USE OF THE TRANSCRIPT

1. This is an uncorrected transcript of evidence taken in public and webcast on www.parliamentlive.tv.

2. Any public use of, or reference to, the contents should make clear that neither Members nor witnesses have had the opportunity to correct the record. If in doubt as to the propriety of using the transcript, please contact the Clerk of the Committee.

3. Members and witnesses are asked to send corrections to the Clerk of the Committee within 7 days of receipt.
Members present

Lord Woolf (Chairman)
Lord Ashton of Hyde
Lord Carrington of Fulham
Baroness Goudie
Lord Lea of Crondall
Lord McNally
Lord Newby
Baroness Noakes

Examination of Witnesses

Mr Kees van de Klugt, Lloyd’s Market Association, and Ms Philippa Handyside, Association of British Insurers

Q15 The Chairman: Good morning, Mr Kees van der Klugt—I hope that is the correct way of pronouncing it—and Ms Philippa Handyside. We are very grateful to you for coming to give evidence before us and are looking forward to the assistance that we think you can give us. I will say at the outset that the members of the Committee have all read your written evidence, so assume we know about that. So far as possible—this applies particularly to any opening statement you wish to make, for example—I would wish you to supplement or explain what is already in writing rather than repeat it. Do either of you want to make opening statements?

Ms Philippa Handyside: I have not prepared one but it might be helpful if I just set out the position of the Association of British Insurers and its members, which is, broadly, that the Marine Insurance Act was long overdue for reform. The excellent work of the Law Commission has produced a Bill of good quality which the ABI’s members support. We had a good dialogue with the Law Commission along the way and the published draft of the Bill is a great improvement on earlier drafts. The direction of reform in relation to fair presentation of risk and remedies for a breach of the duty of fair representation are all welcomed by the industry and largely reflect modern practice. Also, the industry is supportive of the reforms regarding warranties.

I know that you discussed at some length yesterday further reforms that are not included in the published draft of the Bill concerning irrelevant warranties and paying claims within a reasonable time. The members of the Association of British Insurers have been supportive of reform in those areas too. I will leave any further comments to your more specific questions.
The Chairman: Would you like to say anything?

Mr Kees van der Klugt: Lord Chairman, I would like to make a brief opening statement as well. The LMA—the Lloyd's Market Association—represents the common interests of all the managing agents at Lloyd's writing for all the syndicates, so we work a lot with the Corporation of Lloyd's as well as with the IUA and LIIBA, the other associations for the company market and the brokers. The report on the London market by the associations that come together as the London Market Group, which was worked on with the Boston Consulting Group, is referred to in our submission. I thought it was worth mentioning that this report exists because it sets out the London market quite usefully.

The Chairman: If you would like Members to read it, would you be able to provide them with copies?

Mr Kees van der Klugt: I am sure that we could. It is really just to say that it is here, but I could of course make copies available.

The Chairman: If copies are made available, we will certainly look at it.

Mr Kees van der Klugt: I would just like to say one or two other things. The LMA does a lot of work on market processes, for market efficiency, and a lot of educational work in the market. We are ultra-sensitive, on behalf of our members, about anything that might add to costs in the market or decrease efficiency, which is what really informs the way we approach the new Bill. I would like to emphasise that we support the core reforms in the Bill on proportionate remedies for non-disclosure, on banning basis clauses, on warranties becoming suspensory and on the provisions relating to fraudulent claims. We see those as the absolutely central reforms. I should say as well that I am a BILA—British Insurance Law Association—committee member, and that BILA is in the same place in relation to the main reforms as we are. But we have some problems with some of the clauses, as will become apparent. That is what I wanted to say at the outset.

The Chairman: Those problems, with the provisions that are already in the Bill, are dealt with in your evidence.

Mr Kees van der Klugt: Indeed, the problem areas are dealt with in our written evidence.

The Chairman: Thank you very much. Did you want to add anything else?

Mr Kees van der Klugt: There is one point that it is also important to make the Committee aware of. We may be in a slightly different place from the ABI here, but in our market a lot of the insurance contracts come into underwriters having already been prepared in the broker's office. That is an important thing to realise. The brokers work up a contract with
our clients and then bring them into the room at Lloyd’s for a quote. When one is talking about things such as contracting out, it is important to realise that that is where the contracts often originate—not always, but often. I just wanted to make that point at the outset.

The Chairman: On that point, if Lloyd’s were to think of a standard practice with regard to the placing of business with Lloyd’s, it would be quite easy, would it not, to publish the standard terms that Lloyd’s would trade on?

Mr Kees van der Klugt: Not the standard terms of the insurance contract itself. There are model wordings which brokers and underwriters can draw from—indeed Lloyd’s Market Association has a model wordings database—but that is often just self-contained wording that can be part of a contract; it is not the whole contract.

The Chairman: I was not suggesting that it was. What you have described as models is really what I had in mind.

Mr Kees van der Klugt: But what one could not do is standardise terms of a complete contract, because they are very much bespoke.

The Chairman: I was thinking about special areas, particularly about something that Lloyd’s feels very uncomfortable about in the proposed Bill. For example, Lloyd’s could deal with the ability to contract out by model terms.

Mr Kees van der Klugt: I am not so sure about that. It might become apparent when we get to some of the headline questions that we have been given that, first, if one is talking about the whole disclosure scheme as set out in Clauses 3 and 4 of the Bill, and the knowledge provisions in, I think, Clauses 4 to 7, it is very difficult to contract out of the whole disclosure scheme. Contracting out of that part of the Bill is not a particularly feasible proposition. If a broker comes into the room and says to an underwriter, “I have a huge risk that I would like you to quote on. Here is the slip and here are the terms”, I do not think that the underwriter is really going to say, “Well, before I even look at this and take your presentation, I want to just rewrite the law in relation to how we are going to disclose this particular matter”. I do not see how we can set standard terms for contracting out of the scheme set up by the Bill—hence our worry about contracting out being simplistic. What I will refer to as Clause 11, on terms that are relevant to a particular type of loss, is one of the deleted clauses and is not in the Bill. I know that we are going to be asked about this, as it is a sort of all-pervasive term. You would have to analyse the contract and somehow see which terms fall under this provision of the Bill and which do not. Again, when it is all
pervasive, it makes contracting out very difficult, if you see what I mean. Before you can even think about contracting out, you have to analyse the whole wording of the insurance contract even to realise whether the broker, who has put it together with his client, is contracting out.

Baroness Noakes: Do you not have to go through the terms of the contract anyway? So what additional burden does this raise?

Mr Kees van der Klugt: We are immediately on to what I call Clause 11, if that is all right Lord Chairman. I am very happy to answer the point.

The Chairman: You answer it.

