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The Reform of Insurance Warranty Law in Nigeria: Which Way Forward?

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THE REFORM OF INSURANCE WARRANTY LAW IN NIGERIA: WHICH WAY FORWARD?

A thesis submitted to the University of Bangor, School of Law in fulfilment of the requirements for the award of degree of Doctor of Philosophy

By

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2022

Declaration

‘I hereby declare that this thesis is the results of my own investigations, except where otherwise stated. All other sources are acknowledged by bibliographic references. This work has not previously been accepted in substance for any degree and is not being concurrently submitted in candidature for any degree unless, as agreed by the University, for approved dual awards.’

I confirm that I am submitting the work with the agreement of my Supervisor(s)

‘Yr wyf drwy hyn yn datgan mai canlyniad fy ymchwil fy hun yw’r thesis hwn, ac eithrio lle nodir yn wahanol. Caiff ffynonellau eraill eu cydnabod gan droednodiadau yn rhoi cyfeiriadau eglur. Nid yw sylwedd y gwaith hwn wedi cael ei dderbyn o’r blaen ar gyfer unrhyw radd, ac nid yw’n cael ei gyflwyno ar yr un pryd mewn ymgeisiaeth am unrhyw radd oni bai ei fod, fel y cytunwyd gan y Brifysgol, am gymwysterau deuol cymeradwy.’

Rwy’n cadarnhau fy mod yn cyflwyno’r gwaith gyda chytundeb fy Ngrichwyliwr (Goruchwylwyr)’

,

……

June 2022

Dedication

This thesis is dedicated to my wife and my children

Acknowledgments

This work became a reality through the efforts of many people to whom I owe deep gratitude and appreciation. I particularly thank Prof Emilia Anagbogu-Ezenwa who introduced me to Prof Dermot Cahill, who admitted me to Bangor University where I met Prof Zhen Jing, who had been my Supervisor from the Masters, to this level. I cannot thank her enough. She has been kind, patient, and professional in her supervision of my research studies. She was ably assisted by Dr Gwilym Owen, my second Supervisor, whose friendship I will continue to cherish. They were an excellent team. I am profoundly grateful to Dr Ama Eyo who was my personal tutor and whose counsel and encouragement helped me throughout the research.

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Above all, my deep-hearted thanks and appreciation to the Almighty God, the creator of heaven and earth, and the giver of life, who kept me alive and in good health and provided all my needs to undertake this research.

Abstract

Insurance is a bilateral contract whose execution is premised on executory express promises of the insured called warranties, and the insurer's implied promises called indemnity. Whereas the making of the warranty is a condition precedent to the inception of the contract the execution of the indemnity is dependent upon the warranty being exactly complied with. This gives rise to instances whereby the insured's purpose of entering the contract are defeated thereby perpetuating unfairness against the consumer. Accordingly, in line with consumerism many countries including Nigeria, the UK, Australia, and New Zealand have had to reform the law of insurance warranty to mitigate unfairness to the insured, but Nigeria's leaves much to be desired, and it seems to impede on insurance development in the country. This thesis seeks to propose a way forward.

Accordingly, the thesis traces the historical origin of insurance warranty, its cradle, practice, and reform in the UK, and some significant common law jurisdictions such as Australia, and New Zealand, with a view to pinpointing where and how Nigeria may have missed it. The issues with the traditional warranty and the approaches to its reform in the selected jurisdictions are evaluated. Surprisingly, in this regard, Nigeria appears to be in tandem with the others, except that insurance penetration is still exceptionally low, which in this thesis has necessitated an in-depth examination, where Nigeria's exceptionalism is implicated as one of the main causative factors.

To resolve the issue, and since 'normal' approaches to reform appear to have failed, the thesis goes 'out of the box' to propose a hybrid model of reform that combines the strengths and modern approaches of three advanced common law jurisdictions - the UK's, Australia's, and New Zealand's. These are blended with the traditional age-long exceptionalism of the Nigerian peoples to chart a way forward for the reform of Nigeria insurance warranty law.

List of Cases

List of Legislations

Constitution of the Federal Republic of Nigeria 1999

Consumer Insurance (Disclosure and Representations) Act 2012

Insurance Contracts Act 1984 (Australia)

Insurance Contracts Act 2008 (Germany)

Insurance Law Reform Act 1977 (New Zealand)

Insurance Act 2015 (UK)

Marine Insurance Act 1906 (UK)

Marine Insurance Act 1908 (NZ)

Marine Insurance Act 1909 (Australia)

Marine Insurance Act 1961 (Nig)

Marine Insurance Act 1993 (Canada)

Nigerian Insurance Act 2003

Unfair Terms in Consumer Rights Act 2015 (UK)

List of Abbreviations

ABI	Association of British Insurers
ALJR	Australian Law Journal Reports
All ER	All English Report
ALRC	Australia Law Reform Commission
AMC	Admiralty Moot Court
BCLR	British Columbia Law Reports
CIDRA	Consumer Insurance (Disclosure and Representations) Act
CLR	Commonwealth (of Australia) Law Reports
CLRN	Commercial Law Reports Nigeria
COVID 19	Corona Virus Disease 2019
Cth	Commonwealth (of Australia)
ECSLR	East Central States Law Report (Nigeria)
FCA	Financial Conduct Authority
FHCNLR	Federal High Court of Nigeria Law Report
FOS	Financial Ombudsman Service
FSA	Financial Services Authority
HCA	High Court of Australia
IA	Insurance Act
ICOBS	Insurance Conduct of Business Sourcebook
ILJ	Insurance Law Journal
JBL	Journal of Business Law
LC	Law Commission
LMCLQ	Lloyds Maritime and Commercial Law Quarterly
LQR	Law Quarterly Review
LUMEN	Logos Universality Mentality Education Novelty
MIA	Marine Insurance Act
MLR	Modern Law Review

NAICOM	National Insurance Commission
NIG	Nigeria
NILRC	Nigeria Insurance Law Reform Committee
NUS	National University of Singapore
NSW	New South Wales (Australia)
NWLR	Nigeria Weekly Law Report
NZCA	New Zealand Court of Appeal
NZLR	New Zealand Law Report
OUP	Oxford University Press
UNCLOS	United Nations Convention on the Law of the Sea
UTCCR	Unfair Terms in Consumer Contracts Regulation 1999
WABP	West African Book Publishers
WLR	Weekly Law Report
WWR	Western Weekly Reports (Canada)
YLJ	Yale Law Journal

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CHAPTER 1

OUTLINE OF THE RESEARCH

1.1 Introduction

This research seeks to propose a new approach to the reform of insurance warranty law in Nigeria. Warranty is statutorily defined as[1] '…a warranty by which the assured undertakes that some particular thing shall or shall not be done, or that some condition shall be fulfilled, or whereby he affirms or negatives the existence of a particular state of facts … and … is a condition which must be exactly complied with ... If it be not so complied with, then, subject to any express provision in the policy, the insurer is discharged from liability as from the date of the breach of warranty…'[2]

Since the enactment of the MIA 1906 (UK) the statutory requirement of exact compliance with warranty and the fatality of the consequence of its breach had been severely criticised for their harshness and unfair treatment of the insured[3] whereby he is judicially denied the indemnity for which he purchased insurance. Consequently, Nigeria, like other common law jurisdictions that adopted the MIA 1906 rules of warranty, such as the UK,[4] Australia,[5] and New Zealand,[6] have reformed their insurance warranty laws, but Nigeria's reforms appear not to have met the required standard. The obnoxious 'basis of the contract' clause warranty which permits the insurer to refuse to pay a claim on as little as mere suspicion of the insured's bona fides in precontractual representation[7] continues to appear in policy documents and there is a range of

[1] See Sections 33 and 34 of the Marine Insurance Act 1906 (MIA 1906 UK) and MIA 1961 (Nigeria) respectively.
[2] This definition was recently modified in the UK's section 10 (1) Insurance Act 2015 where the clause 'If it be not so complied with, then, subject to any express provision in the policy, the insurer is discharged from liability as from the date of the breach of warranty', is omitted.
[3] See Zhen Jing, 'Warranties and doctrine of alteration of risk during the insurance period: A critical evaluation of the UK Law Commissions' proposals for reform of the law of warranties' 25 ILJ (2014) 185; R Merkin and J Lowry, 'Reconstructing Insurance Law: The Law Commissions' Consultation Paper' 71(1) MLR (2008) 95; M Clarke, 'Insurance Warranties: The Absolute End?' LMCLQ (2007) 474; B Soyer, 'Reforming Insurance Warranties — Are we finally moving forward?' in B Soyer (Ed), Reforming Marine and Commercial Insurance Law, Informa, Ch 7 (2007) 127–154; Sir A Longmore, 'Good Faith and breach of warranty: Are we moving forwards or backwards?' LMCLQ (2004) 158; J Hare, 'The Omnipotent Warranty: England v The World', in: Huybrechts, M.A. et al. Marine insurance at the turn of the Millennium (1999) 53.
[4] MIA 1906 sections 33-41.
[5] MIA 1909 sections 39-47.
[6] MIA 1908 sections 34-42.
[7] See *Joel v Law Union and Crown Insurance* [1908] 2 KB 863, 884 per Fletcher Moulton LJ.

other warranty-related problems. These must be addressed for Nigeria's warranty law to be of any meaningful significance to the development of insurance practice in the country.

1.2 Background of Study

1.2.1 The Nigerian Nation

The geographical expression called 'Nigeria' is an area of over 900,000 square kilometres located in West Africa, bordering the Gulf of Guinea, Niger, and Chad in the north, the Benin Republic in the west, Cameroun in the east, and the Atlantic Ocean in the south. It consists of about 206 million[8] people of over 250 ethnic groups speaking over 400 dialects or languages with as many diverse cultural identities and practices.[9] These diverse groups were involuntarily brought together as one nation by the British under their rule in 1914 and since then every indigent member of any of the ethnic groups or tribes living in Nigeria is identified as a Nigerian. Indeed, the Nigerian Constitution defines a Nigerian as 'every person born in Nigeria before the date of independence,[10] either of whose parents or any of whose grandparents belongs or belonged to a community indigenous to Nigeria or every person born in Nigeria after the date of independence either of whose parents or any of whose grandparents is a citizen of Nigeria…[11] As a former colony of Great Britain English is the official language in Nigeria, and Christianity, Islam, and indigenous beliefs are the main religions. It is a widely held view both domestically and internationally that the conglomeration of the plurality of ethnic groups, dialects, languages, and the diversity of cultural identities and practices under a transplanted legal system[12] makes Nigeria an exceptionalism in the comity of nations such that most human endeavours in the country tend to work in a rather unique way as it is extremely difficult to unify the age-old traditional practices and cultures.[13] For example, Franklin A Ngwu posits that the problem is not with formulating and writing down rules; the constraint is always on the

[8] https://www.statista.com/statistics/1122838/population-of-nigeria/ accessed on 3 March 2021.
[9] Emila Anagbogu-Ezenwa, *Utmost Good Faith and Warranty in Nigerian Insurance Laws: A Critical Analysis*, (Choice Publishing and Book Service, 2015) 9 n2.
[10] "The date of independence" means the 1st day of October 1960.
[11] See section 25 Constitution of the Federal Republic of Nigeria 1999.
[12] The English common law was transplanted from England to Nigeria during the colonial period.
[13] See Deloitte Emerging Markets: Growing Insurance & Challenges with a Focus on Africa (2019). Accessed online at https//www2.deloitte.com on 20 May 2022.

sustainable implementation and observance of the rules[14] citing the words of a Governor of the Central Bank of Nigeria in 2002 where he stated:

> There appears to be a certain built in the attitude of a typical Nigerian economic agent... It manifests itself in a strong propensity to circumvent laid down rules of economic behaviour and to resist control and regulation… it tends to encourage a kind of softness and lukewarmness in the application and implementation of legitimate rules of economic conduct. Hence it provides a fertile ground for bribery, corruption, idleness, and the contrivance of get rich quick attitude which are antithetical to hard work and discipline.[15]

Most stakeholders hold the view that the above dictum fits into most facets of the Nigerian public and private sectors of the economy including insurance**.**

1.2.2 The Political System

Politically, Nigeria is a federal republic consisting of 36 States with the capital at Abuja, and it operates a presidential system of government with a bicameral legislature at the federal level and unicameral legislatures at the States which are headed by executive governors.[16] Each of the States consists of a capital city and varying numbers of local government councils, depending on population and geographical size, totalling 774 in the federation. There are thus three Lists of legislative authority - the exclusive, the concurrent, and the residual. The federal government legislates on the Exclusive and Concurrent Lists,[17] the States the Concurrent[18] and Residual lists, and the local governments the Residual List only.[19] Insurance is on the Exclusive List which only the federal parliament may legislate upon. This has tended to be one of the main problems of insurance law reform in Nigeria which is to find the right mix to cater for the needs of a diverse, multilingual, and multicultural society as Nigeria.

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[14] Ngwu, F N; Anglo-American Model and Corporate Governance Failures in Nigeria: Beyond Neo-Liberal Explanation with a Focus on the Banking Sector, International Company and Commercial Law Review (2014).
[15] Ngwu, F N; Anglo-American Model and Corporate Governance Failures in Nigeria: Beyond Neo-Liberal Explanation with a Focus on the Banking Sector, International Company and Commercial Law Review (2014).
[16] See Part I section 3 (1) to (6) of the Constitution of the Federal Republic of Nigeria 1999.
[17] See Part II section 4 (3) of the Constitution of the Federal Republic of Nigeria 1999.
[18] See Part II section 7 (a) and (b) of the Constitution of the Federal Republic of Nigeria 1999.
[19] See Fourth Schedule Section 1 of the Constitution of the Federal Republic of Nigeria 1999.

Nigeria's administrative structure, military, economy, legal codes, business orientation etc are modelled after the British system. At political independence in 1960, the need arose to immediately 'Nigerianise' the British colonial laws to create an enabling environment for economic development through trade and commerce with the Nigerian people as the main participants.[20]

1.2.3 Natural Resources and Economy

The country is blessed with abundant natural resources such as tin and columbite, iron ore, coal, limestone, petroleum, and natural gas. It is the largest producer of oil and gas in Africa[21] which constitute its major exports and foreign exchange earner making the economy the largest in Africa.[22] As of 2017 there were over 41 million micro-enterprises[23] in Nigeria which represented over 99 percent of the micro, small,[24] and medium-sized enterprises[25] (MSMEs) in the country. As at 2021 the Small and medium-sized enterprises were approximately 71,300 and 1,800, respectively.[26] The gross domestic product (GDP) stood at about 440.00 USD Billion in 2021. According to the Ministry of Industry, Trade, and Investment, MSMEs account for more than 84 percent of total jobs in the country and about 48.5 percent of the, GDP, as well as about 7.27 percent of goods and services exported out of the country.[27] In Nigeria, most micro businesses are often owned and managed by sole operators.

1.2.4 Foreign Policy

Geopolitically, one of Nigeria's foreign policy objectives is enshrined in section 19 (b) 1999 constitution which is 'promotion of African integration and support for African unity.' Nigeria is often looked upon as the voice of the black race and since independence Nigeria has been taking strong positions at the international arena for the liberation of Africa which resulted in

[20] Provisions were specifically made for the reinvestment of insurance funds generated in Nigeria within the country and the insurance of imports into Nigeria to be effected only with insurers in Nigeria ostensibly to prevent capital flight.
[21] Grace Goodrich, 'Africa Oil and Power' (2020). Accessed online at www.africapower.com on 3 March 2021.
[22] https://www.statista.com/statistics/1120999/gdp-of-african-countries-by-country/ Accessed on 1 June 2022.
[23] A micro-enterprise is one having between 1 and 9 employees.
[24] A small enterprise is one having between 10 and 49 employees.
[25] A medium-sized enterprise is one having between 50 and 249 employees.
[26] https://www.statista.com/statistics/1300426/micro-small-and-medium-enterprises-number-in-nigeria/. Accessed on Accessed on 24 May 2022.
[27] https://invoice.ng/blog/msmes-in-nigeria-overview/. Accessed on 24 May 2022.

independence for Zimbabwe (formerly known as Rhodesia), and the dismantling of apartheid in South Africa. In the West African sub-region many of the countries look up to Nigeria for leadership in regional integration.

1.2.5 The Insurance Market

The Nigerian Insurance Market consists of the buyers of insurance and the sellers together with the agents and brokers who bring the two together. There are also the regulators, representative bodies or organizations, consultants and technical advisers which are part and parcel of the market.[28] The buyers include those who have legally recognized relationship with property or pecuniary insurable interest such as individuals, Governments (federal, state, local) and their agencies, multinationals, conglomerates, and other corporate bodies such as small and medium scale industries, banks, health institutions, tourist and hospitality industries, transport industry, educational institutions, etc. For marketing purposes, the buyers can further be segmented to suit the strategy of the insurer, or the insurance agent.

The sellers or suppliers of insurance on the other hand are the insurance companies and the reinsurance companies. At present there are about 57 registered insurance companies and 2 registered reinsurance companies. The reinsurers provide technical security and capacity for the insurance companies and do not supply insurance directly to the consumers. The intermediaries are mainly insurance brokers and insurance agents. There are 460 registered insurance brokers and about 15,000 insurance agents.[29]

The Nigeria insurance market is ranked 62nd in the world and has a total premium volume of $1.64 billion. Insurance premium penetration rates of 0.7% of GDP, ranked 87th in world terms, and average premium per capita of $9.4 reflect a market that is in development.[30]

These statistics indicate that the insurance sector is not doing well for two main reasons. First is the fact that since independence there have been numerous enactments and re-enactments of insurance statutes during military regimes ostensibly to find the right mix of rules that would

[28] Accessed online at https://www.nigeriainsurers.org/page/nigerian-insurance-market on 16 June 2022.

[29] Nigerian insurance market has been described as brokers' market because presently brokers control over 90 per cent of the premium income, leaving less than 10 per cent for insurance agents and even direct marketing channel by insurers. However, insurance agents dominate the individual life insurance market.

[30] Africa insurance trends, nigeria-insurance-survey. Accessed online on 28 May 2022 at https://www.pwc.com/ng/en/assets/pdf/nigeria-insurance-survey.pdf

ensure optimal operation of the insurance industry for economic and national development. Second, the government-inspired legislations seemed to focus more on strengthening the administrative and regulatory structure of the industry rather than on developing the substantive insurance contract law. In this regard, the Nigeria Insurance Law Reform Commission (NILRC) got involved in the reform effort for the first time in 1988 with their inputs in the promulgation of the Insurance (Special Provisions) Decree[31] (ISPD) 1988 whose provisions on warranty[32] departed widely from the common law harsh forfeiture rules, and was subsequently recycled in the Insurance Decree (ID) 1991,[33] Insurance Decree (ID) 1997,[34] the Nigerian Insurance Act (NIA) 2003,[35] and the Insurance (Consolidated) Bill (ICB) 2016[36] making the ISPD 1988, in a sense, the 'gold standard' for the reform of insurance warranty law in Nigeria to date. The promulgation of ISPD 1988 ought to have been a turning point in insurance law legislation in Nigeria because the insuring public had been groaning under the common law principles espoused in the MIA 1961 (Nig). But this did not happen.

The tendency had been that in general the traditional warranty regime in Nigeria failed to take the cultural orientation and ethnography of the people into account in making contracts of insurance. In line with Eugen Huber's 'the law must be delivered in speech out of the thought of the people',[37] the people's culture and tradition ought to have been considered whilst transplanting the foreign law for the people's understanding and acceptance. Rather, the unfair common law forfeiture rules which are tilted heavily in favour of the insurers[38] were unleashed on the insuring public and the results have been disastrous. In consequence, the attempted reforms have tended to focus more on how to mitigate the undue advantages of the insurer over the insured rather than on how to win the confidence and trust of the people on insurance as a beneficial concept. This predicament portrays a negative impression of the insurance business

[31] In Nigeria, laws enacted by military regimes are called 'decrees'.
[32] Section 2 ISPD 1988
[33] Section 48-49 ID 1991.
[34] Sections 58-59 ID 1997.
[35] See Section 55 NIA 2003. The NIA 2003 was promulgated by a democratically elected government ostensibly to reform the MIA 1961 (Nig) but has not achieved the desired result.
[36] Section 86 ICB 2016. The ICB 2016 is a Bill which when passed into law would become the sole Act for insurance law and practice in Nigeria.
[37] Cited in Alan Watson, *Comparative Law: Law, Reality and Society* 3rd ed (Vandeplas Publishing, 2010) 9.
[38] Alastair Owen, *The Law of Insurance Warranties: The Flawed Reforms and a New Perspective* (Informa Law from Routledge, 2021) 1.

in Nigeria.[39] It is unlikely then that any reform of the insurance law, particularly of warranty, which does not address these issues would achieve any appreciable result.[40]

Notwithstanding that the NIA 2003 provisions on warranty significantly depart from the traditional position they still do not resolve the issues and the Act itself contains some errors and contradictions - it did not repeal the portions of the MIA 1961 (Nig) relating to warranty whilst enacting new conflicting provisions of the same. This has resulted to the coexistence of two insurance warranty statutes without a clear statement of guidance or practice direction on the concurrent application of the two laws.

The new Insurance (Consolidated) Bill (ICB) 2016 which was conceived to correct the errors in the NIA 2003 has introduced its own errors and more contradictions. For example, with respect to the materiality of a warranty to the insured risk section 86 (1) of the Bill provides: 'In a contract of insurance, a breach of a term of the contract, whether called a warranty or a condition, shall not give rise to any right by, or afford a defence to the insurer *unless the term is material and relevant to the risk* or loss insured against.' This appears to contradict section 171 (2) of the Bill which provides: 'A warranty within the meaning of this section may be express or implied, and is a condition which shall be exactly complied with, *whether it is material to the risk or not…*' The preceding phrases in italics seem to indicate that in the former a warranty must be material, and not necessarily so in the latter. In a telephone conversation with this researcher on 12 September 2020 the Chair of the Reviewing Committee of the Bill[41] explained that the intendment of section 86 of the Bill was for it to cover only non-marine insurance and section 171 to cover marine insurance only. However, this intention is not indicated anywhere in the Bill. Most importantly, the Bill has not introduced anything new as it largely retains the conflicting provisions of MIA 1961 (Nig) and NIA 2003 relating to warranty. Evidently, some work needs to be done on the law of insurance warranty in Nigeria.

Accordingly, this thesis will critically evaluate the traditional warranty in insurance contract law generally to identify the problematic areas, and in Nigeria in particular, to identify the

[39] See the Central Bank of Nigeria Financial System Strategy Presentation (2020) 73 who's first initiative for insurance development is to solve the negative image problem of insurance in Nigeria.
[40] The research is working on the hypothesis that the problems associated with warranty in insurance law have to do with the imbalance in the law and the very harsh rules of forfeiture which have tended to inhibit patronage by the local population.
[41] Dr Omogbai Omo-Eboh, O Omo-Eboh & Co Legal Practitioners, and Arbitrators, 2 Macarthy Street, Lagos Nigeria.

statutory provisions[42] which need improvement in comparison to other common law jurisdictions who similarly adopted the MIA 1906 (UK) into their laws.[43]

1.3 Aims of the Research

Firstly, the main aim of this research is to propose a workable model for the efficacious reform of Nigerian law relating to insurance warranty with a view to mitigating the problems in this area.

To achieve this aim, the research will examine the traditional concept of insurance warranty, its nature and the problems associated with the common law requirements of strict compliance, the harshness of the remedy of breach, and its unfair treatment of the insureds. In particular, the use of basis clause to deny policyholders of their reasonable expectations under the contract is, arguably, the most consequential of the issues with insurance warranty in Nigeria. The research aims to propose that basis of the contract clause should be outlawed in Nigeria insurance law.

Recently, English law relating to warranty has been amended by the Consumer Insurance (Disclosure and Representations) Act (CIDRA) 2012[44] and Insurance Act (IA) 2015[45] in which

[42] It is observed that the provisions for warranty in the Marine Insurance Act 1961 (Nig) followed almost verbatim the pattern of Marine Insurance Act 1906 (UK) and have remained seemingly unchanged in subsequent insurance legislations up to the current Consolidated Insurance Bill 2016 awaiting debate at the Nigerian Parliament.

[43] The researcher is inspired to concentrate on the principles of warranty in Nigerian insurance laws, considering that it is one of the major principles of insurance law in Nigeria whose practice has grave implications on insurance penetration and contribution to the national economy, but which had not received adequate attention, and an apparent research gap exists in this area of law.

[44] Section 6 (1) and (2) CIDRA 2012 (Warranties and representations) provides: (1) This section applies to representations made by a consumer— (a) in connection with a proposed consumer insurance contract, or (b) in connection with a proposed variation to a consumer insurance contract. (2) Such a representation is not capable of being converted into a warranty by means of any provision of the consumer insurance contract (or of the terms of the variation), or of any other contract (and whether by declaring the representation to form the basis of the contract or otherwise).

[45] Section 9 (1) and (2) IA 2015 (Warranties and representations) provides: (1) This section applies to representations made by the insured in connection with— (a) a proposed non-consumer insurance contract, or (b) a proposed variation to a non-consumer insurance contract. (2) Such a representation is not capable of being converted into a warranty by means of any provision of the non-consumer insurance contract (or of the terms of the variation), or of any other contract (and whether by declaring the representation to form the basis of the contract or otherwise). Section 10 (1) and (2) IA 2015 (Breach of warranty) provides: (1) Any rule of law that breach of a warranty (express or implied) in a contract of insurance results in the discharge of the insurer's liability under the contract is abolished. (2) An insurer has no liability under a contract of insurance in respect of any loss occurring, or attributable to something happening, after a warranty (express or implied) in the contract has been breached but before the breach has been remedied.

the insurer is no longer automatically discharged upon the insured's breach of warranty term, and the use of the basis of the contract clause has been abolished. The research will discuss whether the new approaches adopted in the new legislations can resolve the real issues with traditional insurance warranty. Since the Nigeria Marine Insurance Act 1961 adopted the concept of warranty by following MIA 1906 (UK) and common law, it is thought that perhaps Nigeria would have followed the English example in reforming her warranty law, more so as other common law jurisdictions such as Australia and New Zealand have gone as far as abolishing the concept of warranty in their own reforms. One of the objectives of this research is to explore whether adopting the Australian or the New Zealand model is a better approach for the reform of the Nigerian law as basis clauses[46] are still included in proposal forms in Nigeria. Regrettably, the ICB 2016 which had been drafted ostensibly to correct the lapses and strengthen the reforms in the NIA 2003 has fallen short of the desired objective as it has inexplicably restored the offending portions of the MIA 1961 (Nig) relating to warranty[47] which the NIA 2003 purported to reform.[48] Accordingly, this research aims to propose a pathway for resolving these issues.

Secondly, the research aims to highlight how the draconian rules of warranty unfairly deny the insured his reasonable expectations under the contract which defeat the very purpose for which insurance is purchased in the first place. This lamentable situation may indicate the low level of development in the Nigerian insurance market, but it also portrays the immense potential for growth. In consequence, this research looks to catalyse insurance penetration and growth in Nigeria through the proposals for the reform of the archaic laws of warranty to an all-inclusive modern consumer-friendly paradigm that would meet the needs of its peoples in a modern economy.

Thirdly, two other aspects of the law of warranty are hypothesised to be working against the interest of the insured and constitute problems of insurance warranty in Nigeria - the application of the principles of seaworthiness warranty to non-marine insurance warranty,[49] and the indivisibility of warranty in insurance policies whereby a breach of one warranty term

[46] The use of basis of the contract clause has been abolished in both Australia and New Zealand.
[47] See sections 34 – 42 MIA 1961 (Nig) which are a mirror image of MIA 1906 (UK) sections 31-41.
[48] See section 55 NIA 2003 which departs from the provisions of warranty in sections 34 – 42 MIA 1961 (Nig).
[49] Marine insurance warranty is predicated on the seaworthiness of the ship as a substratum whereas non-marine insurance is not.

infects the entire policy. Again, when this happens the insured bears the brunt, and it does not do any favours to the already battered image of insurance in the country. This research aims to propose for demarcating non-marine insurance from marine insurance. Failure to confine the traditional warranty exclusively to marine insurance would mean retaining its inherent draconian and harsh attributes on the insuring public in Nigeria and it may have been responsible for the inability of previous reform efforts to achieve the desired results. Additionally, the thesis aims to propose for the divisibility of warranty in policies of insurance; and that insurance cases in Nigeria should be tried at a hybrid (combination of modern approaches and indigenous customary and traditional laws) system. It is opined that the course of justice would potentially be better served, particularly in the multicultural, multireligious and ethnically diverse Nigerian environment.[50]

1.4 Research Statement

The primary purpose of an insurance contract is for the insured to be indemnified for loss or damage suffered in a misfortune covered in the policy. The primary research statement is that the traditional warranty regime in Nigeria does not fully reflect this fundament. Although the NIA 2003 purports to depart from the traditional concept it fails to define its relationship with the MIA 1961 (Nig). Therefore, the rules of law in this area need urgent reform.

English reformed laws such as CIDRA 2012 and IA 2015 have amended the traditional remedies for breach of warranty to make them more consumer friendly. Australian Insurance Contract Act 1984 section 54 abolishes the traditional concept of warranty[51] and New Zealand Insurance Law Reform Act 1977, section 11 also gives up warranty.[52] The MIA 1961 (Nig) and NIA 2003 can be reformed by reference to some good approaches from these jurisdictions.

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[50] Though Christianity and Islam are the predominant religions in Nigeria, a sizeable portion of the population are pagans, animists and adherents of various other faiths.

[51] Section 54 (1) and (2) provides: (1) Subject to this section, where the effect of a contract of insurance would, but for this section, be that the insurer may refuse to pay a claim, either in whole or in part, by reason of some act of the insured or of some other person, being an act that occurred after the contract was entered into but not being an act in respect of which subsection (2) applies, the insurer may not refuse to pay the claim by reason only of that act but the insurer's liability in respect of the claim is reduced by the amount that fairly represents the extent to which the insurer's interests were prejudiced as a result of that act. (2) Subject to the succeeding provisions of this section, where the act could reasonably be regarded as being capable of causing or contributing to a loss in respect of which insurance cover is provided by the contract, the insurer may refuse to pay the claim.

[52] Section 11 ILRA 1977 provides: a) By the provisions of a contract of insurance the circumstances in which the insurer is bound to indemnify the insured against loss are so defined as to exclude or limit

1.5 Research Questions

To achieve the aims of the research the following questions are set up:

1. What is the draconian effect of the traditional warranty regime as depicted in the MIA 1906 (UK) and the MIA 1961 (Nig)?
2. What is the extent and efficacy of the mitigation of the harshness of the traditional warranty and the remedies of its breach in the recent reforms in the UK Consumer Insurance (Disclosure and Representations) Act 2012 and the Insurance Act 2015?
3. Are the other common law jurisdictions' approaches such as Australian, and New Zealand bold reforms of abolishing the concept of warranty more appropriate in dealing with the issues of insurance warranty?
4. In view of the coexistence in Nigeria of the MIA 1961 traditional warranty regime on one hand, and the NIA 2003 approach (which is similar in some respects to those of Australia and New Zealand) on the other hand, vis-à-vis the recent reforms of warranty in the UK CIDRA 2012 and IA 2015, which of the two approaches - the UK's or the Australia's and New Zealand's - should Nigeria adopt to improve her law of insurance warranty?

1.6 Methodology

This thesis is qualitative legal research[53] which adopts a doctrinal, empirical, and comparative legal research methodology in which insurance warranty is being comparatively evaluated in some common law jurisdictions in search of an optimal reform model for Nigeria. This type of methodology is being adopted for this research because it is the method most favoured for comparative law research in common law countries,[54] and as indicated by Birds, insurance

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the liability of the insurer to indemnify the insured on the happening of certain events or on the existence of certain circumstances; and b) In the view of the Court or arbitrator determining the claim of the insured the liability of the insurer has been so defined because the happening of such events or the existence of such circumstances was in the view of the insurer likely to increase the risk of such loss occurring, - the insured shall not be disentitled to be indemnified by the insurer by reason only of such provisions of the contract of insurance if the insured proves on the balance of probability that the loss in respect of which the insured seeks to be indemnified was not caused or contributed to by the happening of such events or the existence of such circumstances.

[53] Qualitative legal research is defined as simply non-numerical and the aim is to provide an in-depth and interpreted understanding of a subject matter by learning about other countries' perspectives and histories.

[54] It involves referring a matter to the Law Commissions for study and recommendations which are forwarded to Parliament for enactment into law.

principles are best presented in a doctrinal way.[55] Also, Zweigert and Kotz opine that comparative law methodology is extremely useful for law reform in developing countries such as Nigeria,[56] and it has been observed that comparative study is a good method of improving one's country's laws.[57]

Unarguably, the MIA 1961 (Nig)'s, MIA 1908 (NZ)'s, and MIA 1909 (Australia)'s provisions on warranty are replicas of the MIA 1906 (UK)'s; therefore, they fit into the template of Alan Watson's legal transplants which he defines as 'the moving of a rule or a system of law from one country to another, or from one people to another.'[58] However, the impact of the transplanted law and outcomes of its reforms in the various jurisdictions has been varied, apparently justifying Pierre Legrand's 'The Impossibility of Legal Transplants' where he states: '…there could only occur a meaningful 'legal transplant' when both the propositional statement as such and its invested meaning - which jointly constitute the rule - are transported from one culture to another. Given that the meaning invested into the rule is itself culture-specific, it is difficult to conceive, however, how this could ever happen.'[59] Nevertheless, as Watson states further that borrowing is the name of the legal game[60] this thesis looks to improve the Nigerian law by comparing it with jurisdictions that have achieved better outcomes in their reforms having in view Pierre Legrand's surmise that 'The comparatist must adopt a view of law as a polysemic signifier which connotes inter alia cultural, political, sociological, historical, anthropological, linguistic, psychological, and economic referents.'[61] Without a doubt these factors came into play in the approaches adopted by the four jurisdictions under consideration in their reforms of

[55] John Birds, Birds' Modern Insurance Law, 11th ed (Sweet and Maxwell, 2019) 1.

[56] According to Zweigert and Kotz, *Introduction to Comparative Law* 3rd edn, (Oxford University Press, 1998) 17 'Comparative law has been proving extremely useful in the countries of Central and Eastern Europe where legislators face the need to reconstruct their legal systems after the collapse of the Soviet system. The experience of other European countries helps them choose the solution which best suits their own legal traditions... Even outside Europe states which used to be Soviet republics are finding that foreign laws can be of assistance in framing domestic legislation, as have the Republic of China and many of the developing nations in Africa.'

[57] See Peter de Cruz, Comparative Law in a Changing World (2nd edition, Cavendish Publishing, 1999) 18, for more details on comparative study where Cruz concludes that although comparative study is an acceptable method for reforming one's country's laws, the workability of the proposed laws should be appraised. It would not make sense to adopt an unworkable law.

[58] Alan Warson, *Legal Transplants: An Approach to Comparative Law* (The University Press of Virginia, I974) 2I.

[59] Pierre Legrand, "The Impossibility of Legal Transplants," Maastricht Journal of European and Comparative Law 4, no. 2 (1997): 116.

[60] Alan Watson, *Comparative Law: Law, Reality and Society* 3rd ed (Vandeplas Publishing, 2010) 5.

[61] Pierre Legrand; The Impossibility of 'Legal Transplants', 4 Maastricht J. Eur. & Comp. L. 111 (1997) 116.

the traditional warranty law. This thesis hypothesises that Nigeria's exceptionalism in this regard may have influenced her rather poor performance at the reforms.[62] In addition, other emerging economies like China, India, and Malaysia could not be factored in because while China is not a common law jurisdiction, India and Malaysia had not appreciably reformed their insurance warranty laws to a level worth transplanting as of 1988 when Nigeria commenced her own reforms. Accordingly, the thesis analyses and collaboratively[63] compares the reforms of the more advanced jurisdictions to ascertain their efficacies with a view to recommending them or parts thereof for adoption in Nigeria.

The doctrinal method is carried out based on the analysis of case law, current and existing legislations, judicial and academic opinions, and practitioners guide. The leading research tools used are legal encyclopaedias, case digests, Law Commissions' (LC) reports and secondary sources such as books on insurance law, legal treatises, working papers, and relevant articles in reputable journals,[64] while the empirical research involved informal discussions with relevant authorities and academics on Nigeria insurance laws as well as corresponding with practitioners in insurance companies by telephone, and where necessary, visits, to acquire material and discuss relevant matters to this research. This aspect of the research was however severely impeded by the global lockdown and personal contact restrictions of the COVID 19 protocols.

Bearing in mind that the cradle of insurance warranty law in common law jurisdictions is the MIA 1906 (UK) it is expedient that an inquiry into the draconian character and the issues with insurance warranty are best conducted from its purview. This is then followed by the evaluation of the most recent reform - the UK's model, then the Australian, and the New Zealand models respectively.[65] The target jurisdiction - Nigeria's approach is appraised last having the others in view for possible adoption for better outcomes. This is necessary in order to detect ambiguities, weaknesses, criticisms, and solutions which exist under the existing reformed laws of warranty which cannot be otherwise detected without the examinations of legislation and court cases.

[62] See para 1.2 above.
[63] How the different approaches adopted by those jurisdictions have influenced the end-products of their reforms.
[64] Journals such as Columbia Law Review, Tulane Maritime Law Journal, Yale Law Journal, the Journal of Business Law, Business Law Review, Business Law International, Modern Law Review, Journal of International Maritime Law, Lloyd's Maritime and Commercial Law Quarterly, and the Bangor University library databases like Westlaw, JStor, Hineonline, LexisNexis etc.
[65] It is noted that the three jurisdictions in a sense compared notes.

Lastly, the research harnesses the functional method[66] to transplant practical legal solutions from the UK, Australia, and New Zealand in a somewhat hybridized format to Nigeria.

1.7 Literature Review

In undertaking this research, a wide variety of insurance literature in both common law and civil law perspectives was consulted to assist in identifying the problems associated with insurance warranty and areas on where gaps exist in regard with reforming warranty for a third world common law jurisdiction like Nigeria, and how this treatise may fill in the gaps and create new ground in this area of research. Nevertheless, as it is not feasible to report on every secondary source consulted, only those whose contents bear significantly in the final analysis have been reviewed as follows:

BOOKS

JP Van Niekerk, *Insurance Law in the Netherlands 1500 – 1800 Vol II*[67]

This excellent book provides an insight into the evolution of the marine insurance law in the early 16th century in the European continent, the crisis of identity of insurance as a contract under the Roman *ius communis*, the influence of the law merchant in insurance generally, and the arrival of insurance in England vis-a-vis the English domestic environment. It provides a useful insight as to why England went on a different trajectory than the rest of Europe in the aspect of controlling risk to the insurer in a policy of insurance using warranty as against alteration of risk doctrine, as well as the linkage between the law of disclosure and the genesis of the basis of the contract clause warranties. It is therefore invaluable for the reform of warranty in a balanced, fair and equitable manner for a jurisdiction like Nigeria.

J Allan Park, *A System of the Law of Marine Insurance*[68]

This post-medieval era book explains in detail the doctrine of insurances in a methodically arranged and systematic way for better comprehension of the law of insurance, particularly in regard with the roots of warranties. The relationship between the policy, a warranty therein, compliance with the warranty, breach, consequences and remedy to the insurer are clearly

[66] See Ralf Michaels, 'The Functional Method of Comparative Law' in: *Mathias Reimann and Reinhard Zimmermann* (eds). *The Oxford Handbook of Comparative Law* (2006) 341. Accessed online on 10 August 2016 at https://scholarship.law.dukr.edu/faculty scholarship/1249.
[67] Juta & Co, 1998.
[68] Boston, 1799.

explained and an array of case laws are included to drive home the points in issue. Also, the different types of losses and how they are settled are well elucidated. The liability of the insurer and the ways he was relieved from his responsibility in the early days are examined, ways in which the policy is voided are discussed, as well as discharge and reasons for discharge and when to return and to keep premium in relation to warranty. The elucidation of the original concepts provides a clear perspective on what should be done going forward in the proposals for reform in this thesis.

Robert Merkin, *Marine Insurance Legislation 5th ed* [69]

This book focuses on the MIA 1906 and amongst other things analyses the definition, nature and the whole gamut of insurance warranty law from section 33 to 41 with examples of cases that gave rise to such laws and those that afterwards drew precedence therefrom for their determination in court. It also juxtaposes some of the views expressed by the Australian Law Reform Commission (ALRC) 91 and the recommendations and posits that, perhaps, warranty may have outlived its usefulness in marine insurance law and should be abolished. The book is a treasure trove of information and contains some revolutionary concepts for warranty which are quite enlightening for this research.

Baris Soyer, *Warranties in Marine Insurance* [70]

This book deals with warranties in general - express warranties, implied warranty of seaworthiness, other implied warranties, nature of marine warranties, waiver of breach of marine insurance warranties, warranty type statutory provisions, and provides detailed discussions and case laws to clarify the perspectives of the use of warranties in marine insurance. It is a locus classicus for research in warranty and would be very useful in this research.

AA Tarr and JA Kennedy, *Insurance in New Zealand 2nd ed* [71]

In its introduction this book covers the history, nature and definition of insurance, classification of insurance contracts, reinsurance, and in particular, insurance law reform in the New Zealand perspective. The contents of the book would no doubt have been useful in the reform of the common law insurance warranty in New Zealand, and thus, a reference point for this research.

[69] Informa Law from Routledge; 5th ed (2014).
[70] Taylor and Francis, 2016.
[71] The Law Book Company Ltd, 1992.

JO Irukwu, *Insurance Law and Practice in Nigeria*[72]

This work is reputed to be the first book on insurance law and practice in Nigeria and it had attempted to cover the main principles of insurance including warranty from a Nigerian perspective, and in particular, the attempt to proffer a defence of its breach by Nigerian lawyers at the bar using local nuances but which was firmly rebuffed by the Nigerian bench. The book gives a historical context of the law and practice of insurance in Nigeria particularly with respect to warranty. It is a goldmine of information for the writing of the Nigerian chapter of this thesis.

JO Irukwu, *Fundamentals of Insurance Law*[73]

This is a publication on the modern aspects of insurance in the market of an African common law jurisdiction such as Nigeria. It states the legal principles of insurance law precisely and clearly with relevant supporting cases which aid understanding, and which should potentially eliminate unnecessary time-consuming and expensive litigations. But more importantly, its establishment of the link between the principle of utmost good faith, misrepresentation and warranties and the combined harsh effects of the consequences of their breach on the insured as a trigger in 1988[74] of the ongoing reforms of warranty in Nigerian law is instructive and sheds light on the most efficacious way to achieving the desired results in the reform efforts. It is a leading referral for this research.

Omogbai Omo-Eboh, *The Law of Insurance Contracts in Nigeria*[75]

The book *The Law of Insurance Contracts in Nigeria* examines in clear and precise terms the various statutes governing the insurance industry in Nigeria and analyses the principles of insurance contract against a background of the common law as applied by the courts in Nigeria. It also makes a comparative analysis of principles of insurance law in other common law jurisdictions such as Australia and New Zealand and makes recommendations for reform of some aspects of insurance contract law including warranty in Nigeria. The detailed analysis of the applicable statutes with full citation of all the leading articles that considered the legal principles, case and statute law makes it an invaluable resource for this study.

[72] The Caxton Press, 1078.
[73] Witherby, 2007.
[74] Section 2 of Decree No 40 of the Insurance (Special Provisions) Decree 1988 on warranty.
[75] West African Book Publishers, 2012.

Omogbai Omo-Eboh, *Case Book on Insurance Law*[76]

This book is a compilation of Nigerian judicial decisions on insurance law, particularly warranty, in a book form thereby availing insurance stakeholders a single reference material containing the most important cases on insurance law decided in Nigeria. It is a very useful tool for a work of this nature as it obviates the burden of having to consult different law reports on the subject most of which, invariably, are out of print and no longer readily available anyway.

E Anagbogu-Ezenwa, *Utmost Good Faith and Warranty in Nigeria Insurance Laws: A Critical Review*[77]

This book appears to be the first in Nigeria to directly address warranty as a principle of insurance albeit in combination with utmost good faith. The book provides an in-depth critical analysis of the intricate relationship between the two principles in the Nigerian perspective and makes some proposals for the reform of warranty. Nevertheless, the book was published in 2013 at about the time the concept of a consolidated insurance bill for Nigerian insurance was being muted. Accordingly, most of the discussions, analyses and recommendations were predicated on the Nigeria Insurance Act 2003 which will nonetheless be adapted in modified form to the writing of this thesis.

JOURNALS

WR Vance, 'The History of the Development of the Warranty in Insurance Law.'[78]

This remarkable paper pinpoints some of the geneses of the problem with warranty such as the forfeiture rules, and the 'arbitrary' interpretation of its meaning by common law jurists, particularly Lord Mansfield in the 18th century when he was the Chief Judge of the King's Bench. The paper argues, mainly from the American perspective, that it is inequitable that a party should lose all rights under his contract because of the non-performance of any condition wholly immaterial, and concludes that warranty in insurance law is now a mistake, and that it should be transformed into 'representation'. The arguments in this paper will no doubt enrich the depth of the analysis in this research and contribute to the crafting of the way forward for Nigerian warranty law.

[76] West African Book Publishers, 2012.
[77] Yorkhill, 2015.
[78] 20 YLJ 523 (1911).

RA Hasson, 'Basis of the Contract Clause in Insurance Law.'[79]

This write-up traces what appears to be the genesis of the law which has developed around what has come to be known as 'basis of the contract clause' in insurance law. It highlights the problem of the practice of declaring the contents of a filled proposal form to be the basis of the contract between the insured and the insurer in a language which incorporates the insured's answers into the insurance policy although they are not set out in the policy such that an incorrect answer to any one of the questions is fatal to the insured's claim, whether he answered the question in good faith, to the best of his knowledge, or, indeed, whether his response related to a material fact or not. A remedial legislation is accordingly proposed which will no doubt be key towards proposing ways of reforming similar situations in Nigerian law.

Zhen Jing, 'Warranties and the Doctrine of Alteration of Risk during the Insurance Period: A Critical Analysis of the UK Law Commission's Proposal for Reform of the Law of Warranty.'[80]

This excellently written paper critically discusses the proposals by the Law Commission of England and Wales and the Scottish Law Commission for reform of the law of warranties. The paper examines the doctrine of alteration of risk as an alternative approach for risk management during the insurance period and considers the possibility for the promissory warranty to be replaced by the doctrine of alteration of risk. It argues that the Law Commissions' proposals for reform of the law are insufficient in terms of mitigating the harshness and unfairness of remedies for breach of warranty. It submits that the remedies in the doctrine of alteration of risk are much fairer than those for breach of a warranty and proposes an appropriate model to deal with increase of risk during insurance period which Nigeria may well consider as a solution to the reform of warranty in its laws.

Zhen Jing, 'A Potential Trap for the Insureds: The Application of Basis of the Contract Clauses in China's Insurance Market'[81]

This article briefly considers English and Australian law and practice relating to the basis clause. It analyses reasons for the widespread application of the basis clauses in China, and critically examines problems which may arise accordingly. These are conditions that are easily comparable to those in Nigeria and the possibility to govern the basis clause by the NIA 2003

[79] 34 MLR 29 (1971).
[80] ILJ 2014.
[81] 19 ILJ 2008.

is a concept that may well yield fruitful results in the Nigerian perspective. The recommendations on how to deal with the basis clause in China are also adaptable to the Nigerian situation.

Ling Zhu 'Marine Insurance Warranty: Comparing Common and Civil Law Approaches and their Implications for the Reform of Chinese Law'[82]

Following a thorough discussion of the status quo of warranty law in China, this paper explores the reformed warranty law under the Insurance Act 2015 in England, together with the general 'alteration of risk' doctrine in civil law countries and argues that blindly importing relevant articles from the Insurance Act 2015 is not a feasible solution, as this will not only create more disputes, but will also create inconsistency with other laws. The paper concludes by suggesting that, maybe, adopting the 'alteration of risk' doctrine is a better way to replace the current warranty law under Chinese marine insurance law. This is a timely counsel that Nigeria would do well to heed in respect of the ongoing efforts to reform its law of warranty.

Robert Merkin, 'Australia, Still a Nation of Chalmers?'[83]

This paper suggests that it is time to repeal the MIA 1906 whose content was enshrined in the marine legislation of most common law jurisdictions for the universally acclaimed unjustifiability of the term 'warranty' although it is not too problematic in marine insurance. The paper asserts that in the non-marine insurance context, however, warranties are just a bad memory for Australian policyholders, brokers and their lawyers, explaining that warranties have their origins in the days when it was impossible for the assured to know the truth or otherwise of his statements, so he was in effect required to guarantee them, and that given the judicial and academic consensus that warranties are unjustifiable, and the market's own increasing reluctance to rely upon technical breaches, should there any longer be a need to preserve express warranties in marine policies? ICA 1984 has abolished warranties in non-marine insurance whereas the ALRC 91 preferred that it be replaced (if required by the insurers) by express contract terms under which insurers would be relieved from liability in the event of a breach which was the proximate cause of the loss even if there are other proximate causes. The burden of proving breach would rest on the insurers, although the burden of showing that the breach was not the proximate cause of the loss would be borne by the assured. These are concepts worth

[82] JBL (2017).
[83] University of Queensland Law Journal (2011).

being looked at for possible adoption for Nigeria who like Australia seems to be preferring the demarcation of non-marine from marine insurance.

Rob Merkin and John Lowry, 'Reconstructing Insurance Law: The Law Commissions' Consultation Paper.'[84]

This paper examined the Law Commission's 2006 view that the UK law lacked certainty and that the remedies available to insurers, particularly in relation to innocent non-disclosure and breach of warranty, were harsh and held the potential for injustice. It argues that the position taken in the Law Commissions in proposing different regimes for consumer and business insurance, while alleviating some injustices of the current law (for consumer assureds at least), nevertheless perpetrates, on rather illogical grounds, the potential for injustice as far as business assureds are concerned. Put simply, if the law on non-disclosure and warranties was unfair it should be reformed wholesale in order to strike a fair balance between the parties irrespective of whether the purpose of the contract relates to business or consumer interests. The paper asked further whether maintaining the consumer/business assured distinction does anything to further the objective of constructing a coherent body of law for insurance contracts. The consumer aspect is invariably relevant to the Nigerian chapter of this thesis.

Baris Soyer, 'Risk Control Clauses in Insurance Law: Law Reform and the Future.'[85]

This incisive paper identifies warranty as the most common risk control clause used in insurance law which reflects the fact that liability of an insurer was viewed by Lord Mansfield as an obligation dependent on fulfilment of a warranty by the assured, back in the eighteenth century. However, the problem identified with the law on warranties is that it permits the insurer to escape liability for technical breaches that have nothing to do with the loss in question or that have been remedied prior to the loss, leading to criticisms and calls for reform. The article elaborates on the appropriateness of the reforms introduced by the 2015 Act from risk assessment and management perspectives, x-raying the potential difficulties in regards with altering the consequence of breach of an insurance warranty, loss occurring during the period of suspension due to breach of warranty (term) unrelated to the loss, contracting out, and basis of contract clauses. It concludes that these difficulties aside, it is fair to say that the changes introduced will achieve a fairer regime in domestic insurance markets for risk control clauses

[84] 71 MLR 95 (2008).
[85] The Cambridge Law Journal, 75 [2016]

akin to the solutions adopted by most continental legal systems. Again, this fits into the dynamics of proposing an appropriate way of reforming warranty in Nigerian law.

Baris Soyer, 'Beginning of a New Era for Insurance Warranties?'

This paper identifies the role of warranties in insurance law and practice noting that the current legal regime concerning insurance warranties has been questioned over the years by academics, practitioners, as well as judges. The article considers the appropriateness and viability of the proposed changes by the English and Scottish Law Commissions, via-a-vis the potential impact of such changes on law and underwriting practices. It is concluded that the Law Commissions are generally on the right path and their recommendations deserve firm support, although some difficulties are likely to emerge that could fuel litigation if the proposals are to be implemented in their current format. The paper is potentially a useful guide in finding solutions to the reform of warranty law in Nigeria.

Baris Soyer, 'Reforming Insurance Warranties – Are We Finally Moving Forward?[86]

This article is a chapter in the book '*Reforming Marine and Commercial Law'.*[87] It evaluates from a critical standpoint, the proposal put forward by the Law Commissions with a view to reforming the warranty regime and puts up other possible models which the Law Commissions could have adopted as a basis for a new warranty regime. It sets out essential principles which one would expect an ideal reform model to fulfil to include certainty, freedom of contract, reasonable expectation of the insured, and the need not to allow reform transform into a revolution. The paper also provided reform options to include adopting the doctrine of 'alteration of risk', equating warranty with other risk definition clauses, converting warranties into suspensory conditions, and making alterations in the current warranty regime in line with general contract law. A critique of warranties as to the future, warranties of present or past facts, and statutory controls, and concludes that the strict nature of the traditional warranty regime has not done much favour to the London market in terms of enhancing its reputation as clauses equivalent to warranties are not so common in other jurisdictions. The contents of this paper, particularly the aspect relating to the reasonable expectation of the insured, will no doubt provide the necessary background to propose a reform option for warranty in Nigerian law.

[86] Informa, 2008 1st ed.
[87] Informa, 2008 1st ed.

Howard Bennet, 'Reflections on Values: The Law Commissions' Proposals with Respect to Remedies for Breach of Promissory Warranty and Preformation Non-Disclosure and Misrepresentation in Commercial Insurance.'[88]

This article is a chapter in a book[89] and it presents an in-depth analysis of the promissory warranty as an essential aspect of the common law rule of warranty in regard with the attachment and alteration of risk, the role of the promissory warranty, the consequences of breach and the remedies accruable thereto in marine insurance vis-à-vis the Law Commission's recommendations for reform. The paper raises important perspectives as to the contractual effects of the promissory warranty to both the insured and the insurer which bear significantly on this thesis' task of proposing ways to balance the parties to the insurance contract as a manifest token of the successful reform of the warranty law in Nigeria.

Richard Aikens, 'The Law Commissions' Proposed Reforms of the Law of Commercial Insurance: Will the Cure be Better than the Disease?'[90]

This is also a book chapter[91] and it is a vigorous defence of the status quo, and the author virtually plays the devil's advocate in this piece which is refreshingly different from most of the views already expressed in regards with the reform of warranty, at least in the commercial perspective. It serves as a balancer in the scathing criticisms and arguments for reforms and it is very important to a work of this nature. The author observes that it is easy to sympathise with the consumer insured who has made an innocent error in making a statement about an existing or past fact in a proposal who then forgets about it all and thinks he is insured and suffers a loss which is not paid because the fact was not true, and it is treated as a 'warranty'. But the author admits to having less sympathy for the business insured, who, in its own business, may well demand exact compliance with contract terms with its counterparty, whether it be as to description of goods, date of shipment or the document to be produced to entitle payment on a letter of credit. He argues that if business owners wish to insure the wherewithal of their businesses, can it not be said to make themselves as aware of the consequences of their actions (or inactions) as they would do for their own speciality? This was how the rule as to breach of

[88] Informa, 2008.
[89] Reforming Marine and Commercial Law (Informa, 2008).
[90] Informa, 2008.
[91] Reforming Marine and Commercial Law (Informa, 2008).

warranties was defended when it was first introduced, and one asks whether businesses are less robust now as they were in 1800.

Malcolm Clarke, 'The Future of Warranties and Other Related Terms in Contracts of Insurance.'[92]

This is yet another book chapter[93] which presents arguments with respect to the future of warranties as regards the amendment of their common law features by the IA 2015 in sections 9 and 10 on causality, breach of warranty and remedying of the breach. It provides interesting perspectives on 'the basis of the contract clause' that can be used to deepen the analysis of the type of reform needed to balance the parties in Nigeria.

Rob Merkin and Ozlem Gurses, 'The Insurance Act 2015: Rebalancing the Interests of Insurer and Assured.'[94]

This paper traces the path to reforms and identifies warranties as constituting the most draconian class of term recognised by insurance law being in its eighteenth century conception the means by which the risk to be run by the insurers was defined, and if the description provided by the assured did not match the actual facts, then the risk would simply not attach; and how insurers at the end of the nineteenth century took matters a step further by inserting 'basis of the contract' clauses into application forms; and how it rapidly became established that a basis clause converted every single statement in the application - material, inducing or otherwise - into a warranty. It concludes that the abolition of the clause by the reforms in 2012 and 2015 respectively was a step in the right direction but prefers rather that warranty be removed completely from the statute books unlike its retention in the 2015 Act, albeit in a state of degraded efficacy.

Andrew McGee, 'Alteration of risk in insurance law.'[95]

This paper touches upon what is the position where, the risk having been fully and fairly disclosed to the insurer pre-contract and having been accepted at an agreed premium, and the risk having incepted, the circumstances change so that the risk is in some way different from the one originally presented. It considers a number of questions such as: 'What should we

[92] Informa, 2008.
[93] Informa, 2008.
[94] MLR 78(6) 2015.
[95] 24 ILJ 139 2013.

understand by the term "alteration of risk"? What are the problems created by alteration of risk? What are the possible solutions to these problems? What does the caselaw say? What approaches have been adopted in other jurisdictions?' The answers to these questions may well be the test of an appropriate post-contract balancing of the parties to the insurance contract in Nigeria.

Omogbai Omo-Eboh, 'The Reform of Insurance Contract Law in Nigeria'[96]

This article examines how far recent reforms affect the common law in the main areas giving rise to friction between insurer and insured in the local context in Nigeria. It is observed that common law principles have, at times, produced results considered difficult for insureds who are prevented from recovering insured losses on account of conduct falling short of applicable principle. In particular, it is noted that by far the most common reason why insureds in Nigeria are denied indemnity upon loss is on account of breach of policy terms described as warranties or conditions which are terms that are usually technically worded and complex to understand, in particular, the basis of the contract clauses, and are rarely drawn to the attention of the insureds before loss. The paper concludes that the law governing warranties which impose certain duties on the insured as to present or future facts the breach of which, however trivial entitles the insurer to repudiate the whole contract regardless of the materiality of the term, places the insurer in a very advantageous position to the detriment of the insured. Recommendations are made which will come to bear in charting the way forward for Nigerian warranty law.

1.8 Gaps in the Literature

The main gap this research aims to fill lies in the fact that most of the reviewed literature did not take the Nigerian politico-historical, cultural, and socio-economic dynamics into account in their analyses. As such, most of the identified problems of insurance warranty and the proposed solutions in the literature are not Nigeria-specific and would therefore be unsuitable for implementation in the Nigerian context. This research accordingly proposes a hybrid approach whereby those aspects of the UK's, Australia's, and New Zealand's laws that are amenable to adoption in Nigeria would be blended with the Nigerian customary and traditional practices to remove the harshness of the traditional warranty and make it insured-friendly. Moreover, to enhance the acceptability of insurance a recommendation is made for the laws to, in addition to

[96] JBL, 1991.

being written in English the official language, be formally translated to the three major Nigerian languages Hausa, Yoruba, and Igbo.

