COVID-19 AND BUSINESS INTERRUPTION INSURANCE
Insurance Broker Claims – Causation & Loss

In this fourth note in the series on Business Interruption (BI) policies, we consider further issues which may arise in brokers' claims relating to BI cover, arising out of the Covid-19 pandemic.

Our previous article (which can be found on our website) answered the primary questions:

- "What duties do brokers owe to clients when advising on and placing BI cover?"
- "When is a broker in breach of those duties?"

This note considers causation and loss in answering the following questions:

- "Did the broker cause any loss to the client by its breach of duty?"
- "What loss is attributable to the broker?"

A. Did the broker cause any loss to the client by its breach of duty?

It is important to note that insurance brokers are not in the position of a fall-back insurer, guaranteeing payment of claims if it turns out there is no insurance in place. We consider various questions and scenarios.

(1) Was alternative insurance available at all (or at a premium the insured would have been willing to pay)?

The first scenario is where BI cover has not been obtained at all, because the broker failed to properly advise the client to do so. In those circumstances, the broker would have to convince the court trying the professional negligence action that, had proper disclosure been made, no insurer would have written the risk at all or else the premium would have been unacceptable. The courts have shown a generous attitude to claimants in the past.[1] This defence is unlikely to be attractive where a broker has simply failed to advise a business to obtain BI cover.[2]

The second scenario is where a broker has obtained BI cover on what it says were acceptable terms but the claimant business now contends that the broker should have advised were unacceptable (because, for example, SARS and related diseases were not covered sufficiently broadly to capture the current Covid-19 outbreak). This defence is not usually run because it is so unusual to have a circumstance where no insurance may have existed, but it may be highly relevant to Covid-19-related claims. Evidence of what insurance was actually available at the time may be persuasive. If the claimant business is unable to show that alternative insurance existed, the court could decide that the better BI insurance was not actually available on the preferable terms asserted by the business and that, even if there had been no negligence, the business would have chosen to run the risk uninsured.

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[1] Simpson 10.257; *Eagle Star v Natwest Finance Australia* [1985] UKPC 2
[2] Simpson 10.255; *Charles v Altin* (1854) 139 ER 335

It is also worth noting that here lies another defence for brokers who are challenged on the placement or renewal of other kinds of insurance (such as event cancellation insurance which does not cover the current outbreak), because it may be that the preferable cover would have been reflected in a higher premium which the client would have been unwilling to pay at the time. [3]

(2) Would the insurance which would have been procured have responded to the particular claim in any event?

As things stand, it seems that brokers are more likely to succeed in running a defence that insurers would have exercised their right to repudiate liability under the policy (based upon breach of a relevant condition) such that in fact the claimant has suffered no loss.

Even where no BI insurance was obtained at all, the court has to assess the chances that, if insurance *had* been obtained, the insurers would have relied upon the protection of an exclusion clause.[4] In *Fraser v B. N. Furman (Productions) Ltd. v Miller Smith & Partners,* [5] the Court of Appeal held that what damage the business had suffered did not depend solely on whether, as a matter of law, the insurance company would have been entitled to repudiate liability under the policy, but depended also upon whether, as a matter of business, they would, on the balance of probabilities, have done so.

In *Dalamd Ltd v Butterworth Spengler Commercial Ltd*[6] the court considered the causation analysis where a broker alleged that the claim would have failed anyway due to an alternative defence by the insurer. In *Dalamd*, the broker was found to have advised one client adequately on BI cover but to have failed to advise a second client on the desirability of cover for lost rental income. The clients also asserted that there had been a failure to properly advise on what should be disclosed to insurers before inception of the policy.

The brokers ran a causation defence that the policy would not have responded in any event by reason of some other point for which the brokers were not responsible (in the case, breach by the claimant of an external storage condition regarding where certain items could be stored on the site).

In response, the claimant said that, in order to prove causation, it was enough to show that their chances of recovery against the insurer had been impaired, i.e that there was a reasonably arguable ground to defend liability. It was said that this was enough because it was part of the broker's duty to protect its client from unnecessary risks, including the unnecessary risk of litigation.

The claimant's argument was rejected by Butcher J, who held that the correct causation analysis had two stages:

a) First, decide whether the defence that the policy was voidable (for another reason not attributable to the brokers) was a good one, whether (i) on the law or (ii) on the facts on the balance of probabilities.

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[3] *Dalamd Ltd v Butterworth Spengler Commercial Ltd* [2019] P.N.L.R. 6. Although the brokers had been in breach of duty by failing to advise on the availability of rental income insurance, the claim failed because the client would never have been willing to pay for such insurance, even if advised that it was available.

[4] Simpson 10.262.

[5] [1967] 1 W.L.R. 898

[6] [2019] P.N.L.R. 6

b) Second, decide what the insurer might have done as a matter of business – for example that it might not have taken the point or might have compromised it – to be determined on the basis of loss of a chance.

It is likely that a court will follow the approach set out in *Dalamd* when determining questions of causation such as where there is, or would have been, an alternative defence available to insurers to avoid a BI policy.

