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LLM (Commercial Law)

TOPIC: INSURANCE WARRANTIES IN SOUTH AFRICA: CONSIDERATION OF REFORM OF THE LAW ON INSURANCE WARRANTIES IN SOUTH AFRICA AND WHY THERE IS A NEED FOR SUCH REFORM

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I hereby declare that I have read and understood the regulations governing the submission of LLM (Commercial Law) dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

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CHAPTER ONE INTRODUCTION

I Aim

The overall aim of this dissertation is to consider reform of warranties in the area of insurance law in South Africa.

In considering the main aim of this dissertation, the current law relating to insurance warranties in South Africa and other jurisdictions will be analysed in order to demonstrate why the South African position is unsatisfactory in its current form and therefore in need of reform as well as ideas on how the current law can be reformed.

II Thesis

It will be argued that the South African law on insurance warranties is in need of reform to address unsatisfactory aspects of it indicated in recent judgments and by academic commentators and that such reform should, in broad terms, take account of consumerism and eliminate the harsh and unfair effects associated with the interpretation and implementation of warranties.

III Background to research question

(a) Unsatisfactory features of warranties

Warranties in their current form within South African insurance law have a number of unsatisfactory features associated with the interpretation and application thereof. For example, under the common law there is no requirement of materiality in order for an insurer to repudiate liability for the breach of warranty. Whilst the legislature has attempted to rectify this shortcoming and unbalanced approach by introducing the element of materiality in respect of affirmative warranties, promissory warranties do not fall within its ambit. Further, there is no statutory confirmation of the common law requirement of a causal connection between a breach of warranty and the loss suffered.[1]

(b) Reform of the English Insurance Law relating to, inter alia, warranties

Due to the harshness associated with the application of the Marine Insurance Act 1906 (MIA 1906) as well as the stifling effect that it has had on the United Kingdom insurance market, English law in respect of warranties has subsequently been reformed through the English Insurance Act 2015 ('EIA

[1] M F B Reinecke et al *General Principles of Insurance Law* (2002) 276.

2015'). The provisions of the EIA 2015 have reformed the law on warranties by providing leniency in respect of warranties.

The abovementioned recent reform of the English law which assists in remedying certain of the draconian effects of the pre-2015 regime in relation to insurance warranties indicates that there were inherent issues with the previous English dispensation. As English law has persuasive impact on South African law, it is important to consider the changes effected in the area of English insurance law.

(c) General Reform of South African Insurance Law and trend of consumerism

The introduction of the new Insurance Act 18 of 2017, which relates to the broader reform of insurance law in South Africa, creates an opportunity for legislators to address the current unsatisfactory features of warranties. Further, the current insurance related regulatory framework as well as the South African and worldwide trend of a drive toward consumerism demands that consumers are treated fairly and are not subject to unfair contractual terms. The implications of warranties should be transparent and easy for consumers to understand in an effort to ensure that consumers take the necessary steps to comply with their obligations in terms of the insurance contract and are not subject to harsh and unfair surprises at claims stage.

IV Structure

(a) Chapter 2

This chapter aims to consider the various aspects associated with warranties. In doing so Chapter 2 will highlight the purpose(s) served by insurance warranties, the various types of warranties, breach of warranty as well as the effects of breach of warranty. The chapter will also consider elements of materiality, causation as well as remedying a breach.

(b) Chapter 3

This chapter will also identity and analyse a potential triggers for reform of insurance warranties in South Africa. The chapter will consider three broad triggers, namely, the unsatisfactory features of warranties, recent developments in case law in the form of the landmark case of *Viking Inshore*

Fishing (Pty) Ltd v Mutual & Federal Insurance Co Ltd,[2] as well as consumer protection legislation and regulatory framework developments.

(c) Chapter 4

South African law is a hybrid of different legal systems with its origins derived from the civil law systems of Europe (the continental systems) as well as the common law of England,[3] however, the South African law on insurance warranties was largely influenced by English law.[4] Chapter 4 will therefore focus on considering the English insurance law position pre-2015 and the harshness associated with such laws as well as the developments in English insurance law by considering the recently introduced EIA 2015.

In addition, chapter 4 will also consider how civil law jurisdictions regulate risks pertaining to insurance. In this regard, the Norwegian approach which advocates the principle of alteration of risk will be considered and analysed.

(d) Chapter 6

Chapter 6 will conclude this dissertation. In conclusion, it will be argued that the current position in relation to insurance warranties in South Africa is unsatisfactory and that there is a need for statutory regulation of insurance warranties generally (ie inclusive of promissory warranties) rather than the legislation being restricted to affirmative warranties only as is the current state. Further, it will be argued that legislators should introduce elements of causation and materiality in order to safeguard against insurers avoiding liability for immaterial breaches of warranty or where the breach has not caused or contributed to the loss or damage in question. In addition, the suggested reform to the current law in relation to insurance warranties should be effected through repeal of the Short Term Insurance Act[5] (STIA) or amendment thereto.

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[2] 2016 (6) SA 335 (SCA).
[3] http://www.justice.gov.za/sca/historysca.htm accessed on 10 January 2019.
[4] *Colonial Mutual Life Assurance Society Limited v de Bruyn* 1911 CPD 103 at 126.
[5] 53 of 1998

CHAPTER TWO SOUTH AFRICAN LAW ON INSURANCE WARRANTIES

I Introduction

This chapter will outline the purpose of warranties, the various types of warranties, breach of warranty and the effects of a breach of warranty with a view to providing a background to understanding the complexities that exist with insurance warranties. This chapter will also analyse the elements of representations and materiality, briefly consider the element of causation as well as considering remedying of a breach.

II Purpose of warranties

Warranties have their 'origins in the desire of an insurer to circumscribe and control the risk assumed by such insurer.'[6]

In terms of a contract of insurance, an insurer may provide an insured with compensation in the unfortunate event of the operation of an insured peril under the policy, in exchange for which the insured pays a premium. Insured's are generally risk adverse and insurance companies are in the business of assuming risk. However, in assuming such risk an insurance company will want to have full and accurate knowledge of all pertinent factors that influence or affect the risk in order to assess the risk for purposes of determining their appetite for the risk as well as to determine an applicable premium that is generally directly related to the nature of the risk.[7]

Where an insurer elects to assume the risk, warranties may be inserted into a contract of insurance as a mechanism for maintaining the level of risk at that insured. Therefore, for insurers one of the central purposes of warranties is to control the risk and to ensure that they are not insuring a risk that they have not necessarily bargained on insuring, ie a much higher risk than anticipated or priced for. Control and risk management are all part of the fundamentals of a profitable insurance business and from an economic perspective, it is also important to have the necessary laws in place to regulate and ensure fair insurance practice. As insurers are not entitled to underwrite at claims stage, it is imperative that all relevant information pertaining to the risk is true and accurate at the time of conclusion of the insurance contract.

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[6] J E Hare 'The Omnipotent Warranty: England v The World' in M Huybrechts (ed) *Marine Insurance at the turn of the Millennium* Vol 2 37 at 42.

[7] It is worth noting that the insurer bears the burden of clearly conveying to their policyholders in the policy wording exactly what risks they wish to cover and which risks they intend to exclude.

The inclusion of warranties in a contract of insurance is therefore advantageous to insurers in that warranties assist in controlling the levels of risk for an insurer. For example in the case of an affirmative warranty, which provides for an alternative cause of action in the form of breach of contract in the event of an incorrect statement by an insured.[8] Further, subsequent to the conclusion of a contract of insurance, an insurer may attempt to limit and/or control their risk by the inclusion of promissory warranties in terms of which the insured warrants the performance of a certain act or that a given state of affairs will exist in the future.[9]

III Types of Warranties

(a) Introduction

Whether a warranty is an affirmative or promissory warranty is contingent upon the nature of the undertaking.[10]

(b) Affirmative and promissory warranties

(i) Affirmative warranties

'Affirmative warranties relate to the present or the past'[11] and a warranty is affirmative if the insured warrants to the insurer the correctness of a representation regarding an existing fact,[12] ie an insured states in the proposal form that the captain of the ship is in possession of the necessary certification to sail the ship.

Where the insured makes an untruthful or incorrect representation of a particular fact, which induces the insurer to conclude the contract, this is considered a misrepresentation by commission. Where an insured fails to disclose a material fact to the insurer, this is considered to be misrepresentation by omission, ie non-disclosure. The insured therefore has an obligation to make correct and truthful representations as well as to disclose material information affecting the risk to the insurer.

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[8] M F B Reinecke et al *General Principles of Insurance Law* (2002) 259.
[9] M F B Reinecke et al *General Principles of Insurance Law* (2002) 259.
[10] B Soyer *Warranties in Marine Insurance* 2nd ed 2006 13.
[11] M F B Reinecke et al *General Principles of Insurance Law* (2002) 262.
[12] *Maze v Equitable Trust and Insurance Co of SA Ltd* 1938 CPD 431.

(ii) Warranty of fact or knowledge and opinion

Affirmative warranties may be a warranty of fact or knowledge. A warranty of fact is a warranty that a certain state of affairs does or does not exist, irrespective of the insured's knowledge of that state of affairs. A warranty of knowledge, to which an insured is expected to apply his mind, guarantees that to the insured's knowledge a certain state of affairs does or does not exist.[13]

In addition, affirmative warranties may also be a warranty of opinion, ie where an insured does not warrant the existence of facts or knowledge but instead provides a warranty relating to his opinion.[14]

It therefore becomes apparent that affirmative warranties are not restricted to facts only but also apply to an insured's opinion.

(iii) Promissory warranties

In terms of a promissory warranty, the insured warrants the performance of a certain act or that a given state of affairs will exist in the future. Promissory warranties therefore relate to the future and are created by directly including a suitable term in the policy contract,[15] for example that an insured will ensure that all fire extinguishers on the ship are serviced annually is an example of a promissory warranty.

(iv) Significance of distinction

The significance of the distinction between affirmative and promissory warranties relates to the application of section 53(3) of the STIA.[16] On analysis of section 53 of the STIA it appears that the section offers relief to insured's in respect of affirmative warranties, however, the section does not adequately address the unfairness associated with promissory warranties.

(c) Absolute and relative warranties

(i) Introduction

In addition to affirmative and promissory warranties, our law relating to warranties also consists of relative and absolute warranties.

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[13] M F B Reinecke et al *General Principles of Insurance Law* (2002) 263.
[14] M F B Reinecke et al *General Principles of Insurance Law* (2002) 263.
[15] M F B Reinecke et al *General Principles of Insurance Law* (2002) 262.
[16] J E Hare *Shipping Law & Admiralty Jurisdiction in South Africa* 2 ed 89.

