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Risk definition in insurance law: significance and challenges

*Özlem Gürses**

The traditional common law approach to breach of an insurance contract term had been technical, and had given priority to the form of the relevant term over the effect of the breach in relation to the loss claimed in substance. An attempt to overcome some of the harsh consequences of this technical and strict approach was made by s 11 of the Insurance Act 2015 (UK) (the IA 2015). The wording of s 11, however, is by no means immune from controversies. The starting point of examining the section is to determine whether the relevant insurance contract term defines the risk as a whole. Very limited guidance, however, as to which terms fall within this category is provided by either the IA 2015 or the documents published in the preparatory stages of the Insurance Bill 2014 (UK). The Law Commissions expressly left this matter to be determined by the courts. This paper will seek to clarify the wording of s 11 in terms of ascertaining which terms, when breached, will not instantly provide a pre-determined remedy because of their form, but will rather require an investigation of the substantive effect of their breach in relation to the insured's loss.

Keywords: Risk, risk definition, risk mitigation, insurance, contractual terms, breach, loss, remedies, Insurance Act 2015 (UK).

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1 Introduction

An insurer's risk assessment may be reflected in the policy terms in two different ways. One obvious assessment is a numerical assessment that determines the financial ceiling of the policy cover and the premium to be charged in return. The other type of assessment involves the conditions under which the insurer is prepared to accept the risk. So, for instance, the insurer may include some geographical limitations to the cover, or may impose some obligations on the assured to be complied with during the currency of the policy. This ensures that the risk is maintained as described at the outset of the contract.

Inevitably, the rights and duties of the parties, as set out in the insurance contract terms, will be subject to the general rules that govern the interpretation of contracts:¹ in particular, that a contractual term is to be interpreted according to the ordinary and natural meaning of the word used;² and that, where there are two competing constructions of a contractual provision, the court should adopt that construction which is more consistent with business common-sense.³

However, certain unique characteristics of insurance also require insurance contract terms to be construed differently from other types of contracts. Such differences were especially well illustrated with regard to insurance warranties. Section 10 of the Insurance Act 2015 (UK) (the IA 2015) reformed the remedy for breach of a warranty and overcame some of the draconian consequences observed over centuries. The IA 2015 also carried the reform of insurance contract terms one step further and adopted s 11, which is titled 'terms not relevant to the actual loss'. The identification of the clauses in an insurance contract according to the classification provided by s 11 of the IA 2015 lies at the heart of the discussion in this paper.

¹ The general principles of contractual construction apply to insurance contracts, whether marine or non-marine: *Thomson v Weems* (1884) 9 App Cas 671, 683-684 (Lord Blackburn); *Robertson v French* (1803) 4 East 130.

² *Thomson v Weems* (1884) 9 App Cas 671, 687; *Robertson and Thomson v French* (1803) 4 East 130, 135 (Lord Watson); *Arnold v Britton* [2015] AC 1619; *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101.

³ *Rainy Sky SA v Kookmin Bank* [2012] 1 Lloyd's Rep 34; *Wood v Capita Insurance Services Ltd* [2017] AC 1173.

2 The law before s 11 of the IA 2015

The draconian consequences of breach of insurance warranties or conditions precedent that applied before the IA 2015 are well known. Warranties were (and still are) interpreted strictly.⁴ Breach of a warranty could not be remedied.⁵ The breach did not have to be material to the risk,⁶ so that the insurer was asked to prove only that the assured breached an insurance warranty as a matter of fact,⁷ and what caused the loss did not matter.⁸ The remedy (the form of which had been modified over a number of years from the policy being void,⁹ to the insurer being discharged from liability)¹⁰ was automatic. As a consequence, the only option available for the assured to argue that the insurer waived the breach of warranty was to prove promissory estoppel to this effect.¹¹

Conditions precedent may come in various different forms.¹² They are not expressly touched upon by the IA 2015. However, some types of conditions are relevant to the interpretation of s 11 of the IA 2015. A condition precedent to policy prevents the contract from being formed unless the condition is satisfied. A condition precedent to attachment of the risk does not affect the validity of the contract. However, since the risk does not attach, there is no cover unless the condition is fulfilled. Finally, a condition precedent to insurer's liability is a condition where breach will deprive the assured only of the claim that is tainted by that breach. A valid policy

⁴ *Woolmer v Muilman* (1763) 3 Burr 1419; *Hibbert v Pigou* (1783) 3 Doug KB 224; *Hore v Whitmore* (1778) 2 Cowp 784; s 33(3) of the Marine Insurance Act 1906 (UK) (MIA 1906).

⁵ *Rich v Parker* (1798) 7 Term Rep 705; s 34 of the MIA 1906 to this effect was repealed by the IA 2015.

⁶ *Blackhurst v Cockell* (1789) 3 Term Rep 360; *Rich v Parker* (1798) 7 Term Rep 705.

⁷ *Thomson v Weems* (1884) 9 App Cas 671, 684; *Hibbert v Pigou* (1783) 3 Doug KB 224

⁸ *Thomson v Weems* (1884) 9 App Cas 671, 685. This matter is controversial under IA 2015. For a useful discussion see Robert Merkin and Özlem Gürses, "Insurance Contracts after the Insurance Act 2015" (2016) 132 LQR 445-469.

⁹ *Thomson v Wheems* (1884) 9 App Cas 671; *Dawson v Bonnin* [1922] 2 AC 413; *Newcastle Fire Insurance Co v Macmorran and Co* (1815) 3 Dow 255.

¹⁰ *Bank of Nova Scotia v Hellenic Mutual War Risk Association (Bermuda) Ltd (The Good Luck)* [1992] 1 AC 233.

¹¹ *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India (The Kanchenjunga)* [1990] 1 Lloyd's Rep 391, 399; *Samuel Co Ltd v Dumas* [1924] AC 431; *J Kirkaldy Sons v Walker* [1999] Lloyd's Rep IR 410.

¹² Conditions precedent are explained in a great detail in some of the insurance law textbooks. See *Colinvaux & Merkin's Insurance Contract Law* ch B2; Robert Merkin, *Colinvaux's Law of Insurance* (11th edn, Sweet & Maxwell 2017) ch 8; Özlem Gürses, *Marine Insurance Law* (2nd ed, Routledge 2016) ch 15; Özlem Gürses, *Insurance of Commercial Risks: The Law and Practice* (5th edn, Sweet & Maxwell 2016) ch 2.

exists despite non-compliance with a condition precedent to insurer's liability. Further, if the assured complies with the condition precedent in the future during the currency of the policy, it can make a claim under the policy.

All of these effects of breaches of conditions precedent arise automatically. Although this scheme could operate stringently against the assured and might be described as disproportionate at times, the pre-IA 2015 connection between the classification of a particular term and the remedy attached to such categorisation used to provide very clear certainty for the parties. The IA 2015 did not abolish this certainty entirely. However, in certain defined circumstances set out in s 11, the IA 2015 now restricts the insurer's power to deny liability grounded only on the form of the relevant term of the insurance contract.

3 Section 11 of the IA 2015

In a novel departure for English insurance law, s 11 has introduced some major restrictions on the insurer's ability to enforce pre-determined remedies that are closely linked with the formal categorisation of insurance contract terms. Section 11 addresses the nature of the policy terms on the basis of two different criteria: first, does the term define the risk as a whole; and second, if not, does the term tend to reduce the risk of loss under the categories enumerated under s 11(1)? Two initial, but very crucial, points flow from this distinction. First, if the contractual clause in question is of a type that defines the risk as a whole, the s 11 assessment is not carried forward, as that category of terms falls outside further analysis under the section. In such a case, the insurer will return to the consequences of the breach of contract determined by the common law, by s 10 of the IA 2015, or by contract, as the case may be. Second, if the relevant clause is construed as risk-mitigating but not risk-defining as a whole, the s 11 assessment continues, and the assured may take the opportunity of proving what s 11(3) entails. This point is fundamentally important for insurers. If the assured satisfies the burden of proof as set out under s 11(3), the insurer will be debarred from denying liability for the assured's non-

compliance with the term in question.

As mentioned above, not every term of an insurance contract may be subject to s 11(3) evaluation. In order to be examined under s 11(3), first, the relevant contractual term must not be of a type that defines the risk as a whole; and, second, must fall within one of the categories listed in s 11. The category of terms that are subject to section 11(3) may be regarded as 'risk mitigation clauses'. They are those clauses which, if complied with, 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.

