

# *Insurance contracts after the Insurance Act 2015*

Article

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# INSURANCE CONTRACTS AFTER THE INSURANCE ACT 2015

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## The problem of classification

### *The anatomy of an insurance policy*

Insurance policies are numerous and varied in terms of length, complexity and the nature of the risk insured. That said, any policy can be broken down as follows.

First, the *insuring clause* lists perils (or, in some forms of insurance, all risks) for which insurance is provided.

Secondly, the policy will list *perils excluded* from coverage. These categories rarely encompass the entire range of perils that might befall the assured, and the policy may be silent on “uninsured perils”. The distinction between excluded perils and uninsured perils is reflected in common law rules on causation: a loss concurrently caused by an insured and an excluded peril is irrecoverable,<sup>1</sup> whereas a loss concurrently caused by an insured and an uninsured peril falls within the policy.<sup>2</sup>

Thirdly, there may be one or more *triggers of coverage* requiring satisfaction before cover attaches.<sup>3</sup> The insurers may insist upon receipt of premium. They may also demand the classification of a vessel, compliance with safety requirements in a building<sup>4</sup> or the receipt of a satisfactory proposal form.<sup>5</sup>

Fourthly, there may be *continuing obligations* on the assured. These vary according to the nature of the cover, and include: maintaining security devices; monitoring employees; acting without negligence; restrictions on use of property or means of working; and notification of increase of risk.

Finally, *claims provisions* require compliance with contractual time limits for the notification of claims and with claims co-operation. Other restrictions on recovery may be found, including: double insurance clauses removing the right of indemnity where other insurance is in place; loss mitigation, including taking steps to preserve any potential third party subrogation claim; and in fidelity insurance the obligation to prosecute a defaulting employee.<sup>6</sup>

### *Common law classification*

The common law had little to say about insured, excluded and uninsured perils, and its function was purely to construe them. The striking feature of the common law’s treatment of the assured’s contractual duties is disregard of functionality and emphasis on form. The consequences of a failure by the assured to adhere to a policy term rest not upon its significance or its nature but on its legal classification, in turn dictating the consequences of breach.<sup>7</sup> The common law classification of terms, and the consequences of their breach, is as follows:

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<sup>1</sup> *Wayne Tank & Pump Co Ltd v Employers Liability Assurance Corporation* [1973] 3 All E.R. 825; [1974] Q.B. 57.

<sup>2</sup> *Global Process Systems Inc v Syriat Takaful Malaysia Berhad, The Cendor Mopu* [2011] UKSC 5; [2012] 1 All E.R. (Comm) 111.

<sup>3</sup> Such clauses may on occasion operate to prevent an agreement coming into existence.

<sup>4</sup> *Kler Knitwear Ltd v Lombard General Insurance Co Ltd* [2000] Lloyd’s Rep I.R. 47.

<sup>5</sup> *Beazley Underwriting Ltd v Travelers Companies Inc* [2011] EWHC 1520 (Comm); [2012] 1 All E.R. (Comm) 1241.

<sup>6</sup> Dispute resolution clauses are also standard.

<sup>7</sup> We are concerned only with legal principle here. The Financial Ombudsman Service, statutory since the Financial Services and Markets Act 2000 but voluntary since 1981, applies wider principles under the Insurance Conduct of Business Rules (a part of the Financial Conduct Authority’s Handbook) whereby insurers are not permitted to reject consumer claims unfairly. The thousands of F.O.S. decisions may be found both in *Ombudsman News* and on the F.O.S. website.

- (a) Warranties.<sup>8</sup> Breach of any term designated as, or satisfying the elements of, a warranty, has the effect of terminating the risk automatically, thereby precluding recovery for any future loss.
- (b) Conditions precedent to the risk or cover, operating as “unless” provisions which if not satisfied, simply preclude the attachment of the risk.
- (c) Conditions precedent to liability, whether continuing obligations or claims provisions designated (by one or other accepted forms of wording) as such. Breach precludes a claim. Unlike a breach of warranty, the risk itself is not determined, and only the specific claim is lost. There is no adverse impact on future coverage. Accordingly, the description of warranties as “conditions precedent” – found in too many modern judgments<sup>9</sup> although used in older cases<sup>10</sup> to emphasise the significance of the term – is misleading: the former terminates the risk; the latter bars tainted claims.
- (d) Contractual conditions, ie, any term within (b) or (c) but not designated as warranties or conditions precedent. Here, ordinary contractual principles are applicable. It may be possible to classify the term from the outset as:
  - (i) a “condition” namely a term of obvious importance whose breach is repudiatory of the contract as a whole,<sup>11</sup> or
  - (ii) an ancillary term whose breach can lead only to damages (the general contractual classification of “warranty” for such a term has to be avoided for obvious reasons), or
  - (iii) an innominate term, incapable of initial classification to which a “wait and see” approach is adopted, with the consequences of breach depending upon its effect.<sup>12</sup>
- (e) Terms “descriptive of the risk” which operate to suspend the risk during any period of breach. This is a judicial invention, designed to mitigate the effects of classifying a term as a warranty incapable of remedy. Very few policies contain express suspensory provisions, although the International Hull Clauses 2003, cll. 10-11 have removed<sup>13</sup> the old limits of navigation warranties and replaced them with risk suspension.

The courts invariably treat claims provisions as innominate and thus within class (d)(iii).<sup>14</sup> There are no cases in which such terms have been classified as “conditions” or “ancillary”. The courts have also held that breach of a claims provision cannot be repudiatory of the claim but not the policy, on the basis that partial repudiation is not recognised by the common law.<sup>15</sup>

What is of particular interest is the almost total absence of any proportionality test by which the effects of breach on the insurers are aligned with the available remedy. Prejudice and causation are relevant only in class (d)(iii), and in all other cases the breach has a predetermined automatic effect on the rights of the parties. Unsurprisingly the courts have in a series of decisions struggled with the distinction between conditions and conditions precedent, although there is an unsurprising tendency to refuse the classification of condition

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<sup>8</sup> Warranties may be pre-contractual or post-contractual. The former are unconditional guarantees that pre-contractual statements made by the assured are true in all respects, failing which the risk never attaches. Most commonly warranties were created by “basis of the contract” clauses, deeming all statements to be warranties and thereby sidestepping the rules on misrepresentation. Basis clauses – and, arguably, all pre-contractual warranties - have been deprived of effect by the Consumer Insurance (Disclosure and Representations) Act 2012 and the Insurance Act 2015. We are here concerned only with post-contractual warranties as to the assured’s post-contract conduct.

<sup>9</sup> E.g., *Bank of Nova Scotia v Hellenic Mutual War Risk Association (Bermuda) Ltd, The Good Luck* [1992] 1 A.C. 233; [1991] 3 All E.R. 1.

<sup>10</sup> *Behn v Burness* (1863) 3 B & S 751, at 782-83; 122 E.R. 281; *Thomson v Weems*, (1884) 9 App. Cas. 671, 683-684; (1884) 11 R. (H.L.) 48. See also *Chalmers’ Marine Insurance Act, 1906*, 6<sup>th</sup> ed., London: Butterworth & Co. (Publishers) Ltd. 1966, p. 49.

<sup>11</sup> The only example is *Svenska Handelsbanken v Sun Alliance and London Insurance plc* [1996] 1 Lloyd’s Rep. 519; [1996] C.L.C. 833 – failure by bank under a credit policy to adhere to normal lending criteria.

<sup>12</sup> *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 1 All E.R. 474; [1962] 2 Q.B. 26.

<sup>13</sup> Their adoption is not currently widespread.

<sup>14</sup> E.g.: *Ronson International Ltd v Patrick* [2005] EWHC 1767 (QB) [2006] Lloyd’s Rep. I.R. 194; *Friends Provident Life and Pensions v Sirius International Insurance* [2005] EWCA Civ 601; [2005] 2 All E.R. (Comm) 145.

<sup>15</sup> *Friends Provident Life and Pensions v Sirius International Insurance* [2005] EWCA Civ 601; [2005] 2 All E.R. (Comm) 145.

precedent unless clearly expressed<sup>16</sup> and then to construe it narrowly.<sup>17</sup> There are only two decided cases on class (d)(iii) whereby liability has been reduced by reason of breach: 50% recovery where an assured failed to notify insurers of threats of arson so that steps to prevent loss were not taken;<sup>18</sup> and 85% recovery for failure to notify liability insurers of a possible claim by a third party.<sup>19</sup> These decisions may be rough – indeed, arbitrary<sup>20</sup> – justice, but at least they attempt to match the punishment to the crime.

## Reform

### *Overseas models*

Important reforms have been effected in two comparable jurisdictions, New Zealand and Australia. In New Zealand, the Insurance Law Reform Act 1977 (I.L.R.A. 1977) implemented a very brief report of the Contracts and Commercial Law Reform Committee<sup>21</sup> which proposed a temporary solution pending more detailed consideration. Section 9 of the 1977 Act prevents reliance by an insurer on any contractual claims time limit other than to the extent that prejudice has been suffered. Section 11 of the 1977 Act applies to exclusions and limitations however expressed, and disallows reliance only where: (a) the circumstances in which the insurer is bound to indemnify the assured are defined so as to exclude or limit liability on the happening of certain events or the existence of certain circumstances; (b) the liability was so defined because the happening of the event or the existence of the circumstances was in the view of the insurer likely to increase the risk of loss occurring; and (c) the assured can prove that the loss was not caused or contributed to by the happening of such events or the occurrence of such circumstances. This is straight causation.

In Australia, Report No. 20 of the Australian Law Reform Commission, *Insurance Contract Law* in 1982, advocated a similar approach. The reform is contained in s. 54 of the Insurance Contracts Act 1984 (I.C.A. 1984), although – unlike New Zealand – the legislation excludes both marine insurance and reinsurance.<sup>22</sup> Section 54(1) is concerned with clauses which do not affect the risk of loss (eg, notification provisions) and states that – as in New Zealand – reliance is possible only to the extent that there has not been prejudice. Section 54(2)-(5) of the 1984 Act is concerned with risk clauses, and provides that where an act or omission of the assured could reasonably be regarded as being capable of causing or contributing to a loss, the insurer may not refuse to pay the claim to the extent that the assured can prove that the relevant part of the loss for which recovery was sought was not caused by the act or omission.

