Legal Effect of Breach of Warranty in Construction Insurance in Malaysia

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Abstract: This study is aimed at analyzing the legal effect of breach of warranty in construction insurance contracts in Malaysia in light of the current developments in The English insurance law. The required data and information were collected from Malaysian and English court decisions dealing with breach of warranties in English marine insurance law from the online Malayan Law Journal published on the LexisNexis online database and from published textbooks related to insurance warranties. This study would help to offer judicial guidance to courts in Peninsular Malaysia on how to resolve the legal dilemma associated with breach of warranty in Malaysian insurance law. It was found out that the effect of breach of a continuing warranty will result in the contract of insurance remaining in existence and the risk is being treated as having incepted at the outset but automatically coming to an end as of the date of the breach. More so, the insurer is being discharged from any future liability, although any liabilities of the insurer before the date of the breach are unaffected.

Key words: Contract, court, good luck, liability, marine insurance

INTRODUCTION

In the execution of any construction project there is invariably an element of risk involved (Akintoye and MacLeod, 1997). First, there is the possible risk of a loss as a result of damage to property, plant or machinery. Secondly, the workers involved in the project might sustain bodily injuries. Therefore, the parties involved in a project - the employer, contractor, engineer, architect, etc., - ought to be mindful of this and in order to protect and guard against the possible risks, it is highly imperative that insurance cover is obtained. In view of the importance, most engineering or building contracts have express provisions dealing with insurance.

The main feature of a contract of insurance is that the contract is made to depend on the occurrence of an uncertain event. The nature and extent of insurance cover needed would vary depending on the project. Numerous risks are involved in building and engineering projects. Any two projects are unlikely to carry the same risks. Construction insurance is a practice of exchanging a contingent claim for a fixed payment to protect the interests of parties involved in a construction project (Lyons and Skitmore, 2004). Speaking further, construction insurance is a major method of managing risks in the construction industry. Its primary function is to transfer certain risks from clients, contractors, subcontractors and other parties involved in the construction project to insurers to provide contingent funding in time of difficulty. Heidenhain (2001) also added that in a construction project, insurance is perceived to be the primary tool for risk control only when the risk management level is high and the management’s strategic consciousness is low, however, it is not always the best option for risk management.

Heidenhain (2001) further pointed out that generally, standard forms of contract have been developed for the purpose of providing a balanced distribution of risk; for efficient administration of the contractual activities; for building on the experience gained from repeated use of these forms, but most of all for the optimum protection of one or both parties’ interest. In Malaysian construction industry, the PAM Form of Building Contract 2006 and JKR 203A Form of Contract (Revised, 2007) contain clear insurance clauses in order to provide a balanced distribution of risk in construction contracts. These include clauses 18, 19, 20A and 20B under the PAM Form 2006 and 14, 15, 16 and 18 under the JKR Form respectively.

Problem statement: Court decisions in Malaysia seem to suggest that a breach of warranty in construction insurance policy entitles the insurer to repudiate liability and prevents the contract of insurance from coming into
existence. This misunderstanding by Malaysian courts has resulted in a legal dilemma in insurance law in Malaysia with regards to breach of warranty.

However, the Malaysian insurance law is yet to adopt post Good Luck principles with regards to breach of warranty. The courts in Malaysia have continued to adopt the pre Good Luck principles which unfairly distribute the rights and obligations of parties to insurance contract. This could be justified by the decision of Putra Perdana Construction Sdn Bhd v AMI Insurance (2005), where the court held that a breach of warranty would entitle the insurer to repudiate liability and bring the insurance contract to an end. Similarly, in the case of Teck Liong v Hong Leong Assurance (2002) the court held that the insurer is entitled to repudiate liability to the plaintiff in respect of breach of warranty. Such principles of law are clearly outmoded and do not take into account the significant development in insurance law since Bank of Nova Scotia (1991) case. Before Bank of Nova Scotia (1991) case, the dictum of Lord Mansfield in De Hahn v Hartley (1786) directly or indirectly handed an unfair advantage to insurers over the insured in the sense that insurance companies were using it as a tool of avoiding their own liability and escape payment on the occurrence of the perils insured against. The effect of this is that parties willing to take out an insurance policy become very wary of doing so. Contractors in the construction industry need to undertake a policy to insure the works, materials and goods and insure against injury to persons, loss and or damage to property.

