14 SEPTEMBER 2016

DISPUTE RESOLUTION ALERT

IN THIS **ISSUE**

INSURANCE LAW:

GUIDANCE FROM THE UK FOR SOUTH AFRICAN INSURERS REGARDING FRAUDULENT CLAIMS

In our Alert of 16 November 2015 entitled *Liars, cheats and thieves*, we dealt with *Hayward v Zurich Insurance Company PLC* - a 2015 decision by the England and Wales Court of Appeal relating to insurance fraud. The 2015 decision has now been overturned on appeal by the UK Supreme Court.

INTERNATIONAL ARBITRATION:

WHEN GOOD INTENTIONS COME BACK TO BITE: INVESTMENT ARBITRATIONS IN THE ENERGY SECTOR

Foreign investors' decisions to invest in the energy sector of a particular country are influenced by a country's policies and regulations that promote the use of particular energy sources. Examples are renewable energy or other technologies that reduce the carbon footprint of fossil fuels, in line with climate change objectives.

CDH
CLIFFE DEKKER HOFMEYR

INSURANCE LAW:
GUIDANCE FROM THE UK FOR SOUTH AFRICAN INSURERS REGARDING FRAUDULENT CLAIMS

This appeal judgment sets an important precedent for the law relating to insurance fraud and will undoubtedly have an impact on the South African insurance industry.

In our Alert of 16 November 2015 entitled *Liars, cheats and thieves*, we dealt with *Hayward v Zurich Insurance Company PLC* - a 2015 decision by the England and Wales Court of Appeal relating to insurance fraud. The 2015 decision has now been overturned on appeal by the UK Supreme Court. This appeal judgment sets an important precedent for the law relating to insurance fraud and will undoubtedly have an impact on the South African insurance industry.

The Supreme Court ruled that an insurer's thorough investigations into a claim where fraudulent misrepresentation was suspected would not preclude the insurer from being induced by the misrepresentations. The Court held that in almost all circumstances where fraud was suspected, subsequent proof of the fraud would unravel a settlement.

History of the Hayward case

Hayward suffered an injury at work for which he claimed compensation from his employer's insurer (Zurich). Although Zurich suspected that Hayward had fraudulently exaggerated his injuries to inflate his claim, it was unable to obtain conclusive proof of this. Shortly before trial, a substantial settlement was reached. Two years later evidence emerged from Hayward's neighbours, confirming Hayward's fraud. In light of the new evidence, Zurich sought to rescind the settlement, claiming that the fraudulent nature of Hayward's representations induced it to conclude the settlement.

Hayward argued that the matter had already been disposed of with finality through the settlement agreement and that the court should accordingly dismiss Zurich's application for rescission of the settlement.

The County Court upheld Zurich's argument and set aside the settlement agreement, only awarding Hayward a substantially-reduced sum in compensation for his actual injuries.

In August 2015 the England and Wales Court of Appeal ruled in Hayward's favour, holding that, since Zurich had been aware of (or had strongly suspected) the fraud at the time of conclusion of the settlement agreement, Zurich was not at liberty to have the settlement set aside when better evidence later arose. The court took a harsh stand and ruled that Zurich had concluded the settlement with "eyes wide open" and that the principle of finality of settlements applied.

Significant findings of the UK Supreme Court

The Supreme Court ruled on 27 July 2016 that, contrary to the 2015 finding, Zurich did not have full knowledge of all the facts of Hayward's fraud when it concluded the settlement. It held that Hayward had grossly and dishonestly exaggerated his condition and Zurich had been induced into concluding the settlement.

The Supreme Court also confirmed that a party need not believe the truthfulness of a misrepresentation to still be factually influenced (ie induced) by the misrepresentation to conclude a settlement.

The judges of appeal acknowledged that in some cases an insurer may know that a misrepresentation is false, but may rely upon it anyway as a matter of fact. This will happen when, for example, an insurer

CDH
CLIFFE DEKKER HOFMEYR

INSURANCE LAW:
GUIDANCE FROM THE UK FOR SOUTH AFRICAN INSURERS REGARDING FRAUDULENT CLAIMS

CONTINUED

The principle of finality of settlement agreements is important, but the law cannot be seen to be condoning fraudulent practices.

knows that a claim is false but settles the claim to avoid the possibility that a court may accept the misrepresentation as truth.

The Supreme Court acknowledged that "[i]nsurers may often have grounds for suspicion about a claim but lack the hard evidence necessary to prove fraud," and also conceded that, for an insurer, "[t]o pursue an allegation of fraud without strong evidence is risky".

