01/06; [2005] VSC 482

SUPREME COURT OF VICTORIA

INSURANCE MANUFACTURERS of AUSTRALIA PTY LTD v HERON

Gillard J

4 November, 15 December 2005 — (2006) 14 ANZ Insurance Cases ¶61-669

CIVIL PROCEEDINGS – INSURANCE – INSURED'S MOTOR VEHICLE DAMAGED – CLAIM BY INSURED TO BE INDEMNIFIED – OMISSION BY INSURED TO DISCLOSE RELEVANT INFORMATION TO INSURER – WHETHER OMISSION INDUCED A FALSE BELIEF IN THE INSURER – WHETHER CLAIM MADE FRAUDULENTLY – WHETHER BY DELIBERATELY WITHHOLDING INFORMATION THE INSURED DID SO WITH AN INTENTION OF OBTAINING PAYMENT UNDER THE POLICY – FINDING BY MAGISTRATE THAT THE CLAIM WAS NOT FRAUDULENT – INSURED'S CLAIM UPHELD – WHETHER MAGISTRATE IN ERROR: *INSURANCE CONTRACTS ACT* 1984, S56(1).

H.'s motor vehicle was damaged when it ran off the road whilst H. was driving. H. later made a claim on his insurer seeking indemnity in respect of the damage caused to his vehicle. The insurer refused to pay the claim alleging that H. had not been truthful and frank in statements he made in connection with the claim. The insurer did not accept that H. was driving at the time the vehicle was damaged nor did it accept H.'s version of the circumstances of the incident. H. subsequently took proceedings seeking damages for the market value of the vehicle. At the hearing the magistrate found that H. had dishonestly withheld certain information but found that the omission did not constitute a fraudulent claim. Accordingly, the insured's claim was upheld. Upon appeal—

HELD: Appeal dismissed.

1. The question whether a claim is fraudulent or not is a factual one for the magistrate. To allege that a claim is made fraudulently is a serious allegation and the insurer has the burden of proof on the balance of probabilities in accordance with the standard laid down in *Briginshaw v Briginshaw* (1938) 60 CLR 336.

2. Although the principle of utmost good faith is invariably linked with a fraudulent claim, nevertheless they are two different concepts. The failure to comply with the duty of utmost good faith does not mean that the claim is fraudulent. In all cases where a fraudulent claim is made, one can readily infer a breach of the obligation of utmost good faith. But it does not follow that a breach of the utmost good faith obligation means that the claim made is fraudulent. It must depend upon all the circumstances.

3. The insurer had a heavy burden in this case to establish that by an omission to state certain matters, the insured had misrepresented a fact of substance to the claim. The omission to reveal these facts did not represent any false statement to the insurer. The dishonest intention required for fraud is at least one to induce a false belief in the insurer for the purpose of obtaining payment or some other benefit under the policy. Fraud which relates to the claim made with that intent will disentitle the claimant.

4. The omissions to state the information did not induce a false belief in the insurer in relation to any relevant matter for its consideration. It did not accept H. was driving. It did not accept his version of the circumstances of the incident. The omission to reveal the information, even done deliberately, did not create any false belief in the insurer which in any way improved H.'s prospects in respect of the claim. The claim was not made fraudulently. Further, H. did not, even though he deliberately withheld the information, do so with an intention of obtaining payment or some other benefit under the policy. Accordingly, it was open to the magistrate to find that H.'s claim was not a fraudulent claim.

GILLARD J:

1. This is an appeal by an insurer against orders made by a Magistrates' Court that the insurer pay an insured the sum of $25,000 pursuant to a motor vehicle policy.

Parties

2. The appellant, Insurance Manufacturers of Australia Pty Ltd ("the insurer") is an insurer and insures motor vehicles at the request of the Royal Automobile Club of Victoria. It was the defendant in the Magistrates' Court proceeding.

3. The respondent, Christopher Heron ("the insured"), was at all relevant times a carpenter and the owner of a 2002 Ford Falcon AU motor vehicle registered number SAK 772 ("the vehicle"). The insured was the plaintiff in the proceeding in the Magistrates' Court.

Magistrates' Court proceeding

4. On 4 August 2004, the insured filed a complaint in the Magistrates' Court at Melbourne. He sought damages from the insurer for the latter's breach of a contract of insurance.

5. The basic facts concerning the claim were not in dispute and can be briefly stated. The insured sought an insurance policy over his vehicle from the RACV which resulted in a policy being issued by the insurer. On the morning of 27 March 2004, at approximately 4.30am, the vehicle rolled over in Coolart Road, Hastings and suffered substantial damage resulting in it being written off ("the incident"). The insured stated that he was the driver at the relevant time. The parties agreed that the market value of the vehicle was $25,000. Later that day, the insured lodged a claim with the insurer seeking indemnity in respect of the damage caused to his vehicle. The claim was investigated and the insurer refused the claim.

6. The insurer filed a defence to the claim on 2 September 2004. It admitted that the plaintiff was the owner of the vehicle, that it was covered by a contract of insurance with it, and that a claim had been made. However, it did not admit that the vehicle was involved in a collision. Further, it denied that the insured suffered any loss or damage. The insurer also raised a number of defences. The insurer alleged that a term of the policy entitled it to refuse to pay a claim if the insured was not truthful and frank in any statement made in a claim or in connection with a claim. It further alleged that the insured was not truthful and frank in statements made in the claim or in connection with it.

