



UNLOCK
The National Association
of Reformed Offenders

UNLOCKing Insurance

Report for the Law Commission

Insurance Contract Law Reform

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Insurance and Reformed Offenders

There are 7.3 million people on the Home Office's Offender Index¹, around 99% of whom are in the community.² Equal to one quarter of the working population, these parents, grandparents, children, employees and employers constitute a significant part of UK life.

Since 2000, UNLOCK has developed access to insurance for people with unspent convictions via a handful of specialist brokers and underwriters. UNLOCK also distributes leaflets explaining the value of insurance and the need to disclose unspent convictions. Because of this work, not only do we help individuals secure insurance through the specialist brokers, but we are also made aware of the various problems that consumers face both when trying to obtain insurance through the general market and either at renewal or at claim stage.

The Law Commission have consulted with the FOS and have reviewed around 200 ombudsman final decisions, as a way of understanding the problems caused by non-disclosure and misrepresentation, and the way that the FOS handled these issues in practice. It is the intention of this report to supplement the cases supplied by the FOS with case studies that UNLOCK have compiled with the consent of the individuals involved to evidence the problems with the current disclosure requirements for people with previous convictions. This will hopefully inform the Law Commissions proposals at a policy level, whilst also giving the opportunity to assess such reforms practically against the examples in this report.

¹ Home Office RDS, *Offender Index*, www.homeoffice.gov.uk/rds/offenderindex1.html

² Ministry of Justice, *Adult Prison Population Friday April 18th 2008*, 82,105.

The Current Law

The current law imposes heavy duties on those applying for insurance.

Under the contract law duty of *uberrima fides* (utmost good faith) the onus is, at present, on the proposer or policyholder to disclose material facts *‘that would have an effect on the mind of the prudent insurer in assessing the risk’*, even if they would not necessarily *‘have a decisive effect on the insurers acceptance of the risk or on the amount of premium charged’*.³ The duty of good faith was first codified by statute in Section 17 of the Marine Insurance Act 1906, which states that *“a contract of marine insurance is based upon the utmost good faith, and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party”*.⁴ The quote from the MIA is widely-accepted as an accurate statement of the common law position on good faith, and therefore this duty applies to all insurance contracts. This applies even if the misrepresentation was made honestly and without any lack of care.

The Rehabilitation of Offenders Act 1974 (ROA) aims to prevent a person being penalised indefinitely following a conviction if the sentence is below a term of 30 months of imprisonment. It sets time periods for sentences below this threshold during which the conviction must be declared to relevant parties, such as employers and insurers (at which time is known as an *unspent* conviction). Once this period is over, the conviction is regarded as *spent*. As the ROA relates to insurance, *“the broad effect of the Act...is to relieve any proposer for insurance of the obligation to disclose a conviction or even the fact that he had committed the crime.”*⁵ The ROA therefore limits *uberrima fides* because after the specified time the offence does not need to be declared.

Under English insurance law, the duty of good faith has two basic elements;

- (a) a duty to refrain from making material misstatements
- (b) a duty to disclose all known material facts

It has therefore been established that an applicant for insurance is obliged to disclose all facts that would have an effect on the mind of a prudent insurer when assessing risk.⁶ If the assured fails to make such disclosure, the insurer may avoid the contract,⁷ if the insurer can show that, if it had been given the information, it would not have agreed to the policy on the same terms, or not at all.

It is submitted that consumers are generally unaware of the requirements of a prudent insurer. Despite acting reasonably and honestly, it is therefore possible that a consumer can fail to satisfy the duty of disclosure. The fact that there is also no obligation on an insurer to ask questions, even about matters which have been generally found to be material,⁸ creates further problems.

³ *Pan Atlantic Insurance Co Ltd v. Pine Top Insurance Co Ltd* [1995] AC 501

⁴ Section 17 of the Marine Insurance Act 1906,

⁵ *Reynolds & Anderson v. Phoenix Assurance Co. Ltd & Others* [1978] 2 Lloyd's Rep. 440

⁶ *Pan Atlantic Insurance Co Ltd v. Pine Top Insurance Co Ltd* [1995] AC 501

⁷ Section 18(1) of the Marine Insurance Act 1906,

⁸ *Lambert v Co-operative Insurance* [1975] 2 Lloyd's Rep. 485

It is a common issue that is raised by people who contact UNLOCK. There is a fundamental lack of knowledge on the ground that unspent criminal convictions are regarded as material when obtaining insurance. It is often debated on the UNLOCK Forum (an online community for people with previous convictions) why a rather distant and completely trivial minor conviction is relevant when trying to obtain home insurance.

