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CORPORATE & COMMERCIAL ALERT

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Warrantors beware: An independent contractor can be your “agent”

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The doctrine of vicarious liability holds that an employer is liable for harm or loss arising from the negligence, or other forms of wrongdoing of its employees, that occur in the course and scope of employment. One of the more interesting questions is whether an employer may be held liable for a breach of warranty based on the omission of an independent contractor, in circumstances where the warranty happens to be limited by an Agent Qualification? This was one of the questions dealt with in the recent Supreme Court of Appeals decision of *Rehau Polymer (Pty) Ltd v Brunettes Electrical & others* (641/2018) [2019] ZASCA 101 (25 July 2019).

The facts in *Rehau* essentially boil down to an attempt by the sublessee to attribute the omission of certain independent contractors to activate a gas fire suppression system as a breach of the warranties given by the sublessor to the sublessee in terms of a lease agreement entered into between the two parties in terms of which the sublessor subleased a factory to the sublessee. The failure by the independent contractors to activate the gas fire system in the factory caused a fire to break out.

In terms of the lease agreement the sublessor undertook to construct and lease a factory to the sublessee and warranted that the lease premises structures to be erected on the property would be fit for the purpose for which it was let to the sublessee and would comply with all relevant laws and regulations relating to fire and health safety. The sublessee's claim against the sublessor was founded upon the alleged breach of warranties by the sublessor as a direct consequence of the independent contractors' failure to activate the fire suppression system. The lease agreement contained an Agent Qualification in favour of the sublessor, worded as follows:

“The Sub-Lessee shall not, under any circumstances, have any claim or right of action whatsoever against the Sub-lessor for damages, loss or otherwise that occurs on the Lease Premises or the Supplier Park save for damages or destruction directly caused by any act or omission of the Sub-Lessor, its employees, servants or agents.”

Warrantors beware: An independent contractor can be your “agent”...continued

On the facts and evidence of the case the minority held that the independent contractors could indeed be said to be agents of the sublessor.

Whether an Agent Qualification such as the above can be interpreted as limiting liability under a warranty, is debatable. The majority of the court adopted a relatively narrow and literal interpretation of the lease agreement and found that the wording of the relevant warranties found no application to the actual subsequent activation of the fire suppression system in the first place, and thus the majority did not have to debate the proposition that an independent contractor could be said to be an “agent” of the sublessor.

The minority however adopted an interpretation that the warranty did extend to the proper arming of the fire suppression system, and therefore proceeded to determine *inter alia* whether the Agent Qualification assisted the sublessor. Were the independent contractors “agents” of the sub-lessor in this context?

On the facts and evidence of the case the minority held that the independent contractors could indeed be said to be agents of the sublessor. Witness testimony of the relationship between the sublessor and the independent contractor, and the nature of the services agreement between the parties, strongly indicated that the relationship was one of agency

or mandate. Accordingly, the Agent Qualification could not come to the sublessor’s aid, even if it was intended to be applied to liability under a warranty (which ordinarily is strict and absolute in its terms).

Accordingly, the minority held that the sublessor should have been held liable in contract for the damages caused by the independent contractors, as its agents.

The minority judgment in *Rehau*, although not binding (but at the same time also not contradicted by the majority judgment, given that the majority did not have to consider the question), clearly does show support for extending vicarious liability to the acts (and omissions) of independent contractors, in appropriate circumstances. Where the commercial principle is agreed that there will be an Agent Qualification drafted into an agreement, the parties should express themselves clearly on whether independent contractors are “agents” or otherwise of either party, and also the extent to which the Agent Qualification applies to warranties given under the agreement. Certainly, it must not be assumed by a party that its independent contractors cannot be its agents.

Yaniv Kleitman and Boipelo Diale

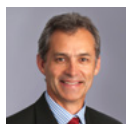
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