Furthermore, the defining characteristic of marine insurance is the uniqueness of the sea as the operating domain which makes seaworthiness of the ship and its warranty crucially essential, and the consequences of its breach fatal to the survival of the contract. However, none of the literature reviewed seems to take this fundamental distinction into account and the principles of seaworthiness warranty are admitted to non-marine insurance warranties. The fundamental nature of the seaworthiness of the ship warranty means that once broken, it infects the validity of the insurances of all other items onboard the ship which may have given rise to the principle that breach of one warranty voids the entire policy. But there is no reason why this principle should apply to non-marine insurance warranties which have no relationship with the ship. This thesis accordingly proposes for the demarcation of marine insurance from non-marine insurance. It is hypothesized that this would exscind the Nigerian insureds (who are mainly consumers of non-marine insurance products) from the harshness of the traditional warranty which is mainly in the marine perspective.

Again, the significance of the aleatory character[97] of the insurance contract which makes it dependent on contingency appears not to be taken into cognisance with respect to contractual obligations such as warranties of future conduct and remedies for their breach. Future warranties impose obligations on the insured which are susceptible to contingencies beyond the insured's control and yet he is required to exactly comply on pains of forfeiture of his benefits for breach of them. This epitomises the unfairness of the traditional warranty regime. Yet, the literature reviewed treats this as a *fait accompli.* This thesis argues that warranties of future conduct are not only inequitable, but they also constitute obstacles to the achievement of the very purpose of insurance which is to indemnify the policyholder in the happening of an insured event.

Similarly, at common law, the fact that it is the insured who purchases insurance for his risks is seemingly overlooked and all the case-laws appear to focus on shielding the insurer from the supposed 'fraudulent intent' of the insured.[98] There seems to be a sense that the insurer is doing the society a favour by being so magnanimous as to offer to bear risks for policyholders. This

[97] Aleatory contract is a contract whose performance depends on some random, chance, or uncertain, event.

[98] Not surprisingly, the cradle of insurance law, the MIA 1906 UK, is skewed in favour of the insurer and leaves the insured completely unprotected from any potential misconduct of the insurer.

point seems stretched beyond the pale in Nigeria. This thesis argues that without the insured insurance would simply be impractical and to that extent the interest of both parties should be balanced in the statutes.

1.9 Originality and Significance of the Research

The originality of this work lies in the fact that so far it is the only research that is dedicated solely to the reform of insurance warranty in Nigerian Law.

The significance of the research is that the proposal for a hybrid approach for insurance warranty whereby the locally appliable aspects of the other common law jurisdictions are blended with the age-long customary practices of the Nigerian peoples, if implemented, would neutralise the de facto mistrust between the insurer and the insured and enhance patronage of insurance products which will in turn enhance penetration and contribution to Nigeria's GDP. This would potentially catalyse new frontiers of research to Nigerian academics to develop a 'new common law of insurance' based on Nigerian content that would enhance the development of insurance law in the country, and possibly play a leading role in enhancing insurance penetration in black Africa.

Also, in the findings and recommendations in this study, the hybrid approach makes significant contributions to insurance jurisprudence in Nigeria by limiting dependence on the subjective magnanimity of insurers and opinions of judges in delivering the benefits of insurance to policyholders. It would contribute to injecting certainty on contractual benefits and facilitate reforms in this area of Nigerian law which has been stagnant.

Furthermore, by drawing attention to the plight of the insured in Nigeria the research clarifies the fundamental objective of insurance - indemnity of the policyholder upon occurrence of the insured event - to the insuring public in Nigeria which should induce the Nigerian Bench to treat it as the primary point in issue during litigations before considering any technical reasons to uphold the insurers' refusal of any claim.[99] Currently, it would seem the forfeiture laws of warranty are contributing immensely to stymying the development of insurance law in the country. In this regard, the proposals for the 'divisibility' of warranty and the statutory

[99] The trust deficit between insurer and the insured in Nigeria stems mainly from cases of unjust denial of claims on the basis of breach of warranties or conditions.

reintroduction of the ancient principle of 'pay now and sue later'[100] are put forward to ameliorate the harshness of the law and enhance mutuality and trust between the parties.

In the legal perspective, the research contributes to insurance warranty law by pointing out the critical flaws, errors and contradictions of the existing statutes as well as the ICB 2016 which is currently awaiting promulgation by Parliament and recommends important solutions to the points in issue. The recommendations can particularly be incorporated into the ICB 2016 before it is passed into law.

1.10 Scope of the Study

The scope of the study is the evaluation of the issues with insurance warranty in common law jurisdictions in search of a workable model for Nigeria. However, it was not possible to stay within the confines of developing economies because none of them had reformed their insurance warranty laws by 1988 when Nigeria began hers. Secondly, as a nation seeking to develop it makes sense to learn from those who are more developed. Accordingly, this research limits its scope to the discussion of the legal principles of insurance warranty in Nigeria in comparison with those of the UK, Australia, and New Zealand because they are all common law jurisdictions whose marine insurance Acts are based on the MIA 1906 (UK). In addition, all four codified their marine insurance Acts within the same era; the UK in 1906, New Zealand in 1908,

[100] See Andrea Addobbati, 'Italy 1500–1800: Cooperation and Competition' *Marine Insurance Origins and Institutions 1300 – 1850* ed AB Leonard (Macmillan, 2016) 64 where it is stated: 'Pay now, sue later: insurers, in practice, could not challenge an insured's claim unless they had first seen to the prompt fulfilment of the contract. By producing eligible guarantors, the insured immediately received indemnity, potentially avoiding insolvency, but in return had to agree to repay it, plus a 20 per cent surcharge, if their demand for payment was later judged unwarranted.' See also JL Longnaker, 'History of Insurance Law, 30 U Kan City L Rev 31, 55 (1962) 44 where the contents of a policy in that era stated in part: '… And if the said goods shall sustain, or have sustained, any disaster (which God forbid), the insurers shall pay to the said --------- the sum insured, within two months from the news reaching the city. And if within six months there shall have been no true news, the insurers shall pay to the said --------- the sum insured; and in case of subsequent arrival and safe discharge at the said place, the aforesaid shall pay back to each the sum he has received. In the event of shipwreck, it is allowed to make recovery without authority from the insurers, it being stipulated that the said insurers are not responsible for theft by the captain of the said ship. *And the insurers are bound first to pay to the aforesaid the sum insured, and to litigate afterwards.* And these are to bind themselves by sufficient sureties (one or more as directed by the fire official deputies on insurance) to pay back to each insurer the sums they have received, with damages of twenty per cent. The time allowed to the insurers for proving is eighteen months.

Australia in 1909, and Nigeria in 1961. Also, their reforms were all initiated by the governments of the respective jurisdictions and were accomplished by legislative intervention.[101]

The scope is limited to seeking ways to reform insurance warranty to remove unfairness as well as equalise the parties to an insurance contract in Nigeria. However, no attempt is made to research into why the traditional concept of warranty is skewed in favour of the insurer. The research is working on the hypothesis that the issues with warranty in insurance law are caused by the application of the principles of seaworthiness warranty to those of non-marine insurance.

1.11 Obstacles to the Research

A work of this nature requires high quality academic materials and unrestricted access to practitioners in the field. The main obstacle in this research is the dearth of academic material such as journal articles, monographs, and books in respect of Nigerian insurance law. This made the work on the Nigerian aspect extremely difficult. Fortunately, the problem was overcome because of the near uniformity of the substantive law of warranty in most common law jurisdictions. As such, literature from other common law jurisdictions could be relied upon in several respects to extrapolate for the Nigerian situation. Furthermore, towards the tail-end of the research, the COVID 19 social distance requirements severely restricted in-person contacts with the supervisors of this work as well as access to books and journals which are only available in hard copies in libraries and other locations. However, the restriction in in-person contacts was largely overcome by use of online platforms such as Blackboard Collaborate, Zoom, and Microsoft Teams, emails and telephone calls.

1.12 Outline of Chapters

The first chapter presents the outline, background, and scope of the thesis.

Chapter Two gives an overview of the origin of warranty in insurance law down to its codification in the MIA 1906 (UK) from where it was assimilated into other common law jurisdictions. As such all the problems with warranty identified in English law equally hold true

[101] These reforms may have influenced each other as they were commenced within few years of one other: England and Wales in 1957, New Zealand in 1975, Australia in 1982, and Nigeria in 1988. Interestingly, the other three jurisdictions completed the reforms in reverse order: New Zealand in 1977 (Insurance Law Reform Act 1977), Australia in 1984 (Insurance Contracts Act 1984) and England and Wales in 2015 (Insurance Act 2015). Although Nigeria completed a reform of warranty in 1988 - Insurance (Special Provisions) Decree 1988 - the reform was replaced by three others in 1991, 1997 and 2003, and currently, the Insurance Consolidated Bill 2016 has been drafted to replace the NIA 2003.

for the other jurisdictions, particularly, Nigeria where most of the statutes of General Application[102] in England have been domesticated.[103]

The main discussion and analysis of the research starts in Chapter 3 where the draconian nature and harshness of the traditional insurance warranty on the insured are discussed and why it has necessitated the reforms in some jurisdictions such as England and Wales, Australia, New Zealand, and Nigeria.

Chapters 4 and 5 evaluate the reforms of the traditional position of warranty carried out in England and Wales, and Australia and New Zealand respectively, and their departure from the traditional position and the efficacies thereof in solving the insurance warranty problem.

Chapter 6 is the main thrust of the research. It discusses the situation of the reform of insurance warranty law from a purely Nigerian perspective. It is noted that but for an extremely careless error Nigeria's reform of warranty would rank shoulder to shoulder with those of Australia and New Zealand. Nevertheless, it is the hybrid approach (the admixture of 'foreign' laws and indigenous traditional and customary practices) that holds the best promise for Nigeria.

Chapter 7 makes findings, recommendations, and conclusion

[102] English statutes of General Application are statutes which applied to all classes of the community or to all the members of any class in England as at 1st January 1900. They formed part of the English law which was enforced in Nigeria particularly in the realm of property and commercial transactions. See Funmi Adeyemi, *Historical Developments of Insurance Law,* (Funmi Adeyemi & Co, 2007) 11.
[103] See Funmi Adeyemi, *Historical Developments of Insurance Law,* (Funmi Adeyemi & Co, 2007) 11.

CHAPTER 2

OVERVIEW OF INSURANCE WARRANTY

2.1 Introduction

It had been widely held that one cannot insure without a warranty.[104] This chapter overviews insurance warranty within the context of the historical origin of insurance up to its codification in the Marine Insurance Act (MIA) 1906 (UK) where it is held to be the substantive law of insurance in most common law jurisdictions including Nigeria. The MIA is principles-based but its provisions on marine insurance warranty seem to have triggered contractual issues in the promissory warranty and the use of 'basis of the contract' clause which do not sit well in the non-marine perspective. Also, although marine in context, the MIA 1906 UK seem not to make any distinction between consumer and non-consumer insurance[105]ostensibly because the notion of consumer was quite alien until much later on in the 20th century. But the pre-MIA 1906 marine insurance practice was basically consumer in outlook[106] which has been sustained both at codification and post-codification eras. Needless to say, the emergence of other non-marine risks has necessitated the widening of the scope to accommodate other non-consumer insurances.

[104] *De Sotto v de Aguilar* (1772) Oldham (n 1) 517.

[105] See the report heard in the Commons on 27 April 1720, in which the House resolved That, for some time late past, several Subscriptions having been made by great Numbers of Persons in the City of London, to carry on publick Undertakings; upon which the Subscribers have paid in small Proportions of their respective Subscriptions ... and that the Subscribers having acted as Corporate Bodies, without any legal Authority for their so doing ...the said Practices manifestly tend to the Prejudice of the publick Trade and Commerce of the Kingdom.[105]

[106] This is attested to by the preamble of the first English insurance Act in 1601 which stated: 'And whereas it hath been time out of mind an usage amongst merchants, both of this realm and of foreign nations, when they make any great adventure, (especially into remote parts) to give some consideration of money to other persons (which commonly are in no small number) to have from them assurance made of their goods, merchandizes, ships and things adventured, or some part thereof, at such rates and in such sort as the parties assurers and the parties assured can agree, which course of dealing is commonly termed a policy of assurance; (3) by means of which policies of assurance it cometh to pass upon the loss or perishing of any ship, there followeth not the undoing of any man, but the loss lighteth rather easily upon many than heavily upon few, and rather upon them that adventure not than those that do adventure, whereby all merchants, especially of the younger sort, are allured to venture more willingly and more freely…'

2.1.1 Insurance – General

Insurance is often described as a risk-bearing industry.[107] In its ordinary and literal presentation, the word 'risk' appears to refer to a sort of danger, hazard, or chance of loss or the possibility that something of bad consequence may happen. It may be defined as the possibility of loss occurring, or simply as uncertainty associated with loss or danger. Risk itself is of two types – pure and speculative. Pure risk is a situation where there is no possibility of gain, while the speculative risk is a situation in which there is uncertainty as to whether a loss or gain will occur. Insurance is more concerned with the latter and is also seen as a mechanism for protecting the victim from the devastating effect of misfortunes. The story is told, as an example of the early idea of risk sharing, of two Chinese farmers, who used to transport their rice for sale at a city at the mouth of the river. Each had his own boat but all too often one or the other would meet with an accident and lose his cargo or be set upon by pirates and robbed. By the simple device of loading half of their rice on each other's boat they doubled their chance of at least getting to market with half a crop. The risk was divided or spread to lessen the risk of total loss. Certainly, this was not insurance, but the inherent concept was evident.

Nevertheless, the definition of insurance is a subject of much debate among scholars. While one school of thought believes a narrow construction of the word 'insurance' requiring a contract of insurance is used, another believes a more liberal construction which includes other risk-sharing devices be adopted.[108] The former looks at insurance on a profit basis or premium-insurance[109] and the latter on a mutual basis, that is, an arrangement for supporting one another and aiding the unfortunate.[110]

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[107] The suppliers of insurance service are generally insurance companies who are constituted as limited liability companies incorporated under the provisions of the Companies Acts of their respective countries of incorporation with shareholders.

[108] See WR Vance, Early History of Insurance Law, 8 Colum. L. Rev. 1, 17 (1908) 3. See also A A Tarr and JA Kennedy, *Insurance in New Zealand* 2nd ed (The Law Book Company Ltd, 1992) 7 where the author argues that if the definition is extended beyond contracts where the obligation is to provide money or money's worth, the net may be cast too widely. But if a contract of insurance is taken to embrace contracts promising the conferment of any benefit on the happening of some certain event, many professional and other bodies giving their members the right to advice and assistance would, to their astonishment, learn that in the eyes of the law they were carrying on the business of insurance.

[109] See A B Leonard, *Marine Insurance: Origins and Institutions, 1300-1850* (Macmillan, 2016) 10.

[110] JP Van Niekerk, *the Development of the Principles of Insurance in the Netherlands from 1500 to 1800 Volume I* (Juta & Co Ltd, 1998) 3.

This state of affairs could be attributable to the dynamism of commercial indices and the business environment making the crafting of a definition of insurance that is both precise enough to be of use in distinguishing it among other human transactions and broad enough to be[111] viewed as generally applicable, to be an elusive goal; coupled with the basic concept of risk-sharing being employed for a vast array of purposes in many different types of cultures and economic contexts.[112] For instance, a warranty in a sales contract whereby the seller undertakes to the buyer to repair or replace, at no cost, thereby bearing the buyer's risk, in case of a defect or malfunctioning of the purchased item, is considered not to be insurance. Similarly, in *St Christopher's* case[113] where the motorist's association in return for an annual payment of $100 agreed that if a motorist was unable to drive because of disqualification or injury, it would provide him with a driver for up to 40 hours a week for a maximum of 12 months, was not insurance.[114] But in *Guaranteed Warranty Corp Inc v State ex rel Humphrey,*[115] it was held that a 'warranty agreement' whereby a corporation, which is neither the seller of television sets or picture tubes, is committed to replace a picture tube which failed as a result of manufacturing defects after a manufacturer's warranty expired, constituted an 'insurance contract', and therefore could not be sold without a license to sell insurance. Thus, there appears to be no concrete agreement on what constitutes insurance. But there is no disagreement that insurance involves, for a premium, the transfer of risk from the insured to the insurer, that on the occurrence of a specified contingent event, the insurer would indemnify the insured on the agreed terms.

2.1.2 Aleatory Nature of Insurance

An aleatory contract is one in which the performance of at least one of the parties to the agreement depends on the outcome of an uncertain event.[116] Insurance fits this bill in the sense that it is basically a contract between A and B in which upon A's payment of a premium equivalent to the hazard run, B will indemnify or insure him against a particular event. The

[111] Robert E. Keeton, Alan I. Widiss, James M Fisher; Insurance Law: A Guide to Fundamental Principles, Legal Doctrines, and Commercial Practices, (West Academic Publishing, 2016), 6 at foot note 15.
[112] Robert E. Keeton, Alan I. Widiss, James M Fisher; Insurance Law: A Guide to Fundamental Principles, Legal Doctrines, and Commercial Practices, (West Academic Publishing, 2016), 3.
[113] [1979] 2 WLR 686 at 697.
[114] The learned Chief Judge said that this was merely a member's benefit.
[115] 533 P.2d 87, 91 (Ariz. Ct. App. 1975).
[116] Indeed, the fundamental issue in insurance is what happens to either or both parties of the contract in the occurrence of that uncertain event known as the subject matter of the insurance.

crucial condition of the insurer's promise is the occurrence of that event or casualty insured against, which is usually in the future and may or may not happen. Furthermore, insurance is a bilateral and reciprocal contract. The performance of the two parties involved is given in exchange for one another but subject to the occurrence of that specified event, which must be by fortuity thereby fulfilling the aleatory character.

2.1.3 Purpose of Insurance

Normally, an insurance contract is initiated by the insured to cover his risk(s). Thus, the primary purpose of an insurance contract is for the insured to be indemnified for loss or damage suffered in a misfortune covered in the policy. In *Castellain v Preston*,[117] for example, Brett, LJ stated:

> The contract of insurance is a contract of indemnity, and of indemnity only, and that … means that the assured, in case of loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified. That is the fundamental principle of insurance, and if ever a proposition is brought forward which is at variance with it, that is to say, which either will prevent the assured from obtaining a full indemnity … that proposition must certainly be wrong."[118]

The inference in the above pronouncement is that the insured's application for a coverage of his risks gives rise to a contract of insurance, and once the policy is made both the insurer and the insured must work towards achieving indemnity for the insured. Nevertheless, from the economic viewpoint insurance neither eliminates the occurrence of loss nor does it prevent or stop the misfortune or disaster from happening. All it does is to lessen the impact of the disaster on the insured.

2.2 Types of Insurance

In the historical antecedents of insurance there are two basic types – non-marine and marine. Non-marine insurance deals mainly with the coverage of risks outside the maritime domain whilst marine deals with the insurance of ships and merchandise at sea. However, it is the principles of the latter that have been statutorily codified in the MIA 1906 (UK) and held to apply to other types.

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[117] (1883) 11 QBD 380.
[118] S Degeling, *Restitutionary Rights to Share in Damages*, (CUP, 2003) 203.

2.2.1 Non-Marine Insurance

There appears to be no statutory definition of non-marine insurance. However, in line with section 1 of MIA 1906 (UK)[119] it can be inferred that other insurances not related to a marine adventure or which cover non-sea risks could be said to be non-marine, which means a contract of non-marine insurance can be said to be a contract whereby the insurer undertakes to indemnify the assured, in manner and to the extent thereby agreed, against non-marine losses, that is to say, the losses incident to non-marine activities. However, the application of the laws of marine insurance in the non-marine domain gives rise to an array of contractual problems, especially with respect to the promissory warranty and its forfeiture rules (discussed later in the thesis).

Due to innovations in transportation, new business practices and other risks arising from natural events such as storms and rough weather; human actions such as warfare and piracy which had to be considered and contained by merchants, who daily faced the serious financial threats of shipwreck, cargo loss, and damage to goods in transit, other types of insurance have, and are, still emerging. For instance, around the middle of the nineteenth century first party cover was extended to a variety of risks, including damage by hailstones and loss of livestock. Liability insurance emerged somewhat later, to cover judicial rulings and statutes rendering shipowners liable for cargo losses, collisions and damage to harbours and jetties. New specialist insurers arose following the first high profile death on the railways in 1830; the passing of Lord Campbell's Act in 1846 under which the dependants of deceased victims were given their own cause of action against tortfeasors; the abolition of window tax leading to the introduction of glass into shop windows; the use of steam boilers in factories; the increased incidence of burglary; the partial abolition of the doctrine of common employment by the Employers Liability Act 1880; the introduction of strict liability workmen's compensation in 1897; and the appearance on the roads of motor vehicles in 1895.[120] It soon became routine for merchants, and later for shipowners, to commission a broker to recruit sufficient underwriters to provide the desired coverage. Insureds, underwriters, and brokers together comprised the commercial

[119] Section 1 MIA 1906 (UK) states: A contract of marine insurance is a contract whereby the insurer undertakes to indemnify the assured, in manner and to the extent thereby agreed, against marine losses, that is to say, the losses incident to marine adventure.
[120] Rob Merkin, 'Australia: Still A Nation of Chalmers? University of Queensland Law Journal (2011) 193.

element of the insurance market.[121] Although marine insurance involves both public and private interests, incorporations intended to benefit the latter were almost always couched in exclamations of the benefits which would accrue to the former.[122] This appears to link almost every significant development in commerce, as well as in Parliament or the courts, in which a risk or liability became apparent, with the formation of new insurance companies. In broad terms, two other types of insurance have evolved – consumer, and non-consumer, insurance.

2.2.1.1 Consumer Insurance

Section 1 CIDRA 2012 defines the consumer as 'the individual who enters into a consumer insurance contract, or proposes to do so', and a 'consumer insurance contract' as 'a contract of insurance between - (a) an individual who enters into the contract wholly or mainly for purposes unrelated to the individual's trade, business or profession, and (b) a person who carries on the business of insurance and who becomes a party to the contract by way of that business (whether or not in accordance with permission for the purposes of the Financial Services and Markets Act 2000).' Thus, the consumer must be a natural person, rather than a legal person (such as a company or corporation). The Explanatory Notes to Consumer Insurance (Disclosure and Representations) Bill clarifies further that the definition expressly provides for mixed use contracts.[123] Where a policy covers some non-business and some business use, the main purpose of the insurance needs to be considered. For example, insurance would be 'consumer insurance' if vehicle insurance covers a limited amount of business use, or if home contents insurance covers some 'business equipment.'

In the light of the above definitions, it is evident that insurance originated on a consumer context which is now held to apply to other classes of insurance on the basis that it codifies the common law. Not surprisingly, the MIA 1906 (UK) in many instances uses the personal pronouns 'he' and 'she' when referring to the insured. Hence, its application to other classes

[121] The development of corporate forms of marine insurance underwriting in Britain over the centuries, culminated in the first chartering of British joint-stock marine insurance companies in 1720. Two key observations can be made about early attempts to establish sanctioned, dedicated corporate insurers. First, projectors seeking formal approval of their ventures typically framed their arguments in terms of the improvement of the marine insurance offer, and, in particular, its financial security, and thus the enhancement of trade. Second, underwriting was seen as a lucrative enterprise. Shareholders, directors, and the authorities approving insurance companies would all benefit.

[122] No incident encapsulates these debates over corporate versus individual underwriting, motivated by mutual security or personal gain, more clearly than a parliamentary enquiry held in 1720 to assess the merits of various proposals to form monopoly joint-stock insurers in Britain.

[123] See Explanatory Notes to Consumer Insurance (Disclosure and Representations) Bill (HL) para 18.

of insurance is the application of the principles of 'the common law' of consumer insurance. Therefore, all jurisdictions including Nigeria who adopted the MIA 1906 (UK) codified the law of consumer insurance.

2.2.1.2 Non-Consumer Insurance

Section 1 IA 2015 define 'non-consumer insurance contract' as 'a contract of insurance that is not a consumer insurance contract'. An insurance contract may be 'non-consumer' for two reasons: either the policyholder is not an individual, or they have entered the contract wholly or in significant part for trade, business, or professional reasons. In many cases, both reasons will apply: the policyholder will be a company or other corporate entity taking out insurance for commercial reasons.

The non-consumer or business insurance is traceable to the enactment of the Joint Stock Companies Act 1856 which opened the door to the formation of insurance companies and the extension of insurance protection to corporate risks as they emerged, including those of the insurance companies themselves[124] in what is currently referred to as reinsurance.[125] This led to calls throughout the end of the 20th century to update the MIA. However, among the jurisdictions that have amended the MIA 1906 only the UK appears to have demarcated the consumer from the non-consumer insured in the CIDRA 2012[126] and IA 2015,[127] not for the purpose of changing the substantive law of insurance which applies to all types of insurance, but for the regulation of practice. Thus, both CIDRA 2012 and IA 2015 apply to consumers and non-consumers in all classes of insurance.

[124] Rob Merkin, 'Australia: Still A Nation of Chalmers? University of Queensland Law Journal (2011) 193.
[125] See para 2.2.3 below for further discussion on reinsurance.
[126] Section 1 CIDRA 2012 states: In this Act— 'consumer insurance contract' means a contract of insurance between— (a) an individual who enters into the contract wholly or mainly for purposes unrelated to the individual's trade, business or profession, and (b) a person who carries on the business of insurance and who becomes a party to the contract by way of that business (whether or not in accordance with permission for the purposes of the Financial Services and Markets Act 2000); 'consumer' means the individual who enters into a consumer insurance contract, or proposes to do so; 'insurer' means the person who is, or would become, the other party to a consumer insurance contract.
[127] Section 1 IA 2015 provides: In this Act (apart from Part 6)— 'consumer insurance contract' has the same meaning as in the Consumer Insurance (Disclosure and Representations) Act 2012; 'non-consumer insurance contract' means a contract of insurance that is not a consumer insurance contract.'

2.2.2 Marine Insurance

Section 1 of MIA 1906 (UK) provides: 'A contract of marine insurance is a contract whereby the insurer undertakes to indemnify the assured, in manner and to the extent thereby agreed, against marine losses, that is to say, the losses incident to marine adventure.' A marine adventure is where any ship, goods or other movables are exposed to maritime perils, that is, the perils consequent on, or incidental to, the navigation of the sea; that is to say, perils of the seas, fire, war perils, pirates, rovers, thieves, captures, seizures, restraints, and detainments of princes and peoples, jettisons, barratry, and any other perils, either of the like kind or which may be designated by the policy of insurance.

In case of any loss or misfortune it is lawful to the insured, their factors, servants, and assigns, to sue, labour, and travel for, in and about the defence, safeguards, and recovery of the said goods and merchandises, and ship, or any part thereof, without prejudice to the insurance. However, it is to be noted that the outcome of a lawsuit is never certain, and the insured may lose the case when he sues. Therefore, the nature of marine insurance is such that *ab initio*, the insured appears to be disadvantaged against the insurer as any breach of the agreed terms automatically discharges the insurer from liability.

2.2.3 Reinsurance

In practice, insurers often insure against the risks to which they themselves are subject, by means of reinsurance. Lord Mansfield in *Delver v Barnes*[128] defined reinsurance as 'a new assurance effected by a new policy on the same risk which was before insured in order to indemnify the underwriters from their previous subscriptions, and both policies are in existence at the same time'.[129] Accordingly, in the domestic market of any jurisdiction, reinsurance is treated as a type of insurance which functions as means of enhancing the financial security of insurers within the industry, and to that extent, the basic rules that apply to insurance, including

[128] (1807) 1 Taunt 48 at 51.

[129] This should not be confused with co-insurance. Whereas an insured under a co-insurance arrangement contract with each of several insurance companies, in the case of reinsurance, the insured contracts only with one underwriter who, in a separate contractual arrangement, may share the business with a reinsurer or a number of reinsurers to whom part of the premium paid is ceded in consideration for undertaking to indemnify the reinsured to the extent specified in the reinsurance agreement.

warranty, also apply to reinsurance.[130] Accordingly, section 9 MIA 1906 (UK)[131] provides for reinsurance.[132]

However, treaty reinsurance often involves international parties, and in that respect other rules beyond the scope of this thesis come into play. The parties involved are usually free to decide which jurisdictional laws will govern the contract, but generally, the laws of warranty would be expected to apply, for instance, in a reinsurance between a German[133] insurer and Lloyds of London, but not so between a British insurer and a German reinsurer.

2.3 Warranty in General

The term warranty is an important part of most commercial contracts and has acquired a variety of meanings depending on the type of contract and sense of its use. In general, it is understood as an expressed or implied undertaking that a certain fact regarding the subject matter of a contract is, or will be, true the breach of which is usually not a valid reason for voiding a contract but it entitles the aggrieved party to damages.[134] In sales contracts, for example, warranty is a written guarantee of functionality of a new appliance, automobile, or other item, given to the purchaser by the manufacturer or dealer, usually, specifying that the manufacturer will make any repairs or replace defective parts of the purchased appliance free of charge for a stated period of time.[135] Indeed, UK Regulation 2 of the 'Sale and Supply of Goods to Consumers Regulations 2002' requires such a consumer guarantee, which it defines as 'any undertaking to a consumer by a person acting in the course of his business, given without extra charge, to reimburse the price paid or to replace, repair or handle consumer goods in any way if they do not meet the specifications set out in the

[130] See John Birds, Birds Modern Insurance Law 9th ed (Sweet and Maxwell, 2013) 7.
[131] Although strictly the 1906 Act only applies to marine insurance, the courts have consistently held that it applies to all forms of insurance, on the grounds that it codifies the common law.
[132] Section 9 MIA 1906 (UK) states: (1) The insurer under a contract of marine insurance has an insurable interest in his risk, and may re-insure in respect of it. (2) Unless the policy otherwise provides, the original assured has no right or interest in respect of such re-insurance.
[133] As a civil law jurisdiction, the 'alteration of risk doctrine' is in use in Germany as against 'warranty' in Lloyds in the UK.
[134] B Soyer, *Warranties in Marine Insurance*, (ed) Taylor and Francis, 2016.
[135] Part 5A on 'Additional Rights of Buyer in Consumer Case' provides in 48A (2) 'If this section applies, the buyer has the right under and in accordance with section 48B below, to require the seller to repair or replace the goods…'

guarantee statement or in the relevant advertising.'[136] Aside the statutory provisions, the manufacturers often make warranties as a marketing strategy to attract and enhance patronage and to assure customers of the quality of the item being purchased, and by implication, its guaranteed functionality subject to the specified conditions of its use. The seller's guarantee lapses at the expiration of the specified period or cancelled if the buyer uses the item in breach of the specified conditions. Thus, the remedy to the manufacturer of an appliance, or its agent, for a breach of warranty by the purchaser in a sales contract, for instance, would be to refuse the purchaser's right to the free repair or replacement of the purchased item; but the sale itself is not cancelled. Hence, in its non-insurance context, warranty is understood as meaning a term of the contract, the breach of which entitles the aggrieved party to damages, but not a right to treat the contract as repudiated.[137]

2.4 Insurance Warranty

In insurance contracts, however, the term warranty assumes a completely different connotation. It is usually made by the insured to the insurer and its breach by the insured discharges the insurer from liability as from the date of the breach but without prejudice to any liabilities before that date.[138] There is thus, a remarkable difference between insurance warranty and warranty in other contracts, mainly, in the consequences of breach. This is because, whereas, the information about the subject matters of most contracts are usually known, or ought to be known, by both parties thereby making them equal, those of insurance are usually about risk(s) that arise out of the applicant's interest in the subject matter, and that interest means the applicant is presumed to have better knowledge of the risk, which he should, therefore, warrant to maintain at pre-contract level in conformity with the freedom of contract principle as precondition for making the contract,[139] in consequence of which the contract is vitiated if the

[136] Accessed online at < http://www.probonogroup.org.uk/lawworks/docs/training/autumn07/Consumer%20handouts%2003.10.07.pdf> 8. Accessed 21st Oct 2017.
[137] Baris Soyer, *Warranties in Marine Insurance*, (Taylor and Francis, 2016) 1.
[138] See section 33 MIA 1906 UK which defines warranty, before it was amended by section 10 (7) IA 2015, as '…a warranty by which the assured undertakes that some particular thing shall or shall not be done, or that some condition shall be fulfilled, or whereby he affirms or negatives the existence of a particular state of facts … and … is a condition which must be exactly complied with ... If it be not so complied with, then, subject to any express provision in the policy, the insurer is discharged from liability as from the date of the breach of warranty…'
[139] See Philip Rawlings, 'Bubbles, Taxes, and Interests: Another History of Insurance Law', 1720–1825 Oxford Journal of Legal Studies, Vol. 36, No. 4 (2016), pp. 799–827.

warranty be not complied with. Secondly, a contract of insurance is in the special category of 'aleatory'[140] contracts which require ordinary terms like warranty to take on special or purely technical meanings to instil some measure of 'certainty' in otherwise uncertain conditions; and for these reasons warranty in a contract of insurance whether marine or non-marine is ascribed a nature that is different from that obtained in general contracts and has become an indispensable part of insurance contracts, particularly in common law jurisdictions.[141]

2.5 Origin of Insurance Warranty

Everyone initially bore their risks in whatever business they were engaged in.[142] Over time, marine merchants discovered the technique of minimising risk during voyages by spreading their wares among several vessels travelling to the same destinations.[143] According to the Hammurabi Code,[144] this ancient practice flourished as far back as 5000 BC in ancient Babylon in their human activities. Those who had the financial resources employed salesmen who were sent on business trips both at home and abroad. However, the salesmen could not be trusted to be always truthful and honest.[145] To circumvent losses from dishonest agents, businessmen devised a scheme whereby a salesman took the goods on loan and the businessman took as collateral a pledge of the salesman's wife, children, and property which would be forfeited if the salesman failed to return. The deal was that in exchange for the 'loan' of money and goods, the businessman received 50 per cent of any profit the salesman made (akin to the payment of premium). If it happened that the salesman lost his goods fortuitously, an oath was taken of him, and he would be freed from forfeiture.[146] In this manner, the loss was shared between the

[140] An "aleatory promise" has been defined as "a promise conditional on the happening of a fortuitous event.

[141] The civil law jurisdictions use the alteration of risk doctrine to achieve the same purposes as warranty.

[142] JL Longnaker, 'History of Insurance Law', 30 U Kan City L Rev 31, 55 (1962) 32.

[143] See JP Van Niekerk, *The Development of the Principles of Insurance in the Netherlands from 1500 to 1800 Volume I* (Juta & Co Ltd, 1998).

[144] The Code of Hammurabi is believed to have been compiled in 2250 B. C. but was discovered by archaeologists in 1902. It was a set of rules that regulated human conduct in virtually every sphere of life in ancient Babylon.

[145] This principle is said to have been set in the 12th century: if it happened that a man entrusted another man his property to carry over sea for gain, and pirates happen to fall in with them and carry off all that he is carrying, or the weather is bad and wrecks the vessel and all is lost, reason commands that he is quit in all and needs not make amend. See Harold E Raynes, *A History of British Insurance*, (Pitman and Sons, 1948) 5.

[146] These traditional systems were based on custom and in cases of dispute, judgements were enforced only through honour on the part of the participants and ostracism on the part of the local community, and the certainty of outcomes was virtually guaranteed.

parties – the salesman, the loss of his profits, and the businessman, his investment. Thus, the elements of fortuity and contingency - key aspects of the insurance contract, and the collateral - a key aspect of warranty, were in evidence.

Subsequently, some of the merchants began to opt for full-time underwriting, which catalysed the introduction of actuarial computations into risks and their probabilities of occurrence in conjunction with economies of scale. This appeared to kick-start the concept of risk control for the insurer, which is one of the roles of warranties in modern contracts. Again, in the early days, insurance was mainly conducted in the marine context as the earliest most cost-effective long-distance mode of transportation was through the maritime domain. By the time other forms of non-marine insurance developed the principles of marine insurance had taken root and it seemed reasonable for them to be held to apply. However, in this thesis, the discussion on warranty in insurance is contextualised on two sources – the marine, and non-marine, mainly because the application of the principles of the former to the latter is hypothesized to be the root of the problematic issues with insurance warranty.

2.5.1 The Non-Marine Source

One of the earliest warranties in a non-marine situation was not directly related to insurance, but it involved a form of risk transfer - it had to do with the inclusion of a clause in the deed of sale of a house in Egypt in 7th century BC, which stated:[147]

> And if another man sue thee or sue son or daughter of thine, we will rise up and will recover(?) (save) (sic) and will give (it) to thee within 30 days, and if we do not recover(?) (save) (sic), we or our children will give to thee a house in the likeness of thy house and its measurements, ... (if) we are not able to recover(?) (save) (sic), we will give to thee thy money, 1 karsh, 4 shekels, and the (value of the) building (improvements) which thou didst build in it (construction which thou mayest construct thereon), and all the lumber(?) (improvements) (sic) which may go upon that house.[148]

The clause effectively transfers the vendee's potential risk of loss of the property to a third party to the vendor. This was clearly similar in form and substance to the insurance future

[147] See Jacob J Rabinowitz, 'Jewish Law: Its Influence on the Development of Legal Institutions' (1956), 146.

[148] Jacob J Rabinowitz claims that the Egyptians copied this clause from the Jews whose recorded history goes beyond 4000 B.C. (Note the use of the word 'shekel' which is the unit of Israel's national currency).

conduct warranty whereby the insured undertakes to do or not to do certain things to minimise risk to the insurer. Such an undertaking by the vendor was no doubt to reassure the vendee of the safety of his purchase and the absence of the risk of loss, just as the insured (the promisor) in a promissory insurance warranty reassures the insurer of the absence of any risks other than the one subscribed to.

Subsequently, in the 17th Century when insurance began to play important roles in human transactions but had not been formally accepted in the Roman *ius communis* as a form of contract, it was often viewed as the insured selling his risk to the insurer, or the insurer selling indemnity to the insured such that the laws of sales influenced practice. In the former, the insurer paid with indemnity and in the latter, the insured paid with the agreed premium. However, the latter seemed to have predominated because of the need for certainty of the affirmations of the seller in early sales contracts. Accordingly, in contracts of insurance, once the insured had paid the premium the insurer would undertake that in the occurrence of the insured event, he would indemnify the insured first, and litigate later.[149] However, it all seemed to change in non-marine warranty with the celebrated case of *Chandelor v Lopus*,[150] in which the seller sold what he affirmed to be a bezar stone to the buyer, who paid 100 pounds. When it was discovered not to be a bezar stone, the buyer brought an action on the case. The Exchequer Chamber held:

> The declaration contains not matter sufficient to charge the defendant ... For the bare affirmation that it was a bezar-stone, without warranting it to be so, is no cause of action: and although he knew it to be no bezar-stone, it is not material; for everyone in selling his wares will affirm that his wares are good, or the horse which he sells is sound; yet if he does not warrant them to be so, it is no cause of action, and the warranty ought to be made at the same time of the sale.[151]

In this case, a precedence for four principles of sales warranty was established: 1) that a false affirmation without warranting was not actionable, 2) an affirmation without warranting was not material, 3) everyone in selling his wares will affirm that his wares are good; and 4) that the warranty ought to be made at the same time of the sale.

[149] See para 1.9 note 100.
[150] 79 Eng Rep 3 (KB 1604).
[151] Thomas J Schoenbaum, 'Warranties in the Law of Marine Insurance: Some Suggestions for Reform of English and American Law', 23 Tul Mar LJ 267 (1999) 273.

Precedence 1 and 3 bear striking resemblance to current practices whereby insurers never make warranties even though they may promise to indemnify the policyholder under conditions specified in the policy and yet elect to deny a claim or litigate first. Precedence 2 may have originated the inclusion of the controversial immateriality of a warranty (discussed later in this thesis)[152] or its breach in the MIA 1906 UK until the recent amendment in IA 2015; and precedence 4 may explain the ubiquitous presence of warranties in both insurance and sales contracts.

In this case, warranty was used in a caveat emptor manner for the exclusive benefit of only one party to a bilateral contract which is very similar with the unfairness of the modern law of insurance warranty in the non-marine context which tends to be in favour of the insurer. This is more so in the consumer context where there is hardly any form of equality between the insured and the insurer[153] and the insured is virtually helpless when the insurer fails to indemnify him, which is hypothesised in this thesis to be the main issue with insurance warranty.

2.5.2 The Marine Source

The practice of taking a pledge of the salesman's wife and children as collateral in marine adventures was evidently a primitive way of hedging capital from the risk of loss.[154] To that extent, it could be characterised as a crude form of warranty by way of emplacing a safeguard to the funds of the businessman. This may have originated the traditional marine insurance warranty regime as evidenced by the practice at the Lloyd's Coffee House in London in the 17th century whereby a person desiring insurance would first bring a paper describing the risks of a marine adventure he was contemplating. This description served as a collateral to the underwriter to help him assess the risk and decide whether to underwrite or not. The paper would be submitted to brokers in turns, who underwrote it in such amounts as they deemed fit after asking the applicant questions to ascertain some conditions, and if necessary, impose others of their own. This procedure was essential at the time because the condition and safety of the ship (the subject matter of the insurance) may not often be ascertainable due to its

[152] See Chapter 3 para 3.5.4.
[153] Nonetheless, it would seem that an unintended positive consequence emerged from this case law: it necessitated the inclusion of warranty in virtually all sales contracts to avoid buyers' suspicion of the genuineness of the products on offer, as well as evident tokens of quality and advertisements for their wares to attract more patronage.
[154] See para 2.5 above.

location - it may be at some distant port, or even at sea, and thus, inaccessible for inspection. This necessitated the underwriters having to rely on the representations of the applicant to elicit the necessary information that would help them assess the nature of risks they were to underwrite.[155] Therefore, it was only natural that the bona fides of those representations be authenticated by formal affirmations and/or promises and undertakings to that effect. A marine insurance warranty thus became an undertaking or promise by the applicant to do or not to do certain things, or whereby he affirmed or denied the existence of a particular set of facts concerning the seagoing vessel, especially its seaworthiness (i.e. ability to withstand the ordinary perils of the sea). The insurer's 'underwriting' on the piece of paper on the other hand implied only an undertaking to indemnify the insured on the occurrence of the specified event or risk insured against; therefore, the indemnity and the manner and the extent thereby agreed of its execution are of the essence of the contract. Thus, in practice, it is a paradox that whilst the insured is statutorily mandated to warrant his obligations not to increase the risk for the insurer no such warranty to indemnify the insured is extracted from the insurer. No specific reason is given for this, but it may be on the presumption that it is the desire of a prudent marine adventurer to arrive safely at destination and must formally commit to it such that any occurrence of risk not covered by a warranty is treated as an act of God which the insurer should be liable.[156] But a breach of any warranty automatically discharges the insurer from liability. This is considered fair in marine insurance in the sense that without a ship and the warranty thereof there cannot be a marine adventure, but unfair against the insured in non-marine insurance because the ship is not required for the contract to be made. Therefore, there is a need for more than an implied promise of the insurer regarding the indemnity of the insured in a contract of insurance.

2.6 Purpose of the Marine Insurance Warranty

In a marine adventure, it has been established that the primary purpose of the stakeholders – the owners of the ship and cargo, the insured and the insurer, and the public, is for the ship and other onboard items to arrive safely at destination. The marine insurance warranty is conceived on that premise, especially in the early era when most of the insurers were the marine merchants

[155] It would have been foolish to underestimate a risk and be unable to pay the claim on its occurrence, the type of situation that was known to have bankrupted many 'reckless' insurers in that era.
[156] See JP Van Niekerk, *The Development of the Principles of Insurance Law in the Netherlands from 1500 to 1800 Volume II* (Juta & Co, 1998) 985 n 446.

themselves. This is evidenced by the existence of such archaic warranties such as those of convoy, neutrality,[157] nationality,[158] and seaworthiness.[159]

Seaworthiness apart, one of the ways in which ships tried to meet their capabilities to encounter the perils of piracy at sea as well as prevent enemy capture in time of war was to sail with a convoy under the protection of armed escorts provided by the Admiralty.[160] Due to the many European wars of the 18th and 19th centuries, and their consequent potential to jeopardise the safe arrival of the ship at destination it was usual to have warranties of convoy in contracts of marine insurance, which required exact compliance and whose breach resulted in the automatic discharge of the insurer from liability.[161] Thus, a breach of a warranty of convoy was tantamount to the ship being unseaworthy as she would most certainly be lost to the enemy, pirates, or privateers at sea. The same applies respectively to the warranties of neutrality[162] and nationality. The warranty of neutrality provides that where insurable property, whether ship or goods, are transported, they shall carry the necessary papers to establish their neutrality on international waters while the warranty of nationality states that '[t]here is no implied warranty as to the nationality of a ship, or that her nationality shall not be changed during the risk.'[163] The purpose was to guarantee unhindered navigation and safe passage on international waters during hostilities. Currently, the United Nations Convention on Laws of the Sea (UNCLOS) which guarantees free passage of all ships even in times of hostilities[164] may have rendered the statute obsolete.

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[157] Section 36 MIA 1906 (UK) provides: (1) Where insurable property, whether ship or goods, is expressly warranted neutral, there is an implied condition that the property shall have a neutral character at the commencement of the risk, and that, so far as the assured can control the matter, its neutral character shall be preserved during the risk. (2) Where a ship is expressly warranted 'neutral' there is also an implied condition that, so far as the assured can control the matter, she shall be properly documented, that is to say, that she shall carry the necessary papers to establish her neutrality, and that she shall not falsify or suppress her papers, or use simulated papers. If any loss occurs through breach of this condition, the insurer may avoid the contract.

[158] Section 37 MIA 1906 (UK) provides: There is no implied warranty as to the nationality of a ship, or that her nationality shall not be changed during the risk.

[159] Section 39 MIA 1906 (UK) provides: (1) In a voyage policy there is an implied warranty that at the commencement of the voyage the ship shall be seaworthy for the purpose of the particular adventure insured.

[160] JP Van Nierkerk, *Insurance Law in the Netherlands, 1500-1800 Vol II* (Juta, 1998) 970-972.

[161] JP Van Nierkerk, *Insurance Law in the Netherlands, 1500-1800 Vol II* (Juta, 1998) 990.

[162] See *Steel v Lacy* (1810) 3 Taunt 258, 128 ER 113 where it was decided that a ship was not seaworthy unless she was provided with the documents necessary to prove her neutrality.

[163] MIA 1906 section 37.

[164] See United Nations Convention on the Law of the Sea Article 87 (1) (a) Freedom of Navigation; Article 90 (Right of Navigation).

2.7 The 'All-Important' Warranty of Seaworthiness of the Ship

It is an established fact that with the peculiar nature of the sea,[165] the ship or marine vessel's reasonable fitness in all respects to encounter the ordinary perils of the seas of the adventure insured,[166] that is, its seaworthiness, is of the essence of every marine contract. In that regard, the warranty of seaworthiness refers to the irreducible minimum requirement that the ship be in a seaworthy[167] state at the commencement of the contract of marine insurance, or there would be no valid contract. In *Lyon v Mells*[168] Lord Ellenborough CJ justified it thus:

> It is a term of the contract … implied by law, that his vessel is tight and fit for the purpose or employment for which he offers and holds it forth to the public: it is the very foundation and immediate substratum of the contract that it is so: The law presumes a promise to that effect on the part of the carrier without any actual proof; and every reason of sound policy and public convenience requires it should be so.

Seaworthiness is of such significance in the marine insurance contract[169] that it is statutorily implied in every voyage policy.[170] It is construed as an absolute warranty that the carrying vessel must, at the time of sailing with the goods, have that degree of fitness as regards both the safety of the ship and the safe carriage of its cargo which an ordinarily prudent owner would require his vessel to have at the commencement of the voyage, having regard to the probable circumstances of that voyage and its nature.[171] A failure of this requirement in whatever guise invalidates the contract. No other branch of insurance is so dependent on the essentiality of one principle for its validity as marine insurance is on the seaworthiness warranty. Needless to say,

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[165] The peculiarity of the sea consists in that heavier than water floating objects on its surface could potentially sink to the bottom and perish in a storm or marine accident.
[166] Section 39 (4) MIA 1906 UK.
[167] The ship's seaworthiness also includes its physical structure and its ability to carry the cargo and goods for which it is being chartered, that is, its cargo-worthiness and its overall security. Furthermore, it is a requirement that the ship and her furniture be sufficient for the voyage, and that the ship also be furnished with sufficient persons of competent skill and ability to navigate her.
[168] Lyon v Mells, (1804) 5 East 428.
[169] See JP Van Niekerk, *The Development of the Principles of Insurance Law in the Netherlands from 1500 to 1800 Volume II* (Juta & Co, 1998) 980 where he postulates that it is not improbable that seaworthiness warranty found such general acceptance by merchants in the medieval era that in the course of time they came to be implied into such contracts.
[170] Section 39 (1) MIA 1906 UK provides that in a voyage policy there is an implied warranty that at the commencement of the voyage the ship shall be seaworthy for the purpose of the particular adventure insured.
[171] It must be stressed however that it goes without saying that the ship does not sail itself. Therefore, the sailors on board the ship are the most essential factor of seaworthiness.

there is no such requirement in non-marine insurance. Therefore, when the marine based principles of the seaworthiness warranty are admitted to non-marine insurance, invariably, many principles of the contract law do not sit well, and instead of a succour, the insurance becomes a seeming burden to the insured, more so as it is a matter of public policy.

2.7.1 Relationship of Seaworthiness with the Onboard Cargo

It is to be noted though that the cargo or other items laden on the ship are independently insurable on terms not necessarily related to marine insurance. Nevertheless, the insurance of the cargo or onboard items will be affected by the ship's unseaworthiness for the simple reason that their carriage in a marine adventure depends on the ship being seaworthy and its safe arrival at the destination. Therefore, the breach of the ship's seaworthiness warranty necessarily results in voiding the other insurances of the onboard cargoes and goods. This may have given rise to the questionable principle that the breach of any warranty in a policy voids the entire contract. However, when strict compliance with the rules of warranty of seaworthiness of the ship and the nullification of the contract for breach are interposed upon the rule that there is no implied warranty that the cargo and goods are seaworthy, it becomes apparent that the warranties on those cargoes and goods are 'indivisible' from the warranty of seaworthiness of the ship. Again, there is no reason for this principle to apply in non-marine insurance.

2.7.2 Unseaworthiness as a Basis for Avoidance of Contract

The implications of the warranty of the seaworthiness of a ship in the marine insurance policy must be seen against the well-established fact that an insurer was not liable for loss or damage caused by an inherent vice and the further consideration that the insured could, at that time, be taken to be fully acquainted with the condition of his ship on her departure and could ensure that she was not sent to sea in an unseaworthy state. The unseaworthiness of the ship avoided the insurance contract because the position was deemed to be tantamount to no ship at all, and the defect of unseaworthiness was not the result of an external misfortune or an unavoidable accident arising from the perils of the sea of which the insurer bore the risk.[172] The ability of the ship to perform her voyage was of the essence of the contract and if she were incapable, there was a failure of consideration, and the contract was void. This was generally accepted in marine adventures, and it became implied in practice. Accordingly, the existence of the implied

[172] See JP Van Niekerk, *The Development of the Principles of Insurance Law in the Netherlands from 1500 to 1800 Volume II* (Juta & Co, 1998) 988.

warranty of seaworthiness also had a significant influence on the matter which the English insured had to disclose to his insurer. Because, in the absence of a specific enquiry by the insurer for such information, it was impossible for the insured to disclose to his insurer all the facts which may have been material for that insurer to decide whether to underwrite the policy and, if so, at what premium. The existence of this warranty, as that of all other warranties, was taken to delimit the insured's duty of disclosure. The insured was therefore not required to disclose any circumstances which had a bearing on the seaworthiness of his ship or of the ship on which he loaded his goods; and because both parties were sea merchants this practice was admitted under the marine insurance principle of utmost good faith.

2.7.2.1 Utmost Good Faith

The utmost good faith principle (which was subsequently codified in the MIA 1906 (UK)[173] was to the effect that a contract of marine insurance was based upon the utmost good faith, and, if the utmost good faith was not observed by either party, the contract may be avoided by the other party.' Accordingly, the insured must disclose to the insurer, before the contract was concluded, every material circumstance which was known to him, and he was deemed to know every circumstance which, in the ordinary course of business, ought to be known by him. The insurer may avoid the contract if the assured failed to make such disclosure. It was on this basis that in *Carter v Boehm*[174] Lord Mansfield said:

> Insurance is a contract based upon speculation. The special facts, upon which the contingent chance is to be computed, lie most commonly in the knowledge of the insured only; the underwriter trusts to his representation and proceeds upon the confidence that he does not keep back any circumstance in his knowledge, to mislead the underwriter into a belief that the circumstance does not exist, and to induce him to estimate the risk as if it did not exist. Good faith forbids either party by concealing what he privately knows, to draw the other into a bargain from his ignorance of that fact, and his believing the contrary.[175]

[173] Section 17 MIA 1906 (UK).
[174] [1766] 3 Burr 1905, [1766] EngR 13, (1766) 3 Burr 1905, (1766) 97 ER 1162 (C).
[175] Philip Rawlings, 'Bubbles, Taxes, and Interests: Another History of Insurance Law', Oxford Journal of Legal Studies, Vol 36, No 4 (2016) 824.

2.7.2.2 Non-Disclosure and Misrepresentation

The dictum in *Carter*[176] above also established the disclosure principle whereby if the insured failed to make such disclosure, the insurer may avoid the contract. In *Pawson v Watson*,[177] Lord Mansfield stated whilst trying to distinguish a warranty from a representation:

> There is no distinction better known to those who are at all conversant in the law of insurance than that which exists between a warranty or condition which makes part of a written policy, and *a representation of the state of the case*. Where it is a part of the written policy, it must be performed as if there be a warranty of convoy, there it must be a convoy; *nothing tantamount will do or answer the purpose*; it must be strictly performed, as being part of the agreement; for there it might be said *the party would not have insured without convoy*. But as, by the law of merchants, all dealings must be fair and honest, *fraud infects and vitiates every mercantile contract*. Therefore, if there is fraud in a representation, it will avoid the policy, as a fraud, but not as a part of the agreement. So, there cannot be a clearer distinction than that which exists between a warranty which makes part of the written policy, and *a collateral representation, which, if false in a point of materiality, makes the policy void*.[178]

Similarly, in *Fillis v Brutton*,[179] Lord Mansfield stated:

> In all insurances it is essential to the contract that the assured should represent *the true state of the ship* to the best of his knowledge. *On that information the underwriters engage*. If he states that as a fact which he does not know to be true, but only believes it, it is the same as a warranty. *He is bound to tell the underwriters truth*.[180]

The combined reading of the italicized phrases in the above dicta is that there has to be an absolutely true, accurate, and material representation of the state of the insured risk or the subject matter of the insurance devoid of any fraudulent intent for a contract to validly come

[176] [1766] 3 Burr 1905, [1766] EngR 13, (1766) 3 Burr 1905, (1766) 97 ER 1162 (C).
[177] (1778), 2 Cowper, 785.
[178] WR Vance, 'The History of the Development of the Warranty in Insurance Law', 20 Yale LJ 523 (1911) 533.
[179] (1782) Park Ins. (6th ed.), 250.
[180] WR Vance, 'The History of the Development of the Warranty in Insurance Law', 20 Yale L.J. 523 (1911) 531.

into being, and that whereas a representation has to be material and not written on the policy, a warranty is the very basis of the insurance and has to be complied with or there is no contract.

The further implications are that first, a warranty is the same as a condition which forms part of a written policy; and second, a materially false representation is equivalent to a fraud and vitiates a policy of insurance. The corollary of the latter would be that a materially true representation has the force of a warranty, especially if written on the policy.[181] This implies that under Lord Mansfield's case law in *Pawson*,[182] any statement written on the policy, irrespective of its materiality or relevance to the risk, is a warranty. If it is a warranty, the insurer would not have insured without it and it is therefore the basis of the contract; therefore, it must be literally true and accurate, or the contract will be vitiated.

It is to be noted that in that era, there was symmetry in information and knowledge of the insurance contract between the insured and the insurer because the insurers were themselves marine merchants who had opted to underwrite risks for their fellow merchants for a fee. Thus, the insurer also knew virtually everything that the insured knew with regards to the making of a marine insurance contract.[183] Accordingly, during litigations, rather than an implied condition of the contract, the courts looked upon the truth or untruth of a representation as involving a question of fraud on the part of the insured. Therefore, in the marine insurance perspective, any untruthful pre-contractual representations of the insured respecting the state of the ship whether due to the honest mistake of the insured or not might prove just as injurious to the underwriter who relied on it as if it had been fraudulently false and should enjoy the same remedy as breach

[181] This seems to explain why insurers were allowed to get away with a dubious basis of the contract whereby they incorporate the insured's pre-contractual answers in a proposal form as part of the policy thereby converting them into warranties.

[182] (1778), 2 Cowper, 785.

[183] See JP Van Niekerk, 'Fragments from the History of Insurance Law,' 13 S. Afr. Mercantile L.J. 102, 120 (2001) 109 where he explains that given the relatively small size of markets at the time, and the fact that merchants insuring one another were very likely in competition, it was not surprising that when they were making the proposal for insurance coverage they would be reluctant to disclose information to their fellow merchant-underwriters about the nature and timing of the cargoes they were expecting or were consigning. In today's language, they would likely be said to be protecting their 'trade secrets'. Needless to say, this exacerbated the practical difficulties merchants experienced to have their risks covered in full. To ease those impediments, early laws imposed a duty on the insured to make representations to the insurer which were to be included in their draft proposals for the underwriters' appraisal and approval. The aim was to furnish the insurer with sufficient information and description of the risk to be insured such as the identity of the parties, the nature of the cargo to be insured, and the circumstances of its carriage. Although these were all representations, they were at the same time the set of facts required to make existing fact warranties.

of (seaworthiness) warranty. The problem however is that this perspective is also admitted to non-marine insurance.

In a more recent case before the enactment of CIDRA 2012 and IA 2015, the good faith based disclosure principle was tested in *Pan Atlantic Insurance Co Ltd and Another v Pine Top Insurance Co Ltd*[184] in which the plaintiff had written long term (tail) insurance.[185] The defendant came to reinsure it. On a dispute there were shown greater losses than had been disclosed, and that this had been known to the Plaintiff. It was held that 'material circumstance' which would require disclosure under the Act (MIA 1906 UK) is such circumstances as would affect an insurer's mind, and it must operate as an inducement to the insurer to enter the policy for it to entitle him to avoid a contract of insurance or reinsurance on the ground of non-disclosure. The insurer must show both that the fact not disclosed was material, and that its non-disclosure induced the contract. To be material a fact did not have to have a decisive influence on the mind of the prudent underwriter. The test is as stated in MIA 1906 subsections 18 (2)[186] and 20 (2)[187] which relate to the common law principles of non-disclosure and misrepresentation respectively. The material non-disclosure or misrepresentation must induce the contract. It is not sufficient that the non-disclosure or misrepresentation is material: 'there is to be implied in the Act of 1906 a qualification that a material representation will not entitle the underwriter to avoid the policy unless the misrepresentation induced the making of the contract, using 'induced' in the sense in which it is used in the general law of contract' and 'in practice the line between misrepresentation and non-disclosure is often imperceptible.'

