Remedying the remedies: the shifting shape of insurance contract law

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The Law Commissions based their reform of insurance contract law on the principle of proportionality. However, its proposals for risk management clauses (such as the insurance warranty) do not follow this model. The orthodox justification for the "automatic discharge" rule established for insurance warranties is that to leave the insurer a counterclaim for damages is unbusiness-like. This article demonstrates that this is a false choice and insurance law has failed to take into account modern developments in contract law.

"You can't always get what you want
But if you try some time, you just might find
You get what you need"[1]

The design of insurance contract remedies in England and Wales is of fundamental importance. The nature of the remedies provides the immediate context in which the substantive rules must be assessed. The reason why the rules relating to utmost good faith, non-compliance with policy terms and fraudulent claims matter is that they each provide a substantial remedy for the insurer: most commonly, that all (or at least some) of the liability under the policy is discharged. Traditional English insurance law recognised a strict "order of performance" model for insurance contract law. Performance was sequential: the insurer could be called upon to pay a claim under the contract only if the insured had performed. This often created rules that favoured the underwriter, but not always. There were examples where the default remedy was weak.[2] What did not normally occur was any attempt to separate the order of performance from the quality of performance. The requirement of strict performance by the insured as a precondition to insurer action denied the possibility of a proportionate remedy.[3] It is clear from the development of insurance law that this is the type of remedy that insurers want, but is it what the industry needs?

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1. M Jagger and K Richards, *You Can't Always Get What You Want* (1969).

2. For example, the Marine Insurance Act 1906, s.39(5) on seaworthiness in time policies would discharge the insurer from liability in the event of three conditions being met, but the conditions (privity of the assured, causative effect and factual unseaworthiness) are sufficiently difficult to prove in practice that the remedy is often supplemented by express contractual requirements as to ship safety.

3. Proportionality can be inherent in the remedy (as in damages, where the magnitude of damages reflects the prejudice caused) or created by a system of remedies where more powerful remedies are reserved for more serious breaches (as in the innominate term).

The "all or nothing" approach to insurance remedies is in stark contrast to that in many civil law jurisdictions, where greater emphasis is placed on providing a proportionate remedy.[4] Cousy wrote about the European experience, where:

> "modern insurance law and legislation increasingly tend to protect the insurance consumer . . . by introducing several protective devices that draw their inspiration from the sphere and the logic of consumer law".[5]

This is in contrast to traditional insurance law, especially within English law, which protected the underwriter, due to:

> "an attitude of systematic suspicion toward the policyholder and the insured. In fact nearly all of the traditional principles of insurance law can (only) be understood and explained as originating in this basic suspicion of 'fear and abuse' ".[6]

Indeed, the traditional English model has been extensively reformed—beyond all recognition in many cases—in other parts of the common law world.[7] Rather than a sequential approach, many other systems adopt a "mitigatory" standard, whereby the insurer's obligation to pay claims is reduced (albeit potentially to zero) where the insured fails to comply with its obligations. The crucial difference is that remedies under the mitigatory standard require actual evidence of prejudice. This mitigatory standard is closer to the normal remedy in most commercial law disputes: price adjustment via set-off and damages.

This paper considers the gradual shift in English insurance contract law: away from the sequential model and towards a mitigatory standard, in light of the current Law Commissions' proposals.

I. INSURER REMEDIES FOR BREACH OF INSURANCE CONTRACT

Remedies represent a core element in the "default rules" that make up much of commercial contract law. In most cases, parties are free to bargain for such remedies as they wish, without legal interference. However, rather than describe the desired remedy in each contract, lawyers have become used to selecting from pre-established defaults. As long as the court follows the intended classification, a commercial lawyer would normally be able to predict the possible remedial outcomes for a breach of a sales condition or an insurance warranty. The label indicates the default remedial position.

An examination of the remedies for breach available to an insurer under English law would display a wide variety of juridical bases for intervention, but one dominant result, that the insurer is discharged from liability for subsequent losses arising under the contract. There are circumstances in which the insurer would remain liable for other

4. See eg M Clarke, "Aggravation of Risk during the Insurance Period" [2003] LMCLQ 109; H Hiess, "Proportionality in the New German Insurance Contract Act 2008" (2012) 5 Erasmus L Rev 105.

5. H Cousy, "About Sanctions and the Hybrid Nature of Modern Insurance Contract Law" (2012) 5 Erasmus L Rev 123.

6. H Cousy, "Insurance between Commercial Law and Consumer Protection", in H Heiss (ed), Insurance Contract Law between Business Law and Consumer Protection (Dike, Zurich/St Gallen, 2012), 516.

7. Eg Australia: Insurance Contracts Act 1984; USA: B Works, "Excusing Nonoccurrence of Insurance Policy Conditions in Order to Avoid Disproportionate Forfeiture: Claims-Made Formats as a Test Case" (1999) 5 Conn Ins LJ 505.

losses, but English law has generally not awarded a reduction in coverage for a given loss. Put simply, an individual loss is normally either subject to an effective remedy against payment (in which case nothing can be recovered) or it is recoverable in full.

The juridical bases for the rules that make up insurance law are many, and in some cases remain contested. A simple survey would discover:

— The requirement that the insured make a fair presentation of the risk prior to contracting. Remedy: contract discharged in its entirety, either by marine insurance statute or by equivalent independent rule of law. It remains a matter of contention whether the remedy is "avoidance" or "rescission", and the extent to which these differ in practice.[8]
— The obligation that the insured comply with policy limits for the proper use of its property during the contract period. Remedy: if an "insurance warranty", then non-compliance triggers permanent automatic discharge from liability as from the date of the breach. This default rule is based on a marine insurance statutory principle of general applicability. If an "exception", then cover is suspended during the period of non-compliance.
— A claim tainted by fraud. Remedy: the insurer has the right to deny all liability for a claim tainted by fraud, either by reliance on an express "forfeiture" clause or by means of an independent rule of law.

The obvious principle which stands outside this model is the remedy for non-compliance with claims conditions, such as a requirement to give notice of an impending claim. There, in what may be the start of a modern trend, the courts decided on a "mitigatory" standard, and awarded damages as the default remedy. The move to a mitigatory standard in respect of claims conditions is less controversial because such clauses have been characterised as incidental to the main purpose of the contract: the insurer's duty to pay claims. This, then, has provided the delineation to date: substantive obligations are enforced by the threat of a loss of cover, lesser obligations by damages. However, this crude division has come under considerable strain, and academic and judicial criticism. The purpose of this paper is to consider the proposals of the Law Commissions in light of this dichotomy of remedy, and ask whether the end is drawing near for the remedy of absolute discharge from liability.

