

# The smoke clears and circumstantial evidence prevails

*Sharma v Insurance Australia Ltd (t/as NRMA Insurance)* [2017] NSWCA 307

Geoffrey Irvine & Sam Harvey | January 2018 | General Insurance

## Summary

The New South Wales Court of Appeal in *Sharma v Insurance Australia Ltd (t/as NRMA Insurance)* recently upheld a decision of the District Court where an insurer successfully defended its decision to deny coverage following a deliberately lit fire at the insured's rental property. This decision highlights how insurers can rely on strong circumstantial evidence when seeking to rely on policy exclusions or when alleging that a fraudulent claim<sup>1</sup> has been submitted by the insured.

## Facts

Mr Sachin Sharma was the owner of a rental property in Ingleburn, New South Wales (the Property). Prior to the fire he engaged Mr Sen, who grew up in the same village as Mr Sharma in Fiji, to assist him in renovations to the Property.

In the late hours of 12 June 2012, a fire destroyed the Property and the contents within.

Prior and subsequent to the fire, there were a number of phone calls and texts passing between four phones - one found at the scene (the Scene Phone), Mr Sharma's personal phone, a phone owned by Mr Sen and a phone registered in the name of a Mr Thomson (Phone X).

It was the insurer's case that the Scene Phone was operated by Mr Sen and Phone X was operated by Mr Sharma.<sup>2</sup>

Following the fire, Mr Sharma made a claim through his Landlord Building and Contents Insurance (the Policy).

The claim was denied on two bases:

1. firstly, alleging that the fire was deliberately lit with the intention of causing the damage by Mr Jai Sen, who entered the Property with the consent of the plaintiff or that the plaintiff consented to Sen's deliberate lighting of the fire; and
2. secondly, that statements made by the plaintiff in the course of his making the claim rendered the claim fraudulently made permitting the defendant to refuse payment pursuant to section 56 of the *Insurance Contracts Act 1984* (Cth) (ICA).<sup>3</sup>

## Findings at First Instance

At first instance, the court was required to determine the case on the wholly circumstantial evidence. Principal amongst its findings, the court found that:

1. Mr Sen had deliberately started the fire;
2. Mr Sen started the fire with Mr Sharma's knowledge and consent; and
3. The Insurer had met its onus of establishing that a Policy exclusion applied and was correct to decline coverage under the Policy.

When determining whether the Insurer had met the onus of establishing that a Policy exclusion applied, the trial judge proceeded on the orthodox basis that the Insurer bore the onus of proving that one of the exclusions applied.<sup>4</sup> The trial judge identified the relevant standard

of proof as satisfaction on the balance of probabilities taking into account the following matters:

1. the nature of the cause of action or defence;
2. the nature of the subject-matter of the proceeding; and
3. the gravity of the matters alleged.

These findings were based on, amongst other things: statements given by Mr Sharma and Mr Sen; Mr Sen's familiarity with the Property; and the call records from the Scene Phone, Mr Sharma's personal phone, a phone owned by Mr Sen and Phone X.

## Findings on Appeal

The Court of Appeal upheld the decision of the District Court, dismissing the 18 grounds of appeal put forward by Mr Sharma. For the purposes of this analysis, three grounds of appeal will be examined.

### **Ground One - Failure to Call Witness**

Mr Sharma submitted that the trial judge erred in failing to draw inferences favourable to him in the face of the Insurer failing to call witnesses at the trial.<sup>5</sup> Such an inference, Mr Sharma submitted, should be drawn in accordance with the principles of *Jones v Dunkel*.<sup>6</sup>

The Court of Appeal affirmed the trial judge's findings that Insurer had attempted to contact Mr Sen without success and that he was an unwilling witness in the case. In making this finding, the Court of Appeal rejected the ground of appeal.

### **Ground Two - Evidence Mr Sen Lit the Fire**

On appeal, Mr Sharma submitted that there was no objective evidence to support that Mr Sen was responsible for lighting the fire.<sup>7</sup>

The Court of Appeal was required to examine the circumstantial evidence surrounding the use of Mr Sen's phone and the Scene Phone. The evidence relied on by the Court included the location of the phones, the timing of phone calls from the two phones, and the numbers dialled.

The Court of Appeal found that 'the only conclusion available... [was that] Mr Sen continued to use the Scene Phone on the evening of the fire until he accidentally left it in the rear of the property after having started the fire...'<sup>8</sup>

### **Ground Three - Evidence Mr Sharma Consented to the Fire**

On appeal, Mr Sharma challenged the finding of the trial Judge that Mr Sharma was the user of Phone X and consented to Mr Sen entering the Property and starting the fire.

While there was no direct evidence to support the finding, the Court of Appeal examined the numerous records of the four phones in question. After noting circumstantial evidence such as similar contact lists across the phones, the fact they were never used at the same time and that the phones were used in almost instantaneous succession to call or message the same common contacts, the Court of Appeal concluded that:

The evidence points clearly to Mr Sen having used the Scene Phone at the time and place of the fire to speak to Mr Sharma, who was using Phone X. The compelling inference in those circumstances is that [Mr Sharma] consented to the lighting of the fire.<sup>9</sup>

## Implications

This decision was primarily concerned with whether the trial judge erred in making findings based wholly on circumstantial evidence regarding the involvement of the insured, his known associates and ultimately whether the fire was deliberately lit.

There are four take away points from this case:

1. Wholly circumstantial evidence can be relied on to decline coverage under a policy of insurance only where the evidence points the court towards a single inference which supports the insurer's decision.
2. When there is only circumstantial evidence supporting the exclusion of coverage under a policy, insurers must provide evidence that can "give rise to a reasonable

and definite inference.”<sup>10</sup> It is not enough for an insurer to present conflicting inferences so that the court is faced with mere conjecture as to the circumstances of the event.

3. Insurers will continue to face a high burden of proof when alleging fraudulent conduct on the part of the insured.
4. Parties to proceedings must take all reasonable steps to locate witnesses so as to avoid a *Jones v Dunkel* inference being drawn.

<sup>1</sup> Within the context of s 56(1) *Insurance Contracts Act 1984* (Cth).

<sup>2</sup> *Sharma v Insurance Australia Ltd (t/as NRMA Insurance)* [2017] NSWCA 307 [6].

<sup>3</sup> *Sachin Sharma v Insurance Australia Limited trading as NRMA Insurance* [2017] NSWDC 10 [2].

<sup>4</sup> *Sharma v Insurance Australia Ltd (t/as NRMA Insurance)* [2017] NSWCA 307 [17] citing *McLellan v Insurance Australia Ltd* (2013) 286 FLR 453.

<sup>5</sup> *Sharma v Insurance Australia Ltd (t/as NRMA Insurance)* [2017] NSWCA 307 [27].

<sup>6</sup> (1959) 101 CLR 298.

<sup>7</sup> *Sharma v Insurance Australia Ltd (t/as NRMA Insurance)* [2017] NSWCA 307 [67].

<sup>8</sup> *Ibid* [74].

<sup>9</sup> *Ibid* [98].

<sup>10</sup> *Bradshaw v McEwans Pty Ltd* (1951) 217 ALR 1, 5; *Trustees of the Property of Cummins v Cummins* (2006) 227 CLR 278, [34] fn 50.

## For more information, please contact:



**Geoffrey Irvine**

Partner

T: 07 3212 6701

M: 0414 848 866

[geoffrey.irvine@turkslegal.com.au](mailto:geoffrey.irvine@turkslegal.com.au)



**Sam Harvey**

Lawyer