

DISPUTE RESOLUTION ALERT

IN THIS ISSUE

BURDEN OF PROOF FOR REPUDIATION BASED ON FRAUD AND A REASONABLE PRECAUTION CLAUSE

In the recent case of *Renasa Insurance Company Ltd v Christopher Brian Watson and Flashcor 201 CC* (Case No: 32/2014 [2016] ZASCA 13 (11 March 2016) the insured lodged claims with their insurer due to loss and damage caused by a fire. The insurer repudiated these claims, basing its defence on two premises: one, that the insured was fraudulent in that the insured was the arsonist and, two, if the first defence failed, that the insured had breached the insurance contract by failing to take reasonable steps and precautions to prevent the loss.

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The fire

In short, certain premises that were owned by Flashcor 201 CC (Flashcore) were let to Mr Watson who conducted a print finishing business from the premises. Renasa Insurance Company Ltd (Renasa) insured both Flashcore and Mr Watson against loss or damage caused by fire on the insured premises. A fire erupted on the premises resulting in loss for both Flashcore and Mr Watson who subsequently lodged claims with Renasa.

The arsonist

It was common cause that the fire was caused by arson. Renasa attempted to rely on circumstantial evidence to show that Mr Watson was the arsonist as he sought to gain financially from the arson. Renasa was, however, unable to provide evidence on how the fire started, where the fire started and what time it ignited. The Supreme Court of Appeal (SCA) found that Renasa's failure to prove these elements meant that it did not discharge the onus of showing that Mr Watson was the arsonist and accordingly dismissed Renasa's defence based on fraud.

Reasonable steps to prevent loss

On the day of the fire Mr Watson arrived on the premises to find it set up for an arson attack. Although Mr Watson and the police (who he reported the incident to) inspected the scene, neither party took steps to prevent the arson from materialising. After the inspection Mr Watson and the police left the scene and shortly after the fire erupted. The SCA considered the case of *Santam Ltd v CC Designing CC* 1999 (4) SA 199 (C) where the court held that in order to repudiate a claim based on a clause that requires the insured to take reasonable steps and precautions to prevent loss, proof of recklessness is required. Recklessness exists when an insured is aware of the danger and, with this knowledge, refrains from taking any measures to avert the danger and prevent the consequential loss. The SCA had to therefore first determine whether Mr Watson was negligent.

The SCA held that to require the insured to take steps to prevent a loss, proof of foreseeability of loss eventuating is first required. The SCA stated that this would require proof that a reasonable person in the position of the insured would

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The SCA found that Mr Watson was not negligent as he could not have been required to take steps to guard against loss caused by an eventuality that was inconceivable.



have foreseen the reasonable possibility of the loss eventuating and then taken reasonable steps to prevent it. Renasa conceded that it was inconceivable that an arsonist would have risked manually igniting the fire after Mr Watson and the police left the scene. It therefore became common cause that a reasonable person in the position of Mr Watson would not have foreseen that an arsonist would ignite the fire after Mr Watson left the premises. It then followed that a reasonable person would not have foreseen that leaving the premises unattended would cause loss to eventuate.

The SCA found that Mr Watson was not negligent as he could not have been required to take steps to guard against loss caused by an eventuality that was inconceivable.

Conclusion

Insurance fraud can be difficult to prove and in the absence of direct evidence insurers will have to rely on circumstantial evidence. If an insurer relies on circumstantial evidence then

the conclusion sought to be drawn must be the most plausible and probable conclusion viewed against the proven or existing facts of the matter.

Clauses in insurance policies that require the insured to take reasonable steps to prevent loss do not necessarily allow the insurer to exclude its liability when the loss is caused by the negligence of the insured. Conversely, when attempting to repudiate a claim based on an insured's failure "to take reasonable steps and precautions to prevent loss" the burden of proof is twofold: the insurer must first prove that the insured was negligent in failing to take reasonable steps and precautions to prevent loss. Once negligence has been established, the insurer must then prove that the insured's negligence also amounted to reckless conduct in that the insured was aware of the danger and, with this knowledge, refrained from taking any measures to avert it.

Verusha Moodley

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