Mr Kees van der Klugt: The difficulty it raises is really to do with the uncertainty of the clause. We dealt with it in written submissions because it was in the last draft produced by the Law Commission that was on the table and we felt that we should deal with it there, unlike Clause 14, which we did not deal with—which was why I waved my arms yesterday. Clause 11 raises quite a few uncertainties that will be very difficult for the broker and the underwriter—I am obviously talking for underwriters—to resolve. First, they have to decide whether the clause goes to the whole risk or just to a type of loss than can arise. Even if one takes the Law Commission’s own examples, one can argue it both ways: whether the term goes to the whole risk so that it does not really fall under the controlling mechanism of Clause 11, or whether it goes to just one type of risk. In some ways, one feels that the underwriter would need a lawyer at his hand, and even the lawyer might not be able to answer without a court deciding whether the term goes to the whole contract or just to a particular type of loss. Then one gets into all the causation difficulties when the term goes to a particular type of loss. To give a very short answer, it is something that the Law Commission itself rejected as a route in the very detailed consultations that it did.

Baroness Noakes: I do not quite understand why over time you cannot evolve contractual forms that satisfy the market to deal with these issues.

Mr Kees van der Klugt: Obviously, we see model wordings being used, some much more often than others, but contracts differ hugely. The underwriter would have the problem of assessing how what I call Clause 11 would impinge on the terms throughout the contract in lots of very different circumstances. The situation is quite different if you are doing business on your own standard terms. This is offering standard terms to your clients, whether it is a mass commercial property risk or whether it is to consumers. Then you can design it very
carefully, take advice on it and design it around the law. In our market, it is a very different proposition.

**The Chairman:** That is because you tailor-make it?

**Mr Kees van der Klugt:** Because you have tailor-made it.

**The Chairman:** But if you are going to take on tailor-making, as you do so well, are there not certain things that you know you have to deal with?

**Mr Kees van der Klugt:** I have explained as best that if you have a Clause 11-type mechanism, that can impinge on a contract throughout. It will cause lots of practical problems at the coalface—the broker and underwriter together. It will be difficult for them initially to see whether the broker’s wording or the underwriter’s wording, if it is bespoke to a particular client, has been put together in a way that is not contracting out. That is our initial question. Even at that stage, it is difficult. Can I just turn it around slightly? There are other factors that make a Clause 11-type provision far less necessary. If one is talking about consumers or micro-businesses, one has the ombudsman. The ombudsman uses the reasonable approach. I really do not think that Clause 11 is particularly necessary. Then we have the financial conduct regulator, and it is deeply ingrained in us that the client is at the heart of the business. The regulator is on top of these things. Again, when one is talking about consumers, there are the unfair contract term regulations 1999. Fairly regularly, but not that often, insurers give undertakings to the regulator not to use certain wordings that are considered to be unfair. All these mechanisms are out there anyway.

**The Chairman:** They are very real safeguards.

**Mr Kees van der Klugt:** Yes they are.

**The Chairman:** But it would be much happier, would it not, for the actual documents that set out the contract of insurance to cover matters without having to rely on the regulator to come in and sort things out?

**Baroness Noakes:** That is particularly the case in the case of the Financial Ombudsman Service, which is a complaints-based mechanism. It only comes in once there has been a failure to settle a complaint and it is referred on to the FOS. We cannot draft law on the basis that the FOS is going to make it fair and reasonable for a particular sector of the insured community.

**Mr Kees van der Klugt:** I can only say again, Lord Chairman, that we are very worried about the operation of that sort of clause.
**The Chairman:** I can assure you that we are concerned about Lloyd’s being worried. We want to try to get to a situation where we meet your concerns, and we will bear that in mind.

**Mr Kees van der Klugt:** Yes.

**Q16 The Chairman:** Have you said what you want to say about your objections to the proposed new regime on fair presentation?

**Mr Kees van der Klugt:** I just wanted to make one point on fair presentation—or actually three points. I would like to record our members’ concern about the message in Clause 3(4)(b). This is putting the underwriter on notice as opposed to just making fair presentation. We are advised that the law has not really changed; it is just that it is in a different spot. I am really just recording that quite a few members are concerned that putting this in Section 3(4)(b) sends out the wrong message. It should really sit under Section 3(5). It is not a lead point of ours—Section 4 is much more important—but we are getting a strong message from members.

**The Chairman:** I do not know whether you want to add anything on the points that we have been discussing, Miss Handyside.

**Ms Philippa Handyside:** I had only one comment that I should express on the part of some members of the Association of British Insurers on fair presentation. Proportionate remedies are very difficult to make work in a liability insurance context. We have members whose business is largely or even exclusively liability insurance. Where an underwriter is indemnifying for a claim made against a party, it will increase costs and delay claims if they pay only their proportionate share of the claim. In reality, to stop costs accruing and to make sure that the claim is paid quickly, they will need to gross it up to seek a contribution. That will often be a very difficult exercise. The liability members of the Association of British Insurers considered that the proportionate remedies worked very harshly in respect of their business. We raised that concern with David Hertzell of the Law Commission and he recognised, as does the industry that I represent, that the need for reform is there and that the reform will not work beautifully in all cases. It may lead to some people being in a worse position. I should register that concern on behalf of that section of our membership.

**The Chairman:** That is very helpful and clear.

**Lord Ashton of Hyde:** My question is some way back and I do not want to revisit it.

**The Chairman:** Lord Lea?
Q17 Lord Lea of Crondall: I am wondering whether we are going to ask the witnesses about the relationship between Clause 3 and Clause 4 and the whole question of the knowledge of the applicant.

The Chairman: Question 2 deals with that.

Lord McNally: Before we leave this, I would like to ask Mr van der Klugt how the particular areas that he is raising affect Lloyd’s international competitiveness. I would be very interested to see the document about the London market because part of the motivation of this Bill is to keep London competitive and reputationally competitive.

Mr Kees van der Klugt: The four core proposals in the Bill, which I mentioned at the outset and with which we are in agreement, might potentially produce more cost for the market. If you take proportionate remedies we think it might be more expensive than at present where there is just the remedy of avoidance. We think it is worth it for those core proposals. There could well be more costs but the benefits will be greater. For Section 4, in particular, the costs could be much more than suggested in the impact assessment. It could affect the efficiency and competitiveness of the market.

Baroness Noakes: That sounds very tentative.

Mr Kees van der Klugt: No, it is not. Question 2 on my list is on Section 4, which we have grave concerns about. One can never say exactly what the cost implications will turn out to be.

The Chairman: That is the problem. Any reform has certain risks involved. You have indicated that Lloyd’s accepts that there is a need for reform in this area.

Mr Kees van der Klugt: In the core areas, but not in Section 4. I have flagged one concern from members in Section 3 and have one other point to make on that. On Section 4, we are firmly of the view that there will be lots of costs associated with it and with the litigation that might ensue. We are quite clearly of that view, although we do not have a crystal ball.

