NZILA Lecture Series 2018

Can the assured's conduct defeat a claim?

Professor Rob Merkin QC

Dougal v BoatsRUs 2018, Unreported

Note

It is unusual for us to publish a judgment without any form of commentary. However, we have just received the decision of Justice Once in *Dougal v BoatsRUs*, 14 February 2018, Doubtful Sound District Court from Professor Rob Merkin.[1]

The transcript does not identify the names of the lawyers representing the parties, and we are led to understand that they all applied for and were granted anonymity by Justice Once on compassionate grounds and for modest consideration.[2]

The Judge herself has no such inhibitions, and can be contacted in the usual way through her clerk in the bar of the *Goat and Bicycle Pump*, Taumatawhakatangihangakoauauotamatea-turipukakapikimaungahoronukupokaiwhenuakitanatahu. However, she has stated her intention of retiring from the law after this judgment to become an arbitrator. T-shirts bearing her slogan: "Arbitration: the right to pay for the wrong answer" are available from her clerk.

We nevertheless believe the judgment to be of sufficient significance to warrant as a public service its reproduction in the following pages, on the assumption that the editors of the New Zealand Law Reports and the ANZ Insurance Cases will in their wisdom choose to ignore it.

JUSTICE ONCE

A Introduction

[1] The plaintiff in these proceedings, Dougal, is - leaving aside his occupation as insurance lawyer - of notoriously bad character. He is a criminal, he seeks to corrupt public officials, he is dishonest in his dealings with the defendant insurers, he is an idiot to an awe-inspiring level that would qualify him as head of government in at least two major English-speaking nations and, after seeing the evidence of his dispute with a key actor in these proceedings, one Hamish, it is obvious that he knows nothing about New Zealand cricket. But does any of that justify summary judgment or strike out against him? As the matter has been fully argued before me, I will state my conclusions on these matters in some detail. Before reading what follows, those of a nervous disposition are advised to adopt a recumbent position and arm themselves with a generous dose of what P G Wodehouse referred to as "electric soup". This judgment proceeds on the basis of the facts agreed by the parties for the purpose of the present application.

B The Factual Background

[2] Dougal is the proud owner of the pleasure craft, *Boaty McBoatface*,[3] which he purchased on 1 April 2016 in reply to an advertisement. The vessel is equipped with all of the latest safety technology.

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[1] The judgment came to light in the course of the preparation of a series of lectures delivered in March 2018 in Auckland, Wellington and Christchurch under the auspices of the New Zealand Insurance Law Association. Rob Merkin QC is Professor of Commercial Law at the University of Exeter and Special Counsel to Duncan Cotterill.

[2] Thanks are due to Jeff Thomson of City University, London, whose comments on the draft judgment were invaluable.

[3] It became apparent in evidence that this name was chosen as a tribute to the winning entry in a public poll in Britain in 2016 to name a new polar research ship. The winning name fought off stiff competition from *Mr Splashy Pants*, *It's Bloody Cold Here*, *What Iceberg?* and *Big Metal Floaty Thing*. The research ship was ultimately named *Sir David Attenborough*, and *Boaty McBoatface* became the name of a polar research robot submarine which is in service at the time of the writing of this judgment.

In particular, in the event of any mechanical malfunction, there is an impressive array of alarms, flashing lights and an automatic speed limiter. The instruction manual for *Boaty McBoatface* explains how all of this works, and contains a paragraph in bold block capitals stating that if the oil pressure drops the engine should be switched off immediately. Dougal, in line with his training as an insurance lawyer, did not bother to read the manual, maintaining the established market custom that any issues can be sorted out at the claims stage.

[3] On 1 April 2017, the day after *Boaty McBoatface* had undergone a thorough service, Dougal took the vessel on a short trip from her berth at Auckland Harbour across the bay to Devonport. On board was a package containing a large quantity of methamphetamine, which Dougal was taking to his friend Hamish, a dealer in the substance. Two minutes after leaving berth, *Boaty McBoatface's* entire warning system came to life and the engine automatically dropped to half of the cruising speed. Dougal decided that the safest thing would be to continue the voyage to Devonport. After another minute the engine cut out entirely. *Boaty McBoatface* had to be towed back to Auckland by the harbour authorities. An official carried out a routine search of the vessel and discovered the package. After a short conversation and the transfer of $100, the official decided that his eyes and nose had deceived him.

[4] The engine was entirely destroyed. Dougal submitted a claim form to his insurers, BoatsRUs. The policy covered "accidents", excluded liability for loss by reason of the negligence of repairers and imposed an obligation on Dougal "to take all reasonable steps to avoid or prevent any loss." The insurers wrote to Dougal asking for the sale agreement evidencing his purchase of *Boaty McBoatface.* Dougal's insurance law training again came to the fore and he was unable to locate either the agreement or the seller. With a flash of inspiration, Dougal asked Hamish to draft and backdate a sale agreement, which Dougal then presented to BoatsRUs on 30 April 2017.

[5] On 5 May 2017 Dougal and Hamish had a heated argument about the best batting line up for the BlackCaps ODI team, ending in an exchange of insults. Hamish threatened revenge. On 7 May 2017 BoatsRUs received a letter "From a Friend", saying that the sale agreement was a forgery and that Dougal had been using *Boaty McBoatface* to carry illegal drugs. After an inquiry, on 31 May 2017 BoatsRUs sent a declinature letter to Dougal, rejecting his claim for the wrecked engine on the grounds that: (i) he was committing an illegal act when the loss occurred; (ii) he was in breach of the implied warranty of legality in s 42 of the Marine Insurance Act 1908; (iii) he has submitted a fraudulent claim; and (iv) there was either no fortuity or he was in breach of the reasonable precautions clause. BoatsRUs have applied for a strike out of the proceedings, or in the alternative, summary judgment. I will consider each of the defences in turn.

C Illegality

Principles

[6] Dougal has committed two serious criminal offences, possession of narcotics and bribing a public official, for each of which he will doubtless be required to answer in other proceedings. The question for me is whether those acts in any way affect his ability to enforce his insurance policy on the principle *ex turpi causa non oritur actio*, namely that a claimant is precluded from founding a cause of action on his own illegal acts*.* The law on illegality in contracts is set out in what is now ss 70-82 of the Contracts and Commercial Law Act 2017, replacing the Illegal Contracts Act 1970 with no changes of substance.[4] The effect of s 72 is that illegal contracts have no effect, although this is subject to a number of important limitations. First, by ss 75 and 76 a party to an illegal contract may be granted relief, including validation of the contract, if the court considers it "just" so do to. Secondly, s 71(1)(a) defines an illegal contract as "a contract governed by New Zealand law that is illegal at law or in equity, whether the illegality arises from the creation or the performance of the contract." It is here important to note that while a contract to perform an illegal act is itself potentially illegal, an illegal act committed in the course of the performance of a contract does not at common law make the contract illegal; in general the guilty party may lose the right to enforce the contract by reason of the illegality, but the overall validity of the contract itself is unaffected. That was decided by Devlin J in *St John*

4 For the origins and purpose of this measure, see Illegal Contracts: Report of the Contracts and Commercial Law Committee (1969).

Shipping Corp v Joseph Rank Ltd,[5] and the principle is in part codified by s 72 in respect of contravention of a statute: "a contract lawfully entered into does not become illegal or unenforceable by any party because its performance is in breach of an enactment, unless the enactment expressly so provides or its object clearly so requires." This is an obvious point and Staughton LJ in his typically robust fashion in *Euro-Diam v Bathurst*[6] put the matter this way:

> "Suppose that a motor car is insured for a calendar year, and is driven in January in excess of the speed limit. Would that be an answer to a claim for loss by theft or fire or a road accident in June? If a publican insured his stock of glasses and they were stolen in June, would it matter that they had been used for drinking after permitted hours in January?"

The insurance policy here is not as formed an illegal contract, and Dougal's unlawful activities in performance do not convert it into an illegal contract. So this is not an illegal contract either at common law or by reason of the application of s 72. The question of enforcement is governed by the common law and not statute.

[7] The law on the position of a party to a contract who commits a crime in the course of performing a contract, the key situation, not governed by the 1970/2017 legislation, remains uncertain. There is little authority on the matter in New Zealand. The modern starting point for the analysis is the decision of the House of Lords in *Tinsley v Milligan*.[7] In that case the parties jointly contributed to the purchase of a property, but it was conveyed to T alone so that M could disguise her interest and continue to claim state benefits. M's claim for a proprietary interest in the property was upheld by majority decision, but on the narrow ground that her claim did not require her to rely upon her illegal act. Their Lordships rejected a line of earlier authority adopting a "public conscience" test whereby the court was required to weigh the consequences of allowing or not allowing a claim. That approach was thought to be unsatisfactory in that it gave rise to unpredictability and uncertainty, and that a far better solution – in the view of the majority – was a single test based upon the need or otherwise for the applicant to rely upon illegality. However, it might be thought equally undesirable for the law to develop a rule which confers upon a defendant a windfall benefit by reason of the claimant's inability to enforce rights. In this jurisdiction s 71 of the 2017 has the starting point that property cannot pass under a contract illegal as formed, but this is sensibly modified by the court's ability to grant a proprietary or restitutionary remedy as it thinks just, under s 72. What is more important about *Tinsley* for present purposes is not the issues there discussed about title, restitution and resulting trusts where there is a fraudulent transfer,[8] but what it says about illegality in performance.

[8] The removal of the public conscience test by *Tinsley* cannot be said to reflect the law in this jurisdiction. First, the 2017 Act builds in a judicial discretion where the contract is illegal as formed. Secondly, in cases not governed by the 2017 Act, there has been a reluctance to adopt an all or nothing approach. In *Leason v Attorney General*[9] it was argued, by way of defence to a trespass claim following a break in at intelligence facilities, that no action could be brought because the facilities were being used to further illegal US activities. The Court of Appeal's review found no useful authority and concluded that "the law is in a state of development." Instead the judgment of Davis J considered the various possible tests of reliance, public conscience and causation and concluded that none of them assisted the defendants. At first instance in *Leason*[10] Gendall AJ had stated that "it cannot be said that the reliance test can automatically be applied as a rule of thumb." There is, however, a third reason why *Tinsley* is of doubtful authority. The case concerned a contract illegal in its formation, and it might be thought that there is a clear distinction between a case where the parties have agreed to do something illegal and one in which their agreement is perfectly innocent and one of them has acted in a fashion which allegedly precludes reliance on the contract.

