A Critical Review on the Collateral Lie in Insurance Law: the Definition, the Reasonableness and the Future Applications and Developments

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Abstract

After introducing the fraudulent claims rule as background, this dissertation starts from *Versloot Dredging BV and Another v. HDI Gerling Industrie Versicherung AG and Others (The DC Merwestone),* a decision given by the Supreme Court in recent years, trying to figure out the meaning of the new concept of "collateral lie" and give a more detailed and practical guidance by means of analyzing the relationship between the lie and the causation-loss demonstration in proving the validity of a claim, based on case comparison and analysis as well as the clues found in the judgment itself. Further, it also focuses on the reasonableness to excuse a morally disapproved collateral lie, except for considering the important reasons such as proportionality that having been fully discussed in the Supreme Court, it meanwhile emphatically disapproves the opposing views after the decision. Despite in support of the decision, the final parts of this paper critically come up with the weak points in the current situation, and give some suggestions on how they could be addressed, particularly in the light of the new regime of Insurance Act 2015 in insurance law, as well as providing the insurers with advice on policy terms drafting, to contract out its effect.

Key words: fradulent claim, collateral lie, causation, contract wording

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1. Practical and Theoretical Background

1.1 Introduction

The fraudulent claim has very significant negative impacts on the insurance market. As the Law Commission Paper recorded, according to the 2010 Association of British Insurers reports, insurers detected 133,000 fraudulent claims, which worth up to £919 million with the cost of £2 billion every year,[1] and its size has remained at the equivalent level over the following years.[2] These costs in turn was distributed to general policyholders in market by widely shared increased premium. Additionally, the insurance contract bases upon good faith,[3] and the duty of good faith has become a long-established rule of law at each stage of contract in insurance law.[4] Making a fraudulent claim is undoubtedly incompatible with the doctrine, and it has been pointed out by authorities that the fraudulent claims rule, deriving from the duty of good faith should be a separated rule applicable tailored to the post-contractual position,[5] even if the policy was silent on it.[6]

Resulted from the seriousness of fraudulent claim and its "morally repugnant" nature, the judiciary has imposed strict attitude towards it to formulate a deterrence for any potential fraudulent insured. The fraudulent claims rule was generated and applied against this background, and owing to the law reform brought by the

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[1] Consultation Paper No 201: Insurance Contract Law: Post-Contract Duties and Other Issues, para 6.6

[2] Law Com 353, para 19.1; see also ABI News Articles 'One scam every minute – ABI reveals the true extent of insurance fraud in the UK' <https://www.abi.org.uk/news/news-articles/2018/08/one-scam-every-minute/> accessed 15 June 2019

[3] Marine Insurance Act 1906 (MIA 1906 here below), Section 17

[4] *Boulton v. Houlder Bros & Co* [1904] 1 KB 784 (CA) at 791, per Mathew LJ

[5] *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd (The Star Sea)* [2001] 1 Lloyd's Rep 389, [61]-[62]; *Agapitos v. Agnew (The Aegeon) (No.1)* [2002] 2 Lloyd's Rep 42 at [45], *AXA v. Gottlieb* [2005] Lloyd's Rep. I.R. 369 at [31]; *Versloot Dredging BV and Another v. HDI Gerling Industrie Versicherung AG and Others (The DC Merweston)* [2016] UKSC 45, [34]-[35]

[6] *Britton v Royal Insurance Co* (1866) 4 F & F 905

Insurance Act 2015 (IA 2015), the remedy for the insurer to the fraudulent claims becomes clear in s.12 that a fraudulent act should forfeit the whole claim that it relates, besides, any interim payments made under that claim must be returned and the insurer has the option to terminate the contract from the time of the fraudulent act. However, the Law Commission deliberately left blank to the definition of the fraudulent claim in order to enable the flexibility of the Act application, and it is for the court to decide what constitute a fraudulent claim.

1.2 The formations where the fraudulent claims rule applies

There are various formations of fraudulent claims which are well-established and widely accepted. In the first category, the insured fabricates a claim which it has not suffered any fortuity that results in loss at all, in parallel with being denied by the rule of causation the insured should also be deemed as making a fraudulent claim thus the whole claim related is forfeited.[7] In the second category, the insured knows it has suffered no loss or lesser loss from the casualty,[8] or is reckless with regard to whether what it claimed is the true case or not,[9] it still knowingly or recklessly claims for indemnification by fabricating or exaggerating the loss. Under both situations even in the latter one where the insured did suffer a genuine loss but exaggerate the claim for a larger amount, the rule that forfeiture of the whole claim related is still applicable so

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[7] The most illustrative examples such as the insured scuttled a vessel intentionally in *P Samuel & Co Ltd v Dumas* (1924) 18 Ll L Rep 211 or the insured was the malicious arsonist in *Stemson v AMP General Insurance (NZ) Ltd* [2006] Lloyd's Rep IR 852, then made a claim against the insurer by fabricating the facts to prove it had suffered fortuity.

[8] *The Aegeon*, at [30]. For the insured claimed for loss which has not suffered, see *Galloway v Guardian Royal Exchange (UK) Ltd* [1999] Lloyd's Rep IR 209. For exaggerating the loss, see *Joseph Fielding Properties (Blackpool) Ltd v. Aviva Insurance Ltd* [2011] Lloyd's Rep I.R. 238; *Orakpo v. Barclays Insurance Co Ltd* [1995] L.R.L.R. 443

[9] *The Aegeon*, at [30]

long as the exaggerated part to be examined alone is material, which has been affirmed by the authorities.[10] The third category is in the form that the insured honestly believe what it claimed initially, as the claim proceeding the insured realized that the claim is an exaggerated one but continuously maintains it. The fourth category is that where there is a known defence to the insured but it deliberately suppresses. The last two classes were identified as falling within the fraudulent claim in *The Aegeon,*[11] and treated as good law in *Versloot Dredging BV and Another v. HDI Gerling Industrie Versicherung AG and Others (The DC Merwestone)*.[12]

1.3 The recent developments in Versloot

Versloot is the latest decision delivered by the Supreme Court involving the fraudulent claims rule, it restated the rationale and context of the rule and meanwhile drastically altered the traditional view in the precedents towards the use of fraudulent means and device expressed in the obiter,[13] deeming the disputed issue as "the first time that either this court or the House of Lords has been required to confront".[14] The issue was whether the insured's purely use of fraudulent means and device in support of a justified claim (viz., the use of collateral lie in the court's expression) should be regarded as a fraudulent claim to be forfeited or not.[15]

