FRAUDULENT INSURANCE CLAIMS AND POST-CONTRACT DISCLOSURE: RECENT DEVELOPMENTS IN ENGLAND

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WHAT AMOUNTS TO FRAUD

There are many English cases on the question of what constitutes a fraudulent claim. The most important categories of fraudulent claims are the following.

Deliberate destruction by the assured

The assured has no claim in respect of a loss which he has brought about by his own deliberate act, eg, destruction of property. What makes the conduct a fraud is making an insurance claim in respect of that loss. The many authorities on what constitutes fraud have highlighted a range of indicia, before, during and after the loss. Relevant pre-loss factors include the assured's solvency, the value of the subject matter and the amount of the insurance, and whether the assured had tried to sell the subject matter in the recent past. Relevant conduct concurrent with the loss includes the assured's behaviour in seeking assistance, whether – in the case of a fire or a marine casualty – other valuable property was off the premises at the time. Post-loss conduct will include the manner in which the assured has sought to deal with the consequences (eg, whether he has sought to have a fire-damaged house demolished), whether the assured has demanded a full investigation into the loss, and the manner in which a claim has been made.

The burden of proving deliberate destruction is borne by the insurers, and their burden – while not the criminal standard – is commensurate with the degree of dishonesty alleged. Insurers do not need to prove fraud until the assured has established that the claim is within the policy. If the policy is "all risks", the assured need only establish that he has suffered a loss, and the burden then switches to the insurers to prove fraud. If the policy is on specific risks, the assured has to show on the balance of probabilities that an insured risk was the proximate cause, and the burden then switches to insurers to prove fraud: the assured's burden is relatively light, as fortuity is not an element of any insured peril, so that if a fire has occurred the assured's burden is discharged. If the loss is unexplained, it may be important to determine whether the policy is all risks or specific risks: there is little authority on the difference, although in *Brownsville Holdings v Adamjee Insurance, The Milasan*,[1] Aikens J held that if the policy identifies specific risks it will not be all risks in the absence of wording which removes the need for the assured to prove how the loss occurred.

Marine policies are somewhat exceptional, as the most important peril – a peril of the seas – incorporates into it an element of fortuity. Accordingly, the assured must demonstrate that the loss was fortuitous in order to bring his claim within the policy, and the insurers' allegations of fraud may never need to be aired. In *The Milasan* Aikens J laid down the following propositions, derived from the cases:

(1) it was for the claimants to prove that the loss was caused by an insured peril, on the balance of probabilities. There was no rebuttable presumption of loss by perils of the seas operating where a seaworthy ship was lost in unexplained circumstances.

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Where the assured proved that the vessel was seaworthy before the start of the voyage, and was lost in unexplained circumstances, the probability was that she was lost by perils of the seas because she was seaworthy.[2] If the assured did not prove seaworthiness, and if there was some evidence as to the loss (eg, a rescued crew) the loss could not be regarded as unexplained;

(2) an incursion of seawater into a vessel was not, by itself, a peril of the seas;

(3) the claimants had to identify and prove (on the balance of probabilities) why water entered a vessel in order to identify the cause of entry as a peril of the seas;

(4) if a defendant insurer was to succeed on an allegation that a vessel was deliberately cast away with the connivance of the owner, then the insurer had to prove both aspects on the balance of probabilities. However, as such allegations amounted to an accusation of fraudulent and criminal conduct on the part of the owner, then the standard of proof that the insurer had to attain to satisfy the court that its allegations were proved had to be commensurate with the seriousness of the charge laid – effectively the standard would not fall far short of the criminal standard;

(5) although there was no presumption of innocence, of the owners, due weight was to be given to the consideration that scuttling a ship would be fraudulent and criminal behaviour by the owners;

(6) when deciding whether the allegation of scuttling with the connivance of the owners was proved, the court had to consider all the relevant facts and take the story as a whole. By the very nature of those cases it was usually not possible for insurers to obtain any direct evidence that a vessel was wilfully cast away by her owners, so that the court was entitled to consider all relevant indirect or circumstantial evidence in reaching a decision;

(7) it was unlikely that all relevant facts would be uncovered in the course of investigations. Therefore it would not be fatal to the insurers' case that "parts of the canvas remain unlighted or blank";

(8) ultimately the issue for the court was whether the facts proved against the owners were sufficiently unambiguous to conclude that they were complicit in the casting away of the vessel;

(9) in such circumstances the fact that an owner was previously of good reputation and respectable would not save him from an adverse judgment;

(10) the insurers did not have to prove a motive if the facts were sufficiently unambiguously against the owners, but if there was a motive for dishonesty then it might assist in determining whether there had been dishonesty in fact.

False statements as to nature of loss

At one end of the scale the assured may assert a loss which has never occurred. At the other he may seek to inflate a genuine loss, by overstating the value of the subject matter lost or by overstating the quantity of subject matter lost. The problem is in drawing a line between a claim which has been inflated with an intention to profit from the insurance or to cover uninsured losses (eg, business interruption losses recouped by boosting the value of insured property), and a claim which has been inflated to allow the assured to recover what he believes he has lost on the basis that insurers are almost certain to seek to negotiate a settlement of less than the amount of the assured's loss. Whether or not there is fraud is a matter of the assured's intention. The English courts have been willing to accept that the assured is entitled to put in a "bargaining" claim without committing fraud, although the bigger the discrepancy between the loss and the claim the easier it becomes to impute fraud.

If there is a substantial degree of fraud in a claim, the English position is now clearly that the entire claim fails, although if the fraud is insignificant then the claim is unaffected. This had long been assumed to be the rule prior to the decision of the Court of Appeal in *Orakpo v Barclays Insurance Services*,[3] where Sir Christopher Staughton expressed the opinion that the fraudulent part of a claim could be severed, and the rest of the claim would remain recoverable. The rest of the Court of Appeal disagreed with apportionment, and opted for all or nothing. The result is, therefore, that if the claim is tainted by substantial fraud, the entire claim goes, whereas if the fraud is trivial the assured recovers his

[2] This is known as the "Sherlock Holmes" exception.

