Reform of the Insurance Law of England and Wales – Separate Laws for the Different needs of Businesses and Consumers

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In mercantile transactions the great object should be certainty[1]
Nothing is more mischievous than uncertainty in mercantile law[2]

Lord Mansfield

Introduction

Some 100 years after the enactment of one of the most important, influential and enduring commercial statutes in England, The Marine Insurance Act 1906[3], the English and Scottish Law Commissions began a review of insurance contract law[4]. The review remains ongoing and encompasses not only marine insurance, but also all areas of non-marine and life insurance.

Despite the widespread international emulation of the Marine Insurance Act[5], the support that it seems to have from the commercial community[6] and certain members of the English judiciary[7], the Act, like a prophet in his own land, has been under attack in England for some years.

Part I of this paper reviews the history of demand for reform and outlines the review process undertaken to date by the Law Commission. It then notes the division between consumer insurance law and commercial insurance law in England. Following a discussion in Part II of the recommendations likely to be made by the Law Commission in respect of the law relating to disclosure, warranties and consequential damages for business insurance, Part III of this article examines the new Consumer Insurance (Disclosure and Representations) Act 2012 and other areas relevant to consumers. Part IV puts English insurance law in its economic context, and the paper concludes that the case

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[1] *Vallejo v Wheeler* (1774) 1 Cowp 143, 153.

[2] *Medcalf v Hall* (1782) 3 Doug 113.

[3] The Marine Insurance Act (6 Edw 7 c.41).

[4] The review began with a Joint Scoping Paper issued in January 2006. The Law Commission and the Scottish Law Commission, *Insurance Contract Law: A Joint Scoping Paper*, (London: Law Commission, January 2006).

[5] See e.g. Canadian Marine Insurance Act (S.C. 1993, c. 22), Indian Marine Insurance Act 1963, the Australian Marine Insurance Act 1909 (but see proposed amendments proposed by the Australian Law Reform Commission resulting in the drafting of a bill to amend the Act in 2001 which has not been enacted (http://www.alrc.gov.au/inquiries/marine-insurance-act-1909).

[6] See Part IV herein.

[7] See paper of Aikens LJ in "Reforming Marine and Commercial Insurance Law" (Informa 2008) .

for reform of primary legislation relating to business insurance is not made and that such reform is likely to be harmful to international commerce and the UK economy.

Part I– History of Reform

A. History of the calls for reform of English Insurance Contract Law

The main areas that have attracted criticism over the years are those aspects of the law that relate to the disclosure obligations of the insured and those that relate to warranties. The criticisms were largely focused on the law's harshness when applied to individuals.

In 1957 the Law Reform Committee's Fifth Report examined the law relating to disclosure and warranties in insurance policies[8]. This committee excluded marine insurance from the scope of its enquiries and recommendations on the basis that "The general public is not interested in marine insurance and we have no reason to believe that the business circles who are concerned with the subject are in any way dissatisfied with the law as it stands."[9] Nothing came of the Committee's recommendations.

In 1980, the English Law Commission reviewed the law of insurance and concluded that these aspects of insurance law were "undoubtedly in need of reform" and that such reform had been "too long delayed"[10], but its proposals were never implemented. The insurance industry did, however, respond to the criticisms of the law of warranties and disclosure with regard to personal lines insurance by agreeing to the Association of British Insurers' Statement of General Insurance Practice in 1986[11]. This statement was a voluntary undertaking by those insurers who were members of the Association of British Insurers that they would comply with certain principles for policyholders taking out insurance in their private capacity only. The Statement included the following provision:

> (b) An insurer will not repudiate liability to indemnify a policyholder:-
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> (i) on grounds of non-disclosure of a material fact which a policyholder could not reasonably be expected to have disclosed;
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> (ii) on grounds of misrepresentation unless it is a deliberate or negligent misrepresentation of a material fact;
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> (iii) on grounds of a breach of warranty or condition where the circumstances of the loss are unconnected with the breach unless fraud is involved.[12]

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[8] Law Reform Committee, *Fifth Report (Conditions and Exceptions in Insurance Policies)* (Cmnd 62) (London: HMSO, 1957). http://www.peterjtyldesley.com/files/Cmnd_62_Law_Reform_Committee_Conditions_and_Exceptions_in_Insurance_Policies.pdf.

[9] ibid at para 3.

[10] Law Commission, *Insurance Law: Non-Disclosure and Breach of Warranty* (Law Com. No.104, Cmnd 8064) (London: HMSO, 1980) *available at* http://www.bailii.org/ew/other/EWLC/1980/104.pdf. The 1980 Report including its draft bill excluded marine, aviation and transport insurance from the scope of its reforms on the basis that such insurance is largely between sophisticated commercial parties.

[11] Association of British Insurers, *Statement of General Insurance Practice,* (London: ABI, 1986) *available at* http://www.peterjtyldesley.com/fos/insurance/pages/files/ABI%20SGIP.pdf.

[12] Ibid. The next sentence of the statement provided that this paragraph did not apply to marine and aviation policies.

On 14 January 2005 the Insurance Conduct of Business (ICOB) issued by the Financial Services Authority [13] ("FSA") came into effect, which had substantially similar provisions[14]. The Financial Conduct Authority (the "FCA") took over responsibility from the FSA on 1 April 2013.[15]

In parallel with these codes for consumer insurance, another development gave consumers the ability to enforce the code against participating insurers – the Insurance Ombudsman Bureau. The Insurance Ombudsman Bureau was established in 1981 to hear complaints by consumers against insurers – primarily for unfair claims handling[16]. It enforced the terms of the ABI Statement of General Insurance Practice, and insurers complied with its rulings. The Ombudsman published annual reports and bulletins thereby providing guidance for insurers and policyholders on how the Ombudsman might rule[17]. These roles have now been taken over by the Financial Ombudsman Service, which rules not only on consumer complaints but also from those of micro-enterprises[18] or charities with an annual income of less than £1m or trusts with a net asset value of less than £1m. The maximum amount that the Ombudsman may award is £150,000 (or £100,000 for complaints received before 1 January 2012)[19].

However, it should not be forgotten that neither the ABI Statement of General Insurance Practice nor the Ombusdman's rulings had the force of law. Effectively, what developed from the mid-1980's and remains in place to date is an alternative system of insurance law and dispute resolution that applied to personal lines insurance that, while complied with by the insurance industry, does not have the force of law.

The limit on the amount that the Ombudsman may award and the fact that this extra-legal parallel practice did not have the force of law and was therefore untidy may explain why pressure remained in England to reform insurance contract law. In 1997 a consumer body published a paper recommending insurance law reform[20], and seemingly of greater

[13] The Financial Services Authority was a body corporate given powers under the Financial Services and Markets Act 2000 to inter alia protect consumers (see S. 2(2)(c) of the Act.

[14] These are now contained in Chapter 8 of the FSA's Insurance: New Conduct of Business sourcebook. Financial Services Authority, *Insurance: Conduct of Business Sourcebook,* (London: FSA, 2008) ch.8.

[15]The FCA is the new regulator responsible for regulating conduct in retail and wholesale markets. HM Treasury, *Financial Services Bill Receives Royal Assent*, (Press Notice 126/12) available at http://www.hm-treasury.gov.uk/press_126_12.htm.

[16] In 2001 the Insurance Ombudsman Bureau was replaced by the Financial Ombudsman Service which was set up pursuant to the authority in Part XVI of the Financial Services and Markets Act 2000 and deals with insurance and a number of other financial services complaints.

[17] Peter J Tyldesley, *The Insurance Ombudsman Bureau - the early history*, Insurance research & practice. Vol 18 pt 2 (July 2003), pp 34-43 *available at* http://www.peterjtyldesley.com/files/2003%20The_Insurance_Ombudsman_Bureau_-_the_early_history.pdf.

[18]An enterprise which both employs fewer than 10 persons and has a turnover or annual balance sheet of €2m or less (see Financial Services Authority, *Glossary,* (London: FSA)).

[19] FSA Handbook, Rule 3.7.4.

[20] John Birds and National Consumer Council, *Insurance Law Reform: the Consumer Case for a Review of Insurance Law*, (London: National Consumer Council, 1997).

importance[21] was a report published in 2002 by the British Insurance Law Association also recommending reform[22]. Like the reports before it, that report recommended only minor changes to marine insurance and to reinsurance[23], and importantly, in the context of marine insurance stated:

> "It is a highly competitive market where the insured is represented by skilled brokers who are well able to represent the insured in negotiating terms with the insurers. Proposal forms are rare. Disclosure is very important, as are warranties. … Accordingly, in the marine market, the insured can normally negotiate for acceptable terms without statutory protection."[24]

Anyone familiar with the way in which other large business risks are placed in the London Market might well wonder why only marine insurance was identified in this way since what is said there is true of many classes of insurance and reinsurance.

The ongoing pressure seems to have been driven by the position summarised by Longmore LJ,

> "Voluntary measures of self-regulation such as the Statements of Insurance Practice whereby insurers volunteer not to rely on their strict entitlement under the law are no substitute for proper law reform."[25]

The proposed reforms would presumably have applied to English domestic insurance whether purchased by consumers or by small or large businesses, but in all this history of pressure in England for insurance contract law reform, the main reports, papers and draft bills recommended that no substantial changes be made to the law of marine insurance and reinsurance.

In its current project, the Law Commission initially considered not reforming marine insurance but ultimately decided not to distinguish between marine and non-marine insurance for the following reasons[26]:

A. Marine, aviation and transport insurance (MAT) is "no longer regarded as such a separate and distinct form of insurance" as it once was.
B. "It would be overly complex to require lawyers to apply one law to (for example) major [construction projects], and quite a different law to ships."