7. The particulars of the allegation were extremely general. The particulars alleged that the insured, or alternatively Leon Murphy, made false statements to the insurer regarding the circumstances surrounding the accident, misled the insurer with respect to the said circumstances, and made statements which they knew or ought reasonably to have known or did not care would cause the insurer to be misled regarding the said circumstances. The alleged false statements and misleading conduct were not identified.

8. Further, and in the alternative, the insurer alleged that the insured owed it a duty to act towards it with the utmost good faith and that there had been a breach of that duty. The particulars of the alleged breach of utmost good faith repeated the particulars which were sub-joined to the allegation that the claim was not truthful and frank. Further, and in the alternative, it was pleaded that the insurer could refuse a claim if the incident which resulted in the claim occurred because the person driving the vehicle was under the influence of alcohol. It asserted that either Mr Heron or Leon Murphy was driving the vehicle at the time of the incident whilst under the influence of alcohol.

9. The proceeding came on for hearing before a magistrate on 28 February 2005 and was heard over three days. Application was made by counsel on behalf of the insured to split the case on the basis that the insurer carried the burden of proof. The learned magistrate acceded to the application and the insurer was required to present its case first. It was accepted by the Court after submission by counsel for the insured, that the defence alleged the false statement was a plea of fraudulent claim. The learned magistrate reserved her decision on 11 April 2005 and delivered it on 6 May 2005.

10. The magistrate found as a fact that the insured was driving at the relevant time and not Mr Murphy. The defence that the driver at the time of the incident was under the influence of alcohol, failed. The real contest concerned the alleged failure by the insured to be truthful and frank in relation to statements he made in the claim. The parties and the magistrate proceeded on the basis that a term in the policy booklet was in effect an obligation of good faith imposed on the insured and that s13 of the *Insurance Contracts Act* 1984 ("the Act") applied to the contract of insurance. The particulars sub-joined to paragraph 11 of the defence relied upon in relation to the alleged breach of the duty to act towards the insurer with the utmost good faith, asserted that the insured made false statements regarding the circumstances surrounding the incident that caused the damage. The defence was not properly pleaded. It did not identify with any particularity

the circumstances relied upon which allegedly constituted a failure by Mr Heron to honour his obligation of utmost good faith as required by s13 of the Act.

11. As appears from Her Honour's reasons, the contentions put by the insurer at trial constituting the breach of the duty of utmost good faith, were that Mr Heron in his claim withheld information in relation to "(1) Leon Murphy's breath test and; (2) information regarding a telephone call to Rosebud Police Station."[1] In order to understand these contentions, it is necessary to state further facts. It appeared that some hours earlier on the night in question, Mr Leon Murphy had been driving the motor vehicle, and had been apprehended by the police and charged with driving whilst his blood alcohol content exceeded .05%. Some hours after Mr Murphy was apprehended, he rang the insured, informed him of what had happened, and requested that the insured come and collect the car and him. The insured did so and the incident occurred when he was driving back with Mr Murphy, who was the passenger. The second matter concerns a telephone call between Mr Heron and a Senior Constable Young, which occurred on the day of the incident at about 1.00pm. Mr Heron told the senior constable that he was unaware of where his car was.

12. The learned magistrate found that Mr Heron was in breach of the obligation of utmost good faith. She made the following findings:

> (i) That the insured's failure to advise the insurer of the conversation he had with a member of the police concerning the whereabouts of his vehicle was dishonest.[2]
>
> (ii) That the insured's failure to advise the insurer of the circumstances surrounding his presence in Coolart Road at 4.30am, namely, that it was because of Mr Murphy's involvement with the police earlier that night, was a conscious decision and the omission was dishonest.[3]

13. What is meant by the word "dishonest" in the context of the learned magistrate's reasons can be determined by reference to what Her Honour said earlier. She stated[4] that there was not a breach of the duty of utmost good faith where there was an omission to disclose, "unless there is dishonesty". She referred to the New Zealand decision of *Vermeulen v S.I.M.U. Mutual Insurance Association*.[5] In that case, Hardie Boys J[6] noted that the duty extends beyond the making of a claim which the insured knew was false because there would be no need for the duty if that is prohibited. Having observed that it was his opinion that a breach involved one of dishonesty, His Honour then said:

> "An intention to deceive the insurer may not be necessary (*Sampson v Goldstar Insurance Co Ltd* [1980] 2 NZLR 742; (1980) 1 ANZ Insurance Cases 60-043) but what is necessary is an honest disclosure of all material facts. The converse of this, which may be the better way of expressing it in view of the onus of proof, is that non-disclosure or error does not amount to a breach of the duty unless there is dishonesty."

14. It is noted that an intention to deceive may not be necessary. In other words, a breach of the duty of utmost good faith may involve dishonesty which does not include an intention to deceive the insurer.