These reforms have abandoned all distinctions based on form, and have substituted a functional approach. If the clause is not a risk clause, its enforcement rests upon prejudice. If it is a risk clause, its enforcement rests upon causation. These measures are not identical and their operation is far from straightforward. Modification has been proposed in each jurisdiction: in New Zealand because the width of s. 11 of the 1977 potentially removes the ability of insurers to delimit the risk that they wish to insure,<sup>23</sup> and in Australia<sup>24</sup> for the different reason that s. 54 extends the period of coverage under professional indemnity policies.<sup>25</sup> Nevertheless, they are a great improvement on the formalistic approach adopted by the common law. Terms bearing the description “warranty” and “condition precedent” have all but disappeared in those jurisdictions. The English and Scottish Law Commissions relied heavily on the experience in the Southern Hemisphere in formulating the proposals that ultimately became the Insurance Act 2015 (I.A. 2015).

### *Towards reform in the UK: early proposals*

The I.A. 2015 was the result of a ten-year reform programme initiated by the English and Scottish Law Commissions in 2006. The original scoping document was ambitious, and mooted codification of the law as a whole. That proved to be a task too far, and the inquiry became focused on the most criticised aspects of

<sup>16</sup> E.g., *Aspen Insurance UK Ltd v Pectel Ltd* [2008] EWHC 2804 (Comm); [2009] 2 All E.R. (Comm) 873.

<sup>17</sup> E.g., *Bonner Williams v Peter Lindsay Leisure Ltd* [2001] 1 All E.R. (Comm) 1140.

<sup>18</sup> *Hussain v Brown (No 2)* Times, December 15, 1995; [1996] 1 Lloyd’s Rep. 627.

<sup>19</sup> *Milton Keynes BC v Nulty* [2011] EWHC 2847 (TCC); [2012] Lloyd’s Rep. I.R. 453, affirmed on other grounds [2013] EWCA Civ 15; [2013] 1 W.L.R. 1183

<sup>20</sup> The 15% deduction in *Milton Keynes* was regarded as such by Edwards-Stuart J himself.

<sup>21</sup> *Aspects of Insurance Law*, July 1975

<sup>22</sup> The A.L.R.C. in its Report *Marine Insurance*, No 91 in 2001, recommended a modified approach for marine insurance. Nothing has come of that recommendation to date.

<sup>23</sup> New Zealand Law Reform Commission, *Some Problems of Insurance Law* 1998, No. 46.

<sup>24</sup> Alan Cameron and Nancy Milne, *Review of the Insurance Contracts Act 1984*, October 2003.

<sup>25</sup> Such policies are written on a “claims made” or “claims made and notified” basis, and extend to notifications made to the insurers in the policy year of actual or potential claims by third parties.

insurance law. The process resulted in the Consumer Insurance (Disclosure and Representations) Act 2012, abolishing the duty of disclosure and modifying the rules on misrepresentation for consumers, and the I.A. 2015. The latter measure makes important changes to the law on presentation of the risk by businesses, as well as modifying the law on fraudulent claims, the general principle of utmost good faith and late payment.<sup>26</sup> The focus here is policy terms.

The reform process has an interesting history. The Law Reform Committee's 1957 Report recommended the abolition of warranties. The Law Commission's 1980 Report, *Insurance Law: Non-Disclosure and Breach of Warranty*<sup>27</sup> proposed that a breach of warranty could not be relied upon if, *inter alia*, it could not have increased the risk that the event which gave rise to the claim would occur in the way that it did in fact occur. The proposals were abandoned in the face of market opposition and also by reason of the withdrawal of proposals by the European Commission to codify substantive insurance law that had prompted the Law Commission inquiry in the first place. The 1980 Report said nothing about conditions.

Fresh proposals were put forward at an early stage in the English and Scottish Law Commissions' most recent programme. Issues Paper 2, *Warranties*, published in November 2006, mooted<sup>28</sup> that: claims should not be denied for reasons unconnected with the loss; an assured should be paid to the extent that the breach did not cause or contribute to the loss. The proposal was specifically for "causal connection",<sup>29</sup> and extended to all terms however classified designed to reduce the risk of loss. However, an important proviso, based upon proposals for reform of the New Zealand legislation,<sup>30</sup> entitled insurers to rely upon a term which defined the risk, in terms, e.g., of the age or qualifications of a driver, the geographical area in which a loss had to occur or use of the subject matter for purposes not specified by the policy.

The Issues Paper was followed in June 2007 by a Consultation Paper, *Insurance Contract Law: Misrepresentation, Non-Disclosure and Breach of Warranty by the Insured*,<sup>31</sup> in which the Law Commissions proposed a causation test,<sup>32</sup> mandatory for consumers but subject to contract for businesses. But there was a rowing back from the earlier more expansive approach. To avoid the need for an arbitrary list of risk definition terms, the provision was to be limited to warranties. The causation test of "increase the risk" proposed in 1980 was rejected as too restrictive in that it was not concerned with how the loss actually occurred. At the other extreme the Law Commissions rejected the notion of recovery unless the breach caused the loss. Instead, the Law Commissions opted for a middle approach whereby the assured would be entitled to recover despite a breach of warranty if able to prove that the breach did not contribute to the part of the loss for which indemnity was sought. As for terms other than warranties, there would be limited protection arising only where the clause was a part of the insurer's standard terms: there, the assured was entitled to the cover that was reasonably expected. That protection was thought to exist for consumers under what is now the Consumer Rights Act 2015, then the Unfair Terms in Consumer Rights Regulations 1993, but extended to businesses by new legislation.

### *Refinements and implementation*

The proposals were revamped by the Law Commissions in a further Consultation Paper, *Insurance Contract Law: The Business Insured's Duty of Disclosure and the Law of Warranties*, published in June 2012.<sup>33</sup> This proposed a two-pronged approach, again resting on the traditional distinction between warranties and other terms. As regards warranties, the effect of breach would not be to terminate the risk but merely to suspend it for the period of breach. As regards terms designed to reduce the risk of particular types of loss, the causation test would be abandoned and replaced with a suspension of the risk only for loss of that type. The proposals were put into draft bill form by the Law Commissions' July 2014 Report *Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims; and Late Payment*.<sup>34</sup> Chapter 17 of this report set out the case for treating breaches of warranty as suspensory only. As will be seen below, that proposal was relatively uncontroversial and passed into law in an unamended form as s. 10 of the I.A. 2015.

More controversial were the proposals in Chapter 18 of the report dealing with terms relevant to particular descriptions of loss. The Law Commissions' desire to move away from a causation test proved to be tricky to

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<sup>26</sup> Merkin and Gürses, "The Insurance Act 2015: Rebalancing the Interests of the Insurer and Assured" 78 Mod. L. Rev. [6] (2015).

<sup>27</sup> Law Com. No. 194

<sup>28</sup> Law Com. No. 194, *Insurance Law: Non-Disclosure and Breach of Warranty*, Chapter 7.

<sup>29</sup> Law Com. No. 194, *Insurance Law: Non-Disclosure and Breach of Warranty* at [7.67].

<sup>30</sup> New Zealand Law Reform Commission, *Some Problems of Insurance Law* 1998, No. 46.

<sup>31</sup> Law Com. No. 182; Scottish Law Com No 134, Chapter 8.

<sup>32</sup> Law Com. No. 182, *Insurance Contract Law: Misrepresentation, Non-Disclosure and Breach of Warranty by the Insured*, at [8.1].

<sup>33</sup> Law Com. No. 294; Scottish Law Com. No. 155.

<sup>34</sup> Law Com. No. 353; Scottish Law Com. No. 238.

formulate. The Law Commissions proposed that breach of a term (however described) which concerned a particular type of loss, or loss at a particular time or place, should only give the insurer a remedy in respect of that type of loss or loss at that time or place.<sup>35</sup> The Law Commissions were concerned with terms “irrelevant” to the assured’s loss,<sup>36</sup> divorcing the way that the loss had occurred from the clause in question: it would suffice if the clause was relevant to the time, kind or place of loss. Thus, if the assured failed to satisfy a requirement to have a lock on a door, and a loss occurred by reason of a break-in through a window, there would be no recovery because the loss was of a type falling within the obligation.<sup>37</sup>

That proposal was destined not to reach the statute book. Representations from sectors of the insurance industry persuaded the Government that it should not be included in a Bill to be implemented under the expedited procedure for non-controversial measures. The Insurance Bill, published a few days after the July 2014 Report, omitted the risks clause entirely. But that was not the end of the story. The Treasury asked the Law Commissions to reconsider the drafting so that some reform could be effected, and a revised “causation-free” draft was circulated for comment on 12 November 2014. The Insurance Bill started its Parliamentary process before the House of Lords Special Public Bills Committee (S.P.B.C.) on 2 December 2014. Witnesses were questioned on the desirability of some measure on risks clauses. Most welcomed the idea,<sup>38</sup> although others raised objections that both the original and revised clauses gave rise to uncertainty and, most importantly, incorporated causation.<sup>39</sup> Nevertheless, the revised clause was added to the Insurance Bill by Government amendment.<sup>40</sup> The Bill completed its S.P.B.C. stages on 15 December 2014 after four half-days of evidence and discussion, almost none of which related to the new clause 11,<sup>41</sup> and sailed through the House of Commons with scant consideration, becoming law on 12 February 2015. All of the oral and written evidence was published by the S.P.B.C. as H.L. Paper 81 following the completion of its proceedings. The irony is that after some eight years of detailed analysis – or closer to fifty if the original proposals are taken into account – during which time various solutions were considered and rejected, the section that ultimately passed into law received minimal scrutiny and there is almost no official interpretative guidance.