One UNLOCK member who called us for advice said *“why on earth is a conviction for assault relevant to my home insurance.”*

Another UNLOCK member said *“my wife, who was clocked speeding, was told it won't affect her premium. So who's more likely, in an underwriters eyes, to cause a crash, the person who has a conviction for driving a car too fast or the person who has a conviction for thumping someone without a car anywhere in sight?”*

Although this argument applies more so to the factors that insurers consider when deciding whether to offer cover, it also applies to the issue of disclosure.

What should be disclosed?

Section 18(2) of the MIA codifies the common law and states that *“every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk.”* Using the test for ‘materiality’ that MacKenna J set forth in *Lambert v. Cooperative Insurance Society Ltd.*,⁹ it is clear that the insured must disclose that which is material, whether or not he considers (reasonably or unreasonably) that fact to be material. In the Lambert case, the court held that the non-disclosure of certain previous criminal convictions was a ‘material’ fact.

*Pan Atlantic*¹⁰ established that it is not sufficient simply to show that a prudent insurer would have been affected by full and accurate disclosure. It is also necessary to establish that the actual insurer was induced to accept the risk on the agreed terms as a result of the misrepresentation or non-disclosure.

However, it is not clear that all insurers even accept that the ROA limits *uberrima fides*.

How will they react if a conviction is spent but is still perceived as relevant to the proposed risk? Of course, insurers should not have access to information about spent convictions, but UNLOCK has evidence that some loss adjusters are asking claimants to make ‘subject access requests’ under the Data Protection Act 1998 to obtain all information held on them by the police. Since these files contain details of all convictions (whether spent or unspent) as well as cautions and reprimands, this is unfair, and a flagrant abuse of the SAR system.

In some cases, insurers have collected over 20 years of premiums before refusing to pay a claim. The reality is that there may be millions of households in the UK with policies that could be avoided in the result of a claim due to non-disclosure.

⁹ 2 Lloyd’s Rep 486 (1975)

¹⁰ *Pan Atlantic Insurance Co Ltd v. Pine Top Insurance Co Ltd* [1995] AC 501

Home Insurance

Securing home insurance is one of the main problems faced by people with previous convictions. Although the decision surrounding whether or not to insure somebody is a purely commercial decision taken by the insurer, there are relevant issues faced by people with previous convictions surrounding the issue of disclosure.

Non-disclosure due to not being asked specific questions at inception

The following case studies highlight the problems that UNLOCK members have faced when obtaining home insurance when they have not been asked specifically upon inception of the need to disclose unspent criminal convictions

Case Study 1

One UNLOCK member had had her Insurance policy for 2 years. When she took out the cover, her daughter had a conviction, but she was never explicitly asked at the point of inception about criminal convictions.

“My washing machine leaked due to a faulty rubber hose whilst we were away on a weekend holiday and it ruined a new laminate wooden floor we had laid 5 months previous. I rang my Insurers (Prudential) and reported the mishap. I was asked six or seven questions and then came the one that took my breath away; do you or anyone in your household have a criminal record? I was very taken aback and replied that my husband and I certainly did not. They again insisted on asking if anyone had a criminal record, whereby I was honest and gave as many details as possible. Over the space of the next week I was contacted 4 times and asked many more questions resulting in a final conversation where there stated “We are cancelling your policy because the onus was on you to inform us of changes to your situation.””

Case Study 2

In this case, the UNLOCK member was not asked specifically about unspent convictions. Furthermore, she was never asked at the point of inception, only at the point of claim.