The facts in *Versloot* are now widely known. The vessel owned by the insured

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[10] For example, *Galloway v. Guardian Royal Exchange (UK) Ltd* [1999] Lloyd's Rep I.R. 209, *Joseph Fielding Properties (Blackpool) Ltd v. Aviva Insurance Ltd* [2011] Lloyd's Rep I.R. 238

[11] *The Aegeon,* at [15] and [18]

[12] [2016] UKSC 45 at [96], *Versloot* below

[13] *The Aegeon*, at [38]

[14] [2016] UKSC 45, at [23], and restated by Lord Hughes at [85]

[15] The expression of fraudulent means and device here is in narrow sense and need to be distinguished from that where its use is to support a non-existed or exaggerated fraudulent claim, for example, in *Savash v. CIS General Insurance Ltd* [2014] EWHC 375 (TCC) Akenhead J this term was used for such purpose at para 55-59.

incurred unrepairable engine damage from flooding, which caused by the crew's negligence proximately. The courts in the first two instances both decided that it was an otherwise good claim but forfeited by the false statement recklessly made by the vessel's manager with regard to the sounding bilge alarm and its invented plausible explanation for non-investigation, to distance the insured from any fault and obtain payment faster,[16] ie. the use of fraudulent means and device was a sub-species of a fraudulent claim.[17] However, the Supreme Court overturned this decision, describing the insured's dishonest conduct as "collateral lie" being irrelevant with the validity of the claim and would not forfeit the insured's claim.

[16] [2016] UKSC at [1]
[17] [2014] EWCA Civ 1349 at [108]

2. What is a collateral lie?

2.1 The straight answer from the judgment

In *Versloot*, Lord Sumption defined the collateral lie as "a lie which turns out when the facts are found to have no relevance to the insured's right to recover"[18], upheld by the majority. Lord Hughes made it more clear that "collateral lie" is equivalent to and carries the same meaning with "fraudulent means and device" when the term is used in narrow sense.[19] The rationale of the majority is the insured's right to indemnity was already established at the time of loss, thus for a collateral lie that irrelevant to the insurer's liability from any aspect, such as the existence, the amount or the contents of the obligation to pay, the insured's dishonest conduct of this kind is only to "gild the lily".[20] In other words, after the full facts related are discovered, it is found to have no influence on the establishment or the formation of the insurer's ultimate liability under the policy terms. It might only be told to affect the behavior of the insurer so as to improve the prospects of the claim, but later with hindsight the lie was found have nothing to do with its validity.[21]

This is the way that collateral lie was defined in *Versloot*, where the majority put more emphasis on illustrating the reasonableness to exclude the collateral lie from the sphere of the fraudulent claims, but the guidance on how to identify a collateral lie is a little bit robust, which needs further clarification so that it could be more legible and accessible and avoid uncertainty when use this concept that on the brink of morality

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[18] n 16, and agreed by the others in majority respectively at [9], [49], [104]
[19] ibid, at [103]
[20] ibid, at [24], [91]
[21] ibid, at [30], [92]

and legality.

2.2 Further illustration and analysis

The ambiguous answer to the application sphere of collateral lie could be clarified by resorting to further analysis of the facts and conclusions in *Versloot*, and comparing the relevant cases in respect of the use of fraudulent means and devices.

As an elementary knowledge, when making a claim under the policy the insurer's liability to pay indemnification could only be established by the insured's proof of causation that originated from an insured peril(s) and the losses it has factually suffered. Therefore, to the opposite of the Supreme Court's definition the dishonest insured normally altered the facts on the part of causation and losses in order to gain something it would not have been entitled if the truth had been told. And this is exactly the difference between the disputed lie in *Versloot* and in other cases of fraudulent claims. In *Versloot*, though the lie is directly connected with the claim, all the facts regarding the causes and the losses are presented to the insurer in the original true state as occurred, which separate the case from the above mentioned first three categories in the fraudulent claims, and as for the last category there's no intention of the insured to suppress any known defence that may cut off the policyholder's right to indemnification.[22] Therefore, irrespective with those wholly irrelevant lies to the claim, if only focus on the respective features of collateral lie in *Versloot* and the well-accepted fraudulent claims, it would be logical for one to summarize from the

[22] For example, to suppress the facts regarding the defence of breach of warranty in *Wisenthal v World Auxiliary Insurance Corporation Ltd* (1930) 38 Ll L Rep 54; or the duty of fair presentation in *Galloway v Guardian Royal Exchange (UK) Ltd* [1999] Lloyd's Rep IR 209

implications derived from the comparisons made here above, when the lie is directly related to the claim, to qualifying as a collateral one which enables the insured to retain a valid claim against the insurer, the insured need to be at least in good faith or honest with the claim itself in substance: the facts in proving the causation and the facts around the losses as claimed, even though the insured does have fraudulent acts that conflict with its duty of good faith in the process of handling the claim; ie. a collateral lie is irrelevant with and immaterial to the recoverability of the claim on the true facts.[23] And at the end after all surrounding facts were determined the insured is still with a good entitlement to the claim, derived from the full causation chain that presented to the insurer, in spite of the lie. To give some examples on such a lie, it could be in the form of misrepresentations made in the documents, forged invoices or lies told in verbal communications between the parties, and with the deployment of which the insured may intend to improve the chances of instant indemnification from the insurer that it entitled to.

The new concept of collateral lie has negated the "fraudulent device rule" suggested by Mance LJ. in *The Aegeon*,[24] which regarded the use of collateral lie as a sub-species of fraudulent claims. Now after *Versloot,* it would be necessary to look at those previous cases bound by or in support of it, where the effectiveness of the alleged lies was very similar to that in *Versloot* and the corresponding forfeiture consequences would be intuitively harsh and disproportionate both in common sense and in law.