[9] There is no authority in New Zealand either clearly accepting *Tinsley* or extending it to the enforcement of a lawful contract. In *Shanghai Neuhof Trade Co Ltd v Zespri International Ltd*[11] the

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5 St John Shipping Corp v Joseph Rank Ltd [1957] 1 Q.B. 267.
6 [1987] 1 Lloyd's Rep. 178.
7 [1993] UKHL 3.
8 See: Potter v Potter [2003] NZCA 103; Pounamu Properties Ltd v Brons [2012] NZHC 590
Graham v Graham [2015] HZHC 1571; S & S Ltd v XYZ Ltd [2016] NZHC 26; Horsfall v Potter [2017] NZSC 196.
9 [2013] NZCA 509
10 Attorney-General v Leason [2011] NZHC 1033.
11 [2014] NZHC 2353.

plaintiff sought damages for alleged breach of a contract for the export of kiwifruit from New Zealand to China. The plaintiff failed to pay the necessary duties imposed by Chinese law, thereby committing the crime of smuggling and subjecting its controllers to fines, and the plaintiff sought to recover damages representing the amount of those fines, the amount of the duties properly payable and also for the defendant's termination of the contract without due notice. Noting that the application of the *ex turpi causa* principle "has proved somewhat troublesome", Courtney J pointed out that courts in other jurisdictions had refused to extend *Tinsley* to other situations, notably tort claims where the action was for injuries genuinely suffered despite illegal conduct.[12] Her conclusion was that, while the claim for reimbursement of the fines plainly fell foul of the *ex turpi principle*, the same could not be said of the other damages claims which were based on alleged contractual obligations. That outcome could be reached by an application of the reliance test. In her words: "There is no suggestion of illegality in relation to the contract itself. The fact that [the plaintiff] committed an offence in China by underpaying the duty does not necessarily affect [the defendant's] own contractual obligations. It is certainly arguable that if those contractual obligations exist then the essential ingredients of the cause of action will be made out without the need to refer to [the plaintiff's] criminal conduct in paying the duty."[13] In the event, the Court took the matter no further as there was an unresolved issue as to whether the illegal acts were performed by an individual within the plaintiff's organisation who was of sufficient status to justify their attribution to the plaintiff.

[10] However, the landscape has now changed entirely with the decision of the UK Supreme Court in *Patel v Mirza*.[14] The background to that case was a trio of Supreme Court decisions[15] where widely different views of the correctness and scope of *Tinsley v Milligan* were expressed. It is unnecessary to explore those decisions, as the law in the UK is now stated definitively in *Patel*, a case in which no fewer than nine Justices of the Supreme Court were empanelled to resolve the conflicts. *Patel* was a restitutionary claim for sums paid by the claimant to the defendant to be used to wager on the value of shares, based on the defendant's inside knowledge of events likely to affect that value. The wager was not effected, and the claimant sought restitution. Applying *Tinsley*, this was an illegal contract and the claimant would be required to rely upon his illegality to secure restitution. He may well have succeeded on an application of the obscure *locus poenitentiae* exception whereby restitution is available to a party who voluntarily withdraws from an unexecuted illegal contract. It proved unnecessary for the majority to engage with that principle. The Supreme Court, by a 6:3 majority, held that *Tinsley* should no longer be followed. The majority, the late and sadly missed Lord Toulson, along with Lady Hale, Lord Kerr, Lord Wilson, Lord Hodge and Lord Neuberger abandoned the reliance principle and instead replaced it with a threefold flexible test which balanced three factors: (a) the underlying purpose of the prohibition transgressed and whether that purpose would be enhanced by denial of the claim; (b) any other relevant public policy on which the denial of the claim might have an impact; and (c) whether denial of the claim would be a proportionate response to the illegality, taking account of the fact that the claimant would doubtless face punishment in the criminal courts. The rigid reliance test has thus been discarded in favour of a composite "Three Ps" test: purpose; public policy; proportionality.

[11] The threshold question for this court is whether *Patel v Mirza* should be followed. There is to date little guidance. The case was referred to without disapproval in *Lynds v Fitzherbert Rowe*[16] and, more significantly, by the Supreme Court in *Horsfall v Potter*,[17] but no ruling was required. The merits of the flexible approach have been considered by Professor Virgo QC,[18] but it has also been commented by way of response that:

> "an approach which involves the discretionary evaluation of a range of factors is inappropriate. First, the relative significance and weight of the "trio of considerations" is not at all clear, and some of the more specific factors relevant to these considerations are not even known in advance. Secondly, by their nature these factors can be weighed up differently by different judges, even on the same facts.[20] These criticisms do not imply that there must be a

[12] *Hall v Hebert* [1993] 2 SCR 159 (Canada); *Miller v Miller* [2011] HCA 9 (Australia).
[13] See also *Lester v Greenstone Barclay Trustee Ltd* [2009] NZHC 2376.
[14] [2016] UKSC 42.
[15] *Hounga v Allen* [2014] UKSC 47; *Les Laboratoires Servier v Apotex Inc* [2014] UKSC 55; *Jetivi SA v Bilta (UK) Ltd* [2015] UKSC 23.
[16] [2017] NZHC 1297.
[17] [2017] NZSC 196.
[18] (2016) 14 Otago LR 257.

> single and rigid rule applied to all cases. But they do imply that the adoption of a single rule that is qualified by defined exceptions according with principle is probably more workable, transparent and conducive to like cases being treated alike."[19]

These concerns reflect those of the minority in *Patel*, Lords Mance, Clarke and Sumption, but in my judgment they are misplaced. By adopting the Illegal Contracts Act 1970 this jurisdiction showed a clear intention to move away from the rigid "all or nothing" rules governing illegality. It is noteworthy that *Tinsley v Milligan* has not been received with enthusiasm and has been applied only to defeat a claim for indemnification for a criminal fine in *Shanghai Neuhof Trade Co Ltd v Zespri International Ltd*, an outcome with which few would argue. The criminal law is designed to ensure that a transgressor is properly punished, and the blunt instrument of a denial of a claim in contract or tort by reason of that transgression risks double jeopardy, disproportionality and the conferring of a windfall. Judges are not automatons fit to apply only rigid rules; they are appointed because they have "judgment".[20] I am reinforced in my view by authorities from elsewhere. I have already referred to the flexible approach in Australia and Canada in respect of tort claims, and the most recent Australian High Court cases specifically refer to proportionality.[21] In October 2017 the New South Wales Court of Appeal in *REW08 Projects Pty Ltd v PNC Lifestyle Investments Pty Ltd*[22] considered the enforceability of property transfers alleged to be illegal and unenforceable by reason of evasion of stamp duty. The contract was there tainted in its formation rather than performance, but enforcement was permitted, one of the grounds being that "to deprive the respondent of the benefit of the … contract would impose a penalty upon it disproportionate to its assumed wrong." English tort cases discussing the ex turpi causa defence have not accepted an extension of *Tinsley* by analogy and instead they lay down a composite analysis. The Hong Kong courts have also accepted the correctness of *Patel v Mirza* in contract claims and have chosen to apply it in the place of *Tinsley*.[23]

[12] It would be remiss not to refer to the recent powerful decision of the Singapore Court of Appeal in *Orchid Trading Ltd v Chua Siok Liu*.[24] This was a claim to recover sums paid under an illegal moneylending agreement. *Patel v Mirza* was not strictly relevant because the principles there laid down were stated to be applicable only to common law, rather than statutory, illegality, given that a court is bound by the terms of a statute as to illegality and its consequences. Andrew Phang Boon Leong JA, delivering the judgment of the Court, rejected *Patel v Mirza* as creating an "unprincipled distinction" between statutory and common law illegality, and held that a court should not have "a further discretion to permit recovery to the prohibited contract". The judgment proceeds on the basis that it is wrong to replace principle with uncertainty and that if a contract is illegal then that is the end of the story as regards enforcement, although issues as to the restitution of sums paid under an illegal contract should be addressed by reference to the overriding principle of "stultification", ie, whether the grant or refusal of restitution would undermine the statutory or common law purpose of prohibiting the contract.[25] Any judgment of the Singapore Courts is to be treated with the utmost respect, but I find that it has no relevance to the issues before me. I am not concerned with a claim for restitution under a contract rendered unlawful by statute, but rather a claim under a lawful contract where the plaintiff has committed incidental criminal acts. *Orchid Trading* says nothing about that situation, and the rejection of *Patel* is only to the extent that *Patel* applies a flexible approach to the enforcement of a contract illegal as formed at common law.