“This month, the fence blew down in the gales and [my partner] phoned the insurance company (Royal Sun Alliance) to ask if this was covered as it was going to cost £200 to renew. They asked her a few questions, one of which included a question of “any family member having convictions”. She of course answered yes (as we have never covered them up) and the insurance company said that an underwriter would contact her the next day. This they did and told her that both her house and motor policies would be cancelled, car in 7 days and home in 14 days”

Case Study 3

One UNLOCK member contacted us with a problem she was having with Direct Line. When she initially called them, she was looking to get re-insured after being refused a claim with a different company because of her husband’s conviction. Knowing the future potential

problems, she called Direct Line and explained the situation. The person she spoke to said that *“it’s not a problem”*. This was in February 2003. When she then received documents relating to a reviewed premium in January 2006, she noticed that the box had been ticked stating that she had previously been refused insurance, but there was no acknowledgement of a criminal conviction. She called them to notify them, and it was suggested that she could not possibly have told them of the conviction. She was informed that, upon renewal, their business would not be considered desirable.

She complained to Direct Line. Their response was: *“On balance, it seems likely that you disclosed your husband’s conviction I would acknowledge that it is unlikely that would have disclosed the cancellation of your previous policy without our representative querying the reason for that cancellation. Given that you had also had an earlier claim, with your previous insurer, repudiated for failing to disclose your husbands conviction, it would seem reasonable to assume that you would have disclosed that conviction to us. Given this, and the fact that your policy has been on risk for three full years, with no claims having been made, I would suggest that our usual assumption that customers with your husbands criminal conviction represent an unacceptable risk, would appear to be somewhat redundant. In view of this, and the fact that it is now ten years since your husband served his sentence, although strictly speaking that sentence is never spent. I would suggest that our previous stance, in refusing to offer renewal of your policy, was a little draconian.”*

In this case, there was a positive outcome for the customer. They recognised the fact that they had failed to record her disclosure of a previous conviction. This is probably due to the fact that in her initial contact she was told that *“it’s not a problem”*.

Case Study 4

One UNLOCK member recently contacted us after they had made a claim through their insurance. They stated to us that *“I have only recently been aware of problems ex-offenders experience because, until I tried to make a claim under an existing contents policy, I did not even know that convictions had to be disclosed. Needless to say, once the Insurance Company found out that I had been convicted of theft in September 2005 they refused to pay my claim and have now cancelled my policy.”*

They stated that, when they took out the policy, they were never asked about their convictions.

Non-disclosure through specific policy guidance

It is apparent that insurers often provide some guidance towards the information that they require. In the example below, an UNLOCK member obtained insurance through the **LV** (Liverpool Victoria) website.

Case Study

In this example, the UNLOCK member went on the LV website.

“I tried some more insurance companies before coming upon the Liverpool and Victoria company. Anyone can get insurance with them so long as you haven't had a non-motoring conviction within the last 5 years. At first I was sceptical but contacted them anyway. They confirmed the 5 year rule and I now have Home Contents Insurance.”

However, UNLOCK followed this up and had a conversation with LV. They stated that, depending on the nature of the conviction, they may also want to know about convictions that fall outside of this period.

This situation is rather concerning because, under the current position, the insurer is still protected by the duty of consumers to disclose all material facts. Although the practice of the FOS would probably protect the consumer in this instance, it is obviously not good practice for insurers to rely on the principle of utmost good faith to avoid a policy through non-disclosure.

Non-disclosure during the policy

At paragraph 4.151 of the Consultation Paper, it is stated that *“in the UK, most non-life policies are renewable annually. For these policies, such a duty with concomitant rights of adjustment is not needed: on renewal, the insured will normally be asked what has changed since last year.”* Furthermore, at paragraph 12.18 (2) of the Consultation Paper, it is stated that *“there should be no general obligation to inform the insurer of changes that become known to the insured only after the policy has been agreed. (4.152).”*

What impact would this on people who obtain criminal convictions during the period of their insurance cover? Would they be required to disclose such convictions if they have been asked about them expressly at the point of taking out the policy? It is often a problem that faces people who obtain their first conviction. In one instance, an UNLOCK member said *“I've just got a conviction. I only got my home insured 6 months ago and now I don't know whether I should tell them or not. I answered no when I got the insurance, so surely I must tell them. I rang up and asked blindly and was told if I had a conviction they couldn't cover me. What should I do?”* Although they were advised to try obtaining insurance through the UNLOCK Panel, if it were codified that there is no obligation to notify an insurer of changes during the policy, then this would afford consumers with the opportunity to arrange their affairs prior to renewal.