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[23] [2016] UKSC 45 at [36] per Lord Sumption's analysis on the materiality test at post-contractual stage.
[24] n 13

Stemson v AMP would be an example to illustrate the disproportionality and unreasonableness brought by applying "fraudulent device rule" to purely use of fraudulent device, where the insured fraudulently stated he had never contemplated to sell the insured house but in fact he had done so. The Privy Council decided such dishonest statements of the insured, acting as a separate ground together with the allegation of arson, for the insurer to deny its liability. Here the insured was absolutely culpable of the forfeiture consequence owing to his arson, but without which, the fraudulent statements that conceal his attempt to sell the property alone should not forfeit the claim. Albeit if that attempt was told it might alert the insurer of the insured's motivation to do so and make further investigation, it had nothing to do with the insurer's ultimate liability on earth, just the same as that in *Versloot:* it neither touch upon the causation or the losses as factually happened; and no matter the insured had attempted to sell the house or not as long as he was still the owner of the insured property and the accident was caused by a covered peril that having been consented in the policy, the insurer would have been liable to indemnify in the end. In that, forfeiting the insured's claim solely on the ground of a fraudulent statement that has no influence on the establishment of insurer's liability will give rise to disproportionate and harsh consequences, just like what would happen in *Versloot* if the insured's claim had been forfeited. And the majority in *Versloot* also disagreed with treating it as a separate ground but more favoured to say in *Stemson v. AMP* the claim was forfeited solely for the reason that the insured made a wholly bogus claim, fabricating fortuity that should be categorized into the first form of fraudulent claims

irrespective of the collateral lie.[25]

Besides, in *Eagle Star Insurance Co. Ltd v. Games Video Co.(GVC) S.A. (The Game Boy),*[26] the court decided that supposed that the insured had had a valid claim, it still would have been forfeited because the policyholder used fraudulent devices (in the form of a set of created documents) to promote the claim, even if the valuation was true and made in good faith. Here, Simon J made an assumption and ruled that a good claim embellished by forged documents should also be forfeited. It means that even if the insured had a good claim with true causation and losses as presented, and having proved by some other reliable methods instead of the formal lost document as required, it still would be forfeited as fraudulent devices were deployed.[27] Similarly, if the assumption stands alone and becomes the only ground for the insurer to allege as a defence against the insured as what happened in *Versloot*, a reasonable person would regard it as too excessive a burden placed on the insured. It's easier for a judge to conclude that among other grounds the purely use of fraudulent device would be an separate defence that capable of operating independently to forfeit the whole claim on assumption, but given that such assumption becomes reality it will be problematic, and now after the introduction of the concept of "collateral lie", when looking at those decisions relied on the "fraudulent device rule", one have to be cautious as the respective consequences in those cases are no longer admissible if they are inconsistent with *Versloot*.

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[25] [2016] UKSC 45, at [28], [83]
[26] [2004] EWHC 15 (Comm)
[27] ibid, at [150]

To sum up, the concept of collateral lie undoubtedly covers a lie that leaves all the information regarding the causation and the loss in proving the validity of the claim unchanged and thus becomes irrelevant to the merit of the claim with hindsight after all the involved facts were uncovered at the trial.

Furthermore, objectively speaking, the causation-loss demonstration can help determine whether the insured at time of fraudulent acts has honestly believed it had a valid claim or not, by comparing with facts uncovered latter. For example, in *Aviva Insurance Ltd v. Brown*,[28] Brown made fraudulent statements to the insurer regarding the alternative accommodation that he had been about to rent, pretending that he would rent it from others but in fact he was the owner of that property and knowingly claimed the rental that did not exist at all. Although according to the eventual arrangements, he decided to live in another accommodation and did have an approved expenditure of rental, the court still decided that the entire claim was forfeited by the false statements he made earlier in respect of his own property. Lord Hughes has explicitly remarked that Brown's case should be deemed as a fraudulent claim,[29] as when Brown made the claim of alternative accommodation fee he knew there's no question of that payment at all but changed the circumstances in proving the causation and the loss, and if believed he would gain something not entitled at that moment.

Therefore, the insured's intent to deceit (something not entitled when the lie was uttered) could be objectively deduced by examining whether the lie that knowingly or recklessly told in the process of claim had altered the causation and loss as latter

[28] [2011] EWHC 362 QB
[29] [2016] UKSC 45 at [82]

discovered at trial. The very similar approach could be found in several precedents which tended to define a fraudulent claim, but the difference was when determining whether the insured had the intent to deceit in terms of its knowingly or recklessly false statements, those decisions failed to explicitly refer to the relevant facts that it presented to the insurer in the causation-loss demonstration originally and compare them with the true facts as latter found, ie. failed to use hindsight.[30]

Furthermore, whether the insured had suffered the true loss as it claimed because of latter arrangements ultimately is unimportant, because the rationale in the fraudulent claims rule that once the insured attempted to deceive, a correction or retraction would be ineffective as it's irremediable.[31] Besides, the culpability of fraudulent claims rests with its intent to deceit when the lie was told, and this is what the policy of deterrence mainly aimed at as well. These important and unique sub-rules under the fraudulent claims rule were respectfully preserved in *Versloot*, and if being observed along with Lord Hughes' attitude against previous cases like *Aviva v. Brown*, it could be inferred that the concept of collateral lie that the majority planned to formulate is relatively restrictive. As a result, the effectiveness of hindsight albeit allowed still should be subject to them rather than step any further. And preserving the application of fraudulent claims rule to such situations where the insured's deceitful intention becomes obvious and recognisable could reconcile the newly-introduced collateral lie with antecedent well-accepted rationale underneath the fraudulent claims rule as

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[30] *Lek v Mathews* (1927) 29 Ll L Rep 141 at pp.163, *The Captain Panagos DP* [1986] 2 Lloyd's Rep 470 at pp.511

[31] *Stemson v. AMP* at [34]; [2013] EWHC 1666 (Comm) at [166]. This point was not overruled by *Versloot* and remains good law

established in *The Star Sea*,[32] to retain the policy of deterrence to a moderate degree and prevent the insured's "one-way bet".

In conclusion, after comparing relevant facts in *Versloot* with other well-recognised fraudulent claim cases a more detailed way to define collateral lie could be drawn: it's a lie that was found irrelevant with the causation and loss in proving the validity of the insured's claim, after all the facts regarding the causation and loss were uncovered. As the causation-loss demonstration at the time of lie is attributable to detect the insured's intent to deceit, which should be deterred by fraudulent claims rule. And if owing to the policyholder's subsequent arrangements, with hindsight the loss it finally suffered equals to what it had fraudulently claimed, such hindsight that revealed the ultimate situation in the case found at the trial should not be allowed to justify the insured's preceding attempt to make a fraudulent claim as a collateral one.

2.3 Collateral lies in other jurisdictions

It cannot be denied that the English court had made a brand new development in advance of other common law jurisdictions in *Versloot* as in other commonwealth jurisdictions like Australia, the United States or New Zealand the use of collateral lie is still deemed as fraudulent claims.[33] However, this rigid rule is featured as distinctive in common law system, if the perspective shifted onto certain civil law jurisdiction, there may be some feasible solutions.