The following example will illustrate how s 11 of the IA 2015 operates. Assume that in an insurance policy the assured warrants that the insured yacht is to be 'fully crewed at all times'. Whilst the yacht is fully crewed at the outset, at some point during the currency of the policy the master leaves his position and it takes about two months for the assured owner to replace the master. The relevant condition is breached upon the first master's departure and is remedied when his position is filled again. If the yacht is damaged by fire after the second master begins his employment, there is no question that, under the pre-IA 2015 regime, the insurer was not liable, irrespective of the fact that the breach was remedied before the loss. By contrast, s 10 of the IA 2015 now provides that, as soon as a new master is employed on board the yacht, the suspension of the cover that occurred by the departure of the first master is lifted. It follows that the insurer cannot claim breach of warranty.¹³

However, now assume that the fire occurs after the first master leaves the yacht but before the second master replaces him. The initial response will be that, as s 10 of the IA 2015 provides, the insurer will not be liable for the loss that occurs at a time when the insurance cover is still

¹³ Unless the loss is attributable to something happening during the breach: IA 2015, s 10(2).

suspended. However, this point cannot be considered independently of s 11 of the IA 2015.¹⁴ The assessment of the assured's claim will require the following steps to be followed. First, the insurer has to prove, as a matter of fact, that the assured did not comply with the term in question. Second, it will be questioned if the 'crew warranty' defines the risk as a whole or falls within the categories of terms that 'would tend to reduce the risk of loss' as listed under s 11(1). If the 'crew warranty' is a risk-defining term, the s 11 assessment stops there and the insurer can seek either the remedy specified under s 10 of the IA 2015 or expressed contractually, as the case may be.¹⁵ Otherwise, the assessment will continue to ascertain if it is a risk-mitigation clause and, if it is, the s 11 assessment moves on to s 11(3). The final step of this exercise is to observe whether the assured establishes that non-compliance with the relevant duty did not increase the risk of loss in the way that the risk has occurred. If the assured satisfies this burden of proof the insurer will have to pay for the insured loss. If the assured does not meet this burden of proof, the remedy under s 10 of the IA 2015 applies.

The separation of the clauses that will be subject to the s 11(3) test and the clauses that will fall entirely outside of s 11(3) is by no means a straightforward task. A linguistic as well as historical analysis of the development of insurance policy interpretations will be offered to see if they can provide useful guidance on ascertaining the meaning of terms that define the risk as a whole.

3 Why were warranties draconian?

The historical development of the construction of insurance contract terms reveals the significance of drawing a distinction between a pre-contractual representation which was not warranted,¹⁶ but was merely a representation inducing a party to enter into a contract; and a

¹⁴ Section 11(4) of the IA 2015 provides that s 11 may apply in addition to s 10 of the IA 2015.

¹⁵ In a case where the parties contract out of the IA 2015 by complying with ss 16 and 17 of the IA 2015. If this term is not a warranty but a condition, the remedy will be determined either by contract or by the common law.

¹⁶ *Anderson v Fitzgerald* (1853) 4 HL Cas 484; *Thomson v Weems* (1884) 9 App Cas 671; *Worsley v Wood, Assignees of Lockyer and Bream, Bankrupts; in Error* (1796) 6 Term Rep 710; *Benham v The United Guarantie*

statement as such, but warranted.¹⁷ A pre-contractual statement of a fact which was not made a contractual warranty was historically described as a ‘collateral representation’. When untrue, a collateral representation was capable of avoiding the contract, but only if the insurer proved that it was material.¹⁸

By contrast, materiality was inherent in the nature of warranties,¹⁹ because the insurer insured the risk on the terms agreed in reliance on the point²⁰ that was warranted by the assured.²¹ Therefore, breach of a warranty availed the insurer with a defence, irrespective of whether it was proved that the breach was material to the loss occurred.²² The courts’ interpretation was that the parties would not have made the warranty a part of the contract as they did, if they had not thought it material.²³ Later, the material nature of warranties was extended²⁴ to a pre-contractual statement of a fact which was specified in the policy as the basis of the contract:²⁵ the enforceability of the contract was foundational upon the truth of the statement made.²⁶

and Life Assurance Company (1852) 7 Ex 744; *Condogianis v Guardian Assurance Co Ltd* [1921] 2 AC 125; *Chanter v Hopkins* (1838) 4 M & W 399 (not an insurance case but explains contractual warranties generally).

¹⁷ In *Pawson v Watson* (1778) 2 Cowp 785, 787 Lord Mansfield said: ‘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. ... I warrant such and such things which are here stated’.

¹⁸ *Pawson v Watson* (1778) 2 Cowp 785, 788. See S D Cole, *Insurance Law* (2nd edn, Effingham Wilson 1929) 69-75; *Joel v Law Union & Crown Insurance Co* [1908] 2 KB 863; *Benham v The United Guarantie and Life Assurance Company* (1852) 7 Ex 744; *Dawsons Ltd v Bonnin* [1922] 2 AC 413, 422 (Viscount Haldane). The duty of fair presentation of the risk is now regulated by the Consumer Insurance (Disclosure and Representations Act) 2012 (UK) (CIDRA 2012) in consumer insurance and the IA 2015 in business insurance.

¹⁹ *Thomson v Weems* (1884) 9 App Cas 671, 683-684.

²⁰ Whether in relation to a present fact or a future event.

²¹ *Eden v Parkison* (1781) 2 Doug KB 732; *Blackhurst v Cockell* (1789) 3 Term Rep 360; *Lilly v Ewer* (1779) 1 Doug KB 72; *Garrels v Kensington* (1799) 8 Term Rep 230. Expressing the existence of a particular state of facts as a condition of the contract was enough to constitute a warranty: *Dawsons Ltd v Bonnin* [1922] 2 AC 413, 428, 429 (Viscount Finlay).

²² *Anderson v Fitzgerald* (1853) 4 HL Cas 484, 506; *Dawsons Ltd v Bonnin* [1922] 2 AC 413, 429 (Viscount Finlay).

²³ *Thomson v Weems* (1884) 9 App Cas 671, 683-684.

²⁴ *Thomson v Weems* (1884) 9 App Cas 671, 684; *Anderson v Fitzgerald* (1853) 4 HL Cas 484; *Condogianis v Guardian Assurance Co Ltd* [1921] 2 AC 125, 129; *Dawsons Ltd v Bonnin* [1922] 2 AC 413, 424.

²⁵ By this clause the truth of particulars became the subject of a warranty. See also Philip Rawlings, ‘Bubbles, taxes, and interests: another history of insurance law, 1720-1825’ (2016) 36 OJLS 799-827, where the author states ‘Good faith bled into warranties, making a distinction difficult, particularly since the courts were prepared to imply warranties.’

²⁶ *Dawsons Ltd v Bonnin* [1922] 2 AC 413, 425 (Viscount Haldane).

These features of warranties also reveal why strict compliance was required. More specifically, Lord Mansfield explained in *Pawson v Watson*²⁷ that '[w]here 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.' Because of the promissory nature of warranties, acting contrary to the agreement affected the contract fundamentally.²⁸

To achieve this result it was not necessary for the parties to attach any punitive remedy to the breach of warranty. Normally, the policy was regarded as void.²⁹ The result was technical and harsh but the judges were of the view that, where the parties had so stipulated, the court had to give effect to the words agreed upon, so that 'hard cases must not be allowed to make bad law'.³⁰ The 'basis of the contract' clauses were not commonly found in marine policies but they had often been relied upon in non-marine insurance. In any event, their use in insurance policies was abolished both in consumer³¹ and business³² insurance. Historically, however, they are important as offering some guidance on the development of warranties, their link with pre-contractual statements and the relevance of 'materiality' of a term or a statement, as examined above.

An emphasis on the material nature of warranties is also seen in some of the modern authorities. Construing the contract as a whole, irrespective of the terminology used, *HIH Casualty & General Insurance Ltd v New Hampshire Insurance Co*³³ ruled that the wording '7.23 Productions will produce and make six made-for-TV Films' was a warranty. In *HIH* the subject

²⁷ (1778) 2 Cowp 785, 787-788.