In this paper we leave behind those *sui generis* rules relating to good faith, and take three areas that place responsibility on the insured during the life of the contract. This enables us to make a closer comparison between insurance and general contract law. The first obligation considered is compliance with contractual terms related to management of the risk. In English insurance contract law, these are the warranties and exceptions to the risk. The second category is the set of obligations of notice and co-operation on the insured after the risk has occurred. The final duty is the payment of the premium.

In each case, non-compliance with the obligations may be of genuine significance to the insurer's position, or merely a minor issue. Despite this, the default legal classification for each varies, with insurers granted substantial remedies for non-compliance with insured's risk management obligations, and lesser remedies for the others.

8. B Harris, "The reform of insurance risk avoidance: are we reforming a right of contractual rescission or a right sui generis?" [2013] JBL 23.

a. Non-compliance with "risk management" terms

The historic position within insurance contract law is to treat obligations related to the insured's control of the risk during the lifetime of the contract as fundamental to the insurer's obligation to pay subsequent claims. In many cases, the obligation to care for the property will be viewed as an "insurance warranty".

In a series of cases decided during his tenure as Lord Chief Justice, Lord Mansfield entrenched the idea of the fundamental nature of risk-related clauses in English insurance law. In *De Hahn* v *Hartley*,[9] the policy contained a clause requiring that the insured vessel leave Liverpool with a minimum of 50 crew members. The insured portion of the voyage was the "middle voyage" of its slave-trading activities. This second leg ran from the west coast of Africa to the Caribbean. The vessel left Liverpool with 46 crew, but remedied this non-compliance a few miles later. It left the UK with 52 crew. This temporary non-compliance had no effect on the insured risk. The commercial purpose of the warranty was to ensure that the vessel was properly prepared for the dangerous middle voyage across the Atlantic. Whether it left Liverpool with 50 crew was frankly immaterial to the insurer. It was not yet on risk.

We could speculate that the insurer would want a promise that the vessel would leave the United Kingdom with an experienced, established crew because it might be difficult to recruit additional suitable crew afterwards. What was not shown—and probably could not be shown—is that the insurer would be able to demonstrate on these facts any actual prejudice to its commercial position caused by non-compliance. The vessel did leave the United Kingdom with a full complement of crew. The short trip in coastal waters with a marginally understaffed crew—understaffed only for the insured peril of a transatlantic voyage carrying slaves—did not increase the risk the insurer was to take. The crew was almost certainly sufficient for a short voyage in British waters. There was "substantial performance" of the duty. That is not to say that the clause could not be broken in a significant manner. Change the facts: have the vessel leaving for the African coast understaffed, and with no prospect of recruiting the same quality of staff once en route. This increases the risk that the underwriter is being asked to undertake, and the insurer should not be liable for the loss. However, on the facts as litigated, this looks like a case of economic opportunism. The insurer here is using a breach of no commercial significance to justify non-performance, and this behaviour has been deplored, and legislated against, in other contexts.[10]

Lord Mansfield was not concerned with the possibility of opportunism, and gave judgment for the insurers, stating a clear principle:

> "A warranty in a policy of insurance is a condition or a contingency, and unless that be performed there is no contract. It is perfectly immaterial for what purpose a warranty is introduced . . . ."[11]

The Mansfield principle on the effect of non-compliance with an insurance warranty was codified in the Marine Insurance Act 1906, s.33(3):

9. *De Hahn* v *Hartley* (1786) 1 TR 343.
10. *Arcos* v *Ronaasen* [1933] AC 470; *Re Moore & Landauer* [1921] 2 KB 519; and the Sale of Goods Act 1979 (as amended), s.15A.
11. *De Hahn* v *Hartley* (1786) 1 TR 343, 345–346.

"A warranty, as above defined, is a condition which must be exactly complied with, whether it be material to the risk or not. If it be not so complied with, then, subject to any express provision in the policy, the insurer is discharged from liability as from the date of the breach of warranty, but without prejudice to any liability incurred by him before that date."

The question for modern courts has been whether the word "condition" in the statute meant "condition precedent" (so that the insurer's obligation would arise only if the insured had complied) or a contractual condition (which would give the insurer the option to terminate the contract for repudiatory breach). Lord Goff of Chieveley in *The Good Luck*[12] resolved this uncertainty, by characterising insurance warranties as "contingent conditions precedent" to liability:

"[I]f a promissory warranty is not complied with, the insurer is discharged from liability as from the date of the breach of warranty, for the simple reason that fulfilment of the warranty is a condition precedent to the liability of the insurer."

On this basis, the insurer is automatically discharged from liability on breach of warranty, because the insured's compliance with such terms is a precondition to the insurer's being liable for subsequent claims. However, this "order of performance" model prevents the insured from remedying the non-compliance, or making any argument that its failure did not prejudice the insurer. There is no breach of contract; the condition precedent is "contingent" in nature. The contract simply ceases to provide cover, as an essential precondition to cover is no longer met.

There have been recent attempts to restate the limits of the "insurance warranty". In *HIH Casualty*,[13] Rix LJ appeared to regard all clauses describing the risk as necessarily fundamental to the performance of an insurance contract:

'[O]ne test is whether it is a term which goes to the root of the transaction; a second, whether it is descriptive of or bears materially on the risk of loss; a third, whether damages would be an unsatisfactory or inadequate remedy . . . *Otherwise the insurer is merely left to a cross-claim in a matter which goes to the risk itself, which is unbusinesslike*."

In addition to his first point, that clauses that are "descriptive of" or "bear materially on" the risk are fundamental, Rix LJ makes a second point as to remedies. These clauses are warranties because otherwise they can be only minor contractual clauses, sounding in damages for breach, and that is "unbusinesslike" in a matter that goes to the risk insured. It would leave the insurer to prove prejudice by non-compliance with the term describing the risk.

However, the courts are aware similarly of the potential consequences for the insured if the term is classified as a warranty. In *Toomey*,[14] Thomas LJ applied *HIH Casualty*, but also noted:

"Furthermore regard must also be had to the draconian effects of a breach of warranty in that a breach discharges the insurer, even if it is not causative of the loss. In many policies of insurance

12. *Bank of Nova Scotia* v *Hellenic War Risks Association (Bermuda) Ltd (The Good Luck)* [1992] 1 AC 233 (HL), 262–263.

13. *HIH Casualty & General Ins Ltd* v *New Hampshire Ins Co* [2001] EWCA Civ 735; [2001] 2 Lloyd's Rep 161, [101] (emphasis added).