The Supreme Court also ruled that an insurer's thorough investigations into a claim where fraudulent misrepresentation was suspected would not preclude the insurer from being induced by the misrepresentations. The Court held that in almost all circumstances where fraud was suspected, subsequent proof of the fraud would unravel a settlement.

Impact on South African law

As it now stands in the UK, fraud (still) "unravels all". This principle has for many years been incorporated in South African law. In terms of our common law, the purpose of the principle that "fraud unravels all" is to restrict the right of fraudsters to avoid the consequence of their performance.

Reversal of the 2015 judgment is good news for insurers in South Africa, as it reinforces the English-law principle that has previously been followed by our courts – that courts will not allow their process to be used by a dishonest person to carry out a fraud.

The principle of finality of settlement agreements is important, but the law cannot be seen to be condoning fraudulent practices.

Willie van Wyk and Philene Spargo

CLICK HERE to find out more about our Insurance Law team.

CDH
CLIFFE DEKKER HOFMEYR

INTERNATIONAL ARBITRATION:
WHEN GOOD INTENTIONS COME BACK TO BITE: INVESTMENT ARBITRATIONS IN THE ENERGY SECTOR

Spain's renewable energy policies and regulations, which promoted investment in the renewable energy sector, are a prime example of good intentions coming back to bite a country because the economics for such projects changed for the worse.

Foreign investors' decisions to invest in the energy sector of a particular country are influenced by a country's policies and regulations that promote the use of particular energy sources. Examples are renewable energy or other technologies that reduce the carbon footprint of fossil fuels, in line with climate change objectives. However, when developing such policies and regulations, governments must be mindful not to expose the country to unforeseen risk where the economics of developing such projects through incentives or subsidies may not be sustainable in the long run.

In invoking the provisions of the ECT, the investors alleged that Spain breached its obligations in terms of the ECT by amending the feed-in-tariff regulations and eventually repealing the regulations.

Spain's renewable energy policies and regulations, which promoted investment in the renewable energy sector, are a prime example of good intentions coming back to bite a country because the economics for such projects changed for the worse. Until 2009 Spain operated a feed-in tariff regulation under the renewable energy programme "the sun can be yours", which provided solar energy producers with a preferential price structure for the electricity fed back into the national grid. However, due to a severe economic downturn, Spain had little choice but to scale back on the feed-in-tariff and then eventually repeal it in its entirety.

Pursuant to the change in policy and regulations to the feed-in-tariff, foreign investors sought compensation under the Energy Charter Treaty (ECT). The ECT is a multilateral international legal framework for energy co-operation among member states designed to promote energy security through the operation of more open and competitive energy markets, while respecting the principles of sustainable development and the sovereign right of states over energy sources. As with many investment treaties, the ECT includes provisions for the protection of foreign investments enforceable against a host state. In invoking the provisions of the ECT, the investors alleged that Spain breached its obligations in terms of the ECT by amending the feed-in-tariff regulations and eventually repealing the regulations. The basis for the claim was that the regulatory change retroactively affected the legal and economic regimes established by previous regulations that the investors had relied upon in carrying out their investments. The investors sought full compensation for the loss of their past and future feed-in tariffs.

The investors were unsuccessful with the claim against Spain, but these types of investment arbitrations continuously require governments (such as South Africa) to carefully consider policies and regulations (or underlying investment agreements) which encourage foreign investors to invest in specific sectors,

CDH
CLIFFE DEKKER HOFMEYR

INTERNATIONAL ARBITRATION:
WHEN GOOD INTENTIONS COME BACK TO BITE: INVESTMENT ARBITRATIONS IN THE ENERGY SECTOR

CONTINUED

In some instances the cost of an investment to a country could be more than the economic benefit, specifically where an investor is successful with a claim against the host state.

such as energy. The risk of a foreign investors being successful with a claim under bilateral investment treaties or regional investment treaties based on policy changes or regulatory changes must always be factored into the actual value of an investment by an investor. In some instances the cost of an investment to a country could be more than the economic benefit, specifically where an investor is successful with a claim against the host state.

South Africa has developed a world-renowned renewable energy programme, however, the government must be mindful of what happened in Spain by undertaking a proper assessment to ensure that proposed future changes to policies or regulations do not expose the country to investor risk. This assessment should include, among others, the current concerns around the economics for the conclusion of further power purchase agreements in terms of the IPP Programmes of the Department of Energy. The risk of investor claims remains real in light of the sunset provision contained in the terminated bilateral investment treaties, including investor-state protection afforded in terms of the SADC Protocol.

Jackwell Feris

CLICK HERE to find out more about our International Arbitration team.