A 'material circumstance' which might justify an insurer's avoidance of a policy was one that would have an effect on the mind of the prudent insurer in estimating the risk; but, for a circumstance to be material, it was not necessary that it should have a decisive influence (such that but for the misrepresentation or non-disclosure the insurer would have declined the risk or accepted it only on different terms). But before an underwriter could avoid for non-disclosure he had to show that he had actually been induced by the non-disclosure to enter into the policy on the relevant terms (i.e. that if the full facts had been disclosed he would not have entered

[184] [1995] 1 AC 501, [1994] 3 All ER 581, [1994] 2 Lloyds Rep 427, [1994] 3 WLR 677.
[185] Accessed online at https://bila.org.uk on 27 June 2022.
[186] Section 18 (2) MIA 1906 (UK) stated: Every circumstance is material which would influence the judgement of a prudent insurer in fixing the premium, or determining whether he will take the risk.
[187] Section 20 (2) MIA 1906 (UK) stated: A representation is material which would influence the judgment of a prudent insurer in fixing the premium or determining whether he or she will take the risk.

into it or would have done so only on different terms). Even where there is non-disclosure of a material fact, if this does not in fact influence the judgment of the actual underwriter, avoidance is not justified.[188]

It is to be noted that this outcome would not have been possible in the precodification era. The combined effect of the principles of utmost good faith,[189] disclosure[190] and representations,[191] in the marine context transforms into enormous advantages to the insurers in the non-marine context especially when such disclosures and representations are declared to be the basis of the contract. Therefore, the *Pan Atlantic*[192] case tends to support Professor Atiyah's claims that common law doctrine is catching up with reality, and that judges have started to realize that in the modern bureaucratic state businessmen value flexible business relations more highly than fixed legal rights.[193]

2.8 The Challenge of Application of Marine Principles to Other Insurances

In the non-marine perspective, Lord Mansfield's dictum in *Carter v Boehm*[194] that *the special facts, upon which the contingent chance is to be computed, lie most commonly in the knowledge of the insured only*[195] would be inaccurate because in non-marine insurance, it is possible to have symmetry in information and knowledge of the subject matter of the insurance between the parties. Unlike the ship, a vehicle or house for instance, could be available for the insurer's inspection during which he may extract all the information he requires to underwrite. Thus, the special facts upon which the contingent chance is to be computed does not lie solely in the knowledge of the insured. Nevertheless, Lord Mansfield established in this case the essence of precontractual representations in contracts of insurance, some of which were often the subjects

[188] In the general law it is beyond doubt that even a fraudulent misrepresentation must be shown to have induced the contract before the promisor has a right to avoid, although the task of proof may be made more easy by a presumption of inducement.
[189] Section 17 MIA 1906 UK (now omitted by virtue of Insurance Act 2015 (c 4), sections 14 (3) (a), 23 (2).
[190] Section 18 (1) MIA 1906 UK (now omitted by virtue of Insurance Act 2015 (c 4), sections 21 (2), 23 (2).
[191] Section 20 MIA 1906 UK (now omitted by virtue of Insurance Act 2015 (c 4), sections 21 (2), 23 (2).
[192] [1995] 1 AC 501, [1994] 3 All ER 581, [1994] 2 Lloyds Rep 427, [1994] 3 WLR 677.
[193] See also Mactavish 2011 Report cited in Special Public Bill Committee Report at page 91 where it is stated: 'In order to avoid unfairness and injustice, Judges routinely do not apply the law as it in fact is.'
[194] [1766] 3 Burr 1905, 97 ER 1162.
[195] Italics inserted by researcher for emphasis.

of warranties in the policy. Thus, the high degree of importance accorded the recitals of past and present facts, which must be true, and are declared to be the basis of the contract, now found in almost every policy of non-marine insurance in some jurisdictions, is not only unnecessary it is lopsided in favour of the insurer.

Also, in non-marine insurance, there is apparently no single incontrovertible essential condition of the subject matter of insurance that is comparable to the seaworthiness of the ship with which to validly bind the insured so that the insurer would enjoy the benefits of exact compliance and automatic discharge upon breach.

2.8.1 The Incongruity of the Immateriality Principle

Lord Mansfield's case law in the leading case of *De Hahn v Hartley*[196] that '[i]t is perfectly immaterial for what purpose a warranty is introduced; but being inserted, the contract does not exist unless it be literally complied with', and which may have given rise to the seeming erroneous conclusion that a warranty need not be material to the risk insured,[197] is incongruous in non-marine insurance. In analysing this case the phrase '[n]ow in the present case, the condition was the sailing of the ship with a certain number of men, which not being complied with, the policy is void' is often disregarded. Lord Mansfield's reference to the number of men in this case was a clear reference to the seaworthiness of the ship[198] (an implied warranty), which was clearly material to the contract,[199] and which had been breached. Thus, the immateriality in the dictum was with respect to exact compliance, not the warranty itself. The apparent inflexibility of the law relating to insurance warranties during Lord Mansfield's time must be seen against the established fact that warranties were then largely if not exclusively

[196] (1778) 1 T R 343.
[197] Again, as indicated earlier, the materiality referred to by Lord Mansfield in *De Hahn v Hartley* (1778) 1 T R 343 was with respect to the ship, and invariably, seaworthiness, which was held to be an implied warranty and therefore precluded any inquiry upon that point including immateriality.
[198] Seaworthiness includes the number of personnel to sail the ship. If a ship sailed without a sufficient crew, she must be taken as being incapable of performing her voyage. See See JP Van Niekerk, *The Development of the Principles of Insurance Law in the Netherlands from 1500 to 1800 Volume II* (Juta & Co, 1998) 989.
[199] See JP Van Niekerk, *The Development of the Principles of Insurance Law in the Netherlands from 1500 to 1800 Volume II* (Juta & Co, 1998) 992 note 493 where it is stated that there is no instance in the eighteenth-century English case law where a dispute between the insurer and the insured related clearly to an immaterial fact, ie, a fact which had no bearing on the risk taken over by the insurer and which could not potentially increase the risk of loss or damage.

concerned with matters which could potentially influence and increase the risk and cause a loss insured against, that is, the warranties concerned matters material to the risk.

This can be contrasted with the non-marine case of *Dawsons Ltd v Bonnin*[200] in which a furniture removal firm took out insurance on a lorry. The firm filled out a proposal form, giving its business address in central Glasgow. When asked where the lorry was usually parked, it inadvertently wrote 'above address'. In fact, the lorry was usually parked in the outskirts of Glasgow where it was destroyed by fire. The firm argued that this fact was not material: it did not increase the risk and probably reduced it. However, the form contained a declaration that the proposal 'shall be the basis of the contract'. The House of Lords held that it did not matter whether the mistake was material; it mattered only that (the basis of the contract clause) warranty had been breached and therefore the insurer could refuse all claims under the policy. Unfortunately, their lordships appear not to have seen the incongruity that if where the lorry was garaged was not material then there would have been no need for it to have been a basis of the contract in the first place let alone its breach being at issue.

2.8.2 Contracting Out

In English law, the parties to an insurance contract were from early on in principle free to insert into their contract whatever lawful terms they could agree upon. This remained the case even after the codification of the MIA 1906 (UK).[201] Not only does the Act not prescribe any form of policy but its provisions are largely permissive, for the most part regulating the legal position in the absence of any agreement to the contrary. This permitted the parties to negotiate and agree on specific situations which were not of a general nature as it was not possible to have a statutory provision that covers every circumstance. However, in non-marine insurance, insurers now with the aid of proposal forms which they themselves have drafted, turn all representations by the insured in those forms into warranties through basis of the contact clause.[202] Warranties are no longer concerned solely with the insured's future conduct and aimed at controlling that conduct and the risk during the currency of the contract and individually inserted into insurance policies to the specific knowledge of the insured or his broker. Increasingly, too, the warranty

[200] [1922] 2 A C 413.
[201] Section 87 (1) states: (1) Where any right, duty, or liability would arise under a contract of marine insurance by implication of law, it may be negatived or varied by express agreement, or by usage, if the usage be such as to bind both parties to the contract.
[202] Section 35 (1) deals with express warranties and provides that they may be in any form of words from which the intention to warrant is to be inferred.

technique has come to be used in respect of matters not having any direct bearing on the risk taken over by the insurer and that, combined with the earlier established rule that a causal link between the breach of the warranty and the actual loss was not required, resulted in large-scale abuse of the technique to the detriment of the insureds.[203]

2.8.3 Irremediability of Breach

In marine insurance it is no defence for the insured that the breach of seaworthiness was remedied and the warranty again complied with before the loss and, by implication, that the breach could and did not cause or contribute to the occurrence of the loss in question because seaworthiness is *ab initio* implied by law and public policy;[204] and although there is no non-marine implied insurance warranty the principle is applied nonetheless.

From the foregoing, it is evident that the general application of the principles of marine insurance warranty to non-marine insurance amounts to a false analogy by lifting it from a context in which it has a wholly different meaning. This makes for incoherence and uncertainty in the law. A rule of tight construction, devised for astute bargains between equals, and adapted to the protection of an infant industry, was slavishly followed which has given rise to warranty in insurance enthroning a slew of one-sided agreements.'[205]

2.9 The Codified Marine Insurance Warranty

By statute, section 33 (1) MIA 1906 characterizes a marine insurance warranty as 'a promissory warranty' which, by virtue of subsection (2), may be express or implied. Therefore, the codified insured's undertaking that some particular thing shall or shall not be done…, or his affirmation or 'negativing' of the existence of a particular state of facts which when expressed in any form of words from which the intention to warrant is to be inferred, written upon the policy, or contained in some document incorporated by reference into the policy, are all promissory. This is the substantive contract law of warranty in most common law jurisdictions whose insurance laws are based on the MIA 1906 (UK) which is also held to apply to other classes of insurance.

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[203] JP Van Niekerk, *the Development of the Principles of Insurance in the Netherlands from 1500 to 1800 Volume I* (Juta & Co Ltd, 1998) 987.

[204] The imposition of an implied warranty of seaworthiness of the ship, excluding the insurer's liability in the circumstances already described, is harsh not only on an innocent consignor of insured cargo but also on an insured ship owner himself who is usually unaware of the precise condition of his ship on her departure.

[205] See Edwin Patterson, 'Warranties in Insurance Law,' 34 Colum L Rev (1934) 595 where he states:'

The interpretation of this statute has given rise to a variety of meanings to 'promissory warranty' which begs the question: Is a promissory warranty the existence of a particular state of facts, or an undertaking that some particular thing shall or shall not be done? Certainly, the two cannot be the same thing. Yet, statutorily, they are both characterised as promissory. Nevertheless, in practice, two distinct forms of warranty have emerged: the first is in the form of past or present facts usually derived from the insured's affirmation or 'negativing' of the existence of a particular state of facts, on which insurers rely to make basis of the contract clause warranties; and the second is in the form of future conduct or 'promissory' warranty which is derived from the insured's undertaking that some particular thing shall or shall not be done, which insurers use to control the insured's conduct with respect to the insured risk. This is the point where marine and non-marine warranties diverge. In the former a warranty is made on things as the stand, not as they will continue to be,[206] whereas in the latter, the reference to future conduct appears to be with a view of the literal meaning of the adjectival derivative of the word 'promise' whose execution is futuristic, and it seems to have gained more traction in practice and has virtually become the dominant aspect of non-marine insurance. In the marine context, Lord Mansfield in *Eden and Another v Parkinson*[207] stated of a warranty: '…The insured tell the state of the ship "then", *and the insurers take upon themselves all future events and risks*[208]… By an implied warranty every ship must be tight, staunch, and strong; but is sufficient if she be so at the time of her sailing. She may cease to be so in twenty-four hours after her departure, and yet the underwriter will continue liable…*the warranty is that things stand so at the time*; not that they shall continue.'[209] Also, Justice Buller averred in the argument in *Saloucci v Johnson*[210]: '*I do not agree with the counsel who contend that the property must*

[206] See *Eden and Another v Parkinson.* Cited in James Allan Park, *A System of Marine Insurance*, (Boston, 1799) 351, Dougl 705.
[207] Cited in James Allan Park, *A System of Marine Insurance*, (Boston, 1799) 351, Dougl 705. It was a case in which the ship in question sailed from L'Orient on the voyage insured on 11 December 1780, having the insured cargo on board. Both the ship and cargo were warranted neutral property at the time of the ship's departure from L'Orient, and so continued until 20 December 1780, on which day hostilities having begun between the English and the Dutch, the Dutch ceased to be a neutral power, and the ship and the cargo ceased to be neutral property. The ship was captured on 25 December 1780 and condemned as lawful prize in the Admiralty court on 19 February 1781. The plaintiff brought this action against the defendant.
[208] Italics added by researcher for emphasis.
[209] See James Allan Park, *A System of Marine Insurance* (Boston, 1799) 351.
[210] Cited in James Allan Park, *A System of Marine Insurance*, (Boston, 1799) 352.

continue neutral during the whole voyage: if it be neutral at the time of sailing and war break out the next day, *the underwriter is liable*.'

The implication here is that in marine insurance, the warranty of seaworthiness of the ship is that 'things stand so at the time; not that they shall continue'; and the underwriter is liable for all future events and risks. Therefore, for this principle to be held to apply to other classes other than marine insurance the warranties thereof must be based on the principles of seaworthiness of the ship; otherwise, they would be incongruent. This raises questions on the appropriateness of the practice of subscribing insurance policies in non-marine insurance upon which the insured loses his indemnity on a purported breach on the basis that the risk has 'changed' or that the compliance with the warranty is a condition precedent to the attaching of the risk.[211] These policies rely on the ingredients and particulars of the seaworthiness warranty, but reject the seaworthiness principle that you 'tell the state of the ship "then", and the insurers take upon themselves all future events and risks.' Arguably, it is the most contentious area in insurance law because absent the insurer taking upon himself all future events and risks, insurance would be just like any other contract, and there would be no need for the insured to be statutorily required, in addition to his collateral representation, to pay premium before the inception of the contract.[212]

Indeed, it has been opined that the application of marine insurance principles of seaworthiness warranty to non-marine insurance amounts to endowing the term 'warranty' with a false analogy by lifting it from a context in which it had a wholly different meaning.[213] Significantly too, the promissory aspect of a warranty in an insurance contract plunges it deep into the general problems of the nature of contractual and promissory liability, for several reasons not least because of the very purpose of the insurance contract itself.

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[211] See Lord Goff's dictum in The Goodluck [1992] 2 Lloyd's Rep 540.

[212] See section 52 MIA 1906 (UK) where it is stated '…and the insurer is not bound to issue the policy until payment or tender of the premium.'

[213] See Edwin Patterson, 'Warranties in Insurance Law,' 34 Colum L Rev (1934) 595 where he states: 'The law of insurance warranties is a product of some typical factors which have made for incoherence and uncertainty in Anglo-American law. Lay draftsmen endowed it with a false analogy by lifting the term warranty from a context in which it had a wholly different meaning. A rule of tight construction, devised for astute bargains between equals, and adapted to the protection of an infant industry, was slavishly followed by a timid judiciary which lacked the courage and resourcefulness to devise a technique for overhauling one-sided agreements.'

2.10 The Contractual Promissory Warranty

Prior to its amendment by the IA 2015 Section 33(1) to (3) of the MIA 1906 (UK) defines a marine insurance warranty as: '…a promissory warranty, that is to say, a warranty by which the assured undertakes that some particular thing shall or shall not be done, or that some condition shall be fulfilled, or whereby he affirms or negatives the existence of a particular state of facts ... a condition which must be exactly complied with … If it is not so complied with, then, subject to any express provision in the policy, the insurer is discharged from liability as from the date of the breach of warranty…' A contractual warranty thus obligates the insured's compliance in return for the insurer's promise of liability on the occurrence of the insured risk. However, the insurer's liability appears not to sit well in practice.

2.10.1 Imprecise Promise-Based Liability

In his book *The Rise and Fall of Freedom of Contract* Professor Atiyah states that promise-based liability holds a person only to those obligations he has freely assumed; and that this promise principle to contract law is not a timeless, logically necessary implication of the nature of contractual liability, but rather is the result of intellectual and social movements that gathered momentum in the late eighteenth century and became dominant by the mid-nineteenth century.[214] It is an established fact that the MIA 1906 is a codification of the case laws of that era which was at variance with the practice of the customs and traditions of merchant under the Law Merchant whose contractual obligations were seen as imposed not primarily by the parties to a transaction, but rather by the community's shared sense of fairness.[215] These were benefit-based and reliance-based. In other words, the promisor's liability was relied upon by the promisee as a benefit of the contract.

The benefit-based liability are contractual obligations imposed by the community's shared sense of fairness to force compensation for, or return of, a benefit conferred during their relationship, whilst the reliance-based liability on the other hand were imposed to compensate for harm one contracting party had suffered by relying on the other party's implicit or explicit assurances. Both worked to protect the interests of contractual parties such that the weaker party was virtually guaranteed of his contractual benefits. The reasoning among merchants had

[214] See Charles Fried, Book Review: *The Rise and Fall of Freedom of Contract* Oxford: Clarendon Press, (Oxford University Press, 1979) 1858.
[215] PS Atiyah, *The Rise and Fall of Freedom of Contract* (1979) 37, 167-168.

been that in so highly speculative a contract as insurance the risk proposed must be accurately defined, and the insured indemnified as the underwriter relies much upon the warranties made by the insured and expressly written in the policy for information defining the risk whilst the insured pays premium in advance having not yet incurred any loss. Combined with the principle of utmost good faith,[216] warranties were then treated as conditions that must be strictly performed for the validity of insurance contracts. This way the interest of the disadvantaged party (such as a consumer-insured) was equitably protected, especially as most societal mores and norms of Europe in medieval times were governed by the religious codes of the Church, which had a strong influence on cultural and commercial practices.[217] Seemingly, the religious codes in that era were regarded as superior to any other and were strictly adhered to as the commandments of the Almighty God which seemed to have conferred a special feature on the Law Merchant whereby the traders adjudicated their disputes in merchant courts, the judges of which were 'elected' by the merchants of market or fair from among their numbers.[218] For several centuries these merchant courts adequately disposed of litigations that arose among merchants, and the preamble to the first statute passed by the British Parliament that recognized the practice of insurance contained a striking tribute to the honesty and fairness which characterized the dealings of merchants in all contracts of insurance.[219] It was generally understood that the common law courts, which did not recognize the quasi-international

[216] See *Carter v Boehm* [1766] 3 Burr 1905.

[217] This could be borne out in the wording of a contract covering the insurances of Flemish cloth and other goods effected by Francesco del Bene & Co of Florence in 1347 which opened with the words 'In the name of God, Amen.' In England, a contract of insurance in 1548 covering a cargo of English cloth ran thus: 'In the name of God, Amen. The 26th day of November 1548. Tomaso Cavalcanti and Giovanni Girale and Company of London make themselves to be assured by the order and account of Paul Ciceny of Messina upon the ship called Santa Maria of Porto Salvo…' There is also the 1555 policy of de Salizar, which stated that 'if God's will be that the said ship shall not well proceed… the parties to the policy promise to remit it to honest merchants and not to go to the law'.

[218] At first, the enforcement of insurance contracts was almost entirely informal. Whether it was in Italy, Belgium, the Netherlands, or England, the principle was the same. Although most policies were issued in writing in 15th-century Venice, some insurances were made orally, relying almost wholly on the personal integrity and religious adherence of the participants to the extent that it would be agreed that each party would choose a reputable merchant as an arbitrator in the event of a dispute; the two arbitrators would choose a third; and both parties would agree to abide by a majority decision of the three thus chosen. See Emily Kadens, 'The Medieval Law Merchant: The Tyranny of a Construct' Journal of Legal Analysis, Volume 7, Issue 2, (OUP, 2015), pp 251–289. Accessed online at https://doi.org/10.1093/jla/lav004 on 10/12/18.

[219] JL Longnaker, History of Insurance Law, 30 U Kan City L Rev 31, 55 (1962) 45.

customs of merchants, afforded no fit forum for the determination of causes between merchants.[220]

However, there is contention on the conception of the promise principle on the basis that to claim compensation for harm suffered by relying on someone, a person must show that his reliance was somehow justified, and absent this requirement a person could thrust obligations on others willy-nilly by merely asserting that he will rely - or, worse yet, that he has relied - on them to perform some burdensome act.[221] The mere expression of an intention to perform the act does not in itself justify reliance. An intention can always be changed - it is not a pledge to bind oneself. It would seem this was also the view of most common law judges of the pre-codification era; otherwise, how does one explain the outcomes of most insurance litigations which tended not to hold the insurers to their promises of indemnity, and which seemed to have been the basis of the forfeiture laws of the era which were subsequently codified in the MIA 1906? For instance, by the end of the eighteenth century, it was clearly established in English insurance law that an undertaking by an insured in the form of a warranty in the insurance contract, inserted by an insurer had to be literally and exactly complied with failing which the insurer is automatically discharge from liability. Yet, there was no corresponding strictness on executing indemnity for the insured. Even a minor immaterial or temporary breach of such a warranty avoided the contract and absolved the insurer from liability. It was irrelevant, furthermore, whether or not the breach in fact increased the insurer's risk, it was equally irrelevant whether or not it was causally related to the loss in question. Unfortunately, this is the operative substantive contract law of warranty of most common law jurisdictions including Nigeria who have not successfully reformed the traditional warranty.

The major defect of this contention, however, is that it falls short of the requirement for certainty in commercial transactions[222] because if one's intention does not justify reliance by

[220] Insurance arrived in medieval England later than in other important commercial centres of Europe. At that time, English common law had already established itself as the de facto arbiter in personal and business disputes. Thus, the universality of the Law Merchant in England was challenged by domestic lawyers, who insisted that the Law Merchant should only be followed if it was subordinated to the common law of England. This meant that merchant practices would no longer be the sole determinant of acceptable behaviour in business transactions.

[221] Charles Fried, The Rise and Fall of Freedom of Contract, 93 Harvard Law Review (1980) 1863.

[222] See *Golden Strait Corporation v Nippon Yusen Kubishka Kaisha* [2007] UKHL 12; [2007] 3 All ER 1 (HL) para 23 where Lord Bingham once wrote – albeit in dissent – that 'the importance of certainty and predictability in commercial transactions has been a constant theme of English commercial law at least since the time of Lord Mansfield'.

the other party, on what then is the contract made at all? Having regard to the consumer context practice of insurance in the early years and the subsequent legal (corporate) personality status of the insurer from the 19th century onwards which made the insurer obviously stronger[223] than the consumer insured, could this be why insurers would often deny claims without any justification and the insureds usually appear helpless in such circumstances? The insurer is virtually allowed to 'cherry-pick' when to honour his promise to indemnify. Indeed, it is argued further that though the insured may be justified in relying on the sincerity of the insurer's promise to indemnify - he is not justified in relying on that intention remaining constant.[224] Unfortunately, this has been the predicament of the consumer insured under the promissory warranty until recent reforms in the New Zealand ILRA 1977, Australian ICA 1984, and the UK's IA 2015.

2.10.2 Apparent Disregard of the Expectation Interest

The reasonable expectation of contracting parties is the notion that contract law does or should protect the expectations of morally reasonable contracting parties, and in particular the expectations of how they (the contracting parties) ought to act in the future.[225] Thus, reasonable reliance ought to presuppose obligation, which can be supplied by the invocation of the convention of promising. The intentional invocation of the institution of promising ought to be a sufficient basis of obligation since the law allowed persons to create in promisees secure expectations about future performance of the promisor, regardless of whether the promisees were harmed by reliance on those expectations; and the expectation interest arises from an expectation that a promise will be kept. In other words, expectation, not reliance, is the central case of obligation.

In insurance the reasonable expectations doctrine refers to the principle that a policy should be interpreted in accordance with the terms the policyholder thought it was purchasing, even if that interpretation is contrary to the plain terms of the policy.[226] Although the term reasonable

[223] Most insurers are large corporations with a retinue of lawyers to defend them in their day-to-day operations.
[224] Charles Fried, 'The Rise and Fall of Freedom of Contract,' 93 Harvard Law Review (1980) 1863.
[225] Stephen A. Smith, 'The Reasonable Expectations of The Parties': An Unhelpful Concept', 48 Canadian Business LJ 366 (2010) 4.
[226] See Stephen A. Smith, 'The Reasonable Expectations of The Parties': An Unhelpful Concept', 48 Canadian Business LJ 366 (2010) 1 where it is stated: 'Whether expressed in narrow or broad terms, the idea that contract law protects, or at least should protect, the reasonable expectations of contracting parties appears eminently sensible. No one has ever suggested that contract law should protect parties'

expectations stands for a number of different ideas it is used in insurance in the context that it is rational to hold that the insured purchases insurance with the expectation to be indemnified upon occurrence of the insured risk. It works to counterbalance the insurer's apparent advantage in the statutory right to issue the policy. Like the contra proferentem principle it is supposed to be adequately relied upon in cases of insurance promissory warranties to protect and deliver justice to the consumer insured.[227] Sadly, this appears not to be the case.

Not surprisingly, the statutory force given to the Financial Ombudsman Service by the Financial Services and Markets Act 2000 coupled with the legally enforceable regulatory requirements in the Financial Services Authority's Handbook mandates insurers to treat consumers and small business policyholders fairly, thereby removing many of the problems.[228] This is despite the position in England that the common law, as developed in marine cases and extended and modified in its application to other forms of cover, is entrenched, although with some modifications. One interesting aspect of the English reforms, and indeed the Law Commissions' project, is that no distinction has been drawn between marine and non-marine insurance. Insofar as a marine policy is taken out by a consumer or a small business, the protective measures extend to it.

2.11 Basis of the Contract Clause Warranty

The word 'basis' is defined as the minimum fundamental constituents, foundation, or support of a thing or system without which the thing or system would cease to exist. That means if statements are declared to be the basis of a contract of insurance, the contract will cease to exist if the statements are not accurate or true, just as is the case with a seaworthiness warranty. Also, by virtue of the law of non-disclosure, an insurer may avoid a contract of insurance for the insured's failure to disclose a fact deemed to be material by the insurer. However, by including a declaration for signature by the proposer whereby he warrants the accuracy of all the answers to the questions asked by providing that the proposer's answers are to form the 'basis of the contract', all the answers in the proposal form are converted into contractual warranties and are incorporated by reference to the policy. Thus, a term that is ordinarily not a warranty could be

unreasonable expectations, and few scholars would argue that the positive law does this as a general rule.'

[227] The non-consumer insured is adequately protected by the retinue of brokers, lawyers, and other experts at their disposal.

[228] Unfortunately, this is not available in Nigeria.

one through the basis clause. As in *Dawson and Bonnin*,[229] the word 'basis' seems to have provided insurers with the substratum in non-marine insurance comparable to seaworthiness in marine insurance and similarly seems to have assumed the status of an implied warranty. The implication is that upon any breach of a basis clause warranty, the insurer is entitled to avoid the policy with retrospective effect so that he was never at risk under it; and he may accordingly reject any claims even in respect of losses that occurred prior to his discovery of the breach.[230] In addition, even if the fact warranted is quite immaterial to the risk, even if the breach did not cause or contribute to the loss, and even if the statement in the proposal form was made honestly and carefully and was true to the best of the insured's knowledge and belief, the insurer becomes entitled to invoke these drastic remedies.[231]

As already stated, the very procedure for making insurance contracts required the insurer's reliance upon proposers' information about the proposed insurance. The practice of pre-contractual representations evolved to a custom, and subsequently, a law of disclosure under common law. Failure to disclose is also tantamount to an act of bad faith and an intention to defraud.

Fortunately, the law of disclosure and the method of making insurance that permitted the creation of basis clause warranties have been abolished by CIDRA 2012 and IA 2015. Provisions with similar effects have been enacted in the New Zealand ILRA 1977 and the Australian ICA 1984. Nigeria is still battling to find the appropriate provisions to ban the practice of basis clause warranties in her law.

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[229] In *Dawsons Ltd v Bonnin* [1922] 2 A C 413, a furniture removal firm took out insurance on a lorry. The firm filled out a proposal form, giving its business address in central Glasgow. When asked where the lorry was usually parked, it inadvertently wrote 'above address'. In fact, the lorry was usually parked in the outskirts of Glasgow where it was destroyed by fire. The firm argued that this fact was not material: it did not increase the risk and probably reduced it. However, the form contained a declaration that the proposal 'shall be the basis of the contract' which converts answers in a proposal form into warranties. The House of Lords held that it did not matter whether the mistake was material; it mattered only that warranty had been breached and therefore the insurer could refuse all claims under the policy. It is reported that the judges construed the word 'basis' to mean the equivalent to saying that these statements (in the representation) are held to be 'contractually material.' Still, that ought to be precisely why the insured should have been allowed to recover because it is the materiality of a representation that confers on it the status of a warranty.

[230] No 073 Insurance Law Non-Disclosure and Breach of Warranty (1979) para 79.

[231] See generally MacGillivray & Parkington on Insurance Law (6th ed Sweet & Maxwell,1975) chapter 10, para 535-638 and 811-912.

2.12 Apparent Conflict of Warranty with Purpose of Insurance

As indicated earlier, the interplay of the rules of law of warranty in section 33 (1) to (3) MIA 1906 (UK) prescribes conditions under which the insurer may deny the insured his benefits of the contract. Yet, the purpose of insurance is the indemnification of the insured on the occurrence of the insured event.[232] But the law of warranty appears to be tilted in favour of the insurer only, and since without the insured, there cannot be a contract of insurance, its prospective remedy of breach against the insured makes the traditional warranty inconsistent with the purpose and aleatory nature of insurance.

2.13 Warranty under Common Law Judges

2.13.1 Construction

The entry of common lawyers into the insurance realm occasioned a metamorphosis to the nature of warranty, transforming it into something significantly different from what it had been under the customs and traditions of merchants. Warranties in insurance policies which were hitherto written for commercial purposes began to receive strict legal scrutiny and construction through the pronouncement of judges, with grave consequences.[233] Determining whether there was a common intention to create an express warranty, an express provision for strict compliance and the right to repudiate for breach, conditions precedent to the attachment of risk etc became new grounds upon which many insurance policies were voided or invalidated even when the purported breaches were events that occurred in the past.[234]

The outcome of the earlier *Chandelor*[235] case typifies the treatment of warranty under common law whereby several conditions are emplaced to elicit the performance of the insurer's obligations. Since the advent of common law judges into the insurance arena, the role of warranty had been severely criticised as having introduced uncertainty and unfairness to

[232] See para 2.1.3 above.

[233] The customs and traditions of merchants continued to govern the commercial transactions, especially of insurance, chiefly because insurance was a relatively new form of contract which even the merchants themselves were struggling to come to terms within the legal sense.

[234] This retroactive application of remedy of breach by the courts appeared to not only strip the parties of the contract the right to conclusively agree on what was a warranty but also established warranty as a condition precedent to the validity of a contract.

[235] 79 Eng Rep 3 (KB 1604).

insurance contracts.[236] This era may have introduced legalism and the consequent phasing away of merchants' age-long customs and traditions, mostly written into the contracts by laymen, as having no basis in law.[237] Thus, warranty – which was something of a means of ascertaining the bona fides of representations under the Law Merchant – was transformed into a legal imperative under common law, and since then, the opinions of judges have been shaping the nature and meaning of warranty, which has seemingly brought about the unintended consequence that the same set of facts could often be labelled a warranty in one court and not so in another; and a precise meaning of warranty had been difficult to come by ever since. And since the warrantor is always the insured, the ultimate loser in such circumstances is anybody's guess.

It is to be noted also that under the common law judges no distinction was made between consumer or commercial insurance, and marine and non-marine insurance. One law was applied to all; and the legacy still subsists, even in the IA 2015.

2.13.2 Prioritisation of Commercialism

It would seem the enactment of the Joint Stock Act and the emergence of laissez-faire market ideology in the nineteenth century catalysed the rise of commercialism, the emergence of promissory liability for future expectations, and changes in value structure and legal doctrine. The new commercial classes required the certainty and predictability of fixed rules and judicial recognition of purely executory contracts safeguarded the risk allocation vital to sophisticated economic planning. This is in view of the fact that early nineteenth-century businesses were either sole proprietorships or partnerships. Thus, the emergence of giant corporations and other hierarchically organized institutions tended to bring an end to individualism. Nevertheless, British economists eventually rejected the pure laissez-faire model, and a majoritarian demand

[236] See PS Atiyah, *The Rise and Fall of Freedom of Contract* (1979) where he states: 'The notion that a promisee was entitled to have his expectations protected, purely and simply as such, as a result of a promise and nothing else, was not generally accepted in eighteenth century law (p 142). We are told that it was not even entirely clear, in the eighteenth century, 'that promises and contract were ways of creating wholly new obligations (p 141). In early law one might be bound because of an agreement, but it was understood that the law was doing the binding - and thus might, without apology, decline to do so if the agreement offended notions of fairness, or, conversely, might unembarrassedly bind one in the absence of agreement.

[237] Philip Rawlings, 'Bubbles, Taxes, and Interests: Another History of Insurance Law, 1720–1825' Oxford Journal of Legal Studies, Vol. 36, No 4 (2016) 800 states that this system was developed by merchants, but it foundered under pressure from lawyers anxious to maintain their control over lucrative litigation.

for broad government services and economic protection replaced values of individualism and self-reliance. Meanwhile, the classical contract model failed to reflect the modern economic realities of mass production and corporate and state market domination. Therefore, consumer-based third-world economies like Nigeria's are better off sticking to the consumer-based model for now.

A major problem of the contractual warranty however is that although, because of consumerism, common law doctrine appears to be catching up with reality and judges seem to have started to realise that in the modern bureaucratic State businessmen value flexible business relations more highly than fixed legal rights. Thus, principles such as 'held covered' clauses[238] now appear in marine warranty policies and contract law now incorporates a more liberal allowance for discharge and modification such as 'contracting out' provisions in the MIA 1906 (UK).[239] In addition, it is returning to a more tort-like emphasis on reliance and restitution as a source and measure of liability. That transition has blurred the once firm line between 'a contract exists therefore expect recovery' and 'no contract exists so no recovery at all.' Therefore, the question is 'is warranty even necessary at all?'

2.14 Summary

Historically, insurance as a means of mitigating the effects of personal and business losses occasioned by misfortunes or natural disasters seems to have been initiated by marine merchants with some unique operating principles such as warranties. It was only a matter of time before it would be extended to other non-marine commercial activities. In common law jurisdictions warranties have been ubiquitous, but so also has its criticism because of the consequences of its application in relation to the purpose of insurance. The transformation of the key insurance principle of warranty vis-à-vis the rise of consumerism in modern business transactions is prompting the question as to whether warranty is at all necessary in insurance contracts.

[238] Under the Institute Hull Clauses the insured is held covered despite breaches of warranty provided that he gives prompt notice to the underwriters and pays an additional premium.
[239] Section 87 MIA 1906 provides: (1) Where any right, duty, or liability would arise under a contract of marine insurance by implication of law, it may be negatived or varied by express agreement, or by usage, if the usage be such as to bind both parties to the contract. (2) The provisions of this section extend to any right, duty, or liability declared by this Act which may be lawfully modified by agreement.

CHAPTER 3

THE UNFAIRNESS OF INSURANCE WARRANTY AT COMMON LAW AS DEPICTED IN THE MIA 1906 (UK) AND THE MIA 1961 (NIG)

3.1 Introduction

This chapter seeks to show that insurance warranty at common law as depicted in the MIA 1906 (UK) is unfair to the consumer insured. The MIA 1906 (UK) is characterised as draconian and harsh in most insurance literature. In particular, the basis of the contract clause warranty epitomises the unfairness of the traditional warranty to the consumer insured. The MIA 1906 (UK) is an extract of judicial pronouncements and a set of principles from 150 years prior which was designed to reflect the law as it stood in 1906. In largely unamended form, it had been enshrined in the law of most common law jurisdictions such as Australia (MIA 1909) and New Zealand (MIA 1908), and Nigeria (MIA 1961). The main fault of its provisions on warranty is the draconian contractual obligations imposed on the insured and the harsh forfeiture rules upon their breach which in most instances deny the insureds their benefits under the contract and negate the very essence of the insurance contract itself. Inevitably, reforms of the MIA provisions on warranty have been carried out in the UK, Australia, New Zealand, and Nigeria, each achieving varying degrees of success, but Nigeria's needs further improvement.

As a former British colony Nigeria's political, socio-economic, administrative, and legal practices were largely inherited from the UK. Accordingly, the discussion of unfairness of insurance warranty at common law in the UK and Nigeria in this chapter is carried out under the auspices of the MIA 1906 (UK). For this purpose, the identified problems with the law and practice of warranty in the 1906 Act are held to be the same for MIA 1961 (Nig). The same goes for other jurisdictions who adopted the MIA 1906 including Australia and New Zealand. To that extent, the efficacy of the reforms in the UK, and Australia and New Zealand are evaluated in Chapters 4 and 5 respectively on the benchmark of the extent to which they have mitigated the unfairness. These are then juxtaposed in Nigeria's reforms in Chapter 7 to make recommendations for a legislative improvement of insurance warranty law in Nigeria.

As already indicated, the contractual promissory warranty seemed not to be an issue with marine merchants of the medieval area under the Law Merchant. It became an issue with the trying of insurance cases by common law judges who held that the marine insurance principles also applied to other classes of insurance on the basis that the principles codify the common

law.[240] Furthermore, most of the common law rules and practices of marine insurance in the MIA 1906 (UK) are consumer-based. As such, the problems of their application in the non-marine domain, in conjunction with the changing face of consumers of insurance products from individuals and small businesses to big corporations, and the associated risks and the growth of modern commerce have been exacerbated[241] and have tended to question the very veracity of the contract theory itself – that is to say, the rules concerned with the formation, performance, and discharge of contractual obligation by the acts of the parties themselves.[242] Not even the rise of consumerism has afforded adequate protection of the interests of the consumer-insured. Invariably, the unfairness of the marine-principles-based MIA 1906 manifests more in the non-marine consumer context which forms the main perspective of the discussion in this chapter, as well as why the thrust of this thesis' argument for a way forward for Nigeria's reforms is focused on the ethnography of the Nigerian consumer bearing in mind the marked environmental and socio-cultural differences between Nigeria and the UK, and the fact of Nigeria lacking any comparative basis with the UK in socio-economic development.

3.2 Severity, Harshness, and Unfairness of the Traditional Warranty

A law is said to be draconian if its severity falls within the code of laws prepared by Draco, the celebrated law giver of Athens.[243] However, the term 'draconian' has come to be used to refer to any unusually harsh law. Similarly, harshness means the state of being ungentle, and unpleasant in action or effect, while unfairness means the state of not being fair, that is, not

[240] See Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims; and Late Payment (2014) para 14.12 where it is stated 'The current law in the UK is based on principles developed in the eighteenth and nineteenth centuries and codified in the Marine Insurance Act 1906. Although the 1906 Act appears to apply only to marine insurance, most of its principles have been applied to non-marine insurance on the basis that the 1906 Act embodies the common law (which itself is mostly based on principles developed in marine cases)'.

[241] See Rob Merkin; 'Australia: Still a Nation of Chalmers?' where it is stated 'The repeal of the Bubble Act in 1824, followed by the successful struggle for limited liability culminating in the Joint Stock Companies Act 1856, opened the door to the formation of insurance companies, and the opportunity was taken to extend insurance protection to risks as they emerged… It is possible to link almost every significant development in commerce, as well as in Parliament or the courts, in which a risk or liability became apparent, with the formation of new insurance companies ... Around the middle of the nineteenth century first party cover was extended to a variety of risks, including damage by hailstones and loss of livestock. Liability insurance emerged somewhat later, to cover judicial rulings and statutes rendering shipowners liable for cargo losses, collisions and damage to harbours and jetties. New specialist insurers arose following: the first high profile death on the railways in 1830…'

[242] PS Atiyah, *The Rise and Fall of Freedom of Contract* (1979) 683.

[243] West's Encyclopedia of American law 2ed (2008).

conforming to approved standards, as of justice, honesty, or ethics.[244] Essentially therefore, both severity and harshness are ingredients of unfairness in contract law.

Prior to its amendment by the IA 2015 the MIA 1906 (UK) provided for nature of warranty (section 33), when breach of warranty excused (section 34), express warranties (section 35), warranty of neutrality (section 36), and 'no implied warranty of nationality' (section 37). Others are warranty of good safety (section 38), warranty of seaworthiness of ship (section 39), 'no implied warranty that goods are seaworthy' (section 40), and warranty of legality (section 41). Section 33 (1) and (2) defines what is meant by 'warranty' in the Act, while sections 37, and 40 (1) provide that 'There is no implied warranty as to the nationality of a ship, or that her nationality shall not be changed during the risk', and 'In a policy on goods or other movables there is no implied warranty that the goods or movables are seaworthy', respectively. These are neither draconian nor harsh, and they do not appear to constitute any unfairness to the insured. Similarly, section 34 (1) provides that non-compliance with a warranty is excused when, by reason of a change of circumstances, the warranty ceases to be applicable to the circumstances of the contract, or when compliance with the warranty is rendered unlawful by any subsequent law, while section 34 (3) states that a breach of warranty may be waived by the insurer. These are also neither draconian nor harsh, and they do not appear to constitute any unfairness to the insured. Section 35 provides: (1) An express warranty may be in any form of words from which the intention to warrant is to be inferred. (2) An express warranty shall be included in or written upon the policy or be contained in some document incorporated by reference into the policy. (3) An express warranty shall not exclude an implied warranty, unless it is inconsistent therewith. It appears to be the only section that ascribes obligations to the insurer, and it is neither draconian, harsh, nor unfair.

These aside, all the other sections and subsections on warranty are mandatory, uncompromising contractual obligations of the insured and the major point in issue is in section 33 (3) which states 'A warranty, as above defined, is a condition which must be exactly complied with, whether it be material to the risk or not. *If it be not so complied with, then, subject to any express provision in the policy, the insurer is discharged from liability as from the date of the breach of warranty, but without prejudice to any liability incurred by him before that date*;'[245]

[244] Online Dictionary.com.
[245] The italicised phrase has been deleted in section 10 (7) IA 2015.

and section 34 (2) tightens the noose further by denying the insured leave, where a warranty is broken, to avail himself or of the defence that the breach has been remedied, and the warranty complied with, before loss.

In brief, the traditional warranty as depicted in the MIA 1906 gives rise to a range of unjust consequential issues on the insured including the 'inexactness' of the express warranty, the rejection of later remedy of breach as irrelevant, lack of causal connection between the breach of warranty and the loss, and exact compliance of the inexact warranties. Others are immateriality of warranty to the risk or loss, automatic discharge of insurer for insured's breach, unjust remedy for breach of warranty, and the unjustness of implied warranties.[246] These are all draconian, harsh, and unfair as they prescribe severe retribution on the insured for breach of section 33 (1) while section 33 (3) at the same time appears to protect the insurer from the insured, even though it is a bilateral contract.

It is unsurprising to note that the MIA 1906 took effect in the period characterised as 'the decline and fall of freedom of contract,'[247] and even though consumerism seems to be a major factor of modern contracts, there are jurisdictions like Nigeria where the traditional warranty still governs insurance contracts and there is need therefore for an evaluative framework for testing unfairness which should form the basis for crafting the way forward for reforming the law.

3.3 Test of Unfairness in the Traditional Warranty

Keeping in view the general law of contract, the purpose, and the bilateral nature of the insurance contract, certain points in issue arise in the common law traditional warranty. For example, the 1980 Law Commission Report stated that aspects of the 1906 Act were 'unjust',[248] while the 1997 National Consumer Council Report said that large parts of that law were 'heavily biased against the interests of consumers' and they often defeat policyholders' reasonable expectations.[249] The main evaluative framework for testing in the law of warranty

[246] The imposition of an implied warranty of seaworthiness of the ship on the insured whilst excluding the insurer's liability upon the insured's breach, raises issues not only on an innocent consignor of insured cargo but also on an insured ship owner himself who is usually unaware of the precise condition of his ship on her departure.
[247] See PS Atiyah, *The Rise and Fall of Freedom of Contract* (1979) Part III.
[248] Insurance Law Non-Disclosure and Breach of Warranty (1980) Law Com No 104, para 6.9.
[249] Insurance Contract Law: Misrepresentation, Non-Disclosure and Breach of Warranty by the Insured (2007) para 1.40.

therefore is to assess its conformity with the general contract law, the basic principles and purposes of the insurance contract, and fairness to the parties. Without a doubt an insurance contract contains the basic elements of offer, acceptance, consideration, and contractual intention. However, the consumer perspective of insurance also requires that fairness to both parties, the interest of the consumer, bargaining power, reasonable expectations and consumerism be factored in as well.

Section 62 (4) UK Consumer Rights Act (CRA) 2015[250] states that a term is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.[251] Under Section 62 (1) CRA 2015 unfair terms are not enforceable against the consumer.[252] Also, a term may be unfair for either procedural or substantive reasons. A term is procedurally unfair if it was not brought to the other party's attention: if for example, it was written in legal gobbledygook or hidden in small print.[253] Section 62 (5) further states that whether a term is fair is to be determined a) taking into account the nature of the subject matter of the contract and b) by reference to the circumstances existing when the term was agreed and to all of the other terms of the contract or of any other contract on which it depends. In this respect, cognizance must be taken of the aleatory nature of insurance, the equality of the parties, freedom of contract, the purpose of the contract, and other considerations which could impinge on its realization such as the laws of disclosure and representations, utmost good faith, and terms of the policy, which prescribe harsh forfeiture rules.[254]

Fair dealing requires that a service provider (the insurer) should not, whether intentionally or unconsciously, take advantage of the consumer's necessity, indigence, lack of experience,

[250] The Nigerian equivalent of this law is considered separately in chapter 6.
[251] Section 62 (4) CRA 2015.
[252] Section 62 (1) CRA 2015.
[253] Insurance Contract Law: Issues Paper 1 Misrepresentation and Non-Disclosure (2006) para 5
[254] In English law the parties were early on in principle free to insert into their contract whatever lawful term they could agree upon. The MIA 1906 recognises that not only implied obligations may be varied by an express agreement or a usage to the contrary but also those obligations declared by the Act itself, the modification of which is not prohibited. In most instances, terms inserted into marine policies were the insurer's standard terms concerning the risk taken over by the insurer and were attempts to exclude certain perils, or to circumscribe or limit that risk, or to place an obligation on the insured in the form of warranty to act in a particular way so as not to increase the risk for the insurer. To that extent, they may not have been a 'negotiation' in the strict sense of the word and could therefore be said to be 'unfair'.

unfamiliarity with the subject matter of the contract, or weak bargaining position.[255] For this purpose, terms which may be regarded as unfair are specified as those which exclude liability for meeting the reasonable expectations of the consumer for no just cause, give exclusive rights to only one party of the contract (the insurer), and impose harsh penalties for breaching the contract.

3.3.1 Interests of Consumers

The interest of the consumer must be seen against the economics of why a rational person should agree to part with their hard-earned money for a product that is at best intangible and at worst uncertain. Therefore, questions such as 'Why do consumers purchase insurance?' or 'What is in it for them?' should reasonably be answered. It is to be noted that insurance is intended to be an effective risk transfer mechanism, bringing peace of mind to the purchaser. The consumer exchanges the risk of a loss of unknown amount for the payment of a known premium. This process performs a valuable function in enabling consumers to plan their financial affairs prudently.[256] But where claims are refused, the transfer of risk fails, and the peace of mind becomes illusory. In such instances the results can be devastating for consumers. For example, in their study of the Financial Ombudsman Service (FOS) cases the Law Commission (LC) saw many complaints relating to critical illness policies. Consumers who were already suffering from their own serious ill-health, or that of a family member, were faced with the added stress of having a claim declined; and the problem is not restricted to critical illness policies. They found evidence of many different types of policy being avoided in circumstances where this approach seemed unduly harsh. Needless to say, this could happen only because of the phrase in section 33 (3) MIA 1906 '…subject to any express provision in the policy, the insurer is discharged from liability as from the date of the breach of warranty'.

3.3.2 Bargaining Power

A term may be substantively unfair if it is extremely harsh, and only imposed because of unequal bargaining power. In practice, most unfair terms have elements of both types. Given how harsh the term was, more should have been done to bring it to the other party's attention. However, it is possible for a term to be unfair even if the other party was fully aware of it but

[255] Collins Dictionary of Law WJ Stewart, 2006.
[256] Insurance Contract Law: Issues Paper 1 Misrepresentation and Non-Disclosure (2006) para 5.1

lacked the power to resist it. Lord Denning's dictum in *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd*[257] aptly captures this scenario where he stated:

> None of you nowadays will remember the trouble we had – when I was called to the Bar – with exemption clauses. They were printed in small print on the back of tickets and order forms and invoices.[258] They were contained in catalogues or timetables. They were held to be binding on any person who took them without objection. No one ever did object. He never read them or knew what was in them. No matter how unreasonable they were, he was bound. All this was done in the name of 'freedom of contract'. But the freedom was all on the side of the big concern which had the use of the printing press. No freedom for the little man who took the ticket or order form or invoice. The big concern said, 'Take it or leave it.' The little man had no option but to take it. The big concern could and did exempt itself from liability in its own interest without regard to the little man. It got away with it time after time. When the courts said to the big concern, 'You must put it in clear words', the big concern had no hesitation in doing so. It knew well that the little man would never read the exemption clauses or understand them…

This aptly depicts the relationship between the consumer-insured and the insurer on bargaining power under the MIA 1906. The detailed terms contained in an insurance policy are not negotiated, nor indeed are they necessarily known to the insured until he receives his policy document, which may not be until sometime after the contract had come into existence. The traditional warranty, as an exception to the general rule, permits one party negotiating a contract to remain silent on matters that would adversely influence the other party and yet require that other party negotiating a contract of insurance to act with the utmost good faith and to disclose all material facts'[259] on pains of severe retribution. This is unfair!

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[257] [1983] 2 AC 803.

[258] Just like basis of the clause in insurance policies which are usually printed in tiny prints at the back of the policy.

[259] The New Zealand Contracts and Commercial Law Reform Committee Report entitled 'Aspects of Insurance Law' submitted in April 1975. (This thesis could not ascertain the exact date of the inauguration of this Committee from available records. It was confirmed however, that the Committee is now defunct. See AA Tarr & JR Kennedy, *Insurance Law in New Zealand*, 2nd ed, (Law Book Company, 1992) 19 n 102.

3.3.3 Reasonable Expectations

The main purpose of contract law is the realization of reasonable[260] expectations induced by promises.[261] At a very basic level the purpose or function of the law of contracts is to protect the reasonable expectations of the parties to any contract.[262] However, what seems to be at issue with the traditional warranty is that its provision on the insurer's discharge from liability upon breach defeats the reasonable expectations of consumers. While it seems correct to allow a policy to be avoided where the policyholder has breached a specified condition or term only a relatively small proportion of policyholders who breach warranties are found to have done so with any dishonest intent.[263] Policyholders deserve better protection than the law currently provides: where they are aware of the problem consumer insureds generally would want that better protection even at the price of slightly increased premiums.[264] Therefore, the time has come to state clearly what rights and obligations a consumer insured should have and which is fair in that it meets the reasonable expectations of both consumers and insurers.[265] This is sadly lacking in the MIA 1906 (UK).

3.3.4 Consumerism

Consumerism in this context refers to the protection or promotion of the interests of consumers.[266] It is a social force designed to protect consumer interests in the marketplace by organising consumer pressures on business to augment the rights and power of buyers in relation to sellers. In the economic sense, it is the idea that increasing the consumption of goods and services benefits the economy, and the consumer is respected and made the target of economic policy and a cash cow for the business sector. Thus, consumerism is a form of mitigating unfairness to the consumer in sales contracts.

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[260] 'Reasonable' as used here means 'rational' (as in 'a reasonable person assumes a reputable vendor will deliver goods when promised') or 'normal' (as in 'a reasonable consumer does not read the fine print in a contract'

[261] Arthur Corbin, cited in Stephen A. Smith, 'The Reasonable Expectations of The Parties': An Unhelpful Concept', 48 Canadian Business LJ 366 (2010) 1.

[262] J. Swan, The Law of Contract, (Markham, Butterworths, 2006), at p. 6. The earlier essay is: "Contracts and the Protection of Reasonable Expectations" in B. Reiter and J. Swan, eds., Studies in Contract Law (Toronto, Butterworths, 1980).

[263] Insurance Contract Law: Issues Paper 1 Misrepresentation and Non-Disclosure (2006) para 5.3.

[264] Insurance Contract Law: Issues Paper 1 Misrepresentation and Non-Disclosure (2006) para 5.3.

[265] Insurance Contract Law: Issues Paper 1 Misrepresentation and Non-Disclosure (2006) para 5.25.

[266] The Oxford Languages Dictionary 2022.

The consumer movement got underway in the 1930s with emphasis on product testing, consumer research, and objective evaluation of the advertising pitches made by the sellers of consumer products. This was based on the conviction that the pricing and quality of consumer goods would improve if people had more accurate and complete information about the nature of the products sold and how well they achieved their ostensible purposes. Since then, many acts and regulations which concern many aspects of public and private law have been introduced to serve the interests of consumers. Within private law they mainly deal with contract law and the law of restitution.[267] For example, the UK Consumer Protection Regulations 2000, the Consumer Protection Regulations 1987, and the Consumer Credit Act 1974 confer a right on the consumer to cancel a contract where they feel their interests are not adequately protected. A cancelled contract is treated as if it never existed and consequently under the law of restitution[268] each party must give back what they received under the contract. Unarguably, these practices are at variance from the law of warranty in section 33 (3) MIA 1906 where the insurer, rather than the insured, is protected. It is not surprising that since 1977 when the first legislative reform of warranty took place in New Zealand, followed by Australia in 1984, and the UK in 2015, the exclusive rights of the insurer against the consumer under warranty in the MIA 1906 have been considerably mitigated. It is to be noted also that court judges had begun to see the need to protect consumer interests in contracts of insurance post-MIA 1906. However, in third world jurisdictions like Nigeria where the Act has not been successfully reformed consumers are still groaning under the unfairness of the traditional warranty.

Furthermore, insurance business seems to be in a class of its own, and in that regard the general principles of consumerism are often applied through some special instruments. For example, the Unfair Contract Terms Act (UCTA) 1977 excluded contracts of insurance from its scope[269] and was only recently repealed by the Consumer Rights Act 2015, and in Nigeria the Consumer Protection Council (CPC) currently excludes insurance in its scope; rather, a special body statutorily charged with the regulation of insurance practice – the National Insurance

[267] Phillip Hellwege, 'Consumer Protection in Britain in Need of Reform', Cambridge Law Journal, 63(3), (2004) 712.
[268] Phillip Hellwege, 'Consumer Protection in Britain in Need of Reform', Cambridge Law Journal, 63(3), (2004) 712.
[269] Alice Carse and Alison Padfield, 'Consumer Insurance: The Risk of Contracting on Unfair Terms', 125 Journal of the British Insurance Law Association 64.

Commission (NAICOM) is in place. Section 86 of the NIA 2003 provides that subject to the provision of the Act, NAICOM shall be responsible for administration and enforcement of the provisions of the insurance Act with warranty provided for in section 55. Nigeria has attempted several times since the enactment of the Insurance Act 1976 down to the NIA 2003 to remove unfairness in the MIA 1961 (Nig) through legislative reforms and has not succeeded, and as such the Act is still the substantive contract law of warranty in the country.[270] This is due to governance issues beyond the scope of this treatise.

3.4 Argument for Fairness of Traditional Warranty

It would seem, though, that the marine insurance warranty and its forfeiture rules appear justifiable in the purely marine context due to the fact that the unseaworthiness of the ship is tantamount to no ship at all and when precisely it would trigger an accident at sea which could result in the loss of the ship, cargo, and souls onboard, is not certain.[271] The civil jurisdictions' doctrine of alteration of risk which serves the same purposes as warranty appears to be milder on the insured[272] because the responsibility for seaworthiness is in a sense assumed by the State, which in turn requires that a breach of the seaworthiness by the insured must be causally linked to the loss for any forfeiture rules to apply. The State, as against a person, legal or natural, being responsible for ensuring the seaworthiness of ships takes away the marine factors of insurance from the insured and makes it 'equal' with other non-marine warranties. Invariably, admitting marine insurance principles to non-marine insurance while leaving the responsibility of seaworthiness in the hands of the insured, as is the practice under common law, is a recipe

[270] Although the NIA 2003 was successfully promulgated its failure to state its relationship with the MIA 1961 (Nig) means it (the MIA 1961) is still in force and when it suits their purposes insurers rely on its provisions in their operations.

[271] See JP Van Niekerk, Insurance Law in the Netherlands 1500-1800 Vol II (Juta & Co, 1998) 992 where it is stated: The apparent inflexibility and harshness of the law relating to insurance warranties in England at the end of the eighteenth century must be seen against the fact that warranties were then largely if not exclusively concerned with matters which could potentially influence and increase the risk and cause a loss insured against. Put differently, the warranties concerned matters material to the risk. Warranties were serious attempts by insurers to control, ameliorate and circumscribe the extent of the risk which they actually took over in terms of insurance contracts, and therefore, although at law a breach of such a warranty was not required to be causally linked (or material) to the loss, in practice the topic of the warranty itself was a potential cause of (and thus material to) the risk of such a loss.

