

VIEWPOINTS

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FRAUDULENT INSURANCE CLAIMS

Frontispiece

Good morning. My name is Rhys Clift and I am a partner in the London law firm Hill Taylor Dickinson.

It is a pleasure to speak to you today on the subject of Fraudulent Insurance Claims in particular the presentation of fraudulent claims on marine insurance policies under English law.

This is something of a game of two halves. I have prepared what is perhaps a rather academic paper on Fraudulent Insurance Claims which you may wish to read at your leisure after today's talk. This presentation will, however, be a slightly lighter affair and is designed to cover the general picture with some illustrations, some factual and some let us say hypothetical.

Screen 1

1. Introduction

As you can see, I propose to deal with this subject under eight main headings as follows:-

1. First, a general introduction.
2. Secondly, by way of contrast to illustrate the general attitude of English (and Scottish) civil law to the presentation of fraudulent claims. As you will see what one might call the "ordinary" law of fraud in respect of civil claims is quite different from the "fraudulent claims rule" in insurance claims.
3. Thirdly, I will be looking at the attitude of the English Courts to fraudulent insurance claims in general, in particular the difficulties of pleading and proving fraud.
4. Fourth, we will look at section 17 of the Marine Insurance Act 1906 which has been said to embody an overarching duty of good faith (utmost good faith which it is said exists both before and after the making of an insurance contract).

In sections 5 and 6 I will be looking at what is or may be (perhaps when the law is more fully developed) the nature and scope of the law as to:-

5. "The Fraudulent Claims Rule"; and
6. Possible implied contractual terms.
7. In section 7 I will be looking briefly at change not envisaged in any recent authority, in particular to the Fraudulent Claims Rule.
8. In section 8 I will then be offering some conclusions.

Screen 2

Introduction

What is the extent of fraud? Naturally the answer to this depends on what type of frauds, whether "criminal" fraud" or "civil" fraud only, whether fraud perpetrated on insurance contracts, on marine insurance contracts, within the United Kingdom or elsewhere within the main underwriting markets.

They say that there are lies, damn lies and statistics and perhaps this is wholly appropriate in the context of a talk about fraud. Let us pluck out two figures as examples.

First, as you may know there is a new statutory definition of fraud working its way through the English Legislature. It has presently reached the shape of a new Fraud Bill. The primary focus of that Bill is not, of course, marine insurance but what I am choosing to describe here as "criminal" fraud. The new Fraud Bill is designed to replace a whole catalogue of English legislation, primarily the Theft Act 1968. The Bill has come into being because the English Home Secretary asked the Law Commission in 1998 to look into the existing law of fraud and to consider whether it was easy for juries to comprehend, adequate for cases to be prosecuted effectively, fair to potential defendants and whether it met the needs of developing technology. Of course as soon as you hear the word "juries" you know that I am not going to be talking about claims on English marine insurance policies because in contrast to procedure in the United States we have in England almost entirely abandoned juries for the determination of civil claims.

In any event the Law Commission's work has resulted in some recommendations which the Government has set out in part in a draft Bill. In tandem with the drafting process the Home Office and the Serious Fraud Office commissioned a review of fraud by National Economic Research Associates which estimated that the annual economic cost of fraud to the United Kingdom is about **£14 billion** (about US\$ 25 billion). Now by way of comparison that is about 25% of the annual budget of running the English National Health Service. This is, I would suggest, a startling illustration of the propensity for dishonesty where there is opportunity and inclination.

But what about insurance fraud? As you are probably also aware the English and Scottish Law Commissions have jointly embarked on a process of review of English insurance law in this the centenary year of the passing of the Marine Insurance Act. It is intended that there should be very wide consultation before the joint Law Commissions should put forward any recommendations and the Law Commissions have therefore issued a joint Scoping Paper canvassing these views very widely. That Scoping Paper sets out a whole catalogue of issues which might be the subject of reform including fraud and the existence and the extent of the post contractual duty of good faith, both of which I am going to touch on in this talk. But to come to the numbers, in the section on fraud it is reported that the Association of British Insurers in March 2005 estimated that the cost of fraudulent insurance claims in England was approximately **£3.5 million** per week (or about US\$ 6.3 million); about £180 million per year.