15. The learned magistrate, having made the findings she did, stated the following:

> "To the extent that I found that the plaintiff dishonestly withheld information relevant to the insurer's decision whether to indemnify or deny liability this amounts to a breach of utmost good faith pursuant to s13 of the *Insurance Contract Act*, and s54 provides the appropriate remedy ... ".

16. Given those findings it is apparent that the learned magistrate used the word "dishonest" as meaning that the insured deliberately omitted to provide information which was relevant to the insurer's decision whether to indemnify or deny liability.

17. I note that neither of the matters of dishonest omission amounting to an allegation of fraud were alleged in the defence. They should have been particularised. They should have been identified.

18. The magistrate then referred to s54 of the Act. It deals with the situation where the effect of a contract of insurance would be that the insurer may refuse to pay the claim because of some act of the insured, and provides in s54(1) –

> " ... the insurer may not refuse to pay the claim by reason only of that act but his liability in respect of the claim is reduced by the amount that fairly represents the extent to which the insurer's interests were prejudiced as a result of that act."

19. The learned magistrate referred to the decision of *Entwills Pty Ltd v National and General Insurance Co Limited*[7] and concluded that there was no evidence of prejudice suffered by the insurer and hence the insured's breach of his obligation of good faith did not enable the insurer to resist his claim for indemnity. Accordingly, s54(1) applied and although the insurer had established the defence, it did not prove any prejudice and accordingly was obliged to pay the indemnity. Those findings made by the learned magistrate are not the subject of this appeal and I need say no more about them.

20. Paragraph 10 of the defence, as I have stated, asserted that the insurer was entitled to refuse a claim if the insured was not truthful and frank in any statement made in a claim or connection with it. It was asserted that the term was express and was contained in the policy booklet. Paragraph 11 asserted a breach of that term and the particulars sub-joined, as I have already stated, assert that the insured made false statements and misled the insurer regarding the circumstances surrounding the incident. At trial, the parties accepted that this was an allegation of a fraudulent claim. The policy booklet contains the following:

> "We may refuse a claim ... , if:
> • you are not truthful and frank in any statement you make in a claim or in connection with a claim."

21. An allegation of a fraudulent claim is indeed serious and should have been pleaded with sufficient particulars to understand in what way the claim was a fraudulent one. The allegation is based upon s56 of the Act. It is the magistrate's findings in relation to this defence which are the subject of the appeal. The magistrate said little in respect to this defence and I will set out hereafter what she said. Her Honour stated that she did not find that fraud had been committed by the insured. It was common ground that it was a serious allegation, and that the insurer carried the burden of proof in accordance with the *Briginshaw* standard of proof.[8]

22. As stated, the defence was inadequate in a number of respects. It did not properly identify the alleged breaches of the duty of utmost good faith, nor did it properly plead the defence of alleged fraud. In my opinion it is essential that the pleadings set out the proper issues, especially where there is a serious allegation such as fraud, and identify them so there is no dispute as to what is in issue between the parties at trial. It is very apparent from what the learned magistrate said that she thought that the defence of a fraudulent claim was a side wind and of little importance. Hence the paucity of the reasons for rejecting the defence. Neither party has sought to appeal the inadequacy of the reasons given by the learned magistrate.

23. The magistrate ordered that the insurer pay damages in the sum of $25,000. She ordered that interest pursuant to s57 of the Act should run from 6 May 2005 and not earlier, and further ordered that each party should bear their own costs. The reasoning in relation to the orders made with respect to interest and costs is somewhat difficult to accept. The insured was successful in his claim. The magistrate found that the insurer was not acting unreasonably in withholding payment and hence ordered that interest should run from the date of the judgment. She went on to state "for similar reasons I order that each party bear their own costs in these proceedings".

24. The insured did not complete a claim form. In accordance with the modern practice, he was interviewed by an investigator some 13 days after the event, during which he gave a long statement which was recorded, printed and signed by him. He stated categorically that he was the driver at the relevant time. The magistrate took the view that the insured's failure to refer to the fact that Mr Murphy had earlier driven the car whilst under the influence of liquor, and failure to tell the investigator that when he spoke to the police he stated he did not know where his car was, entitled the insurance company to refuse indemnity, but that nevertheless s54 entitled the insured to recover his loss. From a very early stage, the insurance company investigated the claim and formed a certain view as to the honesty of the insured. The insurer had grave doubts about the insured's statement that he was the driver. As things turned out these doubts were misplaced. Whether or not the insured had in fact disclosed what he should have disclosed, according to the magistrate would not have made any difference. The insurer was extremely suspicious as to who was driving at the relevant time and even if the insured had revealed the matters which the

magistrate held he ought to reveal, in my view the same result would have followed; a refusal of indemnity. I must say that I am somewhat surprised by the order made by the magistrate with respect to costs. The insurer failed to establish the defences pleaded by it. The very generality of the particulars of false statements suggests that the insurer was unsure about its defence relating to such false or misleading statements. In fact what was found by the learned magistrate was an omission to disclose relevant information. No appeal has been brought in respect to these findings.

Appeal

25. In accordance with the new procedure, the appeal is instituted by the filing of a notice of appeal.[9] In accordance with the Rules the notice must set out the questions of law and the grounds of appeal.