## Effect of the Insurance Act 2015

### *The statutory provisions*

The I.A. 2015 introduced<sup>42</sup> an entirely new classification of policy terms, moving from form to functionality. This is done in two ways. By s. 10(1) “any rule of law that breach of a warranty (express or implied) in a contract of insurance results in the discharge of the insurer’s liability under the contract is abolished.” Instead, by s. 10(2) “an insurer has no liability under a contract of insurance in respect of any loss occurring, or

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<sup>35</sup> Law Com. No. 353 *Insurance Contract Law: Business Disclosure; Warranties; Insurers’ Remedies for Fraudulent Claims; and Late Payment* at [18.3].

<sup>36</sup> Law Com. No. 353 *Insurance Contract Law: Business Disclosure; Warranties; Insurers’ Remedies for Fraudulent Claims; and Late Payment* at [18.7].

<sup>37</sup> Law Com. No. 353 *Insurance Contract Law: Business Disclosure; Warranties; Insurers’ Remedies for Fraudulent Claims; and Late Payment* at [18.40].

<sup>38</sup> Lord Justice Longmore, giving evidence before the clause was reinstated in the Bill, was perfectly content with the original version: H.L. Paper 81, p.52. The proposal was supported by A.I.R.M.I.C. (Association of Insurance and Risk Managers in Insurance and Commerce, whose members represent commercial policyholders), pp. 62 and 65. Brokers were in favour (British Insurance Brokers Association, p. 66; Aon, p. 79; London and International Brokers’ Association, p. 97; Marsh, p. 106), as were some insurers (Aviva, p. 82; R.S.A. p. 109).

<sup>39</sup> In addition to the objections of the Lloyd’s Market Association, discussed in what follows, Lord Mance felt that the original version of the clause would give rise to causation disputes and favoured a new formula that had not yet been found: H.L. Paper 81, p. 58. The British Insurance Law Association, whose members are drawn from all sides of the insurance industry, practising lawyers and academics, was divided on the issue: H.L. Paper 81 p. 78. The Commercial Bar Association opposed the entire Bill for introducing uncertainty into a settled area of law.

<sup>40</sup> The Law Commissions themselves had not contemplated the speed of developments: H.L. Paper 81 p. 15.

<sup>41</sup> Those members of the S.P.B.C. who considered the clause, took the view that, even though it was bound to give rise to problems, it was better than the status quo and the courts would in time reach a proper balance of interests.

<sup>42</sup> The I.A. 2015 comes into force on 12 August 2016, 18 months from the date of Royal Assent.

attributable to<sup>43</sup> something happening, after a warranty (express or implied) in the contract has been breached but before the breach has been remedied.” Thus, a warranty cannot be relied upon unless the assured was in breach at the time of the loss or at least at the time of the happening of the event that gave rise to some future loss.<sup>44</sup> The risk is simply suspended during any period of breach.

Where the assured is in breach of a policy term, the position is governed by s. 11:

11.--(1) This section applies to a term (express or implied) of a contract of insurance, other than a term defining the risk as a whole, if compliance with it would tend to reduce the risk of one or more of the following—

- (a) loss of a particular kind,
- (b) loss at a particular location,
- (c) loss at a particular time.

(2) If a loss occurs, and the term has not been complied with, the insurer may not rely on the non-compliance to exclude, limit or discharge its liability under the contract for the loss if the insured satisfies subsection (3).

(3) The insured satisfies this subsection if it shows that the non-compliance with the term could not have increased the risk of the loss which actually occurred in the circumstances in which it occurred.

(4) This section may apply in addition to section 10.

This version of s. 11 differs from that proposed by the Law Commissions and rejected by the Government in July 2014, in two respects. First, the words “other than a term defining the risk as a whole” have been added to subs. (1), thereby taking out clauses that relate to the scope of cover rather than to specific situations. The effect is to introduce a threefold classification: clauses which define the risk; clauses which do not define the risk but relate to loss of a particular kind, at a particular location or at a particular time; and clauses which do not define the risk and do not relate to kind, location or time. The second modification is that the original wording, under which the insurer could not rely upon a kind, location or time exclusion where the loss was of a different kind, at a different location or at a different time, has been replaced by a more general provision referring to the risk of the loss which actually occurred and the circumstances in which it occurred. The purpose was avowedly to sever all links with causation.

Thus, where a policy term is within s. 11(1) it no longer matters whether it is a condition precedent or a bare condition: enforcement depends upon its impact upon the loss, as set out in s. 11(3). Warranties are more problematic. The stated effect of s. 11(4) is to extend s. 11 to the situation where the assured is in breach of warranty falling within s. 11(1) at the time the loss occurs: s. 10(2) does not rescue the assured because the risk is not suspended, but s. 11(3) operates where its terms are satisfied. The wording of s. 10(2), by stating that the insurer has no liability for any loss after breach of warranty and before its remedy, implies that there is no recovery whatever the cause of the loss. However, it is clear from the Law Commissions’ documents and illustrations that the intention was to subject s. 10(2) to s. 11.<sup>45</sup> Were it otherwise, s. 11(4) would have no work to do. It is nevertheless curious that s. 10(3), which sets out cases where insurers cannot rely upon a loss occurring while a warranty is broken - waiver or where the warranty is no longer applicable to the risk - does not refer to s. 11 as an express modification.

By s. 15 of the I.A. 2015 the terms of a consumer policy cannot be less favourable than the Act itself. It is nevertheless possible for the parties to a business policy to modify or oust ss. 10 and 11, as long as the transparency requirements in ss. 16 and 17 of the I.A. 2015 are met. Those requirements are that the term is clear and that it has been brought to the attention of, or known by, the assured or the assured’s broker. So it is perfectly possible for a business policy to specify automatic termination on breach. Whether that device is used will depend upon the state of the insurance market at any given time.

#### *Reclassification under the Insurance Act 2015*

The rather messy classification under the I.A. 2015 is now as follows.

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<sup>43</sup> Note the careful avoidance of causation language, even though “attributable to”, a phrase used on a number of occasions in the Marine Insurance Act 1906, plainly means “caused by”: *Global Process Systems Inc v Syarikat Takaful Malaysia Bhd, The Cendor Mopu* [2011] UKSC 5; [2012] 1 All E.R. (Comm) 111.

<sup>44</sup> See the Explanatory Notes to the Bill, <http://www.publications.parliament.uk/pa/bills/cbill/2014-2015/0155/en/15155en.pdf>, at [90].

<sup>45</sup> See especially Law Com No 353 *Insurance Contract Law: Business Disclosure; Warranties; Insurers’ Remedies for Fraudulent Claims; and Late Payment* at [18.44].

- (1) *Terms which define the risk insured.* This category encompasses the *insuring clause* and *excluded perils*. There is no statutory control over such provisions, and s. 11(1) specifically excludes regulation of terms “which define the risk as a whole”.
- (2) *Terms, including warranties, which do not increase the risk of loss.* The most important class is *claims provisions*, which are relevant only after the insured peril has occurred and thus cannot affect the loss. Such provisions are outside s. 11 because they are not risk clauses.
- (3) *Terms, including warranties, which increase the risk of loss by time, place and manner* within s. 11(1). A warranty is to be discounted under s. 10 if there was no breach at the time of loss, but breach of any condition or warranty at the time of loss is regulated by s. 11 so that the assured can recover by showing that non-compliance could not have increased the risk of the loss which actually occurred in the circumstances in which it occurred. Thus there is regulation of *triggers of coverage* and *continuing obligations*, however expressed.
- (4) *Terms, including warranties, which increase the risk of loss other than by time, place and manner* within s. 11(1). There is no statutory control over such terms other than that a warranty is to be discounted under s. 10 if there was no breach at the time of loss,

The I.A. 2015 has not followed the more expansive I.C.A. 1984, s. 54 and I.L.R.A. 1977, ss. 9 and 11, and does not regulate the operation of all policy terms however drafted and irrespective of content. Instead, the I.A. 2015 has created a range of difficulties of classification. We address these under the following heads: was there any need to retain the concept of the “warranty”; what is the distinction between a risk provision and “a term defining the risk as a whole”, and is it inherent or one subject to drafting skills;<sup>46</sup> how are non-risk clauses affected: when does a clause increase the risk of loss by reference to time, place and manner; and, where s. 11 applies, have the Law Commissions succeeded in replacing causation with an objective test?

## (1) Warranties

### *The characteristics of warranties*

The substantive law of warranties is derived from the seventeenth and eighteenth century marine insurance market.<sup>47</sup> Early warranties were designed to define the circumstances in which the risk attached and continued to attach. That was essential at a time when the insured subject matter might be located far distant so that its condition and safety was unknown, and when the rules of causation pointed to the last event.<sup>48</sup> A warranty dispensed with issues of proof and removed liability independently of causation rules.<sup>49</sup>

The key features of a warranty as determined by the courts and codified in the Marine Insurance Act 1906 (M.I.A. 1906) are: a promise that some particular thing shall or shall not be done, or that some condition shall be fulfilled;<sup>50</sup> exact compliance, so that it is irrelevant whether the warranty is material to the risk and the breach connected to the loss;<sup>51</sup> automatic discharge of the insurers from all future liability from the date of breach, so that repair of the breach does not reattach the cover;<sup>52</sup> and although a breach of warranty can be waived,<sup>53</sup> that can only be by way of estoppel and not election,<sup>54</sup> given the absence of election following automatic termination.

In the formative period of marine insurance the greatest risks to shipping was not sea perils but the almost constant state of war between European nations and in the Americas, and the activities of pirates.<sup>55</sup> Merchant

<sup>46</sup> See also the Consumer Rights Act 2015, ss. 62-69 and sched. 2, which deprives of effect an unfair term in a consumer contract, but excludes the main subject-matter of the contract or the adequacy of the price and remuneration. This is precisely the same point in a different guise.

<sup>47</sup> Vance “The History of the Development of the Warranty in Insurance Law” 20 Yale LJ 523 (1910-1911); Patterson, “Warranties in Insurance Law” 34 Colum LR 595 (1934).

<sup>48</sup> See the judgments in *Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd* [1918] A.C. 350.

<sup>49</sup> *The Cendor Mopu* [2011] UKSC 5; [2012] 1 All E.R. (Comm) 111.

<sup>50</sup> M.I.A. 1906, s. 33(1).