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[21] See Law Commission's Scoping Paper at para. 1.6.
[22] British Insurance Law Association, *Insurance Contract Law Reform – Recommendations to the Law Commission*, (London: BILA, 2002).
[23] See paras. 27- 31.
[24] id at para. 28.
[25] id at Appendix A at para. 7(5).
[26] The Law Commission and the Scottish Law Commission, *Insurance Contract Law: Misrepresentation and Non-Disclosure,* Issues Paper No. 1 (London: Law Commission, 2006) at paras. 7.84 to 7.86 and The Law Commission and the Scottish Law Commission, *Insurance Contract Law: Misrepresentation, Non-Disclosure and Breach of Warranty by the Insured*, Joint Scoping Paper No. 182 (London: Law Commission, 2007) at paras. 5.149 to 5.156.

C. 'The boundary between MAT and other insurance is extremely difficult to draw and to draft." Consumers who own pleasure craft but also many small leisure businesses and fishermen who do not fall within the description of professionals "who could reasonably be expected to be aware of the niceties of insurance law" should logically be entitled to the same protection as other consumers. "The result would be complex regulations, with arbitrary dividing lines."

The decision to treat all business insurance consistently appears to have support[27]. The difficulty in drawing a bright line between marine and non-marine insurance is likely to lead to a substantial volume of litigation to determine precisely where the line lies. American maritime lawyers who are familiar with the wealth of cases determining whether a floating unit is a vessel will be all too aware of the difficulty in drawing these lines and the seeming endless litigation that these demarcations generate[28]. Such a conclusion does not mean that marine insurance law requires reform. It simply raises, even more acutely, the question of whether large commercial insurance requires reform.

B. Law Commission's Insurance Contract Law Reform Project

In January 2006 the Law Commission issued its Scoping Paper setting out the need, as it saw it, for the review of Insurance Contract Law, giving the reasons why it would specifically review the law relating to disclosure and to warranties, and requesting respondents' views on the scope of the review generally.

Following that paper, there followed a series of Issue Papers in which the Law Commission set out its views on specific areas for reform, including the reasons therefore, and its initial views on the form that a change in the law might take. Responses were invited. The following Issue Papers were released on the following subjects:

A. Misrepresentation and Non-Disclosure (September 2006)
B. Warranties (November 2006)
C. Intermediaries and Pre-Contract Information (March 2007)
D. Insurable Interest (January 2008)
E. Micro-businesses (April 2009)
F. Damages for Late Payment (March 2010)
G. The Insured's Post-Contract Duty of Good Faith (July 2010)
H. The Broker's Liability for Premium (Section 53) (July 2010)
I. The Requirement for a Formal Marine Policy (Section 22) (October 2010)

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[27] Reforming Insurance Contract Law A Summary of Responses to Consultation (October 2008) paras. 3.115 to 3.128 in which over 90% of respondents are said to agree with the proposition that business insurance law apply equally to MAT insurance and reinsurance.

[28] See for example *Stewart v Dutra Const Co* 543 US 481,488-97, 125 S Ct 1118, 160 L Ed 2d 932 (2005) **;** *Holmes v Atlantic Sounding Co Inc* 437 F.3d 441, 445 (5th Cir 2006), *Washington v BP America, Inc* 2012 US Dist LEXIS 164371 (WD La 2012), *Lozman v City of Riviera Beach*, 133 S. Ct. 735, 739-40, 2013 AMC 1, 1-3 (2013).

Following responses to the Issue Papers, the Law Commission issued Consultation Papers setting out its views in light of the responses received. The Consultation Papers issued have been:

A. Misrepresentation, Non-Disclosure and Breach of Warranty by the Insured (July 2007)
B. Post-Contract Duties and Other Issues. (Dec 2011)
C. The Business Insured's Duty of Disclosure and the Law of Warranties (June 2012)

With respect to Misrepresentation and Non-Disclosure, the Law Commission decided in the Consultation Paper to split the law between that applicable to consumers and that applicable to businesses. Therefore, in December 2009 a Final Report was issued covering Consumer Insurance Law: Pre- Contract Disclosure and Misrepresentation.

There followed the Consumer Insurance (Disclosure and Representations) Act 2012[29] which was enacted in that year and came into force on 6 April 2013[30].

The Law Commission expects to issue its final report on Post-Contract Duties and Other Issues as well as a report on Business Insurance Law: Pre-Contract Disclosure, Misrepresentation and Warranties in December 2013 together with a draft bill.

Part II – Business Insurance Reform

Main Areas of Review by Law Commission

As is self-evident from the number and subject of the Issue Papers released by the Law Commission, the scope of the project is significantly broader than that envisaged by the previous reports and papers. The scope is also so broad that space will not permit an examination of all the subjects of the Issue Papers.

In this review, I examine the key areas of disclosure and warranties that form the heart of the Law Commission's project together with its proposals regarding damages for late payment of claims. This review examines these subjects from the perspective of the London insurance market, most of whose business is international, and challenges the extent to which change to these areas of the law will support the commercial needs of those operating in and purchasing from that market.

A. Non-Disclosure

i. Law Commission's concerns with the Law of Disclosure

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[29] 2012 c. 6.

[30] Consumer Insurance (Disclosure and Representations) Act 2012 (Commencement) Order 2013, 2013 No. 450.

The Law Commission's main concerns about the current state of the law of disclosure may be summarised as follows:

A. Businesses are said not to be clear on what needs to be disclosed because it is counter-intuitive for them to have to disclose what the insurer wants to know. Much reliance is placed on a report by the Mactavish Group in 2011[31] which found, based on interviews of over 600 policyholders and 100 senior insurance executives, that companies have a poor understanding of the law of disclosure, that their presentations are poor and that brokers are devoting less time to assisting with these presentations because their fees have fallen over the last few years. On the other hand an AIRMIC survey found that most insureds spent 2 to 6 months in preparing information for their insurance renewals and that nearly 1/3rd of members claimed to have had disclosure issues raised against them in the last 5 years.

B. It is not clear whose knowledge within the insured is relevant, so those placing insurance are not clear as to how to gather the information for the insured's placement.

C. Insurers have insufficient incentive to ask questions at the time of underwriting the risk as opposed to the time of claim. The Law Commission quotes a judgment in which the court stated "I have always understood the proper line that an underwriter should take, except in matters that he is bound to know, is absolutely to abstain from asking any questions, and leave the insured to fulfil his duty of good faith, and to make full disclosure of all material facts without being asked[32]. The Law Commission claims that this attitude gives rise to widespread complaints that the law encourages passive underwriting only to re-open the question of adequate information at the claims stage[33]. However, at the same time, the Law Commission maintains that the law does require the insurer to ask questions if the information disclosed would lead a reasonable insurer to ask those questions[34]. If that requirement exists, then insurers have such an incentive.

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[31] The Law Commission and the Scottish Law Commission, *Insurance Contract Law: The Business Insured's Duty of Disclosure and the Law of Warranties*, Consultation Paper no 204 (London: Law Commission, 2012) at para. 4.29 to 4.52.

[32] id at 5.21 citing Scrutton LJ in *Greenhill v Federal Insurance Co Ltd* [1927] 1 KB 65. The textbooks do not agree that this case supports the proposition that the Law Commission cites it for. Rather they suggest that the case is relevant for determining what the insurer should inquire about and what the insurer could inquire about. Bennett, *The Law of Marine Insurance* 2nd edition 2006 (Oxford University Press 2006) at 4.101, J Gilman and R Merkin, *Arnould's Law of Marine Insurance and Average* 17th Edition 2008 (London; Sweet & Maxwell 2008) at 16-177 to 16-180. The insurer who relies on this extract in order not to ask questions is running a high risk of being held to have waived the requirement for further information.

[33] The Law Commission and the Scottish Law Commission, *Insurance Contract Law: The Business Insured's Duty of Disclosure and the Law of Warranties*, Consultation Paper no 204 (London: Law Commission, 2012) at para. 5.69.

[34] id at 5.44 to 5.60.

D. The remedy for disclosure is too harsh. If a non-disclosed fact would have resulted in a small increase in premium, the insurer may avoid the whole policy[35].

The Law Commission summarised its position stating, "Good disclosure requires co-operation between both parties. . . Our starting point is that the policyholder should make a fair presentation of the risk, and the insurer should ask appropriate questions"[36].

ii. Reasons for the Strictness of Existing Law

The immediate reason for the duty of disclosure is that the insured knows the facts material to the particular risk, so he should disclose them to the underwriter who has no such knowledge. Insurance is one of the few areas of contract where, despite there being no fiduciary relationship between the insured and the insurer, the contract is nevertheless subject to the duty of utmost good faith. Moreover, the duty of disclosure is recognised by the Law Commission and others as underpinning the market's strength in covering a huge variety of risks competitively and effectively[37]. The City of London Law Society correctly noted that because of the duty of disclosure, major insurance transactions are routinely written without "an enormous amount of due diligence being carried out with underwriters relying on insureds and their professional advisors to provide material information"[38].

The Law Commission has also taken on board the point that

> "Insurance provides firms with access to contingent capital – that is access to funds in circumstances when they most need it. Compared with the costs of accessing other capital, such as bank loans, insurance is a cheap option, with lower administrative costs or arrangement fees. Insurance is a cost-effective way to access capital and we would not wish to hinder that."[39]

In essence, these statements summarise the reasons for the duty of disclosure and the requirement that the insured make a fair presentation of the risk[40]. The overwhelming majority of respondents to the Law Commission supported retaining the duty of disclosure.