The decision of the House of Lords in Bank of Nova Scotia (1991) case brought the much needed reform in the area of breach of warranty in English insurance law and to some extent promoted a sense of fairness to parties to insurance contract. It was affirmed in Bank of Nova Scotia (1991) case that:

“Once a breach of continuing warranty occurs, the insurer is simply discharged from liability as from the date of the breach. The discharge of the insurer from liability is automatic and is not dependent on any decision by the insurer to treat the insurance contract as at end. The insurance contract remains in existence”.

This decision is a better approach to adopt than to state that an insurer is entitled to repudiate liability for breach of warranty because the legal effect of a breach of warranty depends on whether the warranty that is breached is a present warranty (that is, warranty that relates to a period before the attachment of the risk) or a continuing warranty (warranty that relates to a period after the attachment of the risk).

Aim and objective: This study is aimed at analyzing the legal effect of breach of warranty in insurance contracts in light of the current developments in The English insurance law with the aim of offering judicial guidance to courts in Peninsular Malaysia in order to resolve the legal dilemma associated with breach of warranty in Malaysian insurance law.

METHODOLOGY

The required data and information were collected from Malaysian and English court decisions dealing with breach of warranties in English marine insurance law from the online Malayan Law Journal published on the LexisNexis online database and from published textbooks related to insurance warranties.

Scope: The court cases referred to in this research work are Malaysian and English cases. Since the Marine Insurance Act 1906 provides the legal framework for warranties used in marine insurance and also applicable to general insurance contracts in the UK, it became pertinent to refer to court decisions that deal with breach of warranties in English marine insurance law. The analysis will focus on legal effects of breach of continuing warranty in insurance contracts in West Malaysia. The cases are chosen from the online Malayan Law Journal published on the LexisNexis online database and from published textbooks related insurance warranties.

Significance of the study: The courts in West Malaysia have continued to adopt the pre-Good Luck principles with regards to breaches of warranty. In the decision of Putra Perdana Construction Sdn Bhd v AMI Insurance (2005), the court held that “a breach of warranty would entitle the insurer to repudiate liability”. Such principles of law are clearly outmoded and do not take into account the significant development in the law since Bank of Nova Scotia (1991). As a matter of fact, the misunderstandings of the courts in West Malaysia on their decisions on breaches of warranty are untenable because the English insurance law has long departed from such principles. In the United Kingdom today, the legal effect of breach of continuing warranty is clearly different from legal effect of breach of present warranty. However, going by the court decisions in the above mentioned cases, it is not encouraging to see that in Malaysian courts, the legal effect of both continuing and present warranties were considered to be the same. Since the Malaysian Insurance Act 1963 is silent on breach of warranty, and there is no legal barrier against courts in West Malaysia making reference to subsequent developments in English law, it became necessary for Malaysian courts to adopt the developments in the English insurance law with regards to breach of continuing warranty so as to resolve the legal dilemma that unfairly favours the insurers against the detriment of the insured. The time has come for the Malaysian courts
to do so. The bells of change in Malaysian insurance law are sounding; the time has come for Malaysian courts to ring out the old and ring in the new.

Sources of Malaysian insurance law: As pointed out by Aun (2005), The English common law and the rules of equity form part of the laws of Malaysia. Speaking further, English law can be found in the English common law and rules of equity, however, not all of England’s common law and rules of equity form part of Malaysian law. The application of the law of England throughout Malaysia is subjected to two limitations: Firstly, it is applied only in the absence of local statutes on the particular subjects. Local law takes precedence over the England law as the latter is meant only to fill in gaps in the local system. Secondly, only that part of the England law that is suited to local circumstances will be applied (Lee, 2005).