So much for the selective statistics. In a nutshell, what is the law and how does it work?

As you can see I would suggest that there are essentially three main types of fraudulent claim which can be made on marine insurance policies. They are these:-

Deliberate losses.

The classic illustration of a deliberate loss is where the assured procures the casting away of his ship by sinking and flooding or perhaps by fire. It is perhaps a startling proposition that, if Paul Todd in his book on Maritime Fraud is right, scuttling is "probably quite common".

Why should this be so? Perhaps it is something to do with the fact that commercial vessels can be insured for sums which are well in excess of their value and owners can find themselves, because of market fluctuation, perhaps with a vessel so insured which is worth substantially less than the value of the mortgage money borrowed on her. The temptation might be irresistible.

Secondly, what one might call exaggeration.

As you will see the example given in my paper is of a case where a vessel was undergoing repairs and where the owners falsely declared to the Underwriters' surveyors and produced documentation in support to demonstrate that the vessel had had its lubricating oil completely drained and re-charged, thereby "exaggerating" the total claim to be made on Underwriters by several thousand Dollars. Perhaps the motivation in doing this was that the assured anticipated being "beaten down" by the Underwriters' surveyors on the genuine claim and was therefore increasing the claim in order that he should only be beaten down to the "right" amount.

Thirdly "fraudulent devices".

A fraudulent device is false evidence which is produced to support what might (or might not) be otherwise a perfectly genuine claim. Because of the particular rule that applies to fraudulent claims on insurance contracts fraudulent devices (and exaggeration) are an extremely dangerous practice for an insured to engage in. If the assured is caught, and it may be that they often are, the consequence is that he will forfeit his rights under the policy. I will come to exactly what it is that might be forfeited later in this presentation.

There is a fourth class which I have referred to here as "non-disclosure".

We all know that under English insurance law the assured has an onerous duty to disclose material facts at the time of negotiation and placement of a marine insurance policy. These are facts which the assured either knew or ought to have known and which might have a bearing on the judgement of the Underwriter in deciding whether to accept the risk and if so on what terms.

Is there a duty of a similar nature and extent to disclose all documents and information which might have a bearing on Underwriters' judgement at the time of presentation of a claim? I am going to suggest, and I think that this is clearly the case, that there is no such equivalent co-terminous duty. This is almost certainly why in drafting the new International Hull Clauses 2003 Underwriters included a provision in clause 45.3 which provides that the claim would be forfeited if the assured knowingly fails to disclose matters which are relevant to Underwriters'

proper consideration of the claim. (Perhaps this explains why the commercial take up of those clauses is low). I am going to return to this later.

Screen 3

2. General approach to civil fraud

There is a sharp distinction to be made between the treatment of what one might call ordinary or civil fraud on the one hand and fraud in relation to insurance claims (at least direct insurance claims by an assured against his own insurer) on the other.

The general position with civil fraud is this: it will not of itself necessarily deprive the claimant of the benefit of a genuine claim. So if A brings a claim and pursues legal proceedings against B and A either say massively exaggerates that claim or puts forward "fraudulent devices" in support of it A will not necessarily be wholly deprived of the benefit of his claim against B, unless the manner in which A has chosen to prosecute his claim has made a fair trial impossible.

In my paper you will see that I have picked a couple of examples to illustrate the general proposition. The first is a personal injury case where the injured party put forward a claim of £1 million and at trial was only awarded by the Judge £55,000. In that case the Judge specifically found that the claimant had exaggerated his disability when giving evidence to the Court but nonetheless damages were awarded.

In the second illustration I have set out some information regarding a Scottish case following the pollution caused by the tanker "Braer". In that case a group of companies asserted that it had suffered losses in its fish farming operations because of an exclusion zone set up following the pollution. The group of companies put forward documentation seeking to demonstrate that agreements had been made between them at arm's length and produced falsified letters purporting to be evidence of these contracts. In the proceedings that ensued the Scottish High Court concluded that the letters had indeed been falsified and witnesses representing the claimant had given false evidence and indeed had been involved in a fraudulent scheme in the presentation of the claim. Nonetheless the civil claim was allowed to proceed on the basis that there were in fact no legally binding contracts but the claimant had nonetheless genuinely lost the opportunity to *make a profit by rearing salmon off Shetland*.

