



Swansea University
Prifysgol Abertawe



Cronfa - Swansea University Open Access Repository

This is an author produced version of a paper published in:
Edinburgh Law Review

Cronfa URL for this paper:
<http://cronfa.swan.ac.uk/Record/cronfa38960>

Paper:

Soyer, B. (2018). Lies, Colleteral Lies and Insurance Claims- The Changing Landscape of Insurance Law. *Edinburgh Law Review*, 22(2)

This article has been accepted for publication by Edinburgh University Press in the journal "Edinburgh Law Review".

This item is brought to you by Swansea University. Any person downloading material is agreeing to abide by the terms of the repository licence. Copies of full text items may be used or reproduced in any format or medium, without prior permission for personal research or study, educational or non-commercial purposes only. The copyright for any work remains with the original author unless otherwise specified. The full-text must not be sold in any format or medium without the formal permission of the copyright holder.

Permission for multiple reproductions should be obtained from the original author.

Authors are personally responsible for adhering to copyright and publisher restrictions when uploading content to the repository.

<http://www.swansea.ac.uk/library/researchsupport/ris-support/>

Lies, Collateral Lies and Insurance Claims – The Changing Landscape in Insurance Law

Determining the scope of the fraudulent claims rule in insurance law has posed a significant challenge for the courts, particularly in the last two decades. In the shadow of the doctrine of utmost good faith, the law in this area has developed in an uncompromising fashion introducing draconian remedies against an assured who submits a fraudulent claim. The Supreme Court's most recent intervention has provided much needed guidance on the state of the law. This article, taking into account the fact that in other areas of law more proportionate remedies have gradually been introduced, discusses the boundaries of the fraudulent claims rule in insurance law as it applies in England and Wales and Scotland. Considering that the insurers might be tempted to introduce fraudulent claims clauses into their contracts to expand the common law definition of insurance fraud at the claims stage, this article also evaluates the wording of such clauses often used in practice and concludes that they lack the desired clarity.

A. Introduction

Until recently almost any lie¹ told by the assured in the process of putting forward an insurance claim has been viewed as “morally repugnant” and capable of constituting a fraudulent claim. This can be seen as a reflection of the judiciary's traditional moral disapproval of fraud.² Also, it is commonly believed that taking an uncompromising stance on the matter would have a deterrent effect. Famously, Mance, LJ, (as he then was) in *AXA General Insurance Ltd v. Gottlieb*,³ in an uncompromising fashion, stressed that the remedy

1 In *Aviva Insurance Ltd v. Brown* [2011] EWHC 362 (QB), the assured, who rented alternative accommodation after being forced out of his home as a result of an insured peril, wrongly informed the insurer that he was being chased by the landlord for the rent in order to pressure them to make prompt payment. Although this was judged to be a fraudulent statement, it was the view of the court that it was not one of sufficient significance to justify the denial of the claim.

2 Lord Wensleydale in *Smith v. Kay* (1859) 7 HLC 750 (HL), at 776, described the fraud in that case as “a great moral fraud, which one can hardly characterise in language strong enough”. More recently, in *Standard Chartered Bank v. Pakistan National Shipping Corp (Nos 2 and 4)* [2002] UKHL 43, [2003] 1 AC 959, Lord Hoffmann, at [19] described the harsh approach of the law of deceit “based upon moral disapproval of fraud”.

3 [2005] EWCA Civ 112, [2005] Lloyd's Rep IR 369, [31].

against insurance fraud is “deliberately designed to operate in a draconian and deterrent fashion.”⁴

However, one does not need to dig deep to find examples where the courts have been prepared to treat those whose actions have been morally questionable in a more proportionate fashion. For example, it has been held by the Court of Appeal in *De Montford Fine Art Ltd v. Acre 1127 Ltd (In Liquidation)*⁵ that even dishonest breach of a contract does not automatically amount to a repudiatory breach.⁶ In a slightly different context, s. 57 of the Criminal Justice and Courts Act 2015 allows courts discretion to dismiss a personal injury claim in cases where the claimant fraudulently exaggerates the extent of his injuries but only if such dismissal would not result in substantial injustice for the claimant.⁷ It needs to be stressed that a similar stance has been taken in the cases of tort of deceit.⁸

Of course, one can justifiably say that insurance contracts, being contracts of utmost good faith, should be treated differently when it comes to dealing with the dishonesty of the assured at the claims stage. However, the Supreme Court recently, in *Versloot Dredging BV v. HDI Gerling Industrie Versicherung (The DC Merwestone)*,⁹ unsettling traditional values and judicial assumptions on the subject, held that bolstering a genuine insurance claim by collateral lies¹⁰ would not render such a claim fraudulent. This judgment is momentous as it not only confirms the readiness of insurance law to follow the general trend of adopting more proportionate remedies in cases of dishonest behaviour on the part of the assured but also sets a benchmark in elaborating how the law concerning the definition of fraudulent claims in

4 Similarly, in *Direct Line Insurance plc v. Khan* [2001] EWCA Civ 1794 [39] Arden, LJ, remarked that: “A civil law sanction, particularly a financial one, made in an appropriate case may be more effective than a criminal sanction or other sanction.”

5 [2011] EWCA Civ 87.

6 However, a different outcome is likely in cases where dishonesty is destructive of a necessary relationship of trust between parties (see, *Tullett Prebon plc v BGC Brokers LP* [2011] EWCA Civ 131, [2011] IRLR 420 and *D & G Cars Ltd v. Essex Police Authority* [2015] EWHC 226 (QB)), or where it is indicative of an intention no longer to be bound by contract.

7 This section goes further than the Supreme Court was prepared to go in *Fairclough Homes Ltd v. Summers* [2012] UKSC 26, [2012] 1 WLR 2004 on the matter where it was held that courts have jurisdiction to strike out a grossly exaggerated and fraudulently maintained claim for personal injuries as a sanction for the fraud in some extreme cases.

⁸ In *Downs v. Chappel* [1997] 1 WLR 426 (CA) the claimant in a tort of deceit action was not allowed to recover subsequent losses incurred once the misrepresentation was discovered and no reasonable mitigating action was taken by him.

9 [2016] UKSC 45, [2017] AC 1, [2016] 2 Lloyd’s Rep 198.

¹⁰ The term, first used by the Supreme Court in *The DC Merwestone*, refers to the practice of telling lies or using fraudulent documentation to support a genuine claim. This practice is also known as using “fraudulent devices” in support of a claim. The latter expression has been borrowed from a standard clause that appeared in fire policies in nineteenth and early twentieth century.

insurance law will develop in future. The main purpose of this article is to map out the scope of the fraudulent claims doctrine in the context of insurance law taking into account the judgment of the Supreme Court in *The DC Merwestone*. Before embarking upon an analysis of that nature, it is essential to discuss the role of the utmost good faith doctrine in this context and other policy considerations that prevail in this area of law.

B. Collateral Lies in Claims Context

(1) Role of the Doctrine of Utmost Good Faith

In numerous authorities, the fraudulent claims rule in insurance law has been treated as a facet of the utmost good faith doctrine. Accordingly, it has been repeatedly affirmed that it is an essential condition of a policy of insurance that the underwriters are treated with good faith, not merely in reference to the inception of the risk, but during the period when the policy is in place and also at the claims stage.¹¹ Despite the fact that alignment of the fraudulent claims rule with the doctrine of utmost good faith has an instinctive appeal, it might be conceptually rather difficult to justify the existence of a link of that nature. The reasons will be considered below.

Traditionally, the fraudulent claims rule in insurance law has been attributed to a rule of law—namely, that “no person ought to be allowed to take advantage from his own wrong”.¹² If the source of the fraudulent claims rule is traced to such a rule of law, which also stipulates its own remedy of forfeiture of the claim tainted with fraud, it is rather difficult to explain why there is a need for the intervention of the good faith doctrine in this context. Courts have often denied the existence of alternative causes of action on matters that fall under the remit of the utmost good faith doctrine. For example, in *Banque Financière de la Cité v. Westgate*

11 *Boulton v. Houlder Bros & Co* [1904] 1 KB 784 (CA), 791-92, per Mathew, LJ; *Orakpo v. Barclays Insurance Services* [1995] LRLR 443 (CA), 451, per Hoffmann, LJ; *New Hampshire Insurance Co v. MGN Ltd* [1997] LRLR 24 (CA), 61, per Staughton, LJ, and most recently at the Court of Appeal level in *The DC Merwestone* [2014] EWCA Civ 1349, [75-77], per Clarke, LJ. Similar sentiments have been echoed in other common law jurisdictions: *Distillers Co Bio-Chemicals (Australia) Pty Ltd v. Ajax Insurance Co Ltd* (1973) 130 CLR 1 (High Court of Australia), 31, per Stephen J, and *Dawson v. Monarch Insurance Co Ltd of NZ Ltd* [1977] NZLR 372 (High Court Wellington), 378.

12 *Levy v. Baillie* (1831) 7 Bing 349 (Court of Common Pleas). More recently, *Manifest Shipping & Co Ltd v. Uni-Polaris Insurance Co Ltd & Le Réunion Européenne (The Star Sea)* [2001] UKHL 1, [2003] 1 AC 469, [62], per Lord Hobhouse and *Agapitos v. Agnew (The Aegeon)* [2002] EWCA Civ 247, [2002] Lloyd’s Rep 42, [2], per Mance, LJ.

*Insurance Co Ltd*¹³ it was held by the Court of Appeal that the insurer's non-disclosure could not give rise to a tort action for damages and the assured's only cause of action lay in breach of utmost good faith duty at the pre-contractual stage on the part of the insurer. By analogy, it can be argued that there is no room for the operation of the utmost good faith doctrine on a matter that has been dealt with by a rule of law.

