do not like to publicise the fact that they have been defrauded and in some of the recent larger fraud rings a number of institutions have suffered substantial losses and are therefore competing for the same assets when pursuing their recovery actions. It remains to be seen whether any solution to these difficulties can be found, but clearly any pooling of information regarding suspect borrowers or professionals can only help to reduce the opportunity to defraud more than one lender and identify those who are actively pursuing careers in mortgage fraud.

The discovery of mortgage fraud and resulting claims of the type I have discussed are likely to have serious implications for the financial and insurance industries - at least while there is a static or falling property market and then for several years thereafter as the problems are sorted out. The number of systematic frauds could well decline, as the flat and falling market fails to offer the incentives required by systematic fraudsters, but as more routine checks are put in place it is likely that the commission of mortgage fraud will become more sophisticated. It only by greater awareness of the problem, the introduction and maintenance of strict lending procedures and tighter regulation on those involved in mortgages from a professional stance that lenders and their insurers will be able to keep ahead of the fraudsters.

3. MARINE INSURANCE
by Richard J. Sayer, Ince & Co.

It is a privilege to be with you all at this your seventh annual conference, and to have been asked to speak on the subject of marine fraud.

I have over the last thirty years practised marine fraud with some regularity, always I hasten to add on the side of the angels - the insurers. I must therefore begin by apologising to all those of you here who are fraudulent shipowners or fraudulent cargo owners - I am somewhat prejudiced and I may not therefore give due weight to your point of view during the next 20 minutes.

Now you have a distinguished panel of speakers to talk about insurance fraud - I don't wish to cut across anything they will be saying so I will confine my remarks about marine fraud to the *wet* aspect of that subject. Marine insurance can be put broadly into 2 categories - dry - which involves documentary and cargo fraud; and wet - involving casualties to vessels. As part of my practice as a maritime lawyer I was a member of a team of investigators who looked at over 60 cases of total loss of ships in the South China Sea in the late 1970's.

After a four month investigation we found that at least 28 vessels had sunk in highly

suspicious circumstances and that in a very large number of cases clear evidence existed that underwriters had been defrauded, both hull and cargo. The sad feature however was that almost all of the suspect losses had already been paid by underwriters before the team had been set up. Why? Because generally underwriters believed that although the losses were in all probability fraudulent, they felt that they would not be able to prove that the losses had been caused deliberately and thus they felt forced to pay. But my message is that they, and their successor underwriters in later cases, take an unnecessarily pessimistic view of their situation, and that there are remedies and defences open to them. Here a few points to support what I have just said.

1) First, as a general proposition the Courts recognise and sympathise with the difficult position in which underwriters find themselves. Here is a quote from Roskill L.J. in the course of his judgment in the *Sageorge* in the Court of Appeal in 1973:

> "I have some sympathy with the attitude of underwriters in these cases ... ships are from time to time scuttled. So are cargoes. There are plenty of examples of scuttled ships recorded in the reports between about 1920 and 1970. Where such losses arise, it is not easy for underwriters to probe or ascertain the truth. Their enquiries may sometimes run up against a blank wall of the dishonest who hope by silence to avoid detection."

In that case the Court acknowledged that the marine underwriter has for some 200 years been in a privileged position. That privilege is extended to procedural advantages permitting them greater opportunities for discovery of the facts than would be open to a non-marine insurer defendant. Although the practice today is less favourable to underwriters, it is possible for them to apply to the Court for an order for an affidavit of ship's papers, as in the *Sageorge* case whereby the plaintiff shipowner is obliged to swear an affidavit detailing all categories of documents which have any relevance to the case, which either belonged to him or to others, and he must show he has made reasonable efforts to obtain such documents. Incidentally the order for ship's papers itself is a very archaic form. Lord Denning described it in the following terms:

> "This form is so long, so full of repetitive detail, and so obscure that it must have been drafted by a conveyancer in the days when payment was so much a folio. The only people who know how it works are the few firms of solicitors in the City of London who handle these cases...."

Until 1936 an order for ship's papers was made in all marine insurance cases as a matter of course, although it did not extend to non-marine insurance.