[3] [1995] LRLR 433.

actual loss.[4] The definition of "substantial" is wide, and covers fraud which is substantial either in absolute terms or in terms of its relationship to the size of the claim. The leading authority is *Galloway v Guardian Royal Exchange*,[5] in which the addition of a £2,000 computer to a claim of £16,000 was substantial in both senses. Similar recent property decisions are *Nsubuga v Commercial Union*[6] and *Baghbadrani v Commercial Union*.[7] *Insurance Corporation of the Channel Islands v Royal Hotel*[8] was a business interruption claim on a hotel which was held to be fraudulent by reason of the overstatement of previous occupancy figures

False statements as to the circumstances of the loss

If the assured misstates how and why a loss occurred, that may also amount to fraud. This head of fraud has become inextricably linked with the assured's post-contractual duty to supply information, and is considered below in that context

POST-CONTRACT DISCLOSURE: THE DUTY NOT TO MAKE A FRAUDULENT CLAIM

While it is universally accepted that the assured must not make a fraudulent claim, there is as yet little consensus as to why this is the case. This is significant in that the remedies for breach of duty vary, depending upon the duty broken. The possibilities are:

(1) Express term
(2) Implied term
(3) Continuing duty of utmost good faith

The range of consequences is:

(a) the claim is lost in its entirety without effect on the policy
(b) the policy determines as of the date of the fraud
(c) the insurers have an option to refuse to pay without determining the entire policy
(d) the policy is voidable *ab initio* and, if avoided, is treated as never having existed
(e) the insurers have the option of refusing to pay a claim without avoiding the policy *ab initio*

An express term can stipulate for any of these. In the absence of an express term, if the basis is implied term then the choice is between (a), (b) and (c). If the basis is utmost good faith, the choice is between (d) and (e). In practice, fraud clauses are all but universal, so there is no need to distinguish between express and implied terms. The key issue is whether there is a continuing duty of utmost good faith which operates alongside express terms but provides a different and alternative range of remedies. As will be appreciated, if the policy is avoided *ab initio*, all past claims in the relevant policy year are lost, and there is a respectable argument that settlements reached on claims prior to the fraud are liable to be undone.

English law, subject to what is said by the House of Lord in *The Star Sea*, has now accepted that the basis of the insurers' rights in relation to a fraudulent claim is the continuing duty of utmost good faith. That proposition has been rejected in other jurisdictions. In Canada, in *Gore Mutual Insurance Co v Bifford*,[9] it has been decided that a fraudulent claim simply entitled insurers to terminate the policy with effect from the date of the fraud, so that what had gone before was preserved. The same approach was adopted by the Scottish courts in *Fargnoli v GA Bonus plc*.[10] Under Australian law,

4 See also the Insurance Contracts Act 1984, s 56(2) (Australia).
5 [1999] Lloyd's Rep IR 209.
6 [1998] 2 Lloyd's Rep 682
7 [2000] Lloyd's Rep IR 94.
8 [1997] LRLR 94.
9 45 DLR (4th) 763 (1987).
10 1996, not yet reported

insurer have the right only to refuse payment of the claim,[11] and even then the court may allow apportionment if total denial would be harsh and unfair given the minimal or insignificant nature of the fraud.[12]

EXPRESS CLAIMS CLAUSES

Fraudulent claims clauses

The wording of fraudulent claims clauses used in the London market has scarcely varied for 200 years. Policies provide that if the assured makes any claim knowing that it is false and fraudulent, the policy becomes void and all claims are to be forfeited. In *Britton v Royal insurance*,[13] Willes J said that the wording of the clause was "in accordance with legal principle and sound policy", in other words, that even if the clause is not express then identical wording will be implied. However, what is unclear from the phrase "the policy becomes void and all claims are to be forfeited": in principle, the outcome could be any of (b) to (e) above. There is no useful authority on the point. Prior to 1985, the year of the calamitous decision of Hirst J in *Black King Shipping v Massie, The Litsion Pride*[14] the assumption was that the policy came to an end on the basis that making a fraudulent claim amounted to repudiation. However, in *The Litsion Pride* Hirst J raised the possibility of a continuing duty of utmost good faith, which encompassed fraudulent claims: since that date, insurers have sought to rely upon utmost good faith rather than upon their express clauses and debate has raged as to remedies. If the House of Lords in its keenly anticipated decision in *The Star Sea* (speeches expected any time from November 2000 onwards) rejects the notion of a continuing duty of utmost good faith, the meaning of these clauses will again become important.

Co-operation clauses

Almost all policies contain claims conditions of various types. These include obligations on the assured: to notify losses; to supply all relevant information; and to co-operate with insurers. What is the effect of a failure by the assured to comply with these conditions?.

Until comparatively recently, it was possible to classify conditions under three heads:

(a) Conditions precedent to the validity of the policy or the commencement of the risk. If such a condition is not fulfilled, the insurer does not face liability. Relevant conditions may be payment of premium, submission of medical evidence, the non-existence of overlapping policies etc.

(b) Conditions precedent to the insurer's liability under the (valid) policy. These generally relate to the claims process or to the assured's conduct and in commercial policies may take the form of a *Scott v Avery* arbitration clause. Breach of this type of condition will prevent the assured from submitting a valid claim, so that the insurer cannot be liable in respect of the loss in question. The validity of the policy itself is, however, unaffected (unless the policy itself provides to the contrary) so that past claims which have been made validly but which remain unsettled are not lost, and the insurer's potential liability for future claims is preserved.

(c) Other conditions (conditions subsequent). These cover the same ground as conditions precedent, and may also relate to matters such as double insurance. Such conditions are not specifically stated to be conditions precedent. The effect of a breach of this type of condition would appear to be consistent with the general law, i.e: (i) the insurers are free to specify the effect of a breach; (ii) if the condition is fundamental, its breach is repudiatory and the insurer can terminate as from the date of breach; (iii) if the condition is incidental, the insurer is

[11] Insurance Contracts Act 1994, s 56(1).

[12] Insurance Contracts Act 1994, s 56(2). This would appear to reflect English law in any event: see above.

[13] (1866) 4 F & F 905.

