The Insurance Bill

A review of the panel discussion on the Law Commission's draft Insurance Bill at BILA's Fiftieth Anniversary Colloquium, held on 15 May 2014.

Harry Wright[1]

Introduction

BILA's fiftieth anniversary Colloquium opened with a highly topical panel discussion on the Law Commission's draft Insurance Bill ("the Bill"), which, if enacted, would substantially reform the law relating to all non-consumer insurance contracts. Presided over by Professor Sir Bernard Rix, the panel comprised eminent contributors from four diverse fields: David Hertzell, the Law Commissioner primarily responsible for giving life to the Bill; John Hurrell, the Chief Executive of AIRMIC (which represents the interests of around 500 commercial insureds, including 70% of the FTSE 100 companies); Paul Jaffe, underwriting and claims counsel at Catlin; and Sara Cockerill QC, a commercial silk with wide experience of insurance law. This article attempts to summarise the views expressed by the four speakers, all of whom have been considering the question of insurance law reform for far longer, and in greater depth, than this author. I shall also (with not a little trepidation, in view of the expertise embodied in the panel) offer a few of my own views on the subject.

From the outset, I ought to declare an interest: I have not come to the matter of insurance law reform from a position of complete neutrality, but having been instructed (along with Gavin Kealey QC) to advise the Lloyd's Market Association on the permutations of the Bill, in its various draft forms.[2] It may not come as a great surprise that the LMA has a number of reservations about the Bill, many of which I share. Judging by Sara Cockerill's contribution to the panel discussion, and by the Q&A, I am not alone (at the Bar, at least) in harbouring substantial doubts, and it is a little unsettling to note that highly experienced lawyers with a deep understanding of this subject share some of my concerns about the potential ramifications of certain parts of the Bill.[3]

I should, however, sound a note of caution here. Lawyers can be conservative creatures, and are fiercely protective, even emotional, about amendments to an area of the law in which they practice. It is relatively easy for members of the Bar to sit in the Temple picking hypothetical holes in the Law Commission's draft, and to prophesy the coming of a morass of problems and uncertainty if the precious *status quo* is altered. They do so not for mere sport, but because they, ultimately, must work with the end product on a daily basis. They care about insurance law. But there is a resultant tendency towards innate hostility to change (from which I am far from immune), not least because it is difficult to articulate the precise ways in which the draft Bill might actually *improve* existing problems, in practice.

In view of the extraordinary time, energy and diligence with which the Law Commission has considered the reform of our insurance law, and the skill of its draftsmen, the lawyers should probably be less gloomy. As well as its thorough consultation on the drafting, it has produced a vast number of thorough and carefully considered papers charting perceived problems with the current law, and offering proposals for reform.[4] David Hertzell's participation on the panel epitomised the Law Commission's open approach, as well as reflecting its prolonged heritage in advocating reform of

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[1] The author is a junior barrister at 7 King's Bench Walk, London.

[2] The Law Commission has published three substantive draft versions of the Bill, each of which appears to have reflected certain comments and concerns of consultees. For the purposes of this article, all references are to the draft Bill (published on 17 June 2014) which, although materially different to the Bill considered by the Panel in May 2014 in certain important respects, nonetheless mirrors the earlier versions in most of the areas which were considered to be controversial by the speakers.

[3] See also Claire Blanchard QC, *Reform of the pre-contractual duty of disclosure of the agent to insure: evolution or revolution?* [2013] LMCLQ, 325

[4] See the wide range of consultation and issues papers published by the joint English and Scottish Law Commissions, all of which are available online: http://lawcommission.justice.gov.uk/areas/insurance-contract-law.htm These papers are essential reading for anybody who wishes to gain an appreciation of the rationale behind the Bill; they also provide useful commentary on the vagaries of English insurance law in recent (and occasionally more ancient) legal history.

insurance law. This has been an intermittent feature since the early 1950s, and most recently bore fruit in the *Consumer Insurance (Disclosure and Representations) Act 2012*, which draws an unparalleled distinction between consumer and business insurance in a way which Sir Bernard Rix and Paul Jaffe respectively described as "*most welcome*" and "*eminently sensible*". We are fortunate that the reform of our non-consumer insurance law has been so carefully considered by the Law Commission. But what of the results?

Is there a problem with the current law?