More fundamentally, the rationale of judges who advocate a strong tie between utmost good faith doctrine and the fraudulent claims rule is inconsistent and does not stand up to scrutiny. Lord Mance, for example, in his dissenting judgment in *The DC Merwestone*, was adamant that the fraudulent claims rule derives from "the foundations of good faith on which insurance rests".¹⁴ However, in *Agapitos and Another v. Agnew and Others (The Aegeon)*¹⁵ he expressed the view that it would be an acceptable solution to treat the common law rules governing the making of a fraudulent claim as falling outside the scope of s. 17 of the Marine Insurance Act 1906.¹⁶ Considering that at the time of that decision, s. 17 of the MIA 1906 was regarded as the main source of the post-contractual duty of utmost good faith and attracted the draconian remedy of "avoidance",¹⁷ the inconsistency is apparent. How can the fraudulent claims rule be a manifestation of the utmost good faith duty but at the same time not attract the remedy of avoidance in case of its breach?

Furthermore, it has often been doubted by scholars¹⁸ whether the duty of utmost good faith applies in its full rigour after an insurance contract is formed. It can be persuasively argued that s. 17 of the MIA 1906 was intended to be a prologue to ss. 18–20, dealing with specific aspects of pre-contractual duty of good faith.¹⁹ Also, it is noteworthy that Sir Mackenzie

13 [1990] QB 665 (CA). The House of Lords did not comment on this part of the judgment [1991] 2 AC 249 (HL).

14 [2016] UKSC 45, [119]. Similar sentiments were echoed by Christopher Clarke LJ at the Court of Appeal level in *The DC Merwestone*. He said, at [109], "The foundation of the [fraudulent claims] rule is the obligation of the utmost good faith—an incident of the special relationship between insured and insurer."

15 [2002] EWCA Civ 247, [2003] QB 556, [2002] 2 Lloyd's Rep 42, [45].

16 On that premise he was certain that no question of avoidance *ab initio* would arise in this context.

17 This is no longer the case following the introduction of the Insurance Act 2015. See, s. 14 of the 2015 Act.

18 See, B Soyer, 'Continuing Duty of Utmost Good Faith in Insurance Contracts – Still Alive?' [2003] LMCLQ 39, at 41–2. Writing extra judicially, Sir Aikens expressed the opinion that the focus of s. 17 is on the pre-contractual stage: "Post-contractual Duty of Good Faith in Insurance Contracts: Is There a Problem that Needs a Solution" [2010] JBL 379, at 389.

19 It should be noted that s. 17 is placed beneath the heading "Disclosure and Representation" and above ss. 18–20, which expressly relates to pre-contractual issues such as disclosure and representation. This can be taken as an indication that s. 17 is intended to play a pre-contractual role only.

Chalmers, the drafter of the Act, in his *Digest of the Law of Marine Insurance*,²⁰ on which the Act was based, made no reference to the post-contractual dimension of the duty of utmost good faith. The uncertainty as to whether the utmost good faith doctrine has a role to play in the post-contractual context was put to bed by the House of Lords in *The Star Sea* case, where it was held with reluctance that formation of the insurance contract does not bring the duty of good faith of both parties to an end.²¹ However, the judiciary has found innovative ways to curb the scope of the duty at the post-contractual stage by restricting it to: i) fraudulent acts committed prior to the commencement of litigation;²² and ii) acts which would amount to repudiatory breach of the contract.²³ It is, therefore, appropriate to say that the judicial trend has been against adopting an expansive approach with regard to the scope of the post-contractual duty of utmost good faith.²⁴ On that basis, one can plausibly argue that in the light of the fact that there is already a rule of law that deals with the matter, there is no apparent need to expand the application of the utmost good faith doctrine to the claims context.

Of course, it is undeniable that there are comparisons between the pre-contractual stage and the claims stage due to information asymmetry. Just like the assured having control of information at the outset for the assessment of the risk, if a loss should occur he has, at the date of making the claim, exclusive control of the information on which the claim must be based. The dominant position of the assured in terms of having relevant information could be used as a justification for bringing the utmost good faith doctrine into play at the claims process.²⁵ However, it should be borne in mind that in all insurance contracts there is an appreciation of this information asymmetry at the claims stage, and clauses are often incorporated into contracts requiring the assured to bring an incident that might give rise to a claim to the attention of the insurers. Most contracts, going further, require the assured to fully co-operate with the insurers at the claims stage and assist insurers in the investigation of a claim put forward. Given that contractual mechanisms are utilised to balance information asymmetry at the claims stage, it is questionable whether it is legitimate for courts to extend

20 Mackenzie Dalzell Chalmers and Douglas Owen, *A Digest of the Law relating to Marine Insurance* (2nd edn) (W. Clowes & Sons 1903).

21 For instance, Lord Clyde noted that the solution of confining the duty of utmost good faith duty to the pre-contractual stage “appears past praying for”.

22 *The Star Sea* [2001] UKHL 1, [2003] 1 AC 469.

23 *K/S Merc-Skandia XXXXII v. Certain Lloyd’s Underwriters (The Mercandian Continent)* [2001] EWCA Civ 1275, [2001] 2 Lloyd’s Rep 563.

24 Longmore, LJ, in *The Mercandian Continent* [2001] EWCA Civ 1275, [2001] 2 Lloyd’s Rep 563, [22], seems to suggest that duty of good faith in the post-contractual context could arise in cases where the insurer has a right to information by virtue of an express or an implied term.

25 See, *Fargnoli v. GA Bonus plc* [1997] CLC 653 (Court of Session (Outer House)), 673, per Lord Penrose. See, also, *Orakpo v. Barclays Insurance Services* [1995] Lloyd’s Rep IR 443 (CA), 451, per Hoffmann, LJ, and 452, per Parker, LJ.

the insurers' contractual remedies for which they could have bargained²⁶ by introducing the utmost good faith doctrine into the equation at this stage.

In summary, it is submitted that the rationale of the opinions expressed in various judgments extending the scope of the utmost good faith doctrine to the claims stage is rather questionable. Whatever the scope of the utmost good faith doctrine in the post-contractual context will be following the law reform effected through the Insurance Act 2015,²⁷ it is very likely that the law concerning fraudulent claims should be considered in isolation from the utmost good faith doctrine. If so, this means that collateral lies told whilst advancing an insurance claim, even if they are material to the consideration of the claim, should not be seen as tainting it simply on the ground that the assured has not acted in good faith.

(2) Values and Policy Considerations

Decoupling the fraudulent claims rule from the doctrine of utmost good faith means that determining its contents becomes an issue of policy, no doubt informed by competing legal values and perceptions.²⁸ Those who believe that a collateral lie told at the claims stage should be capable of tainting a claim, even though the claim itself is genuine, justify this on the ground that such a stance is essential to deter fraud. This is open to criticism on two grounds. First, as highlighted in the Final Report of the Insurance Fraud Taskforce,²⁹ there is no simple profile of a person who commits insurance fraud. Some people commit fraud that is premeditated in nature and usually this kind of fraud is linked to organised crime. It is very difficult to see how severity of legal rules on fraudulent claims would have any impact on the behaviour of this kind of individual. On the other end of the spectrum, fraud is committed by opportunistic individuals; this usually takes the form of exaggerating an insurance claim or using fraudulent devices to secure a quick, hassle-free settlement. In order to be able to say that harshness of the legal rules is likely to have a deterrent effect on this kind of individual, it is necessary to establish to what extent such rules are known by the members of the public. As far as the author is aware, no empirical research has been carried out on the matter but the author suspects that ordinary members of the public are not likely to be aware of the legal

26 In *The Star Sea* [2001] UKHL 1, [2003] 1 AC 469, [61], Lord Hobhouse warns against this kind of expansion.

27 For a recent analysis on this point see, B Soyer and AM Tettenborn, "Mapping (Utmost) Good Faith in Insurance Law- Future Conditional?" (2016) 132 Law Quarterly Review 618.

28 This is a point acknowledged by Lords Clarke and Hughes in *The DC Merwestone* [2016] UKSC 45, [2017] AC 1, [2016] 2 Lloyd's Rep 198, [39] and [55] respectively.

29 This can be found at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/494105/PU1817_Insurance_Fraud_Taskforce.pdf (last accessed on 1 June 2017).

definition of insurance fraud and its consequences. So it is a tall order to presuppose that the behaviour of the assured will be affected by the manner in which insurance fraud is defined. Second, looking at the debate from the other angle, is it likely that people with a valid insurance claim will be incentivised to lie in support of their claim, if they were to know that such a lie would not have a detrimental effect in their claim? Again the author is unaware of any empirical evidence to suggest this will be the case, but more fundamentally, it is submitted that this is very unlikely, as an assured conducting himself in that manner risks losing his credibility, which might have an impact on other parts of his case or even his ability to procure insurance cover in the future.³⁰

When determining a policy question of this nature, one should not ignore the work of legal theorists on the subject. Aquinas, for example, advocates that in order to chart the moral dimension of a lie one should focus on the liar's aim and objectives. On that basis, he suggests that the morality of lying to a dying man should be judged differently than lying to a competitor or to moral transgressors.³¹ Applying his philosophy in the present context, it can be said that a lie told to support a genuine claim should be treated differently than one which is told to advance a claim which is known to the assured to be based on false grounds. Admittedly, in both instances an adverse moral judgment can be passed on the conduct of the assured; but there is certainly room to distinguish the former type of lies, which are told by those who are foolish but honest when it comes to the extent of the loss suffered, from the latter type of lie, which clearly trespasses upon the rules of moral behaviour.

Also, judging the matter in isolation from the doctrine of utmost good faith and in accordance with the fundamental principles of contract law, it is hard to see how fraudulent conduct that does not have any impact on the ultimate liability of the innocent party could have such a detrimental effect on the party at fault. For example, in general contract law the innocent party will be afforded the right to rescind the contract for misrepresentation only if the representee has acted on the misrepresentation to its detriment.³² If misrepresentation, even fraudulent, has had no impact on its intended target, it would neither be actionable in

³⁰ On this point see, J Davey and K Richards, 'Deterrence, Human rights and Illegality: The Forfeiture Rule in Insurance Contract Law' (2015) *Lloyd's Maritime and Commercial Law Quarterly* 314, at 324-328. It is worth noting that P Rawlings and J Lowry, 'Insurance Fraud: The "Convoluting and Confused" State of Law' (2016) *131 Law Quarterly Review* 96, at 118, indicate that an assured who forges a document might feel that his actions are justified especially if his insurer insist on a receipt that cannot reasonably be produced

³¹ St T. Aquinas, *The Summa Theologica. Virtues of Justice in Human Community (2a2ae 101-22)*, (translated by O'Brien, Blackfriars, 1972), vol 41, pp. 151-155, 163-167. For a more contemporary but similar approach, see, Michael Patrick Lynch, *True to Life-Why Truth Matters* (MIT, 2004), at p. 149.

