19/99; [1999] VSC 287

SUPREME COURT OF VICTORIA

AUSTRALIAN ASSOCIATED MOTOR INSURERS LTD v TIEP THI TO

Mandie J

2 August 1999 — 151 FLR 384; 10 ANZ Insurance Cases 75,076

CIVIL PROCEEDINGS – INSURANCE – INTENTIONALLY MAKE FALSE STATEMENTS IN INSURANCE CLAIM – MISTAKEN BELIEF OF INSURED AT TIME OF MAKING CLAIM – MEANING OF "FRAUDULENTLY" – WHETHER INSURED ACTED DISHONESTLY – WHETHER CLAIM MADE FRAUDULENTLY: *INSURANCE CONTRACTS ACT* 1984 (CTH), 56(1).

Section 56(1 of the *Insurance Contracts Act* 1984 (Cth) ('Act') provides:

(1) Where a claim under a contract of insurance, or a claim made under this Act against an insurer by a person who is not the insured under a contract of insurance, is made fraudulently, the insurer may not avoid the contract but may refuse payment of the claim.

T's motor vehicle was comprehensively insured with AAMI. T's vehicle was damaged when it was being driven by her 15 year old son. In making a claim on AAMI for the cost of repairs and towing, T. falsely stated that the vehicle had been stolen and damaged. When AAMI denied the claim, T. issued proceedings to recover the amount. At the hearing, T. gave evidence that the vehicle was driven by her son without her consent. In those circumstances, the insurance policy would have covered the insured for the damage to the vehicle. The magistrate found that T's false statement was the result of her mistaken belief that if her son were driving when the damage occurred, T. would not have a claim under the policy. In those circumstances, the magistrate ruled that the claim had not been made fraudulently within the meaning of s56 of the Act and accordingly, AAMI was not entitled to refuse payment of the claim. Upon appeal—

HELD: Appeal allowed.
1. The essence of fraud is dishonesty. If a person knowingly makes false statements believing that they have an invalid claim in order to mislead the insurer into believing that they have a valid claim, it does not matter whether in fact the claim is valid or invalid. The claim is made dishonestly and hence fraudulently within the meaning of s56(1) of the Act.

2. In view of the finding that T. had knowingly made false statements in her claim when she believed that the true facts, if disclosed, would be such that she did not have a good claim, T. was therefore dishonestly intending to mislead AAMI and accordingly, her claim was made fraudulently under the provisions of the Act. In those circumstances, the magistrate was in error in deciding otherwise.

MANDIE J:
1. This is an appeal from an order of the Magistrates' Court at Melbourne made 9 March 1999, whereby the defendant appellant ("the insurer") was ordered to pay the plaintiff respondent ("the insured") the sum of $11,050.16, together with interest and costs.

2. By amended particulars of claim dated 3 July 1998, the insured had sought to recover the costs of repairs and a towing fee in relation to her motor vehicle which was comprehensively insured under an insurance policy with the insurer. The insured alleged therein that, on 9 May 1997, the insured's vehicle was stolen from the driveway of her home and was subsequently damaged, and she made a claim on 13 May 1997 which had been wrongly denied by the insurer. In the alternative, the insured alleged that if the insurer was entitled to "avoid the policy" (which should perhaps have read "deny the claim"), she was entitled to recover under the provisions of ss31 and 54 of the *Insurance Contracts Act* 1984 (Cth) ("the Act").

3. By its amended notice of defence dated 15 July 1998, the insurer alleged that the insured's claim dated 13 May 1997 was fraudulent and that it had denied the claim on the basis that the insured had made a fraudulent and dishonest claim, alternatively had not acted with the utmost good faith. The fraud or dishonesty thereby alleged was that the insured had claimed that the insured vehicle had been stolen whilst her son was about to wash the car in her driveway, whereas she knew that in truth the vehicle was damaged whilst being driven by her son.

