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Property: Green Shoots, Agent's Commission and Fidelity Fund Certificates

"Ninety percent of all millionaires become so through owning real estate. More money has been made in real estate than in all industrial investments combined. The wise young man or wage earner of today invests his money in real estate" (Andrew Carnegie, billionaire industrialist)

Dollar billionaire Andrew Carnegie said it a century ago, and it still rings true – wise property investment can be hard to beat when it comes to accumulating wealth. The exciting opportunity for buyers at the moment is of course the more attainable sale prices and the lower interest rates resulting from the pandemic and the lockdown. It is, by all accounts, still very much a buyer's market.

On the other side of the coin, sellers and estate agents are no doubt heartened by recent signs that the first green shoots of a recovery are in the offing, and so the time is ripe for a reminder that, in terms of the Estate Agency Affairs Act ("the Act") **only agents with a valid and current Fidelity Fund Certificate (FFC) can operate and**

earn commission.

The challenge for agents is that when it comes to the issue of FFCs, they are at the mercy of the Estate Agency Affairs Board (EAAB), which has reportedly struggled in the past to issue certificates efficiently and on time. This problem will presumably be exacerbated by the ongoing lockdown restrictions and the risk of precautionary office evacuations.

However there is some good news for agents (not such good news perhaps for those sellers or landlords hoping to save on commission!) in a recent Supreme Court of Appeal (SCA) judgment…

No FFC, but not the agent's fault

- Two estate agencies ("S" and "A") jointly brokered a lease agreement, but when S asked for its 50% share A refused, partially on the basis that S had no valid FFC at the time the commission was earned.
- In fact S had done everything necessary to apply for its annual FFC, which was issued by the EAAB on 1 January 2018 in the wrong name (S had converted from a close corporation to a company). The EAAB acknowledged its error and in May 2018 issued a correct FFC to S, backdated to 1 January.
- However the High Court dismissed S's commission claim, holding that mere entitlement to an FFC is not enough – a valid FFC must have been actually issued at the time the commission was earned.
- S appealed to the SCA, which reversed that finding and awarded S its 50%. The Court held that the Act's strict and peremptory requirement for a FFC had to be interpreted in light of both Constitutional considerations and consistency "with what the Act seeks to achieve".
- On that basis, and commenting that "But for the error on the part of the Board, [S] was entitled to, and would have been issued with, a valid fidelity fund certificate for the period 1 January-31 December 2018" and that "the fault lies squarely and solely with the Board", the Court concluded that "the estate agents were rightly considered to have been in possession of a certificate". S is therefore entitled to its commission.

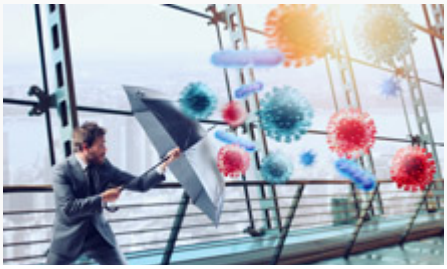
Agents – don't lose your commission!

The Court was however at pains to point out that the particular facts of this case were "in a narrow compass" and it is clear that the general rule remains – hold a valid and current FFC or almost certainly forfeit your commission. Do not even try to rely on an EAAB mistake unless you have complied strictly with all the formalities for a certificate and can prove that you are entitled to one.

And as the Court put it, if something does go wrong with the issue of your FFC "… estate agents should not adopt a supine attitude in the face of the Board's errors. They should do what is reasonably within their power to have the situation rectified. **In the meantime their compliance with the requirements should be a primary factor in the determination of disputes that arise before the error is rectified"** (emphasis supplied).

The Pandemic and Business Interruption Cover – Can You Claim?

"…it must be asked whether, but for the Covid-19 outbreak, the interruption or interference to the Applicant's business would have occurred when the Lockdown Regulations were promulgated" (extract from the judgment below)



It’s no surprise that our media has been awash with reports on the recent High Court judgment around a restaurant’s business interruption cover claims.

The restaurant in question, like many other businesses of all types and sizes, has been suffering severe losses from being forced to close (and latterly trade under very limited conditions) during the lockdown. Its business interruption claim in terms of an “Infectious Diseases Extension” clause in its policy (which it had faithfully been renewing annually since 2007) was rejected by the insurers.

What caused your business losses? The two things you must prove…

Sued by the restaurant, the insurers raised a whole slew of defences to the claim, all of them ultimately rejected by the Court.