In the event that the insured has failed to disclose or has misrepresented a material fact, the insurer's remedy is to avoid the policy and return the premium[41]. The remedy of

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[35] id at para 4.53.
[36] id at 1.3.
[37] The Law Commission and the Scottish Law Commission, *Insurance Contract Law: The Business Insured's Duty of Disclosure and the Law of Warranties*, Consultation Paper no 204 (London: Law Commission, 2012) at para. 4.12 .
[38] id at 4.9.
[39] Id at 4.10.
[40] Id at 5.12.
[41] Subject to there being no fraud in which case it is not returnable. S. 84(3)(a) of the Marine Insurance Act 1906.

avoidance for an innocent or negligent non-disclosure or misrepresentation may be seen as harsh, particularly if the insurer would only have charged a slightly higher premium or required the insured to bear a slightly higher excess[42].Nevertheless, this "harsh" remedy provides a strong incentive to the insured to be careful and diligent in its presentation of the risk to the underwriters. Despite concerns by the Law Commission that the remedy of avoidance is overly harsh, it notes that "non-disclosure is widespread"[43].

So, why should the remedy for non-disclosure and misrepresentation have this policing function? In short, the insured that diligently and carefully discloses all facts in a fair presentation of the risks pay the "correct" rate for laying off that risk. The careless insured that fails to make a full disclosure is likely to pay a lower rate for laying off the risk. Chronic under-declaration results in the fund of premiums on which all insureds depend being depleted, to the detriment of all. That shortfall can only be rectified by pushing up premiums for all concerned. In turn, that corrodes the benefits for which the Law Commission have elsewhere accepted insurance provides- namely a significantly lower cost support for business capital than any of the alternatives currently available. Clearly, the interest of the occasional careless insured should be secondary to the interests of all insureds if a lean and cost-effective insurance product is to remain available. Careless insureds being subsidised by the careful insureds is neither a fair result nor one that the law should encourage.

iii. Law Commission's Provisional Approach

As we have seen, not only have the scope of the duty of disclosure and the remedies for breach thereof attracted the attention of the Law Commission in the current round of proposed insurance law reform, but it has also been at the heart of the criticisms of the law in the Law Commission's 1957 and 1980 reports. Nevertheless, reforming such a key part of insurance law is fraught with difficulty. This is why the Law Commission's 2012 proposals differ significantly from its 2007 proposals that sought more radical changes[44] The Law Commission now proposes that the duty of disclosure be reformulated so that

A. the insured must disclose all material circumstances which it knows or ought to know

B. a material circumstance is one required to provide a fair presentation of the risk

C. a fair presentation of the risk should include
   a. any unusual or special circumstances which increase the risk

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[42] The Law Commission and the Scottish Law Commission, *Insurance Contract Law: The Business Insured's Duty of Disclosure and the Law of Warranties*, Consultation Paper no 204 (London: Law Commission, 2012) at para. 9.2.
[43] Id at 9.28.
[44] id at 1.20 to 1.21and 9.5 to 9.9. This proposal was that the insured only had to disclose that which a reasonable insured would think was relevant to an insurer and that an insurer should have no remedy against an "innocent" non-disclosure.

b. any particular concerns about the risk which led the policyholder to seek insurance, and
c. standard information which market participants generally understand should be disclosed.

D. Where the insurer receives information which would prompt a reasonably careful insurer to make further enquiries, an insurer who fails to make appropriate enquiries will not have a remedy for non-disclosure of any fact which those enquiries would have revealed. [45]

E. The information that a business should disclose is that known by (1) the directing mind and will of the organisation, and (2) those who arrange the insurance on behalf of the organisation. The business policyholder must also disclose information that would have been discovered by reasonable enquiries, which are proportionate to the type of insurance and to the size, nature and complexity of the business[46].

F. In the absence of inquiry, a business policyholder need not disclose:
a. Matters of common knowledge;
b. Information relating to the practices and risks of the trade which a well-informed insurer writing that particular class of business ought to know; and
c. Information known to the directing mind and will of the insurers or to the persons making the underwriting decision[47]

With respect to the remedy for non-disclosure or misrepresentation, the Law Commission provisionally proposes that

A. the remedy of avoidance be retained where the policyholder's conduct is dishonest[48].

B. where the policyholder's conduct is not dishonest, then the remedy be proportionate so that
a. if the insurer would not have entered into the contract at all, then the policy may be avoided and all premium returned
b. If the insurer would have entered into the contract on different terms, then the contract shall be treated as if those terms were included,
c. if the insurer would have entered into the contract but charged a higher premium, then the claim may be reduced in proportion to the amount of the under-charged premium[49]

[45] Id at 5.78 to 5.80.
[46] Id at 6.78.
[47] Id at 8.50.
[48] The law Commission seeks views on whether dishonest conduct should be fraudulent conduct only or whether it should it be deliberate or reckless conduct. See id at 9.63 to 9.68 and 9.74 to 9.76.
[49] Id at 9.40.

C. both the insured and the insurer would then be able to cancel the contract prospectively on reasonable notice[50].

D. In respect of business insurance, the Law Commission proposes that the parties be able to provide that the insurer be entitled to avoid for all non-disclosures and misrepresentations[51].

iv. US Law and European Law

The Law Commission has borrowed the concept of proportionate remedies from the insurance law in many European countries[52]. In its report, the Law Commission provides a brief overview of German non-marine insurance law and of the French Code des Assurance[53]. There are different rules for marine, aviation and transport risks in Germany[54]. The other major European market that competes with London for marine and energy risks is Norway, and there too different rules apply to these classes of insurance.

Moreover, the Law Commission has lifted the proportionate concept out of its wider legal matrix. Under the Continental approach, the duty of disclosure continues after the contract is agreed, so that the insured must disclose those factors that, during the policy period, increase the risk[55]. The premium is then (under some provisions) altered to reflect that increased risk[56]. In English law, the duty of disclosure ceases when the contract is agreed[57]. The Law Commission rejects importing the Continental approach into English law[58] even though it would seem that the Continental continuing duty of disclosure is part of the quid pro quo for pro rata remedies.

In the US, disclosure requirements vary. For instance, for marine insurance and reinsurance subject to New York law, an insured must disclose all information that materially affects the risk being insured[59]. If the insured fails to make such disclosure, the policy may be avoided ab initio. For other types of insurance, whether consumer or business, the insured is under no duty to disclose facts material to the risk unless such failure to disclose amounts to wilful concealment[60]. Rather, the insured's duty is to not

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[50] Id at 9.62.
[51] Id at 9.82 to 9.85.
[52] Id at 1.45.
[53] Id at 3.19 to 3.28.
[54] See para. 3.19.
[55] see e.g. Nordic Insurance Plan 2013, Chapter 3, Section 2 and German Marine insurance conditions
[56] See a general discussion in CMI Yearbook 2000, Vol. 1 at p. 376 et seq. and e.g. German General Rules of Marine Insurance (ADS) and DTV 1973 amended 1984 – clauses 25-26 and DTV – German Standard Terms and Conditions of Insurance for Ocean-Going Vessels 2009 (DTV-ADS 2009) available at http://www.tis-gdv.de/tis/bedingungen/avb/see/DTV-ADS2009.pdf.
[57] Marine Insurance Act, ss 18(1) and 20(1).
[58] Id at 10.11 to 10.13.
[59] *NY Marine & General Ins Co v Tradeline (LLC)* 266 F.3d 112 at 123 (2nd Cir 2001).
[60] *First Fin Ins Co* v. *Allstate Interior Demolition Corp* 193 F.3d 109, 117 (2d Cir 1999).

make any material misrepresentation in the proposal. This rule is followed in some states while others do not require that the non-disclosure amount to wilful concealment[61]**.**

v. Comments on the Law Commission's approach to disclosure

A. The Law Commission has not made a case that the law of disclosure, as applied to business insureds, needs reform. It can point to insureds not understanding the duty sufficiently well, but brokers have a duty to advise their clients, and as we will see the market of commercial insurance is dominated by brokered business. The findings by a risk managers' association that its members are frequently faced with attempts by insurers to question disclosure tells one very little. There is a great deal of difference between an insurer verifying, as part of the claims process, the accuracy of disclosure and then proceeding to pay the claim, and a full-blown dispute about the adequacy of disclosure. It appears that only 5% of AIRMIC members have actually had any litigation in the last 2 years about the quality of disclosure which suggests that 95% of its members have not and therefore do not suffer from the supposed difficulties in complying with the current law[62]. As for the theoretical ability of an insurer to simply sit back during the presentation and not ask any questions, that is questionable and risky as we have seen. None of these findings or results seems sufficient to justify a change to the primary insurance law. In particular, neither the failings of risk managers to understand the law nor the failings of brokers adequately to assist their clients in preparing presentations would appear to be an adequate reason to reform the law in this area. Simpler and less disruptive solutions exist that will not lead to an inevitable deluge of litigation and uncertainty. These solutions include insureds paying their brokers enough to assist them in preparing the information, risk managers receiving training on the law of disclosure, and even negotiating (if necessary) a limitation on the duty of disclosure (as is permitted by the current law).

B. Primary legislation is rarely effective at enforcing more co-operation between contracting parties. In a firmly regulated industry where most business insureds are supported by sophisticated brokers, there are other, more flexible ways to achieve the Law Commission's aim. Insurers are concerned about their reputation as to how they pay claims and are increasingly measured by brokers and associations of risk managers for their attitude to paying claims and for their speed of settlement. Insurers who score poorly on such measures will suffer.[63] Brokers are unlikely to place their better business with them and

[61] See generally Ostrager & Newman "Handbook on Insurance Coverage Disputes" (Fifteenth Ed.) (Wolters Kluwer 2011) at Chapter 3..

[62] The Law Commission and the Scottish Law Commission, *Insurance Contract Law: The Business Insured's Duty of Disclosure and the Law of Warranties*, Consultation Paper no 204 (London: Law Commission, 2012) at para 1.9.

