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Fraud: Does the punishment fit the crime?

Introduction

It is my pleasure to speak to you today on fraud, specifically the particular consequences of fraud under English law, and particularly on marine policies. I am going to look at types of fraud, perhaps with a few examples, and how the law (at least in its current state) responds to it.

I should say first that this is not an academic treatise; nor a line by line review of cases or authorities. It is a bare overview, picking out perhaps one or two cases that might illustrate some core themes which might be examined in greater depth later at leisure.

Now as you may know, the word "fraud" has its origin in Latin and in the seething hotbed of violence and double dealing that was Rome. But oddly, perhaps, if the latest TV series on Rome is an accurate representation of life on the edge of the Tiber, the Romans created a fund of laws and legal concepts that have taken root throughout Europe and which have set in place frameworks of justice and fair dealing. Many of the concepts had or have Latin tags, and uberimae fideii (good faith or utmost good faith) may be one such, square, perhaps, in the subject of my talk.

But for all the meaning of the word fraud is Latinate, the penalties are all Greek. The remedies available to underwriters for insurance fraud are, as we will see, at least in a colloquial sense, Draconian.

To jump Continents in a single bound, if I may, you may recall that according to Gilbert & Sullivan at least the Mikado's highest aspiration touched on the topic of my address. He said:

My object all sublime
I shall achieve in time —
To let the punishment fit the crime —
The punishment fit the crime

The question put to me is this: in respect of marine insurance fraud, have the authors of the Common Law achieved this objective: does the punishment fit the crime?

Outline

I am going to look at punishments and crimes, looking at the "crimes" first.

I am going to approach the subject by looking at six main themes:

1. First, a general introduction with some up to date estimates of the extent of fraud and then turning to types of fraud on marine policies;

2. Second I am going to look very briefly at the general attitude to civil fraud which is not insurance fraud (by way of contrast);

3. Third, let's see why is reliance on fraud by the assured the last weapon out of the legal toolbox;

4. Fourth, I will look at section 17 MIA and its role in claims, but only in passing;

5. Fifth, I will come to perhaps the core of the talk, the Fraudulent Claims Rule (and I should say that my focus is on the rule of law and not on the efficacy of anti fraud contract terms;

6. Sixth, threats to the Fraudulent Claims Rule.

7. Finally to some conclusions.

<u>The extent and types of fraud</u>

Statistics

What is the fascination of insurance fraud? If you tap ***"fraudulent insurance claims"*** into Google you will get 2.5 million hits. Certainly I would say that it is not necessarily because of the efficacy or rather the ease of fraud as a defence to claims. I would venture that the statistical probability of success in an insurance defence runs, to take three types of defence, something like this:

1. coverage points on wordings first (i.e. the meaning of words),

2. second, placing defences like non disclosure or misrepresentation (with the hazard that everything can and does go wrong in the witness box),

3. then third fraud, somewhat further down the list (perhaps even lagging at the bottom).

It is an interesting philosophical point: are tough penalties for fraud under insurance law designed purely to punish or simply to deter? Professor Rhidian Thomas in his excellent article on "fraudulent insurance claims" in LMCLQ 2006 says this:

"***it is transparent that the policy of the common law embodies a disciplinary element. To this extent it stands contrary to the judicial philosophy which is opposed to the introduction of a disciplinary element into the legal relationship between insured and insurer, particularly in the sphere of good faith."***

But if the objective of the fraud defence were to deter, is the deterrence successful, does it work? Are the penalties so severe or sufficiently severe to dissuade an assured from metaphorically placing his hand in the fire or, to mix my metaphors, weaving the first thread in the tangled web of deceit that inevitably builds around any fraudulent claim? Perhaps the better question is: are the penalties sufficiently well known by purchasers of insurance?

Lies, damn lies and statistics, so to offer an answer to the question of deterrence I would tentatively pick out a couple of figures as examples. First in the course of preparatory work leading up to the new Fraud Act 2006 (fully implemented in February of this year) it was reported to the Home Office that the estimated cost of fraud to the UK economy was about £14 billion per annum, a huge figure.

But what about insurance fraud itself? This is an international rather than a national problem, but taking figures published by the Association of British Insurers the position may be grim. In figures published this year the ABI calculated that:

> "*Fraudulent Insurance claims are costing insurers and honest customers over £4 million every day …[and that]. the annual cost of insurance fraud [is about] £1.6 billion*".

Now obviously these are not the estimated figures for fraudulent insurance claims on marine policies nationally or internationally, but the figure is huge and a startling illustration of the propensity for dishonesty, where there is opportunity.

So much for the selective statistics; what in a nutshell 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. These are not cases where the assured carelessly sends a ship to sea possibly in an unseaworthy state, with its sideshell frames creaking, its bulkheads torn and the plating panting or with its fire fighting equipment in an unusable state (with the CO2 bottles discharged and the engine room dampers frozen in place by rust). What I am talking about here are the deliberate burnings, groundings and floodings.

What about an example? We would probably think that we would all recognise one when we see one. In one case a 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 it does 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.