Among common law jurisdictions, Australia is the only one to give detailed analysis on the present issue, likewise there's no clear definition in the Insurance

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[32] *The Star Sea* at [62]

[33] For the first two jurisdictions, see [2016] UKSC 45, [21]-[22]; New Zealand, see *Stemson v. AMP*

Contract Act 1984 (ICA 1984) and the Australian courts had been trapped with the disproportionality to treat it as a fraudulent claim. However, the relevant Australian cases can be distinguished now instead of confusing the collateral lies with fraudulent claims if follow the conclusion in last chapter. In *GRE Insurance Ltd v. Ormsby*,[34] the insured intentionally caused further damage to the entrance of the insured property to strengthen the persuasion of his forcible entry claim, which had actually occurred and its causation and size of loss were in the same form exactly as he presented so it was a collateral lie. While in *Tiep Thi To v. Australian Associated Motor Insurer Ltd,*[35] the insured lied to the insurer, stating the car accident was happened when it was stolen but actually it happened when his son was driving. Here, the insured is entitled to the indemnification from the time of loss but she mistook that her loss would not be covered if the truth was told so she fabricated a story, in which the causation of the accident was completely changed. After all the facts were discovered at trial, her intent to make fabricated claim became obvious though differentiating from *Aviva v. Brown* she was factually entitled to the compensation at the time of lie with hindsight. However, likewise the hindsight should not be used to cure such blatant intent to deceit disentitlement no matter that lies in law or in the insured's mind, as under whichever circumstance the intent to deceit should be deterred and blamed.

There isn't any decided case yet from Australian courts on collateral lies. However, in *Globe Church Incorporated v Allianz Australia Insurance Ltd,*[36] one of the latest

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[34] (1982) 29 SASR 498, the claim was decided to be valid.
[35] (2001) 161 FLR 61, the claimed was decided to be forfeited.
[36] [2019] NSWCA 27

Australian case considered *Versloot*, the court supported Lord Sumption's dicta and ruled that without special agreement the insurer's obligation to pay arises when the loss occurred. As this is the theoretical basis to excuse collateral lie, after being accepted there may be chances for the Australian courts to change their attitude toward collateral lie in the future.

On the other hand, some implications may be drawn from Chinese Insurance Law. By virtue of Article 27 section 4 of Chinese Insurance Law, when committed fraudulent behavior as given in the first three section, the insured need to compensate losses incurred by the insurer, if the latter had factually paid the claim or any other expenses. Before arguments presented, it must be admitted that legal values and protective interests inherented in the these two different jurisidiction, or more broadly, in common law countries and China. As in Chinses Insurance Law, protecting the weaker party, here the insured, is one of the priorities along with the whole context. The law does not clearly separate basic principles applied to commerical insurance contract from consumer insurance contract as that in common law in general. For marine insurance contracts, if Chapter 12 of Chinese Maritime Code does not have specific rules, principles and rules in Insurance Law will apply. There is no such rule as to fraudulent claims in the Maritime Code, thus Article 27 above applies. Then back to the analysis on the section mention above, causation could be found between insurer's loss and insured's fraudulent claim, for it directly refer to the wording of "causes the insurer pay the claim…". The Versloot and Insurance Act 2015 indicates that insurance law in UK is attempting to change the harsh attitude towards the

insured, while coincidently the balance of scales in Chinese Insurance Law tilted to the insured side, thus the requirement of caustion might provide certain hints for UK insurance law.

3. The rationality to introduce the collateral lie into the claim stage

It's a great consensus that the deterrence of fraud is the rationale where the fraudulent claims rule lies,[37] but owing to the distinctive features of collateral lie whether it deserves same level of deterrence as fraudulent claims to forfeit the entire claim is the controversial point even after *Versloot*. The opponents commented that it would encourage the insured to lie by the "one-way bet" since it gives the insured a signal that lying to some extent could be excused and even increase the market premium rate as extra time and money may be wasted, which ultimately would be endured prospectively by other innocent policyholders from the market. These concerns make sense to some extent, nonetheless compared to other considerations to exclude and justify collateral lies, it's reasonable for them to give way and being subordinated. This section attempts to exposit the rationality of the decision by analyzing and reconciling the arguments and counter-arguments that it gave rise to.

3.1 The general law reform trend of rebalancing the interests of contracting parties in insurance law

First of all, the background against which the new development was made should be noted. As a consensus, the IA 2015 has profoundly changed the imbalanced position where the insured and the insurer had been under the MIA 1906, since the

[37] *The Star Sea*, which was referred and confirmed in *Direct Line Insurance v Khan* [2002] Lloyd's Rep IR 364, [38]; *AXA General Insurance Ltd v Gottlieb* at [28], [31]; *The Aegeon* at [14] and *Versloot* at [9], [95]

long-implemented statutory is deemed as more favoured to the insurer. Such imbalance had been criticized as becoming the competitive disadvantage of the English insurance market, discouraging the insured from entering into contract with UK-based insurers.[38]

During the years before *Versloot,* the law or the obiter opinion used to take the "one sized fits all" approach: once an insured has any dishonest conduct in the process of making the claim is material, the penalty of forfeiture will be triggered. However, if the law generally is in pursuit of rebalanced power in the hands of different parties by changing the one-sided scale, the fraudulent claims rule, acting as a unique and essential rule in insurance law should catch up and change accordingly. Nevertheless, the change is not abrupt but backed up with a series of important considerations to be analyzed below.

3.2 The immateriality of collateral lies

Having noted in the first two chapters above, the majority in *Versloot* concluded that a collateral lie is immaterial to the claim, which "makes it not just possible but appropriate to distinguish between them".[39]

It's very evident that in case of a collateral lie the loss presented in the insured's claim is exactly what it has suffered with completely good entitlement and could be easily distinguished from those forms in fraudulent claims. And in the second chapter, it was found that the concept of collateral lie is not as broad as the opponents argued.

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[38] Tony Dempster, Sarah Irons and Lachlan Harrison-Smith, Herbert Smith Freehills, 'Insurance Act 2015: shifting the balance' https:/ /uk.practicallaw.thomsonreuters.com/ (last accessed 19 July 2019)
[39] [2016] UKSC 45 at [26]

Conversely, it's relatively restrictive and the hindsight that used to determine whether the lie is material or not is not unconditional: if taking the facts in causation-loss being uncovered at the trial as a known condition at the time of lie would justify the policyholder's intent to deceive something it is obviously not entitled at that moment, such operation would be barred. Therefore, the immateriality of the collateral lie is indisputable here, because the liability for the insurer to pay totally depends on the terms of policy and is not intervened by any deceitful intent that fraudulent claims rule normally penalizes.

3.3 The policies of proportionality and the deterrence of fraud

The proportionality of remedies is a general trend ready for the insurance law to follow;[40] but whether it is so necessary that proportionality shall push for a collateral lie to be excused, this question is always considered together with the deterrence of fraud: the main purpose of fraudulent claims rule. So it is unsurprisingly that the trial of strength between these two elements is one of the most controversial standpoint for courts at different levels to discuss and decide.