(ii) Relative warranties

A characteristic of a relative warranty is that it is framed in general terms and does not consist of specific details required of an insured, and an element of reasonableness is incorporated, either expressly or by implication.[17]

(iii) Absolute warranties

By contrast, absolute warranties are entirely specific in respect of what is required from an insured and must be exactly complied with.[18] In relation to absolute warranties, even substantial performance by an insured will be regarded as no performance,[19] with the burden of proving no performance resting on the insurer.[20]

By way of example, where performance of a promissory warranty is subject to a specific time period, ie where an insured is required to provide an electrical compliance certificated within 2 weeks of taking out the insurance contract, the insured must perform such obligation within the stipulated time frame and failure to do so will result in the insured being in breach of the contract.

(iv) Significance of distinction

One is required to distinguish between these two warranties in order to determine whether a breach of warranty has occurred.[21]

IV Breach

In relation to relative warranties, an insured will be required to substantially comply with a relative warranty and failure to do so will result in the insured being in breach of the warranty. Substantial compliance is measured by the standard of a reasonable person,[22] implying an objective test.

By contrast in respect of absolute warranties, where the insured fails to strictly comply with such warranty, the insured will be in breach and the breach cannot be remedied by subsequent

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[17] M F B Reinecke et al *General Principles of Insurance Law* (2002) 264.
[18] M F B Reinecke et al *General Principles of Insurance Law* (2002) 265.
[19] M F B Reinecke et al *General Principles of Insurance Law* (2002) 265.
[20] M F B Reinecke et al *General Principles of Insurance Law* (2002) 264.
[21] M F B Reinecke et al *General Principles of Insurance Law* (2002) 264.
[22] M F B Reinecke et al *General Principles of Insurance Law* (2002) 264.

conduct, ie where an insured warranted that he has a drivers licence and in fact does not, he cannot rectify his breach by subsequently obtaining a licence. [23]

V Effect of breach

In terms of South African law, the leading case in relation to the effect of a breach of warranty is the case of *Parsons Transport (Pty) Ltd v Global Insurance Co Ltd*.[24] The insurance policy was subject to certain warranties and the SCA held that "subject to" in contractual settings usually created a suspensive condition, however, it could context dependent, also indicate a resolutive condition[25] but in this present case "subject to" did not create a suspensive condition.[26] The insurer argued that the policy was subject to certain warranties and a breach of warranty absolved the insurer from all liability as the entire policy was subject to payment of premium on due date, which the insured had failed to do. The SCA disagreed and held that the insured's failure to pay the premium did not terminate the all valid insurance cover.

The SCA in *Parsons Transport* pointed out that the *Lewis*[27] case, in which the learned judge stated that a warranty was a statement or stipulation upon the exact truth of which, or the exact performance of which, the validity of a contract depended, was misleading.[28] The SCA stated that a breach of warranty by the insured provides the insurer with a defence to any claim brought subject to a breach.[29] Therefore, a breach of a warranty does not automatically render the contract void, instead, a breach of warranty entitles the aggrieved party, namely the insurer, to elect to exercise a right to avoid the policy and repudiate liability.[30]

Where there has been a breach of warranty the contract is not cancelled in its entirety. Instead the insurer may elect to cancel the contract on the basis of the breach and such cancellation is effective from the time of the breach consequently insurance cover would not be in place when the claim arises, ie cover has been terminated by cancellation before the claim arose.

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[23] M F B Reinecke et al *General Principles of Insurance Law* (2002) 265.
[24] 2006 (1) SA 488 (SCA).
[25] *Parsons Transport (Pty) Ltd v Global Insurance Co Ltd* 2006 (1) SA 488 (SCA) para 5.
[26] *Parsons Transport (Pty) Ltd v Global Insurance Co Ltd* 2006 (1) SA 488 (SCA) para 12.
[27] *Lewis Ltd v Norwich Union Fire Insurance Co Ltd* 1916 AD 509.
[28] *Parsons Transport (Pty) Ltd v Global Insurance Co Ltd* 2006 (1) SA 488 (SCA) para 6.
[29] *Parsons Transport (Pty) Ltd v Global Insurance Co Ltd* 2006 (1) SA 488 (SCA) para 6.
[30] *Parsons Transport (Pty) Ltd v Global Insurance Co Ltd* 2006 (1) SA 488 (SCA) para 6.

Where an insured has breached an affirmative warranty and the insurer cancels the contract, the insured will be entitled to recover premium paid, however, where the insured breaches a promissory warranty, the insured will be entitled to a pro rate premium.[31]

In terms of the general remedies relating to breach of a material term of a contract, the non-defaulting party will be entitled to elect to cancel the contract.

VI Representations and Materiality

At common law, an insurer was entitled to repudiate the contract due to a breach of warranty which was completely immaterial and which has no causal connection to the loss in question.[32] This unbalanced approach swung heavily in favour of insurers which prompted a change in the South African legislature which introduced a statutory provision[33] requiring materiality in relation to a breach of an affirmative warranty in order for an insurer to repudiate the contract.[34] However, this resulted in an insurer having no remedy in cases of an untrue representation, whether or not such untrue representation was warranted to be true, unless the representation was material.[35] The focal point of section 53 of the STIA is 'representations' and therefore it deals with only certain types of warranties and it deals with warranties in a rather indirect manner.[36]

A representation is considered to be a pre-contractual statement or non-disclosure of fact[37] which assists the insurer in assessing the risk, determines the insurers appetite for the risk and the terms of acceptance of the risk. A representation may refer to past or existing facts and will form part of the contract if warranted to be true (ie affirmative warranty) or it may refer to something that may happen in the future (ie promissory warranty).[38]

In the case of *South African Eagle Insurance Co Ltd v Norman Welthagen Investments (Pty) Ltd,*[39] a vehicle was stolen, however, the key was not kept in a locked safe as warranted by the insured and stipulated as a term in the policy therefore insurers repudiated the claim even though the warranty

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[31] M F B Reinecke et al *General Principles of Insurance Law* (2002) 264.
[32] *Jordan v New Zealand Insurance Co Lts* 1968 (2) SA 238 (E) at 238F. Briefly, an insured stated that he was a year older than he actually was at the time of completing the proposal form. Despite the fact that this would have reduced the risk for the insurer n actuarial terms, the insurer was entitled to and did in fact repudiate liability on the basis of a breach of warranty which was completely immaterial and which has no causal connection with the loss in question.
[33] Short Term Insurance Act 53 of 1998 section 53(1).
[34] J E Hare 'The Omnipotent Warranty: England v. The World' in M Huybrechts (ed) *Marine Insurance at the turn of the Millennium* Vol 2 37.
[35] M F B Reinecke et al *General Principles of Insurance Law* (2002) 271.
[36] M F B Reinecke et al *General Principles of Insurance Law* (2002) 271.
[37] M F B Reinecke et al *General Principles of Insurance Law* (2002) 271.
[38] M F B Reinecke et al *General Principles of Insurance Law* (2002) 271.
[39] 1994 2 SA 122 A.

was not material to the loss. In interpreting and applying the legislation provisions, the Court held a representation is a pre-contractual statement of fact that does not become part of the insurance contract, unlike a term.[40] The effect of the Courts decision is that promissory warranties fall outside the scope of the legislature in that it is not necessary for promissory warranties, which regulate contractual undertakings pertaining to the future, to be material to the risk covered by the insurance in order for an insurer to repudiate liability in the event of a breach by the policyholder.

An insured has a duty to disclose any material information to an insurer, prior to the conclusion of a contract of insurance, including every fact of which the insured has actual or constructive knowledge of that is relative and material to the risk insured or the assessment of the premium.[41] A breach of this duty entitles the insurer to avoid the contract of insurance.[42] The test of materiality is objective.[43] The question which arises is whether a reasonable person in the position of the insured, would have considered that certain information or facts may reasonably impact on an insurers decision to accept the risk or such insurers assessment of the premiums, and therefore would have advised the insurer of the information in question in order for the insurer to accurately assess the risk and determine whether it would assume such risk.

An insured will therefore be required by the insurance company to answer questions pertaining to the risk, as well as, if necessary, provide certain affirmative or promissory warranties.

An insurance contract may therefore make provision for warranties that can be considered as a way to manage an insurer's risk. The provision of warranties in an insurance contract is therefore beneficial to an insurer and may be to the detriment of the insured at claim stage if the insured has not strictly complied with the warranty.

In addition to the duty to disclose material information, an insured also has a duty to not make any material misrepresentation to an insurer which is likely to materially affect the assessment of the risk. For example when taking out theft or burglary insurance, an insured may not state that the insured's house has a burglar alarm with linked arm response when in fact the house does not contain a burglar alarm. In the event that the insured fails to comply with the duty to not make any material misrepresentation to the insurer, the insurer may avoid the contract on the basis of such misrepresentation.

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[40] *South African Eagle Insurance Co Ltd v Norman Welthagen Investments (Pty) Ltd* 1994 2 SA 122 (A) at 126H.
[41] *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality* 1985 (1) SA 419 (A) at 432-3.
[42] *Certain Underwriters of Lloyds of London v Harrison* 2004 (2) SA 446 ((SCA)) para 4.
[43] *Commercial Union Insurance Co of SA Ltd v Wallace NO: Santam Insurance v Afric Addressing (Pty) Ltd* 2004 (1) SA 326 (SCA) para 65.

Justice demands that provided an insurer can show that information expressly requested from an insured and indicated to be materially relevant to the assessment of the risk and premiums were in fact relevant for such assessment undertaken by that insurer, then the information is material as contemplated by section 53 of the STIA.

From the perspective of an insurer, a breach of warranty is not as onerous as misrepresentation, ie there is no requirement that a breach of warranty must be material to the loss under common law. Section 53 of the STIA therefore has the effect of bringing in a test for materiality which is not present in common law, however, section 53 does not extend to promissory warranties and is applicable only to affirmative warranties. The significance is that there is a large degree of unfairness associated with the section in that it does not adequately address the issue of a warranty being non-causative to the loss suffered by an insured and the insurer's ability to reject the claim nevertheless.

Whilst litigation is the acceptable way of resolving an interpretation issue relating to contracts as well as legislation, from an insurers perspective, the difficulty with litigation within an insurance environment is that the business of insurance is premised on client service. Client service is generally the key differentiator, which distinguishes insurance companies from each other as the products they sell are generally standardised within the insurance market. What follows is that the preference among insurers is to avoid litigation against their very own clients, as naturally this is not good for business and in many instances the insured is an individual without substantial funds to take on well-funded insurance corporations in a 'David v Goliath' type court battle.

