Agapitos v Agnew [2002] Int.Com.L.R. 03/06

CA on appeal from QBD (Toulson J) before Brooke LJ; Mance LJ; Mr Justice Park. 6th March 2002.

Lord Justice Mance:

Introduction

1. It has been said that the more cases there are endorsing a particular proposition, the shakier it may be (cf Posner, The Problems of Jurisprudence, Harvard University Press, p.83). The waves of insurance litigation over the last 20 years have involved repeated examination of the scope and application of any post-contractual duty of good faith. The opacity of the relevant principles – whether originating in venerable but cryptically reasoned common law cases or enshrined, apparently immutably, in s.17 of the Marine Insurance Act 1906 - is matched only by the stringency of the sanctions assigned. Not surprisingly, recent clarification of aspects of these principles has been influenced by this stringency, particularly in the context of s.17: see e.g. ***Manifest Shipping Co. Ltd. v. Uni-Polaris Shipping Co. Ltd. (The "Star Sea")*** [2001] 2 WLR 170, para. 6 per Lord Lord Clyde and paras. 51, 72 and 79 per Lord Hobhouse, with whom Lords Steyn and Hoffmann agreed at paras. 1 and 2; ***and K/S Merc-Scandia v. Certain Lloyd's Underwriters (The "Mercandian Continent")*** [2001] 2 Ll.R. 563

2. The older common law cases (particularly, ***Levy v. Baillie*** (1831) 7 Bing. 349, ***Goulstone v. Royal Insurance Co.*** (1858) 1 F & F 276 and ***Britton v. Royal Insurance Co.*** (1866) 4 F & F 905) stand for a rule of law, applicable even where there is no express clause in the policy, to the effect that an insured who has made a fraudulent claim forfeits any lesser claim which he could properly have made: see ***The "Star Sea"*** at para. 62, per Lord Hobhouse. It was unnecessary in ***The "Star Sea"*** to consider whether the whole policy is (at least if it is a marine policy) then also voidable, by application of or analogy with s.17: see paras. 64 to 67. Nor did that issue arise in either of the modern decisions to which Lord Hobhouse there referred - ***Orakpo v. Barclays Insurance Services*** [1995] LRLR 443, dicta in which Lord Hobhouse was careful not to endorse, and ***Galloway v. Guardian Royal Exhange (UK) Ltd.*** [1999] LRLR 209 (still more recently applied in this court in ***Direct Line Insurance plc v. Khan*** (11/10/01) [2001] EWCA Civ 1794).

3. S.17 provides: "*Insurance is uberrimae fidei*
17 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."

4. The present appeal raises for consideration (a) whether and in what circumstances the common law rule of law and/or s.17 can apply in the event of use of fraudulent means or devices ("*fraudulent devices*" for short) to promote a claim, which claim may prove at trial to be in all other respects valid, (b) whether (if so) the application of that rule and section ceases with the commencement of litigation and (c) whether, in the light of the answers to these questions, the judge should have allowed the appellant insurers to amend their defence to assert (in short) that the respondents, during the course of the present litigation, maintained a case involving lying representations, as to the date when hot works commenced on the insured vessel.

The facts

5. The litigation arises from the loss of the passenger ferry "*Aegeon*" following a fire on 19th February 1996. She belonged to Ioannis Agapitos. He issued proceedings on 27th January 1997. Since his death on 15th November 1999, the proceedings have been pursued by his son, Konstantinos Agapitos, as his successor in title.

6. The Aegeon was insured against hull and machinery port risks under a slip policy for six months at 9th August 1995 "*whilst laid up and undergoing general and cosmetic maintenance at Neo Molo Drapetsona, Greece*". The conditions included "*Wtd no hot work*". After a spell spent at Eleusis, with insurers' permission, a further endorsement initialled on 12th January 1996 noted that she was again moored at Neo Molo, and that "*Refurbishment/maintenance works have recommenced and Hot Works on decks is due to commence soon*". It further provided "*Wtd LSA certificate and all recs. complied with prior commencement of hot work*". *A fax transmission dated 25th January 1996 (shown, it appears, by the brokers to the leading underwriters on 26th and 30th January 1996) communicated the vessel's managers' advice "that as from yesterday 24.01.96 hot works are carried out on the above vessel*".

7. The brokers responded on 26th January 1996 that the (first) leading underwriter had noted the contents of the fax, but that "*We would stress, however, that coverage of this vessel is warranted LSA certificate updated and all recommendations complied with prior to commencement of hot work. For the sake of good order please confirm that this has been carried out.*" On 29th January 1996 the owner asked the Salvage Association "*Pls appoint Mr Costouros in order to give us a new mooring approval plus L.S.A. certificate in Neo Molo Drapetsona*". The Salvage Association instructed Mr Costouros. There followed some conversations between him and representatives of Mr Ioannis Agapitos, the contents of which are in issue. But it is common ground that Mr Costouros did not actually survey the vessel or issue any new certificate prior to the casualty on 19th February 1996. On 30th January 1996 the brokers informed owners that all leading underwriters had now seen the fax of 25th January, and repeated their warning and request regarding the warranty. By a further endorsement on 6th February 1996 underwriters agreed to extend cover for a further two months from 9th February 1996 at pro rata additional premium, on terms "Wtd LSA cert updated". On 19th February 1996 the fire occurred during hot works.

8. In their defence served on 21st April 1997, underwriters alleged a number of breaches of warranty. That presently material related to alleged failure to obtain a Salvage Association certificate (a) prior to commencement of hot works as required by the endorsement of 12th January 1996 and/or (b) on or shortly after 9th February 1996 as allegedly required by the endorsement of 6th February 1996. (Recently, underwriters have amended to assert that the endorsement of 6th February 1996 warranted that such a certificate had already been obtained.)

Underwriters asserted in support of (a) that hot works commenced by or from 16th January 1996. By amendment dated 7th November 2000, they have alleged, in the alternative, that these commenced by 24th January 1996 or in the further alternative by 19th February 1996. In his original reply of 13th June 1997, the insured denied any breach of warranty, and alleged that hot works began on 12th February 1996 and that, in so far as there was any warranty, the failure of the designated surveyor, Mr Costouros, to make himself available prior to the commencement of the hot works constituted a change of circumstance which excused non-compliance under s.34(1).

9. Underwriters sought in this light to resolve the proceedings by proposing preliminary issues, relying on the fax dated 25th January 1996 to establish the date when hot works began. In evidence in reply on 24th June 1998 the claimant alleged that an oxyacetylene tool had been used for a collateral purpose for a few hours on 24th January 1996, but that this did not constitute "hot works" within the meaning of any of the endorsements. Shortly thereafter on 28th August 1998 the reply was amended to plead this, to delete the s.34(1) defence and to assert that underwriters had waived or were estopped from relying on any warranty that a LSA certificate would be obtained, having regard to the fax of 25th January 1996 and the endorsement of 6th February 1996. On 22nd November 2000 the reply was further amended to rely on the conversations between Mr Costouros and representatives of the claimant on or about 30th January and/or 8th February 1996, and to allege that during them Mr Costouros agreed to hot works starting without any survey of the vessel.