So you can see that even in the clearest of cases where there has been "civil" fraud, where the claim is not an insurance claim and where the claim is genuine and where the claim has not been pursued in such a way as to make a fair trial impossible, the claimant can still succeed. I am, however, pointing out briefly in my paper that the claimant might potentially suffer some adverse consequences in the costs which he might otherwise be awarded.

Screen 4

3. Fraudulent Insurance Claims – Pleading and Proving Fraud

Pleading Fraud

Even if Underwriters suspect fraud, and might feel that they have good grounds, fraud is often the last defence to be pleaded; if indeed it is ever pleaded. This may explain why Underwriters may choose (if they can) to run a whole catalogue of other potential defences (for example avoidance for non-disclosure or misrepresentation or an argument that the policy is void for breach of warranty) even if there might be practical difficulties in proving and making good those allegations.

It is not a simple matter to plead fraud before the English Courts (that is that the vessel has been cast away, that the assured has fraudulently exaggerated his claim or that the assured has dishonestly bolstered his claim by a fraudulent “device”). Full particulars must be provided and these must include every element legally necessary to constitute the fraud alleged. For example, there must be full particulars as to:-

1. Who made the representation.
2. How and when they made it.
3. How it is false.
4. Particulars of the knowledge of the person who made it that it was false or that he was reckless as to its truth (that is that he did not care whether it was true or false).

Screen 5

4. Fraud in Insurance Claims

The split profession

In my paper I am touching on the impact in this of the split profession which exists before the English Courts. As you know we have barristers (broadly trial lawyers) and solicitors (like me who do all the rest of the work). It is a professional rule of conduct for barristers that they must not allege fraud (nor raise the argument in the manner in which they run a trial) unless they have in their hands some evidence for the fraud alleged.

To demonstrate the reluctance of barristers (or Counsel as we call them) to plead fraud I have set out in my paper some information concerning a claim for the constructive total loss of a vessel. You will see in the paper an outline of the facts describing the close links between the assured on the one hand and those who either seized the vessel or those who controlled those seizing the vessel on the other hand. One might think looking at the outline of the facts that an assertion of dishonesty would be entirely credible, but nonetheless the barristers' reluctance to plead fraud is noteworthy.

The difficulty in proving fraud and the scrupulous observation of the professional rule of barristers in that regard has led to what one might call a whole sub-branch or sub-species of English insurance law where (in the absence of any other pleadable defences) Underwriters do not advance any positive defence but simply and formally put the assured to proof of loss. The suspected dishonesty of the assured is the elephant in the room that no one mentions although perhaps it is the pattern that finally once the case has progressed through pleadings, disclosure of documents, exchange of witness statements, exchange of experts' reports and after some of the assureds' key witnesses have given evidence at trial, only then might the Underwriters seek the permission of the Court to amend their case to plead fraud once they, and most particularly their barrister, are satisfied they have sufficient prima facie evidence in their hands to plead the defence.

(Perhaps the position is different here in the United States where you have the relative luxury of taking depositions from witnesses of fact long before trial?).

Screen 6

Fraudulent Insurance Claims

Proving Fraud

What is the standard of proof in proving fraud in English law?

There are in English law two standards of proof. The first is the criminal standard so, for example, if X is prosecuted by the State (we would say by the Crown) for burglary, the Crown will have to prove that X is guilty of the offence as charged "**beyond reasonable doubt**".

However, if A is making a claim against B for breach of contract or for an indemnity under an insurance policy, A generally only has to prove his case "**on the balance of probabilities**". For example, on the loss of a ship A would have to demonstrate by evidence on the balance of probabilities that the proximate cause of the ship sinking was say a peril of the seas.