4. After evidence, including evidence from the insured, and after submissions, the magistrate reserved and some 11 days later handed down written reasons for decision in favour of the insured, comprising seven pages. The learned magistrate found, so far as presently relevant, that on 9 May 1997 the insured and her husband had gone to work in her husband's vehicle leaving her 15 year old son at home; that on later returning home, she and her husband found the insured vehicle near their home in a damaged condition with their son in the vehicle; that the insured moved the vehicle to another nearby location and then, to the knowledge of the insured, the vehicle was reported to the police as stolen; that on 12 May 1997 the insured gave a false statutory declaration to the police to the effect that the insured vehicle had been stolen by a group of youths who had set upon her son whilst he was washing the vehicle and that on 13 May 1997 the insured made similar false statements in a statutory declaration provided to the insured. There was evidence before the magistrate in the form of a written declaration of loss, which took the form of a statutory declaration dated 13 May 1997, in which the relevant false statements are contained.

5. The learned magistrate found that the truth, as at all times known to the insured, was that the vehicle was damaged whilst being driven by her son who was an unlicensed driver. The insurance policy did not cover the insured for damage to the vehicle if at the time the damage was incurred the vehicle was being driven by an unlicensed person, unless the vehicle was so driven without the consent of the insured. The insured gave evidence that her son had driven the car without her consent, and, contrary to the submission put on behalf of the insurer that she should not be believed on this point, the learned magistrate accepted that evidence. Accordingly, the learned magistrate found that the claim was not excluded by the express terms of the policy.

6. The learned magistrate next found that her false statement as to the circumstances in which the damage occurred in her claim to the insurer "was the result of her mistaken belief that if her son were driving at the time the damage was incurred, she would not have a claim under the insurance policy".

7. In the light of those facts, the learned magistrate turned to consider whether the insured had made her claim "fraudulently" within the meaning of s56 of the Act, which would entitle the insurer to refuse payment of her claim.

8. After consideration of the authorities, the magistrate concluded that the plaintiff's claim had not been made fraudulently. The magistrate further concluded that the claim had been made in breach of the duty of utmost good faith, but that this did not assist the insurer having regard to the proper application of s54(2) of the Act.

9. The following questions of law are raised by the appeal:

> "A. Having regard to his findings that the insured had—
> (a) given a completely false account of the circumstances of loss when submitting her claim; and
>
> (b) had done so with the purpose of obtaining insurance benefits when she wrongly believed that she had in the circumstances no entitlements to such benefits—
> did the learned magistrate err in holding that the claim was not a claim made fraudulently within the meaning of s56(1) of the *Insurance Contracts Act*?
>
> B. Did the learned magistrate err in failing to apply the provisions of s56 of the said Act to the circumstances of this case so as to entitle the insurer to refuse payment of the claim?"

10. It can be seen that there is in essence one question to be decided on this appeal: did the magistrate err in law in concluding that the insured's claim was not made fraudulently within the meaning of s56(1) of the Act? It seems to be common ground that as there is no definition of "fraudulently" in the Act, it should have the same meaning as it is given at common law.

11. Section 56(1) of the Act provides that where a claim under a contract of insurance is made "fraudulently", the insurer may refuse payment of the claim.

12. In *Norton v The Royal Fire and Accident Life Assurance Co* (1885) 1 TLR 460, at p461 Coleridge LCJ said:

> "A claim will be fraudulent or based on fraud when it is false and the persons making the claim intended to deceive the insurer by getting out of it money or some other benefit they know they have no right to."

13. If after the word "know" the words "or believe" were added, I would respectfully adopt that as a useful short definition of "fraudulently" for present purposes.

14. The essence of fraud is dishonesty, and that has been often repeated in relation to the definition of fraud under the *Transfer of Land Act*. For a useful consideration of the authorities relating to the meaning of fraud under the *Transfer of Land Act* I would refer to a recently decided case by the Court of Appeal of *Russo v Bendigo Bank Limited* [1999] VSCA 108; [1999] 3 VR 376; [2000] V Conv R 54-615; [2000] ANZ Conv R 86, in which among other cases which are referred to, there is reference to the often cited decision of the Privy Council in *Assets Co Limited v Mere Roihi* [1905] AC 176; 92 LT 397 in which Lord Lindley on behalf of the Board said (at 210):

> "By fraud ... is meant actual fraud, i.e., dishonesty of some sort ..."

And do I not think that under the *Insurance Contracts Act* the position is any different.