³² *Attwood v. Small* (1838) 6 Cl & F 232 (HL); *Jennings v. Broughton* (1853) 5 DE GM & G 126 (Ct of Chancery); *Smith v. Chadwick* (1884) 9 App Cas 187 (HL). More recently, the Supreme Court, in *Hayward v. Zurich Insurance Co plc* [2016] UKSC 48, held that a compromise agreement could be set aside as deceitful misrepresentation caused the insurer to act to its detriment, settling on a false basis. It was the view of the Court that misrepresentation "was intended to influence the mind of the insurers, not necessarily by causing them to believe him but by causing them to value his litigation claim more highly than it was worth."

damages nor capable of giving rise to a right to rescind. When a collateral lie is told when advancing a genuine claim, the position is similar. Here, the occurrence of a loss covered by the policy triggers the liability of an insurer. Any lie told by the assured in the claims context does not alter the fact that the insurer is under an obligation to indemnify the assured for that loss. The insurer is, therefore, not forced to act to its detriment as a result of the collateral lie. It follows that if the prospect of recovery for the claim is jeopardised as a result of a collateral lie told in the claims process, this will be the only instance in contract law where the law penalises a party to a contract on account of fraud that has had no impact in its intended target.

After setting out the relevant principles and policies that prevail in this area of law, a comprehensive analysis on the reasoning of the Supreme Court in *The DC Merwestone* will be offered below.

(3) *The DC Merwestone* before the Supreme Court

The facts of *The DC Merwestone* are relatively straightforward. The vessel was insured against marine risks and as a result of ingress of water its engine room was damaged beyond repair. During the casualty investigation, solicitors acting on behalf of the underwriters sought explanation from the assured for the ingress, its spread from the bow thrusters room to the engine room and the reason why crew were unable to control it by using the vessel's pumps. The assured's general manager responded in a letter which contained a representation that the crew had reported that they had heard a bilge alarm (which would have alerted the crew to the flooding) at noon on the day of the casualty but had failed to investigate it as its sounding had been attributed to the rolling of the vessel in heavy weather.

The trial judge, Popplewell, J,³³ found that the relevant crew member did not commit an outright lie about the bilge alarms but that he "had convinced himself... that there had been an alarm earlier in the day", and that he had spoken to the Master "on several occasions" to say that he could not understand how there could not have been an alarm; and that eventually the Master agreed that there must have been an earlier alarm. He found that the relevant crew member "genuinely believed that if the alarm had gone off, it would probably have been ignored as a result of the weather conditions... He genuinely believed that his account of the noon alarm and the crew ignoring it was a realistic explanation of events." On that basis, he found that the relevant crew had no grounds to believe it was true, and was reckless whether or not it was true. He further found that the general manager of the vessel had no basis to make the presentation in the letter, having consciously decided not to ask the rest of the crew whether it was correct. It ultimately transpired that the general manager did not enquire of the crew because he did not want the absence of their confirmation to hinder him giving an explanation of the flooding that involved no fault on the part of the assured's shore-side

33 [2013] EWHC 1667 (Comm), [2013] 2 Lloyd's Rep 131.

management. If it were to be established that the assured's shore-side management was at fault, this could have potentially afforded a defence to the claim under the relevant policy.

Having held that a false representation was made recklessly,³⁴ the trial judge reluctantly came to the conclusion that the claim was forfeited due to the fact that a collateral lie was told in the process of advancing it although the claim in itself was genuine. In reaching this outcome, Popplewell, J, relied on the dicta of Mance, LJ, in *Agapitos v. Agnew (The Aegeon)*³⁵ where he said that use of a fraudulent device would convert a genuine claim into a fraudulent one if the lie is

“directly related to the claim to which that fraudulent device relates, which is intended to improve the insured's prospects of obtaining a settlement or winning the case, and which would, if believed, tend, objectively, prior to any final determination at trial of the parties' rights, to yield not insignificant improvement in the insured's prospects—whether they be prospects of obtaining a settlement, or a better settlement, or of winning at trial.”³⁶

The assured was unsuccessful on appeal and the Court of Appeal,³⁷ was prepared to endorse the test laid down by Mance, LJ, with a slight alteration.³⁸ The Court of Appeal recognised that this was essentially a policy decision but was convinced that the fraudulent device rule developed by Mance, LJ, is an essential one that targets an assured who attempts to take advantage of his insurer by leading the latter to believe that the claim in question is watertight. This led Christopher Clarke, LJ, to conclude that the use of a fraudulent device has the capacity to destroy "the special relationship between the assured and insurer" in the same manner as submission of a completely fabricated claim would. As a result, it was held that the

34 In line with the reasoning in *Derry v. Peek* (1889) 14 App Cas 337 (HL), it is accepted that a statement made recklessly (careless as to whether it be true or false) at the claims stage is capable of rendering it a fraudulent claim.

35 [2002] EWCA Civ 247, [2003] QB 556, [2002] 2 Lloyd's Rep 42. It is evident that Mance, LJ, on this matter has drawn upon the dictum of Lord Sumner in *Lek v. Matthews* (1927) 29 Lloyd's List Rep 141 (HL), and a first-instance trial before Roche, J in *Wisenthal v. World Auxiliary Insurance Corp Ltd* (1930) 38 Lloyd's List Rep 54 (KB).

36 *ibid* [38]. The dicta of Mance, LJ, was endorsed by the Privy Council in *Stemson v. AMP General Insurance (NZ) Ltd* [2006] UKPC 30, [2006] Lloyd's Rep IR 252. The conclusion reached in *The Aegeon* has been assumed to represent the law in cases both at first instance and on appeal but in none of them was the point put in issue. See, in particular, *Sharon's Bakery (Europe) Ltd v. AXA Insurance UK plc* [2011] EWHC 210 (Comm), [2012] Lloyd's REP IR 164; *Bate v. Aviva Insurance UK Ltd* [2014] EWCA Civ 334, [2014] Lloyd's Rep IR 527; *AXA General Insurance Ltd v. Gottlieb* [2005] EWCA Civ 112, [2005] 1 All ER 445 and *Aviva Insurance Ltd v. Brown* [2012] Lloyd's Rep IR 211.

37 [2014] EWCA Civ 1349, [2015] QB 608, [2015] 1 Lloyd's Rep 32.

38 Christopher Clarke, LJ, *ibid.* at [165], questioned the negative nature of the formulation of Mance, LJ, and expressed a preference (without deciding the point) for a positive requirement that the fraudulent device should “objectively have tended to produce” a “significant improvement in the insured's prospects”.

use of a fraudulent device which is relevant to a claim "crosses a moral red line", and has a fundamental impact on the parties' relationship.³⁹

The majority of the Supreme Court approached the issue from a different perspective.⁴⁰ In determining whether a collateral lie or a fraudulent device used to promote a genuine claim would convert the claim into a fraudulent one, the key question is whether the assured intended that the insurer would act on, or be influenced by the misleading statement. In the context of the tort of deceit, this has been paraphrased as being a requirement that it must be shown that the representor intended to deceive.⁴¹ There is no doubt that a collateral lie told in advancing the claim is intended to influence the insurer in the manner in which he views the claim and its credibility. However, the fact still remains that the claim is in essence a genuine one which, leaving the collateral lies aside, must be responded to by the insurer in a positive fashion. Therefore, one cannot say that the intention of the assured in utilising collateral lies is to deceive the insurer to make a payment for something which the assured is not entitled to. This is precisely the point that the majority in the Supreme Court has focussed on. Drawing a comparison between a genuine claim supported by a collateral lie and a false claim, Lord Hughes stipulated:⁴²

... The collateral lie is certainly told with the aim of improving the position of the liar, but in fact and in law it makes no difference to the validity of his claim whether it is accepted or found out. The false or exaggerated claim is also made with the aim of improving the position of the liar, but if accepted it provides him something to which he is not entitled.

Lord Sumption rightly stresses that in law the assured's right to indemnity arises as soon as the loss is suffered, and it is not a precondition of the insurer's liability that a claim should have been made on him.⁴³ On that basis, it is evident that a collateral lie told when advancing a claim is "immaterial to the parties' respective rights and obligations"⁴⁴ given that the liability of the insurer to indemnify the assured under the contract has been crystallised long before any wrongdoing on the part of the assured has occurred. Of course, as highlighted in Lord Mance's dissenting judgment, it is possible that the fraudulent device is deployed by the assured, as he does not believe or is not confident that he has a good claim.⁴⁵ However, it is equally possible that the assured resorts to the use of a collateral lie to support his claim, as

39 *ibid* [155].

40 Lords Hughes, Clarke, Toulson and Sumption were prepared to reverse the judgment of the Court of Appeal whilst Lord Mance opted to dissent.

41 *Derry v. Peek* (1889) 14 App Cas 337 (HL), 343-344, per Lord Halsbury and *Bradford Third Equitable Benefit Building Society v. Bolders* [1941] 2 All ER 205 (HL), 220, per Lord Wright.

42 [2016] UKSC 45, [2017] AC 1, [2016] 2 Lloyd's Rep 198, [92]. A similar point has been made by Lords Sumption and Toulson, [26] and [107] respectively.

43 *Ibid* [24].

44 *ibid* [107], per Lord Toulson.

45 *Ibid* [126].

he expects the insurer to prolong the investigation process, or perhaps he is frustrated due to the extensive and unnecessary questioning he is facing from his insurers. The fact, however, remains that by telling a collateral lie to advance a genuine claim, the assured is not intending to deceive the insurer to claim something he is not entitled to. Put differently, the assured here does not aim to improve his entitlement under the policy through fraud.