10. In disclosure in early 2001 the claimant disclosed sworn statements taken from two workmen immediately after the casualty, which attested that hot works of a substantial nature had been carried out from as early as 1st February 1996. On 30th July 2001 underwriters' solicitors wrote drawing attention to this, claiming inter alia to avoid the policy for fraud and inviting consent to amendments to their defence to plead such fraud. More specifically the proposed amendments assert that both Mr Ioannis Agapitos, from the service of the original reply on 13th June 1997 until no doubt his death on 15th November 1999, and Mr Konstantinos Agapitos, since he was granted permission to join as claimant on 14th July 2000 or since the writ was amended to join him on 18th October 2000, have knowingly, falsely and fraudulently mis-represented that no hot works were carried out prior to 12th February 1996 and/or were in breach of their duty to act with utmost good faith, in the latter case entitling the asserted avoidance. In support of these pleas, underwriters propose to plead that "Both the claimant and his late father were closely involved in the refurbishment works on the vessel and would have known when hot works commenced" and that "It can be assumed that pleadings in this action and the affidavits relied on by Ioannis Agapitos and latterly [Konstantinos Agapitos] were settled on their instructions".

11. The application to amend came before Toulson J who refused it, for clear and concise reasons. Considering the position on the hypothesis that underwriters had a valid defence of breach of warranty, he concluded that any continuing duty not to deceive underwriters was discharged by the breach of warranty, and that an additional plea of breach of any such continuing duty would anyway be superfluous. Turning to the position on the hypothesis that the claimant was otherwise entitled to succeed, he considered, applying dicta of Rix J in ***Royal Boskalis Westminster NV v. Mountain*** [1997] LRLR 523, 599, that alleged lies could only be material if told in circumstances where the truth would have provided underwriters with a defence. On the hypothesis which he was considering, the lies alleged could not therefore be material. He refused to assimilate the principles governing the use of a fraudulent device or means to promote a valid claim with the common law rule governing the pursuit of a fraudulently exaggerated claim. He also said that he saw great force in the claimant's submission that when litigation begins any duties previously owed under s.17 of the 1906 Act became superseded by the rules which govern litigation.

12. Against Toulson J's decision, this appeal is now brought by permission of Clarke LJ. The submissions that we have heard have, I think, ranged somewhat wider than those addressed to the judge below.

The scope and inter-relationship of the common law rule and s.17

13. In ***The "Star Sea",*** para. 6, Lord Clyde said that to confine s.17 to the pre-contract stage "*now appears to be past praying for*". Lord Scott accepted the section's post-contractual application: see para. 106. Lord Hobhouse, as I see it, proceeded on the same basis: see e.g. paras. 48 and 72. Longmore LJ commented in ***The "Mercandian Continent"*** [2001] 2 Ll.R. 563, para. 34 that this court should now proceed on that basis, and I for my part, whilst expressing the hope that the House of Lords judicially or Parliament legislatively might one day look at the point again, agree that we should do so.

14. The fullest description of the common law rule appears in ***Britton*** in Willes J's summing up to the jury:

"Of course, if the assured set fire to his house, he could not recover. That is clear. But it is not less clear that, even suppose that it were not wilful, yet as it is a contract of indemnity only, that is, if the claim is fraudulent, it is defeated altogether. That is, suppose the insured made a claim for twice the amount insured and lost, thus seeking to put the office off its guard, and in the result recover more than he is entitled to, that would be a wilful fraud, and the consequence is that he could not recover anything. This is a defence quite different from that of wilful arson. It gives the go-by to the origin of the fire, and it amounts to this - that the assured took advantage of the fire to make a fraudulent claim. The law upon such a case is in accordance with justice, and also with 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 the common practice to insert in fire-policies conditions such 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 accordance with legal principle and sound policy. It would be most dangerous to permit parties to practise such frauds, and then, notwithstanding their falsehood

and fraud in the claim, to recover the real value of the goods consumed. And if there is wilful falsehood and fraud in the claim, the insured forfeits all claim upon the policy."

The simple rationale is in Lord Hobhouse's words (para. 62 in ***The "Star Sea"***) that: "*The fraudulent insured must not be allowed to think: if the fraud is successful, then I will gain; if it is unsuccessful, I will lose nothing*".

The policy of the law to discourage the making of fraudulent claims had previously been emphasised by both Lord Woolf MR and Millett LJ in ***Galloway***. Millett LJ, at p.214 described the fraudulent claim rule "*as a necessary and salutary rule which deserves to be better known by the public*" and one which he "*would be most unwilling to dilute …. in any way*".

15. It is convenient at the outset to consider two points on which the scope of the common law rule is not entirely clear. The first is whether a claim, which is honestly believed in when initially presented, may become fraudulent for the purposes of the rule, if the insured subsequently realises that it is exaggerated, but continues to maintain it. The second is whether the fraud must relate, in some narrow sense, to the subject matter of the claim, or may go to any aspect of its validity, including therefore a defence. The first point was left open by Lord Scott in ***The "Star Sea",*** at para. 110. But I believe that the correct answer must be in the affirmative. As a matter of principle, it would be strange if an insured who thought at the time of his initial claim that he had lost property in a theft, but then discovered it in a drawer, could happily maintain both the genuine and the now knowingly false part of his claim, without risk of application of the rule.

16. I believe that this is also implicit in the House of Lords decision in ***Lek v. Mathews*** (1927) 29 Ll.R. 141, although counsel did not cite the case in this connection. The policy there provided that it should "become void and all claims thereunder shall be forfeited" if the assured "*shall make any claim knowing the same to be false or fraudulent as regards amount or otherwise*". Mr Lek claimed £44,000 for loss of stamps (on what he appears to have regarded as a valued policy). Not long after the theft, adjusters were about to recommend payment of £39,000, with Mr Lek retaining stamps recovered worth £5000: see Branson J's judgment at first instance at (1926) 24 Ll.L.R. 191, 197. But they later began to press for more information, and it was in response to their questions that Mr Lek in Flushing in May 1924 prepared the list which was held to be fraudulent and led to the failure of his claim: see per Branson J. at pp. 110-1 and 197-8 and per Lord Sumner in the House of Lords at p. 146. So a clause relating to the *making* of a false or fraudulent claim was held, obviously rightly in my view, to cover the maintenance of a claim which was not originally such.

17. The same conclusion is implicit in the example taken in ***Piermay Shipping Co. SA v. Chester (The "Michael")*** [1979] 2 LL.R. 1, 22 of a plaintiff "*maintaining*" a claim, after discovering fresh information (although the example may in other respects have been overtaken by ***The "Star Sea",*** in that it refers to fresh information discovered "*during interlocutory proceedings*"). Further, if and in so far as the use of fraudulent devices may invoke the fraudulent claim rule – an issue to which I come at greater length below – it would again be artificial to distinguish between the use of such devices before and after the initial making of any claim. Such devices are a not unfamiliar response to insurers' probing of the merits of a claim. The directions given and verdict entered by Roche J in ***Wisenthal v. World Auxiliary Insurance Corp. Ltd.*** (1930) 38 Ll.L.R. 38 proceed on the basis that fraudulent devices used during the course of insurers' investigation of a claim may invoke the common law rule, if otherwise applicable.