²⁸ *Jefferies v John Legendra* (1691) 4 Mod 58; *De Maurier (Jewels) Ltd v Bastion Insurance Co and Coronet Insurance Co Ltd* [1967] 2 Lloyd's Rep 550, 558-559.

²⁹ *Thomson v Weems* (1884) 9 App Cas 671, 687 (Lord Watson). Viscount Finlay raised his objections to this rule in his dissent in *Dawsons Ltd v Bonnin* [1922] 2 AC 413, 430. His Lordship's view was that, at a minimum, an express statement should be required to the effect that any inaccuracy on any point in any of the answers, however immaterial, would be fatal to the policy.

³⁰ *Dawsons Ltd v Bonnin* [1922] 2 AC 413, 424 (Viscount Haldane).

³¹ CIDRA 2012, s 6.

³² IA 2015, s 9(1). Section 17 of the IA 2015 forbids contracting out of s 9(1).

³³ [2001] Lloyd's Rep IR 596.

matter of the insurance was the risk of default in the repayment of the loan that the assured took to finance these films that were to be made. The court held that the term went to the root of the contract, it bore materially upon the risk, and awarding damages was an inadequate remedy compared to the seriousness of the breach for the insurer.

The modern cases proceeded on the established rules of interpretation that warranties have to be strictly complied with, and that all the insurer has to prove is that an insurance warranty was breached as a matter of fact.³⁴ What caused the loss, as far as the breach of warranty was concerned, was not material for the insurer's rejection of claim. However, such harsh consequences caused the courts in some cases to interpret warranties as suspensory conditions or to apply the contra proferentem principle to disentitle the insurer to refuse the claim if this would be disproportionate with the assured's non-compliance with the term.³⁵ The application of the contra proferentem principle is not often seen in insurance cases, although on numerous occasions courts refer to the principle in obiter dicta to express the view that it may, in principle, apply to insurance contracts where the meaning of an insurance term is ambiguous.³⁶ Notably, however, it was recently held in *Crowden v QBE Insurance (Europe) Ltd*³⁷ that the contra proferentem principle should not apply '... to the interpretation of insurance exclusions, because insurance exclusions are designed to define the scope of cover which the insurance policy is intended to afford'. This point will be revisited and discussed below.

*Farr v Motor Traders' Mutual Insurance Society*³⁸ illustrates the difficulty that a court may have in categorising non-compliance with a policy term that had no relevance to the actual loss. In this case the assured insured his two taxi-cabs against accidental external damages by declaring

³⁴ The reader will find a very detailed and useful overview of warranties in *Bluebon Ltd v Ageas (UK) Ltd (Formerly Fortis Insurance Ltd)* [2017] EWHC 3301 (Comm).

³⁵ *Pratt v Aigaion Insurance Co SA (The Resolute)* [2009] 1 Lloyd's Rep 225.

³⁶ *Thomson v Weems* (1884) 9 App Cas 671, 687 (Lord Watson); *Smith v Accident Insurance Co* (1869-70) LR 5 Ex 302, 307 (Martin B), 309 (Kelly CB); *Dawsons Ltd v Bonnin* [1922] 2 AC 413, 430 (Viscount Finlay); *Etherington and Lancashire & Yorkshire Accident Insurance Co's Arbitration, Re* [1909] 1 KB 591; *Fitton v Accidental Death Insurance Co* (1864) 17 CB NS 122, 135; *Zeus Tradition Marine Ltd v Bell (The Zeus V)* [2000] CLC 1705, 1716-1717.

³⁷ [2018] Lloyd's Rep IR 83 [65].

³⁸ [1920] 3 KB 669.

that the two insured vehicles were to be used for public hire and that each vehicle would be used in one shift only. The assured's pre-contractual statements were stated in the policy as the basis of the contract. The assured was operating the two taxi-cabs as declared but, for two shifts only, one of the taxi cabs were used for two shifts whilst the other was under repair. The court interpreted the assured's statements as to the number of shifts for which each taxi cab would be used as a suspensory condition, which meant that cover was suspended during the days that the taxi was used for two shifts but the suspension was lifted when the two cabs were again used for one shift each.

More recently, in *Bluebon Ltd v Ageas (UK) Ltd (Formerly Fortis Insurance Ltd)*,³⁹ after a very lengthy discussion on identifying warranties in insurance contracts, the judge ruled that the clause expressly worded as a warranty was a suspensory condition. These cases signify a well-known, but not always explicitly stated, situation that — despite the fact that the purpose of contractual interpretation by the court is to determine objectively what the parties intended by including such a term in their contract — in reality, there is only one true construction,⁴⁰ which is that which the court called upon to interpret the language gives to the term.⁴¹ Uncertainty of outcome is inherent in any case where the issue is one of contractual interpretation. Section 10, and also possibly s 11, of the IA 2015 overcame one of the difficulties that the courts had to deal with when breach of a warranty potentially created disproportionately harsh consequences for the assured. However, the application of s 11, as discussed throughout this paper, will largely be subject to the courts' interpretation of what constitutes 'a term that defines the risk as a whole'. When a legal issue is answered as a matter of contractual construction it certainly provides flexibility, which was evidently desired. However, inevitably, it also brings uncertainty to the outcome.

Will the above analysis clarify the meaning of 'a term that defines the risk as a whole'? It establishes some of the historical reasons for warranties being draconian, but does not really

³⁹ [2017] EWHC 3301 (Comm).

⁴⁰ *Roberts v Anglo-Saxon Insurance Association Ltd* (1927) 27 Ll L Rep 313, 317 (Scrutton LJ).

⁴¹ *Ibid*, 315 (Bankes LJ).

set standards for establishing a term of that type. However, what can be deduced from the discussion above is that a risk-defining term, by its definition, has to be material. This, nevertheless, does not mean that all terms that are material are risk-defining. Where a restaurant is insured against a number of risks, including fire, and the insurance contract requires the assured to carry out an inspection of the kitchen equipment once in every three months, this condition is clearly material to the risk of fire but, as will be explored further below, is unlikely to be regarded as risk-defining as a whole. Before the IA 2015, if the assured's pre-contractual statement regarding the kitchen inspection was rendered as the basis of the contract, the insurer would have been availed with a certain remedy which used to apply for breach of warranties. On the other hand, after the IA 2015, the insurer's position is subject to the s 11(3) test, as the kitchen inspection requirement is a term that would tend to reduce the risk of a particular kind — fire. The magical effect of technical classification of insurance obligations is no longer as readily available for insurers as it was at the pre-IA 2015 stage. This is a welcome law reform in terms of providing a more balanced solution to non-compliance with policy terms.

4 Main and ancillary terms of contracts

If something material in these terms does not necessarily mean risk-defining, in order to narrow down the standards to apply to identify terms as such, one might carry on with questioning whether the words that qualify the subject matter insured are risk-defining. The question will be whether such qualifications are ancillary to the risk defined or whether they are an essential part of such definition. If the former, such issues will be subject to s 11(3); if the latter, they fall as a whole outside s 11. The risk, as referred to in 'defining the risk as a whole' appears to be the whole subject matter insured, given that a specific insured risk, for instance the risk of 'fire', may not on its own define the risk as a whole within the meaning of s 11. By comparison, 'the assured's business premises in Strand, London', although technically the subject matter insured, is an essential part of the definition of the risk as a whole. The assured's other business

premises located elsewhere, if there are any, fall outside the definition of the risk — as the subject matter insured. However, the issue arises when this definition includes a requirement, for example, that the assured maintains a burglar or fire alarm or a night watchman at the premises.

The relevant question here is whether such requirements are to be classified as ancillary to the definition of the risk as a whole, or to be regarded as essential parts of such a definition. This distinction is the key to separate out the terms that fall within or entirely outside of the s 11(3) test. Terminology that classifies a term on its own is not sufficient to express whether that term is ancillary or essential. Different definitions of warranties provided by the courts in the past illustrate this. For instance, in *Yorkshire Insurance Company v Campbell*⁴² it was held that words qualifying the subject matter of the insurance will be prima facie words of warranty. Moreover, in *Dawsons Ltd v Bonnin*⁴³ Viscount Haldane described a warranty as ‘... an agreement which refers to the subject matter of a contract, but, not being an essential part of the contract either intrinsically or by agreement, is collateral to the main purpose of such a contract.’ On the other hand, in *HIH Casualty & General Insurance Ltd v New Hampshire Insurance Co*,⁴⁴ the term was regarded as a warranty because it was not a collateral term but rather was fundamental to the risk in question.