The approach adopted by the majority of the Supreme Court in the case might, at first sight, seem to be at odds with the stance taken in *Hayward v. Zurich Insurance Co.*⁴⁶ There, the insurer after discovering that the assured acted dishonestly, i.e. he had recovered from his injuries one year prior to the settlement in 2003, attempted to set aside the settlement agreement under the tort of deceit. The first instance judge decided that the settlement should be set aside but the decision was overturned by the Court of Appeal.⁴⁷ The Court of Appeal expressed the view that the insurer could not rescind the settlement agreement because it had raised a suspicion of fraud prior to the settlement but did not succeed in proving fraud and it was not until 2009 that the insurer acquired further evidence to show that the assured had acted in a dishonest fashion. The Supreme Court restored the judgment of the first instance judge holding that the assured's dishonesty in 2003 had induced the insurer to act to its detriment by paying almost ten times more than it should have paid. The Supreme Court in *Hayward* case seems to be taking a more stringent approach when it comes to fraud but there are significant differences between these two decisions. First of all, it should be borne in mind that fraud in the *Hayward* case was considered in the context of setting aside a settlement agreement. This was, in effect, a case on whether the deceitful conduct of the assured was intended to influence the mind of the insurer or not (inducement). More significantly, in the *Hayward* case the fraud committed by the assured caused the insurer to value the assured's claim more highly than it was actually worth. Conversely, in *The DC Merwestone* the insurer was not induced to make a payment when there was no need to make such a payment. The assured had a genuine claim and, despite the fact that he employed fraudulent devices to promote his claim, he was entitled to recover under the policy the amount he sought to recover.

Turning to *The DC Merwestone*, their Lordships in the majority do not deny that a collateral lie told when advancing a genuine claim is undesirable,⁴⁸ and they point out that it might have adverse consequences for the assured, including: i) the threat of a criminal prosecution for fraud; ii) the possibility of being penalised in costs; iii) the possibility of prospective termination of the contract and/or refusal of future insurance; and iv) the loss of any credibility in the trial of a claim.⁴⁹ However, they are of the view that depriving the assured of the whole claim for a wrongdoing of this nature is a disproportionate response to the only detriment suffered by an insurer as a result of a collateral lie—namely, being put off relevant inquiries or embarking on irrelevant ones, as put by Christopher Clarke LJ in the Court of

⁴⁶ [2016] UKSC 48, [2017] AC 142.

⁴⁷ [2015] EWCA Civ 327, [2015] Lloyd's Rep IR 585 (CA).

⁴⁸ *ibid*, [36], Lord Sumption said: "It is true that the moral character of the insured's lie is in no way mitigated by the fact that it turns out to have been unnecessary. But there are principled limits to the role which a claimant's immorality can play in defeating his legitimate civil claims."

⁴⁹ *ibid*, [98], per Lord Hughes. Lord Toulson, [108], also observed that a collateral lie would have "a boomerang effect" through loss of the assured's credibility.

Appeal.⁵⁰ If the insurer is allowed to forfeit a genuine claim on this basis, as Lord Hughes put it, this would be “simply too large a sledgehammer for the nut involved”.⁵¹

It has also been recognised that in contract law there are limits to the extent to which a claimant’s immorality can be utilised to defeat his legitimate civil claims.⁵² Highlighting that the duty of good faith does not apply in its full rigour in the claims context,⁵³ Lord Sumption indicated that similar limits should apply in insurance law, and it would be beyond such limits if the fraudulent claims rule is extended to lies which are found to be irrelevant to the recoverability of the claim. He continued by saying:

[Such an outcome] is disproportionately harsh to the insured and goes further than any legitimate commercial interest of the insurer can justify. It leads naturally to the anomalous consequences which [the first instance judge]... pointed out in the case. These anomalies are all the more remarkable for the fact that the rule has no application to collateral lies told after the commencement of legal proceedings, when experience suggests that parties are most likely to gild the lily. In my opinion it is not the law.⁵⁴

It needs to be stressed that the conclusion that the majority of the Supreme Court has reached in the case is in line with the stance the Financial Ombudsman Services (FOS) has adopted on the matter.⁵⁵ In a case where the loss adjuster overzealously insisted on receipts for every

50 [2014] EWCA Civ 1349, [2015] QB 608, [2015] 1 Lloyd's Rep 32 [132].

51 [2016] UKSC 45, [2017] AC 1, [2016] 2 Lloyd's Rep 198 [100].

⁵² It should be noted that the Supreme Court in *Patel v. Mirza* [2016] UKSC 42, [2016] 3 WLR 399 has taken a similar stance with regard to the position of a claimant who sought to recover money paid pursuant to a contract to carry out an illegal activity (inside dealing). The majority held that in determining whether illegality should prevent enforcement of an agreement, the court has a discretion and in the exercise of that discretion must consider factors such as i) seriousness of the conduct; ii) its centrality to the contract; iii) whether it was intentional; and iv) whether there was marked disparity in the parties respective culpability. In assessing these factors, the Supreme Court confirmed that the relevant issue is “not whether the contract should be regarded as tainted by illegality but whether the relief claimed should be granted”, [219] per Lord Clarke. This effectively means the eradication of the reliance test, laid down by the House of Lords in *Tinsley v Milligan* [1994] 1 AC 340, which orthodoxly prevented a claimant to rely on his own illegal conduct to establish a claim (save in limited circumstances). Therefore, as a general rule a claimant should be entitled to receive money paid pursuant to an illegal contract as long as he satisfies the ordinary requirements of a claim for unjust enrichment.

53 Lord Hughes, [68], said: “... one cannot answer the question in the present case by predicating it on the basis that the fraudulent claims rule is merely a manifestation of the duty of utmost good faith.”

54 *ibid*, [36].

55 The FOS is an ombudsman, established in 2000 and given statutory powers in 2001 by the Financial Services and Markets Act 2000, which helps to settle disputes between consumers and UK-based businesses providing financial services, such as banks, building societies, insurance companies, investment firms, financial advisers and finance companies. The decisions of the FOS are binding on insurance companies if the consumer accepts the final decision before the deadline set by the FOS. If the consumer does not accept the decision it does not become binding on either side and the consumer is free to proceed with a claim against the insurance company in court. The FOS can order an insurance company to pay compensation up to the maximum limit of £ 150,000.

item stolen from a van, forcing the assured to request a friend to falsify a receipt for him, the FOS asked the insurer to pay the claim, which was genuine.⁵⁶ The FOS in that case treated the use of a forged receipt as an “immaterial fraud”.⁵⁷

C. Life After the Supreme Court’s Decision – The Future Development of Law on the Definition of Fraudulent Claims in Insurance Law

The Supreme Court’s decision in *The DC Merwestone* is significant not only in settling the legal position with regard to collateral lies told in the process of advancing an insurance claim but also in terms of providing clues as to how the boundaries of the fraudulent claims rule in common law need to be plotted in the absence of a fraudulent claims clause in the contract. At the same time, one needs to consider carefully to what extent collateral lies told at the claims stage could provide alternative remedies to insurers. These issues will be considered in this part of the article.

(1) Other Lies Told at the Claims Process

As a starting point, it should be stressed that no change should be expected in the legal position when an assured tells lies when presenting a claim with the intention to suppress a defence that the insurer would otherwise have. For example, if the loss occurs a day after the expiry of the insurance policy and the assured pretends that it occurred earlier during the policy period, the claim will be forfeited for fraud. In this instance stating the true state of affairs would have entitled the insurer to deny the claim for falling outside the policy period.⁵⁸ Therefore, borrowing the words of Lord Hughes, the purpose of the lie told here is to “provide the assured something to which he is not entitled in law”.⁵⁹

56 Case Study 42/3 (Ombudsman News, December 2014/January 2015).

57 In the majority of cases, the approach of the FOS is based on what the courts are likely to do in similar circumstances. However, depending on the circumstances surrounding a case, the FOS might use the test of “fairness and reasonableness” as the basis for deciding cases, rather than the strict legal approach.

58 The possibility was contemplated by the Court of Appeal in *The Aegeon* [2002] EWCA Civ 247, [2003] QB 556, [2002] 2 Lloyd’s Rep 42. In that case, in an attempt to convince the underwriters that there was no breach of a “hot works” warranty, the assured made inaccurate statements in relation to the date of commencement of such work. However, such statements were made after the commencement of litigation and for that reason had to be disregarded. Nevertheless, the Court was convinced that the intention of the assured in making such statements was to suppress a potential defence that would have been otherwise available to the underwriters and that would have rendered the claim fraudulent had they been made prior to the commencement of the litigation. Mance, LJ, in *The Aegeon* observed, at [18], “a claim cannot be regarded as valid if there is a known defence to it which the insured deliberately suppresses.” Lord Hughes expressed strong support for this position [2016] UKSC 45; [2017] AC 1; [2016] 2 Lloyd’s Rep 198, [96].

59 [2016] UKSC 45, [2017] AC 1, [2016] 2 Lloyd’s Rep 198, [92].

This much is clear. A more challenging issue is what happens if the loss is genuine but the assured tells a lie at the investigation stage in breach of a claims corporation clause or even claims fraudulently that notice was given within the required time under a claims notification clause by altering the date of the notice. There is little doubt that this kind of dishonesty would amount to breach of the relevant claims clause and the insurer would be entitled to deny payment for the claim that the clause relates to, as long as the clause is treated as a “condition precedent” to liability of the insurer.⁶⁰ It gets more complicated if the clause breached is treated as a mere condition (or contractual warranty), breach of which entitles the insurer to damages only. The insurer in that case could not deny the claim straightaway for breach of the claims provision, but would the dishonesty of the assured mean that the claim is fraudulent? It is submitted that this is unlikely. Unless modified by express conditions in the policy,⁶¹ in insurance law a cause of action accrues on a policy from the moment an insured peril causes loss.⁶² Accordingly, an assured has a right to seek indemnity under the policy from the moment a loss is suffered, and as long as his claim is genuine, i.e. it relates to a loss that is insured under the policy, in line with the spirit of the majority decision in *The DC Merwestone*, any lie told at the investigation stage would be treated as collateral and not capable of converting the claim into a fraudulent one.