At first instance, Popplewell J explicitly expressed his reluctance and regret but feel obliged to follow the *The Aegeon* in support of the insurer's arguments, and commenting the "fraudulent device rule" can lead to disproportionate harshness and injustice upon an assured in favour of an "undeserving insurer".[41] On the second hearing, Clarke L.J. ruled that there is no requirement of proportionality, for the

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[40] Baris Soyer, 'Lies, Colleteral Lies and Insurance Claims- The Changing Landscape of Insurance Law' Edinburgh Law Review (2018) 22(2) 237, 239

[41] [2013] EWHC 1666 (Comm) at [167]

reason that the justification of that drastic forfeiture consequence rests on the prioritized policy concern of deterrence effect in the fraudulent claims rule.[42]

The contradiction between the two competing considerations could not only be found in the relationship between the parties to a policy but also between a third party and the insurer. In *Summers v. Fairclough Homes*,[43] the respondent, a third party to a liability insurance contract, lied about his injuries incurred at work, which expanded his loss nearly ten times more than the actual loss against the insurer. Although it's a dispute of a third party's claim, but its reasoning and conclusion is of significant referential value for the present purpose. Here it was decided that a court is able to remove the third party's fundamental fraudulent claim in "very exceptional cases",[44] only when it was proportionate and appropriate to do so. Though the Parliament went further by legislating three years after that decision, the requirement of proportionality was unchangeably built in the relevant sections in the Act as only if the court having been satisfied that the claimant was "fundamental dishonest" regarding his or her own claim or any other related claim, if doing so would not produce "substantial injustice" the court has to dismiss it.[45] The words "fundamental" and "substantial" carry with strong appeal of proportionality for the court to weigh and consider before it comes to a conclusion, as only if the claimant's conduct reach to the extent of fundamental can the court exercise its power to strike out the whole claim, viz., the consequences brought by it need to be equivalent to the claimant's fraudulent conducts. Likewise,

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42 [2014] EWHC Civ 1349 at [139]
43 [2013] Lloyd's Rep IR 159
44 ibid, at [50]
45 Section 57 of the Criminal Justice and Courts Act 2015

the insurer's counsel in this case submitted that there should be deterrent to prospective dishonest claimants but the court declined to accept their submission that the only way to do so is to strike out such fraudulent claims as there were many other more appropriate or proportionate sanctions could be assumed to achieve same purpose of deterrence rather than simply discharges the insurer of what has been held to be a substantive liability by the court.[46] Here what the court trying to explain was that the policy of deterrence is undoubtedly important but in order to obtain that effect, such absolute result was not the only and proportionate way to approach it. Back to the use of collateral lie, there are also other sanctions could be used as deterrent,[47] instead of forfeiting the whole claim they are more proportionate and capable to deter the insured from committing fraudulent acts, which would also improve the self-consistency among the Supreme Court decisions by cohering these different but strongly related cases.

The proportionality of remedies against the insured's dishonest behaviour could be elaborated better by borrowing Popplewell J's "scale of culpability" theory. As he illustrated, the use of collateral lie is "at the lower end of the scale", despite the insured deployed collateral lie it indeed has a genuine claim with good entitlement to recover under the policy.[48] From the view of a reasonable third party, one could be easily observed that the nature of using collateral lie and making fraudulent claims is far more distinct, as the latter is originated from the insured's greed, who are by

[46] n 43, at [51] and [61]
[47] See [2016] UKSC 45, [98]-[100]
[48] [2013] EWHC 1666 (Comm) at [165]

contrast at relatively higher ends. It's true that they are at varying degrees of severity within the scope of the rule as well, all of which still should be forfeited unexceptionally as the policy of deterrence takes effect. And both Popplewell J and the majority in *Versloot* agreed that the policy of deterrence with an effect of forfeiture should be constrained to that context only rather than extending to a wholly valid claim but supported by a collateral lie.

Again, they both questioned whether or alternatively the extent to which the deployment of fraudulent device was included in the statistics of ABI reports which reveals the large amount of cost triggered by insurance fraud. Those reports simply present rough statistics, neither distinguish the claims were made by the insured or the third parties, nor did it figure out the extent to which deploying fraudulent devices has influence on such large scale of loss. In that, although fraudulent claim is so serious a problem that deserved to be attached with great importance, it still would be inevitably misplaced to blame the use of collateral lie without verifying the distribution it made in significant sum of cost suffered by the insurance industry from fraudulent insurance claims that shown in the reports statistics.

Furthermore, unlike criminal law, deterrence is not the primary function of civil law and this notion has been pointed out both by the courts and the scholars.[49] When the civil law need to take the role of deterrence, it should be regarded as anomaly and

[49] For example, being stressed in *Cassell & Co Ltd v Broome* [1972] AC 1027 and noted by [2013] EWHC 1666 (Comm) at [168], [2014] EWCA Civ 1349 at [100]. See also Julie Anne R. Tarr,'Grappling with fraudulent insurance claims and "collateral lies": comparative insurance law developments in the United Kingdom and Australia' JBL [2019] 1 43,48

confined to the very classes of cases where its application was firmly established.[50] It is admitted that fraudulent claims rule is such an anomaly that has long been deemed as a vital principle in insurance law. However, attaching this kind of anomaly to fraudulent device is not as well-recognised as fraudulent claims rule and the rationality lacks sufficient and reliable evidences, thus one should not be more cautious about whether it is appropriate to extend the principle to that extent, and if the extension produced illogical and unreasonable result, this anomaly to the role of civil law should be prohibited resolutely.

As noted in *The Star Sea* by Lord Hobhouse, and confirmed in *Versloot*, the court should be prepared to examine the application of principles, evaluating to what extent it could reflect the public policy or the needs of fairness and if it cross that boundary and simply serve the interests for one side in a disproportionate fashion, proportionality always demands the court to question its correctness and make due changes.[51] The policy of deterrence is not always the overriding one in insurance law, thus in certain circumstances it should make concession for proportionality, and the remedy to collateral lies belongs to one of those circumstances.

3.4 The said weakened effect of deterrence and the reasonableness underneath collateral lies

Having mentioned above, deterrence is far from the principal function of civil law, and in terms of insurance law insurance is a contract of indemnity to indemnify the

[50] *Rookes v. Barnard (No 1)* [1964] 1 Lloyd's Rep 28
[51] *The Star Sea* at para 61; [2016] UKSC 45 at [27]

actual loss suffered by the insured, caused by insured perils as soon as it occurred.[52] Therefore, except for justified anomalies, the primary role of indemnification shall not be superseded by the policy of deterrence.