[272] Zhen Jing, 'Warranties and doctrine of alteration of risk during the insurance period: A critical evaluation of the UK Law Commissions' proposals for reform of the law of warranties' 25 Insurance Law Journal (2014) 185.

for problems as exemplified in the following Lord Mansfield's cases which are examined in both marine and non-marine contexts:

In *Pawson v Watson*[273] (a case of failure to strictly comply with a warranty) Lord Mansfield stated:

> Where it (the warranty) is a part of the written policy, it must be performed; as if there be a warranty of convoy, there it must be a convoy; nothing tantamount will do or answer the purpose; it must be strictly performed, as being part of the agreement; for there it might be said the party would not have insured without convoy.[274]

The dictum above, if viewed in the purely non-marine perspective, the focus would be on the phrase '[w]here it is a part of the written policy, it must be performed' - regardless of its relationship with the seaworthiness or security of the ship.[275] It is not surprising that some non-marine insurance policies contain warranties so trivial and not necessarily material or relevant to the risk the insured is expected to strictly comply with on pains of losing his benefits under the contract. This is unfair against the insured and may have been responsible for the derogatory characterization of insurance warranty as a 'prodigal aberration', 'toxic',[276] and technical 'traps'[277] for the benefit of the insurer written into the fine print of policies which are not worth the paper upon which they are written requiring a prudent person seeking insurance to have an attorney at his elbow to tell him what the true construction of the document is.'[278]

In the marine perspective, however, the focus would be on the phrase '[a]s if there be a warranty of convoy, there it must be a convoy; nothing tantamount will do or answer the purpose; it must be strictly performed, as being part of the agreement'. This would mean that a warranty of convoy[279] - which was a marine insurance warranty relating to the prevention of capture of the ship at sea during hostilities - must be strictly performed, as being part of the agreement without

[273] (1778), 2 Cowper, 785.
[274] WR Vance, 'The History of the Development of the Warranty in Insurance Law', 20 Yale LJ 523 (1911) 533.
[275] The materiality, relevance of the warranty to the subject matter of the insurance, is not important.
[276] Clifford JA in *Clifford v Commercial Union Insurance Co of SA* 1998 (4) SA 150 (SCA).
[277] See *Zurich Insurance Company v Morrison* [1942] 1 ER 529 at 537 per Lord Greene MR. See also Baris Soyer, 'Risk Control Clauses in Insurance Law: Law Reform and the Future', Cambridge Law Journal, 75(1), (2016) 125.
[278] *Anderson v Fitzgerald* (1853) 10 ER 551.
[279] The warranty of convoy is now obsolete because of the United Nations Convention on the Law of the Sea guarantees free passage of all ships even in times of hostilities.

which the party would not have insured. This is consistent with the practice in that era whereby because of the many European wars sailing with a convoy made the critical difference between a ship's safe arrival at destination or being lost at sea to the enemy, pirates, or privateers. But as the force shipped was in practical terms stronger than that mentioned in the instructions, the underwriters were held liable because the safety of the ship from capture, and by implication, seaworthiness, had not been compromised by the purported breach.

Similarly, in *Bean v Stupart*,[280] the plaintiff insured a ship and in the margin of the policy were written 'eight nine pounders with close quarters, six six-pounders on her upper decks; thirteen seamen besides passengers'. Upon a motion for a new trial in this case, Lord Mansfield averred 'There is no doubt, but this is a warranty. Its' being written on the margin makes no difference. Being a warranty, there is no doubt that the underwriters would not be liable if it were not complied with; because it is a condition on which the contract is founded.' Here again, the non-marine perspective would be to focus on the phrase '[b]eing a warranty, there is no doubt that the underwriters would not be liable if it were not complied with', as against the marine perspective of '[b]ecause it is a condition on which the contract is founded'.[281] The condition referred to here is the 'eight nine pounders with close quarters, six six-pounders on her upper decks…', which related to the vessel being sufficiently armed and manned, and therefore, seaworthy.

The cases just reviewed clearly indicate that under the MIA 1906 whether justice is done in an insurance case depends largely on the context (marine or non-marine) applied in viewing it. A plethora of similar cases as above are out there in the law reports; and as can be seen, each of them would have been capable of being interpreted either way – which means a probable 50% of the cases may have had unjust outcomes. Again, this is the problem of applying only one code to both marine and non-marine insurance warranties alike. Yet, it is not likely that a separate non-marine insurance Act will be enacted by any parliament any time soon. Neither would there likely be a separate definition for non-marine insurance warranty.[282] Meanwhile,

[280] (1778) 1 Dong 11 at 14.
[281] The seaworthiness and the security of the ship is the condition on which a marine contract is founded as against non-marine insurance which hinges only on the insured's undertaking or promise which are not implied by law.
[282] Currently, Australia appears to be the only jurisdiction which has demarcated non-marine from marine insurance with the enactment of the Insurance Contract Act 1984 for non-marine whilst leaving the MIA 1909 (Cth) for marine insurance. However, the implication of that approach is discussed further in Chapter 5 of this thesis.

it is the consumer-insured who will remain at the receiving end of such unjust outcomes.[283] This calls for utmost caution in applying the principles during litigations to deliver justice to both parties of the insurance contract.

3.5 The Unfairness of the Traditional Warranty

3.5.1 The 'Inexactness' of the Express Warranty

Section 35 (1) - (3) provides that an express warranty may be in any form of words from which the intention to warrant is to be inferred, which means that a statement may be converted into a warranty using obscure words that most policyholders may not understand. The aim of an express warranty is ostensibly to permit the parties to freely state their intentions under the contract, in line with section 87 (1) and (2) of the MIA 1906 (UK).[284] For example, in *Aktielskabet Greenland v Janson*,[285] a clause worded 'no mining timber carried' was held to be an express warranty, just as in *Sea Insurance Co v Blogg*[286] where the court did not hesitate to afford warranty status to a clause that without using the word 'warranted' required the insured vessel to sail on or after a specific date.[287] But in *The Bamcell II (Century Insurance Company of Canada v Case Existological Laboratories Ltd)*,[288] the owners of a converted barge 'warranted' that a watchman would be employed at night, and the barge suffered fire damage during the mid-afternoon. The court decided that the term was not a warranty - an uncomfortable finding given the clear wording used. This is the predicament of the insured whereby it is never certain what his exact contractual obligations are let alone their execution, and he must depend on judges' goodwill and subjective opinion to have what should ordinarily be a contractual benefit.

Invariably, the wide-ranging leverage to form warranties by the insurers is a major source of unfairness to the insured.[289] This takes away any pretence to equality between the insurer and,

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[283] Most business insureds are able to afford expert legal services to defend their interests in the courts.

[284] Section 87 (1) and (2) of the MIA 1906 (UK) state that where any right, duty, or liability would arise under a contract of marine insurance by implication of law, it may be negatived or varied by express agreement, or by usage, if the usage be such as to bind both parties to the contract; and that the provisions extend to any right, duty, or liability declared by the MIA 1906 (UK) which may be lawfully modified by agreement.

[285] (1918) 35 TLR 135.

[286] [1898] 2 QB 398.

[287] See Baris Soyer, *Warranties in Marine Insurance*, (Taylor and Francis, 2016) 11.

[288] [1984] 1 Western Weekly Reports 97.

[289] MIA section 24 (1) 'A marine policy must be signed by or on behalf of the insurer…'

especially, the consumer insured.[290] By exercising their statutory rights to issue the policies, most express warranties are usually drafted in favour of the insurers and should ordinarily trigger moral hazard considerations.[291] Yet, the insured is required to exactly comply with the one-sided inexact warranties on pains of losing his benefits under the contract.

3.5.2 Exact Compliance

The aim of exact compliance with a warranty is to prevent the insured from altering the risk post-contract. In the marine perspective the change in status of a seaworthy ship to an unseaworthy one is tantamount to no ship, and it is evident that the principle of exact compliance and the remedy of automatic discharge of insurer for the insured's breach are being applied to non-marine warranties which have no resemblance to that of the seaworthiness of the ship. Yet, it is not likely that the breach of a licensed-driver warranty would increase the risk of loss of a motor vehicle as the breach of the seaworthiness would to the ship. Similarly, a change of voyage, course, or vessel in breach of warranty alters the risk calculation in a marine policy to something significantly different than fixing a different padlock from that warranted in a burglary policy. It is argued that seaworthiness warranty must be exactly complied with because of the higher probability of an unseaworthy vessel perishing at sea thereby potentially causing loss, both of human life, and to the insurer against public policy; but the non-marine circumstance of using another brand of padlock than the one warranted in a burglary policy may not result in such grave consequences. Without a doubt, exact compliance in a non-marine insurance warranty puts undue pressure on the insured and relying on its breach to exclude the insurer's liability for meeting the reasonable expectations of the consumer for no just cause gives exclusive rights to only the insurer and imposes harsh penalties on the insured. To that extent, it is unfair.[292] Worse still, the loss of insurance cover may also have serious consequences for third parties, such as assignees or mortgagees. They may be left without cover even if they did not cause or contribute to the breach.

[290] Most insurers are corporate persons as against consumer insureds who are mostly natural persons.
[291] Indeed, most of the conditions prejudicial to the insured's interest are the product of express contractual stipulations rather than the rules of law in the ordinary sense, and any proposal to alleviate such conditions would potentially involve interference with the freedom of contract of the insurer.
[292] See section 62 (4) CRA.

Furthermore, the MIA 1906 (UK)'s consequences of breach of exact compliance with a warranty[293] are quite severe because of the function a warranty purportedly fulfils. As Lord Goff puts it:[294]

> If a promissory warranty is not complied with, the insurer is discharged from liability as from the date of the breach of warranty, for the simple reason that fulfilment of the warranty is a condition precedent to the liability of the insurer. This, moreover, reflects the fact that the rationale of warranties in insurance law is that the insurer only accepts the risk provided that the warranty is fulfilled…

However, one would have thought that the legal requirements for exact compliance would present a term or condition with an equally exact meaning for the insured's compliance; but the uncertainty in meaning generated by the multiplicity of the conditions in the statutory provisions of MIA sections 33 (1)[295] and 35 (1) – (3)[296] are anything but exact. The unsuspecting insured who is merely looking to purchase cover for his risk(s) is made to sign up on a policy brimming with all manners of bewildering provisions with the caveat to 'exactly comply' on pains of losing his indemnity. Where then is the fairness of the contract?

3.5.3 Automatic Discharge of Insurer for Insured's Breach

Under section 33 (3) MIA 1906 when a warranty is breached the insurer is automatically and permanently discharged from liability as from the date of the breach. James Allan Park in his book *A System of the Law of Marine Insurance*,[297] justifies this dramatic rule of law as '…because he himself (the insured) has not performed his part of the contract…' This assertion is defective in two ways: first, it views a breach from the lenses of dishonesty and fraudulent intent and leaves no room for innocent errors. Second, it treats the insurance contract as a mere *quid pro quo* agreement, whereas in addition to his warranty, the insured mandatorily pays

[293] See MIA 1906 section 33 (3).
[294] See *Bank of Nova Scotia v Hellenic 'Mutual War Risks Ass'n (The 'Good Luck')* [1992] 1 App Cas 233 (1991).
[295] Section 33 (1) states: A warranty, in the following sections relating to warranties, means a promissory warranty, that is to say, a warranty by which the assured undertakes that some particular thing shall or shall not be done, or that some condition shall be fulfilled, or whereby he affirms or negatives the existence of a particular state of facts.
[296] Section 35 MIA 1905 provides: (1) An express warranty may be in any form of words from which the intention to warrant is to be inferred. (2) An express warranty must be included in, or written upon, the policy, or must be contained in some document incorporated by reference into the policy. (3) An express warranty does not exclude an implied warranty, unless it be inconsistent therewith.
[297] James Allan Park, *A System of Marine Insurance*, (Boston, 1799) 319.

premium to the insurer. Therefore, in line with Park's argument if the insurer is discharged from liability, then the insured must have his premium returned. But this is rarely the case.

Furthermore, the automatic discharge of insurers tends to be punitive because it completely shuts out the insured from the purpose for which he purchased insurance in the first place. In some instances, it is inconsistent with the aleatory nature of insurance in the sense that the occurrence of the insured event is unforeseen. Moreover, it rules out the element of misfortune. For example, in a fire warranty, neither of the parties can say precisely when a fire would occur but when it does it triggers a claim whose validity must be ascertained, and which would lead to the discovery of the insured's breach, say, he forgot to service the fire extinguishers when they expired. He might just have the misfortune that while he was out to service the extinguishers, the fire occurred. Thus, although the insured may not have warranted that a fire would not occur, and neither did the breach of the warranty cause the fire, yet its fortuitous occurrence triggered the warranty 'audit', which gave rise to the invalidation of the policy. Therefore, in a future conduct warranty, for instance, notwithstanding the insured's honest intention to comply, he could still be in breach by fortuitous circumstance beyond his control and the insurer is automatically discharged, nonetheless.

This point is driven home by no less a person than Lord Mansfield himself in *Jeffries v Legandra*[298] (a case of warranty of convoy where the insured vessel was separated from the fleet by inclement weather) where he stated:

> An unforeseen separation is an accident, to which the underwriter is liable. It is the law of reason and common sense; for it would be the height of injustice and cruelty to heap misfortune upon misfortune, and to say, that because a ship has been separated from her convoy by stress of weather, or the fury of the elements, that the insured shall suffer still greater misery, by being deprived of that indemnity which he had secured to himself by paying a sufficient and adequate premium. The law of England does not tolerate such principles…[299]

[298] 91 Eng Rep 1171.

[299] Although that dictum was in the perspective of marine insurance, it is equally true in non-marine insurance. But crucially, the finding in that case pinpoints the basic difference between marine and non-marine warranties and why, perhaps, the remedies of breach of marine insurance warranties ought not to be applicable to non-marine insurance warranties.

It is often argued[300] that under common law it is not a defence for the insured to demonstrate that the breach arose due to factors beyond his control. But that is precisely what makes the traditional warranty unfair. The argument is also advanced that irrespective of the insured's state of mind, a breach of obligation changes the risk the insurer agreed to underwrite. But it is equally true that the discharge of the insurer's liability denies the insured his expected indemnity under the contract.[301] Ironically, it was for this kind of occurrence that the insured purchased insurance in the first place. Thus, the statutory automatic discharge of the insurer for breach of warranty is one of the unfairest of the rules of warranty against the insured and it appears insurers have accepted it as the default rule - the 'subject to any express provision in the policy'[302] clause is rarely referred to in framing the remedy for breach of warranty in insurance policies except for contracting out, usually, under conditions that are more favourable to the insurer.

3.5.4 Breach of Warranty Not Being Material to the Risk or Loss

In *Hibbert v Pigou*,[303] the insured ship, warranted to sail with a convoy, sailed, in fact, without one and went down in a storm. The underwriter was held not liable even though the breach had no connection with the loss. Similarly, in *Forsikringsaktielselskapet Vesta v Butcher,*[304] it was held that the failure of the insured owner of a fish farm to comply with a warranty whereby a 24-hour watch had to be maintained was fatal to his claim for loss from storm damage, although it was conceded that the presence of a watch could not possibly have in any way lessened the likelihood or degree of loss by storm.

The question arises that if a term is not material to the risk, what legal imperative is being served by its exact compliance? Arguably, the decision to underwrite the risk also connotes the insurer's undertaking to indemnify the insured. Therefore, under the customs and traditions of merchants where the warranty was a condition of the insurer's promise, it can be argued that materiality of breach could not be irrelevant to the risk because it was among the factors of the insurer's assessment before accepting to underwrite. Similarly, under common law where the

[300] See *Douglas v Scougall* (1816) 4 Dow 269, at 276 where Lord Eldon stated '…and that in a question of seaworthiness, honesty of intention is no answer, but that the fact of seaworthiness must appear, or otherwise the underwriter is discharged…'
[301] The unfairness lies in the insurer walking away with the premium and the insured with nothing, all because of a contingent occurrence over which he had no control.
[302] See section 35 MIA 1906.
[303] (1783) 3 Doug KB 213, 224, 228; 99 ER 624.
[304] [1989] AC 852; [1989] 1 Lloyd's Rep 331.

warranty is held to be a condition precedent to the inception of the contract,[305] the very fact that the parties have expressly stipulated for its future performance is in effect conclusive evidence that they regarded the performance of that act as material and therefore relevant.

The problem is that the irrelevance of materiality of warranty to the risk as stated in section 33(3) of the MIA 1906 opens the door to an express warranty being used to cover just about anything, even if it be absurd or fanciful.[306] In *Allen v Universal Automobile Insurance Co Ltd*[307] a car owner was found to be in breach of a warranty that £285 had been paid for the car when a reduced price £271 had been paid, and in *Abbott v Shawmut Mutual*[308] a policyholder who warranted that the property was subject to a mortgage of £6,600 was found to be in breach because the figure was in fact £6,684.24. In this manner, the insured is overloaded with immaterial exact compliance requirements, leading to frequent breaches of the fundamental terms. Indeed, except for breach of seaworthiness, the argument that the insured should lose his rights under the contract for an immaterial breach is not only unfair but strange to any known law.

3.5.5 Lack of Causal Connection between the Breach of Warranty and the Loss

The irrelevance of the materiality of the warranty also means that there is no need for any causal connection between a breach thereof and the loss that has occurred. But the automatic discharge rule would run its course regardless. However, whilst it is a legitimate right of the insurer to not bear risks outside the policy's purview, it is also not right for the insured to lose his indemnity for losses that he is not responsible. Therefore, the principle of 'no need for any causal connection between the breach of warranty and the loss' is not only unfair but aberrant. To civil law jurisdictions, the idea that an insurer is discharged from liability for all risks where there had been no causal connection of the breach of warranty to the loss that has occurred seems particularly strange. They argue that the common law concept of a warranty is hard to understand and even harder to explain in terms of either legal fairness or economic

[305] See *Bank of Nova Scotia v Hellenic 'Mutual War Risks Ass'n (The 'Good Luck')* [1992] 1 App Cas 233 (1991) where Lord Goff states that 'it is settled by authority that any statement of a fact bearing upon the risk introduced into the written policy is, by whatever words and in whatever place, to be construed as a warranty, and, prima facie, at least that the compliance with that warranty is a condition precedent to the attaching of the risk...'
[306] Baris Soyer, *Warranties in Marine Insurance*, (Taylor and Francis, 2016) 160.
[307] (1933) 45 Ll L Rep 55.
[308] 85 Mass 213 (1861).

efficiency.[309] Therefore, for fairness' sake, causal connection of breach with the loss is a compelling necessity.

3.5.6 Unjust Remedy for Breach of Warranty

At the time of the codification of the MIA 1906 (UK), the other non-marine insurances were mainly fire and life;[310] and as insurance was often equated with a sale, sales warranties also influenced practice. In fire, as in life, insurance, certain acts are known for a fact to cause the occurrence of the insured risk. For instance, storing gasoline where welding is being carried out would most certainly result in a fire, just as excessive alcohol consumption by one who has cirrhosis of the liver would result in his death. In such circumstances, a promise or undertaking by the insured to do or not to do certain things in the future is valid because the resultant effect is known and can therefore be factored into the risk assessment and determination of premium. The future conduct warranty then becomes somewhat more than a mere undertaking or promise – it becomes a moral restraint upon the insured because he is fully conversant with the degree of damage his breach of obligation would cause, such that a breach is treated as an act of bad faith, having become an intentional act. Unsurprisingly, these merited the automatic discharge of insurer because the aim of insurance is not to transfer a known occurrence of a risk to the insurer; there must be an element of fortuity.

But the exact effect of non-compliance with other non-marine future conduct warranties cannot be predicted with certainty and ought not to justify the insurer's liability being immediately prospectively discharged. The probable effect of the breach ought to be determined before applying this remedy. For example, if a motorist forgetfully fails to renew the license of his vehicle when it expires thereby breaching a licensed driver warranty it is unlikely to be the cause of a crash. It should not merit a prospective discharge of the insurer's liability because that would mean even if the license were subsequently renewed, the insured's cover would not be restored. He may still be obligated to continue to pay the premium during the insurance period even though the insurer suffers no injury for the purported breach. Again, this is unfair.

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[309] Trine-Lise Wilhelmsen, Insurance Contract Law: Misrepresentation, Non-Disclosure and Breach of Warranty by the Insured (2006) para 7.64

[310] See Christopher Kingston, 'America 1720–1820: War and Organisation' in *Marine Insurance Origins and Institutions 1300 – 1850* ed AB Leonard (Macmillan, 2016) 222 where it is stated: During the mid-nineteenth century, an increasing proportion of insurance companies were organized as mutuals, rather than joint-stock corporations. This was particularly so in fire and life insurance, but included some marine companies, and some that wrote both marine and other risks.

Therefore, the appropriate remedy to the breach of warranty should depend on the degree of loss or injury caused by the insured's breach.

3.5.7 The Rejection of Later Remedy of Breach as Irrelevant

The unfairness of the traditional warranty is exacerbated by the fact that even if the insured remedies the breach of warranty the cover is not restored. Courtesy of section 34 (2) MIA 1906: 'Where a warranty is broken, the assured cannot avail himself of the defence that the breach has been remedied, and the warranty complied with, before loss.' So, suppose the insured has warranted to service the fire alarm at a certain time and that time elapses without him doing so. In that case, the insurer's liability is discharged, and the later servicing of the alarm does not restore cover. This calls to question the argument that the inoperative alarm increased the chance of fire occurring; if that were to be the case, the insurer should welcome the remedying of the warranty since no fire has occurred yet.

3.5.8 Implied Warranties

Unlike express warranties, implied warranties do not appear in the policy, but they are implied by law from the circumstances in which the contract was created.[311] The law presumes a promise to that effect on the part of the insured without any actual proof; and every reason of sound policy and public convenience requires it should be so.[312] For some unexplained reason, at common law, it is considered 'sound policy' that the insured should endure all the harshness of the warranty and even lose his contractual indemnity for the slightest of infractions whilst at the same time letting the insurer benefit therefrom.[313] Furthermore, although section 34 (3) MIA 1906 states that a breach of warranty may be waived, it is suggested that a breach of the implied warranty is an exception to this rule due to public policy considerations. One would have thought that the insured should at least be 'compensated' with less stringent consequence

[311] The 1906 Act also implies into a marine policy six conditions that operate in the same way as warranties, in that the risk may never attach, or the insurer may be discharged from liability. They relate to commencement of the risk; alteration of the port of departure; sailing for a different destination; change of voyage; deviation; and delay.
[312] See Lord Ellenborough CJ's dictum in *Lyon v Mells* (1804) 5 East 428.
[313] The insurer walks away with the premium following an automatic discharge of liability.

of breach since the implied warranty does not involve any undertaking or promise by him, but the harsh rules apply, nonetheless.[314] The unfairness cannot get any worse.

It is just as well that there is no implied warranty of legality in non-marine insurance.[315] The consumer insured would be the worse for it.

3.6 Unfairness of Basis of the Contract Clause Warranties

The 'basis of the contract' clause appears to have come about through the pronouncements of common law judges in the late 18th and early 19th centuries. In *Bond v Nutt*[316] for example, the court stated that the warranty was a 'condition precedent that admits of no latitude'. Also, Lord Mansfield asserted in *Schoolbred v Nutt*[317] that 'There should be a representation of everything relating to the risk… except it be covered by a warranty'. The warranties referred to here were those of past or present fact which have their foundations on the way marine contracts of insurance were made in those days at the Lloyd's Coffee House in London. Then, there was no clear difference between a warranty and a representation. However, Lord Mansfield tried to disambiguate the two in *Pawson v Watson*[318] where he stated:

> There is no distinction better known to those who are at all conversant in the law of insurance than that which exists between a warranty or condition which makes part of a written policy, and a representation of the state of the case. Where it is a part of the written policy, it must be performed as if there be a warranty of convoy, there it must be a convoy; nothing tantamount will do or answer the purpose; it must be strictly performed, as being part of the agreement; for there it might be said the party would

[314] There are four warranties implied by the MIA 1906 (UK): warranty of seaworthiness;[314] warranty of portworthiness;[314] warranty of cargoworthiness;[314] and warranty of legality.[314] Fortunately, it is fair to say that the significance of the implied warranty is rather diminished in practice nowadays, given that most hull and machinery, and freight policies are written on a time basis.

[315] See *Euro-Diam Ltd v Bathurst* [1990] 1 QB 1 where an attempt to expand the implied warranty of legality into a non-marine policy did not find support of the Court. This was explained by Staughton J, in the first instance in the following manner: Suppose that a motor car is insured for a calendar year, and is driven in January in excess of the speed limit. Would that be an answer to a claim for loss by theft or fire or a road accident in June? If a publican insured his stock of glasses and they were stolen in June, would it matter that they had been used for drinking after permitted hours in January? Those examples demonstrate the point that the insurance here was upon goods, and not upon any adventure. I therefore reject the argument of the implied term. The Court of Appeal affirmed this approach; in its view, implying a term that potentially had these consequences was not necessary to give business efficacy to the agreement.

[316] 2 Cowp 786 (1778).

[317] Cited in James Allan Park, *A System of the Law of Marine Insurance*, (Boston, 1799) 229.

[318] (1778), 2 Cowper, 785.

> not have insured without convoy. But as, by the law of merchants, all dealings must be fair and honest, fraud infects and vitiates every mercantile contract. Therefore, if there is fraud in a representation, it will avoid the policy, as a fraud, but not as a part of the agreement. So, there cannot be a clearer distinction than that which exists between a warranty which makes part of the written policy, and a collateral representation, which, if false in a point of materiality, makes the policy void; but if not material, it can hardly ever be fraudulent.[319]

Similarly, in Fillis v Brutton,[320] Lord Mansfield stated:

> In all insurances it is essential to the contract that the assured should represent the true state of the ship to the best of his knowledge. On that information the underwriters engage. If he states that as a fact which he does not know to be true, but only believes it, it is the same as a warranty. He is bound to tell the underwriters truth.[321]

The implication of the above dicta is that a true and material representation of the insured risk devoid of any fraudulent intent is required for a contract to be valid whilst a warranty is the very basis of the insurance and must be complied with or there is no contract. Also, a materially false representation is equivalent to a fraud and vitiates a policy of insurance which means a material representation has the force of a warranty, especially if written on the policy.[322] The insurers appear to have concluded from these that any statement written on the policy, irrespective of its materiality or relevance to the risk, is a warranty and if so the insurer would not have insured without it, and it is therefore the basis of the contract. It was even more so in the non-marine perspective where Lord Mansfield stated in *Carter v Boehm*[323] 'Insurance is a contract upon speculation. The special facts, upon which the contingent chance is to be computed, lie most commonly in the knowledge of the insured only:[324] The underwriter trusts to his representation, and proceeds upon confidence that he does not keep back any

[319] WR Vance, 'The History of the Development of the Warranty in Insurance Law', 20 Yale LJ 523 (1911) 533.
[320] (1782) Park Ins. (6th ed.), 250.
[321] WR Vance, 'The History of the Development of the Warranty in Insurance Law', 20 Yale L.J. 523 (1911) 531.
[322] This seems to explain why insurers were allowed to get away with a dubious basis of the contract whereby they incorporate the insured's pre-contractual answers in a proposal form as part of the policy thereby converting them into warranties.
[323] [1766] 3 Burr 1905, 97 ER 1162.
[324] Italics inserted by researcher for emphasis.

circumstance in his knowledge, to mislead the underwriter into a belief that the circumstance does not exist, and to induce him to estimate the risqué (sic) as if it did not exist…' Here, Lord Mansfield established the essence of the truth and accuracy of pre-contractual representations in contracts of insurance which have assumed an indispensable part of non-marine insurance in the form of basis of the contract clause.

Typically, the clause would state that the insured's answers to questions by the insurer form the 'basis' of the contract in the following or some other similar wordings:[325] 'I agree that this proposal form has been completed correctly to the best of my knowledge and belief. Nothing material affecting any of my proposals has been concealed; this proposal shall be the basis of and shall form part of the contract between myself and the insurance company.' The effect of this language is to incorporate the insured's answers into the insurance policy although they may not be set out in the policy. Thus, a term that is ordinarily not a warranty could be one through the basis clause, and the consequences to the insured are no less severe. The implication is that upon any breach of a basis clause warranty, the insurer is entitled to avoid the policy with retrospective effect so that he was never at risk under it; and he may accordingly reject any claims even in respect of losses that occurred prior to his discovery of the breach.[326] In addition, even if the fact warranted is quite immaterial to the risk, even if the breach did not cause or contribute to the loss, and even if the statement in the proposal form was made honestly and carefully and was true to the best of the insured's knowledge and belief, the insurer becomes entitled to invoke those drastic remedies.[327]

Inevitably, insurers soon found that there was also an important legal advantage in using them because in warranties they avoided the necessity and difficulty of proving to the satisfaction of the court that an inaccurate answer in a proposal form related to an act which was material to the risk.[328] In *Thomson v Weems,*[329] for instance, it was stated: 'When the truth of a particular statement has been made the subject of warranty, no question can arise as to its materiality or immateriality to the risk, it being the very purpose of the warranty to exclude all controversy

[325] Insurance Contract Law: Misrepresentation, Non-Disclosure and Breach of Warranty by the Insured (2006) para 2.67.
[326] No 073 Insurance Law Non-Disclosure and Breach of Warranty (1979) para 79.
[327] See generally MacGillivray & Parkington on Insurance Law (6th ed Sweet & Maxwell,1975) chapter 10, para 535-638 and 811-912.
[328] See MacGillivray & Parkingson, on *Insurance Law,* 6th ed (1975) ch 10 para 829 cited in No 073 Insurance Law NonDisclosure and Breach of Warranty (1979)
[329] (1884) 9 App Cas 671.

upon that point'. Thus, through basis of the contract clause insurers are in the highly favourable position that they are entitled not only to bona fides on the part of the applicant, but also of full disclosure of knowledge possessed by the applicant that is material to the risk. Through the desire to make themselves doubly secure the insurers depart widely from this position by requiring the insured to agree that the accuracy, as well as the bona fides, of his answers to questions put him by them or on their behalf shall be a condition of the validity of the policy. *In Glicksman v Lancashire & General Assurance Co Ltd,*[330] Lord Wrenbury said 'I think it a mean and contemptible policy on the part of an insurance company that it should take the premiums and then refuse to pay upon ground which no one says it was really material. Here, upon purely technical grounds, they, having in point of fact not been deceived in any material particular, avail themselves of what seems to me the contemptible defence that although they have taken the premiums, they are protected from paying.[331]

Thus, the unfairness of the traditional warranties is exacerbated by 'basis of the contract clause'. The result is that freedom of contract becomes a fallacy as the insurer is given all the advantages and allowed to perpetrate unfairness to the insured in a virtual entrapment, and the undue emphasis on the word 'basis' delegitimizes materiality. This begs the question as to why the basis clause should be used at all in insurance practice. It would seem, upon codification of the MIA 1906 (UK), that the combined effect of the laws of utmost good faith,[332] disclosure[333] and representations,[334] and subscription of the policy afforded the insurers leave to continue to

[330] [1927] AC 139.
[331] J Hare, 'The Omnipotent Warranty: England v the World', Marine Insurance at the Turn of the Millenium Vol 2 (1999) 53.
[332] Section 17 MIA 1906 UK (now omitted by virtue of Insurance Act 2015 (c 4), sections 14 (3) (a), 23 (2) states: 'A contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith is not observed by either party, the contract may be avoided by the other party.'
[333] Section 18 (1) MIA 1906 UK (now omitted by virtue of Insurance Act 2015 (c 4), sections 21 (2), 23 (2) states: 'Subject to the provision of this section, the assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured, and the assured shall be deemed to know every circumstance which, in the ordinary course of business, ought to be known by him. If the assured fails to make such disclosure, the insurer may avoid the contract.' Before the enactment of CIDRA 2012 and IA 2015 this section of the MIA 1906 was tested in *Pan Atlantic Insurance Co Ltd and Another v Pine Top Insurance Co Ltd* [1995] 1 AC 501, [1994] 3 All ER 581, [1994] 2 Lloyds Rep 427, [1994] 3 WLR 677:
[334] Section 20 (1) MIA 1906 UK (now omitted by virtue of Insurance Act 2015 (c 4), sections 21 (2), 23 (2) states: 'Every material representation made by the assured or his agent to the insurer during negotiations for the contract, and before the contract is concluded, must be true. If it be untrue, the insurer may avoid the contract.' This, together with section 18 (1) of the MIA 1906 (UK) which states: 'Subject to the provisions of this section, the assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured, and the assured is deemed to

include basis of the contract clause warranties in insurance policies. But as the *Pan Atlantic*[335] has shown the test of non-disclosure was not as simplistic as the insurers portend; but that did not stop them from pleading it anyway, especially, against payment of claims that they do not like. Fortunately, the law of disclosure and the method of making insurance that permitted the creation of basis clause warranties have been abolished by the Consumer Insurance (Disclosure and Misrepresentations) Act (CIDRA) 2012 for consumer insurance and Insurance Act (IA) 2015 for non-consumer insurance. Provisions with similar effects had been enacted in the New Zealand Insurance Law Reform Act 1977 and the Australian Insurance Contracts Act 1984. Nigeria is still battling to find the appropriate provisions to ban the practice of basis clause warranties in her law.

3.6.1 Fallacy of Freedom of Contract

In the basis clause, the argument for freedom of contract no longer seems to be valid because at filling the proposal form stage, the insured is virtually grilled for information in a rigorous question and answer session by the insurer. This is done with the full knowledge that certain types of insurance, such as motor insurance, are statutorily compulsory. Therefore, it is hardly a 'negotiation' between equal parties as the insurer clearly has the upper hand. The consequence is a situation where the insurer tends to extort and exploit the insured, knowing that the insured is by law bound to purchase insurance anyway. Under the common law freedom of contract, the basis clause has thus widely deviated from the original function and purpose of insurance warranty which accrued social and economic benefits to both parties. It is now an instrument of oppression and unfair dealing in the hands of the insurer. The insured is booby-trapped into parting with his hard-earned money in the form of premium payment, only to have his benefits denied when he needs it the most. This exposes the insured to economic denials to benefit the insurer against public policy. Indeed, the basis of the contract clause warranty is the extreme manifestation of unfairness in insurance.

3.6.2 The Substitution of Validity with Legality

The basis clause substitutes validity for legality – validity recognizes materiality as under the customs and traditions of merchants, while legality does not – as under common law; and once

know every material circumstance which, in the ordinary course of business, ought to be known by him. If the assured fails to make such disclosure, the insurer may avoid the contract.

[335] [1995] 1 AC 501.

the ‘legality test’ (the absolute truth of all representations in the proposal form, past and present) is not satisfactory, a legal basis for the refusal of all claims has been established. Automatically, the remedy of breach of warranty – the automatic discharge of the insurer from liability – becomes a weapon of the insurer against the insured. The expectation of mutual benefits for the parties is replaced with a caveat-emptor winner-takes-all dynamic exclusively for the insurer's benefit under the policy.

In essence, the basis clause is a crafty manipulation of the law to ‘harvest’ the insureds’ premiums without bearing the risks; and the insurers do this with the full awareness that once a thing is declared legal, all other inquiries upon it are seemingly precluded. Hence, despite persistent criticisms, it took more than a century before any concrete corrective action was carried out on the basis clause, and it had to be by legislative intervention. In Nigeria, the efficacy of such an intervention is yet to be achieved.

Moreover, where the basis clause is still in use, the insurers are in the highly favourable position that they are entitled, not only to bona fides on the part of the insured but also to full disclosure of all knowledge possessed by the insured that is material to the risk. The problem with this is that it subjects the insureds to triple jeopardy – the consequences of non-disclosure, misrepresentations, and misstatements; of breach of warranty; and the test of the bona fides of the insured being the prerogative of the insurer, such that the insurer can resile for what would otherwise be non-fraudulent immaterial misrepresentations even though the answers are true to the best of the insured’s knowledge and belief. This is particularly unfair in relation to proposal forms for life policies, where the insured is asked questions about the state of his health[336] of which he can only give an opinion.

The contract of insurance remains, despite the change in circumstances since Lord Mansfield’s days, a contract of speculation the parties to which remain in an unequal position about the actual possession of knowledge relevant to the risk; but nowadays, the positions of the parties have virtually swapped. Through actuarial computations and information from open sources such as the Internet, the insurer may now possess as much as, if not more, knowledge about a

[336] The Law Commission (Law Com No 104) Insurance Law Non-Disclosure and Breach of Warranty (1980) para 7.3.

subject matter of an insurance than the insured.[337] It may well be that the insurer's, rather than the insured's, 'representation' should be the basis of the contract.

3.6.3 Delegitimization of Materiality

One of the main problems with the basis clause is its capability to legally oust the relevance of the materiality of a warranty to the insured risk whilst simultaneously converting the insurer's 'wish list' into contractual warranties. In the recent case of *Genesis Housing Association Ltd v Liberty Syndicate Management Ltd*,[338] the Court of Appeal confirmed that, where a basis of the contract clause is in place, an insurer may refuse a claim for any inaccuracy on a proposal form and such inaccuracy could not be dismissed as immaterial.

Thus, the basis clause takes attention away from the agreed subject matter of insurance to the contract's legality on terms prescribed only by the insurer. Once legality has been established, materiality of terms to the subject matter of the insurance becomes irrelevant. This achieves consequences far beyond the purported aim of the law of disclosure and representation, which is to preclude the insured from fraudulently misstating, misrepresenting, or even concealing information which could potentially induce the insurer to underestimate the risk and charge less premium.

3.6.4 Virtual Entrapment of the Insured

Since no insurance can be made without some sort of representation from the insured, no one in the early days appeared to have issues with the requirement for absolute truth of those representations on the ground that its absence might mean admitting to a fraudulent intent of the insured. It had looked innocent enough then and the unsuspecting judges of that era allowed it. But it is evident now that it is a well-sprung trap by the insurers against the insureds[339] because the 'truth' is viewed only from the insurer's lenses. Curiously, no one seemed to

[337] Insurers have become more skilled and have access to sophisticated risk models. There is a need to reconsider what insurers should be taken to know, and how far they should use this knowledge to probe the policyholder's presentation.
[338] [2013] EWCA Civ 1173, [2013] WLR (D) 368.
[339] Zhen Jing, 'A potential trap for the insureds: The application of the 'basis of the contract' clauses in China's insurance market' 19 ILJ 160 (2008) 1. See also Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims; and Late Payment' (Law Com No 353 / Scot Law Com No 238) (2014) para 13-9.

question why the insurer is not similarly held to account under the law of utmost good faith[340] to volunteer or disclose information to the insured that would assist him (the insured) get the indemnity for which he purchased insurance. How is this not fraudulent on the part of insurers under basis clause warranties? One would have thought the judiciary would correct the wrong, but it seems the common law *stare decisis* had prevailed to permit these virtual unconscionable and adhesion contracts to continue to deny the insureds justice.

3.7 Section 33 MIA 1906 (UK) and Consumerism

Although marine insurance originated in the consumer context, over the years the interests to be protected expanded to include those of other stakeholders such as the insurer, brokers, and the shipowner, most of whom at the outset were not corporate persons. The government was also there to protect the interest of the State and the general public which often involved safety and economic considerations. In time it was easier for the other stakeholders to form associations (such as the Association of British Insurers (ABI) to protect their interests, but not so with the insureds, and it was only a matter of time before the interests of the consumer-insured would become 'orphans'. However, the rise in consumer-based non-marine insurances appears to have also facilitated the rise of consumerism in insurance which has led to many insurers improving their services to the customer.

For many years, the insurance industry has accepted that the rules set out in the MIA 1906 are unsuitable for consumer insurance because the Act was enacted to protect the insurer[341] whereas consumerism seeks to protect the insured. Many stakeholders are of the view that the 1906 Act is archaic and imbalanced,[342] and codification has made it difficult for the courts to develop the law to keep pace with commercial changes.[343] Furthermore, the MIA 1906 codifies principles developed in the eighteenth and nineteenth centuries, when communications were slow and access to information was difficult. Businesses were smaller and their records were

[340] Section 17 MIA 1906 (UK) provides: 'A contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith is not observed by either party, the contract may be avoided by the other party.'

[341] It was drafted on the principle that the proposer knows everything about the risk and the underwriter knows nothing. It therefore sought to protect insurers.

[342] Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims; and Late Payment (2014) para 14.12.

[343] Codification is like a one-way street. Once the law has been codified, there is no practical way of de-codifying it other than repealing it entirely and reverting to the common law, which would produce immense uncertainty.

hand-written, and hand copied. Now electronic communication and data storage have radically altered the scale of commercial enterprises and the way in which information can be transmitted, stored, accessed, and processed. In pursuit of consumerism most shopping including buying insurance is now done online. Hence it is difficult for consumerism to work under the MIA.

With the ever increasing wave of consumerism it is unsurprising that the ABI and Lloyds in 1986 in an apparent oxymoron updated and strengthened the Statement of General Insurance Practice to state that an insurer will not repudiate liability to indemnify a policyholder on the grounds of a breach of warranty or condition where the circumstances of the loss are unconnected with the breach unless fraud is involved.[344] This clearly runs counter to the spirit of section 33 (3) MIA 1906 which provides for automatic discharge of insurer upon the insured's breach. Nevertheless, It is an irony though that in insurance a contract can only be initiated by the insured and yet his interests are the least protected in the contract. These indices are being brought to bear in evaluating the impact of the warranty law in insurance as well as what needs to be done for Nigeria to have a more wholesome reform of her own laws.

3.8 Summary

The unfairness of the common law traditional warranty consists in the seeming protection of only the insurer as against consumerism which seeks to protect the consumer. It manifests also in the impreciseness of the express warranty and the concomitant requirement for its exact compliance, the rejection of later remedy of breach as irrelevant, and the disregard of any causal connection between the breach of warranty and the loss. It is further exacerbated by the application of principles of seaworthiness to other classes through the exact compliance rule, breach of warranty not being material to the risk or loss, automatic discharge of insurer for insured's breach, the unfairness of implied warranties, and the basis of the contract clause.

In the next chapter, the efficacy of the reforms in the UK, Australia, and New Zealand will be assessed by focusing on how they have resolved these issues in mitigating unfairness to the insured in contracts of insurance.

[344] Insurance Contract Law: The Business Insured's Duty of Disclosure and the Law of Warranties (2012) para 12.62.

CHAPTER 4

MITIGATING UNFAIRNESS IN THE TRADITIONAL INSURANCE WARRANTY AND THE EXTENT AND EFFICACY OF THE REFORMS IN UK'S CIDRA 2012 AND IA 2015

4.1 Introduction

This chapter seeks to examine critically to what extent the CIDRA 2012 and IA 2015 in the UK have mitigated the unfairness of the MIA 1906 (UK)'s traditional regime and common law relating to insurance warranty, and whether they have addressed the issues depicted in Chapter 3. In essence, a critical evaluation is being carried out to determine the efficacy of the reforms and identify elements that are potentially usable for mitigating unfairness to the consumer-insured and improving the reform of insurance warranty law in Nigeria.

Arguably, two major weaknesses of the traditional warranty are its codification in the MIA 1906 (UK) which has made it difficult to adapt to the rapidly changing face of modern commerce with respect to consumerism; and its failure to differentiate the consumer, from the non-consumer, insured. It is noted though, that UK insurance has been growing nonetheless.[345] Although it may have comparatively taken a long in coming,[346] the UK finally amended the traditional regime by the enactments of the CIDRA 2012 and the IA 2015 whose combined effect is that the consumer-insured has been differentiated from the non-consumer insured in the pre-contract requirements, and contracting out, basis of the contract clause warranty is abolished, the breach of warranty can now be remedied,[347] and the insurer's liability is suspended during the time of breach - but the insurance coverage is resumed once the breach is remedied. In addition, warranties are now divisible, and a causal connection of breach to the loss is required for the insurer to enjoy a remedy. These all tend towards consumerism. However, no new definition of insurance warranty has been provided and the insurance Act continues to apply equally to all classes of insurance. This would potentially impinge on the efficacy of the reforms that have been made.

[345] The UK is the fourth largest insurance market in the world after the US, China and Japan and the largest in Europe. Accessed online at abi.org.uk on 13 May 2021.
[346] The reforms were initiated by Government since 1957.
[347] Section 10 (2) IA 2015.

4.2 The Reforms

During the LC's[348] consultations with stakeholders and the insuring public prior to the enactment of the CIDRA 2012 and IA 2015 the need to give a fairer deal to policyholders naturally emerged. This was without a doubt consumerism in action. This was against the backdrop that the discrepancies between the law, the Financial Services Authority regulation, the FOS, and guidance from bodies such as the ABI and other industry bodies were most acute in the consumer context, especially in the area of disclosure and misrepresentations. Nevertheless, CIDRA 2012 also affords protection for insurers in the law of disclosure. This is because whilst it may be easy to hold a natural person or a small business to account on disclosure requirements, it is not so easy with large corporations where in many instances uncertainty exists as to who exactly is to be held as the controlling mind of the corporation for the purposes of compliance with disclosure and representations requirements.[349] Accordingly, ABI and other stakeholders, a separate Consumer Insurance (Disclosure and Representations) Act 2012 was enacted in 2012 for small firms and natural persons, and another one in 2015 for

[348] For ease of reference LC would be used to refer to the Law Commissions of England and Wales', and Scotland. This is because although the two are separate bodies, in the UK, insurance is not a devolved area and the works of the Commissions culminating in CIDRA 2012, and IA 2015 were joint. See Special Public Bill (2014) 17 where it is stated 'The Insurance Bill 2014 implements recommendations in a Report which we published jointly with the Law Commission for England and Wales in July 2014. The Report is entitled Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims; and Late Payment (Law Com No 353; Scot Law Com No 238). The Report is part of a wider joint project to modernise and simplify insurance law in the United Kingdom. Our previous Joint Report on Consumer Insurance Law: Pre-Contract Disclosure and Misrepresentation (Law Com No 319; Scot Law Com No 219, 2009) was given effect by the Consumer Insurance (Disclosure and Representations) Act 2012. We should note that the Third Parties (Rights against Insurers) Act 2010 was also based on a much earlier Joint Report of the two Commissions: Third Parties—Rights against Insurers (Law Com No 272, Scot Law Com No 184, 2001). The joint nature of the work on insurance law reflects the fact that the law on this subject has long been essentially the same throughout the United Kingdom, even before the passage of the Marine Insurance Act 1906. Even in the eighteenth century the Scottish courts looked first and foremost at developments in England, although that was often explained as English law providing the best available evidence as to the lex mercatoria of which insurance law (especially marine insurance) formed part.

[349] See comments by David Hertzel LC representative in the Special Public Bill Committee Report at page 8 where he stated: As to senior management, we are encapsulating a common-law principle here. We are trying to ask: who is the controlling mind of the company? With people, it is easy to do, it is what they know, but what does a company know? We are saying the board, the senior management if it is not a company, because this also covers unincorporated entities that are not consumers. The senior management are the people who are the controlling mind of the company. However, if you limit it to what might be known by those two entities or collections of people—the controlling mind and anybody else they instruct to buy their insurance—this is actually very narrow. There are a lot of things in a large organisation that most people would not necessarily know without going out to inquire.

large corporations. But the common law consumer perspective's definition of insurance and insurance warranty in the MIA 1906 have remain untouched.

Evidently, the success of CIDRA 2012 gave rise to IA 2015 which focused on both consumers and businesses alike.[350] The 2015 Act seeks to replace the most outdated of the existing rules with a more appropriate default regime - in an evolutionary rather than revolutionary way - and to reflect the best practice of modern insurers in the market.[351] It is a forward-looking statute that has been crafted based on 'living' principles that would allow the courts to develop it underneath to keep pace as far as it can with social change[352] which is being spearheaded by consumerism. To that extent, it can be said to be a success also. Nevertheless, there are lingering unresolved issues regarding warranty in the reforms. For example, the unfair exact compliance with warranties is still in force, and there is an apparent contradiction between sections 10 (7) and 11 on materiality, causality, and divisibility issues. Clearly, these will impact the efficacy of the reforms in several ways.

4.2.1 Abolition of Basis of the Contract Clause Warranties

The CIDRA 2012 abolishes 'basis of the contract clause warranties' for the 'consumer'[1] insured. Section 6 (1) and (2) respectively provide:

> (1) This section applies to representations made by a consumer - (a) in connection with a proposed consumer insurance contract, or (b) in connection with a proposed variation to a consumer insurance contract. (2) Such a representation is not capable of being converted into a warranty by means of any provision of the consumer insurance contract (or of the terms of the variation), or of any other contract (and whether by declaring the representation to form the basis of the contract or otherwise).

Similarly, section 9 of the IA 2015 abolishes 'basis of the contract' clause warranties for the business-insured.[353] The two sections prevent pre-contract representations from being

[350] House of Lords Special Public Bill Committee (HL) (2014) 12.
[351] David Hertzel at House of Lords Special Public Bill Committee hearing on 2 December 2014.
[352] Insurance Contract Law: Analysis of Responses and Decisions on Scope (2006).
[353] See Explanatory Notes for Draft Insurance Contracts Bill (2014) para A.6 where it is stated An insurance contract may be "non-consumer" for two reasons: either the policyholder is not an individual, or they have entered into the contract wholly or in significant part for trade, business or professional reasons. In many cases, both reasons will apply: the policyholder will be a company or other corporate entity taking out insurance for commercial reasons. However, either reason is sufficient in itself.

converted into warranties by means of a policy term or statement on a proposal form.[354] The implication for the consumer-insured is that the duty to volunteer information to the insurer is abolished.[355] By this, inadvertent errors, unintentional inaccuracies in answers to questions, and immaterial misrepresentations in the proposal forms may no longer incur the uncompromising remedies of warranties. Accordingly, one of the harshest, inequitable, and unfair rules of warranty, and Professor John Hare's 'insurer's nuclear weapon'[356] may have been effectively extinguished which is a plus for insurance consumerism.

As good as this may seem, it is to be noted that there is no statutory provision for basis of the contract clause in MIA 1906 (UK) – it only evolved in practice by judicial interpretation of contractual policy terms based on the statutory express warranties and the common law freedom of contract – and to the extent that these statutes have not been reformed, very little, if anything at all, has changed. For instance, it remains possible for insurers to include specific warranties in the consumer contract of insurance[357] and the business-consumer insured may only contract out subject to certain transparency safeguards provided for in IA 2015 sections 16 (2)[358] and 17 (1) to (5).[359] Even then, section 17 (5) states that the insured may not rely on any failure on the part of the insurer to meet the requirements of subsection (2)[360] if the insured

[354] The provision does not reform the law of warranties save to this extent but postpones it to a later date ostensibly because specific fact warranties are not a major problem within consumer insurance policies. And if they are used in an unfair way, consumers have remedies not only under the FSA rules but also under the Unfair Terms in Consumer Rights Act 2015.
[355] Section 18 MIA 1906 (UK).
[356] J Hare, 'The Omnipotent Warranty: England v the World', Marine Insurance at the Turn of the Millenium Vol 2 (1999) 53.
[357] See Explanatory Notes, Consumer Insurance (Disclosure and Representations) Bill [HL] (2011) para 42. Accessed online at www.parliament.uk on 24 Sep 2019.
[358] Section 16 (2) IA 2015 states: A term of a non-consumer insurance contract, or of any other contract, which would put the insured in a worse position as respects any of the other matters provided for in Part 2, 3 or 4 of this Act than the insured would be in by virtue of the provisions of those Parts (so far as relating to non-consumer insurance contracts) is to that extent of no effect, unless the requirements of section 17 have been satisfied in relation to the term.
[359] Section 17 IA 2015 (The transparency requirements) provide: (1) In this section, 'the disadvantageous term' means such a term as is mentioned in section 16 (2). (2) The insurer must take sufficient steps to draw the disadvantageous term to the insured's attention before the contract is entered into or the variation agreed. (3) The disadvantageous term must be clear and unambiguous as to its effect (4) In determining whether the requirements of subsections (2) and (3) have been met, the characteristics of insured persons of the kind in question, and the circumstances of the transaction, are to be taken into account. (5) The insured may not rely on any failure on the part of the insurer to meet the requirements of subsection (2) if the insured (or its agent) had actual knowledge of the disadvantageous term when the contract was entered into or the variation agreed.
[360] Section 17 (2) IA 2015 provides: The insurer must take sufficient steps to draw the disadvantageous term to the insured's attention before the contract is entered into or the variation agreed.

(or its agent) had actual knowledge of the disadvantageous term when the contract was entered into, or the variation agreed.

In essence, insurers are not being prevented from including conditions that are so fundamental that breach by the insured would discharge the insurer from all liability. The proviso that where this is the case, the insurer should ensure that the consequences of breach are set out fully in the term and should draw the insured's attention to it[361] is not sufficient protection for the consumer-insured because the insurer still retains the statutory right to issue the policy which he would potentially use to his exclusive advantage. This is tantamount to rehashing the freedom of contract dynamic all over again which was shown in Chapter 3[362] to be overwhelmingly in favour of the insurer. This is worrisome.

Also, it is still the case that insurers have an inherent advantage, as they are in position to know more about the principles of insurance law than an average insured. Although the intensive use of professional intermediaries when placing commercial risks is supposed to help enormously bridge the knowledge gap, the question arises as to how many consumer-insureds can benefit from the service.

Although section 6 (1) and (2) of the CIDRA 2012 and section 9 (1) and (2) of the IA 2015 abolish basis of the contract clauses the contractual effects of the traditional warranty are still very much in play because of the interconnection between warranty, representation, and good faith. Traditionally, the practice of insurance law had given rise to an inexorably tangled web of interrelationships between representations, good faith, and warranties that it is virtually impossible to apply one without the others in the contract formation process. For example, from the duty of good faith disclosure is required,[363] whose absolute accuracy is avouched by the basis of the contract clause, which converts it into a warranty, whose breach terminates the insured's cover. As such, certain conducts of the insured are most likely to be caught by one of them, and since these terms have not been abolished in the new Acts, the door is still open for an insurer to draft a policy of insurance in such a manner as to use either or a combination of those terms to impose the practical effects of a warranty on the insured. The insurer is most

[361] Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims; and Late Payment' (Law Com No 353 / Scot Law Com No 238) (2014) para 15.11.
[362] See Chapter 3 sub-para 3.6.1.
[363] The modified Section 17 MIA 1906 (UK) states: A contract of marine insurance is a contract based upon the utmost good faith.

likely to be interested in the forfeiture rules that he can exploit to deny claims and maximize his profits and would potentially use his rights to issue the policy to include terms favourable only to himself.

4.2.2 Prohibition of Contracting Out

Section 10 CIDRA 2012 strictly prohibits contracting out for the consumer insured while section 16 IA 2015 does so for the non-consumer insured subject to certain transparency requirements. Section 10 CIDRA 2012 states: (1) A term of a consumer insurance contract, or of any other contract, which would put the consumer in a worse position as respects the matters mentioned in subsection (2) than the consumer would be in by virtue of the provisions of this Act is to that extent of no effect. Section 16 (2) IA 2015 on the other hand provides: A term of a non-consumer insurance contract, or of any other contract, which would put the insured in a worse position as respects any of the other matters provided for in Part 2, 3 or 4 of this Act than the insured would be in by virtue of the provisions of those Parts (so far as relating to non-consumer insurance contracts) is to that extent of no effect, unless the requirements of section 17 have been satisfied in relation to the term. Section 17 (1), (2) and (3) provide: (1) In this section, "the disadvantageous term" means such a term as is mentioned in section 16 (2). (2) The insurer must take sufficient steps to draw the disadvantageous term to the insured's attention before the contract is entered into or the variation agreed. (3) The disadvantageous term must be clear and unambiguous as to its effect.

The implication is that first, insurers cannot contract out of the abolition of the basis of the contract clause in the consumer contract. Instead, consumers are required to answer insurers' questions honestly and to take reasonable care that their replies are accurate and complete. Second, the insurer's overwhelming advantage over the consumer-insured is significantly diminished thereby virtually equalising the parties. Third and very importantly, the consumer-insured is now statutorily protected against the remedies for qualifying misrepresentation[364] in addition to a reduction in his duties of disclosure and representation. These are positive developments in the direction of consumerism.

Nevertheless, it would have been better still if the tests of 'honestly' and 'reasonable care' had been provided to clarify precisely what is required of the insured during the pre-contract, as the

[364] A qualifying misrepresentation is one whose breach the insurer has a statutory remedy.

insurer still retains the statutory right to determine what information is material for the purposes of underwriting the risk(s).[365] As it is, the insurers would potentially try to regain their advantages over the consumer-insured by making the test of those terms points in issue during litigations.

Although this statutory focusing of attention on the consumer-insured in CIDRA 2012 is a big boost to consumerism there is a need to emphasize the peculiarities of consumer vis-à-vis the non-consumer insured because in the commercial perspective, the characteristics of natural persons and small businesses are clearly distinguishable from those of big companies and multinational corporations. In particular, the ability to hire legal expertise for protection and pre-contract negotiations is crucial in insurance which large corporations can easily afford but which could be quite a challenge to the consumer-insured which is a potential source of suffering unfairness. Indeed, the LC reports that one large company refuses to agree to warranties in any circumstances.[366] Not surprisingly, contracting out is permitted for the non-consumer insured but disallowed for the consumer-insured ostensibly because of the legal skills required for such negotiations.

4.2.3 Restriction of Freedom of Contract

Evidently, insurers have used the freedom of contract principle under the traditional regime to exercise unfair advantage over the insureds during the pre-contract process. A further implication of section 10 (1) CIDRA 2012[367] is that it is tantamount to a restriction of the common law freedom of contract between the consumer-insured and the insurer. Nevertheless, to the extent that freedom of contract potentially operates to the advantage of the stronger party, in this case, the insurer, it is in a sense a fairer position for the insured because access to expert legal service may not be easily available to the consumer-insured due to cost implications, which might be a disadvantage in precontract negotiations. It might also potentially prevent the insurer from imposing the basis clause warranty through other means. To that extent, it is a net gain to the consumer-insured. Again, this is a positive development. However, the insurer's

[365] Section 52 MIA 1906 (UK) states that '…it is the duty of the insurer to issue the policy to the assured or his agent…' while section 7 (3) IA 2015 states that 'A circumstance or representation is material if it would influence the judgement of a prudent insurer in determining whether to take the risk and, if so, on what terms.'

[366] Insurance Contract Law Issues Paper 2 Warranties (2006) para 5.28.

[367] Section 10 (1) CIDRA 2012 states: A term of a consumer insurance contract, or of any other contract, which would put the consumer in a worse position as respects the matters mentioned in subsection (2) than the consumer would be in by virtue of the provisions of this Act is to that extent of no effect.

statutory right to issue the policy[368] and the exact compliance rule still subsists, which means that the insurer can still write in terms favourable to himself in the policy which the insured would have to exactly comply with, thereby sustaining, if not worsening, the existing unfairness of warranties. A statutory provision for a co-joint issuance of a policy between the two parties would have solved the problem.

Again, section 2 (1) and (2) provide: 'This section makes provision about disclosure and representations by a consumer to an insurer *before a consumer insurance contract is entered into or varied*;'[369] and 'It is the duty of the consumer to take reasonable care not to make a misrepresentation to the insurer.' By virtue of the italicized clause above, disclosure and representations by a consumer to an insurer are made 'conditions precedent' to the inception of the insurance contract, which are the same as past or present fact warranties. Where there is any untruth, the insured would incur the remedy of breach of warranty. This nullifies any gains to the insured that may have accrued from the prohibition of contracting out.