[14] [1985] 1 Lloyd's Rep 437.

limited to a claim for damages, and it is immaterial if the breach causes prejudice to the insurer; (iv) if the condition is innominate, the insurer's rights depend upon the seriousness of the consequences. In most cases it is possible to classify a condition as either (ii) or (iii). There are scarcely any reported cases of an insurer being awarded damages where the assured has broken a condition in a non-repudiatory fashion, as in most cases it is difficult for the insurer to prove that loss has been suffered as a result of the breach. Where a claim is presented late, the insurer will be unable to show that loss has been suffered unless the delay is so great that the circumstances of the loss cannot be fully investigated and that the person responsible for the loss cannot be pursued; another possibility for damages might be the existence of a short limitation open to the assured in commencing proceedings against a third party, which has all but expired when the claim is made, to the prejudice of the insurer's subrogation rights. One of the few examples of an award of damages is *Hussain* v. *Brown (No.2)*.[15] In that case, the assured, in breach of a notification clause, failed to inform the insurer that the insured premises were unoccupied. The insurers asserted that, armed with that information, they would have inspected the premises and insisted upon additional security being provided, thereby preventing a claim from arising. The court took the view that there was a 50% chance that the fire would have been averted had the condition been complied with, and, accordingly, it was appropriate to reduce the policy monies payable to the assured by 50%.[16]

This analysis has now to be modified in the light of the decision of the Court of Appeal in *Alfred McAlpine v BAI Run-Off Ltd*.[17] This case concerned a claims notification provision, the assured (or, rather, a third party claiming in the place of the assured following the assured's insolvency). The Court of Appeal held that in the case of a claims condition there was a fourth possibility, namely that the assured had repudiated not the policy as a whole but rather the claim. The result is that claims are divisible, and if there is a repudiation of a claims condition, the claim dies but the policy lives on (unless of course the repudiation relates to the entire policy). On the facts of that case, the Court of Appeal held that a late claim was not a repudiation either of the claim or of the policy itself, so that the insurers were liable. Accordingly, when the assured makes a claim in breach of a claims condition, the question to be asked is whether the breach is serious or trivial.

The K/S Merc-Skandia case

The fact that a claim is fraudulent does not mean that either the policy or the claim has been repudiated, and insurers may still be required to provide indemnity (subject to the operation of the duty of utmost good faith – see below). In *K/S Merc-Skandia XXXXII v Certain Lloyd's Underwriters*,[18] the assured company was a ship repairer located in Trinidad, run by two brothers, RB and KB. T was employed as assistant general manager/consultant. The defendant insurers issued two marine policies insuring the assured against legal liability. The policies contained the usual fraud clause, and also a Notice of Claims clause stating that "In the event of an occurrence which may result in a claim … the assured shall give prompt written notice … and shall keep underwriters fully advised". During 1988 the assured carried out repair work on a vessel belonging to K/S, a Danish company. Soon after the work was completed, the vessel's engine exploded, causing severe damage to the vessel and business interruption losses to K/S. On 1 July 1988 K/S wrote to the assured making a claim for compensation. The assured replied on 2 July 1988, denying liability. In May 1989, it was suggested on behalf of K/S to T that the dispute between K/S and the assured should be referred to the High Court in London. T agreed, and the underwriters took over the conduct of the defence. Their solicitors served an English claim form on the assured in Trinidad, based on jurisdiction agreement entered into n May 1989. It was then suggested (wrongly, it was later proved) that if the case were heard in Trinidad, the assured would have had the right to limit their liability to about 10% of the possible award in England, and this led the underwriters to investigate the validity of the exclusive jurisdiction agreement: if the agreement was challengeable, the case could be heard in Trinidad; if it was not, the insurers might have a defence as the assured had bargained away their rights. In June 1992 KB faxed a letter to the underwriters' solicitors. This was dated 1 July 1988 and purported to be written by KB to K/S: it stated that only KB and RB were

[15] 1996, unreported.
[16] See also *Svenska Handelsbanken* v. *Sun Alliance* [1996] 1 Lloyd's Rep 519 (breach of lending conditions).
[17] [2000] Lloyd's Rep IR 352.

authorised to deal with any claim. If the letter was valid, it undermined the exclusive jurisdiction agreement as T would not have been held out as having authority to enter into it. In fact the letter proved to have been a forgery, created by KB or RB in June 1992. The underwriters denied liability and withdrew their defence. K/S obtained judgment and, following the assured's insolvency, sought to recover from the underwriters.

Aikens J ruled that the forging of the letter was a breach of the Notice of Claims clause, as the assured had failed to keep the underwriters fully informed. Applying *Alfred McAlpine*, and accepting the concession that the clause was not a condition precedent, Aikens J held that the claim had not been repudiated by the submission of a forged document. He ruled that the test of repudiation was whether the underwriters had been seriously prejudiced *in fact* by the breach. On the facts, this was not the case. The forgery had made no difference to the underwriters' position: without the letter the validity of the exclusive jurisdiction agreement would not have been doubted, and the forgery was irrelevant as the case was heard in England with precisely the same outcome. While it was the case that the Underwriters had incurred some loss, in that they had sought to have the English action set aside and had incurred costs, that did not amount to serious prejudice. The outcome was, therefore, that despite fraud by the assured in the claims process, the underwriters could not regard such fraud as sufficiently serious to discharge them from liability. It is possible that they could have pursued a claim for damages for breach of contract, but they were sufficiently sure of their right not to pay that they did not do so.

THE CONTINUING DUTY OF UTMOST GOOD FAITH

Juridical basis

S 17 of the Marine Insurance Act 1906 states that a contract of insurance is one of utmost good faith. Ss 18-20 set out the operation of that duty as regards disclosure and misrepresentation. It has often been commented by judges that ss 18-20 are simply illustrations of the wider principle in s 17, and that the duty of utmost good faith is not confined to pre-contractual matters.[19] However, the ambit of that wider principle has yet to be authoritatively determined despite the numerous cases which have sought to apply the principle in recent years. What does appear to be established is that the continuing duty, if it does exist, has its most important application in the context of fraudulent claims.

The modern starting point is *Black King Shipping v Massie, The Litsion Pride*. In that case the insured vessel was destroyed in a war zone. The policy provided that if the vessel was to enter a war zone, notice was to be given to underwriters and an additional premium was to be payable. Following the loss of the vessel, notice was given to the insurers, it being suggested that the notice had been given in due time but had been delayed. Hirst J, after a lengthy review of the evidence, drew the inevitable conclusion that the assured had tried to slip the vessel through a war zone as a short cut while avoiding the obligation to pay an additional premium for that period, and indeed the evidence showed that the assured was at the time insolvent and could not have afforded any additional premium. The case was, therefore, disposed of on the ground that the assured had fraudulently made a false claim by misdescribing the circumstances surrounding the loss. The troublesome aspect of the case is Hirst J's *obiter* acceptance of the alternative analysis that, even if fraud had not been proved, the underwriters could have avoided liability by demonstrating that the assured had misstated material facts surrounding the circumstances of the loss. The matter was put thus:

> whenever there is a contractual requirement for the insured to give the underwriter information which is material in that it would influence the judgment of a prudent underwriter in making a decision under the contract for which the information is required, the continuing duty of utmost good faith requires the insured to make full disclosure of all material facts, whether or not he realises their materiality, and not simply to refrain from dishonest, deliberate or culpable concealment.

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[18] July 2000.