So, X may be accused of murder of his wife and on the application of the criminal standard of proof be acquitted because the Court (the Jury) cannot be satisfied that he committed the offence "beyond reasonable doubt". However, X may nonetheless be sued by the family of the deceased and held liable in damages, the conclusion of the Court (in our case a Judge sitting alone) being on a balance of probabilities that X caused the death.

However, in a civil case where the defendant in this case an Underwriter alleges that the claimant in this case an assured has effectively committed a criminal offence (scuttling a ship) the burden of proof appears to shift to something rather more than the ordinary civil standard. Although I do not think that English Judges expressly say that there is some sort of intermediate standard of proof here, it appears that there is.

In my paper I have attempted to grapple with what might be the proper definition of this intermediate standard and for convenience you will see that I am labeling it here as a case where there is "**no other reasonable explanation**". One could perhaps argue about my choice of words and so for illustration I am taking the words of Mr Justice Aikens in the Milasan

as an illustration. You will see in my paper an abstract from his judgment in that case. Some of the words he uses there merit quotation. For example he says:-

"If a defendant insurer is to succeed on an allegation that a vessel was deliberately cast away with the connivance of the owner, then the insurer must prove both aspects". (That is that the vessel was cast away and that the owner was party to this) on a balance of probabilities. However, as such allegations amount to an accusation of fraudulent and criminal conduct on the part of the owner, then the standard of proof that the insurer must obtain to satisfy the Court that its allegation of proof must be commensurate with the seriousness of the charge laid. Effectively, the standard will fall not far short of the rigorous criminal standard."

You may be interested to read the quote in full. You will see that the Court is entitled to consider all relevant indirect or circumstantial evidence and that it will not be fatal to Underwriters' case that not all the relevant facts emerge. Further he expresses the view that Underwriters may not even have to prove motive if the facts are unambiguously against the owners.

Screen 7

5. The Application of Section 17 of the Marine Insurance Act 1906

Given the notorious difficulties of pleading and proving fraud it is perhaps not surprising that insurers have, as I have suggested, found it attractive to do something else in defending claims other than pleading the fraud which they suspect. This might be as I said earlier looking for something else: non-disclosure in presentation of the risk or perhaps a breach of warranty, even a non-causative breach of warranty.

Until relatively recently another approach was also available namely to plead in perhaps somewhat general terms reliance on Section 17 of the Marine Insurance Act as providing an ongoing or post-contractual duty of good faith. Section 17 is very familiar to everyone. It says:-

"A contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party".

This obviously says nothing about time whether it is pre or post contractual.

In any event in reliance on that provision until recently it is my understanding that trainee barristers were routinely taught to plead that the assured owed the Underwriters a general duty of the utmost good faith in the presentation of the claim (as distinct from the presentation of risk) and that in pursuance of this duty the assured was required to disclose certain facts, that those facts had not been disclosed, that the Underwriters were therefore entitled to avoid it, that they were now electing to avoid and were therefore relieved of liability for the claim.

As I said earlier we all know that the duty of disclosure pre placement under English law is extraordinarily strict (indeed I believe that this is one area that the Law Commissions are eyeing with a view to potential reform).

This line of reliance upon a co-extensive duty of good faith post placement has its origins in a case called the "LITSION PRIDE". It seems that it has now been brought definitively to an end by the judgment of the House of Lords in the "STAR SEA" in 2001. It now seems clear that Section 17 cannot now be relied on so as to produce a duty of full disclosure in the presentation of claims and a remedy of avoidance for failure to make that disclosure but from the decisions which have been issued since, which are touched on in my paper, and from the views of academic commentators it appears that there is now some uncertainty as to the current state of the law.

Screen 8

The Application of Section 17?

It does seem clear that Section 17 will only now provide a full duty of disclosure with a remedy of avoidance in certain limited circumstances after the original formation of the contract. I have listed these here. They are:-

1. First, where amendments or variations to cover are negotiated.
2. Secondly, and perhaps obviously, where a renewal of insurance is negotiated.
3. Thirdly, where an assured is seeking to rely on a "held covered" provision in the policy.

But that Section 17 is not applicable to all claims.

