VERSLOOT DREDGING: TIME FOR SINGAPORE TO FOLLOW THE TIDE?[1]

I. Introduction

1. The traditional common law position in the field of insurance has always been biased towards the insurer, where insurance doctrines have been "inflexibly applied in favour of insurance companies."[2] This has been noted in several instances, such as the insured's duty of non-disclosure, the interpretation of insurance policies, and in the context of fraudulent claims. In the recent UK case of *Versloot Dredging v HDI Gerling Industrie Versicherung AG* ("***Versloot***"),[3] however, a shift in this attitude can be observed, specifically in regard to fraudulent claims.

2. Traditionally, an insurance claim will be considered tainted if any part of it is found to be fraudulent.[4] This position had also subsequently been extended to claims tainted by fraudulent devices – claims which are otherwise genuine but for a small collateral infraction of dishonesty, usually for the purpose of hastening payment.[5]

3. Unsurprisingly, debates have ensued over the traditional conception of equating a claim tainted by a fraudulent device to that of a full-fledged fraudulent claim. More often, it is argued that such a position is untenable due to the few similarities that both types of fraud share, making it manifestly draconian on the insured.[6]

4. While the law in the UK has changed with the decision in *Versloot*, the law in Singapore still remains that of the traditional common law position. However, it is the authors' view that this position will not remain so for long. Judicial momentum in cases relating to the insured's duty of disclosure and the interpretation of insurance policies have been observed, hinting at a shift in attitude from the inflexible application of insurance law doctrines.

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[2] Yeo Hwee Ying, "Call for Consumer Reform of Insurance Law in Singapore" (2014) 26 SacLJ 215 at [1].

[3] *Versloot Dredging v HDI Gerling Industrie Versicherung AG* [2017] AC 1 ("***Versloot***").

[4] *Agapitos v Agnew (The Aegeon)* [2002] EWCA Civ 247 at p 49.

[5] *Id*, at p 56; *Sumpiles Investments Pte Ltd v AXA Insurance Singapore Pte Ltd* [2006] 3 SLR(R) 12 ("***Sumpiles***") at [30]–[35].

[6] See Lord Sumption and Lord Toulson in *Versloot*, *supra* n 3.

5. In Part II of this article, the authors shall seek to evaluate and justify the new position taken by *Versloot*, and its impact on the law of insurance. Part III will proceed to elaborate on how *Versloot* could change the way insurance law affects consumer insurance in Singapore.

II. Evaluating *Versloot*

A. Brief facts of Versloot

6. It is apposite to first begin with a summary of *Versloot*. There, flooding had occurred aboard the insured's ship due to unidentified causes and consequently resulted in €3.2 million worth of irreparable damage.[7] In a bid to strengthen the insurance claim and accelerate payment processing from the insurer, the insured's ship manager fabricated a lie when questioned for an explanation as to the lack of measures taken to control the flood.[8] He claimed that although the bilge alarm had sounded and was heard by the crew, investigation was not performed as the alarm was believed to have been caused by the ship rolling in bad weather.[9] The purpose of such a lie was to give the impression that the damage was a result of the crew's negligence and not the ship's defective condition, since the insured was of the impression that the latter would render the claim void. [10]

7. However, this turned out to be unnecessary since the policy had not contained any exclusion to that effect, and the claim was thus recoverable.[11] Nevertheless, the High Court and the Court of Appeal adopted the traditional common law position, holding that since a collateral lie was used to support the insured's claim, the insurer had a right to reject it despite the genuine claim.[12]

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[7] *Versloot*, *supra* n 3, at [2].
[8] *Versloot*, *supra* n 3, at [3].
[9] *Versloot*, *supra* n 3, at [3].
[10] *Versloot*, *supra* n 3, at [3].
[11] *Versloot*, *supra* n 3, at [4].
[12] *Versloot Dredging BV v HDI Gerling Industrie Versicherung AG* [[2015] Lloyd's Rep. IR 115, at [166].

8. This was eventually overturned by the Supreme Court with a 4:1 majority.[13] Distinguishing between fraudulent claims and claims tainted by fraudulent devices, the court held that depriving an insured of his genuine claim on the basis of it being tainted by a fraudulent device is "disproportionately harsh",[14] all the more so when the fraudulent device had turned out to be unnecessary.

