
# With the Brillante Virtuoso litigation bubbling away, when does dishonesty forfeit an otherwise valid marine insurance claim?

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# Fraudulent claims – a serious problem

- ABI Estimate 2016 - Value of inflated or fictitious claims - £1.32-2.1 billion – NB Particular concerns about fraudulent PI claims

  (*Insurance Fraud Taskforce Final Report PU 1891 January 2016* – Cited by Lord Hughes in *Versloot Dredging BV v HDI Gerling (SC))*

- ABI 2017 – 113,000 fraudulent claims detected – Estimated value £1.3 billion

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# Common law

- Common law:

*"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 important that such good faith should be maintained. It is the 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 accordance with legal principle and sound policy." (Britton v Royal Insurance (1866) per Willes J)*

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# Insurance Act 2015, section 12

- ***12 Remedies for fraudulent claims***

  *(1)If the insured makes a fraudulent claim under a contract of insurance—*

  *(a)the insurer is not liable to pay the claim,*

  *(b)the insurer may recover from the insured any sums paid by the insurer to the insured in respect of the claim, and*

  *(c)in addition, the insurer may by notice to the insured treat the contract as having been terminated with effect from the time of the fraudulent act.*

- Applies to contracts concluded after 12 August 2016
- No definition of "fraudulent claim" - NB *Versloot* pre Insurance Act 2015

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# Categories

- (1) Fabricated claim

  *Britton v Royal Insurance Co (1866)* – Arson

  *Brillante Virtuoso* (2015 to date) – Alleged scuttling of oil tanker v claim that blown up by pirates

- (2) Claim intentionally inflated

  *Lek v Matthews* (1927) – Claim for theft of valuable stamps included a substantial number of stamps which the insured knew he had never owned

- (3) Fraudulent device

  *Versloot (*2017) (SC) – *"collateral lies", "a lie which turns out when the facts are found to have no relevance to the to the insured's right to recover."* (per Lord Sumption); *"gilding the lily" (*Lord Hughes)

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# *Versloot Dredging BV v HDI Gerling* (2016) (SC)


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# *Versloot*

- Fraudulent claim (category (1)) and Exaggerated claim (category (2) – Clearly established that Insurer does not have to pay claim or any part of it.

- Unchanged by Supreme Court decision in *Versloot.*

> *"The logic is simple. 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 Star Sea* (2003) (HL) per Lord Hobhouse)

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# *Versloot*

- Issue in *Versloot* – Fraudulent device (category (3)) - Where the claim is a good claim but the insured had lied during the making of the claim, was the insurer obliged to pay the claim?

- *The AEGEON (2003)* (CA) – Mance LJ (obiter) held that collateral lie in the presentation of a claim, even if irrelevant, was subject to the fraudulent claims rule, so long as material i.e. not insubstantial and designed to promote the claim.

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# *Versloot - Decision of Popplewell J*

- Casualty – Ingress of water into engine room
- The lie - Mr Chris Kornet, a representative from the vessel's managers "*developed a theory*" that bilge alarm had sounded but crew had been unable to deal with the leak due to the rolling of the ship in heavy weather
- Popplewell J found this to be a reckless untruth.
- However, lie irrelevant to the merits of the claim.

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# *Decision of Popplewell J*

- Popplewell J found:
- Loss proximately caused fortuitous entry of seawater through the sea inlet valve during the voyage – therefore a peril of the seas.
- Rejected claim that Owners had sent vessel to sea knowing she had defective pumps in her engine room
- So, on the face of things, valid claim.
- BUT, although lie irrelevant to the merits of the claim, Insurers did not have to pay due to the "*collateral lie*"

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# *Decision of Popplewell J*

- Popplewell J clearly uneasy about coming to this conclusion [255]:
- *I have reached this conclusion with regret. In a scale of culpability which may attach to fraudulent conduct relating to the making of claims, this was at the low end. It was a reckless untruth, not a carefully planned deceit. It was told on one occasion, not persisted in at the trial. It was told in support of a theory about the events surrounding the casualty which Chris Kornet genuinely believed to be a plausible explanation. The reckless untruth was put forward against the background of having made the crew available for interview by the underwriters' solicitor, who had had the opportunity to make his own inquiries of the crew on the topic. To be deprived of a valid claim of some €3.2 million as a result of such reckless untruth is, in my view, a disproportionately harsh sanction*

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# *Versloot Supreme Court*

- Court of Appeal – Upheld Popplewell J

- Supreme Court – Majority held that fraudulent device/collateral lie (category (3)) will no longer invalidate a claim
- Decision 4:1 (Lords Sumption, Hughes (albeit with additional reasons), Clarke and Toulson v Lord Mance)
- Leading judgment - Lord Sumption
- Majority held that “fraudulent device”/collateral lie (category (3)) will no longer invalidate a claim

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# *Supreme Court – Reasoning – Key Takeaways*

- Fundamental distinction between a fraudulent or fraudulently exaggerated claim and collateral lie:

  Fraudulent or exaggerated claim – insured's dishonesty designed to get him something to which he is not entitled;

  Collateral lie – insured only seeking to recover what he is entitled to and *"the lie is irrelevant to the existence or amount of that entitlement … the lie is dishonest, but the claim is not."*

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# *Supreme Court – Reasoning – Key Takeaways*

- Forfeiture felt to be disproportionate
- Anomalous that fraudulent claims rule no longer applied once proceedings had commenced – *The Star Sea*
- Relevance of materiality/inducement – A distinction is to be drawn re position of insurers pre-contract when insurers have a discretion in deciding whether to write the risk and on what terms based on what insurers would consider material and post-contract where if claim legally valid must pay it

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# *Supreme Court - Reasoning*

- Decision generally welcomed
- Concern that lack of deterrent for insured prepared to lie when making a claim
- May lead to uncertainty. May not be easy to tell during claims making process whether or not a lie is "collateral"
- Will it lead to insurers amending their policies to apply the "fraudulent claims" rule to fraudulent devices by contract:

  "[insurers will] no doubt be advised about whatever may be the potential merits of making express whatever understanding they have, or action they may wish to take, regarding the effect of fraudulent devices" (Versloot per Lord Mance)"

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# *Brillante Virtuoso*

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# *Brillante Virtuoso – An update*

- The Facts - https://www.bloomberg.com/features/2017-hijacking-of-brillante-virtuoso/
- Flaux J  Judgment (2015) –  Dealt with quantum first rather than liability - Vessel was a CTL, quantified sue and labour costs
- Insurers then amended to plead that Vessel scuttled
- Flaux J Judgment (2016) -  Owners' claim struck out for failure to comply with disclosure order
- 2019 – Claims by mortgagee bank continuing.  Trial on liability started in February before Teare J.

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# Thank you


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