COVID-19 AND BUSINESS INTERRUPTION INSURANCE
Insurance Broker Claims

The insurance world is currently on high alert due to the circumstances around Covid-19 leading to widespread notifications on Business Interruption (BI) policies.

This note considers issues relating to breach of duty by insurance brokers which arise out of business interruption policies. A further note will consider causation and loss in insurance broker claims.

This is the third instalment in the series by Hailsham Chambers on business interruption policies (the first two, on breach, causation and loss as between insurers and insured, can be found on our website).

On 1 May 2020, the FCA announced that it will seek declarations from the court regarding whether BI policies respond to Covid-19 related claims, but maintained its belief that "in the majority of cases, business interruption insurance was not purchased to, and is unlikely to, cover the current emergency". What are the options for a business which does not have a BI policy at all, or has a BI policy that does not respond to the current circumstances at all, or has inadequate BI cover? Businesses may consider whether to bring a claim against their insurance broker.

In relation to business interruption cover, claims against brokers are only likely to get off the ground if both (a) they negligently failed to advise either obtaining BI cover at all, or obtaining the right kind of cover, and (b) it turns out that, had insureds had such policies, the policies would have paid out. Until it is known in which circumstances BI policies will pay out, most claims against brokers are likely to be premature.

In the long term, insurance brokers are required to have Professional Indemnity (PI) cover in compliance with the FCA's rules and so may be attractive targets for recovery where businesses are in a difficult financial situation or insurers decline cover. Brokers' Errors & Omissions (E&O) policies may be broad enough to cover errors made by consultants or other freelances as well as employees. While the courts have emphasised that insurance brokers are not default insurers where there is a gap in cover, there may be a swathe of claims made against brokers relating to BI policies.

Below, we consider the areas where brokers may find themselves vulnerable on breach of duty and consider how brokers may wish to protect themselves against future claims.

BREACH OF DUTY

Does the broker have a duty to give advice about business interruption insurance?

The general duties of an insurance broker advising commercial clients may include recommending that many businesses consider taking out BI insurance as part of their composite commercial insurance or as a stand-alone product, although all cases will be fact-specific. While there is a distinction between insureds who know what they want and insureds who rely on the broker to tell them what they ought to have, it is important to ascertain where the balance of expertise lies between broker and client regarding the client's insurance needs.[1] The duty may also apply where a client

[1] *Fine's Flowers v General Accident Assurance Co of Canada* (1977) 81 DLR 3 139; Simpson, *Professional Negligence and Liability*, at 10.149 (chapter edited by T Adam QC).

appears to have missed an important area of coverage.[2] Where a broker has not raised the option of BI cover with the customer, they may well be found to have breached their duty, depending upon the circumstances of the case. For example, if a business wished to pare down their insurance to obtain as cheap a suite of policies as possible, it might be open to a broker to inform the client that BI insurance was a desirable option rather than an essential, depending upon the particular needs of the client.

What advice should a broker give about BI insurance?

Assuming that BI insurance is relevant, there are specific duties which a broker should comply with when advising on BI insurance and placing the insurance, which may be particularly relevant where BI cover is alleged to be inadequate for the client's needs. In general, a broker should take reasonable steps to ensure that the client understands the basis on which the insurance was written and the consequences of underinsurance, including how the relevant sum is calculated.[3]

In the leading case of *Eurokey Recycling Ltd v Giles Insurance Brokers Ltd* [2015] PNLR 5, the defendant brokers admitted breach of duty but denied causation. Blair J held that the broker was under a duty to, and failed to, properly advise the client about the type and scope of cover which the client needed and, in doing so, to match as precisely as possible the risk exposures which had been identified with the coverage available.[4] Blair J held that the following principles of law applied to the placement of BI cover:

1. Whilst a broker is not expected himself to calculate the business interruption sum insured or choose an indemnity period, both of which are matters for the commercial client, the broker must provide sufficient explanation to enable the client to do so. This will include an explanation of the method of calculating the sum insured, which will likely require an explanation of terms in policies such as 'estimated gross profits', 'maximum indemnity period', and the considerations to take into account when choosing a maximum indemnity period.
2. In order to do this, the broker will need to take reasonable steps to ascertain the nature of the client's business and its insurance needs.[5]
3. There is a duty to take reasonable steps to ensure that the client fully understands the meaning, for insurance purposes, of the term 'Gross Profit'. This is because 'Gross Profit' in a business interruption policy means something different to what it means to the average businessman (*Arbory Group Ltd v West Craven Insurance Services* [2007] Lloyd's Rep. I.R. 491, HHJ Judge Grenfell at [25]).
4. An insurance broker providing [the standard service that the broker was providing in *Eurokey,* which did not include calculating the business interruption sum or choosing an indemnity period] is neither required nor expected to conduct a detailed investigation into a client's business. However, the broker's duty is not diminished because his firm may offer an enhanced service at additional cost. Regardless of the availability of additional services,

[2] *First National Commercial Bank v Barnet Devanney* [1999] Lloyd's Rep IR 459; *Professional Negligence and Liability* at 10.150.
[3] *JW Bollom & Co v Byas Mosley & Co* [1999] Lloyd's Rep PN 598 per Moore-Bick J
[4] *Jackson & Powell on Professional Liability*, 7th ed, §16–045; *Standard Life Assurance Ltd v Oak Dedicated Ltd* [2008] All E.R. (Comm) 916, [102], Tomlinson J; ICOBS at 5.2.2(1), 5.2.2(2) and 5.2.2B and 5.2.2D.
[5] *Youell v Bland Welch & Co. Ltd (Superhulls Cover No. 2) [1990] 2 Lloyd's Rep. 431* at 445, Phillips J; *Dunlop Haywards (DHL) Ltd v Barbon Insurance Group Ltd [2010] Lloyd's Rep. I.R. 149* at [168(1)], Hamblen J; *Saville v Central Capital [2014] C.T.L.C. 97* at [29–30], Floyd LJ; *Professional Negligence and Liability*, at 10.144.

the above duties apply to any broker who takes on business of this kind.