[19] See, eg, *Container Transport International v Oceanus Mutual* [1984] 1 Lloyd's Rep 476.

Hirst J based his decision on a number of principles:

(a) s 17 of the Marine Insurance Act 1906 was not confined to pre-contractual matters;
(b) there were various cases in which the courts had, after a loss, ordered a marine assured to provide the insurers with the ships' papers[20] - Hirst J classified this duty as being based on utmost good faith;
(c) there were cases in which an assured had sought to exercise his rights under a held covered clause, and to obtain extended coverage on offer under the contract by giving notice to the insurers and paying any additional premium required.[21]

None of these grounds is particularly convincing. Ground (a) overlooks the fact that the part of the Marine Insurance Act 1906 in which ss 17-20 appear is headed "*Disclosure and Representations*," so that it is arguable that nothing more than pre-contractual matters were under discussion, and indeed there is no pre-1906 Act case which could have justified a codification of the law along the lines suggested by Hirst J. Ground (b) appears to be merely a point of procedure rather than any application of a principle of good faith.[22] Ground (c) is reconcilable with principle, in that the held covered clauses in question required a decision on the part of the insurer to extend cover, and in that respect they can be regarded as fresh insurances to which the ordinary pre-contractual duty would apply. In short, there is no solid basis for a continuing duty.

It should also be said that the legal basis for the continuing duty - an implied term in the insurance contract - cannot stand, as it has long been clear (a point emphasised by the House of Lords in *Pan Atlantic v Pine Top*[23]), that the duty of utmost good faith is not based on any implied term and arises *ex contractu* as a matter of law.

The *dicta* of Hirst J in *The Litsion Pride* have nevertheless proved to be the starting point for discussion in the later cases. For the purpose of analysis, it is possible to consider the *dicta* under a number of distinct heads.

Information to which the continuing duty applies

General principles

The duty applies, according to *The Litsion Pride*, "wherever there is a contractual duty for the insured to give the underwriter information". The duty is not, therefore, on this formulation a general duty to make disclosure or avoid misrepresentation at every stage in the contract. Such a duty would in any event be inconsistent with two fundamental principles: that a misrepresentation or failure to disclose relating to the risk itself, which arises after the policy has incepted cannot be relied upon by the insurer to avoid the policy;[24] and that the assured is free to increase the risk under the policy at any time[25] provided that the policy does not impose conditions or warranties on any such increase and provided also that the assured does not actually change the very nature of the risk.[26] The courts have in any

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[20] *China Traders Insurance Co v Royal Exchange Assurance Corpn* [1898] 2 QB 187; *Leon v Casey* [1932] 2 KB 576.

[21] *Overseas Commodities v Style* [1958] 1 Lloyd's Rep 546; *Liberian Insurance Agency v Mosse* [1977] 2 Lloyd's Rep 560.

[22] It was so treated by the Court of Appeal in *Manifest Shipping Co Ltd v Uni-Polaris Shipping Co Ltd, The Star Sea* [1997] 1 Lloyd's Rep 360.

[23] [1994] 3 All ER 581.

[24] *Ionides v Pacific Fire and Marine Insurance Co* (1872) LR 7 QB 517; *Cory v Patton* (1874) LR 9 QB 577; *Lishman v Northern Maritime Insurance Co* (1875) LR 10 CP 179.

[25] *Toulmin v Inglis* (1808) 1 Camp 421; *Shaw v Robberds* (1837) 6 Ad & El 75; *Pim v Reid* (1843) 6 Man & G 1; *Thompson v Hopper* (1856) 6 EB & E 172; *Mitchell Conveyor & Transport Co v Pullbrook* (1933) 45 Ll LR 239.

[26] See, eg, *Hadenfayre Ltd v British National Insurance* [1984] 2 Lloyd's Rep 393. Such cases are comparatively rare.

event traditionally construed express increase of risk terms very narrowly,[27] and indeed in the most recent appellate decision, that of the Court of Appeal in *Kausar v Eagle Star*,[28] that Court went as far as holding that an increase of risk condition merely reflected the common law, so that an assured who failed to inform the insurer of an increased risk was not in breach of a condition imposing that obligation, as the condition operated only where the risk was fundamentally altered.[29] The basis of this decision and the earlier decisions is that the insurer is deemed to have consented to increases of risk which were contemplated at the outset, as the premium reflects such increases, and that an obligation on the assured to notify the insurers every time the risk increased would be completely impractical.

The continuing duty must, therefore, attach to some specific contractual obligation to notify. It was suggested to the court in *Hussain v Brown (No 2)* that the continuing duty was confined to "held covered" clauses, under which there is of necessity an obligation to notify material facts to the insurer to enable the insurer to determine whether or not to extend coverage. However, that suggestion was rejected as being inconsistent with the more expansive approach taken by Hirst J in *The Litsion Pride*. It is nevertheless noteworthy that in *La Banque Financiere v Westgate Insurance*[30] Lord Jauncey commented that the continuing duty was "confined to such exceptional cases as a ship entering a war zone or an insured failing to disclose all facts relevant to a claim". The proposition that some contractual obligation is required was indeed confirmed by the Court of Appeal in *New Hampshire Insurance Co v MGN*,[31] involving a fidelity policy, where it was held that a cancellation clause conferring on the insurer the right to cancel at any time did not operate to create a general obligation on the assured to disclose material facts just in case the insurer might decide to exercise the right to cancel in the light of information provided by the assured.[32] This type of clause aside, there are three possibilities in the decided cases.

Increase of risk clauses

Where there is an obligation on the assured to disclose to the insurer any information which increases the risk, or to seek the insurer's consent to an increase of risk, the duty of utmost good faith attaches to that duty. This does not, however, take the argument much further, for if there is an express duty to notify, it must be strongly arguable that the contractual duty amounts to an exhaustive statement of the assured's obligations which overrides the continuing duty of utmost good faith. This was indeed held to be the position in *Hussain v Brown (No 2)*. In that case it was held that a contractual obligation on the assured to notify any circumstance which might increase the risk superseded the continuing duty of utmost good faith, so that the insurer's only remedy was breach of contract,[33] and that as a general principle an insurer who wished to maintain that duty in existence despite the presence of an express term would have to make clear provision for that in the policy. Given that most policies do not so provide, it might be thought that the duty in this context is almost self-cancelling.

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[27] Of the many illustrations, see: *Glen v Lewis* (1853) 8 Ex D 607; *Baxendale v Harvey* (1859) 4 H & N 445; *Shanley v Allied Traders Insurance Co* (1925) 21 Ll LR 195; *Mint Security v Blair* [1982] 1 Lloyd's Rep 188; *Exchange Theatre Ltd v Iron Trades Mutual* [1983] 1 Lloyd's Rep 674.