VII Causation

Whilst absent from English insurance law, the requirement of a causal link between breach and loss can be found in most civil law systems,[44] for example Norway's principle of alteration of risk. It has been advocated by Professor van Niekerk that in South African law, in order for an insurer to rely on the breach of a promissory warranty by an insured, the insurer should be required to prove the existence of a causal link between the breach of the warranty and the event giving rise to the loss and subsequent claim.[45]

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[44] J P Van Niekerk 'Non-Disclosure, Misrepresentation and Breach of Warranty in South African Insurance Law: Some Tentative Suggestions for Reform' (1999) *Journal of South African Law* 584 at 589.

[45] J P Van Niekerk 'Non-Disclosure, Misrepresentation and Breach of Warranty in South African Insurance Law: Some Tentative Suggestions for Reform' (1999) *Journal of South African Law* 584 at 589.

This requirement, whilst present at common law, should be solidified at statutory law level in order to bring about a balanced and fair approach to the South African law on insurance warranties and to ensure that only 'a relevant breach of a promissory warranty confers any rights upon the insurer'.[46]

In the recent case of *Viking Inshore,*[47] heard before the SCA, Wallis JA remarked that promissory warranties should not lightly be construed as invalidating insurance cover where the breach is unrelated to the loss or damage. [48] The case, which will be considered in detail in chapter 3 below, shows a more practical approach to the construction of warranties and signals a clear intent to include a causal connection between breach of warranty by the insured and the loss suffered.

VIII Remedying of a Breach

The general contractual remedies that are generally available to an aggrieved party will also be available to an insurer in the event that an insured breaches a warranty, subject to the provisions of section 53 of the STIA.

[46] J. P. Van Niekerk 'Non-Disclosure, Misrepresentation and Breach of Warranty in South African Insurance Law: Some Tentative Suggestions for Reform' 1999 J. S. Afr.L. 584 (1999) at 590.
[47] *Viking Inshore Fishing (Pty) Ltd v Mutual and Federal Insurance Co Ltd* 2016 (6) SA 335 (SCA).
[48] *Viking Inshore Fishing (Pty) Ltd v Mutual and Federal Insurance Co Ltd* 2016 (6) SA 335 (SCA) at 23.

CHAPTER THREE TRIGGERS FOR REFORM

I Introduction

In this chapter, the writer will consider triggers for reform of insurance warranties within the South African context, namely the unsatisfactory features of warranties, recent developments in case law, namely the *Viking Inshore* case, and consumer protection legislation and other insurance related regulatory frameworks.

II Unsatisfactory features of warranties

For an insurer to rely on misrepresentation as a manner in which to avoid a contract of insurance, the insurer must prove that the misrepresentation was material to the risk. English insurance practice had introduced warranties and the mechanisms of using them into insurance contracts to enable insurers to withdraw from insurance contracts based on an incorrect statement without having to prove that such incorrect statement was material to the risk or that it induced the contract. Due to the less onerous burden of proof associated with breach of warranty, it became the more desirable cause of action for insurers.[49] The current challenge faced by an insured is that in the event of a breach of a promissory warranty, even where such breach is inconsequential to the loss, an insurer may not be liable in terms of the policy due to the breach.

The main concerns associated with legislation pertaining to insurance warranties is that there is no materiality requirement, ie an insurer could demand strict compliance with a warranty that was immaterial to the risk, and there is no causation requirement, ie an insurer could reject a claim for any breach, no matter how immaterial that breach was to the loss.

The extensive protection that warranties afford insurers places the insured at a significant disadvantage and calls for reform in an effort to remedy such disadvantage and remove the inherent benefit associated with insurance warranties for insurers.

What is clear is that whilst there are significant shortcomings in the current laws pertaining to insurance warranties and the application thereof is a rather one sided affair in favour of the insurer, upon consideration of the original purpose of warranties, it is the writer's view that warranties still serve the purpose of risk management within South African insurance law. It would therefore be short sighted to advocate for the elimination of warranties from our insurance law.

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[49] M F B Reinecke et al *General Principles of Insurance Law* (2002) 259.

However, what is required is fundamental reconsideration and reform of the relevant laws in order to make provision for the possibility of remedying a breach along with the element of causality. This will in turn bring about fairness and equity to both parties of an insurance contract.

III Recent Developments in Case Law

Conflict between the insurer and the insured as well as complexities in interpretation often accompany warranties which can frequently lead to litigation. Recent developments in case law, particularly the case of *Viking Inshore Fishing (Pty) Ltd v Mutual and Federal Insurance Co Ltd*[50] further reinforces the need for reform of insurance warranties within the South African context.

At this point it is important to note that South African insurance law does not draw a distinction between marine insurance warranties and general insurance warranties both of which are governed by sections 53 and 54 of the STIA as well as the common law.

(a) Viking Inshore - The Facts

Viking Inshore Fishing (Pty) Ltd ('Viking') was the owner of a fishing vessel, named the Lindsay. On 8 May 2005 there was a collision between the Lindsay and the Ouro do Brazil which immediately sank the Lindsay.

Viking thereafter lodged a claim against its marine hull policy for indemnity for the loss it had suffered, ie the agreed value of the vessel. The claim for indemnity was repudiated by Mutual and Federal.

(b) Western Cape High Court decision

The court considered the case of *Lewis Ltd v Norwich Fire Insurance Limited*[51] and the definition attributed to the term warranty by Innes CJ who said the following:

> 'A warranty, in the sense in which that term is used in insurance transactions, is a statement or stipulation upon the exact truth of which, or the exact performance of which, as the case may be, a validity of the contract depends. Courts of law will construe such stipulations as they would any other conditions of the policy; but once the meaning has been ascertained a warranty must be

[50] [2014] ZWACHC 154; 2016 (6) SA 335 (SCA).
[51] 1916 AD 509.

exactly complied with whether it is material to the risk or not. … A strict observance of its terms is a condition precedent to the incidence of liability.'[52]

The court also considered the decision in *Parsons Transport*[53]. In relying on the above authorities, the court was adamant that there was no obligation on an insurer seeking to rely on a warranty to prove a causal nexus between the breach of such warranty and the eventual loss or damage suffered by an insured seeking indemnity under the insurance policy.

In light of Viking's non-compliance with the Regulations and consequent breach of the MSA warranty, the court held that the warranty referred to in the insurance contract is a promissory warranty which imposes a strict duty on the insured with the intention of providing the insurer with a measure of control over the risk subsequent to the conclusion of the contract.[54] A breach by the insured of such a warranty amounts to breach of the insurance contract. The court therefore held that Mutual & Federal successfully proved the breach and that Viking's claim, based on the marine hull policy issued by Mutual & Federal, must fail.[55]

The outcome of the case was undoubtedly unsatisfactory. The case reiterated that insurers hold the power when it comes to warranties in contrast to an insured who pays a monthly premium for peace of mind that his property is covered in the unfortunate event of an insured event. Despite accepting a premium, an insurer would be entitled to repudiate liability based on an insured's breach of a warranty irrespective of whether such breach was indeed causally connected to the loss or damage suffered. This draconian approach in relation to warranties stems from the traditional approach taken by English courts and the requirement that a warranty must be strictly complied with and which the court a quo in *Viking Inshore Fishing* proved to be too tentative to move away from.

Not surprisingly, Viking appealed the *court a quo's* ruling, the relevant portions of the Supreme Court of Appeals decision will be considered below.

(c) SCA Decision

The SCA held the view that the breach of the MSA warranty was not available to Mutual and Federal in repudiation of the claim for indemnity in terms of the policy and therefore did not delve further into the enquiry relating to alleged breach of the MSA warranty.

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[52] *Lewis v Norwich Fire Insurance Limited* 1916 AD 509 at 514 and 515.
[53] 2006 (1) SA 488 (SCA).
[54] *Viking Inshore Fishing (Pty) Ltd v Mutual and Federal Insurance Co Ltd* [2014] ZWACHC 154 para 56.
[55] *Viking Inshore Fishing (Pty) Ltd v Mutual and Federal Insurance Co Ltd* [2014] ZWACHC 154 para 56.

However, in Wallis JA's *obiter* remark, in contrast to the *court a quo's* decision, Wallis JA noted that Mutual and Federal had adopted the approach that at every moment of every day during the period of cover Viking was obliged to comply with every regulation promulgated under the MSA for the safety and seaworthiness of the vessel. It contended that any departure for this rigorous degree of compliance entitled it to avoid liability under the policy, citing Innes CJ statement as quoted above.

The court made mention of two distinctive points, namely, the construction and application of the warranty and the normal difficulties that can often be associated with a sea voyage

The court noted that the contentions by Mutual and Federal adopted an extreme view of what was required from the insured in order to comply with the warranty and in contrast to the *court a quo's* decision in relation to strict compliance of warranties, Wallis JA took a more practical approach and rejected the approach put forward by the insurers, Mutual and Federal.

Wallis JA stated such warranties are to be construed favourably towards the insured because of the impact upon the liability of the insurer, ie such warranties are to be given a practical and business-like construction in view of the purpose of the clause and the insurance policy. Warranties are therefore not lightly to be construed as invalidating cover on the grounds unrelated to the loss.[56]

Against this background, the learned judge noted that the ordinary intention of the MSA warranty is to require the insured to comply with the regulations promulgated under the MSA that are related to safety and seaworthiness. The SCA noted that it is less obvious that the insurer's liability in terms of the policy is always contingent upon compliance by the insured. Where liability arises due to an insured peril which is completely unrelated to safety or seaworthiness of the vessel, namely, piracy, earthquake, volcanic eruption or lightning etc., it cannot be argued by an insurer that the identity and qualification of the crew on board or the absence of fire-equipment or life jackets should affect the insurers liability in terms of the policy. This interpretation speaks to a construction of the warranty in a manner in which it applies only when the breach is materially connected to the loss suffered by the insured.

The SCA thereafter considered the difficulties associated with sea voyages, namely, a life jacket may be lost overboard or damaged, a fire extinguisher may be exhausted due to prior use on the voyage, the vessels equipment may malfunction or be damaged or lost. It is does not seem practical, nor can it be the intention, that the vessel should return immediately to a port in order to remedy the deficiency in order to enjoy the full benefit of insurance cover. In amplification of his view, Wallis

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[56] [56] *Viking Inshore Fishing (Pty) Ltd v Mutual and Federal Insurance Co Ltd* 2016 (6) SA 335 (SCA) para 23

JA raised the question of how would the warranty be applied if the vessel, in returning to the port in order to remedy the deficiency, is lost or damaged for reasons other than the said deficiency, stating that it would be harsh to interpret a warranty in a manner which precludes an insurers liability in such instances.