Screen 9

6. The Fraudulent Claims Rule

As I say, I believe it is fair to say that the current state of the law in the area of claims is somewhat uncertain. Looking at the current authorities in the round, what is the current state of the law and how is the common law likely to evolve?

Let's take the Fraudulent Claims Rule first. The Fraudulent Claims Rule in English insurance law is anomalous and draconian. I have set out a quotation from a leading judgment in the House of Lords in the "STAR SEA" in my paper which summarises the rule. In a nutshell, where an insured has made a fraudulent claim on insurance, the insurer is not liable for that claim, even if the insured could have recovered for that claim (or perhaps a lesser claim) if it had been honestly made.

As you will see in my paper I have picked out three points in relation to the Fraudulent Claims Rule from the recent authorities.

Grounds

First, for Underwriters to rely on this rule there must be a sufficient basis to plead fraud whether it is the procurement of a deliberate loss, an exaggerated claim or the use of a "fraudulent device".

So if Underwriters want to rely on this claims rule there will be no escaping the difficulties of pleading and proving fraud which I have referred to above.

I suspect that when this principle is fully developed it will be clearly established that a fraudulent representation is required and that a mere non-disclosure (however deliberate and however much intended to mislead) will not in any way fall under this rule.

Screen 10

The Fraudulent Claims Rule

Timing: When does the duty end?

This brings me to a rather quirky point of English insurance law. Following the decision in the "STAR SEA" and the later decision in a case called the "AEGEON" it is clearly established that the fraud rule only applies **before** the commencement of Court or arbitration proceedings. So if the assured puts forward a claim, abstains from any kind of dishonesty then commences an action and only then creates fraudulent documentation in support of that claim Underwriters cannot rely in the defence of that claim on the Fraudulent Claims Rule. The logic of this appears to be that once proceedings have commenced the rights and responsibilities of the parties are governed by the rules of procedure but frankly it seems rather peculiar to me.

Forfeiture: What is forfeit?

The expression used in the old authorities was that if the assured engages in fraud in an insurance claim he will "forfeit all benefit under the policy". I suspect that those old cases meant exactly that and that there was no prospect once a fraud had been committed of the assured obtaining anything whatsoever under the policy.

But now apparently this is not so. The Court of Appeal in a case called **Axa & Gottlieb** in 2005 has now decided that the territory should be divided up in a different way. Where a fraudulent device is deployed the assured will certainly lose or forfeit the whole claim in relation to which that fraud was committed but will not lose the benefit of any other (genuine) claim.

Indeed it seems that if the assured has a genuine claim either before or after the claim in relation to which the fraud was perpetrated he will not forfeit the benefit of either claim on the policy, unless perhaps two of the claims are related.

As you will see I am describing in my paper an example of how this might operate in practice. Let us say there was damage to a ship on a policy which gave rise to a claim for salvage and a claim for the cost of repairs. Let us say that the fraud was committed only in relation to the claim for repairs. I am speculating that because the two claims arise from the same incident or event the assured would forfeit his right to an indemnity for the repairs and would be liable to return to the Underwriter any monies advanced in relation to the salvage.

Screen 11

The Fraudulent Claims Rule

Examples

Against that background I thought we would look again quickly at a few examples.

Let's take deliberate loss. We would probably think that we would all recognise one when we see one. The classic example is obviously scuttling. In one case, I was acting for the Reinsurers of a cargo of steel bars. The ship was on a voyage from Spain to the Middle East and sank off the coast of Crete, coincidentally in one of the deepest areas of water in the Mediterranean. The vessel sank a short distance offshore. A large flotilla of small boats went out to the vessel to offer assistance and on board one of these was a local photographer. He took pictures which allegedly showed someone on board knocking out the portholes with a steel hammer to facilitate the ingress of water. Of course, this might demonstrate that the vessel was deliberately sunk, but as you will have gathered from what I have already said it would not necessarily demonstrate that the vessel was scuttled by the assured because it would be equally possible, although you might say unlikely, that the crew were committing barratry.