[28] [2000] Lloyd's Rep IR 154.

[29] It is difficult to see how *Hussain v Brown (No 2)* can stand with *Kausar*. In *Hussain* it was held that the assured's failure to notify the insurer, in accordance with the contract, of an increase of risk – in the form of unoccupancy – meant that the insurer was not given the opportunity to review the assured's security mechanisms and to make recommendations as to how they might be improved. The assured's damages were, accordingly, reduced by 50 per cent, representing the chance that with disclosure the loss would have been averted. *Kausar* would arguably have construed the notice clause as not extending to mere increase of risk, so that the assured could not have been in breach of it by failure to make disclosure.

[30] [1990] 1 All ER 947.

[31] [1997] LRLR 24 Staughton LJ reserving his position. The majority view was that *The Litsion Pride* could not be supported insofar as it suggested that a duty might exist in the absence of an express obligation to notify.

[32] This aspect of the decision was followed in *Hussain v Brown (No 2)*.

"Held covered" clauses

Where the assured wishes to take advantage of a held covered clause and to obtain additional cover, or at least to retain cover which would otherwise have expired by reason of a breach of warranty or some other obligation, the duty of utmost good faith applies to the information forwarded to the insurer. As already commented, this proposition is not a startling one, given that what is in effect being achieved under a held covered clause is the creation of a new contract on different terms.

An analagous situation arises where the assured seeks to obtain additional cover under the policy, and applies to the insurer for an extension but fails to disclose material facts relating to the application. In *Fraser Shipping Ltd* v. *Colton*[34] the assured sought an indorsement from the insurers which would have permitted the insured vessel to change its voyage and head to a destination different to that specified in the policy. The insurers agreed to the indorsement, ignorant of the fact that the change of voyage had previously been put into effect. The Court of Appeal held that the fact was material and that the assured was in breach of duty under the MIA 1906, s 18, and that the insurers were entitled to avoid the policy as varied by the indorsement.

Fraudulent claims

This area is that which has given rise to the greatest problems. The superimposition of the continuing duty of utmost good faith on pre-1985 principles has not been a comfortable task, and has given rise to questions as to whether that duty is wider than the express or implied contractual duty to avoid making fraudulent claims, particularly in the contexts of the need to prove fraud and of the appropriate remedy. The result of the cases would appear to be that the contractual and extra-contractual duties have become identical in their effects, and that there is no great advantage in considering whether the insurer's rights arise under an express term, under an implied term or under the continuing duty of utmost good faith: the insurer's rights however those duties are classified are the same. What is less certain, however, is exactly what those rights are, and in particular whether the insurer has the right to reject the claim, to regard the contract as repudiated by the assured or to avoid the policy *ab initio*.[35] If the last-mentioned possibility is correct, the assured will lose not just his fraudulent claim but also all previous claims.[36]

The K/S Merc-Skandia case

In *K/S Merc-Skandia* Aikens J undertook a thorough review of the cases, and laid down the following principles:

(1) There had been a general rejection of the notion of a generalised post-contractual duty of utmost good faith. On the contrary, the older cases made it clear that any post-contractual misrepresentation as to the scope of the risk did not give insurers the right to avoid. The post-contractual duty was restricted to two situations: (a) where the insurer had been given information for the purposes of taking on a new or increased risk under an existing policy; and (b) where the assured was making a claim under the policy.

(2) As regards category (1)(a) situations, a duty of utmost good faith had been found: (i) on renewal of the policy, renewal amounting to a new contract; (ii) on variation of the policy terms, as again the risk was to be altered; (iii) where the assured was under some express duty by the terms of the policy to give information concerning a proposed risk; or (iv) in the operation of a held covered clause, the purpose of which is to extend the risk for additional premium.

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33 As to which see n 29, where it is pointed out that *Kausar v Sun Alliance* effectively precludes any remedy unless the risk has altered in its very nature, and that *Hussain* is arguably incorrect insofar as damages were awarded for breach of contract.

34 [1997] 1 Lloyd's Rep 586.

35 In *Orakpo v Barclays Insurance Services* it seems that Staughton LJ favoured the first possibility, Hoffmann LJ favoured the second possibility and Sir Roger Parker favoured the third possibility.

36 This point is discussed further, below.

(3) As regards category (1)(b) situations, the cases demonstrated that the post-contract duty did not go wider than allowing avoidance when the assured had made a fraudulent claim. Mr Justice Aikens accepted that in some of the case there had been comments to the effect that there might be a wider duty, but even those comments were confined to the proposition that there could only be a breach of the duty if the fact "deliberately or culpably" concealed or misrepresented was legally relevant to the claim itself.

Aikens J regarded *The Litsion Pride* as the only authority which was out of step with these principles, but that the outcome in that case was in any event supportable on the basis that the policy provided expressly for disclosure of the very circumstances which had occurred, given that the information related to an increase of risk. Aikens J emphasised that the mere existence of a clause which required information to be given to an insurer so that a decision could be made by him did not attract the duty of utmost good faith: an increase of risk was required. That was the effect of *New Hampshire Insurance Co* v *MGN Ltd*, denying that a clause which entitled the insurers to give notice of termination imposed any generalised obligation on the assured to provide information throughout the currency of the policy which might be material to the insurer's decision as to whether or not to exercise the right to terminate.

The definition of materiality

A fact is material in the post-contractual sense if it would have influenced a prudent underwriter in his decision whether to accept the risk at all and, if so, on what premium and terms. There also has to be inducement. The pre-contractual test for materiality is plainly inapplicable in the post-contractual context, and was accordingly modified by Hirst J in *The Litsion Pride*. A fact is material, in Hirst J's formulation, if "it would influence the judgment of a prudent underwriter in making a decision under the contract for which the information is required". Presumably the decisions which might be relevant here are to increase the premium, to refuse a claim or to cancel the policy. However, as already noted, it was held in *New Hampshire v MGN* and *Hussain v Brown (No 2)* that the mere fact that the insurer has a contractual right to cancel does not of itself create any continuing duty of utmost good faith, and that the insurer's decision must be one which relates to a specific disclosure obligation.