Aun (2005) also pointed out that after the April 7, 1956, English common law and equity became non binding in Peninsular Malaysia, at best, they are only persuasive. Speaking further, there is no legal barrier against local courts making reference to subsequent developments in English law. Though strictly not binding, local courts may accept subsequent English authorities if in their view, it is desirable to do so in the absence of local statutory provisions or judicial guidance. Lord Scarman took note of this approach in Jamil bin Harun v Yang Kamsiah & Anor. (1984) when he said:

“Their Lordships do not doubt that it is for the courts of Malaysia to decide, subject always to the statute of the Federation, whether to follow English case law. Modern English authorities may be persuasive, but are not binding. In determining whether to accept their guidance, the courts will have regard to the circumstances of the States of Malaysia and will be careful to apply them only to the extent that the written law permits, and no further than, in their view, it is just to do so”.

With the aid of these provisions, English law has often been referred to for guidance in resolving legal dilemmas in the field of insurance law. Since the Malaysian Insurance Act 1963 does not seem to have covered the matter of breach of warranty in insurance policies, by virtue of section 5(1) of the Civil Law Act 1956, the decision of the House of Lords in Bank of Nova Scotia (1991) case can be adopted by Malaysian courts. Section 5(1) of the Civil Law Act 1956 provides that:

“In all questions or issues which arise or which have to be decided in the States of West Malaysia ... with respect to the law of ... marine insurance, average, life and fire insurance ... the law to be administered shall be the same as would be administered in England in the like case at the date of the coming into force of this Act, if such question or issue had arisen or had to be decided in England, unless in any case other provision is or shall be made by any written law.”

The English insurance law: The English Marine Insurance Act (MIA) 1906 is the earliest and comprehensive governing law on general insurance warranties in The United Kingdom. With regards to warranty issues in insurance law in the UK, The Act provided the legal framework for warranties used in contract of marine insurance but this does not mean that the use of such terms is unique solely to marine insurance contracts. Warranties also appear in all types of non-marine insurance contracts. The rules laid down by the MIA 1906 for Marine warranties are also applied to non marine warranties in the UK. It has in fact been observed on numerous occasions that the judges refer to marine insurance principles or the provisions of the MIA 1906 when dealing with a non-marine warranty.

In relation to breach of warranty in non-marine insurance contract, the dictum of Lord Mansfield in De Hahn v Hartley (1786) suggested that “a breach of warranty entitled the insurer to repudiate the contract”. However, in the early nineties, the English insurance law had undergone further developments and changes with regards to breach of warranty. Soyer (2006) pointed out that in the UK, if a breach of warranty occurs, it has to be considered whether the warranty breached is a present or continuing warranty because their legal effects are not the same. It is only in the breach of present warranty that an insurer will repudiate liability and bring the contract to an end. But if the breach is of a continuing warranty, the insurer is simply discharged from liability as from the date of the breach of warranty but the insurance policy remains in existence.

It was the decision of the of the House of Lords in the case of Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd (The Good Luck) (1991) that led to the significant developments in the English insurance law. Before Bank of Nova Scotia (1991) case, the dictum of Lord Mansfield in De Hahn v Hartley (1786) directly or indirectly handed an unfair advantage to insurers over the insured in the sense that insurance companies were using it as a tool of avoiding their own liability and escape payment on the occurrence of the perils insured against. The effect of this is that parties willing to take out an insurance policy become very wary of doing so. Contractors in the construction industry need to undertake a policy to insure the works, materials and goods and insure against injury to persons, loss and or damage to property.
The decision of the House of Lords in Bank of Nova Scotia (1991) case brought the much needed reform in the area of breach of warranty in English insurance law and to some extent promoted a sense of fairness to parties to insurance contract. It was affirmed in Bank of Nova Scotia (1991) case that:

“Once a breach of continuing warranty occurs, the insurer is simply discharged from liability as from the date of the breach. The discharge of the insurer from liability is automatic and is not dependent on any decision by the insurer to treat the insurance contract as at end. The insurance contract remains in existence”.

This decision is a better approach to adopt than to state that an insurer is entitled to repudiate liability for breach of warranty because the legal effect of a breach of warranty depends on whether the warranty that is breached is a present warranty (that is, warranty that relates to a period before the attachment of the risk) or a continuing warranty (warranty that relates to a period after the attachment of the risk).