The 1970's saw, as Roskill L.J. described it, a "secular struggle between shipowners' defence clubs and hull and cargo underwriters regarding the practice and procedure to be adopted in the Commercial Court in interlocutory proceedings in cases of alleged scuttling". The shipowners' defence clubs - a form of legal fees insurance - won one battle in this struggle when they persuaded the Court of Appeal in the case of the *Dias* in 1973 that underwriters would be required to give particulars of the matters upon which they relied to support a plea that a vessel had been scuttled as part of their pleadings. Evidence and argument does not require to be pleaded and underwriters need only give the best of particulars of the allegations of scuttling which they are able to do, with the liberty to amend and amplify if necessary during the trial. Buckley L.J. said in that case that the precise area which will require to be particularised in a scuttling case will vary from case to case but speaking generally the practice henceforth will be that the marine underwriter is in no better position than any other defendant in a non-marine fraud case. The secular struggle continues in different forms: 0 last year case - tape recordings.

2) So much for interlocutory procedural matters. What of the trial procedures? Underwriters are always concerned at what they perceive to be the very heavy burden of proof upon them. But in many cases the burden is less onerous than a nervous insurer would suspect. It will usually be the case that where a claim is made under a marine policy for a total loss by sinking the assured will rely upon perils of the sea. On the authority of the *Tropaioforos* (1960) and the House of Lords in *Samuel v. Dumas* (1924) the assured has the burden of proving a negative - that the ship was lost by perils of the sea and not by scuttling. If on balance of probabilities he fails to persuade the court that the ship was not lost by scuttling he will not recover. Thus although the underwriter must establish probably beyond all reasonable doubt that the ship was in fact scuttled, if he fails to do so but the assured alas fails to prove the negative the underwriter will still succeed. The burden of proof to establish perils of the sea has led to several recent cases where the assured has failed to recover - see the "*Popi M*" in 1982, the "*Zenovia*" in 1984 and the "*Marel*" in 1990 are examples.

In the case of a fire, the assured is however better off. He can, on the authority of *Slattery v. Manse,* satisfy the burden of proof upon him simply by establishing the existence of a fire. The burden then transfers to the insurer to prove connivance. The reason for this odd distinction is the fact that fire is a named peril in the standard marine hull policy.

Burden of proof also features significantly in the question of barratry. Barratry is defined as a wrongful act wilfully committed by the master or crew to the prejudice of the owner. It is a plea sometimes used by a shipowner as an alternative to a plea perils of the sea. If a shipowner feels that underwriters have obtained some strong evidence that one of the crew members deliberately sank the vessel, the assured may well decide to change his plea to barratry. Interestingly it has been held, see *Elfi Issaias v. Marine Insurance Company* in 1923, that to establish such a plea the shipowner does not need to produce any evidence to show his lack of privity, consent or connivance in the crew members scuttling act. In the recent case of the "*Zenovia*" 1984, Bingham J. was persuaded by the *Issaias* case that once the owners have proved a casting away by deliberate act of the master or crew, it is for the insurers to establish to the highest standard required for proof of fraud in a civil case that the owners consented to or connived at the casting away.

However, the marine insurer in my view should not be concerned if his assured pleads barratry. For the practical reality is that once an assured gives up his argument that the loss occurred by perils of the sea and *instead* pleads barratry he has in practice put himself into the position of having to show that *he was not involved* because his case is immediately inherently unlikely. In modern times only one plea of barratry has succeeded in court and that, the "*Michael*" in 1979 was regarded, with all due respect to the Judge, as something of an aberration.

3) Practical Remedies

A practical remedy open to the marine insurer is to investigate the casualty with all speed, before the trail has grown cold. Underwriters make use of this remedy whenever possible. A good example of this arises in the case of the "*Michael*" to which I have just referred.

