Singapore Journal of Legal Studies
[1994] 369 – 386

OF WARRANTIES AND TERMS DELIMITING RISKS IN INSURANCE CONTRACTS

The term 'warranty' in insurance law (more so than its counterpart in general contract law) is a critical term entailing severe consequences. Accordingly, many a sympathetic judge has often been constrained to construe a warranty to be a lesser term – in particular, a term delimiting risk which functions as a suspensive condition. The paper attempts to examine when it is possible to distinguish one from the other, to explore the consequences of the breach of such a warranty, and to determine whether there is a distinction in this regard between the marine and non-marine regimes.

I. Introduction

INSURANCE law sometimes has a tendency to forge its own peculiar vocabulary. This is particularly evident in the terminology used in insurance contracts where certain terms have over time acquired meanings that are different from those used in general contracts. An important example lies in the way the term 'warranty' is applied. Whereas in contract law a warranty is generally regarded as a collateral or minor term[1] (the breach of which does not allow the innocent party the right to rescind but only a right to damages),[2] in insurance law it is considered to be a very critical term in

[1] This is in contradistinction to the condition which is a major term in contract law. The breach of such a condition gives the innocent party the right to be discharged from the contract. See Trietel, *Law of Contract* (8th ed), at 689-690. See also s 11(2), Sale of Goods Act, Statutes of the Republic of Singapore, Cap 387, 1994 Rev Ed. On the other hand, the consequences of a breach of condition in the insurance policy may vary according to the nature of the condition and the terms of the contract. The condition could be precedent to the validity of the policy, or be precedent to the insurer's liability for a particular loss, or be more collateral in that the insurer may only have, upon breach, a claim to damages for any loss suffered. See, *eg*, *London Guarantee Co* v *Fearnley* (1880) 5 App Cas 911, *Re Bradley & Essex & Suffolk Accident Indemnity Society* [1912] 1 KB 415, and *Stoneham* v *Ocean, Ry and Gen Accident Ins Co* (1887) 19 QBD 237. However, the problem in the insurance context is compounded by the often loose and confusing terminology used by insurers and sometimes even by judges as well – for instance, when they used the terms 'condition' and 'condition precedent' interchangeably with the term 'warranty'; *eg*, Lord Wright in *Provincial Ins Co* v *Morgan* [1933] AC 240 at 253-254, and du Parcq LJ, in *Woolfall & Rimmer* v *Moyle* [1942] 1 KB 66 at 78.

[2] See Trietel and s 11(2), Sale of Goods Act, *ibid*. No doubt this warranty in contract law can be an important term in the sense that it has become a term of the contract as opposed

the contract (a breach of which entails severe consequences).

Even within insurance law itself, there may still be some lingering uncertainty as to whether differences exist between the marine and non-marine regimes as regards the consequences of not complying with an insurance warranty. For marine insurance law, the recent House of Lords' decision in *Bank of Nova Scotia* v *Hellenic Mutual War Risks Association (Bermuda) Ltd* [*The Good Luck*] [3] has already stipulated that the breach of a warranty ought to automatically result in a discharge of the insurer's liability prospectively from the time of breach. The position in respect of general insurance law is, on the other hand, somewhat unclear at present: The original presumption was that the breach of a non-marine insurance warranty merely gives the insurer the option to repudiate the policy,[4] but the marine insurance *Good Luck* decision (which prescribes an automatic discharge) has since then cast some doubts on the validity of such a supposition.[5]

Whether it be an automatic discharge of liability or optional repudiation of the policy, it is undeniable that the consequences are, unfortunately, rather severe for the insured who has breached a term which has been construed as a warranty.[6] This is further compounded by the other characteristics of

to it being a mere representation which is not part of the contract; see *Oscar Chess Ltd* v *Williams* [1957] 1 WLR 370.

3 [1991] 2 Lloyd's Rep 191; [1991] 2 WLR 1279.

4 This was in fact the appellate court's position in the *Bank of Nova Scotia* v *Hellenic Mutual War Risks Association [The Good Luck]* [1989] 2 Lloyd's Rep 238 (CA). See the English Law Reform Committee Report, "Conditions and Exceptions in Insurance Policies", Cmnd 62 (1957), at para 119; and the English Law Commission Report, "Insurance Law: Non-Disclosure and Breach of Warranty Law", No 104 (1980) Cmnd 8064, at para 6.6 . See also the dicta of Lord Goddard CJ in *West* v *National Motor & Accident Ins Union Ltd* [1954] 1 Lloyd's Rep 461 at 463; and of Donaldson J in *de Maurier (Jewels) Ltd* v *Bastion Ins Co Ltd* [1967] 2 Lloyd's Rep 550 at 558. Many textbook authors have previously adopted such a supposition. See the earlier editions of Birds, *Modern Insurance Law* (2nd ed), at 100; Clarke, *The Law of Insurance Contracts*, at 20-6C; MacGillivray and Parkington, *Insurance Law* (8th ed), at para 790; *Colinvaux's Law of Insurance* (6th ed), at 128-129; Poh, *Law of Insurance* (2nd ed), at 130; and Tan, *Insurance Law in Singapore*, at 109.