18. As to the second point, a claim cannot be regarded as valid, if there is a known defence to it which the insured deliberately suppresses. To that extent, at least, fraud in relation to a defence would seem to me to fall within the fraudulent claim rule. Further, I do not consider that it should make any difference in this connection if the known defence consists of breach of warranty or a known right to avoid for mis-representation or non-disclosure. The ordinary course of insurers' claims investigation following a loss involves all such aspects: see e.g. **Gan Insurance Company Ltd. v. Tai Ping Insurance Company Ltd. [2002] EWCA 248,** paras. 36-38. In ***The "Star Sea"*** the documents which had been allegedly wrongly withheld were relevant to a defence of breach of warranty – viz. sending the ship to sea in an unseaworthy state with the privity of the owners, in breach of the implied warranty in s.39(5) of the 1906 Act. Tuckey J expressed doubt at first instance whether the fraudulent claim rule extended to a defence: [1995] 1 Ll.R. 651, 668. But the case was not one of a known defence, merely one of alleged withholding of documents which were relevant to the merits of a possible defence. Tuckey J's finding that there was no fraud in any event rendered the scope of the fraudulent claim rule irrelevant on appeal. I note only that none of the speeches in the House of Lords contains any positive suggestion that the common law rule or s.17 cannot apply to a known defence.

19. I turn to examine the scope of the rule and the section more closely. Where there is a fraudulent claim, the law forfeits not only that which is known to be untrue, but also any genuine part of the claim. In contrast, where the use of fraudulent devices occurs, the whole claim is by definition otherwise good. The present appeal raises for consideration whether, as a matter of policy, the underlying rationale of the fraudulent claim principle should extend to invalidate not merely the whole of a claim where part proves good, but the whole of a claim where the whole proves otherwise good. The word "proves" of course assumes that all aspects of the litigation proceed to trial, which, although common, is not inevitable. The effect of the fraudulent claim principle is that, once it is determined (which it may be by trial of a preliminary issue) that part of a claim was false, the rest is forfeit, without it being essential to determine whether or not that rest itself related to genuine loss. If the use of fraudulent devices constitutes a defence to a claim, the possibility arises that this might be established by a preliminary issue, making trial of further issues irrelevant, so that, once again, it might never be determined whether genuine loss was suffered.

20. Mr Popplewell QC for the appellant insurers in the present case argues persuasively that the rationale of the common law rule regarding fraudulently exaggerated claims has force in the wider context of use of fraudulent devices to promote an insurance claim. If an insured uses fraudulent devices to support a claim, he does so, normally, because he believes that it is necessary or expedient to do so. He uses such devices, precisely because he cannot be sure that his claim is otherwise good. Mr Popplewell therefore submits that it should be irrelevant for an assured to show subsequently that the claim was all along good or that his fraudulent devices were superfluous. If the deception succeeds, and the insured wins, either at trial or because insurers settle on the basis that the facts were or may be as presented to them, the insured gains, because he avoids consideration of what he perceives as his true but weaker case. Assuming that the claim was in truth good all along, he will still successfully have gilded the lily (and may achieve a better settlement thereby). If the deception is revealed, either before or at trial, the insured cannot, Mr Popplewell submits, be allowed to think that he will lose nothing. The whole claim, if not the whole policy, must be forfeit, so as to introduce an incentive not to lie, paralleling that already recognised by the common law rule.

21. Mr Popplewell would wish to subsume the use of fraudulent devices under the head of fraudulent claim. But, whether or not it is so termed, he submits that fraud in the pursuit of a claim should attract parallel treatment. Consideration of both these submissions is complicated by the uncertainties regarding the potential overlap between, and the effects of, the common law rule regarding fraudulent claims and the general duty of good faith recognised under s.17. There remains still open the possibility that, although categorising a claim as fraudulent opens the way to forfeiture of the instant (and perhaps any future) claim, it does not give rise to the more drastic remedy of avoidance of the whole contract (see ***The "Star Sea"*** at para. 66, reserving judgment on this aspect of the decision in ***Orakpo v. Barclays Insurance Services*** [1995] LRLR 443 (CA)). Paradoxical though this might appear in relation to a type of fraud which one might think paradigmatic of want of good faith, the result could be welcome as a means of limiting the scope of the more draconian s.17. Having said that, there are circumstances in which a right to avoid may be lost by election, whereas the automatic effect of forfeiture may be less easy to circumvent; and the decision of this court in ***K/S Merc-Scandia v. Certain Lloyd's Underwriters (The "Mercandian Continent")*** [2001] 2 Ll.R. 563 places significant limitations on the application of s.17, which, if extended outside the context of that case to the situation where fraudulent devices or means are used to promote a claim, would themselves almost always completely preclude the section's application to that situation.

22. There is a dearth of convincing authority standing positively for, or indeed against Mr Popplewell's submissions. In formulating the common law rule, Willes J in ***Britton v. Royal Insurance Co.*** referred simply to "the practice to insert in fire policies conditions that they shall be void in the event of a fraudulent claim". It is of interest that some such policy conditions deal not merely with fraud in the claim made but also "*false swearing or affirming in support thereof*" or the use of "*any fraudulent means or devices … to obtain any benefit*" under the policy: see e.g. the clauses in **Levy v. Baillie** (above), in ***Insurance Corp. of the Channel Islands Ltd. v. McHugh*** [1997] 1 Ll.R. 94 and in ***Lehmbackers Earth Moving and Excavators (Pty.) Ltd. v. Incorporated General Insurances Ltd*** (1984) 3 SA 513 (considered in the ***McHugh*** case at p.134). What assistance, either way, is to be gained from this is less clear.

23. A common clause of this nature might be taken either as indicating (cf the approach in ***Britton***) or perhaps as contrasting with the proper scope of the common law rule. Whichever approach is generally true, the meaning of a "*fraudulent claim*" and "*any fraudulent means or devices*" under the language of a *particular* contractual clause may not necessarily correspond with the meaning to be attached to either phrase at common law. This is illustrated by ***Insurance Corp. of the Channel Islands Ltd. v. McHugh*** itself, where at pp.125-6 I observed that the concept of "fraudulent claim" (under condition 5 in the policy there) might in context be confined to fraud in the presentation of a formal written claim under condition 4. There was, however, on any view in that case use of "fraudulent means or devices". Similarly, in ***K/S Merc-Scandia v. Certain Lloyd's Underwriters (The "Mercandian Continent")*** [2001] 2 Ll.R. 563, the court dismissed a clause forfeiting any claim made by the assured "knowing the same to be false and fraudulent" from further consideration, because the insurance in question was a liability insurance, and "no question of making a claim under a liability policy arises until the liability of the assured is established (whether by agreement, judgment or arbitration)". I need not pause to consider whether there may not be a distinction between the making of a claim and the accrual of a cause of action against professional indemnity insurers.

24. **The "Mercandian Continent"** affords no guidance as to the appropriate approach to use of fraudulent devices to promote a claim under a policy. It was an unusual case, where the insured's deceit was aimed at the third party claimant. The deceit could be said to have been intended to benefit the insurers. In its enthusiasm to obtain the benefit of Trinidadian jurisdiction where it had been led (erroneously) to think that the local Merchant Shipping Act provisions would give it the benefit of a much lower limitation figure, the insured forged a false document, designed to rebut the third party's contention that London jurisdiction and law had been expressly agreed. The case was dealt with not by reference to any principle governing either fraudulent claims or fraudulent devices to obtain benefit, but as a case which raised for consideration the proper scope of s.17 of the Marine Insurance Act 1906.

