

Insurance Brokers – a review of recent developments

Professional Indemnity Insurance Conference

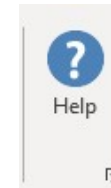
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The duty to avoid unnecessary risk of litigation

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Failure to include available clause putting matter beyond doubt

FNCB v Barnet Devanney (Harrow) Ltd [1999] Lloyds Rep. IR 459

- Brokers arranged insurance in names of owner and the mortgagee Bank for Tortworth Hall
- Policy did not contain a mortgagee protection clause
- Following a fire, insurers purported to repudiate the policy on grounds of breach of warranty and non-disclosure, despite accepting the Bank was not responsible for those matters
- Bank settled with insurers for a fraction of the value of the indemnity
- New Hampshire Insurance Co v MGN Ltd [1997] LRLLR 24 – established that insurers should not have been able to avoid against Bank, even in the absence of a mortgagee protection clause
- Broker liable for difference between settlement and full indemnity:

“It is not the function of a broker to take a view on undetermined points of law. The protection to be afforded to the client should, if reasonably possible, be such that the client does not become involved in legal disputes at all. As in the case of a solicitor, the insurance broker should protect his client from unnecessary risks including the risk of litigation.”

The duty to avoid unnecessary risk of litigation

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Ambiguous wording

Standard Life Assurance Ltd v Oak Dedicated Ltd [2008] EWHC 222 (Comm)

- 97,000 professional negligence claims against Standard Life in relation to misselling mortgage endowment policies
- Brokers arranged a PI Policy for Standard Life with a £75m limit and an excess of £25m
- In Policy schedule the excess was described as £25m “*each and every claim and/or claimant*”
- Insurers argued (successfully) that the effect was that the £25m excess applied per claimant
- Held: brokers in breach of duty:

“it is the duty of the broker to obtain, insofar as possible, insurance coverage which clearly meets his client’s requirements. Coverage is only clear insofar as it leaves no room for significant debate. The coverage will be unclear, and the broker in breach of duty, if the form thereof exposes the client insured to an unnecessary risk of litigation.”

- Judge commented that would have held brokers in breach even if the Insured had succeeded on the interpretation argument.

The duty to avoid unnecessary risk of litigation

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A “Duty to Nanny”?

ABN Amro v RSA [2021] EWHC 442 (Comm)

- Bank entered “repo” transactions with cocoa producers: Bank provided working capital by purchasing products; clients required to repurchase at agreed price
- Bank’s 2016/17 all risks marine policy provided cover for physical loss and damage to cargo
- Bank instructed its broker, Edge, to include an unusual “Transaction Premium Clause”, which covered losses suffered upon Default, meaning “*a failure, refusal or non-exercise of an option, on the part of the insured’s client (for whatever reason) to purchase (or repurchase) the Subject Matter Insured from the Insured at the Pre-agreed Price*”
- Clause had been drafted by Bank’s lawyers
- Losses of £35m suffered following failure to repurchase by Bank’s clients
- Dispute between Bank and insurers as to meaning of TPC clause – Bank won: Court held clause was clear
- Despite having won against insurers, Court held that Edge were in breach of duty to the Bank for having failed (a) to advise the Bank about the appropriate market (credit insurance) in which to place this kind of cover, and (b) to ensure that the (cargo) insurers understood the cover (credit insurance) that they were agreeing to provide
- Loss? “Duty to Nanny”?

The duty to ensure that insured makes an informed decision

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Infinity Reliance Limited v Heath Crawford Limited [2023] EWHC 3022 (Comm)

- Insured online seller of customised baby toys. Thrived during Covid-19 lockdowns
- Broker arranged commercial combined insurance, including Business Interruption (BI)
- Broker provided the Insured with information about BI on alternative bases, namely (a) declaration linked and (b) sum insured. Insured instructed the broker to obtain BI insurance on 'sum insured' basis.
- Fire in May 2021 damaged the warehouse storing Insured's products, causing significant BI.
- Insurers identified that the BI was underinsured – applied average, paying out only £9.25m in respect of BI losses of £12.17m
- Broker liable for failing properly to explain the concepts of average and declaration linked cover.
- *"It is not for a broker to force upon its client a type of cover that the client does not want, even if it disagrees with that preference, and even if it is a foolish preference...A broker must respect a client's informed decision, even if it is a bad one. But it must make sure that it is an informed decision...."*

Loss of a chance to obtain cover

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Norman Hay plc v Marsh Limited [2024] EWHC 1039 (Comm)

- Norman Hay plc a holding company for an international chemicals business
- Claim arose out of a fatal car accident involving employee of a subsidiary of Norman Hay plc. The underlying claimant sued Norman Hay plc on basis of vicarious liability; claim settled for USD 5.5m
- Norman Hay brought negligence claim against broker, alleging negligence in failing to obtain a policy that would cover the loss
- Broker applied to strike out on basis that (a) Norman Hay was not liable to the underlying claimant; (b) Norman Hay would not be able to prove the settlement was reasonable.
- Court dismissed application: it was not necessary for Norman Hay to show that it was liable to the underlying claimant, and that the insurer would have paid out – merely, to show that it had lost a substantial chance of making recovery from the putative insurer.

Concluding comments

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- Duty on brokers to understand:
 - the details of the insured client's businesses and business needs;
 - the intricacies of cover; not only clauses, but also the appropriate markets
- A “duty to nanny” – including duty (to the client) to ensure that the *insurers* understand the risks they are underwriting, as well as ensuring that the client understands the cover it is obtaining
- In relation to complex products (e.g. W&I, Tax Liability, Credit Insurance, Aviation), expectations of brokers and of solicitors converging.