The burden of proof and the admissibility of police reports in cases where fraud is alleged

Averkin v Insurance Australia Ltd [2016] NSWCA 122

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Link to decision

Summary

The recent New South Wales Court of Appeal case of *Averkin v Insurance Australia Ltd* [2016] NSWCA 122 highlights the difficulties in maintaining a strong defence when fraud is alleged rather than relying on the gaps or weaknesses in the plaintiff's own case. This case involved a strict ruling adverse to the insurer on the question of the admissibility of a police report as a business record.

Facts

The insured made a claim on the insurance policy issued by the insurer following the destruction by fire of his 2008 Nissan Navara Ute on around 23 August 2013. The agreed value was $38,870. The insurer refused indemnity, leading to proceedings being commenced in the District Court. The insured alleged that the insurer's refusal to indemnify him in respect of the theft was incorrect.

The insurer's defence denied that the vehicle had been stolen, giving as particulars that the vehicle displayed no physical signs consistent with it being stolen, and that the plaintiff had failed to demonstrate that the vehicle had been taken without his consent or connivance. The insurer positively alleged the following matters of fact:

1. the locks on the door of the vehicle were found unlocked;
2. the ignition steering lock assembly (ISLA) of the vehicle had not been bypassed;
3. the engine control unit (ECU) of the vehicle had not been disturbed or bypassed, with the consequence that the vehicle could only have been operated with an electronically correct operational key;
4. the insured was in possession of both keys given by the manufacturer and was in financial difficulty and had motive to lodge a theft claim.

At first instance the trial judge ruled in the insurer's favour, however this decision was overturned on appeal.

During the appeal five grounds were pressed. The first was directed to the ultimate conclusion. The remaining grounds were:

- the primary judge erred by reversing the onus of proof;
- the primary judge erred in admitting evidence of an expert's hearsay assertion that the car was fitted with an engine immobiliser;
- the primary judge erred in admitting the police records as business records under section 69(2) of the *Evidence Act 1995* when they fell within the exclusion contained in section 69(3)(b);
- the primary judge erred in finding that (i) there were only two keys coded to operate the vehicle; (ii) the keys examined by the expert were those for the subject vehicle; and (iii) the car had an engine immobiliser fitted to it.

The second, third and fourth grounds listed above reflected challenges to essential steps in the reasoning process advanced by the insurer to establish its defence,

which was (i) the vehicle was moved from near Mr Averkin's home to a distance away, (ii) the vehicle had an engine immobiliser, (iii) because the vehicle had an engine immobiliser, it was moved by a person in possession of a key, (iv) there were only two keys, both of which were in the possession of Mr Averkin, and therefore (v) Mr Averkin was complicit in the movement of the car, and its destruction by fire.

Decision

Onus of proof

When an insurer has serious doubts about the insured's version of events they will normally deny the insured event took place and allege fraud. The burden of proof that the event took place lies with the insured, but the burden of proof that there was fraud lies with the insurer. Given the seriousness of the allegation of fraud, a court will also need to achieve a higher degree of certainty before reaching such a conclusion as compared to the ordinary civil standard, the balance of probabilities.

In examining the second ground of appeal Leeming JA stated that the primary judge made an error when her Honour stated "I am not satisfied the plaintiff has proven on the balance of probabilities that he was not complicit in a plan to have the vehicle moved." This statement seemingly shifted the onus onto the insured to prove he was not committing fraud.

Although her Honour later correctly stated in the judgment that the insured bore no onus and that in light of the seriousness of the allegation advanced by the insurer, the heightened standard reflected in section 140(2) of the *Evidence Act* applied, errors in reasoning were still found to have materially contributed to the conclusion at first instance. Therefore this ground of appeal was made out.

Admissibility of police reports

The third ground of appeal related to the admissibility of the police records. Police reports are prima facie a form of hearsay evidence. To be admitted they must fall within an exception to the hearsay rules for business records contained in section 69 of the Evidence Act. As it is easily established that police reports are a form of business records, the difficulty in these reports being admitted relates to whether they fall within an exclusion under section 69(3). Section 69(3)(b) states that business records cannot be admitted as an exception to the hearsay rule if they were 'made in connection with an investigation relating or leading to a criminal proceeding.'

The trial judge determined that the police records were admissible as a business record. Her Honour was of the view that because the police reports were of a preliminary nature the exclusion under section 69(3)(b) was not satisfied.

On appeal, Basten JA found the police report to be inadmissible because the report described the incident as a 'stolen vehicle ' case and noted that there was likely an accelerant used to start the car fire. Basten JA felt these reports were made in connection with an investigation. His Honour found it 'patently obvious' that on arrival at the scene the police had quickly formed the view that at least two serious property offences had been committed, which was sufficient to engage the exclusion in section 69(3)(b).

Although not all the grounds of appeal were made out, given the gaps in the evidence and the unexplained failure on the part of the insurer to fill those gaps, when taking the insurer's case at its highest it had failed to make good its defence to the appropriate standard for fraud. As the insured was able to establish that the insured event took place he was successful in his appeal with judgment entered in his favour.

Implications for Insurers

This case highlights how difficult it can be for insurers to present enough evidence to establish fraud. When a police report reveals even a preliminary view on the investigating officer's part that a crime warranting prosecution has occurred, the insurer will need to find another way to make their case due to exceptions in the Evidence Act.

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