There was significant disparity between the four speakers over how far the *status quo* represents a real problem, although broadly speaking, reformist and conservative camps emerged. David Hertzell and John Hurrell felt that elements of the current law had been rendered obsolete, and were leading to undesirable practices and results. Contrastingly, Paul Jaffe and Sara Cockerill suggested that the current framework was (with some exceptions) not so problematic, the former praising the high degree of certainty which English insurance law currently affords commercial parties.

For David Hertzell, the problem is rooted in the *Marine Insurance Act 1906* ("the 1906 Act"); drafted in a bygone age for a pure marine market, and now rendered partly obsolete by social and economic change, and the IT revolution. It is, he suggested, simply no longer the case that the insured has a monopoly on knowledge of material circumstances which ought to be disclosed; in view of the developments in IT, it is very likely that the insurer will possess, or have access to much potentially material information. In spite of this, Hertzell acknowledged that much in the 1906 Act remained desirable, and that a common-sense test should be employed to distinguish good from bad.

Hertzell identified two forms of mischief said to arise from the current law, the first being the apparent phenomenon of "*underwriting at the claims stage*", where an underwriter purposefully desists from asking questions at the pre-contractual stage, and effectively takes a gamble on the risk. If and when there is a loss, only then does the insurer begin to probe the insured for information, seemingly in an attempt to find some material matter which was not disclosed, thereby releasing the impish genie of avoidance. Later, Paul Jaffe appeared to question whether this problem was more perceived than real, since he had yet to meet the purported underwriter who did *not* ask questions of its prospective insured during the risk presentation, and Hertzell acknowledged that the problem had declined in recent years.

The second mischief was that of "*data dumping*" whereby prospective insureds electronically disclose vast amounts of information to insurers for fear of inadvertently breaching the duty of good faith, even though much of that information is unlikely to be material.

John Hurrell continued this theme by presenting a view of the *status quo* through a range of statistics obtained by AIRMIC's surveys of its members. Startlingly, the legal framework underpinning underwriting and claims is, he said, "*one of the top two or three things that keeps them awake at night on a regular basis, and has been for some time*". Only 17% were confident that they fulfilled the existing duty of disclosure, 96% wanted reform of the 1906 Act, and there was a general attitude (also noted by David Hertzell) that insurers used the threat of avoidance as a powerful bargaining chip in settlement negotiations. This, said Hurrell, caused AIRMIC members to harbour real uncertainty about the effectiveness of insurance as a product.

If, as the first two speakers suggested, a valuable section of policyholders is suffering a crisis of confidence in English insurance law, it would be foolish not to listen very carefully to those concerns. There is, however, a temptation to allow the vociferous demands of some to become too great a driver of change, and that strikes me as the wrong approach. The law ought not to be driven by public opinion, but by a concern for whether it is *actually* leading to unfair results, in practice. The fact that 96% of AIRMIC members support reform of the 1906 Act is not in and of itself proof that the existing law is bad, still less that the 'solution' of further legislation will remedy the perceived problems. Indeed, if David Hertzell's portrayals of underwriting at the claims stage and data dumping are right, I do not immediately see how either of these problems is caused by the 1906 Act, nor that they can or should be remedied by *any* legislation, let alone the specific provisions of the Bill. These appear to be technical problems with the manner in which insurer and insured interact in the process of fulfilling the duty of good faith (and therefore surely a candidate for regulatory reform) rather than being problems created by the very nature of that duty (a more obvious matter for legislation).

John Hurrell appeared less sanguine about whether the current law on avoidance was actually causing injustice to his members; only 17% of AIRMIC members had had a claim challenged for non-disclosure, with "*very few*" actually leading to avoidance. Sara Cockerill went further, stating that as far as avoidance was concerned, one really has to cast around for cases in which the courts clearly came to the wrong decision. I am not at all sure about this. Citing an absence of unfair decisions in the law reports (which is itself questionable) is scarcely evidence that the remedy of avoidance is worth preserving. It is the power of the threat of that draconian remedy which is the real problem (and which judges have been criticising for aeons), since it provides insurers with an unfair supremacy of arms, as well as enabling them to avoid in cases where the breach of duty has no bearing whatsoever on the loss. With the exception of Cockerill, there was broad support from the panel for the Bill's introduction of proportionate remedies.