The legal position is also uncertain when the assured, who suffers a genuine loss, advances a lie so fundamental as to transform the essential basis of his claim.⁶³ Imagine the position of an assured who insures his yacht under a time policy against main marine perils including “perils of the seas” and “fire”. The vessel is lost in moderate weather conditions due to the entry of seawater into her engine room. Conscious of the fact that the burden of proof facing the assured to be able to claim loss by a peril of the seas is a heavy one,⁶⁴ the assured convinces his employees to assert that a fire which started in the engine room could not be controlled and eventually led them to abandon the vessel, which sank shortly after.⁶⁵ On that basis, the assured advances a claim based on loss by “fire”. Here, even though the assured has suffered a genuine loss, which is covered by the terms of the policy, he has no honest belief in the truth of the statements made in the claim. Put differently, there is misrepresentation or misdescription of the circumstances under which the claim for indemnity had arisen which

⁶⁰ See, *Denso Manufacturing UK Ltd v Great Lakes Reinsurance (UK) plc* [2017] EWHC 391 (Comm); [2017] Lloyd’s Rep IR 240 (QB). Remedies that can be available to an insurer for breach of a claims corporation or similar clause will be deliberated below under (3).

⁶¹ *Insurance Corporation of the Channel Islands Ltd v. McHugh and Royal Hotel Ltd* [1997] LRLR 94 (QB), 134, per Mance, J.

⁶² In relation to liability policies no cause of action arises until the liability of the assured has been established by agreement, judgment or arbitration; see, *Bradley v. Eagle Start Insurance Co Ltd* [1989] AC 957 (HL).

⁶³ The issue was raised in *Piermay Shipping v. Chester (The Michael)* [1979] 1 Lloyd’s Rep 55 (QB) but was left undecided.

⁶⁴ It is not adequate to prove the existence of sea water in the vessel to rely on this peril. The assured is expected to prove that the water entered into the vessel as a result of a fortuitous incident. See, *Rhesa Shipping Co SA v. Edmunds (The Popi M)* [1985] 2 Lloyd’s Rep 1 (HL).

⁶⁵ On assured’s account the loss has arisen in a similar manner in *Kastor Navigation Co Ltd & Another v AXA Global Risks (UK) Ltd & Others* [2004] EWCA Civ 277, [2004] 2 Lloyd’s Rep 119.

has the effect of transforming the basis of the claim to one which the assured has no genuine belief in. It is submitted that in such instances the claim put forward should be regarded as a fraudulent one, and there is nothing in the reasoning of the Supreme Court which contradicts this outcome. The assured clearly has belief in the fact that he has suffered a loss that comes under the scope of the policy but has no belief in the claim as he puts it; i.e. the loss was caused by fire. The loss claimed under the policy cannot be viewed in isolation from the circumstances it has resulted from. If the circumstances which are alleged to have caused the loss are not true, the claim itself is tainted and cannot be treated as “genuine”.⁶⁶

(2) Deliberate Concealment at Claims Stage

A related question is the position of the assured who suffers a genuine loss but refrains from presenting to the insurer or the loss adjuster information, for example an email exchange with his agents on matters concerning the loss, which might possibly create doubt in the mind of the insurer as to the validity of the claim or might encourage him to make further investigations.

There is a wealth of legal authorities in the context of the tort of deceit where courts have tackled similar issues. The key question is whether deliberately concealing a relevant fact or matter could amount to a fraudulent statement within the meaning of *Derry v. Peek*,⁶⁷ which is an essential ingredient of the tort of deceit. It has been held on numerous occasions that in a case where there is a duty to speak, the failure to disclose or speak may be taken as an implied representation that nothing which is the subject of an obligation of disclosure has been withheld. Put differently, suppression of key facts in cases where there is a duty to speak will often carry with it an implied representation by silence which is indistinguishable in character from a false positive representation. Chambre, J, in the early nineteenth century in *Tapp v. Lee* stipulated:⁶⁸ “Fraud may consist as well in the suppression of what is true, as in

⁶⁶ It is worth noting that in other common law jurisdictions courts have often treated such claims as fraudulent. In *To v Australian Associated Motor Insurers Ltd* (2001) 3 VR 279 for example, the insured’s son did not have a driving licence and crashed the car when driving without her mother’s permission. The assured, in the mistaken belief that the car was not insured when driven by unlicensed drivers, claimed that her car had been stolen. The loss was genuine but the assured fabricated a fraudulent story misrepresenting the fact to the effect that her car had been stolen by youths who had caused damage to it. The Court of Appeal in Victoria held that the whole claim was tainted. See also, *Cox v. Orion Insurance Co Ltd* [1982] RTR 1 (CA).

⁶⁷ (1889) 14 App Cas 337 (HL).

⁶⁸ (1803) 3 B & P 367 (Court of Common Pleas), 371.

the representation of what is false.” Modern authorities seem to have endorsed this view,⁶⁹ although dissenting views are occasionally expressed.⁷⁰

Similar sentiments have been echoed in the context of insurance law. In *Marc Rich Agriculture Trading SA v. Fortis Corporate Insurance NV*,⁷¹ the assured claimed for the loss of cargo under a warehouse-to-warehouse cover. The cargo had been removed from the warehouse without the assured’s consent. The assured had come to an agreement with the party who had removed the cargo that it would pay for it. It was, however, alleged by the insurer that the assured had suppressed the fact that it had contacted an agent to see if he could ascertain what was happening with the cargo but had then abandoned that effort in the hope that the removing party would agree to pay for the cargo. There was no plea of any deliberate misrepresentation or lies, only concealment.

The case came before the court on a strike-out application by the assured requesting the court to strike out a defence by the insurers, who pleaded that there had been a fraudulent claim on the premise that the assured failed to disclose material facts in the claims process. Cooke, J, refused to strike out the defence, indicating that he could not decide that the assured was “so clearly right that there [was] no possibility of other arguments succeeding”.⁷² However, the tone of Cooke, J’s judgment clearly indicates that the solution would be different if the matter were approached on the basis of a duty of utmost good faith which requires full disclosure.⁷³ He seems to be of the view that in that case, concealment at the claims stage might well amount to a misrepresentation, which is an essential element on which to found a fraudulent claim.⁷⁴

Although the issue was not explicitly deliberated in *Yeates v. Aviva Insurance UK Ltd*,⁷⁵ the Court of Appeal’s judgment contains hints that an implied representation by silence could result in a fraudulent claim in some cases. There, the assured in the aftermath of flooding of

69 *Ellard v. Andrews* [2002] EWHC 2842 (QB), [31]-[34], per Cooke, J; *HIH Casualty General Insurance Ltd v. Chase Manhattan Bank* [2003] UKHL 6, [2003] 2 Lloyd’s Rep 61, [21], per Lord Bingham; *Conlon v. Simms* [2006] EWHC 401 (Ch), [2006] 2 All ER 1024, [202]- [203], Lawrence Collins, J; *AIC Ltd v. ITS Testing Services (UK) Ltd (The Kriti Palm)* [2006] EWCA Civ 160, [2007] 1 Lloyd’s Rep 555, [298], per Rix, LJ; *JD Wetherspoon plc v. Van De berg & Co Ltd* [2007] EWHC 1044 (Ch), [17], per Lewison, J.

70 In *Society of Lloyd’s v. Jaffray* [2002] EWCA Civ 1101, Waller, LJ, said, [29]: “... in order to establish the tort of deceit the names must establish relevant fraudulent misrepresentations. Mere omissions are not sufficient.” See, also, *HIH Casualty General Insurance Ltd v. Chase Manhattan Bank* [2003] UKHL 6, [2003] 2 Lloyd’s Rep 61, [75], per Lord Hoffmann.

71 [2004] EWHC 2632 (Comm), [2005] Lloyd’s Rep IR 396.

72 *ibid*, [33]. In his judgment, Cooke, J, treated this area of law as being “undoubtedly difficult and developing”.

73 *ibid*, [32].

74 A fraudulent claim in the context of insurance law has been described by Lord Trayner in *Reid & Co Ltd v. Employers’ Accident and Live Stock Insurance Co Ltd* (1899) 1 F 1031, at 1036-7, as a “fraudulent misrepresentation or misdescription of the circumstances under which the claim had arisen, or of the nature and extent of the damage done, for which the claim for indemnity was made.”

75 [2012] EWCA Civ 634.

his insured home obtained an invoice from a company for repairs, but failed to reveal to the insurer the fact that the company which produced the invoice for project management of the repair work was in fact owned by him and his wife. At first instance, the insurer succeeded in obtaining a summary judgment against the assured on the ground that he made a fraudulent claim or used fraudulent devices. The matter came before the Court of Appeal in the context of the assured's application for an extension of time in which to lodge his appeal. In advancing his application, which was refused, one of the arguments put forward by the assured was that he was not guilty of any positive misrepresentation and that he was effectively branded a fraudster on a summary judgment application without being given the opportunity to give evidence on the critical question of whether he had intended to deceive the insurers. Longmore, LJ, describing the assured's arguments as being doubtful and difficult, said:⁷⁶

... The starting point has to be that, as the [trial] judge found, [the assured] intended to and did give the false impression to insurers that [the management company] was wholly separate from himself and his wife.

The judgment leaves no doubt that in the view of Longmore, LJ, knowing and deliberate withholding of information may in some circumstances constitute fraud, especially if it can be shown that the concealment amounts to calculated deception on the part of the assured, who allows the insurer to believe in his trustworthiness while actively falsifying that belief by his inactivity.⁷⁷

Indeed, as indicated by Cooke, J, the state of law in this area is far from settled. However, in considering the potential impact of the Supreme Court judgment in *The DC Merwestone*, different situations should be distinguished. If the assured is aware that the insurer in the process of evaluating a claim put forward is labouring under a misapprehension as to the circumstances concerning the loss or the evidence put forward, but deliberately chooses to remain silent, as indicated by Longmore, LJ, it is very likely that concealment in those circumstances might amount to misrepresentation. The outcome here is the result of the application of common law rules deriving from the tort of deceit⁷⁸ and it is believed that there is nothing in the judgment of the Supreme Court that casts doubt upon the application of these long established rules.

