

DALAMD LIMITED V BUTTERWORTH SPENGLER COMMERCIAL LIMITED

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In a policyholder's claim against brokers, what test should the court apply to causation when an insurance policy would not respond for reasons unconnected with the broker's negligence? Should the court consider matters on the basis of the lost chance of securing some form of payment from insurers (often argued by policyholders), or should it be on the basis that unless a recovery from insurers was more likely than not, no claim against the broker can succeed.

FACTS

Following a fire at a recycling plant in Cheshire in October 2012, claims were presented to insurers which were declined for a variety of reasons including an entitlement to avoid the policies, breach of condition and the application of exclusions.

The crux of Insurers' arguments on cover were that the policyholder, JLS, had failed to disclose material information including: (i) the fact that JLS was a 'phoenix' company which had been established following its predecessors' insolvency; (ii) that there had been a build-up of waste at the premises; (iii) the HSE, Environment Agency and Fire Service had previously raised concerns about the premises; and (iv) there had been two previous incidents (in 2010 and 2011) which had the potential for fire. Insurers also considered that an External Storage Condition had been breached.

A negligence claim was brought against the defendant insurance broker, Butterworth. It was claimed that Butterworth failed to pass material information to insurers and to give adequate advice to JLS about the matters which ought to be disclosed. JLS claimed from Butterworth the indemnity to which it would have been entitled under the policies, but for Butterworth's negligence. No claim was brought against the insurers themselves.

Butterworth denied that there had been any breach of duty by them and argued that they had given proper advice at all times. Butterworths also denied that any alleged negligence had caused loss because the insurers were entitled to decline the claim based upon grounds unconnected with any alleged negligence on their part - in this case, breach of the External Storage Condition.

This raised important questions about the correct approach to causation in brokers' negligence cases. Arguments centred on whether a policyholder must show that the claim against insurers would have failed as a result of the broker's negligence. The policyholder in this case said this was not necessary - it only had to show that the broker's negligence had "impaired" the insured's claims under the policy. It was argued that this flowed from a broker's established duty not to expose a client to unnecessary risk of litigation.

Additionally, the parties argued as to how the court should approach a contention that, but for the broker's breach, the policy would in any event not have responded by reason of some other point for which the brokers were not responsible - in this case the breach of the External Storage Condition.

DECISION

The decision as to the duties owed by Butterworth in its capacity as JLS' broker were largely uncontroversial (see [Jones v Environcom Limited](#)).

On the issue of causation, Butcher J found that it was to be determined, on a balance of probabilities, whether the insurance policies were voidable and whether there were reasons other than the broker's negligence which would have meant that an indemnity would not have been available.

Part of the claim failed but in respect of certain elements, Butterworth were found liable to the claimant and ordered to pay £1.6 million.

COMMENT

Insurers are often a party in proceedings against insurance brokers and in such cases their coverage arguments have to be determined on a yes/no basis, on the balance of probabilities. Butcher J held that 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. Otherwise the basis on which coverage related defences are decided would depend on whether or not the insurers were a party and this could

produce anomalous results.

The outcome in this case means that, in a negligence claim against the broker, 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. Had the court determined that the policyholder only had to show a loss of chance to recover an indemnity from insurers, in order to bring a successful claim against a broker, this could have resulted in a significant increase in broker negligence claims given the reduced threshold that would need to be met.

The court did however accept that in certain cases (without identifying what type of cases) the position might be different and an assessment of causation on a loss of chance basis might be appropriate. As it was not pleaded in this case, no further comment was made. The door remains open, if only ajar, for policyholders to continue to pursue such arguments.

FOR MORE INFORMATION ON THIS CASE PLEASE CONTACT ONE OF OUR EXPERTS IN DEFENDING BROKER NEGLIGENCE CLAIMS:

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