4.2.4 Abrogation of Automatic Discharge of Insurer

Whereas section 33 (3) of the MIA 1906 (UK) states that the insurer's liability under the contract is automatically discharged from the point of breach, section 10 (1) of the IA 2015 states that any rule of law that breach of a warranty (express or implied) in a contract of insurance results in the discharge of the insurer's liability under the contract is abolished. This should be applauded because it has long been established that the remedy of breach of insurance warranty is disproportionately severe and inappropriate to the violation.[370] Automatic discharge from liability is also manifestly unfair when viewed against the backdrop that most warranties function to prevent risk alteration after the inception of the policy. In most cases, alterations made in the risk do not have a lasting impact.[371] Nonetheless, insurers have been known to use it more as a technical defence against the payment of claims rather than for controlling the risk.[372] As the discharge of the insurer's liability is automatic, neither party to

[368] Section 52 MIA 1906 (UK) provides in part '…the duty of the insurer to issue the policy to the assured or his agent, are concurrent conditions…'
[369] Italicized by researcher for emphasis.
[370] Baris Soyer, 'Risk Control Clauses in Insurance Law: Law Reform and the Future, The Cambridge Law Journal 75 (2016) 2.
[371] Baris Soyer, 'Risk Control Clauses in Insurance Law: Law Reform and the Future, The Cambridge Law Journal 75 (2016) 2.
[372] The law reports are full of cases involving refusal to indemnify the insured for breaches that are immaterial, irrelevant, and lack any causal link to the loss which had occurred.

the insurance needs to take any step concerning it. In consequence, the consumer-insured may suddenly be without cover and quite often be unaware of it.[373] In an apparent oxymoron, the ABI opined that this consequence could be 'highly problematic for an insured'.[374] The consumer-insured who is unlikely to have expert legal agent may not realise that he must either renegotiate with the insurer to restore cover or take steps to find alternative cover.

In any event, the implication of the amendment is that the 'language' of policies would potentially become less technical, frivolous warranties would most certainly fade away, and cumbersome compliance requirements on the insured would diminish, thereby lessening the rate of breaches of warranty and the attendant litigations and associated costs. This is a net gain for consumerism as the probability of the insured getting his benefits under the contract is also enhanced, thereby meeting an essential purpose for purchasing insurance. This is an excellent step towards mitigating unfairness in the traditional warranty. Thus, the insurers will have to find another 'technical excuse' for denying the payment of even legitimate claims.

In a similar vein, section 10 (7) of the IA 2015 amends section 33 (3) of the MIA 1906 (UK) by removing the clause '[if] it be not so complied with, then, subject to any express provision in the policy, the insurer is discharged from liability as from the date of the breach of warranty, but without prejudice to any liability incurred by him before that date', from the subsection, thereby effectively repealing those existing statutory rules and any common law equivalent. Accordingly, section 33 (3) of the MIA 1906 (UK) now reads: 'A warranty, as above defined, is a condition which must be exactly complied with, whether it be material to the risk or not.' This means the consumer-insured needs only to concern himself with compliance obligations as the threat of the insurer's 'guillotine' (automatic discharge) is no longer hanging over his head, ready to drop. This would potentially change the rule of law of insurance warranty into a milder, fairer, more balanced, and more equitable contractual dynamic. Thus, a key aspect of unfairness in the traditional warranty is now in part expunged from the statute books.

However, it is still the case that the warranty must be exactly complied with, failing which the insurer's liability is automatically and immediately suspended giving rise to two implications, depending on whether the breach can be remedied or not. If the breach is remediable, the

[373] M Clarke, 'Insurance Warranties: the absolute end?' LMCLQ (2007) 474.
[374] Zhen Jing, Warranties and doctrine of alteration of risk during the insurance period: A critical evaluation of the UK Law Commissions' proposals for reform of the law of warranties 25 Insurance Law Journal (2014) 187.

insured can do so and have his cover restored. But if it is not,[375] the suspension becomes permanent. In such circumstances, the insured does not get his desired indemnity for which he paid the premium. This is still unfair.

4.2.5 The Introduction of the Remediability of Breach

One of the key reforms made by IA 2015 on the traditional warranty is in section 10 (2) which provides: 'An insurer has no liability under a contract of insurance in respect of any loss occurring, or attributable to something happening, after a warranty (express or implied) in the contract has been breached *but before the breach has been remedied*.'[376] Also, section 10 (4) states that '[s]ubsection (2) does not affect the liability of the insurer in respect of losses occurring, or attributable to something happening – (a) before the breach of warranty, or (b) *if the breach can be remedied, after it has been remedied*.'[377] Clearly, by virtue of the immediate italicized phrases above, the breach of warranty is now remediable. The insurer's liability is suspended during that period, but the insurance coverage is resumed once the breach is remedied. This significantly modifies the traditional warranty in section 34 (2) of the MIA 1906 (UK) which states that 'when a warranty is broken, the assured cannot avail himself of the defence that the breach has been remedied, and the warranty complied with, before loss'. Again, this mitigates another key area of unfairness to the insured and enhances consumerism.

It is ironical though that at common law, a momentary inconsequential or immaterial breach of a warranty should not be remediable, especially in circumstances where the warranty functioned to maintain the risk at the pre-contract level, which was the essence of the warranty in the first place. The insurer should welcome the remedying of the breach by the insured, and the insured should not be automatically deprived of his insurance cover by the operation of law.[378] For example, when the insured gives an incorrect but immaterial answer in a basis clause warranty, the insurer has obviously not suffered any consequential damage.[379]

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[375] If a deadline is missed, for instance, the insured could never cease to be in breach because the critical time for compliance has passed.
[376] Italics added by researcher for emphasis.
[377] Italics added by researcher for emphasis.
[378] Baris Soyer, 'Risk Control Clauses in Insurance Law: Law Reform and the Future', The Cambridge Law Journal, 75 [2016]
[379] Denying recovery to a policyholder for such inconsequential breach smacks of the insurer lacking in good faith and any pretensions of having made the contract for any altruistic purpose of providing cover, but rather for a mercenary economic benefit at the expense of the policyholder. This appeared to be the type of conduct Lord Wrenbury was referring to when he stated in *Glicksman v Lancashire & General*

Nevertheless, even as it stands, the remediability of breach of warranty has great potential for removing unfairness in the law. Clearly, under this law, the outcome in the leading case of *De Hahn v Hartley*[380] would have been a dismissal of the underwriter's lawsuit for a purported breach of warranty because the warranty had been 'remedied' as at the time of the loss. Thus, the obnoxious and unfair traditional warranty whereby the insured is statute-barred from recovery for even a trivial unintentional error in breach of a warranty is extinguished, and very effectively too. This is welcome.

4.2.6 The Enactment of Suspensive Liability

The suspension of the insurer's liability under section 10 (2) means that the insurer will have no liability for anything that occurs or is attributable to something occurring during the suspension period. However, to treat warranties as suspensive conditions is tantamount to treating what would otherwise be a continuing warranty as merely suspending the risk so that once the breach has been remedied, the risk reinstates.[381] Furthermore, the implication of section 10(4)(b) – that section 10 (2) does not affect the liability of the insurer in respect of losses occurring or attributable to something happening if the breach can be remedied, after it has been remedied – is that the insurer will be liable for losses occurring after a breach has been remedied.[382] This is unlike what obtained under the traditional warranty regime where any breach, no matter how trivial, was held to automatically and permanently discharge the

Assurance Co Ltd [1927] A C 139 'I think it a mean and contemptible policy on the part of an insurance company that it should take the premiums and then refuse to pay upon a ground which no one says was really material. Here, upon purely technical grounds, they, having in point of fact not been deceived in any material particular, avail themselves of what seems to me the contemptible defence that although they have taken the premiums, they are protected from paying.'

[380] (1778) 1 TR 343. A vessel was insured for a voyage from Africa to its port of discharge in the West Indies. It was written on the margin of the policy: 'Sailed from Liverpool with 14 six-pounders, swivels, small arms, and 50 hands or upwards; copper sheathed.' As the vessel was captured during the period covered by the policy, the underwriter paid the loss. Subsequently, learning that the vessel had sailed from Liverpool with only 46 hands – although it had, six hours later, taken on six additional men at Anglesea, thus sailing from that island with 52 men – the broker brought an action to recover the money paid on the ground that the insurance was void for breach of warranty. Judgment was given for the plaintiff.

[381] Zhen Jing, Warranties and doctrine of alteration of risk during the insurance period: A critical evaluation of the UK Law Commissions' proposals for reform of the law of warranties 25 Insurance Law Journal (2014) 190. See also R Merkin, 'Reforming Insurance Law: is there a case for reverse transportation?', A Report for the English and the Scottish Law Commissions on the Australian Experience of Insurance Law Reform (2007) 60.

[382] Explanatory Notes for Draft Insurance Contracts Bill (2014) para A.69. Accessed online at https://www.scotlawcom.gov.uk/files/5114/0309/9806/Explanatory_Notes_-_17_June_2014.pdf on 23 August 2021.

insurer from liability, and that '[w]here a warranty is broken, the insured cannot avail himself or herself of the defence that the breach has been remedied, and the warranty complied with, before loss.'[383] There is thus a diminishing of the insurer's rights. Linking the insured's recovery to circumstances when he is no longer in breach of the warranty also satisfies the reasonable expectations of a reasonable insured and underscores the importance of complying with contractual obligations and it is also fair to the insurer. Most importantly, it is clear that the insurer will statutorily no longer be automatically and permanently discharged from liability for any breach of warranty. This is commensurate with the concept of consumerism as the trampling on the consumer-insured's contractual benefit has finally been abolished.

Nevertheless, the phrase 'attributable to something happening' is rather nebulous because any number of things could happen during the period of the breach. For instance, since the contract itself is still alive, a covered risk might occur by natural causes, or the insured might breach another policy warranty during the suspension period. It has been suggested that the wording is intended to cater for the situation in which loss arises as a result of an event which occurs during the period of suspension but is not actually suffered until after the breach has been remedied.[384] It may happen, for example, that a fire alarm warranty is breached in the warehouse where fine wines are stored, and the insurer's liability is suspended until the fire alarm is restored to working order. Meanwhile, another warranty in the policy covering fine wines requires the bottles to be stored on their sides, and the insured mistakenly stores them upright, with the effect that the corks shrink and the wine becomes oxidized, which is not noticed until after the fire alarm had been restored. Although the insured may remedy the breach by laying the bottles on their sides, the permanent loss of quality of the fine wine is 'attributable to something happening' during the period of breach of the fire alarm warranty. Under section 10 (2), the insurer is not liable.

It is to be noted, though, that this explanation is not incorporated into the statute so that the meaning of the phrase 'attributable to something happening', remains uncertain to the general reader. Furthermore, there are warranties whose breach cannot be remedied, that is, cannot become essentially the same as that originally contemplated by the parties as depicted under

[383] Section 34 (2) MIA 1906 UK.
[384] The Explanatory Notes for Draft Insurance Contracts Bill (2014) para A69. See also Alastair Owen, *The Law of Insurance Warranties: Flawed Reforms and a New Perspective* (Routledge, 2021) 131.

sections 10 (5)[385] and (6)[386] (like the example of the oxidized wine). In addition, some warranties require something to be done by an ascertainable time. Suppose a deadline is missed, for instance. In that case, the insured could never cease to be in breach because the critical time for compliance has passed[387] so that suspension of liability in such circumstance is virtually of no contractual significance. Moreover, it means if an actual loss occurs fortuitously during the period of suspension of the insurer's liability, the insured has no cover regardless. This is unfair to the consumer-insured, who is suddenly rendered without cover for doing absolutely nothing wrong. This is even worse than the traditional position that this statute purports to reform. At least, traditionally, the insured's cover disappears permanently, foreclosing any false sense of being under cover, only to have it blown away fortuitously. Therefore, there is an urgent need for a redraft of this portion of the statute.

Interestingly, the attribution to 'something happening' that invariably gives rise to the suspension of the insurer's liability causally links that 'something' to the suspension, as in the example of the oxidized wine (whose quality has been lost because of breach). It seems then that the crucial relevance of causal connection of the breach to the resultant loss is again being established, albeit through the backdoor.

4.2.7 The Introduction of Causal Connection of Breach with the Loss that Has Occurred

Under section 11 (1)[388] and (2) of the IA 2015, insurers will not be able to rely on breach of a warranty or similar 'risk mitigation term' to reject a claim if the breach is not connected to the actual loss that has occurred. Therefore, automatic, and permanent termination of cover will no longer be the insurer's sole remedy for breach of warranty. In particular, subsection (2) states: 'If a loss occurs, and the term has not been complied with, the insurer may not rely on the non-compliance to exclude, limit or discharge its liability under the contract for the loss if the

[385] IA 2015 section 10 (5) provides: For the purposes of this section, a breach of warranty is to be taken as remedied—(a) in a case falling within subsection (6), if the risk to which the warranty relates later becomes essentially the same as that originally contemplated by the parties, (b) in any other case, if the insured ceases to be in breach of the warranty.

[386] IA 2015 section 10 (6) A case falls within this subsection if— (a) the warranty in question requires that by an ascertainable time something is to be done (or not done), or a condition is to be fulfilled, or something is (or is not) to be the case, and (b) that requirement is not complied with.

[387] The Explanatory Notes for Draft Insurance Contracts Bill (2014) para A70.

[388] IA 2015 section 11 (1) provides: This section applies to a term (express or implied) of a contract of insurance, other than a term defining the risk as a whole, if compliance with it would tend to reduce the risk of one or more of the following— (a) loss of a particular kind, (b) loss at a particular location, (c) loss at a particular time.

insured satisfies subsection (3) - 'The insured satisfies this subsection if it shows that the non-compliance with the term could not have increased the risk of the loss which actually occurred in the circumstances in which it occurred.' Thus, a connection is required between the non-compliance with a warranty and the risk of loss. In effect, the insurer's age-long amour may have been pierced. This is in sharp contrast to the traditional position, which rendered the causal connection of breach to the loss irrelevant. The insurer was permitted to literally dictate the terms of the contract without let or hindrance. Thus, the changes introduced are a fairer regime for warranty than in the MIA 1906 (UK) because it particularly affords the consumer-insured the opportunity to 'defend' himself by showing that the non-compliance with the term could not have increased the risk or the loss which occurred in the circumstances in which it occurred. In effect, the compelling necessity for a causal connection between breach and the loss, which had been a recurrent recommendation of reports of the LC,[389] may have finally been implemented. In this regard, the amendment is a step in the right direction. But crucially too, causal connection to the breach is a principle of the alteration of risk doctrine, a key pillar of the civil jurisdictions' control of risk to the insurer.[390] There is then a sense of a 'hybrid' approach – a combination of common law and civil law solution - to mitigating the unfairness of irrelevance of causal connection of breach with the loss.

However, it is not clear in the Act whether the causal connection contemplated is with the increase of risk of loss or the loss itself. A causal connection merely to the increase of risk of loss may not be relevant, as a claim can only be made upon the occurrence of an actual loss. But a connection of breach to the actual loss is obviously relevant because a loss would be injurious to the insurer's interest. On the other hand, the cause of loss would have to pass the causation tests before it can be of any advantage to the insured. Thus, this point is potentially controversial in practice.

It is argued in the Explanatory Notes to the 2014 Insurance Bill,[391] for instance, that a direct causal link between the breach and ultimate loss is not required, and that the test is not whether the breach actually caused or contributed to the loss but whether non-compliance with the term

[389] See Insurance Contract Law: Misrepresentation, Non-Disclosure and Breach of Warranty by the Insured (2007) para 8.1. See also Insurance Contract Law Issues Paper 2 Warranties (2006) para 11. See also R Merkins and O Gurses, 'Insurance Contracts after the Insurance Act 2015', LQR (2016) 5.
[390] Zhen Jing, 'Warranties and doctrine of alteration of risk during the insurance period: A critical evaluation of the UK Law Commissions' proposals for reform of the law of warranties' 25 ILJ (2014) 183.
[391] See the Explanatory Notes for Draft Insurance Contracts Bill (2014) para A.78.

could have increased the risk in the circumstances that the loss occurred.[392] However, it should be questionable as to why the insurer should be preoccupied with a mere increase of risk, whereas only the actual loss may be capable of triggering a claim. This may have given rise to suggestions that it is necessary to look at the issue broadly and not to consider 'the way' in which the loss occurred. The cause of the loss is immaterial, and it is particularly irrelevant that compliance with the obligation would not have made any difference: it is enough that it could have made a difference, the point being that the word 'circumstances' differs significantly from the word 'way'.[393]

Unfortunately, this tends to make the argument of causal connection of the breach with the loss or damage unnecessarily academic because the parties to an insurance contract are basically interested only in their benefits under the contract, which can be triggered only upon the occurrence of the actual loss regardless of 'circumstances' or 'the way'. Therefore, this portion of the statute needs to be reworked.

4.2.8 The Introduction of Divisibility of Warranty

Divisibility of warranty refers to the situation whereby the breach of one warranty term in a policy does not void the entire policy, in contrast to the traditional warranty regime where a breach of any warranty in the insurance policy invalidates the whole contract. The practice that the breach of a single warranty discharges liability for all risks covered by the policy had been widespread in the insurance industry of common law jurisdictions. It had been standard practice that breach of a warranty associated with one risk in a policy document, such as fire, also discharges the insurer from liability for losses of some other kind, such as flood[394] in the same document.

Courtesy of section 11 (1) - (4) of the IA 2015, where compliance with a warranty would tend to reduce the risk of loss of a particular type or at a particular time or place, the insurer's liability

[392] For example, if a motor policy warrants that the vehicle will be driven by a qualified driver, and a learner driver crashes because of a sudden loss of consciousness, the loss that actually occurred was crashing, and the fact that the vehicle was being driven by a non-qualified driver may have increased the chances of the loss that actually occurred (crash), but not the chances of a loss in the circumstances in which it occurred (loss of consciousness).

[393] Robert Merkin and Ozlem Gurses, 'Insurance Contracts after the Insurance Act 2015' LQR (2016) 15.

[394] Zhen Jing, 'Warranties and doctrine of alteration of risk during the insurance period: A critical evaluation of the UK Law Commissions' proposals for reform of the law of warranties' 25 ILJ (2014) 186.

for breach of the warranty would only be suspended in respect of losses of that type. By this provision, warranty is now divisible because the '[t]erms not relevant to the actual loss' set out in section 11 of the IA 2015 are meant to concern warranties and other terms which are designed to reduce the risk of a particular type of loss, or the risk of loss at a particular time or in a particular place.[395] In the event of breach of such a term, it is intended that the insurer's liability will only be excluded for losses of that type, or at that particular time or place. Section 11 (1)[396] specifically refers to contractual terms which, if complied with, 'would tend to reduce the risk' of loss, as described above. In other words, multiple breaches of specific warranties could conceivably lead to several areas of liability being 'carved out' of the policy, with the rest of the contract continuing to operate.[397] Unsurprisingly, this purports to curtail certain traditional 'rights' of the insurer and there seems to be a sense that some concessions are being made to the insured, which is a positive development.

Indeed, under the IA 2015, section 11 brings benefits to policyholders by preventing insurers, in certain circumstances, from relying on a breach of a policy term that is unconnected to the actual loss suffered as grounds upon which to decline a claim.[398] This makes the materiality of the breach of warranty and its causal connection with the loss relevant, thereby removing one of the main areas of unfairness in the common law insurance warranty.

Nevertheless, the focus of section 11 seems to unnecessarily be on preventing the increase of risks to the insurer rather than on facilitating indemnity for the insured and to that extent it goes against the concept of consumerism. The common law system of generally permitting economic losses to lie where they fall[399] seems to have been jettisoned in this respect. Rather than letting the insurer manage his business risks like everyone else, he is apparently being statutorily assisted to walk away with insurance premiums for risks he has not borne. This is

[395] The Explanatory Notes for Draft Insurance Contracts Bill (2014) para A72. The 'particular location' provision is aimed at, for example, the place where a vehicle is garaged or an obligation to keep valuable items in a safe while on specified premises.
[396] Section 11 (1) provides: (1) This section applies to a term (express or implied) of a contract of insurance, other than a term defining the risk as a whole, if compliance with it would tend to reduce the risk of one or more of the following— (a) loss of a particular kind, (b) loss at a particular location, (c) loss at a particular time.
[397] See Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims; and Late Payment para 17.55.
[398] The Adviser: 'The Insurance Act 2015: Warranties and Other Terms' (Marsh & MacLennan, 2016) 2.
[399] JL Longnaker, 'History of Insurance Law,' 30 U Kan City L Rev, 55 (1962) 31.

despite Lord Mansfield's case law in *Eden and Others v Parkinson*[400] and in *Lilly v Ewer*[401] that 'The warranty is, that things stand so at the time; not that they shall continue.'

Similarly, Chief Baron Pollock famously said in *Baxendale v Harvey*:[402] 'If a person who insures his life goes up in a balloon, that does not vitiate his policy… A person who insures may light as many candles as he pleases in his house, although each additional candle increases the danger of setting the house on fire.' The implication here is that the insured's state may change but not necessarily because of breach of warranty. It is therefore up to the insurer to do his due diligence and decide, when underwriting, whether to accept a risk or not. The statutory safeguards against escalating risks to the insurer appear to countermand the precedence in the two cases above, which begs the question: 'Why should the insurer be statutorily protected against risks when it is his business to underwrite risks?' If every change of the subject matter of the insurance is treated as a change of risk how then would the insured's reasonable expectations be met?

Take the illustration as provided by the LC, for instance.[403] A motor policy contains a roadworthiness warranty, and there is a breach in the form of a defective headlight. If the vehicle skids on black ice in the dark, then – although the faulty headlight did not cause the accident – the risk of the loss that occurred and the circumstances in which it occurred were increased by non-compliance so that the warranty is operative. The loss that occurred was a crash, and the circumstance in which it occurred was darkness. Conversely, if the vehicle collided with a truck in broad daylight, the defective headlight could not have contributed to the accident in the circumstances in which it occurred. It is submitted that this analogy is too hypothetical, cumbersome and tends to answer for only particular occurrences. Besides, it is convoluted and potentially difficult to apply. What should happen, for instance, if in the example above, a hail stone drops from the sky and shatters the windscreen of the car? Certainly, there is no compliance with a warranty that can prevent that from occurring.

[400] Dougl 705, 792. Cited in James Allan Park, *A System of the Law of Marine Insurance*, (Boston, 1799) 319.
[401] (1778), Oldham, Mansfield Manuscripts, vol I, 551.
[402] (1859) 4 H & N 445, at 449 and 452.
[403] Robert Merkins and Ozlem Gurses, 'Insurance Contracts after the Insurance Act 2015' LQR (Sweet and Maxwell, 2016) 16.

4.3 The Extent and Efficacy of the Reforms

The efficacy of the warranty reforms in the CIDRA 2012 and IA 2015 is assessed on the extent to which they have solved the unfairness depicted in Chapter 3 with reference to the consumer-insured. Notably, the mischievous basis of the contract clause has been abolished for both the consumer and business insureds, and the unfairness of the traditional warranty has been somewhat ameliorated. The IA 2015 went further to address the following areas of unfairness regarding warranty: the unjustifiable requirement and purpose of exact compliance with a warranty, the unfairness of the remedy of automatic discharge of insurer for insured's breach, breach not being material to risk or loss, lack of causal connection between the breach of warranty and the loss, the unfairness of the rejection of later remedy of a breach as irrelevant, and the indivisibility of warranty.

On the other hand, the following issues were not addressed: the unjustness of implied warranties, the apparent conflict in meaning of the promissory warranty and past or present facts warranties with the statutory definition in practice. Also, the issue of the established principles of the warranty of seaworthiness of the ship being applied to non-marine warranties is not addressed. No demarcation has been made of marine and non-marine warranties, and no new definition of warranty has been provided so that the uncertainty of its exact meaning still subsists. This researcher opines that the waiver of breach of warranty ought to have been retained, and the old practice of 'pay now and sue later'[404] should have been reintroduced as a way of lessening the unfairness and imbalance of the traditional warranty as well as enhancing the achievement of the age-old insurance principle of mitigating the effects of misfortunes for the insured. Overall, the reforms only partially solved the warranty problems as there are still some lingering issues concerning some of the solutions in the IA 2015.

4.3.1 Issues on Efficacy of the Abolition of Basis of the Contract Clause

As noted earlier, although the basis clause warranty has been abolished, procedurally, a pre-contract representation respecting the subject matter of the insurance must be made by the insured, and it is still a principle of insurance law that such a representation if false in any

[404] See JL Longnaker, 'History of Insurance Law, 30 U Kan City L Rev 31, 55 (1962) 44 where it is stated 'And the insurers are bound first to pay to the aforesaid the sum insured, and to litigate afterwards. And these are to bind themselves by sufficient sureties (one or more as directed by the fire official deputies on insurance) to pay back to each insurer the sums they have received, with damages of twenty per cent. The time allowed to the insurers for proving is eighteen months.

material point, avoids the policy.[405] Innocent or fraudulent misrepresentation may also render the contract voidable, or the contract may be terminated for breach of an essential term. Clearly, these pre-contractual representations are the same information that makes up past or existing fact warranties, and insurers are still permitted to include them in their policies. The inexorably tangled web of interrelationships between representations, utmost good faith, and warranties are wont to make it virtually impossible to take away the mischief of the basis clauses by merely abolishing its use. Therefore, retaining the insurer's statutory right to issue the policy, which permits him to include specific warranties in them under conditions specified by him which the insured must comply with, significantly degrades the efficacy of the abolition of the basis clause. It is tantamount to giving back with the right hand what has been taken away with the left.

4.3.2 Non-Abolition of Specific Warranties

Warranty in a consumer insurance contract is itself not abolished under sections 6 of the CIDRA 2012 and 9 IA 2015, only that it cannot be created through the basis of the contract clause. Therefore, it remains possible for insurers to include specific warranties within their policies.[406] However, such a warranty would need to be fair within the meaning of the Unfair Terms in Consumer Rights Act 2015 to be valid.[407] Undeniably, most insurers' policy forms contain standard policy terms drafted in advance that have literally not been individually negotiated. The consumer has therefore not been able to influence the substance of the terms. To that extent, they must be regarded as unfair.

Furthermore, it is a notorious fact that under section 21 of the MIA 1906 (UK),[408] the traditional practice has always been that the insured rarely, if ever, gets to see the policy before the

[405] See *Pawson v Watson* (1778), 2 Cowp, 785.
[406] Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims; and Late Payment (2014) para 16.11.
[407] Section 62 (4) of the Consumer Rights Act 2015 provides that a term is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.
[408] MIA 1906 section 21 provides: A contract of marine insurance is deemed to be concluded when the proposal of the insured is accepted by the insurer, whether the policy is then issued or not; and for the purpose of showing when the proposal was accepted reference may be made to the slip or covering note, or other customary memorandum of the contract, although it is unstamped.

inception of the contract[409] and notwithstanding the utmost good faith principle[410]of the MIA 1906 before its amendment by the IA 2015 insurers do not always square up with the consumer-insured on this point. The preponderance of case law indicates that the relationship between the insurer and the insured can at best be characterized as that of 'caveat emptor', where each party works for their exclusive benefit to the detriment of the other. This raises fundamental questions of fairness as to the statutory right of the insurer to issue the policy and the permissibility of specific warranties. Although it has been suggested that warranties are rarely, if ever, used in consumer insurance contracts and do not present a problem beyond that posed by the basis of contract clauses,[411] their very existence is technically detrimental to the benefit of the insured because the insurer can invoke them any time to his advantage. Indeed, one sector of the insurance industry had stated during consultations that in practice, they only take advantage of technical defences such as those founded on 'basis of the contract' clauses to repudiate policies when they suspect fraud which they are unable to prove.[412] This makes the insurer judge and jury in his own case. What then would stop him from taking other advantages, especially if not prohibited by law?

4.3.3 Issues with Suspensive Liability

Arguably, the most unfair aspect of the traditional warranty is the remedy of automatic discharge of the insurer's liability for a breach of the warranty. It would seem then that anything that takes away this undue advantage to the insurer is a game-changer. But no. The IA 2015 provision under section 10 (2), which suspends the insurer's liability from the time of the breach, and reattaches it once the breach is remedied, is not 'the hero' of the IA 2015 because it can only solve one problem, that is, that a breach of warranty can be remedied, but it does not solve the problems of strict compliance, automatic and immediate suspension of the cover, and the irrelevance of causal connection between the breach and the loss. The remedy of

[409] As noted by the New Zealand Contracts and Commercial Law Reform Committee the practice was that the detailed terms contained in an insurance policy were not negotiated; nor indeed were they necessarily known to the insured until he received his policy document, which may not be until sometime after the contract had come into existence. Where, for example, the policy was held up by a mortgagee it may never come to the hands of an insured at all; and if it did come into his hands, he was unlikely to appreciate all its nuances of meaning.

[410] See section 17 MIA 1906 (UK) A contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith is not observed by either party, the contract may be avoided by the other party.

[411] Lord Eatwell, Consumer Insurance (Disclosure and Representations) Bill [HL]: Evidence (2011) 10.

[412] Insurance Law: Non-Disclosure and Breach of Warranty (Law Com 104) (1980) para 7.6.

suspensive liability means that if a loss occurs during the suspension, it is irrelevant whether the loss is caused by the breach of the warranty in question or that of another warranty in the policy, as the insurer would still be free from liability to pay the loss. This is still unjust and unfair to the insured. Moreover, the breach is remediable only if temporary; if it is permanent, the insurer's liabilities are equally permanently suspended. This would place the insured in the same position as under the common law rule for permanent breach. Worse still, under closer scrutiny the suspensive liability approach tends to raise more questions than answers.

For example, the LC tried to demonstrate what is intended to be achieved by the suspensive provision with the following illustration:[413] A couple insures a small yacht. The policy includes three warranties: (1) a 'premium payment' warranty, requiring payment by June 1; (2) a 'lock warranty' requiring the hatch to be secured by a special type of padlock; and (3) a 'pleasure use only' warranty, forbidding the yacht to be used for commercial gain. The insureds breach all three warranties. They fail to pay the premium until June 15, install the wrong type of padlock, and use the yacht for paid fishing trips. On July 1, the insureds are using the yacht to transport paying customers when it is hit by a sudden hurricane and sinks.

At common law, every single breach may automatically discharge the insurer from liability whereas, under the suspensive provision, the cover would be suspended and would be restored when the breach is remedied. The payment of premium on June 15 would remedy the breach, and the insurer's liability would be restored. No problem there.[414] However, the lock warranty is aimed at preventing increase of risk of loss by theft. This is a specific warranty that, under the suspensive provision, would not suspend the insurer's liability for other types of loss, say, in a fire. Ordinarily, it seems fair enough. However, under closer scrutiny, it is noted that it is not easy to distinguish warranties designed to reduce the risk of a particular type of loss and exceptions in some situations. Accordingly, the suspensive provision is a potential recipe for disputes, and the insured's predicament is not resolved.

The 'pleasure use only' warranty relates to the contract in general and suspends the insurer's liability for all losses until it is remedied. Clearly, the breach had not been remedied in the

[413] Insurance Contract Law: The Business Insured's Duty of Disclosure and the Law of Warranties (2012) para 15.5-15.7.

[414] It is to be noted, though, that premium is already statutorily mandated to be paid before the inception of the contract. When and how the premium should be paid is an agreement of the parties. In my view it is superfluous to make it the subject of a warranty.

instant case, so the insurer rejected the claim on this basis. It is clear that in this situation the approach would not improve the current law. First, under section 10 (7), the insured must still strictly comply with the 'pleasure use only' warranty. Second, the insurer's liability is automatically and immediately suspended from the moment that the paying passengers board the craft. Third, it is irrelevant that the loss has no connection with taking paying customers but is caused by a hurricane.

The only improvement here is that once the insured has deboarded the paying passengers, he has remedied the breach and the cover can be restored. But this is potentially problematic because if, for example, the yacht is regularly employed for passenger services every Monday and for pleasure use for the rest of every week, is the insured in breach of the 'pleasure use only' warranty only on Monday, and the breach remedied from Tuesday to Sunday? Or is he deemed to be in breach for the whole period from Monday to Sunday? Therefore, for this statute to be efficacious, there is a need to redraft this portion of the law to answer these questions.

For instance, since no definition of warranty has been provided in the IA 2015, and the rule of exact compliance is still in force, a workable solution to the ambiguity in the instant case would be to remove the clause 'other than a term defining the risk as a whole' from section 11 (1)[415] so that subsections (1)(a), (1)(b), and (1)(c) would separate the different conditions of occurrences of loss with respect to a particular kind, particular location, and particular time; and section 11 (2) and (3)[416] would then be accordingly applied as the remedy of every such breach.[417] In the case under consideration, none of the breaches of the three warranties was causally linked with the sinking of the boat, in which case the insurer would be held liable.

[415] Section 11 (1) IA 2015 states: This section applies to a term (express or implied) of a contract of insurance, , if compliance with it would tend to reduce the risk of one or more of the following—
(a) loss of a particular kind,
(b) loss at a particular location,
(c) loss at a particular time.

[416] Section 11 (2) and (3) IA 2015 provides:
(2) If a loss occurs, and the term has not been complied with, the insurer may not rely on the non-compliance to exclude, limit or discharge its liability under the contract for the loss if the insured satisfies subsection (3).
(3) The insured satisfies this subsection if it shows that the non-compliance with the term could not have increased the risk of the loss which actually occurred in the circumstances in which it occurred.

[417] After all, section 11 (4) IA 2015 states that this section may apply in addition to section 10.

Although this is a hypothetical case, if such a rule is made, it would potentially lead to the disappearance of trivial and inconsequential warranties from policy documents, thereby lessening the problems.

4.3.4 Non-Demarcation of Non-Marine from Marine Warranties

The major difference between marine and non-marine warranties has already been discussed in Chapter 3 and will not be repeated here. So far, Australia appears to be the only common law jurisdiction that has adopted the option of demarcating the two and it seems that the unfairness and imbalance of the traditional regime in the Australian insurance market are all but gone. The lack of similarity between the warranty of seaworthiness and any essential term in non-marine warranties means applying the rules of law of the former to the latter will potentially continue to be problematic. Indeed, the apparent attempt to create the equivalent of the seaworthiness warranty in non-marine insurance by using the basis clause as the substratum of non-marine insurance so that statements in a proposal form are converted into warranties has been fraught with problems. Thus, demarcating non-marine from marine warranties should have naturally followed the abolition of the basis of the contract clause because, as things stand, there is no substratum (similar with seaworthiness) in non-marine warranties that can be the basis of insurance in the non-marine domain. This means that requirements of exact compliance and immateriality may no longer be justifiable and should be applicable only in special circumstances[418] for non-marine warranties whilst still being retained for marine warranties.[419]

4.3.5 Unresolved Issues with Waiver of Breach

Section 10 (3) IA 2015 provides that subsection (2) does not apply if: (a) because of a change of circumstances, the warranty ceases to be applicable to the circumstances of the contract; (b) compliance with the warranty is rendered unlawful by any subsequent law, or (c) the insurer waives the breach of warranty. Section 10 (3a) and (3b) are the same as section 34 (1) and (3) MIA 1906 (UK) respectively, which had seemingly not been problematic at all in insurance warranty law. The problematic issue appears to be in section 10 (3c), which concerns waiver of breach. Since section 10 (2) IA 2015 provides that an insurer has no liability under a contract of insurance in respect of any loss occurring or attributable to something happening after a warranty (express or implied) in the contract has been breached and by virtue of the judgment

[418] For example, in situations where the insured's breach directly causes the loss.
[419] Because it is already known that an unseaworthy ship is the equivalent of no ship.

in *The Good Luck*[420] (whose practical effect is that there may be obligations of the insured under the contract which will survive the discharge of the insurer from liability), it may devolve on the insurer to have to exercise this prerogative (waiver) to bring the contract to a formal end. Otherwise, the contract might be left unresolved during the insurance period. Therefore, waiver of breach ought not to have been deleted from the MIA 1906 (UK).

4.3.6 Need to Reintroduce the Practice of Pay Now and Sue Later

To underscore the purpose of insurance as a hedge against sudden contingent injurious occurrences, the underwriters in the olden days would commit to paying immediately upon notice from the insured of the occurrence of the insured risk, with the proviso that if it turned out to be otherwise, the insured would return the money with accrued interest of 20 percent.[421] This facilitated mutual trust and good faith between the parties: the insured pays the premium in advance, having not suffered any loss, in the understanding that he would not recover the premium even if the insured risk does not occur during the insurance period; the insurer on his part pays the claim in the understanding that all the warranties have been complied with, failing which he would sue and recover the money paid out. This is precisely what happened in the leading case of *De Hahn v Hartley*.[422] The essential aspect of this arrangement is that it ensures immediate succour to the insured in the event of a sudden misfortune. Therefore, it fulfils the policyholder's purpose for purchasing insurance. But the current practice of litigating first before payment of claims defeats mutuality, goodwill, and the very purpose of insurance warranty, and it had worked to the detriment of the insureds. And yet, without the insureds, there cannot be an insurance contract. Not surprisingly, some critics have gone as far as to advocate for the outright abrogation of warranty in insurance law since it tends to defeat the insured's reasonable expectations under the contract.

4.4 Summary

The traditional warranty as codified in the MIA 1906 (UK) is unfair against the consumer-insured, which CIDRA 2012 and IA 2015 have attempted to reform. The obnoxious basis of the contract clause has been outlawed, and insurers will no longer be able to rely on a breach

[420] [1992] 1 App. Cas. 233 (1991).
[421] See JL Longnaker, History of Insurance Law, 30 U Kan City L Rev 31, 55 (1962) 44 where it is stated '…and the insurers are bound first to pay to the aforesaid the sum insured, and to litigate afterwards…'
[422] (1778) 1 T R 343.

of a warranty or similar 'risk mitigation term' to reject a claim if the breach is not connected to the actual loss that has occurred. Most importantly, automatic and permanent termination of cover will no longer be the insurer's sole remedy for breach of warranty. Instead, cover will be suspended while the insured is in breach of warranty. Also, the insurer's discretion to waive the breach of warranty is abolished.

On the other hand, the insured's exact compliance with a warranty, whether material to the risk or not, is still a statutory requirement. Quite significantly, it is unlikely that the current unfairness of warranty can be solved without demarcating marine from non-marine insurance because most of the unfairness arises as a result of applying the warranty of seaworthiness principles to non-marine insurance warranties. To the extent that these issues have not been addressed in the reforms, there is a lingering doubt over their efficacy. Nevertheless, the divisibility of warranty is a promising reform which Nigeria would do well to consider. Crucially, the introduction of the civil jurisdiction's causal connection of breach to the loss to justify the insurer's denial of claim translates to a 'hybrid approach'. This may be the 'eureka' that Nigeria needs to move its reform forward.

In the next chapter, a similar evaluation of the reforms of warranty in the laws of Australia and New Zealand will be carried out to ascertain their effectiveness well as whether they provide a better option for Nigeria's adoption.

CHAPTER 5

THE ABOLITION OF THE CONCEPT OF WARRANTY IN AUSTRALIA AND NEW ZEALAND AND ITS APPROPRIATENESS IN CONSUMERISM

5.1 Introduction

The aim of this chapter is to critically evaluate the Australian, and the New Zealand, approaches of abolishing the concept of warranty in their insurance laws. This is to determine whether such a model addresses the issues of unfairness to the consumer-insured raised in Chapter 3, and whether it is suitable for adoption to improve the reform of Nigerian insurance warranty law. The focus of the reforms in both Australia and New Zealand appears to be on the management of post-contract risk and the common law position in relation to insurance warranty. There seems to be a sense in these jurisdictions that the unfairness in the traditional warranty is in those areas of law and that any mitigation thereof benefits the consumer-insured. To that extent the reforms can be said to be 'consumerist' in outlook. Accordingly, although the law applies to both the consumer and non-consumer insureds alike all references to 'the insured' in this chapter are made in the context of the consumer-insured.

5.2 Consumerism in the Australia Approach

The Australian reform of insurance warranty law commenced in 1976 when the Australia Law Reform Commission (ALRC) was asked to investigate the laws surrounding insurance contracts.[423] The terms of reference required the ALRC to provide a report on the adequacy of the law governing insurance contracts, regarding the interests of the insurer, the insured, and the public. It also tasked the ALRC to recommend what, if any, legislative or other measures were required to ensure a fair balance between the interests of both the insurer and the insured.[424] This coincided with the period in which the consumer movement was gaining

[423] The only law governing insurance in Australia then was the MIA 1909 (Cth) which is almost the same with the MIA 1906 UK.

[424] The terms of reference were as follows: (1) the adequacy of the law governing contracts of insurance (excluding marine insurance, workers compensation and compulsory third party insurance) having regard to the interests of insurer, insured and the public, and in particular- whether terms and conditions presently found in contracts of insurance operate unfairly; whether certain, and if so what, terms and conditions should be mandatory in contracts of insurance; whether certain, and if so what, terms now found in contracts of insurance should be prohibited; whether the practice of incorporating statements made in proposal forms into contracts of insurance provides an equitable basis of contract between the insurer and the insured; whether it should be mandatory for an insurer to supply to a person seeking insurance written information as to that person's rights and obligations under the proposed contract; whether arbitration clauses in contracts of insurance are operating unfairly to the parties or are otherwise

momentum and it is not surprising that the ALRC looked into the unfairness of breach of warranties to the insured.[425] The first recommendation was for the use of unambiguous words in simple English to describe terms and the rules governing the effect of the insured's conduct prior to a loss.[426] The effect of a term should not depend on whether it is in the form of a warranty or a condition. Second, the right to termination of the contract should be limited to cases where the insured's conduct caused or contributed to the relevant loss.[427] Third, the award of damages should be by reference to whether the insured's conduct caused or contributed to the loss, in line with the law of contract.[428] Other terms whose remedies for breach were similar with those of warranties were also covered as the fairness or otherwise of a term is not a matter of form but of substance. The aspects affecting warranties were covered in sections 24 and 54 of the Insurance Contracts Act (ICA) 1984.

5.2.1 The Demarcation of Marine from Non-Marine Insurance in ICA 1984

Section 9 (1) (d) ICA 1984 provides: Except as otherwise provided by this Act, this Act does not apply to or in relation to contracts and proposed contracts: to or in relation to which the Marine Insurance Act 1909 applies…' This is in line with section 1 of the terms of reference of the ALRC 20 which specifically excluded marine insurance in the law reforms.[429] Although no definition of 'non-marine' insurance is provided, section 10 makes a general reference to contracts of insurance where it states: 'A reference in this Act to a contract of insurance includes a reference to a contract that would ordinarily be regarded as a contract of insurance although some of its provisions are not by way of insurance.'[430] Essentially, MIA 1909, which

undesirable; whether the principles of the law of agency in pre-contractual negotiations should be modified to provide greater fairness to the insured; (2) what, if any, legislative or other measures are required to ensure a fair balance between the interests of insurer and insured; and (3) any other related matter.

[425] ALRC Discussion Paper 63 (2000) para 1.9.

[426] The Law Reform Commission Report No. 20 Insurance Contracts (1982) para 224.

[427] The Law Reform Commission Report No. 20 Insurance Contracts (1982) para 225.

[428] The law of contracts prescribes proportionate remedies.

[429] The topic of marine insurance was omitted from the Commission's earlier inquiries into the law of insurance because, it was said, marine insurance was a discrete area with special significance for international trade and commerce. (See Executive Summary Review of the Marine Insurance Act 1909, 2000) para 1.6.

[430] Such contracts include superannuation, general insurance, liability insurance, an instalment contract of general insurance etc which are listed in sections 4 – 11 ICA 1984. Section 11 (4) (a) for instance states: For the purposes of this Act: (a) a superannuation contract is a contract of life insurance that is being maintained for the purposes of a superannuation or retirement scheme, where the insured is a trustee for the purposes of the scheme…'

covers marine insurance, is excluded because although a contract of marine insurance is a contract that would ordinarily be regarded as a contract of insurance, there are none of its provisions that are not by way of insurance. This was a major step in favour of the consumer-insured as the MIA 1909 provisions on warranty are a near replica of those of the MIA 1906 (UK) in both form and substance and which have been shown to perpetrate unfairness against the consumer-insured.

5.2.2 Abandonment of the Concept of Warranty in Section 24 ICA 1984

5.2.2.1. Treating Every Precontract Statement as a Representation Rather than as a Warranty

Section 24 of the ICA 1984 states: 'A statement made in or in connection with a contract of insurance, being a statement made by or attributable to the insured with respect to the existence of a state of affairs, does not have effect as a warranty but has effect as though it were a statement made to the insurer by the insured during the negotiations for the contract but before it was entered into.' This provision disposes of present warranties by treating every precontract statement as a representation rather than as a warranty, so that breach does not have any automatic effect but rather attracts the ordinary rules governing misrepresentation.[431] Thus, the insurer's ultimate weapon in warranty – the automatic and permanent discharge from liability - is neutralised. The age-old uncertainty in meaning between warranties and representations is also put to rest, as the two were often used interchangeably in early times.

[431] ICA 1984 sections 23 and 28. Section 23 states: Where:
(a) a statement is made in answer to a question asked in relation to a proposed contract of insurance or the provision of insurance cover in respect of a person who is seeking to become a member of a superannuation or retirement scheme; and (b) a reasonable person in the circumstances would have understood the question to have the meaning that the person answering the question apparently understood it to have; that meaning shall, in relation to the person who made the statement, be deemed to be the meaning of the question; while Section 28 provides:
(1) This section applies where the person who became the insured under a contract of general insurance upon the contract being entered into: (a) failed to comply with the duty of disclosure; or (b) made a misrepresentation to the insurer before the contract was entered into; but does not apply where the insurer would have entered into the contract, for the same premium and on the same terms and conditions, even if the insured had not failed to comply with the duty of disclosure or had not made the misrepresentation before the contract was entered into.
(2) If the failure was fraudulent or the misrepresentation was made fraudulently, the insurer may avoid the contract.
(3) If the insurer is not entitled to avoid the contract or, being entitled to avoid the contract (whether under subsection (2) or otherwise) has not done so, the liability of the insurer in respect of a claim is reduced to the amount that would place the insurer in a position in which the insurer would have been if the failure had not occurred or the misrepresentation had not been made.

This is a positive development as a major ingredient of unfairness to the consumer-insured has been extinguished.

5.2.2.2. Abolition of Basis Clause Warranties

The phrase '…a statement made by or attributable to the insured with respect to the existence of a state of affairs does not have effect as a warranty…' practically prevents the insured's precontractual representation from being converted into warranties, which is usually done through the basis of the contract clause. In effect, section 24 abolishes basis of the contract clause warranties in Australia. This is similar with the reform in section 6 of the CIDRA 2012 for consumer insurance and section 9 of the IA 2015 for business insurance in the UK. It also means that insurers are precluded from possibly obtaining a warranty from the policyholder as to the health of the life insured.[432]

Nevertheless, certain circumstances still exist which can potentially bring to bear the practical effects of a warranty on the insured, especially in the post-contract risk management perspective. This will be discussed in subsequent paragraphs.

5.2.3 Departure of Section 54 ICA 1984 from the Traditional Warranty

5.2.3.1 Strikes Fair Balance Between the Interests of Insured and Insurer

Section 54 of the ICA 1984[433] applies to any term that excludes or restricts cover because of a post-contractual act or omission of the insured or some other person, and it effectively reforms

[432] Robert Merkin, 'Reforming Insurance Law: Is there a Case for Reverse Transportation? A Report for the English and Scottish Law Commissions on the Australian Experience of Insurance Law Reform' at para 4.32 where it is stated that insurers remain free to ask the policyholder questions about the life assured; but these can only be answered to the best of the policyholder's knowledge and belief and all that is required of the policyholder under section 26 ICA 1984 is honesty.

[433] Section 54 is entitled 'Insurer may not refuse to pay claims in certain circumstances' and it provides: (1) Subject to this section, where the effect of a contract of insurance would, but for this section, be that the insurer may refuse to pay a claim, either in whole or in part, by reason of some act of the insured or of some other person, being an act that occurred after the contract was entered into but not being an act in respect of which subsection (2) applies, the insurer may not refuse to pay the claim by reason only of that act but the insurer's liability in respect of the claim is reduced by the amount that fairly represents the extent to which the insurer's interests were prejudiced as a result of that act. (2) Subject to the succeeding provisions of this section, where the act could reasonably be regarded as being capable of causing or contributing to a loss in respect of which insurance cover is provided by the contract, the insurer may refuse to pay the claim. (3) Where the insured proves that no part of the loss that gave rise to the claim was caused by the act, the insurer may not refuse to pay the claim by reason only of the act. (4) Where the insured proves that some part of the loss that gave rise to the claim was not caused by the act, the insurer may not refuse to pay the claim, so far as it concerns that part of the loss, by reason only of the act. (5) Where: (a) the act was necessary to protect the safety of a person or to preserve property;

the common law rules of law of the doctrine of warranty. This is consistent with the standpoint of the terms of reference of the ALRC 20,[434] which emphasised the need for contracts of insurance to strike a fair balance between the interests of insurer and insured, whether terms and conditions presently found in contracts of insurance operate unfairly; whether certain, and if so what, terms now found in contracts of insurance should be prohibited; and what, if any, legislative or other measures are required to ensure such fair balance between the two parties. Notably, these terms of reference seem to seek a departure from common law principles because the subsisting 'unfair' laws of insurance warranty in Australia being referred to here are sections 39 to 47 of the MIA 1909 (Cth), a carbon copy of sections 33 to 41 of the MIA 1906 (UK), which are a codification of common law decisions on insurance warranty cases. Furthermore, most common law precodification decisions on cases of insurance warranty reflected the marine perspective, and it is therefore not surprising that the ICA 1984 itself does not apply to marine insurance. This is a significant step in the direction of consumerism.

5.2.3.2 Abolishes the Approach of Automatic Discharge for Breach of Warranty

The insurer's remedy of automatic discharge for post-contract breach of warranty is abolished under section 54 (1) of the ICA 1984, which states:

> Subject to this section, where the effect of a contract of insurance would, but for this section, be that the insurer may refuse to pay a claim, either in whole or in part, by reason of some act of the insured or of some other person, being an act that occurred after the contract was entered into but not being an act in respect of which subsection (2) applies,[435] the insurer may not refuse to pay the claim by reason only of that act but the insurer's liability in respect of the claim is reduced by the amount that fairly represents the extent to which the insurer's interests were prejudiced as a result of that act.

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or (b) it was not reasonably possible for the insured or other person not to do the act; the insurer may not refuse to pay the claim by reason only of the act. (6) A reference in this section to an act includes a reference to: (a) an omission; and (b) an act or omission that has the effect of altering the state or condition of the subject-matter of the contract or of allowing the state or condition of that subject-matter to alter.

[434] See also note 423 above (terms of reference for ALRC 20).

[435] Section 54 (2) states: 'Subject to the succeeding provisions of this section, where the act could reasonably be regarded as being capable of causing or contributing to a loss in respect of which insurance cover is provided by the contract, the insurer may refuse to pay the claim.'

This section denies the insurer leave for refusing to pay claims for breaches of post-contract terms, including future conduct warranties, where the acts could not reasonably be regarded as being capable of causing or contributing to a loss in respect of which insurance cover is provided by the contract. This significantly mitigates unfairness against the insured unlike what obtains under the MIA 1909 (Cth) where the advantage is tilted heavily towards the insurer. In addition, the clause 'by reason of some act of the insured *or of some other person* '[436] is arguably the first time it is being statutorily admitted that third parties, or fortuitous events, can cause a change in post-contract risks for the insurer, unlike under the traditional warranty where the insured is presumed to be the sole culprit. This makes section 54 (1) a more efficacious approach to dealing with the non-marine promissory or future conduct warranty which has been notorious for denying the insureds their reasonable expectations under contracts of insurance.

5.2.3.3 Emphasises Substance Rather than Form of Contractual Term

The phrase '…the insurer may refuse to pay a claim, either in whole or in part, by reason of some act of the insured … being an act that occurred … but not being an act in respect of…' emphasises substance rather than the form of the contractual term in issue. Under the traditional regime the mere invocation of the magic word 'warranty' was sufficient to trigger those dramatic remedies for the insurer. Indeed, the apparent purpose of section 54 is that the parties' rights in the event of a breach of or non-compliance with a contractual term should depend on 'matters of substance', not on whether a term is characterised as a warranty or condition, or on the difference in effect between a breach of warranty and an occurrence caught by temporal exclusion. To that extent, warranty has been rendered of no contractual significance, and a more equitable result is now achievable between the insurer and the insured.

It is to be noted, though, that post-contract obligations of the insured relating to increase of risk during the insurance period is a controversial issue. The insured can argue that a contract of insurance is made on the current state of the risk as evaluated by the insurer. The basic principle of insurance[437] requires that any post-contract loss caused by a peril insured against should be payable in good faith by the insurer unless the loss is on account of an intentional conduct of

[436] Italics added by researcher for emphasis.

[437] Section 7 MIA 1909 (Cth) provides: A contract of marine insurance is a contract whereby the insurer undertakes to indemnify the assured, in manner and to the extent thereby agreed, against marine losses, that is to say, the losses incident to marine adventure while section 23 provides: A contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party.

the insured or a change in the subject matter of the insurance. Otherwise, allowing the insurer to have remedies for an increase of risk amounts to giving him an opportunity to rethink the contract. He may terminate a contract he would otherwise not be able to in the case of a bad bargain.[438] As stated by Saville LJ in *Kausar v Eagle Star Insurance Co Ltd*:[439] 'The insurance bargain is one where, in return for the premium, they (the insurers) take upon themselves the risk that an insured peril will operate. In calculating that premium, it is for the insurers to assess the chances of insured perils operating; and the fact that they may (in hindsight) have got this assessment wrong does not begin to establish that what has happened falls outside the cover they have agreed to give.'[440]

It was accordingly held in *Ferrcom Pty Ltd v Commercial Union Assurance Co of Australia Ltd*[441] that the insured's failure to notify the registration of a mobile crane as a motor vehicle, contrary to a term requiring notice of change of use, could not have contributed to any loss. It was similarly held in *Gibbs Holdings Pty Ltd v Mercantile Mutual Insurance (Australia) Ltd*[442] that failure to notify the insurers of an increase of risk by change of use did not affect the prospects of loss.

On the other hand, in line with Chief Pollock's dictum in *Baxendale v Harvey,*[443] a policyholder may alter its nature without the insurer's consent after attachment of the risk.[444] In this regard, the insurers reserve the right to protect themselves from an increase in risk during the period of insurance; they can argue that they assessed the risk on the basis of the information which the insured disclosed to them about the potential risk of the subject matter at the time of the contract, and upon which they issued the policy. They are prepared to bear a risk on the basis of that evaluation, but if a generic change takes place during the policy period, such that the framework within which the risk was assessed is materially changed, it is then a different risk that should not be covered.[445] From this standpoint, the insured is expected on good faith

[438] Zhen Jing, The insured's post-contract duty of notification of increase of risk: a comparative perspective JBL (2013) 2.
[439] [2000] 1 Lloyds Rep I R 154 CA (Civ Div).
[440] Zhen Jing, The insured's post-contract duty of notification of increase of risk: a comparative perspective JBL (2013) 2.
[441] [1993] HCA 5; 176 CLR 332; 67 ALJR 264.
[442] [2003] HCA 39. 214 CLR 604.
[443] (1859) 4 H & N 445, at 449 and 452.
[444] Baris Soyer, Risk Control Clauses in Insurance Law: Law Reform and the Future, Cambridge Law Journal, 75(1) (2016) 109.
[445] See Andrew McGee, 'Alteration of Risk in Insurance Law' 24 ILJ 139 (2013) 2.

– during the pendency of the contract – to take reasonable care, at least, not to increase the risk intentionally. Nevertheless, whilst the insurer may be entitled to a remedy for any intentional increase of risk by the insured, it is unfair, and indeed unreasonable, to expect the insured to 'exactly' perform futuristic obligations whilst the insurer is granted specified remedies for any breach thereof because as earlier pointed out in Chapter 2 the original concept of a warranty is that it is made as things stand, not as they shall continue to be.[446] Therefore, the insurer's argument may have merit only if the contract ends as soon as it is signed, but if it is to last futuristically for any period at all, then it is unfair to place the burden of a fortuitous increase of risk on the insured.[447]

Most importantly, judicial notice should be taken that the insured purchases insurance cover for his risks out of the desire to have a reasonable certainty of the capability to continue with life's endeavours uninterrupted by contingent occurrences. However, what the rule as to a continuing warranty or other post-contract risk control term does is to take away this potential benefit from the insured by requiring him to contrarily undertake – to his detriment – that the conditions of the insurer's coverage of the risk at inception shall remain unaltered going forward, failing which he forfeits his benefit. This is counter to the principle of consumerism and fails to take into cognisance that fortuities and contingencies which are well beyond the insured's control would most certainly occur, putting him in involuntary breach of contract with the attendant consequences, nonetheless. In essence, the insured's quest for certainty in his business is rendered uncertain whilst the insurer's economic benefits from the premium is made certain,[448] again, regardless of the aleatory nature of the insurance contract which requires that the performance of at least one of the parties to the agreement (in this case the insurer) is dependent upon the outcome of an uncertain event.[449] This is a paradoxical irony. Accordingly, section 54 (1) solves the problem by pointedly stating:

[446] See Chapter 2 para 2.9.
[447] If the breach is fortuitous or triggered by a third party not connected to the insured then there is no reason to hold the insured to account.
[448] If the warranty is broken the risk terminates automatically, so that in the case of a present warranty the risk never attaches (and the premium is never earned) whereas in the case of a future warranty the risk terminates from the date of breach (leaving the premium irrecoverable because the risk has attached) and the risk is not reinstated when the assured's breach of the warranty is remedied.
[449] Warranting and payment of premium are precontractual obligations of the insured which means the performance of one of the parties being dependent on fortuity is referring to the insurer.

> Subject to this section, where the effect of a contract of insurance would, but for this section, be that the insurer may refuse to pay a claim, either in whole or in part, by reason of some act of the insured *or of some other person,*[450] being an act that occurred after the contract was entered into but not being an act in respect of which subsection (2) applies,[451] the insurer may not refuse to pay the claim by reason only of that act…

Unarguably, this is a recognition that a third party's conduct may also cause the occurrence of circumstances that would amount to a breach of warranty for which the insured should not be held accountable.

5.2.3.4 Makes Causal Connection of Breach to the Loss Relevant

The irrelevancy of causal connection or lack of it to the loss had been a contentious issue in the traditional warranty regime. Under common law, whether the breach of warranty caused the loss or not is not relevant; rather, the issue is whether it increased the risk of occurrence of the insured event. Section 54 ICA 1984 introduces the relevancy of causal connection between breach and loss under subsections (2), (3), and (4). Section 54 (2) states: 'Subject to the succeeding provisions of this section, where the act could reasonably be regarded as being capable of causing or contributing to a loss in respect of which insurance cover is provided by the contract, the insurer may refuse to pay the claim.' Section 54 (3) provides: 'Where the insured proves that no part of the loss that gave rise to the claim was caused by the act, the insurer may not refuse to pay the claim by reason only of the act.' Lastly, section 54 (4) states that 'where the insured proves that some part of the loss that gave rise to the claim was not caused by the act, the insurer may not refuse to pay the claim, so far as it concerns that part of the loss, by reason only of the act.'