Lord Lea of Crondall: It would be useful if you could elaborate on that, because in the evidence we have received, which you can corroborate I am sure, the Lloyd’s Market Association has a view about Sections 4(4) and 4(6) and so on that is not general in the industry, in particular your own evidence in paragraph 19 and your interpretation of “senior management”. Other people think that they can live with that, and in the hypothetical case of trying to define it perhaps the view would be that it would be better not to go down that track. As everybody would agree, the industry as a whole—and Lloyd’s has its own characteristics—has such a variety of different types of management structure that “senior
“management” is a good catch-all phrase. In your case, you say that it simply means the board of directors. Why have you reached that view?

**Mr Kees van der Klugt:** The Law Commission says that in, I think, paragraph 8.59 of its report.

**Ms Philippa Handyside:** Paragraph 54 of the Explanatory Notes says that the senior management is the board or equivalent.

**Lord Ashton of Hyde:** The Bill says, “individuals who play significant roles in the making of decisions about how the insured’s activities are to be managed or organised”.

**Baroness Noakes:** The Explanatory Notes cannot be used unless that is unclear. It does not seem to me to be unambiguously referring to the board.

**Ms Philippa Handyside:** Mr van der Klugt is not on his own here. I am content with the wording in the Bill. The wording in the Explanatory Notes—and I appreciate your comments—detracts from the slightly wider concept contained in the Bill and it is undesirable that it does so.

**Baroness Noakes:** Do you think it should be narrower?

**Ms Philippa Handyside:** I think it should be wider. The wording in the Bill is acceptable to the part of the industry that I represent. The wording in the Explanatory Notes is not.

**Lord Lea of Crondall:** Given that this is going to be in statute, this definition presumably replaces any obiter dicta in other documentation. Section 4(6) says that, “‘senior management’ means those individuals who play significant roles in the making of decisions about how the insured’s activities are to be managed or organised”. Is not this question of it meaning the board of directors alone not a red herring that, if true, could lead to the immense contradiction that you want everybody in the company who is putting in the claim to step up to the plate and be responsible? I am not quite clear why you are now not able to satisfactorily accept what is actually in the Bill.

**Ms Philippa Handyside:** I am.

**Mr Kees van der Klugt:** We are advised by two QCs, and going on the Law Commission’s own notes, that “senior management” is very restricted. They consider it to be the board. We are saying the same thing; we think that is too restricted. It is the board equivalent. That is our advice.

**Lord Ashton of Hyde:** You have just disappointed a whole lot of the executives.
Mr Kees van der Klugt: We think that it is far too narrow, because it does not capture in the disclosure process the information from key executives that is attributable to the company.

Baroness Noakes: You agree but it is just a question of whether the wording achieves what you each want to achieve?

Mr Kees van der Klugt: I think that is probably the case.

Lord Carrington of Fulham: Does this not mirror what is in the financial services legislation, in practice the PRA and FCA? We discussed this yesterday with the Law Commission, which interprets it as being effectively the board in any case because it assumes that the board is running the company. If the board is not running the company it would pretty quickly tell the board to come off the board, if you see what I mean. Ought this not to apply to insurance companies in the same way? If you are on a board you have responsibilities to run the company and to know what is going on in it. If you do not, you should not be on the board.

Mr Kees van der Klugt: I think we are talking about a slightly different situation. Presently—and this is what we are saying should remain the case—a wider group of people than just the board have the relevant knowledge that should be disclosed when buying insurance. In fact, the key knowledge is probably with the key executives, not just at board level but under board level and with the chain of command. The concept, as we have been told by the Law Commission as it understands it, is just drafted or understood too narrowly.

Lord Carrington of Fulham: It is not drafted too narrowly. You are saying that it is too narrow in the Explanatory Notes.

Mr Kees van der Klugt: Our advice is that it is the drafting as well.

Lord Carrington of Fulham: I do not have an insurance background; I have a banking background. I am slightly concerned that you think that a board should not insist on knowing what is in the insurance contracts and therefore the information that has been provided by the senior managers. If the senior managers are not telling the board, there is something seriously wrong in the way the company is being run, just as the PRA would consider there to be a problem in a bank if that was happening.

Baroness Noakes: It is inconceivable that a board knows about individual insurance contracts. Speaking as somebody who sits on boards today, the people who know are actually quite a long way down the organisation. At best, it is the executive committee,
where most decisions are made, having been properly delegated to them. The regulators accept that construct of governance, which is widely practised in the Anglo-Saxon world.

**Lord Ashton of Hyde:** You would have responsibility for it, which is different.

**Lord Carrington of Fulham:** I think this wording is fine, but delegation is the key. If the board feels confident in delegating, they are responsible for it.

**Ms Philippa Handyside:** Responsibility is not the same as knowledge, and that is an important distinction. In the PRA/FCA context, you are talking about a notion of responsibility almost in spite of knowledge. That is right and proper in the sense that the board should demand answers to questions, but knowledge of the context of a risk comes from the bottom of an organisation up, rather than the other way round, so I am very much in agreement.

**Lord Carrington of Fulham:** I have difficulty with junior employees being required to provide information to external parties which they do not provide to the board. Is that not what we are saying? I do not think it should be. It would not be in financial services.

**Lord Ashton of Hyde:** I do have an insurance background. For example, when you are doing computer modelling you have masses of data provided by individuals. Of course the board has to set up systems and controls to make sure that those data are accurate, but they do not know the individual details. Somebody further down the organisation whose job it is does provide that material information, but every single board member cannot know what is on the CD-ROM that is given to the insurer.

**Ms Philippa Handyside:** Or whether a warehouse stores oxygen cylinders.

**The Chairman:** There are still areas where the responsibilities are different. Could Lord Newby ask a question on this matter?

**Lord Newby:** There is obviously a difference between what is in the Bill and what is in the Explanatory Notes. For the avoidance of doubt, what is in the Bill is what should be there. The Explanatory Notes should be clearer and more accurately reflect what is in the Bill and they will be changed and reprinted.

**The Chairman:** I am most grateful for that important clarity.

**Baroness Noakes:** Does that mean that the Government think they are not legislating in accordance with what the Law Commission thought it was going to achieve, or that they are?

**Lord Newby:** The Government believe they are legislating for what the Law Commission wishes to achieve.
Baroness Noakes: Which is just the board of directors, so we are back where we started.

Lord Newby: Perhaps before the next meeting I will get a little statement from the Law Commission on this point, because there is confusion which I do not believe exists in their minds.

The Chairman: We will look forward to receiving the statement in due course. We will now move off that, unless you are particularly anxious to say something.

Mr Kees van der Klugt: Yes I am. That is not the end of Section 4 I am afraid, because then we go on to the reasonable search. Our problem with this is that it is broad, vague and very uncertain. If there are any difficulties it will take a huge amount of factual and expert exploration to see what search the company should have done and what it should have produced. We are very worried about this concept. One has to say that this section substantially ousts the common law, so it will be a brand new set of principles for a brand new statutory scheme which we think is relatively high risk. That is the best way I can put it.

Baroness Noakes: High risk in what sense? In the sense of possibly needing the court ultimately to interpret that, or something else?

Mr Kees van der Klugt: That is where it would land up, but with a lot of uncertainty and cost that could continue for a long time because of the sheer number of different factual circumstances that can arise.