Back in 1972 a Greek shipowner took underwriters to court claiming that the loss of his vessel the "Gold Sky" had been due to perils of the sea. The assured's chief witness was the Greek third engineer Mr Komiseris who gave evidence in court on a number of the days of the 60 day trial, alleging that a breach in the shell plating had occurred, that water had sprayed into the engine room, and that the ship had in consequence sunk. My firm was acting for underwriters in that case and one of our assistant solicitors sat in court within a few feet of Mr Komiseris throughout the entire trial, inevitably getting to know him at least on a "good morning" basis. Seven years later the same assistant solicitor, by then a partner, was standing in the senior partner's room when a telephone call came through from underwriters that another Greek vessel, the "Michael" had sunk, that the crew had been rescued by a tug which was due

to arrive within two days at a Caribbean Island, and that we should send someone to interview the rescued crew to establish what had happened. Simply by reason of his having been in the room at the time, our friend the ex-assistant solicitor and now partner was despatched to the Caribbean. There he was standing on the quayside when the tug arrived carrying the crew and he took a series of photographs of the motley collection of unshaven individuals. Imagine the mutual shock when through the lens of the camera he realised that one of the crew was none other than Mr Komiseris. Greeting each other as old enemies they went off for a cup of coffee and Mr Komiseris explained that he had opened the sea cocks in the engine room to permit water to come in and the ship sunk, just as he had in the earlier case of the "Gold Sky". The shipowner claimed perils of the sea but upon realising the underwriters knew the facts, changed his plea to barratry. To be ahead of the game in this manner in this particular case did not ultimately do underwriters any good because as I have stated the Judge found that the shipowner did not authorise or connive at Mr Komiseris's act and that the shipowner was therefore entitled to recover on the basis of barratry. Mr Komiseris was therefore held to be the maritime equivalent to a pyromaniac - perhaps a seacockomaniac.

4) Apart from instructing investigators to seek evidence as soon as possible, a further remedy is open to insurers in that they can by spending what may not necessarily be large sums of money, seek tangible evidence of fraud. Surveyors can be promptly despatched to examine the manner in which a stranded vessel has gone aground, fire experts can sift through the charred remains of fire damage, and divers and even underwater video equipment can be used to examine vessels which have sunk in water not too deep for examination. In a case which recently went to trial, the "*Nyeaster*" the Judge was impressed by video evidence to demonstrate that a pipe in the engine room had been disconnected, thus permitting water to enter the engine space.

The evidence which underwriters seek may very often prove to be less than decisive. That is hardly surprising, given the great likelihood that a fraudulent shipowner will not have left evidence lying around to be used against him by his insurers. It is for example highly unusual, and indeed will be very dangerous, for a witness admission of scuttling to be put forward as evidence in Court. What is however frequently put forward is "sore thumb" evidence - a fact or event that sticks out as being incapable of innocent explanation. For example, in the "*Gold Sky*" in 1972 and the "*Captain Panagosdp*" in 1990 the assured could not readily explain why the master of the ship had not accepted the offers of help of salvage tugs which came up with the sinking vessel. In the case of the "*Rio Mar*", which went to court in the United States, the assured had even greater difficulty in explaining why the crew sought to drive away

the salvage tug which came alongside by throwing metal bolts and other objects at the salvage crew. In the celebrated case of the "*Salem*", on behalf of hull underwriters we interviewed the assistant cook who recounted to us how he had been ordered to prepare sandwiches, rather than the usual cooked meal, and had only appreciated the significance of the order when he later found himself eating his share of the sandwiches in the ship's lifeboat, whilst watching the ship slowly sinking half a mile distant.

It is these pieces of evidence, small but significant, which can provide underwriters with the remedy they seek against the fraudster. I should make it clear that Perry Mason style forensic triumphs in these cases are rare indeed. One did occur in the case which went to trial in 1960 - the "*Tropaioforos*" - when underwriters cross-examining Counsel asked the master of the vessel to describe what he had done when he had awoken on the morning of the casualty. The master made the fatal error of admitting that he had shaved in the very early hours and had donned a clean shirt, shortly before his ship struck the "unknown submerged object", which caused her to sink with surprising speed.

5) If the evidence is strong that a fradulent act has occurred what chance has the insurer of then satisfying the court that the assured connived in that fraudulent act? In marine insurance cases the Court will be prepared to draw inferences of connivance from clear evidence that a fraudulent act has occurred. For the Court is realistic and wordly wise. In the splendid words of Lord Summer in *Compania Martiartu v. Royal Exchange Assurance* in 1924:

> "Ships are not cast away out of lightness of heart or sheer animal spirits. There must be some strong motive at work, and this is usually the hope of gain."