26. The questions of law were expressed as follows:

> "1. Whether the learned magistrate, having found that the respondent –
> (a) consciously and deliberately withheld information from the appellant concerning Mr Leon Murphy having received an infringement notice for driving or being in charge of a motor vehicle with a blood alcohol concentration level of 0.11% but less than 0.12% on 27 March 2004;
> (b) dishonestly failed to advise the appellant that he had claimed to have no knowledge of the whereabouts of his motor vehicle during his conversation with Senior Constable Young of Victoria Police on 27 March 2004;
> (c) erred in law in concluding that the plaintiff's claim on the relevant policy of insurance was not fraudulently made within the meaning of s56(1) of the *Insurance Contracts Act* 1984 (Cth).
>
> 2. Whether the learned magistrate having found that the respondent –
> (a) [same as above];
> (b) [same as above]
> erred in law in failing to conclude that the plaintiff had thereby knowingly made a false statement to the appellant in connection with an insurance claim for the purpose of inducing the appellant to meet the claim thereby rendering the respondent's claim fraudulently made within the meaning of s56(1) of the *Insurance Contracts Act* 1984 (Cth).

27. The grounds of appeal are similarly expressed.

28. The appellant insurer sought orders that the appeal be allowed and that the insured's claim be dismissed, that judgment be entered for the insurer and that the insured pay the appellant's costs of the proceeding and the appeal.

Magistrate's Reasons

29. As earlier stated, the defence of a fraudulent claim does not appear to have been central to the issues in the proceeding. Very early in her judgment, the magistrate said:

> "The defendant seeks to avoid payment of the claim on the grounds that the insured had breached it (sic) duty of utmost good faith and <u>also possibly</u> made a fraudulent claim."
> (Emphasis added).

30. Her Honour's reasons concerning the defence were –

> "In conclusion, I consider it appropriate to further address the issue of fraud, but do not intend to, in any great detail, having regard to my findings of breach of duty of utmost good faith. It was the plaintiff that alleged that paragraph 11(3) of the defence amounts to an allegation of fraud. I supported such an interpretation when I so ordered that the case be split. I refer again to the case of *Protean v American Home Insurance* [1985] VicRp 18; [1985] VR 187; (1985) 4 ANZ Insurance Cases 60-683 and particularly at VR p234 where Fullagar J states that it is necessary to bear in mind the gravity of the allegation, and again refers to the High Court case of *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336; [1938] ALR 334; (1938) 12 ALJR 100 and in particular I refer to Dixon J's observations of the critical considerations before such a finding should be made.
>
> Just in conclusion I will just read those observations. 'The seriousness of an allegation made in inherent unlikelihood of an occurrence of a given description of the gravity of the consequences flowing from a particular finding, are considerations which must effect the answer to the question, whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters reasonable satisfaction should not be produced by inexact proofs, indefinite testimony or indirect inferences. Everyone must feel that when, for instance, the issues on which of two dates an admitted occurrence took place, a satisfactory conclusion may be reached on materials of a kind that would not satisfy

> any sound or prudent judgment if the question was whether some act had been done involving grave moral delinquency.' In short, I do not find that a fraud has been committed by the plaintiff.
> I am sorry that was a bit lengthy, but are my findings clear."

31. It can be seen that the magistrate failed to explain why it was that she found that fraud had not been committed by Mr Heron in making the claim. Neither party has sought to appeal against the inadequacy of the reasons given. The authorities make it clear that a judicial officer in delivering a decision must give sufficient reasons to enable both the parties and an appellate court to ascertain the reasoning upon which the decision was based. See *Sun Alliance Insurance Ltd v Massoud*.[10]

32. Whilst the magistrate did not explain her reasoning in concluding that the insured had not committed fraud in making his claim, her reasons provide some indication of her reasoning. In my view, taking into account the reference by the magistrate to an authority, and quoting what Dixon J stated in *Briginshaw*, it seems to me that the reasons why she found that a fraud had not been committed by the insured were because although she had made the findings she did, she was not persuaded that the insured intended to deceive the insurer by his omission and the insurer had failed to establish the defence. Her Honour referred to the Court of Appeal decision of *To v Australian Associated Motor Insurers Ltd*.[11] I put to counsel on the appeal that one should read the learned magistrate's reasons in that way, namely, that the finding that fraud was not established was because it had not been established by the insured, that the insured intended to deceive the insurer to gain an advantage by omitting to state the matters that the learned magistrate considered were relevant and in breach of his duty of utmost good faith.

33. Earlier in Her Honour's reasons for judgment, when talking about the duty of utmost good faith and s54 of the Act, and having observed that there was a non-disclosure concerning Mr Murphy and the phone call to the Rosebud Police, the magistrate posed the question whether the non-disclosure and false statements were made with the intention of deceiving the insurer. She then said:

> "For these purposes I refer to the matter of *To* to which I was referred, and in particular to Buchanan JA where he states at 285 (sic) of that decision:
>
> 'The mental element required to establish fraud is an intention to deceive, that is an intention to create a false belief in a person deceived for the purpose of obtaining money or some other benefit."

34. The learned magistrate then went on to consider whether the failure to disclose amounted to a breach of the duty of utmost good faith, and asserted that to prove that there must be dishonesty.