[63] See, eg *Willis Quality Index®* available at www.willis.com, *Gracechurch Consulting's Claims Performance Monitor (CPM)* available at www.grch.net.

insureds will likely look to move their business to other insurers. Additionally, regulators are able to respond speedily with regulations to enforce actions against insurers. The FSA, and its successor the FCA, have rules on claims handling[64] against which regulated firms are measured. If they fall short, then the regulator may require that remedial measures are taken.

C. The proposed changes to the duty are intended to be evolutionary and incorporate current judicial developments into a new statute[65]. While it may be presented as not intended to change the current law significantly, a new statute following the Law Commission's thinking will undoubtedly introduce new concepts, each of which will require judicial consideration, likely more than once.

D. With regard to the proposal to change the remedy from avoidance alone to a proportionate approach would give rise to more difficulties. For example, the proposal to change the remedy from avoidance alone to a proportionate approach will give rise to a new area of dispute in most cases. Currently the underwriter must show that the information that was not disclosed should have been disclosed by the insured and was material to the prudent and the actual underwriter. With a focus, case by case, only on what is proportionate for the particular transaction, there will be an additional dispute as to precisely what the underwriter would have done had the information been disclosed.

    a. The proposal changes to the remedy for avoidance also do not require the insured to pay the correct premium. In the absence of an explicit policy provision, it appears that if, in the absence of a claim, the insurer discovers that there is careless misrepresentation or non-disclosure (such as an under-declaration of insured values), which would have effected the premium charged, then the insurer may have no remedy against the insured other than to cancel the policy prospectively. That is a very curious omission. Whether the insurer has a remedy against the insured for the premium as damages for breach of contract is unknowable at this stage.

E. Any new law is likely to lead to a great deal of uncertainty and litigation. Examples of new concepts that the Commission intends to introduce are (1) replacing the prudent insurer with the reasonably careful insurer. If this change is other than cosmetic, it will result in the old case law setting the standard for materiality by reference to the conduct of prudent insurers being rendered obsolete, with little indication what the new concept is meant to

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[64] Financial Services Authority, *Insurance: Conduct of Business Sourcebook,* (London: FSA, 2008) section 8.1.1.

[65] The Law Commission and the Scottish Law Commission, *Insurance Contract Law: The Business Insured's Duty of Disclosure and the Law of Warranties*, Consultation Paper no 204 (London: Law Commission, 2012) at paras. 1.22 to 1.24.

imply. The alternative view is that this proposed standard of materiality is simply updated terminology. If that is what is intended, then the case law should be retained in order that the certainty of the current standard is preserved rather than discarded, which would produce a significant increase in uncertainty and litigation. (2) introducing a new test that the business policyholder must disclose information that would have been discovered by reasonable enquiries, which are proportionate to the type of insurance and to the size, nature and complexity of the business. This will need a great deal of clarification and is a factual test that will require application on a case-by-case basis. (3) introducing new fact-intensive limitations on what a business insured need not disclose prior to the conclusion of the contract. One can fairly wonder what information relating to the practices and risks of the trade a well-informed insurer writing that particular class of business ought to know? This new test should give rise to plenty of work for underwriting experts and coverage litigators.

The Law Commission maintains that the current law generates a high volume of disputes and litigation although it only identified 26 High Court cases in the last decade. To rely on that very modest volume of litigation as sanctioning a reform that will invariably require repeated judicial clarification is not sound.

F. Why is the information known by the directing mind and will of the insurer (which the author assumes means the main executive directors) relevant to the underwriting process? With an increased specialization in the insurance market at the underwriter level, what the actual underwriter writing this class ought to know is far more relevant that the knowledge of the directors of the company. That is what the current law requires the court to consider, and the fact that the Law Commission is proposing something that is, in the author's view, entirely off the point is troubling. As a practical matter, will this not tie executive directors in disputes concerning policies with which they had no involvement in underwriting?

G. While some element of deterrence has been retained, is it enough? The Law Commission itself has acknowledged that there may be many instances of non-disclosure despite the apparently robust current law. Is there not a real risk that there will be more disclosure problems when the deterrence aspects of the current law are reduced?

H. The proposed ability of the parties to contract out of the default law is not an appropriate answer to the criticisms above because contracting out will likely be done in a myriad of different ways, thereby again giving rise to uncertainty. Moreover, contracting out of the law is not something that has been embraced on any significant scale by the market, and there is little evidence to suggest that this will change. If all those in the market seek certainty, contracting out of the law does not provide that certainty.

I. The certainty of English law is being attacked. If it is accepted that business people want a certain and straightforward law in which to frame their commercial transactions, then upsetting the certainty of the law is likely to lead businessmen to look for an alternative law for their contracts which will be damaging to English interests.

B. Warranties

i. Law Commission's concerns with current law

The Law Commission's main concerns about the current state of the law of warranties may be summarised as follows[66]:

A. Basis of Contract clauses[67] – these clauses have been criticised by judges and academic commentators for some years as "trapping" the policyholder and providing the insurer with the warranty remedies to what would otherwise be disclosure cases[68]. Their effect of contractually converting statements made in the disclosure into warranties enables the insurer to avoid paying claims when the non-disclosed or misrepresented fact was not material to the risk. In contrast, under s. 20 MIA 1906 and the relevant case law, an insurer may not avoid a policy unless those facts were material to the risk.

B. Alleged increasing indiscriminate use of warranties – applied to terms dealing with minor matters

C. Effects of breach are automatic, complete (all risks discharged) and severe. This results in the policyholder being without cover without realising it.

D. Remedy of breach prior to loss is irrelevant – even for the most minor of breaches. The fact that the insurer is discharged from liability despite the breach of warranty being remedied prior to the loss is seen to be very harsh. The example given is the case of *De Hahn v Hartley*[69] in which the vessel's policy contained a warranty that the ship have a crew of at least 50. The vessel left Liverpool with a crew of 46 at which point there was a breach of warranty. At the next port it picked up 6 additional crew, and some time thereafter the vessel suffered a casualty. The insurer was discharged from liability for the claim.

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[66] Taken from slides presented by the Law Commission at joint BILA, Law Commission and University of Southampton conference on 26 June 2012 entitled *"Whither Insurance Contract Law Reform"*.

[67] A basis of contract clause is a clause in a proposal form or policy that states that the answers given form the basis of the contract and that this has the effect of converting all the answers into warranties. For recent application of the law, see *Genesis Housing Association v Liberty Syndicate Management Ltd* [2012] EWHC 3105 (TCC).

[68] See 1980 BILA Report at paras. 7.2 to 7.4.

[69] (1786) 1 TR 343.

E. Waiver – upon breach the contract is dead but the insurer can still waive it back to life.

F. Uncertainty - the courts' use of construction to moderate harshness of law is leading, it is said, to increased uncertainty. Warranties must be construed strictly[70] albeit in light of the other terms and the commercial context of the contract[71]. The Law Commission maintains that the cases go beyond this principle and use other techniques such as interpreting the warranty as a suspensive condition, resolving ambiguities against the insurer, construing the warranty as only applying to some of the risks covered by the policy, or simply finding that the terms are not warranties at all[72].

ii. Reason for the Strictness of Existing Law

There is no doubt that the existing law on warranties is strict. However, it should be recognised that the law on warranties dovetails with the law relating to disclosure in a number of respects. (1) facts that are warranted do not need to be disclosed, (2) the duty of disclosure (but not good faith) ceases at the time that the parties enter into the contract of insurance. Therefore, if it is important to the risk being assumed by the insurer that a fact or state of affairs remains in existence throughout the duration of the risk, then the insured must either warrant that fact or the results of such a breach must be excluded.

It does appear that in certain types of domestic insurance, policies contain warranties when exclusions might be a simpler and clearer way of ensuring that certain losses are not covered. The Law Commission is clearly exercised by a state of affairs that could be seen as a temporary market failure, and it is suggested that this has given rise to the Law Commission's third proposal as set out below. However, in the author's view, a failure in one part of the domestic market is not a reason for reform of primary insurance legislation, for the reasons set out above, and that there are more effective and less disruptive ways to deal with a perceived market failure. If there is a real market demand for policies in which such warranties are drafted as exclusions, it is very surprising that no insurer or broker is offering such a product.

iii. Law Commission's Provisional Approach

To remedy these concerns and apparent problems, the Law Commission proposes the following changes:

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[70] *Samuel* v. *Dumas* [1923] 1 KB at 624.

[71] J Gilman and R Merkin *Arnould's Law of Marine Insurance and Average* 17th Edition 2008 (London; Sweet & Maxwell 2008) at 19-18.

[72] The Law Commission and the Scottish Law Commission, *Insurance Contract Law: The Business Insured's Duty of Disclosure and the Law of Warranties*, Consultation Paper no 204 (London: Law Commission, 2012) at paras. 12.44 to 12.59 .

A. Abolish basis of contract clauses for business insurance (this has already been done for consumer insurance – see Part III)

B. The effect of a breach of warranty will only suspend the insurer's liability for the duration of the breach, so if a breach is remedied, then cover will be restored.

C. Where the warranty is designed to reduce the risk of a particular type of loss, then a breach only suspends liability for that type of loss and that loss is only suspended for the duration of the breach.[73]

It is proposed that the new regime will be mandatory for consumer insurance and that for business insurance the parties can contract out of the new regime but only if the policy contains a term to that effect that is written in clear, unambiguous terms and is specifically brought to the attention of the other party before the contract is formed.