It is perhaps a startling proposition that, if Paul Todd in his book on Maritime Fraud is right, scuttling is **"probably quite common".** If he is right, perhaps the punishment is insufficient or insufficiently well known, whether it fits the crime or not.

Why should this be so? Perhaps the explanation for the prevalence of scuttling 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, 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.

Is this right? What is the primary driver for scuttling? Is it pure greed, or desperation? Is it more prevalent in times of economic pressure? It would be an interesting exercise, perhaps, to plot the incidence of loss against periods of economic turmoil particularly if it were possible to cull from the data the fraudulent claims. In other words, were there more dishonest claims in the Great Depression in the 1930s, in the OPEC crisis, in the Far East crash in 1998? Or, looking at the other end of the telescope, are there fewer losses in boom times? Perhaps an answer is to be found in plotting losses against the freight rate over the last 70 years?

You will know better than me: with the huge surge in world trade with the boom in China and India in the last five years has there been a reduction in total losses, particularly where there are lets say in the arcane words of insurance law "**concerns about proximate cause**"?

Exaggeration

This brings me to “exaggeration” (and the exaggeration must be substantial).

Lets take an example: a vessel goes into a yard for repairs and the owner falsely declares to the Underwriters’ surveyors and produces 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.

Obviously this has to be distinguished from the sort of permissible negotiation that normally takes place with insurance claims

In weighing the gravity of the punishment, does this kind of venal behaviour merit the full force of the fraudulent claims rule?

“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. This is the first step on the path to perdition. 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.

Can this really be right? Should claims of this type be equated with scuttling?

What about a hypothetical example? Assume the assured is 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 are allegedly lost on land in transit and a claim is put forward for loss by theft.

In support of the claim the assured produces a typical catalogue of shipping documents: survey reports, manifests, documentation to support exportation and importation. So far so good; but, the documents look rather odd and some (though purportedly issued in different places and issued at different times) look rather similar both as to the typeface, the writing and the notes. Let’s say we deliver these to a handwriting specialist in London. He subjects them to various tests and as a result it appears 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 is plain that this is not an ordinary sequence of documents issued in a chronological manner in locations separated by several hundreds of miles.

We meet the assured and his representatives in a Central European location. We discuss the claim and the circumstances of loss and we then lay out on the table the documents showing the markings which demonstrate (perhaps beyond all reasonable doubt) that they are false. There are two armed guards. As the clock ticks, one walks up and down the corridor and the other stands in the corner of the room. The assured’s first question “can we go now?”

In this hypothetical case, the claim is never pleaded, but 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 is not and as a matter of English law the assured would forfeit the entire claim.

Non-Disclosure

There is a fourth class which I have referred to here as “non-disclosure”. Which I will touch on in passing here.

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 judgment 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' judgment 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?).

General approach to civil fraud

So much for the “crimes”.

I am going to look briefly at the general approach to civil fraud by way of comparison, to weigh up the fairness of the punishment. There is a 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 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.

There may be numerous ways to illustrate this. One is, say, 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 (i.e. about 5 % of the sum claimed). 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.

Let's look at a second illustration, 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 followed 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 the elements of “civil” fraud, appear, 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. (The plaintiff might of course suffer serious costs consequences.)

But does the punishment fit the crime? Is a costs penalty enough? And would the situation be different if these examples were insurance claims?

Fraudulent Insurance Claims – Pleading and Proving Fraud

Pleading Fraud

It may be not so much that the punishment does not fit the crime, but rather that the crime is exceedingly difficult to plead and prove.

Even if Underwriters suspect fraud, and might feel that they have good grounds to do so, 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, if there is to be reliance on a false representation, Underwriters must provide 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).

The split profession

In England there is a split profession. As you know we have barristers (broadly trial lawyers) and solicitors (like me who do the rest of the work). It is a professional rule of conduct for barristers that they must not allege fraud (nor even raise the argument in the manner in which they run a trial) unless they have in their hands some evidence for the fraud alleged. Barristers are notoriously reluctant to plead fraud.

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 <u>any</u> 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.

Proving Fraud

What then 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.

What might be the proper definition of this intermediate standard of proof? 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. 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 of its allegation* ***must be commensurate with the seriousness of the charge laid. Effectively, the standard will fall not far short of the rigorous criminal standard.***"

The judge's views in that case might merit further review. He says 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. But nonetheless it is a tough task to persuade a court of an allegation of fraud.

The Application of Section 17 of the Marine Insurance Act 1906

I come back to this as a bit of an aside. Given the notorious difficulties of pleading and proving fraud it is perhaps not surprising that insurers have in the past 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.

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.

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 Section 17 is not applicable to all claims.

Paradoxically it would be easier to succeed in a non disclosure defence with a lesser burden of proof than to plead fraud (provided the witness testimony stands up), but the penalty visited on the assured would be greater; avoidance ab initio but with a return of premium as the consolation prize.

The Fraudulent Claims Rule

Before looking at the fraudulent Claims Rule, it is worth saying a few words about fraudulent claims **clauses**, though these are I believe less common in marine policies than they are in say fire or property insurances. In short the law permits the parties to agree the consequences of fraudulent claims, to

include the forfeiture of the claim itself and prospective termination of cover under the policy. Where the language is clear it can also permit retrospective termination or avoidance of the policy and thereby deprive the assured even of earlier honest claims, innocently made.