(3) Has the claimant broken the chain of causation in some other way?

It is also worth remembering that the claimant might have broken the chain of causation in some other way, for which the broker is not responsible.

B. What loss is attributable to the broker?

In *Arbory Group Ltd v West Craven Insurance Service,*[7] the insured group brought a claim against their broker following a fire which left them underinsured for BI cover and caused the liquidation of the subsidiaries. The court followed *SAAMCO* when considering the measure of the loss for which the brokers were responsible. The court found that the defendant brokers were liable for failure to advise the insured to obtain adequate BI cover which resulted in underinsurance of loss of profits. The court held (at para 44) that:

a) First, the claimant had to show that the duty was owed to it and that it was a duty in respect of the kind of loss which it had suffered. In *Arbory*, the answer had to lie in determining the kind of loss that could reasonably have been foreseen in the event that insufficient BI cover was effected as a result of the negligence of the broker.

b) Secondly, it was necessary to determine the cause of the loss of profitability of the company and whether it could be attributed to the breach of duty identified.

The court made some key findings in relation to BI insurance on the evidence, which may indicate a court's likely approach to future cases involving similar claims:

- BI cover is essential for businesses as it covers all costs not met from sales during the period of recovery from an incident which causes a stoppage of production or cessation of normal business.
- Unlike other insurance, BI cover is designed to inject additional funds into a going concern in order to maintain it as a profitable going concern.
- The object of BI cover is to return the insured to a fully operational state as quickly as possible and over-insurance is encouraged by insurers.
- The broker's duty in *Arbory* was to ensure that sufficient BI cover was in place to enable the company to recover and to resume its pre-incident level of profitability at the earliest date. It was significant that BI insurance was taken out in addition to insurance for the normal consequences of fire, such as damage to property and equipment.
- It was reasonably foreseeable that failure to effect sufficient cover was liable adversely to

[7] [2007] P.N.L.R. 23

affect the profitability of the business so insured.

- Had the business been adequately insured for BI, the client Group companies would have received funds which they would have used to enable the speedy resumption of production and trading; that because there was a significant shortfall the subsidiaries were forced into liquidation, and, significantly, the pre-fire level of business could not be maintained.
- The broker was or should have been aware that the client was running a business which by its nature and stage of development required BI cover to sustain it through any temporary disruption.

As a result, the court found that the claimant was *not* restricted to the extra insurance payment that would have been made if adequate BI cover had been in place, and consequential profit losses could also be recovered.

- This was not a case of seeking damages for the late payment of damages. The insurer had in fact paid promptly under the BI policy. Had there been no underinsurance, a full payment would have been made at around the same time as payment was in fact received. However, the court did not restrict the claim against the broker to the amount which would have been the liability of the insurer to pay had payment been made at that date and also awarded consequential profit losses that would have been earned had adequate BI cover been in place.
- The question for assessment of damages was the likely profits. How would the client Group have performed, had it been helped over the aftermath of the fire as it should have been (if adequate BI cover had been in place)?

C. Contributory negligence

In *Arbory* the court also considered whether the client had caused its own loss or was contributorily negligent by failing to notice that the sum for which the company should be insured for BI was inadequate, based upon the form and the notes provided for renewal. The key was that the client did not understand the concept of insured gross profit because this was not explained to it properly (and so the broker was liable for breach of duty). The court was unimpressed with the broker's contributory negligence argument. It held that there was great difficulty with the broker suggesting that the underinsurance was the client's responsibility, because the client had engaged the broker to provide them with the specialist understanding of insured gross profit, which it could only have obtained through professional advice.

In cases of underinsurance, where a broker has failed to properly advise their client, it therefore seems unlikely that the broker will succeed in establishing that the client caused or materially contributed to their own loss.

It is not yet clear how claimants will frame their cases against brokers arising out of Covid-19. If the broker had a duty to advise the client regarding the limitations of their cover in relation to an outbreak of a notifiable disease or a pandemic, it seems unlikely that a client which has engaged the professional advice of brokers would be held responsible for their failure to understand and spot the same restriction. The level of sophistication of the client and the extent of the broker's duty are likely to be highly relevant to questions of causation and contributory negligence in Covid-19 related claims.

CONCLUSION AND FINAL THOUGHTS

While the extent of brokers' negligence claims arising out of Covid-19 is still unclear, there are numerous notifications being made on BI policies where cover is highly likely to be disputed. Brokers are steadily making notifications on their own professional indemnity (PI) policies regarding circumstances which could give rise to claims. There are potential defences available on causation and loss which will be fact-specific. In particular, brokers might have success in establishing that there was no alternative insurance available which would have covered the consequences of Covid-19, or that clients would not have paid the additional premium for better cover. But, in cases where such arguments fail, the case law highlights that the objective of BI cover is likely to be to return the insured to a fully operational state as quickly as possible, which might mean that brokers are held liable for a significant proportion of the loss where a company is underinsured.

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