MILLS & REEVE
Achieve more. Together.

What's past is prologue…Insurance Brokers E&O

James Thompson
Principal Associate, Mills & Reeve

6 July 2022

Introductions

- Aims for today….Back to the Future…

  - The high water mark for brokers E&O in 2011 with the decision in **Jones v Environcom**
  - The robust approach taken to causation defences in **Channon v Ward**
  - The need for expert evidence in **Avondale;** and
  - Loss of a chance or straight but for – in cases such as **Dalamd**

- The impact of Insurance Act 2015 and issues of risk
- The view from the continent…..

MILLS & REEVE
Achieve more. Together.

The high water mark

Jones v Envirocom in 2011

Alleged brokers negligence in failing to warn a client (Environcom) about the duty to disclose material facts.

- Written warning in the standard documents - Court found that the Broker was in breach of its duty and said:

"In any event, I am not persuaded that it is sufficient to simply rely on upon written standard form explanations and warnings annexed to proposals or policy documents. The broker must satisfy himself that the position is in fact understood by his client, ***and this will usually require a specific oral or written exchange on the topic, both at the time of the original placement and at renewal****"*

- However on causation:

"*what would have happened had the broker done its job properly and passed on the relevant information about the risk (here the use of plasma cutters) then there was no realistic chance of obtaining cover from this or any other Insurer"*.

MILLS & REEVE
Achieve more. Together.

2014 – Eurokey v Giles

Eurokey Recycling Ltd v Giles Insurance Brokers Ltd [2014] EWHC 2989 (Comm) – Queen's Bench Division (Commercial Court)

The Court found the insurance broker **wasn't liable in contract/negligence**. It had had adequately explained what business interruption cover was and had had no reason to believe that the figures provided by the Client were inadequate when advising on levels of cover.

- **Brokers aren't expected** to calculate business interruption sum insured / choose an indemnity period, but they have to provide sufficient explanation for a client to do so – e.g., the method of calculating the sum insured.
- The **Broker needs to take reasonable steps** to ascertain the nature of the client's business and insurance needs, **but doesn't need to conduct a detailed investigation into the client's business**.
- It is assumed that small/medium sized enterprises would **understand the nature of insurance**.
- **Brokers aren't expected to verify the information given to them by a Client** who appears to be well-informed about their business, unless they have reason to believe that it's not accurate.

2017 – Channon v Ward

Channon v Ward [2017] EWCA Civ 13 – Court of Appeal

- The broker was alleged to have been negligent by failing to arrange professional indemnity cover for a Chartered Accountant who was also a director of a property development company. The Broker had been arranging the Claimant's PI for a number of years.
- Broker negligently failed to arrange PI insurance cover.
- As a matter of causation the Court found that the insurers would have resisted the claim so the claim against the broker also failed.

2018 – Avondale v AJG

Avondale Exhibitions Limited v Arthur J Gallagher Insurance Brokers Limited [2018] EWHC 1311 (QB) – Queen's Bench Division (Commercial Court) is another case that is worthy of taking a look at.

Professional negligence claim brought against an insurance broker relating to non-disclosure of the company director's criminal convictions (a common occurrence). Held:

- Broker had an obligation to "exercise the reasonable skill and care of an ordinarily competent member of the profession" **but it is for the court to decide what amounted to reasonable competence**.
- **Claimant failed to adduce expert evidence** but is expert evidence actually required in brokers claims?

2018 – Pakeezah Meat Supplies v Total Insurance Solutions

Pakeezah Meat Supplies Ltd v Total Insurance Solutions Ltd [2018] EWHC 1141 (Comm) – Queen's Bench Division (Commercial Court)

There was a fire on the premises of the claimant supermarket, and the court needed to assess damages in the resulting insurance action. Held :

- If the Broker had performed its duty, the claimant would have accurately disclosed all relevant matters to the insurer
- The Broker was liable to pay damages in the amount which the Claimant would have recovered under the 'correct' insurance policy had it obtained the right level of cover to begin with
- **There was a low possibility that the insurer wouldn't have insured the Claimant if the information had been disclosed, so a 25% reduction in damages was applied.**

MILLS & REEVE
Achieve more. Together.