Application[26]

[13] I therefore hold that there should be a two-step approach to the question of illegality in performance. The first step is to ask whether the plaintiff's case is founded on illegality. This reflects

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[19] Havelock, (2016) 14 Otago LR 285.
[20] For the distinction between "judgment" as an outcome and "judgment" as a thought process, see *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1994] 3 All ER 581.
[21] *Nelson v Nelson* [1995] HCA 25; *Miller v Miller* [2011] HCA 9.
[22] [2017] NSWCA 269.
[23] *Chung Tin Pui v Li Pak Sao* HCA 568/2007, 29 September 2017; *Li Po Lai v Tai Wo Finance Ltd* [2017] HKEC 2329. Earlier, in *Tse Chun Wai v Leung Kwok Kin Joseph* [2017] 4 HKLRD 563, it was held that *Tinsley* remained binding until the Court of Final Appeal had confirmed that *Patel* prevailed, but that caution is not found in the later cases.
[24] [2018] SGCA 5.
[25] Echoing on this matter the majority of the High Court of Australia in *Equuscorp Pty Ltd v Haxton* [2012] HCA 7.
[26] See *Singularis Holdings Ltd v Daiwa Capital Markets Europe Ltd* [2018] EWCA Civ 84.

the "reliance" test in *Tinsley*, and is a useful starting point because it filters out those cases where the defendant is opportunistically focusing attention on the plaintiff's criminality rather than the merits of the case. A causal link is thus required, and although it is unnecessary here to identify the strength of that causal link – the reliance test as laid down by *Tinsley* has proved far from straightforward to apply – it might be thought that the link has to be direct. If the reliance/causation test is satisfied, the second step then becomes an assessment of the merits of the case by reference to the "Three Ps". A plaintiff who seeks to benefit from his crimes may be ruled out, as may – as in *Shanghai Neuhof Trade Co Ltd v Zespri International Ltd* – a plaintiff who seeks to be relieved, by way of indemnity, of the criminal sanction imposed upon him by reason of his crimes. But in other cases there may be little or no justification for a civil sanction.

[14] A few words on the possible application of these principles to insurance cases may be apposite. The reliance filter removes the *ex turpi causa* bar to recovery where the plaintiff's loss is unrelated to his transgressions. That proposition is undoubted whatever view of *Patel v Mirza* is taken, and it is fully consistent with the established principle in s 11 of the Insurance Law Reform Act 1977 requiring a causal link between breach of policy term and loss.[27] In *Delaney v Pickett*[28] the plaintiff was injured in a motor accident and commenced proceedings against the admittedly negligent driver. The evidence showed that both parties were carrying quantities of cannabis and the probability was that it was not for their personal use. Nevertheless the English Court of Appeal rejected the suggestion that the plaintiff's illegal act should affect his right to seek damages from the negligent driver. There was no possible connection between a passenger's possession of cannabis and the negligence of the driver.[29] In *McCracken v Smith*[30] the plaintiff, a pillion passenger on a stolen motor cycle, was injured in a collision between the motor cycle and a van. Both vehicles were being driven at excessive speeds. The English Court of Appeal denied the plaintiff a claim against the driver of the motor-cycle on the ground that there was a strong causal link between his injuries and his participation in the joint criminal enterprise of theft. However, there was no such bar to a claim against the driver of the van, and the plaintiff was held to be entitled to recover 50% of his loss from that defendant, the 50% deduction reflecting the plaintiff's own contribution to his injuries. In *The Nancy*[31] the insured vessel on a voyage from became a constructive total loss by fire on a voyage from Iran to China for the transport of sulphur. It transpired that freight invoices issued in respect of the sulphur had to be processed in US dollars by the assured's New York correspondent bank, contrary to US law. Blair J in the English High Court held that illegality under US law was not relevant to a policy governed by English law, but in any event there was no possible connection between any transgression of the law and the manner in which the loss occurred.

[15] Where the reliance filter does not rescue the assured, the "Three Ps" in *Patel v Mirza* then become relevant. Its operation can be illustrated by *Osman v J Ralph Moss Ltd*,[32] where a plaintiff convicted and fined for driving without the requisite motor insurance was able to recover damages from the insurance broker who advised him that insurance was not needed. The offence was one of strict liability and the assured bore no culpability. The correctness of that decision was doubted after the ruling in *Tinsley*,[33] but in my judgment the efficacy of the ruling has been restored by *Patel.*[34] The law as I now find it to be was anticipated by the Supreme Court of Victoria in *Fire and All Risks Ltd v Powell*,[35] where an assured who, having deliberately overloaded his vehicle and suffered loss when it became wedged under a low bridge, was held to be entitled to his insurance claim despite an

[27] Echoed, albeit in different formulations, in s 54 of the Insurance Contracts Act 1984 (Cth) and in the UK under s 11 the Insurance Act 2015.
[28] [2011] EWCA Civ 1532.
[29] The plaintiff was unable to recover any compensation. The driver was uninsured and the UK's fallback compensation scheme administered under an agreement with the UK Government by the Motor Insurers Bureau excluded liability for injuries arising where the victim was committing a criminal act at the time: *Delaney v Secretary of State for Transport* [2015] EWCA Civ 172. That exception has now been deleted from the MIB Agreement on the ground that it is incompatible with European Union law. See also *Joyce v O'Brien* [2013] EWCA Civ 546.
[30] [2015] EWCA Civ 380.
[31] *Sea Glory Maritme Co v Al Sagr National Insurance Co, The Nancy* [2013] EWHC 2116 (Comm).
[32] [1970] 1 Lloyd's Rep 313.
[33] See *Safeway Stores Ltd v Twigger* [2010] EWCA Civ 1472.
[34] The post-*Patel* approach adopted in Scotland in *D Geddes (Contractors) Ltd v Neil Johnson Health & Safety Services Ltd* [2017] CSOH 42.
[35] [1966] VR 513.

infringement of regulatory legislation. More recently, in,[36] the Supreme Court of the Australian Capital Territory allowed a claim under a liability policy by an assured who had used his vessel without a personal watercraft licence and in the course of such use had injured a third party. My analysis of this decision is that, while it might be argued that the reliance filter would have been of no assistance in that the vessel should not have been in use at all, proportionality and public policy do not indicate a need to deprive the victim of a source of recovery in the form of the assured's policy. I leave open for future consideration the question whether a distinction is to be drawn between first and third party policies in applying the *Patel v Mirza* test.

[16] My conclusion is as follows. (1) The policy of insurance is not illegal as formed – there was no agreement to insure an illegal risk. The Contract and Commercial Law Act 2017 is therefore not engaged. (2) The policy insurance is not rendered illegal as performed, the combined effect of the common law as explained in *Euro-Diam v Bathurst* and also s 72 of the 2017 Act. (3) There is no connection between Dougal's criminal acts and the damage to the engine of *Boaty McBoatface*. The damage would have occurred whether Dougal had been carrying a cargo of drugs or a cargo of law books. By the time that the act of bribery took place, the damage had already been suffered. This finding in relation to the reliance filter is enough to dispose of the defence of *ex turpi causa*. (4) Even if some causal link could have been shown, the New Zealand courts should apply *Patel v Mirza* and determine the purpose of the legislation, whether public policy is served by denying recovery and whether such denial is proportional to Dougal's unlawful conduct. I need express no view on this matter other than to say that it is not one that could easily be resolved by summary judgment.

C The Warranty of Legality

[17] Although the insurers' public policy arguments have been dismissed, an alternative ground of defence with respect to Dougal's criminality is the warranty of legality in s 42 of the Marine Insurance Act 1908. This states that "There is an implied warranty that the adventure insured is a lawful one, and that, so far as the assured can control the matter, the adventure shall be carried out in a lawful manner." The provision contains two separate warranties. The first is a present warranty that the insured adventure is lawful in its formation. The second is a future warranty that the insured adventure is carried out lawfully so far as the assured can control the matter. There is a further relevant provision, section 89, which preserves the ordinary rules of the common law, including general principles applicable to illegality of contract. The distinction between the two sections is not immediately apparent, but it may be that section 42 was directed to cases where the underlying risk was illegal, whereas the section 89 saving was concerned with the legality of the insurance contract itself. That does not fall for determination here, as there is no question but that Dougal's policy was a lawful one. The real issue to be determined is whether his unlawful acts trigger the section 42 warranty requiring the voyage to be conducted lawfully or whether section 42 has some lesser effect. It is to be recalled that the 1908 Act was designed only to be a codification of the common law, so it is pertinent to consider whether the common law recognised that marine insurance policies had special features meriting separate treatment. Certainly non-marine insurance law has never treated legality as an implied contractual term and ordinary principles governing illegal contracts have instead been applied.[37] Just what the great Sir Mackenzie Chalmers, judge, Parliamentary draftsman and progenitor of the Marine Insurance legislation had in mind when preparing section 42 is, fortunately, at least in part, known to us. His co-authored text with David Owen, *Digest of Marine Insurance Law* was published in its second edition in 1901 at a time when his work on the Marine Insurance Bill was in its closing stages. The book anticipates the legislation and annotates each of the proposed sections with the cases that support their wording.

[18] Turning first to the implied section 42 warranty, "that the adventure insured is a lawful one", the proposition that the English courts would refuse to give effect a marine policy on an unlawful adventure was recognised at an early stage in the development of marine insurance law: if the adventure itself was illegal, the policy could not be enforced. Virtually all of the cases arose out of the war conditions prevailing, with short interludes, from 1756 to 1815, when Britain was successively at war with France (the Seven Years War), America (the American War of Independence, supported by France), France again (the Napoleonic Wars) and then America for a second time (the 1812-1814

[36] [2016] ACTSC 76.
[37] *Euro-Diam Ltd v Bathurst* [1988] 2 All ER 23.

War). The principle that it was not permissible to insure property belonging to an enemy alien,[38] developed from the earlier more limited concepts that an enemy alien could not bring proceedings in the English courts[39] and that insurance against the capture and condemnation of enemy property by British warships or privateers was unlawful.[40] Trading with the enemy was eventually recognised as being unlawful at common law, and took down with it any insurance on such trade. By way of example, in *Parkin v Dick*,[41] insurers were held not to be liable for the loss of a vessel seized and condemned as a French prize when at the time she was carrying naval stores the export of which had been prohibited by Orders in Council under a measure adopted in 1793.[42] In *Vandyck v Hewitt*[43] an insurance policy on the risk of the loss of cargo purchased from an enemy alien was similarly held to be unenforceable. Some of the early authority on the point stemmed from the Convoy Act 1798, passed at the start of the Napoleonic Wars and designed to prevent goods and vessels falling into enemy hands. This measure required vessels to sail in convoy unless otherwise licensed by the Crown, the grant of a licence being conditional on the vessel possessing minimum numbers of crew and guns. There were numerous decided cases in which policies were struck down because they were on an unlicensed vessel not sailing in convoy[44] or because the assured's licence was either invalid[45] or its terms had not been complied with.[46]

[19] A perusal of these cases shows that none of them refers to any "warranty of legality". The above cases are not cited in Chalmers' *Digest*, but those that are referred to are similarly devoid of such usage. Indeed, there is some partial confusion in the *Digest's* citations. *Gedge v Royal Exchange Assurance Corporation*,[47] said to be one of the cases on which section 42 was based, was a policy made without interest contrary to the 1746 Act and thus was illegal under statute independently of any possible implied warranty relating to the underlying risk. The notes to section 42 in the *Digest* refer to *Kellner v Le Mesurier*[48] and *Gamba v Le Mesurier*,[49] both insurances against the risk of the capture of enemy property, and although in each case the policies were held to be on illegal risks and therefore unenforceable it was not suggested in either of them that a warranty was involved. Curiously, *Brandon v Curling*,[50] which raised the same point, is classified by *Digest* as a section 89 case where the policy itself was illegal at common law rather than by reason of the "warranty". So the epithet "warranty", to describe what was going on, seemingly stems from the fertile mind of Chalmers.

