Barry.Nilsson. LAWYERS

CARELESS FRAUDSTER AND MOBILE PHONE RECORDS DEFEAT PROPERTY DAMAGE CLAIM

24 JANUARY 2018 | INSURANCE ISSUES

The insurer succeeded in relying upon circumstantial evidence to prove that the insured consented to the insured property being burned down, triggering exclusion clauses in the policy.

IN ISSUE

- Whether objective evidence justified inference as to identity of person who lit fire and as to insured having consented to that person's doing so.

THE BACKGROUND

After his rental property was destroyed by a deliberately lit fire, the appellant made a claim under a property insurance policy he held with the respondent. The respondent maintained that a friend of the appellant started the fire with the appellant's knowledge and consent. The wholly circumstantial evidence on which the respondent relied included:

- records for the usual phone of the appellant's friend
- a prepaid phone belonging to the friend and found at the scene
- the appellant's usual phone
- a prepaid phone found at the scene at the time of the fire (alleged also to have been operated by the appellant).

The respondent denied the claim, relying upon:

- a general exclusion for loss or damage arising from any intentional act or omission by the appellant or someone acting with his consent
- a specific exclusion for loss or damage caused by a fire started with the intention to cause damage by the policyholder or someone who enters the property with his consent (other than tenants or their guests)
- allegedly fraudulent statements in the claim within *Insurance Contracts Act 1984* (Cth), s 56(1).

THE DECISION AT TRIAL

The trial judge accepted that there was no direct evidence that the appellant's friend lit the fire with the appellant's consent, but concluded that there was sufficient circumstantial evidence

to reach this conclusion. This circumstantial evidence included the friend's familiarity with the property, lies to investigators, phone records proving continued use of the phone found at the scene, and the lack of any other plausible explanation for the friend's presence at the scene.

Accordingly, the court held the claim was made fraudulently and the exclusion clauses applied to relieve the respondent of the obligation to indemnify under the policy.

THE ISSUES ON APPEAL

The appellant appealed on 18 grounds. These broadly concerned a challenge to the trial judge's conclusion that the appellant was involved in the destruction of the property so as to attract the operation of the pleaded exclusions and an error in construing the relevant exclusion clause.

THE DECISION ON APPEAL

After reviewing the evidence, the Court of Appeal determined that the only conclusion available on the probabilities as to whether the fire was lit with the appellant's knowledge was that reached by the trial judge – the appellant's friend entered the premises and lit the fire and accidentally left his mobile phone behind. There was no other plausible reason for him to be at the scene of the fire when it started. There were no other conflicting inferences of equal probability available regarding the use of the phone and its presence at the scene.

The Court of Appeal rejected the appellant's submission that the specific exclusion clause should be construed as requiring the insured's consent "not just to the entry onto the property, but to the conduct of the person who started the fire". The Court of Appeal held that the ordinary and natural meaning of the specific exclusion was clear. It applied if the fire was started with the intention of causing damage and by someone who entered the property with the appellant/insured's (at least express) consent.

IMPLICATIONS FOR YOU

Two lessons can be extracted from this decision. Firstly, phone records can be invaluable evidence. The insurer obtained and relied upon records of phones registered to the appellant and his friend, a pre-paid phone found at the scene, and a second pre-paid phone which the trial judge inferred was used by the appellant. Secondly, circumstantial evidence may be sufficient to secure a finding in favour of an insurer if it can be shown to be the preferred version of events on the balance of probabilities.

Sachin Sharma v Insurance Australia Ltd trading as NRMA Insurance [2017] NSWCA 307

AUTHORS

JULIA BYRNES
SENIOR ASSOCIATE

+61 2 8651 0225
julia.byrnes@bnlaw.com.au