COVID-19 Claims against Insurance Brokers - Where are we now?

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In our previous commentary on the impact of COVID-19 we have been keen to avoid predicting a "flood" of E&O claims against insurance brokers as a result of the pandemic.

The complexity of the policy interpretation issues relating to business interruption (BI) wordings was such that the FCA Test Case was necessary to try and bring some clarity to the key issues arising under disease, non-damage or hybrid BI wordings.

Following the Test Case there have, so far as affected policyholders are concerned, been winners and losers depending on their particular type of BI cover (often found deep within a Commercial Combined policy).

Insurers have been settling BI claims under policies which have been held to be responsive to the COVID-19 pandemic. However, even now, there are residual coverage issues (for example relating to "*at the premises*" clauses) progressing before the Courts where the correct legal interpretation remains uncertain.

So, how are things playing out from the brokers' perspective?

As we expected, we are now seeing a trickle - not a flood - of claims against brokers, both under the Professional Negligence Protocol and before the FOS.

These include claims where a policyholder moved from an insurance policy (or scheme) with a responsive BI clause (in light of the Test Case), such as a general notifiable disease wording, to a policy which does not respond to COVID-19, such as a policy with a defined, or closed, list of infectious diseases. The nub of such claims are allegations that the broker should not have procured more restrictive cover for the policyholder.

In other cases the claim is simply that the broker failed to obtain BI cover for a pandemic or advise the policyholder as to the need for such cover. Some of these claims are, wrongly in our view, being framed as mis-selling claims.

In defending brokers there is no one size fits all defence; the type of the policyholder's business and timing of the placement being relevant factors. However the overriding and common feature of the claims is that, in large part, they are advanced with the benefit of hindsight.

Let's not forget that the national lockdown measures taken by the government were truly unprecedented. Even such terms as "*lockdown*" were unheard of before March 2020.

Would an insurance broker be negligent in failing to consider whether cover for a global pandemic fell within the insurance demands and needs of most UK commercial SMEs, for example a beauty salon or a gym? If governments around the world did not see the pandemic coming, how could it be fair to expect an insurance broker to have done so?

The second major theme in many of the claims we are seeing against brokers is causation. By the time the possible need for BI cover for a pandemic came into focus would there have been insurance available in the market (or available at an acceptable cost to its policyholder)?

In many ways, and without diminishing the dreadful impact on many businesses without responsive BI cover, the availability of cover for COVID-19 has been shown to be something of a lottery.

It has taken the Supreme Court to grapple with the precise language of such clauses and only when such wordings have been stress tested by the national lockdowns resulting from the pandemic.

In deciding on whether the brokers were negligent where a policyholder has found itself without BI cover for COVID-19, the Courts must avoid the benefit of hindsight.

As the High Court put it some years ago: "*In this world there are few things that could not have been done better if done with hindsight… the standard of care to be expected of a professional must be based on events as they occur, in prospect and not in retrospect…on any footing a duty of care is not a warranty of perfection*"[1].

[1] Mr Justice Megarry – The Duchess of Argyle case [1972]

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