Wallis JA's *obiter* remarks in relation to promissory warranties are pivotal to the insurance and marine insurance industries signalling a clear intent that a breach of warranty must be materially connected to the loss or damage suffered by the insured before an insurer can repudiate liability for such loss and/or damage. This pragmatic interpretation is fair, just and aligned with consumer protection rules and regulations as well as international jurisdictions. Further the *obiter* will undoubtedly carry a large degree of significance in future warranty disputes which result in litigation, however, it also begs the question why the legislators do not take a forward thinking approach and amend the current legislation in order to address a clear deficiency without wasting valuable court time and millions of rands in legal costs.

IV Consumer protection legislation and regulatory framework

The introduction of new legislation in the form of the Insurance Act[57] ('Insurance Act'), which came into effect on 1 July 2018, provided an opportunity for legislators to effect changes to South African insurance law generally as well as to remedy the existing defects of the STIA in relation to insurance warranties. The new legislation is aimed at providing protection for consumers by regulating the dealings of the insurance industry. Despite implications of the *Viking* judgment, the legislators have not made any changes to the relevant sections of the STIA.

Further, on 22 June 2017 the Financial Sector Regulation Bill ('FSR Bill') was passed. The FSR Bill is the first step towards the implementation of the Twin Peaks model of financial regulation, which sees regulation split into two functions, namely, market conduct regulation and prudential regulation.

Market conduct denotes the manner in which financial service providers conduct their business, design and price their products, and treat their customers. This function is therefore predominantly concerned with the relationship between insurance companies and policyholders and it is in this

[57] Act 17 of 2018.

context that matters relating to advertising, compliance with product features and standards, claims handling and dispute resolution become relevant.[58]

Embedded in the legislation is the Treating Customers Fairly ('TCF') principles, which is a regulatory framework set by the Financial Sector Conduct Authority. TCF governs the way a financial service provider's business conducts daily dealings with its clients ensuring that all clients are treated fairly during all stages of the product life cycle and advice process. The South African TCF principles mirror that of the UK based Financial Services Authority regulation of the same name.

TCF has six outcomes and whilst each outcome carries its importance, the following outcomes, when considering fairness and equity in the context of warranties in relation to a policyholder, stands out:

(a) TCF outcome three: 'Customers are given clear information and are kept appropriately informed before, during and after the time of contracting';

(b) TCF outcome six: 'Customers should not face unreasonable post-sale barriers when they want to… submit a claim… .'

The FSR Bill and TCF principles are relevant in that it entrenches the principles of fairness and equity when dealing with consumers and highlights the need for insurance companies to ensure that there is transparency between itself and its policyholders. TCF is the direction followed in the financial services industry and the new principles-based approach is one of the cornerstones of the Twin Peaks model.[59] Insurers therefore are required to demonstrate that they deliver the specified outcomes to their customers. The current law in relation to promissory warranties is therefore contrary to these principles in that an insurer will be entitled to cancel an insurance policy where there is a breach which is not materially related to the loss or damage suffered.

In addition to the Insurance Act and the FSR Bill, section 48 of the Consumer Protection Act[60] which deals with unfair, unreasonable or unjust contract terms should also be taken into consideration when considering reform to insurance legislation. Whilst the insurance industry is not subject to the provisions of the CPA, the enactment of this legislation indicates a drive toward consumerism and

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[58] Daleen Millard 'The Impact of the Twin Peaks Model on the Insurance Industry' (2016) 19 *Potchefstroom Elec LJ* 1 at 5.

[59] Daleen Millard 'The Impact of the Twin Peaks Model on the Insurance Industry' (2016) 19 *Potchefstroom Elec LJ* 1 at 6.

[60] Act 68 of 2008 (CPA). The CPA is aimed at protecting consumers, including all individual natural persons and small businesses with assets or annual turnover of less than R2 000 000. The STIA was exempt from the provisions of the CPA up until 1 October 2012, ie the insurance sector was provided a 'grace period' within which to align its legislation with that of the CPA. The new Insurance Act and the new Policy Protection Rules are aimed at providing greater protection for policyholders similar to that envisaged in the CPA but tailored to the insurance industry specifically.

highlights the importance of ensuring that there is fairness and equity in all dealings with consumers, which is also set out in insurance specific legislation and regulatory framework. It is worth noting that the UK has similar consumer protections in the form of the Consumer Rights Act 2015.

Like the English and South African jurisdictions, it is evident that Australian legislation is highly geared toward protection of the consumer. Section 54 of the Insurance Contracts Act[61] ('ICA') provides that an insurer may not deny liability based on trivial breaches of the policy by the insured unless such breach could reasonably be said to have caused or contributed to the loss, thereby introducing both materiality and causation requirements. Pleasure crafts, for example, were moved from the MIA 1906 to the ICA as the MIA was primarily designed to cover insurance contracts relating to the international carriage of goods and the intention was that individuals who owned pleasure craft should receive the consumer protection benefits of the ICA.[62]

In New Zealand, section 11 of the Insurance Law Reform Act 1977 has been described as being very 'consumer friendly' in that it allows for an insured to recover from insurers, if the insured is able to show on a balance of probabilities that the insured's breach of a policy term designed to prevent an increased risk of loss, has not caused or contributed to the loss or damage suffered.[63]

The South African legislation and principles, namely the Insurance Act, FSR Bill, TCF and CPA, favour a warranty system that is transparent, user friendly and has its foundations in fairness and equity. Often a policyholder may be aware of the existence of a warranty but unaware of the implications thereof in the case of non–compliance. Further, warranties and the consequences of non-compliance should not be hidden in fine print in the contract of insurance and insurers, through their policy wordings, should be obliged to ensure that consumers are fully aware of the warranties and their implications of non-compliance.

Warranties do have a purpose within South African insurance law, however, in its current form there it is far more beneficial for an insurer than it is for an insured which is in contradiction with the principles of fairness and equity which are embedded within our legal and regulatory framework.

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[61] Act 80 of 1984.
[62] Australian Law Reform Commission Report 91 *Review of the Marine Insurance Act 1909* (2001) para8.15.
[63] Robn Merkin; John Lowry 'Reconstructing Insurance Law: The Law Commissions' Consultation Paper' 2008 *The Modern Law Review Limited* 95 at 112.

CHAPTER FOUR ENGLISH INSURANCE LAW ON WARRANTIES

I Introduction

As the South African law on insurance warranties was largely influenced by English law, it is necessary to consider the previous and current English positions in relation to insurance warranties as the English approach, whilst not flawless, has shifted from a draconian style approach to a more consumer friendly approach with the enactment of the English Insurance Act 2015.

This shift is in line with worldwide trends as such trends clearly signal an intent toward ensuring consumers are subject to fair terms and conditions in relation to insurance products, including in relation to insurance warranties.

II Background

In the 17th century English courts began to acknowledge that some of an insured's contractual undertakings could constitute a condition precedent, ie a prerequisite to the insurer's promise of cover. A breach of these terms, referred to as warranties, gave the insurer unconditional right to repudiate the policy. By contrast, in civil law jurisdictions a breach of a similar term entitled the insurer to repudiate only if that breach went to the root of the contact and was causative of the loss.[64]

Lord Chief Justice Lord Mansfield in the 1786 case of *De Hahn v Hartley* in relation to the warranty regime stated:

> 'There is a material distinction between a warranty and a representation. A representation may be equitably and substantially answered: but a warranty must be strictly complied with. Supposing a warranty to sail on the 1st of August, and the ship did not sail till the 2nd, the warranty would not be complied with. 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; but being inserted, the contract does not exist unless it be literally complied with.'[65]

Put differently with a view to modern day insurance contracts, a warranty is a promise made by an insured to the insurer confirming a particular state of facts which promise, if the insured fails to honour, may result in insurers avoiding the policy at claim stage.

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[64] J E Hare 'The omnipotent warranty: England v the world' in M Huybrechts (ed) *Marine Insurance at the turn of the Millennium* Vol 2 37 at 43.
[65] *De Hahn v Hartley* (1786) 1 TR 343.

Lord Mansfield's understanding of the strict compliance doctrine implied that any immaterial, non-causative and even rectified breach of warranty entitled the insurer to refuse to pay a claim.

III Marine Insurance Act 1906

The provisions of the Marine Insurance Act 1906 ('MIA 1906') represents English common law which was developed in connection with marine insurance as marine adventures/voyages were mostly insured at the time due to the lucrative nature of the business. However, the MIA 1906 is not confined to marine insurance only and applies to general insurance as well. As the MIA 1906 reflects the law on insurance warranties in general in English law and because there is no distinction drawn between general insurance warranties and marine insurance warranties it is necessary to consider the provisions in detail. Sections 33 to 41 of the MIA 1906 deals specifically with the various aspects of the warranty regime under English Law.

(a) Definition of Warranty

In accordance with the definition of warranty as contained in section 33(1) of the MIA 1906, the following undertakings may be considered to be warranties[66]:

a) past or present facts (affirmative warranties);
b) future conduct of an assured, ie continuing or promissory warranties (this category has a tendency to create a basis for litigation); or
c) that some condition may be fulfilled.

The terminology used in relation to warranties can often lead to confusion. One is required to distinguish between a warranty, promise, condition and misrepresentation and this renders it challenging to comprehend what the true nature of the regulation is.[67] According to the Law Commission,[68] the difficulties in defining warranties lead to a significant uncertainty in insurance relationships and provide a vast ground for litigation. This in itself is sufficient grounds to have triggered reform within the English law environment.

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[66] D E Romanora *Marine Insurance Warranties Development in England, in comparison with other countries* (unpublished LLM thesis, University of Oslo, 2015) 7.
[67] Wilhemsen T L 'Duty to Disclosure, Duty of Good Faith, Alteration of Risk and Warranties: An Analysis to the replies to the CMI Questionnaire' (2000) *CMI Yearbook* 332 at 392.
[68] The Law Commission Consultation paper 204 *Insurance Contract Law: The Business Insured's Duty of Disclosure And The Law Of Warranties* (2012) para11.19.