At this stage, on the issue of defining the main term of a contract, an analogy may be drawn with s 64 of the Consumer Rights Act 2015 (UK),⁴⁵ which provides that a term of a consumer contract, subject to the requirements of transparency and prominence, may not be assessed for fairness to the extent that it specifies the main subject matter of the contract. The Court of Justice of the European Union recently adopted a broad contextual approach, to the effect that a term that defines the very essence of the contractual relationship, that sets out the essential

⁴² [1917] AC 218, 224.

⁴³ [1922] 2 AC 413.

⁴⁴ [2001] Lloyd’s Rep IR 596.

⁴⁵ The Consumer Rights Act 2015 (UK) re-implements the Unfair Terms in Consumer Contracts Directive 1993 which was previously implemented by the Unfair Terms in Consumer Contracts Regulations 1999. The 2015 Act revoked and replaced the 1999 Regulations as well as removing from the Unfair Contract Terms Act 1977 (UK) provisions that could apply to the parties to a consumer contract.

obligations of the contract which characterise it, falls within the notion of the ‘main subject matter of the contract’.⁴⁶ The ‘nature, general scheme and the stipulations of the contract and its legal and factual context’ is to be taken into account in this exercise. Although the English courts’ view is in favour of a restrictive interpretation,⁴⁷ it was held that a term that defines the period during which a member is entitled to use the facilities of a gym club and, in return, must pay a particular monthly subscription, was a core term that defines the main subject matter of the gym club’s membership agreement.⁴⁸ Similarly, in an agreement where ‘agent’s fee was payable on a purchaser exchanging unconditional contracts to purchase the Property’, this was held to define the main subject matter of the contract.⁴⁹ The 19th recital to the Unfair Terms in Consumer Contracts Directive 1993 (which the 2015 Act re-implements) states that ‘... in insurance contracts, the terms which clearly define or circumscribe the insured risk and the insurer’s liability are taken into account in calculating the premium paid by the consumer ...’ are core terms and therefore fall outside the fairness assessment under the Directive.

Returning to insurance contracts, the assured’s desire is to be protected by virtue of indemnity insurance against financial losses that he may suffer as a result of the happening of perils as identified by the insurance contract.⁵⁰ If the assured insures a property against fire, the subject matter insured is the property and the fire, the identified circumstance, is a peril/risk insured against. Knowing that, if a fire occurs, the financial damage that he might suffer will be indemnified by the insurer offers peace of mind for the assured. What the insurer agrees to provide is initially this security and, if the risk occurs, payment to the assured of the amount determined by the terms of the insurance contract. The assured, in return, pays the premium. If the risk does not occur during the currency of the policy the assured is not entitled to claim the return of the premium when the contract expires: the assured has paid it for the peace of mind

⁴⁶ *Kasler v OTP Jelzalogbank Zrt* (C-26/13) [2014] 2 All ER (Comm) 443; similarly *Matei v SC Volksbank Romania SA* (C-143/13) [2015] 1 WLR 2385; *Van Hove v CNP Assurances SA* (C-96/14) [2016] Lloyd’s Rep IR 61.

⁴⁷ *Director General of Fair Trading v First National Bank Plc* [2002] 1 AC 481. However, after the recent decisions by the CJEU and with Brexit looming, it is unclear how the English courts will interpret s 64 of the Consumer Rights Act 2015 (UK) in future.

⁴⁸ *Office of Fair Trading v Ashbourne Management Services Ltd* [2011] ECC 31 [152].

⁴⁹ *Foxtons Ltd v O’Reardon* [2011] EWHC 2946 (QB) [57].

⁵⁰ For a detailed and clear explanation of the nature of a contract of insurance see *Prudential Insurance Co v Inland Revenue Commissioners* [1904] 2 KB 658, 663.

deriving from the protection that the insurer agreed to provide during the currency of the policy. As referred to above, there may be several different factors that affect insurers' financial evaluation of risk.

With regard to the words that qualify the subject matter insured which influence the premium rate, the definition of 'main terms' under Recital 19 of the Unfair Terms in Consumer Contracts Directive 1993 or the Consumer Rights Act 2015 (UK) is to be distinguished from the definition of 'the risk as a whole' under s 11 of the IA 2015. They may overlap with regard especially to the terms that define the essential parts of the contract. However, a term that defines the risk as a whole in the IA 2015 may encompass broader types of terms than those that are defined under the first two instruments. In the context of cargo insurance, it is the definition of the cargo insured; in the context of hull insurance, it is the definition of the ship insured; in the context of liability insurance, it is the type of liabilities that the assured will encounter as identified in the insurance contract. Where the two different statutory regimes mentioned above diverge is that the terms that qualify the cargo may fall outside the definition of main terms under the consumer regulations but may still fall within the scope of s 11 of the IA 2015. All will depend on the construction of the terms that qualify the subject matter insured.

For instance, where the property insured is described as 'first class', but is in fact second class, this clearly relates to the object of the contract and is of a risk-defining nature. This qualification must be material, otherwise the description is not false, and the assured's non-performance of the contract cannot be argued. So, in *Newcastle Fire Insurance Co v Macmorran and Co*⁵¹ the subject matter insured, a cotton and woollen mill, was specified and warranted as 'first class' and, according to the insurer's practice, a lower rate of premium was charged than for second class premises of this type insured. The only question for the insurer was, 'What is the building *de facto* that I have insured.'⁵²

⁵¹ (1815) 3 Dow 255.

⁵² *Newcastle Fire Insurance Co v Macmorran and Co* (1815) 3 Dow 255, 265.

In *De Hahn v Hartley*⁵³ the ships insured on the term as ‘... warranted copper-sheathed, and sailed from Liverpool with 14 six-pounders, (exclusive of swivels, &c.) 50 hands or upwards...’. The central question was whether the number ‘50’ that qualifies the number of crew is an essential part of the definition of the subject matter insured. The answer is likely to be ‘no’ under the consumer regulations, but is likely to be ‘yes’ under the IA 2015.

In *Farr v Motor Traders' Mutual Insurance Society*,⁵⁴ referred to above, the feature that distinguished the assured’s statement from a warranty was that, by its nature, the assured’s statement *described*⁵⁵ and therefore limited the risk to be run.⁵⁶ It can therefore be deduced that a term that limits the risk to be run describes the risk.

However, what significance is to be attached to the words ‘as a whole’ in s 11? In *Farr* the words ‘as a whole’ were not mentioned to qualify the word ‘description’. The court explained that the premises or goods would be covered by the policy provided they complied with the description.⁵⁷ This certainly applies to the interpretation of the phrase under s 11. Hypothetically, if *Farr* was to be considered under the IA 2015, the court’s interpretation of the relevant restriction as describing and therefore delimiting the risk, means that the assured’s breach would fall outside the s 11(3) assessment. The insurer would be entitled to a remedy for breach of a warranty but, since the suspension was lifted before the accident occurred, the assured would be able to recover the insured loss under the contract. If that is the correct interpretation of *Farr* under s 11 of the IA 2015, the words ‘as a whole’ may not add much significance to the term that defines the risk.

⁵³ (1786) 1 Term Rep 343.

⁵⁴ [1920] 3 KB 669.

⁵⁵ Emphasis added.

⁵⁶ [1920] 3 KB 669, 673-674.

⁵⁷ [1920] 3 KB 669, 674. A similar analysis is observed in *De Maurier (Jewels) Ltd v Bastion Insurance Co and Coronet Insurance Co Ltd* [1967] 2 Lloyd’s Rep 550, 558-559.

However, this issue should be explored further. Exclusion clauses, for instance, may geographically exclude places from the cover, or the words ‘warranted free from average’⁵⁸ may constitute a limitation of the insurer’s liability.⁵⁹ For the IA 2015 what matters is not whether a term is called an exclusion clause by the parties, but whether that term defines the scope of the contract as a whole or tends to mitigate the risk. Nonetheless, the definition of exclusion clauses provides some assistance and guidance in determining a risk-defining term. According to MacDonald Eggers QC in *Crowden v QBE Insurance (Europe) Ltd*⁶⁰ ‘... an exclusion clause in an insurance policy is not designed to exclude, restrict or limit a primary liability on the part of the insurer; instead, it is intended to define the risk which the insurer is prepared to accept by way of the insurance contract’.