15. It seems to me that the findings by the magistrate at pages 4 to 6 of his reasons involve a finding of dishonesty. Although the word "dishonesty" is not used, it seems to me to be an inevitable inference from the finding that the insured made false statements in her claim in the mistaken belief that she would not have a claim if the true facts were stated, that the magistrate was finding that she had acted dishonestly with the intention to mislead and, as I understood it, counsel for the respondent felt obliged to concede, and did concede, that the magistrate's finding necessarily involved a finding of dishonesty in this respect.

16. If a person knowingly makes false statements believing that they have an invalid claim in order to mislead the insurer into believing that they have a valid claim, it seems to me not to matter whether in fact the claim is valid or invalid. The claim is made dishonestly and hence fraudulently within the meaning of the Act. I think that proposition is supported by the authorities to which Mr Riordan, who appeared as counsel for the insurer, referred, including *Gugliotti v Commercial Union* (1992) 7 ANZ Insurance Cases 61-104; (1992) 15 MVR 463, and *Vermeulen v SIMU Mutual Insurance Association* (1987) 4 ANZ Insurance Cases 60-812, and I think that if the magistrate had a different view about *Gugliotti*, as appears from page 6 of his reasons, then he was in error.

17. The magistrate appeared to rely to some extent on the case of *GRE Insurance Limited v Ormsby & Ors* (1982) 29 SASR 498; (1982) 2 ANZ Insurance Cases 60-472, a decision of the Full Court of the Supreme Court of South Australia, a case which has subsequently been criticised and distinguished. Before this court, counsel for the insured also relied upon this case. In that case there was a claim for the loss of stock after a break-in and theft, and the trial judge found that there was a break-in and theft, but he did not make a finding as to whether the plaintiff had attempted as alleged by the insurer to falsely bolster the claim or the evidence by tampering with the lock, perhaps with the intent of making it easier to show that there had been a break-in and theft.

18. Mr Justice Mitchell said in substance that a false statement or false evidence in a claim would ordinarily amount to a fraudulent claim, but in that case it was conceded that the claim was valid, therefore it was not a fraudulent claim if there was simply an attempt to support a valid claim. I have difficulty in accepting that line of reasoning, unless underlying the reasoning His Honour was taking into account the absence of a finding that the plaintiffs believed that their claim was a false one, and perhaps believed that their claim was a true one or were simply seeking to bolster it. That may or may not be a valid approach, but it is certainly irrelevant for the purposes of this case. Mr Justice Walters seemed to say, as I read it, that there was no false claim initially made, but that there was later false evidence, and that the plaintiffs had no intent to get money which they knew they had no right to. Again I need not decide whether that is a valid proposition because in the present case there is a significant distinction, namely, that the insured did attempt to get money which she believed she had no right to. As I understood Mr Justice Cox's judgment in *Ormsby*, he emphasised that there was a later and perhaps collateral falsity which was not covered in the absence of specific terms of the policy. It is perhaps a hard

case; I have some doubts as to its correctness, with respect, but it is clearly distinguishable from the present case, in my opinion.

19. In the present case I think that the magistrate was in error because, having found that the insured had knowingly made false statements in her claim when she believed that the true facts, if disclosed, would be such that she did not have a good claim, she was therefore dishonestly intending to mislead the insurer and he was accordingly obliged to find under the provisions of the Act that the claim was made fraudulently.

20. Counsel for the insured submitted (correctly) that the conduct of the insured in making the claim stemmed from a mistake - but the mistake which she made went to the question whether she had a valid claim or not - it did not go to the relevant and material matter, namely, whether what she was putting forward to the insurance company was true or false. As to that she was not labouring under any mistake. She knew, in plain language, that she was telling lies to the insurer.

21. Counsel for the insured initially submitted that it was not shown that the state of mind of the insured was dishonest, but for the reasons which I have already given, I think that the findings of the magistrate necessarily carry that conclusion with them, as counsel had to concede.

22. For those reasons I think that the appeal must succeed.

APPEARANCES: For the appellant AAMI: Mr PJ Riordan, counsel. CKB Partners Lawyers. For the respondent: Ms FI O'Brien, counsel. Galbally & O'Bryan, solicitors.