The position, on the other hand, could be rather different if the assured simply chooses to conceal matters concerning the loss which he has not been asked about. As indicated above, the majority of the Supreme Court believes that the doctrine of utmost good faith has no role to play in a claims context.⁷⁹ Therefore, in the absence of any express clause to the contrary,

76 *ibid*, [28].

77 *Kensington International Ltd v. Republic of Congo* [2007] EWCA Civ 1128, [2008] 1 Lloyd's Rep 161, [59], per Moore-Bick, LJ.

78 It was held in *Hill v. Gray* (1816) 1 Stark NPC 434 that such a concealment with a fraudulent intent might give rise to a liability in deceit.

79 There is nothing in the Insurance Act 2015 which contradicts this position. The Act indicates that the insurance contracts are contracts of good faith, but it is left to courts to determine the precise scope of the good faith obligation.

it is clear that the assured is under no duty to speak at this stage. If there is no duty on the part of the assured to speak, as long as he is not aware that the insurer is labouring under any misapprehension with regard to relevant circumstances concerning the loss, it is unlikely that his silence could amount to an implied representation which is the essential element to establish a false statement.⁸⁰ This is the natural consequence of decoupling the utmost good faith doctrine from the claims process as maintained by the majority of the Supreme Court in *The DC Merwestone*. It would be inconceivable to say, on one hand, that the duty of good faith has no role to play at the claims stage, and, on the other hand, to allow the insurer a defence based on the assured's silence at the claims stage due to his reluctance to co-operate. Of course, the position might be different if the policy contains an express obligation to co-operate at the claims stage but the assured chooses to remain silent. In that case, silence would probably amount to breach of the relevant co-operation clause, providing the insurer with a contractual remedy depending on the legal classification of the clause.⁸¹

(3) Collateral Lies at Claims Stage and Other Possible Remedies

Turning back to the collateral lies told at the claims stage, although such lies could not act as a bar to the claim in question following the decision of the Supreme Court in *The DC Merwestone*, it is worth considering what impact, if any, they could have on the position of the assured.

The first question is whether the insurer is entitled to claim the additional cost of investigating such a claim by way of damages as opposed to costs. This is possible especially if the policy in question contains a claims co-operation clause requiring the assured to assist the insurer at the investigation stage of a claim. In the context of insurance contracts, such collateral promises that relate to the claims process are often treated as mere conditions (collateral stipulations) even if they are expressed to be “conditions precedent to the liability of the insurer”.⁸² An assured who deliberately provides misleading information to the insurer

80 See the authorities discussed above.

81 *Friends Provident Life & Pensions Ltd v. Sirius International Insurance Corporation* [2005] EWCA Civ 601, [2005] 2 Lloyd's Rep 57; *The Mercandian Continent* [2001] EWCA Civ 1275, [2001] 2 Lloyd's Rep 563; *Alfred McAlpine Plc v. BAI (Run-Off) Ltd* [2000] 1 Lloyd's Rep 437.

82 It was held, for example, in *Stoneham v. Ocean Railway and General Accident* (1887) 19 QBD 237 (DC) that the term which required the company to give notice in case of a fatal accident within seven days was not a condition precedent to recovery, even though it was worded in this fashion, but was merely a contractual term the breach of which imposed an obligation upon the assured's representatives to reimburse the company for any extra expenses which they might incur from having to investigate the circumstances of an accident at a long interval after its occurrence. See also, *Re Bradley and Essex and Suffolk Accident Indemnity Society* [1912] 1 KB 415 (CA). More recently, it has been tentatively suggested in *Friends Provident Life & Pensions Ltd. v. Sirius International Insurance and Others* [2005] EWCA Civ 601, [2005] 2 Lloyd's Rep 517 that a claims notification clause which does not specify the consequences of its breach might be regarded as a mere condition. However, the classification of claims corporation clauses might differ depending on the type of the insurance contract in question. For example, in the context of “After the Event Insurance” policy, a claims corporation clause was held to be a condition precedent in *Denso Manufacturing UK Ltd v Great Lakes Reinsurance (UK) plc* [2017] EWHC 391 (Comm); [2017] Lloyd's Rep IR 240 (QB). Sitting as the Deputy Judge of the High Court, Ms Sara Cokerill QC, at [40] said: “The policy cannot work without the input of the insured because the insurer is not a party to the litigation, and is entirely reliant on the insured cooperating with it and giving it

at the investigation stage of an insurance claim is likely to be in breach of such a collateral promise, enabling the insurer to claim wasted costs emerging from his actions (e.g. the cost of investigating such a claim).

Even in the absence from the contract of a clause of that nature, it is submitted that in a case where the assured bolsters a genuine claim by using collateral lies, such costs might be recovered as damages for the tort of deceit. No reference to this point has been made in the Supreme Court judgment, but it is submitted that a collateral lie told in the process of advancing a genuine claim could satisfy all the pre-requisites of such an action. Here, a false representation is clearly made by the assured knowingly and without belief in its truth.⁸³ Such representation is made by the assured with the intent to deceive⁸⁴ the insurer that the claim put forward is sound or unquestionable. In other words, the assured's intention is that the lie shall be acted upon by the insurer so that a quick and hassle-free payment will be made with regard to the claim. Lastly, the insurer must show that he acted in reliance on the assured's misrepresentation.⁸⁵ The insurer could satisfy this requirement by showing that the making of the representation has influenced his decision to make a quick payment with regard to the claim put forward without engaging in further evaluation or investigation of the claim. In other words, what is relevant here is what the insurer would have done had no lie been told with regard to the claim in question. As long as the insurer could demonstrate that he would have acted differently had no misrepresentation been made by the assured, he would be able to satisfy the last and probably the most challenging requirement for an action in tort for additional investigation costs.⁸⁶

A more challenging question is whether the policy might be terminated prospectively by the insurer as a result of a collateral lie told at the claims stage. Although Lord Hughes listed this as a likely outcome,⁸⁷ the issue is not straightforward. The key question here is whether telling a collateral lie with regard to a genuine claim put forward amounts to repudiation. Put differently, is such conduct capable of showing an intention no longer to be bound by the

information. Once the litigation is over there are still important steps to be taken in minimising the quantum of recovery, which the assured may feel little incentive to do once the case is lost without such firm requirements. This is not a case like *Bradley* where the commercial purpose of making the clauses conditions precedent is non-existent (in that case the wages book was simply used for premium calculation); here the commercial purpose of the conditions is obvious." Courts in Scotland approach the matter in a similar way. For example, in *Zurich Insurance Plc v. Coralpeak Ltd* [2016] SCOH 43, the Outer House of the Court of Session treated a "reasonable precautions clause" in a fire policy as a condition precedent.

83 In other words, using the words of Lord Herschell in *Derry v. Peek* (1889) 14 App Cas 337 (HL), at 376, the assured has no "honest belief in the truth of such statement".

84 *Peek v. Gurney* (1873) LR 6 HL 337 (HL), 411-13, per Lord Cairns.

85 See, for example, *Holmes v. Jones* (1907) 4 CLR 1692 (High Court of Australia).

86 In *Parker v. National Farmers Union Mutual Insurance Society Ltd* [2012] EWHC 2156 (Comm), [2013] Lloyd's Rep IR 253, where the claim was rejected by the insurer, the insurer's non-fixed costs incurred in investigating the claim were held to be recoverable as damages. This issue was not disputed, although the legal basis of such award has not been elaborated by Teare, J.

87 [2016] UKSC 45, [2017] AC 1, [2016] 2 Lloyd's Rep 198, [98].

contract? The test for repudiatory breach has been described in numerous ways,⁸⁸ but recently the Court of Appeal in *Grand China Logistics Holding (Group) Co Ltd v Spar Shipping AS (The Astra)*⁸⁹ endorsed the “root of the contract” test as “useful and readily capable of application.”⁹⁰ Borrowing the words of Lord Wilberforce in *Federal Commerce v. Molena Alpha (The Nanfri)*,⁹¹ “to amount to a repudiation a breach must go to the root of the contract”. This exercise would require the court to determine i) the benefit that the insurer intended to obtain from the contract; ii) whether a reasonable insurer in the position of the insurer would have no expectation that the assured would be able perform the contract without telling collateral lies of this nature; and iii) if so, was the prospective non-performance such as to go to the root of the contract? To a certain extent, the outcome would depend on the gravity of the breach. For example, utilising fraudulent invoices in advancing a genuine claim might be treated as more serious conduct compared to a collateral lie told in explaining the reason for the assured taking a particular course of action. However, it should be noted that given that the doctrine of utmost good faith is not applicable at the claims stage, it will be an uphill task to convince the court that such a breach, even accompanied by dishonesty, amounts to a repudiatory breach by damaging the relationship of trust between parties.⁹²

(4) Exaggerated Claims

It has been stressed in *The DC Merwestone* that the fraudulent claims rule extends to fraudulently exaggerated claims barring the whole of the policyholder’s claim.⁹³ The law concerning fraudulently exaggerated claims is clear in some respects. As a starting point, it is evident that to defeat a claim, the falsehood must be substantial. This is no more than an application of the *de minimis* rule⁹⁴ and is a useful mechanism utilised to determine whether a fraudulent intent can be imputed to the assured in the absence of independent evidence of his state of mind. The degree to which the claim has been inflated will be the decisive factor in differentiating fraud and innocence. For example, in *Central Bank of India Ltd v. Guardian Assurance Co Ltd*,⁹⁵ the Privy Council seemed to have no problem in drawing the inference

88 For example, in *Decro-Wall International SA v. Practitioners in Marketing Ltd* [1971] 1 WLR 361 (CA), 380, Buckley LJ, expressed the test as follows: “To constitute repudiation, the threatened breach must be such as to deprive the injured party of a substantial part of the benefit to which he is entitled under the contract...”

89 [2016] EWCA Civ 982, [2016] 2 Lloyd’s Rep 447.

