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COURT REVISITS APPLICATION OF CAUSATION AND LOSS OF A CHANCE PRINCIPLES IN NO-INSURANCE CLAIM AGAINST BROKER

In the recent matter of *Norman Hay*[1], the Commercial Court applied loss of a chance principles to a professional negligence claim against an insurance broker. Specifically, the judge found that where a claimant had no insurance policy in place at all, due to alleged negligence of the broker, the measure of loss will be the claimant's loss of a chance to recover under the hypothetical policy.

This means that the claimant may recover in full if it can establish that there would certainly have been cover that would have paid out. If, on the other hand, it can show there would have been an opportunity to settle at a discount, notwithstanding a coverage defence, it may be entitled to recover damages on that lost chance to settle for a lower sum.

Background

Norman Hay, a holding company whose group companies were specialist chemicals providers, retained its broker to place its global liability programme for the 2018/19 and 2019/20 policy years.

On 22 November 2018, an employee of Norman Hay was involved in a road traffic incident whilst driving a rental car. The incident resulted in the death of the employee and serious injury to another individual. A claim was commenced against Norman Hay by the injured individual alleging that the crash was caused entirely by the negligence of its employee. The claim was settled for USD 5.5 million.

Norman Hay were not entitled to be indemnified for the settlement as it did not have rental motor liability cover as part of the global liability programme. A claim was subsequently brought against the broker by Norman Hay on the basis that the broker allegedly failed to arrange cover which would have responded in these circumstances, which was denied. The broker subsequently applied for the claim to be struck out, or summary judgment in its favour, on the grounds that it believed Norman Hay had failed to, *inter alia*, establish liability towards the injured third party.

In deciding the broker's application for strike out or, alternatively, summary judgment, Mr Justice Picken had to determine whether Norman Hay had reasonable grounds for bringing the claim and whether the claim had a real prospect of success.

Arguments

A key issue in Norman Hay was the application of a previous authority *Dalamd Commercial Ltd v Butterworth Spengler*[2] (see our previous briefing for more detail here).

In that case, *Dalamd* was refused cover by its insurer, both on the basis that there had been non-disclosure and misrepresentation, and secondly a breach of an external storage condition in the policy. Of particular relevance is that the insured accepted the declinature, and did not pursue the insurer. It instead brought a claim against its broker ("Butterworth") alleging that it had negligently failed to pass on information to the insurer resulting in the non-disclosure. Butcher J held that the claimant must show that the policy would have responded but for Butterworth's negligence (and not just that the negligence had impaired the claim).

Of key interest for present purposes was Butcher J's decision on how the Court should approach the insurer's alternative ground for denying cover (ie the breach of the storage condition). *Dalamd* argued that the question of whether the insurer would have pursued that alternative defence and been successful at trial should be decided on a "loss of a chance" basis. Butcher J disagreed with these submissions and held that the Court ought first to decide

[1] [2024] EWHC 1039 (Comm)

[2] [2018] EWHC 2558 (Comm)

on the balance of probabilities if the insurer's alternative ground would have succeeded at trial. If so, there was a secondary question as to whether the insurer would have pursued this to trial or whether *Dalamd* had lost the chance to settle.

The Broker's Position in Noman Hay

The first key aspect of the broker's position was the 'liability issue'. The broker argued that where Norman Hay had settled the claim against it, then it was required to: (a) establish that it was liable to the third party as a matter of law; and, (b) prove that in the hypothetical counter-factual where rental car insurance had been obtained, the insurance would have indemnified them. This causative analysis, it argued, was to be carried out on the 'balance of probabilities'.

The broker placed reliance on the decision in *Dalamd* to argue that even if there had been insurance cover in place, insurers would have declined an indemnity as the insured was not liable to the third party. It was for the claimant to plead and prove on the balance of probabilities that the (in this case hypothetical) insurance cover would have indemnified it. It would only be what the insurer would have done as a matter of business practice that would be determined on a loss of a chance basis.

Norman Hay's Position

In response to the broker's position on the liability issue, Norman Hay argued that it was not necessary to show that it was liable to a third party and that an insurer would have been legally bound to indemnify them. Rather, they argued that the correct legal test to be applied to the causative analysis was "loss of a chance".