Baroness Noakes: That is always the case when legislation incorporates the concept of reasonableness in relation to an act or something similar. It has to adapt because it allows the thing to adapt to circumstances as they develop in markets, which is the advantage of it.

Mr Kees van der Klugt: Our advice is that the law works in this area. The common law is being displaced in an area where, we are advised, the law works pretty well dealing with a tremendous range of factual circumstances. This new scheme will introduce a degree of uncertainty. The LMA does not see it as one of the core desirable reforms. We think it is taking quite a big risk in an area that it is not necessary to reform.

Q18 Lord Lea of Crondall: In paragraph 20 of the Section 4 part of your evidence, you say that you are concerned that Section 4, “fails adequately to address the common practice of multi-party insurance”, and that, “Where a parent company with multiple operating subsidiaries takes out insurance in its own name, with the subsidiaries as mere beneficiaries of the policy, those subsidiaries will not be ‘the insured’”, but without the knowledge, necessarily, of the parent company. This is a special case of what we have been discussing for the last 15 minutes, I guess. Are you trying to have it both ways, to use the vernacular? We
have a complexity of modern groups and shareholding arrangements. Is it in the broader national interest to stumble over facts like that, which obviously need to be covered if we are going to have a Clause 4? If you have a concern, is the onus not on you to say how you would improve the clause?

**Mr Kees van der Klugt:** We did forward our own suggestions to the Law Commission and we copied them to HM Treasury on 4 August: it is ingrained in my mind. First, we put forward some suggestions on trying to reach consensus in this area. Unfortunately, everybody has been working to a tight timescale and our suggestions were rather overtaken. We are concerned about the area of beneficiaries of cover, how the reasonable search will extend through to them and whether there is a lacuna in the Bill. What if a beneficiary, which is not owned by the holding company that places the insurance, simply does not pass through highly relevant information to the holding company? There is no ownership between them: the holding company has to assimilate what is in its organisation. Does that mean organisations that are not even owned by it? Part of our problem with the clause is knowing what is “the organisation” and what are “the others”. What if you simply do not get the relevant information from others that you do not own? We are unclear about how this will work.

**Baroness Noakes:** It would not be reasonable for you to have information from people you do not own if they have no other obligation to give you information.

**Mr Kees van der Klugt:** It would be absolutely reasonable to have the relevant information; we are just worried about the situation where it is not given. My understanding is that this is currently dealt with by the “agent to know” concept in the common law, under which relevant agents—whoever they are, it could be an employee or an outside agent—need to pass through highly relevant information. If the common law is being ousted, we are into this new area. What if the target of the search simply does not pass through relevant information?

**Ms Philippa Handyside:** We share a modest concern on this issue with the LMA. Where someone is arranging insurance on behalf of a number of other entities, there is the possibility now that the law could develop to say that a reasonable search by the insured would involve getting all the information from the beneficiaries that would be obtained if the beneficiaries were the insured. The Bill certainly does not go that far, and in fact the Explanatory Notes at paragraph 42 do not really assist in leading to that sensible outcome. Paragraph 42, which relates to Clause 4, says: “The duty falls on ‘the insured’, defined in
clause 1. In some situations, one party may enter into a contract on behalf of others. Who is ‘the insured’ in such cases is, and will continue to be, a question of construction of the particular contract”. That just does not help with the question of what happens when your insured is arranging a policy for a number of beneficiaries, corporate or otherwise. It would assist greatly if there was clarification about an arranger being the equivalent of an agent to know in such circumstances.

The Chairman: Have you an amendment in mind that should be made?

Ms Philippa Handyside: I could suggest one, which might be better in the provisions in the Bill than in the Explanatory Notes.

The Chairman: I would not ask you to draft it now, but perhaps you could in due course.

Ms Philippa Handyside: I would like to think I am up to doing it now, but I am not sure.

The Chairman: There are dangers, one knows, in not being cautious

Mr Kees van der Klugt: My Lord, we can liaise on that point, and perhaps we could resurrect some drafting we worked up with our counsel.

The Chairman: Yes. I am not saying that we are going to adopt it, but we would like to see it. I would be very grateful if you and Ms Handyside could co-operate in any way you think possible.

Lord Lea of Crondall: Lord Chairman, such a codicil to the submission would need to reconcile what is being said in respect of Clause 20—that the subsidiaries are mere beneficiaries and are not the insured. Is there not a rather unbelievable dichotomy in ordinary speech in saying that they are beneficiaries but are not the insured?

Mr Kees van der Klugt: My understanding is that these beneficiaries are people who we as insurers are generally covering. It is just that under the definition of “insured” in the Bill, they are not the insured or the contracting party. But they are people we are genuinely covering for claims.

The Chairman: Yes. Could you do that within seven days?

Ms Philippa Handyside: Certainly we could.

Q19 The Chairman: That would be very helpful. We would be very grateful to receive it. We shall move on. Do you think there is any need to amend the law of warranties?

Ms Philippa Handyside: We have not covered your Question 3, about the knowledge of insurers, on which I had one small point.

The Chairman: I thought we had just been on that.
Ms Philippa Handyside: I am sorry. We covered the knowledge of the insured, but there is just one small point about the knowledge of insurers. Clause 5(2)(b) fixes insurers with knowledge of information that is readily available to the individuals making the underwriting decision. I only express the concern of the modern era that a glut of information is readily available. Almost any information is readily available, and that could infect the insurer with an almost impossible burden of knowledge which in reality they will not live up to. The information that is out there on the internet, which you do not have to pay for, should not necessarily be regarded as information that is readily available to the person making the underwriting decision. You might not know that it is out there or where to find it. There could be some information in the Explanatory Notes covering the point that just because something is on the internet, it does not mean—

Lord Carrington of Fulham: I do not know how you can restrict that. If it is there, you do a Google search for it and you find it. It is there and readily available. Do you say that you can use one search engine but not another?

Ms Philippa Handyside: I agree that it is impossibly difficult. The problem might be in the existence of this imputed knowledge provision. We discussed this at length with David Hertzell. The Law Commission is rightly trying to create a situation where the underwriter cannot live in his little silo and not have regard to information that it would be reasonably easy for him to find out, either within his organisation or more generally, about a risk. That is an aim which we applaud and support. The question is just whether this clause drags in a little too much for those purposes.

Lord Ashton of Hyde: It does differentiate though, referring to information “held by the insurer”.

Ms Philippa Handyside: Yes, although of course everyone has access to the internet.

Lord Ashton of Hyde: But that is not held by the insurer.

Baroness Noakes: Is this not about the insurer’s own information?

Ms Philippa Handyside: The insurer’s own information.

Baroness Noakes: But there is still a question mark in respect of the quantum of information that is held within a large and complex insurance group.

Ms Philippa Handyside: Absolutely.

The Chairman: I know that the Minister would like to ask something.