<sup>51</sup> M.I.A. 1906, s. 33(3).

<sup>52</sup> M.I.A. 1906, ss. 33(3) and 34(2).

<sup>53</sup> M.I.A. 1906, s. 34(3).

<sup>54</sup> *Kirkaldy & Sons Ltd v Walker* [1999] 1 All E.R. (Comm.) 334; [1999] Lloyd’s Rep I.R. 410

<sup>55</sup> This may be seen from the Lloyd’s SG Policy, formalised in 1789 but in use in various forms earlier, which listed insured perils as “of the seas, men of war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and counterpart, surprisals, takings at sea, arrests, restraints, and detainments of all kings, princes, and people, of what nation, condition, or quality soever, barratry of the master and mariners, and of all other perils ...”



vessels of enemy states,<sup>56</sup> and even neutral vessels carrying contraband of war<sup>57</sup> were fair game as prizes for warring navies and especially for privateers. The latter group, merchant and other vessels acting under state authorisation in the form of letters of marque seized enemy vessels and cargo for reward,<sup>58</sup> and caused general havoc.<sup>59</sup> Lloyd's underwriters, accounting for 96% of the marine market from the passing of the Bubble Act in 1720 until its repeal in 1825, demanded warranties that vessels would travel in convoy,<sup>60</sup> were neutral,<sup>61</sup> carried papers of neutrality<sup>62</sup> so that they were immune from capture as prizes, or sailed on a given day to avoid embargo.<sup>63</sup> Lloyd's insured the vessels and cargo of enemy aliens alike.<sup>64</sup> When in 1807 President Jefferson introduced the ill-advised<sup>65</sup> embargo on trading with England and France in retaliation to blockades imposed by each of those countries, vessels and their cargo were "warranted free from American condemnation".<sup>66</sup> The Free from Capture and Seizure warranty, introduced in 1883 removed war risks from marine policies and effectively required owners of vessels and cargo to secure distinct war risks policies. To counter sea perils, express warranties dictated the date and route of sailing,<sup>67</sup> although in the case of voyage policies the law stipulated that the risk would terminate automatically in the event of breach.<sup>68</sup> Cargo warranties related to the description and tonnage of what was being carried.<sup>69</sup>

The growth of other forms of insurance from the middle of the nineteenth century, and particularly consumer insurance in the twentieth century, saw the extension of the warranty device from marine insurance. It nevertheless became settled that the codified rules set out in ss. 33 to 35 of the M.I.A. 1906 extended to all classes of insurance.<sup>70</sup> Most early marine warranties were by their nature risk-defining, setting out the parameters of cover rather than excluding specific causes of loss. The spread of warranties into new forms of insurance was characterised by a widening in scope so that they more closely resembled exclusions rather than defining the circumstances necessary for coverage. Typical warranties found in modern policies relate to the use of vehicles and the use of security protections on buildings. Some warranties are entirely divorced from the risk, e.g., premium warranties requiring instalments to be paid on given dates.<sup>71</sup>

It is apparent from this brief summary that warranties are draconian. Their subsequent adoption in life, property, motor and other sectors was not inevitable and takes them a long way from their original function. Warranties have no counterpart in civil law jurisdictions and have been eliminated in New Zealand, and in

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<sup>56</sup> Determined by the domicile of the owner: *The Harmony* (1800) 2 C Rob 322.

<sup>57</sup> Defined by the Court of Admiralty in prize cases as cargo intended for use in hostilities: *Yangtze Insurance Association v Indemnity Mutual Marine Assurance Company* [1908] 2 K.B. 504; *The Kim* [1915] P. 273.

<sup>58</sup> Privateering has a long and interesting history, predating the emergence of national navies in the seventeenth century. The earliest form in England was Crown licence to effect reprisals against other vessels, but it developed into a general grant in time of war whereby the spoils were shared between the Crown and the privateer. In the Napoleonic Wars privateers were allowed to keep 100% of the spoils, to encourage disrupting French supplies. Until the eighteenth century, the most celebrated of England's seafarers were privateers.

<sup>59</sup> Privateering was abolished by the Declaration of Paris in 1856 following the Crimean War. The US alone refused to sign. On 17 April 1861, two days after President Lincoln's Proclamation calling for troops to enforce US law in the seceding states, President Davis of the Confederacy issued a Proclamation "inviting all those who may desire by service in private armed vessels on the high seas ... to make application for letters of marque and reprisal ..."

<sup>60</sup> *Jefferies v John Legendra* (1691) 4 Mod. 58; *Lethulier's Case* (1692) 2 Salk 443; *Morley v Bordieu* (1746) 2 Str. 1265; *Hibbert v Pigou* (1783) 3 Douglas 224.

<sup>61</sup> *Woolmer v Muilman* (1763) 3 Burr 1419; *Pawson v Watson* (1778) 2 Cowp 785; *Eden v Parkison* (1781) 2 Dougl. 732.

<sup>62</sup> A warranty implied by usage where a vessel was warranted neutral: see s. 36(2) of the M.I.A. 1906.

<sup>63</sup> *Hore v Whitmore* (1778) 2 Cowp. 784.

<sup>64</sup> The original common law rule was that there were no public policy restrictions on insuring enemy property (*Henkle v Royal Exchange* (1749) 1 Ves Sen 317). That rule was reversed some years later (*Brandon v Nesbitt* (1794) 6 T.R. 23), but Lloyd's continued to insure.

<sup>65</sup> Causing more damage to American trade than the blockades and leading to the 1812-1814 War.

<sup>66</sup> *Livie v Janson* (1810) 12 East. 647.

<sup>67</sup> *Birrell v Dryer* (1884) 9 App. Cas. 345.

<sup>68</sup> Codified in ss. 42 to 49 of the MIA 1906. The Law Commissions rejected proposals to repeal those provisions even though they operate in much the same way as warranties.

<sup>69</sup> *Hart v The Standard Marine Insurance Co Ltd* (1889) 22 Q.B.D. 499; *Yangtze Insurance Association v Indemnity Mutual Marine Assurance Company* [1908] 2 K.B. 504; *Overseas Commodities Ltd v Style* [1958] 1 Lloyd's Rep. 546.

<sup>70</sup> *The Good Luck* [1992] 1 A.C. 233.

<sup>71</sup> *JA Chapman & Co Ltd v Kadirga Denizcilik ve Ticaret AS* [1998] Lloyd's Rep. I.R. 377; [1998] C.L.C. 860.

Australia in non-marine cases.<sup>72</sup> Scarcely any commentator has a good word to say about them.<sup>73</sup> Their retention has led to a mass of conflicting case law on what constitutes a warranty, whether the warranty is merely a statement of present fact or precludes future conduct<sup>74</sup> and whether there is any breach of the warranty at all.<sup>75</sup> The courts are not warranty-friendly.

### *Effect of the Insurance Act 2015*

The effect of ss. 10 and 11 of the I.A. 2015 is to retain warranties while removing their most offensive features. Automatic termination of the risk has been replaced with suspension of the risk by s. 10(2), and the lack of any need for a link between the warranty and the loss where there was breach at the time of loss is removed by s. 11. Why, then, have warranties been retained? Perhaps the answer is to be found in the implied marine warranties set out in ss. 36-41 of the 1906 Act, although the only two of any current vitality are the warranty of seaworthiness (s. 39) and the warranty of legality (s. 41). The Law Commissions appear to have been reluctant to repeal the implied warranty provisions for fear of disturbing the market. However, if that was the reason, it is misplaced: the implied warranty of seaworthiness is often subject to held covered provisions which convert it into a suspensory condition; and the warranty of legality has in recent times come to resemble little more than a restatement of the common law principles of illegality,<sup>76</sup> whatever they might happen to be at the moment.<sup>77</sup>

The primary change to the law of warranties is the removal of automatic termination and its replacement with suspension. That solution was developed in a series of motor cases where clauses described as “warranties” were held to be descriptive of the circumstances in which the insurers would face liability, so that if the circumstances were not satisfied at the time of the loss the insurers could be treated as off-risk.<sup>78</sup> Exactly when a clause was a true warranty or merely suspensory was unclear,<sup>79</sup> and later decisions extending the principle to property<sup>80</sup> and marine<sup>81</sup> policies were unable to derive a sensible rationale for the distinction other than judicial instinct based in part upon the width (warranty) or restricted (suspensory provision) nature of the exclusion. That analysis is fortunately no longer necessary.

It remains to consider exactly how s. 11 will apply to warranties assuming that there is breach at the time of the loss. Section 11(1) excludes any term that “defines the risk as a whole”. More will be said of this below, but warranties in their original conception were precisely that. The proper function of a warranty may be seen from *HIH Casualty and General Insurance Co v New Hampshire Insurance Co*<sup>82</sup> in the context of a film finance policy, where coverage applied if revenues from films did not reach a figure sufficient to pay of insured loans. The Court of Appeal held that, although the obligation to make 16 films in two slates had not been described a warranty,<sup>83</sup> it necessarily took effect as a warranty because it defined the very risk that the insurers had agreed to run. Rix L.J. was of the view that the characteristics of a warranty were that it went to the root of the transaction,

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<sup>72</sup> Their retention in marine cases is more explained by the unwillingness of the Australian legislature to jump ahead of the UK in this regard: see generally, A.L.R.C. 91.

<sup>73</sup> Notably Hasson, “The “Basis of the Contract” Clause in Insurance Law” (1971) 34 M.L.R. 29.

<sup>74</sup> *International Management Group (UK) Ltd v Simmonds* [2003] EWHC 177 (Comm); [2004] Lloyd’s Rep. I.R. 247.

<sup>75</sup> E.g., *Pratt v Aigaion Insurance Co SA, The Resolute* [2008] EWCA Civ 1314; [2009] 1 Lloyd’s Rep. 225.

<sup>76</sup> *Sea Glory Maritime Co v Al Sagr National Insurance Co, The Nancy* [2013] EWHC 2116 (Comm); [2013] 2 All E.R. (Comm) 913.

<sup>77</sup> *Jetivia SA v Bilta (UK) Ltd* [2015] UKSC 23; [2015] 2 All E.R. 1083.