14. *Toomey* v *Banco Vitalicio de Espana SA de Seguros y Reasseguros* [2004] EWCA Civ 622; [2005] Lloyd's Rep IR 423, [42].

and reinsurance, the parties make clear in the contract whether the term is a warranty or not; if the term is important to the insurer or reinsurer, he can seek to make the term an express warranty. In such circumstances, the insured or reinsured knows where he stands and that a breach can discharge the insurer. A court should, where there is no express agreement, approach the issue of construction with these considerations in mind."

This point was reinforced by Merkin, in his assessment of the current state of English insurance law:[15]

"Warranties in their origin were designed to describe and delimit the risk that insurers were prepared to run. If the risk as described to insurers was not that which they actually faced, it seemed right for them to treat themselves as discharged from future liability. However, the original conception has been abused, and by the middle of the twentieth century it had become common practice for insurers to demand warranties for all manner of matters, many of which would have had no or little impact on the underwriting decision . . . ."

One way of resolving this apparently impossible choice—between classifications that, on the one hand, risk draconian forfeiture of benefits and, on the other hand, are unbusinesslike—is to recognise that this is a false choice. Developments in English contract law (and within insurance contract laws worldwide) have created remedies for breach of contract that shift away from the automatic prospective discharge model of *The Good Luck*, and yet remain businesslike.

Within insurance law, attempts to mitigate the harshness of the insurance warranty have not led to the development of a proportionate alternative. The judiciary have destroyed much of the single advantage of the insurance warranty—"legal certainty"—by a range of creative approaches to the non-strict enforcement of such terms. The first approach is to refuse to recognise the clause as an insurance warranty, even if it is so labelled. Terms of the contract will be classified as "exceptions" to the risk that either suspend liability for the period of non-compliance ("suspensive conditions")[16] or discharge insurers only for losses causally related to the breach ("causative exceptions").[17] Insurers have brought this upon themselves, with haphazard application of the label "warranty" to clauses that were never intended to have that effect. Judges have further reduced the impact of risk management clauses by creative use of interpretative techniques such as *contra proferentem*, and a willingness to find that non-compliance has been excused by way of an estoppel. However, the judiciary is not homogeneous, and some judges are more willing than others to mitigate the effect of a breach of insurance warranty.

The story of "risk management" clauses and remedies is therefore largely an unhappy one. The default rules are generally too strict, and rely on insurers to not enforce their strict legal rights in cases of marginal breach. The reason for this is that in some cases the only alternative classification imagined by the courts is a simple clause sounding in damages. This is described as unbusinesslike for a risk-related term. The legacy of *De Hahn* is therefore felt in modern insurance contract law in cases such as *HIH Casualty.* Rix LJ imagined himself as facing a difficult choice between two classifications, both of

15. R Merkin, *Reforming Insurance Law: Is There a Case for Reverse Transportation?*, [7.1]. Archived at *lawcommission.justice.gov.uk/docs/ICL_Merkin_report.pdf.*

16. *CTN Cash & Carry Ltd* v *General Accident Fire & Life Assurance Corp Plc* [1989] 1 Lloyd's Rep 259; *Kler Knitwear Ltd* v *Lombard General Insurance Co Ltd* [2000] Lloyd's Rep IR 47.

17. Marine Insurance Act 1906, s.39(5).

which represent extreme solutions. In his world view, either the insurer's duty to pay is dependent on the insured's strict compliance with the risk management obligation, or it is independent, and the underwriter will have to pay any claim, no matter how severe the breach, subject to a set-off for damages. He imagines the choice in this way because that is the choice Lord Mansfield described in *De Hahn*.

However, if we take a case with a trivial breach, such as *De Hahn*, then we could readily argue that automatic discharge is similarly unbusinesslike, because it deprives the insured of insurance cover without good commercial reason. What insurance law needs to do, and urgently, is to recognise that contract law has developed since 1778. There are sophisticated clauses that permit minor remedies for trivial non-compliance *and* substantial remedies for serious breaches. Insurance law needs to embrace the innominate term. Sadly, as we will see below, the first attempt to do so has not been successful.

b. Non-compliance with "claims process" obligations[18]

In most insurance policies there will be an obligation—whether express or implied—to give notice of a claim within the contract. This is frequently added to, for example, by time-shifting the obligation forward: becoming an obligation to give notice of an event which *may* give rise to a claim. It may be extended, and require the insured to co-operate with the insurer's investigation of the loss, by furnishing documents or other assistance.

What distinguishes these obligations from the "risk management" clauses above is the function of the clause. It is the management of the claim that is now the focus of the duties. There is potential overlap, as efficient claims management can help reduce the eventual liability of the insurer for the insured event. The commercial purpose of the claims management duties is primarily to allow the insurer to make a rapid and efficient assessment of the factual circumstances surrounding the claim. This helps to detect fraudulent claims, but also to reduce administrative costs.

The legal consequences of non-compliance with an obligation to inform the insurer of a potential claim has been the source of a considerable volume of recent litigation. The (apparently heretical) model proposed by Waller LJ in *Alfred McAlpine Plc* v *BAI (Run-Off) Ltd*[19] was for an "innominate" model for such clauses. This would discharge the insurer entirely for cases of serious prejudice caused by late notification, and award damages for minor infractions.

In the leading case of *Friends Provident Life and Pensions Ltd* v *Sirius International Insurance*,[20] Mance LJ made clear that the default remedy is for the insurer to be able to reduce the pay-out on a claim to the extent that it could prove that it had been prejudiced by the late notification. He rejected the "innominate term" model on the basis that it is not possible to partially terminate a contract, where the contract cannot be severed. He viewed

18. See generally M Clarke, *The Law of Insurance Contracts*, 4th edn (Informa, London, 2012), Ch.26; J Davey, "Claims Notification Clauses and the Design of Default Rules in Insurance Contract Law" (2012) 23 Ins LJ 245.

19. [2000] EWCA Civ 40; [2000] 1 Lloyd's Rep 437; [2000] Lloyd's Rep IR 352.

20. [2005] EWCA Civ 601; [2005] 2 Lloyd's Rep 517; [2006] Lloyd's Rep IR 45.

insurance contracts as entire, with the insurer either bound to pay claims as they arise, or not bound.