6) We have so far debated the remedies which are available to marine insurers *within* the Court process - interlocutory and final trial - as well as the remedies of enquiry and investigation. Finally let us look at other practical means whereby insurers can limit their exposure to fraudulent claims.

First, the sharing of information. The exercise of enquiry into the loss of 60 vessels in the South China Sea in the 1970's, to which I referred at the beginning of this talk and which was known as the FERIT exercise, an acronym for Far East Regional Investigation Team - was only possible because the marine insurers of eight countries, including the United Kingdom, got together to share information and expense. Insurance is of course a highly competitive matter and competitors do not readily share their secrets. But there can be no benefit to an individual insurer in

secreting information about a fraud which has been perpetrated upon him or of which he has obtained some knowledge: he must put it into a general pool of information for the benefit of all. The "Aliakman Runner" provides a good example. The ship sank causing a cargo of Golden Buddhas alleged to be worth $32m. Insurers discovered from fellow insurers that the cargo owners had unsuccessfully endeavoured to insure this cargo in 2 other markets.

Secondly, the use of existing data. In the FERIT example a database was created giving the names of all crew members who had served on each of the vessels in question, and the names of as many shareholders and other principals as could be found. Cross referencing names through the database led us to identify numerous examples of crew members who had served on two or three otherwise apparently completely unconnected losses. Underwriters can nowadays turn to the I.M.B. with its fraud database, to cross-check the names thrown up by their enquiries.

Thirdly, Influence with Governmental Authorities. Influence exerted individually cannot of course be as effective as influence directed in a concerted joint effort. If insurers are paying for marine losses arising more frequently under one particular flag than under another, or in one particular geographic location, the fact should be recognised and the reasons sorted out. One practical example of how insurers could influence flag states to their own advantage would be for them to press for a full and proper marine enquiry to be held every time there is a significant casualty, and particularly a total loss.

Fourthly, Underwriters should also use their influence with Classification Societies whose function it is to survey and certify the physical condition of vessels. The London hull market has recently led the world in stepping up pressure on Classification Societies to improve their standards.

Lastly, Underwriters should continue, and increase, their cooperation with the police. There has been a distinctive trend towards involvement of the police by the commercial interests in marine fraud cases. It used to be said that insurers did not involve the police and therefore were not helping to stamp out the menace of fraud.

Together with others who have been involved in such matters I believe that the greatest deterrent to marine fraud is the prosecution of the fraudsters. The police must therefore be brought in. In recent years the trend has changed. I have seen a number of cases, particularly in the Far East, where insurers have been quite prepared to file a complaint and have thereafter liaised with the police. However, I would respectfully suggest that some improvement can still be made in those lines of communication.

For example how many countries will follow the example of Singapore where a committee has been created at which representatives of the police authorities and the commercial interests sit together. An informal committee on marine matters exists in the London marine insurance market. Somewhat similar bodies exist in other fields: for example the California Insurance Department Fraud Bureau several years ago was reporting that me than 3,500 instances of suspected fraud involving at least $50 million had been referred to the State by insurance company investigators in California over a 21/2 year period. Legislation in New York has recently created an Insurance Fraud Bureau to bridge the gap between the civil and criminal investigators.

There is no doubt that the most effective means of uncovering a fraud is for the commercial investigator and the police to work together. The former will have his sources of information, his expertise in the specialised field, his contacts in the industry and his ability to spot a fraud by interviewing the witnesses on day one. He will also have the ability, not shared by the police, to move quickly and easily across national borders in pursuit of a lead. On the other hand he does not have the powers of the police in appropriate cases to enter and search, to seize documents and to interrogate witnesses who are not prepared to meet him. They can each do their own job and, given absolute mutual trust, can pool their respective skills to the common benefit.

Thus any forum, such as a national or international liaison committee which will improve cooperation between the commercial interests and the police, can in my view only be a step in the right direction.

Conclusion

In conclusion I would suggest that so far as marine fraud is concerned, the outlook for the insurance industry is not as bleak as the media might occasionally portray it. Not every T/L case since the "*Salem*" is a scuttler. Owners can, by using the remedies and defences we have been examining, and in particular by adopting a robust stance when fraud is suspected, continue to win the battle against fraud.