[20] The second implied warranty in section 42 is "that so far as the assured can control the matter, the adventure shall be carried out in a lawful manner." This suggests that any unlawful act committed in the course of the adventure immediately brings the risk to an end unless the act is beyond the assured's control, but it is not an accurate representation of the pre-1906 authorities. The *Digest* cites *Pipon v Cope*,[51] but that was a case in which the assured's vessel was lost after it had been forfeited to the Crown by reason of confiscation for smuggling and thus has nothing to say about illegal performance. The other authorities cited by Chalmers' *Digest* indeed show that an innocent assured was not precluded from relying on the policy by reason of an unauthorised illegal act on the part of the master or crew, but they do not suggest that every illegal act within the assured's control or committed with his privity would otherwise terminate the risk in the familiar manner of a warranty. All turned upon: (a) the construction of the legislation creating the relevant requirement; and (b) the connection

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[38] *Furtado v Rogers* (1802) 3 B & P 191; *Oom v Bruce* (1810) 12 East 225. Lord Mansfield had earlier been perfectly content to let British underwriters insure enemy property, as he regarded the trade as profitable: *Gist v Mason* (1786) 1 TR 88.
[39] *Brandon v Nesbitt* (1794) 6 TR 23; *Bristow v Towers* (1794) 6 TR 35. Lord Mansfield's earlier view to the contrary in *Anthon v Fisher* (1782) 3 Doug 16, allowing an enemy privateer to bring suit in England on a ransom bond, was rejected.
[40] *Bell v Potts* (1800) 1 TR 548,
[41] (1809) 11 East 502.
[42] 33 Geo. 3, c 2. See also *Chalmers v Bell* (1804) 3 B & P 604 33: goods exported from India on a non-British vessel in contravention of the Navigation Act 1659.
[43] (1800) 1 East 96.
[44] *Cohen v Hinckley* (1808) 1 Taunt 249.
[45] *Wainhouse v Cowie* (1811) 4 Taunt 178; *Ingham v Agnew* (1812) 15 East 517.
[46] *Hinckley v Walton* (1810) 3 Taunt 131; *Edwards v Footner* (1808) 1 Camp 530, although in that case the assured was not privy to the infringement and thus was allowed to recover.
[47] [1900] 2 QB 214.
[48] (1803) 4 East 396.
[49] (1803) 4 East 407.
[50] (1803) 4 East 410.
[51] (1808) 1 Camp 434.

between the illegal act and the insurance. As to (a), two cases cited by Chalmers may be contrasted. The Customs Consolidation Act 1853[52] prohibited the carriage of cargo on deck, and it was decided in *Cunard v Hyde*[53] that an assured privy to the infringement was unable to recover under the policy. By contrast, *Redmond v Smith*,[54] a failure to secure that contracts with the crew were in writing contrary to legislation,[55] held that the contravention was regulatory and did not affect the legality of the voyage. As to (b), in *Dudgeon v Pembroke*[56] the court was of the view that a policy would not respond where a vessel was lost carrying passengers without a certificate contrary to the Merchant Shipping Act 1854,[57] but Quain J warned that "where the relation between the illegal act and the policy is not direct, but remote and incidental, so that neither the design or tendency of the latter is to aid or promote the commission of the former, the validity of the contract is not impaired or affected." Other cases referred to in Chalmers' *Digest* are simply off point.[58] Once again, there is no hint of a "warranty" being applied to illegal performance.

[21] Decisions since 1906 have not sought to delve into the history of section 42 and have taken its wording at face value. A series of Australian authorities demonstrates the point. In *Doak v Weekes*[59] the assured was held to be in breach of the implied warranty by sending the vessel to sea with a crew not holding the requisite statutory qualifications. In *Switzerland Insurance Australia Ltd v Mowie Fisheries Pty Ltd*[60] the owner of a fishing vessel lost by sinking was met by the section 42 defence that there had been a failure to engage an appropriately qualified maritime engine driver for the use of the vessel more than 15 nautical miles from the coast as required by Victoria and Tasmania legislation. The assured succeeded, but only by reason of the Federal Court's finding that that there was no breach on the facts. In neither case was the loss in any way connected with the infringement. These cases led the Australian Law Reform Commission to propose in 2001[61] that the possibility that "any breach of a regulation may be interpreted as a breach of warranty" should be reversed by legislation, by requiring a causal connection between the breach and the loss. That proposal, along with the rest of the Report, has not been implemented, and it has since been held in *Solway v Lumley General Insurance Ltd* [62]that failure to register a vessel without reasonable excuse contrary to Queensland law, and in *Wiltrading (WA) Pty Ltd v Lumley General Insurance Ltd*[63] that failure to carry required radiotelephony equipment, each constituted a breach of warranty. Similarly, in Canada, in *Ocean Masters Inc v Allianz AGF MAT Ltd*[64] the assured was able to recover for the loss of its fishing vessel only because it was trading within 120 miles off the coast of Newfoundland and therefore not in breach of its certificate.

[22] The most that can be said of the cases cited in support of section 42 is that the common law denied recovery under a policy written on an illegal adventure, and that an assured who committed an illegal act in the course of the adventure might potentially lose his claim but subject to Quain J's important caveat. So, why has the law chosen to classify these principles as "warranties" to such damaging effect? There is a satisfactory explanation, flowing from the ambiguity of the word "warranty". That term in its origins[65] in marine insurance was used in two senses, a point indeed properly noted in the *Digest*. First, it delimited the risk run by insurers. As early as 1749 the Lloyd's

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[52] 16 & 17 Vict, c 107.
[53] (1859) 2 E & E 1. Contrast *Wilson v Rankin* (1865-66) LR 1 QB 162, also cited by Chalmers, where the assured was unaware of the infringement.
[54] (1844) 7 Man & G 457.
[55] 5 & 6 Will 4, c 19 (1835).
[56] (1873-74) LR 9 QB 581.
[57] The assured succeeded as he was not a party to the infringement.
[58] *Waugh v Morris* (1872-73) LR 8 QB 202 (charterparty); *John Cory & Sons v Burr* (1883) 8 App Cas 393 (construction of the free of capture and seizure warranty); *Trinder, Anderson & Co v Thames and Mersey Marine Insurance Co* [1898] 2 QB 114 (proximate cause of loss); *Janson v Driefontein* [1902] AC 484 (friendly property seized followed by an outbreak of war – no reason to deny recovery); *Nigel Gold v Hoade* [1901] 2 KB 849 (British goods seized by a foreign enemy).
[59] (1986) 82 FLR 334.
[60] [1997] FCA 231.
[61] *Review of the Marine Insurance Act 1909*, ALRC Report No 91, Chapter 9.
[62] [2003] QCA 136.
[63] [2005] WASCA 106.
[64] 2007 NLCA 35.
[65] Vance, "The History of the Development of the Warranty in Insurance Law" 20 Yale LJ 523 (1910-11); Patterson, "Warranties in Insurance Law," 34 Columbia Law Review 602 (1934).

market introduced the "free from particular average"[66] warranty, later incorporated into the Lloyd's SG Policy in 1779[67] by the term: "Corn and fish are warranted free from average, unless general, or the ship stranded: sugar, tobacco, and some other specific goods, free from average, under 5 per cent (and all other goods, under 3 per cent) unless general, or the ship be stranded." This was not any form of promise by the assured, but rather an exclusion of small losses. Again, in the Napoleonic era the London Market adopted the wording "warranted free from capture and seizure" removing from the SG Policy any cover for losses resulting from the actions of enemy warships and privateers. These were not matters within the control of the assured and were in effect exclusions from or limitations on coverage. The second sense in which the term "warranty" was used was in the form of a promise by the assured that stated facts were true or that the voyage would be conducted in a given promised fashion. Promissory warranties developed in the wartime conditions from the late seventeenth century onwards, and were in their origins designed to protect the vessel and cargo against enemy capture: accordingly they related to promises to sail in convoy[68] or to maintain neutrality and thus (in theory at least) immunity from seizure by a belligerent power.[69] As is well known, warranties of the latter type later came to be classified as promises to be strictly complied with, whose breach terminated the risk automatically as from the date of breach independently of any materiality to the risk or connection with the loss that actually occurred. All of that is codified in sections 34-37 of the Marine Insurance Act 1908 which provisions – subject to the legislation referred to later in this judgment – remain good law in this jurisdiction.[70]

[23] It is very possible that the term "warranty" in section 42 of the 1908 Act was intended simply to refer to situations in which the assured's insurance was not capable of enforcement at common law, by reason either of the illegality of the underlying risk or by reason of the assured's commission of illegal acts in the performance of the insured adventure. My preferred view of section 42, which gives it a meaning consistent with the common law authorities, is that it is a statement of the circumstances in which the policy is of no effect, and that in turn can only be the position if the general law recognises the illegality of the underlying risk or the illegality of the performance of an otherwise lawful risk. I appreciate that the positioning of section 42 in the 1908 Act, in that Part setting out the rules on implied contractual warranties and in close conjunction to the implied warranty of seaworthiness in voyage policies in section 40, militates against such an interpretation, but the point remains the pre-1906 authorities do not support the suggestion of an implied contract term in the context of legality. If that is right, then it follows that there is no special principle involved at all, and that section 42 does not operate as a contractual warranty by terminating the risk as soon as the assured commits an illegal act. This Court is of course not free to ignore a statutory provision, but the dearth of authority in New Zealand permits the conclusion that it is permissible to peer behind the legislation to see exactly what section 42 means. Lifting the cloak draped by section 42 shows that it should be construed as no more than a statement that there is an implied limitation in a policy of marine insurance that an adventure or performance rendered unlawful by the ordinary law is not covered by the policy. In my judgment it follows that the warranty of legality stands or falls with ordinary principles of illegality affecting contracts.