Nonetheless even after the final decision was given the criticism still remarking that remitting the use of collateral lie would acutely diminish the deterrence effect of the rule; in that, even if the extension seems disproportionate and harsh, it's still unavoidable and necessary. This is the said weakened effect brought by *Versloot*, to retort this argument it would be instrumental to scrutinize the effectiveness of the deterrence effect itself and the root causes for the insureds to deploy collateral lies.

The real effectiveness of the deterrence effect owed to fraudulent claims rule has been contested by proponents who favoured the proportionate approach to collateral lies as there's little empirical evidence to show that the common-law rule was an effective deterrent to fraud.[53] Actually the notion that a civil rule of law is able to bring about deterrence effect has been questioned as a whole in recent years, although the courts insisted that the policy of deterrence must be maintained for the rationale of deterrence is not dependent on "scientific anthropology" but on the vindication of collective moral values,[54] it's still fallacious to extend its effect to a scenario where the misconduct of the insured is not resulted from the deliberate greed or recklessness to gain something not entitled. Conversely, to a large extent the use of collateral lie in business relationships are resulted from the imbalanced legal status that the parties

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[52] n 20
[53] P.J. Rawlings and J.P. Lowry 'Insurance fraud: the "convoluted and confused" state of the law' LQR (2016) 132(Jan) 96, 116
[54] [2016] UKSC 45 at [10]

have been in, where unfair treatments have been endured by the insureds.

Most of disputes regarding insurance claims in fact are firstly attempted to be settled outside the court, for consumers, they prefer the Financial Ombudsman while for business, they prefer arbitration or settlement agreements.[55] Unlike consumers who are given extra protection by law in their relationships with the insurer, the commercial insureds with an insurance claim against the insurer are probably forced to face with lower offer or unreasonable delays in payments, as noted by Popplewell J the conduct of the insurer in denying its liability may itself be unreasonable.[56] However, there's little rule to cope with these unfairness, and these latent reasons behind the insured's misconduct are not reflected in the ABI reports. For example, it's common for insurers to insist on the insured's presentation of receipts to prove its ownership of the insured property, without which the latter will have difficulties in proceeding its claim even if it would be able to prove that with other good evidences. In commercial world, every day delayed in the payment or each portion of deduction matters or even may be decisive so the insured is compelled to takes the risk. Given that the main sources of problems are originated from insurers then how could one expect to address them by deterring the insureds? If so, the insured would be placed at a completely disadvantageous position with little chance to protect themselves from the insurers' malicious treatment.

Therefore, even though the policy of deterrence in insurance law is justified it could not be justifiable to impel its effectiveness on collateral lies. The way that Supreme

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[55] P.J. Rawlings and J.P. Lowry 'Insurance fraud and the role of the civil law.' MLR (2017) 80(3) 524, 525
[56] n 48

Court handle with this problem would also alert the insurer they could not feel free to squeeze the insured's legal interests in their settlements. Additionally, the effectiveness of deterrence to insurance fraud should not only be determined by the scope of fraudulent claims rule but also look at the law regarding insurance fraud as a whole. As no matter in newly issued statutory in recent years, or in *Hayward v. Zurich Insurance*,[57] a Supreme Court decision given only one week later than *Versloot*, when the party's intent to deceive the insurer is proved to get something it was not entitled, consequences in law has become even more severe than it used to be, where the policy of deterrence against insurance fraud has been more powerful than before. So it's better to describe these changes as sending a signal to the industry that the law is moving to a proportionate and balanced situation and owing to these changes the policy of deterrence will work in the right way rather than being diminished its effectiveness.

3.5 Information Asymmetry

It's undeniable that there is information asymmetry between the insurer and the insured as the latter has exclusive control of information relating to the claim and this has placed the insurer at a vulnerable position which give effect to the fraudulent claims rule; yet, the strength of this proposition should be reviewed nowadays and even if the insurer should be as well-protected from that vulnerability as before, this is not the case at least for collateral lies.

First, the fraudulent claims rule originated in the middle of 19th century, a time

[57] [2016] UKSC 48

when the insurer was not as well-equipped with advanced and efficient means and devices to acquire information as it is nowadays; additionally, the information is more exchangeable and well-spread in the market than before. Therefore, the information asymmetry has been alleviated to some extent though it has not been eased, and even if the rule should be preserved for the strong policy against fraudulent claims, it should not extend to the use of collateral lie as the insurer is still at the same position where the policy has brought it to with nothing lost, where the vulnerability does not have any influence to its liability. Furthermore, there's often policy terms to deal with the problem of information asymmetry at the claim stage, which require the insured co-operate closely with the insurer in the process of making the claim and carrying out the investigations.[58] In that, the court should not make the extension, which probably provide the insurer with double protection, being unfair to the other side of the policy.

Broadly speaking, it's unreasonable for the use of collateral forfeiting the whole claim: from the perspective of law, in spite of the lie, the insured gains nothing more than its lawful entitlement under the policy; from the perspective of polies, the policy of deterrence should not be unbounded as its effectiveness in civil law is acting as an anomaly and should give its way if unreasonable and disproportionate consequences incurred; and from the perspective of common sense, although with the deployment of collateral lie, the insurer's vulnerability resulted from the information asymmetry between the parties does not put it at a worse position than it would have been under

[58] n 40

the policy.

Nevertheless, it is also true that the use of collateral lie in certain circumstances will cause the insurer unwanted loss such as wasted effort made in the investigation, which has been recognised in *Versloot*,[59] and the worries in the counterarguments are not ungrounded because the insurer's unmitigated loss would be imposed on the market and born by innocent insureds with increased premium rates, but the Supreme Court's decision were unclear on the solutions to this part of loss, it simply awarded a full amount of compensation as what the insured claimed. Consequently, even though it was on the right direction that in pursuit of proportionality, it still failed to give more considerations to the insurer's legal interests by clarifying how would the insurer's impaired interests be remedied if that does happen. And the law should be developed clearer and further from this aspect.

[59] n 39

4. The remedies possible for the insurer when come across with collateral lies

In *Versloot*, Lord Sumption had explicitly pointed out that the decision was to clarify common law rules under the regime of MIA 1906 instead of interpreting its meanings for the purpose of IA 2015,[60] and given that the common law rules related have been displaced by s.12 of the Act, the determination of collateral lies and its potential remedy should be considered separately before and after the new Act. Nonetheless, under whichever regime the aim here is to build proportionality into the rules regarding collateral lies, at the prerequisite of avoiding harsh consequences that are disproportionate to the culpability of the insured's conduct, also to represent the prejudiced interests of insurers if relevant losses are incurred and proved in the claims of insurers at the same time.