In *K/S Merc-Skandia* Aikens J considered in detail the test of materiality appropriate to a post-contractual failure to disclose. Aikens J ruled that, while the continuing duty on the assured was to refrain from a deliberate act or omission intended to deceive the underwriters, the facts relied on by the underwriters had to be material to either (a) increase of risk or (b) presentation or pursuance of a claim (consistently with the scope of the assured's duty. In *K/S Merc-Skandia* itself, Aikens J held that the fraud did not relate to either of these matters, but instead related to the mere collateral point as to whether the English courts possessed jurisdiction over the dispute. That meant that either there was no duty at all, or that there was a duty which had not been broken.

Aikens J further ruled that the mere fact that the assured had been fraudulent in an immaterial fashion was not of itself a material fact which had to be disclosed to the underwriters on moral hazard grounds: were it otherwise immaterial fraud would of itself become a material fact. Aikens J relied upon the speech of Lord Mustill in *an Atlantic Insurance Ltd* v *Pine Top Insurance Co Ltd*,[37] where it had been denied that the duty of utmost good faith was disciplinary in nature: its sole purpose was to ensure that underwriters possessed material facts. Thus an immaterial fact was not converted into a material one simply because fraud was involved. The same principle would appear to apply on placement.[38]

It should also be recalled that, following *Pan Atlantic v Pine Top*, underwriters have to show that they were induced to act in a different way by reason of the assured's breach of duty. In *A/S Merc-Skandia*

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[37] [1994] 2 Lloyd's Rep 427.

[38] However, there is authority for the proposition that an assured who is prepared to be fraudulent is a greater "moral hazard" than an honest assured, so that fraud is of itself a material fact on placement: this was indeed the essence of the ruling of Mance J in *Insurance Corporation of the Channel Islands Ltd* v *McHugh and Royal Hotel Ltd* [1997] LRLR 94, where it was decided that it was material for insurers to be told that the assured had contemplated defrauding his bankers.

there was no evidence that the underwriters had been induced to do anything in relation to the claim under the policy. If the fact was immaterial to the claim, then any inducement was by definition confined to that immaterial fact and could not be relied upon by the underwriters.

The assured's state of mind

It will be remembered that in *The Litsion Pride* Hirst J said that "the continuing duty of utmost good faith requires the insured to make full disclosure of all material facts, whether or not he realises their materiality, and not simply to refrain from dishonest, deliberate or culpable concealment". On this reasoning, the continuing duty operates in a post-contractual fashion in exactly the same way as in pre-contractually, ie: (a) if the assured has made a false statement, knowingly or otherwise, the insurer can rely upon the duty of utmost good faith; (b) if the assured has failed to disclose a material fact, he is not in breach of duty if he was unaware of the fact and could not be expected to know it, but he is in breach of duty if he is aware of a fact which he does not disclose on the basis that he did not regard it as material. In cases following *The Litsion Pride*, the courts proved reluctant to accept a proposition of this width. Thus, in two cases involving negligent misrepresentation in the making of claims – relating to the circumstances of the loss – the trial judges expressed the view that an innocent or negligent assured should not lose his claim, and that what was required was some degree of culpability,[39] and there are similar comments by the Court of Appeal in *Orakpo v Barclays Insurance Services*. The need for actual fraud was stressed by Rix J in *Royal Boskalis v Mountain*,[40] in which the learned judge so restricted the post-contractual duty as regards both non-disclosure and misrepresentation, but denied in *Hussain v Brown (No 2)*, where the reasoning in *The Litsion Pride* was adopted.

The question of state of mind was discussed at length by the Court of Appeal in *The Star Sea*.[41] In this case, a refrigerated vessel, became a constructive total loss as the result of a fire on board. The underwriters denied liability on the basis[42] that the assured had failed to disclose the circumstances of the loss and thus had broken its continuing duty of utmost good faith. A report prepared by an expert for the assured on the fire, which was privileged, was subsequently produced at trial and privilege was waived. That report indicated that there had been deficiencies in safety procedures on board. Once the report became known to the insurers, they took the further defence that failure to disclose its contents at an earlier stage meant that the presentation of the claim, and indeed the case before the court, was misleading, and contravened the assured's continuing duty of utmost good faith. Tuckey J at first instance[43] held that the continuing duty required proof of fraud on the assured's part in submitting his claim, but on the facts there had been no fraud as the existence report in question was not known to the assured at the relevant dates. The Court of Appeal agreed with this conclusion, and held that the general obligation in s 17 of the 1906 Act for both parties to observe utmost good faith, could not be broken by an innocent, negligent or reckless withholding of information: fraud was necessary to bring the continuing duty of utmost good faith into play, and as fraud had not been shown in the present case, the underwriters' defence was doomed to failure. In so deciding, the Court of Appeal accepted the proposition that the duty of utmost good faith "continues through the contractual relationship at a level appropriate to the moment".[44] The position was restated by the Court of Appeal in *Alfred McAlpine*, where the relevant state of mind was regarded as fraudulent, or at the very least culpable recklessness.

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[39] *Parker & Heard Ltd v Generali Assicurazioni SpA* 1988, unreported; *Bucks Printing Press Ltd v Prudential Assurance Co* 1991, unreported. In these cases the assured had stated that a loss had occurred in particular circumstances (concerning respectively whether a door had been locked and whether cargo had been stored above or below deck), but had not checked. The court in both cases rejected a defence based on utmost good faith.

[40] [1997] LRLR 523.

[41] [1997] 1 Lloyd's Rep 360.

[42] They also argued that the vessel had been sent to sea in an unseaworthy state with the privity of the assured, and that the proximate cause of the loss was unseaworthiness, thereby giving them a defence under s 39(5) of the Marine Insurance Act 1906. This defence was rejected on the basis that the assured did not have actual or "blind eye" knowledge of the unseaworthiness, so that privity could not be shown.

[43] [1995] 1 Lloyd's Rep 651.

[44] Taken from Malcolm Clarke, *The Law of Insurance Contracts*, 2nd ed 1994, p 208.

