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"ON-HIRES" IN THE PLANT HIRE INDUSTRY – THE FIRST CASE

Insurers of mobile cranes, plant and earthmoving equipment, as well as brokers and adjusters in that field will be aware that the letting ("hiring out") of such equipment is invariably governed by the standard terms of hire approved by the Contractor's Plant Hire Association ("CPHA"). The CPHA is a professional body which represents approximately 90% of the plant hire industry in South Africa. Indeed some Plant All Risks Policies provide that cover is conditional upon a signed agreement of hire on terms "no less onerous" than the CPHA terms. Certain PAR policies give cover for hired-in cranes; others do not.

The essence of the CPHA terms is that although the equipment is let to the hirer along with a competent and qualified operator, the hirer is obliged to control and supervise the operator so that the operator effectively becomes the employee of the hirer during the period of hire. It follows that negligence by the operator which directly results in damage to the equipment, or to surrounding property, is regarded as negligence on the part of the hirer. The risk of loss or damage to the equipment passes to the hirer once the equipment arrives on site. There are several decided cases from 1986 onwards, including Supreme Court of Appeal authority, which have reaffirmed this.

During the past twenty years or so, a practice has grown in the plant hire industry which is best described as "on-hiring". Typically, this happens where a crane hire company does not have sufficient cranes available in its fleet at a given point of time which means that it cannot meet the requirements of its own customer on a particular project. Anxious not to lose the business, that crane hire company which we will refer to as the "middleman" must then source cranes from one of its competitors in the industry in order to meet the end user's immediate requirements.

The "middleman" agrees rates, period of hire and the like with the crane owner and in terms of the practice which has grown up in the industry, the crane owner will insist that the "middleman" signs its standard CPHA terms of hire. Normally, the additional cranage is delivered direct to the end user at site. At no stage is there any contractual relationship between the crane owner and the end user. The typical scenario may become complicated where the middleman has its own annual Plant All Risks Cover with or without a "hired-in" liability section.

Until now there has been no reported case in the Law Reports on the issue of liability for damage to the crane hired by the middleman in a situation of "on-hire". That was until the case of *Sarens (Pty) Ltd vs Cleveland Crane Hire (Pty) Ltd* decided in the South Gauteng Division of the High Court during March 2015.

The facts of the *Sarens* case were similar to the typical scenario outlined above. The owner of the crane, Sarens, relied on a job contract which had been signed by the middleman. The job contract stipulated that the transaction would be subject to Sarens' general terms and conditions (which were identical to the CPHA terms) and that these terms were available on request.

The middleman conceded that in previous hires between it and Sarens, Sarens' CPHA terms of contract were applicable. Sarens and the middleman knew that the latter's representatives would not be on site – let alone that they would not be controlling or supervising the operator. Whilst on site, the crane sustained damage due to the negligent actions of Sarens' operator (which in the instance of a "direct" hire, would mean that the hirer would be held liable for the damages in line with the decided cases).

Sarens sued the middleman for cost of repairs to its large (200 ton) crane, as well as for loss of income suffered while the crane was inoperable; relying on the provisions of its CPHA approved terms of contract.

The middleman argued that, even assuming that Sarens' CPHA terms were applicable, those terms could not possibly govern the transaction inasmuch as both parties knew that the middleman was in fact a conduit between Sarens and the end user and would neither be in control of nor would be able to supervise Sarens' operator.

Furthermore, the CPHA terms provide that the hirer may not sublet the crane or part with possession thereof. The middleman argued that these terms cannot be applicable in an on-hire situation, because the intention of the parties is precisely the opposite – i.e. that the crane *will* be sublet to the end user and that the middleman *will not* retain possession of the crane. The terms only make sense in the case of a direct hire contract between owner and end user.

The Court found in the Sarens case that *"the total evidence show[ed] that the parties did not apply their minds [to] the terms and conditions at all"*. Furthermore, the Court held that it could neither "create" a contract for the parties nor dictate the terms thereof. Accordingly, the Court upheld the middleman's defence and dismissed Sarens' claim.

Although the *Sarens* case arose out of the hire of a mobile crane, the decision will apply to cases where earthmoving plant and equipment, with operator, is let to a middleman for the purposes of on-hire to a third party.

In summary, although each case involving the on-hire phenomenon will be decided on its own facts, insurers and brokers who underwrite and place PAR cover should be mindful of the *Sarens* decision and its implications. At the very least, a contract of hire incorporating the CPHA terms should no longer be seen as a guarantee of a successful subrogated recovery action against the hirer of the plant or equipment.

Written by Pierre Ferreira, director (Insurance) and Morgan Riley, associate (Insurance)