Norman Hay sought to distinguish its claim from *Dalamd*.

The Decision

Picken J ruled that it was not appropriate to strike out Norman Hay's claim or to give summary judgment dismissing it.

On the important liability issue, Picken J held that it was correct, following *Astrazeneca* v XL[3] that if an insured is to recover from an insurer under a liability policy, then the insured's liability towards a third party must be established by the Court considering the insurance dispute. If the third party liability claim had been settled, then a policyholder would need to show in the insurance dispute that it was in fact legally liable to the third party and the amount for which it would have been liable if the matter had proceeded to Court.

However, Picken J found that the position is different where an insured is claiming against its insurance broker alleging negligence. These circumstances, he held, provide scope for a broader enquiry as to what would have happened had Norman Hay been able to present a claim to its putative insurer. This exercise required an assessment of the chance that the claim under the putative policy would have been met.

Picken J envisaged that this would require a Court to consider how the putative insurer would have engaged with Norman Hay. Would they have simply requested that Norman Hay act as a prudent uninsured in settling the liability arising from the road traffic incident or, perhaps more likely, would they have corresponded with Norman Hay and provided an indemnity of some sort?

Picken J then considered the *Dalamd* case in some detail.

In *Dalamd*, Butcher J had reached the view that he did because otherwise the insured, faced with an assertion of an arguable defence from insurers, would have had the choice as to whether to pursue the insurer, or the broker, for the indemnity in full. Butcher J held that the issue of whether there was a good alternative defence available to insurers should depend on the facts, and there was no good reason why the approach to determining the alternative coverage point should be different depending on whether the insurers were a party to the action or not.

However, Picken J found that unlike *Dalamd*, the facts in Norman Hay did not involve an actual policy of insurance but consideration of the counterfactual with a hypothetical policy of insurance. This was not a case where the insured had chosen not to pursue its insurer – there was no insurer. Consideration of what insurance would have been in place necessarily involved looking at loss of a chance type aspects such as what policy would have been obtained, and what conditions would have been included.

Butcher J had in addition flagged in *Dalamd* that there may be cases where a claimant contends that its broker has, in effect, deprived the insured of an opportunity of having its insurance claim determined by a Court and that in such circumstances different considerations may apply. Picken J considered this to be a carve out that neatly fitted the current case as, due to the broker's alleged negligence, there was no policy nor an insurer against which

[3] [2013] EWCA Civ 1660

coverage arguments could be tested. This view of the matter was supported by commentary in Simpson on Professional Negligence & Liability, and consistent with the law in solicitors' negligence claims relating to lost litigation (where the claimant does not need to prove he would have been successful in the lost litigation, just that he would have brought the claim, then everything else goes into the loss of a chance analysis).

Applying Mr Justice Picken's comments to the present facts, it would mean Norman Hay were able to invite a Court to conclude that, had a liability policy been in place which covered rental car risks, a full recovery could be realised (if liability could be established) or a partial recovery could be realised where the putative insurer would take a pragmatic or commercial stance notwithstanding arguments available to it (the exact discount to be assessed on a loss of a chance basis).

Comment

The case suggests that the approach in *Dalamd*, with a requirement to prove cover, will not always apply, and that in some cases, it is enough for a claimant to prove it lost a chance to make a recovery. This will apply in particular where a claimant, through the alleged negligence of its broker, has no policy nor insurer against which to claim. This is a lower threshold for claimants and avoids an "all or nothing" outcome and could result in a partial recovery where, despite coverage arguments available to it, a hypothetical insurer may have taken a commercial or pragmatic stance. In such cases it will be necessary to apply the loss of a chance principles, so that the claimant will need to establish a "real and substantial" chance it would have secured some benefit, and then a discount will be applied to reflect the chance of success. However, it does mean that in some cases claimants might recover something where insurers might have fully defended the claim.

There is an important asterisk against this decision, because Picken J was not handing down final judgment. If the matter goes to trial this may not be the last we hear of "loss of a chance" in this context.

For more information, please contact the author(s) of this alert

ALEX WALLEY
Senior Associate, London
T +44 (0)20 7264 808
E alex.walley@hfw.com

RUPERT WARREN
Partner, London
T 44 (0)20 7264 8478
E rupert.warren@hfw.com