Lord Newby: Clause 5(2)(b), as Lord Ashton just said, does not simply say that the information has to be readily available but that it has to be held by the insurer and be readily
available. That does not mean that we are talking about anything that might conceivably be on Google at all. It is saying that the information has to be held by the insurer. Just being able to access it by Google does not mean that it is held by the insurer, does it?

Lord Carrington of Fulham: Although you would expect the insurer to do due diligence, presumably, to find out what is readily accessible, as you would on anything else these days.

Lord Newby: Yes, but that is a slightly different point.

Baroness Noakes: The point is about information in the claims department and whether that has been passed on. That sounds simple, but in large groups it is not necessarily simple, although that is not the point that was being originally addressed.

Ms Philippa Handyside: You are absolutely right to point out that “held by the insurer” connotes something more than something in the internet ether.

The Chairman: However diligent an insurer is, Google will have more information.

Ms Philippa Handyside: Baroness Noakes is right: in a multinational insurance company there could be information about a risk buried in another country in another claims department which it would not necessarily be reasonable to expect—

Lord Ashton of Hyde: But if it is material to the risk, it would be reasonable, would it not?

Ms Philippa Handyside: There is certainly a question about the practicalities. In fact, there is not that information consolidation and searchability, and that would result in a massive additional cost.

Lord Ashton of Hyde: It is just a question of the insurer’s systems and controls and how they organise their company.

Baroness Noakes: It is partly how they organise their company and where they book their contracts. It is specific to the insurer: i.e. not all companies within an insurance group. It is a question of whether in practice there are any highly complex companies where that might be an issue. It might not be such a big issue.

The Chairman: Are these not just the sort of problems that are bound to have to be sorted out with regard to new legislation of this sort where there is the background of the previous legislation, which has been in existence for over 100 years? Cannot the commercial court make it clear relatively quickly where the practicalities lie?

Lord Lea of Crondall: Presumably the alternative would be European or multinational legislation whereby the running of a multinational company—it is a fact of life—means that it has to have a management structure that has to take responsibility. The fact that it is
complicated and puts up costs is in relation to the huge benefits of running a multinational company.

Ms Philippa Handyside: I am not sure.

Lord Lea of Crondall: You referred to the fact that somebody could be in another country and it might be difficult to search for this information. If we are talking about an insurable risk, the responsibility extends.

Ms Philippa Handyside: Yes, and the wording does say “readily available”, so it does not mean that you have to have infinite internal search engines to drag something up. It should be possible under this test for a piece of information to be held by an insurer that does not infect the knowledge of the underwriter. You are right that you do not arrive at perfect results. I just wanted to voice a concern about “readily available” that what the Law Commission was trying to achieve here in discussions was the recognition that in complex insurance companies you do not have a perfect flow-through of information held by the insurer to the underwriter.

The Chairman: Thank you very much, Ms Handyside. That is very helpful.

Mr Kees van der Klugt: As Lord Newby said, we had similar discussions with the Law Commission, but in the organisation we took some comfort in the words “held by the insurer”.

The Chairman: I wonder if we may move on. Can I ask Baroness Goudie to ask her question?

Q20 Baroness Goudie: I am pleased that you agreed with the Bill’s approach to fraudulent claims. How do you suggest we treat fraudulent means and devices as a lesser form of fraud?

Mr Kees van der Klugt: Lord Chairman, we are content with the Law Commission’s approach to fraudulent claims, and we simply think when it comes to the question of treating fraudulent means and devices as a lesser fraud it should be left to the courts. That is the clear view that I get from our members.

Ms Philippa Handyside: We and our membership agree entirely with the Law Commission’s approach that it is not a helpful distinction. Fraud is fraud and it is something that the Government are taking seriously. Chris Grayling announced a taskforce yesterday to address issues of insurance fraud. It is not the time to create fraud-lite.

Baroness Goudie: Thank you very much.
Q21 Baroness Noakes: Should there be a duty on insurers to make payment within a reasonable time—that is to say, should the clause that does not feature in the Bill be reinstated, not necessarily in the terms in which it was originally proposed but in the revised terms that I think you are aware of? I think that the ABI has said that it is supportive of the revised wording.

Ms Philippa Handyside: I am not sure that I have seen a revised wording of what was Clause 14. A version of Clause 14 was produced.

Baroness Noakes: I misled you. It is the original one, which has been dropped. It has not been revised.

Mr Kees van der Klugt: This is why I waved my arm yesterday. There is some confusion. I only waved it because I felt that I could answer your question immediately. We did not deal with this in our submission, and I think probably others also did not, because no new draft was proposed by the Law Commission, whereas there was on the dropped Clause 11.

The Chairman: Is there anything you wish to say?

Mr Kees van der Klugt: Yes, most certainly. The first thing to say is that it is already a commercial imperative to pay claims. Our members certainly pride themselves on paying claims. One of our members pointed out in a written submission that league tables are kept by the brokers on who is the best at paying claims, so there is a commercial imperative first of all. Secondly, there is a regulatory imperative. I am not exactly sure where it has got to, but I think that the Financial Conduct Authority is doing one of its thematic reviews. It is moving away from the consumer arena into the commercial arena too, quite rightly. It is doing a thematic review on commercial claims. No doubt there will be guidance and things to look out for in that.

I am just making the point that there is a regulatory imperative as well. One of our main concerns about the Clause 14 damages for late payment, which was deleted, is that it could have given rise to speculative claims in the market. David Hertzell of the Law Commission is worried about that point. He agreed with that point yesterday and had indicated similar worries in fact about the deleted Clause 14. I do not want to put words into his mouth, but I think that is what he said yesterday and it is what I have heard before. There is a very great worry about speculative secondary claims for damages as soon as you have a difficult claim. With a difficult claim, the parties feel that they have to go to the courts or arbitration to deal with it. As soon as that happens, you get a speculative secondary claim for damages for late payment. In fact, you are now in court and it might take three years.
The Chairman: First, we have to understand what you mean about a late payment. I may be wrong and I would appreciate any help that you can give me, but I assume that if there is a bone fide reason for not making a payment, it is not a late payment. It is a late payment when you have no justification for making a late payment. I think that you are talking about the situation where there is some substance. I know that the position across the pond may be different, but we are dealing with the situation so far as English law is concerned, which I accept will change to a degree.

Mr Kees van der Klugt: I am not so sure that we have the same understanding of the Law Commission’s intention. Our understanding was that if you went to court for genuine reasons and lost, you should have paid the claim without going to court. The Law Commission is clearly giving time for investigation, adjustment et cetera. However, if you go to court for genuine reasons and lose your action, the reasonable time for payment—

The Chairman: Shall we see whether the Minister could help on that?

Baroness Noakes: If it has gone to court, surely it is open to the party to pay the money into court to stop any further problem arising, so that it has the possibility of limiting its financial exposure once litigation has commenced.

Mr Kees van der Klugt: Certainly. That is the case, but we are talking about another whole segment of potential liability for damages.

