern circumstances, insurers have many other sources of data upon which decisions are typically made whether to accept or deny insurance and, if accepting it, at what premium and upon what conditions. They may ask (as the insurer here could have done) specific questions, false answers to

which would deprive the insured of indemnity. As modern writings on insurance practice today disclose, insurers also have access to up to date and computerised records of claims experience. Decisions to accept or reject insurance frequently depend nowadays as much upon statistical data as upon the previous claims experience of the proponent for insurance; see discussion in **Australian Law Reform Commission: Insurance Contracts** (ALRC 20) 1982 at 9218."

(b) "There is no suggestion of any physical or moral hazard in the fire, the non-disclosure of which is complained about. Therefore the consequence would be that, although the insured could quite readily have protected itself by a question in its proposal form, differently framed, and although no complaint is made of the answers given by the insured. the insured is left to carry the burden of a very substantial loss for no reason better than because of its failure to volunteer to the insurer the previous associated fire claim and the subsequent decision "for administrative purposes" not to renew insurance. In this respect, the insured's position is not atypical. In the real world of insurance cover, it is more appropriate to require insurers, who control such matters, to pay more attention to the language of their proposal forms than to extend the scope of the obligation of insureds to volunteer the whole history of their insurance-related past, lest some item in it might play a part, however, minor, in the decision-making process of an insurance officer, however, junior."

Despite differences in emphasis, the following applicable principles still appear valid.

1. Given that a fact is within the knowledge, actual or presumed, of the assured, such a fact must be disclosed if the prudent insurer would regard it as material in deciding whether to grant cover. See **State Insurance v McHale** [1992] 2 NZLR 399, 409.

2. Materiality being a question of fact, the reasonableness or otherwise of what is claimed to be

material will be a relevant consideration in determining whether it is. Ibid 409.

3. The duty of disclosure exists independently of any that may be spelt out in the policy documents. This is a positive duty so that it is no answer to an allegation of non-disclosure in a proposal that there was no question specifically directed to the particular point. Ibid 409.

4. A fact is material if it would have influenced the mind of a prudent insurer in determining whether to accept the insurance and, if so, on what terms. Ibid 411.

5. The prudent insurer test cannot be abandoned without legislation. Ibid 411.

6. Whilst the Court of Appeal in **McHale's** case left open the question whether the disclosure of material facts would be such as to effect the formation of the opinion of the prudent insurer rather than the decision of the prudent insurer, the question has been authoritatively determined by the House of Lords (by a three to two majority) in **Pan Atlantic Insurance v Pine Top Co** [1994] 3 All ER 581.

7. The test of materiality for both marine and non-marine insurance is whether the relevant information

would have had an effect on the mind of a prudent insurer in weighing up the risk. The test is not whether, had the relevant information been fully and accurately disclosed, it would have had a decisive effect on the prudent underwriter's decision whether to accept the risk, and if so, at what premium: **Pan Atlantic** (supra).

The relevant principles have been helpfully summarised in an earlier decision of the Court of Appeal in **Misirlakis v New Zealand Insurance Co Ltd** (1985), 3 ANZ Insurance Cases 78,893, 78,896 -

> "As in the case of other moral hazard, the absence of specific questions as to previous convictions, the answers to which would be treated as material to the particular risk by a prudent insurer, does not relieve an insured from the obligation to disclose matters clearly material to that aspect of the proposed risk. And it is well settled that notwithstanding the questions asked in the proposal the common law duty of disclosure remains and the proposer must disclose material facts which are not covered by the questions (**Hardy Ivamy, General Principles of Insurance Law**, 4th ed. at p.178).
>
> Whether criminal convictions are material to the particular risk can only be determined in the light of all the circumstances existing at the time the proposal is completed or the insurance is otherwise proposed for. That must include in the case of the convictions themselves the nature of the offending, the penalty, the age and circumstances of the person concerned at the time, and the time which has elapsed since the offending, and those matters must be assessed against all other relevant risk factors. Whether or not, if looked at in isolation, a prudent insurer would have regarded Mr Misirlakis' four year old convictions for dishonesty as material to a decision to accept the risk assumed under the fire cover - and like Ongley J and reflecting his reservations we prefer to express no final view as to that - we are satisfied that he was well entitled to conclude that given the significance to a prudent insurer of the appellants' insurance history with

> the State, the non-disclosure of Mr Misirlakis' criminal convictions was a material non-disclosure."

