MATTERS

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INSURANCE

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In this English case, Hayward sued his employer after allegedly sustaining serious back injuries from an occupational accident. His claim was supported by an orthopaedic surgeon's expert evidence.

The employer's insurer (Zurich) defended the claim. Liability was admitted and an apportionment for contributory negligence was agreed. The quantum of Hayward's claim remained disputed in view of video footage depicting Hayward doing 'heavy work' at home. Despite the video, Zurich's own medical expert could not conclude with certainty that Hayward's claim was fraudulent.

Because of the footage, Zurich pleaded that Hayward "exaggerated his difficulties in recovery and current physical condition for financial gain". This was tantamount to a plea of fraud against Hayward's claim.

Before trial, the parties concluded an agreement in full and final settlement of Hayward 's claim. Two years later, Hayward's neighbours came forward alleging that Hayward had fully recovered long before the settlement was concluded.

Zurich then applied to court to rescind the settlement agreement and recover the amount paid out, alternatively claiming the difference between the settlement paid and the damages which Hayward may truly have been entitled to.

On appeal, the court ruled that Zurich only needed to show that it had been *influenced* by Hayward's false allegations, rather than having believed the truthfulness thereof. The court found that Zurich had proven this.

On further appeal, the England and Wales Court of Appeal (EWCA) confirmed that settlement agreements may be rescinded upon uncovering a fraudulent representation on a material fact which induced a party to conclude a settlement.

However, to rescind the agreement, the innocent party must have *believed* the truthfulness of the misrepresentation and this belief must be a factor which influenced it to conclude the settlement.

The EWCA found Zurich had not *believed* Hayward's fraudulent contentions to be true and had thus concluded the settlement with "eyes wide open" to the fraud as a risk management exercise. Accordingly, Zurich was precluded from crying foul when better evidence later arose.

The ruling highlights the commercial importance of *legal certainty* and *finality of settlement agreements* and that, in the absence of a true fraud, a settlement agreement must be upheld.

In South Africa fraud must be proven by showing, amongst other elements, that the false representation *induced* the innocent party to act. To have done so, the representation must have been *believed*.

The *Hayward* judgment – although not binding on South African courts – will likely guide our courts' reasoning in dealing with fraudulent insurance claims. The harsh reality: by settling, insurers agree to forego the opportunity to disprove false statements made by the claimant and cannot reserve the right to come back later for another attempt.

Insurers should weigh their options carefully when considering a settlement of a suspected (or known) fraudulent claim – as a settlement of such a claim cannot easily be undone.

Willie van Wyk and Philene Spargo

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WHEN CAN AN INSURER REPUDIATE A CLAIM ON THE BASIS OF NON-DISCLOSURE?

An insurance contract is one of utmost good faith and in order to accurately assess the risk the insurer relies, almost exclusively, on information provided by the insured. There is therefore a duty on the insured to disclose all material information relevant to the risk that is to be underwritten.

In the matter of *Regent Insurance Co Ltd v King's Property Development (Pty) Ltd t/a King's Prop* 2015 (3) SA 85 (SCA) the insured, King's Prop, had one of its buildings damaged by fire and claimed the costs of the repairs and lost rental from its insurer, Regent Insurance Co Ltd. Regent rejected the claim alleging that King's Prop failed to disclose material information when it applied for the insurance policy. This non-disclosure was King's Prop's failure to advise Regent that the insured premises was occupied by a tenant (Elite Fibre Gauteng CC) which manufactured truck and trailer bodies using highly flammable materials - a risk that Regent would not have assumed had it known the nature of Elite's business.

