Insurer's right to elect method of settlement of claim

Fogarty v CGU Insurance Ltd [2016] ACTCA 62

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Link to decision

Summary

The ACT Supreme Court has rejected an insured's claim for damages and interest against his building and contents insurer for breach of duty of utmost good faith alleged to have arisen as a result of the election by the insurer as to the method of settlement of the claim. The decision confirms that, subject to the policy wording, the insurer retains the right to elect how it wishes to resolve the claim as long as its election is not unreasonable.

At first instance

The plaintiff held a policy of insurance with CGU Insurance Ltd ('CGU') covering building and contents against accidental loss or damage, including damage by fire. A fire occurred at the insured premises on 12 May 2009 and the claim made for damage was accepted by CGU. CGU then elected to repair the three fire damaged kitchen floorboards. A dispute arose over the process in which the damage was to be repaired as the insured sought assurances from CGU that should the repairs be unsuccessful, CGU would replace the entire floor.

The insured commenced proceedings against CGU under section 57 of the *Insurance Contracts Act 1984* (Cth) ('ICA') for unreasonably withholding payment of the claim. At first instance the Magistrate found against CGU for a breach of contractual obligations as well as a breach of the duty of utmost good faith. The Magistrate made orders akin to specific performance as well as for costs and interest.

First appeal

CGU appealed to a judge of the ACT Supreme Court. The insured cross appealed in relation to the order for specific performance (as he had not sought those orders).

The judge found that the insured did not have a proper basis for refusing CGU's original offer to repair the damage and accordingly held that the insurer had not breached a contractual obligation to repair, nor its duty of utmost good faith.

Specifically on the alleged breach of duty of utmost good faith the court cited Justice Kirby in *CGU Insurance v AMP Financial Planning Pty Ltd*[1] in finding that the actions of CGU in declining to provide the assurance demanded by the insured fell well short of the type of act of dishonesty, caprice or unreasonableness that would constitute a breach of the duty of utmost good faith.

The court substituted a verdict for CGU with costs.

ACT Court of Appeal

The insured appealed the decision of the primary judge to the ACT Court of Appeal. The Court of Appeal found:

- That as CGU had been precluded from discharging its obligations because of the insured's refusal to allow CGU to conduct the repairs, no breach of the insurance contract had arisen.
- No breach of the duty of the utmost good faith had occurred under section 13 of the ICA as CGU had accepted liability for the repairs from the outset and CGU was under no contractual obligation to give the additional assurance requested by the insured.

The appeal was dismissed and the insured ordered to pay CGU's costs.

Implications

Sometimes insureds are not in agreement with the proposed method of settlement of a claim even when the right is clearly with the insurer to choose that method under the policy wording. This decision confirms that – subject to the terms of the policy – it remains the insurer's right to make an election as to the method of settlement of a claim - whether that be by repair, replacement or the payment of the cost to repair or replace.

Furthermore, a refusal by the insured to accept the elected method of settlement proposed by the insurer cannot (without more and where the settlement proposed was reasonable and available) mean that the insurer has breached its duty of utmost good faith.

An insurer will not in these circumstances be found liable for interest under section 57 of the ICA for unreasonably withholding payment of the claim where the insured maintains a refusal to accept the elected method of settlement.

In circumstances where an insured refuses to accept the settlement method, an insurer should clearly set out in writing to the insured the elected basis of settlement. If the elected basis is cash settlement, the insurer should take steps to make the payment of the settlement sum to the insured where possible, even if it is ultimately rejected or returned by the insured.

[1] [2007] HCA 36 at 257

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