25. ***The "Star Sea"*** was, in contrast, concerned with alleged embellishment of the assured's position with regard to what proved, at trial, to be a defence raised by underwriters under s.39(5) of the 1906 Act, on which the assured was anyway entitled to succeed. The assured was said to have withheld on discovery two experts reports relating to a prior casualty, because these were unhelpful to the assured in respect of underwriters' defence. I have already pointed out that the plea of fraudulent withholding was in fact rejected. The withholding was deliberate, but the documents were privileged and the assured's solicitors believed that there was no obligation to disclose them. I do not read Lord Hobhouse's speech, particularly at paras. 39 and 72, as expressing any positive view as

to the position, if the withholding had been fraudulent. What may be said to offer some general encouragement for Mr Popplewell's submissions, is Lord Hobhouse's general statement, at para. 72, that "*Fraud has a fundamental impact upon the parties' relationship and raises serious public policy considerations. Remediable mistakes do not have the same character*".

26. In ***Royal Boskalis Westminster NV v. Mountain,*** Rix J (whose judgment was overruled on grounds which need not presently concern me) did express views about the scope of the concept of "fraudulent claim" compared with the duty of good faith under s.17. The allegation was that the insured had fraudulently suppressed the continuing existence of a copy of a "*finalisation agreement*" reached with the Iraqi authorities, which would have revealed to underwriters certain financial arrangements agreed with those authorities. Rix J held (at p.592) that underwriters had not pleaded and were not entitled to pursue any case of fraudulent claim. The only case they had raised was one of "culpable mis-representation and non-disclosure" in alleged breach of the general duty of good faith as recognised in ***The "Litsion Pride"*** (now over-ruled in this regard by ***The "Star Sea").*** But Rix J went on (at pp.592-3) to express the view that, even if underwriters had intended to make a case of fraudulent claim, the facts could not justify it:

"*It was not a false or fraudulent claim. It is totally unlike those instances of fraudulent claim to be found in the authorities, such as claims in respect of deliberately self-inflicted or pretended losses, or claims which are knowingly or recklessly exaggerated: see for instance* ***Goulstone v. Royal Insurance Co.*** *(1858) 1 F & F 276 …… or* ***The "Captain Panagos DP"*** *[1986] 2 Ll.R. 470, where Evans J defined a fraudulent claim as "one which is made on the basis that facts exist which constitute a loss by an insured peril, when to the knowledge of the assured those alleged facts are untrue" at p.511. ….. I doubt that it is every knowingly or recklessly false statement made in the context of a claim which renders that claim a fraudulent claim for the purpose of the doctrine whereby the making of a fraudulent claim leads to the automatic forfeiture of the whole policy under which the claim is made*".

27. On the other hand, in ***Lek v. Mathews*** (1927) 29 Ll.L.R. 141, 164, Visc. Sumner disagreed with Atkin LJ's view, at (1926) 25 Ll.L.R. 525, 544, that the clause there (relating in terms to the making of "any claim knowing the same to be false or fraudulent") would not cover the "collateral" supply of information known to be false in support of a valid claim. Further, in the judgment of this court in ***Piermay Shipping Co. SA v. Chester (The "Michael")*** [1979] 2 LL.R. 1, Roskill LJ said:

"*In Halsbury's Laws of England (4th ed.) vol. 25, the law is stated thus in par. 510:*

(510) Effect of fraudulent claim. The making of a fraudulent claim is a breach of the duty of good faith and consequently the assured forfeits all benefit under the policy, whether it contains an express condition to that effect or not. Policies of non-marine insurance usually contain an express condition against fraudulent claims.

(511) What claims are fraudulent. A claim which is put forward when the assured knows he has suffered no loss or which is supported by false evidence is clearly fraudulent."

It is fair to add that, in the like passage in the fourth edition reissue (1994), the authorities cited all relate to cases of no or exaggerated loss.

28. Underwriters' plea in ***The "Michael"*** was that the assured owners had "*made and maintained the claims …. throughout the period from February to September 1973 as for a loss caused by perils of the sea, namely accidental flooding of the engine room, notwithstanding that they knew that the flooding was deliberate and caused by Komiseris or were reckless whether it had been so caused or not. In the premises the claim was made fraudulently with the intention of deceiving the Defendant …..*" (see [1979] 1 Ll.R. 55, 88).

Thereafter, owners changed their case to assert, and assert only, that Komiseris had sunk the vessel deliberately without their privity and that the loss had thus occurred by barratry. The owners succeeded on this latter case at trial and on appeal. Underwriters' plea of fraud was rejected on the facts. The court of appeal made clear however that it was expressing no view on the extent to which, had the peril of the seas claim been fraudulent, underwriters would have had a defence to the barratry claim: see p.22. Even if Kerr J at first instance or the court of appeal was assuming that the fraudulent pursuit of a peril of the seas claim would undermine any genuine barratry claim, dishonest presentation of a claim on a totally different factual basis from the truth, so as to invoke an entirely different peril, may represent a special case. Such a case might fall within the fraudulent claim rule, without that rule necessarily embracing the use of less fundamental fraudulent devices. So, apart from the citation from Halsbury, the case is of no great assistance.

29. I must however note the jury direction given and verdict entered by Roche J ***in Wisenthal v. World Auxiliary Insurance Corp. Ltd.*** (1930) 38 Ll.L.R. 38. Insurers' defence to a claim for loss by theft of furs succeeded on the basis of jury findings that fraudulent means or devices had been used in two respects. The first respect consisted of fraudulent concealment of a stock sheet or book, which the insured had told insurers' investigating accountant did not exist (see pp.61, 62). The second consisted of fraudulent concealment of facts and documents relating to the bank account of a Mr J. White (the name used by Mrs Wisenthal's brother in law). The Wisenthals had been using unsuitable premises in Glasgow to conduct auctions of their goods, without disclosing publicly that these were their goods, and these facts or some of them would have been material for insurers to know at placement (see pages 60-61). Mr White appears to have been closely connected with the Wisenthals' business and his name was used for the auctions and auction premises (pages 55-56, 57 and 59). During the claim, Mr Wisenthal, who conducted the business for his mother, represented falsely to insurers that Mr White had nothing to do with the business (page 57). On this basis, both aspects of concealment were treated as material to the claim. The direction given by the judge to the jury is recorded as having been on these lines:

"Fraud …. was not mere lying. It was seeking to obtain an advantage, generally monetary, or to put someone else at a disadvantage by lies and deceit. It would be sufficient to come within the definition of fraud if the jury thought that in the investigation deceit had been used to secure payment or quicker payment of the money than would have been obtained if the truth had been told."

While the actual decision on materiality was evidently the jury's, the judge's treatment of the fraudulent claim principle and of the issue of materiality is of interest.

30. That some distinctions exist between fraudulent claims, in the narrow sense of cases of no or exaggerated loss, and the use of fraudulent devices is clear. A fraudulent claim exists where the insured claims, knowing that he has suffered no loss, or only a lesser loss than that which he claims (or is reckless as to whether this is the case). A fraudulent device is used if the insured believes that he has suffered the loss claimed, but seeks to improve or embellish the facts surrounding the claim, by some lie. There may however be intermediate factual situations, where the lies become so significant, that they may be viewed as changing the nature of the claim being advanced (cf ***The "Michael"*** above). The description of "fraudulent claim" given by Evans J in ***The "Captain Panagos DP"*** and adopted by Rix J in ***Royal Boskalis*** may simply have been intended to cater for such situations, rather than other cases of use of fraudulent devices.