Duration of the duty

The view that the continuing duty of utmost good faith "continues through the contractual relationship at a level appropriate to the moment" has another important consequence, namely, that the duty further dwindles once the parties have entered into a commercial negotiation concerning the loss[45] and comes to a complete end once legal proceedings have been commenced. In *The Star Sea* Tuckey J held at first instance that whatever the scope of a continuing duty of utmost good faith, it came to an end as soon as the insurers had rejected the claim or, if that was wrong, at the very latest, when proceedings were commenced: in the present case, the alleged breach of duty had taken place following the issue of a writ, and was to be dealt with not by the duty of utmost good faith but rather by the court's own procedures. The Court of Appeal was rather more guarded. It refused to accept the view that the insurer's rejection of the assured's claim brings the duty to an end, although the Court was apparently of the view that commencement of proceedings had that effect, given that a litigant is under a general duty not to prosecute proceedings fraudulently. It follows, therefore, that if an inflated claim is made no earlier than the assured's statement of claim in the proceedings, the insurer cannot rely upon such fraud to avoid its liabilities,[46] and the matter is to be dealt with by the court alone.[47]

Consequences of breach of duty

Perhaps the most important outstanding issue - in that the point is relevant also to fraudulent claims – is the effect of a breach of the continuing duty of utmost good faith. In *The Litsion Pride* Hirst J recognised that a breach of the duty of utmost good faith does not give rise to damages,[48] and that the only remedy previously recognised was avoidance *ab initio*. That remedy is certainly a just one where a policy is obtained by breach of duty, and is thus to be regarded as in some way tainted from the outset, but it is scarcely appropriate where the obligation broken by the assured is a post-contractual one, particularly in the light of Lord Mustill's comment in *Pan Atlantic v Pine Top* that the purpose of the duty of utmost good faith is to ensure that the insurer receives a fair presentation of the risk, and not to punish the assured. A policy may have been operating for a lengthy period, and there may have been claims both settled and yet to be resolved prior to the assured submitting a fraudulent claim: the effect of avoidance *ab initio* is to nullify outstanding claims awaiting settlement and, arguably, to impose an obligation on the assured to repay sums previously received by him under the policy, by reason of the removal of his vested rights, a matter discussed further below. This consideration doubtless influenced Hirst J in his ruling in *The Litsion Pride* that, as regards post-contractual breaches of duty, the insurer had the option either to avoid the policy *ab initio* or to affirm the policy and to reject the fraudulent claim. The optional approach was adopted shortly after *The Litsion Pride*, by Evans J in *The Captain Panagos*.[49] In that case, the insured vessel ran aground, and subsequently was destroyed by fire. Evans J held that both the grounding and the fire were fraudulent, but added that if the grounding alone had been fraudulent, the insurer could either avoid the policy or affirm the policy and reject the claim, and that if it had taken the latter form of action it would have been liable for the genuine fire. Although this view of the matter was accepted by Hobhouse J in *The Good Luck*,[50] *dicta* in other cases preferred the traditional view that the remedy is avoidance *ab initio*.[51] Exactly the same question arises in the ordinary case of a fraudulent claim: the notion that the assured loses the benefit of the policy is

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[45] *Diggens v Sun Alliance & London Assurance* 1994, unreported.

[46] The contrary assumption was adopted by Judge Kershaw in *Transthene Packaging Co Ltd v Royal Insurance (UK) Ltd* [1996] LRLR 32 on these very facts, although there the point was not argued. The same assumption was made, again without argument, in *Hussain v Brown (No 3) 1997, unreported.*

[47] A contrary view was adopted at first instance in *Baghbadrani v Commercial Union* [2000] Lloyd's Rep IR 94, where fraud occurred in the proceedings following submission of figures on quantification of loss. However, it is hard to see how this can be reconciled with *The Star Sea*.

[48] That point was confirmed by the Court of Appeal in *The Good Luck* [1990] 1 QB 818, in which damages were refused to an assured in respect of an insurer's alleged breach of duty of utmost good even though the remedy of avoidance was useless to the assured, as a loss had been suffered.

[49] *Continental Illinois National Bank of Chicago v Alliance Assurance Co Ltd* [1986] 2 Lloyd's Rep 470.

[50] [1988] 1 Lloyd's Rep 514.

[51] *La Banque Financiere v Westgate Insurance* [1991] 2 AC 249: *The Good Luck* [1990] 1 QB 818 (CA).

meaningless in legal terms, and could be referring to avoidance *ab initio*, termination of the entire policy for breach or denial of a the claim itself.

The Court of Appeal in *The Star Sea* refused to be drawn too far on this matter. The Court of Appeal appears to have been of the view that the remedy is avoidance. The Court of Appeal suggested (but refused to decide) that the remedies problem might be overcome by simply regarding as voidable the act performed by the insurer which was induced by the post-contractual breach of duty – thus, if the policy is endorsed by reason of a failure to disclose, the endorsement could be set aside, and if a claim is presented in breach of duty, the claim itself is lost. This approach resolves some, but not all of the problems. On the suggested analysis, if a claim is made in breach of the duty, and the insurer decides to settle, it would follow that only the settlement could be set aside by the insurer, leaving the rest of the policy intact. Again, if the assured's breach of duty relates to the provision of information, eg, that the risk has increased, and the insurer does not take the steps open to him (eg, to increase the premium), the analysis would lead to the conclusion that the insurer could not refuse to accept the increased risk, but would merely have the right to reconsider the position in the light of the facts and to increase the premium. What will be appreciated, however, is that the real problem is not so much the continuing duty of utmost good faith, but rather the failure of the courts to resolve the dilemma as to the insurer's appropriate remedy for a fraudulent claim. In *K/S Merc-Skandia* Aikens J accepted that a fraudulent claim rendered the policy voidable, and the appropriate remedy was avoidance *ab initio*.

Finally, in this context, reference may again be made to the Court of Appeal's decision in *Fraser Shipping Ltd* v. *Colton*, the facts of which were given above. It will be recalled that the Court of Appeal held that failure by the assured to disclose material facts in order to obtain an indorsement to the policy entitled the insurers, in the words of Potter LJ, "to avoid the policy, as varied by the endorsement". This might mean one of three things:

(a) the indorsement was of itself ineffective, so that no claim could be made under it – this proposition seems to be unexceptionable;
(b) the policy as amended by the indorsement was avoided, with effect from the date on which the indorsement was agreed to by the insurers;
(c) the policy as amended by the indorsement was avoided, with effect from the date on which the original policy was effected

The Court of Appeal's reasoning, regrettably, does not distinguish between (b) and (c).

Restitution of sums paid following avoidance ab initio

If it is right that a fraudulent claim renders an insurance contract void *ab initio*, then that contract is treated as never having existed. One obvious consequence is that any claims which are outstanding and which have not been settled at the date of avoidance will lapse. However, there are three problem areas:

(a) settlement contracts which have been executed
(b) settlement contracts which have not been executed
(c) payments made by the insurer without a settlement contract.