Baroness Noakes: But relatively few go to court. We have had evidence that says there are relatively few disputes on insurance contracts.

Mr Kees van der Klugt: I think there are fewer and fewer. In the Law Commission’s consultations it was down to about 25 in the High Court in the last 10 years.

Baroness Noakes: So it is not a very big issue.

Mr Kees van der Klugt: Well, I think there are many more arbitrations going on.

Q22 The Chairman: I am very grateful for having my attention drawn to this. Did the draft clause, which we no longer have, deal with it in subsection 4, which says, “If the insurer shows that there were reasonable grounds for disputing the claim, whether it is the amount of any sum payable or whether anything at all is payable, the insurer does not breach the term implied by subsection 1 merely by failing to pay the claim, or the affected part of it, while the dispute is continuing.”?

Mr Kees van der Klugt: I take that on board. The slight difficulty is that we are talking about a clause that was deleted from the Bill last summer and it is not absolutely fresh in our minds.
The Chairman: I agree. That is why I am so grateful to the learned clerk for the draft of it, because it seems to me to be covering, in very clear language, exactly the point that we were discussing.

Mr Kees van der Klugt: Can I just make some other points?

The Chairman: Yes, certainly.

Mr Kees van der Klugt: There is a technical point there. If the damages for late payment claim is being heard at the same time as the main underlying dispute, there is a technical issue with having to release your privileged advice to show that you are acting reasonably. You would have very prolonged trials, because you would probably have to try the underlying matter first and then have the damages for late payment trial, because only at that point could you start to release privileged advice.

The Chairman: That surely is a molehill in these matters. The situation is that if there is a dispute that engages the court as to the right solution to the principal point, I cannot see that there would be many cases where the subsidiary point would be contested.

Mr Kees van der Klugt: I can only say that we feel that it is quite a practical point. You would have to have one trial after the other, because in showing you were reasonable you would, potentially, have to release your privileged advice. That is a technicality. I just wanted to raise my list of points.

The Chairman: By all means.

Mr Kees van der Klugt: Another very technical point is on limitation. Under the Law Commission’s proposed clause, which was dropped, the limitation period would move away from the date of loss to the time when it would have been reasonable to have made the payment. That could have reserving implications. I am not an actuary, but that is the feedback that we have been getting from our members. I think the Law Commission is quite sympathetic to that issue. There could be reserving issues in terms of more uncertainty. It is a technical point, but a material one.

The Chairman: Any other points?

Mr Kees van der Klugt: No. That is my quota.

The Chairman: Thank you for that.

Ms Philippa Handyside: Do you want to finish before I talk about damages for late payment?

Mr Kees van der Klugt: I just want to throw in another couple of things. One should not forget that the courts can already award interest.
The Chairman: Can they now award compound interest?

Mr Kees van der Klugt: They can award interest, but not compound interest.

The Chairman: I do not think they can.

Mr Kees van der Klugt: They can award indemnity costs for very bad behaviour by an insurer, so there are mechanisms. Because this was dropped from the Bill last summer and the Law Commission did not issue another draft as they did for Clause 11, we put in a suggested draft last August, which we thought was going to the nub of the Law Commission’s problem, about bad behaviour. The draft clause gave a right of action if there was deliberate or reckless mishandling of a claim.

The Chairman: Could you let us have that?

Mr Kees van der Klugt: Yes.

Baroness Noakes: That would be not the law of England but the law of Scotland, which is one of the advantages of this clause, as I understand it.

Ms Philippa Handyside: This is a point on which I find that members of the ABI and the LMA are not in agreement. The members of the ABI were supportive of the introduction of Clause 14. It is universally accepted and supported by our members that claims should be paid within a reasonable time. It is not just disputes that dictate a reasonable time. For instance, if a business is flooded it has to dry out before you can start to reinstate. Obviously that goes to what a reasonable time is and the law is more than capable of acknowledging this.

We discussed with the Law Commission our concern about introducing an implied term of paying claims within a reasonable time. There is a very active entrepreneurial claims handling industry in the UK. You could create here a new cause of action so that a claim could be paid—not disputed but paid—and a claims management company could offer a service to the insured saying, “Do you think there was a delay from which you suffered a loss and it could have been paid a couple of months sooner?” They can do a number of pre-action steps to work up that claim, the costs of which they will recover, even if there is a Part 36 offer or acceptance of the claim at a very early point. This has the potential to add a massive amount of frictional cost to the system. I quote the example of noise-induced hearing loss, which the claims management industry has fastened upon and for which claims in the UK have increased by 400% in the last four years. That is evidence of the impact of the growth of those claims. I know that those are personal injury claims, which we are not talking about here, but the typical costs recoverable by the claims management industry are multiples of
the damages paid. These are largely small amounts of damages, although you might be able to show a particular loss, but the concern is that it opens the floodgates to a new revenue stream for the claims management industry in this country. The ABI and its members are supportive of this clause, notwithstanding.

**The Chairman:** You have to be competitive with what is happening in other territories.

**Ms Philippa Handyside:** Yes, in the rest of the world. No member of the ABI came out against this clause, but there are members who are very supportive of it and who point out that for their SME customers, a claim being paid within a few months can be the difference between survival and failure. I represent members who are very strongly in favour of the introduction of a clause along these lines. Others are more agnostic about it, but no one has set their teeth against it.

**The Chairman:** If there are abuses but otherwise a change in the law is desirable, it is up to the courts to put in place procedures so that there are disincentives to abuse the system.

**Ms Philippa Handyside:** You are absolutely right, and it is part of my day job to make representations for civil justice reforms that achieve that in all sorts of areas.

**The Chairman:** We do our best.

**Ms Philippa Handyside:** Progress is slow in that sort of reform, as you well know.

**Lord Lea of Crondall:** I think we are now on Question 8.

**Baroness Noakes:** We have just addressed it actually.

**Lord Lea of Crondall:** In that connection, perhaps Lloyd’s could comment on the Clause 14 that was, which we all have in front of us. What in particular is wrong with it?

**Mr Kees van der Klugt:** Because the clause was taken out of the Bill last July, I do not have it in front of me.

**Baroness Noakes:** Could we have a note?

**Mr Kees van der Klugt:** We came up with a revised draft that we put to the Law Commission in August. We are very happy to put that into play again.

**The Chairman:** Could you be kind enough when you send your revised provision to bring a note at the same time explaining the points in writing? That will let us get ahead.

**Mr Kees van der Klugt:** I could certainly do that.

**The Chairman:** We would be very grateful if you did.

**Lord Lea of Crondall:** Would it be fair to say that you are conscious of the fact that the issue of late payment is not picking on the insurance industry? A Bill for small firms got a Second Reading yesterday that has major clauses on this very question. There is a normal
profile of the great damage done to people by late payment. Is it right for Lloyd’s to feel that it could be for another Bill? You are not opposing it in principle, but what is this hypothetical clause you could live with if it was in another Bill? Why not this Bill?