[24] All of that aside, even if section 42 of the 1908 Act takes effect as an implied contractual warranty, it does not appear to have the draconian effect indicated by the Australian cases. I am reinforced in that view by the decision of the English High Court in *Sea Glory Maritime Co v Al Sagr National Insurance Co, The Nancy*.[71] That case concerned a hull policy on a vessel lost by fire. One of the many defences raised by the insurers was that the insured owners had infringed the warranty of legality by arranging for freight invoices on sulphur to be shipped from Iran to China to be paid by a New York correspondent bank in breach of US law on sanctions with Iran. Blair J dismissed the

[66] "Particular average" was the original term for partial loss.
[67] Which remained in general use until 1983.
[68] Later superseded by the Convoy Act 1798.
[69] *Jeffries v Legandra* (1690) 2 Salk 443; *Lethulier's Case* (1692) 2 Salk 443; *Bond v Gonsales* (1704) Holt KB 469; *Henkle v Royal Exchange Assurance Company* (1749) 1 Ves Sen 317.
[70] Of the 80 or so nations that have adopted the UK Marine Insurance Act 1906, the UK alone has modified these provisions, by the Insurance Act 2015. This measure: (a) abolishes the automatic termination principle and replaces it with a suspension of the risk for any period of breach (section 10); and (b) even in period of breach, prevents reliance unless there is some connection between the breach and the loss (section 11). Australia has removed the effect of warranties for non-marine policies (section 54 of the Insurance Contracts Act 1984) but has left marine law unchanged.
[71] [2013] EWHC 2116 (Comm).

defence on the ground that the warranty of legality was relevant only to illegality under the law governing the policy, English law, but added that "I agree with the claimants that the 'adventure' insured under a hull policy like the present Policy is that the ship is exposed to maritime perils ... The payment of freight is not within the insured adventure, and the defendant's contention fails for that reason." This is clear authority for the proposition that incidental illegality does not affect the legality of the voyage or, therefore, the enforceability of the insurance. However, there are other reasons why section 42 is of limited effect in this jurisdiction. The implied warranty "that the adventure insured is a lawful one" is subject to the principles in the Contracts and Commercial Law Act 2017, there being no saving in the 2017 Act for inconsistent provisions in earlier legislation: there is accordingly no automatic denial of enforcement. The implied warranty that "so far as the assured can control the matter, the adventure shall be carried out in a lawful manner" is subject to section 11 of the Insurance Law Reform Act 1977. Under that well-known section, an exclusion or limitation on coverage "so defined because the happening of such events or the existence of such circumstances was in the view of the insurer likely to increase the risk of such loss occurring" cannot be relied upon by an insurer if the assured can prove that the loss was not caused or contributed to by the excluded events. Section 14 of the 1977 Act states specifically that "Nothing in the Marine Insurance Act 1908 shall limit any provision of this Act and the provisions of this Act shall prevail in any case where they are in conflict with any provision of that Act." An insurance policy exclusion for illegal acts is only effective if it removes cover where the general law does not, and it must follow that such an exclusion is redundant unless it was "in the view of the insurer likely to increase the risk of such loss occurring" so that it falls within section 11.

[25] In the present case, as I have already determined, Dougal's various misdeeds do not give BoatsRUs an illegality defence at common law. My preferred view of section 42, that it merely confirms that the policy will not respond where the common law denies recovery, means that in the present case section 42 has nothing upon which to bite. The alternative view of section 42, that it is a contractual warranty whose effect is to terminate the risk, still does not assist BoatsRUs: there was nothing illegal in the adventure, as noted in *The Nancy*; and it is straightforward for Dougal to bring himself within section 11 of the 1977 Act by showing that his breach of the warranty had no causal effect on the loss that he actually suffered.

D Fraudulent Claim

[26] That Dougal has attempted to deceive his insurers is not open to question. He has procured and presented a forged document of title in order to substantiate his claim. Is this a fraudulent claim, and – if so – what are its consequences?

What is a fraudulent claim?

[27] It is clear from the authorities that "fraud" is something more than negligence and requires deliberate or reckless conduct on the part of the assured.[72] Further, the civil standard of proof is applicable albeit in a flexible fashion –taking account of the seriousness of the allegation - to establish fraud.[73] The duty is sometimes expressed in terms of utmost good faith, although the main significance of that point is in relation to the insurer's remedy for a fraudulent claim, a matter to which I consider below. I have no hesitation in holding that the fraud perpetrated by Dougal on his insurers was deliberate and constitutes "fraud" on any definition of that word. However, fraud by the assured in the claims process is not necessarily to be equated with "fraudulent claim." There is a potential distinction between cases where the assured is making a claim in circumstances where he is not entitled to do so, and cases where the assured has an entitlement to payment but has been dishonest in establishing that entitlement. To date this jurisdiction has not recognised any such distinction, but this court is now called upon to determine whether to follow the UK Supreme Court in *Versloot Dredging BV v HDI Gerling Industrie Versicherung AG*[74] in doing so.

[72] *Lahman v Phoenix Insurance Co* (1888) 7 NZLR 271; *New Zealand Insurance Co Ltd v Forbes* (1988) 5 ANZ Insurance Cases 60-871 (CA); *Gate v Sun Alliance Insurance Ltd* HC Auckland CP1218/92, 19 January 1994; *Dowsing v State Insurance Ltd* [1996] 3 NZLR 622; *Vero Insurance NZ Ltd v Posa* [2008] 3 NZLR 701
[73] *Z v Dental Complaints Assessment Committee* [2008] NZSC 55; *AMI Insurance Ltd v Devcich* [2011] NZCA 266.
[74] [2016] UKSC 45.

[28] The “lack of entitlement” frauds are readily identified.[75] The most obvious, on which there are numerous authorities unnecessary to cite here, are claims for losses: deliberately inflicted by the assured upon himself (typically arson or scuttling); not suffered at all; thought at the time to have been suffered but subsequently shown not to have existed (as where property thought to have been destroyed is rediscovered); or suffered to an extent less than that presented to the insurers (exaggerated loss). Fraud of any of these types removes the claim entirely, so that genuine losses are also wiped out. There may be a combination of these possibilities.[76] Less straightforward is the situation where the assured has suffered a loss of the type and amount claimed, but is aware of a defence open to the insurers and chooses to suppress that defence. Once again there is no entitlement to indemnification, but by reason of a breach of duty by the assured or through a lack of coverage. The clearest illustration is *Agapitos v Agnew*,[77] where the assured warranted that no welding (“not works”) would be carried out on the deck of the vessel. A spark from welding led to a fire for which the assured made a claim which alleged that the fire had come from a different source, and it was held by the English Court of Appeal that the insurers were discharged from liability by the assured’s version of the circumstances of the loss which converted an uninsured loss into an insured loss. This head of fraud may also be the proper explanation of *Blanshard v National Mutual Life Association of Australasia Ltd*,[78] where the assured withheld from health insurers the information that following his disability he had entered into a non-competition covenant with his employer so that his loss of income was due not to sickness (insured) but to his agreement (not insured). Clearer illustrations are *Savash v CIS General Insurance Ltd*[79] (falsely representing that the loss occurred at a time when premises were occupied in circumstances where unoccupancy was a defence) *Police v Gopal*[80] (misstating date of loss so as to bring a prior event within the scope of a later policy).

[29] The “entitlement” cases have long caused controversy. Their common feature is that the assured has a perfectly genuine claim but has chosen to make fraudulent statements when pressing it, such statements in the decided cases relating to the precise circumstances in which the loss occurred. This practice has been dignified by the title “fraudulent means and devices”, conferred by Lord Mance in *Agapitos*, who laid down the test that there is fraud where “the fraudulent device … tended to yield a not insignificant improvement in the assured's prospects of success.” It is possible to identify two different situations. The first is where the assured suffers a loss which he knows entitles him to an indemnity from insurers but which he fears he cannot prove without resorting to fraud. The second is where the assured suffers a loss that he wrongly believes does not entitle him to an indemnity and therefore resorts to fraud so as to make it appear that the circumstances fell within the scope of coverage. The former situation can be illustrated by *Sharon’s Bakery (Europe) Ltd v AXA Insurance UK Plc*[81] in which, in order to establish the value of machinery damaged in a perfectly fortuitous and insured fire, the assured produced a forged invoice. There was no dispute that the machinery belonged to the assured, that the amount claimed was not exaggerated and that the assured had correctly believed that he was entitled to be paid that sum, but there was nevertheless fraud by the assured and Blair J in the English High Court denied recovery on that ground. The latter situation is exemplified by *Stemson v AMP General (NZ) Ltd*,[82] one of the last of the appeals to the Privy Council before its replacement by the Supreme Court. Here, the assured made a claim for damage to his house by fire, and falsely stated that there had been no attempts to sell the house before the fire. Such statements were immaterial to the sum payable. Investigations by the insurer showed that the house had been on the market before the fire and the insurer was led to the conclusion that the assured’s failure to sell the house had caused him to seek to convert the house into cash by setting fire to it. That suspicion was vindicated on the evidence, but Lord Mance, speaking for the Privy Council on the point, held in the alternative that the false statements made by the assured were sufficient to defeat the claim. It is apparent that, had the truth been told, there would (but for proven arson) have been an entitlement to payment. The Privy Council treated this as a fraudulent means and devices case even though it is arguably better classified as one involving the suppression of evidence that might give rise to a suspicion of fraud.