Uncertainty and possible injustice may be caused by the current state of the law in New Zealand as enunciated. Legislation along the lines of the Australian Commonwealth legislation on the point was commended by Richardson and Hardie Boys JJ at the conclusion of their joint judgment in **McHale's** case; no action has been taken by the New Zealand legislature. Therefore one must accept that, despite its potential harshness, the law in New Zealand on the insured's duty of disclosure is generally as stated above.

Questions put by an insurer in a proposal may either enlarge or limit the duty of disclosure. Whether there has been a limitation is a matter of construction of the proposal: "the test being whether a reasonable person reading the form would be justified in thinking that the insurer had restricted its right to receive all material information". See **State Insurance Limited v Fry** (1991), 6 ANZ Insurance Cases 77-237, 77-238.

Whether an insurance broker is the agent of the insured or the insurer must be determined by reference to S.10 of the Insurance Law Reform Act 1977 ('the Act') which provides -

"Salesman, etc to be agents of insurer -

(1) A representative of the insurer who acts for the insurer during the negotiation of any contract of insurance, and so acts within the scope of his actual or apparent authority, shall be deemed, as between the insured and the insurer and at all times during the negotiations until the contract comes into being, to be the agent of the insurer.

(2) An insurer shall be deemed to have notice of all matters material to a contract of insurance known to a representative of the insurer concerned in the negotiation of the contract before the proposal of the insured is accepted by the insurer.

(3) In this section the term "representative of the insurer" includes any servant or employee of the insurer and any person entitled to receive from the insurer commission or other valuable consideration in consideration for such person's arranging, negotiating, soliciting, or procuring the contract of insurance between a person other than himself and such insurer."

WAIVER BY INSURER:

I turn first to the question as to whether the insurer has, either through the form of its proposals or the action of Stenhouse lost its right to rely on the general principles of non-disclosure as a basis for avoiding liability.

Counsel for the plaintiff submitted that the form of the questionnaire had the effect of limiting Quinby's obligation of disclosure for the following reasons -

(a) The declaration was intended to form the basis of the contract;

(b) It asked specific questions concerning the insured's past claims history, the value and nature of its assets and security of its premise;

(c) It did not ask any questions concerning criminal convictions or financial position;

(d) The only questions relating to honesty concerned the optional extra of fidelity insurance for employees which cover Quinby did not wish to take;

(e) It did not include any general question inviting disclosure of any other material facts;

(f) The declaration stated "I have read the above and agree that to the best of my knowledge and belief it represents a true and complete statement". Such declaration is more specific than those which were considered in those cases which required the insured to go beyond the questions in the proposal form and confirm subjectively that the insured had not withheld any information likely to affect acceptance of the proposal;

(g) Neither Mr Black nor the defendant's risk assessment manager advised Quinby of any possible matter of materiality which should have been disclosed;

(h) Mr King stated he would have disclosed everything about his convictions had he been asked by Mr Black.

I have considered the authorities on this question; notably, four cases involving the State Insurance - **McFarlane v The State Insurance General Office Manager** (1988), 5 ANZ Ins Cas 75-651, **State Insurance General Manager v Hanham** (1991), 3 NZBLC 99-191, **State Insurance General Manager v Peake** [1991] 2 NZLR 287 and **State Insurance Limited v Fry** (Supra).

In each case, the questionnaire specifically asked applicants for insurance whether they had any convictions or demerit points for motor vehicle offences within the previous 10 years. They were also asked about any further information likely to affect the acceptance of the insurance.

In **McFarlane**, Eichelbaum J (as he then was) found as a fact that the insured had regarded the existence of his prior convictions as a factor likely to accept the proposal. The insured's argument that he had answered the questions truthfully failed. The learned Judge made at 75-663 a general comment reminiscent of that of Kirby P quoted earlier -

> "I have little doubt that insurers deliberately refrain from asking about a proponent's general criminal record for marketing reasons. This notwithstanding, when it suits they maintain such a record should have been disclosed. There is a lot

to be said for the view that insurers should not be able to have it both ways."

In **Hanham**, the insured had 20 prior criminal convictions, including 9 for theft, none of which related to motor vehicles. Holland J considered that the insured was relieved of the duty to disclose these convictions by the form of the proposal because it specifically related to traffic convictions within the last 10 years. The learned Judge was fortified in this conclusion by the subjective nature of the wording in the general question and the declaration that the insured was required only to disclose material facts which he believed would affect the acceptance of the insurance. If the insurer had wished to retain the objective test as to materiality, it could have deleted the words "to the best of my knowledge and belief" in the declaration and altered the wording of the general question.