However, the Malaysian insurance law is yet to adopt post Good Luck principles with regards to breach of warranty. The courts in Malaysia have continued to adopt the pre Good Luck principles which unfairly distribute the rights and obligations of parties to insurance contract. This could be justified by the decision of Putra Perdana Construction Sdn Bhd v AMI Insurance (2005), where the court held that a breach of warranty would entitle the insurer to repudiate liability and bring the insurance contract to an end. Similarly, in the case of Teck Liong v Hong Leong Assurance (2002) the court held that the insurer is entitled to repudiate liability to the plaintiff in respect of breach of warranty. Such principles of law are clearly outmoded and do not take into account the significant development in insurance law since Bank of Nova Scotia (1991) case.

**Distinction between warranties and conditions in insurance law:** In contract of insurance, the terms provided in the agreement may have varying legal effect, depending on the importance of the term. The mere labeling of a term as a “condition”, “condition precedent”, or “warranty” does not automatically confer a definite legal status on the term, although it will go some way in showing the intentions of the parties. Ultimately, the test is primarily one of determining the intentions of the parties.

The terms “warranty” and “condition” in the context of an insurance contract have acquired a meaning peculiar only to insurance law. For instance, under the English Sale of Goods Act 1979, a stipulation in a contract of sale is a condition that if breached, it will give rise to a right to treat the contract as repudiated, and a warranty is a term, the breach of which may give rise to a claim for damages but not a right to reject the goods and treat the contract as repudiated. In insurance law, the terms are used with the opposite effect.

Davis (1996) asserted that in construction insurance policy, warranty plays a key role. He added also that warranty is a condition precedent, and unless it is performed, there is no contract. It is perfectly immaterial for what purpose a warranty is introduced, but, being inserted, the contract does not exist unless it is literally complied with. According to Poh (1990), warranties are said to serve a very significant function in the law of insurance, which is, determining the scope of the cover agreed by the insurer. He added also that from the insurer’s point of view, the extent of the risk is crucial, as his liability will largely depend on it. The warranties incorporated into the contract play an essential role in assessing the risk.

The word warranty in a technical sense is used to refer to a certain term of an insurance contract, breach of which has particular legal consequences. With a warranty, one party of the insurance contract, the insured, undertakes certain obligations that need to be complied with within a certain period of time and the liability of the insurer, under the insurance contract, depends on the assured’s compliance with these obligations. In this respect, warranties are used by the insurer as a shield against liability (Poh, 1990). Warranties are said to serve a very significant function in the law of insurance that is, determining the scope of the cover agreed by the insurer. A contract of insurance is described as a contract whereby the insurer undertakes to indemnify the assured, in manner and to the extent thereby agreed, against certain losses in return of a payment known as premium. Accordingly, from the insurer’s point of view, the extent of the risk is crucial, as his liability will largely depend on it. The warranties incorporated into the contract play an essential role in assessing the risk.

**Condition:** A condition in an insurance policy is a term which would entitle an insurance company to claim damages in the event of a breach but not to disclaim liability under the policy. In Stoneham v Ocean Railway and General Accident Insurance Co (1877) it was decided by the English Court of Appeal that where an insured is in breach of a condition in the policy, the insurers were entitled to claim damages for breach of the condition but could not disclaim liability under the policy.

**Condition precedent:** If an insurance company is to be entitled to disclaim liability for breach of a condition, the insurance company must make the condition a condition
warranties in insurance contracts can be categorized or continuing warranty (Soyer, 2006): classification, warranty is classified as a present warranty after the attachment of the risk. Based on this before the attachment of the risk or relates to a period depending on whether the warranty relates to a period classification according to time and nature of undertaking and according to the time and nature of undertaking, and further stated that classification according to time and nature of undertaking depends on whether the warranty relates to a period before the attachment of the risk or relates to a period after the attachment of the risk. Based on this classification, warranty is classified as a present warranty or continuing warranty (Soyer, 2006):

- Present/affirmative warranty: This warranty relates in time to the circumstances at the inception of the risk. In such a case, the warranted event must be complied with before the risk attaches. Compliance to this kind of warranty is considered to be a condition precedent to the attachment of the risk. As such, the validity of the insurance policy depends on the compliance with this warranty.
- Promissory/Continuing warranty: This warranty relates to circumstances after the attachment of the risk. In other words, some warranties undertake that a given state of affairs will be satisfied or avoided at some time after the inception of the risk. More so, the warranty might undertake that a given state of affairs will not only exist at the inception of the risk, but also during its continuation. Common examples include warranties to maintain alarms or sprinkler systems in commercial fire policies.

