

Fraud can cost you dear - even if you win your case

Chris Jefferis



Dishonest claims continue to cost the insurance market dear; an Association of British Insurers report of July 2009 estimated undetected general insurance claims fraud totals £1.9bn (\$3.09bn) a year, with early indications of a rise in response to the recession.

But what of those claims that do reach the courts? In this article we consider the judicial approach in some recent cases.

It is a quirk of English insurance law that the effect of a claimant's dishonesty depends on the point in the process at which it occurs. At the pre-litigation stage, the common law rule is that a claim, if made fraudulently by using dishonest devices to support it or for an impermissibly exaggerated amount, is forfeit. Simple enough when the claim has not been paid – the insurer simply does not pay, provided he can make good this defence. Where the claim has been paid in part after fraud has taken place, that payment will be returnable.

But what happens if the claim is initially honestly presented, a payment on account is then made and only then does the insured act dishonestly? The Court of Appeal's answer in the 2005 case of *Axa v Gottlieb* was that fraud lost the insured the right to retain the monies initially paid.

A similar point arose in the recent case of *Direct Line v Fox*. Simplifying the facts to their essentials, Fox made a claim in respect of fire damage to his property. The claim was settled in part by cash but the second part of the loss adjustment took the form of a written agreement by Direct Line to pay a further sum, once that had been vouched.

Fox put forward a false invoice in support. Direct Line had suspicions about its authenticity and informed Fox the loss adjusters would be making a further visit to verify the works. At this point, Fox wrote to Direct Line attempting to retract that part of the claim.

The judge held although Fox had been dishonest, the insurance policy had been supplanted by the written agreement and the remedy of forfeiture for use of a fraudulent device did not attach to that. That outcome was probably a bit of a shock to Direct Line.

The judge also said, obiter, forfeiture could not be avoided by retracting the false claim or forged evidence. It is fair to say the weight of authority favours that view.

However, he said if that view was wrong and forfeiture could be avoided by retraction, that would only arise where the insured had retracted voluntarily and at a point when insurers had not raised any suspicions about the claim. Therefore, even if retraction does have a curative effect, it would not have assisted Fox.

In 2002, the House of Lords decided in the case involving the *Star Sea* a lack of good faith at the litigation stage of a claim was not privately actionable by insurers. The primary (but unspoken) reason may have been the very old rule that witnesses, even if malicious or dishonest, have absolute immunity from civil suit for what they say in proceedings.

However, this is not a complete answer to dishonesty in civil litigation and there has been much attention recently on the ways it can be controlled.

In *Kirk v Walton*, Justice Cox granted permission for contempt proceedings to be brought against the claimant, Kirk, on the basis of DVD footage obtained by insurers that appeared to show Kirk enjoying an active lifestyle, contrary to evidence given in support of her personal injury claim.

Cox J said the contrast between Kirk's verified statements, persisted in for a long period of time, and what was shown on the DVD, taken together with the comments of the insurer's medical experts, raised a strong prima facie case she had been lying.

She therefore authorised the insurers to commence and conduct what in effect was a private criminal prosecution for contempt of court, an offence that can lead to imprisonment at the judge's discretion.

The contempt proceedings produced an interesting twist. Quite rightly, the judge hearing them decided he had to apply a criminal standard of proof. Doing so, he concluded in truth Kirk probably was unwell, with a condition that gave her good days and bad days. So, the DVD evidence, which might have been taken on a good day, did not prove she was faking an injury.

But she did not escape. She had lied in the proceedings because her medical condition was one she had suffered from before the motor accident. She was fined £2,500 and ordered to pay a substantial part of the insurer's legal costs.

In the 2001 case of *Molloy v Shell*, Lord Justice Laws suggested, obiter, it might be possible for the courts to refuse to award any damages at all where a claim had been exaggerated. However, that Old Testament version of natural justice did not withstand scrutiny in the recent case of *Shah v Ul-Haq*.

The issue before the Court of Appeal was whether the judge should have struck out a genuine personal injury claim on the basis that the claimant had supported another person's fictional claim in the same proceedings.

It was held a genuine claim could only be dismissed on account of dishonesty where that claim was based on an insurance contract, namely a contract of utmost good faith; there was no more general rule of law.

The court was sympathetic to the difficulties faced by insurance companies in dealing with false or exaggerated claims for personal injury but considered the law so well established it would be wrong to change it by judicial intervention. Any such change was a matter for parliament.

It is a long-established principle of English law a losing party usually pays the winning party's costs. However, in deciding whether to make a different order, the court is entitled to take into account the conduct of the parties. The courts have shown over recent years they will express their disapproval of dishonesty in adverse costs orders. For example, in *Sulaman v Axa*, insurers sought to recover sums paid before discovery of a fraud.

After a three-month trial they succeeded against most of the defendants but failed against Sulaman. Following her "victory", Sulaman applied for her costs but was awarded only one-third of them because the trial judge was satisfied she had lied in two respects in her evidence. This decision was upheld on appeal.

So it can be seen in the past 12 months fraud has continued to make a splash in the law reports. In that context, we look forward with particular interest to the law commission's paper on the "post-contractual duty of good faith", to see if the approach taken by the courts in this field is supported.

This article is copyright Informa UK Limited and is reproduced with permission. Further reproduction, retrieval, copying or transmission of this article is not permitted without the publisher's prior consent. Informa UK Ltd does not guarantee the accuracy of the information contained in this article nor does it accept responsibility for errors or omissions or their consequences.

Ince & Co is an international commercial law firm which practises in seven broad strands:

AVIATION | BUSINESS & FINANCE | COMMERCIAL DISPUTES | ENERGY & OFFSHORE | INSURANCE & REINSURANCE | INTERNATIONAL TRADE | SHIPPING

Dubai	Hamburg	Hong Kong	Le Havre	London	Paris	Piraeus	Shanghai	Singapore
T:+971 4 3598982	T:+49 40 38 0860	T:+852 2877 3221	T:+33 2 35 22 18 88	T:+44 20 7481 0010	T:+33 1 53 76 91 00	T:+30 210 4292543	T:+86 21 6157 1212	T:+65 6538 6660
F:+971 4 3590023	F:+49 40 38 086100	F:+852 2877 2633	F:+33 2 35 22 18 80	F:+44 20 7481 4968	F:+33 1 53 76 91 26	F:+30 210 4293318	F:+86 21 6170 3922	F:+65 6538 6122

E: firstname.lastname@incelaw.com

24 Hour International Emergency Response T +44 20 7283 6999

The information and commentary herein do not and are not intended to amount to legal advice to any person on a specific matter. They are furnished for information purposes only and free of charge. Every reasonable effort is made to make them accurate and up to date but no responsibility for their accuracy or correctness, nor for any consequences of reliance on them, is assumed by the firm. Readers are firmly advised to obtain specific legal advice about any matter affecting them and are welcome to speak to their usual contact.

© 2011 Ince & Co International LLP, a limited liability partnership registered in England and Wales with number OC361890. Registered office and principal place of business: International House, 1 St Katharine's Way, London, E1W 1AY.

LEGAL ADVICE TO BUSINESSES GLOBALLY FOR OVER 140 YEARS