Mr Kees van der Klugt: If our draft could be lived with, it could be in the Bill very quickly. We put forward another draft and we could do that again. It is not for me to say whether there is enough time to put something else into the Bill. I know time is very short.

The Chairman: You are absolutely right, but if you could let us have it within a week I think we would be able to accommodate it.

Mr Kees van der Klugt: I would like to give some comfort to Lord Lea of Crondall that paying claims is why we are there. It is a commercial imperative. We are in a highly competitive market and if we did not pay claims properly and quickly the London market would not thrive, and we do. We should not lose sight of that. Those are my points. I was just trying to give some comfort on the board area.

The Chairman: Are there any further questions from my colleagues? We are most grateful for your evidence. It has been extremely valuable. We look forward to receiving one or two things, but it really has been a great help.

Ms Philippa Handyside: Thank you for the opportunity to be heard.

The Chairman: You can stay or leave but we are going to move on to our other witness.

Mr Kees van der Klugt: Thank you, as the ABI said, for the opportunity to develop this.
Examination of Witness
Lord Justice Longmore

Q23 The Chairman: Lord Justice Longmore, we are most grateful to you for rearranging your affairs so that you could give evidence before us. I am sure it is going to be of great assistance. You have had a very good opportunity to listen to proceedings.

Lord Justice Longmore: Yes, it was very useful and informative for me to hear your questions and the responses. I would say initially—and this is really only the personal view of someone who has been involved in insurance litigation for most of their professional life—that I am very supportive of the Law Commission’s proposals. The world has not stood still since 1906. It is a very long time since Parliament has taken commercial insurance into its purview. Two or three years ago it dealt with consumer insurance, but the terms of the Marine Insurance Act, which itself was a codification even in 1906, have become very creaky. In my view, the Law Commission has done sterling work over a number of years to try to bring the law into the modern age. I am very supportive of what it has done.

Q24 The Chairman: You have heard the concerns from Lloyd’s about certain aspects of the Bill. While its evidence is clear and fresh in our minds, do you wish to make any comment about it, having listened to it with your great experience?

Lord Justice Longmore: Perhaps a little. On the whole in expressing its concerns, Lloyd’s has accepted the core principles of the Bill, particularly the fair presentation of the risk. That seems to me to be rather essential. It is a concept which the courts have themselves been moving. What is so deleterious about the 1906 law is the fact that an insured has to disclose what is material in the view of a prudent insurer—the insured has to look into the insurer’s mind to know what material is. I do not think that the concerns expressed go to that. If one can at least achieve that, it would be quite a considerable step forward.

The Chairman: Could I interrupt you there, if I may—and please forgive me for doing so—because it seems to me to be directly relevant to what you have just said? Do you have any views as to whether the Bill should extent to reinsurance?

Lord Justice Longmore: I am not very clear whether the intention is that it should or should not. My view is that it would be beneficial if it did.

The Chairman: I was hoping to hear your view.

Baroness Noakes: Should it say so explicitly?
**Lord Justice Longmore:** It would be better if it said so explicitly. One could have a nice legal case, I suppose, about whether insurance includes reinsurance. I think it has actually been held in the sense that when an insurer is authorised or not authorised to do business, it includes a reinsurer. However, that is a very different question. If the Law Commission’s intention, and your intention, is to include reinsurance, which I would support, it would be better if it said so expressly.

**The Chairman:** Thank you very much. I apologise for the interruption. Please carry on with what you were going to say.

**Lord Justice Longmore:** I was going to have a word about the concerns that you have heard expressed this morning. They are mainly in the area of non-disclosure: what the insured should know. Concerns have been expressed about what the Bill says not going far enough as to what the insured should know. I think the discussion about senior management concluded really that the Explanatory Notes, which I have not actually seen, may not be quite reflective of what the Law Commission intends. I think the Law Commission intends that those in a senior position responsible for insurance, whether at board level or not, should be caught by the concept of “senior management”. The question of reasonable search has been raised in a comparatively neutral way by members of Lloyd’s because they say that it will be a departure from the common law that will make it more difficult for the insured because they will now have to do a reasonable search and they did not have to before. Also, it may not go far enough because of the concerns of beneficiaries in particular.

I am not sure that it is such a departure from common law as Lloyd’s may be thinking. The common law requires the insured to disclose that which he knows or ought to know. Here, we are talking only about things that, ex hypothesi, the insured does not know. So the question is: what ought he to know? These days it seems to me that the concept of a reasonable search is itself a reasonable concept. You do not have to research everything; you have to do a reasonable search. I will come back to the uncertainties behind that in a moment, but it seems that that may be right as a concept. It is not very different from referring to what the insured ought to know, although it probably qualifies it, because under the 1906 Act the insured might be said to be in a position where he ought to know a lot of things that perhaps would not be covered by a reasonable search. But there are not many, so I do not believe that it is a great departure from the common law.

I would accept, however, that “reasonable search” is a slightly uncertain concept. It may give opportunities either for an insurer to say, “You have not done a reasonable search”, or for
the insured to continue to dump material on the insurer, but it is a fairly finite matter. It might of course depend on litigation, but once one has had two or three cases I would hope that the judges of the commercial or mercantile courts up and down the country would be able to know and explain what a reasonable search does require.

There may be a point about beneficiaries that needs to be ironed out. I do see that. If a big company insures for the benefit of its employees, and if the employees know something, should that be disclosed? Not if it is a mere employee, unless it is something which the insured should have discovered by a reasonable search. But I think myself that that is fair enough.

The Chairman: Would anybody like to ask anything?

Q25 Baroness Noakes: Certainly. Sir Andrew, could you let us know your view of the Bill’s treatment of warranties?

Lord Justice Longmore: I certainly support the current Bill in what it says about warranties, in Clauses 9 and 10. The law is currently extraordinarily strict, as you no doubt know. You have to comply directly with any warranty, and if you do not the whole contract is discharged. That can lead to serious injustice, so I certainly support Clauses 9 and 10 so far as they go. There is the question of whether the Bill should also include the old Clause 11, which is not in the Bill but which is very pertinent to any discussion about warranties. I am afraid I am not quite clear why it has been taken out of the Bill at the moment. I think the original proposal was desirable. I see that it changes the current law quite a lot, and again may lead to a bit of uncertainty, but in most cases where there has been a breach of warranty it will be fairly clear whether or not it had anything to do with the loss. Most European countries, I think, have some concept that any breach of a warranty or of a term in the insurance contract must have some connection with the loss before the insurer can rely on it. I myself had a case where there was a warranty on a fish farm where there should be a 24-hour watch and there was not. However, the loss was caused by a tremendous storm that took place in a Norwegian fjord, and whether there had been a watch or not it would not have made any difference to the fact that the fish farm was totally lost. The case could have had very unfair result if it had been dealt with solely under English law. Clause 11 would certainly have ameliorated that.

The Chairman: One hopes that under English law as it is at the moment, in the sort of situation that you have given the responsible insurer will actually accept and adopt an approach that reflects the law as it is proposed to be.
**Lord Justice Longmore:** One would hope so, but it would not necessarily happen. I have to say that in this case that was not the approach taken by Lloyd’s.