Mance LJ did not consider the possibility of a proportionate, "innominate" condition precedent. Such a clause can be imagined, although it has not yet been implemented in English law. Such a clause would reduce the insurer's obligation to the extent that the insurer has been prejudiced where notice is late, but not seriously so. For seriously prejudicial breaches, the standard condition precedent remedy, of discharge from liability for that claim, could be employed. This avoids the difficulty of partial repudiatory breach identified by Mance LJ, but provides the range of remedies sought by Waller LJ. Such a device could be constructed by judicial precedent, but would probably require an appeal to the Supreme Court, given the decision in *Friends Provident.*[21]

In both models, the judges proposed a mitigatory standard. For Mance LJ, late notice leads to "set-off" of the damages owed by the insured to the underwriter against the (presumably) larger claim the insured has for its insured loss. This is a clear example of the "mitigatory" approach to breach. The insurer must still perform its contractual responsibilities, but in a reduced fashion, to reflect the breach by the other party. The standard remedy was for the insurer's obligation to be reduced, and not removed. Even under the *McAlpine* model, liability would only be discharged following a breach with provable significant consequences. The "order of performance" model, where notice obligations act as a condition precedent to liability for the claim, now requires an express contractual term to that effect. As Mance LJ said in *Friends Provident*:[22] "If insurers consider that they want or need such protection, they can and should try to express it in their insurance contracts and see if insureds and the broking market will accept it."

An application of the *Friends Provident* rule can be seen in the recent case of *Milton Keynes BC* v *Nulty*,[23] concerning a fire at a recycling centre. There was a substantial delay in notifying insurers of two fires at the centre, and the precise cause of the fires proved difficult to ascertain. The basis for measuring the prejudice to the insurer needed to be established. Edwards-Stuart J equated the position of an insurer which is unable to contest a claim due to late notice with that of a client who has lost the chance to defend a claim against them because of a negligent solicitor.[24] The similarity—the loss of a chance—is there, but it does seem to equate the tortious damages for the professional negligence of the solicitor with the remedies for breach of a contractual obligation to give prompt notice of a claim. This is controversial.[25] Edwards-Stuart J admitted that there was no scientific basis for measuring the loss, but estimated that a 15 per cent reduction in the indemnity was required. This is an obvious example of a mitigatory standard at play. It is not merely a question of simple set-off, but of proportionate reduction in the insurer's obligation to reflect the failure by the insured to manage the claims process appropriately.

21. There is support from the contract law community for a challenge to *Friends Provident*. See J Carter, G Tolhurst and E Peden, "Developing the Intermediate Term Concept" (2006) 22 JCL 268. The labels "innominate term" and "intermediate term" are interchangeable.

22. [2005] EWCA Civ 601; [2005] 2 Lloyd's Rep 517; [2006] Lloyd's Rep IR 45, [33].

23. [2011] EWHC 2847 (TCC); [2012] Lloyd's Rep IR 453.

24. *Ibid*, [271–275].

25. J Poole, "Loss of chance and the evaluation of hypotheticals in contractual claims" [2007] LMCLQ 63.

c. Payment of premium obligations

The primary source of consideration for the insurer comes in the form of the monetary consideration, the premium. One might expect all other obligations of the insured to be secondary to the source of income. Indeed, in many US states it is assumed that the insurance contract is a kind of "reverse-unilateral" contract, whereby the insured performs its sole obligation by payment of the premium, and waits for performance by the insurer.[26] Despite this, the default legal classification of prompt payment of insurance premiums under English law is not to consider it as one of the primary obligations of the contract.

The rationale for classifying premium obligations as non-fundamental can be traced to the facts of an early case. In *Kelly* v *London and Staffordshire Fire Insurance Co*[27] the putative insured had paid the premium to his agent, the broker, but this was not passed on to the underwriter. In the intervening period, a loss occurred. In considering whether, in the absence of contractual provision, the insurer was "on risk" from time of contracting, or only from the time of payment, Mathew J held: "There is no express provision in the policy that it shall not attach, until payment of the premium, and it cannot here be implied."[28] In this case, where the premium has been paid by the insured, but only to his agent and not to the underwriter, then we have two innocent parties: insured and insurer. There is an argument for treating such delay in payment as a breach of a major term—the *Kelly* rule exposes the underwriter to potential expense without having had the premium to invest. Nonetheless, following *Kelly*, English courts have required insurers to contract for a more potent remedy, and such clauses are now included routinely.

There are two main ways in which insurers vary this common law position.[29] The first is by requiring by contractual provision an insurance warranty from the insured that the premium will be paid promptly, or at least within a defined period of credit,[30] eg in *Chapman* v *Kadirga Denizcilik*:[31] "Warranted each instalment of premium paid to underwriters within 60 days of due dates." Clauses in this form were criticised as extending the principle of warranties beyond risk-related issues.[32] Failure to comply will generate automatic discharge from prospective liability, as seen above in *The Good Luck*.[33]

Secondly, the clause may grant the insurer a right to cancel the contract for late payment. This is often combined with a grace period, and/or a notice period, before which the insurer cannot cancel cover. These provisions can often be layered, and produce quite complex clauses, with multiple opportunities for an insured to remedy its non-payment. So, the LSW 3000 clause (11/01) stated:[34]

26. H Beh & J Stempel, "Misclassifying the Insurance Policy: The Unforced Errors of Unilateral Contract Characterization" (2010) 32 Cardozo L Rev 85.
27. (1883) Cab & El 47.
28. *Ibid*, 48, *per* Mathew J.
29. Law Commission, *The Broker's Liability for Premiums: Should s.53 be Reformed?* (July 2010), [1.13–1.14].
30. See also "Warranted premium payable on cash basis to London Underwriters within 90 days of attachment", *Heath Lambert Ltd* v *Sociedad De Corretaje de Seguros* [2004] 1 Lloyd's Rep IR 905.
31. [1998] Lloyd's Rep IR 377 (CA).
32. Merkin, *supra*, fn.15, [7.1].
33. *Supra*, fn.12.
34. *www.charterersliability.com/index_iframe_content.srf?pkn=file_id&pkv=430&lang_id=129* (emphasis added).

"*The Insured undertakes that premium will be paid in full to underwriters within 60 days of inception of this policy* (or, in respect of instalment premiums, when due).

If the premium due under this policy has not been so paid to Underwriters by the 60th day from the inception of this policy (and, in respect of instalment premiums, by the date they are due) *Underwriters shall have the right to cancel this policy by notifying the Insured via the broker in writing . . .*

It is agreed that Underwriters shall give not less than 15 days prior notice of cancellation to the Insured via the broker. If premium due is paid in full to Underwriters before the notice period expires, notice of cancellation shall automatically be revoked. If not, the policy shall automatically terminate at the end of the notice period . . . ."

From a legal perspective, we have two widely varying clauses:

— the insurance warranty that leads to automatic termination on non-compliance; and
— the mitigated cancellation clause.