35. Counsel did not demur from my observations as to what I thought was the learned magistrate's reasoning for rejecting the defence of a fraudulent claim.

Question of law

36. By reason of s109 of the *Magistrates' Court Act* 1989 a party to a civil proceeding may only appeal to the Supreme Court on a question of law. As a general proposition, a finding of fact made by a magistrate does not involve a question of law. It is emphasised that that is a general proposition which will, of course, depend upon whether there is any evidence to support the finding. The learned magistrate made certain findings of fact, and then had to determine whether or not those findings led to the conclusion that the claim was made fraudulently within the meaning of s56(1) of the Act. She held that the insured had not committed fraud.

37. The submission put on behalf of the insurer by Mr H. Austin of counsel was that, having made her findings of deliberate and dishonest omissions by the insured to provide relevant information to the insurer, namely, that Mr Murphy had earlier driven the motor vehicle with a blood alcohol reading in excess of .05 and that the following day the insured had told the police that he did not know where his vehicle was, the magistrate was bound to find that the claim was fraudulent within the meaning of s56(1) of the Act. His submission was that, having made the findings in relation to the breach of the duty of utmost good faith, the magistrate in fulfilling her fact finding role was bound to hold that the claim was a fraudulent one within the meaning of s56 of the Act.

38. The task that confronted the magistrate, having found that there had been a breach of the duty of utmost good faith although not giving the insurer the right to refuse the claim, was to consider and determine whether the insurer had proven that the claim was a fraudulent one. Her Honour had earlier referred to what Buchanan JA said in the *To* case. There is no suggestion by counsel for the insurer that the magistrate misdirected herself on a question of law. It follows that the argument is that in her fact finding role the magistrate was in error. To make good this contention, it was necessary for the insurer on this appeal to show that having made the findings Her Honour did concerning utmost good faith, there was no finding open other than that there had been a fraudulent claim. In other words, the magistrate was bound to reach that result because of those findings, and her failure to do so was perverse.

39. In *To v Australian Associated Motor Insurers Ltd*,[12] the insured made a claim under a motor vehicle policy. Her 15 year old son had driven her vehicle without her consent and damaged it. The insured mistakenly believed that the policy would not cover the damage and when she made the claim she falsely stated that the vehicle had been stolen and damaged. This was obviously a false claim. It was contended on behalf of the insured that although she had falsely stated the circumstances leading to the damage, nevertheless if she had told the truth she would have been entitled to recover in any event. The magistrate at first instance agreed, but it was reversed on appeal by a single judge of this Court and the latter's decision was upheld by the Court of Appeal. On appeal, Buchanan JA wrote the leading judgment. His Honour considered statements made in the cases as to what constituted fraud and considered the mental element required. His Honour said:[13]

> "In my view the mental element required to establish fraud is an intention to deceive, that is, an intention to create a false belief in the person deceived for the purpose of obtaining money or some other benefit. It is not necessary to go further and stipulate knowledge or belief as to a lack of entitlement to the money or other benefit claimed."
> (Emphases added).

40. His Honour, noting that a false statement made fraudulently within the meaning of s56(1) of the Act is one made knowingly in connection with a claim for the purpose of inducing an insurer to meet the claim, observed:[14]

> "For the reasons set out above, I consider that the existence of an underlying valid claim does not render fraud irrelevant; the dishonest intention required for fraud is at least one to induce a false belief in the insurer for the purpose of obtaining payment or some other benefit under the policy, with or without belief or knowledge of a lack of entitlement; and fraud which relates to the claim made with the requisite intent will disentitle the claimant even if made subsequent to the first presentation of the claim."
> (Emphases added).

41. His Honour's observations were made in the context of the facts in that case and his statements of what constitutes a fraudulent claim cannot be said to be an exhaustive definition.

42. At first instance, Mandie J referred to what Lord Coleridge CJ said in his charge to a jury in *Norton v Royal Fire and Life Assurance Co.*[15] His Lordship stated that:

> " ... He had left to the jury whether it was fraudulent in the sense of an intention to deceive and defraud the company by getting out of them money he knew he had no right to ... ".

43. Mandie J added the words "or believe" after the word "knew".

44. In *Norton's* case, the insured admitted at trial before the jury that he had exaggerated the amount of his loss because he had been advised to inflate the claim because insurance companies never allowed the full claim and always cut it down. It appears before the proceeding was instituted, that the plaintiff in fact reduced the amount of the claim. The learned trial judge left the question to the jury saying:

> "I have already said that it is not a false claim if all the articles were there merely because too high a value was placed upon them; but you must look at the whole conduct of the plaintiff, and say whether it was a fraudulent claim."

45. The jury found for the plaintiff. Application was then made to the Queen's Bench Division on behalf of the insurer for a new trial and Lord Coleridge CJ and Cave J upheld the judgment in favour of the plaintiff. Lord Coleridge CJ emphasised that it was a question of fact for the jury.