Where there is no such clause, The Fraudulent Claims Rule will apply. It is anomalous and draconian. The Rule was reiterated by Lord Hobhouse in the "STARSEA". 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.

According to Lord Hobhouse :"***the logic of the law is simple: The fraudulent assured must not be allowed to think: if the fraud is successful , then I will gain; if it is unsuccessful I will lose nothing"***, though it's a little difficult to see how that reasoning can be applied to honest claims promoted by dishonest means.

The House of Lords took the view that the principle was well established and certainly existed since the 19th Century. Two 19th century fire cases were relied on as authority for this harsh principle**, Gouldstone** [v Royal Insurance] in 1858 and **Britton** [v Royal Insurance] in 1866. The principle is that if the claim is **"willfully false in any substantial respect**" the assured should forfeit **"all benefit under the policy".** Perhaps these cases might best be understood when read against the prevailing moral climate in Victorian England, albeit it is well understood that Victorian morality was at best confused or even hypocritical. In any event the Fraudulent Claims Rule remains good law and, according to Lord Hobhouse, well illustrated by the direction of Mr Justice Wilkes to the jury in the **Britton** case:

"***the law upon such a case is in accordance with justice and also sound policy. The law is that a person who has made such a fraudulent claim could not be permitted to recover at all. The contract of insurance is one of perfect good faith on both sides, and it is most important that such good faith should be maintained. It is common practice to insert in fire policies conditions that they shall be void in the event of a fraudulent claim; and there was such a condition in the present case. Such a condition is only in accord with legal principle and sound policy. It would be most dangerous to permit parties to practice such frauds, and then, notwithstanding their falsehood and fraud, to recover the real value of the goods consumed. And if there is willful falsehood and fraud in the claim, the assured forfeits all claim whatever upon the policy. This, therefore, was an independent defence; quite distinct from that of arson"***

Where did this Rule come from? Professor Thomas says it is said to be founded on an independent rule of common law, and not based on any idea of an implied contract term nor indeed on the principle of utmost good faith. Rather it is a ***"special rule with a distinct origin and history"***.

It may be that, in tandem with this, there is an implied right arising out of the law of contract which permits an insurer prospectively to terminate or avoid a policy and in addition to seek damages for breach of contract by the assured. Professor Thomas says the law is slowly creeping towards this position.

In any event, I would make three points in relation to the Fraudulent Claims Rule:

Grounds

First, for Underwriters to rely on this rule obviously 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.

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 (to maximize his chances of success or plug holes in his evidence) 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.

So, let's 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 previously advanced in relation to the salvage.

What about previous, concurrent or subsequent claims? Professor Thomas suggests that some authorities suggest that taking the Fraudulent Claims Rule in isolation the assured might be deprived of any future claim on the same policy, though he is doubtful of the proposition.

Threats to the Fraudulent Claims Rule

Before I conclude, perhaps we can look quickly at threats to the continued existence of 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 (not founded in an implied contract term nor arising from a generalised duty of good faith).

I suspect that in due time the law may be harmonized "up". 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.

Conversely, the law might be harmonized "down" by the whittling away or eradication of the Fraudulent Claims Rule for insurance policies.

Why? 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. The Fraudulent Claims Rule might not have been simply a creature of the prevailing moral climate, but also of the then state of forensic investigation. By contrast there is today a baffling array of technical wizardry that permits underwriters to investigate claims and then peel back layers of contrivance.

But focusing for the moment on losses of marine vessels, can it really be said that Underwriters today place much reliance at all 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, I suspect that this is very rare. In practice, where sinkings, groundings or fires occur it is often the case that Underwriters instruct solicitors immediately who go straight to the casualty 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, it may be said that they are hardly relying on information from the assured at all (certainly not passively). If so perhaps it would not be surprising if underwriters would be deprived of the benefit of the anomalous Fraudulent Claims Rule?

Conclusions

- At present, Underwriters on marine insurance policies have the benefit of an anomalous and draconian Fraudulent Claims Rule. The rule is remarkably tough.

- 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) whether the loss is deliberate, substantially exaggerated or supported by "fraudulent devices"

- On recent authority, it appears that if two claims arise from the same loss or 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.

- The logic for depriving the assured of the whole claim if it arises from a deliberate loss is unarguable; either there was no loss or the loss was not caused by an insured peril. There the punishment meets the crime.

- The treatment of exaggerated claims or false claims supported by fraudulent devices is perhaps consistent with the criminal law which views attempts to commit offences as being worthy of punishment. Again, the rule meets the requirements of public policy and offers punishment as a deterrent to fraud.

- But where "fraudulent devices" are used to support a genuine claim, can the Rule stand? Is it fair? Perhaps not.

- With this limited exception, if fraud in insurance claims is widespread, perhaps the focus should shift from evaluating the success in achieving Mikado's sublime objective. Perhaps the focus should be more directed to doing more to draw to the attention of assureds the folly and consequences of deceit.

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