The insurers may well argue that they are entitled to avoid their agreements and recover their payments by reason of mistake of fact or law. The position here is unusual, as in most cases where a contract is avoided by reason of mistake, or restitution is sought of sums repaid by mistake, the mistake relied upon existed at the date of the contract or payment. However, in the situation under discussion, there is no mistake at the date of the settlement contract or the payment: the basis of restitution, avoidance *ab initio*, has arisen *ex post facto* but with retroactive effect. It may be, however, that the fact that a mistake arises by reason of subsequent events having retrospective effect is immaterial. In *Kleinwort Benson v Lincoln City Council*[52] the House of Lords, reversing the rule that a mistake of law does not give rise to a claim for restitution of payments,[53] held that payments made by a local authority under

[52] [1998] 4 All ER 513.
[53] For nearly 200 years English law drew a distinction between error of fact and error of law: sums paid under an error of fact were recoverable (*Kelly v Solari* (1841) 9 M & W 54) whereas sums paid

the erroneous belief that the payments were *intra vires* were recoverable from the other contracting party following a ruling by the courts that the payments were *ultra vires*. The common law operated in a declaratory fashion, so that any ruling on the law did not create new law but merely declared what the law has always been: thus, when the payments were made, a mistake was deemed to have existed and the money could be recovered by way of mistake. It follows that mistake is an appropriate remedy in these cases.

Executed settlement contracts

A contract can be avoided for mistake (presumably after *Kleinwort Benson* both of fact or law) if there is a fundamental common mistake. The leading authority is *Bell v Lever Brothers*,[54] in which a severance contract between employer and employee was held to be valid even though it was later discovered by the employer that the employee had been guilty of fraud which would have justified dismissal without compensation. Some purported limit was put on this case by the Court of Appeal in *Magee v Pennine Insurance*,[55] in which the Court of Appeal by a majority held that *Bell* concerned only common mistake at law, and that equity took a wider approach: on this reasoning insurers were held to be able to rescind a settlement contract having discovered material non-disclosure. However, the general view is that *Magee* is wrongly decided and that *Bell* prevails. It may be, therefore, that a compromise is binding even though insurers subsequently discover a right to avoid the policy as a whole. The reasoning in *Bell* has recently been followed in *Nurdin & Peacock plc v Ramsden & Co Ltd*.[56]

It may be noted here that if the compromise agreement is itself induced by material misrepresentation, it may be set aside irrespective of the fate of the insurance contract.[57] However, as a compromise is not a contract of insurance, it does not attract a duty of disclosure: the latter point is clear from *Bell* itself.

Executory settlement contracts

In principle there should be no difference between a contract under which sums have been paid, and a contract under which sums have yet to be paid. There is old authority[58] for the proposition that an executory contract can be more easily set aside than an executed contract, although there is no modern authority for that proposition. *Magee* itself was an executory contract, and it was not argued that the insurers could avoid the agreement by reason of anything other than common mistake.

Money paid in the absence of settlement

After *Kleinwort Benson*, the position would appear to be that insurers can recover sums paid to the assured in the absence of a binding settlement agreement[59] where there is a mistake of law or fact. The principle itself appears not to rest upon the quality of the mistake, but on the notion that there has been unjust enrichment. There are two important limitations on the insurers' right of recovery.

(a) A payment is irrecoverable if "the payer intends that the payee shall have the money at all events whether the fact be true or false".[60] It is arguable that a sum paid to close a dispute between the parties would be irrecoverable even though there was no settlement contract.

(b) The defence of change of position prevents restitution where there is no unjust enrichment: "the defence is available to a person whose position has so changed that

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under an error of law were irrecoverable (*Bilbie v Lumley* (1802) 2 East 469). In *Kleinwort Benson* the rule in *Bilbie v Lumley* was overruled.

[54] [1932] AC 162.

[55] [1969] 2 QB 507.

[56] 1999, not yet reported.

[57] *Baghbadrani v Commercial Union* [2000] Lloyd's Rep IR 94.

[58] *Herbert v Champion* (1807) 1 Camp 134.

[59] In the UK, insurers have to some extent stepped away from entering into "full and final settlement" agreements with their assureds, as they are regarded as unfair on assureds given that futher losses may subsequently materialise.

[60] *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd* [1980] QB 677, per Robert Goff J

it would be inequitable in all the circumstances to require him to make restitution, or alternatively to make restitution in full".[61] It is not necessarily enough that the assured has spent the money: what is required is that he would not have made the same purchase from other resources, and that the assured was genuinely unaware of the mistake. There has, in other words, to be a causal link between the payment and the assured's expenditure. In *Scottish Equitable plc v Derby*[62] an assured who had been overpaid by insurers by error on their part was required to repay sums which he had expended on paying off his mortgage, as the court thought that he would have sought to do this by other means.[63]

LOSS OF THE RIGHT TO AVOID FOLLOWING A FRAUDULENT CLAIM

It is apparent in accordance with general principle that the insurers can lose their rights following a fraudulent claim. This may happen in one of three ways: by reason of a binding compromise agreement; by waiver; and by estoppel. Each of these possibilities was considered by Judge Gibbs QC in *Baghbadrani v Commercial Union*.

In that case the assured, who owned a private school damaged by fire, had made exaggerated claims under both a material damage policy (overstatement of repair costs) and under a business interruption policy (overstatement of expectations as to occupancy). The insurers had initially denied liability for the claims, but despite abandoning its defences nevertheless failed to make payment. The assured's solicitor wrote stating that proceedings would be commenced unless payment was made, and the insurers' solicitor replied that the insurers would proceed to a settlement and would continue with the adjustment process. In fact the insurers were looking for a defence, and 15 months later they relied upon fraud in the claim. Judge Gibbs allowed the insurers to deny liability.

(a) There was no compromise agreement. The exchange of correspondence had not amounted to a contract, and even if it had done so the contract would have been voidable for misrepresentation: although the claims had been quantified after the contract, it was the assured's duty to correct information given to insurers prior to the agreement.

(b) There was no waiver. Waiver required an unequivocal statement by insurers which would have given the impression to a reasonable man that they had made an informed choice to accept liability. A statement by insurers that they intended to pay could not be regarded as unequivocal until they had had the opportunity to investigate the claim, and if that statement had been induced by fraud then the assured would have appreciated that the insurers had not made an informed choice. The right of the insurers to have a reasonable time to consider their position was confirmed by David Steel J in *Callaghan and Hedges v Thompson*.[64].

(c) There was no estoppel. While in principle estoppel merely required an unequivocal statement, even if it was based on an error and did not constitute an informed choice, a person guilty of fraud could not pray in aid the equitable jurisdiction of the court.

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61 *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548, Per Lord Goff.

62 [200] 3 All ER 793.

63 The court all but refused to follow *Avon County Council v Howlett* [1983] 1 All ER 1073, which applied fairly generous principles of estoppel to overpayments.

64 [2000] 1 Lloyd's Rep 125.