For the purposes of s 11 of the IA 2015 two different category of terms are identified: terms that set out the primary obligation of the insurer to indemnify the assured in the event that the insured risk occurs; and terms that define the risk referred to in explaining the primary responsibility of the insurer. It goes without saying that the primary obligation of the insurer is outside the analysis under s 11(3). The concern is the matters surrounding, or setting the conditions for, the insurer’s primary obligation. If an exclusion clause does define the risk to be insured, although the phrase ‘as a whole’ is not used, for the purposes of s 11 it should be assumed that it is implied and therefore such exclusion clauses fall outside the scope of s 11(3). Revisiting the point made about the contra proferentem rule above,⁶¹ what was suggested in the *Crowden* case is capable of applying in connection with s 11 of the IA 2015. Where the risk is defined and such definition is outside s 11(3), it will fall outside the contra proferentem principle. This will provide contractual certainty with regard to the definition of the risk that the parties desired at the outset of the contract.

⁵⁸ Excludes coverage for partial losses.

⁵⁹ *Ellinger & Co v Mutual Life Insurance Co of New York* [1905] 1 KB 31, 37.

⁶⁰ [2018] Lloyd’s Rep IR 83, [60].

⁶¹ *Ibid* [65].

5 Restrictions inherent in the risk

Taking this exercise one step forward with regard to the interpretation of the true nature of insurance contract terms, an analogy may also be drawn with a similar provision of the Australian Insurance Contracts Act 1984 (Cth)⁶² (ICA 1984), s 54 of which has some similar objectives to those of s 11 of the IA 2015. The relevant law in Australia prior to the ICA 1984 was similar to the pre-IA 2015 position under English law. Each of these two legal systems has been subjected to major law reforms. Today, both s 54 of the ICA 1984 and s 11 of the IA 2015 attempt to overcome disproportionately harsh consequences of non-compliance with policy terms.⁶³ The relevance of s 54 to this paper is that it postulates that the remedy for breach of an insurance contract term is determined, not on the basis of the form of the relevant policy term, but of the substantive effect of the assured's act or omission on the loss suffered and claimed from the insurer.⁶⁴ Where an insurer proposes to reject a claim made by the assured, whether the insurer can successfully achieve this is subject to the filter provided by s 54.

Section 54 operates as a two-stage exercise, the first step of which is to examine if the relevant act or omission of the assured 'could reasonably be regarded as being capable of causing or contributing to [the] loss'. If the answer is positive, the issue is resolved by reference to s 54(2)-(4) of the ICA 1984. If, however, the answer is negative, the application of s 54(1) is triggered.⁶⁵

In the interpretation of s 54, the starting point is the existence of a claim⁶⁶ for which the insurer is prima facie liable under the insurance contract, but which the insurer may, in principle, refuse because of the act or omission referred to in s 54(1). The act or omission referred to under s

⁶² This is an Act to reform and modernise the law relating to certain contracts of insurance. The ICA 1984 does not apply to reinsurance (s 9(1)(a)) and marine insurance (s 9(1)(d)).

⁶³ So that insurance contracts operate fairly for insurers, assureds, and other members of the public: *Maxwell v Highway Hauliers Pty Ltd* [2014] HCA 33 [19]; *Allianz Australia Insurance Ltd v Inglis* [2016] WASCA 25 [53].

⁶⁴ For a detailed analysis of s 54 see G Pynt, 'Everything you always wanted to know about s 54, but were afraid to ask' (2010) 21 Insurance Law Journal 202; Gürses, 'Reform of construction of insurance contract terms' [2013] JBL 1, 39-58.

⁶⁵ *Gibbs Holdings Pty Ltd v Mercantile Mutual Insurance (Australia) Ltd* [2000] QCA 524 [21] (Thomas JA).

⁶⁶ *Antico v Heath Fielding Australia Pty Ltd* [1997] HCA 35, *Maxwell v Highway Hauliers Pty Ltd* [2014] HCA 33 [21].

54(1) takes place during the post-contractual period. In other words, section 54(1) operates where there is a claim made on the insurer to which the policy responds, but with respect to which an act or omission by the assured or some other person has the effect that the insurer may refuse to pay the claim. The inference of s 54(1) is that, where such a claim exists, subject to insurer's prejudice,⁶⁷ the insurer may not refuse the claim, although contractually he may seem to be entitled to do so.⁶⁸

Can the Australian experience of the interpretation of s 54 be helpful to determine which terms define the risk as a whole and which do not? The starting point of both of the statutes in Australia and the UK is the emphasis that they place on the seriously disproportionate effects of some remedies relative to the harm caused by the assured in cases where the insurance contract has been breached. Neither s 11 of the IA 2015 nor s 54(1) of the ICA 1984 alters the terms of the insurance policy.⁶⁹ Most importantly, s 54 is not concerned with the legal character of the reason for the insurer's refusal of the claim; in other words, whether the claim falls within an exclusion clause or amounts to a breach of a condition.⁷⁰ The focus is on the assured's, or third party's, act or omission at a post-contractual stage which would excuse the insurer from an obligation to pay a claim for a loss actually suffered by the assured. The Australian Law Reform Commission Report published in 1982⁷¹ stipulated that, with respect to setting a remedy for an assured's breach of an insurance contract term, no difference was to be drawn between a term framed as an obligation of the assured (eg, 'the assured is under an obligation to keep the motor vehicle in a roadworthy condition'); as a continuing warranty of the assured (eg, 'the assured warrants he will keep the motor vehicle in a roadworthy condition'); as a temporal exclusion from cover (eg, 'this cover will not apply while the motor

⁶⁷ Prejudice compares two situations: the position of the insurer after the act or omission of the assured, and what the insurer's position would have been if the act or omission had not occurred. In *Ferrcom Pty Ltd v Commercial Union Assurance Co of Australia Ltd* (1993) 176 CLR 332 had the act or omission not occurred the insurer would go off the risk; therefore the prejudice was equal to the amount insured, so that the insurer's liability was reduced to nil. See *Moltoni Corp Pty Ltd v QBE Insurance Ltd* [2001] HCA 73.

⁶⁸ *FAI General Insurance Co Ltd v Australian Hospital Care Pty Ltd* [2001] HCA 38 [20].

⁶⁹ *Aussie Tax Pty Ltd v Markel Capital Ltd* [2008] VSC 592.

⁷⁰ (1997) 188 CLR 652, 660-661.

⁷¹ *Australian Law Reform Commission Report No. 20, Insurance Contracts* [1982] ALRC 20, <<https://www.alrc.gov.au/report-20>> (Insurance Contracts Report).

vehicle is unroadworthy’); or as a limitation on the defined risk (eg, ‘this contract provides cover for the motor vehicle while it is roadworthy’).⁷² Moreover, as noted by the Australian courts:

[T]he distinction between “cover” on the one hand, and “condition or exclusion” on the other, is a distinction that depends on the form of the contract and not on its substantive effect. No distinction can be made, for the purposes of s 54, between provisions of a contract which define the scope of cover, and those provisions which are conditions affecting an entitlement to claim.⁷³

By contrast, s 11 of the IA 2015 is still concerned with the character of the term in question. The investigation has two limbs: first, whether such term describes the risk as a whole; and second, whether non-compliance with it could have increased the risk of loss in the way the risk has occurred.

When considering the relevance of s 54 of the ICA 1984, attention must be paid to the limitation on the operation of s 54(1) that has been imposed by the Australian courts,⁷⁴ namely that s 54(1) does not operate to relieve the assured of *restrictions or limitations that are inherent in that claim*.⁷⁵ This phrase was explained further by the High Court of Australia in *Maxwell v Highway Hauliers Pty Ltd*:⁷⁶ ‘A restriction or limitation that is inherent in the claim which an insured has in fact made, ... is a restriction or limitation which must necessarily be acknowledged in the making of a claim, having regard to the type of insurance contract under which that claim is made’.⁷⁷ The process of understanding what are the restrictions or limitations that are inherent in the claim is one that involves the construction of the policy.⁷⁸

This is similar to the methodology employed by a court in applying s 11 of the IA 2015. Such a

⁷² Insurance Contracts Report 140, 289-290.