<sup>78</sup> *Farr v Motor Traders Mutual Insurance Society Ltd* [1920] 3 K.B. 669; *Roberts v Anglo-Saxon Insurance Association Ltd* (1927) 27 Ll. L.R. 313; *Provincial Insurance Co Ltd v Morgan & Foxon* [1933] A.C. 240; (1932) 44 Ll. L. Rep. 275; *De Maurier (Jewels) Ltd v Bastion Insurance Co and Coronet Insurance Co Ltd* [1967] 2 Lloyd’s Rep. 550; (1967) 117 N.L.J. 111.

<sup>79</sup> Suspensory provisions, other than held covered clauses, were rarely express.

<sup>80</sup> *CTN Cash and Carry Ltd v General Accident Fire and Life Assurance Corp* [1989] 1 Lloyd’s Rep. 299; *Kler Knitwear Ltd v Lombard General Insurance Co Ltd* [2000] Lloyd’s Rep. I.R. 47.

<sup>81</sup> *Century Insurance Company of Canada v Case Existological Laboratories Ltd, The Bamcell II* [1984] 1 WWR 97; *Bueno v Marac Fire and General Insurance Ltd* Unreported, 26 August 1984, H.C.N.Z.; *Martin Maritime Ltd v Provident Capital Indemnity Fund Ltd, The Lydia Flag* [1998] 2 Lloyd’s Rep. 652; *GE Frankona Reinsurance Ltd v CMM Trust No.1400, The Newfoundland Explorer* [2006] EWHC 429 (Admlty); [2006] Lloyd’s Rep. I.R. 704. The suspensory argument was unsuccessfully put by the insurers in *Pratt v Aigaion Insurance Co SA, The Resolute* [2008] EWCA Civ 1314; [2009] 1 Lloyd’s Rep. 225, a case where there was an alleged breach of a crewing warranty at the date of the loss so that the classification of the term mattered only in that a less strict construction of the term was claimed to be justified.

<sup>82</sup> [2001] EWCA Civ 735; [2001] 2 Lloyd’s Rep. 161.

<sup>83</sup> A warranty can be created by any form of clear wording: M.I.A. 1906, s. 35(1).

was not only so described but bore materially on the risk and damages would not be an adequate remedy to the insurers for breach.<sup>84</sup> The I.A. 2015 makes no attempt to define “warranty” so that common law tests continue to apply.<sup>85</sup>

“True” warranties are thus risk-defining and outside s. 11. It may be, therefore, that s. 11 has limited effect on warranties, whether expressed or construed as such. Specific risk exclusions masquerading as warranties are governed by s. 11, and s. 11(4) states that s. 11 applies to warranties where s. 10 does not assist. The inevitable conclusion is that there is no longer any magic in the term “warranty”.<sup>86</sup> The 2015 Act treats warranties as ordinary conditions: there can be no reliance if there is no breach, and if there is breach then s. 11 will restrict enforcement where its requirements are satisfied. It may be, therefore, that warranties will wither on the vine. A bolder legislative approach would have been to make explicit what is implicit, to repeal ss. 33-41 of the 1906 Act and to declare that the common law ceased to have effect. Australia in particular would have thanked us for providing a means of establishing congruity between its non-marine and marine insurance regimes. By that means s. 10 would have been unnecessary and s. 11 could have done all the hard work in ensuring that irrelevant breaches of any term – warranty or otherwise – could not be relied upon. As it is, the courts will still have to determine whether a term, however it is described by the parties, is or is not a warranty for the purposes of s. 10, a question then to be replicated if any question of enforcement arises under s. 11.

## (2) Defining the risk and excluding liability

### *The problem stated*

A key element in the operation of s. 11 is the words added in December 2014 “other than a term defining the risk as a whole”. Such terms fall outside s. 11, and it is plain from the Law Commissions’ documents that insurers should be allowed to exclude certain forms of loss entirely. Thus if a vehicle insured for private use is damaged in the course of the assured’s business activities, the insurers should not have to face liability even if the immediate cause of the loss was, e.g., a drunken driver. Again, if a professional indemnity policy insures the business activities of a solicitor, liability incurred in any other capacity is outside the risk defined. That makes good sense. The difficulty is in establishing the distinction between risk definition and exclusion in less clear-cut instances. The Law Commissions recognised in L.C. 353 that the measure presented “contracting parties and courts with a new challenge”.<sup>87</sup> Inevitably the courts are going to have to develop some sense as to when a clause defines the risk and when it excludes liability or imposes a condition upon which liability depends. They have been spared that task by common law rules on formality, but is no escape under statutory rules on substance.

If all turns upon drafting, it would be a matter of simplicity for every insurance exception to be framed as risk defining. An insurer may wish to exclude liability for theft where there is no operative burglar alarm. That can be done in the form of an exclusion, leaving the assured free to recover if there is no alarm but the loss from fire or indeed any peril other than burglary. But suppose the policy defines the insured risk as a building with an operative burglar alarm, and the loss is the result of fire. If the court accepts that the term defines the risk, there can be no recovery for any form of loss in the absence of an operative burglar alarm. Yet that is more or less the paradigm situation in which s. 11 is required. The same may operate against the insurers. Using the motor vehicle example given above, the outcome may vary depending upon whether the policy defines the risk as driving for private purposes or defines the risk as driving but with an exclusion for loss incurred while the vehicle is being used for business purposes: s. 11 has no application in the former case but operates in the latter.

Neither the 2015 Act nor the Explanatory Notes to the Insurance Bill define this phrase. The Law Commissions themselves made only limited attempts to explore the point and proffered the guidance that “any

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<sup>84</sup> See also *Union Insurance Society of Canton Ltd v George Wills & Co* [1916] 1 A.C. 281.

<sup>85</sup> In response to a question from the SPBC as to how a warranty could be identified, the response of David Hertzell, lead Law Commissioner on the project, was: “How long do we have?” (H.L. Paper 81, p. 11). Mr Hertzell confirmed that the I.A. 2015 does not change the definition of warranties, whatever it may be.

<sup>86</sup> Cf. Law Com. No. 353 *Insurance Contract Law: Business Disclosure; Warranties; Insurers’ Remedies for Fraudulent Claims; and Late Payment* at [18.44]: “All warranties will be caught by [s 10], but only some by [s 11], because not all warranties are aimed at reducing particular risks ... Some define the scope of the contract as a whole, such as a term restricting cover to personal (and not commercial) use. Others have no bearing on risk of loss at all, such as premium payment warranties.”

<sup>87</sup> Law Com. No. 353 *Insurance Contract Law: Business Disclosure; Warranties; Insurers’ Remedies for Fraudulent Claims; and Late Payment* at [18].

such term will have a general limiting effect ... not linked to a specific risk sector.”<sup>88</sup> More specifically, the Law Commissions have said that s. 11 does not apply to terms which set out:<sup>89</sup>

- “(1) the uses to which insured property can be put (e.g. commercial/personal);
- (2) the geographical limits of the policy;
- (3) the class of ship being insured; or
- (4) the minimum age/qualifications/characteristics of a person insured.”

The Law Commissions add that “if one was insuring a ship, terms relating to its class, the qualifications of the captain and the commercial use made of the ship would tend to affect either the whole risk, or a significant part of the risk.”<sup>90</sup> It is noteworthy that the phrase “a significant part of the risk” has here crept in, words not used by the legislation, but they reflect the Law Commissions’ view that a risk-defining clause is of general as opposed to specific importance

The Law Commissions’ illustrations demonstrate the elusiveness of the distinction. A marine seaworthiness or a motor roadworthiness warranty seemingly define the risk as a whole. However, the Law Commissions were of the view that s. 11 applies and that a loss unconnected to seaworthiness or roadworthiness would be recoverable. The uncertainty was highlighted by the Lloyd’s Market Association (L.M.A.) in its oral<sup>91</sup> and written<sup>92</sup> evidence to the S.P.B.C., questioning the robustness of the Law Commissions’ own illustrations. By way of example, the L.M.A. suggested that it was by no means obvious that a policy insuring an oil refinery containing a clause requiring a qualified fire officer to be on the premises at all times related to the risk as a whole or only to loss caused by fire at a particular part of the refinery.<sup>93</sup>

#### *Help from the Southern Hemisphere*

A lesson to be learned from the experience in Australia and New Zealand is that the problem is pervasive. There is no obvious solution other than judicial good sense. The equivalent legislative wording does not refer to risk definition, but the issue has arisen in different guises.

In New Zealand the courts took it upon themselves, unprompted by legislation, to introduce the concept of risk-definition. In *Barnaby v South British Insurance Co Ltd*<sup>94</sup> a buildings policy excluded cover for “fault, defect, error or omission in design.” The insurers were held able to deny liability when a wall collapsed for reasons unconnected with its pre-existing condition, Hardie Boys J noting that “the section is designed to deal with those kinds of exclusion clauses which provide for circumstances likely to increase the risk of a loss which the policy actually covers ... the section is not designed to deal with exclusion clauses which specify the kind of loss or the quantum of loss to which cover does not apply at all.” The *Barnaby* principle was applied in *Hall v FP North Ltd*,<sup>95</sup> where a public liability policy covering the assured’s activities as an investment adviser excluded loss relating to the insolvency of any company: the restriction was regarded as risk-defining, by qualifying the scope of cover provided. In *Nelson Forests v Three Tuis*<sup>96</sup> the assured’s public liability policy related to his farm. That was held to define the risk so that liability incurred from a fire was held not to be covered because it arose out of the separate activity of renting accommodation to tourists. *Nelson* and *Hall* may be thought straightforward illustrations of the scope of policy cover, but *Barnaby* is far from obviously in the same category. Other decisions have either distinguished *Barnaby* or disregarded the point. It has thus been held that conditions against modification of the subject matter as defined in the policy are not risk-defining,<sup>97</sup> thereby drawing a difficult distinction between defective property and subsequent alterations giving rise to defects. Restrictions on cover for young or unlicensed drivers under a motor policy<sup>98</sup> and for work injuries under a travel

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<sup>88</sup> Law Com. No. 353 *Insurance Contract Law: Business Disclosure; Warranties; Insurers’ Remedies for Fraudulent Claims; and Late Payment* at [18.35].

