22 NOVEMBER 2017

DISPUTE RESOLUTION ALERT

IN THIS **ISSUE**

INSURANCE:
SPEAK UP OR SHUT UP!

The English Court of Appeal has spoken in the 2017 matter of *Ted Baker PLC and Another v AXA Insurance UK PLC and Others* and it would be remiss of both insurers and insureds not to take note of the "duty to speak".

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Understandably, you are probably asking: So what?

Well, South African insurance law has a long relationship with its English counterpart dating back to the 1800s. English insurance law remains a persuasive source of South African insurance law and English decisions can potentially be relied on as authority in South Africa, particularly where we do not have developed law on the subject.

Into the meat of the matter, let's set the scene: Joe, a trusted employee of Ted Baker PLC (Ted), stole seven tonnes of clothing from Ted between 2000 and 2008. No need to worry, thought Ted – we have an insurance policy that covers us for the loss.

Ted claimed from its insurers, AXA, Fusion Insurance & Tokio Marine Europe (collectively AXA) for the losses that resulted from Joe's shenanigans. Under a condition precedent in the policy, AXA requested documentation from Ted that would assist AXA in assessing the loss. Ted did not provide all the documents because of the cost and time required to do so, relying on a clause in the policy requiring AXA to pay for Ted's accountants to produce the specific documents. After various exchanges on the point, Ted regarded the issue as "parked" and in subsequent correspondence, AXA did not suggest that it required any further information or quantum documentation.

Ultimately, AXA said there was a breach of the condition precedent and rejected Ted's claim, Ted having not provided the specific documents. Ted raised estoppel and waiver claiming that AXA had given Ted the impression that all requirements had been met.

On a rigid application of the legal principles, AXA could rely on Ted's failure to provide all of the relevant documentation. In fact, even under South African law, the duty of good faith requires that the insured submit all relevant documents relating to a claim – this was view of the Supreme Court of Appeals in the 2003 matter of *Schoeman v Constantia*, where Judge Marais held that:

> The argument is that a contract of insurance is one of the utmost good faith... The customer must disclose every material circumstance in his knowledge... If he does not do so the insurer may avoid the contract.

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CONTINUED

It would be unconscionable to let AXA avoid its liability based on its failure to correct an impression that it knew was mistaken and had done nothing to correct.

Accordingly, it would be unconscionable to let AXA avoid its liability based on its failure to correct an impression that it knew was mistaken and had done nothing to correct. AXA was thus estopped from relying on the failure to submit the documents.

There you have it. Insurers (and insureds as well) should take heed of the duty to speak.

PS Ted might have won the documents argument but it did not satisfy the appeal court that it had had proved the amount of its claim or that it had satisfied the condition of the policy that its claim was more than £5,000 on each and every loss. In the result, Ted won a noteworthy battle but lost the war.

Tim Fletcher and Tim Smit

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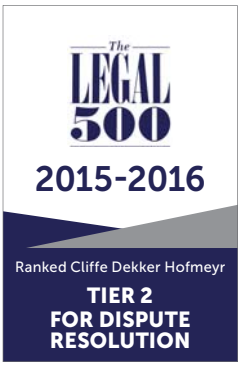

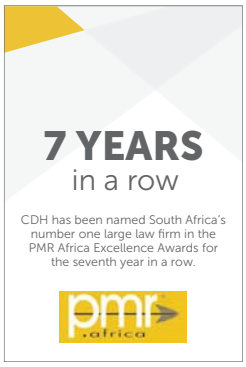

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Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 3 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving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

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