With regard to marine, aviation and transport insurance as well as reinsurance, the Law Commission proposes that the same law applies to these classes as applies to any other class of business or consumer insurance. It also proposes retaining the implied warranties contained in Ss. 39-41 of the Marine Insurance Act as well as the implied voyage conditions contained in Ss. 43-46 of that Act.[74]

As previously mentioned, the 2012 proposals of the Law Commission are its second set of proposals on this subject. In its 2007 paper[75], it had proposed a complex structure that distinguished between warranties as to past or current facts on the one hand and as to future conduct on the other. In both cases the insurer could only decline a claim if the breach contributed to the loss. Following concerns expressed about these proposals, the Law Commission accepts that the causal connection test is unsuited to many terms[76] and does not propose using it explicitly.

iv. US law and European law

US law regarding warranties in insurance policies has been described as "utter chaos"[77]with some state laws requiring strict compliance with the warranty, breach of which suspends cover, while others require that the loss be caused by the breach, and still

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[73] The Law Commission and the Scottish Law Commission, *Insurance Contract Law: The Business Insured's Duty of Disclosure and the Law of Warranties*, Consultation Paper no 204 (London: Law Commission, 2012) at para 15.1 et seq.
[74] Id at para. 16.1 et seq.
[75] The Law Commission and the Scottish Law Commission, *Insurance Contract Law: Misrepresentation, Non-Disclosure and Breach of Warranty by the Insured*, Consultation Paper no 182 (London: Law Commission, 2007) .
[76] The Law Commission and the Scottish Law Commission, *Insurance Contract Law: The Business Insured's Duty of Disclosure and the Law of Warranties*, Consultation Paper no 204 (London: Law Commission, 2012) at paras.14.50 and 14.57.
[77] S. E. Goldman "Litigating Marine Insurance Warranties: Once More Into the Breach", FDCC Quarterly, Winter 2007 at 111.

others require that the breach increased the hazard[78]Some states, such as New York, apply different rules to warranties depending upon whether the insurance is marine or non-marine[79]. As we have seen, in certain European counties, the duty of disclosure continues during the policy period[80]. There is, therefore, no need for a common law approach to warranties as the insured must disclose during the policy any change in facts that increase the risk during the period of the policy, after which the parties will agree to an additional premium[81].

v. Comments on the Law Commission's approach to warranties

Abolition of basis of contract clauses – The author agrees with this proposed reform. It is unlikely that many insureds understand the effect of a basis of contract clause, and it seems to the author that insurers should not be able to avoid cover for non-disclosure or misrepresentation of non-material facts disclosed prior to inception. This author and most consultees agreed that these clauses should be abolished.

Allowing the remedying of breach before the loss to reinstate cover – The author accepts that this change removes what appears to be unnecessary harshness of the current law. Any change should, however, explicitly recognize that it can only apply to those warranties where the breach is capable of remedy prior to loss. For instance, where a policy contains a confidentiality warranty because knowledge of the policy would increase the risk of loss, publication of the detail of the policy is never capable of remedy.

Distinguishing between warranties designed to reduce risk of a particular type of loss and those with a more general effect. The proposal is that where the warranty is designed to reduce the risk of a particular type of loss, a breach only removes liability for that type of loss and the policy is only suspended for that loss and for the duration of the breach. With respect to the Law Commission, this third proposal is fundamentally flawed.

First, it requires a distinction between warranties designed to reduce the risk of a particular type of loss and those that are not, such as those that go to moral hazard or to the scope of the risks that the insurer is willing to underwrite. Many insureds in dispute with their insurers will contend that the warranty is designed to reduce only a particular type of loss, and I dare say that many insurers will contend that the warranty is not so designed. This is therefore ground that is fertile for disputes. Consider a warranty that the vessel remains at all times classed with a particular society. This warranty would, in the insurer's eyes, go to a definition of the risk, and breach of that warranty should, if the second proposal is enacted, suspend all cover for the duration of the breach. An insured

[78] See generally E F LeBreton III and M T Summers, "MLA Special Report – P&I Annotations", Chapter 21. Available at www.mlaus.org.
[79] See The Law Commission and the Scottish Law Commission, *Insurance Contract Law: The Business Insured's Duty of Disclosure and the Law of Warranties*, Consultation Paper no 204 (London: Law Commission, 2012) at para 13.30.
[80] See Part II(A)(v) herein.
[81] A brief overview of some European law is provided at The Law Commission and the Scottish Law Commission, *Insurance Contract Law: The Business Insured's Duty of Disclosure and the Law of Warranties*, Consultation Paper no 204 (London: Law Commission, 2012) at paras. 13.33 -13.53.

faced with a grounding claim would contend that remaining in class might only relate to the seaworthiness of the vessel thereby relating to perhaps the perils of the seas, fire and other engine and machinery claims. The grounding caused by the fault of the crew would have occurred whether the vessel was in class or not. Which type of warranty is it? Or consider the locks warranty on a property. The Law Commission states with confidence that this goes to the risk of theft and therefore would not discharge the insurer for a fire claim[82]. What if the fire was caused by intruders who had ignited highly flammable material in the inadequately protected premises? Can it really be said that the lock warranty did not go to that risk?

Second, the suspension of cover for only those risks that the warranty is said to be designed to prevent is introducing causation by the back door. The Law Commission has accepted that introducing a causative link between the breach of warranty and the loss is flawed, and yet it is being reintroduced in this manner. It appears that far too little attention is being paid to the practical impact, particularly in terms of litigation costs, of introducing such considerations into the equation.

For these reasons, as regards business insurance, the author advocates acceptance of the first two proposals of the Law Commission but the removal of the third.

With regard to the contracting out proposals for business insurance, some modification of the proposal is required. While it seems reasonable that the warranty should be clearly and unambiguously stated in the contract, this requirement that the warranty be specifically brought to the attention of the insured in a brokered market (where the insurer and insured rarely meet) requires clarification that bringing it to the attention of the broker is adequate. It will also likely give rise to disputes as to who said what to whom at the time that the risk was broked.

Finally, with regard to the proposal to leave intact the law relating to implied warranties and voyage conditions, this seems to be a case of the Law Commission agreeing with the proposal that "if it ain't broke, don't fix it". That seems eminently sensible although the same response could have been given in many other areas.

C. Damages for Late Payment

i. Existing Law

The Law Commission is looking at Post Contract Duties and other Issues including damages for late payment. The current law is that an insured cannot recover damages for late payment of an insurance claim because an insurance policy is a promise to keep the insured item free from damage and to indemnify the insured for its loss if that promise is broken; it is not a promise to compensate for the loss[83]. Therefore, claims under insurance

[82] See at 15.37 and 15.51.

[83] *Firma C-Trade SA v Newcastle Protection and Indemnity Association (London) Ltd (The Fanti)*; *Socony Mobil Oil Inc v West of England Shipowners Mutual Insurance Association (The Padre Island)* [1991] 2 AC 1.

policies are claims for damages, not for debts.[84] Under English law a claimant cannot obtain damages for non-payment of damages[85]. Nor can an insured recover for hardship, inconvenience or mental distress caused by the insurer's failure to pay the claim[86]. The Financial Services Ombudsman may award such damages to an insured whose claim falls within its jurisdiction[87]. Furthermore, the only remedy for the insurer's breach of duty of utmost good faith in failing to pay the claim is avoidance of the policy[88], which is of little use if an insured wants its claim paid. All of this is reinforced in the marine context by sections 67 and 68 of the Marine Insurance Act which state that in the case of a valued policy, the insured cannot recover more than the agreed value and in the case of an unvalued policy the maximum amount recoverable is the insurable value of the thing insured.

The potential hardship that this can give rise to is said to be demonstrated by the case of Sprung[89] which the Law Commission relies on heavily to argue that this area of insurance law should be reformed. Mr Sprung ran a small family business that processed animal waste. In early April 1986 his factory and plant were badly vandalised resulting in £30,000 worth of damage. At the time of the loss, the market in which Mr Sprung operated was at a low ebb. His business was under very considerable financial pressure. There was a dominant competitor in the market that was described as a predator. The insurer denied the claim on the basis that the policy did not cover wilful damage. Mr Sprung could not afford to make the repairs and was unable to raise a loan, so in September the business collapsed. The Court held that the insurer should have paid the claim by the end of October. Mr Sprung commenced proceedings against the insurer. Four years later the insurer abandoned its defence and judgment was entered in favour of Mr Sprung for £30,000 plus simple interest and costs. When he pursued his claim for his consequential loss of £75,000 the Court of Appeal held that he was not entitled to recover this loss for the reasons set out above. The House of Lords has subsequently declined to take up this issue despite the explicit invitation of the Court of Appeal.[90]

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[84] Id.

[85] *The President of India v Lips Maritime Corporation (The Lips)* [1988] AC 395.

[86] *Apostolos Konstantine Ventouris v Trevor Rex Mountain (The Italia Express (No 2))* [1992] 2 Lloyd's Rep 281.

[87] See fn. 16 for the jurisdiction of the Ombudsman.

See Financial Services Authority, *Dispute Resolution: Complaints,* (London: FSA) at DISP 3.7 for the awards which the Ombudsman may make.

and Financial Ombudsman, *Compensation for Distress, Inconvenience or other Non-Financial Loss*, (Technical Note) at www.financial-ombudsman.org.uk which sets out its approach to paying claims over the sum insured. The website also contains examples of such awards.

[88] *Banque Financiere de la Cite SA (formerly Banque Keyser Ullman SA) v Westgate Insurance Co (formerly Hodge General & Mercantile Co Ltd)*, also known as *Banque Keyser Ullmann SA v Skandia (UK) Insurance Co Ltd* [1990] 1 QB 665, later approved by the House of Lords in *Banque Financiere de la Cite SA v Westgate Insurance Co Ltd* [1991] 2 AC 249.

[89] *Sprung v Royal Insurance (UK) Ltd* [1999] Lloyds Rep IR 111 (CA).

[90] *Mandrake* v *Countrywide* [2005] EWCA Civ 840 in which the Lord Justice Rix in the Court of Appeal followed *Sprung* but invited the House of Lords to reconsider the issue. The House of Lords declined to give leave to hear the case. See http://www.publications.parliament.uk/pa/ld200506/ldjournal/239/059.htm.