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[75] See the classification by Lord Mance in *Agapitos v Agnew* [2002] Lloyd’s Rep IR 573.
[76] *Back v National Insurance Co of New Zealand Ltd* [1996] 3 NZLR 363.
[77] [2002] Lloyd’s Rep IR 573.
[78] (2004) 13 ANZ Insurance Cases 61–621.
[79] [2014] EWHC 375 (TCC).
[80] [2000] D.C.R. 727.
[81] [2011] EWHC 210 (Comm).
[82] [2006] Lloyd’s Rep. I.R. 852.

[30] The decision in *Stemson* reflects the position accepted in both New Zealand and Australia, although after an uncertain slow start. In *GRE Insurance Ltd v Ormsby*[83] the South Australia Supreme Court ruled that the fraudulent presentation of evidence did not defeat a valid claim. That reasoning has been rejected in every subsequent decision. In *Walker Civil Engineering Pty Ltd v Sun Alliance & London Insurance plc*[84] it was said that "If a person knowingly makes false statements believing that they have an invalid claim in order to mislead the insurer into believing that they have a valid claim, it seems to me not to matter whether in fact the claim is valid or invalid. The claim is made dishonestly and hence fraudulently ..." Even in the case where a false statement is made to support what the assured believed to be an honest claim, the courts have condemned the conduct as justifying denial of liability. In *Vermeulen v SIMU Mutual Insurance Assoc*,[85] Hardie Boys J accepted the proposition that it was a breach of the duty of utmost good faith for the assured to support a claim with false evidence even if the claim was valid: the duty extended beyond making a fraudulent claim in the narrow sense, and required honest dealings. That approach was followed in *New Zealand Insurance Co Ltd v Forbes*,[86] where *Ormsby* was distinguished on the ground that the insurers had in that case conceded the validity of the claim. Those Courts preferred the view that "If a false statement is made, at any stage, in support of a claim under an insurance policy, the insurer may well be misled, may accept the statement at face value and consequently refrain from further enquiry".[87] Subsequently, in *Tiep Thi To v Australian Associated Motor Insurers Ltd*,[88] the Court of Appeal of Victoria refused to follow *Ormsby*, and there held that there was a fraudulent claim where the assured asserted that the damage to her vehicle had been done by a thief rather than – as was the case – her 15-year old son. The assured wrongly believed that, had the truth been told, she would have had no claim. So, as far as the law in New Zealand and Australia is concerned, the submission of forged or false evidence constitutes the use of fraudulent means and devices where the assured would otherwise have been entitled to recover, and for that purpose it is irrelevant whether or not the assured believed that the claim was valid.

[31] Once again the UK has potentially changed the landscape. The decision of the Supreme Court in *Versloot Dredging BV v HDI Gerling Industrie Versicherung AG, The DC Merwestone*[89] involved the more serious of the two possible uses of fraudulent means and devices, namely, where the fraudster believed that the claim would have been uninsured but for the lie. Here, the vessel suffered irreparable damage to its engines following an ingress of water on 28 January 2010, the result of a series of unfortunate events: the negligence of the crew in failing to close the sea inlet valve of the emergency fire pumps after they had been cleaned; seawater getting into the emergency fire pumps, freezing and then expanding, causing cracking; the negligence of contractors who had failed to seal the engine room bulkheads so that they were not watertight; and defects in the engine room pumping system rendering it unable to deal with the volume of water. The insurance was written on the terms of the Institute Hull Clauses, which set out two sets of insured perils: those for which recovery is possible irrespective of any negligence of the part of the assured (including perils of the sea); and those which are subject to the defence of want of due diligence on the part of the assured (including crew negligence). The insurers' solicitors sought an explanation of the loss, and an employee of the ship's managers stated in an email in April 2010 that he had been told that the bilge alarm had sounded at about noon on 28 January 2010. That was false, and the statement had been made because the managers believed that the relevant insured peril was crew negligence and that if the bilge alarm had not been working then the insurers would have been able to contend that the vessel had not been maintained with due diligence. When the case came before Popplewell J, it was decided that a peril of the sea consists of a fortuitous event followed by an ingress of water, and that for those purposes crew negligence was a fortuitous event. There was accordingly a perfectly good claim independently of due diligence and the lie had been pointless. Popplewell J felt that he was bound by a series of cases, including *Agapitos* and *Sharon's Bakery*, to hold that the use of fraudulent means and devices was itself fraud. The Court of Appeal affirmed the first instance decision, but with enthusiasm for the outcome insofar as the ruling was a statement against fraud. The only inroad into the earlier authorities was Christopher Clarke LJ's reformulation of the test as being that the fraudulent device must

[83] (1982) 2 ANZ Ins Cas 60-472.
[84] (1999) ANZ Ins Cas 61-418. See also *Gugliotti v. Commercial Union Assurance Co of Australia* (1992) 7 ANZ Insurance Cases ∂61-104
[85] (1987) 4 ANZ Insurance Cases 60-812.
[86] (1986) 4 ANZ Insurance Cases 60-731.
[87] *Purcell v State Insurance Office* (1982) 2 ANZ Is Cas 60-495.
[88] [2001] VSCA 48.
[89] [201] UKSC 45.

have tended to yield a significant improvement in the assured's prospects of success.[90] In the Supreme Court, Lord Mance in his dissenting judgment was content to accept this stricter approach.[91]

[32] It is noteworthy that at the time of the first instance decision, the English and Scottish Law Commissions were consulting on the future direction of insurance law reform, including the law on fraudulent claims. Popplewell J was one of five judges of the Commercial Court to respond to the consultation by arguing that the fraudulent means and devices principle was too strict and that an assured with a genuine claim – whether or not he knew it – should not lose that claim by a later pointless lie. The Law Commissions ultimately did choose to legislate on fraudulent claims, in s 12 of the Insurance Act 2015 (UK), but the section is concerned only with the remedies for fraud and makes no attempt to define fraud. It was noted in the evidence before me that a draft version of s 12 which might arguably have confirmed the result in the High Court in *Versloot*, was amended to remove the offending words before the section passed into law. It is also appropriate to note that House of Lords Special Public Bills Committee, which had primary responsibility for Parliamentary scrutiny of the Insurance Bill as introduced in 2014, received much evidence on the matter. The insurance industry was overwhelmingly in favour of the status quo, the Association of British Insurers – a body equivalent to the Insurance Council of New Zealand – stating in evidence that it did not wish to be "fraud-light." The matter was thus left to the Supreme Court.

[33] In a split 4:1 decision, the majority (Lords Sumption, Clarke, Hughes and Toulson) rejected the existence of the concept of fraudulent means and devices, preferring the less pejorative description "collateral lies".[92] A claim under a first party policy arises as soon as the insured peril occurs. In principle there is an immediate right to payment, although the law grants an indulgence to the insurers by allowing them a reasonable time – according to the formulation of Gendall J in *Young v Tower Insurance*,[93] on "the type of insurance, the size and complexity of the claim, compliance with any relevant statutory or regulatory rules or guidance, and factors outside an insurer's control" – to make payment before incurring liability for interest or for damages for breach of the implied duty of utmost good faith. That entitlement is not to be lost because of lies irrelevant to that entitlement. The majority judgments, notably that of Lord Sumption, contain a good deal of analysis of materiality, but that does not affect the ultimate conclusion that an assured who has an entitlement to an indemnity should not be deprived of that indemnity by a collateral lie. The discussion of "materiality" has the potential to mislead, in that the majority view could be construed as referring to the relevance of the lies to the claim, but a closer reading of the judgments should make it clear that if there is materiality then it relates to the credibility of the assured in proving his loss in any subsequent judicial proceedings. The touchstone of fraud is lack of entitlement. Lord Mance, the leading advocate of fraudulent means and devices, dissented on the ground that all fraud should be discouraged, and his analysis alone gives rise to the need for the question of whether the lie was material in the sense that it improved the assured's prospects of being paid. The majority test is by contrast relatively straightforward to apply, and is based simply on an objective analysis of the question whether the assured was seeking to recover no more than, at the date of the loss, was his entitlement. It is to be noted that no distinction was drawn between lies to support a claim believed by the assured to be valid and lies to support a claim wrongly believed by the assured not to be valid. This conclusion was reached by reference to the common law. There was an alternative argument by the assured based on human rights as enshrined in the European Convention on Human Rights and EU law, namely, that a person with a property right – including a valid insurance claim – should not have that right confiscated by the state unless there was an overriding reason to do so. An irrelevant attempt to deceive did not qualify as such a reason. The Supreme Court ultimately did not need to rely upon the alternative human rights ground. The latter point is important, in that *Versloot* is not to be regarded as the unique application of European legal principles but rather as a strong statement of the common law. This Court has to determine whether *Versloot* should be followed.

[34] Sitting as first instance judge – even in the esteemed surroundings of Doubtful Sound – I am bound by the decisions of the Court of Appeal in *Vermeulen* and *Forbes*, although possibly not by *Stemson* where the point was *obiter* only. I am therefore driven to conclude that Dougal's claim must be dismissed on this ground. This is one of the rare situations where a judge is forced to an outcome that she did not wish to reach. However, should permission to appeal be sought so that the matter can be reconsidered by the Court of Appeal, I would have no hesitating in acceding. My reasons are as follows. First, as the

[90] Para 165.
[91] [2016] UKSC 45, para 114.
[92] Lowry and Rawlings, "Insurance Fraud and the Role of the Civil Law" (2017) 80 MLR 510.
[93] [2016] NZHC 2656. The draftsman of section 13A of the Insurance Act 2019 (UK) will doubtless be flattered by the verbatim borrowing of his efforts.