At paragraph C.32 of the Consultation Paper, it is stated that *“surprisingly, there were four cases in the sample where the insurers attempted to argue that a policyholder had an ongoing duty to inform them about changes to their circumstances during the course of the policy. Two were travel policies; two were motor policies.”*

Furthermore, at paragraph C.33 of the Consultation Paper, it is stated that *“ombudsmen were not sympathetic to this argument, and in all four cases they overturned the insurer's decision. In Case 57, for example, the travel insurer argued that the policyholder should have notified them of changes to her health. The ombudsman found there was no on-going duty of disclosure. In addition to requiring the claim to be paid, he awarded the complainant £500 for distress and inconvenience caused by the delay in payment.”*

It is submitted that a number of people with previous convictions make their insurers aware once they have obtained their conviction. This is often through fear that, if they make a claim, it will not be paid out. It would be useful if guidance were included in the reforms which explicitly stated the requirements of an individual if they were to obtain a criminal conviction during an insurance policy.

Is there an obligation on insurers to notify their insurers during a policy if they have obtained a conviction since inception? If no, this must be codified and made clear to all parties involved.

Non-disclosure at renewal

Often, criminal convictions are obtained for the first time during the course of an annual insurance policy. This raises questions as to whether the consumer is under an obligation to disclose these convictions, or whether they wait until renewal. This predicament is highlighted below by the case of an UNLOCK member:

“We have buildings and contents insurance that we had before the conviction and have continued to pay it thinking we would be covered. Am I right in thinking that we probably aren’t, even though no-one asked us at renewal about convictions?”

At paragraph C.31 of the Consultation Paper, it is stated that *“the FOS is prepared to hold that a non-disclosure in response to a renewal notice may be sufficient to avoid a policy, but ombudsmen tended not to be sympathetic to wide requirements to disclose anything an insurer may think material. In five out of the six cases, the insurer’s decision was overturned. In case 102, for example, the ombudsman found that the complainants had behaved recklessly in not reading the notice on page 2 of the renewal form and therefore failing to mention their son’s criminal conviction. However, given the circumstances of the conviction and the complainants’ excellent claims record, the ombudsman was not convinced that the insurer had been influenced in their decision (as required under stage 2 of the procedure).”*

One UNLOCK member, whose husband got a conviction for assault 4 years ago, stated *“I currently have a home insurance policy that is about 8 years old and which is automatically renewed each year. Not an excuse I know but I’ve never read the small print of the policy documents and didn’t know about disclosing criminal convictions; the thought never even entered my head as to needing to tell them about this and have only just recently found this out. Now I know I have to tell them I want to, but don’t want to be left without a policy (as its a term of our mortgage we have one) and also not wanting to be punished for the rest of our lives for telling insurance companies about it and then it never being taken off their records, even when it becomes spent.*

Disclosure of spent convictions

Although, for the purposes of insurance, only unspent convictions are regarded as material, spent convictions are invariably disclosed, either through implication of being refused cover in the past, or through inaccurate wording of questions requesting such information.

Below is an example of the problems that arise through being refused cover in the first instance because of an unspent conviction. Once the convictions becomes spent, reasons must be given for why the cover was refused initially, which inevitably leads to the disclosure of the now spent conviction

Case Study 1

"I wondered if you could give me some advice. My daughter has a criminal record. It was for perverting the course of justice - she reported her boyfriend for rape and it was a false allegation. She received a 1 year referral order with the youth offending service including 24 hours community service. It will be spent in Jan 09. We have had trouble getting insurance this renewal for house and buildings. When the conviction is spent do we have to declare it? The only other thing is it normally asks if you have been refused insurance and if you say yes you will have to explain."

"Thanks for your reply. I have used your list and obtained insurance, but at a much greater cost. Next year when we renew her conviction will be spent, so I will not have to declare this from what you are saying, but I will have to state insurance has been refused before and if they ask the reason why what do I have to say?"