Effect of breach of warranty in construction insurance: Court decisions in insurance law in Malaysia seem to suggest that a breach of warranty entitles the insurer to repudiate liability and prevents the contract of insurance from coming into existence. This paper demonstrated that the above proposition is untenable in the light of the current development in the insurance law in the United Kingdom concerning breach of warranty.

At this point, it would be necessary to discuss the facts of the two Malaysian cases where the there was a misunderstanding by the Judges on their decisions relating to breach of warranties in insurance contracts.

In Teck Liong (EM) Sdn Bhd v Hong Leong Assurance Sdn Bhd (2002) The plaintiff was issued a fire insurance policy by the defendant to cover his stock in trade stored in a warehouse. The stock in trade was destroyed by fire. The plaintiff claimed for the insured sum. The defendant argued that the plaintiff on the date of the fire did not hold any valid trading license from the Local Authority to operate its business which was a breach of warranty 9(a) of the policy. Dismissing the claim, it was held that the plaintiff was in breach of warranty 9(a) when the fire occurred for not having such a license. Therefore, the defendant was entitled to repudiate liability to the plaintiff in respect of the plaintiff’s claim under the policy.

In Putra Perdana Construction Sdn Bhd v AMI Insurance Bhd (2005) The plaintiff obtained an insurance policy from the defendants. The policy included a warranty concerning fire fighting facilities and fire safety at the construction site. A fire broke out at the basement car park of one of the blocks which was still under construction causing considerable damages. Upon the plaintiff’s claim on the policy, the defendants issued a notice of repudiation of liability under the policy on the ground that a warranty on fire fighting facilities and fire safety at the construction site was breached. Dismissing the claim with costs, it was held that, the defendants were entitled to repudiate liability to the plaintiff in respect of the plaintiff’s claim under the policy. Also, warranties have to be strictly complied with, like conditions precedent. Therefore, if there is a breach of warranty entitling the insurer to repudiate liability, it matters not if the breach has no bearing or connection with the loss. When a term in a policy is stipulated to be a warranty or a condition precedent to the liability of the insurer, the warranty/condition has to be strictly complied with by the...
insured before the insured is entitled to bring a claim on the policy.

**Legal effect of breach of warranty:** It is submitted that the above court decisions in the cases of Putra Perdana and Teck Liang (2002) are misleading in the light of the UK decision of Lord Goff in Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd., (The Good Luck) (1991) though the Good Luck case strictly speaking applies to breach of warranty in the marine insurance context, many subsequent cases have decided that the Good Luck ruling is applicable to all forms of insurance.

As pointed out by Tharmakulasingam (2006), a more suitable term that should have been employed by the learned judges in those Malaysian decisions to describe the legal effect of breach of a continuing warranty is that the insurer is simply discharged from liability from the date of breach. This would have been a better approach than to state that an insurer is entitled to repudiate liability for breach of warranty.

The legal effect of warranty depends on whether the warranty that is breached relates to a period before the attachment of the risk (present warranty) or the warranty breached relates to a period after the attachment of the risk (continuing warranty).