(b) Strict Compliance

Section 33(3) of the MIA 1906 defines a warranty as a condition which must be exactly complied with, whether material to the risk or not and failure by the insured to adhere to the exact compliance requirement will result in automatic discharge from liability for an insurer from the date of the breach of warranty. Remedying the breach will not change the insurer's liability. The insured will therefore be without insurance cover even where there is no causal connection between the breach of warranty and the loss or damage suffered. This rule is common to both marine and non-marine insurance contract law.[69]

The condition of absolute compliance as outlined in the MIA 1906 places a substantial burden on an insured as there is no requirement of fault on the part of the insured and the cause of the breach as well as materiality of such breach is irrelevant to an insurers liability.[70] The strict compliance rule provides that the insurer cannot require anything greater than the warranted undertaking, and on the insured's part, nothing less than exact performance will be accepted.[71] As mentioned above in this chapter, the strict interpretation dates back to the 1786 case of *De Hahn v Hartley* where the court held that the owners breached a warranty by failing to set sail with fifty crew members as warranted, therefore, a warranty is a condition precedent to liability.

It is clear that if there has been any departure from a warranty, no matter how slight (except possibly if the departure is *de minimis*), there has been a breach of warranty.[72] This point is further illustrated in the case of *Overseas Commodities Ltd v Style*,[73] where the insured shipped two consignments of tinned pork from France to London under an all risk policy. The policy contained a warranty which required that all the tins of pork should be marked by the manufacturers with their date of manufacture, while a portion of the tins were actually not marked. When the tins were delivered, many of them were found to be rusty or broken. The insurer rejected the insured's claim on the basis that the warranty was breached. The court held that lack of such marks on many of the tins amounted to a breach of warranty and the insurer was not liable.

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[69] M A Clarke 'Insurance Warranties: the Absolute End?' (2007) *LMCLQ* 474 at 480.

[71] D E Romanora *Marine Insurance Warranties Development in England, in comparison with other countries* (unpublished LLM thesis, University of Oslo, 2015) 13.

[72] *De Hahn v Hartley* (1786) 1 TR 343.

[73] [1958] 1 Lloyd's Rep. 546.

(c) No requirement of materiality

Section 33(3) of the MIA 1906 does not contain a requirement of materiality and provides that 'a warranty must be complied with whether it is material to the risk or not'. This principle was outlined in the case of *Newcastle Fire Insurance v Macmorran & Co*[74] where the court held that when a thing is warranted to be of a particular nature or description, it must be exactly what it is stated to be, it does not matter whether it is material or not.

(d) No requirement of causation

Further, there is no requirement of a causal link between the breach of warranty by the insured and the loss or damage suffered. This point has been illustrated in case law, for example, in *Hibbert v Pigou*[75] a ship was lost in a storm, however, insurers avoided liability due to the breach of a convoy warranty. In *Dawson Ltd v Bonnin*[76] the insured warranted that a lorry was parked at one address whereas it was parked at a different address and despite the fact that this did not increase the risk insured, the insurer was discharged from liability.

> In his judgement in *Forsikringsaktieselskapet Vesta v Butcher*[77] Lord Griffiths commented that, 'it is one of the less attractive practices of English law that breach of warranty in an insurance policy can be relied on to defeat a claim under the policy even if there is no causal connection between the breach and the loss'.[78]

Briefly, the facts of this case are that the policy contained a warranty stating that there will be a guard watching over the insured fish farm twenty-four hours. A heavy storm hit one night and all the fish was swept out of the farm by the storm, there was no watchman on duty as warranted. Although it was acknowledged that no watchman could prevent the loss in any event, the court held that under English law the insured's failure to maintain such twenty four watch over the fish farm as warranted discharged London based reinsurers from their liability. The primary insurers were Norwegian based and governed by Norwegian law, which provides that a breach of warranty must be causative to the loss prior to insurers being able to rely on the breach to deny liability and the claim was therefore honoured. Notably had the original insurers been governed by English law the

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[74] (1815) 3 Dow 255.
[75] *Hibbert v Pigou* (1783) 3 Doug KB 213.
[76] [1922] 2 AC 413.
[77] [1989] 1 Lloyd's Rep 331.
[78] [1989] 1 Lloyd's Rep 331 at 335 This was a case involving reinsurance. It was held that the warranty in the reinsurance contract should be given the same effect as it was in the direct policy, which was governed by the Norwegian law, under which breach of warranty does not make the policy null and void unless it is operative to the loss.

reinsurers could have and more than likely would have successfully declined liability for the loss.[79] This case therefore clearly illustrates the difference between the continental systems and the English law approach in relation to insurance warranties.

(e) Automatic Discharge

Section 34(2) of the MIA 1906 provides that once a warranty has been breached, the insured cannot rely on the defence that the breach had been remedied, and the warranty complied with, before the loss.

The above position was reinforced in the case of the *Good Luck* where the Court examined the relevant sections of the MIA 1906 in relation to warranties. In the *Good Luck* case the bank required that the ship owners not permit the ship to enter a war zone area without prior notification to the bank as the bank had funded the purchase of the ship. The ship owners insured the ship with Hellenic Mutual War Risks Association ('the club') against war risks. The club later established that the ship owners were sending the ship into war zone areas, namely the Arabian Gulf, without prior notice to the bank, however, did nothing to stop the breach. The *Good Luck* was subsequently hit by Iraqi missiles and damaged as it entered a war zone. The ship became a constructive loss.

The bank argued the club was in breach of its contractual obligation as per the letter of undertaking and therefore the insured's breach of warranty meant that the bank was automatically off risk. This argument was accepted by the trial court.

After reviewing the pre-1906 law, the Court of Appeal stated that prior to 1906, breach of warranty did not automatically bring the risk to an end, and the MIA 1906 did not intend to change this position. In the House of Lords, Lord Goff disagreed with the conclusion reached by the Court of Appeal instead he held that an automatic discharge of liability was clearly intended in the plain words of MIA 1906, section 33(3) and the risk came to an end automatically upon the breach of warranty and the club was therefore in breach of its obligations to notify the bank.

The Court of Appeal equated breach of warranty to a breach of condition in terms of general contract law which did not automatically terminate the contract. In accordance with the House of Lords a breach of warranty will automatically discharge the insurer from liability as at the date of the breach, thereby equating a warranty to a condition precedent. The breach does not need to have a

[79] A Longmore 'Good Faith and Breach of Warranty: Ae We Moving Forward or Backwards?'(2004) *LMCLQ* 158 at 160.

causative connection with any loss which is the subject of a claim under the contract or with the risk being insured.[80] The club was therefore discharged from liability as soon as the ship entered the war zone areas.

In the *Good Luck* the House of Lords concluded that the fulfilment of the warranty is a condition precedent to the liability or further liability of the insurer. This indicates that the rationale of warranties in insurance law is that the insurer only accepts the risk provided the warranty is fulfilled.[81] Accordingly, as the contract is discharged automatically, by operation of law, the former policyholder may unknowingly find themselves without cover[82] which can result in serious consequences to the detriment of such policyholder.[83]

According to Clarke,[84] the court's interpretation of section 33(3) was justifiable on the wording of that subsection, but section 34(3) provided, somewhat inconsistently, that a breach of warranty may be waived by the insurer, thus suggesting the contradiction that, although the contract has been discharged under section 33(3), there can be nonetheless an election not to discharge the contract. The contract no longer exists but the insurer can still waive it back into existence.[85]

The warranty regime under the MIA 1906 was therefore premised on the doctrine of strict compliance that does not take into consideration issues of materiality, causation or fault and the doctrine of automatic discharge which has the effect of providing an insurer with an exclusive remedy of automatic termination of liability immediately upon breach of warranty by an insured.[86]

The above sections of the MIA 1906 created a great deal of harshness and inequity to an insured as the insurer would be entitled to decline a claim irrespective of whether the warranty warranted by the insured was material to the loss in question. By way of example, if a shipowner warranted that

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[80] *Bank of Nova Scotia v Hellenic War Risks Association (Bermuda) Ltd (The Good Luck)* [1992] 1 AC 233.
[81] *Bank of Nova Scotia v Hellenic War Risks Association (Bermuda) Ltd (The Good Luck)* [1992] 1 AC 233 at 262-263.
[82] M A Clarke 'Insurance Warranties: the Absolute End?' (2007) *LMCLQ* 474 at 481.
[83] To expand on this point, which position does seem unduly harsh Malcolm Clarke in his article Insurance Warranties: the Absolute End?, has pointed out that in practice the position of such policyholders is less risky than it appears as discharge under s33(3) operates subject to any express provision in the policy. Therefore the parties can contract out of automatic termination if they wish, ie marine insurance contracts commonly include 'held covered' clauses which allow the policy to continue after the breach of warranty.
[84] M A Clarke 'Insurance Warranties: the Absolute End?' (2007) *LMCLQ* 474 at 481.
[85] Courts have dealt with this apparent contradiction by regarding the 'waiver' as estoppel, ie the contract has been discharged but the insurer is estopped from pleading the fact under section 34(3). A waiver by estoppel can be described as a promise not to rely on a breach of warranty as a defence; the representation to that effect must be unequivocal, and relied upon in circumstances where it would be inequitable for the insurer to go back on his representation which representation must be by words or conduct but not by silence. *Kosmar Villa Holidays Plc v Trustees of Syndicate 1243* [2008] EWCA Civ 147. The subject of estoppel is vast and falls outside the scope of this dissertation save for this brief note in respect of its application in relation to section 34(3).
[86] D E Romanora *Marine Insurance Warranties Development in England, in comparison with other countries* (unpublished LLM thesis, University of Oslo, 2015) 21.

there would be ten fire extinguishers onboard the ship at any given time and the owner were to subsequently suffer a loss due to collision with another ship, and during investigations it emerges that there were only five extinguishers onboard, insurers would be within their rights to decline liability. The insurer would be entitled to cancel the policy even though the breach, ie failure to comply with minimum number of fire extinguishers did not result in the actual loss, ie collision/sinking.

In *Hussain v Brown*[87], where the insured property was damaged by fire, but the insurer denied liability for a breach of a burglar alarm warranty, Saville LJ remarked that 'a continuing warranty is a draconian term. The breach of such warranty produces an automatic cancellation of cover, and the fact that a loss may have no connection with that breach is irrelevant.'[88] The draconian terms and inherent unfairness often associated with the provisions of the MIA 1906 towards policyholders' signalled sufficient reason for reform.

IV Reform of the English Law on Insurance Warranties: English Insurance Act 2015

(a) Introduction

The MIA 1906 was significantly out of kilter with best practice in the modern insurance market and the law failed to keep up to date with developments in other areas of contract and consumer law as well as with insurance law in other jurisdictions.[89] Reform was required and came in the form of the EIA 2015 that has transformed and improved the law on warranties and provided more leniency in respect of warranties. Whilst the EIA 2015 does not make any change to the definition of warranty, sections 33(3) and 34 of the MIA 1906 were revoked and there are three major areas of reform in relation to warranties in the EIA 2015 which will be analysed in detail below.