Case Study 2

"I am concerned not only about getting home insurance in the first place but then about what happens in the future, even after the conviction has become spent. If you apply for insurance after the conviction is spent then you do not have to tell the insurer but it will already be on some insurance company records (if you did disclose it and were lucky enough to get insurance) and they all tell you they share information etc. What is to say the insurance companies cannot use this information in 10 or 20 years time to suddenly increase your premiums or refuse you insurance? Whereas, if you never told them and then lawfully applied for insurance after the conviction becomes spent, they would never know, and this wouldn't be illegal. Is there any law, perhaps under the Information Act or the Rehabilitation Act or something, where you can make insurance companies delete information of disclosed convictions once they become spent?"

Case Study 3

The case study below highlights how, because of the vagueness surrounding the legal position that consumers face when disclosing information, and coupled with the vulnerability that people with previous convictions often suffer from, individuals often declare all convictions, even if they are spent.

"I was scared that they might come back if I claim and not pay out, so I made sure that I told them about all of my convictions, even a minor 4 month sentence from 24 years ago".

This reinforces the argument that it must be made clear, within any proposed reforms, that spent criminal convictions are explicitly mentioned as being information that does not need to be disclosed. Only this amount of protection would empower consumers with the confidence they need to obtain suitable insurance.

Disclosure of previous charges

When obtaining insurance, the question asked in relation to criminal convictions usually also asks for information about any criminal charges or pending prosecutions. Disclosure of this, in our experience, has led to the refusal of cover. However, what happens when the person next applies for insurance and has to answer the question "have you ever been refused insurance?" This will ultimately lead to the inadvertent disclosure of a previous charge that was never convicted. Once in possession of this information, an insurer would then be able to take this information into account.

Case Study

"Then regardless of if I am proven guilty or not it will be immaterial because I will "have been refused insurance" which means I will pretty much have to declare as such. So even if I am proved innocent! In the future I would I assume be asked "why I was refused" which would mean I would have to declare I was charged and then they would refuse me wouldn't they? What do I do?"

Motor Insurance

In contrast to the approach taken towards home insurance for people with previous convictions, the approach of motor insurance providers seems to be varied in so much as the information that they require to be disclosed.

It is often the case that motor insurance providers do not ask for any information about non-motoring convictions. One UNLOCK member stated; *“well in relation to motor insurance, since being convicted (non motoring offence), and released I remained with the same insurance company. When I renewed, and filled in the form, there was only one question about any offences and that was 'motoring offences' so I have not found any difficulty in getting car insurance.”*

Furthermore, although such guidance is given over the telephone, there is a reluctance to substantiate this with written confirmation. One UNLOCK member told us that *“I asked them [for written confirmation] and they said they couldn't send me anything but the transcript of the call and that would cost £10 and take several weeks. I took the full name of the lady I spoke to and she assured me the call was recorded and logged and I could refer back to it but I'm not happy.”*

The above approach is commonplace. This problem is substantiated by the consumer opinion that criminal convictions are not relevant to motor insurance. One UNLOCK member stated *“My wife, who was clocked speeding, was told it won't affect her premium. So who's more likely, in an underwriter's eyes, to cause a crash, the person who has a conviction for driving a car too fast or the person who has a conviction for thumping someone without a car anywhere in sight?”* Although this begins to question what an underwriter should take account of when making a decision whether to insure or not, it also serves to reinforce the argument that, unless specific questions are asked, there should be no duty to volunteer such information. If a circumstance is classed as material by an insurer, it should be explicitly requested.

Specific Motor Insurers

Direct Line Insurance

UNLOCK have recently obtained written confirmation from Direct Line stating *“further to our recent telephone conversation, I write to confirm that we do not require any information regarding non-motoring convictions when obtaining motor insurance. We do, however, require disclosure of any motoring convictions received within the last five years”.*

This was followed up by a telephone call to their Customer Services Department on the 18th November 2008. The response was that *“I have looked at the underwriting guidelines and you are not obliged to disclose any non-motoring previous convictions [to obtain motor insurance]”.*

An UNLOCK member has also posted on the UNLOCK Forum that *“I have been insured with direct line for over ten years but upon my release three years ago I telephoned direct line to inform them about my conviction. As with the others on the forum I was told that they were*

not interested in details of my conviction unless it related to a motoring offence. I have queried this with direct line on number of occasions, the last time being when I took out breakdown cover and was asked about convictions. My question is do you think I should declare this material fact each time I renew my insurance with them and is it necessary to have something in writing between us to acknowledge that I have declared my conviction."