46. The matter went on appeal and the appeal court set aside the verdict and judgment on the ground that the verdict was unsatisfactory because the view of the evidence that the plaintiff knowingly made a false statement in order that the company might act upon it was not properly left to the jury.[16]

47. In considering whether a claim is made fraudulently, the starting point must be the terms of the contract of insurance. In seeking to determine what might be described as the common law meaning of "a fraudulent claim" in the authorities, it is necessary to ascertain whether the particular case was dealing with a clause in a contract of insurance. Sometimes the term of the contract reveals what is meant by, and the effect of, a fraudulent claim. As stated, the policy booklet which constitutes the contract of insurance in the present matter provides very little assistance as to what is meant by a fraudulent claim. No doubt this has come about because of the presence of s56 of the Act. It follows therefore that in determining what is a fraudulent claim, the principles laid down in the cases must be considered. But in considering the cases, it is necessary to see whether they dealt with a particular clause which provides a definition of a "fraudulent claim".

48. The Act does not contain a definition of the phrase "fraudulent claim". The cases provide examples of fraudulent claims. The classic example of a fraudulent claim is where an insured intentionally misstates a fact with an intention of obtaining payment under a policy to which the insured is not entitled. If an insured makes a claim when no loss has been suffered within the terms of the policy then the claim is a fraudulent one. See *Phillips v Chapman*[17] where a claim was made for loss arising from a burglary which had not taken place. In *Thompson v Hopper*[18] the insured suffered a loss but it was not caused by the peril insured against. In that case a vessel was sent to sea in an unfit condition which increased the danger which ultimately led to her loss. See also *Fire and All Risks Insurance Company v Powell.*[19]

49. Often claims are made which are inflated. Sometimes the insured is not guilty of dishonest conduct. For example, there may be an honest overestimate, or a mistake may be made. It cannot be overlooked in this regard that the value of a loss is often an expression of opinion. In those circumstances the claim may not be fraudulent, but if it is shown that the insured intended to defraud the insurers, then the claim is fraudulent. Intention to defraud may be inferred because the over-estimate is excessive.

50. Fraudulent claims may be made in a variety of ways, but they all have at least three common features. First, by reason of the conduct of the insured or another on his behalf, whether it be act or omission, the insured represents to the insurer a fact or facts, which is or which are false. This may also result because of circumstances over which the insured has some control, where a representation is made which is false and which the insured, knowing the insurer is labouring under a false belief, does nothing to correct it. Secondly, the false fact is relevant to whether the insured will accept or reject the claim. Thirdly, the insured is induced to form a mistaken belief about some aspect of the claim.

51. The defence asserted that the insured or alternatively his friend Mr Murphy made false statements or misled the insurer regarding the circumstances surrounding the accident. The findings made by the learned magistrate were that the insured dishonestly omitted to reveal certain information. The omission to reveal the information did not represent any false fact to the insurer. On the other hand, the dishonest failure to reveal relevant information to a claim may constitute fraud in the circumstances. But whether or not it does will depend upon whether or not it is proven that it was done with an intention to deceive.

52. It is well settled that a false representation may be made intentionally or recklessly not caring whether it be true or false, Lord Herschell in *Derry v Peek* wrote:[20]

> " ... Fraud is proved when it is shewn that a false representation is being made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states."

53. Further, a false representation may be made even though the insured has not made any false statement but in the circumstances has knowingly created a false belief. An insured cannot ignore the obvious in making statements or representations, or use the Lord Nelson principle of "turning a blind eye". An insured is bound to make enquiries to ascertain the true position in making a claim. The doctrine of utmost good faith ensures that this is so. As stated, the literal truth may in certain circumstances create a false representation of fact which is known to the insured. The insured has a duty to disabuse the insurer of any fact relevant to the consideration of the claim and its determination. The latter involves at least two important decisions, first, acceptance of the claim and secondly, the quantum of the claim.

54. Unlike other areas of the law, the insurer does not have to act upon the represented fact or facts and suffer damage before it may refuse a fraudulent claim. The approach in insurance law is different and is bound up with the duty to observe the utmost good faith in dealings with an insurer throughout, including the making of a claim. The principle stated by Lord Halsbury in *Derry v Peek*[21] does not apply. His Lordship said in a case where it was alleged that false representations were made in a prospectus by the directors of the company:

> "To quote the language now some centuries old in dealing with actions of this character, 'fraud without damage or damage without fraud' does not give rise to such actions."

55. The approach in the law of insurance is different. In *Britton v The Royal Insurance Company*,[22] Willes J said:[23]

> "The law upon such a case is in accordance with justice, and also with sound policy. The law is, that a person who has made a fraudulent claim could not be permitted to recover at all. The contract of insurance is one of perfect good faith on both sides, and it is most important that such good faith should be maintained. It is the common practice to insert in fire policies conditions that they shall be void in the event of a fraudulent claim; and there was such a condition in the present case. Such a condition is only in accordance with legal principle and sound policy. It would be most dangerous to permit parties to practise such fraud, and then, notwithstanding their falsehood and fraud, to recover the real value of the goods consumed. And if there is wilful falsehood and fraud in the claim, the insured forfeits all claim whatever upon the policy."