In **Peake**, the insurer omitted to disclose convictions for forgery, breach of probation and receiving. Chilwell J held that the insurer was not entitled to avoid the insurance policy by reason of non-disclosure and that the insured's duty of non-disclosure had been limited by the wording of the insurance proposal. He found that case indistinguishable from **Hanham's** case.

The judgment of Henry J on appeal from the District Court in **Fry's** case is to similar effect. Henry J said at 77-420 -

> "The requirement in the written contractual document of a subjectively assessed disclosure must displace the more onerous duty which would otherwise be implied under the general law. Were that not so, the wider duty would include the narrower which is then itself superfluous. The two cannot sensibly stand together as separate obligations contained in the same contractual sitting."

I cannot find that the proposal in this case relieved Mr King of the common law duty of an insured to reveal relevant matters. In each of the State Insurance cases, the specific question related only to traffic convictions over a defined period. Each of the Judges considering the questionnaire had no difficulty in finding that by restricting the information sought to a certain kind of conviction over a named period, the insurer had waived the general requirement of the insured to disclose other material convictions.

Here there is no statement requiring the insured to state other material facts. I cannot read the general certification of correctness that the questions answered represented "a true and complete statement to the best of my knowledge" as meaning anything other than "my answers to the questions you chose to ask were correct to the best of my knowledge and belief". Some of the questions related to matters which might be within the proponent's belief. Mr King did not answer questions relating to fidelity cover which Quinby did not seek. It was not for the insurer to approach the insured direct since the evidence was that it was industry practice for the insured to deal with a broker only.

I accept the following summary by Eichelbaum J in **McFarlane** (supra) at 75-663 as applying to the present case. The quotation comes shortly before the extract from the judgment cited earlier -

> "I have a reservation as to the extent one can accept the assurances now readily given that the summary proffered by the plaintiff, and its repetition to the insurer, accurately represented the same picture that would be obtained from a view of the list of convictions in total and accurate form. In relation to a number of the insurances there is also the factor that when they were placed the most recent conviction was four or five years old.
>
> In a different context I have already commented on the nature, quantity and continuity of the convictions, and of the light they reflect on the outlook and character of the plaintiff. While none involved dishonesty, or (on an individual basis) was really serious, I consider that they should fairly be described as indicating irresponsibility repugnant to ordinary social or business standards of integrity. Further, although not related directly to the risks insured under the policy, as at 25 September 1979 I consider that their nature and proximity in time should fairly be taken as indicating to a reasonable prudent insurer that there was a likelihood of continuing irresponsibility on the part of the assured. Or, as is put in Tarr, **Insurance Law in New Zealand** (1985) they were referable to the integrity of the insured; the moral hazard, as it was described in **Woolcott v Sun Alliance & London Insurance Ltd** (1978) 1 All ER 1253 at p. 1257. As at 1979 the convictions were indicative of a persistent and continuing course of conduct and I just cannot perceive that if those convictions had been put fully before an insurer at that time he would not have regarded them as material, and as Mr Fulford said either declined the risk or materially altered the terms on which he would otherwise have accepted it."
>
> . . .
>
> "By way of final counter to this defence, Mr Reed submitted that the insurer's attitude in declining the claim for non-disclosure of general criminal convictions was in breach of the duty of good faith imposed upon both parties to an insurance contract.

> The essence of the argument was that the insurer, knowing that general criminal convictions were capable of being considered material, but that few proponents disclosed such convictions unless information was requested in a particular way, failed to draw these matters to the proponent's attention by means of a specific question, or by other means to direct his attention to the consequence that non-disclosure could mean the rejection of an otherwise valid claim. It was submitted that in effect the insurer had set a trap. No authority was cited in support of this novel argument, which I reject. If the insurer sets a trap by ambiguous questions, then the defence will fail. Otherwise, if in accordance with established principles the insurer discharges the onus of proving that there has been non-disclosure of a material matter, the insurer is entitled to avoid the policy."

For the similar reasons, I cannot hold there has been estoppel by the plaintiff by virtue of the form by which the defendant chose to make known the information it required. Estoppel is harder to prove than waiver. There is no justification for holding that the conduct of the defendant encouraged an expectation or assumption on the part of Quinby.

ROLE OF STENHOUSE:

I now consider the role of Stenhouse, through Mr Black, in procuring the contract of insurance between the plaintiff and the defendant. He stated in evidence that he was acting for Quinby although he knew that the insurer was relying on the information he provided from the insured. There is no pleading that the defendant is liable because of the conduct of the broker as its agent. Nor was there any claim that Stenhouse breached its duty

to Quinby as Quinby's agent. Such a claim is now statute-barred but it might have been one which could seriously have been pursued, given the circumstances as I have described them.