31. The authorities also indicate that there are differences between, on the one hand, a fraudulent claim to recover a non-existent or exaggerated loss and, on the other, a breach of the duty of good faith under s.17. Rix J said in ***Royal Boskalis,*** at p.599, that

"upon my understanding of the nature of a fraudulent claim, there is no additional test of materiality or, to put the same point perhaps in another way, the test of materiality is built into the concept of a fraudulent claim".

32. This observation merits some further examination. I start by noting an aspect of this court's decision in ***Galloway.*** The claim there made, following a burglary, for some £18,143, consisted in the main of genuine loss, but as to £2000 involved the alleged loss of a non-existent computer. The court agreed with the judge that the whole claim was forfeit. Lord Woolf MR explained references in ***Orakpo*** to the need for "*substantial*" fraud as intended to exclude fraud which could be regarded as "*immaterial*" (or, in Visc. Sumner's words in ***Lek v. Mathews,*** so "*unsubstantial as to be de minimis*"). In this context the right approach was to look at the size of the non-existent loss alone and not to draw some comparison between it and the size of the genuine claim. Millett LJ suggested that the right approach was to consider whether the making of the claim was "*sufficiently serious to justify stigmatising it as a breach of [the insured's] duty of good faith so as to avoid the policy*". This assumes that the remedy of avoidance is available in this context. Whether it is available was not in issue in either ***Orakpo*** or ***Galloway*** (as Lord Hobhouse observed in ***The "Star Sea"),*** and is a matter which, I suggest, merits further examination, before the common law commits itself.

33. Secondly, in relation to Rix J's observation in ***Royal Boskalis,*** to the extent that loss claimed is non-existent, the claim will fail anyway and the fraud is clearly material in so far as it amounted to an attempt to recover for non-existent loss. But the real bite of the fraudulent claim rule is to forfeit even the genuine part of any claim; and the fraud by definition is *not* material in any ordinary sense to the genuine part. Thus, it is sufficient for the rule to apply that the fraud occurs in making a claim and relates to a part of the claim which, when viewed discretely, is not itself immaterial or "*unsubstantial*".

34. In contrast, it is a general requirement of s.17 that the matter fraudulently mis-represented or undisclosed should have been material. In ***Royal Boskalis,*** Rix J considered that, if the duty under s.17 extended at the claims stage to non-fraudulent, albeit culpable non-disclosure, then: "…. *it seems to me to make sense that the test of materiality should depend on the ultimate legal relevance to a defence under the policy of the non-disclosure or misrepresentation relied on as a breach*" (p.588) and "*The result would be that non-fraudulent breach of duty in relation to claim A would only be proved if the matter misrepresented or concealed justified a defence to that claim, but upon such proof the insurer would be shown to be justified, if he so chooses, to avoid the policy as a whole.*" (p.589)

35. In ***The "Mercandian Continent"*** the court adopted Rix J's test (contained in these passages from ***Royal Boskalis)*** as appropriate under s.17. The court in ***The "Mercandian Continent"*** was not, however, concerned with a situation where there was either a fraudulent claim or the use of any fraudulent device to promote an insurance claim. Rix J's test does not necessarily fit either of these situations. If one *were* to apply the test of materiality developed in ***Royal Boskalis*** and in ***The "Mercandian Continent"*** to the use of a fraudulent device, two consequences would follow. First, the use of a fraudulent device would itself commonly become immaterial. With regard to the claim itself, if that was bad in any case, it would fail because it was bad, and any finding that a fraudulent device was used would add nothing. With regard to the policy generally, a finding of use of a fraudulent device could only add something, if one were to assume that (a) either s.17 creates a right of avoidance or the common law rule of forfeiture affects future claims as well as the claim to which the device related *and* (b) some other past claim(s) had been paid (which insurers decided that they wished to recover by avoiding the whole policy) or some future claim had arisen (which insurers wished to avoid paying). Secondly, there could be no preliminary issue to determine whether a claim failed for use of a fraudulent device. The proceedings would have to be litigated to trial to determine whether "*the matter misrepresented or concealed justified a defence to [the] claim*".

36. What relationship need there then be between any fraud and the claim, if the fraudulent claim rule is to apply? And need the fraud have any effect on insurers' conduct? Speaking here of a claim for a loss known to be non-existent or exaggerated, the answers seem clear. Nothing further is necessary. The application of the rule flows

from the fact that a fraudulent claim of this nature has been made. Whether insurers are misled or not is in this context beside the point. The principle only arises for consideration where they have *not* been misled into paying or settling the claim, and its application could not sensibly depend upon proof that they were temporarily misled. The only further requirement is that the part of the claim which is non-existent or exaggerated should not itself be immaterial or unsubstantial: see paragraphs 32-33 above. That also appears consistent with general principle, even though, in a pre-contract context, no significance or sanction attaches to a fraudulent misrepresentation or non-disclosure unless it has, by misleading insurers, induced them to enter a contract. Thus, Lord Mustill considered in ***Pan Atlantic Insurance Ltd. v. Pine Top Insurance Ltd.*** [1995] 1 AC 501, 533B that the texts and the relevant cases leave no room for doubt that - whereas, if the representation inducing a contract was either fraudulent or a "warranty" of the contract, "its falsehood would invariably give a right to avoid" - an innocent misrepresentation inducing the contract would in contrast "*give the underwriter a right to avoid only if it was material*" (cf also Howard N. Bennett on The Doctrine of Utmost Good Faith [1999] LMCLQ 165, 177).

37. What is the position where there is use of a fraudulent device designed to promote a claim? I would see no reason for requiring proof of actual inducement here, any more than there is in the context of a fraudulent claim for non-existent or exaggerated loss. As to any further requirement of "materiality", if one were to adopt in this context the test identified in ***Royal Boskalis*** and *The "Mercandian Continent",* then, as I have said, the effect is, in most cases, tantamount to saying that the use of a fraudulent device carries no sanction. It is irrelevant (unless it succeeds, which only the insured will then know). On the basis (which the cases show and I would endorse) that the policy behind the fraudulent claim rule remains as powerful today as ever, there is, in my view, force in Mr Popplewell's submission that it either applies, or should be matched by an equivalent rule, in the case of use of a fraudulent device to promote a claim – even though at the end of a trial it may be shown that the claim was all along in all other respects valid. The fraud must of course be directly related to and intended to promote the claim (unlike the deceit in ***The "Mercandian Continent").*** Whenever that is so, the usual reason for the use of a fraudulent device will have been concern by the insured about prospects of success and a desire to improve them by presenting the claim on a false factual basis. If one does use in this context the language of materiality, what is material at the claims stage depends on the facts then known and the strengths and weaknesses of the case as they may then appear. It seems irrelevant to measure materiality against what may be known at some future date, after a trial. The object of a lie is to deceive. The deceit may never be discovered. The case may then be fought on a false premise, or the lie may lead to a favourable settlement before trial. Does the fact that the lie happens to be detected or unravelled before a settlement or during a trial make it immaterial at the time when it was told? In my opinion, not. Materiality should take into account the different appreciation of the prospects, which a lie is usually intended to induce on insurers' side, and the different understanding of the facts which it is intended to induce on the part of a judge at trial.