<sup>89</sup> Stakeholder Note: Terms Not Relevant to the Actual Loss, at [1.8], reproduced in H.L. Paper 81, p. 47.

<sup>90</sup> Stakeholder Note: Terms Not Relevant to the Actual Loss, at [1.8], reproduced in H.L. Paper 81, p. 47.

<sup>91</sup> H.L. Paper 91, p. 20.

<sup>92</sup> H.L. Paper 91, p. 36.

<sup>93</sup> H.L. Paper 91, p. 37.

<sup>94</sup> (1980) 1 A.N.Z. Insurance Cases 60-401.

<sup>95</sup> (2010) A.N.Z. Insurance Cases 61-631.

<sup>96</sup> [2010] N.Z.H.C. 2178, reversed on other grounds [2011] N.Z.C.A. 576.

<sup>97</sup> *Culham v Lumley General Insurance (New Zealand) Ltd* Unreported, 6 November 2000, N.Z.H.C.; *Hing v Security & General Insurance Co (NZ) Ltd* (1986) 4 A.N.Z. Ins. Cas. 60-696. The point was not taken in *Tweddle v State Insurance Ltd* Unreported, 16 May 1991, H.C.N.Z. and left open in *Price v New Zealand Insurance Ltd* [2003] D.C.R. 700.

<sup>98</sup> *State Insurance Ltd v Lam* Unreported, 10 October 1996, N.Z.C.A.

policy<sup>99</sup> are treated as exclusions rather than risk definitions.

In Australia there is no protection under s. 54 unless, but for an act or omission, there would otherwise be coverage under the policy. So it is necessary to ascertain what is covered before it can be said that the act or omission is capable of being excused. Guidance was given by majority of the High Court in *FAI General Insurance Co Ltd v Australian Hospital Care Pty Ltd*,<sup>100</sup> where it was said<sup>101</sup> that s. 54 “does not permit, let alone require, the reformulation of the claim which the insured has made... In other words, the actual claim made by the insured is one of the premises from which consideration of the application of s. 54 must proceed. The section does not operate to relieve the insured of restrictions or limitations that are inherent in that claim.” So, the relevant distinction in Australia is, based on the claim, between exclusions and inherent restrictions or limitations. This is simply another way of stating the problem. *Prepaid Services Pty Ltd v Atradius Credit Insurance NV*<sup>102</sup> was a straightforward decision holding that a restriction in a credit policy on classes of debts insured was risk-defining rather than exclusionary, but Meagher JA in the NSW Court of Appeal sought to clarify the meaning of “inherent restrictions or limitations”:<sup>103</sup>

[The event insured against] may be an accident which results in personal injury or property damage; or the happening of that injury or damage ... These descriptions of themselves are not sufficiently specific to define the event covered by a particular type of policy. The accident will have to be of a particular kind, or arise out of or in the course of a specified activity. The injury or damage will usually have to happen in the course of or in connection with a particular activity.

The cases are at one in holding that the form of the policy is not a relevant consideration, and that the question is one of substance. But, that aside, the distinction is difficult to apply. In *Johnson v Triple C Furniture & Electrical P/L*<sup>104</sup> the pilot of a private aircraft was involved in a fatal accident. The policy required the pilot to complete a flight review within two years prior to any flight. There was held by the Queensland Court of Appeal to be no relevant act or omission, and that the absence of coverage was an inherent restriction in policy coverage. But that decision was subsequently overruled by the High Court in *Maxwell v Highway Hauliers Pty Ltd*<sup>105</sup> which involved a motor policy stating that “No indemnity is provided under this policy of Insurance. unless the driver: ...Has a P.A.Q.S.<sup>106</sup> driver profile score of at least 36 ...” Two insured vehicles were damaged in separate accidents, each with a driver who had not taken the P.A.Q.S. test. In a short judgment, the High Court ruled that the accidents were within the scope of coverage and that there had been omissions that gave rise to a defence: s. 54 was thus engaged. *Johnson* was wrongly decided in holding that the temporal restriction was one on the claim made.

Consider the earlier Queensland decision in *Stapleton v NTI Ltd*.<sup>107</sup> Here, a motor policy excluded cover where any part of the destination was more than 450 km from the assured’s base of operations. The court’s view was that the 450k.m. radius was a necessary part of the defined insured event. This is consistent with *Maxwell*, in that the claim made by the assured was for damage occurring in an area outside the scope of coverage, although it might also be argued that the claim was for damage and the relevant act excusable by s. 54 was taking the vehicle outside the protected zone. Equally difficult is a recent decision from Western Australia, *Inglis v Sweeney*,<sup>108</sup> where a household policy excluded the assured’s liability to any person normally living with the assured. Injury was sustained by the assured’s daughter. The District Judge held that the claim was one for injury, and that s. 54 negated the restriction because living with the assured was not an inherent restriction but merely a matter of detail.

So what does this tell us about s. 11 of the I.A. 2015? In both New Zealand and Australia the legislation has been construed as: (a) requiring a disregard of form; and (b) drawing a distinction between inherent limitations on coverage and policy exclusions. The I.A. 2015 confirms both points, but the phrase “defines the risk as a whole” is elusive, and irreconcilable borderline decisions are probable.

### (3) Risk and other clauses

<sup>99</sup> *Sun Alliance v Travel the Earth* [1997] D.C.R. 31.

<sup>100</sup> (2001) 204 C.L.R. 641. The case involved a late claim under a “claims made and notified”, a matter not regulated by the I.A. 2015.

<sup>101</sup> (2001) 204 C.L.R. 641 at [41].

<sup>102</sup> [2012] N.S.W.C.A. 252.

<sup>103</sup> [2012] N.S.W.C.A. 252 at [134].

<sup>104</sup> [2010] Q.C.A. 282.

<sup>105</sup> [2014] H.C.A. 33.

<sup>106</sup> People and Quality Solutions Pty Ltd, providing psychological testing of drivers' attitudes towards safety.

<sup>107</sup> [2002] Q.D.C. 204.

<sup>108</sup> [2015] W.A.D.C. 34.

The I.A. 2015 is not designed to have any effect on policy terms unrelated to the risk. Such terms include notification provisions, co-operation, mitigation and subrogation protection. Conditions precedent relating to such matters have full effect and, if broken, give insurers an absolute defence even though there is no prejudice to the insurers. It might be argued that the words in s. 11(1) “if compliance with it would tend to reduce the risk of ... loss of a particular kind” could refer to the insurer’s loss and not that to the assured. Thus, if the assured under a claims made liability policy fails to notify insurers within the policy year of a claim made against it, or of circumstances becoming known to the assured that might give rise to a claim, the insurer may be unable to defend the assured properly in subsequent proceedings: thereby giving rise to “loss of a particular kind”. That interpretation is, however, strained. The word “loss” as used in s. 11 appears to refer to the assured’s loss only: that is the only possible interpretation of the words “liability under the contract for the loss” in s. 11(2). This is not an oversight or flaw in drafting, but a deliberate decision by the Law Commissions to confine reform to risk clauses only. Indeed, the I.A. 2015 will apply to a non-risk clause only where it is described as a warranty and the court takes the insurers at their word.<sup>109</sup> In the case of a premium warranty, therefore, breach has a suspensory effect under s. 10(2), so that payment resurrects the risk. If insurers wish to restore the common law provision of once-and-for-all termination for late payment<sup>110</sup> the language of conditions will have to be used.

The distinction between risk and non-risk clauses is not always straightforward. The UK test is the objective, whether “compliance with it would tend to reduce the risk of ... loss”. In Australia, the question under s. 54(2) of the I.C.A. 1984 is whether “the act [or omission] could reasonably be regarded as being capable of causing or contributing to a loss”. Although the question is framed in terms of the assured’s conduct, the UK legislation is in effect the same, given that it refers to “compliance”, ie, an act or omission. In New Zealand, under s. 11 of the I.L.R.A. 1977, the test is whether “the liability of the insurer has been so defined because the happening of such events or the existence of such circumstances was in the view of the insurer likely to increase the risk of such loss occurring”, a matter to be determined subjectively and based on the evidence of the insurers.<sup>111</sup> The subjective test was specifically rejected in the drafting of s. 11 of the I.A. 2015, the Law Commissions determining that it would be difficult to show what a clause was designed to do, particularly where standard terms were involved, and that exclusions were in reality designed to remove liability rather than to minimise the risk.<sup>112</sup>

Where the clause relates to the risk, the statutory requirement that compliance would tend to reduce the risk of loss is not necessarily satisfied. Australian authority is instructive. Satisfying obligations relating to intoxicated drivers,<sup>113</sup> change of use,<sup>114</sup> burglar alarms<sup>115</sup> and occupation of buildings<sup>116</sup> unarguably tend to reduce the risk of loss. But it has been held that failure to comply with an obligation to notify the insurer of an increased risk does not of itself increase the risk,<sup>117</sup> and it would seem that s. 11 of the I.A. 2015 is open to the same interpretation. The holdings in *Johnson v Triple C Furniture*<sup>118</sup> and *Maxwell v Highway Hauliers Pty Ltd*<sup>119</sup> illustrate the difficulty: in the former, failure by a pilot to undergo a flying review every two years was capable of causing or contributing to the loss, but in the latter the failure of a lorry driver to undergo psychological testing was not.

In Australia and New Zealand a finding that the clause is not a risk clause triggers other protective measures relieving the assured in full or in part from breach in the absence of prejudice to the insurers.. Under s. 9 of the I.L.R.A. 1977, late notification can be disregarded. Section 54(1) of the I.C.A. 1984 is not so restricted and extends to all terms relating to acts or omissions which cannot reasonably be regarded as being capable of causing or contributing to a loss. The I.A. 2015, by contrast, is silent and the assured is thrown back onto the formalism of the common law. The Law Commissions at no stage sought to tackle claims and other non-risk provisions. It is possible that the Law Commissions were wary of the Australian experience of the operation of s.