However, in both situations there is an in-built period of credit in which the insured is not in breach. This is at least some evidence of insurers' being prepared in practice to structure obligations in such a way as to allow substantial performance in practice. That is, the credit obligation is an inbuilt permission to pay late. A lawyer might not view it as a permission to pay late, as in law it is merely deferring the date of the obligation, but from a functional perspective it shows a willingness to go beyond requiring the insured to perform in advance, with the insurer liable only after completion of the insured's duties. Indeed, both clauses reserve the right to be discharged from cover until after a substantial period of time has elapsed. This looks like a form of de facto proportionality. There is certainly a strong case for arguing that the LSW 3000 clause and its variants offer a structured approach to lateness, with proportional remedies of chargeable interest and final warnings. It should be recalled that this is the primary consideration for the insurer that it is being bargained over. The latitude granted here is in stark contrast to the rigidity of the "risk management" provisions seen above. This disparity needs to be considered in greater depth, in light of the growing general contract law case law and literature on the competing demands on legal certainty and remedial flexibility.

II. THE "CONDITION"/"CONDITION PRECEDENT" IN GENERAL CONTRACT LAW

One of the difficulties of a common law system relying largely on judge-made law is that rules tend to become frozen in the historical context in which they were made. The eighteenth century nature of insurance law means that it is a very different animal from sale of goods law. Insurance is the dinosaur that survived. It is perhaps crocodilian in nature: ancient, often savage, but sometimes surprisingly caring.[35] Our task is to reflect on its heritage, in order to adapt it to modern conditions.

a. Shift 1: from "condition precedent" to "condition" and "warranty"

In the far history of English contract law, breach by one party was not an excuse for the innocent party's withholding performance. The remedy available was damages for breach,

35. "But despite this fierce reputation, many do not realize that the Nile crocodile, nature's ultimate predator, is in fact a very nurturing parent!": *thestickytongue.org/2010/05/09/nile-crocodiles-the-gentlest-of-mothers/.*

unless fault could be shown. This principle was considerably restricted by a series of cases in the late-eighteenth century, with the rise of "assumpsit" ("he undertook") as the basis for litigation.

To counter this development, a litigant would deny liability by establishing that the other party was in breach, and performance of the defendant's obligation was not yet required. The notion of dependant covenants is traced to *Kingston* v *Preston*,[36] a decision of Lord Mansfield in 1773.[37] Thus the growth in "interdependent conditions", which acted as conditions precedent to the innocent party's obligations, occurred just as Lord Mansfield was seeking to give form to insurance contract law.[38]

This historical context is crucial for understanding the early insurance cases. The stark choice for Lord Mansfield was whether to treat obligations on the insured as independent obligations, so that the insurer would be obliged to pay in full whatever the nature of the insured's breach, or as dependant obligations, ie as conditions precedent, so that the insurer's duty never arose if the insured had not performed in full. The legacy of this choice is what we see in the *HIH Casualty* decision reviewed above: that it would be unbusinesslike to leave the underwriter with merely a counterclaim against the insured, no matter the extent of the breach. But contract law has not remained confined to this choice. As Beck noted,[39] the Sale of Goods Act 1893 reflected the late-eighteenth-century division in sale of goods between "condition" and "warranty", and freed general contract law from conflating the order of performance with remedies for poor quality of performance. By 1990, Treitel was able to claim a complete differentiation between order and quality of performance:[40]

> " 'condition precedent' (when used in relation to the order of performance) refers to an event (ie the performance of one party's obligation), while 'condition' (when used in relation to the conformity of performance) refers to a term of the contract (or to the content of one party's obligation)."

The reason for the fundamentally different end results for insurance and sales was suggested by Oldham in his leading text, *English Common Law in the Age of Mansfield*.[41] He compared the approaches to implied "conditions" (conditions precedent at this time) in insurance and sales. The timing of the legal intervention coloured the nature of the promise. If accepted in the eighteenth century, then a condition precedent; if developed in the nineteenth, then a "condition" or a "warranty".[42] Using access to Lord Mansfield's trial notes, Oldham claims that the implied warranty of seaworthiness in marine insurance arose because the underwriter was not able to inspect the vessel prior to contracting, whereas a buyer would normally be able to inspect the goods prior to sale. This explains the difference in result—an implied promise of "quality" in insurance but not in sales—but not the difference in nature. Insurance, developed in the Mansfield era, clung

36. (1773) 2 Doug 689.

37. See generally A Beck, "The Doctrine of Substantial Performance: Conditions and Conditions Precedent" (1975) 38 MLR 413.

38. The originating "insurance warranty" cases occur within the two decades after *Kingston* v *Preston*: *De Hahn* v *Hartley* (1786) 1 TR 343 and *Bean* v *Stupart* (1778) 1 Doug 11.

39. Beck, *supra*, fn.37, traces the doctrine to *Kingston* v *Preston* and subsequent case law.

40. GH Treitel, "Conditions and Conditions Precedent" (1990) 106 LQR 185.

41. J Oldham, *English Common Law in the Age of Mansfield* (Univ of N Carolina Press, 2004).

42. T Schoenbaum, "Warranties in the Law of Marine Insurance: Some Suggestions for Reform of English and American Law" (1998) 23 Tul Mar LJ 267, 276 traced this divergence to *Street* v *Blay* (1831) 2 B & Ad 456; 109 ER 1212.

to obligations as "conditions precedent". Sales, developed more thoroughly in the nineteenth century, utilised the developing minor/major term classification of "contractual warranty" and "condition". This explains why both sales lawyers and insurance lawyers talk of "warranties" and yet mean fundamentally different obligations by the word: they refer to different generations of the concept.

b. Shift 2. From "condition/warranty" to "condition/innominate term/warranty"

By the start of the twentieth century, we have a growing divide between commercial law contracts based on the modern conception of discharge for repudiatory breach (such as sales) and those based on conditions precedent (such as insurance). In sales, order of performance obligations are routinely used to deliver concurrent performance (such as in delivery and payment obligations), rather than requiring sequential performance. The codification of insurance contract law, at least in marine insurance law, similarly describes insurance warranties as "conditions" in the text, but is interpreted differently. This is maintained by Lord Goff as holding true to Lord Mansfield's choice of insurance warranty as sequential performance by condition precedent and not modernised as was sales law.

This decision to keep within the boundaries of contingent clauses, rather than the promissory world of "conditions" and "warranties" introduced by the Sale of Goods Act 1893, is crucial. The promissory realm recognised the weakness of the *ex ante* classification of all obligations as either minor (contractual warranties) or fundamental (conditions) in the *Hongkong Fir* case.[43] The judgment of Diplock LJ in *Hongkong Fir* deserves repeating, although it is familiar to English lawyers. When re-reading this, the crucial question to hold in mind is: *why do these statements not apply to the insurance relationship?*

Diplock LJ began by restating the problem that had troubled contract law since Lord Mansfield's time: when is the innocent party discharged from its own obligations for breach by the other party?