Under the regime of MIA 1906, neither the duty of good faith nor the fraudulent claims rule is applicable to provide remedies and although some hints of other possible sanctions could be found in *Versloot*, the court should take a more straightforward stance to clarify that any loss incurred by the insurer that is attributable to the policyholder's fault (in telling collateral lies) should be remedied by developing common law rules regarding collateral lies. As whether the lie is collateral could only be determined after the surrounding facts are fully uncovered and when the insurers was preparing their arguments they may simply seek to deny the claim relying on the fraudulent claims rule but fail to consider recovering its loss once the lie was deemed as collateral. In that, it should take the form of that as soon as the

[60] n 16

insurer's liability is established after all the facts were determined at trail, there's no need for the insurer to file an additional litigation to proceed the claim of prejudiced interests with extra time and expenses but its impaired interests could be remedied automatically.

On the other hand, under the regime of IA 2015, the first thing need to do is to determine whether the collateral lie as established in *Versloot* is within or outside the regulation of fraudulent claims rule as identified in s.12. It's still unambiguous that how the courts are going to manage their relationship as there isn't any decided case yet. There would be a probability dichotomy: under the first probability, the collateral lie is within the fraudulent claims scope so its deployment would lead to the consequence forfeiture; while under the second probability, *Versloot* would remain operative to policies under the new regime and collateral lie would not subject to the fraudulent claims rule but become an isolated one to be considered. There's reasonable basis to contemplate that the second probability is stronger. Firstly, the expressed remedy in s.12 is forfeiture of the whole claim, which was deemed as too draconian and disproportionate to be applied to collateral lies in the decision and given that the status of the new Act was to formulate more proportionate remedies as well as more balanced status for the parties, including the use of collateral lies is contrary to the general trend and primary purpose of IA 2015. Moreover, when the *Versloot* decision was given the IA 2015 was about to come into force and all of the judges in the majority had referred to it, thus they are with the hindsight of the stipulations in the Act, and the due changes though irrelevant with the interpretation

of the Act were still made against the particular background. Accordingly, it's unreasonable to exclude the application to the Act of such a decision that in conformity with the general trend. Meanwhile, regarding the fraudulent claims rule it is rarely considered by the Supreme Court in the past few decades so it would be more practical to reserve the application of this corresponding decision under the new regime.

If and highly probable that the *Versloot* is still applicable to IA 2015, there's several workable solutions where the remedies could be drawn. Firstly, at the time of the hearing if the incompleteness of *Versloot* in this regard was complemented, it could be used directly to make up for the insured's prejudiced interests. Secondly, even if the issue wasn't considered up to a case had arisen from the regime regulated by IA 2015, unlike MIA 1906, solutions here could be drawn directly from the duty of good faith as the IA 2015 has removed its remedy of avoidance and now it is for the courts to decide with their discretion. It's absolutely feasible to file the claims of breaching the duty of good faith and the fraudulent claims rule together, for the reason that they are compatible with each other and no more contradictory under the legal framework of IA 2015. Therefore, as far as the current situation is concerned, when the insurer suspected an insured had any fraudulent conduct in its claim, before all the facts being determined at trial it would be better for the insurer to prepare its arguments that base on both of them. And in case the evidence presented by the insurer reveals that it incurred any additional costs resulted from the insured's lie, the courts could award damages to mitigate it, or other sanctions which are more appropriate to the case at

hand.

Clarifying the stance that the insurer's legal interests would be protected even though the lie of the insured had been deemed as collateral could comfort the resistance on the side of the insurer, and at the same time to react with the corresponding incompleteness of the principles that established in *Versloot*, especially under the regime of MIA 1906 where neither of the duty of good faith nor the fraudulent claims rule could be accessible.

5. Contracting out the effect to the *Versloot* decision

As the noted in *Versloot* by majority, the effect of *Versloot* decision is limited to a case that "the extension of forfeiture to a purely collateral lie as part of general rule"[61], thus such term under the MIA 1906 would still be effective. However, the problem is firstly if such clause is permitted what kind of wording it should adopt in order to exclude the effect of general rule associated with collateral lies as established in *Versloot*; and secondly, should and how this kind of "contracting out" clause be applicable to policies concluded after IA 2015?

5.1 The due wording to contract out the Versloot effect

Lord Mance had contemplated in his judgment that the insurers were very likely to reintroduce the "fraudulent devices rule" by express clauses to such effect,[62] and this is not unfounded conjecture given that the insurers were advised to insert such clauses into their prospective policies especially after Popplewell J stressed the unreasonableness and harshness brought by treating it as a general rule in law,[63] and this result could be achieved in various wording of a policy term. However, it's noteworthy that though contracting out is allowed, as far as its disproportionate and harsh consequence is concerned, it's not one hundred percent sure that the court would allow all kinds of terms that the insurer argues to have such effect, more likely it would possibly constrain its application only to terms where the wording is sufficiently unambiguous so that the proportionality could be protected to the largest

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[61] [2016] UKSC 45 at [82], [100]
[62] ibid, [133]
[63] n 55, 532

extent.

The relevant policy terms wording that is purported to have such effect may be drafted in the ways below:

(1) Define fraudulent claims in the policy

"*5. Use fraudulent claims: …(b) uses fraudulent means or devices including the submission of false or forged documents in support of a claim whether or not the claim is itself genuine; or (c) makes a false statement in support of a claim whether or not the claim is itself genuine…*".[64]

Here, it explicitly refers to "fraudulent means or device", its remedy and the form it may take, which is very detailed to the extent that collateral lie is undoubtedly included and could exempt the insurer's liability to pay such an otherwise valid claim.

Another type of clause that is potentially against collateral lie and may be relied by the insurer, which can frequently be found in home insurance policies. They usually structured as: "*9. Fraud: If the your claim is in anyway dishonest or exaggerated we will not pay any benefit under this policy…*".[65]

This clause titled with "fraud" and its wording is not as evident as the above-mentioned one to preclude the insured from making claims in respect of a collateral lie. As a result, it need to wait and see how the court is going to interpret such clause: either it would be understood for the insurer, relying on the dishonest nature of the conduct; or more probably it could be understood for the insured as the

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[64] Zurich's 360 contractor policy <https://www.zurich.co.uk/business/business-insurance/construction/allied-and-finishing-trades> accessed 1 August 2019

[65] Aviva's home insurance policy <https://www.aviva.co.uk/insurance/home-products/home-insurance/> accessed 1 August 2019

whole clause is titled under "fraud", while in *Versloot* the majority described the collateral lie as "the lie is dishonest but the claim is not",[66] thus it could hardly be contracted out by such wording of a clause.