5 *Ibid*. The *Good Luck case* (which has enunciated that the consequence of a breach of warranty is actually different from what has hitherto been thought to be the general insurance position) raises the issue whether the marine insurance position should also apply to non-marine policies. See the discussion, *infra*, under Heading IV (C).

6 As has been noted in paras 219 and 187 of the Australian Law Reform Commission Report No 20, "Insurance Contracts", termination (whether elective or automatic) is often a harsher remedy in the context of insurance contracts as compared with other types of contracts. In the sale of goods, for example, avoidance does not usually result in hardship to either party as the seller gets back his goods and the buyer recovers his money, but where insurance contracts are concerned the termination normally takes place after a loss has occurred and a claim has been filed. The termination can never put the parties back into

a warranty which, not surprisingly, are all in the insurer's favour:[7]

(a) the warranty has to be strictly complied with at all times;

(b) materiality of the term is irrelevant;

(c) even when the breach has nothing to do with the loss incurred, the contract is still to be discharged.

It is thus possible for the insurer to enjoy a windfall by refusing to settle a claim even when it can be established that the breach is totally unconnected with the loss. Recognising this, many a sympathetic judge feels constrained to construe a term in an insurance contract to be a lesser term involving less draconian consequences – often as a condition[8] or as a term delimiting risk.[9]

Deciding whether or not an insurance term is to function as a warranty is actually not as straightforward as might have first appeared (notwithstanding the phraseology used in the insurance contract), as can be seen from the recent case of *L'Union des Assurances de Paris IARD* v *HBZ International Exchange Co (Singapore) Pte Ltd*[10] (the *HBZ* case) in which the appellate and first instance courts ascribed different functions to the same term. The present article therefore seeks to examine the nature of the insurance warranty and to distinguish it from the other terms of the insurance contract. Of particular interest is the aforementioned term delimiting risk which is basically a suspensive condition operating more like an exception (*ie,* the insurer is off risk[11] when there is a breach of the term but on risk again[12] when the breach has been remedied) – as opposed

the substantial position they were in at the time of the contract because at that time the insured has not suffered any uninsured loss.

7 Literature castigating the doctrine of warranty is rife; see, *eg*, paras 6.9-6.10 of English Law Commission Report (*supra*, note 4) and paras 218-219 of Australian Law Reform Commission Report (*ibid*).

8 Conditions can often be collateral terms in insurance contracts and generally pertain to obligations regarding claims procedures or terms conferring rights on the insurer. In respect of the effects of its breach, see *supra*, note 1.

9 This is sometimes variously known as a warranty delimiting risk or a term descriptive of risk. The judges have also tried to ameliorate the harshness of the warranty doctrine by construing the warranties very narrowly so that the fact situation does not amount to a breach of warranty. See, *eg*, the approach of the majority Law Lords in *Provincial Ins Co* v *Morgan* [1933] AC 40.

10 [1993] 1 SLR 822 (HC); [1993] 3 SLR 161 (CA), hereinafter known as the *HBZ* case.

11 Meaning that the risk has been suspended.

12 Meaning that coverage is resumed.

to the warranty which cannot be cured once it is breached.[13] These issues have been brought into sharp focus in the *HBZ* case and reference will be made, where appropriate, to the judgments delivered by the learned judges Goh J (of the Court of Appeal) and Rubin JC (of the High Court).

II. *HBZ* CASE

It is useful to briefly review the *HBZ* case at this juncture since this would be helpful for the subsequent discussions. As foreign-exchange dealers trading in money and gold, HBZ International Exchange Co (S) Pte Ltd had to regularly withdraw substantial amounts of cash and gold bars from a nearby bank and so they took out a policy with L'Union des Assurances de Paris IARD to cover loss of money or gold from any of the six causes itemised as Sections A-F in the schedule of the policy. Four of the causes dealt with losses incurred whilst the items were on transit, whereas the remaining two causes covered non-transit losses for items kept in the locked safes. A number of terms had been listed in the policy, of which only the following are pertinent to the ensuing discussion:

(a) Warranty No 1 which "warranted that carryings exceeding S$100,000 be accompanied by at least two employees of the insured;"

(b) Condition 2 which required that "the insured shall take all reasonable precautions for the safety of the property insured ...;"

(c) Condition 9 which maintained that "the due observance and fulfilment of the terms, provisions, conditions and endorsements of this policy by the insured insofar as they relate to anything to be done or complied with by him and the truth of the statements and answers in the said proposal shall be conditions precedent to any liability of the company to make payment under this policy."