> "Every synallagmatic contract contains in it the seeds of the problem: in what event will a party be relieved of his undertaking to do that which he has agreed to do but has not yet done? The contract may itself expressly define some of these events . . . but human prescience being limited, it seldom does so exhaustively and often fails to do so at all."[44]

He started to answer this question by reprising the law of "condition" and "warranty" in general contract law. First, the "condition":

> "No doubt there are many simple contractual undertakings . . . of which it can be predicated that every breach of such an undertaking must give rise to an event which will deprive the party not in default of substantially the whole benefit which it was intended that he should obtain from the contract . . . and such a stipulation, unless the parties have agreed that breach of it shall not entitle the non-defaulting party to treat the contract as repudiated, is a 'condition'."[45]

43. *Hongkong Fir Shipping Co Ltd* v *Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26.
44. *Ibid*, 69–70.
45. *Idem.*

And secondly, the "contractual warranty":

"So too there may be other simple contractual undertakings of which it can be predicated that no breach can give rise to an event which will deprive the party not in default of substantially the whole benefit which it was intended that he should obtain from the contract; and such a stipulation, unless the parties have agreed that breach of it shall entitle the non-defaulting party to treat the contract as repudiated, is a 'warranty'."[46]

Crucially, he refused to see this list as exhaustive. He imagined a further set of clauses that are not so readily classified, because the possible consequences of breach will vary. Sometimes the innocent party will be substantially prejudiced by breach, sometimes not:

"There are, however, many contractual undertakings of a more complex character which cannot be categorised as being "conditions" or "warranties" . . . Of such undertakings all that can be predicated is that some breaches will and others will not give rise to an event which will deprive the party not in default of substantially the whole benefit which it was intended that he should obtain from the contract and the legal consequences of a breach of such an undertaking, unless provided for expressly in the contract, depend upon the nature of the event to which the breach gives rise and do not follow automatically from a prior classification of the undertaking as a 'condition' or a 'warranty'."[47]

Why could this not apply to insurance promises? If we reconsider the facts of *De Hahn* from above, we had a promise that the vessel would leave Liverpool with a minimum of 50 crew. The insurer was not yet on risk; it would be liable only for losses in the transatlantic passage, not the prior voyage to Africa. It left Liverpool with 46, but collected an additional six crew-members while within UK waters. An *ex ante* classification here is liable to lead to unsatisfactory results. Requiring strict compliance with the clause as a condition precedent to insurer liability risks discharging the insurer for minor breaches. However, substantial breaches of this obligation could severely prejudice the insurer's commercial position: it has priced the risk on certain assumptions. The problem is that the warranty fails to completely capture the underwriting assumptions. It appears that the parties did not foresee this type of limited breach. It is no surprise to modern contract scholarship to find that contracts are incomplete. As Diplock LJ noted above,[48] "The contract may itself expressly define some of these events . . . but human prescience being limited, it seldom does so exhaustively and often fails to do so at all".

What then are we to do with insurance warranties? The current position of the Law Commissions is to amend rather than replace the "order of performance" model for risk management clauses. In the next Part, we examine whether there are signs that the law reforms will shift towards a proportionate model.

III. LESSONS FROM THE LAW COMMISSIONS (2006–)

Since 2006, the English and Scottish Law Commissions have undertaken a "root and branch" review of insurance contract law. To date, this has led to one statutory change,

46. *Idem.*
47. *Idem.*
48. *Supra*, fn.44.

and the possibility of a substantial number of further changes. Within this process of review, the remedial landscape has been closely examined, and often found wanting. What is crucial is that the Law Commissions have not simply envisaged an alteration of the remedies available, for example by imposing a greater number of criteria that must be satisfied before the insurer is discharged from liability. In many cases, the Commissions have proposed a fundamental shift in the nature of the remedy, away from an "order of performance" model and towards a mitigatory standard.

We begin with the statutory changes in the Consumer Insurance (Disclosure and Representations) Act 2012, which came into force in April 2013. It applies in consumer insurance contracts, and largely mirrors the soft law position adopted by the Financial Ombudsman Service. Schedule 1 of the Act altered the existing remedies for misrepresentation. What is evident is that the insurer's remedies are designed to be proportionate. The regime reflects what the insurer would have done had it been presented with the accurate position at the moment of contracting. Three distinct situations are envisaged by paras 5–7:

> "5. If the insurer would not have entered into the consumer insurance contract on any terms, the insurer may avoid the contract and refuse all claims, but must return the premiums paid.
>
> 6. If the insurer would have entered into the consumer insurance contract, but on different terms (excluding terms relating to the premium), the contract is to be treated as if it had been entered into on those different terms if the insurer so requires.
>
> 7. In addition, if the insurer would have entered into the consumer insurance contract (whether the terms relating to matters other than the premium would have been the same or different), but would have charged a higher premium, the insurer may reduce proportionately the amount to be paid on a claim."

The precise nature of the proportional remedy stated in para.7 requires clarification, because proportionality can be enforced in a number of different ways. In the 2012 Act, we have a pro rata payment of the claim, in line with the percentage of the premium actually paid compared to that which would have been charged:

> "8. 'Reduce proportionately' means that the insurer need pay on the claim only X% of what it would otherwise have been under an obligation to pay under the terms of the contract (or, if applicable, under the different terms provided for by virtue of paragraph 6), where—
>
> $$X = \frac{Premium\ \ actually\ \ charged}{Higher\ \ premium} \times 100\text{”}$$

This does not rule out the possibility that paras 6 and 7 will both apply. There will be situations in which the insurer would have amended the terms *and* increased the price, had it been aware of the true position.

The focus of this article is not these pre-contractual duties and remedies, but the approach to breach. What then have the Law Commissions proposed for "risk management", "claims management" and premium payment provisions? Has it similarly suggested a shift to proportionate remedies? Moreover, has it extended this beyond consumer insurance?

The simple answer is that the Law Commissions have made detailed proposals relating to "risk management", some minor proposals on premium clauses, and no statements on "claims management" obligations.

a. The Law Commissions, insurance law and breach of warranty: evidence of proportionality?

The Law Commissions' current position is that insurance warranties should be reclassified as "suspensive conditions".[49] This remains an order of performance model, but with a greater opportunity for the insured to remedy the breach. Essentially, the insurer's liability for claims occurring would be suspended during periods of non-compliance with a "warranty". This model retains the "pay all or pay nothing" aspect of the original insurance warranty. It is an order of performance device, but one which permits the insured to perform at any time, so that there is no permanent loss of cover; no loss of opportunity to cure non-compliance. Despite this, the Law Commissions thought that this rule should not be enforced in all cases, as liability would otherwise still be suspended for *all* losses during the period of non-compliance. To deal with this, the Law Commissions suggested that statute should:[50]

> "introduce special rules for terms designed to reduce the risk of a particular type of loss, or the risk of loss at a particular time or in a particular location. For these terms, a breach would suspend liability in respect only of that type of loss (or a loss at that time or in that place)".