The contention that the *status quo* might not be as broken as Hertzell and Hurrell suggested was taken up by Paul Jaffe, who cited the global success of the UK insurance market, which is the third largest in the world,[5] and the largest in Europe. If English insurance law were really such a dinosaur that it risked putting the UK at a competitive disadvantage (as the Law Commission had previously suggested might be the case[6]), why was it one of the UK's largest invisible exports, worth £9.1 billion per annum? Although he acknowledged that the reasons for this success are manifold and complex, a key component (he said) was the high degree of certainty offered by English insurance law, which made disputes far more likely to settle, and therefore appealed to commercial parties. Jaffe acknowledged that this "commercial certainty" argument was hardly novel: it was reflected in the views of Lord Mansfield in the eighteenth century,[7] and remained highly relevant today.[8]

Jaffe's view that insurance law was probably not as broken as had been suggested appeared to be partly shared by Sara Cockerill, who acknowledged that since the 1906 Act the law had, with a few exceptions, adapted in a fairly subtle and nuanced way to achieve fair results, rather than being fettered.

What are the potential problems with the Bill?

Whether by accident or design, the two broadly "reformist" speakers did not engage in any substantive analysis of the actual provisions of the draft Bill during their contributions, but largely focussed on the "problems" of the current landscape, with brief references to the ways in which the Bill would bring about "improvements". To be frank, this struck me as something of a missed opportunity to showcase the contention that, in the words of Lord Carrington of Fulham, this "*modest little Bill…is stuffed with useful things*."[9] I nonetheless recognise that articulating the ways in which a proposed reform will actually improve things is difficult, particularly in fifteen minutes, and (as I have said) the Law Commission has already done so, in detail, elsewhere.

Lord Carrington's more recent description of the Bill was reflected by Sir Bernard's non-exhaustive opening summary of the wide range of areas affected by the Bill, including: the nature of the insurer's duty; non-disclosure and misrepresentation; knowledge (actual, constructive and imputed), proportionate remedies; the nature of warranties and the effect of breach of warranty; fraudulent claims; an implied term to pay valid claims within a reasonable time (now dropped); the abolition of the right to avoid for breach of the duty of good faith; and, provisions on contracting out. As Paul Jaffe reflected the Bill does "*quite a lot*" to English insurance law; it contains no fewer than 17 new tests, including 14 factual tests which, all in all, amount (in his view) to an unnecessary and risky gamble.

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[5] The top two being (1) the USA and (2) Japan.

[6] See, for example, *Insurance Contract Law: Misrepresentation, Non-disclosure and Breach of Warranty by the Insured*, Law Commission Consultation Paper No 182, [1.53] and [1.58]; see also *Insurance Contract Law, Issues Paper 1: Misrepresentation and Non-Disclosure* (Joint Law Commissions' issues paper, September 2006), [7.35].

[7] *Medcalf v Hall* (1782) 99 ER 566, Lord Mansfield at 567: "*Nothing is more mischievous than uncertainty in mercantile law*."

[8] See, for example, *The Economist*, 10 May 2014: [English and NY lawyers'] "*biggest advantage is that they have common law systems with centuries of binding precedent. That means they can offer as much certainty as any jurisdiction can*…"

[9] House of Lords Second Reading Committee, 29 July 2014, column GC624.

Sara Cockerill's conclusion was more restrained; the Bill would not do "*real damage*" to English commercial law since, as has been shown since the 1906 Act, the common law is inclined to finesse and refine the sharper edges of statute. She nonetheless appeared to incline towards the "*if it isn't broken*" school of thought, and highlighted the high levels of uncertainty inherent in many of the proposed changes.

With the caveat that what follows is based largely on the speeches of Paul Jaffe and Sara Cockerill (since only they referred in any detail to the actual provisions of the draft Bill), I shall attempt to distil the principle concerns which were expressed about the more striking provisions in the Bill.

The "Duty of Fair Presentation" and remedies for its breach

The Bill retains the insured's duty of disclosure, though it is re-characterised as the "*duty of fair presentation*", which permits the insured to fulfil the duty either by actually disclosing all material circumstances known to him, *or* by giving sufficient information to put a prudent insurer on notice of the need to ask further questions (i.e. doing what might currently found the defence of waiver[10]). This, in the view of David Hertzell and John Hurrell, should encourage underwriters to be more proactive in asking questions of prospective insureds, thereby combatting underwriting at the claims stage. Section 3(3)(b) also requires the insured to give its disclosure in a way which "*would be reasonably clear and accessible to a prudent insurer*" – which ought (said Hurrell and Hertzell) to reduce the phenomenon of data dumping. Hurrell reported that AIRMIC's members were almost entirely supportive of the proposed reforms of the duty.[11]

