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CAUSATION AND LOSS IN BROKERS' NEGLIGENCE CLAIMS:

DALAMD LIMITED v BUTTERWORTH SPENGLER COMMERCIAL LIMITED [2018] EWHC 2558 (Comm)

This is a tale of the unexpected. In his judgment in this brokers' negligence case Mr Justice Butcher has clarified the law as to the correct approach to apply when dealing with causation and loss. The judgment is an important one for anyone dealing with claims against brokers.

The case arose out of a fire at a waste-recycling facility in 2012 in respect of which two insureds had differing interests. Following the fire insurers declined to indemnify on various bases.

The claimant, an assignee of the insureds, only sued the insureds' brokers. It alleged the brokers had been negligent and that the insureds had been deprived of the benefit of the insurance indemnities, alternatively they were entitled to compensation for the lost chance of recovering such sums.

The judge found that the brokers had been in breach of duty in certain limited respects.

When the court came to consider causation and loss it had to resolve two points of principle which assumed particular prominence because there was scope for argument as to (1) whether the insurers had been entitled to decline an indemnity in the events which had happened; and, (2) whether insurers might in any event have had independent reasons to decline payment even but for the brokers' negligence.

The first point concerned the question of whether the insureds had in fact lost the benefit of the insurance policies. The issue was whether the claimant merely had to show that the negligence had impaired the insureds' claims by giving the insurer reasonably arguable grounds to decline payment, as the claimant contended, or, as the brokers maintained, whether the claimant had to prove that claims on the policies would actually have failed as a result of the brokers' negligence, with the court resolving any point of law and making any necessary findings of fact on the balance of probabilities.

The second point concerned what the position would have been as to an entitlement to any indemnity but for the brokers' negligence. The issue was whether all questions as to the hypothetical stance of insurers and as to what would have happened to any claim, including by way of compromise or at any trial as against insurers, were to be decided on a loss of a chance basis, as the claimant contended, or whether, as the brokers maintained, the court had to decide whether any independent ground for declining an indemnity would have succeeded, resolving any point of law, and making any necessary findings of fact on the balance of probabilities, the only scope for a loss of chance inquiry being as to issues such as what the insurer might have done as a matter of business (ie whether they would have taken the point irrespective of what the strict merits might have been).

The court accepted the brokers' submissions on both issues.

In relation to the first issue the court considered that it was too favourable to an insured for it only to have to prove that his brokers' negligence had impaired his claim against insurers. It was accepted, on authority, that an insured could settle with his insurers and then proceed against his brokers for the balance without having to establish that the insurers' defence had been a good one. However, where there was no settlement with insurers it was necessary, on authority, to decide whether insurers were in fact entitled to decline payment, that being a matter depending upon past facts which had to be determined on the balance of probabilities.

It was also pointed out that where, as was common, claimants sued both their insurers and their brokers, the question of whether the policy was voidable or there was some other basis for declinature would necessarily have to be determined and it would be anomalous as against the brokers if the position was different just because the insurers had not been sued.

In relation to the second issue the court again considered that the brokers' submission was supported by authority and that similar considerations applied and supported the contention that the question of whether there would have been an independent reason to decline an indemnity had to be determined on the balance of probabilities and not as a loss of a chance. The question again depended on matters of past fact and the point would have had to be determined on the balance of probabilities in any claim against insurers such that it would be anomalous if the absence of insurers led to a different approach.

The court *did* accept that the position might be different in both respects if the effect of the brokers' negligence had been to deprive the insured of the opportunity of having his claim under the insurance determined by the court, but otherwise it saw no reason why the brokers should not have to prove their case on the balance of probabilities. The absence of insurers from the action was not a bar: underwriters' evidence would have been admissible and could have been called by either party, if relevant.

If it survives any appeal *Dalamd* will have significant ramifications for any insured grappling with the familiar conundrum of whether to sue insurers or the brokers or both.

Insureds whose insurers have declined an indemnity will need to think very carefully indeed before only suing their brokers, for they will have to prove that the policy was in fact voidable or that for some other reason insurers were not obliged to pay. Where a claim under the policy is more difficult by reason of the brokers' negligence but where it is *questionable* whether insurers were entitled to decline an indemnity, it will be a high-risk strategy not to sue the insurers as well.

Furthermore, claimants who only sue their brokers need to be able to defeat outright any argument that there was a reason independent of the brokers' negligence why an indemnity would always have been declined. Only if the court is persuaded on the balance of probabilities that the independent reason would not have been established if put to the test, alternatively, that there was a chance that insurers would not have taken the point even though it was a winner, will the insured be entitled to damages.

Finally, insureds who only sue their brokers will have to give particular thought to the *evidence* necessary to persuade the court (a) that insurers were entitled to decline; and, if relevant, (b) that insurers would not have established any independent reason for declining cover unrelated to the brokers negligence (or would not have taken the point). To a considerable extent a claimant suing only his brokers will have to marshall the evidence that would have been needed in a claim against his insurers.

A link to the judgment follows:

http://fy68w4dd72j1r1z33vbuky14-wpengine.netdna-ssl.com/wp-content/uploads/2018/10/Dalamd-v-Butterworth-CL2015000276-final-judgment-0310181.pdf

Case note by Simon Wilton

Hailsham Chambers, 18 October 2018