Justices of the Supreme Court emphasised in *Versloot*, an insurance claim is a property right. Confiscating that right because of an attempt to defraud that is doomed to failure has a smack of lack of proportionality. One is put in mind of the debate in the criminal law as to whether an impossible attempt, eg, reaching into the empty pocket in a misguided attempt to steal a wallet, should be treated as culpable. Secondly, while I appreciate that the amount of loss suffered by the insurance industry by reason of fraudulent claims runs into millions of dollars annually, this type of fraud does not lead to the payment of claims that were not otherwise payable. To the contrary, insurers receive a windfall if the assured tells a pointless lie. Thirdly, and linked to the second point, there is something of an incongruity here. Collateral lies are designed to secure payment, and the facts of at least some of the decided cases show that such lies are often told when all other avenues to secure payment have been exhausted.[94] However, at least until the decision of Gendall J in *Young v Tower Insurance*, late payment of a valid claim by an insurer gave no remedy in damages. The incongruity has therefore been removed as a matter of law, but few plaintiffs choose to press their claims to court. Fourthly, and again linked the foregoing, the loss suffered by the assured by the use of a fraudulent means or device is the entire claim whereas the loss suffered by the insurer is the cost – if any – of investigating and pinning down the lie. As was noted by Lord Sumption in *Versloot*, the prohibition on fraudulent claims is designed to prevent the assured from obtaining money to which he is not entitled, not to protect the insurer against incurring what will usually be disproportionately small expenditure. The appropriate remedy for an insurer who is put to such cost is a claim for damages for breach of the contractual co-operation clause,[95] and if the matter reaches the court where the lie is maintained then there are ample powers to punish the assured by means of an adverse costs award, possibly on an indemnity basis, even if the claim succeeds, and by contempt proceedings. Finally, the underlying ethos of the 1970's statutory reforms to contract law in general and insurance law in particular is a move towards proportionality. Adopting *Versloot* is to my mind a progressive step that this jurisdiction would be wise to take.

What are the consequences of a fraudulent claim?

[35] It remains for me to consider the consequences of Dougal's fraud. It suffices to say, without a copious and repetitive citation of authority, that the weight of authority favours the view that a fraudulent claim is a breach of the duty of utmost good faith. For reasons that are unclear, New Zealand's 1908 implementation of the UK's Marine Insurance Act 1906 omitted the troublesome s 17 which lays down a general duty of utmost good faith upon both parties and prescribes only the remedy of avoidance. The wording of s 17 is loosely based on Lord Mansfield's judgment in *Carter v Boehm*,[96] a case concerned purely with pre-contractual non-disclosure, but its terminology presupposes pre-contractual and post-contractual duties of utmost good faith owed by both parties. It is of interest to note that there was no clear authority before 1906 laying down any sort of duty of utmost good faith other than that owed by the assured in presenting the risk to the insurers. Isolated dicta – eg, those of Buller J in *Wolf v Horncastle*[97] that an insurer who sought to rely upon the technical and unmeritorious defence of want of insurable interest in response to an otherwise valid claim would not be acting with the utmost good faith – scarcely justify the width of s 17. It is only in the last half century that attempts have been made to give s 17 life independent of the assured's duty of fair presentation. The basic problem is that the wording indicates that the only remedy open to an assured who complains that he has not been given sufficient information by the insurer as to the nature and meaning of the policy, or that the claim has not been paid when it should have been, is to avoid the policy and thereby to deprive himself of any possibility of recovery for loss suffered. It has been proved all but impossible to reconcile a
post-contractual obligation with an incongruous pre-contractual remedy. It is for that reason that the English courts have shied away from classifying a fraudulent claim as a breach of the assured's duty of utmost good faith, as such a conclusion would allow the insurers to avoid the policy ab initio and thereby to remove the benefit of all genuine losses and claims suffered by the assured prior to his fraud.

[36] The UK has by the Insurance Act 2015 addressed the problems raised by s 17 in two ways. First, s 17 itself has been amended to repeal the avoidance remedy and to leave s 17 as a bald statement that a contract of insurance is one requiring the observance of utmost good faith by both parties. Quite what utmost good faith consists of, and what a breach of it leads to, are problems that our UK friends will have

[94] *Aviva Insurance Ltd v Brown* [2011] EWHC 362 (QB).
[95] That such damages are available was confirmed in *Parker v National Farmers Union Mutual Insurance Society Ltd* [2012] EWHC 2156 (Comm), disregarding the earlier first instance ruling to the contrary in *London Assurance v Clare* (1937) 57 Ll LR 254.
[96] (1766) 3 Burr 1905.
[97] (1798) 1 Bos & Pul 316.

to resolve. Secondly, s 12 of the Insurance Act 2015 lays down an exhaustive set of remedies for a fraudulent claim. In essence, the insurers can refuse to pay the claim and they also have a right to give notice terminating the policy. However, any rights accrued to the assured in respect of other claims before the fraud are unaffected. The disproportionate retroactive removal of accrued rights has thus been expunged from the law.[98] In this jurisdiction, untrammelled by s 17, it has been left to the courts to determine the scope of the principle of utmost good faith and the remedy for its breach. While the authorities on fraudulent claims regularly refer to utmost good faith, it has never been suggested in our courts that the insurer's remedy is one of avoidance. It has sufficed in all of the cases to deprive the assured of the entirety of his claim in the event of fraud. The fact that a fraudulent claim has been classified as a breach of the duty of utmost good faith is of far less moment than was the case in England before the passing of the Insurance Act 2015. I have already referred to the judgment of Gendall J in *Young v Tower Insurance*. It was there decided that the utmost good faith principle, insofar as it applies to pre-contract and post-contract duties owed by an insurer, takes effect as an implied term.[99] The remedy for breach is, accordingly, damages and not avoidance *ab initio*. What is good on one side of the equation must hold good on the other, and I have no hesitation in concluding that fraudulent claims should be subject to a contractual analysis. A fraudulent claim is a breach of the assured's implied contractual obligation to act with the utmost good faith: the claim itself is lost in its entirety, insurers have the right to give notice terminating the contract as to the future and there may also be a right to seek damages for any loss suffered by the insurers by way of expenditure incurred in pinning down the fraud.

Conclusion on fraudulent claim

[37] I am driven by the authorities to hold that there was a fraudulent claim by the use of fraudulent means and devices. The claim should accordingly be struck out on that ground.

E Accident and Negligence

[38] It is common ground that if there was an accident then the policy responds, but subject to the defence that the loss was the result of Dougal's negligence in contravention of the policy requirement of reasonable care. BoatsRUs have thus raised the fundamental questions of whether the gross negligence of an assured precludes recovery either because it means that there is no "accident" or that there is an absence of "reasonable care".

[39] I turn first to the concept of an "accident". The most widely-cited definition is that of Lord Buckmaster in *Fenton v J Thorley & Co Ltd*,[100] namely, "an unlooked-for mishap or an untoward event which is not expected or designed". This definition has been applied in a series of cases in all common law jurisdictions and in a wide variety of property, personal accident and liability policies, and unsurprisingly judges have regularly put their own gloss on these words. It would be possible to undertake a detailed analysis of the range of nuances in the authorities, but this is not a worthwhile enterprise because ultimately every case turns on its facts. What appears to be clear, and certainly this is the position accepted by the New Zealand authorities, is that an event is not an accident where the assured has deliberately courted a risk of which he is aware, and it does not suffice that the assured is aware of the risk but does not believe that it is serious.[101] But that of course assumes actual awareness of the risk. A much discussed question is whether the test of knowledge is objective or subjective. There are three possible answers. First, attention has to be focused on the actual assured, so if that assured in question has no appreciation of the problem then he cannot be said to have courted it. Secondly, it is appropriate to

[98] The same approach has been adopted in the Insurance Contracts Act 1984, s 56 (Cth), although there is an additional right conferred upon insurers that is not reflected in the English measure, namely, cancellation of all other policies issued by the insurers to the fraudulent assured.

[99] The Insurance Contracts Act 1984 (Cth), s 13, has adopted the implied term approach to utmost good faith, splitting off fraudulent claims and pre-contractual presentation of the risk from utmost good faith and setting out separeat rules for them. This measure does not, however, extend to marine insurance, and Australia retains its own version of the marine legislation, the Marine Insurance Act 1909 (Cth), with s 1 of the UK measure being reproduced as s 23 of the 1909 Act.

[100] [1903] AC 443, 448, echoed by the High Court of Australia in *Australian Casualty Co Ltd v Federico* (1986) 160 CLR 513.

[101] *Mount Albert City Council v New Zealand Municipalities Co-operative Insurance Co Ltd* [1983] NZLR 190; *Groves v AMP Fire & General Insurance Co (NZ) Ltd* [1990] 2 NZLR 408; *Hurley Contractors Ltd v Farmers Mutual Assoc* (1991) 6 ANZ Insurance Cases 61–076; *Bridgeman v Allied Mutual Insurance Ltd* [2000] 1 NZLR 433.

look at the knowledge of a reasonable assured, and to ask whether the acts of the assured, coupled with the knowledge that he ought objectively to have possessed, amounted to a courting of the risk. The third and intermediate possibility is to focus on the actual assured and to ask whether a reasonable person with that assured's degree of comprehension would have appreciated that there was a serious risk. Another way of expressing the matter is whether the expectation that an untoward event might occur is objective (in that it is the obvious consequence of the assured's conduct), subjective (in that the outcome did not occur to the assured), or subjective-objective (in that the outcome would not have occurred to a reasonable assured with the assured's actual understanding.)