For Jaffe, the reformulation of the duty represents a complete, unnecessary and unfortunate change, since permitting an insured to fulfil its duty by merely revealing enough to put an insurer on inquiry is "*the antithesis of a fair presentation*". I am not sure that this is quite right, nor that the reformulation really represents such a radical change to the existing law.[12] In certain situations, it must be possible to undertake a fair presentation by reasonably putting the insurer on inquiry that it needs to ask further questions of the insured; this has certainly been suggested in some recent cases.[13] Nevertheless, the introduction of the "second limb" as a means of actively fulfilling the duty must represent an opening up of what is currently merely a defence, particularly considering how rarely waiver has succeeded in the reported cases.[14] In essence, waiver becomes a sword, not a shield.

Of all the proposed reforms, Sara Cockerill was "*saddest*" about changes to the duty of disclosure, although she focussed more on the remedies for its breach than the content of the duty. Although she acknowledged the binary nature of avoidance, she nonetheless felt that it offered a welcome degree of certainty, and that the proposed introduction (in the Bill's Schedule) of proportionate remedies might lead to great uncertainty. As David Hertzell explained, the proportionate remedies aim to achieve a "*neutral outcome*", not "*a windfall for insurers*", by requiring the court to consider what the insurer would have done had a fair presentation been made, such as writing the risk on different terms, or charging a higher premium.

Cockerill and Jaffe were both concerned that this would cause further proliferation of expert evidence on the question of what a prudent insurer might have done but for the breach, and perhaps an inquiry (and concomitant expansion of disclosure) into what the *actual* underwriter did in previous similar

[10] See, for example, *Synergy Health (UK) v CGU Insurance Plc* [2011] Lloyd's Rep IR 500, Flaux J at 526-527.
[11] Specifically, according to surveys of AIRMIC members, 88% support the principle of a "duty of fair presentation"; 94% believe that the insurer ought to be encouraged to make further enquiries of the insured; and 94% support the introduction of proportionate remedies for breach of the duty of fair presentation.
[12] See *Reforming Insurance Contract Law: Initial Draft Clauses,* Law Commission explanatory notes, January 2014, [2.16].
[13] See, for example, *Synergy Health* (above).
[14] This is because the courts have generally been unwilling to dilute the absolute nature of the existing duty of utmost good faith through excessive application of waiver; see the leading case of *Container Transport International Inc v Oceanus Mutual Underwriting Association (Bermuda) Ltd* [1984] 1 Lloyd's Rep 476, Parker LJ at 511.

situations (an avenue which the Court of Appeal previously blocked in *Marc Rich & Co AG v Portman*[15]). She foresaw the courts having a "*torrid time*" on the matter of remedies in the years following enactment, and here (as well as elsewhere) reverted to the familiar refrain: "*if it isn't broken*…"

This view of the Bill's introduction of proportionate remedies struck me as an example of the lawyers' conservatism overextending itself. For reasons I have already touched upon, the sole remedy of avoidance has had its day, and the intelligent introduction of proportionate remedies for breach of the new "*duty of fair presentation*" is surely the most welcome aspect of the Bill. In cases where the breach is deliberate or reckless, or where the insurer would not have written the risk at all (but for the breach), avoidance remains (as it should) on the table. However, the all or nothing nature of the remedy, and the disparity of arms which results from it, is softened; it will now be possible (for example) to reduce the value of a claim in proportion to the amount of additional premium which would have been charged, but for the breach. While there may be uncertainty about how the courts will approach the remedy in the early years, this is an inadequate reason for preserving an element of the law which has become obsolete.

Knowledge under the Bill

The Bill would oust the entirety of the law on attribution of knowledge from the realm of insurance, and would replace this legal basis for determining a party's knowledge with a factual test. In the case of the corporate insured, it would know "*only*" what is actually known to certain defined classes of person,[16] as well as anything which should have been revealed from a "*reasonable search of information available*" to it.[17]

Paul Jaffe was rigorously opposed to the replacement of tests based on well-established and elaborate legal principles with factual tests, and cited an *amicus curiae* brief prepared on behalf of United Policyholders (a *policyholders'* lobby group in the USA) in the Supreme Court of Texas, which is worth quoting in full:

> *"The natural result of transforming a question of law into a question of fact is that discovery expands exponentially, litigation costs vastly increase, the time required to reach a resolution expands exponentially, and additional burdens are placed on . . . courts. The resultant increase in litigation costs, protracted discovery, and expansion of time to resolve these coverage disputes naturally favors the party to the transaction . . . that is in the financially superior position . . ."*

The fact that the Bill defines the ambit of an insured's knowledge by reference to the purely factual matter of what would have been revealed by a reasonable search of information available to it (or its agent) will inevitably expand the ambit of disclosure if this matter comes to be considered in the context of a dispute. Sara Cockerill foresaw yet more scope for further expert evidence on the question of what a "*reasonable search*" ought to be, which the Law Commission has suggested will depend on the nature and size of the insured's business.[18]

Moreover, the wholesale ousting of the law of attribution is likely to leave unexpected lacunae, not least (as Sara Cockerill noted, and Claire Blanchard QC has described in more detail[19]) the unexplained euthanasia of the "*agent to know*". Under the Bill, the port agent's knowledge that the insured's vessel had been lost would not have been attributed to the insured (unlike in *Proudfoot v Montefiore*[20]), since the agent was not responsible for the insured's insurance, nor would his knowledge of the loss of the ship have been discovered by a reasonable search (because it was in his mind only). Absent the rules of

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[15] [1997] 1 Lloyd's Rep 225
[16] These are (under section 4(3)) the insured's "*senior management*", and those "*responsible for the insured's insurance*", including agents. Both of these categories are defined in section 4(5)).
[17] Section 4(4).
[18] Explanatory notes
[19] *Reform of the pre-contractual duty of disclosure of the agent to insure: evolution or revolution?* [2013] LMCLQ, 325
[20] (1867) LR 2 QB 511.

attribution, the insured would not have had such knowledge.
Sara Cockerill also highlighted a potential problem over the meaning of "*the insured*" for the purposes of knowledge, particularly in the context of a parent company with multiple operating subsidiaries which takes out insurance in its own name. The subsidiaries will not be "*the insured*",[21] meaning their knowledge will not (without more) be fixed to the parent. On a similar note, Paul Jaffe highlighted the addition in the most recent version of the draft Bill of a provision by which no party will have knowledge of any confidential information acquired in the context of a business relationship with a party other than "the insured" or "the insurer". At first blush, this might (in certain cases) radically cut down the amount known to an insured (for the purposes of what it must disclose), and might mean that a parent company is excused from disclosing highly material information acquired in course of its relationship with a subsidiary, if that subsidiary is not an "insured". He could not "*begin to understand how this will work in practice*".

A further problem with the proposed reforms to the law of knowledge was raised by Alistair Schaff QC in the Q&A session. Whereas the current law takes account of the imperfections in an insured's business practices, so as to excuse the fact that an insured may (even negligently) have failed to discover certain information,[22] section 4(4) of the Bill would tend to hold all insureds to the standard of a reasonable insured for the purposes of deciding what they ought to know. In other words, the Bill tends to treat all insureds as though they conduct their business prudently, whereas (as McNair J held in *Colonial Wharves*), this is not the case, and one of the very purposes of insurance is to protect against the insured's own negligence in this regard.
In all, the rationale underlying this very significant shift away from attribution of knowledge towards a factual test was not at all clear from the panel discussion. John Hurrell explained that it was *not* on the list of concerns which kept AIRMIC's members awake at night, nor is it a "*problem*" caused by the 1906 Act (at which most of the Law Commission's fire has been directed), since attribution forms part of the law of agency, and is therefore a creation of the common law. David Hertzell did not explain why the existing law in this area had failed the Law Commission's common sense test, and from the brief points raised in the discussion, there appear to be many reasons to leave the matter of knowledge well alone.

The nature of warranties, and the effect of their breach

All of the speakers agreed that the Bill brought about a welcome end to basis clauses, and all acknowledged the fairly vociferous calls for reform of the law relating to warranties, on which 95% of AIRMIC's members desired change. When it came to discussion of the nature of reform, consensus quickly melted away.

At the time of the panel's discussion, the Bill contained two fundamental changes to the law on warranties: firstly, they will become suspensory conditions, meaning that where the insured is in breach, the insurer cannot simply tear up the contract, but will be off risk unless and until the insured remedies the breach. If loss occurs after the breach has been remedied, the insurer is liable. The second, seemingly much more controversial change is that where, as is so often the case, *any* term (if complied with) "*would tend to reduce the risk of*" loss of a "*particular type*" or at a "*particular location or time*", breach of that term cannot be relied upon to exclude or limit liability for loss of a different type/time/place; so (in Sara Cockerill's example) no reliance on breach of a term requiring a night watchman for a loss which occurred during the day.