2019 – Dalamd v Butterworth Spengler

Dalamd Ltd v Butterworth Spengler Commercial Limited [2019] PNLR 6 – Queen's Bench Division (Commercial Court)

- The Claimant had to show as an issue of fact that a claim on its policy would have failed as a result of the broker's negligence. It is not enough to show that the negligence had impaired the insured's claim under its policy.
- Questions relating to the policy coverage should be determined against the Broker on the same basis, **in cases where the insurers are not a party**.
- Policyholders must prove a right to indemnity under the policy on a balance of probabilities, whether or not that claim is also brought against its insurer.
- However in certain cases the position might be different and an assessment of causation on a loss of chance basis might be appropriate.

Insurance Act 2015

Insurance Act 2015

- Biggest / most influential factor in decrease in claims against Brokers.
- Insurer now hesitates before declining. Few cases of proportionate remedies.

Berkshire Assets (West London) v AXA [2021] EWHC 2689 (Comm) – Queen's Bench Division (Commercial Court) - Held:

- ❖ Court should rely on the statutory definition of a material circumstance under s7(3) and (4) Insurance Act 2015 when considering the facts of a case.
- ❖ AXA wasn't under an obligation to conduct a detailed investigation into the nature of the charges.
- ❖ Materiality needs to be tested as at the date of placement - Facts raising doubt about the risk are sufficient to be material.
- ❖ As an issue of fact (in this case) the Court was persuaded AXA would have declined the risk if the charges had been disclosed.
- ❖ The failure to disclose was in this instance a breach of the duty to make a fair presentation of the risk.

Conclusions on the developing case law and risk management.

- Has the tide turned?
- Breach an issue but causation more in focus.
- Basic risk management:
  - Needs and Demands;
  - Open questions;
  - Know the wording – provide advice that gives advice.

- Policyholders need to prove their case and the non-negligent reason.
- The impact of the Insurance Act on claims against Brokers equally should therefore not be underestimated.

MILLS & REEVE
Achieve more. Together.

FCA Test Case

The FCA test case

- 370,000 policyholders could now possibly receive a pay out under their policies. The hearing covered 21 policy wordings but in short boiled down to:
- Disease wordings: Loss causes by occurrence of a notifiable disease at or within a specified distance from the Policyholders' premises. Finding: An "Occurrence" (only) within the specified area was an Insured peril.
- Prevention of Access: Those cases were a policyholder has been unable to use its premises as a result of the impact of covid. The Court found there was no requirement for an actual legislative step requiring closure, and equally losing access to part of the premises may suffice.

MILLS & REEVE
Achieve more. Together.

Liability for covid claims…

- Breach: was Covid cover real a “need and demand”?
- Causation: Could the cover be obtained? Would the Policyholder have paid premium ?
- The rise of the claims factory?

MILLS & REEVE
Achieve more. Together.

A view from the Continent

- Where does the burden lie?
- Time limits?
- Direct actions?

MILLS & REEVE
Achieve more. Together.

Questions

1. What do you think about the lack of need for expert evidence ? What really are experts commenting on in Brokers E&O case ? The law of contract ? Agency ? Just because it has always been done that way doesnt make it right!
2. Is it right that the Broker has access to the causation defences that it does ? Is it letting them off the hook? Is causation often forgotten?
3. Are you seeing proportionate remedies on the rise?
4. Should the burden of proof be reversed in the UK?
5. Training – what do you do? Consider CII ? Consider on-line resources.
6. Is there a need to be qualified? What does a Broker have to do to be a good risk?

MILLS & REEVE
Achieve more. Together.

Thank you

If you have any questions or would like to speak to one of our team, we'd love to hear from you.

Call or email:
James Thompson
T: +44(0)121 456 8211
E: James.thompson@mills-reeve.com