[40] It is possible to identify strands of each of these alternatives in the numerous relevant judgments. In the context of personal accident, for example, the Singapore Court of Appeal in *Quek Kwee Kee v American International Assurance Co Ltd*[102] has recently decided that death caused by an overdose of drugs is accidental unless the insurers can show that the assured intended to commit suicide: the strong likelihood that that would be the outcome did not suffice. In reaching that conclusion, the Court rejected a series of English decisions, notably *Dhak v Insurance Co of North America (UK) Ltd*,[103] to the effect that death from overdosing was not accidental if the outcome was the inevitable consequence of the assured's conduct. The most detailed analysis is that of Flanagan J in the Supreme Court of Queensland in *Matton Developments Pty Ltd v CGU Insurance Ltd (No 2)*,[104] where the assured's driver disregarded the weight loading instructions given for the use of a crane on an incline, in the mistaken belief that the weight of the crane would flatten the rubble in his path to safe access to a ramp. Flanagan J, having noted that the New Zealand authorities favoured a purely subjective approach, adopted a subjective-objective test, holding that the assured must have sufficient knowledge to be said to have deliberately courted the risk but that if the venture was so foolhardy that the loss was almost inevitable then there could not be said to have been an accident. Flanagan J found on the facts that there was no accident, but his conclusion - although not his reasoning - was reversed on appeal, the majority ruling that the outcome was plainly unintended by the driver of the crane and that the tipping of the crane was not obvious and inevitable.

[41] By something of a bizarre coincidence, a similar issue to that before me was very recently determined by the Federal Court of Australia in *Sheehan v Lloyd's Names Munich Re Syndicate*.[105] In that case also a yacht engine was wrecked on a short return voyage undertaken by an assured who wrongly assumed - not having acquainted himself with the instructions - that the vessel would automatically revert to a safe speed in the event of a loss of oil pressure and that the various alarms that sounded and flashed were simply warnings. The test applied was subjective-objective, namely that a reasonable person with the assured's limited knowledge would not have anticipated loss in the few minutes necessary to return to berth.[106] There is no support in New Zealand for a purely objective test. The choice is between a purely subjective approach or a subjective-objective analysis. On the facts before me there is no need to resolve that question, because a reasonable person unaware of the significance of the alarms on *Boaty McBoatface* would probably have taken the view that a short trip would do no harm and was preferable to the alternative of bobbing around in the harbour with cut engines waiting for relief. It may be that a reasonable person would have read the documentation before firing up, but that is to impose an objective standard, namely that of a reasonable person aware of the oil pressure alerts and thus of the need to stop immediately. I am satisfied, therefore, that the loss was accidental. The subjective-objective test has the advantage of precluding an assured from arguing his own impressive level of crassness as a ground for recovery.

[42] The loss being accidental, it remains to consider whether Dougal had failed "to take all reasonable steps to avoid or prevent any loss." Fortunately for the vast majority of us, the common law does not recognise any obligation on the assured to prevent or mitigate a loss, so that insurers cannot rely upon the assured's negligence as a defence. There is an apparent exception in the context of marine insurance, in the form of the duty to "sue and labour" as codified in section 78(4) of the Marine Insurance Act 1908, whereby "It is the duty of the assured and his or her agents in all cases to take such measures as may be reasonable for the purpose of averting or minimising a loss." As with section 42, Chalmers seems to have adopted a somewhat idiosyncratic view of the authorities up to 1906, converting what was in the cases no more than a statement of the causation principle that

[102] [2017] SGCA 10
[103] [1996] 1 Lloyd's Rep 632.
[104] [2015] QSC 72, reversed [2016] QCA 208.
[105] [2017] FCA 1340.
[106] That did not help Mr Sheehan, whose claim was defeated by a policy exclusion for loss caused by defective engine design.

the assured must not cause his own loss into what appears to be a contractual duty whose breach sounds in damages.[107] The provision was indeed described in *Astrovlanis v Linard*, *The Gold Sky*[108] as a drafting error. Fortunately the previous law has been re-established by a series of English and Australian decisions,[109] and the only decision since 1906 in which the assured has been deprived of any part of his indemnity under section 78(4) is *Linelevel Ltd v Powszechny Zaklad Ubezpieczen SA, The Nore Challenger*,[110] where a small fraction of the indemnity was deducted to reflect the extent to which the assured had caused its own loss by using a damaged vessel without investigation.

[43] That leaves the express "reasonable care" clause. Such clauses first appeared in English employers' liability policies towards the middle of the twentieth century, and were dealt an almost fatal blow in *Woolfall & Rimmer Ltd v Moyle*,[111] where it was pointed out that if a policy against liability for negligence excluded liability for negligence, it would not be of great value. On that basis, the clause was not triggered by conduct falling short of recklessness. By the time of *Fraser v B N Furman (Productions) Ltd*[112] it had become settled law that the test for breach was recklessness, ie. in the words of Diplock LJ,[113] the assured's conduct was "with actual recognition by the insured himself that a danger exists, not caring whether or not it is averted ... [W]here he does recognise a danger [he] should not deliberately court it by taking measures which he himself knows are inadequate to avert it." The same interpretation was in due course, and for the sake of consistency, given to reasonable care clauses in first party policies[114] even though first party losses are perfectly plentiful where there has been no hint of negligence. It is unnecessary to extend the length of this judgment with an exhaustive citation of the numerous authorities on the point from all common law jurisdictions, other than to say that the recklessness test derived from *Fraser v Furman* is now an established part of New Zealand law for liability[115] and first party[116] insurance.

[44] It might be thought at first sight that a reasonable care clause does not add anything to a contractual requirement for an "accident" or "fortuity" and that if there is an accident then by definition the assured could not have been reckless. To that, there is one major caveat. Diplock LJ made it clear that the recognition of danger had to be on the part of "the insured himself", a test which appears to be entirely subjective. It is not pertinent, therefore, that a reasonable assured would have known enough to have acted differently, nor that a reasonable person with the assured's knowledge would have acted differently. Although the subjective approach is now enshrined in the common law generally, authorities from this jurisdiction have subjected the test to a gloss, best expressed by McMullin J in *Roberts v State Insurance General Manager*[117] as meaning that there is breach in respect of a risk which the assured "knows of but chooses to disregard or which ought to be so obvious to the ordinary man as to be inescapable is a proper one." There is now some support for the objective test,[118] although outweighed by a refusal to be drawn elsewhere.[119] If it is the case that the test for "accident" is at its highest subjective-objective whereas the test for reasonable care is objective, then a reasonable care clause is not completely a waste of ink, in that it gives the insurer

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[107] See: *Stringer v English & Scottish Marine Insurance Co* (1869) LR 5 QB 599; *Kidston v Empire Marine Insurance Co* (1867) LR 1 CP 535; *Currie v Bombay Native Insurance Company* (1869) LR 3 PC 72.
[108] [1972] 2 Lloyd's Rep 187.
[109] *Integrated Container Service Inc* v. *British Traders Insurance Co Ltd* [1984] l Lloyd's Rep 154; *National Oilwell (UK) Ltd* v. *Davy Offshore Ltd* [1993] 2 Lloyd's Rep 582; *The Vasso* [1993] 2 Lloyd's Rep 309; *State of Netherlands* v. *Youell* [1998] 1 Lloyd's Rep 236; *Strive Shipping Corporation* v. *Hellenic Mutual War Risks Association (Bermuda) Ltd*, *The Grecia Express* [2002] Lloyd's Rep IR 669; *Mitsui Marine Fire Insurance Co* v. *Bayview Motors Ltd* [2003] Lloyd's Rep IR 117; *Melinda Holdings SA v Hellenic Mutual War Risks Association (Bermuda) Ltd* [2011] EWHC 181 (Comm); *Clothing Management Technology Ltd v Beazley Solutions Ltd* [2012] EWHC 727 (QB); *Allison Pty Ltd v Lumley General Insurance Ltd, The Pilbara Pilot* [2006] WASC 104.
[110] [2005] 2 Lloyd's Rep 534.
[111] [1942] 1 KB 66,
[112] [1967] 1 WLR 898.
[113] [1967] 1 WLR 898, 905-906
[114] *Sofi v Prudential Assurance Co Ltd* [1993] 2 Lloyd's Rep 567.
[115] *Hing v Security & General Insurance Co (NZ) Ltd* (1988) 5 ANZ Insurance Cases 60-886.
[116] *Haines House Haulage Co v Gold Star Insurance Co Ltd* (1989) 5 ANZ Insurance Cases 60-937; *Kelly v National Insurance Co of New Zealand Ltd* [1995] 1 NZLR 641.
[117] [1974] 2 NZLR 312, at 319.
[118] *Cross v State Insurance Ltd* DC Whangarei NP955/96, 12 May 1998.
[119] *Hing v Security & General Insurance Co (NZ) Ltd* (1988) 5 ANZ Insurance Cases 60-886; *Cee Bee Marine Ltd v Lombard Insurance Co Ltd* [1990] 2 NZLR 1; *Kelly v National Insurance Co of New Zealand Ltd* [1995] 1 NZLR 641.

protection over and above the requirement for an accident by taking away cover from incompetence not appreciated by the assured but apparent to a reasonable person. The curiosity of the law in other jurisdictions is that a reasonable care clause gives perhaps less protection than the requirement for an accident, but that is merely a matter of observation.

[45] In practice there is rarely going to be much difference as to what test is applied, although this may be such a case. Dougal himself plainly did not appreciate the risk, and I have already decided that a reasonable person with Dougal's skill-set would not have appreciated the risk. However, it may be that a wholly objective reasonable person would have taken the trouble to read the manual and familiarise himself with the warnings and their significance, so that the engine would have been cut immediately. In the absence of any guidance in the authorities other than dicta that may or may not have been fully considered, I am for the sake of consistency tempted to favour the tried and trusted subjective analysis adopted elsewhere.

G Disposition

[46] I find that Dougal is unable to recover for the loss of *Boaty McBoatface*. He is not precluded from doing so by reason of public policy, the absence of an accident, negligence or the warranty of legality, but rather by reason of the fact that under New Zealand law as it presently stands he has made a fraudulent claim. This outcome is to my mind highly unsatisfactory. Of his various transgressions, forging a document of title is the least of them. It is unrelated to the merits of his claim and at worst has caused the insurers minor inconvenience. However, any decision as to whether this jurisdiction follows the lead of *Versloot* is a beyond my pay grade.