The provisos '…being capable of causing or contributing to a loss…' and '…caused by the act' in subsections (2), (3), and (4), respectively, bring causal connection to the loss into relevance as well as the principle of divisibility of warranty. The insurer may refuse to pay a claim where the insured's conduct caused the loss – or part thereof – for which the claim is being made, subject only to the insured's inability to prove lack of connection between the

[450] Italics added by the researcher for emphasis.
[451] Section 54 (2) states: 'Subject to the succeeding provisions of this section, where the act could reasonably be regarded as being capable of causing or contributing to a loss in respect of which insurance cover is provided by the contract, the insurer may refuse to pay the claim.'

two,[452] and the insured may be held to account on his conduct only in relation to that aspect which bears directly upon the loss or damage. Where such conduct is a breach of warranty, it does not affect other warranties or risk control terms, thereby effectively breaking the indivisibility rule whereby a breach of one warranty brought the entire contract to an end.

The yet unanswered question is: what is the test of causal connection being contemplated in section 54? Reservations have been expressed on the approach of a causal link and concerns have been raised that the burden of proof being on the insured to prove a lack of a causal connection between the breach and the loss is a departure from the pattern that who alleges must prove.[453] Also, can the onus of the two parties be integrated?[454] What is the expected endpoint, for instance, when the insured is trying to prove a lack of causal link while the insurer is to prove it exists? If one exists, it is a powerful policy defence of the insurer, and vice versa if none exists.

Regardless, it has been suggested that the Australian approach is being too generous to the insureds.[455] Many instances seem to merit this assertion, but the most obvious appears to be in *Maxwell v Highway Hauliers Pty Ltd*[456] which although concerns a non-consumer insured nevertheless illustrates the point. In this case, Highway Hauliers Pty Ltd (the Insured) carried on a trucking business. It was insured by various Lloyd's Underwriters (the Insurers). During the period of insurance, two trucks belonging to the Insured were damaged in separate accidents. The Insured claimed under its policy for the damage to the trucks. The Insurers denied indemnity on the grounds that the drivers of the damaged trucks had not been 'PAQS' (Pacific Association of Quantity Surveyors) certified – as the policy purported not to cover loss where the drivers were not certified. That failure itself did not cause the accidents, subject to the claims; neither were the Insurers prejudiced. Nevertheless, the trial judge held that the Insurers were obliged to indemnify the Insured for the cost of repairing the trucks by reason of

[452] This is similar to the LC of England and Wales (2007) proposal that the causal connection test should apply to warranties in marine insurance in the same manner as non-marine insurance. That is to say, the insurer should pay a claim where the insured can prove on balance of probabilities that the event constituting the breach did not contribute to the loss.
[453] Malcolm Clarke, 'The Future of Warranties and Other Related Terms in Contracts of Insurance' (Informa, 2016) 56.
[454] Richard Aikens, 'The Law Commissions' Proposed Reforms of the Law of "Warranties" in Marine and Commercial Insurance: Will the Cure be Better than the Disease? (Informa, 2008) 114.
[455] Insurance Contract Law: Misrepresentation, Non-Disclosure and Breach of Warranty by the Insured (2007) para 8.43.
[456] [2014] HCA 33.

section 54 (1) of the ICA 1984. Incredulously, the trial judge held further that by denying indemnity to the Insured, the Insurers were liable for consequential loss of profits suffered by the Insured, amounting to $145,000 AUD.

This outcome – whereby the insured's breach of duty was overlooked, and the insurers were held liable for consequential loss suffered by the insured for a purported wrongful denial of indemnity was somewhat far-fetched. Granted that the lack of PAQS certification by the drivers of the accidented vehicles did not cause the loss this outcome might potentially achieve unintended consequences beyond striking a fair balance between the parties to the contract. For example, what would be the motivation for an insured to comply with any contractual obligation not causally connected to a loss under the contract? The fact that the Insurers were liable to pay $145,000 AUD more than they would otherwise have if indemnity had been granted in the first instance could potentially trigger the motivation for future insureds to intentionally breach contractual obligations in the hope of gaining from a wrongful denial of indemnity. This goes counter to the basic principle of indemnity that the insured should not gain from a misfortune.[457] Worse still, the consequential losses could potentially be much higher than the claim, depending on the nature of the insured's business and the impact of the denial on that business. How does this not contravene the principle that the insured should never be more than fully indemnified? It is against the principle of insurance that the insured be not compensated for a loss over which he has not paid premium, which is the implication of the finding in this case. Unfortunately, this appears to have gone beyond the remit of consumerism.

5.2.4 The Proportionate Remedy

The proportionate remedy is also implicated in section 54 (1) where it states '…but the insurer's liability in respect of the claim is reduced by the amount that fairly represents the extent to which the insurer's interests were prejudiced as a result of that act.' This is to say that where the act or omission of the insured could not reasonably be regarded as being capable of causing

[457] MIA 1909 Section 38 (2) (a) and (d): Where the assured is over insured by double insurance:
(a) the assured, unless the policy otherwise provides, may claim payment from the insurers in such order as he or she may think fit, *provided that he or she is not entitled to receive any sum in excess of the indemnity allowed by this Act* (italics added by researcher for emphasis);
(d) where the assured receives any sum in excess of the indemnity allowed by this Act, he or she is deemed to hold such sum in trust for the insurers, according to their right of contribution among themselves.

or contributing to a loss, the insurers are only entitled to damages and any liability is to be reduced by the amount that fairly represents the extent to which the act or omission prejudiced the insurers' interests. Again, at first glance, it seems a very reasonable solution. However, prejudice is notoriously difficult to prove under scrutiny as proof necessarily deals with the counterfactual world[458] and would potentially affect the proportionating of the remedy. Take, for instance, the case of equipment insured only in respect of non-commercial use which is vandalised while being used on a job outside that category. It can be argued on the one hand that, but for the non-private use, the equipment would not have been where it was, and the loss would not have occurred. On the other hand, it can also be argued that the commercial use was not causative. In such circumstances, it seems impossible to calculate an apportionment in any intellectually justifiable manner.

The provision for the proportionate remedy to the insurer presumptively implicates the materiality of the insured's prospective breach to the risk and invariably links the breach to the potential increase of risk or damage suffered by the insurer. Nevertheless, insurers will bear the burden of producing figures to show what the premium should or would have been by comparison with what it is. Invariably, no matter how accurate those figures maybe, they would still be undeniably hypothetical and will therefore potentially present the problem of moral hazard and the reliability of the insurer's information as he is an interested party. Moreover, does it not then mean that the insurers have the capability to determine the likely effect of the prospective increase of risk and charge premium accordingly at inception, rather than placing the burden of exact compliance with post-contractual obligations on the insured in situations over which the insured has little or no control? The approach of the prospective charge of premium in relation to actuarial predictive increase of risk would potentially avoid the hassles of litigation on proportionality which will inevitably involve expensive and uncertain battles of legal experts on either side.

Therefore, as significant as section 54's amendment of the common law remedy of complete and permanent discharge of the insurer from liability is, these associated difficulties may potentially mar its benefits not only to consumer-insured but to the insurer as well.

[458] Robert McDougall, 'Section 54(1) of the Insurance Contracts Act 1984 (Cth)' (2014) Accessed online at https://www.aila.com.au/articles/Conference_Papers/90 >

5.3 Efficacy of the Australia Reforms

For all intents and purposes, section 24 effectively abolishes basis of the contract clause and 54 ICA 1984 all but nullifies the practical effects of the traditional and common law warranty, in particular the future conduct warranty. To that extent, the associated problems of warranty as depicted in Chapter 3[459] have been largely addressed.

Rightly or wrongly, the ALRC 20 seemed to view post-contract obligations of the insured in non-marine insurance as one of the major sources of unfairness to the consumer-insured and it appears to have been one of the main targets of their reform efforts. Lord Denning seems to concur when he postulated in *Roles v Nathan*[460] that:

> [T]he ICA has been very beneficial, it has almost rid us of those two unpleasant contractual terms, the warranty, and the condition precedent, that haunted insureds for hundreds of years, and it has replaced them with the attractive section 54, which has so far given us no trouble that we couldn't handle.

Nevertheless, section 54 still leaves much to be desired. As stated earlier in Chapter 4, bearing in mind that warranty has been an inherent part of insurance contracts[461] from ancient times, it might be too early yet to beat the drums of success. This is because section 54 appears to admit to the presumption that the insurer is at greater risk than the insured in a contract of insurance and should therefore be protected after doing away with warranty,[462] by allowing him to use restrictions, exclusions, and limitations to 'cherry-pick' what and how he would provide insurance. But these terms have the same effect as warranties.

Secondly, the potential consequences of the abrogation of warranty might trigger a chain reaction in the insurance industry with far-reaching ramifications. For instance, the insurers

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[459] See chapter 3

[460] [1963] 1 WLR 1117, [1963] 2 All ER 908.

[461] More than 200 years ago, Lord Mansfield described a warranty as 'a condition on which the contract is founded', to establish the existence of circumstances without which the insurer does not undertake to be bound. See Zhen Jing, 'Warranties and doctrine of alteration of risk during the insurance period: A critical evaluation of the UK Law Commissions' proposals for reform of the law of warranties' 25 Insurance Law Journal (2014) 185 where she states that the nature of a warranty as a foundation of an insurance contract has remained the same in modern law. See also *The Good Luck* [1992] 1 AC 233 at 263 per Lord Goff (hull); [1991] 3 All ER 1; [1991] 2 WLR 1279; [1991] 2 Lloyd's Rep 191 where Lord Goff described a warranty as 'any term of the insurance contract which, properly construed, is a condition precedent to the inception or continuation of cover.

[462] There seems to be a sense that insureds use warranties to lure the insurer into underwriting their risks, only for them (the insureds) to breach the warranty or increase the risks to the insurer.

might be left with no other statutory means of controlling the post-contract increase of risk. They might assess the operating environment as 'too risky', and some of them might quit the insurance business altogether. That would give rise to the few remaining ones being overstretched or even overwhelmed by requests for insurance,[463] which would potentially trigger an increase in premiums that the insureds would have to bear. This eventuality would still leave the insureds at a disadvantage. In essence, section 54 appears to be overkill. Another form of statutory post-contract control of risk to the insurer ought to have been permitted in its provisions, such as a negotiated increase of premium upon the insured's breach, similar with the 'held covered' principle in Institute Hull Clauses[464].

In addition, section 54 seems to concentrate more on remedies rather than preventing breach of obligations. There seems to be a sense that balancing and equalizing the parties to an insurance contract is all about appropriating the pecuniary benefits under it. However, as discussed earlier, the provisions of section 54 appear insufficient and inadequate to bring about the fair accruement of the contractual benefits to the parties. Accordingly, section 54 ought instead to have also addressed the prevention of breaches of post-contract obligations because it stands to reason that if there are no breaches, neither would remedies be necessary. Remedies tend to catalyse the hostile caveat emptor and winner takes all dynamic, rather than the symbiotic 'swim together and sink together' approach of the medieval marine merchants under which underwriters provided incentives for the policyholders to do all in their power to avoid breaching a warranty. For instance, policyholders in those days were often offered some discounts on premium payments if they sailed and arrived with a convoy[465] which undeniably were consumerist in outlook.

Furthermore, the terms of section 54 with regards to the post-contract increase of risk appear to be similar in effect to the civil jurisdictions' alteration of risk doctrine, albeit under a common law legal framework. This is an instance of a combination of civil and common law principles - a seeming hybrid approach – to solve a problem. In its original marine insurance

[463] Insurance is currently a virtually indispensable service in every modern economy, and some aspects like motor insurance are even compulsory by law.
[464] Under the Institute Hull Clauses the insured is held covered despite breaches of warranty provided that he gives prompt notice to the underwriters and pays an additional premium.
[465] See for example *Lily v Ewer* (Doug 72), an action for money had and received, brought against an underwriter for a return of premium. The policy was for a voyage from Venice to London via the Currant Islands, at a premium of five guineas per cent, 'to return two per cent if she sailed with convoy from Gibraltar and arrived.'

sense under civil jurisdictions, risk alteration did not connote an increase or decrease thereof, which were described as 'acts of God' and duly covered under maritime perils. It referred to intentional human conduct such as change of voyage, route, date of departure, or a diversion to a different port.[466] However, the (mis)application of marine insurance principles[467] to non-marine insurance has tended to expand the meaning of alteration of risk to include post-contractual increase to the non-marine risk, its function being to confine the risk to the scope that the insurer promised to undertake at the inception of contract. The distinction, however, is that under civil law, the insurer shall have remedies for the increase of risk because the statutory provision for compulsory seaworthiness of commercial ships has effect tantamount to the State warranting that every ship shall be seaworthy for the voyage.[468] Therefore, applying the civil law principle of alteration of risk in place of the common law warranty and its remedy without changing the legal framework, as purports to be the case with section 54, will potentially be fraught with complications. Not surprisingly, Prof Baris Soyer notes that section 54 is in 'a state of flux'.[469]

Again, section 54 appears to have been enacted with the presumption of warranty and other risk control clauses, being instruments in the hands of insurers to extort the insureds unfairly, and that such terms must therefore be done away with to achieve equity and balance to the parties. It is respectfully submitted that this presumption may not be accurate because, as pointed out earlier in this thesis, the problem with warranty appears to be the misapplication of its original seaworthiness of the ship principles to non-marine insurance, in apparent disregard of the peculiarity of the sea as an operating medium for transportation.

5.4 The New Zealand Approach

The New Zealand reform of insurance warranty law started with the report of the Contracts and Commercial Law Reform Committee entitled 'Aspects of Insurance Law' submitted in April

[466] JP Van Niekerk, Insurance Law in the Netherlands 1500-1800 Vol II (Juta & Co, 1998) 954-960.
[467] See Robert Merkin, 'Australia: Still a Nation of Chalmers?' University of Queensland Law Journal Vol 30(2) (2011) 197 where he states 'there are some aspects of marine insurance which do not sit easily within a non-marine regime.'
[468] See chapter 3 para 3.4.
[469] Baris Soyer, 'Reforming Insurance Warranties – Are We Finally Moving Forward' in *Reforming marine and commercial law* (Informa, 2008) para 3.2.

1975.[470] The Committee was called upon to consider and report on the large topic of the law governing contracts of insurance on the Marine Insurance Act (MIA) 1908 New Zealand (NZ) whose provision on insurance warranty were a near mirror image of the MIA 1906 (UK). The Committee made some proposals which were implemented with the enactment of the Insurance Law Reform Act New Zealand 1977 (ILRA 1977). The ILRA 1977 extensively modifies New Zealand law of insurance generally, including marine insurance as codified by the MIA 1908 (NZ) in areas relating to misrepresentations in contracts of insurance. Most significantly it jettisons insurance warranties in sections 5[471] and 11[472] respectively. The consequences of the reform are the abolition of basis of the contract clause, curtailment of certain traditional rights of the insurer, and the abolition of automatic discharge of the insurer. Others are the introduction of relevance, as well as causal connection of breach with the loss, the insureds' leave to protect and enforce their interests, and the statutory introduction of arbitrator/court to determine claim or liability. Needless to say, these were all consumerist in outlook bearing in mind that the consumer movement was barely half a century old when these reforms were effected.

5.5 Jettisoning of the Traditional Warranty in ILRA 1977

5.5.1 Abolition of Basis Clause Warranties

Section 5 of the ILRA 1977 abolishes basis clause warranties. It provides that a contract of insurance shall not be avoided by reason only of any statement made in any proposal or other

[470] This thesis could not ascertain the exact date of the inauguration of this Committee from available records. It was confirmed however, that the Committee is now defunct. See AA Tarr & JR Kennedy, *Insurance Law in New Zealand*, 2nd ed, (Law Book Company, 1992) 19 n 102.

[471] Section 5 states: (1) A contract of insurance shall not be avoided by reason only of any statement made in any proposal or other document on the faith of which the contract was entered into, reinstated, or renewed by the insurer unless the statement— (a) was substantially incorrect; and (b) was material. (2) Nothing in this section shall— (a) apply in respect of any contract of insurance embodied in a life policy; or (b) limit the provisions of sections 4 and 7.

[472] Where— (a) by the provisions of a contract of insurance the circumstances in which the insurer is bound to indemnify the insured against loss are so defined as to exclude or limit the liability of the insurer to indemnify the insured on the happening of certain events or on the existence of certain circumstances; and (b) in the view of the court or arbitrator determining the claim of the insured the liability of the insurer has been so defined because the happening of such events or the existence of such circumstances was in the view of the insurer likely to increase the risk of such loss occurring,— the insured shall not be disentitled to be indemnified by the insurer by reason only of such provisions of the contract of insurance if the insured proves on the balance of probability that the loss in respect of which the insured seeks to be indemnified was not caused or contributed to by the happening of such events or the existence of such circumstances.

document on the faith of which the contract was entered into, reinstated, or renewed by the insurer unless the statement was substantially incorrect and was material. The implication is that without reference to the insured's fraudulent intent, there is no right of the insurer to avoid a policy only because of a statement made in any proposal or other document purporting to declare the truthfulness of the representations or declaring it to be the basis of the contract. This effectively abolishes basis of the contract clause warranties in New Zealand.

Since then, consumer-insureds in New Zealand may have been breathing sighs of relief as they may not have to worry whether they need an attorney at their elbow to guide them in providing answers to questions on proposal forms when purchasing insurance. The abolition of the basis of the contract clause warranties in New Zealand is a repugnance of the common law position on warranty and having been the first legislative reform of that concept in common law jurisdictions, may well be ascribed the trigger of insurance consumerism in the common law world, with Australia following in 1984, and later, the UK in 2012. It is similar in effect to the civil law position (the alteration of risk doctrine) which is regarded as milder than the common law's in respect of an insured's breach of an undertaking in the insurance contract. In the former, breach of any undertaking by the insured does not avoid the insurer's liability for a loss not caused by or at least causally related to such a breach, but the contract remains valid, and the insurer is liable for any other loss. Even then, such terms are not customarily expressed or inserted in insurance contracts, reliance being placed rather on misrepresentation, and the exclusion of liability by the insurer for loss caused by inherent vice and the insured's conduct.[473] These is an insured-friendly approach and to that extent consumerist in effect. Thus, by this legislation alone, a significant aspect of unfairness in insurance has been extinguished in New Zealand.

5.5.2 Curtailment of Certain Traditional Rights of the Insurer

Under section 11, the insurer's common law remedies and liabilities have been significantly mitigated in several respects. Section 11 of the ILRA 1977 provides that where:

> (a) by the provisions of a contract of insurance, the circumstances in which the insurer is bound to indemnify the insured against loss are so defined as to exclude or limit the liability of the insurer to indemnify the insured on the happening of certain events or

[473] See JP Van Niekerk, *The Development of the Principles of Insurance Law in the Netherlands from 1500 to 1800 Vol II* (Juta & Company Ltd, 1998) 959-960.

on the existence of certain circumstances; and (b) in the view of the Court or arbitrator determining the claim of the insured, the liability of the insurer has been so defined because the happening of such events or the existence of such circumstances was in the view of the insurer likely to increase the risk of such loss occurring, the insured shall not be disentitled to be indemnified by the insurer by reason only of such provisions of the contract of insurance if the insured proves on the balance of probability that the loss in respect of which the insured seeks to be indemnified was not caused or contributed to by the happening of such events or the existence of such circumstances.

Here is the ultimate trigger of consumerism where for the first time in a common law jurisdiction a statutory provision makes the insured's indemnity its subject matter. It purports to prevent the insurer from relying on contractual provisions that are so defined as to exclude or limit the insurer's liability to indemnify the insured upon the occurrence of certain events or upon the existence of certain circumstances. Invariably, warranties fall within such circumstances as their breach under the MIA 1908 (NZ) entitles the insurer to discharge himself automatically and permanently from liability. Such circumstances are intended to prevent the post-contract increase of risk to the insurer, and to that extent, the New Zealand approach is somewhat similar with Australia's in substance but different in form. Unsurprisingly, abolition of automatic discharge of insurer and irrelevance of breach and its causal connection with the loss are the main points in issue with respect to the reform of the common law warranty of the MIA 1908 (NZ). However, section 11 additionally goes the extra mile to afford the consumer-insured the benefit of the burden of proof and denies the insurer the right to determine the claim, conferring it rather on an arbitrator or court.

5.5.3 Abolition of Automatic Discharge of the Insurer

Section 11 abolishes automatic discharge of the insurer for the insured's breach of warranty. It provides that '…the insured shall not be disentitled to be indemnified by the insurer by reason only of such provisions of the contract of insurance…' In effect, section 11 requires more than just the breach of a policy provision such as a warranty, an exclusion, a limitation, or any other binding contractual obligation on the insured to deny him his expected benefits under the contract. The breach must be connected in some way to the loss. As already stated in Chapter 3 the unfairness of the common law automatic discharge of the insurer consists in its application regardless of the relevance of the breach or its causal connection with the loss that has

occurred.[474] This denies the insured any chance of reaping his benefits in the contract, and quite so often he is often left without cover without even realising it.[475] This raises questions about the rationale of the automatic discharge principle of insurance warranty, as the insured is not so much as given the opportunity to defend the product for which he has spent his hard-earned money to purchase. Consequently, the statutory removal by section 11 of the remedy of automatic discharge extinguishes the sting of the traditional warranty. This is good for balance and fairness in contracts of insurance in New Zealand and it satisfies the main terms of reference for the Contracts and Commercial Law Reform Committee.

5.5.4 Introduction of Relevance of Breach to the Loss

Again, under section 11, the breach of warranty is made to be relevant to the loss. The phrase '…because the happening of such events or the existence of such circumstances was in the view of the insurer likely to increase the risk of such loss occurring…' means the inclusion by the insurer of provisions such as warranties or other risk mitigating terms in the policy makes the breach thereof relevant to the loss, differing significantly from the common law position which controversially denies the relevance of the breach of warranty, and by extension, its causal connection to the loss that has occurred. It is a wonder how such inequity and lop-sidedness in favour of one party of a bilateral contract could have lasted this long. It has been persistently questioned as to why the insurer should be entitled to a remedy over a breach that is immaterial and irrelevant to the loss on a questionable likelihood of its capability of increasing the risk of the loss occurring. After all, it has never been proven that the existence of a risk of loss is the same as the loss itself! And even if that were to be the case and the breach has not caused the loss, how does that jeopardise the interest of the insurer who has contractually undertaken to bear risks in consideration of a premium? However, with respect to warranty, section 11 defends the interest of the consumer-insured by tasking the insurer to show how a breach of term increases the risk of loss and – by implication – its relevance. This is much more reasonable than the common law position which disregards these requirements. In effect, this amendment perpetrates fairness to the insured.

[474] See chapter 3 sub-para 3.5.3.
[475] See Chapter 3 para 3.10.

5.5.5 Requirement of Causal Connection of Breach with the Loss

The statement in section 11 that 'the insured shall not be disentitled … if the insured proves … that the loss … was not caused or contributed to by the happening of such events…,' introduces the requirement of causal linkage of the breach of warranty to the loss that has occurred. It also means that an immaterial breach of warranty would not disentitle the insured of being indemnified by the insurer. Similarly, the phrase '…the loss in respect of which the insured seeks to be indemnified was not caused or contributed to by the happening of such events or the existence of such circumstances' establishes the need for a causal connection between breach and loss. Again, as observed in the preceding paragraph, this contrasts sharply with the traditional position where such connection was not required for the insurer to invoke the draconian remedy of automatic discharge from liability, and in so doing, without warning and in one fell swoop, extinguish the contractual benefit of the insured in purchasing insurance. The causal link of a breach to the loss that has occurred is equitable and fair to both parties and it accords well with international best practice and takes away the embarrassment of having to explain what Professor John Hare describes as 'the prodigal aberration of the European *ius communis* of insurance law'.[476] Similarly, in *New Zealand Insurance Co Ltd v Harris*,[477] the Court of Appeal observed that section 11 is intended to counteract the practice by insurers of putting temporal non-causative exemption clauses into insurance contracts.[478] Richardson J stated: 'The inquiry there is whether the loss in respect of which the insured seeks to be indemnified was caused or contributed to by the happening of the events … There is then a presumption of a causal link between the relevant events or circumstances and the particular loss.'

Furthermore, while introducing this legislation, the then New Zealand Minister of Justice had stated:[479]

> Clause 11 deals with what are called non-causative exemptions. Insurance policies commonly exclude liability in certain instances. For example, a motor vehicle policy may exclude liability while the vehicle is being driven in an unsafe condition. If the

[476] John Hare, The Omnipotent Warranty: *England v The World*. A paper presented at the International Marine Insurance Conference in November 1999.
[477] [1990] 1 NZLR 10.
[478] Law Reform, Consultation Paper: Insurance Contracts (LRC 65 2011) para 5.69.
[479] Parliamentary debates House of Representatives 6 July 1977, 1207.

vehicle is hit while stopped at traffic lights the insurer would be able to avoid liability even though the unsafe condition had nothing to do with the accident. The clause confines the right to avoid the policy to those instances where the circumstances specified in the exemption contributed to the accident.

Thus, the import of section 11 is that where any warranty in a contract of insurance is not complied with by the insured and the breach of that warranty is not a factor that increases the risk of the damage claimed, the insurer may not rely on that warranty's breach to deny indemnity (contrary to section 34 of the MIA 1908 (NZ)).[480] This is a fair position for both parties. For a legislation aimed at balancing the parties, this is to be expected because the law reports are full of cases where common law courts allowed an insurer to rely either on an object clause or an exception to refuse to honour a policy in circumstances where an event or omission occurred, having no causal link with the accident.[481] This has been an unnecessary perpetration of unfairness to the insureds.

5.5.6 Insureds' Leave to Protect and Enforce their Interests

Under section 11, the insured is afforded the benefit of a defence of his conduct or a justification of why his claim should succeed despite a breach of a contractual term, by proving on the balance of probability that the loss in respect of which he seeks to be indemnified was not caused or contributed to by the breach. This is against the backdrop that the breach of a warranty may not necessarily result in a loss. This is a right denied the insured under the MIA 1908 (NZ),[482] which permits the automatic discharge of the insurer from liability, and which has also been scathingly criticised as unfair. Section 11 thus affords the insured the opportunity

[480] Section 11 has been said twice (in obiter dicta) by the High Court of New Zealand to apply to express warranties only, rather than to those implied by statute (for example, the warranty as to legality).

[481] It is to be noted that in those early years of marine insurance a warranty served as adequate representation of the subject matter of the insurance (because a ship for instance might not immediately be available for inspection because it was out at sea or elsewhere in the globe), unlike in non-marine insurance (like car insurance for instance), where the vehicle can easily be inspected and its roadworthiness ascertained without necessarily requiring a warranty from the insured. In such circumstance it would seem that exclusions and suspensory provisions were the best means of risk control for the insurer. This raises significant questions as to whether the common law rules of forfeiture in marine warranties should be applicable to non-marine warranties as is currently practised. The important point to note however as stated by Alan Sherlock and James Bullock is that section 11 ameliorates the common law provision on warranty as it provides a statutory limitation on the ability of insurers to deny liability for claims because of the breach of a policy condition where the breach is not the cause of the loss.

[482] Section 34 (3) MIA 1908 NZ.

to ‘balance’ an otherwise one-sided contract seemingly written exclusively for the insurer's benefit.

In *New Zealand Insurance Co Ltd v Harris*,[483] the New Zealand Court of Appeal allowed an insured (who had breached a warranty by hiring out a tractor, the tractor being destroyed by fire) to benefit from the provisions of section 11, having established on the balance of probability that the hiring out of the tractor was not the cause of the fire. Therefore, there was no connection between the breach and the loss.[484] Richardson J stated: ‘The onus of proof rests on the insured, and the answer turns on the objective assessment of the Court or Arbitrator, not on the subjective views of the insurer.’

It is to be noted though that considerable unfairness still exists as, despite paying premium for his cover, the insured is still subjected to the rigours of burden of proof and convincing the court of his ‘innocence’ over an event which may not even be causally connected with the loss, on pains of losing his indemnity. Meanwhile, the insurer is restrained only by the circumstances which he (the insurer) had circumscribed in the contract, such as excluding and limiting certain kinds of risks. The insurer virtually ‘cherry-picks’ what risks to underwrite, when, and how. This seems to invert the well-known commercial adage – consumerism - that ‘the customer is king.’ Nevertheless, the burden of proof that permits the insured to recover on proof of lack of causality between breach and loss is a significant balancer of the parties to a contract of insurance.

5.5.7 Statutory Introduction of Arbitrator/Court to Determine Claim or Liability

Contrary to the common law position in the MIA 1908 (NZ), section 11 statutorily mandates the arbitrator or Court to define the circumstances of the insurer’s liability where it states: ‘In the view of the Court or arbitrator determining the claim of the insured the liability of the insurer has been so defined…’ By this provision the insurer is no longer judge and jury in his own case. In *Kelleher v Christopherson*,[485] for instance, the claimant was a labourer who used his car to drive to and from work. The claimant kept a few pigs and regularly obtained pig swill

[483] [1990] 1 NZLR 10.
[484] After finding that the contract did not require the tractor to be kept under cover or at a particular location, and that the insured had not breached a separate warranty to take all reasonable steps to safeguard the vehicle, the Court of Appeal upheld the trial judge‘s decision that breach of the warranty did not cause or contribute to the loss.
[485] (1957) 91 ILTR 191.

from the canteen at his workplace, transporting the swill in his car. An accident occurred while transporting the pig swill on the claimant's returning from work. Judge Neylon took the view that the claimant was engaged in pig farming by way of a hobby or amusement, rather than by way of a business, stating:

> I cannot accept the proposition that by carrying swill he thereby converted a journey which was covered by insurance into one which was not so covered. It appears to me that when a person is using his car for a purpose which is apparently covered by his policy of insurance, there is a very heavy onus on the insurance company to discharge before it can establish that such a user has ceased to be insured by reason of some action of the insured.[486] As in this case, it is a fact that the insured was returning home from work and thus is covered by insurance. To deprive him of this benefit it must be proved that he has done something which alters the nature of the journey or user of the car.

This outcome is the exemplary manifestation of consumerism and goes far beyond the wildest imagination of a consumer-insured under the traditional principles of warranty, where the insurer would have declined liability by merely invoking 'breach of warranty'. It is, therefore, one of the most significant amendments of the law of warranty that the definition of the circumstances of the insurer's liability is conferred on neutral arbiters like the courts, as hitherto, the underwriters exploited the statutory mandate to issue the policy to seize control of the circumstances surrounding the creation of insurance contracts,[487] hiding under the common law freedom of contract and virtually sit as judges in their own case by deciding when to refuse or honour a claim. Professor WR Vance aptly describes the situation when he states:

> The unseemly struggle that ensued between the unwise insurers who sought so to frame their policies as to compel the courts to allow them the dishonest benefit of forfeitures unsuspected by the insured, and the courts who sought by liberal construction, and sometimes distortion of the language of the policies, to do justice in spite of the warranties, resulted in a mass of litigation and confused precedent, the like of which cannot be found in any other field of our law.[488]

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[486] This is similar to the medieval marine merchants' principle of pay now and sue later.
[487] It had been argued that in that era policyholders were in a position of power: they knew material facts about the marine adventure and could also alter the risk once cover had been provided.
[488] WR Vance, 'The History of the Development of the Warranty in Insurance Law', 20 Yale L.J. 523 (1911), 534.

The worrying aspect, though, is that section 11 does not clearly state how the insured is to be protected in the event of a breach of an implied warranty not causally linked to the loss.[489]

5.6 Efficacy of the New Zealand Reforms

The combined effects of the abolition of basis clause warranties, curtailment of certain traditional rights of the insurer, abolition of automatic discharge of the insurer, introduction of relevance and the requirement of causal connection of breach with the loss, the insureds' leave to protect and enforce their interests, and the statutory introduction of arbitrator/court to determine claim or liability, all but take out warranty from policy documents in New Zealand as the traditional grave consequences of their breach have been neutralised. Indeed, section 11 even seems to be skewed in favour of the insured, which is rare in a common law jurisdiction. In effect, like Australia, New Zealand has largely addressed the non-consumerist problematic issues on warranty raised in Chapter 3.

Nevertheless, section 11 seems to be already running into difficulties because of the hassles involved in proving causation. As in other jurisdictions, when one thing can be said to have caused another, in New Zealand, depends on the approaches used, which may produce different outcomes. This difficulty has been further compounded by the recent introduction of the so-called Wayne Tank principle, where if a loss has two effective and interdependent causes, one within the policy and one excluded by it, the exclusion prevails. In *AMI Insurance Ltd v Legg and Ors*,[490] for instance, the Court of Appeal found for the insurer, concluding that it was not liable to cover the policyholder for damage 'arising out of or in connection with' a business of the policyholders other than their farming business.[491] Such findings as this would almost certainly be relied upon in similar cases to arrive at similar outcomes. This would potentially open the door for insurers to rely on their statutory right to issue policies to frame warranties, exclusions, or limitations in terms that would easily capture causes of loss to occurrences within the policies in order to benefit from the Wayne Tank principle. This would potentially restore unfairness to the insureds.

[489] Review of the Marine Insurance Act 1909 (DP 63) para 5.39.
[490] [2017] NZCA 321.
[491] The damage was caused by a fire which had spread from a deliberately constructed 'fire heap' on their property consisting of material from their farming activities (prima facie covered) and materials from another business.

On the other hand, the 1977 'consumerist' reform in New Zealand has been thought to have gone too far in favour of the insured. In particular, it has been suggested that section 11 has been interpreted in such a way that it takes no account of the extent to which a risk control clause may be framed with the statistical likelihood of the greater risk of accident of a vehicle used commercially than the same vehicle confined to private use; and that it tends to prevent insurers from declining liability to indemnify for losses to equipment during commercial use when the cover by its terms is confined to private use. Indeed, it had permitted a situation where the insured paid a lesser premium in return for motor vehicle cover on the basis that it was confined to a named driver, but the insurer was required to indemnify for loss caused when the vehicle was in the control of a different driver,[492] although this might be related to the manner in which that particular contract was drafted.[493] Panckhurst J stated in *Womersley v Peacock*[494] that exemptions or warranties implied by statute were not seemingly considered when section 11 was drafted with reference to the circumstances in 'a contract of insurance'[495] and 'the view of the insurer' as to increased risk.[496] As a result, he thought it doubtful whether section 11 can override a statutory warranty. In this regard, however, section 14 of the ILRA 1977 clearly provides that: 'Nothing in the Marine Insurance Act 1908 shall limit any provision of this Act and the provisions of this Act shall prevail in any case where they conflict with any provision of that Act.'[497] Nevertheless, for clarity, there should be a clear statement as to whether marine insurance is demarcated from non-marine insurance, as section 11 literally 'takes the wind out of the sails' of the laws of warranty under the MIA 1908 (NZ), which are principle-based on marine insurance.

[492] *State Insurance Ltd v Lam* (unreported, 10 October 1996, CA 159/96).
[493] It is thought by the New Zealand Law Reform Commission that the exclusion should not apply to a provision which defines the age, identity, qualifications or experience of a driver of a vehicle, a pilot of an aircraft, or an operator of a chattel; or defines the geographical area in which a loss must occur if the insurer is to be liable to indemnify the insured; or excludes loss that occurs while a vehicle, aircraft or other chattel is being used for commercial purposes other than those permitted by the contract of insurance.
[494] *Womersley v Peacock* (unreported), High Court of NZ, Christchurch Registry CP 24/98, 8 September 1999. Cited in Review of the Marine Insurance Act 1909 (1991) para 9.56.
[495] ILRA 1977 section 11(a).
[496] ILRA 1977 section 11(b).
[497] Insurance Law Reform Act 1977, section 14.

5.7 Summary

In both Australia and New Zealand, there has been a marked departure from the traditional common law position on insurance warranties with respect to marine insurance. The wind of the consumer movement appears to have blown across these climes and there seemed to be a sense that insurers should not be permitted to avoid liability for breaches of warranty and similar terms that are unrelated to the loss in the non-marine insurance perspective, which in essence does away with the unfairness of warranties in that respect in the two jurisdictions[498] thereby largely addressing the problems depicted in Chapter 3.[499] The terms of section 54 and section 11 regarding the post-contract increase of risk appear to be similar in effect to the civil jurisdictions' alteration of risk doctrine, albeit under a common law legal framework. This is another instance of a seeming hybrid approach, and it is a novelty in common law jurisdictions.

However, further reforms are needed in both jurisdictions. In Australia, another form of statutory post-contract control of risk to the insurer ought to have been permitted in section 54. Also, there is need for section 54 to also focus on preventing breaches of post-contract obligations to forestall the difficulties of proportionate remedies. Section 11 appears to be framed in a manner that permits interpretations that are skewed in favour of the insured, and the situation of difficulties in proving causation in the test of causal connection gives rise to lingering doubts. Whereas Australia has demarcated marine from non-marine insurance, no such legislation has been passed in New Zealand, just as in the UK.

Altogether, given that there are other risk control terms for the insurer, the abolition of non-marine warranties in the two jurisdictions is a more appropriate model than the UK approach.

In the next chapter, the Nigerian attempts at reform will also be evaluated with a view to identifying how best to leverage the reforms in this chapter to propose, in Chapter 7, ways to improve the Nigerian law of insurance warranty.

[498] See Lord Denning's remarks in para 5.4 above.
[499] Chapter 3 para 3.7.

CHAPTER 6

NIGERIA'S PERSPECTIVE OF UNFAIRNESS IN THE TRADITIONAL WARRANTY AND THE FAILED ATTEMPTS AT ITS REFORM

6.1 Introduction

The aim of this chapter is to discuss the unfairness of the traditional warranty from a uniquely Nigerian perspective[500] and the failed attempts at its reform since the enactment of the MIA 1961 (Nig) to date. This is with a view to making a legislative proposal in Chapter 7 for the improvement of the Nigerian warranty law. The reforms started in 1988 with the promulgation of the ISPD 1988, culminating in 2003 with the enactment of the NIA 2003 where the Nigerian version of the reformed warranty is depicted in section 55. It is on record that the NIA 2003 reform Committee in their consultations sent teams to the Law Commissions of the UK, Australia, and New Zealand but as at then only the last two had concluded their own reforms. Not surprisingly, the consequential effects of section 55 NIA bear striking resemblance to those of New Zealand and Australia. In the MIA 1961 (Nig) insurance warranty is treated under sections 34-42 of the Act [501] which are the same as sections 33-41 of the MIA 1906 (UK). The NIA 2003 which is purported to be a reform of the MIA 1961 (Nig) tragically failed to state the relationship between them and it contains other grave errors that necessitated the initiation of yet another set of reform in the Insurance (Consolidated) Bill (ICB) 2016 which also contains yet more errors.[502]

Currently, Nigerian insurance has two sets of laws for warranty: one set is sections 34-42 of the MIA 1961 (Nig), the other is section 55 of NIA 2003; and there seems to be no clear boundary between the two sets. This has been causing problems in practice. The ICB 2016

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[500] See Chapter 3 para 3.1.

[501] Section 34 MIA 1961 provides:
(1) For the purposes of this section and of Sections 35 to 42 of this Act (which relate to warranties) a warranty means a promissory warranty, that is to say, a warranty by which the assured undertakes that some particular thing shall or shall not be done, or that some condition shall be fulfilled, or whereby he affirms or negatives the existence of a particular state of facts.
(2) A warranty within the meaning of this section may be express or implied and is a condition which shall be exactly complied with whether it is material to the risk or not. If not so complied with, then subject to any express provision in the policy, the insurer shall be discharged from liability as from the date of the breach of warranty, but without prejudice to any liability incurred by them before that date.

[502] Fortunately, the ICB is yet to be enacted into law. Hence, it is easier for the inherent errors to be corrected.

attempts to put the two sets in one consolidated legislation, and it is evident that the intention is for Nigeria to maintain still two sets of rules on warranty, one for marine insurance and the other for non-marine insurance; but there is no statement to that effect in the Bill. This must be resolved for the ICB 2016 when passed into law to achieve the desired objective.

6.2 The Traditional Warranty in the MIA 1961 (Nig)

The premier insurance warranty law in Nigeria is sections 34 - 42 of the MIA 1961 (Nig) which is a replica of sections 33 - 41 MIA 1906 (UK). According to Professor Irukwu:

> The Nigerian Marine Insurance Act of 1961 was deeply and totally copied from the English Marine Insurance Act 1906 almost word for word because as at that time we had just gotten independence. It was one of the earliest legislations by the Parliament and we were not very bold, and we were too much tied to the British and we didn't want to introduce any laws that will complicate our international trade. So, we followed the British pattern.[503]

In other words, the intendment of the MIA 1961 (Nig) was to reproduce the MIA 1906 (UK) under a Nigerian name. It is noteworthy that the Act was one of the earliest legislations by Parliament, which underscores the importance the government attached to insurance. Accordingly, this chapter is a supplement of the Nigerian perspective of the discussion on the traditional warranty in Chapter 3. Nevertheless, due to the marked difference between the UK and Nigeria in the socio-economic factors that drive insurance practice and the fact that non-marine and consumer insurance are the more dominant in Nigeria,[504] it is necessary to examine them as a factor of the reforms of the traditional warranty in the country.

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[503] This remark was made by Professor Irukwu in his office in Lagos during a conversation with this researcher. At the time he was the President of the Nigerian Insurance Law Association and a former Managing Director of Nigeria Reinsurance Company of Nigeria. He was also the Chairman of Nigeria Insurance Law Reform.

[504] Nevertheless, the Nigerian nuances did not appreciably affect practice in the strictly marine insurance aspects of warranty in sections 37–42 (warranties of neutrality, nationality, good safety, seaworthiness of ship, seaworthiness of goods, and legality) mainly because since the introduction of insurance in 1810 in Nigeria shipping was almost exclusively being undertaken by the British who insured their vessels in their home country. At independence, virtually no indigenous Nigerian insurance companies possessed the technical capability to underwrite marine insurance contracts in-country. The few non-British foreign companies whose vessels registered under the Nigerian flag were also insured overseas. Not even the establishment of the defunct Nigerian National Shipping Line (for national security purposes) could afford Nigeria any appreciable share of the shipping market. Under such conditions, it had been virtually impossible for any significant indigenous form of marine insurance practice to

6.3 Socio-economic Factors in Nigeria and the Need for a Reform of the Traditional Warranty in the Country

6.3.1 Socio-economic Factors

The main socio-economic factors that influence the development of insurance products[505] include inappropriate distribution channels such as poor infrastructure, insufficient knowledge/skills; products not suited to market such as copy and paste, complex terms and conditions, irregular income levels, and unbanked community; and lack of trust given rise to by fraud, poorly trained brokers, limited understanding of insurance by policyholders, and significant delays. Other challenges include poor literacy, low income, alternatives to insurance, for example, community-based schemes etc.[506] Countries listed in a Deloitte report[507] under the less developed countries include Egypt, Tunisia, Algeria, Kenya, Morocco, Angola, and Nigeria. Nigeria's total penetration (life and non-life insurance) is the least at 0.5%. In the report, 86% of insurance companies surveyed are of the view that on the demand side high cost of insurance contributes highly to poor penetration while low level of trust in insurance, complicated take-on and claims process, lack of understanding of insurance products, low perceived value for money, inadequate distribution channels available are of medium impact, and lack of availability of products to meet customers' needs, community based schemes/societies/clubs e.g. Stokvel, and language barriers are of low impact. 70% of the companies believe that customers have a low level of trust in insurance companies, reasons being lack of clear communication by the insurer and perceived high cost of insurance. The report states further those countries with a higher GDP per capita generally have a higher penetration rate.

On the supply side factors, the perceived impact on the penetration rate includes regulation, unfavourable economic conditions, low profitability, poor quality data, lack of available information, political factors, challenges distributing products, and language. Unsurprisingly, 74% of the companies believe that regulation is adequate in the area of treating customers

develop. This has given rise to the situation whereby sections 37 - 42, strictly marine insurance warranties, have been redundant since the enactment of the MIA 1961 (Nig). Consequently, there are no notable reported cases in those areas in any of the regional law reports compiled in Nigeria to date.

[505] Deloitte Emerging Markets: Growing Insurance & Challenges with a Focus on Africa (2019). Accessed online at https//www2.deloitte.com on 20 May 2022.

[506] Ibid.

[507] Supra.

fairly. On how government can improve penetration rates 12/13 (92.3%) say educate the public to increase awareness, 7/13 (53.8%) enforce compulsory insurance, 6/13 (46.1%) improve infrastructure, and only 3/13 (23%) improve infrastructure. As to what can companies do to improve customers' trust in fairness and value for money, 11/12 (91.6%) say customer service e.g. prompt claims settlement, 9/12 (75%) provide more communication to policyholders, 9/12 (75%) making the wording of documents simpler, 8/12 (67%) increase transparency and disclosure, 8/12 (67%) educating clients and intermediaries, 4/12 (41.6%) using technology e.g. to capture claims, and 4/12 (33%) rewarding loyalty.

From the foregoing it is noted that except for inadequate distribution channels available, lack of availability of products to meet customers' needs, and community-based schemes/societies/clubs, the demand side factors that contribute highly to poor penetration are all attributes of, or are related to, the traditional insurance warranty. Where insurance fails to meet reasonable expectations, confidence in the market can be undermined. Dissatisfied consumers spread the word, and those who have had an insurance claim rejected frequently have a deep sense of grievance.[508]

6.3.2 The Low Take-up of Insurance

At 0.7%[509] penetration rate currently, insurance take-up is abysmally low in Nigeria. The forfeiture rules of insurance regarding non-disclosure, misrepresentation, utmost good faith, and warranty have made insurance an unwise and unattractive investment to consumers and non-consumers alike, although it is slightly different in reinsurance because both parties understand the game, and many Nigerian insurers reinsure overseas (with Lloyds of London) anyway. Most policyholders take up insurance only in those aspects that are compulsory by law such as compulsory insurance of all marine cargo import; road traffic third party, death, bodily injury, and property damage; public building and non-public building - in - course of erection; compulsory contributory health insurance plan and professional negligence of health care provider etc. To date, it is a widely held view in Nigeria that the insurance companies are clever rogues who charge you a premium to insure something, and when you make a claim, they point out some flimsy condition hidden away in tiny print on the back of the policy, to

[508] Insurance Contract Law: Issues Paper 1 Misrepresentation and Non-Disclosure (2006) para 5.4.
[509] Africa insurance trends, nigeria-insurance-survey. Accessed online on 28 May 2022 at https://www.pwc.com/ng/en/assets/pdf/nigeria-insurance-survey.pdf

prove that you are not covered.'[510] Even some of the learned judges had shared similar sentiments. For example, in *Lion of Africa Insurance Co v Oduah*[511] Nwokedi J commented:

> I have no doubt that the operation of insurance business at the moment generates untold hardship for a vast number of people. And I feel strongly that the time has now come for the Government to step in and protect citizens of this country from the harshness of insurance operations.

In *Lion of Africa v Fisayo*[512] the Court of Appeal remarked:

> This is yet another case rather common before us these days, of some insurance companies being rather too quick to pocket the insured's premium but trying to hang on every straw to frustrate the very intention of the policy by repudiating liability when a claim arises.

Even the Supreme Court commented in *National Insurance Corporation of Nigeria v Power and Industrial Ltd:*[513] 'Insurance companies have far too often managed to get away with it on mere legal technicalities.'

Also, the NILRC concluded its deliberations on Nigeria insurance law with the remark that: 'the law governing warranties which impose certain duties on the insured as to present or future facts the breach of which, however trivial, entitles the insurer to repudiate the whole contract regardless of the materiality of the term, places the insurer in a very advantageous position to the detriment of the insured.[514]

In a state of affairs as described above such a business will invariably experience low take-up.

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[510] See the preface to JO Irukwu, *Insurance Law and Practice in Nigeria* (The Canton Press West Africa Ltd, 1978) xiii where the author explains that such beliefs may be due to a lack of understanding of the basic principles and objects of insurance. In any event it has never been satisfactorily explained why the forfeiture provisions of an insurance contract in Nigeria are always written in very tiny prints and always at the back of the policy, which tends to lend credence to the belief that insurers are trying to hide it from the insureds only to bring it up in their defence against a claim.

[511] [1973] 3 ECLSR 78.

[512] [1986] 4 NWLR 647 at 684.

[513] [1986] 1 NWLR 1 at 35.

[514] Omogbai Omo-Eboh, *The Law of Insurance Contracts in Nigeria*, (WABP, 2012) 167. This might explain why the tenor of section 2 ISPD 1988 which they helped the government to draft widely departed from the traditional warranty and which till date is still being recycled in the attempts at reforms.

The insurers on their own part hold the view that Nigerians are generally averse to intangible products such as insurance,[515] they repugn strongly from contractual benefits that are based on promissory obligations of the other party such as payment of indemnity by the insurer, especially where they are required to first fulfil their own obligation such as the payment of premium as a condition precedent to the inception of the insurance contract.[516] The main reason for this is corporate misgovernance which is generally and informally referred to as 'corruption' – a situation whereby government and bodies corporate and/or their agents fail to fulfil contractual promises to the public or individuals which has given rise to a trust deficit of the citizens and which makes them to resile from formal promissory products such as insurance.

6.3.3 Cultural Factors and Nigeria's Uniqueness

'Nigeria is a unique market where conditions do not always lend themselves to textbook business strategies … Nigeria's business culture is vastly different from that of the rest of the world, and even its regional neighbours.[517] Deloitte Invest in Nigeria Country Report (2018) also states that 'Penetrating the (Nigerian) market successfully requires consideration of local business practices. Due to unpredictable factors affecting the business environment, personal relationships within a business setting are highly valued in the country. Understanding the nuances of protocol in the country enables investors to navigate difficult business situations and helps to mitigate risks.'[518] Under this state of affairs, the unfair rules of warranty have invariably impacted the market in a rather peculiar way mainly in the consequences of breach of warranty - the automatic forfeiture of cover and/or indemnity to the insured - not sitting well with the insuring public, which has tended to give rise to a sense of apathy towards insurance in the country. As indicated earlier the low literacy level of the people and their culture and local traditions being incompatible with the traditional and common law warranty rules

[515] Point made by a leading industry player during my interactive session with him in his office on 8th of March 2015, Lagos, Nigeria. At the time he was the President of the Nigerian Insurance Law Association and a former Managing Director of Nigeria Reinsurance Company of Nigeria. He was also the Chairman of Nigeria Insurance Law Reform.
[516] It was established in the cases of *Ezeigbo v The Lion of Africa Insurance Co Ltd* (1972) ECSLR 808 and *Babalola v Harmony Insurance Co* Suit No/166/81 of 14/1/82, Ibadan, that the full payment of premium is a sine qua non to the validity of an insurance contract and that whence premium is paid, the insurer is likewise expected to perform his own part of the obligation.
[517] Deloitte Invest in Nigeria Country Report (2018) 33.
[518] Ibid.

inherent in the MIA 1961 (Nig) are contributory factors.[519] Accordingly, most of the reforms that have been attempted have tended to focus on amending the remedies of breach. Unfortunately, the Nigerian Bench appears either not to have understood the issue or have chosen to ignore it and have continued to rely on common law decisions in the UK to adjudicate insurance cases in Nigeria.

Culturally, for example, it is expected in Islam (one of the main religions in Nigeria), that insurance (Takaful) should be founded on the principles of mutuality and cooperation, incorporating the elements of shared responsibility, joint indemnity, common interest, and solidarity. Under the Islamic Sharia laws, excessive uncertainty as regards when the insured can collect on his policy is prohibited in transactions. Similarly, the insurer's failure to explain the forfeiture rules to the insured is considered to be contrary to mutuality. Dealings and investments in interest-bearing assets that are common features of conventional insurance are thus considered incompatible with the Sharia,[520] and to that extent most adherents of the faith were, prior to the enactment of the NIA 2003, reluctant to take up insurance products, and the few that did usually encountered problems during claims because of the rules on insurable interest in section 7 MIA 1961 (Nig).[521] Customarily, the average Nigerian cannot comprehend why, having paid the premium, he should forfeit his benefits under the contract for a purported breach of a warranty which he neither understands nor appreciates and about which nobody told him anything. To salvage this situation for instance, section 56 NIA 2003, which deals with insurable interest, was drafted in such a manner as to accommodate Islamic and customary practices[522] as against section 7 MIA 1961 (Nig), which does not, and since then there has been

[519] See Pierre Legrand; The Impossibility of 'Legal Transplants', 4 Maastricht J. Eur. & Comp. L. 111 (1997) 116 where he states: A rule is necessarily an incorporative cultural form. As an accretion of cultural elements, it is supported by impressive historical and ideological formations. A rule does not have any empirical existence that can be significantly detached from the world of meanings that characterizes a legal culture; the part is an expression and a synthesis of the whole: it resonates.

[520] AT Bello, 'Insurance Template in Nigeria; Critical Assessment of Legislative Chronicle' (Babcock University, 2017) 12.

[521] Section 7 MIA 1961 (Nig) provides: (1) Subject to the provisions of this Act every person has an insurable interest who is interested in a marine adventure. (2) In particular a person is interested in marine adventure where he stands in any legal or equitable relation to the adventure or to any insurable property at risk therein, in consequence of which he may benefit by the safety or due arrival of insurable property, or may be prejudiced by its loss, or damage thereto, or by the detention thereof, or may incur liability in respect thereof.

[522] Section 56 (c) NIA 2003 provides for insurable interest as follows: In this section, 'legal relationship' includes the relationship which exist between persons under customary laws or Islamic law whereby one person assumes responsibility for the maintenance and care of the other.

some calm in that area of law. Unfortunately, the amendment was not extended to the sections regarding warranty.

6.3.4 The Endemic Issues of the Nigerian Insurance Environment

The points at issue with insurance warranty in Nigeria are generally not different from those of other common law jurisdictions. Neither does the contexts of marine and non-marine insurance as depicted in Chapter 2 different in Nigeria.[523] What differs in that respect is mainly in the level of technological and economic advancement in the country which is comparatively low and which restricts the participation of Nigerians.[524] For example, Nigeria's maritime annual freight paid in 2018-2019 was estimated at more than USD 6.8 billion, more than 80% of which was earned by foreign firms in the maritime transport industry.[525] The main reason for this is lack of technical capability to underwrite marine insurance contracts in-country which makes most ship owners and importers to prefer foreign reinsurers. Essentially, the forms of marine insurance in Nigeria include hull insurance - which caters to the need of the torso and hull of the vessel along with all the articles and pieces of furniture on the ship, cargo insurance – which covers damage to goods carried on board a ship, as well as prior to loading and after discharge and during inter-modal carriage, freight insurance which covers the earnings of freight and effected by the person entitled to the freight i.e. owner/charterer, Protection and Indemnity, and Port Operations, etc.[526] Other forms of insurance outside these constitute the non-marine insurance in the country. Consequently, the level of Nigeria's participation in the globalisation and liberalisation of insurance services whereby providers are interconnected globally through syndicates and reinsurances is not significant. Accordingly, it is more meaningful to concentrate more on developing the laws of the consumer-type insurances due to the

[523] See Chapter 2 paras 221 – 222.
[524] Chidi Lloyd et al; 'Maritime Transportation and the Nigerian Economy: Matters Arising', Commonwealth Law Bulletin (2020) 6-11 where security, low incentives for indigenous investors, poor integrated maritime transport systems, inadequate manpower development are listed as problems and challenges of maritime transportation in Nigeria.
[525] Nigerian Maritime Industry Forecast 2018–2019: Emerging Opportunities and Challenges, cited in Chidi Lloyd et al; 'Maritime Transportation and the Nigerian Economy: Matters Arising', Commonwealth Law Bulletin (2020) 5.
[526] *Lakinbofa Goodluck,* 'The state of marine insurance in Nigeria' Ship & Ports (2018). Accessed online at https://shipsandports.com.ng/state-marine-insurance-nigeria/.

predominantly non-marine commercial activities of over 70%[527] of its vast population of approximately 206 million people.[528]

Furthermore, the Nigerian environment is characterised by issues that are endemic and unique to it such as its being a third-world country, the diversity of its socio-cultural cleavages,[529] and its geopolitical differences from the English environment from where the laws were transplanted.[530] In particular, the problems identified in Chapter 3 are exacerbated in the Nigerian environment by the incursion of military rule in the country, the incompatibility of the English common law with indigenous practices in relation to the warranty forfeiture rules, and the application of the principles of freedom of contract.

6.3.5 The Effects of English Common Law

It is known that common law is the ancient law of England based upon societal customs and recognized and enforced by the judgments and decrees of the courts whereof Lord Mansfield and the British Parliament in the eighteenth century laid down the rules of law of insurance warranty. Pierre Legrand states that the meaning of a rule is … a function of the interpreter's epistemological assumptions which are themselves historically and culturally conditioned.[531] Unsurprisingly, the insuring public in Nigeria is not satisfied with the common law position as to why a warranty should be the cause for which an insured should lose his benefits under it for a purported breach that is not even material or relevant to the insured risk and not causally linked to the loss that had occurred. This nuance tends to characterize the fully developed warranty in the common law decisions to the Nigerian-insured as an anomaly in contract law. This is the legacy passed down to Nigeria by the British and it is not faring well for two principal reasons. First, the historical, cultural, socio-economic, and political factors upon which the common law thrives in Great Britain are alien in Nigeria. Culturally, the extended family system in Nigeria engenders a communal and shared system of ownership that de-

[527] https://www.statista.com/topics/6729/agriculture-in-nigeria/#topicHeader__wrappe Accessed online on 22 May 2022.
[528] https://www.statista.com/statistics/1122838/population-of-nigeria/ accessed on 3 March 2021.
[529] See chapter 1 para 1.2.
[530] See Pierre Legrand; The Impossibility of 'Legal Transplants', 4 Maastricht J. Eur. & Comp. L. 111 (1997) 114-115 where he states: 'Each English child, for example, is a common-law-lawyer-in-being long before she even contemplates going to law school.'
[531] See Pierre Legrand; The Impossibility of 'Legal Transplants', 4 Maastricht J. Eur. & Comp. L. 111 (1997) 114.

emphasises self-interest as against that of the community in settling disputes.[532] Contrariwise, at common law the focus in an action is on the judicial interpretation of the points in issue without respect of persons. This tends to induce the parties in a lawsuit to do all to win the legal argument, and which invariably triggers the caveat emptor dynamic, which is antithetical to communalism and mutual benefits. Second, political, and administrative exigencies in Nigeria necessitate that the laws be written in English, which most of the local population do not speak or understand. Under British rule, the people were obliged to obey the laws as interpreted to them by the British, but after independence, the socio-cultural diversities of the indigenous people came into play in ways that were totally alien to the contemplation of the common law.