5. The nature and scope of a broker's obligation to assess a commercial client's business interruption insurance needs will depend upon the particular circumstances of the case, including the client's sophistication, and the number of times the broker has met the client in the past.[6]
6. Although business interruption insurance is for commercial clients, the level of client sophistication will vary enormously. It cannot be assumed that an SME will have any understanding of the nature of the insurance.
7. Although as a matter of common sense a client may not need annual repetition of advice previously given and understood, this assumes that the responsible personnel remains the same. It also assumes that the giving of the advice can be properly demonstrated by documentation (or otherwise), and the onus is likely to be on the broker to show this.
8. If a client who appears to be well informed about his business provides a broker with information, the broker is not expected to verify that information unless he has reason to believe that it is not accurate.[7]
9. Having satisfied these obligations, where a broker is given express instructions as to the cover to be obtained, he must exercise reasonable care to adhere to those instructions.[8]

In *Eurokey*, the court held that the brokers had provided a reasonable explanation of BI cover at various renewals. The claimant had provided the figures upon which the cover was based and the brokers had no reason to think they were inadequate. Following *Eurokey*, it is for insurance brokers to demonstrate the advice given, which may be difficult where there are gaps in the evidence available.

Receipt of information after placement of the insurance – is the broker a 'mere postbox'?

In *HIH Casualty & General Insurance Ltd v JLT Risk Solutions Ltd (Formerly Lloyd Thompson Ltd)* [2007][9], the court was concerned with the post-placement obligations on an insurance broker to an insurer and reinsurer. The insurance broker had been at the centre of devising and structuring a high-risk, high-premium insurance product for insurers and reinsurers covering the financing of three "slates" of low-budget Hollywood films, none of which were successful or attained their projected revenues. The facts were very different from *Eurokey.* In *HIH Casualty,* the broker was held to be liable for failing to advise the client post-placement that, because the full quota of films had not been made, they were at risk and not insured for particular losses. There was therefore a continuing duty to monitor the risk post-placement.

In *Eurokey*, Blair J also had to consider whether the broker had breached his duty of care by failing to read information received post-placement. The broker received the draft accounts from the client after placement of the insurance in order to forward the documents to a credit provider. Eurokey alleged that, had the broker read the draft accounts, he would have noticed that the business was

[6] *William Jackson & Sons Ltd v Oughtred & Harrison (Insurance) Ltd* [2002] Lloyd's Rep. I.R. 230 at [29], Morison J; ICOBS 6.1.6B, 6.17.
[7] *Jackson & Powell*, ibid, §16–069, and *Synergy Health (UK) Ltd v CGU Insurance Plc* [2011] Lloyd's Rep. I.R. 500 at [206], Flaux J.
[8] *Colinvaux's Law of Insurance*, 9th ed, 15–034.
[9] [2007] EWCA Civ 710

grossly underinsured on its BI cover. Blair J distinguished *HIH Casualty*[10] by finding that, on the facts in *Eurokey*, the broker was indeed a 'mere postbox'.

The question of whether there was a continuing duty to monitor the risk post-placement therefore appears to turn upon the scope of the duties which the broker accepted prior to placement of the BI cover. There will be a spectrum of services undertaken for clients. Businesses wishing to bring a claim against brokers for failure to advise on post-placement information will need to establish that such a duty was specifically undertaken. Insurance brokers will wish to be very clear about the precise duties which they agree to undertake in order to protect themselves from future claims.

Covid-19 claims: pandemic insurance and advice regarding notifiable diseases

In the context of Covid-19-related claims against insurance brokers, the court may face new arguments on whether particular clients (such as those running large annual events) should have been advised to obtain pandemic insurance or should at least have been advised about the restrictions regarding their insurance under standard BI wording. Brokers may take some comfort from the particularly expensive and specialist nature of pandemic insurance which may arguably mean that it was not relevant to most clients. While the court will consider what a reasonable broker would have done, this will not always be sufficient where the practice is held to be unreasonable in and of itself. While some brokers will have fairly detailed records of the advice given, others may be at a disadvantage in the event that their evidence about what advice they gave is challenged. Brokers may benefit from looking at their existing practices in order to reduce the risk of future claims.

CONCLUSION AND FINAL THOUGHTS

The court has given specific guidance regarding the nature of brokers' duties when advising on BI insurance and placing BI insurance. Insurance brokers will need to consider the sophistication of the client and advise appropriately. In some cases, insurance brokers may also be liable to advise where they have received information post-placement, for example if evidence comes to light suggesting that the BI cover was inadequate. Insurance brokers are busy assisting policyholders in making claims on BI cover presently; they may need to consider their own exposure if and when those claims are declined.

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[10] *HIH Casualty & General Insurance Ltd v JLT Risk Solutions Ltd (Formerly Lloyd Thompson Ltd)* [2007] EWCA Civ 710.