There were many requests for quotations for cover of the premises as well as various revisions to the policy between the insurance brokers of King's Prop and Regent. Throughout these communications, however, King's Prop did not disclose to Regent that a tenant was occupying the premises and using highly flammable materials to manufacture its products. Section 53(1) of the Short-Term Insurance Act, No 53 of 1998 (Act) states that a policy will not be invalidated on account of a failure to disclose information unless that non-disclosure is likely to have materially affected the assessment of risk under the policy. The Supreme Court of Appeal (SCA) stated that since the introduction of s53 of the Act, the test in respect of misrepresentations and non-disclosure is an objective one, involving a two-pronged enquiry: The insurer must first prove materiality of the non-disclosure and then prove that the non-disclosure induced it to conclude the contract. The SCA further noted that the question to be asked is whether a reasonable person would have considered the fact not disclosed to be relevant to the assessment of risk by the insurer.

In this matter the SCA found that while the insurance broker for Regent could have ascertained information about the premises from available records, what he would not have discovered was that the premises was being let by an entity manufacturing products using highly flammable materials. The SCA found that had Regent known that the premises was used to manufacture products made from highly flammable materials it would have refused the cover. The SCA found that Elite's occupation of the premises, which King's Prop failed to disclose, made a material difference to the assessment of risk. The SCA therefore found that Regent was induced to enter into the contract by the non-disclosure of Elite's business.

It is clear that one of the prerequisites for proper assessment of risk by the insurer is for the insured to make a full disclosure of all information material to the insurer's assessment of risk. Failure to do so entitles the insurer to repudiate a claim if that failure materially affects the insurer's assessment of risk.

Byron O'Conner and Verusha Moodley

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After banning the use of drones altogether in June 2014, the SACAA, together with the Department of Transport and other key industry role players, developed these new regulations, making South Africa one of only four countries globally to have relevant legislation for the commercial use of drones.

This novel legal framework has set the stage for the first fully operational commercial drone operators to commence business. The vast range of commercial applications of drones comes with inherent risks and the necessity for adequate insurance products for operators. Part 101.04.12 of the regulations states that remote piloted operator certificate holders should at all times be adequately insured for third party liability.

Lloyd's produced an emerging risk report titled "Drones take flight" which investigates the insurance industry's role in drone safety and identifies five fundamental risks facing the sector:

- **Negligent or reckless pilots:** Adequate development of training and licensing schemes are imperative to provide assurance of operators' capability. Insurers are likely to have particular concerns regarding moral hazard, as pilots on the ground could feel disassociated from the risk occurring in the air. Some insurers may require a higher risk retention unless operators demonstrate responsible and safe behaviour.
- **Patchy Regulatory Regimes:** There are inconsistencies between drone laws governing different jurisdictions as many countries are only developing regulations around drone operations at this stage. To counter this uncertainty, robust regulations are needed and this, in turn, will allow insurers to make provision for drone operators. Other important factors for the success of the regulatory regime are harmony across international standards and clarity regarding third party liability.
- **Poor Performance:** The industry is growing too rapidly and unevenly for regulators to provide strong oversight without technological support. Tracking or monitoring technology (such as "Geo-fencing" technology to prevent drones from straying into controlled airspace) would assist operators to stay within the confines of the law.
- **Vulnerability to cyber-attack:** Drones could be vulnerable to cyber-attack with some reports suggesting there is a thriving community of "drone hackers". Cyber security measures would have to be increased significantly to fare favourably in underwriters' risk assessment of commercial drone operations.

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- **Privacy infringement:** This is perhaps the most cited public concern about drones. Professional indemnity insurance can cover the cost of damages awarded for breach of privacy against drone operators. Key requirements for insurance are expected to include the completion of privacy impact assessments and compliance with applicable regulations and laws.

The South African regulations deal with many of the issues raised in Lloyd's risk report. New applications for the use of drones will come to light as the industry develops. In such a fledgling industry, these developments will necessitate the adaptation of existing regulations and revised assessments of insurance risks. Drones have huge potential to enhance a range of activities. One certainty is that drones are here to stay and as certain commentators note, they are likely to take over numerous manned aviation functions and jobs.

Craig Hindley

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