B. The traditional position on the law on fraudulent devices

(1) The disproportionate sanction on fraudulent devices

9. As alluded to above at [1] – [3], claims tainted by the use of fraudulent devices are distinct from fraudulent claims. A fraudulent device is involved if the insured believes that he has suffered the loss claimed but seeks to improve or embellish the facts surrounding the claim by some lie.[15] A fraudulent claim however is premised on the striking absence of a genuine claim, thereby rendering it an egregious offence.[16] This often involves falsification and exaggeration of a non-existent claim.[17] Notwithstanding, English insurance law prior to *Versloot* - and Singapore insurance law to date - had treated both equally in terms of the legal sanctions – that recovery from the insurer by the insured is prohibited under both situations.[18] This is widely known as the "fraudulent claims" principle.[19]

10. There are various justifications for the fraudulent claims principle. Public policy considerations feature significantly, specifically with regard to the insurance industry. Fraudulent claims have been projected to cost £2 billion annually in the United Kingdom.[20] Consequently, by prohibiting recovery by the insured, it acts as a form of deterrence against the abuse of the insurance industry.[21] This is largely similar to the

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[13] *Versloot*, *supra* n 3.
[14] *Versloot*, *supra* n 3, at [36].
[15] *Versloot*, *supra* n 3, at [26].
[16] *Versloot*, *supra* n 3, at [25].
[17] *Agapitos v Agnew* [2003] QB 556 ("***Agnew***") at [30].
[18] *Sumpiles*, *supra* n 5, at [31].
[19] *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd* [2003] 1 AC 469 ("***The Star Sea***") at [62].
[20] *Versloot Dredging BV v HDI Gerling Industrie Versicherung AG & ors* [2013] Lloyd's Rep 131, at [164].
[21] Lord Clark, "What Shall We Do About Fraudulent Claims?" The William Miller Commercial Law Annual Lecture, Edinburgh Law School (20 November 2015) < https://www.supremecourt.uk/docs/speech-151120b.pdf> (accessed on 15 July 2017)>.

general rule that nobody should profit from his own criminal wrongdoing.[22] As laid down by Lord Hobhouse in *Manifest Shipping co Ltd v Uni-Polaris Insurance Co*, the fraudulent claims principle ensures that the insured will "not be allowed to think: if the fraud is successful, then I will gain; if it unsuccessful, I will lose nothing."[23] The same reasoning has been adopted in relation to claims tainted by fraudulent devices, as affirmed in *Agapitos v Agnew (*"***The Aegeon***").*[24]

11. However, it is submitted that the Supreme Court in *Versloot* was right to hold that claims tainted by fraudulent means should not suffer the same consequences as a full-fledged fraudulent claim. In *Versloot*, a clarification was made as to what constitutes a "material collateral lie".[25] For a collateral lie to preclude the claim, the real test of materiality was held to be that the collateral lie must at least go to the recoverability of the claim. This is in contrast with the previous position in *The Aegeon*, where the test was that the use of fraudulent devices is considered material if, objectively ascertained, they have yielded an improvement in the insured's prospects that was "not insignificant".[26] These prospects may include obtaining a settlement, a better settlement, or winning at trial.[27]

12. Indeed, the position taken in *Versloot* should be lauded. This could be seen to be in line with the UK's movement to make the insurance industry more consumer-friendly.[28] The prior focus on a "not insignificant" improvement in prospects was not only ambiguous but criticised.[29] The test of materiality correctly recognises that fraudulent devices are typically immaterial and irrelevant to the honest claim. As Lord Sumption stated, "the insured gains nothing from the lie which he was not entitled to have anyway. Conversely, the underwriter loses nothing if he meets a liability that he had anyway".[30]

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[22] *Sumpiles*, *supra* n 5, at [31], making reference to *Beresford v Royal Insurance Co Ltd* [1937] 2 KB 197. See also *The Star Sea*, *supra* n 19, at [62].
[23] *The Star Sea*, *supra* n 19, at [62].
[24] *Agnew*, *supra* n 17, at [30].
[25] *Versloot*, *supra* n 3, at [30].
[26] *Agnew*, *supra* n 17, at [45].
[27] *Agnew*, *supra* n 17, at [38].
[28] The UK has introduced consumer centric legislation such as the Consumer Insurance (Disclosure and Representations) Act 2012 (c 6) (UK), and it is suggested that the position in *Versloot* complements it to a certain extent.
[29] John Birds, Ben Lynch, and Simon Miles, *MacGillivray on Insurance Law: Relating to all Risks other than Marine* (Sweet & Maxwell, 13th Ed, 2015), at para 21-059, where the authors explain that the test of "not insignificant increase" has generated differing interpretations judicially and elsewhere.
[30] *Versloot*, *supra* n 3, at [26].