Counsel for Quinby submitted that Stenhouse was "a representative of the insurer" within the meaning of S.10(3) of the Act; he relied on the decision of Hillyer J in **Helicopter Equipment Limited v The Marine Insurance Company Limited** (1986), 4 ANZ Ins Cases 74-365. In that case, as in the present, there was an agreement between the insurer and the broker that the broker would deduct 10% from the premium paid by the insured and pay the balance to the insurer. Hillyer J held that the broker had received valuable consideration from the insurer and was the insurer's agent.

Counsel for the defendant relied on **Hing v Security & General Insurance Co (NZ) Limited** (1986) 4 ANZ Ins Cases 74,143, 74,149; Sinclair J held that the common law had been settled for many years; that an independent insurance broker was the agent of the insured and not of the insurer; that S.10(3) did not cover such persons when acting for the insured in arranging the insurance. This subsection was rather intended to cover salesmen and the like.

In **Gaunt v Goldstar Insurance Co Limited** (1992) 7 ANZ Ins Cases 77,393, 77,395, the Court of Appeal held that the

broker is a representative of the insurer for the purpose of knowledge or notice but not for any other purpose. The general purpose of S.10(2) is directed to disclosure by an insured to a representative of the insurer who may not be an agent of the insurer where the insurer is seeking to decline liability on the grounds of non-disclosure. In that case, the Court held there was no evidence of unconscionable conduct on behalf of the insurer; S.10(2) could not be applied so as to convert that conduct into unconscionable conduct or give rise to the application of the defence of estoppel. On this authority, it is difficult to hold that Stenhouse was the agent of the insurer when Mr Black did not inform Mr King of an insured's duty of disclosure of relevant matters such as the convictions.

FAIR TRADING ACT CLAIM:

I now turn to the next claim that the plaintiff is entitled to rely on S.9 of the Fair Trading Act 1986 and that the insurer was acting in a manner which was misleading or deceptive by giving Quinby the impression that all it had to do to satisfy the defendant's requirements was to answer the questions set out in the questionnaire.

In **Fanhaven Pty Ltd v Bain Dawes Northern Pty Ltd** (1982) 2 ANZ Ins Cases 77-714, the majority of the New South Wales Court of Appeal held that a broker had no duty to warn

the insured to disclose all material facts; although the scope of a broker's duty must be ascertained by reference to particular facts the answer might have been different had the broker had some notice of a questionable matter which might have imposed a special duty in the circumstances. There was no claim in that case under the Australian equivalent of the Fair Trading Act.

S.9 requires an objective test. See **Goldsboro v Walker** [1993] 1 NZLR 394, 397. The conduct sought to be impugned does not have to amount to a misrepresentation or that the person engaged in the conduct does not have to intend to mislead. See **Prudential Building & Investment Society of Canterbury v Prudential Assurance Co (NZ) Limited** [1988] 2 NZLR 653, 648.

Relying on **Money v Westpac Banking Corporation** [1988] ATPR (Digest) 46-034, counsel for the plaintiff submitted it could be misleading or deceptive for one party to fail to advise the other as to matters of law or even as to the extent of that party's liability under the contract.

In **Money's** case, a borrower wished to borrow from the bank a nominated amount of money and was asked to sign a mortgage securing that amount. The mortgage in fact provided security for an unlimited amount. The plaintiff claimed that he had signed the mortgage on the understanding that the advances would not exceed the nominated amount. The Federal Court held that the bank

had failed to draw the borrower's attention to the unlimited nature of the security and that omission amounted to misleading and deceptive conduct. It was irrelevant that the applicant could have read the mortgage; entitlement to relief does not depend on whether the applicant has taken reasonable care to look after his own interests.

This case is readily distinguishable. The borrower made known to the bank the amount for which he was prepared to give security. The bank substituted the amount for something different.

It was submitted that the insurer by requiring only certain questions to be answered gave the impression that it only required information from the plaintiff on those topics. Counsel relied on a decision of Judge Inglis Q.C. in the District Court in **King v NZ Insurance Co Ltd**, (1993) DCR 31. In that case, an insurer sought to avoid liability on the grounds that an insured had failed to disclose past criminal convictions. The Judge analysed the proposal and noted that the questionnaire which the insured was required to sign was the means by which the insurer had chosen to make known to the insured what information was required and that the insurer had waived the insured's duty to disclose various convictions by virtue of specific questions posed in that form.