It is argued that the English common law is like an English oak tree:[533]

> You cannot transplant it to the African continent and expect it to retain the tough character which it has in England. It will flourish indeed, but it needs careful tending. So with the common law … it has many principles of manifest justice and good sense which could be applied with advantage to peoples of every race and colour all the world over, it also has many refinements, subtleties and technicalities which are not suited to other folk. These off-shoots must be cut away because the people must have a law which they understand and which they respect … the common law cannot fulfil this role except with considerable qualification and the task of making these qualifications is entrusted to the judges of these lands. It is a great task which calls for all their wisdom.[534]

Unfortunately, the Nigerian Bench seems not to take exception to this argument. Take these two Nigerian cases, for example, *Amaechi v Norwich Union Fire Insurance Society,*[535]and *Okoli v West African Provincial Insurance Co Ltd.*[536] In *Amaechi,* the plaintiffs had taken a burglary policy in respect of their shops. When a burglary occurred, the insurer resisted the insureds' claim to recover under the policy on the grounds that they had not fulfilled a warranty

[532] Funmi Adeyemi, *Historical Developments of Insurance Law,* (Funmi Adeyemi & Co, 2007) 7.
[533] See Denning LJ's dictum in *Nyali Ltd v Att-Gen* [1956] 1 QB 1 at 16.
[534] CMS Nzunda, 'Salomon v Salomon and Foss v Harbottle in Malaŵi', The Comparative and International Law Journal of Southern Africa, Vol 17, No 2 (1984) 172-187.
[535] Unreported, Suit No LD/1958. (Lagos High Court); Reported in Irukwu, Insurance Law in Africa (1987) 132.
[536] Unreported, Suit No JD/42/63. (Jos High Court); Reported in Irukwu, Insurance Law in Africa (1987) 133.

of the policy, which required them to keep proper books of account as regards the shops so covered. On the other hand, however, it was contended by the insureds' counsel that the insureds being petty traders, should not reasonably be expected to have kept such books of account as a competent businessman would have done.

At this point, Lord Denning's 'common law off-shoots' ought to have been cut away because the people must have a law that they understand and which they respect.[537] Unfortunately, it was held that a warranty must be literally and strictly complied with, otherwise, the insurance contract will be avoided. The fulfilment of the warranty could not be excused only that the insureds were petty traders. This was, sadly, an unwise ruling on the part of the judge.

In *Okoli*,[538] some of the warranties in the policy provided that a night watchman shall be patrolling the insured's premises from 9 pm to 6 am daily and that the account books of the insured shall be kept in an iron and fire-proof safe at the close of business each day. It was borne out in evidence that the plaintiff insured had not observed any of the warranties set out above. The defendant insurer consequently refused liability when the peril insured against happened. The insured sought to explain away his non-compliance with the warranties on the basis that he did not appreciate the consequences of the breach in view of his low literacy level (read as poor understanding of English language) and the unsophisticated nature of his business. Rejecting the insured's contention, it was held that a warranty must be strictly adhered to. Otherwise, the insured cannot make a successful claim on the policy as the breach of warranty entitles the insurer to repudiate liability under the policy. Again, the judge, in this case, failed to recognise that such 'refinements, subtleties and technicalities' are not suited to such folk.[539]

In both cases above the insureds' breaches of terms did not result in any damage or loss to the insurers. Therefore, the judges ought to have given heed to Lord Denning's dictum above and due cognisance of the environment in which the law was being applied vis-à-vis the letters of the law. The outcomes of the cases would not have turned out the way they did, and the

[537] See Lord Denning's counsel in *Nyali Ltd v Att-Gen* [1956] 1 QB 1 at 16. See also Funmi Adeyemi, *Historical Developments of Insurance Law*, (Funmi Adeyemi & Co, 2007) 7.
[538] Unreported, Suit No JD/42/63. (Jos High Court); Reported in Irukwu, Insurance Law in Africa (1987) 133.
[539] See Lord Denning's counsel in *Nyali Ltd v Att-Gen* [1956] 1 QB 1 at 16.

attractiveness of insurance to the locals would have potentially been assured. As it were, the judges mishandled the cases and in so doing, cast suspicion upon insurance as a product.

From the foregoing, it is evident that the operation of the English common law insurance warranty in Nigeria tends to hamper the delivery of the benefits of insurance to the insured and the fault lies majorly with those indigenous judges who failed to rise to the occasion when history beckoned. They ought to have taken judicial notice of unfairness of the warranty rules, the lack of transparency in insurance contracts, and the insureds' lack of understanding of the common law interpretation of warranty and the consequences of its breach. On this basis alone, and since the insureds' purported breaches did not cause any injury to the insurers, the judges ought to have allowed them to recover. As Nigerians themselves, the learned judges ought to have protected the Nigerian culture of certainty of contractual collateral benefits and not yield to a foreign doctrine (warranty) that was already being criticised at its place of origin. In brief, the early Nigerian judges failed to stand up for the Nigerian values by failing to appropriate the considerable latitude inherent in the common law to 'Nigerianise' warranty for the benefit of the domestic insurance market. Thus, Nigeria ever since had been grappling with the difficult but onerous task of finding the right model to reform the common law unfair laws of insurance warranty to make them workable in Nigeria.

6.3.6 The Unfair Application of Freedom of Contract

As in other commercial principles, the foundational influence of the British insurers in Nigerian also instituted the common law freedom of contract[540] in insurance practice. Freedom of contract per se is not alien in Nigeria. The problem, however, is in the tradition that had evolved of insurers being free as to the choice of terms inserted in their policies which the 'unlearned' insureds must sign as a precondition for purchasing insurance. Although freedom of contract is the accepted practice in the free world, it is based on the presumption of equality of both parties to the contract, which is rarely ever the case in Nigeria.[541] The introduction of insurance by the British who were also the colonial masters started off the insurer-insured relationship

[540] Freedom of contract in this perspective means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.

[541] The level of literacy of the insureds makes them less equal to the insurers.

on a seemingly master-servant dynamic where the mostly illiterate insured simply obeyed instructions given him by the insurer including thumb-printing (signing) of documents that were detrimental to his interests, such as basis of the contract clauses.[542] In this regard, since the pre-independence era, parties to insurance contracts in Nigeria had been anything but equal, and it subsists till date. This is despite freedom of contract's lack of consonance with social ideology of the legal system taken as a whole, and the incontestability and overwhelming evidence that it has little practical applicability of the common law beyond contract, and it has been conclusively labelled a naive myth.[543] Needless to say, it continues to produce adverse results because insurers continue to include exemption and limitation clauses and the imposition of terms that policyholders find difficult to comply with due to their low literacy level.[544]

The government seems to recognise this imbalance and has attempted to correct it. For example, in 1976 government sought to deal with the issue by administrative control provisions in the Insurance Act 1976[545] but no appreciable result was achieved. The practice in some countries is for statutory standard policies to be prescribed for certain classes of insurance, especially consumer-type contracts, and although this may interfere with the freedom of contract principle, it is nevertheless necessary in the public interest. Unfortunately, those who ought to have been in the vanguard in this regard (the Nigerian Bench) appeared to prefer the idealism of *stare decisis* over the Nigerian traditional and cultural value systems, and Nigeria has been saddled with a virtually inchoate and stagnant insurance industry ever since.

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[542] The basis of the contract clause permits an insurer to refuse a claim for any inaccuracy, no matter how trivial in the insured's precontract representation, even if immaterial to the insured risk. Thus, it gives overwhelming advantage to the insurer over the insured in contracts of insurance.

[543] Betty Mensch, 'Freedom of Contract as Ideology,' Stanford Law Review 33, No 4 (1981) 754.

[544] Omogbai Omo-Eboh, *The Law of Insurance Contracts in Nigeria*, (WABP, 2012) 167.

[545] See Insurance Act 1976 section 14 (1) & (4). Subsection (1) states: subject to subsection 4 below no insurance policy or certificate of insurance shall be issued and no contract shall be entered into by any insurer without the prior approval of the Director and no rider, clause, warranty or any endorsement whatsoever shall be attached to, printed or stamped upon any document containing any such policy, certificate or contract or deleted therefrom unless the form of such rider, clause, warranty or endorsement or the matter to be deleted has the prior approval of the Director. (4) Where the form of any policy, certificate, contract, rider, clause, warranty or endorsement or deletion therefrom referred to in this section is one of standard class, that is where any such form does not deviate from the others in that particular class in any material particular, then only six copies of any such form need be referred to the Director for the purposes of this section.

6.4 The Need for Reform of the Traditional Warranty in Nigeria

In view of the foregoing the government has yielded to calls and the compelling necessity for the reform of the MIA 1961 traditional warranty regime for its lack of fairness to consumer insured and incongruity of the following principles with respect to the tenets of the Nigerian socio-cultural nuances:

6.4.1 The Operation of the Exact Compliance Rule

The requirement that terms in a contract be strictly complied with as in section 34 MIA 1961 (Nig)[546] is not strange to the average Nigerian per se. Before the advent of British rule in the area, Nigerians engaged in inter-tribal, inter-ethnic and intercity treaties and agreements involving strict compliance terms that were reasonably executed without default. Indeed culturally, most Nigerians' religious obligations require strict compliance with one form of term or the other in deference to the gods, on pains of severe retribution. However, in the religious sense, the purposes of animal sacrifices, for instance, are generally known to be for the appeasement of the gods through the shedding of animal blood. Accordingly, where the exact animal required, say, a sheep, is not available, an equivalent substitute such as a goat would suffice. So, to the 'unlearned' average Nigerian-insured, the value system that has built up around compliance with contractual terms is 'if the gods accept substitutes and substantial compliance, so be it'. In contrast, the traditional warranty's strict compliance brooks of no latitude, and no equity, whatsoever, and substantial compliance is simply not acceptable. The only question is, has that event happened?[547] It is difficult, therefore, for the Nigerian-insured to understand why, for instance, a warranty that he keeps books of account should be exactly complied with if it is not to enable the insurer to know the actual value of goods in the store that is the subject matter of the insurance. In *Mattar v Norwich Union Fire Insurance Society*,[548] for instance, a warranty under a theft policy stated that 'the assured keeps and during the whole of the currency of the policy shall keep a complete set of books, accounts and stock sheets or stock books showing a true and accurate record of all business transactions, and stock in hand…' The insured sought to recover for loss by theft whereupon the insurer relied on its

[546] Section 34 (2) MIA 1961 (Nig) provides: 'A warranty within the meaning of this section may be express or implied, and is a condition which shall be exactly complied with, whether it is material to the risk or not…'
[547] See McNair J's dictum in *Overseas Commodities Ltd v Style* [1958] 1 Lloyd's Rep 546, 558.
[548] [1965] ALR Comm 268.

breach. The insured contended that he kept sufficient books and records to enable the insurer to determine what goods were in the shop and their value at the time of loss. Under the *contra profentem* rule, it was submitted that as the warranty was vague, the sales books and the invoices kept by the insured would suffice. However, on appeal, this argument was rejected by the Supreme Court, which held that terms in the nature of warranties demanded strict and literal compliance no matter how close.[549] That was an unfortunate outcome and a wasted opportunity to advertise the benefits of insurance to Nigerians which could potentially enhance penetration.

Similarly, in *Narsons (Nig) Ltd v Lion of Africa Insurance Co Ltd*[550] the plaintiff insured had undertaken under a warranty clause inserted in the burglary policy to fix Chubb locks on the doors of the premises covered. When a claim arose, it conceded that it had failed to fix Chubb locks as required under the policy. However, the insured contended that he had substantially complied with the warranty by affixing an equivalent of the locks, and should, as such, be entitled to recover under the policy. At trial, it was clear from the correspondence between the parties in the suit that both of them understood that the purpose of the warranty was to keep the whole of the premises, the subject matter of the insurance, secured.

Clearly, in both cases above, the judges failed to take cognisance of Lord Denning's wisdom that the common law has many refinements, subtleties, and technicalities which are not suited to other folks,[551] in this case, Nigerians. In the latter case, the judges being Nigerians, ought to have taken judicial notice that there is no pre-colonial precedence of the common law concept of warranty in the average Nigerian mind, and the fact that the burglary in all probability would still have occurred even if Chuub locks had been in place, ought to have induced them not to allow the insured to lose his contractual benefit for a purported failure to exactly comply with a warranty. Crucially, in the former, the Supreme Court ought to have relied on the principle of first impression that a warranty of keeping books of account was a peculiar case unique to Nigeria[552] to allow the insured to recover because the not-so-literate could not appreciate such technical refinements of the law inherent in that case; and most Nigerians belonged in that category. Again, the judges ought to have taken judicial notice that the law that caters for the

[549] The High Court took a rather elitist preservation of doctrinal purity against practical reality contrary to Lord Dennings view in *Nyali Ltd v Att-Gen* [1956] 1 QB 1 at 16.
[550] [1969] NCLR 185.
[551] See Denning LJ's dictum in *Nyali Ltd v Att-Gen* [1956] 1 QB 1 at 16.
[552] Elsewhere in jurisdictions of high literacy rate a businessman does not require an insurance warranty to keep proper books of account.

interest of only a few (insurers) would unquestionably not be a good law. Judgment for the insured would have established solid precedence for future similar cases, and Nigeria would have been spared the ensuing hassles to reform the warranty law.

It is submitted, therefore, that fairness ought to have been given priority in this instance because the insured paid his premium, and his conduct did not injure the insurer in any way, yet he was denied the benefit of his insurance on a mere technicality which a semi-illiterate like him should not be expected to understand.

6.4.2 The Unfair Application of the Remedy for Breach of Warranty

The traditional remedy of automatic and permanent discharge of the insurer for breach of warranty has been described as harsh in most jurisdictions, and it is even more so in the Nigerian situation. What kind of law, for instance, should ascribe to only one party of a bilateral contract the absolute right to rescind a contract without any prior notice to the other party, especially when such rescission results in losses to the non-aggrieved party? Does it not raise issues of moral hazard? The average Nigerian's distrust of parting with his hard-earned cash for a mere promise of indemnity or a pay-out upon the occurrence of the insured event, and his belief in the principle of cause and effect, are only exacerbated by the insurer's repudiation of the insurance for a purported breach particularly if minor or irrelevant to the loss. Again, the legal finesse required to accept such eventuality does not exist in the average Nigerian mind whose cultural interpretation of the insurance contract is that the insured is understandably ready to forfeit his premium payments only for his conducts that are directly connected to or caused the loss; anything to the contrary is unacceptable.

In the earlier case of *Okoli*[553] the insured sought to explain away his non-compliance with the warranties on the basis that he did not appreciate the consequences of the breach in view of his low literacy level. The nuance of what he was actually saying was that the essence of the contract was the requirement of premium payment which he had met. The insurer ought also to reciprocate by paying him his claim. Anything else beyond that amounted to the insurer exploiting his illiteracy to defraud him.

[553] Unreported, Suit No JD/42/63. (Jos High Court); Reported in Irukwu, Insurance Law in Africa (1987) 133.

It is submitted that the common law remedy of breach of warranty is difficult to understand, and to the Nigerian-insured inappropriate to the offense. It is not surprising that there is a general apathy for insurance products, which partly accounts for insurance penetration in Nigeria being as low as 0.7%.[554]

6.4.3 The Lack of Causal Connection between Breach and the Loss

As in most common law jurisdictions, the discharge of the insurer from liability even where there is no causal connection between the breach of term and the loss has not been well received in Nigeria because it is unexplainable, and it bears no resemblance to any known indigenous law or practice. The largely illiterate consumers of insurance products do not understand why they should lose their contractual indemnity for a breach that has no connection with the loss. In Nigeria, where the common law is alien and hardly understood, neither wholly accepted, in the first few instances where this happened, the word spread like wildfire that insurance is a 'white man's scheme' to fleece them of their hard-earned money. A wave of apathy towards insurance products had ensued ever since from which the industry is still reeling to date.

6.4.4 The Unscrupulous Practices of Some of the Insurers

As in the MIA 1906, there is no specific provision for basis of the contract clause in the MIA 1961 (Nig). However, just as used to be the pre-CIDRA 2012 an IA 2015 practice in the UK the equivalent sections of the MIA 1961 on express warranty, disclosure, and freedom of contract are shrewdly relied upon by Nigerian insurers to include basis clauses in their policy documents and it has not been good for the insureds.[555]

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[554] Africa insurance trends, nigeria-insurance-survey. Accessed online on 28 May 2022 at https://www.pwc.com/ng/en/assets/pdf/nigeria-insurance-survey.pdf

[555] Section 36 (1) – (2) of the MIA 1961 (Nig) provides: (1) An express warranty may be in any form of words from which the intention to warrant is to be inferred. (2) An express warranty shall be included in or written upon the policy or be contained in some document incorporated by reference into the policy. In this regard, the declaration in the proposal form to the effect that the insured warrants the correctness, accuracy and truth of the answers therein and shall be the basis of the contract, is legally permissible as it is usually incorporated into the policy. When juxtaposed with section 20 (1) MIA 1961 (Nig) which provides that the assured shall disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured, failing which the insurer may avoid the contract, and section 88 MIA 1961 (Nig) which provides: 'Where any right, duty, or liability would arise under a contract of marine insurance by implication of law, it may be negatived or varied by express agreement, or by usage, if the usage is such as to bind both parties to the contract', give wide leverage for insurers to include basis clause warranties in their policies.

6.4.4.1 The Entrapment of the Insureds

When it suits them insurers in Nigeria rely on section 54 (1) NIA 2003 that where an insurer requires an insured to complete a proposal form or other application form for insurance, the form shall be drawn up in such manner as to elicit such information as the insurer considers material in accepting the application for insurance of the risk and any information not specifically requested shall be deemed not to be material.[556] Indeed, this provision appears to make all questions and answers in the proposal form material to the risk insured, which justifies the insurer's reliance on any inaccurate or incorrect answer to repudiate the contract. From this perspective, it has been suggested that the provision is similar in function to the basis of the contract clause and that for that reason, section 54 (1) NIA 2003 establishes basis of the contract clause in Nigerian warranty law. And insurers are in the habit of hiding the basis clause declaration in tiny prints at the back of the proposal form as if to 'trap' the proposer into signing it without reading it. However, the argument is faulty because unlike the basis clause whose focus is on the accuracy, correctness, and truth of the answers, the focus of section 54 (1) NIA 2003 is on whether the information is material, whose breach is in fact treated as irrelevant in the traditional warranty regime. But the high bar of the test of accuracy, correctness, and truth, in conjunction with section 20 (1) MIA 1961 (Nig) which requires that the insured shall disclose to the insurer what he knows, is taken advantage of by unscrupulous insurers to lay traps for the insureds by asking them all manners of immaterial questions in hope of catching them in an untrue, inaccurate, or incorrect answer on which to rely to repudiate the contract and keep the premium. It ought not to be so.

However, the lack of clarity on the relationship between NIA 2003 and MIA 1961 (Nig) opens a window that insurers exploit to perpetuate this unwholesome practice.[557] Professor Irukwu explains[558] that when insurance law and practice was adopted into Nigerian law by virtue of

[556] Section 54 NIA 2003.

[557] Indeed, currently, most policy documents of major Nigerian insurance companies, including the Takaful Islamic insurance which purports to be inconsistent with general insurance principles, contain basis clauses.

[558] This was in a telephone conversation with this researcher on 6/11/2020 on the use of basis clause in Nigeria. Professor JO Irukwu is a Senior Advocate of Nigeria and Fellow of the Insurance Institute of Nigeria and Associate Member of the Chartered Insurance Institute of London, Member of the British Insurance Law Association, Member of the Governing Council of the West African Insurance Institute, Chairman, Education Committee of the West African Insurance Institute. He had been President, Nigeria Insurance Law Association, President, Insurance Institute of Nigeria, Managing Director, Unity

the statute of General Application in 1900,[559] the noble intention was that the basis clause would be applied in such manner as to protect both the insured and the insurer - the insured, if he told the whole truth he could not be in breach and should therefore receive his benefit of the contract as at when due; and for the insurer, he would not be misled having relied on the accuracy, truth and correctness of the representations of the insured, to underwrite. The insurer was supposed to take charge of the process in a transparent manner by first explaining to the insured the need for the absolute truth of his answers to the questions in the proposal form and their relationship to the insured's ability to make a successful claim under the contract, as well as the consequences of breach of that duty. But due to lack of proper understanding, the courts in Nigeria gave harsh and prejudicial interpretation to the basis clause in favour of the insurers, thereby instituting a culture of distrust of insurance among Nigerians. Nevertheless, Irukwu concedes that where the insurer fails to pre-brief the insured on the overall implication of filling the proposal form, section 54 (1) NIA 2003 ought indeed to preclude the insurer from declaring the answers therein to be the basis of the contract. The only snag is that it appears the courts in Nigeria are yet to see it in this light and the insertion of basis clause by insurers in contracts continues to perpetrate the harshness of warranty on the Nigerian insured.

6.4.4.2 The Exploitative Operation of Basis Clause

In Nigeria, as in other climes, the basis clause declaration usually does not reference the purpose for which the insured is purchasing the insurance. Yet, it is to be the basis of the contract. In this regard the insurer uses his statutory right under the law of misrepresentation and non-disclosure to exploit the insured's ignorance of what he (the insurer) considers as material or true to ask all manners of questions of the insured including those the insured may not necessarily know the answer and may have to opine. If it turns out that any of the statements in the proposal is inaccurate or the policyholder unwittingly fails to disclose a fact which the insurer considers to be material, the insured would be in jeopardy either under the law of misrepresentation, non-disclosure, promissory warranty, or basis of the contract clause. In either instance, the insured loses his benefits under the contract.

Life and Fire Insurance Company Ltd, Managing Director, Nigeria Reinsurance Corporation. He was Chairman of the Committee to Review Nigeria Insurance Laws in 2009.

[559] Statutes of General Application are those laws that were enacted in England before 1 January 1900 which are held to be applicable in Nigeria until a local law replaces them.

A typical operation of the basis clause in Nigerian is depicted in *Akpata v African Alliance Insurance Co Ltd*[560] in which an applicant for life insurance completed a proposal form containing, *inter alia,* the following questions: 'Do you usually enjoy good health?' and 'Has any proposal on your life ever been made?' The questions were answered in the affirmative and negative, respectively. The signed proposal contained the basis of the contract declaration, which was recited in the policy issued. The proposer was put to a medical examination the result of which was recorded in a questionnaire warranting the truth of answers supplied, but without being declared as forming the basis of the contract. To the question 'Have you ever suffered, or do you now suffer from… gastric or duodenal ulcers', the reply was 'No'. The insured died of an ulcer of the stomach. At trial, it was revealed that unknown to him and his doctors, he suffered from stomach ulcers at the time of the answers. The disease was also undetected by the insurer's doctor during the examination. It also turned out that the insured held a life policy in the past, which he did not disclose in the proposal form.

On the above facts, Taylor CJ found that both the proposal form and questionnaire form the basis of the contract between the parties. The insurer was held unable to repudiate liability on account of the untrue statements as to the insured's answers as these were not incorrectly answered in light of the knowledge available to him, but could do so by virtue of the false answer to the previous policy held by him. It was held that the materiality of the answers was irrelevant.[561]

It was a similar outcome in *Ilonzo & Sons v Universal Insurance Co Ltd*[562] the insurers were held entitled to repudiate the contract on account of a false answer given in the proposal form as to where books of account are kept by the insured without regard to its materiality or connection with the resultant loss.[563] The irrelevance of materiality means an insurer may ask any questions of the insured, including those he (the insured) may know nothing about but about which he must hazard a guess which the insurer would, later on, find to be inaccurate and the basis of denying a claim. It is sad that under the guise of freedom of contract, the courts in Nigeria have allowed insurers to get away with such sham practices.

[560] [1967] 3 ALR Comm 264.
[561] Omogbai Omo-Eboh, *The Law of Insurance Contracts in Nigeria*, (WABP, 2012) 161.
[562] [1972] 2 ECSLR 611.
[563] Omogbai Omo-Eboh, *The Law of Insurance Contracts in Nigeria*, (WABP, 2012) 162.

It is to be noted that it is a notorious fact that in some Nigerian societies, particularly among the non-adherents of monotheism, it is not considered a lie in the sense of trying to cheat or being dishonest, and indeed a taboo, for a man to disclose his sickness or other personal matters - regarded as a sign of weakness - to anyone other than a traditional healer for the purpose of treatment[564] or 'protection' from 'enemies' through sacrifice or amulets and charms; and most of the indigenous insurers know it. Therefore, the requirement for absolute truth of the answers in a proposal form is an exploitation of the incongruence of modern insurance to indigenous peoples' cultural and traditional practices. Furthermore, answers to questions such as 'Do you usually enjoy good health?' can only be the insured's opinion and where they do not match the fact they should not be held as grounds for the insurer's repudiation of the contract. Neither should the answers to such inexact questions be convertible to warranties which require the insured's exact compliance. Yet, in the case of *Rank Xerox (Nig) Ltd v Centre (Nig) Ltd*[565] the court of appeal re-affirmed that once the term of the contract is written and made the basis of contract it is in such term that *the court will revert into the determining the right and obligation of parties and no more.*[566]

Moreover, to the extent that the test of materiality is left to the insurer's discretion, he (the insurer) is virtually made a judge in his own case, and if the purchasers of insurance were 'learned' at least, they would probably insist on adding to their declaration at the foot of the filled proposal form the proviso 'the above statements are correct and true to the best of my knowledge'.[567] But that is not the case and the insurers in Nigeria have continued to exploit this ignorance to the detriment of the insureds.

6.5 An 'Out of the Box' Paradigm

No doubt, controlling risk for the insurer which is the main role of warranties in insurance in common law jurisdictions is universal – the civil jurisdictions use alteration of risk - except that warranty has been shown to perpetrate unfairness to the insured in the consequences of breach in the non-marine context. This thesis argues that the UK, Australia, and New Zealand have successfully used hybridized solutions in their reforms to neutralise unfairness in the traditional

[564] Personal medical records are also protected by privacy laws in most jurisdictions around the world.
[565] (1995) INNLR (pt 374) 703.
[566] Italics inserted by researcher for emphasis.
[567] Although such pleading was rejected in *Thomson v Weems* (1884) 9 App Cas 671, it was because it had not been inserted in the proposal form and the learned Judges would also have taken cognizance of the fact it was a re-insurance case involving two professionals who should know better.

warranty. In the UK it is in section 11 (1)[568] and (2) of the IA 2015, under which insurers will not be able to rely on breach of a warranty or similar 'risk mitigation term' to reject a claim if the breach is not connected to the actual loss that has occurred; while in Australia and New Zealand it is the terms of sections 54 and 11 respectively with regards to the post-contract increase of risk which require a connection between the breach and the loss for the insurer to enjoy a remedy. These are similar in effect to the civil jurisdictions' alteration of risk doctrine which is regarded as fairer.

It is noted that insurance is a global phenomenon and Nigeria cannot be an island to itself. No doubt the traditional warranty was transplanted from Britain during the colonial period, but it has been sustained long after colonialism because of the diversity of the ethnic nationalities in Nigeria which necessitated the use of English (the language in which the insurance laws are written) as the official language,[569] as it would be unfeasible to translate the law into each of the over 400 languages in the country. This is yet another dimension of Nigeria's exceptionalism which makes it unwise to compare her with other third world economies because language of the law, the manner of its transplantation, the culture and local nuances of the indigenous people, and numerous other factors beyond the scope of this thesis might differ with those of the other third world economies and make such comparison meaningless. Besides, it is easier to borrow from a more sophisticated system that can be used as a model, especially where the donor system is available in writing.[570] Furthermore, Nigeria's GDP is the highest in Africa and there is a sense that to borrow from less robust economies would be fruitless.[571] Therefore, to the extent that the socio-economic dynamics in Nigeria are not likely to disappear any time soon, some form of a hybridized solution of combining the 'foreign' advanced systems with the 'indigenous' system lends itself as expedient for the way forward.

6.6 Need to Demarcate Marine from Non-Marine Insurance in Nigeria

Further to the discussion in chapter 3 it would be expedient for Nigeria to demarcate marine from non-marine to enhance fairness to the consumer-insureds which are the main consumers

[568] IA 2015 section 11 (1) provides: This section applies to a term (express or implied) of a contract of insurance, other than a term defining the risk as a whole, if compliance with it would tend to reduce the risk of one or more of the following— (a) loss of a particular kind, (b) loss at a particular location, (c) loss at a particular time.
[569] Alan Watson, *Comparative Law: Law, Reality and Society* (3rd ed Vandeplas Publishing, 2010) 11.
[570] Ibid 7.
[571] Ibid 11.

of insurance products in Nigeria. Indeed, this appears to be the direction of the government sponsored ICB 2016 whereby all the provisions of the MIA 1961 (Nig) in relation to warranty have been reproduced along with those of NIA 2003, albeit in different sections of the Bill. The impression being conveyed seems to be that the provisions of sections 171 – 179 ICB 2016 - a replica of sections 34-42 MIA 1961 (Nig), which are based on the traditional warranty regime will cover marine insurance while section 86 (1) – (7) a near replica of section 55 (1) – (5) will cover non-marine insurance. Since the mid-1980s, the Nigerian government as part of its Structural Adjustment Program adopted a policy of 'privatization' which involves the divestment of government from running 'for-profit' businesses. This means that Nigeria is unlikely to wholly adopt the civil jurisdictions' doctrine of alteration of risk which might involve the committal of State funds for ensuring the seaworthiness of ships which in common law jurisdictions devolves on the insured or the ship owner. For the sake of fairness to the insureds, especially in the non-marine context, it would be expedient therefore to demarcate marine from non-marine insurance in Nigeria.

6.7 Need and Extent for Discontinuance of Applying the Marine Warranty Rule in Nigeria

In Nigeria, the traditional marine warranty rule is covered in section 34 (1) and (2) MIA 1961 (Nig) which provides:

> (1) For the purposes of this section and of sections 35 to 42 of this Act (which relate to warranties) a warranty means a promissory warranty, that is to say, a warranty by which the assured undertakes that some particular thing shall or shall not be done, or that some condition shall be fulfilled, or whereby he affirms or negatives the existence of a particular state of facts.
>
> (2) A warranty within the meaning of this section may be express or implied, and is a condition which shall be exactly complied with, whether it is material to the risk or not. If it is not so complied with, then, subject to any express provision in the policy, the insurer shall be discharged from liability as from the date of the breach of warranty, but without prejudice to any liability incurred by him before that date.

As in the UK the 'traditional' marine warranty rule is held to apply to all classes of insurance including consumer, business, and reinsurance because the MIA 1906 (UK) from where it was transplanted in Nigeria is principles-based which makes it applicable to all types of insurance as well as allow the courts to develop it underneath to keep pace as far as possible with social

change. In line with the earlier definition of marine insurance,[572] the forms of marine insurance in Nigeria include hull insurance, cargo insurance, Protection and Indemnity, and port operations, etc.[573] Other forms of insurance outside these whether consumer or non-consumer constitute the non-marine insurance. It is argued that the traditional warranty forfeiture rules are fair in the marine context because of the potential grievous consequences, against public policy, of the breach of a seaworthiness warranty which could result in the loss of the ship, souls on board, and cargo. The problematic issues arise mainly in the application of the forfeiture rules to other classes of non-marine insurance. Accordingly, because of the success of the Australian ICA 1984 it should be a matter of public policy to 'borrow' the Australian approach and disambiguate marine from non-marine insurance in Nigeria which means all forms of marine insurance will operate under the traditional regime (sections 34 – 42 MIA 1961 (Nig) now sections 171 – 179 ICB 2016) while non-marine will be under section 55 NIA 2003 now section 86 (1) – (7) ICB 2016. It is to be noted though that at common law there is only one definition of insurance warranty for both consumer and business insurance and the many attempts at the reform of the traditional warranty has always been targeted at its accruable remedies – in the New Zealand's section 11 ILRA 1977, Australia's ICA 1984, and Nigeria's section 55 NIA 2003, it is the abrogation of the insurer's automatic discharge from liability, and in the UK's section 10 IA 2015 it is the insurer's suspensive liability. Therefore, in Nigeria it is pertinent that the traditional warranty regime should disapply to all classes of non-marine, including business, insurance but continue to apply to marine insurance in modified form by introducing the equivalent of the 'held covered' principle in Institute Hull Clauses[574] in Nigerian law.

6.8 The NIA 2003 Reform of the Traditional Warranty

6.8.1 Attempted Outlawing of Basis of the Contract Clause in Section 54 (1)

It is common knowledge that one of the commonest means of creating warranties is the use of basis of the contract clause and it is widely found in most proposal forms of Nigerian insurers. Its attractiveness to insurers seems to be its requirement that the insured avouch the accuracy and truthfulness of all his answers to the questions in the proposal form by signing a declaration

[572] See chapter 2 sub para 2.2.2.
[573] Lakinbofa Goodluck, 'The state of marine insurance in Nigeria' Ship & Ports (2018). Accessed online on 20 May 2022 at https://shipsandports.com.ng/state-marine-insurance-nigeria/.
[574] Under the Institute Hull Clauses the insured is held covered despite breaches of warranty provided that he gives prompt notice to the underwriters and pays an additional premium.

to that effect. Most insureds sign the declaration without recourse to its legal implications, which are quite dire. Accordingly, it was reasoned by the Military - the original authors of section 54 NIA 2003 - that if the right to rely on the insured's answers in the proposal form were denied the insurer, there would be nothing to declare as basis of the contract. Section 54 (1) NIA 2003 accordingly provides:

> Where an insurer requires an insured to complete a proposal form or other application form for insurance, the form shall be drawn up in such manner as to elicit such information as the insurer considers material in accepting the application for insurance of the risk and any information not specifically requested shall be deemed not to be material.

The seeming implication of this subsection is that any information that is not material to the risk does not influence the insurer's decision on whether to underwrite the risk or not and should therefore not be the basis of the contract. Since the insurer is conferred with the right to ask questions of the insured, and he alone knows what risk(s) he is ready to underwrite based on his actuarial computations and assessment, he is to elicit such information as he (the insurer) deems material in accepting the application for insurance. This was supposed to effectively oust any tendency of the insurer to require any declaration from the insured purporting to hold answers in the proposal form to be the basis of the contract. Furthermore, in these circumstances, by virtue of the principle of estoppel,[575] the insurer is supposed to be prevented from accepting the insured's answers to be the basis of the contract; and 'any information not specifically requested shall be deemed not to be material' means under section 55 (1) NIA 2003[576] the insurer loses the right to rely on it for a remedy. This was particularly essential in the reform effort because the effect of the basis clause warranty had been quite debilitating to the insuring public who do not understand why the inaccuracy or untruthfulness of information not material to the insured risk should be the basis for forfeiture of their benefits under the contract. Nonetheless, the insurers continued to capitalise on the ignorance of the insuring

[575] Estoppel occurs when the assured is induced by the conduct of the insurer to take action to his detriment.' In the *Yacht Escapade* (1961) AMC at 2421 the underwriters were held estopped from invoking the benefit of a breach of warranty by insisting that the assured incur salvage expenses by using a salvor of their choice.

[576] In a contract of insurance, a breach of term whether called a warranty or a condition shall not give rise to any right by or afford a defence to the insured unless the term is material and relevant to the risk or loss insured against

public to rely on the misreading of section 54 (1) NIA 2003 to insert basis of the contract clauses in their policies. Unsurprisingly, there had been calls for an immediate and outright abrogation of basis of the contract clause. But this had not been forthcoming due to the seeming reluctance by the civil authorities who are still beholden to their colonial mentality, particularly those who had their legal education in the UK and are Queen's Counsels, to do the needful.[577]

6.8.2 Introduction of the Transparency Safeguard in Section 54 (2)

Section 54 (2) NIA 2003 provides:

> The proposal form or other application form for insurance shall be printed in easily readable letters and shall state, as a note in a conspicuous place on the front page, that 'An insurance agent who assist an applicant to complete an application or proposal form for insurance shall be deemed to have done so as the agent of the applicant.

In Nigeria, it is a notorious fact that the insured rarely gets to see a copy of his answers to questions in the proposal form, let alone the policy document to which it is incorporated. This gives rise to some form of opacity in the insurance contract process. The requirement of section 54 (2) is to compel transparency on the insurer to ensure the insured and his agent are forewarned on the gravity of the answers to be provided in the proposal form and the need to exercise caution. This purports to nullify the 'trap' of hiding the warning in tiny prints at the back[578] and puts the insured on his guard. But again, the unclear relationship of the NIA 2003 and the MIA 1961 (Nig) has tended to put this provision in abeyance.

6.8.3 Section 55 NIA 2003's Departure from the Traditional Warranty

Section 55 NIA 2003 provides:

> (1) In a contract of insurance, a breach of term whether called a warranty or a condition shall not give rise to any right by or afford a defence to the insurer against the insured unless the term is material and relevant to the risk or loss insured against.
>
> (2) Notwithstanding any provision in any written law or enactment to the contrary, where there is a breach of term of a contract of insurance, the insurer shall not be entitled

[577] This is because, until the enactment of CIDRA 2012 and IA 2015, basis clause warranties were still being allowed in the UK.

[578] See JO Irukwu, *Insurance Law and Practice in Nigeria* (The Caxton Press West Africa Ltd, 1978) xiii.

to repudiate the whole or any part of the contract or a claim brought on the grounds of the breach unless-

(a) the breach amounts to a fraud; or

(b) it is a breach of fundamental term of the contract.

(3) Where there is a breach of a material term of a contract of insurance and the insured makes a claim against the insurer and the insurer is not entitled to repudiate the whole or any part of the contract, the insurer shall be liable to indemnify the insured only to the extent of the loss which would have been suffered if there was no breach of the term.

(4) Nothing in this section shall prevent the insurer from repudiating a contract of insurance on the ground of a breach of a material term before the occurrence of the risk or loss insured against.

(5) In subsection (2) of this section, "fundamental term" means a warranty, condition or other term of an insurance contract which a prudent Insurer will regard as material and relevant in accepting to underwrite a risk and in fixing the amount of premium.

Clearly, these provisions have attempted[579] to mitigate the harshness of the traditional warranty, particularly the remedies accruable to the insurer, with a view to protecting the insureds from the unfair forfeiture rules. Nevertheless, though commendable, the manner in which this statute was crafted seems to be lacking in the finer details of the technical aspects of insurance law such as the definition of fraud and 'fundamental term'.[580] The positive aspect, however, is that section 55 NIA 2003 is similar to the Australian ICA 1984 section 54 (1) – (2)[581] and section 11 ILRA 1977 in that it abandons the automatic discharge approach,

[579] The word 'attempted' is used because the non-abrogation of sections 34-42 MIA 1961 (Nig), or at least a demarcation of marine from non-marine insurance means under the wide-ranging rights of the insurer in the MIA 1961 (Nig) section 88 he reserves the right to contract out of section 55 (1). It must go down as one of the weaknesses of the NIA 2003 in failing to oust contracting out.

[580] This law was originally enacted by the military junta in the 1988 Decree.

[581] Section 54 (1) – (2) ICA 1984 states: (1) Subject to this section, where the effect of a contract of insurance would, but for this section, be that the insurer may refuse to pay a claim, either in whole or in part, by reason of some act of the insured or of some other person, being an act that occurred after the contract was entered into but not being an act in respect of which subsection (2) applies, the insurer may not refuse to pay the claim by reason only of that act but the insurer's liability in respect of the claim is reduced by the amount that fairly represents the extent to which the insurer's interests were prejudiced as a result of that act. (2) Subject to the succeeding provisions of this section, where the act could reasonably be regarded as being capable of causing or contributing to a loss in respect of which insurance cover is provided by the contract, the insurer may refuse to pay the claim.

establishes the relevance of materiality of breach of warranty, and introduces the concept of the causal connection between the breach and the risk or loss. It also recognises that a loss may not necessarily be caused by the insured's breach of a term. In effect, section 55 NIA 2003 has departed from the traditional concept of warranty, and to that extent, like the Australian and New Zealand approaches before it, it is consumerist in outlook.

6.8.3.1 Abolition of the Automatic Discharge Approach

The right of an insurer following a breach under the traditional warranty is to treat himself as automatically discharged from liability to make any payment under the contract. However, the provision in section 55 (1) that: 'In a contract of insurance, a breach of term whether called a warranty or a condition shall not give rise to any right by or afford a defence to the insurer against the insured *unless the term is material and relevant to the risk or loss insured against*'[582] abolishes the automaticity of that right; the insurer must first prove the existence of the materiality and relevance of the term to the risk.[583] This amounts to the extinguishment of a major doctrinal pillar of the traditional warranty regime. This is particularly significant because in Nigeria, the popular adage that 'he who comes to equity must do so with clean hands' is consistent with societal mores and strong cultural significance. Therefore, it is generally believed among the insuring public that it is wrong for the insurer to avoid liability for the breach of a warranty which did not influence his decision to underwrite in the first place. This explains why section 55 (2) (a) requires that the insured's breach must amount to a fraud for the insurer to be entitled to repudiate the whole or any part of the contract or a claim. Its beauty lies on the burden of proof being placed squarely on the insurer thereby shielding the barely literate Nigerian insured from the unfair advantages of the insurer under the traditional regime.

6.8.3.2 Introduction of Causal Connection between Breach and the Risk or Loss.

The proviso in section 55 (1) 'unless … the term is relevant to the risk or loss insured against' introduces the requirement of a causal link between breach and the loss, and it solves three peculiar problems of warranty law in Nigeria. First, it contributes to taking away the unfair automaticity of the insurer's right to discharge from liability. This is a significant point of equalisation of the parties to the insurance and ameliorating the unfairness of the traditional

[582] Italics added by researcher for emphasis.
[583] See para 6.8.3.3 below.

position. Second, it caters for the Nigerian traditional values of cause and effect and brings in some measure of equity into the insurance process to a level acceptable to the Nigerian-insured, that is, that his breach causing the loss is sufficient justification for the forfeiture of his benefits under the contract. Third, it defends the insurance industry from a widely held, if erroneous, belief that they are generally averse to the payment of claims. Thus, section 55 (1) NIA 2003 has been widely received in Nigeria as its indigenous approach is generally acclaimed as having departed from the 'foreign law' in section 34 of the MIA 1961 (Nig). However, it is not clear at this point whether the Military, who were the original drafters of this subsection, consulted with the Law Commissions of New Zealand, or Australia,[584] who had earlier in 1977 and 1984 respectively amended the common law rules to require one form of causal connection between breach and loss or the other in their laws, but there are strong indications that the NILRC who are insurance practitioners, and who made inputs in the initial draft of the ISPD 1988, did.

However, the process for the determination of causation has not been provided for in the Act. Ascertaining the cause of a loss is often contentious in litigations at the courts, even in advanced jurisdictions such as the UK, Australia, and New Zealand, and it is potentially more so in Nigeria where the common law is seemingly encountering a crisis of acceptance. This might lessen the efficacy of the provision.

6.8.3.3 Introduction of Materiality and Relevance of Breach of Warranty to the Loss

The relevance of the materiality of breach to the loss and of the warranty itself to the risk insured against has been a contentious issue under the traditional warranty. The clause 'In a contract of insurance, a breach of … a warranty or a condition shall not give rise to any right … to the insurer unless the term is material…'[585] in section 55 (1) NIA 2003 effectively makes the materiality of a warranty relevant, not only to the risk insured against but an essential part of the contract, without which the insurer is stripped of any right to rely on the insured's breach to repudiate liability. As indicated above, the general view has been that the rule of immateriality and irrelevance of a warranty was viewed as a clever scheme by the 'white man' to fleece the locals from their hard-earned money.

[584] Under the military such information are classified and protected as State secrets.
[585] ICB section 86 (1) provides: 'In a contract of insurance, a breach of a term of the contract, whether called a warranty or a condition, shall not give rise to any right by, or afford a defence to the insurer unless the term is material and relevant to the risk or loss insured against.'

The snag, however, is that materiality is not explicitly defined in the Act. Nevertheless, having regard to section 54 (1) NIA 2003[586] there is a sense that the test of materiality is left to the discretion of the insurer; and the fact that insurers use basis clause to convert the answers in the proposal form into warranties admits a warranty, at least in the corollary sense, into a material term. Still, it is unclear whether it is the particular, or prudent insurer, being contemplated. In the former, materiality is viewed in relation to what the particular insurer would consider relevant to know in estimating the risk. It was accordingly held in *Elton v Larkin*[587] that: 'A material concealment is a concealment of facts which if communicated to the party who underwrites, would induce him either to refuse the insurance altogether or not to effect it except at a larger than the ordinary premium. In the latter, a material circumstance is one that would influence the judgment of a prudent insurer in fixing the premium or determining whether he would take the risk, which seems to be the intention of section 54 (1) NIA 2003.[588] This accords with MIA 1961 (Nig) section 20 (2)[589] , which states that 'Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium or determining whether he or she will take the risk'; and clearly a future conduct warranty, in particular, will influence the insurer's decision as to whether or not to underwrite.

This raises further questions as to whether the materiality of breach of warranty caused the loss, or the breach is only causally connected with the loss. If it is the former, the right of the insurer to repudiate under section 55 (1) is triggered, but in the latter, the complex and controversial nature of proving causation will potentially come into play and significantly degrade the efficacy of this provision of the Act.[590]

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[586] Section 54 (1) NIA 2003 states: 'Where an insurer requires an insured to complete a proposal form or other application form for insurance, the form shall be drawn up in such manner as to elicit such information as the insurer considers material in accepting the application for insurance of the risk and any information not specifically requested shall be deemed not to be material.'

[587] (1832) 5 C&P 385, 392.

[588] Section 54 (1) NIA 2003 provides: 'Where an insurer requires an insured to complete a proposal form or other application form for insurance, the form shall be drawn up in such manner as to elicit such information as the insurer considers material in accepting the application for insurance of the risk and *any information not specifically requested shall be deemed not to be material.'* (Italics inserted by researcher for emphasis).

[589] Section 20 (2) MIA 1961 (Nig).

[590] Somehow, since the original enactment of this section in 1988 there is no reported case yet on the issue from which an evaluation may be made of the actual working of the capability of the linkage of a breach to the loss could be said to be the proximate cause of the loss.

6.8.3.4 Breach Amounting to a Fraud

Section 55 (2) (a) NIA 2003 provides 'Notwithstanding any provision in any written law or enactment to the contrary, where there is a breach of term of a contract of insurance, the insurer shall not be entitled to repudiate the whole or any part of the contract or a claim brought on the grounds of the breach unless the breach amounts to a fraud…' This subsection purports to override any provision in any other law (including MIA 1961) to the contrary and allows the insurer to refuse a claim only for a breach amounting to a fraud. This raises the bar for the refusal of claims to a very high level for the insurer, thereby preventing him from denying claims on mere technicalities, which is a common practice in Nigeria and had brought insurance into profound disrepute among the general public.

However, the contentious issue here lies on fraud not being defined or explained anywhere in the Act to enable contracting parties or a general reader to understand how it should be construed in this context.[591] Nevertheless, going by precedence, in *Derry v Peek*[592] it was held that a proposer was guilty of fraudulent misrepresentation if the statement was made knowingly without belief in its truth or recklessly as to whether it is true or false.[593] In this regard, even an inadvertent, inaccurate but legitimate claim, may equally be denied on the presumption that the insured would have intentionally done it. This potentially brings the educational status of the average Nigerian insured into the reckoning, as he might not be able to give an accurate estimate of a claim and on which the insurer would capitalise in practice. Moreover, the test of the estimate's accuracy and who - the insured or the insurer - is to conduct it is not specified. Therefore, there is need to redraft the subsection, perhaps, to provide for a regulatory-authority-appointed loss adjuster to ascertain the value of a claim in line with the provisions of the policy before lodging same with the insurer who should then settle it. This might provide better protection for the illiterate insured in the claim process.

6.8.3.5 Introduction of 'Fundamental Term'

In similar manner to section 55 (2) (a), section 55 (2) (b) NIA 2003 prevents the insurer from refusing a claim except on grounds of a breach of 'fundamental term'. Section 55 (5) defines fundamental term in subsection (2) as a warranty, condition or other term of an insurance

[591] This provision replicates section 55 (2) NIA 2003.
[592] (1889) 14 App (as 337).
[593] See Agom, Modern Nigeria Law of Insurance, (Concept Publications, 2013) 143.

contract which a prudent insurer will regard as material and relevant in accepting to underwrite a risk and in fixing the amount of premium. Therefore, bearing in mind that at the time of enacting the NIA 2003, the only known written law on insurance warranty in Nigeria was the MIA 1961 (Nig) sections 34-42, the phrase 'notwithstanding any provision in any written law or enactment to the contrary…' is presumptively referencing MIA 1961 (Nig) section 34 (2).[594] Therefore, substituting 'fundamental term' for 'warranty' in section 55 (2) (b), the phrase 'If it is not so complied with, then, subject to any express provision in the policy, the insurer shall be discharged from liability as from the date of the breach of warranty' in section 34 (2) 1961 (Nig), has been abolished. This is similar with the amendment in IA 2015 section 10 (7). Therefore, it would seem that the NIA 2003 reformed the strict rule of automatic discharge ahead of the UK reform on this point.

Again, the reference to materiality being an ingredient of 'fundamental term' here, which is the only one of two conditions[595] whose breach the insurer is entitled to repudiate the whole or any part of the contract or a claim strengthens section 54 (1) in preventing the insurer from use of basis clause to create warranties, because the insurer will have to prove that the untruth or inaccuracy in an insured's representation or statement is fraudulent.

In another instance, there is a sense in Part IX NIA 2003 that the three terms Disclosure, Condition and Warranty, may have been consolidated into 'fundamental terms'.[596] In this regard, subsection 55(2) (b) can also have 'fundamental term' replaced with either of the words 'disclosure', 'condition', and 'warranty'. It is understandable that a condition, or warranty, may be breached; but if 'fundamental term is replaced with 'disclosure', section 55 (2) (b) would now read: 'Where there is a breach of a term of a contract of insurance the insurer shall not be entitled to repudiate the whole or any part of the contract or a claim brought on the grounds of the breach unless it is a breach of 'disclosure'. This would make section 55 (2) (b) virtually meaningless because 'disclosure' per se is not a law, and cannot, therefore, be breached.

[594] Section 34 (2) MIA 1961 (Nig) states: 'A warranty within the meaning of this section may be express or implied, and is a condition which shall be exactly complied with, whether it is material to the risk or not. If it is not so complied with, then, subject to any express provision in the policy, the insurer shall be discharged from liability as from the date of the breach of warranty, but without prejudice to any liability incurred by him before that date.'
[595] The other is when the breach amounts to a fraud as discussed in sub-sub-para 6.5.3.5 above.
[596] Part IX NIA 2003 is entitled Disclosure, Condition and Warranty.

Nonetheless, there is a positive side to this: the burden of proof that the term breached is 'fundamental' rests with the insurer. This potentially eases pressure on the insured and significantly mitigates the unfairness of warranty.

6.8.3.6 When Insurer Must Indemnify the Insured

Section 55 (3) NIA 2003 provides that 'Where there is a breach of a material term of a contract of insurance and the insured makes a claim against the insurer and the insurer is not entitled to repudiate the whole or any part of the contract, the insurer *shall*[597] be liable to indemnify the insured only to the extent of the loss which would have been suffered if there was no breach of the term.'[598] This provision is a novelty unheard of under the traditional warranty regime as it goes beyond the extinguishment of automatic discharge to a situation of compelling the insurer to indemnify the insured, albeit only to the extent of the loss which would have been suffered if there is no breach of the term. This is arguably the first time in a common law jurisdiction that a deliberate attempt is being made by statute to help the insured realise his purpose for purchasing insurance. This is consumerism and is what insurance is supposed to be all about because, incontrovertibly, there simply cannot be insurance without the insured.

Generally, the insured's right to be paid a claim arises only if he (the insured) has complied with all the relevant policy conditions, particularly those that are made conditions precedent to the insurer's liability. But section 55 (3) does not state why and how the insured who is in breach of a material term should still claim against the insurer, whereas under section 55 (1), breach of a material term resurrects the insurer's right to defend against the insured's claim.[599]

Ordinarily, the insured in breach can still file for a claim for either of two reasons: (1) the insurer has waived the breach, or (2) the insurer is estopped from relying on the breach to deny the claim. The former is an unlikely occurrence in Nigeria because of the caveat-emptor-like relationship between the insurer and the insured whereby each party appears to work for their own exclusive benefit to the detriment of the other. The latter is the more likely, and indeed, there is a case in point. In *Lawal v Amicable Insurance Ltd,*[600] the insured warranted in a goods-

[597] Italics added by researcher for emphasis.
[598] Section 55 (1-3) NIA 2003 specifies the conditions where the insurer is not entitled to repudiate a contract.
[599] In practice, insurers opt for the automatic discharge under section 34 MIA 1961 (Nig) which is still in force.
[600] [1982] 3 FNR 283.

in-transit policy to render monthly statements of the value of goods carried. The insurer repudiated liability upon a loss citing breach of warranty, among other reasons. It was held that the conduct of the insurer in accepting renewal premiums for three successive years with the knowledge that the insured was not complying with the warranty raised estoppel as well as a waiver by inducing the insured to believe that it was unnecessary to perform the warranty, and that the insurer's rights would not be enforced.

On the other hand, if the insured had not breached a material term, the insurer shall be liable to indemnify the insured only to the extent of the loss which would have been suffered if there was no breach of term. Being a contract of indemnity, the amount recoverable by the insured will be limited to his interest in the subject matter of the insurance.[601]

6.8.3.7 Recognition of Potential Third-Party Cause of Loss

The clause in section 55 (3)[602] that 'the insurer shall be liable to indemnify the insured only to the extent of the loss which would have been suffered *if there was no breach of the term*'[603] recognises the fact that a loss may be caused by a third party, or by fortuity, whether there has been the insured's breach of term or not. This is a fact absolutely disregarded in promissory or future conduct warranties where the search for the culprit of every risk of, or actual, loss to the insurer, is always targeted at the insured.[604]

6.9 The Problems of the Reforms of the Traditional Warranty in Nigeria

6.9.1 The Chaos and Inadequacy of the Attempted Reforms

While the MIA 1906 (UK) provision on warranty was reformed by the IA 2015 that of the MIA 1961 (Nig) was supposed to have been reformed by the NIA 2003, but that effort only introduced confusion when it stated in section 2(3)d of the Act that it applies to marine insurance, without

[601] JO Irukwu, *Insurance Law and Practice in Nigeria* (The Caxton Press West Africa Ltd, 1978) 37.
[602] Section 55 (3) states: 'Where there is a breach of a material term of a contract of insurance and the insured makes a claim against the insurer and the insurer is not entitled to repudiate the whole or any part of the contract, the insurer shall be liable to indemnify the insured only to the extent of the loss which would have been suffered if there was no breach of the term.
[603] Italics added by researcher for emphasis.
[604] This can be understandable in marine insurance because of the significance of the ship in the marine contract. But there is no reason why this should apply to non-marine insurance where something else other than the insured can trigger an occurrence which is capable of increasing the risk or causing loss to the insurer. For instance, a fire may be caused by lightening and the insured's claim may be refused for breaching a 'serviceable fire extinguisher' warranty. The Nigerian mind cannot accept this as a proportional law.

repealing the MIA 1961 (Nig), the de facto statute in that area of law. This brought into existence two conflicting sets of rules on warranty - sections 34-42 MIA 1961 and section 55 NIA 2003. Incredulously, the confusion is still subsisting as sections 37 – 39 MIA 1961 (Nig) and section 55 NIA 2003 have been reproduced in two different parts of the ICB 2016 respectively - sections 174 – 176 (same as sections 34-42 MIA 1961), and section 86 ICB 2016 (same as section 55 NIA 2003). It is therefore imperative that the MIA 1961 (Nig) provisions on warranty be urgently reformed yet again and be confined exclusively to marine insurance while sections 54 and 55 NIA 2003[605] be re-amended in a different form than section 86 ICB 2016[606] by including outright abolition of basis clause and be applicable to non-marine insurance only.

6.9.2 The Faulty Laying of the Foundation of Reforms by the Military

Having not succeeded in the effort to administratively protect policyholders and the insuring public from the harsh forfeiture rules of insurance through the office of the Director of Insurance under the IA 1976, the Military enacted section 2 ISPD 1988. The Decree had its roots originally

[605] Section 55 NIA 2003 provides: (1) In a contract of insurance, a breach of term whether called a warranty or a condition shall not give rise to any right by or afford a defence to the insured unless the term is material and relevant to the risk or loss insured against. (2) Notwithstanding any provision in any written law or enactment to the contrary, where there is a breach of term of a contract of insurance, the insurer shall not be entitled to repudiate the whole or any part of the contract or a claim brought on the grounds of the breach unless- (a) the breach amounts to a fraud; or (b) it is a breach of fundamental term of the contract. (3) Where there is a breach of a material term of a contract of insurance and the insured makes a claim against the insurer and the insurer is not entitled to repudiate the whole or any part of the contract, the insurer shall be liable to indemnify the insured only to the extent of the loss which would have been suffered if there was no breach of the term. (4) Nothing in this section shall prevent the insurer from repudiating a contract of insurance on the ground of a breach of a material term before the occurrence of the risk or loss insured against.

[606] Section 86 ICB 2016 provides: Breach of material and relevant terms (1) In a contract of insurance, a breach of a term of the contract, whether called a warranty or a condition, shall not give rise to any right by, or afford a defence to the insurer unless the term is material and relevant to the risk or loss insured against. (2) Where there is a breach of a term of a contract of insurance, the insurer shall not be entitled to repudiate the whole or any part of the contract or a claim brought on the grounds of the breach unless: (a) the breach amounts to a fraud; or (b) it is a breach of a fundamental term of the contract. (3) Where there is a breach of a material term of a contract of insurance and the insured makes a claim against the insurer and the insurer is not entitled to repudiate the whole or any part of the contract, the insurer shall be liable to indemnify the insured only to the extent of the loss which would have been suffered if there was no breach of the term. (4) Nothing in this section shall prevent the insurer from repudiating a contract of insurance on the ground of a breach of a material term before the occurrence of the risk or loss insured against. (5) Notwithstanding the provisions of this section an insurer may waive the breach of a term of the contract. (6) For the purpose of subsection (2) of this section, "fundamental term" means a warranty, condition or other term of an insurance contract which a prudent insurer will regard as material and relevant in accepting to underwrite a risk and in fixing the amount of premium. (7) In this section, the word 'insured' includes a person making an application to procure an insurance.

in the desire of the State to address the harshness to the insured of the combined effects of the law of warranty, the duty of the utmost good faith, and the law of disclosure. For some inexplicable reason, in Nigeria, the insurer is not held to account on his duty to the insured under the utmost good faith principle; rather, all attention is focused on the insured's duty of disclosure, especially on the proviso 'and the assured shall be deemed to know every circumstance which, in the ordinary course of business, ought to be known by him.' In practice, insurers rely heavily on it to find insureds in the breach under basis of the contract clause.

