

New South Wales Court of Appeal Hooks into Subpoenas

Lowery v Insurance Australia Ltd [2015] NSWCA 303

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Summary

The New South Wales Court of Appeal has recently handed down a decision to set aside a number of subpoenas to produce issued by an insurer as constituting a fishing expedition.

In its decision, the New South Wales Court of Appeal made it clear that it was not the Court's job to redraft subpoenas that are too wide in scope.

Background

On 27 March 2014, a 2008 Mercedes Benz owned by Mr and Mrs Lowery ('the Mercedes') was stolen from a fenced and gated car park and destroyed by fire. At that time the Mercedes was insured by Insurance Australia Ltd ('IAL').

Mr & Mrs Lowery lodged a claim for the total loss of the Mercedes under the policy.

IAL refused to pay the claim on the basis that Mr & Mrs Lowery had, in breach of the terms of the policy, failed to co-operate with IAL's investigation of the claim, in part by not providing information nor taking part in an interview regarding the claim and IAL maintained its position was prejudiced.

IAL maintained that the value of that prejudice was the entire claim amount, as Mr and Mrs Lowery had not established that the Mercedes was stolen and damaged as reported by them. The prejudice claimed was such that IAL was not in a position to cover the value of the Mercedes at all.

Mr & Mrs Lowery commenced proceedings in the District Court of New South Wales seeking indemnity under the policy for the total loss of the Mercedes.

The Subpoenas

In defending the proceedings, IAL issued subpoenas to produce on NSW Police Force, Vodafone Australia, Telstra, Optus Mobile Pty Ltd and Roads & Maritime Services (RMS).

The subpoenas sought documents relating to Mr & Mrs Lowery, their son (who had custody of the Mercedes at one point) and the person who controlled the car park from which the Mercedes was taken.

IAL maintained that the purpose of the subpoenas was to obtain material which might provide a basis for challenging either the accounts given by those individuals of the circumstances surrounding the loss of the Mercedes, or to challenge more generally the credibility of each person.

Mr & Mrs Lowery made an application to set aside the subpoenas on the basis that they constituted a 'fishing expedition'. This application was rejected by the trial judge.

Mr & Mrs Lowery sought leave to appeal the trial judge's decision on the application to set aside the subpoenas to the New South Wales Court of Appeal.

The Decision

Despite there being no pleading of fraud, the credibility of Mr & Mrs Lowery, their son and the controller of the car park were in issue.

A subpoena to produce is for a legitimate forensic purpose and does not constitute a fishing expedition if it seeks documents where there are reasonable grounds to think "that fish of the relevant type are in the pond".¹

However, a subpoena to produce is nothing more than a fishing expedition to see whether any such documents are in existence where there is no evidence, and no reason to suppose, that there would be any documents of the relevant category.

Justices Emmett and Basten held that the 5 subpoenas, in the form drafted, constituted fishing expeditions and were not for a legitimate forensic purpose. It was held that the material sought in all 5 subpoenas went beyond what would reasonably be required to investigate the matter.

The majority made it clear that it was not the Court's job to redraft subpoenas that are too wide in scope.

Justice Adamson dissented on the conclusion, having determined there was no error in principle applied by the trial judge to warrant the Court of Appeal overturning the decision.

In coming to this conclusion, Justice Adamson noted that an insurer is required, as part of its duty to maintain a provident fund, to ensure that a claim is *bona fide* prior to accepting and paying out a claim. In Justice Adamson's view, an insurer is both entitled and obliged to enforce the duty of co-operation and employ such investigative or forensic processes at its disposal, to assess a claim when it has formed the view that the claim cannot be paid without further investigation.

Implications

The key points for insurers to take away from this decision are twofold:

1. Insurers involved in litigation need to be quite specific or pointed when issuing subpoenas to produce. An insurer should carefully consider the nature of documents it is seeking and ensure those documents sought are relevant to the facts in issue in the proceedings. The addition of a precise date range may assist an insurer in ensuring the subpoena is not deemed a fishing expedition.
2. An insurer needs to be cognisant not only of its right to properly investigate a claim, but also its duty to ensure that a claim is *bona fide* before accepting the claim. This raises interesting considerations for an insurer when it is considering a commercial approach to the resolution of a claim where the investigation costs are high relative to the amount of the claim.

1. *Lowery v Insurance Australia Ltd* [2015] NSWCA 303 at [42] per Emmett JA citing *Liristis v Gadelrabb* [2009] NSWSC 441 at [5].

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