The difficulty with these propositions is that they extend insurance coverage, without a reduction in liability or increase in premium. There is merely the "soft" requirement of a possible (rather than actual) causal effect, by requiring that the "risk management" clause relate to the risk that eventuated. This reflects judicial sentiment in cases such as *Printpak*,[51] and indeed the examples given by the Law Commissions are very similar in tone to decided cases:

> "Thus the breach of a warranty to install a burglar alarm would suspend liability for loss caused by an intruder but not for flood loss. Similarly, a failure to employ a night watchman would suspend the insurer's liability for losses at night but not for losses during the day."[52]

There is substantial support from respondents to Law Commissions' consultations to amend the existing warranty rule and reduce its harmful consequences.[53] As the graph below shows, there was a clear majority in favour of two distinct but related proposals:

1. Only to suspend liability during a period of breach (rather than discharge all future liability; and
2. Expressly to permit insureds to remedy a breach of warranty.

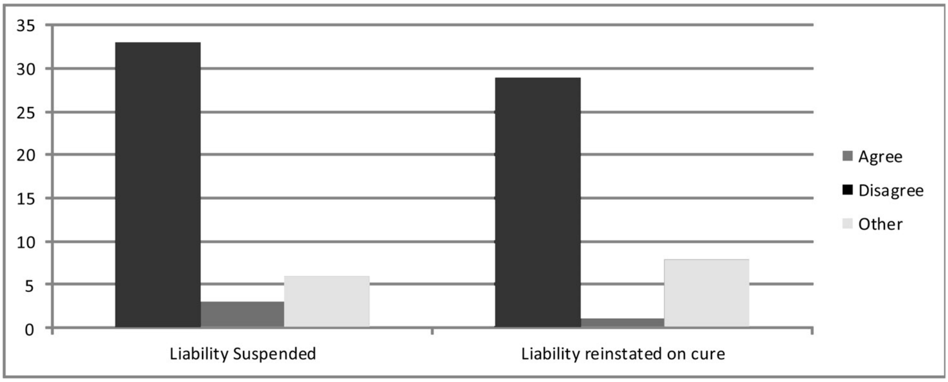
49. English and Scottish Law Commissions, *Insurance Contract Law: The Business Insured's Duty of Disclosure and the Law of Warranties* (LCCP No 204, 2012).

50. *Ibid*, [11.22].

51. *Printpak* v *AGF Insurance Ltd* [1999] Lloyd's Rep IR 542.

52. LCCP No 204, [11.22].

53. *The Business Insured's Duty of Disclosure and the Law of Warranties, Summary of Responses to Third Consultation Paper* (March 2013).



Responses from Respondents to Law Commissions Consultation (March 2013). Data courtesy of Law Commissions.

While these changes to the law have considerable overlap, the first deals more closely with continuing warranties that require on-going actions throughout the life of the policy, and the second would remedy the situation in *De Hahn* whereby the insurer never comes on risk because a promised action is not completed prior to the insurer coming on risk.

Are these proposals proportionate in nature? Put simply, no. They are potentially more just in some circumstances, but they do not differentiate between levels of breach. They retain the character of the "insurance warranty" by assuming that any breach of a description of the risk should discharge the insurer from liability, at least for that element of risk, during non-compliance.

The difficulties with the Law Commissions' proposals can be exemplified by taking two routine situations. First, take a warranty that requires a particular state of affairs that even when breached might not raise the risk beyond that on which the price was calculated, because the insurer has been too broad in its stating the circumstances warranted as existing. In *The Resolute*,[54] the insurer had inserted a crewing warranty that stated "Warranted Owner and/or Owner's experienced skipper on board and in charge at all times and one experienced crew member". This was so broadly stated that not even the insurer thought it should be given its literal meaning. Fishing vessels of the type insured spend a substantial part of the calendar year in port inactive, for regulatory and climatic reasons. The insurer did not claim that it had priced the risk on the basis of permanent, professional occupation and care. The court was obliged, by creative use of interpretative devices, to make commercial sense of an unbusinesslike clause. Strictly interpreted, this would savagely reduce cover for a fishing vessel even under the Law Commissions' proposals.

The second difficulty is that the rules could force an insurer to pay a claim even when there is an on-going causal effect. Again, amend a leading case, here: *The Good Luck*.[55] Assume the vessel enters the prohibited war zone in breach of warranty but now escapes back to neutral waters unharmed. After a further 10 kilometres of travel, a helicopter

54. *Pratt* v *Aigion Insurance Co SA (The Resolute)* [2008] EWCA Civ 1314; [2009] 1 Lloyd's Rep 225; [2009] Lloyd's Rep IR 149.
55. [1992] 1 AC 233.

gunship that has been tracking the vessel out of the prohibited zone attacks and destroys the vessel. Under the Law Commissions' proposals, cover would reattach when the vessel left the prohibited zone, and the insurer would be liable for a risk causally related to the breach.[56]

What then can be done to remedy the remedy for breach of "claims management" clauses? The first step is to reject a single, simple default for all situations. Commercial insurance is too diffuse and complex for a "one size fits all" model. Default rules have a nasty habit of becoming the new norm, even if parties can freely bargain to replace them.[57] Instead, the Law Commissions should look to provide statutory recognition for a range of clauses. In doing so, they could provide a range of remedies. At one end should lie the classic warranty with a strict order of performance approach for insurers able to sell such products in the competitive international marketplace. The range of approved clauses would extend to a softer regime whereby the insured only loses cover for a claim where the failure to comply with "risk management" obligations substantially prejudices the underwriter—akin to the "innominate term" of *Hongkong Fir.*

In doing so, the Law Commissions can take some comfort from the history of the "insurance warranty" in the courts. At each of the crucial points in its development, the judiciary has envisaged a false choice between a strong and a weak clause, when middle grounds were conceivable. Lord Mansfield in *De Hahn* saw only a choice between independent and dependent promises. The resulting remedial choice was between an insurer's always having to pay despite breach of risk management clauses (if independent) and an insurer's never having to pay (if dependent). Similarly, for Lord Goff in *The Good Luck*, the choice was between interpreting the Marine Insurance Act 1906 as requiring compliance with either a "condition precedent" or a "condition", when general contract law had already moved on to the innominate term. In neither case does the fault lie with the judge. They played the hand dealt. However, the Law Commissions are not constrained in this fashion and ought to consider the need for a proportionate "risk management" obligation. That way, where commercial parties so desire, the remedy can be made to fit the significance of the breach: reduced cover where the non-compliance is not serious, but with discharge from liability where the insurer is severely prejudiced. To deny that as a possibility is to ignore the obvious, that in insurance, as elsewhere:

> "There are . . . many contractual undertakings of a more complex character . . . Of such undertakings all that can be predicated is that some breaches will and others will not give rise to an event which will deprive the party not in default of substantially the whole benefit which it was intended that he should obtain from the contract . . . ."[58]

b. The Law Commissions, insurance law and non-risk related breach

The Law Commissions have made only passing reference to payment obligations, and made no consideration of claims notification clauses. Their attention has focused on the

56. A similar point is made in P MacDonald Eggers, "The Past and Future of English Insurance Law: good faith and warranties" (2012) UCL JL&J 211, 241.

