

**Comments of City of London Law Society, Insurance Law Committee regarding the Law  
Commissions' Issues Paper 2 – Warranties**

**(Review of Insurance Contract Law)**

*These comments represent preliminary views and opinions of the Insurance Law Committee of the City of London Law Society. The members of the Committee are Ian Mathers of Allen & Overy (Chairman); Martin Bakes of Herbert Smith; Christian Wells of Lovells; Michael Mendelowitz of Barlow Lyde & Gilbert; Stephen Lewis of Clyde & Co; Geoff Lord of Kennedys; Kenneth McKenzie of Davis Arnold Cooper; James Bateson of Norton Rose; Martin Mankabady of Lawrence Graham; Maxine Cupitt of CMS Cameron McKenna; Richard Spiller of Kendall Freeman; Paul Wordley of Holman Fenwick & Willan; Glen James of Slaughter & May; Terry O'Neill of Clifford Chance; Charles Gordon of DLA Piper; Catherine Hawkins of Berrymans Lace Mawer; and Victoria Sander of Linklaters.*

1. We are again grateful to the Law Commission for the invitation to attend the seminar relating to Issues Paper 2 which was held at the offices of Barlow Lyde & Gilbert on 27 November 2006. The Issues Paper has provided an invaluable basis for the debate about warranties in insurance contracts. We appreciate that, at this stage, you do not wish to receive detailed comments about the merits of the tentative proposals made in Issues Paper 2 or indeed topics that you have identified in that paper on which you have invited comments. We understand that there will be an opportunity to make detailed comments following the publication of the First Consultation Paper relating to your review of insurance contract law. Accordingly, as with Issues Paper 1, we have obtained preliminary comments from members of the Committee and the purpose of this paper is merely to share those comments with you.

2. In general, the members of the Committee recognise that the issues dealt with in Issues Paper 2 are complex because they involve consideration of possible restrictions upon freedom of contract in areas of considerable significance to insurance and reinsurance contracts, i.e. circumstances where an insured might no longer enjoy the protection of cover under the policy and/or where the insured's right to payment of a claim might be defeated. As such the ambit of Issues Paper 2 goes further than its title suggests.

3. There was general support amongst the members of the Committee for the tentative proposals made in respect of basis of contract clauses. There was general agreement that such clauses are capable of abuse and that the circumstances in which an insurer might enjoy the right to defeat a claim should be specifically identified in the policy itself.

4. There was also considerable support for the proposal to change the law so that the effect of a breach of warranty is no longer the automatic termination of the contract. There was support for what is tentatively proposed in Issues Paper 2 in this regard and, in particular, support for the idea that where the insurer brings the contract to an end, the insured should cease to be liable for future premium and should receive a pro rata refund of premium that it has paid.

5. The members of the Committee felt that there was considerable force in the treatment of warranties as to past or existing facts in the same way as representations and that

insurers should only have a remedy for breach of such warranties in cases of negligence and fraud, and that in cases of negligence (at least, in relation to consumer insurers) the remedy should be proportionate.

6. The Committee recognised that the position was more difficult so far as warranties as to future conduct were concerned. Our discussions relating to such warranties produced the following views:

a. A number of members of the Committee expressed concern that the practical effect of the tentative proposals might be that insurers would introduce lengthy and complex insuring clauses which define the risk in a way which incorporates what would otherwise be warranties and other similar terms which would as warranties and terms require there to be a causal connection between the breach and the loss (assuming that the law is changed to reflect your tentative conclusions). This may simply be an inevitable risk of the proposals and would be the subject of market forces (in other words market forces might militate against such a development). Such clauses might also be subject to regulatory intervention.

b. Whilst the members of the Committee saw force in enabling an insured to demonstrate the lack of a causal connection between breach and loss, some members of the Committee questioned how this might operate in practice. It was noted that you preferred the New Zealand model, i.e. whether the breach contributed to the loss. The temptation to try to demonstrate that the alleged breach did not cause the loss, i.e., did not make any difference, may be overwhelming and a Court may be hard-pressed in those circumstances to maintain the concept of "contribution" to a meaningful extent.

c. A number of members of the Committee pointed to and expressed concern about the fact that the tentative proposals regarding a causal connection, and the proposed qualification to that, i.e. that the insured would not be allowed to establish lack of a causal connection in relation to a fundamental term (we paraphrase), would add complexity to the law as it stands and might make cases more difficult to resolve. That said, members of the Committee also recognised that such complexities and practical difficulties might be a necessary consequence of introducing sufficient flexibility to enable Courts to do justice in particular cases.

d. Some members of the Committee echoed a view which had been expressed at the seminar in November, to the effect that the proposed changes would reduce the scope for combating claims which are believed to be fraudulent. But the Committee generally recognised the force of comments made by you that it is unsatisfactory that insurers should rely on breaches of warranty in order to combat fraud and that this is perhaps more a problem to be addressed during your further examination of questions of fraud in respect of claims.

7. Members of the Committee noted the references in the Issues Paper to the Unfair Terms in Consumer Contracts Regulations. Members of the Committee expressed some concern

about over-reliance on the regulations which are not particularly "user friendly".

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