I cannot accept this decision as basis for finding liability under the Fair Trading Act for the reasons given below.

S.9 of the Fair Trading Act is based on S.52 of the Australian Trade Practices Act 1974. It is interesting that the Commonwealth Government later enacted S.22 of the Insurance Contracts Act 1985 which requires an insurer "clearly to inform the insured in writing of the general nature and effect of the duty of disclosure". As indicated by the Court of Appeal in **McHale's** case, such a provision should now be in New Zealand law but it is not. One should not have thought it necessary for the Commonwealth Legislature to have enacted that provision had the Fair Trading Act equivalent covered this situation.

In **Gate v Sun Alliance Insurance Limited** (an unreported decision of Fisher J, C.P.1218/92, Auckland, 20 December 1993) on which counsel for the defendant place much reliance, the Judge noted that S.50 of the Fair Trading Act provides that the Act will not limit or affect the operation of any other statute; the Marine Insurance Act 1908 sets out the extent of the duty of disclosure for marine insurance contracts. The House of Lords in the **Pine Hill** case (supra) pointed out that the Marine Insurance Act was declaratory of the common law which applied equally to non-marine insurance contracts. If the Fair Trading Act were to reverse the common law duty

of disclosure for non-marine insurance, then there would be an anomalous difference in obligations between marine and non-marine insurance.

Fisher J, whilst acknowledging that omissions can constitute misleading conduct in terms of S.22 of the Act, held that an insurer does not breach the Fair Trading Act by negotiating an insurance contract without first warning the insured of the insured's legal obligations in general and a disclosure obligation in particular.

For the same reasons as appealed to Fisher J, I am unable to hold that the Fair Trading Act provides a cause of action to Quinby.

NON-DISCLOSURE EFFECT:

I now consider the various allegations of non-disclosure to see whether they would have affected the mind of the prudent insurer to enter into the contract on the particular terms. The Court of Appeal in **Misirlakis** in the passage cited showed that, whether criminal convictions are material to a particular risk can only be determined in the light of all the circumstances existing at the time of the proposal. The circumstances include the nature of the offending, the penalty, the age and the situation of a person at the time and other risk factors.

I consider that the convictions six years previously for receiving when imprisonment was given to a first offender would have influenced the prudent and reasonable insurer particularly when these convictions arose in the course of conducting a business. It may be that an insurer's misgivings would have been allayed by Mr King's explanation that his criminality had been minor; however, the prudent insurer would have wanted to check Mr King's rather dismissive approach to the gravity of the convictions against the severity of the penalty; particularly so where the insurer was asked to assume a risk for a large amount of stock of a sort which could easily be annihilated by fire.

Numerous cases were cited by counsel where convictions were considered as being necessary to be disclosed to an insurer. It is not helpful to recount all of those. In **Reynolds and Anderson v Phoenix Assurance Co Limited** (1978) 2 Lloyd's Rep 440, Forbes J made a distinction between a professional receiver and someone who may once have failed to ask the origin of goods offered to him.

Counsel for the plaintiff relied on **Alliance Insurance Co of Philadelphia v Laurentian Colonies & Hotels Limited & Ors** [1953] ILR 445. In that case, the insured's principal shareholder and general manager had been sentenced to 5 years for living off the proceeds of prostitution some 15 years prior to the insurance being taken out. The appellate Court of the Province of

Quebec held that this conviction was not material because it did not increase the risk of a fire loss; although the crime was one of gross moral turpitude, the general manager's conduct in the interim appeared to have been exemplary.

I regard the dishonest conduct for which Mr King was not charged as more serious offending than the receiving and potentially of greater materiality to the potential insurer. Mr King embarked on a campaign to deceive members of the public. My concern is that Mr King's perception of the seriousness of this conduct was blunted by the failure by the Justice Department officials to take any action against him for what seem to have been clear breaches of several enactments. Moreover, they indicated to him that if he ceased advertising and paid back the investors, nothing would happen to him. There is no doubt that Mr King solicited money from the public on the pretext that it was to go into a contributory mortgage scheme when it went into Quinby's account.

In **Gate's** case, Fisher J considered that, in principle, incidents of prior dishonesty are capable of being material; more importantly, single acts of dishonesty which might have been in themselves insignificant may in the aggregate become material. A prior act of dishonesty does not need to have resulted in a conviction.