⁷³ *FAI General Insurance Co Ltd v Australian Hospital Care Pty Ltd (Australian Hospital)* [2001] HCA 38; *Maxwell v Highway Hauliers Pty Ltd* [2014] HCA 33.

⁷⁴ *FAI General Insurance Co Ltd v Australian Hospital Care Pty Ltd (Australian Hospital)* [2001] HCA 38 [41].

⁷⁵ Emphasis added.

⁷⁶ [2014] HCA 33.

⁷⁷ *Ibid* [23].

⁷⁸ *Watkins Syndicate 0457 at Lloyds v Pantaenius Australia Pty Ltd* [2016] FCAFC 150 [40].

construction aims at identifying in a broad sense, as a matter of substance, what is the essential character of the policy.⁷⁹ The words that the parties use are doubtless taken into account — not to classify the term as a warranty, but rather to identify the limits of cover. For instance, in a marine policy, where the insurer describes the scope of the cover as ‘international voyages only’, a domestic voyage will fall outside the cover. Such a restriction in the cover is also inherent in a claim under such a policy that the voyage be domestic and not international.⁸⁰ The exercise will involve the identification of the nature and limits of the risks that are intended to be accepted, paid for, and covered. Such restrictions, in an ‘occurrence based’ contract, acknowledge that the indemnity sought can only be in relation to an event which occurred during the period of cover.⁸¹ Similarly, if the assured’s claim under the policy is for a third party demand made after the insurance period has expired, that does not fall within s 54.⁸² In line with the analysis of s 11 presented above, in *Stapleton v NTI Ltd*⁸³ the limit was set geographically, such that accidents occurring within 450 kilometres from the assured’s base of operations were covered by the policy. It was held that an accident occurring outside this geographical limit was also outside the policy cover. The court stated that the policy, on its true construction, insured the assured on some journeys, but not on all journeys. The 450 km radius was a necessary part of the definition of the event insured against under this policy.

It is therefore submitted that, whilst at first blush a term that ‘defines the risk as a whole’, and a restriction that is ‘inherent in the insured claim’ appear to differ because of the way they are formulated, essentially they express the same limitations to insurance cover.

⁷⁹ Ibid.

⁸⁰ Ibid [41].

⁸¹ *Maxwell v Highway Hauliers Pty Ltd* [2014] HCA 33 [25].

⁸² *Newcastle City Council v GIO General Ltd* [1997] HCA 53; *Maxwell v Highway Hauliers Pty Ltd* [2014] HCA 33 [24], [25].

⁸³ [2002] QDC 204.

6 Clauses increasing the risk

Looking into the more specific characteristics of risk clauses it is necessary to refer to the clauses governing the increase of risk at the post contractual stage. The common law distinguishes cases in which the danger of loss increases during the currency of the policy, and cases in which the very nature of the subject matter insured has been altered.⁸⁴ The assured is not precluded from recovering under the policy in the former instance;⁸⁵ whereas in the latter, the common law discharges the insurer from all liability for loss to the subject matter.⁸⁶ Especially common in property insurance policies, terms may govern the circumstances in which the assured's conduct or activities may increase the risk of insured loss.⁸⁷ Some of the policy wordings referred to above in this paper are of this nature, in that they provide that the assured will not enter into some enterprises that will increase the risk of danger of the loss insured. The assured's non-compliance with his duty in this respect will be subject to s 11 where the loss has occurred and the insurer proposes to deny liability.

It goes without saying that, before the IA 2015, whether such duties were drafted as a warranty or condition precedent played a crucial role in ascertaining the insurer's liability to indemnify the assured. There have been also differences of view as to the level of activities required to trigger either enforcement of the contractual outcome of non-compliance with the duty, or the common law position of altering the risk. The earliest relevant cases focused on whether the change made by the assured was only temporary, or permanent and habitual in altering the risk.⁸⁸ So it was held that 'a single act of kindness'⁸⁹ did not change the nature of the subject

⁸⁴ Colinvaux & Merkin's Insurance Contract Law (n 12) para B-0230.

⁸⁵ *Pim v Reid* (1843) 6 Man & G 1; *Shaw v Robberds, Hawkes, and Stone* (1837) 6 Ad & El 75; *Toulmin v Inglis* (1808) 1 Camp 421.

⁸⁶ *Kausar v Eagle Star Insurance Co Ltd* [2000] Lloyd's Rep IR 154; *Colinvaux's Law of Insurance* (n 12) para 5-034.

⁸⁷ *Sun Fire Office v Hart* (1889) 14 App Cas 98.

⁸⁸ *Shaw v Robberds, Hawkes, and Stone* (1837) 6 Ad & El 75. The property insured was 'a kiln for drying corn in use'. Only once, for a favour, the assured allowed bark to be dried in his kiln during which a fire damaged the property.

⁸⁹ *Ibid.*

matter insured permanently.⁹⁰ In *Dobson v Sotheby*⁹¹ the insurer's premium rate was determined according to the nature of the premises and materials stored in them. The assured was required to ensure that no hazardous goods were deposited. The policy provided that 'if buildings of any description insured with the Company shall, at any time after such insurance, be made use of to stow or warehouse any hazardous goods, without leave from the Company, the policy should be forfeited'. This description did not bear materially on the risk, but rather aimed to mitigate it. As a result, the prohibition was interpreted as being relevant only to the habitual use of fire, or to the ordinary deposit of hazardous goods, but as not including their occasional introduction for a temporary purpose connected with the occupation of the premises. In other words, this clause would be a risk mitigation clause within the meaning of s 11 of the IA 2015.

Notably, in a similar wording, where the insurer required any 'alteration' to be notified and an additional premium to be arranged if the alteration was to be indorsed, the court held that 'alteration', in this context used to mean a change of circumstances, was to be notified to the insurer to allow the insurer to re-evaluate the risk under these changed circumstances.⁹² In this respect, whether as an experiment and therefore temporarily, or permanently, introducing new elements to the risk was held to have fallen within a notification clause affording an opportunity to the insurer to ascertain whether it would take on the increased risk. This analysis renders such a clause as risk-defining within the meaning of s 11 of the IA 2015.

With further developments in contractual construction and the establishment of the significance of the wording of warranties and conditions precedent, the more modern policies mostly relied on the remedy expressly stated in the relevant policy wording.⁹³ The rulings on such policy wordings are, once again, difficult to reconcile when the courts' interpretations

⁹⁰ Ibid. See also *Dobson v Sotheby* (1827) Mood & M 90.

⁹¹ (1827) Mood & M 90.

⁹² *Glen v Lewis* (1853) 8 Ex 607.

⁹³ See *Kausar v Eagle Star Insurance Co Ltd* [2000] Lloyd's Rep IR 154: 'You must tell us of any change of circumstances after the start of the insurance which increases the risk of injury or damage. You will not be insured under the policy until we have agreed in writing to accept the increased risk.'

varied from requiring fundamental changes to affect the policy wording which rendered the policy void in the case of a change of circumstances after the contract was made,⁹⁴ to a more moderate interpretation of the change of circumstances required to have that effect under a contractual clause.⁹⁵ In *Ansari v New India Assurance Ltd*⁹⁶ the activities in the premises were stated to be ‘wholesaling kitchenware’ and the property was stated to have been protected by an automatic sprinkler system. After a fire occurred in the premises, the insurers discovered that the sprinkler system had been turned off at the isolating valve at the junction with the main water supply, and that the premises contained a considerable quantity of goods including scooters and mini-motorbikes. As a result, after those changes, the premises were not to be described as either being protected by a properly functioning automatic sprinkler system or kitchenware wholesaling.⁹⁷ Under the IA 2015, the description of ‘wholesaling kitchenware’ would be risk-defining and the clause in relation to the sprinkler system would be regarded as risk-mitigating.

7 Express remedy

The abovementioned analysis makes it clear that, unlike in the pre-IA 2015 era, expressing the remedy together with the relevant clause now plays a very limited significance in determining the nature of the term. As its title suggests, s 11’s concern is whether the breach of an insurance contract term is *relevant to the loss*.⁹⁸ The outcome that the parties aimed to achieve

⁹⁴ *Scottish Coal Co Ltd v Royal and Sun Alliance Insurance Plc* [2008] Lloyd’s Rep IR 718, applying *Kausar*: ‘material change in the original risk ... the policy shall be avoided unless the continuance be agreed by endorsement signed by the company’.