On 2 October 1989, HBZ instructed Talib (a general clerk), who was to be accompanied by Badron (a clerk-cum-driver), to cash a S$500,000 cheque and purchase 14 gold bars. After completing the transactions, they drove back from the bank to their regular car park (located one floor above the HBZ premises). Whilst walking down the flight of stairs leading from the car park to their office, they were overpowered by a group of assailants

[13] See s 34(2), Marine Insurance Act, Statutes of the Republic of Singapore, Cap 387, 1994 Rev Ed. This Act is a replica of the English Marine Insurance Act, 6 Edw 7 c 41. See also *Colinvaux*, *supra*, note 4, at para 6-10.

and robbed of all the cash and gold. HBZ promptly filed a claim but L'Union denied liability on the grounds that there were breaches of certain terms in the policy, *viz:*

(a) breach of warranty in two respects

(i) Talib was only accompanied by one other person whereas L'Union contended that Warranty No 1 required (at least) two other persons;

(ii) there were three instances when the two men were not in the immediate vicinity of each other – when Talib went into a room in the bank to collect the cash and Badron was left to wait in the bank hall, when Badron went to drive the car to the bank entrance where Talib was waiting with the cash and gold, and when Talib stood near the staircase leading down to HBZ whilst waiting for Badron to park the car;

(b) breach of condition precedent to liability in that reasonable precautions – such as use of suitable personnel for such an assignment and variation of route from car park to HBZ premises – were not taken.

As regards the latter, the first instance judge, Rubin JC, ruled that there was no breach of condition precedent to liability, it being accepted that the standard required in insurance law was generally expected to be lower.[14] In his view, the insured "did not deliberately court danger; neither was there any reckless disregard in the manner the plaintiffs [the insured] gave directions to their employees nor in the mode in which the moneys and valuables were caused to be transported."[15] The argument that HBZ did not take reasonable precautions to ensure the safety of the insured items was thus dismissed and the insurer chose not to bring this up again when subsequently filing for appeal. As such, the main focus of the present article will be on the other matter relating to breach of warranty which was dealt with at length by both appellate and first instance courts.

[14] The English courts have generally construed such conditions requiring the insured to take reasonable care or precaution, to apply only to reckless or worse acts by an insured; see *Fraser* v *Furman* [1967] 1 WLR 898 at 906. This has been fully endorsed in more recent cases like *Sofi* v *Prudential Ass Co Ltd* [1993] 2 Lloyd's Rep 559 and *Devco Holder Ltd* v *Legal & General Ass Soc Ltd* [1993] 2 Lloyd's Rep 567.

[15] *Supra*, note 10, at 838 (HC).

III. Construction of Terms

Rubin JC sought to ameliorate the effect of Warranty No 1 by adopting a rather liberal construction to conclude that it had not been breached. In doing this, he appeared to have accepted at face value that this particular term did indeed function as a warranty. Proceeding similarly on the assumption that Warranty No 1 was to be so regarded, counsel for the insurer argued in the appellate proceedings that L'Union should be discharged from all liabilities since a warranty once breached could not be cured even though there was no breach at the time of the loss, as had been provided for by section 34(2) of the Marine Insurance Act:

> 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.[16]

This point was, however, not addressed by the Court of Appeal at all since they chose to view the problem from another perspective; as had been explained by the appellate judge Goh J, "Warranty No 1 is ... a risk delimiting clause under which the appellants [the insurer] would be off risk when the carryings were not accompanied by at least two employees but they would be back on risk the moment the carryings were so accompanied."[17] In other words, Warranty No 1 is not a warranty *strictu sensu*. It is remarkable how the same clause could have been so differently perceived by the two courts, and a comparative examination of the approaches that had been taken should thus help to shed some light on how terms in a policy ought to be construed.

A. *Creating a Warranty*

A good starting point would be to analyse what had led Rubin JC to accept the term warranty at its face value. This would entail an examination of how warranties can generally be created – essentially a question of construction of the parties' intentions as evidenced by their wording within the contract. The easiest way is apparently through the use of the basis clause[18] which transforms into warranties all the insured's declarations and answers to the questions listed in the proposal form, but then this was not how Warranty No 1 was created in the *HBZ* case since it had appeared in the main policy instead.

[16] *Supra*, note 13.

[17] *Supra*, note 10, at 169 (CA).

[18] Unlike other types of contracts, the insurance contract often comprises not only the final policy issued, but also the questions, answers and declarations contained in the proposal form (which frequently takes the form of a seemingly simple questionnaire). These questions

Another unequivocal way of creating a warranty, which it is submitted the drafter of the policy signed by HBZ and L'Union could have adopted in order to obviate this particular ambiguity as regards the status of Warranty No 1, is to explicitly ascribe in the appropriate clauses of the contract the consequences of the breach, *eg,* "accord the insurer the right to terminate or to forfeit the policy in the event of breach of such a term" and "in the event of non-compliance the policy is to be forfeited *or* the insurance is void *or* the insurance shall be of no force."[19]

Yet another, albeit more controversial, way of creating a warranty is by specifically employing certain key words. Using the very word 'warranty', for instance, should by itself have already been highly indicative of the parties' intention to create a warranty, but then the appellate decision in the *HBZ* case has amply demonstrated that this may not necessarily lead to the conclusion that such a warranty has indeed been created.[20] Similar conclusions were also arrived at by the English courts in the two motor-insurance cases of *de Maurier (Jewels) Ltd* v *Bastion Insurance Co*[21] (where the insured had warranted in the slip that the vehicles were to be fitted with locks and alarms) and *Roberts* v *Anglo-Saxon Insurance Association*[22] (where the schedule of the policy contained the term that "warranted use for the following purposes – commercial travelling, ..."). In both these cases, the words used were, instead, taken to be merely descriptive of the risk involved. Hence, it is possible for such a usage of the term warranty to be altogether disregarded should the court feel that the parties had not intended it to be a warranty.

