

Standing firm on insurance fraud



DONALD DINNIE,
Head of Norton Rose Fulbright South
Africa Disputes Practice

Because our civil law is not punitive, a fraudulent device used in an insurance claim will not non-suit the insured for that portion of the claim which is untainted by the fraud unless there is an appropriate fraud clause in the insurance policy.

The position is different in English law. The Queen's Bench Division of the Commercial Court recently determined in the matter of *Versloot Dredging v HDI Gerling Industrie Versicherung* that an insured who has made a fraudulent claim forfeits any lesser claim that they could properly have made. That fraudulent claims rule is also extended to cases in which the insured deployed in support of a wholly valid claim some fraudulent means or device to advance the claim.

The claim is fraudulent if the insured believes that it suffered the loss claimed but seeks to improve or embellish the facts surrounding the claim by some lie. Reckless untruth is sufficient to amount to fraud for the purposes of the English fraudulent claims rule.

The English insured must not be allowed to think that if any my fraud is successful then I will gain and if it is unsuccessful I will lose nothing.

It reflects a policy of the law to discourage the making of fraudulent claims.

The English courts have also said that the rule is deliberately designed to operate in a draconian and deterrent fashion.

"The policy of the rule is to discourage any feeling that the genuine part of the claim can be regarded as safe and that any fraud will lead, at best, to an unjustified bonus, and worse, in probability, to no more than a refusal to pay a sum which was never insured in the first place."

It is regrettable that the South African courts have discounted that rationale on the basis that the penalty for an insured in the use of fraudulent devices is only the disallowance of that portion of the claim, an adverse cost order, and possible claim for damages by the insurer for the costs of investigating and dealing with the fraudulent elements or part of the claim, and an exposure to criminal sanction for fraud.

Relying on the justice system - The reality is that the civil sanction relies on and imposes on the insurer an obligation to take additional steps and to incur additional costs in seeking a remedy, and in respect of an insured who at the end of the trial may be without financial assets to meet adverse cost orders or damages awards. As regards the criminal sanction, the insurer has to rely on a criminal justice system which is at best under enormous resource and capacity pressures.

British insurers have also taken the step of instituting private prosecutions where the Crown was declined to do so. In the recent judgment of *AXA General Insurance Limited & Others*, the insurer successfully prosecuted the insured for a fraudulent claim.

Also recently, the House of Lords has approved the Criminal Justice and Courts Bill which proposes to give the courts power to dismiss personal

injury claims where the claimant has been "fundamentally dishonest". That is even if the claimant would still have been entitled to damages. The courts will make an exception only if the claimant would suffer "substantial injustice" and the court can order the claimant to pay costs incurred by the defendant.

The Justice Minister commented:

"The government simply do not believe that people who behave in a fundamentally dishonest way by grossly exaggerating their own claim or colluding should be allowed to benefit by getting compensation in spite of their deceit."

Whether that clause sees the light of day remains to be seen.

The introduction of that amendment, together with the successful use of private prosecutions for fraud, and the English "fraud unravels all" approach to fraudulent insurance claims gives a general sense of the mood of the insurance industry and of the public to fraudulent claims. It is, after all, the honest insureds who indirectly pay for fraudulent insurance claims, even if those claims are unsuccessful.

With insurance laws amendments in the pipeline, the time may be right for a fundamental dishonesty clause relating to insurance claims similar to clause 45 of the Criminal Justice and Courts Bill.

Absent legislative intervention, the insurers can make successful use of the fraud clauses in use in the industry. Exclusions can be tightened up by having regard to the *Versloot Dredging* judgment.

Insurers should also consider, on the appropriate facts instituting civil claims for damages when fraudulent means are used, and private prosecutions when the State declines to prosecute.

It is time to end fraudulent insureds' free-ride.