For an illustration of an exaggerated loss I would refer you to the example of the owners who put forward a claim for a replacement of a full charge of lubricating oil when no such replacement had in fact taken place.

What about "fraudulent devices"? I have a few examples.

In the first case the assured were purportedly shipping a quantity of let us say legal goods by container over land from the Middle East by road via Iran to a Central European State. The goods were allegedly lost on land in transit and a claim was put forward for loss by theft.

In support of the claim the assured produced a typical catalogue of shipping documents: survey reports, manifests, documentation to support exportation and importation. So far so good. But, the documents looked rather odd and some (though purportedly issued in different places and issued at different times) looked rather similar both as to the typeface, the writing and the notes. We therefore delivered these to a handwriting specialist in London. He subjected them to various tests and as a result it appeared by various means that the documents had been created anti-chronologically, some documents had been signed on top of/before other documents which should not yet even have come into existence. In other words it was plain that this was not an ordinary sequence of documents issued in a chronological manner in locations separated by several hundreds of miles.

We met the assured and his representatives in a Central European location. We discussed the claim and the circumstances of loss and we then laid out on the table the documents showing the markings which demonstrated (perhaps beyond all reasonable doubt) that they were false. There were two armed guards. As the clock ticked, one walked up and down the corridor and the other stood in the corner of the room.

Although the case was never pleaded, perhaps you could say that these documents could constitute individually and together a classic “fraudulent device”? The claim may have been perfectly innocent and genuine but the paperwork was not and as a matter of English law the assured would forfeit the entire claim.

In a second claim let's say the assured was a jewelry manufacturer and had procured insurance from time to time over a period of weeks stretching out over more than a year for jewelry to be taken abroad to jewelry shows and for demonstration for sale. The salesman transported the small package of jewelry around with him as he travelled from city to city. The jewelry was stolen. The precise circumstances were never clear. It was not clear whether he had the jewelry with him, whether it was in his car, whether it was in his hotel room or whatever.

The assured had a particular difficulty; namely that it appeared that at the time when the loss occurred insurance cover had ended. The assured's broker had in his capacity as an underwriting agent issued a series of covers under a binding authority covering the jewelry but not for the period in which the loss occurred (or so it seemed). Later, however, an addendum to the cover emerged. It was not in the correct chronological sequence. It was wholly unlike the covers that were previously placed.

Again, the loss itself might have been perfectly genuine. The practical consequence was again that if the necessary components could be proved the assured would have forfeit the benefit of the policy.

Another hypothetical example:

Let's say the assured is insured for stock of metal. The assured takes to inventories, 12 months apart. The first inventory shows the assured has as part of its stock 10,000 units of metal. The second inventory shows that the assured had 5,000 units of metal and the difference between the two cannot be accounted for by normal trade and sale.

The inventory comprises not only an inspection or evaluation of the stock on the premises but also the obtaining of confirmations from third party sources. These third parties hold the metal from time to time in the normal course of trade and manufacture. Let us say that for the purpose of inflating the assured's inventory at any one point for the purpose of putting forward a claim the assured procures false confirmations from third parties massively inflating the amount of metal which they hold to the assured's account. If the inventories and those false confirmations were produced as part of the evidence laid before Underwriters on the basis of which they were to evaluate a loss of stock and if it were feasible to prove in this hypothetical circumstances the requisite particulars of fraud the assured would forfeit any genuine claim.

Let's take one last rather strange fictional example. The assured purchases insurance for two containers of machine tools to be shipped from a Central European Country via Greece and then by sea to Columbia. On arrival let's say that the two containers are found open and half empty. The containers purportedly contained machine parts. What machine parts one might ask might be shipped from, say, Serbia, to Columbia?

What would be the Underwriters' remedies if the assured were to appear in person at the offices of the Underwriters' agents demanding payment of the loss and brandishing a small handgun by way of presentation of the claim? Perhaps that of itself might not fall neatly under the Fraudulent Claims Rule although if circumstances like this ever were to happen if the case was heard by Mr Justice Aikens even if as he would say, "part of the canvas remained blank" perhaps the Underwriters running such a defence (looking at anomalies in the documents) might be speaking to a receptive ear.