38. The view could, in this situation, be taken that, where fraudulent devices or means have been used to promote a claim, that by itself is sufficient to justify the application of the sanction of forfeiture. The insured's own perception of the value of the lie would suffice. Probably, however, some limited objective element is also required. The requirement, where a claim includes a non-existent or exaggerated element of loss, that that element must be not immaterial, "unsubstantial" or insignificant in itself offers a parallel. In the context of use of a fraudulent device or means, one can contemplate the possibility of an obviously irrelevant lie – one which, whatever the insured may have thought, could not sensibly have had any significant impact on any insurer or judge. Tentatively, I would suggest that the courts should only apply the fraudulent claim rule to the use of fraudulent devices or means which would, if believed, have tended, objectively but prior to any final determination at trial of the parties' rights, to yield a not insignificant improvement in the insured's prospects – whether they be prospects of obtaining a settlement, or a better settlement, or of winning at trial. Courts are used enough to considering prospects, e.g. when assessing damages for failure by a solicitor to issue a claim form within a limitation period.

39. Some difficulty arises at this point with regard to dicta in the recent authorities relating to ***The "Litsion Pride"*** [1985] 1 Ll.R. 437. In that case, the owners had intended to trade to the Persian Gulf, and to do so, in order to save war risks premium due under the relevant "*held covered*" provision, without informing insurers. After the vessel was hit by a missile, owners, however, concocted and back-dated a letter to the brokers, purporting to advise the intended voyage, and the brokers also maintained the genuineness of this letter (although they did not believe in it) at meetings with the underwriter thereafter. Hirst J held, after lengthy analysis, that the language of the held covered clause meant that it was not a condition precedent to war risks cover that prior or prompt notice of entry into the Gulf should have been given.

40. Lord Hobhouse in **The "Star Sea"** at para. 71 said of **The "Litsion Pride"** that: "*In so far as it is based upon the principle of irrecoverability of fraudulent claims, the decision is questionable upon the facts since the actual claim made was a valid claim for a loss which had occurred and had been caused by a peril insured against when the vessel was covered by a held covered clause. It is not necessary to examine whether the case could have been decided in favour of the insurer as one clearly feels it ought to have been.*"

Lord Scott said at para. 106: "*Hirst J held that the falsely dated letter was a fraud directly connected to the claim and a breach of the section 17 duty of utmost good faith. I do not think that anyone would dissent from that conclusion.*"

Longmore LJ said in **The "Mercandian Continent"** at para. 29: "*Mr Justice Hirst held that the letter was a fraud clearly connected to the claim and the later statements were made in the direct context of the claim. It is thus a case of making a fraudulent claim and to that extent was, with respect, good law, but irrelevant to the present case.*"

41. Lord Hobhouse seems thus to have questioned whether the fraudulent claim principle can embrace the case of a valid claim fortified by fraudulent devices. In the light of the facts in ***The "Litsion Pride",*** I find unpersuasive Mr Popplewell's submission that all he meant was that owners' fraud could not possibly have been material to the existence of policy cover. That could only be asserted with any confidence at the end of a long judgment by Hirst J, considering the authorities on "held covered" clauses. Lord Hobhouse's reasoning does however leave open a possibility of some other remedy. Lord Scott had no doubt that that remedy lay under s.17. Longmore LJ thought that ***The "Litsion Pride"*** was explicable, as a case of fraudulent claim, and adopted a view of that concept wide enough to embrace use of a fraudulent device.

42. Longmore LJ's explanation of ***The "Litsion Pride"*** also involves an important distinction between cases of fraudulent claim (including thereby, as Longmore LJ did, the use of a fraudulent device or means to promote a claim) and other cases of deceitful conduct towards insurers - such as the conduct in ***The "Mercandian Continent"*** itself, which was not designed to promote the insurance claim or to prejudice the insurers, but was committed in what Longmore LJ described (at para. 43) as an "over-enthusiastic" attempt to promote both their interests by defeating or minimising the third party claim against the insured.

43. The latter situation (conduct not designed to promote a claim) can only be considered under s.17. The sole sanction provided by that section is avoidance. Before such a deceit can entitle avoidance under s.17, the court held in ***The "Mercandian Continent"*** at para. 35 that:

"…. *(A) the fraud must be material in the sense that the fraud would have an effect on underwriters' ultimate liability as Mr Justice Rix held in Royal Boskalis and (B) the gravity of the fraud or its consequences must be such as would enable the underwriters, if they wished to do so, to terminate for breach of contract. Often these considerations will amount to the same thing: a materially fraudulent breach of good faith, once the contract has been made, will usually entitle the insurers to terminate the contract. Conversely, fraudulent conduct entitling insurers to bring the contract to an end could only be material fraud. It is in this way that the law of post-contract good faith can be aligned with the insurers' contractual remedies. The right to avoid the contract with retrospective effect is, therefore, only exercisable in circumstances where the innocent party would, in any event, be entitled to terminate the contract for breach.*"

44. It is evident that the severity of the sanction under s.17 led the court to adopt a combination of pre-conditions to that section's operation, which in practice must make it a rare case indeed when it will ever be relevant. Save in cases involving a claim for non-existent or exaggerated loss (with which the court was not concerned), criterion (A) would appear unlikely to be satisfied. Proposition (B) requires, in addition, gross (or "repudiatory") mis-conduct. Given proposition (B), it may, it seems to me, be open to consideration whether the additional threshold to the application of s.17 constituted by proposition (A) is universal - even in contexts where the background to an alleged breach of the duty of good faith includes a potential insurance claim. One may speculate about the position, if, for example, there were deceit in some other context which might be held to require the parties to an insurance to deal honestly together (such as – perhaps - the reporting of a particular voyage for the purposes of obtaining cover under a held covered clause). What is clear is that, if proposition (A) were to apply to the use of fraudulent devices to promote a claim, the practical result would be, at least generally, that the use of fraudulent devices would be irrelevant; there would be no possible sanction.

45. What then is the appropriate approach for the law to adopt in relation to the use of a fraudulent device to promote a claim, which may (or may not) prove at trial to be otherwise good, but in relation to which the insured feels it expedient to tell lies to improve his prospects of a settlement or at trial? The common law rule relating to cases of no or exaggerated loss arises from a perception of appropriate policy and jurisprudence on the part of our 19th century predecessors, which time has done nothing to alter. The proper approach to the use of fraudulent devices or means is much freer from authority. It is, as a result, our duty to form our own perception of the proper ambit or any extension of the common law rule. In the present imperfect state of the law, fettered as it is by s.17, my tentative view of an acceptable solution would be:

a) to recognise that the fraudulent claim rule applies as much to the fraudulent maintenance of an initially honest claim as to a claim which the insured knows from the outset to be exaggerated,

b) to treat the use of a fraudulent device as a sub-species of making a fraudulent claim - at least as regards forfeiture of the claim itself in relation to which the fraudulent device or means is used. (The fraudulent claim rule may have a prospective aspect in respect of future, and perhaps current, claims, but it is unnecessary to consider that aspect or its application to cases of use of fraudulent devices.)

c) to treat as relevant for this purpose any lie, directly related to the claim to which the fraudulent device relates, which is intended to improve the insured's prospects of obtaining a settlement or winning the case, and which would, if believed, tend, objectively, prior to any final determination at trial of the parties' rights, to yield a not insignificant improvement in the insured's prospects – whether they be prospects of obtaining a settlement, or a better settlement, or of winning at trial, and

d) to treat the common law rules governing the making of a fraudulent claim (including the use of fraudulent device) as falling outside the scope of s.17 (as advocated, though more generally, by Howard N. Bennett in the article to which I have already referred). On this basis no question of avoidance ab initio would arise.