57. J Davey, "The Reform of Insurance Warranties: A Behavioural Economics Perspective" [2013] JBL 118.

58. *Ante*, text to fn.49.

areas in which the underwriter will be discharged from liability under the traditional rules.

In the discussion of the legal fiction at work in the marine insurance market, that the broker is liable for the premium, the Law Commissions considered the effect of payment warranties. They considered that such warranties should be reformed alongside standard, risk-related warranties. Additionally, they suggested that a notice requirement be implemented. This is more problematic.

The proposal is that "the onerous effects of these clauses might be mitigated by, for example, requiring advance notice to be given to the policyholder before an insurer relies on one".[59] While this proposal may appear logical, it is contrary to the condition precedent nature of the warranty. Indeed, it would be contrary to the "suspensive condition" nature of the current Law Commissions' proposals on warranties. In neither of the models does the insurer operate the clause to avoid liability, it is automatic. If a notice obligation is required, then the effect is to turn the "payment warranty" into a contractual condition, whereby the insurer terminates the contract following repudiatory breach by the other party. If this is the intended effect of the proposal, it could be more clearly stated.

The Law Commissions did not propose amending the current common law default remedies for late notification of a claim or late payment of a premium. In each case, the remedy is relatively weak, with the insurer unable to treat itself as discharged from liability simply on breach. This is some evidence of the drift towards a proportionate insurance contract law, that the non-proportionate remedies are the ones under the closest scrutiny. What is not visible is a clear agenda in favour of redesigning insurance contract law on a proportionate basis. The Law Commissions' project is still in flux, and proposals have been abandoned and/or considerably amended during the process. What is visible is an ad hoc attempt to create rules acceptable to the market that reflect something of Cousy's "sphere and the logic of consumer law".[60]

IV. CONCLUDING THOUGHTS ON THE COSTS AND BENEFITS OF PROPORTIONALITY IN DEFAULT RULES

There are those for whom the prospect of proportionality is not welcome.[61] It means two things: the loss of freedom of contract and the loss of legal certainty.

Take freedom of contract first. Bennett noted: "Freedom of contract . . . dictates that parties to an insurance contract are at liberty to classify any term as a warranty."[62] However, properly understood, freedom of contract is not infringed by altering the default remedy for a breach of a risk management clause such as a warranty. Default rules can be amended by the parties by expressly contracting for a different remedy. It is therefore not contrary to contractual freedom to cast the default rules as proportionate, as long as parties can recast the promises in their contract as requiring strict compliance. Why, then, bother changing defaults at all, if parties can contract around them? The simple answer is that

59. Law Commissions, *Reforming Insurance Contract Law: Issues Paper 8: The Broker's Liability for Premiums: Should Section 53 be Reformed?* (2010), [6.45].

60. *Supra*, fn.5.

61. H Bennett, "Good Luck with Warranties" [1991] JBL 592.

62. *Ibid*, 597.

defaults have a lingering effect on parties' selection of clauses. If you wish parties to make a genuinely free choice, show them a range of options, and let them select the clause that best fits their specific requirements. The lesson is clear: all freedom of contract means is that the rules should be default rules, and not mandatory. It does not assist in selecting the shape of the default.

For that, we must consider the second objection, "legal certainty". Here, the complaint is that a proportionate model prevents the parties from knowing their respective rights and remedies in advance of breach. However, this argument often conflates "legal certainty" with "decision certainty"; and should not. If we have a clear simple rule such as a traditional insurance warranty, we know that on breach the insurer is discharged from liability. Right? Well, maybe. Recall the vast array of legal devices that judges can deploy to defeat this outcome.

1. Reclassification: a finding that, although labelled as a warranty, the clause when properly interpreted has instead the effect of a suspensive condition, or other "risk management" clause that does not discharge the insurer. Not convinced? Read *Kler Knitwear*.[63]
2. Interpretation: although there appears to be breach, when judicially interpreted the clause imposes a much less onerous obligation on the insured. Here, see *Provincial Insurance* v *Morgan*.[64]
3. Waiver/estoppel: even though there is breach of a clause that would normally discharge prospective liability, the insurer has acted inconsistently with this right, and the right has been lost. Although not successfully argued often, it is argued frequently.

Even if we have legal certainty because none of the above issues arises, that does not equate to decisional certainty. Insurers routinely fail to enforce their strict legal rights. Even if the legal department is certain that liability can be treated as discharged, the client may be too valuable to risk losing. The short-term interest in discharging this liability may be overridden by the long-term interest in maintaining a reputation with this customer and with the market in general. In short, insurance is not the kind of contract in which parties require absolute legal certainty because they need immediately to exercise those legal rights. Rather, insurance is a market in which there is time, even if only a few days, to determine the appropriate response to non-performance by the insured. Proportionality is a better fit for insurance than for many of the commercial law spheres in which the innominate term already operates.

Let us finish by reflecting on the recent view of barrister and author Peter MacDonald Eggers:[65]

> "To restrict the scope of such warranties does interfere with the parties' contractual freedom. That is not to say that such warranties cannot benefit from legislation requiring warranties to be expressed in clear and unambiguous terms, to be brought specifically to the attention of the assured . . . ."

The easiest way to achieve this model is to pick a default rule that is not the traditional insurance warranty, and make the insurers bargain for, and write clauses that produce, a

63. *Kler Knitwear Ltd* v *Lombard General Insurance Co Ltd* [2000] Lloyd's Rep IR 47.
64. *Provincial Insurance Co Ltd* v *Morgan* [1933] AC 240.
65. P MacDonald Eggers, "The Past and Future of English Insurance Law: good faith and warranties" (2012) UCL JL&J 211, 244.

strict rule. In default rules analysis this is termed a "penalty default", as it forces parties better to express their bargain. However, if empirical evidence of behaviour is replicated in practice, it is more likely that insurers will adjust to, and then subtly adapt, the new default. By that means, freedom of contract can be maintained and proportionality in insurance achieved. Then, the ghost of Lord Mansfield can be laid to rest.