**Effect of breach of warranties which relate to a period before the attachment of the risk:** Some warranties relate in terms of time to circumstances at the inception of the risk. In such cases, the warranted event or condition must be complied with at some time before the risk attaches. Lord Blackburn in Thomson v Weems (1884) asserted that in cases where the warranty relates in time to circumstances at the inception of the risk, breach will result in the insurer never coming on the risk. Compliance with a warranty of this type was considered as condition precedent to the attaching of the risk. In that case, the assured had warranted, in a life policy, the accuracy of the statements that he had made in the proposal form. When the evidence clearly proved that the assured’s statement as to his temperance in his habits was untrue, the policy was held null and void. Accordingly, the validity of the insurance policy depends on the compliance with the warranty and, once the warranty is breached, the contract never comes into existence. The suspensive effect of contingent condition precedents, which may arise in some contracts, therefore has no application in this context due to the special nature of insurance contracts.

One may argue that the principle in relation to breach of warranties, which relate to period before the attachment of the risk, was derived from a non-marine case and, therefore, does not apply in the context of marine insurance. However, this point cannot be argued forcefully for two reasons. First, Lord Blackburn, in Thomson v Weems (1884), expressly stated his opinion, that as regards the effect of breach of warranty, the same principles applied whether the insurance is marine or not. Secondly, two different judgments of Lord Mansfield in relation to marine warranties delivered in the late 18th century adopt a similar language. In Woolmer v Muliman (1763) the insured vessel was warranted neutral and was lost by perils of the sea. At the trial, there was evidence to the effect that she was not neutral property and Lord Mansfield CJ said that: ‘this was no contract, for the man insured neutral property and this was not neutral property’.

**Effect of breach of warranties which relate to a period after the attachment of the risk:** Some warranties concern the assured’s future conduct and required him to do or not to do a particular thing, or fulfill some conditions at some point after the attachment of the risk. Such warranties are termed continuing warranties. Common example includes warranties to maintain alarms or sprinkler systems in commercial fire policies (Soyer, 2006).

In cases where the warranty relates in time to circumstances after the inception of the risk, the breach of such warranties will not have any effect on the existence of the contract, unlike breach of present warranties. In the case of breach of continuing warranty, the risk is treated as having incepted at the outset but automatically coming to an end as of the date of breach. Thus, the insurer is discharged from any future liability, although any liabilities of the insurer before the date of the breach are unaffected. The insurer is entitled to retain the full amount of the premium even though the insurer may have been on the risk for a short period only. This is due to the fact the risk that has incepted has simply come to an end; as such there has not been a total failure in consideration on the part of the insurer.

The meaning of this subsection became the subject of judicial examination in the 1990s in the case of Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd (The Good Luck) (1991). The facts of the case may be summarized as follows:

The ship named good Luck was insured with the defendant club and mortgaged to the claimant bank. As required by the mortgage, the benefit of the insurance was assigned to the bank, and the club gave a letter of undertaking to the bank, whereby the club promised to advise the bank promptly if the club ceased to insure the ship. The ship was sent to the Arabian Guff in breach of warranty under the insurance, was hit by Iraqi missiles and became a constructive total loss. Both the club and the bank
knew of the loss but, whereas the club discovered the breach of warranty, the bank did not investigate the possibility. In the mistaken belief that the loss was covered, the bank made further loans to the ship owners. In view of the breach of warranty, the insurance could not be enforced, and the bank sued the club for having failed to give prompt notice on the fact that they had ceased to insure the ship. The trial judge upheld the bank’s argument that the insurer’s breach of warranty had brought the risk to an end automatically and therefore the club was in breach of his contractual obligation in their letter of undertaking.

However, the Court of Appeal, after reviewing the pre-1906 authorities, reached the conclusion that prior to 1906, breach of warranty did not automatically bring the risk to an end, and the 1906 Act, as a codification of the case law, had not intended to effect any change to that position.

In the House of Lords, Lord Goff disapproved with the conclusion of the Court of Appeal. He held that an automatic discharge of liability was clearly intended in the plain words of MIA 1906, s.33 (3) and the risk came to an end automatically upon the breach of warranty and the club was therefore in breach of its obligations to notify the bank.

In the wake of the decision of the House of Lords in Bank of Nova Scotia (1991), it is now clear that the remedy available in case of a breach of insurance warranty is radically different than remedies for breach of other contractual terms. A breach of warranty is distinguished from the general conditions in that the latter, if broken, gives rise to both damages and discharge, but the discharge occurs only on the election of the innocent party. The insurance warranty is distinguished from general warranty in that the latter, if broken, gives rise to damages, but not to discharge, whether automatic or by election.