⁹⁵ *Forrest & Sons Ltd v CGU Insurance Plc* [2006] Lloyd’s Rep IR 113: condition 3(b) of the claimant’s policy provided that it ‘shall be avoided with respect to any part thereof in regard to which there may be any alteration after the commencement of this insurance ... (b) whereby the risk of loss, destruction, damage, accident or injury is increased ...’. *Kausar* was not referred to in *Forrest*.

⁹⁶ [2009] Lloyd’s Rep IR 562.

⁹⁷ ‘This insurance shall cease to be in force if there is any material alteration to the Premises or Business or any material change in the facts stated in the Proposal Form or other facts supplied to the Insurer unless the Insurer agrees in writing to continue the insurance.’

⁹⁸ Emphasis added. This, inevitably, introduces an element of proving what caused the loss. This aspect of s 11 is examined in Merkin and Gürses (n 8) and will not be repeated here.

where a contracting clause was not complied with was discovered more often than not by a term pre-fixed to the relevant clause, eg, a warranty or condition precedent as mentioned above. Alternatively, and also commonly, such a conclusion was observed in the remedy expressly attached to the clause⁹⁹ or mentioned elsewhere in the policy.¹⁰⁰ The location of an express remedy is not essential to its enforcement.

When interpreting contractual clauses and the effect of their breach on the insurer's liability, the inclusion of an express remedy has always been taken into account as a strong indication that the insurer did not agree to indemnify the assured unless the assured complied with the contractual clause or clauses.¹⁰¹ Some contractual disputes involved a clearly stated outcome, such as the insurer 'will not be liable'¹⁰² unless the relevant clause was complied with, or in the form of an overarching clause stipulating that the insurer's liability would depend on the observance of the policy terms and conditions.¹⁰³ In the context described here it did not matter whether, in its substance, the relevant clause was material to the risk or loss that had occurred. The wording was sufficient to express the parties' intention that they regarded that condition, in this context and contract, to be definitive enough for the insurer to deny liability. This contractual certainty strengthened the insurer's position.

The interpretation of contractual terms in this manner is not prevented by the IA 2015, but only for those terms that fall outside the risk mitigation clauses as described by s 11(1) and s 10.¹⁰⁴ In this respect, if a condition precedent is to the attachment of the risk, it is submitted that that is also a risk-defining term and therefore, unless the assured complied with it, the risk is not

⁹⁹ 'Provided also, that if anything averred in the declaration hereinbefore referred to shall be untrue, this policy shall be void, and all monies received by the said company in respect thereof shall belong to the said company for their own benefit.': *Thomson v Weems* (1884) 9 App Cas 671. See Viscount Finlay in *Dawsons Ltd v Bonnin* [1922] 2 AC 413.

¹⁰⁰ *Aspen Insurance UK Ltd v Pectel Ltd* [2009] 2 All ER (Comm) 873.

¹⁰¹ 'Provided also, that if anything averred in the declaration hereinbefore referred to shall be untrue, this policy shall be void, and all monies received by the said company in respect thereof shall belong to the said company for their own benefit.': *Thomson v Weems* (1884) 9 App Cas 671; *Eagle Star Insurance Co Ltd v Cresswell* [2004] Lloyd's Rep IR 537.

¹⁰² *Eagle Star Insurance Co Ltd v Cresswell* [2004] Lloyd's Rep IR 537.

¹⁰³ *Aspen Insurance UK Ltd v Pectel Ltd* [2009] 2 All ER (Comm) 873.

¹⁰⁴ For insurance warranties only.

covered by the insurance contract. Similarly, where a condition precedent is a condition precedent to contract, the insurance contract will not exist unless and until the condition is satisfied and there will be no need to discuss whether that term defines the risk as a whole.

A condition precedent to insurer's liability is different. If such a condition precedent is risk-related, depending on its risk-defining nature, it may be subject to s 11(3) assessment. For instance, a clause in the following words will be a risk-mitigating clause: 'It is a condition precedent to liability that ... all waste or refuse outside the Buildings is stored in (a) non-combustible lidded and lockable containers or (b) metal skips kept within designated areas at least 10 metres from any building or other property and removed from the Premises when the containers or skips are full.'¹⁰⁵

However, conditions precedent to insurer's liability may also take the form of claims co-operation and claims control clauses which are expected to operate on the occurrence of the risk insured.¹⁰⁶ Hence, they are neither risk-defining, nor risk-mitigating. Their concern is that, at the stage where a claim is addressed to the insurer, the assured is contractually commanded to comply with some certain procedural clauses as set out by the contract. The common law interpretation of contractual conditions and their effect is left intact by the IA 2015 in so far as such claims provisions are concerned.

8 Risk-defining terms under s 11

The conclusion drawn from the above analysis is that a term relating to risk clearly has to have a material bearing on the risk.¹⁰⁷ As a consequence, first, any exercise aiming to identify the nature of a term cannot disregard the relationship between the risk and the term in question. This plainly disqualifies the claims provisions, as elucidated above. Second, terms that tend to

¹⁰⁵ As provided in the policy in *Sugar Hut Group Ltd v Great Lakes Reinsurance (UK) Plc* [2011] Lloyd's Rep IR 198.

¹⁰⁶ For example, see *Friends Provident Life & Pensions Ltd v Sirius International Insurance Corp* [2005] 2 Lloyd's Rep 517: 'In the event of any occurrence which may result in a claim ... the assured shall give prompt written notice ... and shall keep underwriters fully advised'.

¹⁰⁷ *Barnard v Faber* [1893] 1 QB 340; *Ellinger & Co v Mutual Life Insurance Co of New York* [1905] 1 KB 31, 37.

reduce the risk of loss are likely to be material for the risk too. The crucial distinguishing feature between risk-reducing terms and those that define the risk as a whole is the subject matter of each term. A separation should be made between the object of the contract and a term that is collateral to it.¹⁰⁸ A risk mitigation clause defines the subject matter of a collateral term. Irrespective of the wording chosen by the parties, if it is absolutely clear that the insurer did not agree to insure any other circumstances than those outlined by the clause, that clause defines the object of the contract and therefore defines the risk as a whole. If the clause relates to some evident aspect of the risk, without which the risk could potentially increase, but it is not absolutely clear that the insurer did not agree to insure the risk itself, that is a risk mitigation clause. It follows that, whilst the former is concerned with the performance of the contract, the latter deals with one of the characteristics that is collateral to the object of the contract and therefore will be subject to a s 11(3) assessment.

On the basis of this analysis, for example, in *HIH Casualty & General Insurance Ltd v New Hampshire Insurance Co*¹⁰⁹ the assured's undertaking as to '7.23 Productions will produce and make six made-for-TV Films' was clearly absolute and of a risk-defining nature.

The description of the object of the contract in *Yorkshire Insurance Company v Campbell*¹¹⁰ falls under the same category. In the *Yorkshire* case a horse was insured by a policy of marine insurance for a voyage from Sydney to Fremantle against marine perils, and the risk of mortality. During the voyage the horse died from natural causes and the insurers discovered that the horse was not 'by Sould out of St Paul mare' as described by the assured. The Privy Council held in the *Yorkshire* case that the words that describe the horse insured were capable of materially affecting the transaction.¹¹¹ First, if the words in question were left out, there would be nothing to show what kind of horse the animal insured was. It might be anything from a Shetland pony to a Suffolk punch; it might be thoroughbred or cross-bred. The words were

¹⁰⁸ *Chanter v Hopkins* (1838) 4 M & W 399.

¹⁰⁹ [2001] Lloyd's Rep IR 596.

¹¹⁰ [1917] AC 218, 225.

¹¹¹ [1917] AC 218, 225.

also material if, in case of loss, the identity of the animal came to be disputed, or if, the vessel being overdue, the underwriters desired to reinsure their line on the horse.¹¹²

Similarly, in *Nelson v Salvador*¹¹³ the assured 'warranted to sail on or before the 10th of August 1827' but the ship did not depart for the voyage insured until 11 August. In the view of the court there was no doubt that the warranty was breached and the insurer was entitled to the remedy. Lord Tenterden CJ said '... there is no sailing here. The warranty means that the ship shall be on her voyage on the given day.'¹¹⁴ It was immaterial that the delay in departure was because of a risk of a very heavy swell setting into the bay endangering the ship. Since the departure date was warranted, it had to be strictly complied with. Therefore the warranty was not to be read 'the ship should be in condition, and ready to sail if the weather permitted'.