Of most interest to businesses holding this type of cover will be the central question of whether or not **the wording of your particular policy**, in particular any “notifiable disease extension” clause (which in this case was a no-premium, “free cover” extension) will cover you for losses sustained **in the particular circumstances of this pandemic and the lockdown.**

The clause in this particular case promised cover for "interruption or interference with the business due to (e) notifiable disease occurring within a radius of 50 km of the premises…".

The insurer argued that this covered only losses resulting from business interruption “where the interruption is due to the Notifiable disease and not losses as a result of other causes” and that in this case business was interrupted not by the Covid-19 outbreak but rather by the lockdown “which is not insured under the Policy.” It also argued that “there was no sufficient causal link between the Covid-19 outbreak and the [restaurant]'s eventual loss.” The restaurant, it said, could have taken out other policies to specifically cover it in these circumstances but it chose not to do so.

In a nutshell, the Court found that the restaurant had to show two things –

1. “The Covid-19 as a Notifiable disease, caused or materially contributed to the "Lockdown Regulations" that gave rise to the Applicant's claim (this is a factual enquiry). If it did not, then no legal liability can arise…”

2. “If it did, then the second question becomes relevant, namely whether the conduct is linked to the harm sufficiently closely or directly for legal liability to ensue, or whether the harm is too remote from the conduct”.

Finding that the restaurant had indeed proved causation as above, the Court declared that it was covered for such of its losses as it “is able to calculate and quantify from time to time”.

So are you covered?

The insurers have said they are taking this matter on appeal to the Supreme Court of Appeal (the insurance industry as a whole of course faces substantial losses from these claims), but remember that your particular policy may anyway be worded so as to cover you. There are also media reports of similar claims being met by some insurers, and of interim relief being offered by others. As the Court in this case put it “each case must be decided upon its own facts and the law”.

Moreover the Financial Sector Conduct Authority (FSCA) says that “The National Lockdown cannot be used by any insurer as grounds to reject a claim” and that “policyholders are able to claim in instances where they can show that they have satisfied the requirements of their specific policy, whether it was before, during or after the national lockdown”. You can complain to the FSCA if you feel that you have been

treated unfairly.

Lockdown Admission of Guilt Fines – The Criminal Record Risk

Breaking any of our lockdown laws can be an expensive business, risking heavy penalties.

If you are accused of a contravention and offered the option of paying an "admission of guilt" fine to avoid a court appearance, beware! It may seem like the easy way out to pay up and put the whole thing behind you but it could land you with a criminal record.

You really don't want to have a criminal record!

Having a criminal record comes with serious and lifelong negative consequences. Even an old and long-forgotten minor offence can hang around in the background until it suddenly pops up at the worst possible times – such as when you apply for a travel visa or a new job.

When are you most at risk?

The general rule is that you will acquire a criminal record if you are arrested, if the police open a docket and take fingerprints, and if you are thereafter convicted of a crime.

The problem with admission of guilt fines is that they may well leave you with a "deemed" conviction and sentence which will end up in the CRC (SAPS Criminal Record Centre) database. Although there was talk in the past of the CRC capturing convictions with just your name and I.D. number the main risk seems to still be in having your fingerprints taken.

It's not easy to get rid of a criminal record

And once you have a criminal record, it's not easy to get rid of it.

1. Firstly, you can apply for "expungement" of the record to remove it from the CRC database, but that option is only available to you after 10 years and for certain "minor offences". It will also take a long time to process - "20 – 28 weeks" per SAPS. Note that some specified minor convictions fall away automatically after 10 years – ask for specific advice.

2. Secondly, you could ask a court to set aside your conviction and sentence – costly, not quick and not guaranteed to succeed.

3. Thirdly, you could hope that planned amendments to our criminal procedure laws will retrospectively come to your aid – speculative and not yet in the pipeline.

The bottom line - if you are offered the option of paying an admission of guilt fine, ask for advice before you accept!

Property Subsidence: New Law, Strict Liability and Ubuntu

"…every landowner has a right to the lateral support and where subsidence or other destabilisation occurs, as a result of excavations on an adjacent property, the owner of the adjacent property will be liable in an action for damages irrespective of whether she was negligent or not." (Extract from judgment below)

It's every homeowner's nightmare – your property starts subsiding and as the tell-tale cracks in the living room widen alarmingly, it begins to dawn on you that your whole house is at risk of collapse.

The cause must, you decide, be your neighbour's excavations for a new house/garage/swimming pool. You approach said neighbour for a friendly chat and a request to do something about it urgently. "Sorry" replies your neighbour, "not my fault, I am building exactly according to approved plans so it's your problem."

So where do you stand legally?

A recent Supreme Court of Appeal (SCA) decision has broken new ground (weak pun intended!) in our law here, and all property buyers, sellers and owners would do well to take note.