90 *ibid*, [76], per Gross, LJ.

91 [1979] AC 757 (HL), 779.

92 *Tullett Prebon plc v BGC Brokers LP* [2011] EWCA Civ 131, [2011] IRLR 420 and *D & G Cars Ltd v. Essex Police Authority* [2015] EWHC 226 (QB).

93 [2016] UKSC 45, [2017] AC 1, [2016] 2 Lloyd’s Rep 198, [52].

94 *Lek v. Mathews* (1927) 29 LIL Rep 141 (HL), 145, per Viscount Sumner.

95 (1936) 54 LIL Rep 247.

of fraudulent intent on the part of the assured in the light of excessive level of exaggeration of the claim submitted.⁹⁶ In cases where there is a degree of exaggeration but not to a substantial extent, the assured could successfully argue that there was no fraudulent intent on his part and inflation was made for bargaining purposes in anticipation that the claims put forward would be cut down by claim adjusters.⁹⁷

This much is clear. However, two issues still remain in the dark: i) in determining whether a claim is substantially exaggerated or not, should one consider the amount of exaggeration itself or should the amount of exaggeration be compared to the percentage of the whole claim? and ii) is it possible that there could be instances where exaggeration is substantial but nevertheless no inference of fraudulent intent can be drawn? These issues have not been aired in *The DC Merwestone*, but by considering the ethos behind the majority judgment, an informed guess can be made in relation to how the law could develop in this area.

On the first issue, there is a fair degree of confusion. In *Galloway v. Guardian Royal Exchange (UK) Ltd*⁹⁸ Lord Woolf MR considered the fraud in the context of the whole claim and decided that because the fraud related to a substantial amount and was a significant percentage of the claim, the whole claim was tainted. Millett, LJ, on the other hand, indicated that the solution favoured by Lord Woolf MR “would lead to the absurd conclusion that the greater the genuine loss, the larger the fraudulent claim which may be made at the same time without penalty.”⁹⁹ He suggested that the fraudulent part of the claim should be considered in isolation in order to decide whether it was “sufficiently” serious to justify stigmatising the claim as a fraudulent one. The fact that Mummery, LJ, agreed with both judges does not add any further clarity. However, the approach advocated by Millett, LJ, was subsequently endorsed by the Court of Appeal in *The Aegeon* where Mance, LJ, observed: “it is sufficient for the rule to apply that the fraud occurs in making a claim and relates to a part of the claim which, when viewed discretely, is not itself immaterial or unsubstantial.”¹⁰⁰ *The DC Merwestone* was a case where the central issue was the impact of a collateral lie on a genuine insurance claim. However, the tenor of the leading judgments in the case is that in determining whether a claim is fraudulent or not the key consideration should be to identify the motive of the assured. If the assured is trying “to obtain more than the law regards as his entitlement” the claim is dishonest.¹⁰¹ It is submitted that the moment the assured puts forward a claim which is substantially exaggerated in its own right, the threshold is passed and the claim should be treated as fraudulent regardless of what percentage of the entire claim the fraudulent part relates to.

96 Here the degree of loss was exaggerated by a hundred fold. See also *Transthene Packing Co Ltd v. Royal Insurance (UK) Ltd* [1996] LRLR 32 (QB) where a claim for the purchase price of goods which were at the time of the loss seriously defective was held to be fraudulent.

97 See, *Nsubuga v. Commercial Union Assurance Co Plc* [1998] 2 Lloyd’s Rep 682 (QB), 686, per Thomas, J.

98 [1999] Lloyd’s Rep IR 209 (CA), at 213–4.

99 *ibid*, 214.

100 [2002] EWCA Civ 247, [2003] QB 556, [2002] 2 Lloyd’s Rep 42, [33].

101 [2016] UKSC 45, [2017] AC 1, [2016] 2 Lloyd’s Rep 198, [26] and [92], per Lords Sumption and Hughes respectively.

On the second issue, it is submitted that in following the spirit of the majority judgment in *The DC Merwestone*, an assured putting forward a substantially exaggerated claim should not be treated as acting fraudulently in cases where the value of the item lost is difficult to assess or is a matter of opinion, or where it is physically impossible to determine the number and value of goods lost, for example when items are lost in a fire. Ultimately, here an assured is not consciously trying to obtain more than he is entitled to in law, so the whole claim should not be tainted by making an inference of fraud. The author believes that the judgment in *Dawson v. Monarch Insurance Co of New Zealand*¹⁰² could be viewed in this light and reflects the state of law in an accurate fashion. There, the assured, a fairground proprietor, claimed under his insurance policy for the loss of an inflatable rabbit and the attachments thereto. The claim advanced was for \$6000.¹⁰³ The insurer denied liability under a fraudulent claims clause on the ground that the claim was fraudulently exaggerated.¹⁰⁴ Having noted that the subject matter of the insurance was a unique item and there was no ready market for inflatable rabbits, the trial judge, Somers, J, reached the conclusion that the claim was put honestly and no inference of fraud could be drawn, although he judged the value of the rabbit to be \$3500. Conversely, it is submitted that the judgment in *Ewer v. National Employers' Mutual General Assurance Association Ltd*¹⁰⁵ is rather questionable particularly considered in the light of the Supreme Court judgment in *The DC Merwestone*. There, the assured made a claim for the value of new goods under a policy which provides cover for replacement value only. McKinnon, J, was prepared to give the assured the benefit of the doubt by saying that: "The plaintiff knew the claim would be discussed, and probably drastically criticised, by assessors; he had been asked for invoices, and he started the bargaining with them by putting down the cost of price to his articles as if they were new. Though I admit the resulting figure is preposterously extravagant, I do not think there was any fraud in putting forward."¹⁰⁶ With respect it is submitted that this goes too far. It is difficult to see on what basis the claim might not be regarded as fraudulent if the assured with the knowledge that the insured goods are second-hand (and accordingly of a lesser value) proceeds to claim their full value from the insurer. Surely, it would be difficult for any assured in that position to argue that the exaggeration was carried out for bargaining purposes especially if there is a huge difference between the value of new goods and second-hand ones.

(5) Fraudulent Claims Clauses

The Supreme Court judgment in *The DC Merwestone* merely states the common law position on the definition of a fraudulent claim; but there is no reason why this cannot be altered with an express provision stipulating, for example, that a collateral lie told at the claims stage

102 [1977] 1 NZLR 372 (High Court Wellington).

103 This was equivalent of approximately £ 3850 in 1977.

104 It was not defined in the clause what amounts to a fraudulent claim, so the matter was left to the common law.

105 [1937] 2 All ER 193 (KB).

106 *ibid*, 203.

would amount to a fraudulent claim.¹⁰⁷ Most fraudulent claims clauses used in practice, in fact, define what amounts to a fraudulent claim in a wide-ranging fashion. For example, the fraudulent claims provision in *Joseph Fielding Properties (Blackpool) Ltd v. Aviva Insurance Ltd*¹⁰⁸ stipulated that the insurer would have a remedy:

(a) if a claim made by [the assured] or anyone acting on [the assured's] behalf to obtain a policy benefit is fraudulent or intentionally exaggerated, whether ultimately material or not, or (b) a false declaration or statement is made or fraudulent device put forward to support a claim.

This kind of clause possibly alters the common law position with regard to exaggerated claims, but more significantly any collateral lie used to support a genuine claim will be caught by it.¹⁰⁹ Similarly, by virtue of cl. 45(3) of the International Hull Clauses 2003, the assured, apart from deliberately and recklessly refraining from misleading the insurer in the proper consideration of the claim or the settlement, is also expected not to conceal any circumstance or matter (either deliberately or recklessly) from the insurers material to the proper consideration of a claim or a defence to such a claim.¹¹⁰

However, fraudulent claims clauses used in practice not only define the meaning of a fraudulent claim but often prescribe the remedy available to the insurer should the assured present a fraudulent claim. For example, the clause that appeared in *Joseph Fielding Properties (Blackpool) Ltd v. Aviva Insurance Ltd* in case of submission of a fraudulent claim provided the insurer with an option to avoid the policy from the inception of the insurance or from the date of the claim or alleged claim. The introduction of the Insurance Act 2015 has altered the legal position dramatically. Section 12 of the 2015 Act now stipulates the remedies available when a fraudulent claim is submitted,¹¹¹ and if parties wish to introduce different remedies, it is essential that they contract out of this provision. In order to contract out of s. 12 and be able to put the assured in a worse position than he would be under the Insurance Act 2015 in terms of remedies for submitting a fraudulent claim,¹¹² the insurer needs to take sufficient steps to draw the disadvantageous term to the attention of the assured

107 In fact, Lord Mance in his dissenting speech encouraged insurers to consider the wording of fraudulent claims provisions in their contracts [2016] UKSC 45, [2017] AC 1, [2016] 2 Lloyd's Rep 198, [133].

108 [2010] EWHC 2192 (QB), [2011] Lloyd's Rep IR 238.

109 It is not clear whether any false statement made at the claims stage would be adequate to bring the remedy stipulated in the clause into operation regardless of any consideration with regard to its materiality to the claim.

110 It is not clear how the test of materiality for the purposes of this clause will operate in practice. For more discussion on the subject, see, B Soyer, 'A Survey of the New International Hull Clauses' (2003) 9 JIML 256, at 263.

111 Essentially the insurer i) is not liable to pay the claim, ii) may recover from the assured any sums paid by the insurer in respect of the claim; and iii) may by notice to the assured treat the contract as having been terminated with effect from the time of the fraudulent act.