On the other hand, Rubin JC appeared to have placed weighty emphasis on the term warranty (although he did not explicitly express it in his judgment). This, it may be argued, is an equally acceptable approach, having at the very least the merit of imparting certainty to an otherwise rather vexatious matter. In the present *HBZ* case, one would in fact not be all that wrong to suppose that Warranty No 1, in spelling out the security

and answers are often made part of the contract through appropriate phraseology the device of the basis clause – which incorporates and makes the completed proposal form part of the contract itself. Example of a basis clause: "I agree that the above answers ... shall be the basis of the policy and of the interim insurance should any be granted." See *Dawsons Ltd* v *Bonnin* [1922] 2 AC 413; *Yorkshire Ins Co* v *Campbell* [1917] AC 218.

19 Cases which have used or attempted to use this technique include *Shaw* v *Robberds* (1837) 6 A&E 75; *Farnham* v *Royal Ins Co* [1976] 2 Lloyd's Rep 437; and *Glen* v *Lewis* (1853) 8 Ex 607. Some of the cases employed the term 'void' which nowadays may not be entirely accurate in the light of the *Good Luck* ruling which prescribes an automatic discharge of liability upon breach; nevertheless, as suggested by Birds in *Modern Insurance Law* (3rd ed) at 126, one should still regard these terms as warranties.

20 See ensuing discussion in main text under Heading III (B).

21 [1967] 2 Lloyd's Rep 550.

22 (1927) 96 LJKB 590.

measures expected of the assured for the safe transit of the cash and gold, did have a significant bearing on the risks and could by the force of its content be construed as a 'true warranty'.[23] Rubin JC's categorization of the term may thus be defensible after all (although, in attempting to circumvent the harshness of construing the term to be a warranty, his approach to the construction of the clause did unfortunately create some difficulties).[24]

B. *Construing as a Lesser Term*

As had been noted earlier, there has not been any lack of literature castigating the harshness of the warranty rule and judicial attempts have in fact been made to ameliorate its effects.[25] Two approaches are available – either by interpreting a warranty restrictively[26] or by relegating it to be a lesser term[27] altogether. Although the approach adopted by Rubin JC followed the former of these two options, the appellate judges decided instead to employ the latter and they re-classified Warranty No 1 as a 'term delimiting risk' which attracted less severe consequences. It would therefore be worthwhile to try and garner from an analysis of the appellate decision the various factors that indicate when a term is delimiting, or descriptive of, the risk.

Before delving immediately into the judgment delivered by Goh J, it would be helpful to briefly review other cases that had similarly ruled in favour of a lesser term.

The first case of *Farr* v *Motor Traders' Mutual Insurance Society*[28] revolved around the answer furnished by the plaintiff insured [owner of two taxis] in the proposal form (which contained the usual basis clause to convert all the answers into warranties). In response to the question asking for the number of shifts each taxi had to ply per day, the insured had provided the answer of one – correct at the time of applying for the insurance cover. There was, in actual fact, a short period when one taxi was driven for two shifts per day since the other had to undergo some maintenance repairs, but the two taxis resumed their one-shift-per-day routine after the return of the repaired vehicle from the workshop. One of the taxis later met with an accident and a claim was thereafter filed by the insured. The insurer, however, pleaded the earlier breach of the warranty and wanted to terminate the contract. This line of defence was rejected by the court which ruled,

[23] See Clarke, *supra*, note 4, at para 20-2B1.

[24] See ensuing discussion under Heading III (C).

[25] *Supra*, note 7. See also *supra*, note 9.

[26] "In insurance law a warranty ... , though it must be strictly complied with, must be strictly though reasonably construed." *Per* Lord Wright, *Provincial Ins Co* v *Morgan* [1933] AC 240 at 253-254.

[27] Like a term delimiting risk.

[28] [1920] 3 KB 669.

instead, that the term was merely descriptive of risk and that cover had resumed because there was compliance again at the time of the accident.