This appears to clearly clarify the obligations on customers when disclosing criminal convictions.

Churchill Insurance

UNLOCK have also recently obtained written confirmation from Churchill that *"for Car Insurance purposes, we only need to be informed of motoring convictions which have occurred within the last 5 years. We do not need to be informed of any non-motoring criminal convictions."* Edward Worf, Customer Service Assistant, Business Support

This is also substantiated by an UNLOCK member, who stated *"Car Insurance - I'm now with Churchill - they were fine about non-motoring convictions, didn't even want to know when the conviction was let alone what etc. I did double check with them and made a careful note of the person's name I spoke to and the date and time, before accepting their word - they are in insurance! - about the policy being OK."*

This, on the face of it, appears to accord with the approach of Direct Line.

However, I subsequently received a follow-up email from The Royal Bank of Scotland group, of which both Direct Line and Churchill are a part. The initial email states that;

"1. In general, when dealing with private car customers the only occasion where we would ask for any non-motoring unspent criminal convictions is where we have been asked to cover a convicted inmate of an open prison, (as they're allowed out on day release and may have their own car). In certain instances we are able to offer a motor insurance quotation.

2. In general when dealing with these customers only, we do not impose a blanket exclusion towards unspent criminal convictions and are legally entitled to ask specific questions which may affect the overall risk. Whilst the client is not obliged to answer, failure to do so could however place us in a position where we are unable to proceed with a motor insurance quotation.

3. In general when dealing with these customers only, any unspent criminal convictions received such as, but not restricted to, fraud, dishonesty, damage to property, as well as convictions such as but not restricted to, perverting the course of justice, aiding and abetting etc, will be declined a motor insurance quotation by The Royal Bank of Scotland group.

We ask all other private car customers 'have you or anyone who will drive the vehicle had any motoring convictions or bans within the last five years'. This question is relative to all drivers of the vehicle, for which the insurance quotation relates. Whilst we do not ask specifically about non-motoring offences, as per the principle of utmost good faith the proposer has a duty not to conceal anything that is relevant such as those noted in point 3."

The excerpt underlined above appears to suggest that there are only specific offences which they require disclose of, however they retain the requirement for all unspent convictions, despite not asking specifically for such information. It could be asserted that, if specific offence information is required, such information is requested explicitly, rather than requiring it to be disclosed under the principle of utmost good faith.

When questioning the last paragraph of this email, UNLOCK received the response below;

“Whilst in general I can confirm we do not ask specifically of any private car customers whether they have any non-motoring criminal convictions, I am unable to give you a ‘one size fits all’ answer, due to the very nature of the principle of utmost good faith, which applies. Any correspondence you have received therefore from The Royal Bank of Scotland group which does, is unfortunately inaccurate or misinformed. As you're aware, the principle of utmost good faith confirms the proposer has a duty to voluntarily disclose, accurately and fully, all facts material to the risk being proposed, whether requested or not. The risk being proposed is a Motor Insurance policy, and as such, we, being the Royal Bank of Scotland group, require the proposer to voluntarily inform us of for e.g. any unspent non-motoring criminal convictions in connection with, but not restricted to; fraud/dishonesty/ vehicle related criminal convictions/ aiding and abetting/ etc. In summary, any private car customer who has any unspent non-motoring criminal convictions must volunteer this information to the insurer. We, the insurer, are then in a position to make an informed decision based on the full facts presented whether to offer or to decline the risk.” Clare Moore, Senior Underwriter, RBS Insurance

This therefore is clear indication that the insurer is retaining their right to be informed of unspent criminal convictions. This is despite:

- a) Churchill providing me with written confirmation stating that they do not need to be informed of such convictions
- b) Churchill not asking about any convictions other than motoring convictions
- c) Direct Line (who are also owned by the RBS group) re-confirming, after I had received the emails above, that they do not need to be informed of any non-motoring convictions. This is in blatant conflict with advice

It must therefore be questioned where the insured would stand if, following such advice such as that given by both Direct Line and Churchill in writing, they didn't disclose but that this was ultimately raised as an issue when making a claim.