Instead of benefiting the insurance industry, negative repercussions may in fact arise in the form of delays and increased premiums in the long run.[31]

(2) The confused state of law in regard to the consequences of a fraudulent claim

13. The state of law in both the UK and Singapore as to the precise consequences of a fraudulent claim have been less than satisfactory prior to *Versloot*. This was a result of the various characterisations of the doctrinal foundation undergirding fraudulent claims. For instance, the duty not to make a fraudulent claim has been differently characterised as an implied term of the contract,[32] a part of the duty of utmost good faith in both the UK Marine Insurance Act 1906 ("**UK MIA**")[33] and Singapore's Marine Insurance Act[34] (which is identical), and a standalone common law rule based on public policy.[35]

14. There are far-reaching implications as the governing principles and remedies available to an insurer varies under each approach. Under the common law approach, the insured's claim will be *forfeited* on the discovery of a fraudulent claim.[36] On the other hand, if a fraudulent claim is deemed to be a breach of the duty of good faith enshrined in s 17 of the UK MIA, the consequence would be vastly different as the sole remedy would be that of *avoidance*.[37] This entitles insurers to recoup all prior payments on any genuine claims, but it will also mean that insurers will not be getting anything much since premiums will be disgorged to the insured on the basis of total failure of consideration.[38] Doing so essentially leaves both parties no further than where they had begun, and is largely recognised as a disproportionate response, especially to the

[31] This was observed in *Versloot*, *supra* n 3, at [55], and alluded to in John Birds, *supra* n 29, at para 21-062, where processes to file a claim have been described to "work hardship" in particular circumstances.
[32] *Orakpo v Barclays Insurance Services* [1994] CLC 373 ("***Orakpo***") at 450.
[33] Marine Insurance Act 1906 (c 41) (UK) s 17; *Black King Shipping Corporation v Massie (*"***The Litsion Pride***"*)* [1985] 1 Lloyd's Rep 437, at p 512. The rule enshrined in s 17 of the Marine Insurance Act (Cap 387, 1994 Rev Ed) is not limited to marine insurance policies. Per Steyn J in *Banque Financiere de la Cite SA v Westgare Insurance* [1990] 1 QB 665, at p 701, it was observed that "[t]he Act of 1906 was a codification of the common law, and it is inconceivable that the common law regarded marine insurers as bound by a duty of the utmost good faith but not other insurers".
[34] Marine Insurance Act (Cap 387, 1994 Rev Ed) s 17 ("**SG MIA**").
[35] *Agnew*, *supra* n 17, at [25].
[36] *Galloway v Guardian Royal Exchange (UK) Ltd* [1999] Lloyd's Rep IR 209, at p 213.
[37] SG MIA s 17; the Marine Insurance Act embodies the common law principles, and hence, principles contained therein will similarly apply to other forms of insurance. See for example, *Drake Insurance plc v Provident Insurance plc* [2004] QB 601, at [83].
[38] John Birds, *supra* n 29, at para 17-031.

insurer.[39] The different doctrinal foundations referred to in [13] thus result in vastly varied effects (ie. forfeiture vs avoidance). The courts have also not been consistent nor clear as to the appropriate approach to adopt with regard to such cases.[40] If the courts are already straining reasoning to mitigate the harshness of such a consequence in regard to fraudulent claims, this makes it even more crucial that claims tainted by fraudulent devices should not be equated with the fraudulent claims principle.

15. *Versloot* is therefore a welcome decision towards clarifying the law for claims tainted by fraudulent devices. Using a straightforward "materiality" test, *Versloot* clarifies that only collateral lies that go towards the recoverability of the claim may be relied upon to avoid the claim.[41]

16. Singapore, however, still retains the old test in this area of law. This was pronounced in *Sumpiles Investments Pte Ltd v AXA Insurance Singapore Pte Ltd*.[42] There, it was held that if the fraudulent device is believed to yield "a not insignificant improvement" in the insured's prospects of obtaining a settlement of winning the case, the claim may be avoided on the basis of the fraudulent devices doctrine.[43] In light of the developments in the UK, it is perhaps timely for the law on fraudulent devices in Singapore to be refreshed.