CDH
CLIFFE DEKKER HOFMEYR

International Arbitration
NEWS BULLETIN

International Arbitration Bill of South Africa is anticipated to be approved by cabinet by end of October 2016 and if no contentious issues arise during the parliamentary process the bill is expected to be adopted by the South Africa Parliament during the first half of 2017.

TOP RANKED GLOBAL CHAMBERS AND PARTNERS 2016
Cliffe Dekker Hofmeyr
BAND 2
Dispute Resolution

The LEGAL 500
2015-2016
Ranked Cliffe Dekker Hofmeyr
TIER 2
FOR DISPUTE RESOLUTION

2013
HIGHEST RANKING
of Client Satisfaction amongst African Firms
Legal Week

NO.1
6
YEARS IN A ROW
for client service excellence
#6YearsInARow
pmr.africa

CHAMBERS GLOBAL 2011–2016 ranked us in Band 2 for dispute resolution.

Tim Fletcher ranked by CHAMBERS GLOBAL 2015–2016 in Band 4 for dispute resolution.

Pieter Conradie ranked by CHAMBERS GLOBAL 2012–2016 in Band 1 for dispute resolution.

Jonathan Witts-Hewinson ranked by CHAMBERS GLOBAL 2014–2016 in Band 3 for dispute resolution.

Joe Whittle ranked by CHAMBERS GLOBAL 2016 in Band 4 for construction.

TOP RANKED GLOBAL CHAMBERS AND PARTNERS 2016

CDH
CLIFFE DEKKER HOFMEYR

OUR TEAM

For more information about our Dispute Resolution practice and services, please contact:

Tim Fletcher
National Practice Head
Director
T +27 (0)11 562 1061
E tim.fletcher@cdhlegal.com

Grant Ford
Regional Practice Head
Director
T +27 (0)21 405 6111
E grant.ford@cdhlegal.com

Roy Barendse
Director
T +27 (0)21 405 6177
E roy.barendse@cdhlegal.com

Eugene Bester
Director
T +27 (0)11 562 1173
E eugene.bester@cdhlegal.com

Lionel Egypt
Director
T +27 (0)21 481 6400
E lionel.egypt@cdhlegal.com

Jackwell Feris
Director
T +27 (0)11 562 1825
E jackwell.feris@cdhlegal.com

Thabile Fuhrmann
Director
T +27 (0)11 562 1331
E thabile.fuhrmann@cdhlegal.com

Anja Hofmeyr
Director
T +27 (0)11 562 1129
E anja.hofmeyr@cdhlegal.com

Willem Janse van Rensburg
Director
T +27 (0)11 562 1110
E willem.jansevanrensburg@cdhlegal.com

Julian Jones
Director
T +27 (0)11 562 1189
E julian.jones@cdhlegal.com

Tobie Jordaan
Director
T +27 (0)11 562 1356
E tobie.jordaan@cdhlegal.com

Corné Lewis
Director
T +27 (0)11 562 1042
E corne.lewis@cdhlegal.com

Richard Marcus
Director
T +27 (0)21 481 6396
E richard.marcus@cdhlegal.com

Burton Meyer
Director
T +27 (0)11 562 1056
E burton.meyer@cdhlegal.com

Rishaban Moodley
Director
T +27 (0)11 562 1666
E rishaban.moodley@cdhlegal.com

Byron O'Connor
Director
T +27 (0)11 562 1140
E byron.oconnor@cdhlegal.com

Lucinde Rhoodie
Director
T +27 (0)21 405 6080
E lucinde.rhoodie@cdhlegal.com

Jonathan Ripley-Evans
Director
T +27 (0)11 562 1051
E jonathan.ripleyevans@cdhlegal.com

Willie van Wyk
Director
T +27 (0)11 562 1057
E willie.vanwyk@cdhlegal.com

Joe Whittle
Director
T +27 (0)11 562 1138
E joe.whittle@cdhlegal.com

Jonathan Witts-Hewinson
Director
T +27 (0)11 562 1146
E witts@cdhlegal.com

Pieter Conradie
Executive Consultant
T +27 (0)11 562 1071
E pieter.conradie@cdhlegal.com

Nick Muller
Executive Consultant
T +27 (0)21 481 6385
E nick.muller@cdhlegal.com

Marius Potgieter
Executive Consultant
T +27 (0)11 562 1142
E marius.potgieter@cdhlegal.com

Nicole Amoretti
Professional Support Lawyer
T +27 (0)11 562 1420
E nicole.amoretti@cdhlegal.com

BBBEE STATUS: LEVEL THREE CONTRIBUTOR
Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 3 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

JOHANNESBURG
1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN
11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

CDH
CLIFFE DEKKER HOFMEYR