There is no doubt that Mr Sprung suffered, and from the facts of the case, it appears that the insurer should never have declined the claim. However, despite the characterisation of the case by the Law Commission, it appears that the cause of the collapse of the business was not the failure of the insurer to pay the claim in a timely matter because it collapsed before the date that the indemnity should have been paid. Also, in the author's experience, these cases are extremely rare, and extremely rare cases should not form the basis of law reform. Today, Mr. Sprung would have taken his case to the Ombudsman and obtained the appropriate relief. Bizarrely, as we will see in (iii) below, the Law Commission's approach would not have saved Mr. Sprung's business.

ii. Penalties for not paying claims in a timely fashion

A well-informed American lawyer might well ask himself at this point "Why do English insurers ever pay claims under insurance policies subject to English law if there is no apparent penalty for wrongful denial or late payment?" The answer is that the Law Commission has set out a very unbalanced view of the reality of insurance law and practice and that there are many ways in which insurers are penalised for wrongful denial or late payment.

The penalties for wrongful denial or late payment of claims include:

A. Paying the other side's costs – England operates a "cost-shifting" system in litigation in which the prevailing party generally recovers 60%-70% of its fees from the other side. If the court finds that the behaviour of the losing party was particularly unacceptable, then it may award costs on an indemnity basis which are generally 80% to 90% of the other side's costs. Of course, the losing party also has to pay its own costs.

B. Interest – although simple interest is usually the basis for recompensing a party for the time it has been out of funds, as a result of a recent decision[91], a court may award compound interest – which it is more likely to do in a case in which it disapproves of the defendant's conduct.

C. Reputational – insurers are increasingly measured by brokers on their attitude to paying claims and on their speed of settlement. Insurers that score poorly on such measures will suffer.[92] Brokers are unlikely to place their better business with them, and insureds will likely look to move their business to other insurers.

[91] *Sempra Metals (formerly Metallgesellschaft Limited) v Commissioners of Inland Revenue* [2007] UKHL 34, [2008] 1 AC 561.

[92] See e.g. *Willis Quality Index®* available at www.willis.com, *Gracechurch Consulting's Claims Performance Monitor (CPM)* available at www.grch.net.

D. Regulatory – the FCA has rules on claims handling[93] against which regulated firms are measured. If they fall short, then the regulator may require that remedial measures are taken. Moreover, under s. 150(1) of the Financial Services and Markets Act 2000, a contravention by an authorised person is actionable at the suit of a private person who suffers loss as a result of that contravention[94].

E. Consumers and Micro-Enterprises – these persons can seek redress from the Financial Ombudsman Service.

So, insurers face very real pressure to pay claims in a timely manner even if that pressure does not result from the threat of consequential damages.

iii. Law Commission's Provisional Approach

The Law Commission is "persuaded that there is a compelling case for reform"[95] and proposes legislative reform to re-characterise the insurer's obligation as a duty to pay a valid claim within a reasonable time[96]. That would give rise to damages for foreseeable losses in the event of late payment of an insurance claim because business insurance liability for consequential losses could be excluded unless the decision to reject or delay a valid claim was not made in good faith[97].

iv. Consequential Loss under English Law

In English law, where one party breaches a contract the innocent party may claim damages for the loss suffered. That amount may be fixed in the contract (liquidated damages) or be left to be determined by the courts (unliquidated damages).The claimant must prove that actual, financial loss was incurred and establish that the loss was not too remote in that it either:

A. Arose naturally from the breach as per the reasonable contemplation of the parties at the time of contract, or

B. Derived from special circumstances outside the ordinary course of event not within the reasonable contemplation of the parties and that were recoverable only if specifically made know to the parties at the time of contract[98].

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[93] Financial Conduct Authority, *Insurance: Conduct of Business Sourcebook,* (London: FSA, 2008) section 8.1.1.
[94] Although this appears not to be available to businesses, *Titan Steel Wheels Limited v The Royal Bank of Scotland plc* [2010] EWHC 211 (Comm), [2010] 2 Lloyd's Rep 92.
[95] The Law Commission and the Scottish Law Commission, *Insurance Contract Law: Post Contract Duties and Other Issues* (Consultation Paper No. 201) (London: Law Commission, 2011) at para 4.14.
[96] id at 5.2.
[97] id at 5.26 et seq.
[98] *Hadley v Baxendale* (1854) 156 ER 145.

The law books are full of cases that examine, in the charterparty context, the foreseeability of damages[99] demonstrating the amount of litigation that arises out of this test. This volume of cases is not surprising as the test is essentially a factual one depending on the facts of each case, so that volume can be expected to continue. Moreover, the current leading authority[100] is criticized as having left the law unclear as to how remoteness is evaluated[101] and has spawned further litigation on this subject[102]. It seems curious that the Law Commission (one of whose duties is to simplify the law) is proposing to change to the law from one that is certain to one where it is anything but.

The injured party must also show that reasonable steps were taken to mitigate that loss. In the insurance context this would likely mean that the insured should use its own funds or borrow funds to repair or replace the damaged property. Where this is done, the consequential loss would likely be the cost of that loan, which is one of the reasons that interest is awarded[103]. The level of damages may be limited by express provisions of the contract, albeit in the case of ambiguity such limitations are narrowly construed against the party that drafted the clause.[104]

Since 2007[105] the courts have been able to award compound interest for late payment of a debt, and the courts use the interest mechanism with flexibility (often together with a large cost award) to provide justice in harsh cases. Where the insured is unable to effect a loan, the Law Commission suggests that the foreseeable losses will include loss of business and the like[106]. Applied to marine insurance, one can easily anticipate a raft of further questions. For example, where most vessels are owned by one ship companies, how much examination will the court undertake of the owner's corporate structure to determine whether the owner group of companies was in fact able to raise the funds even though the single vessel-owning company could not on its own raise the funds?

v. Consequential Loss under US law

It might be expected that US law would be significantly more policyholder-friendly than English law with regard to allowing insureds to claim for consequential loss for non-payment or late payment of a claim. However, this is not as clearly the case as one might expect. It was not until 2008 that the New York Court of Appeals "expanded the law"[107] in New York[108] to permit such damages. Even though at least 9 cases since 2008 have

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[99] See *Scrutton on Charterparties and Bills of Lading* (22nd Ed 2011) at 19-003 to 19-005.
[100] *Transfield Shipping Inc* v. *Mercator Shipping Inc. (The Achilleas)* [2009] 1 AC 61 (HL).
[101] See for example, Treitel *The Law of Contract* (13th Ed) (Sweet & Maxwell 2011) at 20-110 to 20-20-112 and "McGregor on Damages" (18th Ed) (Sweet & Maxwell 2011) at 6-165 to 6-173.
[102] See Third Supplement (2012) to "McGregor on Damages (2011) 6-173A to 6-173I.
[103] "McGregor on Damages" (18th Ed) (Sweet & Maxwell 2011) at Chapter 15.
[104] *Ailsa Craig Fishing Co Ltd v Malvern Fishing Co Ltd* [1981] UKHL 12.
[105] *Sempra Metals Ltd v Inland Revenue Commissioners* [2007] UKHL 34 [2008] 1 AC 561.
[106] LCCP 201 at paras. 2.68 – 2.69 and 5.4.
[107] New York Court of Appeals Holds that Insurers May Be Liable for Consequential Damages. — *Bi-Economy Market, Inc v Harleysville Insurance Co* 886 NE 2d 127 (NY 2008). 122 Harv L Rev 998 at 1005 (2009).
[108] *Bi-Economy Market, Inc v Harleysville Ins Co of NY* 886 N.E.2d 127 (NY 2008). and *Panasia Estates, Inc. v Hudson Ins Co* 886 NE 2d 135 (NY 2008).

considered the issue of consequential damages against insurers[109], it is not clear whether such damages can only be awarded if the insurer has breached its duty of good faith and fair dealing. It appears generally in US states that consequential losses are only recoverable if there has been a breach of the duty of good faith and fair dealing by the insurer[110].

Therefore, under the laws of major maritime states of the US, the insurer may be liable for consequential loss caused by the failure to settle the claim in a timely manner, but only where its dealings were in breach of the duties of good faith and fair dealing. This author finds it extraordinary that, by eschewing any consideration of fault on the insurers' part beyond simple non-payment, the English Law Commission is proposing to launch on a legal experiment exposing insurers to a degree which even some major US states have resisted.

vi. Problems with the Law Commission's Approach to Damages for Late Payment

In respect of business insurance, there are a number of further problems with the Law Commission's proposals regarding damages for late payment:

A. They do not reflect any real need for a change in the law. It is interesting that outside the area of consumer law (where such change is unnecessary because the Ombudsman can and does award such damages), the respondents to the Law Commission's paper supporting such a change were those representing large corporate insureds[111]. They have no need for such protection being perfectly capable of securing alternative finance in the event of a disputed claim.

B. The law on the remoteness of damages is far from clear and is the subject of a great deal of litigation.

C. Reforms will lead to satellite litigation[112]. As we have seen above, there are complex and fact-intensive enquiries that need to be made in each case whether

[109] *Grinshpun v Travelers Casualty Company of Connecticut* (23 Misc 3d 1111A, 2009), *Haym Salomon Home for the Aged, LLC v HSB Group Inc.* (2010 US Dist LEXIS 4255), *In Re Axis Reinsurance Company REFCO Related Insurance Litigation* (2010 US Dist LEXIS 33377), *OK Petroleum Distribution Corp v Travelers Indemnity Company* (2010 US Dist. LEXIS 71465), *Woodworth v Eerie Insurance Co* 743 F. Supp 2d 201 (WDNY 2010), *Third Equities Corp v Commonwealth Land Title Insurance Company* (2010 NY Misc. LEXIS 6113), *Schlather, Stumbar, Parks & Salk, LLP v One Beacon Insurance Company* (2011 US Dist LEXIS 5779), *Goldmark Inc. v Catlin Syndicate Ltd.* 2011 EL 743568 (EDNY 2011), *Augeri v Fidelity National Title Insurance Company* (2011 NY Misc LEXIS 5885) .