A slope subsides and a neighbour sues

- This long-running dispute between neighbours dates from 2008 and concerns the owners of two properties on a steeply sloping mountainside, one above the other.

- The house on the upper property was built in 1994. Fourteen years later in 2008 the owner of the lower property started extensive excavations in preparation for construction of her new house.

- The upper owner very soon noticed problems, with his garden and outside walls showing clear signs of subsidence. Eventually there was a major movement in the underlying ground and the entire slope subsided. The upper owner's property moved laterally and downwards towards the excavation resulting in extensive structural damage to the property. It was clearly a major event, with another neighbour having to abandon his property entirely because of safety concerns.

- The upper owner sued the lower owner for damages, and after a long fight through the courts the matter ended up with the SCA which upheld the damages claim by the upper owner.

The duty of "lateral support"

The Court addressed several important questions, all of them vitally important to any property owner or prospective property owner -

- **Does the duty of support cover buildings, or just land "in its natural state"?** Our law has long recognised a neighbour's duty to provide physical lateral support for adjoining properties, but until now it has been unclear whether that applies only to land "in its natural state", or whether it extends also

to developed land with “artificial” structures on it. **It’s an important question - few urban properties would be covered if the duty applies only to undeveloped land.**

The SCA’s final word – the duty of support applies to both land in its natural state and to “improved” and developed land (i.e. your house and other structures are covered).

As an important side note here, the Court referred to both the fact that “in our neighbour law, **fairness and equity are important considerations**”, and to the fact that “in our constitutional context, the principle of lateral support must find expression in the **constitutional value of Ubuntu, which ‘carries in it the ideas of humaneness, social justice and fairness’”** (Emphasis supplied). Sticking to the ‘letter of the law’ may no longer be enough when dealing with your neighbours!

Which leads us to another important thought – take legal advice immediately you realise your property is in danger. You may well be advised to urgently apply for an interdict to stop the excavations or other building work from continuing.

- **Did the excavations breach that duty?** The Court was faced with competing evidence from two geo-technical experts who were agreed that there was a slope failure which caused ground movement on the affected properties, but differed on the cause and mechanism of the slope failure. In the end the Court held that “the exact mechanism which caused the removal of lateral support is unimportant” and that the claimant “succeeded in establishing that the slope mobilisation had resulted from a breach of the duty to provide lateral support due to the excavation on the first appellant’s property”.

- **Did the excavations cause the loss?** On an analysis of the evidence the Court determined that the claimant had established both factual causation (“whether the relevant conduct caused or materially contributed to the harm giving rise to the claim”) and legal causation (“whether the conduct is linked to the harm sufficiently closely or directly for legal liability to ensue, or stated differently, whether the harm is too remote from the conduct.”).

- **Is negligence necessary?** Normally to establish a damages claim you must prove that the person who caused your loss acted both wrongfully and negligently (or deliberately). Not so, said the Court, “the right of support is a natural right of ownership” and in subsidence cases “it is unnecessary to prove an unlawful act or negligence; the cause of action is simply damage following upon deprivation of lateral support.”

That last finding of course means that landowners are “strictly liable” – something to bear in mind before you buy or develop any property where subsidence could possibly be an issue.

Websites of the Month: Why and How to Encourage Whistleblowing in Your Workplace

Our law (in the form of the Protected Disclosures Act) encourages employees to disclose unlawful or irregular conduct in their workplaces without fear of reprisal.

Why encourage it?

"3 Reasons Why Whistleblowing is Important for Public and Private Companies" on the Compliance Line website **here** suggests that employers should actively encourage their employees to "whistleblow" because –

1. "The majority of fraud is captured through Whistleblowing". It should be one of your frontline protections against financial loss from criminal activity.

2. "Whistleblowers are often close to the action and have the most important information".

3. "Whistleblowing helps align people so the organization can pursue its vision and mission". You are in essence protecting your business from two serious risks - reputational damage and the negative consequences of corporate non-compliance.

Lockdown has subjected businesses and their employees to unusually high levels of stress – financially and generally. That is bound to expose companies to new and greater risks of unlawful conduct and loss, and with that comes an increased need to protect yourself and your business from those risks.

And how to encourage it?

"How to make whistleblowing work" on the Good Corporation's **website** brings together multiple suggestions on how to create a successful whistleblowing system, whilst a whistleblowing platform like **Code Red** ("designed in accordance with the King IV code on corporate governance which encourages ethical business leadership and organizational culture") or **Whistle Blowers** makes it easy to encourage effective and anonymous online reporting.
