



## New groundbreaking ruling from the Israeli Supreme Court concerning an insurer's obligation to pay the compensation to the insured even though it does not have the relevant policy, nor its terms and conditions

(CA 7436/12 Clal Insurance Company Ltd., et al. vs. B.Y.M Contracting Company Ltd., et al, dated July 6, 2017)

### Summary

The Court was asked to rule that an insurance company was obligated to pay compensation for third party damages, even when no policy confirming insurance coverage or its terms, including limits, could be found. The Court filled these gaps using extra-contractual evidence presented before it and in reliance on the accepted rules of interpretation for insurance contracts. The Court decided that the insurer should pay compensation for an amount reflecting what the Courts considered would have been the intention of the parties<sup>1</sup>.

### The Facts

**B.Y.M Contracting Company Ltd.**, an Israeli construction company (the “**Respondent**”) won a tender for the construction of residential units. For purposes of construction, the Respondent started digging without a permit near buildings constructed by a different construction company (the “**Second Contractor**”). That winter was particularly rainy, and at a certain point, cracks were found to be developing in the adjacent road and buildings, which were built by the Second Contractor.

The project's land consultant was summoned to the site where he recommended immediate works to fill the Respondent's digging site and create a drainage system for the large volume of rainwater that had collected in the area. After these works were carried out, the cracks in the ground expanded considerably, new cracks started appearing in additional buildings, and later on, a number of the buildings even collapsed.

Almost seven years after the damage was done, the Clal insurance company which compensated the other company for its damages, filed a subrogation claim against those parties which, in its view, were liable for the vast damage caused by the construction project. This claim was filed against, *inter alia*, the

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<sup>1</sup> The facts of the particular case are complex and involve numerous legal issues, so we have simplified its description in this memorandum.



Respondent, which in turn sent a third party notice to Clal alleging that the damages being claimed were covered by an insurance policy maintained by the Respondent through a second insurance company called “Zur Shamir.” Note also that this insurance portfolio had actually been acquired by Clal after the occurrence of this insurance event.

The Respondent only succeeded in locating the relevant insurance policy number, but not the policy itself. Clal was likewise unable to find the policy file, despite being presented with a policy number, and initially denied the existence of any insurance coverage. It subsequently changed its position on the matter when it discovered partial documentation of such coverage on its computer system, which indicated the existence of a “Contractors Insurance” policy for the relevant insurance period, with a limit of NIS 6,150,000, and next to this amount the words “Property Chapter” and a “NIS 5,425 premium” were written.

Accordingly, Clal confirmed the existence of an insurance policy for “construction works” for the relevant period, but claimed that the policy issued to the Respondent at the time only included a Property Chapter without coverage for the liability of third party damages, and, therefore, the third party notice it was served should be denied. Moreover, Clal claimed that its conclusions were further substantiated by the low premium that was paid, which supported the fact that the policy included nothing more than property insurance.

### The District Court Ruling

The Court rejected Clal’s claims and ruled that the policy included third party coverage as well, relying on the following evidence as presented before it:

- Testimony from the Respondent’s insurance agent, who confirmed that the Respondent maintained a policy with third party liability during the years preceding the events as well as during the period of the events itself.
- A letter from the Respondent to the insurer (Zur Shamir) when the events occurred informing it of the damages suffered by, *inter alia*, the Second Contractor.
- The absence of a response letter from the insurer (Zur Shamir) denying third party coverage.
- A letter from an assessor, appointed by the insurer to examine the events for itself, in which the damages suffered by this other company were confirmed and, in the assessor’s opinion, the Respondent should be relieved from any fault.
- The contract under which the Respondent purchased building rights for the land demanded that a number of insurance policies be maintained, including a policy covering third party damages.
- Conclusions cannot be drawn from the price of the premium with respect to the content of the policy maintained, since the comparisons made by Clal with its other insurance policies during



that period have no bearing on the policy offered by Zur Shamir, under which the Respondent maintained its own policy.

In accordance with these rulings, the District Court ruled that Clal (as the successor of the insurance company, Zur Shamir) shall indemnify the Respondent for the damages suffered by the Second Contractor.

## The Supreme Court Ruling

In 2012, Clal appealed the decision of the District Court to the Supreme Court of the State of Israel.

In the context of Clal's appeal, the Supreme Court deliberated, *inter alia*, on the District Court's ruling concerning the existence of third party coverage despite the absence of an actual policy. The Supreme Court affirmed the District Court's findings and reasoning, but accepted Clal's claim that the District Court failed to consider the limitations of liability covered by the insurance policy, resulting in Clal's obligation to pay the entire amount of compensation ruled by the District Court in this case. In view of this "*lacuna*" in the District Court's judgment, the Supreme Court ruled that in the absence of a specific insurance contract, the intention of the parties must be interpreted considering the totality of the circumstances. In this case, the Court ruled that the limitation of liability for third party coverage should be NIS 480,000, taking into account the following circumstances:

- The existence of "Construction Works" policies that were issued to the Respondent during that period, which included third party coverage limited to NIS 480,000.
- Standard requirements of the Ministry of Construction and Housing for carrying out construction works, which include maintaining an insurance policy with a third party chapter which includes limited liability of NIS 450,000 - 500,000.

Insurance premium amount – the issue of whether the purpose of an insurance contract can be surmised from the cost of the insurance policy has yet to be settled. In the U.S., an insurer bears the burden of proof to demonstrate that lower premiums prove more limited coverage, and in order to shift the burden of proof, the insurer must present empirical evidence supporting such a claim. In the present case, the relatively low premium paid for third party coverage serves as an additional indication for determining the insured party's reasonable expectations concerning the scope of that coverage.

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