MORE TH>N

UNLOCK have obtained written confirmation from MORE TH>N that, with reference to motor insurance they need to be informed of unspent non-motoring convictions *“if the conviction relates to an offence of fraud and dishonesty. If it is an unrehabilitated conviction, e.g. for burglary, it would need to be disclosed, however a conviction for assault, for example, would not need to be disclosed”*

This highlights a complete lack of understanding of the ROA and how it applies to insurance. The premise of the ROA is based upon sentence length, not offence category. The approach of MORE TH>N substantiates a number of discussions that UNLOCK have had when

approaching insurers in an attempt to obtain their policy towards people with previous convictions. Specific reference is often made towards offences that fall under the notion of “moral hazard”. This appears to include offences that are seen as unpopular, such as violent and sexual offences.

Co-operative Insurance

The Co-operative insurance have told an UNLOCK Member, and UNLOCK, over the telephone that they do not need to know about any unspent non-motoring convictions for the purposes of motor insurance. This is supported by their website, which, in the assumptions section, makes no reference to non-motoring criminal questions, and does not ask about them at any time when obtaining a quote.

However, when pushed further, making reference to particularly serious offences such as manslaughter, I was informed by telephone that they may need to know about such convictions. I was therefore advised that “it would be best to disclose that conviction just in case”.

Hastings Direct

The approach of Hastings Direct is included to highlight the differentiation between insurers. They have written to UNLOCK and have confirmed that *“part of the Hastings Direct call script is to ask if any previous unspent criminal convictions have been incurred as it is our policy to decline these applicants.”*

Summary

It is apparent that some providers state that they do not need to know about ANY non-motoring convictions.

This raises questions about what impact this has upon the duty to disclose all material facts, irrespective of whether asked about them or not. This ultimately, from an end-user perspective, makes it unclear about what a proposer is required to disclose. As a result, a consumer could be routinely going beyond what is required by the insurer to the point of volunteering extra information and ultimately being refused insurance.

The problems when obtaining motor insurance appear to be:

- 1) When an insurance company states that they do not need to be informed of unspent non-motoring convictions, they are nevertheless unwilling to confirm this in writing to a policyholder. This can potentially cause problems at the point of claim
- 2) Various insurance companies have different approaches towards non-motoring convictions. Although this is commercially acceptable, it places the consumer in a difficult position of knowing what information each company requires, even though they are not asking for it specifically.

Insurance Aggregator Research

Over the last few years insurance websites have become hugely popular, generating millions of pounds worth of profits while being criticised for focusing on price over protection. At the same time, the percentage value of claims actually paid out has dropped significantly. This situation accords generally with the position that is referred to in paragraph 4.16 of the Consultation paper, referring to current sales processes make it difficult for a consumer to disclose additional facts.

In a recent UNLOCK investigation into five leading aggregators, none were ultimately able to offer *valid* insurance to the customer, though several still generated quotes.¹¹ All sites referred to *any* convictions, not *unspent* convictions. Two websites mentioned the ROA, but only once the customer clicked a “?” button. Two asked about convictions with no reference to the ROA.

One website simply assumed no convictions, despite its obvious relevance to insurers. **Moneysupermarket.com** asks no questions about convictions at all. Rather, the fact that the customer has ‘no convictions’ is set as a basic assumption of the site. The customer does not even have an opportunity to discover this until after they have entered all their property and personal details. Even at this late stage, discovery of this assumption is dependent on the customer being savvy enough to know that blue underlined text is a hyperlink and that checking the assumptions of the website are of fundamental importance. Far from requiring the individual to read the assumptions, Moneysupermarket.com does not even suggest that they read them. Yet this would be simple as on the very same page the customer is advised that by proceeding further they are accepting the hyperlinked ‘terms and conditions’ of the site.

Yet again the customer faces only unfavourable possibilities. If they do read the assumptions, they will quickly discover that the site is essentially useless to them. If they do not read the assumptions, they will run in to the same problems on every quote they try to follow up, wasting a great deal of time and becoming very frustrated.

Problems

- Difficult for consumers to read the small print
- Assumptions that consumers have no convictions, with no specific questions being asked

Recommendations

- An initial filter page which, amongst other things, asks a consumer whether they have any unspent criminal convictions. If the insurer is unable to process such cases online, either they should provide a telephone number to contact in house (if they are still able to place somebody on cover), or alternatively refer to a suitable organisation who are able to provide such cover (such as the UNLOCK list of insurance brokers).