**Baroness Noakes:** So you would favour the reinstatement of Clause 11, as redrafted?

**Lord Justice Longmore:** I would encourage that, yes.

**The Chairman:** I must point out that the insurer may be in run-off or something of that sort.

**Lord Justice Longmore:** Of course, and the liquidators may have to take technical points for everybody’s benefit.

**Q26 The Chairman:** Do you think there is a need for a clause regulating the operation of other conditions? Do you foresee any issue with the distinction drawn between risk definition and exclusion or the possible introduction of a causation test?

**Lord Justice Longmore:** I think that is what Clause 11, which is not currently in the Bill, is getting at, in particular subsection (2), which says, “if a loss occurs and the insured has breached a term then the insurer is not to rely on the breach to exclude if the insured satisfies condition 3”. I would be in favour of that. The other matter that you discussed, which I am afraid I have not thought about in detail because it is not currently in the Bill, is late payment, which is the most recent thing. Again, I can see some scope for encouraging litigation. If an insurer does not pay, these days a claims management company may come along and say, “They could have paid it three or four months sooner. Don’t you think it might be worth having a case?”. I am not sure if that is why the Law Commission has currently withdrawn it from the Bill.

**The Chairman:** I think it was considered somewhat controversial and was not suitable because of this procedure.

**Lord Justice Longmore:** I can see that it is a matter of some controversy and perhaps therefore should not be subject to this procedure.

**The Chairman:** We would be grateful, if it does not impose on you, if you would take the opportunity to have a look at that at your leisure—if you have any—and let us have a note on what you would say.

**Lord Justice Longmore:** About Clause 14?

**The Chairman:** Yes. That would be quite useful. We would be grateful for that.

**Lord Justice Longmore:** I would be happy to do that.

**The Chairman:** I do not know whether you heard me mention sending it within seven days.
Lord Justice Longmore: Yes. I think that it could probably be done in seven days.

Q27 Baroness Goudie: Sir Andrew, do you regard it as appropriate to treat fraudulent means and devices in the same way as other cases of fraudulent claims?

Lord Justice Longmore: Yes. I am certainly supportive of what the Law Commission has done in the Bill on fraudulent claims. There is a sort of satellite law in this area about fraudulent devices, which are not exactly claims. It does not seem that this clause is intended to deal with fraudulent devices unless the courts can be a little more sensible than they have been and adapt the word “claim” to include devices, which I think might happen if this clause is in its present form.

The Chairman: What do you mean by “fraudulent device”?

Lord Justice Longmore: It is something that is done by an insured not directly in the claim but in order to improve his chances in the claim. I had a case where an insured told a lie in order to achieve a more favourable jurisdiction for the purposes of a claim being determined, so it was not exactly a fraudulent claim but a fraudulent device to secure a more favourable result than he would otherwise get. He thought that he would do better in England than in some other place, so he pretended that there was a clause that said that England should determine the case. So technically, it is a bit difficult to call it a fraudulent claim.

The Chairman: So it was a procedural device?

Lord Justice Longmore: Yes, it is usually something like that. Suborning a witness is not necessarily making a fraudulent claim, although it might be. These things merge into one another, and I think that the Law Commission and the Bill are probably well advised to leave fraudulent devices on their own and deal with fraudulent claims that require the reform that is in the Bill.

The Chairman: The courts may have finally to adjudicate on what is a claim.

Lord Justice Longmore: Yes, that may be right.

Lord Lea of Crondall: As a judge in those circumstances, when there is a flagrant abuse of some device—I did not know that a lie was a device, but I think that is a category of point—would you as a judge feel under any obligation to set in motion some process of rectifying that or doing something about it? Or is it a case of it not being in your jurisdiction so nothing is done about it?

Lord Justice Longmore: Well, if it is a fraudulent claim, you dismiss the claim. But I think you are asking whether you do anything more than that.
Lord Lea of Crondall: No, if it were not a fraudulent claim because of the technical point you are making, if it were some other device, including a lie, would you simply accept the fact that a lie had been told? Is that okay?

Lord Justice Longmore: No it is not, not once the lie is exposed.

Lord Lea of Crondall: So what happened in that case?

Lord Justice Longmore: I think I am right in saying that we ensured that the case took place in the right jurisdiction.

Lord Lea of Crondall: No, I do not mean that. Is the fact of telling an untruth something that you would then need to do something about as a judge?

The Chairman: I think what is being is asked is whether you would refer the matter to be Director of Public Prosecutions, for example.

Lord Justice Longmore: No, one would not normally do that. I am afraid that sitting as a judge in the commercial court one comes across lots of very questionable conduct. If you referred every witness who told a lie to the Director of Public Prosecutions he would get fed up pretty quickly.

Lord Lea of Crondall: I am glad to see that on the record.

Q28 Lord McNally: I wonder if we could ask one more piece of advice from you, Sir Andrew. For a layman, listening to advice from Lloyd’s, one gives due respect. Everyone who comes before us seems to tell us what a wonderful piece of legislation this is, but—. Lloyd’s has been particularly “but”-y. Apart from issues that have to be deferred because they are too controversial for this process, is there anything in the evidence that from your experience you think Lloyd’s has really pushed a button on that we should take very seriously?

Lord Justice Longmore: I was rather impressed by what was said about the beneficiaries point, which I touched on. If a large company insures its employees or even its contractors, have we got quite right the obligations of disclosure about that? An employee or contractor may know that he has a very bad claims record, for example, but that is not known to the senior management. That is something that one should perhaps look at again. That was one matter that certainly struck me while we are hearing the evidence.

Lord Lea of Crondall: Have you come across difficulties at present about where responsibility lies in the insured, in terms of the board of directors? We have always assumed that the pyramid goes to the board of directors. Do you have any comment on that? It has become a bone of contention.
Lord Justice Longmore: It seems that it has, but currently the insured is deemed to know what his agents or employees know, so that does not really arise. But I can see that under the reforms it may arise because the obligation is now confined to senior management and senior management have to ensure that there is a reasonable search. It seems to me that that is exactly what senior management should do. We have to differentiate between the board and senior management as far as insurance is concerned, because quite a lot of boards will of course be anxious to ensure that their company is properly insured but the details of the insurance will inevitably be dealt with by an insurance department, and probably by an insurance broker. It would be a completely independent firm. The extent to which the board should, on what is just one aspect of its business—the risk aspect of its business—actually take active steps to know everything that the insurance department knows, let alone what an insurance broker knows, is almost a counsel of perfection.

Lord Lea of Crondall: Thank you.

The Chairman: Are there any other questions? Thank you very much indeed. If you have nothing that you can usefully add, just let us know.

Lord Justice Longmore: I will submit a note about late payment.

The Chairman: That concludes the evidence that we are hearing today. We will continue on Tuesday 9 December, at 10.00 am in Room 4.