Justified claims supported by collateral lies

Eighteen months after it was passed, the Insurance Act 2015 came into force, on 12 August 2016. It applies to all policies made, or to *variations*, after that date. Largely by adjusting remedy, it seeks to correct long-perceived imbalance in the realm of pre-contract disclosure. It also captures the common law on fraudulent claims, though it does not define those, or address the scope and legal result of what had become known as *fraudulent devices*. This was considered in the Supreme Court decision in the "DC MERWESTONE" [2016] UKSC 45 on 20 July.

If an insured makes an entirely fabricated claim, he cannot recover. Likewise, if he makes a genuine one, but exaggerates or inflates it, the law permits the insurers to decline the whole claim, disallowing severance and treating it as one single process invalidated by attempted falsehood. Fraud is to be deterred. An insured cannot make a one-way bet, thinking that "if the fraud is successful, then I will gain; if it is unsuccessful, I will lose nothing." That is settled law, and section 12 of the 2015 Act now provides that if an insured makes a fraudulent claim under a contract of insurance the insurer is not liable to pay the claim, and, further, may recover any payments, another part of the common law rule.

But what if the insured makes a wholly valid claim, but then tells a lie in order - as he thinks - to improve it, or perhaps get quicker payment? During the last 90 years, sporadically, slowly and with judicial reluctance, the law had developed to allow the insurer to decline then, too, even though the lie had not affected the insured's right to recover. Where, for example, there was an attempt to defeat a perceived policy defence, but there proved to be none, so the falsehood made no difference, the insurers could still decline, on account of the insured's *fraudulent device* - though it had not succeeded, deceit had been intended. Early in their claim, the insured owners of the "DC MERWESTONE" told a "reckless untruth" to try to quicken the process and mask a mooted policy point based on the vessel's condition, but the facts established no such defence so the lie was ineffective. A unanimous Court of Appeal upheld the Judge's ruling that the insurers had validly declined due to the fraudulent device deployed by the insured.

By a 4-1 majority the Supreme Court overturned this and held that the doctrine of fraudulent devices no longer operates automatically to defeat a claim. It was wholly disproportionate to allow that just because the insured had (perhaps once, only) told a collateral lie i.e. one which "turns out when the facts are found to have no relevance to the insured's right to recover." In such a case, the vital distinction is that the insured was not seeking to get something other, or something more, than the law regards as his entitlement - "the lie is dishonest, but the claim is not."

To permit an insurer to decline, the collateral lie "need not have any adverse impact on the insurer, [but] it must at least go to the recoverability of the claim", on the facts as they later turn out. An insurer can no longer rely in this way on an untruth which *proves to have been* immaterial to the insured's right to recover - the falsehood must be assessed in the light of all the facts, not just those known when it was uttered.

Lord Mance disagreed, urging that the fraudulent devices rule had a key role in fighting fraud and promoting insurance claim integrity, and that all should be examined at the time of the lie, as only then can one assess its impact: the wait-and-see approach of the majority blurs that, undermines deterrence in overlooking the reality that most claims are settled long before any fact-finding trial, and gives an insured the very one-way bet denied him for an exaggerated claim.

In sum, if a lie was told but turns out not to have been (one can put this many ways) "causally relevant to underwriters' ultimate liability, or at least, to some defence of the underwriters", it is of no account. But if a lie does prove relevant in such a way, surely underwriters have a policy defence anyway. And if like most the claim is settled, but based on such a falsehood, the deceit has succeeded.

While one can argue that, in this enduring common law arena, the quest for proportionality has left logic behind, unlike with many of the matters now regulated by the Insurance Act 2015, complete freedom of contract remains. Lord Mance strongly hinted at that in closing, and perhaps the courts have not yet seen the last of fraudulent devices - or, as here re-named, collateral lies.

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