III. An opportunity for an update to Consumer Insurance Law in Singapore?

17. The developments in *Versloot* appear to fall in line with the clarification of insurance law in the United Kingdom, closely following the introduction of the Consumer Insurance (Disclosure and Representations) Act 2012[44] and the Insurance Act 2015.[45] The legislative reforms refined the balance between the insurer and the insured,

[39] *The Star Sea*, *supra* n 19, at [51].
[40] For example, in *Orakpo*, *supra* n 32, at 450, the duty not to make a fraudulent claim was characterised as an implied term of the contract; in *The Litsion Pride*, *supra* n 33 at 512, such duty was characterised as part of the duty of utmost good faith enshrined in s 17 the SG MIA, *supra* n 34; and in *Agnew*, *supra* n 17, at [25], this duty was pronounced to be a standalone common law rule based on public policy.
[41] *Versloot*, *supra* n 3, at [36].
[42] *Sumpiles*, *supra* n 5, at [30]–[32].
[43] *Sumpiles*, *supra* n 5, at [33].
[44] Consumer Insurance (Disclosure and Representations) Act 2012 (c 6) (UK) ("**CIDRA**").
[45] Insurance Act 2015 (c 4) (UK).

providing for a more consumer friendly insurance law regime.[46] One commentator has even remarked that the legislative reforms marked the "doctrinal split" between consumer and commercial insurance.[47] It is clear that the United Kingdom has shifted to a pro-consumer stance with regard to consumer insurance, and *Versloot* may be seen to contribute to such a movement. By qualifying the remedies available in claims tainted by fraudulent devices, *Versloot* adds to the refinement of this balance between insurers and the insured.

18. The developments in the UK renewed calls for Singapore to adopt a similar approach.[48] It is unclear how exactly Singapore courts would react to *Versloot*, but a brief survey of previous judicial attitudes to the restrictive approach of the UK MIA[49] might give some hint as to whether the approach in *Versloot* will be adopted.

A. Duty of utmost good faith and non-disclosure by the insured

19. The current position in Singapore – mirroring the old position in UK - regarding pre-contract disclosure for the insured can be found in ss 17 and 18 of the UK MIA.[50] As part of the insured's duty of utmost good faith,[51] the insured must disclose to the insurer:

> "every material circumstance which is known to the insured, and the insured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him; and if the insured fails to make such disclosure, the insurer may avoid the contract."[52]

20. This obligation to disclose is not in itself onerous. However, the precise definition of "materiality" is problematic. "Materiality" has been defined to include what "would influence the judgment of a prudent insurer in fixing the premium or determining

[46] Simon Goh, "The Impact of the UK Insurance Act 2015 on Singapore Insurance Law and Practice", *Singapore Law Gazette* (October 2016).
[47] John Birds, *Birds' Modern Insurance Law* (Sweet & Maxwell, 10th Ed, 2016), at p 16.
[48] Commentators have called for the adoption of such a stance when the UK revised its Insurance Act in 2015: see Yeo Hwee Ying, *supra* n 2, at [45]; Simon Goh, *supra* n 46.
[49] SG MIA, *supra* n 34.
[50] *Ibid*.
[51] SG MIA, *supra* n 34, s 17.
[52] SG MIA, *supra* n 34, s 18.

whether he will take the risk."[53] But in the context of a consumer insurance contract, how would the insured know what would "influence the judgment of a prudent insurer"? The UK MIA was enacted at a time when insurance contracts were concluded between sophisticated businesses with equal bargaining power.[54] The inapplicability of such a standard for consumers has been highlighted on numerous occasions,[55] and in *Pan Atlantic Insurance v Pine Top Insurance* ("***Pan Atlantic***"),[56] the House of Lords introduced an additional requirement: the insurer had to show he had actually been "induced by the non-disclosure to enter into the policy on the relevant terms."[57]

21. The High Court of Singapore in *UMCI Ltd v Tokio Marine & Fire Insurance Co (Singapore)*[58] applied the formulation from *Pan Atlantic*, and did not allow the insurer to avoid the contract due to the absence of clear evidence of reliance.[59] While not expressly stated, it was clear that the the law as laid out in the UK MIA (as well as in Singapore's Marine Insurance Act) was unsatisfactory and in need of reform.[60]

22. The UK 2012 Consumer Insurance (Disclosure and Representations) Act 2012[61] effectively codified the requirements laid out in *Pan Atlantic*,[62] and laid out a framework for the determination of "qualifying misrepresentations".[63] The new legislation thus effectively allows for the qualification of the effect of s 17 of the UK MIA by incorporating the inducement requirement for an action against the insured.[64]In Singapore, despite the comments in *UMCI Ltd v Tokio Marine & Fire Insurance Co (Singapore)*,[65] no legislative intervention has been made, and the full extent of s 17 of the Marine Insurance Act[66] still applies to consumers.