For Paul Jaffe, the second of these changes was "*enormously disappointing*", since in his (and Sara Cockerill's) view it "*introduces causation by the back door*", in spite of the fact that the Law Commission previously appeared to reject the prospect of a pure causation test in the context of warranties[23] because (in Cockerill's words) it would have meant a "*field day for litigation*". Cockerill

[21] Which is defined in the Bill as "*the party to a contract of insurance who is the insured under the contract…*"
[22] See *Australia & New Zealand Bank Limited v Colonial & Eagle Wharves Limited* [1960] 2 Lloyd's Rep 241, McNair J at 252.
[23] See *Insurance Contract Law: The Business Insured's Duty of Disclosure and the Law of Warranties,* Law Commission Consultation Paper No 204, p.138: "*several criticisms were made of the proposals*

referred again to breach of a term requiring a night watchman, whereupon loss is caused, this time by a lorry crashing into the building at night. Would the term, if complied with, tend to reduce the risk of that sort of loss? The answer is not at all obvious, and would invariably lead the parties into the mire of causation, with all the uncertainty that brings. In view of this, she expected "*all but the clearest cases of any size to fight*", since the new regime allowed "*much more scope for argument*", whereas the *status quo*, although unpopular, was at least certain. In view of this, although she acknowledged that the reform would be popular with insureds, she questioned whether the costs, in terms of uncertainty and a likely increase in litigation, outweighed the benefits.

Perhaps reflecting some of these concerns, section 11 of the draft Bill has been dropped from the version introduced into the House of Lords on 17 July 2017. For my part, this was an entirely welcome decision by the Law Commission, since the introduction of causation into the law of warranties would have muddied what are currently clear waters. I was particularly concerned that the Law Commission appeared to consider that section 11 did not (or perhaps ought not) to introduce causation:

> *"Importantly, a causal link between the breach and the ultimate loss is not required...the term should not be considered in light of what has actually happened. That is, it is not relevant whether or not breach of the term actually contributed to the loss which has occurred. It is sufficient that the term is relevant to the particular kind, time or place of loss. If that is the case, the insurer is not liable for the actual loss."*[24]

I do not follow the reasoning in this commentary (particularly the words "*relevant to the particular kind…*"), nor do I consider that it reflects what has been drafted in section 11 of the Bill, since while that section does not "require" a "causal link" between the breach and the ultimate loss, it does not forbid one from being considered in assessing whether the actual loss is "*of a different kind*". On the contrary, it seems that the term must be considered *"in light of what has actually happened",* since it is not otherwise possible to assess whether the "*loss*" is "*of a different kind*" for the purposes of section 11(2).

For example, a policy contains a term whereby a factory must ensure that "*the immediate areas in which welding is carried out must be segregated by the use of screens made of fire retardant material*". In breach of that term, the insured uses screens made of an inflammable substance. While in breach, it suffers a catastrophic loss caused by a gas explosion, resulting in a major fire. Can the insurer rely on the breach of warranty to exclude or reduce its liability?

The answer, under section 11, is not immediately clear. The insured would doubtless argue that the term requiring fire retardant screens was concerned with loss caused not just by fire in general, but by a particular kind of fire; namely, fire caused by welding sparks flying into the factory. This is of an entirely "*different kind*" to fire caused by a gas explosion. Crucially, there is nothing on the face of section 11 which prevents the insured from taking this "causation" type approach.

Happily, in view of the removal of section 11, the example above is now of purely academic interest.

Damages for breach of implied term to pay claims in a reasonable time

Section 14(1) of the Bill would have introduced an implied term into every contract of insurance that the insurer must pay any sums due "*in a reasonable time*", though as with section 11, the Law Commission has decided to drop the proposal. Again, support for this measure was (at best) lukewarm; it was (according to John Hurrell) not a matter of great concern to AIRMIC members, and in Paul Jaffe's view was "*fraught with difficulty*", not least regarding how an insurer is to show, if it disputes a claim, that it is acting reasonably. Would the insurer have to disclose counsel's opinion in the midst of coverage litigation, in order to prove reasonableness?

