Initial onus of proof still rests on an insured - even in a fraud case

Sgro v Australian Associated Motor Insurers Ltd [2015] NSWCA 262

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Summary

The New South Wales Court of Appeal has dismissed an appeal by a vehicle owner ('the Insured') who failed to meet the initial onus to establish that his vehicle had been stolen so as to obtain payment under a policy of vehicle insurance.

The Court held that even though the Insurer had not established the claim was fraudulent, the Insured had not met the standard of proof required to establish that an insured event had occurred in order for his claim to come within the terms of the Policy.

Facts

The Insured alleged that his Ferrari 360 Modena was stolen and claimed payment under a policy for an agreed value of $190,350 held with AAMI ('the Insurer'). The Insurer declined the claim, alleging that the claim was fraudulent and the Insurer was entitled to refuse payment pursuant to section 56 of the *Insurance Contracts Act 1984* (Cth).

At First Instance

The lower Court found:

- that the Plaintiff failed to establish on the balance of probabilities that the vehicle had been stolen; and
- that the Insurer was nonetheless entitled to refuse the claim pursuant to section 56 because the Insured was not honest and candid 'for whatever reason' in the answers he gave in relation to the claim.

This second ground was a novel finding as a basis for the Insurer being entitled to refuse payment of the claim pursuant to section 56. The lower Court held that the Insured was not 'candid' as to his whereabouts on the day the vehicle disappeared, however the lower Court did not make a specific finding of fraud given:

- the lack of cogent evidence as to matters such as the number and location of keys and remotes for the vehicle; and
- the lower Court was not satisfied the Insured had a financial motive for involvement in the disappearance of the vehicle.

The Insured gave evidence that he called the police after the vehicle was allegedly stolen and stated that the dealership or its liquidators could have had access to a spare key, sourced his address and stolen the vehicle. The lower Court considered this implausible and that it suggested the Insured was in a panic about explaining how the vehicle might have been stolen.

The Insured's version of events surrounding the alleged theft was contradicted by contemporaneous telephone records and the evidence of a lay-witness.

In such circumstances the lower Court was not prepared to make a finding that the vehicle had been stolen, but also refused to make a finding that the Insured's false statements were made in order to induce a false belief in the Insurer as required for a finding of fraud. The lower Court found, however, that the Insurer could still rely on section 56 due to the lack of honesty of the Insured.

On appeal

On appeal, it was argued by the Insured, among other things, that:

- The finding of the lower Court was incongruous in that the Court did not make a finding as to there being a financial motive to make a fraudulent claim yet held that the Insurer could refuse payment of claim under section 56.
- The lower Court erred in failing to accept corroborating evidence of the Insured's parents.
- The lower Court erred in finding that the Insurer was entitled to refuse payment of claim under section 56.

The appeal was dismissed with costs ordered in favour of the Insurer on the basis that, among other things:

- While the absence of a finding that the Insured had a financial motive for making a fraudulent claim did not mean the rejection of the claim was incongruous, financial motive is only one factor to be weighted alongside other evidence; the ruling of the lower Court in relation to section 56 was not available as the seriousness of a finding of fraud does not permit a finding other than that fraud or the fraudulent conduct had occurred.
- While section 56 does not require that an insurer prove that a fraudulent statement caused prejudice to the insurer, it does require more than mere dishonesty.
- Section 56 requires proof that:
    1. an Insured had made a claim fraudulently;
    2. with a dishonest intent to induce a false belief in the Insurer;
    3. for the purpose of obtaining a benefit under the Policy.
- Section 56 is not satisfied by a finding only that the Insured was not honest and candid 'for whatever reason'.

However, importantly, the Court of Appeal upheld the lower Court's finding that the Insured had failed to establish that a theft had occurred.

In finding for the Insurer on this 'thresh hold' issue the Court confirmed that where the probabilities of an alleged fact having occurred or not remain equal, a plaintiff will not have met their onus of proof to the civil standard.

Implications for Insurers

The case highlights some important issues for insurers dealing with fraud cases:

1. Even where a defence of fraud fails, an insured still bears the primary and initial onus of establishing their claim is covered under the Policy. This onus will not be discharged where the likelihood that the insured event alleged by the Insured to have occurred is equal to the likelihood that no insured event occurred.
2. An insurer does not bear the onus of disproving the claim of an insured in the first instance.
3. An insurer does not have to establish that another version of events is more likely than the version of events alleged by the insured. A Court will not, or at least should not, give a plaintiff 'the benefit of the doubt' if the evidence does not establish that their version of events is more probable than not.
4. Dishonesty alone will not suffice to make out a defence of fraud under section 56 without clear evidence that the conduct was engaged in for the purpose of obtaining a benefit from the insurer.
5. Allegations of fraud can be hard to establish on an evidentiary basis and financial motive is only one factor in establishing fraud. The intention of the Insured to create a false belief in order to obtain a benefit remains a crucial element which must also be established by insurers.

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