(b) Section 9: Warranties and Representations

Insurers have in the past used the basis clauses to convert policyholders' answers and declarations into contractual warranties.[90] Section 9 provides that a representation is not capable of being converted into a warranty by means of a provision of the contract, such as a basis of contract clause (ie statements or representations in the proposal form) and for a warranty to apply it must be expressly

[87] [1996] 1 Lloyd's Rep 627.
[88] [1996] 1 Lloyd's Rep 627 at 630.
[89] Explanatory notes to the Insurance Act 2015.
[90] B. Soyer 'Beginning of a New Era for Insurance Warranties?' (2013) *LMCLQ* 396.

included in the contract of insurance. Therefore a term which provides that the facts stated in the proposal form, form the basis of the contract, will no longer be of any effect and the insurer and potential policyholder will not be entitled to contract out of this provision in respect of consumer insurance. An insurer can still make a representation by the insured into a specific express warranty, such as that the roof of a house is of standard construction. It is noteworthy that in respect of business insurance, the parties are free to contract out of the statutory regime provided the warranty is written in clear, unambiguous language and is specifically brought to the attention of the other party when the contract is concluded.[91]

The reason for the reform pertaining to the abovementioned provision is to promote transparency and to ensure that a policyholder, particularly consumers, recognises and understands the nature of the provisions attached to the insurance contract and the consequences thereof. It is unlikely that large corporation policyholders' would fall victim to the perils of such clauses as they would inevitably be supported by a legal team and professional insurance brokers who will invariably identify and potentially guard against such clauses. However, business insurance policyholders' could also consist of small businesses as well as individuals who may not always fully appreciate the legal consequences attached to such clauses nor do they have the support of a legal team who can identify and guard against the consequences of such clauses.

(c) Section 10: Breach of Warranty

Section 10 applies to all express and implied warranties and replaces the remedy for breach of warranty as previously contained in section 33(3) of the MIA and provides that any breach of a warranty does not automatically discharge insurers from liability therefore if the insured remedies the breach, the insurer will be on risk again and can still be liable for subsequent losses. In essence, this equates to warranties being suspensive conditions. If an insured peril operates after breach but before remedy, insurers should not be held liable for such a loss.

The effect of the current changes pertaining to section 10 is that it allows for a scenario where the insurer will continue to be held liable for valid claims which are not related to the breach of warranty. Thus if the insurance contract was suspended, the insurer would not be liable for claims related to the breach but would be liable for those that are not.

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[91] P M MacDonald Eggers 'The Past and Future of English Insurance Law: Good Faith and Warranties' (2012) 1 *UCLJLJ* 211 at 240.

Under the old regime, breach of warranty permanently discharged the insurer's liability, under the EIA 2015, cover is merely suspended until the breach of warranty is remedied, if it can in fact be remedied.

Due to the increased investigation and litigation costs and the difficulties of proof associated with requiring a causal connection test between the breach of a warranty by the insured and the loss suffered, the causation test was rejected. In addition, a causation test would not be appropriate for all warranties, since some warranties may be relevant to the loss without having a causal connection with such warranty. For example and as pointed out by the Law Commission, a past claim does not cause (or even contribute to) a future claim, but it may be highly relevant to the insurer's assessment of the likelihood of future claims. In light of these challenges, the recommendations consequently moved away from the requirement of a causal link between the breach of warranty and the loss and focused on the category of loss with which the warranty or term was concerned.[92]

Section 10 refers to 'time warranties' and 'any other warranties' (general warranties) and remedying a breach of warranty for the purposes of section 10 is dependent on the type of warranty in question.

A time warranty[93] refers to an undertaking to do or not to do something or to fulfil a specified condition by an ascertainable time and if breached, the breach will be remedied if 'the risk to which the warranty relates later becomes essentially the same as that originally contemplated by the parties'[94]. In respect of breaches of general warranties, these are deemed remedied 'if the insured ceases to be in breach'[95] Finally, section 10(4)(*b*) recognises the fact that a breach of warranty may be incapable of being remedied in which case the insurer will not be liable for the loss in question.

In accordance with the provisions of the EIA insurers will not be held liable if the warranty 'ceases to be applicable to the circumstances of the contract, compliance with the warranty is rendered

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[92] L Naidoo 'Revisiting the South African (Marine) Insurance warranty against the English Insurance Act of 2015 and the Nordic marine insurance plan of 2013: *Viking Inshore Fishing (Pty) Ltd v Mutual and Federal Insurance Company Limited*' (2015) 27 *SA Merc LJ* 563 at 571.

[93] By way of example, an insured warrants that by 1 July he would have installed 10 fire extinguishers. The insured, in breach of the warranty, fails to install 10 fire extinguishers on 1 July and instead does so on 31 July. A month later upon installation of the 10 fire extinguishers, the insured has remedied the breach, because the risk to which the warranty relates, namely fire, has become essentially the same as originally contemplated as the installation of the 10 fire extinguishers has presumably diminished the risk of loss by fire.

[94] Section 10(5)(*a*).

[95] Section 10(5)(b). By way of example, if the insured warrants that its vessel will not enter a war zone, but the master sails into a war zone, the breach will be deemed remedied the minute the vessel leaves the war zone because the insured has ceased to be in breach of warranty.

unlawful by any subsequent law or the insurer waives the warranty'. The existing exceptions to a breach of warranty have remained unchanged.

(d) Section 11: Terms not relevant to the actual loss

Section 11 focusses on the period where the insured is in breach of a warranty. Section 11[96] provides that an insurer cannot deny liability if the insured failed to comply with a warranty but can show that such failure to comply would not have increased the risk of the loss. Therefore where there is warranty that there would be ten fire extinguishers onboard a ship and the insured suffers a loss due to collision it is expected that an insured could show that non-compliance with the fire extinguisher warranty could not have increased the risk of that loss and the insurer should honour the collision claim. It is clear from this section that the intention is to prevent inequity, however, the section may not be as clear cut as intended and may result in disputes relating to the interpretation of the section.

Section 11(1) applies to a term designed to reduce the risk of the loss if complied with, however, it also draws a distinction between specific risk terms and 'a term defining the risk as a whole' the latter of which section 11 does not apply by reason of the Law Commission recognising that a warranty could be a term which actually describes the risk.[97]

Section 11 therefore also does not apply to affirmative warranties given that they are not aimed at a specific type of loss by are used to describe the risk generally at the outset. Affirming warranties perform this function but affirming or denying the existence of a particular state of facts at the formation stage while promissory warranties achieve the same objective by undertaking that a particular thing shall or shall not be done during the currency of the policy.[98]

As it was the intention of the legislators to do away with the causation test, Section 11 therefore does not introduce a causation test for an insurer to rely on a breach of warranty. The relevant test is

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[96] Section 11 of the English Insurance Act reads as follows: 'Terms not relevant to the actual loss (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 (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.'

[97] L. Naidoo 'Revisiting the South African (Marine) Insurance warranty against the English Insurance Act of 2015 and the Nordic marine insurance plan of 2013: *Viking Inshore Fishing (Pty) Ltd v Mutual and Federal Insurance Company Limited'* (2015) 27 *SA Merc LJ* 563 at 572.

[98] L. Naidoo 'Revisiting the South African (Marine) Insurance warranty against the English Insurance Act of 2015 and the Nordic marine insurance plan of 2013: *Viking Inshore Fishing (Pty) Ltd v Mutual and Federal Insurance Company Limited*' (2015) 27 *SA Merc LJ* 563 at 572.

therefore not whether the non-compliance actually caused or contributed to the loss which the insured has suffered.[99]

The EIA 2015 has improved an insured's position and significantly benefits an insured in the form of section 11(4) which provides that if the term is a warranty, section 10 of the EIA 2015 relating to breach of warranty will also apply.

Soyer[100] noted that there are certain difficulties associated with the application of section 11, namely, that it is difficult to ascertain if a warranty has the impact of reducing a particular risk and furthermore there is the issue of causation, identifying a warranty's precise objective may be problematic. These difficulties associated with the application of section 11 may lead to disputes and potential litigation.

(e) Concluding remarks in relation to the EIA 2015

Whilst there have been amendments to the legislation, section 10 of the EIA 2015 touches on sections 33 and 34 of the MIA 1906, but the EIA 2015 has left untouched other relevant parts of the MIA 1906 pertaining to warranties, namely section 35 on express warranties, section 36 on warranty of neutrality, section 37 on nationality, section 38 on good safety, section 39 on seaworthiness, section 40 on seaworthiness of goods, and section 40 on legality. These rules still apply, but one would need to consider how these rules could be reconciled with the new legislation.[101]

The EIA 2015 significantly reforms the English law on insurance warranties. It provides much needed protection to policyholders as well as providing benefit to insurers. Section 10 abolishes the remedy of automatic termination of liability, ie if the insured remedies their breach of warranty, the insurer can still incur liability as well as incur liability for subsequent losses. Section 11 ensures that that an insurer cannot deny liability if the insured failed to comply with a warranty but can show that such failure to comply would not have increased the risk of the loss. Together, these sections provide an insured with significant protection. However, as mentioned above, the EIA 2015 is not a flawless piece of legislation and potential difficulties relating to the interpretation of section 11 exists.

There appears to be a worldwide trend toward consumerism and drive for transparency when dealing with consumers. The Law Commission report concluded that the MIA 1906 had been

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[99] The Law Commission Consultation paper 204 *Insurance Contract Law: The Business Insured's Duty of Disclosure And The Law Of Warranties* (2012) para96.
[100] Baris Soyer 'Beginning of a new era for insurance warranties?' (2014) *LMCLQ* 396 at 392.
[101] A M Costabel 'The UK Insurance Act 2015: A Restatement of Marine Insurance Law' (2015) 27 *St Thomas L Rev* 133 at 156.

substantially 'insurer-friendly'.[102] Whilst the English law appears to be moving in the right direction in order to address the harshness and unfairness towards consumers associated with the previous warranty regime, it is worthwhile considering how civil law jurisdictions approach the regulation of risk pertaining to insurance. A noticeable example is Norway, the Norwegian marine insurance plans are viewed as one of the most sophisticated codes in the world.[103]

V The Norwegian Approach – Alteration of Risk

In civil law jurisdictions such as Norway for example, the principle of alteration of risk, which takes into consideration fault, materiality of breach and causation, is a preferred method of controlling risk rather than warranties which are often utilised within common law jurisdictions.