56. In that case the insured fraudulently exaggerated the amount of the loss. The common law adopted a very strict approach to the question, requiring the utmost good faith in making a claim, and the mere fact that the insurer was not induced to act to its detriment and hence suffer loss was of no consequence. As Buchanan JA said in the *To* case:[24]

> "The courts' attitude to fraudulent claims was a manifestation of the fundamental principle of insurance law that the utmost good faith must be observed by each party, the importance of which has often been emphasised."

57. The decision in the *To* case demonstrates that the insurer need not prove that it suffered any loss as a result of the fraudulent claim. The philosophy of the law is to discourage the making of fraudulent claims. It has been the law for hundreds of years and is still the law. Lord Hobhouse in *The Star Sea*[25] said:

> "The fraudulent insured must not be allowed to think: if the fraud is successful, then I will gain; if it is unsuccessful I will lose nothing."

58. The 1984 Act deals with fraudulent claims in s56. Section 56(3) underlines the importance of the philosophy of the law of deterring fraudulent conduct. Section 56 alters the common law in that in certain circumstances the Court may order the insurer to pay even though the claim was made fraudulently. However, the alteration to the law is confined and the Court may order an insurer to pay "if only a minimal or insignificant part of the claim is made fraudulently and non-payment of the remainder of the claim would be harsh and unfair."

59. The question whether a claim is fraudulent or not is a factual one for the tribunal of fact, whether it be a judicial officer or a jury.[26] Pollock CB in charging the jury said:

> "But the question is, whether the claim was fraudulent, i.e., whether it was wilfully false in any substantial respect. The case concerned a fire policy and the question did arise as to the value of furniture."

60. Secondly, to allege that a claim is made fraudulently is indeed a serious allegation, and although the insurer has the burden of proof on the balance of probabilities, nevertheless it is the standard laid down in *Briginshaw v Briginshaw*.[27]

61. It bears repeating what Dixon J said:[28]

> "The truth is that, when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality. No doubt an opinion that a state of facts exists may be held according to indefinite gradations of certainty; and this has led to attempts to define exactly the certainty required by the law for various purposes. ... Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony or indirect inferences."
> (Emphases added).

62. His Honour went on to quote a number of dicta and observed:[29]

> "It means that the nature of the issue necessarily affects the process by which reasonable satisfaction is attained. When, in a civil proceeding, a question arises whether a crime has been committed, the standard of persuasion is, according to the better opinion, the same as upon other civil issues ... But consistently with this opinion, weight is given to the presumption of innocence and an exactness of proof is expected."
> (Emphasis added).

63. In the present proceeding, the learned magistrate observed that the burden rested upon the insurer, and referred to what was said by Sir Owen Dixon in *Briginshaw's* case. The magistrate also referred to what Buchanan JA said in *To's* case as to what was meant by a fraudulent claim. There is no doubt that a finding of fact can constitute an error of law where it is established that on the evidence, the Court could not reasonably have reached the conclusion that it reached.[30] The learned magistrate found as a fact that the claim was not fraudulent. The magistrate's decision is to be treated as a finding of fact by a jury. The test was stated by Herring CJ in *Young v Paddle Bros Pty Ltd*[31] where his Honour said:

> "The principle that has to be applied is that applicable to the verdict of the jury. ... If on any reasonable view of the evidence that decision can be supported, then the party who complains of that decision cannot have it set aside and the contrary decision that he desires substituted for it. It is a question of what he is entitled to as a matter of law, and he is only entitled to a contrary decision when that decision is the only possible decision that the evidence on any reasonable view can support."[32]

64. Stephen J (as he then was) said:[33]

> " ... in the case of any question of fact the Court should treat the matter as an appeal from the verdict of a jury and should not make up its own mind upon the evidence but rather confine itself to seeing whether there was evidence upon which the magistrate might, as a reasonable man, come to the conclusion to which he did."

65. The insurer submits on this appeal, that having made the finding she did on the breach of the obligation of utmost good faith, the learned magistrate was bound to find that it was a fraudulent claim. In other words, no other conclusion was open to Her Honour having made those findings on the primary facts.

66. Although the principle of utmost good faith is invariably linked with a fraudulent claim, nevertheless they are two different concepts. The failure to comply with the duty of utmost good faith does not mean that the claim is fraudulent. In all cases where a fraudulent claim is made, one can readily infer a breach of the obligation of utmost good faith. But it does not follow that a breach of the utmost good faith obligation means that the claim made is fraudulent. It must depend upon all the circumstances.

67. The insured made a claim under the policy. The claim was that he was the driver at the relevant time and his vehicle suffered damage. It is clear that the insured did not make a false statement concerning the identity of the driver or the fact of damage to his vehicle. He did not make any false statement about his state of sobriety or otherwise. He did not complete a claim form but, in accordance with the insurer's practice, was interviewed at length by an investigator and signed a long, detailed statement prepared during the interview. He did not make a false statement in the signed record. He failed, according to the reasons of the learned magistrate, to disclose two pieces of information and the learned magistrate held that he had dishonestly withheld the information. The learned magistrate held that he should have revealed these facts to the insurer and that he was dishonest in failing to do so.