112 The Act refers to a term of this nature as a disadvantageous term.

before the contract is entered into,¹¹³ and such term should be clear and unambiguous as to its effect.¹¹⁴

As a final point, a few observations need to be made with regard to the use of express fraudulent claims clauses, particularly given that Lord Mance has encouraged the sector to reflect on this matter in the light of the majority decision in *The DC Merwestone*. Assuming that such a clause introduces alternative remedies to the ones encapsulated in s. 12 of the Insurance Act 2015 by contracting out of the Act in the manner prescribed by s. 17, the first question is the relationship between the remedies stipulated and the common law remedy of forfeiture.¹¹⁵ Imagine that the relevant clause stipulates that “If the assured shall make any claim knowing the same to be false or fraudulent, as regards amount or otherwise, this policy shall become void, and all claim there-under shall be forfeited.”¹¹⁶ It is submitted that the mere existence of the fraud clause and reference to the remedy of “forfeiture” in the clause, should not amount to waiver of alternative remedies. Given that the common law remedy of forfeiture stems from a rule of law rather than any term of the contract,¹¹⁷ ordinary contract law principles suggest that “express, pertinent and apposite” wording¹¹⁸ would be required to found a waiver. Therefore, in the absence of “unequivocal wording” indicating that remedies stemming from law are replaced by contractual remedies,¹¹⁹ the common law remedy of forfeiture should exist side by side with the remedy stipulated by the fraudulent claims clause.

Another matter that requires further evaluation is identifying the precise effect of a fraudulent claims clause. Most of such clauses used in the market stipulate that in a case where a fraudulent claim has been submitted, “all benefit under this clause shall be forfeited.” Potentially these words may mean: i) that the particular claim tainted with fraud will be forfeited; ii) that all the benefit under the policy will be forfeited as from either a) the date when the claim arose or b) the date of fraud; iii) that the liability of the insurer will be discharged automatically with prospective effect from the date of breach; or iv) the liability of the insurer will be avoided *ab initio*.

113 Section 17(2) of the Insurance Act 2015.

114 Section 17(3) of the Insurance Act 2015.

115 The legal position is similar in Scotland. It has been confirmed in *Fagnoli v GA Bonus Plc* 1997 SCLR 12, 30, per Lord Penrose, that “a claim tainted by fraud would be cut down as a whole”.

116 This clause appeared in *Dome Mining Corporation Ltd v Drysdale* (1931) 41 LIL Rep 109 (KB).

117 This point made forcefully by Lord Hughes in *The DC Merwestone* [2016] UKSC 45, [2017] AC 1, [2016] 2 Lloyd's Rep 198, [55]. See also, the observations of Lord Mance, [119]. Similarly, see *The Mercandian Continent* [2001] EWCA Civ 1275, [2001] 2 Lloyd's Rep 563, [11] per Longmore, LJ.

118 *Quebec Marine Insurance Co v. Commercial Bank of Canada* (1870) LR 3 PC 234, 243, per Lord Penzance.

119 On the issue of waiver in the context of commercial contracts, see the judgment of the House of Lords in *Motor Oil Hellas (Corinth) Refineries SA v. Shipping Corporation of India (The Kanchenjunga)* [1990] 1 Lloyd's Rep 391.

Out of these alternatives, bearing in mind that in recent years the harshness of “avoidance” as a remedy has attracted considerable criticism from various judicial authorities,¹²⁰ it would not be fanciful to suggest that courts would take some convincing that both parties wanted the fraud clause to operate retrospectively.¹²¹ Also, if it was the intention of the parties to confine “forfeiture” to the relevant claim as suggested by (i), given that this adds nothing to the common law remedy of forfeiture, which already exists by operation of law, one might wonder why the parties went to the trouble of incorporating a “fraudulent claims clause” into their contract.¹²² This realistically leaves us with (ii) and (iii). In *Insurance Corporation of the Channel Islands Ltd v. McHugh*¹²³ when construing the phrase “all benefit under this policy shall be forfeited”, Mance, J, in certain parts of his judgment seems to be suggesting that the effect of “forfeiture” is prospective, but this matter has not arisen for decision in the case.¹²⁴ In Scotland in *Fagnoli v. G A Bonus plc*,¹²⁵ when the Court of Session was required to determine whether a similarly worded clause applied retrospectively, the decision was in the negative. Lord Penrose was of the view that the words “all benefit under this policy should be forfeited” were ambiguous. This could mean that all the benefit in respect of the particular claim or all benefit in respect of the policy as a whole. He resolved the issue by applying the *contra proferentem* rule and construing the clause against the party who puts it forward. The insurer had drafted the clause, accordingly it was held that only the claim which the fraud related should be forfeited.¹²⁶

Although the weight of authority seems to support the contention that the effect of “forfeiture” is prospective, still uncertainty remains as to what point in time the remedy will bite, whether from the date of breach or from the date the claim arose, and whether it applies automatically or not.

The use of the term “void”, which is common in standard fraudulent claims clauses, can also be controversial in this context. In its most technical sense, a void contract describes a situation where no binding contract comes into being. This might arise for a variety of reasons, for example either because the parties were at cross purposes¹²⁷ or where parties made a mistake by concluding a contract where no subject matter existed.¹²⁸ In these circumstances no contract at all arises. The term is also sometimes used to describe a situation where deeds and

120 See particularly, *The Star Sea* [2001] UKHL 1; [2003] 1 AC 469, [51], per Lord Hobhouse.

121 It has clearly been stated in *The Star Sea* [2001] UKHL 1, [2003] 1 AC 469, [64], by Lord Hobhouse that the remedy of “avoidance” operates distinctly from the remedy of “forfeiture of all benefit”.

122 Cf the decision of the Court of Session (Scotland) in *Fagnoli v. G A Bonus plc* [1997] CLC 653.

123 [1997] LRLR 94.

124 *ibid*, 135.

125 [1997] CLC 653.

126 The South African court reached a similar decision in *Lehmbackers Earthmoving v. Incorporated General Insurance Co* [1983] 3 SA 513 (App. Div).

127 *Falck v. Williams* [1900] AC 176 (PC).

128 *McRae v. Commonwealth Disposals Commission* (1951) 84 CLR 377 (High Court of Australia).

other instruments executed to transfer an interest in the property or money are of no force and effect. When used in this context, it usually means that the instrument is not effective to transfer whatever interest is sought to be conveyed or assigned, but it does not mean that the instrument fails to give rise to binding contractual obligations. Again, there are instances where the word “void” has been used to describe loosely the effect of illegality arising during the performance of a contract.¹²⁹ Here, illegality usually makes the contract unenforceable but its effect is usually prospective.

It is, therefore, evident that the word “void” could carry potentially different meanings. It is highly unlikely that the word has been used in this context in its most technical sense, meaning that the contract has never come into existence. The fraud that arises during the performance of the contract can hardly be seen as having an impact on the foundations of the agreement between the parties. It is possible and certainly advantageous for the insurer to argue that the term entitles him to avoid the contract *ab initio* should a fraudulent claim be submitted. However, given the fact that the potential impact of such interpretation is devastating for one of the parties, it would probably be treated as an improbable term for them to agree on in the absence of unambiguous wording to that effect.¹³⁰ Of course, on the premise that the parties were ambiguous as the effect of this clause, it is always open to courts to construe it *contra proferentem* and resolve it against the party who benefits from the clause—in this case the insurer.¹³¹ If this solution is to be adopted, the court would be prepared to make the remedy available to the insurer in case of breach of such a clause only prospectively (*de futuro*).¹³²

D. Conclusion

It has often been assumed that the fraudulent claims rule in insurance law should have a deterrent effect and is a facet of the doctrine of good faith. As a result, the boundaries of the rule have been construed in a broad fashion and in the recent past, the courts lower in the hierarchy took the view that collateral lies told in the process of advancing a genuine claim were capable of converting the claim into a fraudulent one. In other areas of law of obligations, however, a different judicial trend is evident and judges have been prepared to treat those who have been morally questionable in a more proportionate fashion. The majority of the Supreme Court in *The DC Merwestone* took a similar stance and was prepared to hold

129 *Napier v. National Business Agency Ltd* [1951] 2 All ER 264 (CA).

130 In the clause adopted in *Joseph Fielding Properties (Blackpool) Ltd v. Aviva Insurance Ltd* [2010] EWHC 2192 (QB); [2011] Lloyd's Rep IR 238, clear language was used to illustrate that the contract would be avoided from the inception upon submission of a fraudulent claim.

¹³¹ Although there is a growing reluctance to use the *contra proferentem* rule when interpreting contracts, in the context of insurance law, in particular when there is a huge discrepancy in terms of the bargaining power of the parties, courts have employed this principle occasionally. See, for example, *Pratt v. Aigaion Insurance Co SA (The Resolute)* [2008] EWCA Civ 1314; [2009] 1 Lloyd's Rep 225 and *Sugar Hut Group v. Great Lakes Reinsurance (UK) Plc* [2010] EWHC 2636 (Comm); [2011] Lloyd's Rep IR 198.

¹³² In *Direct Line Insurance plc v. Fox* [2009] EWHC 386 (QB), it was held by HH Judge Seymour QC that the standard express fraudulent claims wording did no more than replicate the common law and did not have retroactive effect—the phrase “shall become void” meaning that the previous accrued rights were unaffected.

that collateral lies told at claims stage do not have an impact on the validity of a genuine insurance claim.

It has been put forward in this article that historical assumptions on a possible affiliation between the fraudulent claims rule and utmost good faith doctrine are extremely questionable and there is no evidence to suggest that the rule should carry a deterrence effect. Considering the future development of the fraudulent claims rule in the light of the Supreme Court judgment, the author concludes that:

- i) Collateral lies told at claims stage, even though they do not have an adverse impact on the validity of a genuine claim, could potentially enable the insurer to claim damages and in extreme cases even terminate the contract prospectively;
- ii) Some lies told at claims stage could still potentially convert the claim into a fraudulent one especially if they are capable of transforming the basis of the claim;
- iii) Deliberate concealment of certain facts by the assured at claims stage could render the claim fraudulent especially if the assured is aware that the insurer is in the process of evaluating a claim put forward is labouring under a misapprehension as to the circumstances concerning the loss or the evidence put forward;
- iv) A knowing exaggeration of a claim, even if done for negotiation purposes, could potentially convert the claim into a fraudulent one on the premise that the assured has no honest belief in such a claim; and
- v) It is possible that insurers might opt to use tailor-made fraudulent claims rules to alleviate the potential impact of recent judicial developments. However, careful drafting would be needed in order to achieve this outcome; and some of the commonly used clauses in the market lack the desired clarity.