Gilding the lily, post-Versloot

Angela Bilbow - 05 October, 2016

Following the Supreme Court's landmark ruling which held that a collateral lie, or fraudulent device, does not lead to the forfeiture of an insurance claim, a roundtable hosted by Brick Court Chambers debated the wider impacts to the UK's insurance sector.

On 20 July 2016 the United Kingdom Supreme Court handed down judgment in *Versloot Dredging v HDI Gerling Industrie Versicherung* that a collateral lie used in an otherwise legitimate insurance claim does not lead to forfeiture.

The controversial development of justified claims that are supported by collateral lies was a first for the Supreme Court to consider, with it ultimately drawing a distinction between fraudulently exaggerated claims, where the insured seeks to gain something for which it is not entitled, and claims where the lie is irrelevant to the existence or amount of a claim, where the insured is trying to gain no more that it is entitled.

Nonetheless, the judgment led to mixed reaction among the legal profession as to the potential long-term implications. At the time, **Ince & Co**, which represented insurer **HDI Gerling**, said in a statement that it agreed with dissenting **Lord Mance** that "abolishing the fraudulent devices rule meant that claimants pursuing a bad, exaggerated or questionable claim can tell lies with virtual impunity".

On the other hand, **Holman Fenwick Willan**'s (HFW) **Jim Cashman**, who represented **Versloot Dredging**, pointed to the very narrow set of circumstances of the case and said this type of claim is infrequent. "The law has not changed," he told *CDR*, "I do not think there will be a flood of people lying in their insurance claims as a result of this judgment".

A FRAUDSTER'S CHARTER?

The roundtable, which was attended by a mix of in-house and private practice insurance lawyers, was presented by **Brick Court Chambers**' **Richard Lord QC**, who was instructed by HFW in *Versloot*, , pupil barrister **David Heaton** and former Commercial Court, Court of Appeal and Privy Council and judge **Sir Richard Aikens**.

Kicking off the discussion, Lord recalled the reaction of the press which had likened the decision in *Versloot* to a 'fraudster's charter' – a conclusion he did not accept. It was a policy decision, he said, which could have gone either way.

However, the case, which concerned a EUR 3.2 claim under a marine insurance policy, raises interesting questions, he said, on how assureds, insurers and insurance litigators will behave post-*Versloot*, and, indeed, *Hayward v Zurich* (2016), which held that if an insurer discovers proof of fraud post-settlement, even though it had suspected the fraud and settled anyway, it could set aside the settlement under the tort of deceit.

Response at the roundtable was mixed. One in-house counsel said that in light of *Versloot*, the wording in its contracts had been assessed and was found to be broad enough to preserve its position against claims where fraudulent devices are present.

It was unlikely, they continued, that a large number of their claimants will even have heard of *Versloot*; therefore, they did not see their 'day job' being largely affected. However, "shock factor and impact were two different things".

Another reiterated that very few contested claims actually make it to court. The crux of the problem, said the City insurance lawyer was that insurers already spend a lot of resources on investigating fraudulent claims that never make it to court.

"From a practical point of view, *Versloot* is unlikely to herald a sea change for insurance litigators. Telling collateral lies in support of a genuine claim continues to have serious ramifications, even if forfeiture of the claim is no longer one of them," say **Maurice Holmes** of **Crown Office Chambers**, who attended the event.

Hence, he says, it seems doubtful that there will be a discernible increase in the number of insureds who are prepared to tell collateral lies, who would otherwise have not done so before the judgment.

While many insurers may feel they have airtight wording to protect against fraudulent devices, many law firm briefings, following the publication of the judgment, suggested that insurers may need to insert express exclusion clauses in their contracts.

The problem with contractual or statutory remedies for insurers and reinsurers post-*Versloot* is really a matter of timing, says **Gavin Coull**, partner at City insurance law firm **Foran Glennon**.

As the dissenting judgment from Lord Mance suggests, underwriters could seek to impose tighter exclusions including any deliberate untruth in the presentation of a claim, irrespective of whether it would have ultimately made any difference to coverage, says Coull.

"Underwriters could also craft contractual remedies based on proportionality, but would either of these options be practical or commercial in the current market? Similarly, the court could impose cost sanctions if, as the majority opine, the 'gilded lily' is revealed at trial and the effect of the lie can be quantified in terms of wasted costs."

However, in the real world, he says, when the majority of claims do not reach court, what redress do underwriters have when assessing claims and seeking a discount, or imposing a measurable deterrence, when the effect of the lie is not readily identifiable or quantifiable at the time the lie is made?

LEGISLATIVE GUIDANCE

While insurance fraud appears to be high on the government's agenda, with the 'Insurance Fraud Taskforce' just one initiative where efforts are being ramped up, the new Insurance Act 2015, which came into force in August 2016, sheds little light in defining what a 'fraudulent claim' is, with section 12 only going as far as to codify the common law rules for fraudulent claims.

"If you changed the word 'fraud' to 'dishonesty' then there would be a greater issue," said one attendee. When does an exaggeration become dishonesty? The new Act is not "wholly insurer-friendly".

"Everyone can identify with the stress of making a claim," said another, adding that a good insurance broker will set coverage expectations early on.

With the amount of money and time spent on investigating claims being a recurring issue mooted during the roundtable, as well as the feeling that there is an ever-increasing burden on the insurer to prove a lie, Aikens asked if there was a "halfway house", perhaps where cost sanctions are applied in the event a collateral lie is discovered.

"Proportionate deduction would naturally sit with the issue," said one in-house counsel, but how could this be measured?

The fact is, said one, that cost sanctions are already available for dishonest claims. The new Act, they said, "may have

deliberately avoided this".

While some at the event felt that *Versloot* gave entitlement to 'gild the lily', ultimately it is beneficial to claimants to tell the full story. A collateral lie may have been deemed permissible by the Supreme Court in an otherwise valid insurance claim, but non-disclosure of the matter in subsequent years can have "massive consequences". If it is ever adjudicated…