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<sup>109</sup> In the authors’ view, a premium warranty is not a true warranty. The Law Commissions nevertheless devoted much of their analysis to the effect of the legislation on such clauses.

<sup>110</sup> See *JA Chapman & Co Ltd v Kadirga Denizcilik ve Ticaret AS* [1998] Lloyd’s Rep I.R. 377.

<sup>111</sup> *New Zealand Insurance v Harris* [1990] 1 N.Z.L.R. 10; *AMP General Insurance (NZ) Ltd v Hugo* (2003) 12 A.N.Z. Ins. Cas. 61-563.

<sup>112</sup> Law Com. No. 353 *Insurance Contract Law: Business Disclosure; Warranties; Insurers’ Remedies for Fraudulent Claims; and Late Payment* at [18.12-18.14].

<sup>113</sup> *Bunting v Australian Associated Motor Insurers Ltd* [1994] T.A.S.S.C. 9.

<sup>114</sup> *Austcan Investments Pty Ltd v Sun Alliance Insurance Ltd* (1992) 7 A.N.Z. Ins. Cas. 61-116.

<sup>115</sup> *McNeill v O’Kane* [2002] Q.S.C. 144.

<sup>116</sup> *Mercantile Mutual Insurance (Aust) Ltd v Schigulski* [1993] S.A.S.C. 4137.

<sup>117</sup> *Ferrcom Pty Ltd v Commercial Union Assurance Co of Australia Ltd* (1993) 176 C.L.R. 332 (registration of crane); *Gibbs Holdings v MMI* (2002) 11 A.N.Z. Ins. Cas. 61-484 (storage of flammable material).

<sup>118</sup> [2010] Q.C.A. 282.

<sup>119</sup> [2014] H.C.A. 33.

54(1) in relation to professional indemnity policies, but that particular problem has now been surmounted.<sup>120</sup> Perhaps the greatest weakness of the I.A. 2015 is its failure to address non-risk clauses.

#### **(4) Regulated risk clauses: time, location and kind**

The stated intention of s. 11 is “to enable an objective assessment of the “purpose” of the provision, by considering what sorts of loss might be less likely to occur as a consequence of the term being complied with.”<sup>121</sup> The test focuses on the parties’ objective intentions at the date of the contract, so that it looks forward from that time.

Assuming that the clause is one that if complied with would tend to reduce the risk of loss, it must do so by reference to loss at a particular time, at a particular place or of a particular kind. This confined list appears neither in the I.C.A. 1984 nor in the I.L.R.A. 1977. The reforms proposed, but to date not adopted, in New Zealand in 1998 would have deemed certain clauses not to be increased risk clauses, based on the experiences of insurers finding themselves unable to rate by statistical evidence. A provision would have been excluded if it: “(a) defines the age, identity, qualifications or experience of a driver of a vehicle, a pilot of an aircraft, or an operator of a chattel; or (b) defines the geographical area in which a loss must occur if the insurer is to be liable to indemnify the insured; or (c) excludes loss that occurs while a vehicle, aircraft, or other chattel is being used for commercial purposes other than those permitted by the contract of insurance.” The Law Commissions took the view that the purpose of the proposed reforms was to reflect the New Zealand Law Commission’s analysis that such provisions went to the heart of risk profile and would not be caught by I.A. 2015, s. 11.<sup>122</sup> But that has to be questioned. Categories (a) and (b) seem to be paradigm examples of when s. 11 of the I.A. 2015 could be expected to apply; only category (c) unarguably falls into the category of risk definition. It was said in L.C. 353 that:<sup>123</sup> “There is undoubtedly a degree of uncertainty relating to how the courts will interpret a “type of loss”, a “loss at a particular place” and “a loss at a particular time”. Often the questions will have common sense answers, but we are aware that sometimes they will not.” We would not argue with that.

Loss at a particular time is plainly temporal, relating, for example, to the operation of a burglar alarm, or the employment of a night watchman, outside working hours. A mere “whilst” connection would seem to be insufficient, so that a clause restricting coverage whilst goods or a vehicle are left unattended or with a key in the ignition would not qualify under this head, although it might be targeted at loss of a particular kind.

A term that would tend to reduce the risk of loss at a particular location was distinguished by the Law Commissions from a term that delimits geographical coverage, e.g., a motor policy that restricts first party damage to use of the vehicle in the UK: the latter type of provision was regarded as relating to the risk as a whole and outside s. 11. The particular location provision is aimed at, for example, the place where a vehicle is garaged or an obligation to keep valuable items in a safe while on specified premises.

Loss of a particular kind is perhaps the most complex of the three s. 11 classes. There is an initial difficulty in distinguishing such exclusions from terms defining the risk as a whole. But, that aside, a term aimed at reducing loss of a particular kind could at its broadest be any term affecting any subject matter: fire or theft affecting property; damage to a car; or liability to a third party under a liability policy. Alternatively it could be aimed at a specific type of fire (e.g., electrical) or theft (e.g., through a particular point of access). The point awaits judicial determination, as accepted by the Law Commissions. To use their example, if the assured warrants that there is a five-lever mortise lock on a door and the assured’s lock has only three levers, the “loss of a particular kind” could be theft generally or it be theft by picking the lock. Thus, if intruders enter through a

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<sup>120</sup> The problem related to “claims made and notified” policies, under which cover is triggered by either: (a) a third party claim being made against the assured, and notified to the insurer, in the policy year; or (b) the assured becoming aware of circumstances that might give rise to a claim and notifying those circumstances to the insurers in the policy year. After a series of conflicting decisions, the High Court confirmed in *FAI General Insurance Co Ltd v Australian Hospital Care Pty Ltd* (2001) 204 C.L.R. 641 that late notification of circumstances was excusable under s. 54(1), so that an insurer could face liability for future claims that properly fell into a later year of cover. The matter was sufficiently serious for reforming legislation to be drafted, but it was never implemented and the market overcame the problem by withdrawing express head (b) coverage other than in Directors and Officers policies, and leaving assureds to rely upon a statutory right to notify circumstances (s. 40 of the 1984 Act) breach of which is not subject to s. 54 condonation.

<sup>121</sup> The Explanatory Notes to the Bill, <http://www.publications.parliament.uk/pa/bills/cbill/2014-2015/0155/en/15155en.pdf>, at [94].

<sup>122</sup> Law Com. No. 353 *Insurance Contract Law: Business Disclosure; Warranties; Insurers’ Remedies for Fraudulent Claims; and Late Payment* at [18.34].

<sup>123</sup> Law Com. No. 353 *Insurance Contract Law: Business Disclosure; Warranties; Insurers’ Remedies for Fraudulent Claims; and Late Payment* at [18.49].

window, and the latter interpretation is correct, the clause was not designed to reduce the risk of theft generally so that it falls outside s. 11 entirely and the warranty holds good.<sup>124</sup>

It is submitted that, unless s. 11 is to be deprived of much of its effect, where the clause contains a wide-ranging obligation covering various possible causes of loss, e.g., an obligation to undertake a fire hazard inspection, the word “kind” has to be construed broadly to relate to fire in general, rather than to any specific manifestation of fire. But even with that interpretation, s. 11 does not cover the entire field of limitations and exclusions. What of a clause that removes cover while a vehicle is hired to a third party? There is a good argument that it is risk-defining and outside s. 11, but even if that is wrong it cannot easily be said to target the risk of loss of a particular kind, or at a particular time or place. So it would seem, as suggested earlier, that there are risk clauses that do not define the risk as a whole but nevertheless outside s. 11.

## (5) Causation?

### *The statutory test*

The purpose of s. 11 is to prevent denial of liability for a loss of a completely different nature from that contemplated by an exclusion. Straightforward examples given by the Law Commissions include: breach of a fire alarm or locks warranty where the loss is caused by flood; or failure to employ a night watchman where there is a theft in the middle of the afternoon.<sup>125</sup> Fears of a pure causation test had been expressed to the Law Commissions. Section 11 in its final form avoids reference to causation, and was duly welcomed by the majority of the witnesses to the SPBC, but it is far from obvious that the section meets its billing.<sup>126</sup> Breaking s. 11 down, there is an initial objective question: would compliance with a term tend to reduce the risk of a loss of a particular kind, at a particular location and at a particular time? In the view of the Law Commissions, there is no causation element involved, as the test looks forward.<sup>127</sup> If so, the assured can recover by showing that non-compliance “could not have increased the risk of the loss which actually occurred in the circumstances in which it occurred.” It is thus necessary to look at what actually happened. The test is whether non-compliance could not have increased the risk of that loss, as opposed to whether non-compliance was the cause of that loss.

The operation of s. 11 turns on the meaning of the phrase “the loss which actually occurred in the circumstances in which it occurred.” Two interpretations are possible. The first is causation-based and exemplified by *New Zealand Insurance v Harris*.<sup>128</sup> Here, a policy insuring a tractor excluded loss while the tractor was “let out on hire”. The tractor was destroyed by fire while it was on hire to a third party. The insurers argued for a wide causation test, namely that if the tractor had not been hired out then there might not have been a fire at all. The New Zealand Court of Appeal rejected that suggestion, on the basis that “refined analysis in terms of metaphysical inquiries into causation should be eschewed” and instead the focus should be on the immediate cause of the loss, which was fire unrelated to the hiring.

The alternative interpretation, and that intended by the Law Commissions, is set out in the Explanatory Notes to the Insurance Bill. A direct causal link between breach and ultimate loss is not required, and the test is not whether the non-compliance actually caused or contributed to the loss<sup>129</sup> but whether non-compliance with the term could have increased the risk in the circumstances that the loss occurred. It is necessary to look at the issue broadly and not to consider “the way” in which the loss occurred.<sup>130</sup> The cause of the loss is immaterial, and in particular it is irrelevant that compliance with the obligation would not actually have made any difference: it is enough that it could have made a difference. The focus is on looking forward from when the risk was underwritten (the breach could not have increased the risk of the loss), as opposed to looking backwards from

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<sup>124</sup> Stakeholder Note: Terms Not Relevant to the Actual Loss, at [1.18(1)]. This example has separate causation problems, discussed below. See also the written evidence of the L.M.A., H.L. Paper 81, p. 37, noting that a warranty requiring the presence of a qualified fire officer at an oil refinery would relate to loss at a particular place under a fire policy but under an all risks policy that would not be the case and s. 11 might not apply at all.