Fisher J came to this view after considering **Misirlakis** (supra), **March Cabaret Club & Casino Ltd v London Assurance** [1975] 1 Lloyd's Rep 169 and **Reynolds v Phoenix Insurance Co Ltd** [1978] 2 Lloyd's Rep 440, 460.

May J said in the **March Cabaret** case at 177 -

> "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."

The point was made by Mr Bell in evidence that undetected dishonesty can be more material than a conviction because it can indicate that an insured is too clever to be caught and therefore is more likely successfully to defraud an insurer.

For the reasons indicated earlier in this judgment there were several acts of dishonesty by Mr King surrounding his efforts to raise money from the public.

On the subject of Quinby's financial circumstances, it is not usual for an insured's finances to be disclosed to an insurer when fire cover is sought - it may be different for "loss of profits" cover. Nevertheless, in the particular facts of this case, along with the dishonesty and the previous convictions, cumulatively, mean there

should have been disclosure to the insurer of Quinby's precarious financial position.

Quinby had suffered a downturn in sales; cheques had been dishonoured; there was no way in which capital to the unfortunate "investors" could be repaid; although some interest payments were being made, it was hard to see how the borrowings of such large amounts at such high rates of interest could continue to be serviced.

The bald facts are that, allowing Mr Simonetta to be a creditor and rejecting the unlikely story given to the investigator and the defendant's solicitor, Quinby had at the date of the fire roughly $700,000 worth of liabilities against $400,000 worth of assets. The liabilities were increasing rapidly because the borrowings from Mr Simonetta and the private investors were at high rates of interest. As against that, Mr King had hoped to sell the stock at 100% mark-up in the forthcoming holiday season.

In **Gibbs v NZI Insurance Company Ltd** (A.172/80, judgment 6 December 1983, Auckland) Chilwell J considered that a plaintiff's financial circumstance could be a material fact and therefore information which ought to have been disclosed.

Counsel for Quinby relied upon the case from Quebec where the insured was held at the time of taking out the

insurance to have been "operating on the proverbial shoe string". The appellate Court in Quebec considered that the insured's financial condition did not affect the risk insured. Hyde J at 470 said -

> "Every business venture has its financial aspect and the fact that all applicants for insurance on commercial property are not required to submit financial statements implies that the insured is not interested in obtaining such information unless the financial position of the applicant for insurance is such that the likelihood of a fire is increased. That surely is the only testament of materiality."

I agree with that statement in general. If Quinby's poor financial situation had been the only matter undisclosed, possibly it need not have been disclosed. However, its setting along with Mr King's previous convictions and his dishonesty would have made it relevant to an insurer asked to insure a business of this particular sort.

In the whole of the circumstances, I find there was also a duty on the insured to indicate to the proposed insurer the general financial condition of Quinby, including the following particular matters: (a) that it had borrowed money from the public under dubious circumstances (putting the matter at best for Quinby); (b) it had a very large unsecured debt to Mr Simonetta, the servicing of which was difficult, if not impossible, at an interest rate of 30%. Such information would have affected the judgment of the prudent insurer who, whilst not necessarily declining the cover, would have required this

information before making a decision to provide cover at the quoted premium or something higher.

I do not regard as material matters for disclosure the alleged income tax matters and that cheques were "bounced" by Quinby's bankers.

MISSTATEMENTS AFTER FIRE:

With regard to the claims that, in the course of the post-fire investigations Mr King told untruths, I do not regard as material any untruths regarding previous insurance. This was not a particularly material matter to the insurer.

Likewise, the incredible story relating to Mr Simonetta which Mr King told Mr Sutton and Mr Leman. Even if one were to hold that shortly after the fire Mr King was overwrought, in bad health and upset by what he saw as the overbearing tactics of Mr Sutton, that could not excuse his statement to similar effect when seeing Mr Leman; the latter's evidence was put in by consent; there was no suggestion that Mr Leman used any overbearing tactics or acted other than as a dutiful recorder of what he and Mr King had discussed.

The evidence suggests that the loss was caused by an electrical fault and therefore these untrue statements, even if false did not have much bearing on the loss.

However, I find that there was a duty on Mr King to have disclosed both his previous convictions for receiving and the perilous financial condition of Quinby, including its debts - some of which were incurred by dishonest conduct. I therefore consider that the defence of non-disclosure has succeeded. The defendant is entitled to judgment and costs.

Since the defendant did not ask for security for costs, I imagine that it probably will not have much chance of being paid any award. However, counsel are at liberty to file a memorandum.

R D Barker J.