All I would say in relation to these examples, real or imaginary, is that even though reliance on the fraud rule might be attractive difficulties of proof may mean the rule is never relied on, or at least it is not the first weapon to be taken out of the toolbox.

Screen 12

7. Possible contractual terms

Implied terms?/Which?

It is possible that as the common law progresses and is worked out over various cases the law on the presentation of insurance claims will advance by the introduction of implied terms rather than by the application of a sweeping overarching duty of good faith post contract.

In my paper I have attempted to describe how this might be done.

As I have said, the law is in a relatively uncertain state. It is clear that Section 17 cannot be relied on to provide Underwriters with a right of avoidance for non-disclosure of material facts in a presentation of a claim, but it seems equally clear that there is some sort of post-contractual duty of good faith.

Precisely what is the character of that duty and how does and will it manifest itself?

You will see in my paper that I have quoted a short section out of the leading judgment of Lord Hobhouse in the House of Lords in the "STAR SEA". You will see that he says that a contractual obligation of good faith for the performance of the contract, including the presentation of claims, presents in itself no conceptual difficulty. He goes on to say that such obligations could arise from implied or inferred contractual terms. Indeed he says having reviewed the position:-

"This is no doubt why Judges have on a number of occasions been left to attribute the post-contract application of the principle of good faith to an implied term".

Frankly, this is a rather difficult area and not without its complexities and has generated a fair amount of academic comment. I believe it is fair to say that English law is generally rather reluctant to introduce into contracts implied terms, but it seems that in the field of marine insurance in particular following the judgment of the House of Lords in the "STAR SEA" there is an opportunity for such implied terms now to be discovered.

Perhaps it will be said that it is an implied term of a marine insurance contract that an assured should disclose information and do so honestly. Conversely, such implied terms might require

Underwriters to act fairly in relation to the insured. In my paper you will see that I have quoted from one of the academic papers which deals with this area and have picked out illustrations of circumstances in which an insurer might be required to act fairly in such a way for example:-

- Where an insurer has a right to control the defence of a claim on a liability policy; or
- Where an insurer seeks to exercise rights of subrogation which might have an adverse impact on the insured (for example in relation to his uninsured losses).

I am also suggesting that in due time it may be the case that such implied terms will include a provision whereby Underwriters would have a duty not to refuse to pay claims except on the basis of a reasonable suspicion and a duty to decide within a reasonable time whether to pay or refuse claims.

Screen 13

Possible Contractual Terms

Consequences of breach

If the common law is to develop let's say a whole catalogue of such implied terms what would be the legal nature of those terms and what, most particularly, would be the consequences of breach?

In my paper I am speculating that the process of development of implied terms may ultimately prove more beneficial to assureds than to insurers. As a matter of general contract law where the Court discovers an implied term if that term is broken as a matter of routine the party in breach would be entitled to a claim in damages. Obviously I am speaking here only about compensatory damages and not punitive damages. Where there is a breach by the Underwriter, for example with regard to implied terms for handling and timeliness of payment of claims it might be that damages would be an entirely adequate remedy (or at the very least might discourage Underwriters from the temptation of acting unfairly in handling claims).

But conversely if an implied term would be that the assured should disclose certain information when presenting a claim, damages might not be of much use to insurers. The insured might have a claim for loss and the insurers might then seek to put forward a counterclaim for damages for failure by the insured to comply with the implied duty to provide information and documentation. But, if at the end of the day the Court determines that notwithstanding the failure to produce documents and information, the insured has a genuine claim Underwriters might have difficulty establishing the nature and extent of the losses they had incurred by reason of breach of the implied term.

Perhaps then the law might evolve in such a way as better to protect the rights of insurers. You may be aware that for certain types of general contract terms if a breach is sufficiently serious the innocent party may be entitled to terminate the contract. However, even termination in such circumstances might be of little use to Underwriters for two reasons.