[110] See Ostrager & Newman "Handbook on Insurance Coverage Disputes" (Fifteenth Ed.) (Wolters Kluwer 2011) at Chapter 12.

[111] e.g. Covington and Burling and AIRMIC.

[112] Note the response of the General Council of the Bar to Issues Paper 6, "we are regularly instructed in cases where the clients find it remarkable that they cannot seek damages for losses to their businesses occasioned by insurers unreasonably refusing to pay insurance claims or delaying such payments." The Law Commission and the Scottish Law Commission, *Insurance Contract Law: Post Contract Duties and Other Issues*, Consultation Paper no 201, (London: Law Commission, 2011) at para.4.11.

an alleged loss was foreseeable or indeed caused by the alleged delayed or non-payment. There are also likely to be complex questions as to the amount of the loss.

D. If the insurer has been able to exclude or limit its liability for consequential loss, then there will have to be an additional enquiry as to whether the insurer acted in good faith (because the exclusion does not apply if the insurer acted in bad faith).

E. This satellite litigation will lead to significantly increased cost which inevitably will feed through into higher premiums for all. Additionally, the threat of such satellite litigation may hinder the ability of insurers to properly investigate claims, likely leading to more improper claims being paid, with the same result.

F. This satellite litigation will lead to greater uncertainty in business insurance in respect of insureds who have no need for greater "protection" from a new and uncertain law[113].

G. The flexible law on interest may give the courts power to craft a remedy commensurate with the insured's loss.

H. The London Market tends to insure larger and more difficult risks[114]. Bearing in mind the types of insureds who purchase insurance in the London Market, the consequential damages may hugely exceed the indemnity under the policy. It is the author's experience that the daily value of lost production in the energy sector can easily exceed US$10m per day**.** An insurer faced with the threat of a suit for consequential loss by an insured impatient with the pace of its claim adjustment process could face an excessive exposure[115], which may be why the lawyers to and associations of businesses are so keen on this proposal. They should be careful what they wish for; excessive exposure leads to insurers restricting capacity and that may leave insureds without adequate cover.

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[113] Curiously, the Law Commission accepts that large insureds do not need such protection yet recommend reforms that would provide it. See The Law Commission and the Scottish Law Commission, *Insurance Contract Law: Post Contract Duties and Other Issues* (Consultation Paper No. 201) (London: Law Commission, 2011) at para. 2.30 at which they say that "*The Lips* reached a fair result. The litigants were sophisticated commercial people who had allocated the risks of exceeding lay-days in their contract. . . . It was right that the parties should be bound by their agreement and that the courts should not provide additional damages."

[114] For instance Lloyd's insures 94% of FTSE 100 companies (Lloyd's Annual Report 2011, p. 5) and a significant proportion of global offshore energy premiums are written in Lloyd's (taken from Lloyds Report "Drilling in Extreme Environments (2011) which in turn cites International Union of Marine Insurance 2010: Energy and Offshore committee, IUMI Conference 14 September 2010. Lloyd's writes over 60% of global offshore energy premium. This data does not include the Nordic region, Russia or Kazakhstan due to lack of data and is based on 2009 figures.

[115] *Transfield Shipping Inc v Mercator Shipping Inc.* [2009] 1 AC 61 at para 21 **"**if losses of that type are foreseeable, damages will include compensation for those losses, however large".

I. Business Interruption or Loss of Hire (hereafter collectively referred to as BI) insurance protects such insureds. The court in *Sprung* understandably described the argument that the insured could have bought BI insurance which would have protected the business from the financial effects of the insurer's delayed payments as particularly unattractive[116]. Nevertheless, complex claims can take time to adjust and plants time to rebuild. BI insurance protects the insured during that down time. Not only could the proposed change lead some to argue that BI insurance is less necessary, but it could also give rise to BI insurers subrogating against PD insurers for alleged slow payment of claims giving rise to a longer downtime than would otherwise have been necessary.

J. It may require that insurers buy additional reinsurance or put aside additional capital to protect against such liabilities, which will result in higher premiums. As was correctly stated by Judge Smith's dissent in *Bi-Economy*[117], "The result of the uncertainty and error that the majority's opinions will generate can only be an increase in insurance premiums. That is the real 'consequential damage' flowing from today's holdings."

K. Bad Facts make Bad Law Reform as much as they make bad law. In the author's view, it is inappropriate to change the law to protect the very rare insured who was mistreated without giving due consideration to the effect that such reform will have on the insurance market overall and the significant likelihood of significantly increased litigation leading to higher premiums for other insureds

L. The certainty of English law is being attacked. If it is accepted that business people want a certain and straightforward law in which to frame their commercial transactions and on the basis of which to predict the outcome of any dispute that they may have, then upsetting the certainty of the law is likely to lead businessmen to look for an alternative law for their contracts, which will be damaging to English interests.

Part III - Consumer Insurance Reform

A. Consumer Insurance (Disclosure and Representations) Act 2012

As we saw in Part I (B), the Law Commission drafted the Consumer Insurance (Disclosure and Representations) Act 2012 that was enacted in that year and came into force on 6 April 2013. That Act applies only to consumers[118] and is not applicable to micro-enterprises. Thus, the application of this Act is different to and narrower than the jurisdiction of the Financial Services Ombudsman. The new Act deals with two aspects of consumer insurance law:

[116] *Sprung v Royal Insurance (UK) Ltd* [1999] Lloyds Rep IR 111 (CA) at 117.

[117] *Bi-Economy Market, Inc.* v *Harleysville Ins. Co. of N.Y.*, 886 NE 2d 127 (NY 2008) at 135.

[118] Defined in S. 1 as "an individual who enters into the contract wholly or mainly for purposes unrelated to the individual's trade, business or profession".

i. Disclosure and Misrepresentation, and
ii. The conversion of representations into warranties

The rest of consumer insurance law, including damages for late payment of claims, remains the subject of the ongoing consultations.

The Act limits the duty of disclosure by a consumer to a "duty of the consumer to take reasonable care not to make a misrepresentation to the insurer"[119] and provides that "a failure by the consumer to comply with the insurer's request to confirm or amend particulars previously given is capable of being a misrepresentation . . . "[120]. Reasonable care is assessed by the standard of care of the reasonable consumer[121], with any particular characteristics or circumstances of the consumer of which the insurer was or ought to have been aware being taken into account[122]. Misrepresentations made dishonestly are always to be taken as showing lack of reasonable care.[123]

The insurer's remedy for a misrepresentation depends upon whether it was made deliberately, recklessly, or carelessly[124]. The insurer may avoid the contract and refuse to pay all claims without having to return any premium if the misrepresentation is made deliberately or recklessly[125]. If the misrepresentation is made carelessly, then the remedy depends upon what the insurer would have done if the misrepresentation had not been made, so that

A. if the insurer would not have entered into the contract at all, then the policy may be avoided and the entire premium returned,

B. if the insurer would have entered into the contract on different terms, then the contract shall be treated as if those terms were included, or

C. if the insurer would have entered into the contract but charged a higher premium, then the claim may be reduced in proportion to the amount of the under-charged premium.

This Act therefore effectively abolishes the duty of disclosure as far as consumers are concerned. The logic for this was that consumer insurance is (1) invariably applied for through proposal forms or online, and if the insurer considers a factor relevant for underwriting the policy, then it must ask a question about that factor rather than relying on the duty of disclosure, and (2) unlike the insurance of business, which involves a multitude of different factors peculiar to the business, most consumer insurance is fairly

[119] Id at S. 2(2).
[120] Id at S. 2(3).
[121] Id at S. 3(3).
[122] Id at S. 3(4).
[123] Id at S. 3(5).
[124] A careless misrepresentation is one that not deliberate or reckless. S. 5(3).
[125] Id at Sch. 1 (2).

standard, and (3) different in that the insurer through its use of large databases often knows more about the factors relevant to the insurer than the insured does .[126]

The Act introduces the concept of proportional remedies, which is largely borrowed from European law, into the law of representation[127]. As we saw in Part II, basis of contract clauses in insurance policies subject to English law have the effect of converting all representations made in a proposal form into warranties. These were seen as a trap for the policyholder. The Act therefore provides that representations are not capable of being converted into warranties by means of any provision in the insurance contract or any other contract[128]. It is assumed that individual warranties may still be imposed in the contract and that this is only intended to abolish wholesale conversion, but while this was stated in the Explanatory Notes to the Bill[129], it is not clear from the language of the Act itself.

While the Act represents a theoretically significant change in English insurance law, in practice it will not change the rights of insurance consumers significantly because it brings consumer law in line with the practice of the Financial Services Ombudsman.

B. Reform of Consumer Insurance Law relating to Warranties and Damages for Late Payment of Claims

To date there has been no change to consumer insurance law relating to warranties (other than basis of contract clauses) or to damages for late payment of claims. As we have seen, the Ombudsman does not enforce warranties where the breach is unconnected to the loss, and the Ombudsman can and does award sums for late payment of claims.

The Law Commission's proposals relating to warranties in consumer insurance are currently the same as those for business insurance subject to its caveat that the parties should not be able to contract out of the proposed law. Similarly, with regard to the proposals relating to damages for late payment of claims, the proposals for consumer insurance are the same as those for business insurance except that the Law Commission recommends that for consumer insurance damages for late payment not be excludable[130]. In consumer insurance, the Law Commission also proposes that damages be available for distress and inconvenience[131].