46. If that approach were adopted, then underwriters' proposed amendments in the present case would raise a defence which ought to be tried, subject only to the claimant's further objections that (a) they relate to fraudulent devices or means allegedly used during the course of the present litigation, and (b) they are made too late, in circumstances prejudicing the claimant, and should be disallowed as a matter of discretion.

The application of the fraudulent claim rule after litigation

47. In ***The "Star Sea"*** Lord Clyde said at para. 4:

"As regards the obligations in law of an insured at the stage of a disputed claim I take the view that there is no duty upon the insured to make a full disclosure of his own case to the other side in a litigation. I see no practical justification for such an obligation at that stage. Unlike the initial stage when the insurer may rely very substantially upon the openness of the insured in order to decide whether or not to agree to provide insurance cover, and if so at what level of premium, the insurer has open to him means of discovery of any facts which he requires to know for his defence to the claim. Moreover I have found no precedent to support the appellants' proposition; if anything the authority at least of MacGillivray on Insurance Law, 9th ed. (1997), para 19-59 points in the opposite direction. The idea of a requirement for full disclosure superseding the procedural controls for discovery in litigation is curious and unattractive, and one which would require to be soundly based in authority or principle."

48. Lord Hobhouse dealt with the matter more fully at paras. 73-78, where he said this: "*In Litigation:*

73. The point here is whether the obligation of good faith and disclosure continues to apply unqualified once the parties are engaged in hostile litigation before the courts. There is no authority directly on this point. It was decided in favour of the owners by both courts below. There are however dicta in cases which show that the judges concerned contemplated that the obligation of good faith could continue to apply during litigation. Thus, by way of example, Viscount Sumner in Lek v Mathews (sup) at p 145 said in relation to an express clause that he was inclined to think that it would extend to false statements during the course of the trial. It is therefore right to consider what effect the commencement of legal proceedings has upon the relationship of the parties. Similarly some of the judgments in the ship's papers cases treat the order for ship's papers as an application of the obligation of good faith.

74. Before the litigation starts the parties' relationship is purely contractual subject to the application of the general law. …..

75. When a writ is issued the rights of the parties are crystallised. The function of the litigation is to ascertain what those rights are and grant the appropriate remedy. The submission of the defendants in this case is that, notwithstanding this, one party's conduct of the litigation can not only change that party's substantive rights but do so retrospectively avoiding the contract ab initio. It cannot be disputed that there are important changes in the parties' relationship that come about when the litigation starts. There is no longer a community of interest. The parties are in dispute and their interests are opposed. Their relationship and rights are now governed by the rules of procedure and the orders which the court makes on the application of one or other party. The battle lines have been drawn and new remedies are available to the parties. The disclosure of documents and facts are provided for with appropriate sanctions; the orders are discretionary within the parameters laid down by the procedural rules. Certain immunities from disclosure are conferred under the rules of privilege. If a party is not happy with his opponent's response to his requests he can seek an order from the court. If a judgment has been obtained by perjured evidence remedies are available to the aggrieved party. The situation therefore changes significantly. There is no longer the need for the remedy of avoidance under s.17; other more appropriate remedies are available. The same points have been persuasively made by Callahan AJ sitting in the Supreme Court of Connecticut in Reg. v Connecticut Ins Placement Facility (1991) 593 A.2d 491 at 497.

76. I recognise that it is possible for something to be done in the litigation which may amount to a contractual act; the delivery of pleadings and similar documents are a form of communication. Such communication can have a contractual significance which can and will still be given effect to. Thus it is possible by a pleading to repudiate a contract or accept a repudiation as terminating the contract. Similarly, a claim or defence may affect the substantive rights of a landlord and tenant inter se. But the acts and omissions of the assured relied upon by the defendants in the present case are not of that character. They are solely relevant as alleged failures to observe good faith under s.17. The s.17 principle is a principle of law and if its rationale no longer applies and if its operation, the conferment of a right of avoidance, ceases to make commercial or legal sense then it should be treated as having been exhausted or at the least superceded by the rules of litigation. It will also very often be the case that by the time the litigation has started the cover has expired or its subject matter has ceased to exist so as to make the continuing relationship of insurer and insured no longer current and the observation of good faith only significant to the litigation.

77. I am therefore strongly of the view that once the parties are in litigation it is the procedural rules which govern the extent of the disclosure which should be given in the litigation, not s.17 as such, though s.17 may influence the court in the exercise of its discretion. The cases upon ship's papers, far from supporting the continuing application of the duty of good faith in truth support the opposite conclusion. As previously discussed, the fact that orders for ship's papers were only made in marine insurance despite the fact that the principle of good faith applies to all insurance and the fact that the order was a matter of discretion not of right shows that it is a procedural remedy not a matter of contract although the principle of good faith clearly influenced the attitude of the court to making such an order. But, most conclusively, the fact that the remedy was to obtain an order from the court and not to avoid the contract shows both the limits of the principle and the change of relationship which comes about when the parties are in hostile litigation.

78. Therefore this point must be decided against the defendants as well."

49. Lord Scott said simply:

> *"110 …. I can see a great deal of force in the argument that the section 17 duty does not apply to conduct in the prosecution of litigation, as to which the Rules of Court that govern litigation constitute the regulatory code. A decision as to that, too, is best left for a case where the point is critical to the result.*
>
> *111. I would, however, limit the duty owed by an insured in relation to a claim to a duty of honesty. …. "*

50. Lords Steyn and Hoffmann agreed with the speeches of both Lords Hobhouse and Scott. Since Lord Hobhouse considered that the point "must be decided against the defendants as well" (indicating that as far as he was concerned this was a concurrent reason for his dismissal of the appeal on the issue of good faith), while Lord Scott considered that it was "best left for a case where the point is crucial to the result", there is room for doubt about the precise position. The better view, I think, is that Lords Steyn and Hoffmann cannot be treated as endorsing this part of Lord Hobhouse's speech as a concurrent reason for the dismissal of the appeal on the issue of good faith, although, if they had disagreed with his observations as dicta, I would have expected them to express their disagreement.

51. ***The "Star Sea"*** thus contains most powerful dicta to the effect that the duty of good faith under s.17 is superseded or exhausted by the rules of litigation, once litigation is begun. The House of Lords was concerned with this point in a case where the argument was that the duty covered non-fraudulent conduct. In a case where breach of the duty in s.17 was in point, I would unhesitatingly apply the dicta, both because of their weight and also because I respectfully agree with them. But, as Mr Popplewell points out, the House of Lords was not concerned with either a fraudulent claim or the use of fraudulent devices to promote such a claim. The common law rule may have a different duration. That is possible. One may also speculate about the court's approach to the construction of an apparently unqualified and unlimited contractual term (a point touched on briefly in **Insurance Corp. of Ireland** at p.133). A fraudulent claim or the use of fraudulent devices to promote a claim during litigation may be regarded both as a more clear-cut and as a more egregious form of misconduct than any other form of breach of the duty of good faith under s.17.

