Insurance

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Fraud in insurance & fraud on insurers: a distinction without a difference, ask **Alison Padfield** & **Sam Nicholls**

IN BRIEF

- Fraud means an insurance claim is forfeited, but after *Fairclough Homes Ltd v Summers*, this does not apply to other civil claims. As a result, applications by insurers for security for costs & commital for contempt are likely to increase.

Why should a claimant forfeit the whole of a fraudulently exaggerated claim made directly against an insurer under an insurance policy, but only forfeit the fraudulently exaggerated part of a civil claim in which the defendant is insured, with the damages to be paid (indirectly) by an insurer? This is the puzzle which remains after the Supreme Court's decision in *Fairclough Homes Limited v Summers* [2012] UKSC 26.

The question of how to deal with a fraudulently exaggerated civil claim has a short—barely a decade—but interesting history (see Dominic Regan's article "Damaged!", NLJ, 29 June 2012, p 855). In the law of insurance, on the other hand, the modern approach was established by Willes J in *Britton v Royal Insurance Co* (1866) 4 F & F 905. As Willes J explained, in a claim for goods consumed by fire: "It would be most dangerous to permit parties to practise such frauds, and then, notwithstanding their falsehood and fraud, to recover the real value of the goods consumed."

A matter for Parliament

Attempts to bring other civil cases into line with the approach taken in insurance claims were roundly rejected in *Ul-Haq v Shah* [2009] EWCA Civ 542. The Court of Appeal said that there was no power to reject a claim on the grounds that it was fraudulently exaggerated, but that this aspect of the claim should then be dealt with in costs. Smith LJ said that she had "some sympathy with the view that fraudulently exaggerated claims should be struck out in their entirety", but that the law was so well-established that that would have to be a matter for Parliament.

In *Fairclough*, the Supreme Court said that *Ul-Haq* was wrongly decided and that the courts do have jurisdiction to strike out a statement of case in a fraudulently made claim for abuse of process, either under CPR 3.4(2) or in their inherent jurisdiction. However, the victory was Pyrrhic, as the Supreme Court went on to say that although the power existed, it should only be exercised in "very exceptional circumstances", of which it struggled to find an example: "It is very difficult indeed to think of circumstances in which such a conclusion would be proportionate. Such circumstances might, however, include a case where there had been a massive attempt to deceive the court but the award of damages would be very small."

A sharp contrast

The contrast with the approach to fraudulent insurance claims, which was referred to by the Supreme Court in *Fairclough* only in passing, could not be greater. The principle described so graphically by Willes J in 1866 has been extended to otherwise honest claims put forward with the assistance of a "fraudulent device". The result is the loss (or "forfeiture") of the whole claim, including any part which could have been made honestly. Fraudulent claims are unaffected by the Consumer Insurance (Disclosure and Representations) Act 2012 (not yet in force), and reform by the Law Commission looks unlikely. In its Consultation Paper on Insurance Contract Law (*Post Contract Duties and Other Issues* (CP No 201, 20 December 2011), the Law Commission noted that "insurers are particularly vulnerable to fraud, as policyholders are often the only people fully aware of the circumstances of a loss", and said that it thought that fraud should lead to forfeiture of the whole claim to which the fraud relates.

This can have startling consequences. In *Aviva Insurance Ltd v Brown* [2011] EWHC 362 (QB), a subsidence claim, Eder J, while recognising that the conclusion "might seem harsh", held that the entire claim was forfeited on the basis that a single one of 21 allegations of fraud was made out. This was so even though the allegation concerned a claim for alternative accommodation which was not pursued by the insured. In *Sharon's Bakery (Europe) Ltd v Axa Insurance UK plc* [2011] EWHC 210 (Comm), the whole of an otherwise honest claim was forfeited for the use of a "fraudulent device": a single false invoice submitted in support of the claim.

Ongoing battle

With no likelihood of parliamentary reform on the horizon, it seems that *Fairclough Homes* has closed one front in the battle between liability insurers and fraudulent claimants. Insurers will, with the encouragement of the Supreme Court in *Fairclough*, look to the other weapons at their disposal. These include applications for security for costs on the basis that the claimant's after the event insurance may be avoided for fraud (see *Michael Phillips Associates Ltd v Riklin* [2010] EWHC 834 (TCC)) and applications to commit claimants to prison for contempt of court (see *Brighton & Hove Bus & Coach Co Ltd v Brooks* [2011] EWHC 2504 (Admin)). NLJ

Alison Padfield & **Sam Nicholls,** Devereux Chambers. Alison Padfield is the author of *Insurance Claims* (Bloomsbury Professional, 3rd edition, 2012). E-mail: *padfield@devchambers.co.uk* & *nicholls@devchambers.co.uk* Website: *www.devereuxchambers.co.uk*