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[53] SG MIA, *supra* n 34, s 18(2).
[54] John Birds, *supra* n 47, at p 15; John Birds, *supra* n 29, at paras. 1-024 to 1-025.
[55] *Ibid*.
[56] *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1995] 1 AC 501 ("***Pan Atlantic***").
[57] *Id*, at 549.
[58] *UMCI Ltd v Tokio Marine & Fire Insurance Co (Singapore) Pte Ltd* [2008] SGHC 188 ("***UMCI***").
[59] *Id*, at [30]–[33].
[60] This was particularly pointed out at length by Lord Mustill when he found the precedents concerning the UK MIA lacking, and implied the reliance element into the statute, in *Pan Atlantic*, *supra* n 56, at 548-549. Referenced in *UMCI*, *supra* n 58, at [24] and [30]–[33].
[61] CIDRA, *supra* n 44.
[62] Yeo Hwee Ying, *supra* n 2, at [20].
[63] CIDRA, *supra* n 44, ss 4–5.
[64] Yeo Hwee Ying, *supra* n 2, at [20].
[65] *UMCI*, *supra* n 58.
[66] SG MIA, *supra* n 34, s 17.

B. Interpretation and incorporation of terms

23. Further judicial sentiment about the inadequacy of current insurance laws can be seen in the cases concerning the terms of consumer insurance policies.

24. In *NTUC Co-operative Insurance Commonwealth Enterprise Ltd v Chiang Soong Chee* ("***Chiang Soong Chee***"),[67] the High Court was asked to rule on whether a strict or broad interpretation of a clause describing disability was to be taken.[68] Essentially, the insured argued for the broad definition – that the insurer was liable to make the payout if the insured could establish that he could no longer substantially carry out his usual occupation.[69] The insurer argued that the strict interpretation was to be taken – that for a payout to be made, it was necessary for the insured to establish that he unable to carry out any work at all.[70]

25. The court, after looking through the policy in detail, decided that the strict interpretation was more appropriate, but raised an important observation on such consumer life insurance policies.[71] Woo J noted that:

> "members of the public [who] may be unaware that their life policies with such a benefit have a strict interpretation… insurers who rely on the strict interpretation should educate the public of the limited scope of the disability benefit in their policies so that the public can take further steps to see if the requisite cover is available."[72]

26. Woo J went one step further, urging insurers to be proactive in catering to the consumers in this aspect, and "not wait for legislation to compel them to do so."[73]

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[67] *NTUC Co-operative Insurance Commonwealth Enterprise Ltd v Chiang Soong Chee* [2008] 2 SLR(R) 373 ("***Chiang Soon Chee***").
[68] *Id*, at [19].
[69] *Id*, at [18].
[70] *Id*, at [18].
[71] *Id*, at [47]–[50].
[72] *Id*, at [50].
[73] *Ibid*.

27. Shortly after, the Court of Appeal in *Tay Eng Chuan v Ace Insurance Ltd*[74] made similar recommendations, citing *Chiang Soong Chee* with approval on this point.[75] The interesting point in this case is that the Court of Appeal framed such an obligation on the insurer as part of its duty of utmost good faith to the insured.[76] This is a twist from the conventional reference to the duty of utmost good faith at s 17 of the Marine Insurance Act (both UK and Singapore which are identical)[77] which typically has the burden placed on the insured, particularly in cases relating to non-disclosure.

C. Judicial momentum for consumer-centric insurance law

28. In the cases highlighted above on both non-disclosure and interpretation of terms, it is arguable that the black-letter law would have been unfavourable to consumers. Short of changing the law completely, the judicial attitude appears to slant towards providing for a more balanced playing field between insurance companies and consumers. Indeed, the relevance of the UK MIA, codified in 1906 in the UK before being adopted wholesale in Singapore in 1994 in the form of the Singapore MIA, falls into question. The courts' attempts at managing this irrelevance to consumer policies may also be observed in the cases above.

IV. Conclusion – will *Versloot* ignite the revolution of change in Singapore's insurance law?

29. The doctrinal implications of *Versloot* provide an opportune time to revamp and update Singapore's insurance laws, particularly in the aspects concerning consumers. Part II of this piece has shown how *Versloot* is the right path in the development of insurance law, and should indeed be adopted by Singapore courts, while Part III has shown that there has been a need for some change in consumer insurance laws in Singapore for a while now. While it remains unclear how Singapore courts (and indeed even Parliament) might react to *Versloot*, the opportunity to draw a "doctrinal distinction"[78] between commercial and consumer insurance law has come. Keeping in line with Singapore's

[74] *Tay Eng Chuan v Ace Insurance Ltd* [2008] 4 SLR(R) 95.
[75] *Id*, at [30].
[76] *Ibid*.
[77] SG MIA, *supra* n 34, s 17.
[78] John Birds, *supra* n 47, at p 16.

vision to be a global insurance marketplace by 2020 (which is not too far away), a legislative reform of the archaic SIngapore MIA is definitely due, and the lessons from the UK are of invaluable guidance.