In the second case of *Provincial Insurance Co Ltd* v *Morgan*[29] (involving another commercial motor-insurance policy), it had been warranted in the proposal form that the lorries to be insured were to be used only for carrying coal but actually there were occasions when they carried timber too. An accident happened to one of the insured lorries a day after it had off-loaded its cargo of timber. The insurer sought to exploit the breach of warranty, but the appellate court ruled that the user limitation was merely descriptive of risk and the insurer was consequently held to be on risk since the lorry was carrying only coal at the time of the collision.[30]

There may be initial difficulties when trying to rationalize the decisions in these two cases, but a comparison reveals that it is possible to identify a common thread that helps to explain the rationale. The editors of *MacGillivray and Parkington* have observed that "the user of the motor vehicle appears to be potentially flexible and changeable from day to day"[31] and in both of the cases it is clearly unreasonable to tie the vehicle down to a particular usage. Not only is this overtly restrictive since it robs the owners of the flexibility to respond to changes in work schedules, it is also economically inefficient since business opportunities may be lost as a result of the need to adhere to the terms laid down in the policy. An appropriate compromise in such a situation is to allow the risk to be suspended on every occasion of breach but to place the insurer on risk again when there is compliance with the terms.[32]

This line of reasoning does not appear to be limited to motor-insurance cases, as the recent case of *CTN Cash and Carry* v *General Accident Fire and Life Assurance Corp*[33] (the *CTN* case) has shown. Unlike many of the other cases in which the term delimiting clause appeared in either the proposal form or the slip, in the *CTN* case the critical term was in the main policy on the cash-and-carry warehouse of the plaintiff insured. The policy itself was a general one consisting of twelve sections; two of the sections dealt

29 [1932] 2 KB 70 (CA).

30 In the House of Lords, Lords Russell and Wright both endorsed the appellate court's construction of the term as one delimiting risk. The other three Law Lords held the term to be a promissory warranty which nonetheless was not broken in the circumstances as they construed the clause very restrictively; see [1933] AC 240.

31 See MacGillivray and Parkington, *Insurance Law* (8th ed), at para 771.

32 Merkins has also attempted to rationalise these cases on the basis that in all those fact situations the risk was increased only during the period of 'breach' and not thereafter. The weakness of this argument, as he also pointed out, was that many warranties proper also shared this nature and the fact that their breaches were remedied could not cure their having been broken in the first place; see Merkins and McGee, *Insurance Contract Law*, at B.2.3-25.

33 [1989] 1 Lloyd's Rep 299.

with burglary and money insurance which were subject to a term that "warranted that the secure cash kiosk shall be attended and locked at all times during business hours". Prior to the close of business one evening, robbers raided the warehouse soon after the cashier had left her place at the cash kiosk to collect the till key from the office upstairs. Contending that the clause ought to be regarded as a term delimiting risk, the insurer refused to indemnify the loss because the risk was suspended by reason of the non-compliance at the time of the loss. The argument put forward by the insurer was in this case accepted by the judge (Macpherson J) and the literal wording 'warranty' was thus ignored. One basis for this decision could be traced to the judge's impression of the clause; from an examination of its context, Macpherson J found that the clause was relevant only to two of the twelve sections and hence "it would be unrealistic ... to imagine a breach of this warranty bearing in any way upon the rest of the sections of the policy."[34] In addition, Macpherson J rested his decision on other cases such as the aforementioned *Farr* [35] and *Roberts* [36] – in particular, the fact that the term in the *CTN* case was, actually, not like a warranty in the sense that it went "... to the root of the transaction between the parties which ought to avoid or relieve the association from their liability under the policy."[37]

Returning to the *HBZ* case, it was similarly noted by Goh J that Warranty No 1 bore no relevance to two of the six sections listed in the schedule of the policy (since these two sections related only to non-transit losses).[38] Adopting Macpherson J's line of reasoning, Goh J therefore ruled that the term was also not to be regarded as a warranty but merely as one that delimited risk, and the insurer was held to be on risk again since there was no non-compliance at the time of the loss. It could be inferred, then, that for a composite (or more complex) policy comprising different risks, terms relevant only to certain of the risks as well as terms not generally applicable to all the risks (regardless of the importance of such terms to specific risks) might in fact not be warranties at all but instead could be construed as terms delimiting risks.

It would be helpful to take a closer look at the two non-transit sections of the policy when trying to understand the rationale behind the appellate decision in the *HBZ* case. Since both of these sections related only to those

[34] *Ibid*, at 302.
[35] *Supra*, note 28.
[36] *Supra*, note 22.
[37] *Supra*, note 33, at 302.
[38] Unlike the other sections of the schedule which covered loss of money or gold incurred whilst in transit, these two sections dealt with loss (due to burglary, robbery, house-breaking or hold-ups) of "money and/or gold in locked safe ..." as well as "blank travellers' cheques in locked safe".

items kept in the locked safes,[39] there was no need for any escort and Warranty No 1 thus did not apply. Suppose, for discussion purposes, that certain of the items kept in the locked safes had been lost; it would certainly be unfair if in such a situation recovery could be prevented because of some previous breach of warranty pertaining to coverage for items on transit. There would furthermore be the related question of whether the ratio of relevant to irrelevant sections ought also to be considered. It would seem that Goh J was not deterred by the fact that the number of irrelevant sections constituted a mere one-third (*ie,* 33%) of the total number of sections – as compared with the much higher ratio of five-sixth (*ie,* 83%) for the earlier *CTN* case.