68. In my opinion, the insured did not represent a false fact to the insurer which in any way affected its consideration of the claim. There was no fraudulent misstatement of fact or representation of a false fact by conduct. Applying the principles of law stated by Buchanan JA concerning the mental element, namely, an intention "to create a false belief in the person deceived for the purpose of obtaining money or some other benefit", it was clearly open to the magistrate to conclude that the insurer had failed to prove that intention. Applying what His Honour later said in the judgment:[34] "The dishonest intention required for fraud is at least one to induce a false belief in the insurer for the purpose of obtaining payment or some other benefit under the policy", it was clearly open to the magistrate to come to the conclusion that there was no dishonest intention to induce a false belief in the insurer. Further, it is clear from Her Honour's reference to the New Zealand case that the breach of the obligation of utmost good faith does not necessarily involve an intention to deceive. In my opinion the learned magistrate had this in mind when reaching her decision that the insurer had not proven that the insured made a fraudulent claim.

69. The insurer fails because in my opinion it was open to the learned magistrate to conclude as a question of fact that although there had been an omission to reveal two pieces of information, the omission did not constitute a fraudulent claim.

70. It is not to the point on this appeal whether this Court would have come to the same conclusion. However, as the learned magistrate's reasons were sparse to say the least, it is appropriate to briefly state my views.

71. The insurer had a heavy burden in this case to establish that by an omission to state certain matters, the insured had misrepresented a fact of substance to the claim. The omission to reveal these facts did not represent any false statement to the insurer.

72. As Buchanan JA said in the *To* case, "The dishonest intention required for fraud is at least one to induce a false belief in the insurer for the purpose of obtaining payment or some other benefit under the policy". Fraud which relates to the claim made with that intent will disentitle the claimant.

73. The claim throughout was that the insured was driving the vehicle when it suffered the damage. The insurer put that question in issue. But the insured did not represent anything to the contrary. The omissions to state the information which the magistrate said should have been revealed, did not induce a false belief in the insurer in relation to any relevant matter for its consideration. It did not accept he was driving. It did not accept his version of the circumstances of the incident. It had a suspicion that Mr Murphy had been driving and that he had been consuming alcohol earlier in the night. The omission to reveal the information, even done deliberately, did not create any false belief in the insurer which in any way improved the insured's prospects in respect of the claim. The claim was not made fraudulently. Further, the insured did not, even though he deliberately withheld the information, do so with an intention of obtaining payment or some other benefit under the policy.

74. In my opinion, the finding of fact made by the magistrate was open to her on the evidence. Further, in my opinion, the learned magistrate's conclusion was correct. The appeal fails.

75. Subject to any submissions by counsel, I propose to make the following orders:
(i) That the appeal be dismissed.
(ii) That the appellant pay the respondent's costs including reserved costs.

[1] See p8 of her Honour's reasons.
[2] See p11 of her Honour's reasons.
[3] See p11 of her Honour's reasons.
[4] See p10 of her Honour's reasons.
[5] (1987) 4 ANZ Insurance Cases – 60-812.
[6] At 74,987.
[7] (1991) 6 ANZ Ins Cases 61-059.
[8] See *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336; [1938] ALR 334; (1938) 12 ALJR 100 and *Hornal v Neuberger Products Ltd* [1957] 1 QB 247 at 258; [1956] 3 All ER 970.
[9] See Rule 58.07 of the Supreme Court Rules.
[10] [1989] VicRp 2; [1989] VR 8.
[11] [2001] VSCA 48; (2001) 3 VR 279; (2001) 161 FLR 61; (2001) 11 ANZ Insurance Cases 61-490.
[12] *Supra*.
[13] At p285.
[14] At p286.
[15] (1885) 1 TLR 460 at 461.
[16] See Ivamy, *General Principles of Insurance Law*, 2nd ed, p363 footnote 14.
[17] (1921) 7 Ll L Rep 139.
[18] [1858] EngR 946; 120 ER 796; [1858] EB & E 1038.
[19] [1966] VicRp 73; [1966] VR 513 at 517.
[20] [1889] UKHL 1; (1889) 14 AC 337 at 374; 5 TLR 625.
[21] *Supra* at p343.
[22] [1865] EngR 66; (1866) 4 F & F 905; 176 ER 843; 15 LT 72.
[23] At (1866) 4 F & F 909; ER 444.
[24] *Supra* at 205.
[25] [2003] 1 AC 469 at 499.
[26] See *Gouldstone v Royal Insurance Co* [1858] EngR 38; (1858) 1 F & F 276; 175 ER 725.
[27] [1938] HCA 34; (1938) 60 CLR 336; [1938] ALR 334; (1938) 12 ALJR 100.
[28] At p361.
[29] At p363.
[30] See *TAC v Hoffman* [1989] VicRp 18; [1989] VR 197 at 200; (1988) 7 MVR 193.
[31] [1956] VicLawRp 6; [1956] VLR 38 at 41; [1956] ALR 301.
[32] See also *Taylor v Armour and Company Pty Ltd* [1962] VicRp 48; [1962] VR 346; (1961) 19 LGRA 232; and *Spurling v Development Underwriting (Vic) Pty Ltd* [1973] VicRp 1; [1973] VR 1 at 11; (1972) 30 LGRA 19.
[33] At p11.
[34] At 286.

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