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[126] The Law Commission and the Scottish Law Commission, *Insurance Contract Law: Misrepresentation, Non-Disclosure and Breach of Warranty by the Insured*, Consultation Paper no 182 (London: Law Commission, 2007) at paras. 4.132 to 4.133.
[127] British Insurance Law Association, *Insurance Contract Law Reform – Recommendations to the Law Commission*, (London: BILA, 2002) per Longmore LJ at para. 35 of Appendix A.
[128] Id at s 6(2).
[129] Consumer Insurance (Disclosure and Representations) Bill [HL], para.42.
[130]The Law Commission and the Scottish Law Commission, *Insurance Contract Law: Post Contract Duties and Other Issues* (Consultation Paper No. 201) (London: Law Commission, 2011) at para 5.20 et seq..
[131] Id at 5.49 et seq. As previously noted, this is already available through the Financial Ombudsman Service.

Whether, if enacted, these proposals will cause the Ombudsman to change its practice to bring it into line with any new law remains to be seen.

Part IV – Insurance Law Reform in its Economic Context

A. The London Market as part of the UK insurance market

The UK insurance market is unusual in that it is out of proportion to the size of the UK economy. The UK economy has the seventh largest GDP in the world[132], but it has the third largest insurance market in the world and the largest in Europe, with premiums of US$310bn in 2010 of which some £69.9bn relates to general insurance.[133]

The reason for this outsized insurance market is the London Market, which consists of Lloyd's syndicates, international insurance and reinsurance companies and a large number of P&I Clubs. Most of the business underwritten by these insurers and reinsurers is located or domiciled outside the UK.

The London insurance market's role is summarized succinctly by a report of TheCityUK[134]:

> The London Market is a distinct and separate part of the UK insurance and reinsurance industry centered in the City of London. It consists mostly of general insurance and reinsurance, and predominantly involves high-exposure risks. It is also the only place where all of the world's twenty largest international insurance and reinsurance companies are active.

The London insurance market's gross premium per year is estimated at £36.9bn (approximately US$56bn)[135], and it employs 50,000 people. In the marine context, the London market is the single largest marine insurance market in the world[136] with some 20% of the global marine insurance premium income.

Policies written in the London market are almost exclusively placed by brokers representing the insured. A proposal for insurance is prepared by the brokers who incorporate it into a slip and then seek quotes from leading insurers participating in the relevant part of the market. The slip contains the key contract terms and may refer to standard sets of clauses. The London market is known for its willingness to underwrite bespoke policies prepared by brokers on behalf of their clients[137]. Therefore, this is a

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[132] International Monetary Fund, World Economic Outlook Database October 2012.
[133] TheCityUK, *Insurance 2011* (London: TheCityUK, 2011) at p.1.
and TheCityUK, *Trends in UK Financial and Professional Services* (London: TheCityUK, 2012) at p 8.
[134] TheCityUK, *Trends in UK Financial and Professional Services* (London: TheCityUK, 2012) at p 9.
[135] Id at p 9.
[136] International Union of Marine Insurance Global Premiums 2011 and 2010 by Country (available at www.iumi.com).
[137] For a description of the London Market, see *Edinburgh Assur Co v R L Burns Corp* 479 F Supp 138, 144 (CD Cal. 1979), aff'd in part and rev'd in part 669 F 2d 1259 (9th Cir 1982).

market where well-represented insureds prepare insurance proposals that are then presented to a market with a large number of participants competing to underwrite the business.

This context is important when combined with a further fact – many of the marine policies written in the London Market are subject to English law. While the insurance market can and does write insurance subject a wide variety of international insurance laws, English law is clearly the single most favored applicable law. So, English law plays a significant role in the large UK insurance exports.

One might wonder why it is that insurers and their clients prefer English law to apply to their policies and subject them to English jurisdiction or arbitration. The author believes that it is a combination of the following factors:

A. Freedom of contract
B. Extensive precedent, which with
C. Experienced marine lawyers and judges lead to
D. Certainty of outcome

It is the author's view that Lord Mansfield had it right: certainty of outcome is what parties to a commercial contract want, and that includes parties to an insurance policy.

Change to the law will by necessity decrease the certainty of outcome as time is taken for the new law to be applied and interpreted[138]. That is not to say that no change should be undertaken, but only that when advocating change to commercial law, it should be considered whether the unwanted dislocation caused by such change is outweighed by the benefits from such change.

The marine market's desire for change in their policies, or otherwise, can be seen from the collective reaction to the various policy forms introduced by the London Market over the last 30 years. The international shipowning community shunned the International Hull Clauses 1/11/03 even though those removed features that the Law Commission now believes are anathema to insureds. There has been limited take-up of the 2009 American Institute Hull Clauses despite the limited changes contained in that set of clauses. The author has seen no evidence that the shipowning community generally feels a need for significant reform of English insurance law.

A number of the Law Commission's proposals deal with detail apparently designed to produce greater transparency and clarity in both insurance documentation and the placing process. It is submitted that this aim is more effectively achieved by market initiatives or regulation rather than by primary legislation dealing with contract interpretation. A good example of how such reform occurs is the Market Reform Contract introduced by the London Market in 2001 for all slips which, for example, requires that all subjectivities are

[138] The mass of litigation which followed reform of Australian insurance law is an obvious example.

separately highlighted on the slip and that the remedies for breach thereof are clearly stated[139].

B. The UK Domestic Insurance Market

The UK domestic general insurance market is quite different from the London Market, both in how business is written and in the relative power of buyers and sellers. The net written premium of the UK domestic general insurance was £32.2bn in 2010[140] – over £4bn smaller than the London Market. Most of this business consists of consumer insurance with the largest classes of business being:

A. Motor insurance with premiums of £11.8bn
B. Property insurance with premiums of £9.6bn
C. Accident and health with premium of £5bn[141]

It is difficult to determine how large the UK commercial insured market is from the statistics available, and it is likely that this wide variety of companies buys insurance in both the domestic and London markets[142]. However, it does appear that the UK business insured market is small in relation to both the London Market and the UK domestic consumer market, particularly if micro-enterprises whose disputes may be dealt with by the Ombudsman are removed.

The markets also differ in how business is introduced to the insurer. In the UK domestic commercial market, independent intermediaries bring some 80% of business to insurers while only 40% of consumer business is broked to insurers. Nearly 1/3rd of consumers access the insurance market directly – much of it online[143].

These statistics support the Law Commission's approach of treating consumers and business insureds differently. They do, however, make some of the Law Commission's arguments regarding the supposed protection required for businesses difficult to sustain. By far the largest proportion of business insurance is prepared and introduced by the insured's agent, the broker.

Part V - Conclusion

The public policy consideration behind consumer insurance is the protection of consumers who are not able to negotiate the terms of a specialist type of contract but rather are presented with a "take it or leave it" option in a situation where the parties' respective bargaining positions are very unequal. The principle behind business insurance is not the same. The business insured has access to specialist advice, either from brokers

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[139] For the contract and an explanation, see www.marketreform.co.uk.
[140] The City UK, *Insurance 2011* (London: The City UK, 2011) at Table 7.
[141] Id at p 8.
[142] Some 20% of Lloyds' premium income of £19.7bn is from the UK (most of which will be commercial). Id at charts 18 and 25.
[143] Id at p 11.

or increasingly from in-house risk personnel. The goal there should be the promotion of certainty of meaning, so that when businessmen enter into the transactions the courts will enforce the terms of those contracts. These very different considerations ought to give rise to different legal regimes. In the US, these already exist to some degree with a highly regulated admitted market and much less regulated surplus lines, marine and exempt markets. The principles of protecting consumers and leaving business to business contracts less regulated give rise to the sensible solution of ensuring that both types of insureds have what they need from the insurance market. In the UK, that solution has to some extent existed for many years in practice, if not in law, with the Ombudsman services and the codes and regulations relating to consumer insurance on the one hand and a well-established law for business insurance on the other hand. To the extent that the Law Commission's project continues to reform consumer insurance law to bring it into line with consumer practice, that may be worthwhile.

The UK has a very large international business insurance market, the London market, that thrives in part because of the substantial body of insurance law, which together with a specialised Commercial Court and specialised arbitrators gives rise to predictable dispute outcome. This in turn makes contracts more certain and disputes easier to settle.

The approach to reform of the primary law of insurance should start from the premises that (1) the case for reform must be driven by a very real need for law reform (as opposed to say regulatory or other reforms), and if there is no such need, then (2) reform should not be undertaken because of the inevitable uncertainty and litigation that follows the introduction of any new law.

The case for reform of most areas of business insurance law has not been made. There are many indicators that the law is at least satisfactory. The surveys on which the Law Commission relies for the alleged need for reform do not provide it. For instance, the fact that risk managers of large companies do not understand insurance law, when one of their main jobs is to buy insurance, is an indicator of a problem of training or the like. It is not an indicator of the need to reform the law. There are discrete areas of the law where small reforms could perhaps remove areas of perceived unfairness. For instance, the abolition of "basis of contract" clauses would remove a defence to insurers that is not perceived as being transparent or clear. Similarly, changing the effect of a breach of warranty from terminating the cover to suspending cover would largely preserve the effect of a warranty and may merit further consideration.

With respect to the law on disclosure and that on late payment of claims, there is no convincing reason for reform of insurance contract law, and the proposed changes are so substantial that they will create an enormous amount of uncertainty and hence litigation. It is not an answer to changes to business insurance law in this area that the parties can contract out of the default law as this will likely be done in a myriad of different ways thereby again giving rise to uncertainty.

The Law Commission has consulted extensively, looked at the insurance law of other countries and has taken comments into account. Its 2012 proposals regarding disclosure

and warranties are certainly an improvement over its 2006 proposals, which were wholly unworkable. Nevertheless, it is very much hoped that in this last phase of its project, the Law Commission will reconsider its business insurance proposals bearing in mind the economic importance of the London Market and the risky sacrifice of the current prized certainty of business insurance law.