It should be pointed out that the *CTN* case had actually been greeted with a little disaffection in that it was the insurer who had argued that the term which "warranted that the secure cash kiosk shall be attended and locked at all times during business hours" ought to be regarded as a term delimiting risk.[40] This was rather unusual as one would have expected this approach to be used for the benefit of the insured, but it turned out that the insurer in the *CTN* case had chosen to expropriate it for his own cause. It is submitted that the *contra proferentum* rule should in this case have been applied against the insurer since the contract had been prepared by the insurer (and not by the insured). Such a paradox was fortunately absent in the *HBZ* case as the term-delimiting-risk device was justifiably utilised to the advantage of the insured (who obviously needed the added protection far more than the insurer).

C. *First Instance Decision*

Before proceeding onto the next major heading, it ought also to be mentioned that the Court of Appeal in construing Warranty No 1 to be a term delimiting risk neatly avoided the difficulties encountered by Rubin JC who unfortunately found himself in the awkward position of having to maintain that there was no breach of such a term despite his supposition that this clause was to operate as a warranty. For comparison purposes, it may therefore be useful to briefly review the first instance decision as well.

As had been highlighted earlier,[41] the insurer had additionally claimed that there had been three different instances of physical separation between the HBZ employees, Talib and Badron. Two of them were summarily

[39] *Ibid.*

[40] See Birds' lament in "Limitations of Theft Policy and Unwarranted Terms" [1989] JBL 355 at 356, that in respect of the device of term delimiting risk "the insurers have hijacked it for their benefit!"

[41] See discussion under Heading II.

dismissed by Rubin JC: as to the first instance (in which Talib was invited by a bank officer to enter the customer room to collect the money whilst Badron had to wait in the bank hall), Rubin JC rightly held that transit had not even begun and so it was inappropriate to raise the issue of breach here; as to the second instance (in which Badron left Talib to wait in the safety of the bank premises and went to drive the car over to the entrance of the bank), Rubin JC agreed with HBZ that a step taken for the purpose of safeguarding the insured items should not be deemed as being at variance with the letter and spirit of the policy, and in so doing the judge appeared to have adopted a purposive approach to construing the warranty in an attempt to give effect to the chief intention of the clause.[42]

The most controversial aspect of Rubin JC's judgment related to the third instance of separation (in which Talib alighted from the car first and waited at the staircase leading to the HBZ premises whilst Badron drove the car to a nearby parking lot). The insured argued that the separation was temporary and the two men were already together again when set upon by the gang of robbers. Rubin JC decided for the insured as he concurred that the physical separation (of only a few metres) between the two men was at most a momentary lapse, and support could also be drawn from other authorities[43] which similarly held that an occasional aberration did not amount to a breach. Seen from such a perspective, Rubin JC's ruling on this particular point could thus be considered as wholly acceptable. What was disquieting, actually, was his apparent endorsement of the insured's additional argument that the fleeting separation between the two men bore no nexus to the subsequent loss and hence could not be construed as a breach of warranty. If Warranty No 1 did indeed function as a warranty however, then whether or not the breach bore any connection with the loss should not be of any relevance whatsoever, it being a characteristic that once such a term had been breached the insurer would be automatically discharged from liability.[44] Indeed, it is this very lack of need for a nexus that has drawn so much criticism and many have been calling for a reform of this unsatisfactory situation.[45] It was therefore interesting to observe that

[42] See Clarke *supra*, note 4, at 20-4A.

[43] *Eg*, *Shaw* v *Robberds* (*supra*, note 19) in which the court held that any change in the user has to be more permanent and habitual for there to be a breach of an increase of risk clause. A single isolated act would not count.

[44] Or if the pre-*Good Luck* position obtains, then the insurer has an option to repudiate the contract; see *supra*, notes 4 and 5. For a discussion on the lack of a need for a nexus between breach and loss before there can be termination upon breach, see MacGillivray, *supra*, note 4, at para 744.

[45] See the English Law Commission Working Paper No 73, "Insurance Law Non-Disclosure", at para 119; and the English Law Commission Report No 104, *supra*, note 4, at para 6.9 and the recommendation for reform at para 6.20-6.23. See also the comments of the Australian Law Reform Commission, *supra*, note 7, at paras 219, 221-223 and 225-228.

by having adopted a different and more preferable construction of Warranty No 1 the appellate judges were spared from having to grapple with this contentious matter.[46]

IV. Effect of Breach of Warranty

The appellate judges also discussed what the outcome would be if Warranty No 1 had truly been a warranty: The conclusion they reached was that the insurer should be regarded as having waived their right to repudiate since in this case they had failed to do so timeously. This appeared to be the position in general insurance law.[47] (In fact, prior to *Good Luck* it was thought to be applicable to marine insurance law as well.) According to this commonly presumed position, a breach of warranty did not automatically discharge the insurer's liability but rather it presented the insurer with the option to repudiate the contract – similar to the general contractual approach to promissory conditions.[48] The problem, however, was that such a stand was not really compatible with the literal wording employed in section 33(3) of the Marine Insurance Act which stipulated instead that "... subject to any express provisions 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."[49]