Like South Africa, in Norway, an insurance contract is one under which an insurer is to bear the risk of specified perils to which the insured interest is exposed. Warranties are not a feature of Norwegian insurance practice. In accordance with the Norwegian insurance legislation, the Nordics Insurance Contracts Act ('Nordic ICAs') which governs insurance relating to consumers and is aimed at protecting consumers, insurers enter into a contract of insurance based on the information that is provided by an insured. It is worth noting that whilst the Nordic ICAs is aimed at extensive protection of consumers, such widespread protection is not required within the marine insurance industry as it is often commercial businesses contracting with the insurer and more generally speaking Norwegian ship owners are traditionally well versed and possess substantial expertise in insurance related matters.[104]

The Nordic Marine Insurance Plan of 2013 ('the Nordic Plan') is founded on the Norwegian Marine Insurance Plan of 1996 (version 2010) and is a set of standard marine insurance contractual terms. As Derrington points out,[105] the Nordic Plan must be incorporated in the individual agreement between the parties by way of reference in the contract of insurance.

The Nordic Plan and the Nordic ICAs do not include warranties. Scandinavian laws do not recognise the elevation of a contractual term, however material and causative to the loss, to any

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102 The Law Commission Consultation paper 204 *Insurance Contract Law: The Business Insured's Duty of Disclosure And The Law Of Warranties* (2012) para1.17.

103 B Soyer *Warranties in Marine Insurance* 2 ed (2006) 265.

104 Commentary to the NMIP 2013, Version 2019 Chapter 3 page 91 available at http://www.nordicplan.org/Commentary/ accessed on 14 November 2018.

105 S C Derrington *The Law Relating to Non-Disclosure, Misrepresentation and Breach of Warranty in Contracts of Marine Insurance A Case for Reform* (unpublished PHD thesis, The University of Queensland, 1998) 18.

special status akin to the insurance warranty under English law.[106] In the continental legal systems, the equivalent of a warranty is regulated as an alteration of risk that provides the insurer with certain remedies in the event of such alteration of the risk by an insured.[107]

(a) Alteration of Risk

(i) Nordic ICAs

Section 4-6[108] (limited liability due to an alteration of risk) and section 4-7[109] (reservation regarding reduction of compensation in the event of an alteration of risk) of the Nordic ICAs regulates alteration of risk. The provisions provide the insurer with the right to limit liability in the event of alteration of risk or changes in circumstances which are material to the calculation of the premium. The relevant sanctions are total or partial exemption from liability, or a proportionate reduction in liability for the insurer depending on how much the alteration of risk have influenced the loss in question. However, for the insurer to invoke these sanctions the requirements of fault and causation must be met by the insurer. These sections are aimed at the insured and link legal consequences to the insured's actions or omissions.[110]

(ii) The Nordic Plan

Clauses 3-8 to 3-12 of the Nordic Plan governs alternation of risk. The general rules on alteration of risk correspond to the relevant Nordic ICAs but the definitions of alteration of risk, the threshold/criteria for triggering sanctions and the sanction structure are different.

It is necessary to distinguish between alterations of the risk having the effect of terminating the insurance contract by frustration of the contract, and alterations which are not of such character.

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[106] J E Hare 'The Omnipotent Warranty: England v. The World' in M Huybrechts (ed) *Marine Insurance at the turn of the Millennium* Vol 2 37 at 49.

[107] L Naidoo 'Revisiting the South African (Marine) Insurance warranty against the English Insurance Act of 2015 and the Nordic marine insurance plan of 2013: *Viking Inshore Fishing (Pty) Ltd v Mutual and Federal Insurance Company Limited*' (2015) 27 *SA Merc LJ* 563 at 574.

[108] Nordic Insurance Contracts Act, Section 4-6.

[109] Nordic Insurance Contracts Act, Section 4-7.

[110] Commentary to the NMIP 2013 version 2019 Section 2 page 100-101 available at http://www.nordicplan.org/Commentary/ accessed on 14 November 2018.

The first paragraph of Clause 3-8[111] sets out two general conditions, which must be met for a change in the risk to be considered an alteration of the risk as required in the Nordic Plan, namely:

(a) there must have been a change of a fortuitous nature.[112] Such change will include an alteration of the risk insured or increase of risk.[113] However, if one of the perils to which the insured's interest is exposed increases in intensity, this will not constitute an alternation of the risk which the insurer can then invoke. Clause 3-11 therefore does not require the insured to notify the insurer if the ship runs into extremely bad weather; and

(b) the change must amount to frustration of the fundamental expectations of the contract of insurance in question.[114]

In respect of both conditions above, the decisive factor in order for the insurer to rely on the sanctions as provided for in the Nordic Plan will be the construction of the insurance contract in question as well as the basic principles of insurance and contract. The issue therefore becomes one of whether the insurer should be bound to maintain the cover without an additional premium in the new situation which has arisen, or whether it would be reasonable to give the insurer the opportunity to apply the sanctions provided in the Nordic Plan.[115]

Like the relevant Nordic ICAs, the Nordic Plan uses the wording 'alteration of risk' and not increase of the risk. This expression was chosen out of consideration for situations where a change in the risk can clearly be ascertained due to evolving external circumstances, but it is difficult to determine whether the risk has in fact become demonstrably greater.[116]

The Nordic Plan obliges an insured to timeously advise an insurer of an alteration of the risk insured and failure to do so entitles the insurer to cancel the insurance contract on 14 days' written notice or take other action.[117] As the consumer is at the forefront of protection in terms of the Nordic

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[111] The Nordic Marine Insurance Plan of 2013 Version 2019, Clause 3-8, Alteration of the Risk: An alteration of the risk occurs when there is a change in the circumstances which, according to the contract, are to form the basis of the insurance, and the risk is thereby altered contrary to the implied conditions of the contract.

[112] Commentary to the NMIP 2013 Version 2019 Section 2 page 102 available at http://www.nordicplan.org/Commentary/ accessed on 14 November 2018.

[113] D E Romanora *Marine Insurance Warranties Development in England, in comparison with other countries* (unpublished LLM thesis, University of Oslo, 2015) 26.

[114] Commentary to the NMIP 2013 Version 2019 Section 2 page 102 available at http://www.nordicplan.org/Commentary/ accessed on 14 November 2018.

[115] Commentary to the NMIP 2013 version 2019 Section 2 page 101 available at http://www.nordicplan.org/Commentary/ accessed on 14 November 2018.

[116] Commentary to the NMIP 2013 version 2019 Section 2 page 101 available at http://www.nordicplan.org/Commentary/ accessed on 14 November 2018.

[117] The Nordic Marine Insurance Plan of 2013 Version 2019, Clause 3-11, Duty of the assured to give notice: If the assured becomes aware that an alteration of the risk will take place or has taken place, he shall, without undue delay, notify the insurer. If the assured, without justifiable reason, fails to do so, the rule in Cl. 3-9 shall apply, even if the

ICAs, in contrast to the Nordic Plan, the Nordic ICAs provides that the rules on alteration of risk may only be invoked if the insured has failed to take reasonable steps to notify the insurer as soon as the insured is aware of the change.[118]

In terms of the Nordic Plan, an insurer will be discharged from liability in the event that an insured intentionally causes or agrees to an alteration of the risk. The insurer will however, only be entitled to be discharged from such liability provided that had the insurer had prior knowledge of the alteration, the insurer would not have accepted the insurance. In addition, the insurer is not required to cancel the contract of insurance in order to avoid any future lability.[119]

The Nordic Plan and the Nordic ICAs make provision for an insurer to cancel the contract of insurance by providing the insured with 14 days' written notice should the insured alter the risk.[120] As the Nordic ICAs are aimed at the protection of consumers, it is not surprising that a noticeable difference between the Nordic Plan and the Nordic ICAs lies in the fact that the Nordic ICAs contain an addition requirement that the cancellation must be reasonable and it outlines a specific procedure to be followed when cancelling the contract.

Importantly, the Nordic Plan precludes an insurer from relying on Clauses 3-9 and 3-10 where the alteration of the risk is no longer material to the insurer.[121]

On analysis of the Nordic ICAs and the Nordic Plan, it becomes clear that under Norwegian law before an insurer can rely on an alteration of the risk by the insured, ie a breach of term, the insurer must establish that such alteration of risk or breach was material and causative to the loss suffered by the insured. It therefore follows that the Norwegian approach in relation to alteration of risk is not based on strict compliance with certain contractual terms, unlike the South African and English systems, instead an alteration of the risk by the insured permits the insurer to cancel the contract of insurance by giving the insured's 14 days' notice. In addition, the Nordic Plan contains special provisions in relation to safety regulations, trading areas, illegal activities which would alter the risk and these provisions are specially regulated and have their own requirements and consequences for breach.

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alteration was not caused by him or took place without his consent, and the insurer may cancel the insurance by giving fourteen days' notice.

[118] Commentary to the NMIP 2013 Version 2019 Section 2 page 104 available at http://www.nordicplan.org/Commentary/ accessed on 14 November 2018

[119] The Nordic Marine Insurance Plan of 2013 Version 2019, Clause 3-9.

[120] The Nordic Marine Insurance Plan of 2013 Version 2019, Clause 3-10.

[121] The Nordic Marine Insurance Plan of 2013 Version 2019, Clause 3-12, The insurer may also not rely on Cl. 3-9 and Cl. 3-10 after the alteration of the risk has ceased to be material to him if the risk is altered by measures taken for the purposes of saving human life, or by the insured ship salvaging or attempting to salvage ships or goods during the voyage.

The Norwegian approach also signifies a pragmatic approach to dealing with a situation where an insured increases the risk insured without informing the insurer thereby exposing the insurer to a higher risk without the insurer having the opportunity to establish if it indeed has the appetite for the increase in risk at a higher premium, or in fact at all.

VI International Harmonisation

There has been significant reform in the international market, for example, in the United Kingdom with the introduction and implementation of the English Insurance Act 2015 as well as in Norway in the form of the Nordic Marine Insurance Plan of 2013, whilst the South African law pertaining to insurance warranties remains stagnant.[122]

It is necessary for South African legislators to consider the developments in the legal and regulatory frameworks pertaining to insurance in South Africa as well as the developments relating to warranties under the continental systems and the recent changes to the English law on insurance warranties. In doing so, legislators should also consider implementing changes to our legislation in order to ensure that South African law does not remain stagnant in its current unsatisfactory state.

In considering international harmonisation, whilst this concept would be beneficial to a certain extent especially in relation to marine insurance as well as reinsurance where contracting is sometimes on a global level, it does have its difficulties. In the case of *Classic Sailing Adventures (Pty) Ltd*,[123] for example, the parties' choice of law and jurisdiction were English law and South African jurisdiction.