The same observations are valid for a policy of insurance on the ship *New Westmoreland*, at and from Jamaica to London, warranted to sail on or before the 26th of July 1776¹¹⁵ and the wording of 'at and from Venice to the Currant Islands, and at and from thence to London':¹¹⁶ the departure date is the object of the contract.

More examples can be given. In *Robertson and Thomson v French*¹¹⁷ the policy insured the ship and the cargo on '... at and from *all, any, or every port and place where and whatsoever on the coast of Brazil*, ... beginning the adventure upon the said goods and merchandizes from the loading thereof aboard the said ship ...'. The ship was loaded at the Cape of Good Hope, and then went to Benguela, Africa, and from there to Rio de Janeiro, Brazil. She was lost after two months staying on the coast of Rio. The policy provided no cover as the risk could only attach on goods and ship after loading had taken place on the coast of Brazil. Since that never took place, the policy never attached.

¹¹² *Yorkshire Insurance Company v Campbell* [1917] AC 218, 225.

¹¹³ (1829) Mood & M 309.

¹¹⁴ Ibid 310.

¹¹⁵ *Hore v Whitmore* (1778) 2 Cowp 784. It was held that 'the warranty was positive and express, that the ship should depart on or before the day appointed, and therefore, must be complied with'.

¹¹⁶ *Lilly v Ewer* (1779) 1 Doug KB 72.

¹¹⁷ (1803) 4 East 130.

This analysis is in line with the very limited guidance provided by the Law Commissions, which said that ‘any such term will have a general limiting effect ... not linked to a specific risk sector.’¹¹⁸ More specifically, the following terms would fall within the risk-defining category:¹¹⁹ ‘(1) the uses to which insured property can be put (e.g. commercial/personal); (2) the geographical limits of the policy; (3) the class of ship being insured; or (4) the minimum age/qualifications/ characteristics of a person insured.’

It also appears that in a property insurance policy the following is risk-mitigating but not risk-defining: ‘It is warranted that the electrical installation be inspected and tested every five years by a contractor approved by the National Inspection Council for Electrical Installation Contracting (NICEIC) and that any defects be remedied forthwith in accordance with the Regulations of the Institute of Electrical Engineers’.¹²⁰ It is a term collateral to the subject matter insured, rather than describing essential characters of the property that the insurer agreed to insure.

Similarly, as is often seen in property insurance policies, where the assured warrants that he will maintain a certain brand of security alarm system for the premises insured, as being part of the contract but collateral to the object of it, breach of the warranty will be subject to the s 11(3) assessment.¹²¹

The same conclusion would be reached in a policy that insures some night clubs and a kitchen warranty requires the assured ‘to keep all frying and other cooking ranges free from contact

¹¹⁸ Law Commission and Scottish Law Commission, *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 18.35.

¹¹⁹ *Stakeholder Note: Terms Not Relevant to the Actual Loss*, para 1.8, reproduced in House of Lords Special Public Bill Committee, *Insurance Bill* (HL Paper 81, 2014) 47.

¹²⁰ The clause was at the heart of the dispute in *Bluebon Ltd v Ageas (UK) Ltd (Formerly Fortis Insurance Ltd)* [2017] EWHC 3301 (Comm) where Bryan J interpreted it as a suspensory condition. The risk was insured in 2009, hence was analysed under the old regime.

¹²¹ See eg *AC Ward & Son Ltd v Catlin (Five) Ltd* [2010] Lloyd’s Rep IR 695 where it was warranted that ‘... the burglar alarm system shall have been maintained in good order throughout the currency of this insurance under a maintenance contract with a competent specialist alarm company who are approved by the Insurers ...’.

with combustible material’ and also states that all extraction ducts would be ‘cleaned regularly and maintained and checked at least once every six months by a specialist contractor’. These two provisions were disputed in *Sugar Hut Group Ltd v Great Lakes Reinsurance (UK) Plc*¹²² where Burton J questioned if the clauses worded as a warranty were actually suspensory conditions. Without any need for discussing whether they are suspensory conditions, under the IA 2015 these clauses will be regarded as risk-mitigating clauses.

9 Limited role of terminology

After setting out certain criteria for identifying risk-defining terms, a final point should be made where terminology is likely to play a role of, probably in a very limited and restricted way, in this exercise. Terminology is not a determining factor establishing a risk-defining clause. However, some particular words may play a persuasive role that the clause is of this nature. In this regard, the word ‘warranted’, when used in conjunction with ‘only’, may intensify the prominence of the clause for the parties. Where the scope of the application of the cover is limited with the wordings ‘warranted only’ it gives a definite character to the relevant clause — that it is only on the basis of this condition that the insurer agreed to cover.¹²³ ‘Warranted only’ is a promissory declaration as to the risk: ‘I will insure you under certain circumstances, but only under certain circumstances.’¹²⁴ Hence, it enhances the possibility that ‘warranted only’ would tend to describe the risk as a whole.

It is the same as the well-known warranty or promise in marine insurance, ‘warranted no St. Lawrence between Oct. 1 and Mar. 31’, which means that if the assured’s vessel ventures into the St Lawrence River and is lost between those dates the assured does not recover under the policy because that is not the risk that the insurance company has undertaken.¹²⁵ In *Roberts v*

¹²² [2011] Lloyd’s Rep IR 198.

¹²³ *Roberts v Anglo-Saxon Insurance Association Ltd* (1927) 27 Ll L Rep 313, 315.

¹²⁴ *Ibid.*

¹²⁵ *Ibid* (Scrutton LJ).

*Anglo-Saxon Insurance Association Ltd*¹²⁶ the policy purported to insure a motor vehicle of a certain horse-power and with a certain registered letter and number ‘warranted used only for the following purpose; commercial travelling’. It was held that this promise as to the future occupation of the car limited the risk that the insurance company undertook, so that if a loss occurred when it was not being used for the purpose of commercial travelling, the insurer was not liable.¹²⁷

A question may then be raised as to whether the words ‘subject to’ have the same persuasive power as ‘warranted only’. This will depend on the context. In *Zeus Tradition Marine Ltd v Bell (The Zeus V)*¹²⁸ a yacht was insured ‘[s]ubject to survey including valuation by independent qualified surveyor prior to commencement of in commission period’. In this case it was held to be a condition precedent to the attachment of the risk. Under the IA 2015, if this clause is interpreted in such a manner that the object of the contract is the yacht which, after the survey, must be found to meet the requisite standards, it would be a risk-defining term. If, for example, that this was an elderly craft which had undergone a lengthy refit extending over a considerable period, and was intended for commercial use when it eventually came into commission, and the parties were aware of this, this context would reinforce the clause’s risk-defining nature.

10 Concluding thoughts

Doubtless s 11 of the IA 2015 places some restrictions on insurers’ capability to reject the assured’s claim where the assured does not comply with his contractual promise. Such restrictions, however, do not apply freely. This paper has attempted to explore the scope of s 11 with the particular aim of providing useful guidance in its future application. Section 11 neither interferes with freedom of contract, nor alters its terms. Rather, it regulates the

¹²⁶ Ibid 313.

¹²⁷ Ibid 315 (Scrutton LJ).

¹²⁸ [2000] CLC 1705, 1715.

remedies that are attached to the policy terms by the parties. It is a welcome law reform, especially in addressing the imbalance between the assured's and the insurer's position in comprehending the implications of policy terms where particularly technical terms are used. The application of the IA 2015 by the courts is yet to be observed and the wording of s 11 is by no means perfect. Some of the harsh consequences of breach suffered by the assureds in the past are likely to vanish under the new regime.

The fundamentals have not changed, in the sense that the wording of the insurance contract will continue to determine the rights of the parties through the courts' interpretation of the contractual clauses. What has changed is the direction and focus of that interpretation. Whereas the determining point used to be strictly the technical wording and the remedies attached to that, under the IA 2015, the focus is now upon the nature of the clause and the relevance of its breach to the loss claimed by the assured. Section 11 is a step that has been taken towards providing remedies under insurance contracts based on the substantive effect of contractual terms rather than on the basis of their form. Uncertainties with respect to the interpretation of insurance contract terms, however, have by no means evaporated.