¹¹ UNLOCK, *UNLOCKing Insurance: Issues and Evidence*, 2008

Law Commission Proposals

The Law Commissions proposals, as UNLOCK interprets them, are that, if implemented, the standard of disclosure being of the “reasonable insured” would mean that it would be unreasonable to disclose a spent conviction and reasonable to disclose an unspent conviction. This position clearly correlates to the current provisions under the ROA.

UNLOCK agree with the Law Commission that the test of materiality should accord with the position in Scotland for life assurance of whether a reasonable man in the position of the assured, with knowledge of the facts in dispute, should have realised they were material.¹²

It is, however, submitted that guidance to such a provision should be included to explicitly align such a test with the provisions of the ROA by stating that the requirement of disclosure of spent convictions would be regarded as unreasonable under such a test of materiality.

If it were to be made clear, through guidance attached to legislation, that spent convictions, in accordance with the ROA, do not need to be disclosed, it would afford customers with confidence when obtaining insurance, and would allow them the opportunity of sourcing the most competitive quote, rather than obtaining insurance through a specialist underwriter capable of placing people on cover with unspent convictions.

Often, because of the vulnerability suffered by individuals who have previous convictions, they are reluctant to trust insurers who will not state in writing that they do not be informed of spent convictions. One UNLOCK member recently stated that *“although my convictions are now spent, I still feel more confident getting insurance through one of the UNLOCK insurers, because they are used to dealing with people with previous convictions, they know all about me and my past, and I feel more confident if I ever had to make a claim.”*

In the Consultation Paper, paragraph 12.5 states that *“we provisionally propose that where the insurer asks a general question, the insurer should have no remedy in respect of an incomplete answer unless a reasonable consumer would understand that the question was asking about the particular information at issue. (4.32)”*

In the Consultation Paper, it is proposed that there will be no duty on the consumer policyholders to volunteer information. Therefore, if they are not asked about unspent criminal convictions they are not expected to disclose them. Second, if a question is asked, the policyholder will be expected only to give information that a reasonable insured in the circumstances would give.

It has been asserted to UNLOCK that, in response to the general question *“is there anything else we might like to know,”* consumers would not be expected to say that they had a criminal conviction. If, however, they were asked a clear question about unspent criminal convictions they would be expected to answer it properly.

¹² *Life Association of Scotland v. Foster* (1873) 11 M 351

Unspent criminal convictions are always material to the prudent underwriter however questions are often not asked or not asked clearly. This is evident in the section above with regards to motor insurance.

It is therefore recommended that clear guidance stating such an example like the one above (*"is there anything else we might like to know"*) is included within the relevant guidance section of the reforms proposed. This would clarify the situation in relation to what a consumer is expected to disclose in terms of previous convictions.

It is routinely referred to that, if an insurer regards a particular circumstance as being material, it is prudent to ask a question which relates to this. As such, it is submitted that the situation should be one where, for an insurer to be made aware of any unspent convictions, the question asked must specifically refer to unspent criminal convictions. This would therefore place the consumer into a confident position whereby, if they are not asked about criminal convictions, they do not need to be disclosed.

Conclusions

The stated practice of the Financial Ombudsman is that insurers may not avoid a consumer policy for non-disclosure where no question has been asked. If this were to be codified in legislation, it would certainly mean that the issue of disclosure of criminal convictions would be much clearer for the consumer. People with convictions, contrary to the stereotype of wanting to hide their convictions, often want to disclose all their convictions, mainly through fear of recriminations. This problem is substantiated by questions referring to “any” convictions, and the thought that insurers avoid paying out claims wherever possible.

If proposals are implemented which remove the onus on the consumer to disclose information which they are not specifically asked, it will in a sense bring the position of obtaining insurance in line with the position of the ROA when obtaining employment.

When applying for a job, an individual’s unspent convictions only need to be disclosed if they are asked about them. If they are not asked, they are not obliged to disclose.

A similar position for obtaining insurance would certainly be welcomed to enable people who, by the very nature of the facility they are looking to secure, are trying to lead law-abiding lives. This would allow them to be confident about the policy that they have and with the information that they have disclosed.