Sara Cockerill was surprised that the Law Commission had missed an opportunity to tackle the oddity of the "*hold harmless fiction*", whereby English Law characterizes an insurer's duty as one to prevent

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[to introduce a causation test which an insurer must satisfy in order to rely on breach of warranty to exclude loss], which have led us to rethink our approach."

[24] The Law Commissions and Insurance Contract Law Reform: An Update [2.28] and [2.33].

harm which, if breached, sounds in damages.[25] It is this oft-criticised legal fiction which currently prevents an insured, as in Mr Sprung's eponymous and widely criticised case,[26] from recovering damages for the late payment of an indemnity, since English law does not recognise damages for late payment of damages.[27] Nonetheless, the Law Commission eschewed the opportunity to overturn this fiction, favouring an implied contractual term instead.

This alternative approach was, in Cockerill's view, likely to be problematic, not least because of the superbly fact-specific concept of payment within a "*reasonable time*", a question the courts will face in a complete vacuum of authority, and on which there may be tremendous scope for argument. She also cited Lord Mance's concern that it would become standard practice for an insured to claim damages for late payment in most cases where a claim is declined, thereby adding a distinct and perhaps undesirable element to insurance litigation.[28] There might also be a can of worms in the context of consequential losses, and yet more uncertainty about the effect of the implied duty on reinsurance.

Perhaps most importantly, however, Cockerill questioned whether the implied term would actually be of much use to insureds in many cases, including in the *cause célèbre* of *Sprung*. Although she lacked the time to develop the point fully, Sprung's claim may well have failed on foreseeability (at least as the law then stood), since his loss was caused by his "choice" not to reinstate his damaged factory, itself a result of his own impecuniosity.[29] It appears to be the case in Scotland (where damages for late payment of a valid claim are available) that many parties struggle to overcome the foreseeability hurdle.[30] In view of this, she hinted, the implied term may be of limited practical use to insureds.

I am not so sure. Take the common example of the insurer that declines a claim (in good faith), thereby requiring the insured to take legal advice, or even to commence proceedings. The insurer later realises that its basis of refusal was unsound, and pays the claim. Whereas currently the insured must simply absorb its legal costs, under section 14(1), it could recover. Whether is does depends (in part) on the reasonableness of the insurer's original refusal (under section 14(4)). This might promote more careful claims handling by insurers, while (perhaps rightly) offering compensation where an insured has suffered further loss as a result of an unreasonable refusal. There would, however, be delicious scope for argument over whether a refusal was indeed reasonable (which may effectively require re-litigating the substantive dispute on coverage or liability). Litigation, and costs, may proliferate and lengthen through a new industry in claims for late payment. There is talk that section 14 may be re-introduced into the Bill at a later stage. While this would undoubtedly be welcomed by lawyers, I favour its exclusion.

Conclusions

In his introductory remarks to the audience, Professor Sir Bernard Rix referred to the 70% to 80% of BILA members who (according to a BILA poll) believe that "*the Bill would influence or greatly influence the conduct of underwriting and the conduct of claims*". He rightly did not speculate over whether the influence would be positive or negative. There is clearly welcome change in the Bill: a softening of the harshness of avoidance, and the abolition of basis clauses being most obvious. The lasting impression from the panel discussion, however, was that the Bill is likely to create as many problems as it solves, not least the notorious mischief of uncertainty. This is because the Bill has overextended itself into areas where there really is no clamour, still less any need for reform, the law on attribution of knowledge being the most obvious. As Sara Cockerill concluded, the lawyers will be drooling over the years of litigation which the Bill, if enacted, will almost certainly yield. Delicious though that prospect sounds to a junior at the Commercial Bar, it is bad news for insurers and insureds.

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[25] *Firma C-Trade SA v Newcastle Protection and Indemnity Association (The Fanti); Secony Mobil Oil Inc v West of England Shipowners Mutual Insurance Association (The Padre Island)* [1991] 2 AC 1, Lord Goff at 35 -36.
[26] *Sprung v Royal Insurance (UK) Ltd* [1999] 1 Lloyd's Rep IR 111.
[27] *The President of India v Lips Maritime Corporation (The Lips*) [1988] AC 395, Lord Brandon at 425.
[28] (2011) ICMLQ p.353
[29] Above, Evans LJ at 118.
[30] See, for example, *Hawkins v Scottish Mutual Assurance Plc* [2005] CSOH 101, RF MacDonald AC at [22].