First, termination under general contract law in these circumstances does not operate retrospectively and is therefore unlikely to deprive an assured of a claim for a genuine loss

which has already occurred. Secondly, in any event, under general contract law the English Courts take a very tough attitude in this area and would only be willing to find that a breach is sufficiently serious if the character of that breach is such that the injured party is "substantially deprived of the whole benefit of the contract". I would suggest that it would be very difficult for Underwriters to establish that breach of such an implied term relating only to disclosure of documents and information with regard to any particular claim would satisfy this tough test.

Perhaps then the English Courts might develop this area of implied terms to discover implied conditions precedent or perhaps even implied warranties. As you will see from my paper, I think that this is frankly unlikely. The probability of the English Courts implying such stringent terms into policies is low.

It will be fascinating to see how the two parallel but different strands of common law (pure contract and insurance law) will progressively evolve and perhaps converge.

Screen 14

8. Threats to the Fraudulent Claims Rule

I have looked in very general terms now at the present state of the law and how the law is likely to develop in this rather difficult area. What I am proposing to do now is to look very quickly at possible further developments in the law which are not indicated in any of the recent judgments, in particular threats to the Fraudulent Claims Rule.

For the reasons I have indicated, the Fraudulent Claims Rule is anomalous and draconian. The law takes a different attitude to fraudulent claims under insurance policies as compared to general fraudulent civil claims. On the face of it there seems little justification for this other than that it stands as an issue of well established authority.

I suspect that in due time the law may be harmonised. This might be achieved by the law taking a tougher attitude first to fraud in general civil actions and second to fraud after the commencement of proceedings. In both cases, then, the law might find that if fraud has been committed the claimant should be deprived of all right in respect of the relevant claim, that is that his right should be forfeit. As you will see from my paper, at present proceedings may be struck out for mere delay but apparently not struck out for fraud after the action is started. This is a startling proposition.

Conversely, the law might be harmonised by the whittling away or eradication of the Fraudulent Claims Rule for insurance policies. Presumably, the original justification for the rule was that Underwriters were entitled to rely on documents, information and representations provided by the assured in order to determine whether a loss was payable or not and if so in what amount.

But focusing for the moment on losses of marine vessels, can it really be said that Underwriters place this much reliance on documents and information provided by the assured? Let's take the case of a sinking. How often can it truly be said that Underwriters simply sit back and wait for documents and information to be produced by the assured in presentation of a claim? In truth this is very rare. In practice, where sinkings occur it is often the case that Underwriters instruct solicitors immediately who take joint statements from the officers and crew of the

vessel and have immediate access to all the ship's documents. Where Underwriters are this assertive since the nature of the relationship has changed in the context of claims so that they are rather no longer relying on information from the assured perhaps it would not be surprising if they would be deprived of the benefit of the anomalous Fraudulent Claims Rule.

Screen 15

9. Conclusions

1. At present, Underwriters on marine insurance policies have the benefit of an anomalous and draconian Fraudulent Claims Rule.
2. By virtue of this rule, if fraud is pleadable and can be proven, the assured will forfeit all right to the relevant claim (but not necessarily all benefit under the policy in respect of other genuine claims).
3. On recent authority, it appears that if two claims arise from the same event (for example a claim for salvage and repairs) then if there is any fraud in relation to one of those claims then the assured may forfeit one and be required to repay the other.
4. It is now clear that an assured is not required to disclose documents and information in relation to a claim to the standard required at the time of placement, nor therefore is there a right to avoid for such non-disclosure.
5. Otherwise the state of the law, post placement is unclear. There is certainly a duty to desist from fraud but the precise scope of insured's duties in presentation of claims is still evolving.
6. The duties of insureds and insurers in relation to claims may be founded upon implied contractual terms. The precise nature of those terms and the consequences of their breach need to be worked out. To the extent that breach would only entitle an injured party to damages this might be beneficial for insureds but the benefit to insurers would be questionable.
7. The likelihood of the English Courts implying terms with draconian remedies (for example conditions precedent or warranties) is small.

Rhys Clift

Partner

Hill Taylor Dickinson

ddi: + 44 (0) 207 280 9199

fax: + 44 (0) 207 283 1144

rhys.clift@htd-london.com

www.htd-law.com