The remedy for breach of an insurance warranty is also different than the remedy available in case of breach of utmost good faith obligations. In the latter case, the innocent party could avoid the contract "ab initio", but the contract cannot be said to be automatically avoided by breach of utmost good faith obligations; it remains in force until avoided by the insurer. Once the innocent party elects to avoid the contract, however, the avoidance will be effective as of the moment of agreement (Tharmakulasingam, 2006).

The automatic discharge remedy is expected to have serious implications on the position of parties to an insurance contract. Under the automatic discharge rule, rights and liabilities of the insurer that materialized before the breach remain unaffected. The insurer is entitled to retain the full amount of the premium, unless the risk is divisible, as he has been on the risk for a while and, therefore, there has not been a total failure of consideration. Similarly, any liability on the insurer, which had accrued up to the date of the breach of warranty, remains unaffected. These points have been illustrated in JA Chapman & Co Ltd v Kadirga Denizcilik ve Ticaret, (1998) where the assured had warranted that installments of the premium would be paid on given dates, but had fallen behind. It was held that the late payment of a single installment brought the risk to an end so that the insurer could never be liable for future losses, whereas the assured remained under an obligation to continue to make payments.

Where an insurer discovers that a breach has taken place without any claim arising, even though he is discharged from liability automatically in law, he should still notify the assured that he is minded to regard himself as discharged from liability. If he does not, he runs the risk of committing an unequivocal conduct, which could amount to waiver of breach of warranty. The notification, without a doubt, gives the assured sufficient time to arrange alternative cover.

The insurer should also be entitled to seek a declaration of non-liability from the court where he contends that his liability has been discharged by a breach of warranty. The remedy is, of course, discretionary and will not be granted if it would create substantial inconvenience or injustice.

Similarly, in cases where a claim is made and the insurer, suddenly discovering a previous breach, refuse to pay, the insurer will be justified in his refusal, provided he has not acted in any way since the time of the breach that can be considered as waiver of breach. Finally, in a case where the breach and claim are simultaneous and are related to one another, it is still advisable that the insurer notifies the assured that he regards himself as discharged, in order to disregard the possibility of waiver by an act of affirmative conduct.

It is now readily understandable that, if a continuing warranty is not complied with, the insurer is discharged from liability as from the date of the breach of warranty, for the simple reason that the fulfillment of the warranty is a condition to the liability of the insurer. This moreover reflects the fact that the rationale of warranties in insurance law is that the insurer only accepts the risk provided the warranty is fulfilled. This is entirely understandable: and it follows that the immediate effect of a breach of a continuing warranty is to discharge the insurer from liability as from the date of the breach. More so, non fulfillment of a continuing warranty does not prevent the contract from coming into existence. What it does is to discharge the insurer from liability as from the date of the breach. Certainly, it does not have the effect of bringing the contract to an end.
CONCLUSION

In line with achieving the objective of this paper, it was found out that a breach of a present warranty will result in the insurer never coming on the risk, the contract will cease to exist, the insurer will not be facing any liability for losses and premiums paid are also recoverable by reason of total failure of consideration. While a breach of a continuing warranty will result in the contract of insurance remaining in existence; the risk is being treated as having incepted at the outset but automatically coming to an end as of the date of the breach. More so, the insurer is being discharged from any future liability, although any liabilities of the insurer before the date of the breach are unaffected. Most importantly, the insurer retains the full amount of the premium even though the insurer may have been on the risk for a short period only.

Since the Malaysian Insurance Act 1963 is silent on breach of warranty, and there is no legal barrier against courts in West Malaysia making reference to subsequent developments in English law, it became necessary for Malaysian courts to adopt the developments in the English insurance law with regards to breach of continuing warranty so as to resolve the legal dilemma that unfairly favours the insurers against the detriment of the insured. The time has come for the Malaysian courts to do so. The bells of change in Malaysian insurance law are sounding; the time has come for Malaysian courts to ring out the old and ring in the new.

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