



NZILA Annual lecture series: 2018

Can the Assured's
conduct defeat a
claim?

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Illegality

Illegality I: old law

Contracts illegal as formed:

Contracts and Commercial Law Act 2017

- Contract illegal as formed has no effect (s 72)
- Court may grant relief if “just” (ss 75 and 76)
- No illegality by performance in breach of enactment (s 72)

Contracts illegal as performed: common law

- *Tinsley v Milligan* [1993] UKHL 3, rejection of public conscience test and recoverability determined by “reliance” test
- Uncertain position in NZ: *Shanghai Neuhof v Zespri* [2014] NZHC 2353; *Leason v AG* [2013] NZCA 509
- Not followed in Australia: *Nelson v Nelson* [1995] HCA 25; *REW08 Projects v PNC Lifestyle* [2017] NSWCA 269

Illegality II: new law

Change of approach: *Patel v Mirza* [2016] UKSC 4

6:3 majority overruling *Tinsley*.

- Is illegality relevant to the claim?
- If so:
 - What is the purpose of the statutory prohibition?
 - Does public policy require denial of recovery?
 - Is denial of recovery proportional

Non-UK reception

- Rejected in Singapore: *Orchid Trading v Chua Siok Liu* [2018] SGCA 5
- Not clear in NZ: *Lynds v Fitzherbert Rowe* [2017] NZHC 1297; *Horsfall v Potter* [2017] NZSC 196
- Adopted in Hong Kong: *Li Po Lai v Tai Wo Finance Ltd* [2017] HKEC 2329

Illegality III: application

The reliance filter

- *Delaney v Pickett* [2011] EWCA Civ 52 (cannabis)
- *McCracken v Smith* [2015] EWCA Civ 380 (stolen vehicle)
- *The Nancy* [2013] EWHC 2116 (Comm) (illegal payments)

The “Three Ps”

- *Osman v J Ralph Moss Ltd* [1970] 1 Lloyd’s Rep 313 (broker)
- *Fire and All Risks Ltd v Powell* [1966] VR 513 (low bridge)
- *Whittington v Smeaton* [2016] ACTSC 76 (unlicensed use)

Do liability policies merit special treatment?

The warranty of legality

Marine Insurance Act 1908, s 42:

- 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.


Interpretation

- *The Nancy* [2013] EWHC 2116 (Comm) (illegal payments)
- *Doak v Weekes* (1986) 82 FLR 334 (unqualified crew)
- *Switzerland Insurance Australia v Mowie Fisheries* [1997] FCA 231 (no qualified engine driver)
- *Solway v Lumley General Insurance Ltd* [2003] QCA 136 (unregistered vessel)
- *Wiltrading Ltd v Lumley General Insurance Ltd* [2005] WASCA 106 (failure to carry radio equipment)

Where does this come from: true warranty or description?

Effect in NZ

- CCLA 2017
- Insurance Law Reform Act 1977, s 11



Fraudulent claims

Fraudulent Claims I: Meaning

What is fraud?

Non-entitlement fraudulent claims

- No loss
- Self-inflicted loss
- Exaggerated loss
- Discovery of truth after loss
- Suppression of known defence
 - *Blanshard v National Mutual Life* (2004) ANZ Ins Cas 61-121

Entitlement fraud

- Lie told to support known genuine claim (assured right)
- Lie told to support known false claim (assured wrong)

Fraudulent Claims II: Collateral lies or fraudulent means and devices?

Fraudulent means and devices

- *GRE v Ormsby* (1982) 2 ANZ Ins Cas 60-472
- *Vermeulen v SIMU Mutual* (1987) 4 ANZ Ins Cas 60-812
- *New Zealand Insurance v Forbes* (1986) 4 ANZ Ins Cas 60-731
- *Tiep Thi To v AAMI* [2001] VSCA 48
- *Stemson v AMP General* [2006] Lloyd's Rep IR 852

The move to collateral lies

- *Agapitos v Agnew* [2002] Lloyd's Rep IR 573
- *Sharon's Bakery v Axa* [2011] EWHC 210 (Comm)
- *Versloot v HDI Gerling* [2016] UKSC 45: entitlement, materiality and inducement irrelevant
 - Claim is property right
 - Wrong to include in fraud loss figures
 - Reciprocal duty on insurers, but see now *Young v Tower Insurance* [2016] NZHC 2656 and UK Insurance Act 2015, s 13A

Fraudulent Claims III: Remedy

Breach of duty of utmost good faith: the mystery of the missing s 17

- *Vermeulen v SIMU Mutual* (1987) 4 ANZ Ins Cas 60-812

Breach of contract

- *The Litsion Pride* [1985] 1 Lloyd's Rep 437
- *The Star Sea* [2001] Lloyd's Rep IR 247
- *Axa General Insurance v Gottlieb* [2005] Lloyd's Rep IR 369

Breach of implied term of utmost good faith

- *Young v Tower Insurance* [2016] NZHC 265` +

Other solutions

- Insurance Act 2015 (UK), s 13
- Insurance Contracts Act 1984 (Cth), s 56

Accident

“an unlooked-for mishap or an untoward event which is not expected or designed”: has the assured deliberately courted the risk

- *Mount Albert City Council v New Zealand Municipalities Ins*[1983] NZLR 190
- *Groves v AMP Fire & General Insurance Co (NZ) Ltd* [1990] 2 NZLR 408
- *Bridgeman v Allied Mutual Insurance Ltd* [2000] 1 NZLR 433

Test for awareness of the risk to be courted

- assured must have been aware of the risk
 - *Quek Kwee Kee v American International Assurance Co Ltd* [2017] SGCA 10
- reasonable person in assured’s position must have been aware of risk
 - *Matton Developments v CGU Insurance* [2016] QCA 208
 - *Sheehan v Lloyd’s Names Munich Re Syndicate* [2017] FCA 1340
- reasonable person would have been aware of risk
 - *Dhak v Insurance Co of North America (UK) Ltd* [1996] 1 Lloyd’s Rep 632

Reasonable care

Common law reasonable care

Statutory reasonable care: Marine Insurance Act 1908, s 78(4)

- “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.”
- *The Nore Challenger* [2005] 2 Lloyd’s Rep 534

Contractual reasonable care

- Prudent uninsured
- Prudent uninsured in assured’s position
- The assured
 - *Roberts v State Insurance General Manager* [1974] 2 NZLR 312
 - *Hing v Security & General Insurance Co (NZ) Ltd* (1988) 5 ANZ Insurance Cases 60-886
 - *Kelly v National Insurance Co of New Zealand Ltd* [1995] 1 NZLR 641