The Court correctly applied English law to the issues before it, however, it also on occasion referred to South African decisions and textbooks. South African law has no binding authority in an English court applying English law, further South African law may be of little persuasive authority. The reverse is also true, ie English law has no binding authority in a local court applying South

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[122] L Naidoo 'Revisiting the South African (Marine) Insurance warranty against the English Insurance Act of 2015 and the Nordic marine insurance plan of 2013: *Viking Inshore Fishing (Pty) Ltd v Mutual and Federal Insurance Company Limited*' (2015) 27 *SA Merc LJ* 563 at 576.

[123] *Representative of Lloyd's v Classic Sailing Adventures (Pty) Ltd* 2010 (5) SA 90 (SCA) Briefly, Classic Sailing Adventures (Pty) Ltd were the owners of a yacht called the *Mieke*, which sank off the coast of Mozambique during a voyage in terms of the perils insurance against under the contact of insurance and became a total loss. An insurance claim was instituted against Lloyd's who rejected the claim resulting in the insured's decision to pursue a claim against the local Lloyd's representative in the Cape Town high court exercising its admiralty jurisdiction.

African law, although it may have some persuasive authority on matters where local authority is unclear.[124]

Whilst the concept of an international harmony is worth considering when implementing changes to the South African law on insurance warranties, there are significant hurdles that accompany this concept which are beyond the scope of this dissertation. What is of importance is that in South African law the parties to a contract are free to choose a foreign legal system to govern their contractual relationship should they wish to do so.

[124] J P Van Niekerk 'Choice of English Law and Practice in a South African Short Term Policy of Marine Insurance: Jurisdiction and Applicable Law' (2010) *Journal of South African Law* 590 at 603.

CHAPTER FIVE CONCLUSION: THE WAY FORWARD

I Argument for reform

From an insurer's perspective one of the main purposes of warranties is to define and therefore to preserve the risk and to protect against variation of such risk.[125] Warranties are therefore a way in which an insurer controls and manages the risk it insurers. For the profitability of the business, amongst other things, an insurer must seek to ensure that the insurance contract adequately provides for a way for the insurer to guard against thinking it is insuring a benign risk whereas in fact and unknown to the insurer, the insurer is actually insuring a much higher risk, without first having the opportunity to:

(a) adequately assess the risk;

(b) consider whether it has the appetite for the risk in its current form;

(c) consider whether to enforce any risk reduction requirements; and

(d) apply an accurate premium which is in line with the higher risk.

An insured should not be entitled to benefit from the contract of insurance in the event of a breach of a contractual term that would be considered a warranty, where such breach caused or contributed to the loss. Such benefit may take the form of either, indemnity for the loss or a reduced premium during the course of the lifespan of the insurance contract, ie a lower premium calculated by an insurer based on a lower risk profile than what the risk actually represents which may in fact be a higher risk and therefore a higher premium attaches. An insurer should not have to cover a risk which the insurer has not agreed to. Warranties provide the parties to the contract of insurance the means to agree to their own terms, ie freedom of contract.

Taking the aforesaid into account, warranties therefore still serve an important purpose within the South African insurance industry. However, what has become clear during the course of this research is that the application of warranties is unfair, unduly harsh on an insured as well as contradictory to consumer protection legislation and regulatory frameworks.

The issues identified with the STIA is as follows:

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[125] H Bennett *The Law of Marine Insurance* 2 ed (2006) at 285.

(a) Whilst Section 53(1) restricts an insurer's right to cancel an insurance contract only if the incorrectness of the representation is material, such representations apply only to affirmative warranties thereby excluding from its ambit promissory warranties.

(b) In relation to promissory warranties, insurers can therefore escape liability for minor and non-causative breaches, as there is no requirement of a causal link between breach of warranty and loss suffered;

(c) The insurer is entitled to avoid the policy and repudiate liability immediately upon breach, there is no provision for suspension of an insurers liability until the insured has remedied the breach; and

(d) The concept of warranties as encompassed within the STIA lends itself to confusion as there is certain overlap with non-disclosure, misrepresentation and warranties, it would be far more sensible for the legislators to deal with warranties directly in the STIA.

As can be seen, section 53 of the STIA in its current form contains a number of challenges in relation to warranties and the interpretation and application of warranties are therefore intrinsically linked to unfairness and undue harshness toward an insured which is contrary to various consumer protection legislation and regulatory framework enacted within South Africa. The application of insurance warranties unfairly benefits an insurer as it provides insurers with the opportunity to avoid liability even where the warranty was not material to the insurer's decision to accept the risk, without any requirement of causation, and without regard to fault on the part of the insured.[126] The harsh nature of warranties in South African law is further highlighted by the court's decision, as well as Wallis JA's *obiter* remarks in relation to promissory warranties in the case of *Viking Inshore,*[127] which suggests a shift toward interpreting warranties in a more pragmatic and fair manner thereby softening the concept as contained within the STIA.

Although there are attempts to mitigate against the harshness of the application of warranties and soften the effects of the statue either through judicial interpretation or by drafting of insurance contract clauses[128], these solutions are insufficient and do not provide a sense of comfort to consumers

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[126] Wilhemsen T L 'Duty to Disclosure, Duty of Good Faith, Alteration of Risk and Warranties: An Analysis to the replies to the CMI Questionnaire' (2000) *CMI Yearbook* 332 at 392.

[127] *Viking Inshore Fishing (Pty) Ltd v Mutual and Federal Insurance Co Ltd* 2016 (6) SA 335 (SCA) para 23.

[128] Insurance contracts will therefore often include certain clauses in an effort to regulate the risk. For example Clause 11 of the Santam Personal Policy VER001 at page 4 which states 'Information that affects the risk
We may declare the whole or any part of this policy invalid if you:
• have not given us all the details that affect the risk; or

who often only realise that a loss suffered is not covered at claims stage. As pointed out by Professor van Niekerk, judicial reform whilst possible is not practical as the results are not always completely satisfactory especially since any reform will, of necessity, have to involve the amendment if not the repeal of existing legislative measures.[129]

To provide fairer outcomes for consumers and in line with changes in legislative and regulatory frameworks, the South African law pertaining to insurance warranties is in need of legislative reform by amendment or repeal of the STIA.

II Manner of Reform

The manner in which the international insurance community regulates risk provides options for reform within the South African environment.

Legislators should consider dealing with warranties directly within the STIA and introducing elements of materiality and causation so that an insurer may only avoid liability for breach of warranty where the warranty was material the loss or where the breach caused or contributed to the loss in question.[130] Attaching an element of materiality of the warranty to the loss would be far more beneficial and result in a fairer outcome for the insured.

Regarding the element of causation, whilst requiring that a causal link should exist between the breach of warranty and the loss, legislators should bear in mind that this 'test' cannot be applied universally to all claims.

Further, breach of warranty should result in the suspension of an insurer's liability in relation to the loss in question and not in respect of the contract of insurance in its entirety, ie an insurer should still be liable for other valid claims which may arise in terms of the insurance contract.

In the event that an insured's non-compliance with a warranty alters the risk to the extent that it increases the insurers exposure and had the insurer been aware of such alteration, it would not have contracted at all or contracted on significantly different terms, the insurer should be entitled to

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• have misrepresented or misdescribed any details that affect the risk.
You must advise us immediately of any change in the risk. Should there have been any material change in the risk, then we may amend the cover and premium from the date of the change.
If you do not inform us of any material change in the risk, we will be entitled to avoid the policy or reject any claim that occurred after the change in the risk.'

[129] J P Van Niekerk 'Non-Disclosure, Misrepresentation and Breach of Warranty in South African Insurance Law: Some Tentative Suggestions for Reform' (1999) *Journal of South African Law* 584 at 585.

[130] J P Van Niekerk 'Non-Disclosure, Misrepresentation and Breach of Warranty in South African Insurance Law: Some Tentative Suggestions for Reform' (1999) *Journal of South African Law* 584 at 585.

repudiate the claim[131]. However, such repudiation should relate to the claim in relation to the loss suffered and not to the contract in general thereby prejudicing an insured in respect of valid claims which may arise in terms of the policy.

It is worth noting that certain issues, which under the English system are dealt with as warranties, in other systems is dealt with in a manner akin to warranties even if not expressly stated as such. Therefore, even if the concept of warranties is completely abolished within the common law countries, this does not necessarily mean that the solution inherent in the concept of warranties will not be kept for certain issues.[132]

The Norwegian approach of the alteration of risk principle protects an insurer from any changes that a policyholder may make to the risk, whereas, the purpose of warranties is to define the risk as well as to manage and control the risk during the currency of the insurance contract.

Rather than advocating adoption of an entirely new and untested approach, which will require revamp of the entire insurance industry as the principle cannot be blindly uprooted and inserted into our law, it would be far more sensible and cost effective for legislators to amend our current legislation.

Law reform is a critical feature of the just and rationale development of any body of law.[133] Reform of insurance warranties in South Africa will result in fairness and equity towards both parties to an insurance contract but more importantly toward the consumer. Insurance policies have standardised wording and consumers will not be entitled to negotiate the terms thereof, the respective bargaining powers of the parties to the insurance contract are therefore very unequal.[134] The importance of fairness and equity in dealing with consumers has therefore been highlighted in various legal and regulatory frameworks with which the insurance industry is required to act in accordance with. It is worth mentioning that there is also a significant drive toward consumerism within various different jurisdictions, including the UK, Norway and Australia.

Common law countries like Australia and New Zealand[135] have shifted away from the traditional approach of the MIA 1906. In civil law jurisdictions such as Norway, the alteration of risk

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[131] J P Van Niekerk 'Non-Disclosure, Misrepresentation and Breach of Warranty in South African Insurance Law: Some Tentative Suggestions for Reform' (1999) *Journal of South African Law* 584 at 585.
[132] Wilhemsen T L 'Duty to Disclosure, Duty of Good Faith, Alteration of Risk and Warranties: An Analysis to the replies to the CMI Questionnaire' (2000) *CMI Yearbook* 332 at 393.
[133] P M MacDonald Eggers 'The Past and Future of English Insurance Law: Good Faith and Warranties' (2012) 1 *UCLJLJ* 211 at 244.
[134] Paul Jaffe 'Reform of the Insurance Law of England and Wales – Separate Laws for the Different Needs of Businesses and Consumers' (2013) 87 *Tulane Law Review* 1075 at 1126.
[135] New Zealand's Insurance Law Reform Act 1977, s11.

principle is based on materiality, causation and fault of the insured. Reform in the manner suggested above may result in an alignment of the South African law on insurance warranties with that of various other international jurisdictions.

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