52. For my part, I consider that it would be inappropriate to introduce a distinction between the duration of impact of the fraudulent claim rule (including in that any extension to cover the use of fraudulent devices to promote a claim) and of the s.17 duty. The present point is free from authority. The same policy considerations that led Lord Hobhouse to restrict the latter duty to the pre-litigation period militate strongly in favour of a similar restriction of the duration of the common law duty. The present case, with its interruption of pending litigation to pick over the prior course of the litigation and to find an additional defence, provides a good example of the pragmatic objections to any continuing duty (even one defined by reference to fraud), applying after litigation had begun. I add that similar considerations would, I believe, be borne in mind whenever the court was called upon to construe an apparently unlimited express clause covering fraudulent claims or the use of fraudulent devices.

53. I therefore conclude that the proposed amendments raise a case which would be obviously bad, in so far as it depends on the assertion of lying in breach of either a common law duty or a duty under s.17 continuing after the commencement of litigation. The judge's expression of view to that effect at p.9 in the transcript was correct, although he had by then already indicated that he would refuse the application on different grounds. For this reason, and without adopting the judge's primary reasoning, underwriters' appeal should in my view be dismissed.

Discretion

54. In the light of my conclusion in paragraph 53, it is unnecessary to express any view as to the appropriate exercise of discretion, any more than the judge did. I say only that I was not persuaded by Miss Andrews QC's submissions that, if the proposed amendments would raise a properly arguable case in law, they should be refused as a matter of discretion, because of their lateness and the potential prejudice to the claimant arising from the death in November 1999 of Mr Ioannis Agapitos. The amendments plead fraud. Underwriters rightly considered that they could only plead fraud if they had clear evidence of fraud. The fact that they could and did plead that hot works began in January 1996 does not mean that they knew that fact, with sufficient certainty to use it as the basis for a plea of fraud against Mr Ioannis or Mr Konstantinos Agapitos. Counsel took the view that it was only after the insured's belated disclosure of the two workmen's statements in early 2001 that it was sufficiently clear that this was the case, to base a case of fraud against the two Messrs. Agapitos on the allegation. I agree with that view. Such previous indication as there were that hot works proper had started prior to 6th February 1996 was very limited and unsworn.

55. There is no criticism of the speed with which underwriters raised a case of fraud in 2001. What is relied upon as prejudice is the death of Mr Ioannis Agapitos in November 1999. The extent to which the proofs which must have been taken from him and his son regarding the course of repair works and hot works cover all aspects which would be relevant to the fraud plea has not been disclosed by the claimant, and I would not be satisfied, in the result, that any such prejudice has been shown. Apart from that, if prejudice was caused, it was the claimant's own fault for not disclosing earlier and at the proper stage the two workmen's statements, which it is not suggested were privileged. Lists of documents, which should have contained these statements, were first exchanged on 20th November 1998, that is a year before Mr Ioannis Agapitos' death, and the course of the present application indicates that, if those lists had contained the two statements, underwriters' proposed amendments would have been formulated and the present application made in ample time to enable any necessary further instructions to be taken from Mr Ioannis Agapitos.

Conclusion

56. The upshot is that this appeal fails, in my judgment, for the single reason identified in paragraph 52-53.

Mr Justice Park:

57. I too would dismiss this appeal.

58. A regrettable but not uncommon phenomenon in the civil courts is the litigant, whether a claimant or a defendant, who thinks that he has a fairly good case but is worried that he just might lose, so he tries to improve his chances by embellishing the evidence and telling a few lies. Suppose that at the trial his lies are exposed, but the judge takes the view that he would have won the case anyway without them. Does he lose the case because he lied? The answer is: no. If his case is a good one anyway, he wins. It is deplorable that he lied, but he is not deprived of his victory in consequence.

59. The present case raises the question whether it is any different if the litigant who tells lies is an insured claimant, the defendant is the insurer, and the insured is attempting to improve his chances of securing judgment for his claim under the policy. In my judgment, for the reasons which Mance LJ explains, it is not any different. The point arises because, if the litigant had told his lies, not in the course of the court proceedings, but at the earlier stage when he was pressing his claim upon the insurer, it is likely that the lies, if discovered, would have provided the insurer with a defence at common law under the fraudulent claims principle. The case for the insurers is that the position is exactly the same if the litigant tells his lies in the course of the litigation, but in my view it is not.

60. As to the ambit of the fraudulent claims principle I respectfully adopt the comprehensive and scholarly exposition in the judgment of Mance LJ, to which I could not possibly add anything of value myself.

61. In this case the insured has said that hot works did not commence on the vessel until 12 February 1996. The insurers say that that was a lie: they say that recent disclosures reveal that hot works had begun not later than on or about 1 February 1996, and that both of the Messrs Agapitos (the father, now deceased, and the son) must have known that they had begun by then. The relevance of the point is that 8 February was the earliest date on which, according to the insured's case, a London Salvage Association certificate was in force (or, if a certificate was not in force, the designated surveyor of the LSA had confirmed that, if hot works commenced thereafter, there would be no breach of the insured's warranty). The insured had warranted that hot works would not begin until a LSA certificate was in force. So, if hot works had begun by 1 February, the insurers have an arguable case that the insured was in breach of warranty. The result would be that the insurers would not be liable under the policy for the consequences of the fire which destroyed the vessel on 19 February. On the other hand, if hot works did not begin until 12 February the insured has a maintainable case that there was no breach of warranty. (Whether that case will succeed seems to me likely to depend heavily on what the LSA's surveyor is found to have said on 8 February, and on what the effects of what he said were; but those are not points which have been explored in the current hearing.)

62. It is of course open to the insurers on the pleadings as they presently stand to advance at trial the case that hot works had begun on 1 February (before the LSA certificate or anything equivalent from the LSA's surveyor was in place), that in consequence the insured was in breach of warranty, and that therefore the case should be decided in favour of the insurers. However, the insurers want to amend their pleadings so as to put forward in addition the more root and branch case that the claimant, an insured who owes a duty of good faith to his insurers, has told a significant lie in advancement of his insurance claim, and that for that reason alone his claim should be dismissed.

63. If the insured's statement (the alleged lie) that hot works did not commence until 12 February had been made to the insurers in the course of pre-litigation discussions and negotiations about the policy claim, it would, I believe, follow from the principles which Mance LJ has described that permission should be given to amend the defence so as to raise the plea which the insurers wish to advance. However, the statement was not made to the insurers in pre-litigation discussions and negotiations: it was made in a pleading in the course of the litigation. Mance LJ's conclusion is that that circumstance removes it from the ambit of the fraudulent claims principle. I respectfully agree with him, both in the result and in the reasons for it. In my opinion the case simply becomes one, such as I described in the first paragraph of this short concurring judgment, where a litigant is alleged to have lied in support of his case. If a litigant did lie that is reprehensible, and the fact that he thought it necessary or desirable to lie obviously causes one to suspect that his case, stripped of the lies in support of it, may not be a good one. But it is not the law that, if his case is a good one after all, the fact that he lied in support of it is in itself a ground for judgment being given against him.

64. I have one further thing to say in conclusion. It is not conceded by or on behalf of the claimant that his pleaded averment about the date of commencement of hot works was a lie, and I expect that at trial it will be denied that it was anything of the sort. I would not wish anything that I have said to be understood as implying any view on my part about whether the statement was a lie or not.

Lord Justice Brooke:

65. I agree with both judgments.

Order: As per minute draft minute. Permission to appeal to the House of Lords refused. (Order does not form part of the approved judgment)

Andrew Popplewell QC & Claire Blanchard (instructed by Messrs Ince & Co) for the Appellants
Geraldine Andrews QC (instructed by Messrs Memery Crystal) for the Respondents