<sup>125</sup> The Explanatory Notes to the Bill, <http://www.publications.parliament.uk/pa/bills/cbill/2014-2015/0155/en/15155en.pdf>, at 96.

<sup>126</sup> See the oral and written evidence of the L.M.A., where s. 11 is referred to as introducing “causation by the back door”: H.L. Paper 81, p. 36. The L.M.A.’s full evidence is at pp. 20 and 35-37.

<sup>127</sup> Law Com. No. 353 *Insurance Contract Law: Business Disclosure; Warranties; Insurers’ Remedies for Fraudulent Claims; and Late Payment* at [18.16].

<sup>128</sup> [1990] 1 N.Z.L.R. 10.

<sup>129</sup> The Explanatory Notes to the Bill, <http://www.publications.parliament.uk/pa/bills/cbill/2014-2015/0155/en/15155en.pdf>, at [97].

<sup>130</sup> Stakeholder Note: Terms Not Relevant to the Actual Loss, at [1.17].



the actual circumstances of the claim (whether the breach contributed to the actual loss).<sup>131</sup> The argument here is that the word “circumstances” differs significantly from the word “way”.

### *Application*

It is our submission that the causation and s. 11 tests give rise to different outcomes only in exceptional cases. That view was shared by the L.M.A. in its evidence to the S.P.B.C. We say that primarily because the distinction between “circumstances” and “way” is as a matter of language hard to draw. Indeed, without reference to the Law Commissions’ explanations the distinction is elusive. If s. 11(3) had simply stated that there is recovery only if the assured’s breach “could not have increased the risk of the loss” then the Law Commissions’ intentions might conceivably have been fulfilled. But the statutory reference to the circumstances in which the loss occurred poses the question of why the loss actually happened. It is only by accepting the argument rejected in *Harris* that s. 11 can truly be divorced from causation. But s. 11 does not read in that way. Applying the wording of s. 11 to *Harris*, if the insurance on a vehicle is inoperative while it is on lease, but it is leased and catches fire, surely the fact of leasing could not have increased the risk of loss by accidental fire. That assumes that all lessees are fire hazards. It may be that the lessee involved is an arsonist, but that is a causation question and both causation and s. 11 would then deny recovery.

An illustration provided by the Law Commissions is telling.<sup>132</sup> A motor policy contains a roadworthiness warranty, and there is breach in the form of a defective headlight. If the vehicle skids on black ice in the dark then although the faulty headlight did not cause the accident, the risk of the loss that actually occurred and the circumstances in which it occurred were increased by non-compliance, so that the warranty is operative. The loss that occurred was a crash, and the circumstances in which it occurred was darkness. Conversely, if the vehicle collided with a truck in broad daylight, the defective headlight could not have contributed to the accident in the circumstances in which it occurred. The L.M.A. in its written evidence to the S.P.B.C. was critical of this example.<sup>133</sup> As regards the accident at night, the L.M.A. thought that it would be open to the assured to argue that the black ice might not have been visible even if the headlight had been working. As regards the accident in the day a working headlight might have given the truck greater warning and allowed its driver to take evasive action. All of this is pure causation. It may be added that under the causation test set out in both the I.C.A. 1984 and the I.L.R.A. 1977, the assured would have to prove that the loss was not caused or contributed to by the defective headlight, a tough task as regards the accident at night given that the burden of proof is on the assured. So conceivably a different result might be reached, but that is unlikely.<sup>134</sup>

Examples of the intrusion of causation abound. L.C. 353<sup>135</sup> set out a scenario where a special form of padlock was warranted affixed to a yacht, but was not so affixed at the date of loss. Plainly s. 10 cannot assist, and s. 11 will help only where the loss is other than by theft. The illustration then adds that if there was a break-in there can be no recovery even if the special padlock would not have prevented it. But is that correct? Section 11(3) allows recovery if the assured can show that the non-compliance with the term could not have increased the risk of the loss which actually occurred in the circumstances in which it occurred. Plainly compliance with the warranty would have reduced the risk of the loss that occurred, but would it have done so in the circumstances that it occurred? The circumstances are presumably that some heavy-duty burgling kit was involved. It is only by depriving the phrase “circumstances in which it occurred” of any meaning that the Law Commissions can achieve their purpose of freeing the legislation of causation. The same point was made by the L.M.A. in its criticism of the Law Commissions’ illustration of breach of a requirement for a five-lever mortise lock where there is a break in at a time when the lock is only three-lever. As the L.M.A. suggest, if the door is battered down, there is nothing to stop the assured showing that a higher-grade lock would have made no difference. Conversely, if the intruders had obtained access through a window, it is not immediately apparent that the warranty irrelevant to the loss: the thieves may have discovered that security was lax and accordingly might have targeted the building.<sup>136</sup>

The analysis can be transposed to other forms of insurance. If a motor policy excludes liability whilst the vehicle is being driven by a learner driver, and the driver crashes because of a sudden loss of consciousness, a Southern Hemisphere causation test would require the insurers to pay because the loss was not caused by the breach. But s. 11 reaches the same result: the loss that actually occurred was crashing, and the fact that the

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<sup>131</sup> Stakeholder Note: Terms Not Relevant to the Actual Loss, at [1.16].

<sup>132</sup> Stakeholder Note: Terms Not Relevant to the Actual Loss, at [1.18(2)].

<sup>133</sup> H.L. Paper 81, p. 36.

<sup>134</sup> But it can be done: see *Norwich Winterthur Insurance (New Zealand) Ltd v Hammond* (1985) 3 A.N.Z. Insurance Cases 60-637.

<sup>135</sup> Law Com. No. 353 *Insurance Contract Law: Business Disclosure; Warranties; Insurers’ Remedies for Fraudulent Claims; and Late Payment* at [18.28].

<sup>136</sup> H.L. Paper 81, p. 36.

vehicle was being driven by a non-qualified driver may have increased the chances of the loss that actually occurred (crash), but not the chances of a loss in the circumstances in which it occurred. The capacity of a driver is nothing to do with health. Again, if a vehicle is to be used exclusively in a given zone, and it is damaged outside that zone,<sup>137</sup> then unless there was some geographical feature responsible for the loss then it cannot be said that non-compliance increased the risk of the loss in the circumstances in which it occurred. Only by disregarding the statutory words “in the circumstances in which it occurred” can there be a different result.

In *Forsikringsaktieselskapet Vesta v Butcher*<sup>138</sup> London market reinsurers sought as against Norwegian insurers of a fish farm to rely upon breach of 24-hour watch warranty in both policies. Fish escaped following a storm that no amount of watching could have prevented. The insurers were liable by reason of a causal requirement under Norwegian law. The reinsurers were held by the House of Lords to be unable to rely upon the English law interpretation of the reinsurance warranty and had to pay, but if the case was to arise under the I.A. 2015, it would be necessary to ask whether failure to mount a watch could have increased the risk of the loss that actually happened in the circumstances that it happened. The circumstances were a storm, and non-compliance with the warranty could not have increased the risk of loss by storm. L.C. 353 indeed expressly recognises that *Vesta* would be decided differently under the I.A. 2015.<sup>139</sup>

A more recent example is s. 11 in *Milton Furniture Ltd v Brit Insurance Ltd*.<sup>140</sup> Here, insurers were held to be entitled to deny liability for breach of a burglar alarm warranty where the loss was caused by a fire. There was no evidence of a break-in. A working burglar alarm cannot affect the risk of loss by fire, so – assuming that the burglar alarm requirement was not risk-defining – the outcome would presumably be different under s. 11. It might be argued, using the test rejected in *Harris*, that the inoperative burglar alarm increased the risk of break-in, and that of itself created a fire-hazard. But if that is right, then s. 11 has a very narrow ambit indeed, and would more or less be confined to circumstances where, eg, a building is hit by a falling aircraft at a time when the burglar alarm was not functioning.

## Final considerations

We have not sought to argue that the statutory changes are undesirable. Reforming legislation always brings a period of dislocation and uncertainty. There is inherent uncertainty in the pre-I.A. 2015 law, with courts striving to overcome the worst excesses of conditions precedent and warranties by refusing to regard them as consistent with their titles, or – where that is impossible – by artificially narrow construction. So one form of uncertainty is replaced by another.

The approach to contract construction is entirely different under the I.A. 2015. To enforce a warranty after 12 August 2016, no less than seven questions have to be answered: (1) is the clause a warranty at all? (2) is there breach at the date of the loss or has the breach been remedied? (3) does the warranty define the risk as a whole? (4) does the warranty tend to reduce the risk of any loss? (5) is the risk reduced one relating to its kind, place or time? (6) could non-compliance not have increased the risk of the loss that actually occurred in the circumstances that it occurred? (7) in the case of a non-consumer contract, have the parties substituted by express transparent terms a different outcome to that set out in the I.A. 2015? If the term is not a warranty but a condition precedent, then steps (3)-(7) are relevant. If it is not a condition precedent, then there is probably no need to rely upon the I.A. 2015 at all.

Some 40 years on, the New Zealand and Australian courts are still struggling with their reforms. In the commercial law sphere, certainty is probably more important than any other consideration. The I.A. 2015 was recognised by the Law Commissions and the S.P.B.C. as being in general both important but also something of an unknown quantity. Section 11 in particular was adopted at the last minute and with virtually no Parliamentary discussion. It will take some years and a series of seminal decisions of the English courts<sup>141</sup> to know exactly what effect these reforms will have.

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<sup>137</sup> Assuming that this is not regarded as risk-defining, which must be the case given that s. 11 gives geographical limits as an illustration of an affected risk clause.

<sup>138</sup> [1989] 1 Lloyd's Rep. 331.

<sup>139</sup> Law Com. No. 353 *Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims; and Late Payment* at [18.57].

<sup>140</sup> [2015] EWCA Civ 671.

<sup>141</sup> Cf. Law Com. No. 353 *Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims; and Late Payment* at [18.49].