Moreover, by virtue of section 20 MIA 1961 (Nig)[607] the test of the insured's bona fides on the materiality of the disclosed facts is conferred on the prudent insurer's sole opinion which raises issues of moral hazard, and it is potentially worse with the actual insurer. It beats the imagination as to what a barely literate Nigerian can know on insurance that would satisfy the expectation of the uncompromising insurer who is trying to protect his own interests, which would undoubtedly be adversely affected when he is called upon to pay the insured's claim following a loss. Thus, in practice, the duty of disclosure seems to override the bilateral and reciprocal duty of utmost good faith[608] as the insurer rarely, if ever, explains to the insured the implications of the contract he is about to make.[609] As it is, the Military lacked the necessary competence to plug these loopholes. Under this state of affairs, the average Nigerian insured is potentially 'guilty' on arrival at the point where he purchases insurance as his low educational standing, and lack of knowledge of the principles of insurance do not permit him to appreciate the implications of the contract.

Although the courts had viewed this practice with disapproval and had tried to alleviate this unfairness to the insured, for example, by imposing a high burden of proof on the insurers, in most instances the courts are equally mindful of their onerous duty to not do any violence to the law in their pronouncements, as well as to not rewrite the contracts for the parties. As such,

[607] Section 20 MIA 1961 (Nig) provides: Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium or determining whether he or she will take the risk.
[608] See JO Irukwu, *Fundamentals of Insurance Law* (Witherby, 2007) 100 where he explains that the duty of utmost good faith is an 'overriding duty', of which the duty of disclosure is only one aspect; and that under the common law, the duty imposed by the utmost good faith principle is not only an overriding duty, it is also a reciprocal duty which applies with equal force to the two parties to an insurance contract.
[609] If such explanations were to be given, it would at least put the insured on notice to be circumspect with the questions in the proposal form and to exercise due diligence in providing the answers thereto.

another attempt at reform became necessary under a democratically elected government which culminated in the enactment of the NIA 2003.

6.9.3 Unclear Relationship of NIA 2003 with MIA 1961 (Nig)

The greatest weakness of the NIA 2003 is undeniably the failure to clearly state in the Act its relationship with the MIA 1961 (Nig). Currently, there is uncertainty as to which should supersede during litigations. Under this state of affairs, the tendency had been stronger towards maintaining the *status quo ante.*[610] Consequently, notwithstanding the good direction of section 55 NIA 2003, the unfairness of the traditional warranty is still being suffered by Nigerian consumers. Moreover, whereas the rules of warranty in the MIA 1961 (Nig) are marine in nature and are based on the common law, those of the NIA 2003 are non-marine in nature and are tending towards equity. The Australian ICA 1984's example of stating that it does not apply to marine insurance, if adopted, would have sufficed to resolve the dilemma.

6.9.4 Non-Abolition of Basis Clause

Some commentators on Nigeria insurance have suggested that a major weakness of the NIA 2003 is the failure to outrightly abolish 'basis of the contract clause' in line with the assertion that 'No meaningful reform of insurance law can be achieved without a complete overhaul of the law which has developed around the "basis of the contract" clause in insurance litigation'.[611] It is to be noted, though, that basis clause per se is not a statute. It evolved by practice in judicial interpretation of the extant laws of the time and flourished by *stare decisis*. Therefore, this thesis is of the view that current provisions in the NIA 2003, particularly section 54, are sufficient to permanently extinguish the existence of basis clause warranties if only the courts would step up and hold the insurers to account on their duties under the section.

6.9.5 The Confusion in ICB 2016

The ICB 2016 is currently an ordinary bill that is yet to be enacted into law by the Nigerian parliament. It was originally drafted in 2013, redrafted in 2015, and finally, a committee was constituted in 2016 to formally review it before transmission to parliament for enactment into law. It is thus a culmination of the unsuccessful attempts at reforming the warranty law since

[610] The insurers will continue to exploit the undefined relationship between the NIA 2003 and the MIA 1961 (Nig) to their own advantage by relying on the MIA 1961 because it is more insurer-friendly. This will further weaken section 55 of the NIA 2003.
[611] RA Hasson, 'The "Basis of The Contract Clause" In Insurance Law' 34 MLR 29 (1971) 29.

the 1988 Decree. Additionally, the 2016 Committee was to update the Bill to align with international best practices and make such necessary recommendations as the committee may deem fit for the overall good of the insurance industry in Nigeria.[612] Unfortunately, there is a big contradiction in respect of the sections relating to warranty. Sections 34 – 42 MIA 1961 (Nig), which section 55 NIA 2003 purports to reform, have been reproduced verbatim in the Bill in sections 171 – 179 whilst sections 54 and 55 NIA 2003 are also respectively reproduced in sections 85 and 86 of ICB 2016. The implication is that section 86 (1) – (5) reform sections 171 – 179 of the same Bill. That is confusing.

Furthermore, section 55 (1) – (4) NIA 2003 is reproduced in section 86 (1) – (4) ICB 2016 with slight modifications: the opening phrase 'Notwithstanding any provision in any written law or enactment to the contrary' of section 55 (2) NIA 2003 is omitted in section 86 (2) ICB 2016;[613] and three additional subsections, (5), (6), and (7), have been added. However, section 86 (6) of the Bill is the same as section 55 (5)[614] of the 2003 Act. Effectively, therefore, the only new provision with respect to warranty in the ICB 2016 is section 86 (5) and (7). Section 86 (5) provides: 'Notwithstanding the provisions of this section an insurer may waive the breach of a term of the contract' while section 86 (7) states: 'In this section, the word "insured" includes a person making an application to procure an insurance'. It is apparent that section 86 (5) is similar with the concluding phrase in section 35 MIA 1961 (Nig) which states that 'A breach of warranty may be waived by the insurer'.

The implication of the insurer waiving a breach of term of the contract is that he cedes his rights specified under that section or subsection. If the insurer opts to exercise this right, therefore, under section 86 (5) of the Bill, he will have no remedy for breaches of terms (warranties) that are material and relevant to the risk or loss insured against or which amount to a fraud or of fundamental terms. This would contradict section 86 (1), which states: 'In a contract of insurance, a breach of a term of the contract, whether called a warranty or a condition, *shall not*

[612] See Opening remark by Prof JO Irukwu on conference for the review held at the Lagoon Restaurant, Victoria Island, Lagos, Nigeria (June, 2009).
[613] This appears to be an attempt to pave way for the inclusion of section 34 MIA 1961 (Nig) in the Bill without contradicting section 55 (2) NIA 2003. If that was the intention, then it has been rather poorly done because there is still a contradiction between the two, nonetheless.
[614] Section 55 (5) states: In subsection (2) of this section, "fundamental term" means a warranty, condition or other term of an insurance contract which a prudent Insurer will regard as material and relevant in accepting to underwrite a risk and in fixing the amount of premium.

give rise[615] *to* any right by, or afford a defence to the insurer…' This is simply because in such eventuality the insurer would have no right to cede. Similarly, the phrase 'Notwithstanding the provisions of this section an insurer may waive the breach of a term of the contract' appears to contradict section 86 (3) of the Bill which states: 'Where there is a breach of a material term of a contract of insurance and the insured makes a claim against the insurer and the insurer is not entitled to repudiate the whole or any part of the contract, the insurer shall be liable to indemnify the insured only to the extent of the loss which would have been suffered if there was no breach of the term.' Now, in circumstances where the insurer is not entitled to repudiate the whole or any part of the contract as in this subsection, then, he is irrevocably bound to indemnify the insured; he has no remedy to waive. Therefore, if enacted into law, these provisions would be problematic in practice.

Furthermore, sections 171 – 179 ICB 2016 are the same as sections 34 – 42, but sections 34 -36 had been the problematic areas in insurance warranty law in Nigeria and had been the focus of reforms since the 1988 Decree down to the 2016 Bill itself. It is therefore inconceivable that section 86 (2) ICB 2016 which provides 'Where there is a breach of a term of a contract of insurance, the insurer shall *not be*[616] entitled to repudiate the whole or any part of the contract or a claim brought on the grounds of the breach unless: (a) the breach amounts to a fraud; or (b) it is a breach of a fundamental term of the contract', should coexist in the same Bill with section 171 (2) which states that 'A warranty … is a condition which... *If it is not so complied with, then, subject to any express provision in the policy, the insurer shall be discharged from liability as from the date of the breach of warranty…* '[617] Here again, the contradiction is palpable - under section 86 (2) the insurer is 'not entitled to repudiate' whilst under section 171 (2) the insurer 'shall be discharged from liability as from the date of the breach of warranty'.

From the foregoing, the ICB 2016 does not appear to advance the reform of insurance warranty law to any appreciable level. On the contrary, if passed into law, it would potentially generate more confusion and chaos in practice because of these contradictions.

Inexplicably, the error of not abolishing basis of the contract clause in the NIA 2003 has been repeated in the ICB 2016; and its section 85 reproduces section 54 NIA 2003 with an additional

[615] Italics inserted by researcher for emphasis.
[616] Italics inserted by researcher for emphasis.
[617] Italics inserted by researcher for emphasis.

subsection (3) which states: 'A disclosure or representation made by the insured to the insurance agent shall be deemed to be a disclosure or representation to the insurer provided the agent is acting within his authority.' This is an apparent attempt to curtail the occurrence whereby insurance companies in denying claims disown the activities of their own agents who have helped the insured to fill the proposal form, albeit inaccurately.

The reference of section 85 (3) ICB 2016 to the activity of an insurance company agent in filling proposal forms, which is an important aspect of the basis clause process, tends to prove that section 54 NIA 2003 was indeed intended to abolish the use of basis clause to create warranties, as under section 85 (3) ICB 2016, inaccuracies or misstatements can no longer be ascribed to the insured. All that is required now is for section 85 (3) to further add that all proposal forms are to be filled by the agents of the insurance companies based on information supplied by the prospective policyholders. This would foreclose reliance by any insurer on any clause purporting to be the basis of the contract.

6.10 Efficacy of the Reforms

Strangely, since the enactment of section 2 ISPD 1988 the predecessor of section 55 NIA 2003, till date, no notable case relating to warranty, and only two to conditions, *Leadway Assurance Company Ltd v Zeco Nigeria Ltd*[618] and *Ganagaramani v Amicable Insurance Plc*,[619] have been litigated at the courts.[620] This may well be a foretaste of the efficacy of the NIA 2003, absent the tragic error of its section 2(3)(d). For example, in *Ganagaramani v Amicable Insurance Plc*,[621] the plaintiff had taken out a policy in respect of his car with the defendant. When the car was stolen at gunpoint, the insured made a claim under the policy whereupon the insurer unconditionally admitted liability in the sum of N600,000:00. After it had paid N200,000:00 out of the agreed indemnity sum, the insurer refused to settle the outstanding sum alleging that the insured had breached a condition in the policy for having failed to install an immobilizer and burglar alarm as stipulated in the policy. Judgment was entered for the plaintiff. It was held that the insurer could not rely on the failure of the insured to fix the immobilizer to avoid liability since it would have made no difference even if it had been fixed, having regard to the fact the car had been snatched at gunpoint. In other words, there was no connection between the breach

[618] [2004] 11 CLRN 66.
[619] [2000] 1 FHCNLR 635.
[620] See Omogbai Omo-Eboh, *Case Book on Insurance Law in Nigeria* (WABP, 2012) 68.
[621] [2000] 1 FHCNLR 635.

of condition and the loss that occurred. This would be an improbable outcome under section 34 MIA 1961 (Nig).

6.11 Summary

The MIA 1961 (Nig) adopted the MIA 1906 (UK) traditional concept of warranty apparently without considering its workability vis-a-vis the cultural and socio-economic dynamics in Nigeria in consequence of which in addition to the many problems identified in Chapter 3 more still had arisen in the domestic scene, which means a higher benchmark than that used to test the efficacy of the UK reforms is required for the reforms in Nigeria. Evidently, the military junta tried through the 1988 Decree to domesticate insurance law to the local environment but clearly lacked the competence for such a highly technical area of law. It seemed like the NIA 2003 would put the law of warranty out of its misery but ended up as a mere make-up of the flawed 1988 Decree. As if that was not enough, the 2016 Bill came with its principle of consolidation by combining the draconian warranty provisions of the MIA 1961 (Nig), and the errors of the NIA 2003 into a bundle of contradictions. The result is that insurance warranty law appears to be in a worse position than it was in 1961.

Nevertheless, the reforms did come up with some near revolutionarily proactive ideas that hold a lot of promise for warranty law in Nigeria if properly articulated. For example: the extinguishment of the automatic discharge rule, the introduction of the requirement of causal connection of breach with the loss, the requirement that breach must amount to a fraud, and/or be of a fundamental term for the insurer to be entitled to repudiate the whole or any part of the contract, and the burden of proof rests with the insurer, and the provision that if none of these preceding conditions are met then the insurer must indemnify the insured, are indeed revolutionary. The totality of the practical effects of these provisions is that the insured is all but relieved of the unfairness of the traditional warranty, similar with those of Australia and New Zealand. Sadly, this has not happened because of the grave error of failing to clearly define the relationship between the MIA 1961 and NIA 2003. Therefore, the need for reform of insurance warranty law is even more urgent now than ever before.

Having regard to the relative progress observed in the other three jurisdictions reviewed in this thesis, Chapter 7 will move to juxtapose the warranty laws and practices in those jurisdictions with Nigeria's to proffer recommendations for a way forward for the law of warranty in Nigeria.

CHAPTER 7

RESEARCH FINDINGS, RECOMMENDATIONS AND CONCLUSIONS

7.1 Introduction

This research has presented the unfairness of the traditional warranty and doctrinal and comparative analysis of four common law jurisdictions' approaches to its reforms: the UK, Australia, New Zealand, and Nigeria. The central research question examined in the thesis concerns which of the first three approaches efficaciously solves the problems of insurance warranty as identified in Chapter 3. This is with a view to identifying a suitable model to recommend for Nigeria's adoption to improve her undeveloped insurance warranty law. In response to the objective of the study, failure to factor in the exceptionalism of Nigeria's cultural proclivities, coupled with the inconsistent and contradictory provisions on warranty in the two coexisting Nigeria insurance Acts,[622] have been identified as critical impediments to a wholesome reform of warranty law which had also stymied insurance growth and development in the country. Recommendations in line with global best practices are made for the way forward. The thesis thus contributes significantly to the improvement and development of insurance laws and regulations in Nigeria.

7.2 Research Findings

Warranties have been part and parcel of insurance policies for centuries, and the early warranties were mainly concerned with the security of the ship whereby the policyholder would make an unconditional promise that he would act in a given way, failing which the insurer is discharged from liability. Such commitment was imperative mainly because of the crudity and inefficient means of communication in that era which made the pre-contract assessment of the ship difficult as it may be on a voyage somewhere far away from the location of the contracting parties.[623] The significance of this fact seemed lost to court judges of that era during litigations during which the legal implication of the promise assumed precedence whereby many contracts of insurance were voided on mere technicalities of breach of warranty. This practice was subsequently extended to other non-marine insurances.[624] The traditional common law

[622] Section 34 MIA 1961 (Nig) and section 55 NIA 2003.
[623] See Robert Merkin in 'Forward' to Alastair Owen, *The Law of Insurance Warranties: The Flawed Reforms and a New Perspective* (Informa Law from Routledge, 2021) xix.
[624] Before codification of the MIA 1906 (UK) there appeared to be no problem with warranty as a concept. Marine merchants seemed to have accepted that it was a just outcome to automatically

warranty regime has since become the only system that allows an insurer following a breach of a non-seaworthiness of the ship-related warranty to avoid liability even when it is wholly unconnected to the loss that had occurred. This is in contradistinction with the civil law jurisdictions' practice of the alteration of risk doctrine[625] that requires that a breach be causally connected to the loss in some way before it can absolve the insurer from liability. The traditional warranty regime is the legacy passed down to the jurisdictions that adopted the MIA 1906 (UK) into their insurance warranty laws. It is widely accepted that the practices of that regime are now archaic and incompatible with modern insurance dynamics with regard to consumerism.

The MIA 1961 (Nig) adopted the MIA 1906 (UK) traditional concept of warranty without considering its workability in Nigeria's cultural and socio-economic setting. The military regime, which initially initiated the move to domesticate insurance law to the local environment, lacked the competence to legislate in such a highly technical area of law as insurance warranty. Nevertheless, they deserve commendation for their foresight. Unfortunately, the NIA 2003 failed to improve on the Military's flawed 1988 Insurance Decree. Neither did the 2016 Bill add any value to the NIA 2003 provision on warranty. Nonetheless, the NIA 2003's abrogation of the automatic discharge rule and the introduction of the requirement of causal connection of breach with the loss are a positive direction for warranty law in Nigeria which deserves to be strengthened by the removal of section 2(3)(d) NIA 2003 as well as fine-tuning the Military's domestication initiative.

Accordingly, this research finds that:

discharge the insurer if the insured warranted falsely that a ship was seaworthy when in fact it was not, ostensibly because of the grave implication of an unseaworthy ship putting out to sea. It follows also that once a ship had sailed, its seaworthiness cannot be guaranteed, hence Lord Mansfield's case law in *Eden and Others v Parkinson and Others* (1781) 1 Dougl KB 732 which prevent 'future' seaworthiness of the ship warranty. Obviously, such issues do not arise in non-marine insurance. The so-called past and present fact warranties, and warranties as to the future evolved in the hands of common law judges whilst trying to apply marine insurance principles to other classes of insurance. Notably, such practices have churned up some strange and weird outcomes during litigations giving rise to derogatory characterisations of warranty as draconian, harsh, severe etc.

[625] Zhen Jing, 'Warranties and doctrine of alteration of risk during the insurance period: A critical evaluation of the UK Law Commissions' proposals for reform of the law of warranties' 25 ILJ (2014) 185.

1. The unfairness of the traditional warranty regime as depicted in the MIA 1906 (UK) and the MIA 1961 (Nig) is the requirement of exact compliance with a warranty as harsh and imprecise in meaning as it is,[626] and the automatic discharge of the insurer upon its breach by the insured.

2. The extent and efficacy of the mitigation of the unfairness of the traditional warranty and the remedies of its breach in the recent reforms in the UK Consumer Insurance (Disclosure and Representations) Act 2012 and the Insurance Act 2015 is the abolition of the use of basis of the contract clause to create warranties and the replacement of automatic discharge with automatic suspension of liability which resumes when the breach is remedied, but no new and precise definition of warranty is provided.

3. The other common law jurisdictions' approaches such as Australia's and New Zealand's bold reforms of abolishing the concept of warranty by disentitling the insurers of the rights to automatic discharge from liability for breaches of warranty and similar terms in non-marine insurance appear to be more efficacious in dealing with the issues of insurance warranty as they rooted warranty out of insurance, except that such approach is tantamount to overkill and 'throwing the baby away with the bathwater.' There are still some good roles of the traditional warranty which should be retained, such as protecting the insurers from the fraudulent tendencies of some policyholders.

4. As to which of the two approaches – the UK's, or Australia's and New Zealand's – should Nigeria adopt to improve her law relating to insurance warranty, a juxtaposition of the approaches (as hereunder) is carried out, and it is concluded that none of them alone would be fully suitable for Nigeria, not even the granting of precedence to NIA 2003 over MIA 1961 (Nig),[627] because none of them was particularly designed for the Nigerian insurance environment. These 'foreign' concepts would still have to be learnt by the indigenous people most of whom are barely literate; and if the experience since 1821 till date (0.7% insurance penetration)[628] is anything to go by it is obvious that any such foreign based concept of warranty

[626] See Chapter 3 sub-paras 3.6.2 and 3.6.3.
[627] The NIA 2003 section 55 appears to have been doctrinally adopted from the Australian and New Zealand approaches while the sections 34-42 MIA 1961 (Nig) are a replica of sections 33-41 MIA 1906 (UK). Indeed, this researcher have sighted documents which indicate that the NILRC who crafted the ISPD 1988 (the progenitor of the NIA 2003) visited Australia during their consultations.
[628] Africa insurance trends, nigeria-insurance-survey. Accessed online on 28 May 2022 at https://www.pwc.com/ng/en/assets/pdf/nigeria-insurance-survey.pdf

would need to be blended with practices that are intrinsically Nigerian for easier acceptance and execution.

7.3 Juxtaposition of the Other Jurisdictions' Approaches with Nigeria's

Generally, each jurisdiction adopted the approach it deemed best suited for meeting the needs of its own insurance market. Arguably, the unfairness of the traditional warranty has mainly been associated with the non-marine promissory warranty and warranties formed by the basis of the contract clause. The issue with the non-marine insurance warranty is its seeming application of only selected aspects of the rules of law of the warranty of seaworthiness of the ship.[629] However, warranties formed by the basis of the contract clause have been abolished in the other three jurisdictions whereas Nigeria is yet to do so. Therefore, whether a particular approach is best suited for adoption for Nigeria depends on how efficaciously it has addressed the issue of non-marine promissory warranty and the extent to which its abrogation of the basis of the contract clause can be applied in Nigeria in cognisance of the peculiarity of the Nigerian insurance environment. This is done by juxtaposing the approaches with the provisions in Nigeria's section 55 NIA 2003.

7.3.1 New Zealand and Australia Approaches

With respect to the remedy of breach both New Zealand's section 11 ILRA 1977 and Australia's section 54 ICA 1984 have moved away from the traditional position, just as Nigeria's section 55 NIA 2003. In the three jurisdictions, there seems to be a sense that insurers should not be entitled to automatic discharge from liability for breaches of warranty and similar terms in non-marine insurance, thereby abolishing the unfair traditional warranties in that regard. Furthermore, the terms of the three sections (11 ILRA 1977, 54 ICA 1984, and 55 NIA 2003) in respect of post-contract increase of risk appear to be similar in effect with the civil jurisdictions' alteration of risk doctrine which require some linkage of breach to the loss, albeit under a common law legal framework. This amounts to some form of a systemic jurisdictional hybrid. In Nigeria, subsection 55 (3) NIA 2003 goes even further to provide that 'Where there is a breach of a material term of a contract of insurance and the insured makes a claim against

[629] The non-marine promissory warranty applies the rules of strict compliance with a warranty and automatic discharge of insurer upon insured's breach but disregards the rule of the seaworthiness of the ship warranty that 'The insured tell the state of the ship 'then', and the insurers take upon themselves all future events and risks…' See Lord Mansfield dictum in *Eden and Another v Parkinson* (Cited in James Allan Park, *A System of the Law of Marine Insurance*, (Boston, 1799) 351, Dougl 705).

the insurer and the insurer is not entitled to repudiate the whole or any part of the contract, the insurer shall be liable to indemnify the insured only to the extent of the loss which would have been suffered if there was no breach of the term.' Undeniably, the indicative voice here appears more emphatic than those of sections 11 ILRA 1977 and 54 ICA 1984. However, the painful snag is that this otherwise beautiful piece of legislation is marred by section 2(3)(d) NIA 2003 which included marine insurance as part of general insurance covered by the Act. This opens the door for insurers to continue relying on section 34 (2) MIA 1961 (Nig), which provides for the remedy of automatic discharge.[630] This is a tragic error which requires urgent correction.

Importantly, whilst Australia has demarcated marine, from non-marine, insurance[631] with warranties abandoned in the latter, no such legislation has been passed in New Zealand;[632] but the provision in section 14 of the ILRA 1977 that 'Nothing in the Marine Insurance Act 1908 shall limit any provision of this Act and the provisions of this Act shall prevail in any case where they are in conflict with any provision of that Act',[633] has the same effect as section 54 ICA 1984, as section 11 ILRA 1977 seems to cover only non-marine insurance. In Nigeria, but for the vexatious section 2(3)(d) NIA 2003 the intention was clearly to demarcate marine, from non-marine, insurance because though a littoral state, Nigeria is not a major shipping nation and its potential in insurance arguably lies more in consumer-type insurances due to the predominantly non-marine commercial activities of its vast population of approximately 206 million people.[634] The inclusion of the provisions of both sections 34-42 MIA 1961 (Nig) and section 55 NIA 2003 in the ICB 2016 attests to this. Therefore, Nigeria would have been better off in that area by expunging section 2(3)(d) from the 2003 Act.

[630] It also blunts the efficacy of section 55 (1) NIA 2003, arguably the most important aspect of the reform of the traditional warranty in Nigerian law.
[631] Australia rightly confined the common law principles in the MIA 1909 to marine insurance where it belongs. The demarcation means promissory warranty, in particular, is abolished in non-marine insurance in Australia (it is still permissible in the MIA 1909). Even exclusions and limitations which could have similar effects as breach of warranty are curtailed in some way by section 54. The aim seems to be to mitigate the draconianism of the traditional warranty rather than the form or substance of the term. This is against the backdrop that there was no problem with insurance warranty before the advent of the common law judges on insurance litigations. Many of them seemed not to have deep understanding of insurance as did Lord Mansfield.
[632] New Zealand did not demarcate but made sure that ILRA 1977 overrides MIA 1908. That way section 11 will more or less apply only to non-marine insurance.
[633] Insurance Law Reform Act 1977, section 14.
[634] https://www.statista.com/statistics/1122838/population-of-nigeria/ accessed on 3 March 2021.

Again, section 5 ILRA 1977 of New Zealand's apparent intention to prevent insurers from using basis of the contract clause warranties to avoid liability for non-material representations made in proposal forms or other pre-contractual documentation in New Zealand still vests on the insured the onus to make accurate statements.[635] Therefore, it does not abolish basis of the contract clause warranties in sufficiently clear terms or prevent insurers from bringing the effects of such terms to bear on the insured. In contrast, in Nigeria, section 54 (1) NIA 2003 places the onus squarely on the insurer to elicit all the information that he considers material in assessing the risk, thereby shielding the insured from being extorted by the insurer. But the insurers have continued to insert basis clauses in their proposal forms by virtue of the same section 2(3)(d) NIA 2003, which then permits them to rely on the combined effects of sections 19, 20, 21, 22, and 88 MIA 1961 (Nig)[636] to include basis of the contract clauses in their proposal forms. Therefore, Australia's is more efficacious because the fact of ICA 1984 not being applicable to marine insurance ousts the application of the laws of disclosure and misrepresentation in sections 24-26 MIA 1909 so that section 24 ICA 1984 of Australia[637] is the sole authority on the issue. This pre-empts any attempt by the insurers to create warranties by declaring any representation of the insured or part thereof to be the basis of the contract. Therefore, although the Australian approach was not designed for Nigeria, it can be 'Nigerianised' in conjunction with expunging NIA 2003 section 2(3)(d) from the Act. This approach is believed to be more efficacious in addressing the issue of basis of the contract clause warranties in Nigeria.

7.3.2 The UK Approach

In the UK, the common law definition of warranty has been retained but largely modified.[638] Nevertheless, it goes without saying that the cause of a fire, for instance, would necessarily be

[635] The ILRA 1977 section 5 (1) states: A contract of insurance shall not be avoided by reason only of any statement made in any proposal or other document on the faith of which the contract was entered into, reinstated, or renewed by the insurer unless the statement (a) was substantially incorrect; and (b) was material.

[636] Sections 19-22 MIA 1961 (Nig) are laws of disclosure and representation whilst section 88 concerns freedom of contract.

[637] Section 24 ICA 1984 states that 'A statement made in or in connection with a contract of insurance, being a statement made by or attributable to the insured, with respect to the existence of a state of affairs does not have effect as a warranty but has effect as though it were a statement made to the insurer by the insured during the negotiations for the contract but before it was entered into.'

[638] Section 33 (3) MIA 1906 now reads: 'A warranty, as above defined, is a condition which must be exactly complied with, whether it be material to the risk or not.' The second sentence 'If it be not so complied with, then, subject to any express provision in the policy, the insurer is discharged from

different from the cause of a burglary, which would necessarily impinge on the manner of creating the warranties in respect of those risks. This makes it difficult to have one definition of warranty that fits all, a situation which has been exploited to great advantage by the insurers against the barely literate insureds in Nigeria. The IA 2015 has introduced new rules to mitigate the unfairness of the traditional warranty by expunging the automatic discharge of the insurer upon the insured's breach, though the principle of exact compliance still subsists in the IA 2015[639] and the average Nigerian-insured would still be in jeopardy of its breach if adopted. In Nigeria, section 55 NIA 2003 has moved away from it. However, moving away from warranty per se does not solve the problem since public policy in Nigeria appears to prefer that warranty be retained in insurance law, and, as the ICB 2016 (Nig) tends to suggest, that separate warranty laws be enacted for marine and non-marine insurances respectively. Although it is clear that the average Nigerian insured still does not think it right to be denied their indemnity without any just cause, especially when they have paid the premium,[640] the proviso that the suspensive liability for the insured's breach would be resumed when the breach is remedied appears to be fair and equitable and would provide the needed linkage between complying with a warranty and being indemnified for a loss to the Nigerian insured.[641] Therefore, it is the most 'Nigerianisable' of the three approaches to remedy of breach because of its near consonance with the peoples' cultural practices.[642]

Crucially, the case of breach of a risk control clause whereby the manner, time, and place in which the breach occurred must be relevant to the loss is also similar with the civil jurisdictions' alteration of risk doctrine and as the UK is still a common law jurisdiction, there is a sense of a hybridisation here also. It seems hybridisation is now the new fad, and it may well hold the approach that can nudge the Nigeria warranty reforms forward. Accordingly, in view of Nigeria's exceptionalism, a special hybridisation is imperative, which would 'Nigerianise'

liability as from the date of the breach of warranty, but without prejudice to any liability incurred by him before that date', is omitted.

[639] Section 10 (7) (a) IA 2015 means a warranty is a condition which must be exactly complied with, whether it be material to the risk or not.

[640] See Chapter 4 sub-para 4.3.3 where it is observed that if an actual loss occurs fortuitously during the period of suspension of the insurer's liability, the insured has no cover regardless which is absolutely unfair to the insured who is suddenly rendered without cover for doing absolutely nothing wrong.

[641] The requirement to remedy the breach before cover can be resumed would bring to bear on the Nigerian insured the significance of compliance with a warranty and its relationship with his indemnity in the event of loss.

[642] See Chapter 6 para 6.3.1.

certain aspects of the Australian, New Zealand and UK approaches to solve the warranty reforms quagmire.

7.4 General Recommendations

For the special hybrid to be adequately robust and effective certain doctrinal framework needs to be in place. Accordingly, the following general recommendations are proffered to provide the groundwork for the new approach:[643]

1. The current concept of insurance in Nigeria creates a caveat-emptor-like paradigm in which the winner takes all.[644] The insurer tries to avoid paying claims while the insured may try to cover up and induce the underwriter to agree to insure the risk at a lower premium. It ought not to be so. Therefore, there is a need for proper education and raising awareness of the populace on what the insurance concept truly is - that it is for the mutual benefit of both parties, and it must be based on goodwill. This underlying foundation must be laid in Nigeria, failing which even the best warranty reforms are unlikely to work.

In this regard, it is recommended that special emphasis be laid on the performance of contractual obligations by both parties whereby the insured pays the agreed premium in good faith and the insurer undertakes on goodwill to unfailingly indemnify, or pay to the insured, a sum of money, or its equivalent, on the happening of a specified future uncertain event in which the insured has an interest, and in which he suffers injury, loss or damage which are not caused by his intentional act(s).

The emphasis on contract execution (which is currently lacking in Nigerian insurance practice) would potentially certify the performance of the monetised aspect of the insurer's undertaking to the insured (the indemnity),[645] just as the monetised aspect of the insured's obligation (the premium) is statutorily made certain for the insurer.[646] This would be a confidence-building

[643] The Nigerian insurance sector has been stagnant for too long and a lot of harmful practices have to be rooted out to give way for a 'new' beginning.
[644] The insurer's win is the insured's loss and vice versa. Therefore, each tries to outwit the other from the precontract down to when a claim is paid or denied.
[645] Currently, it is not certain because it is virtually impossible for the semi-literate Nigerian insured to satisfy the requirements of the basis clause warranty and the non-marine promissory warranty. The insurers know this and they would most certainly go to court over a claim they do not like and they would most certainly win leaving the insured with nothing.
[646] Section 53 MIA 1961 (Nig) provides: 'Unless otherwise agreed, the duty of the assured or his agent to pay the premium, and the duty of the insurer to issue the policy to the assured or his agent, are

measure in the insurance market. In this connection, it is further recommended that the old principle of 'Pay now and sue later'[647] be enacted into law. This would equalise the parties to the contract. In particular, the certainty of indemnity upon the occurrence of the insured event would satisfy the average Nigerian's preference for tangible benefits and catalyse higher performance of contractual obligations such as warranties. This would potentially enhance insurance penetration.

2. To further consolidate the need for good faith and trust between the insurer and the insured it should be provided in section 1 of the new law, that the two parties must cooperate with one another so that the insurer can 'gain' the premium of the insured in the non-occurrence of the insured risk, and for the insured to be indemnified in its occurrence. In Nigeria, this can be facilitated by translating all insurance statutes into the three major Nigerian languages of Hausa, Yoruba and Igbo as every Nigerian understands at least one of them. Accordingly, it is recommended that every insurance contract be written in the language chosen by the parties from among the three major languages above with a duly signed or thumb-printed proviso that the contents of the policy have been read or interpreted to, and understood, by the insured.

3. It had been argued that the insured as the one looking for insurance cover for his risks must be the one to make warranties as to past and present facts and undertake to do or not do certain things in the future, to enable the insurer asses the risk to determine whether to underwrite it or not. However, this is only half of the narrative. The other half is that the knowledge of the actuarial science of risk calculation and the probability of occurrence of the insured risk rests with the insurer. He alone knows the implication of underwriting a particular risk and he determines and collects the premium and issues the policy based on that calculation.[648] It is recommended that warranties be made by the insured swearing an oath to uphold the actions/inactions or conditions designated by the insurer as capable of increasing the risk of, or causing, the loss itself. Furthermore, it is recommended that each warranty should be in respect of only a particular risk and the consequences of its breach separately specified, so that the

concurrent conditions, *and the insurer shall not be bound to issue the policy until payment or tender of the premium.* (Italics inserted by researcher for emphasis).

[647] See chapter 1 para 1.9 note 79 for a detailed description of the ancient insurance principle of 'pay now and sue later'.

[648] Judy Feldman Anderson and Robert L. Brown, 'Risk and Insurance', (Education and Examination Committee of the Society of Actuaries, 2005) 2-3.

breach of one warranty would not be capable of voiding an entire multi-sectioned policy; that is, warranty should be divisible.

4. From the contents of sections 55 NIA 2003 and 86 ICB 2016, it is apparent that the Nigerian public policy is tended towards a departure from marine insurance warranty whilst section 171 of the ICB 2016 tends to suggest otherwise. There is a need to resolve this ambiguity. It is recommended that the rules of law of seaworthiness of the ship warranty should not be applicable to non-marine insurance promissory warranties. In this regard, the ICB 2016 should be withdrawn from Parliament and reworked to reflect this. It should be boldly written in the preamble: *In this Bill section(s)… apply(ies) to non-marine insurance warranties only and section(s)… apply(ies) to marine insurance warranties only.*

7.5 Specific Recommendation for Improving the Reform of Nigerian Law on Warranty

By virtue of section 55 (3) NIA 2003 the requirement that there be some form of causal connection between breach and loss for the insurer to be discharged from paying claims is already a systemic hybrid of remedy of breach,[649] but it alone is unlikely to work in Nigeria because of its foreign orientation.[650] Accordingly, a special hybrid approach needs to be crafted to adequately address the basis of the contract clause warranties and the promissory warranty in Nigeria. The hybrid approach would involve the following:

The Australian ICA 1984's demarcation of marine from non-marine insurance,[651] prevention of statements made by the insured with respect to the existence of a state of affairs from having effect as a warranty,[652] together with the UK IA 2015's principle of suspensive liability and resumption of cover upon remedy of breach of warranty, and the New Zealand ILRA 1977's requirement of a causal connection between breach and loss, to be blended with the Nigerian insured's cultural and traditional method of making contracts (usually by swearing to an oath), to form a special hybrid approach. The principal aim is to deliver a modern consumerist value to the average Nigerian insured in a manner that is agreeable to his everyday cultural and traditional practices, thereby enhancing his acceptability and patronage of insurance products.

[649] See par 7.4.1 above.
[650] Both common law and civil law systems are foreign to the Nigerian environment.
[651] The demarcation of marine from non-marine insurance would oust the application of the laws of disclosure and misrepresentation in sections 19-22 MIA 1961 (Nig), so that section (B) sub-para 7.6.2 below assumes the sole authority on the issue.
[652] See section 24 ICA 1984.

7.5.1 The Intention of the Special Hybrid Approach

The intention of the special hybrid is to neutralise the unfairness of the existing fact warranties and those of non-marine promissory warranty such as the requirement of exact compliance with the inexact warranties, automatic and permanent discharge of insurer from liability for breach, and denial of indemnity to the insured for non-causative breach of the warranty term. These had been particularly repugnant to the Nigerian insured. In the special hybrid approach, exact compliance would be retained but modified with the new traditional concept of warranty blended with the provision that the breach can be remedied, whilst the obnoxious automatic discharge of insurer would be replaced by the UK's suspensive liability and breach being remediable. This would be further strengthened by New Zealand's placing of the burden on the insurer to show that the insured's conduct has increased the risk of loss; after which the burden shifts to the insured to prove on the balance of probabilities that the loss was not caused or contributed to by his conduct.[653] This approach would fit the Nigerian environment better because it neutralizes the insurers' exploitative use of the basis of the contract clause to create warranties and the automatic discharge of insurer for the insured's breach of promissory warranties, while the insured is afforded the opportunity to prove that his actions/inactions had no causative connection with the loss that has occurred. This would remove the average Nigerian's mistrust of insurance products as the 'white man's scheme' to fleece him of his money.

The beauty of this arrangement would be that the insured's contractual obligations would be on issues that the insurer himself had designated. This would take away the burden from the barely literate insureds,[654] reduce breaches of warranty term, solve the problem of lack of transparency in the formation of insurance contracts and resolve the distrust of insurance products by the locals.[655]

7.5.2 The Special Hybrid Approach for Dealing with Non-Marine Warranties

(A) Indigenized Warranty

[653] See Alastair Owen, *The Law of Insurance Warranties: Flawed Reform and a New Perspective* (Informa Law from Routledge, 2021) 116.
[654] The insurer can designate these issues after asking questions of the insured to ascertain facts.
[655] The insured's swearing would make him aware of what the warranty is all about, the importance of compliance and the gravity of breach.

(1) A warranty should be characterized as a sworn statement of the insured that he will not intentionally carry out any of the activities designated by the insurer (during precontract negotiation) as capable of causing or increasing the risk of occurrence of the insured event or of causing loss.
(2) The insurer shall designate to the insured during the precontract negotiation all the acts capable of causing the occurrence of the insured event or of causing loss or increasing the risk of loss during the insurance period.
(3) If the insured has substantially[656] complied with the acts named in (2) the insurer may not refuse any claim during the insurance period.

(B) Abolition of Warranties of Existing Fact[657]

Any statement made in or in connection with a contract of insurance, being a statement made by or attributable to the insured, with respect to the existence of a state of affairs does not have effect as a warranty but has effect as though it were a statement made to the insurer by the insured during the negotiations for the contract but before it was entered into.

(C) Abolition of Automatic Discharge Rule[658]

(1) Any rule of law that breach of a warranty in a contract of insurance results in the discharge of the insurer's liability under the contract is abolished.
(2) An insurer has no liability under a contract of insurance in respect of any loss occurring, or attributable to something happening, after a warranty in the contract has been breached but before the breach has been remedied.
(3) Subsection (2) does not affect the liability of the insurer in respect of losses occurring, or attributable to something happening - (a) before the breach of warranty, or (b) if the breach can be remedied, after it has been remedied.
(4) For the purposes of this section, a breach of warranty is to be taken as remedied - (a) in a case falling within subsection (5), if the risk to which the warranty relates later becomes essentially the same as that originally contemplated by the parties, (b) in any other case, if the insured ceases to be in breach of the warranty.
(5) A case falls within this subsection if - (a) the warranty in question requires that by an ascertainable time something is to be done (or not done), or a condition is to be fulfilled, or something is (or is not) to be the case, and (b) that requirement is not complied with.

[656] Substantial compliance here means the loss has not been caused by reckless conduct of the insured.
[657] Adapted from section 24 ICA 1984.
[658] Adapted from section 10 IA 2015.

(D) Requirement for Causal Link between Breach and the Loss[659]

Where- (a) By the provisions of a contract of insurance the circumstances in which the insurer is bound to indemnify the insured against loss are so defined as to exclude or limit the liability of the insurer to indemnify the insured on the happening of certain events or on the existence of certain circumstances; and (b) In the view of the Court or arbitrator determining the claim of the insured the liability of the insurer has been so defined because the happening of such events or the existence of such circumstances was in the view of the insurer likely to increase the risk of such loss occurring, - the insured shall not be disentitled to be indemnified by the insurer by reason only of such provisions of the contract of insurance if the insured proves on the balance of probability that the loss in respect of which the insured seeks to be indemnified was not caused or contributed to by the happening of such events or the existence of such circumstances.

7.5.3 Sources of Law

The sources of law of insurance will be legislation, customs, and local traditions of the people.[660] This would be particularly consistent with the Nigerian peoples' multicultural and varied customs, which have been in practice for ages and have become unwritten laws. However, custom and tradition may not abrogate or conflict with legislation; and judges would not make law with their decisions; rather, the code would charge them with interpreting, as closely as possible, what has been passed by the legislature or long-established by custom and tradition. All the warranty and warranty-related terms of the insurance contract would be statutorily listed, and each term matched with its own remedy upon breach, but the common law jurisprudential process would still be used for dispute resolutions.

7.6 Conclusion

As an aspect of a collateral contract, an insurance warranty is supposed to facilitate the execution of the purpose of insurance which is to provide succour to the policyholder in a misfortune. So far, it has failed, as from its cradle in the UK to the other jurisdictions warranty has had to be reformed in diverse ways; and the reforms still leave much to be desired.

[659] Adapted from section 11 ILRA 1977.
[660] Defined as ‘practices repeated for a long time and generally accepted in the local environment as having acquired the force of law.’

To craft a workable model for an exceptional jurisdiction like Nigeria requires a form of 'thinking outside the box'. The genesis, original purpose, development, and metamorphosis of warranty were traced to what it had become presently. Its doctrinal implication and problems generated by its application in practice were examined to determine how to address them. The approaches of the other advanced common law jurisdictions had been examined and juxtaposed with Nigeria's to arrive at the conclusion that none of them alone has all the answers.

The new Insurance (Consolidated) Bill 2016 which, it had been hoped, would provide the way forward for Nigeria already indicates it does not have the goods as it has introduced its own errors.[661] Most importantly, the Bill also fails the 'interest of the insured' test as it largely retains the provisions of MIA 1961 (Nig) and NIA 2003 relating to warranty which are based on 'foreign' concepts. Consequently, the special hybrid approach, which looks to factor in those aspects that have been excluded – the indigenous cultural and traditional practices of the Nigerian peoples, is proposed. It is also evident, though, that whereas the traditional warranty cannot be wholly abandoned, not taking into account the exceptionalities of the local people has also proven unworkable.

Therefore, the 'out of the box' solution that this thesis brings to the table – the special hybrid approach looks to harness the positive aspects of the approaches of three modern concepts to propose a way forward for warranty law in Nigeria. It is believed that if the general recommendations and the proposal for the special hybrid approach of this thesis are implemented, the numerous attempts at the reforms of insurance warranty law in Nigeria would be a thing of the past and insurance in the country would be put on the path of growth and development.

[661] For example, with respect to the materiality of a warranty to the insured risk section 86 (1) of the Bill provides: 'In a contract of insurance, a breach of a term of the contract, whether called a warranty or a condition, shall not give rise to any right by, or afford a defence to the insurer *unless the term is material and relevant to the risk or loss insured against.'* This appears to contradict section 171 (2) of the Bill which provides: 'A warranty within the meaning of this section may be express or implied, and is a condition which shall be exactly complied with, *whether it is material to the risk or not*…' The preceding phrases in italics seem to indicate that in the former a warranty has to be material, and not necessarily so in the latter.

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APPENDIX 1: EXCERPT OF THE RELEVANT PROVISIONS FROM MIA 1961

1. Marine Insurance Act 1961

Section 3. Marine insurance defined

A contract of marine insurance is a contract whereby the insurer undertakes to indemnify the assured, in manner and to the extent thereby agreed, against marine losses, that is to say, the losses incident to marine adventure.

Section 5. Marine adventure and maritime perils defined

(1) Subject to the provisions of this Act, every lawful marine adventure may be the subject of a contract of marine insurance.

(2) In particular there is a marine adventure where-

(a) any ship, goods or other movables are exposed to maritime perils, such property being referred to in this Act as insurable property;

(b) the earning or acquisition of any freight, passage money, commission, profit, or other pecuniary benefit, or the security for any advances, loan, or disbursements, is endangered by the exposure of insurable property to maritime perils;

(c) any liability to a third party may be incurred by the owner of, or other person interested in or responsible for, insurable property, by reason of maritime perils.

(3) For the purpose of this section, **"maritime periIs"** means the perils consequent on, or incidental to, the navigation of the sea, that is to say, perils of the seas, fire, war perils, pirates, rovers, thieves, captures, seizures, restraints, and detainments of princes and peoples, jettisons, barratry, and any other perils, either of the like kind or which may be designated by the policy.

Section 34. Nature of warranty

(1) For the purposes of this section and of sections 35 to 42 of this Act (which relate to warranties) a warranty means a promissory warranty, that is to say, a warranty by which the assured undertakes that some particular thing shall or shall not be done, or that some condition shall be fulfilled, or whereby he affirms or negatives the existence of a particular state of facts.

(2) A warranty within the meaning of this section may be express or implied, and is a condition which shall be exactly complied with, whether it is material to the risk or not. If it is not so complied with, then, subject to any express provision in the policy, the insurer shall be discharged from liability as from the date of the breach of warranty, but without prejudice to any liability incurred by him before that date.

Section 35. When breach of warranty excused

(1) Non-compliance with a warranty is excused when, by reason of a change of circumstances, the warranty ceases to be applicable to the circumstances of the contract, or when compliance with the warranty is rendered unlawful by any subsequent law.

(2) Where a warranty is broken, the fact that the breach has been remedied and the warranty complied with before loss shall be no defence to the assured; but a breach of warranty may be waived by the insurer.

Section 36. Express warranties

(1) An express warranty may be in any form of words from which the intention to warrant is to be inferred.

(2) An express warranty shall be included in or written upon the policy, or be contained in some document incorporated by reference into the policy.

(3) An express warranty shall not exclude an implied warranty, unless it is inconsistent therewith.

Section 37. Warranty of neutrality

(1) Where insurable property, whether ship or goods, is expressly warranted neutral, there is an implied condition that the property shall have a neutral character at the commencement of the risk, and that, so far as the assured can control the matter, its neutral character shall be preserved during the risk.

(2) Where a ship is expressly warranted "neutral" there is also an implied condition that, so far as the assured can control the matter, she shall be properly documented, that is to say, that she shall carry the necessary papers to establish her neutrality, and that she shall not falsify or suppress her papers, or use simulated papers. If any loss occurs through breach of this condition, the insurer may avoid the contract.

Section 38. No implied warranty of nationality

There is no implied warranty as to the nationality of a ship, or that her nationality shall not be changed during the risk.

Section 39. Warranty of good safety

Where the subject matter insured is warranted "well" or "in good safety" on a particular day, it is sufficient if it be safe at any time during that day.

Section 40. Warranty of seaworthiness of ship

(1) In a voyage policy there is an implied warranty that at the commencement of the voyage the ship shall be seaworthy for the purpose of the particular adventure insured.

(2) Where the policy attaches while the ship is in port, there is also an implied warranty that she shall, at the commencement of the risk, be reasonably fit to encounter the ordinary perils of the port.

(3) Where the policy relates to a voyage which is performed in different stages, during which the ship requires different kinds of or further preparation or equipment, there is an implied warranty that at the commencement of each stage the ship is seaworthy in respect of such preparation or equipment for the purpose of that stage.

(4) A ship is deemed to be seaworthy when she is reasonably fit in all respects to encounter the ordinary perils of the seas of the adventure insured.

(5) In a time policy there is no implied warranty that the ship shall be seaworthy at any stage of the adventure, but where, with the privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness.

Section 41. No implied warranty that goods are seaworthy

(1) In a policy on goods or other movables there is no implied warranty that the goods or moveable are seaworthy.

(2) In a voyage policy on goods or other movables there is an implied warranty that at the commencement of the voyage the ship is not only seaworthy as a ship, but also that she is reasonably fit to carry the goods or other movables to the destination contemplated by the policy.

Section 42. Warranty of legality

There is an implied warranty that the adventure insured is a lawful one, and that, so far as the assured can control the matter, the adventure shall be carried out in a lawful manner.

APPENDIX 2: EXCERPT OF THE RELEVANT PROVISIONS FROM IA 1976

Section 14 (1) and (4) of the Insurance Act 1976 provided:

(1) Subject to subsection (4) below, no insurance policy or certificate of insurance shall be issued and no contract shall be entered into by any insurer without the prior approval of the Director[662] and no rider, clause, warranty or any endorsement whatsoever shall be attached to, printed or stamped upon any document containing any such policy, certificate or contract or deleted therefrom unless the form of such rider, clause, warranty or endorsement or the matter to be deleted has the prior approval of the Director.

(4) Where the form of any policy, certificate, contract, rider, clause, warranty or endorsement or deletion therefrom referred to in this section is one of a standard class, that is where any such form does not deviate from the others in that particular class in any material particular, then only six copies of any such form need be referred to the Director for the purposes of this section.

[662] The director was the government agent responsible for the registration of insurance companies and administration and regulation of insurance business in Nigeria.

APPENDIX 3: EXCERPT OF THE RELEVANT PROVISIONS FROM INSURANCE (SPECIAL PROVISIONS) DECREE NO 40 OF 1988

DISCLOSURE, CONDITIONS AND WARRANTIES

Section 1: Disclosure - Proposal to Contain Request for all Material Facts

(1) Where an insurer requires an insured to complete a proposal form or other application form for insurance, the form shall be drawn up in such manner as to elicit such information as the insurer considers material in accepting the application for insurance of the risk and any information not specifically requested shall be deemed not to be material.

(2) The proposal form or other application form for insurance shall be printed in easily readable letters and shall state, as a note in a conspicuous place on the front page, that "An insurance agent who assists an applicant to complete an application or proposal form for insurance shall be deemed to have done so as the agent of the applicant".

(3) A disclosure or representation made by the insured to the insurance agent shall be deemed to be a disclosure or representation to the insurer provided the agent is acting within his authority.

(4) In this section, the expression "insured" includes an applicant for insurance.

Section 2: Warranties - Only Material and Relevant Terms to Give Rise to a Right

(1) In a contract of insurance, a breach of term whether called a warranty or a condition shall not give rise to any right by or afford a defence to the insurer against the insured unless the term is material and relevant to the risk or loss insured against.

(2) Notwithstanding any provision in any written law or enactment to the contrary, where there is a breach of term of a contract of insurance, the insurer shall not be entitled to repudiate the whole or any part of the contract or a claim brought on the grounds of the breach unless-

(a) the breach amounts to a fraud; or

(b) it is a breach of fundamental term of the contract.

(3) Where there is a breach of a material term of a contract of insurance and the insured makes a claim against the insurer and the insurer is not entitled to repudiate the whole or any part of the contract, the insurer shall be liable to indemnify the insured only to the extent of the loss which would have been suffered if there was no breach of the term.

(4) Nothing in this section shall prevent the insurer from repudiating a contract of insurance on the ground of a breach of a material term before the occurrence of the risk or loss insured against.

APPENDIX 4: EXCERPT OF THE RELEVANT PROVISIONS FROM NIA 2003

PART IX - DISCLOSURE, CONDITION AND WARRANTY

Section 54

(1) Where an insurer requires an insured to complete a proposal form or other application form for insurance, the form shall be drawn up in such manner as to elicit such information as the insurer considers material in accepting the application for insurance of the risk and any information not specifically requested shall be deemed not to be material.

(2) The proposal form or other application form for insurance shall be printed in easily readable letters and shall state, as a note in a conspicuous place on the front page, that "An insurance agent who assist an applicant to complete an application or proposal form for insurance shall be deemed to have one so as the agent of the applicant".

(3) A disclosure or representation made by the insured to the insurance agent shall be deemed to be a disclosure or representation to the insurer provided the agent is acting within his authority.

(4) In this section, the expression "insured" includes an applicant for insurance.

Section 55

(1) In a contract of insurance, a breach of term whether called a warranty or a condition shall not give rise to any right by or afford a defence to the insured unless the term is material and relevant to the risk or loss insured against.

(2) Notwithstanding any provision in any written law or enactment to the contrary, where there is a breach of term of a contract of insurance, the insurer shall not be entitled to repudiate the whole or any part of the contract or a claim brought on the grounds of the breach unless-

(a) the breach amounts to a fraud ; or

(b) it is a breach of fundamental term of the contract.

(3) Where there is a breach of a material term of a contract of insurance and the insured makes a claim against the insurer and the insurer is not entitled to repudiate the whole or any part of the contract, the insurer shall be liable to indeminify the insured only to the extent of the loss which would have been suffered if there was no breach of the term.

(4) Nothing in this section shall prevent the insurer from repudiating a contract of insurance on the ground of a breach of a material term before the occurrence of the risk or loss insured against.

(5) In subsection (2) of this section, "fundamental term" means a warranty, condition or other term of an insurance contract which a prudent Insurer will regard as material and relevant in accepting to underwrite a risk and in fixing the amount of premium.

APPENDIX 5: EXCERPT OF THE RELEVANT PROVISIONS FROM ICB 2016

PART X

INSURANCE CONTRACTS: DISCLOSURE, CONDITIONS AND WARRANTIES

Section 85. Proposal form

(1) Where an insurer requires an insured to complete a proposal form or any other application form for insurance, the form shall be drawn up in such a manner as to elicit such information as the insurer considers material in accepting the application for insurance of the risk and any information not specifically requested shall be deemed not to be material.

(2) The proposal form or any other application form for insurance shall be printed in easily readable letters with an inscription in a conspicuous place on the front page, that "the insurance agent who assists an applicant to complete an application or proposal form for insurance shall be deemed to have done so as the agent of the applicant".

(3) A disclosure or representation made by the insured to the insurance agent shall be deemed to be a disclosure or representation to the insurer provided the agent is acting within his authority.

Section 86. Breach of material and relevant terms

(1) In a contract of insurance, a breach of a term of the contract, whether called a warranty or a condition, shall not give rise to any right by, or afford a defence to the insurer unless the term is material and relevant to the risk or loss insured against.

(2) Where there is a breach of a term of a contract of insurance, the insurer shall not be entitled to repudiate the whole or any part of the contract or a claim brought on the grounds of the breach unless:

(a) the breach amounts to a fraud; or Page 67 of 183

(b) it is a breach of a fundamental term of the contract.

(3) Where there is a breach of a material term of a contract of insurance and the insured makes a claim against the insurer and the insurer is not entitled to repudiate the whole or any part of the contract, the insurer shall be liable to indemnify the insured only to the extent of the loss which would have been suffered if there was no breach of the term.

(4) Nothing in this section shall prevent the insurer from repudiating a contract of insurance on the ground of a breach of a material term before the occurrence of the risk or loss insured against.

(5) Notwithstanding the provisions of this section an insurer may waive the breach of a term of the contract.

(6) For the purpose of subsection (2) of this section, “fundamental term” means a warranty, condition or other term of an insurance contract which a prudent insurer will regard as material and relevant in accepting to underwrite a risk and in fixing the amount of premium.

(7) In this section, the word “insured” includes a person making an application to procure an insurance.

171. Nature of warranty

(1) For the purposes of this Part, a warranty means a promissory warranty, that is to say, a warranty by which the assured undertakes that some particular thing shall or shall not be done, or that some condition shall be fulfilled, or whereby he affirms or negatives the existence of a particular state of facts.

(2) A warranty within the meaning of this section may be express or implied, and is a condition which shall be exactly complied with, whether it is material to the risk or not. If it is not so complied with, then, subject to any express provision in the policy, the insurer shall be discharged from liability as from the date of the breach of warranty, but without prejudice to any liability incurred by him before that date.

Section 172. When breach of warranty excused

(1) Non-compliance with a warranty is excused when, by reason of a change of circumstances, the warranty ceases to be applicable to the circumstances of the contract, or when compliance with the warranty is rendered unlawful by any subsequent law.

(2) Where a warranty is broken, the fact that the breach has been remedied and the warranty complied with before loss shall be no defence to the assured; but a breach of warranty may be waived by the insurer.

173. Express warranties

An express warranty:

(a) may be in any form of words from which the intention to warrant is to be inferred;

(b) shall be included in or written upon the policy, or be contained in some document incorporated by reference into the policy; and

(c) shall not exclude an implied warranty, unless it is inconsistent therewith.

174. Warranty of neutrality

(1) Where insurable property, whether ship or goods, is expressly warranted neutral, there is an implied condition that the property shall have a neutral character at the commencement of the risk, and that, so far as the assured can control the matter, its neutral character shall be preserved during the risk.

(2) Where a ship is expressly warranted "neutral", there is also an implied condition that, so far as the assured can control the matter, she shall be properly documented, that is to say, that she shall carry the necessary papers to establish her neutrality, and that she shall not falsify or suppress her papers, or use simulated papers. Where any loss occurs through breach of this condition, the insurer may avoid the contract.

Section 175. No implied warranty of nationality

There is no implied warranty as to the nationality of a ship, or that her nationality shall not be changed during the risk.

Section 176. Warranty of good safety

Where the subject matter insured is warranted "well" or "in good safety" on a particular day, it is sufficient if it be safe at any time during that day.

177. Warranty of seaworthiness of ship

(1) In a voyage policy, there is an implied warranty that, at the commencement of the voyage, the ship shall be seaworthy for the purpose of the particular adventure insured.

(2) Where the policy attaches while the ship is in port, there is also an implied warranty that she shall, at the commencement of the risk, be reasonably fit to encounter the ordinary perils of the port.

(3) Where the policy relates to a voyage which is performed in different stages, during which the ship requires different kinds of or further preparation or equipment, there is an implied warranty that, at the commencement of each stage, the ship is seaworthy in respect of such preparation or equipment for the purposes of that stage.

(4) A ship is deemed to be seaworthy when she is reasonably fit in all respects to encounter the ordinary perils of the seas of the adventure insured.

(5) In a time policy, there is no implied warranty that a ship shall be seaworthy at any stage of the adventure, but where, with the privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness.

178. No implied warranty that goods are seaworthy

(1) In a policy on goods or other moveables, there is no implied warranty that the goods or movable are seaworthy.

(2) In voyage policy on goods or other moveables, there is an implied warranty that, at the commencement of the voyage, the ship is not only seaworthy as a ship, but also that she is reasonably fit to carry the goods or other moveables to the destination contemplated by the policy.

179. Warranty of legality

There is an implied warranty that the adventure insured is a lawful one, and that, so far as the assured can control the matter, the adventure shall be carried out in a lawful manner.