A. *Current Position in Marine Insurance*

The position in marine insurance, on the other hand, had already been clarified by the House of Lords' *Good Luck* ruling.[50] This case centred around a ship that was dispatched by its owner into the Gulf area, a prohibited zone in view of the armed conflicts occurring then. The ship itself was mortgaged to a bank which had extracted from the insurer (P & I Club) a contractual undertaking that there would be prompt notification should the insurance cover on the vessel be lifted. The insurer, however, failed to do so after having been informed that the ship had breached a warranty by sailing into the Gulf War zone. The bank in the meantime continued to advance additional loans to the owner and only learnt of the breach a few weeks

[46] Perhaps it is unfortunate that the appellate judges did not correct the mis-impression of Rubin JC.

[47] Subject to the rider that perhaps the *Good Luck* decision has now modified the position; see ensuing discussion in main text and also *supra*, notes 4 and 5.

[48] See Treitel, *supra*, note 1.

[49] This provision seems to imply an automatic discharge; *supra*, note 13.

[50] *Supra*, note 3. For comments on the case, see Birds (1991) 107 LQR 540, Bennett [1991] JBL 598, and Clark [1991] LMCLQ 437.

later when the vessel was severely damaged after having been struck by a hostile missile.

The bank asserted that the additional loans would not have been granted had the insurer been prompt in notifying that the ship had ceased to be insured. Two possibilities had to be considered:

(a) Did the coverage automatically lapse, as provided for by section 33(3) of the English Marine Insurance Act, once there was a breach (*ie,* before the said loans were granted)?

(b) Was the remedy an elective one? If so, the contract had actually been repudiated by the insurer at a later date (*ie,* after the said loans had been given).

The House of Lords ruled in favour of adopting the literal reading of the Marine Insurance Act, and in so doing they effectively dispelled the hitherto prevailing supposition – common then even amongst Law Commission Reports and various leading textbooks – that the latter contractual approach was applicable.[51] In fact, in the leading judgment Lord Goff refused to assimilate the warranty in insurance law with promissory conditions in contract law,[52] and for marine insurance law the warranty functioned more like a condition precedent and any non-compliance should then automatically free the insurer from liability (without prejudice to accrued liability).[53] This was in line with the rationale of warranties in insurance law as the insurer ought to be perceived as accepting the risk only when the warranty was dutifully being fulfilled; in other words, the warranty served as a risk-defining clause that operated more like an exception (since it certainly could not be seen as dependent upon the insurer's decision). In retrospect the ruling was logical as well as defensible, although at the time it did rock the insurance community by debunking the earlier notion of an elective remedy.[54]

[51] *Supra*, note 4.

[52] In which breach gives the innocent party the option to be discharged from the contract; see Treitel, *supra*, note 1.

[53] This is without prejudice to rights that have already accrued. The contract may survive the breach of warranty in the sense that there may be further obligations (*eg*, to pay premiums) although this may in fact be rare and the practical effect is that the contract will come to an end; see Lord Goff (*supra*, note 3, at 1295) and Birds (*supra*, note 4, at 121).

[54] See comments at *supra*, note 50.

B. *Impact of Good Luck on Doctrine of Waiver*

Should the House of Lords' ruling in the marine insurance *Good Luck* case be directly transposed to the general insurance arena for application to cases like the present *HBZ* case? If so, then Goh J's statement that "... if it was such a warranty as contended by counsel for the appellants [the insurer], the appellants ought to have repudiated the policy timeously" would need to be reconsidered as the effect of warranty as spelt out in *Good Luck* had a significant impact on the doctrine of waiver.

As has been argued elsewhere,[55] it is difficult to comprehend how the principle of waiver (which presupposes that the contract remains in effect and that the insurer has lost his right to avoid) is to be applied in the light of an automatic termination of liability upon any occurrence of breach, and there has been a suggestion that such a waiver should actually be read as referring to some form of 'reinstatement'.[56] Goh J's statement is, on closer scrutiny, predicated on the assumption that the insurer has to actively elect to terminate the contract for otherwise he may be construed as having waived his right to repudiate (because of any delay or silence on his part), but with the *Good Luck* ruling there is now no question of the insurer having to timeously take any positive action to repudiate the contract since the insurer's liability would have been automatically discharged anyway. Hence, mere inaction on the part of the insurer simply maintains the *status quo* – one in which his liability has been forthwith discharged.

C. *Clarification Required for Non-Marine Insurance*

From a reading of the appellate decision in the *HBZ* case, one may be led to suppose that the general insurance position for Singapore remains that prior to the marine insurance *Good Luck* ruling.[57] However, this statement cannot be advanced with absolute certainty since Goh J did not proffer any reasons and there was also no reference in his judgment to the landmark *Good Luck* decision. It is submitted that the situation in England may not be too dissimilar as well. Whilst the position on the effect of warranty in marine insurance has effectively been sealed by the *Good Luck* case, it remains arguable whether this holds in general insurance too.[58]

[55] See Birds' comments in his article (*supra*, note 50, at 542) and his book (*supra*, note 19, at 122).