(2) Condition precedent to liability

The most often-cited condition precedent to deal with the assured's dishonest conducts at the claim stage is the Institute Hull Clauses 2003, cl.45.3. It stipulated that "*45.3.1 It shall be a condition precedent to the liability… the Assured shall not… mislead or attempt to mislead the Underwriters in the proper consideration of a claim or the settlement thereof by relying on any evidence which is false;*

45.3.2 conceal any circumstance … material to the proper consideration of a claim or a defence to such a claim."

Having mentioned above, such clause is particularly meant to tackle the problem of information asymmetry at the claim stage, to urge the insured fully and honestly corporate with the insurer when make the claim. When deploying a collateral lie the insured is unquestionably attempt to mess up the insurer's proper consideration of the claim, for instance, what type of investigation needs to be taken or whether to take such investigation or not. Hence, the collateral lie is likely within its regulation and the related claim would be forfeited accordingly.

5.2 Contracting out the Versloot effect after IA 2015

As explained in the last chapter, it's extremely probable that the *Versloot* decision would remain applicable thus there would be room left for the insurer-sided to

[66] n 39

contract out like what the majorities permitted in their judgments.

However, s.16 and s.17 of the Act explicitly set out the contracting out requirements to exclude the application of provisions in IA 2015 Part 3 and Part 4, placing the insured at a disadvantageous position than it would have been in law, and violating which the relevant contract terms would be ineffective. In terms of fraudulent claims, those requirements only apply to fraudulent acts within the definition of fraudulent claims, but outside which, such as a collateral lie under the above-predicted probability, they are inapplicable. This means that the insurer is able to invent the remedies to such act as they wish and free of any restrictions to notify the insured and it will not be voided by law, and as commented by some scholars such consequence is "bizarre",[67] and it's so disproportionate that becomes completely contradict to the expectations of the Law Commission in law reforming.

Therefore, the problem need to be addressed in the future legal practice. In respect of a consumer insurance it is very likely to be addressed by referring to s.62 of Consumer Rights Act 2015, as it stresses that the unfair terms to the nature of a consumer contract is void. In that, the re-introduction of avoidance or forfeiture, these more rigid consequences than that in general is undoubtedly unfair to the indemnification nature of insurance contracts. On the other hand, with regard to business insurance contract there's no additional protection like that for consumers. However, if avoidance is adopted as remedy without fully notified and consented it is certainly contradictory to proportionality, required by common law and the spirit of

[67] Richard Aikens, 'When is a 'fraudulent claim' only a 'collateral lie'?' LMCLQ [2017] 3(Aug) 339, 343; Jack Alexander and Daniel Brinkman 'Versloot and the Insurance Act 2015.' LMCLQ [2019] 1(Feb) 11, 14

IA 2015, as the insured who deploys the collateral lie will be put in a worse position than those who make a fraudulent claim.[68] Similarly, even the remedy is forfeiture, it is also more demanding than the general position and without special notification like what required by s.16 and s.17, it would share the same problem as if avoidance was adopted, and this is particularly possible to happen in the polices held by the insured who runs a small business and meanwhile very unluckily be served by a careless broker. Hence, being confronted with these potential problems it would be better to introduce symmetrical transparency requirements to contract out general rules regarding collateral lies with that having been established in s.16, s.17 and s.62. Firstly, to guarantee the insured is sufficiently aware of its disadvantageous standing and fully consent with it. Secondly, when contracting out the general rules of collateral lie, the consequences in those terms should in no way worse than making a fraudulent claim in the same relationship. Otherwise, the insured's legal interests may be jeopardized by the incompleteness in law. Nonetheless, as this bizarre consequence has been recognised by many academician and the supporters of *Versloot*, the courts must have realized that the necessity to make further developments to make up for the flaws, and it could be expected that due changes is going to be made in the near future.

[68] For example, the relevant terms in *Sharon's Bakery (Europe) Ltd v AXA Insurance UK plc* [2012] Lloyd's Rep IR 164

6. Conclusion and Further Argument

This contribution proposes to clarify and further develops the definition of collateral lies as identified in the Supreme Court's decision of *Versloot* by connecting it with the causation-loss demonstration, and concluded that in terms of a collateral lie, it should not knowingly or recklessly alter the true facts in presenting the causation and the loss of the claim, ie. in proving the validity of the claim as latter discovered. The causation-loss proof with hindsight can also be conducive to find out the insured's blatant intent to deceit, and prevent the insured with such intent to be indemnified as it is exactly the policy of deterrence underneath the fraudulent claims rule directly targets at. However, in consistent with the majority's view the policy of deterrence should not extend to a collateral lie, as it's disproportionate and unreasonable, to the opposite of the general trend pursued by the law reforming in insurance law. And in my view, the prioritized policy of deterrence in fraudulent claims rule may not as efficient as asserted according to recent researches, and even if it has to be preserved it is not diminished by the introduction of collateral lie as protested. Firstly, the deployment of collateral lies cannot be addressed simply by deterring as it is a compelling choice resulted from unfair treatments after the benefit-risk balance. Secondly, it is adjusted to work in the right way that it should have been in the fraudulent insurance claims in overall. Nonetheless, it should be admitted that though due changes were made there's still grey zone in current law and the *Versloot* is just a beginning for moving forward. In order to do so, it should be and in fact very probably to be applicable under the reformed regime of IA 2015; besides,

to take the legal interests of both sides to a policy into account, and most importantly the prejudiced interests of the insurer in respect of a collateral lie must be considered and remedied within the new rule itself. Lastly, as *Versloot* left room for the insurers to contract out its effect, the potential disproportionate consequence to introduce more serious remedy of avoidance should be prevented, and the insured's right to be informed of its disadvantageous position than it would have been in law should also be protected.

However, certainly there's still weakness in this paper. For example, in terms of the insurer's prejudiced interests it would be better to introduce the prejudice test like that built in bare conditions to the insured's non-risk related acts as a whole into the legislation like what the ICA 1984 did in the second limb of s.54(1),[69] in which using a collateral lie is only one manifestation of them, but that would step too far and become onerous for the current scale of discussion as the paper only focus on collateral lies rather than non-risk related acts in general. In a word, the problems could be better addressed at a higher and broader level in the future.

[69] Özlem Gürses, 'Reform of Construction of Insurance Contract Term' JBL [2013] 1, 39

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