[56] Birds, *Modern Insurance Law*, *ibid*.

[57] In the light of s 3 of the Singapore Application of English Law Act and the Chief Justice's recent practice statement (Business Times, 12 July 1994, p 2), it may be that the Singapore Court of Appeal may choose to adopt its own tact and distance itself from the House of Lords' *Good Luck* decision.

[58] See discussion of controversy by Birds, *supra*, note 4, at 122-123.

Having two different regimes operating alongside each other – automatic discharge of liability for marine insurance and elective repudiation of policy for non-marine insurance – tends to complicate matters since it leaves behind such a muddle.[59] No useful purpose is being served, and it is regrettable that the appellate court in the *HBZ* case did not seize the opportunity to shed further light on the Singapore position with regard to this particular ambivalence in general insurance law.

D. *Problem of Damages*

Another perplexing point that needs to be considered is Goh J's additional comment that L'Union reserved the "right to sue for damages, if any, for the breach". This is rather disquieting. It is true that for a breach of condition in contract law the innocent party has a right to damages regardless of whether he chooses to repudiate;[60] the position with respect to a warranty in insurance law is, however, quite different since it should not be assimilated with that of a promissory condition.[61] Certainly, damages have not been regarded as a remedy for breach of warranty – even if one makes the supposition that the non-marine position is different and that it does not follow the current developments in marine insurance. A review of the text-books and cases on this issue confirms that there is no other alternative: It is avoidance or nothing.[62] As a matter of fact, it would be difficult to apply the rules of damages (which have always embodied the causal relationship between breach and loss)[63] because in insurance law there is no requirement for a warranty to be connected with the loss before the policy can be avoided. Damages could not have been assessable if there was no causal connection between breach and loss.

[59] The courts have generally emphasised that, unless there are good reasons, the general principle should equally apply to both types of insurance (*viz,* marine and non-marine); see *Lambert* v *CIS* [1975] 2 Lloyd's Rep 485, and *Highland Ins Co* v *Continental Ins Co* [1987] 1 Lloyd's Rep 109.

[60] See Treitel, *supra*, note 1.

[61] As discussed earlier in the main text under Heading IV (A).

[62] At no time have damages ever been regarded as a remedy; note the reiteration of this point by Bennett, *supra*, note 50, at 596. Likewise, the idea of granting damages for non-disclosure was specifically dismissed in *Banque Financière de la Cité S A* v *Westgate Ins Co Ltd* [1988] 2 Lloyd's Rep 513 (CA).

[63] In particular, the rule of remoteness can hardly be applicable as the loss does not need to reasonably flow from the breach as required in *Hadley* v *Baxendale* (1854) 9 Ex 341 and *Heron II* [1969] 1 AC 350.

V. Conclusion

It is lamentable that in insurance law the doctrine of warranty continues to be shrouded in so much uncertainty and controversy. Two important issues were discussed at length in the present article:

(a) In respect of terminology, there is no guarantee that a term will be regarded by others to be a warranty simply because it has been stated to be so in the contract. It would appear that the drafter ought additionally to ascribe to the term the consequences of a breach (*ie,* accord the insurer the right to be discharged, or whatsoever) in an effort to safeguard against the possibility of a different interpretation. The appellate *HBZ* decision is therefore welcome in that it has provided useful indicators as to when a term may instead be perceived to be merely delimiting the risks covered in the policy.

(b) On the other hand, the controversy with regard to the effect of a breach of warranty in general insurance remains unresolved. The appellate judges in the *HBZ case* seem to be in favour of the traditional position of optional repudiation commonly presumed to be associated with general insurance. However, in the absence of any further discussion on this issue, it is not clear whether they are also consciously deciding for a dichotomy to be created between the marine and general insurance regimes.

It is, nevertheless, significant that the appellate court had striven to construe the term to be less than what is to be expected of a warranty as this suggests that the judges do recognise, albeit tacitly, that the doctrine of warranty in insurance law is indeed unduly harsh. However, such attempts by judges to circumvent the matter should not be taken as the solution to this unsatisfactory situation. What is really needed is a more considered legislative review[64] like those already undertaken in some of the other commonwealth jurisdictions. In the meantime, given the prevalence of warranties in policies and the ease with which warranties can be technically breached the insured is unfortunately left with a lingering sense of uneasiness as he cannot be certain whether the policy he had paid for will be protective of his interest; even when a particular breach can be established as having no connection with the loss incurred, there still exists the possibility of

[64] See the Australian Law Reform Commission Report, *supra*, note 7; and the ensuing legislative provision in the Australian Insurance Contracts Act 1984 (Cth).

the insurer's liability being automatically discharged or of the policy being repudiated by the insurer.

YEO HWEE YING*

* LLB (Hons) (Singapore), LLM (London); Senior Lecturer, National University of Singapore.