



COVID-19 Briefing: Professional Negligence Against Insurance Brokers

This follows our briefing of 22 January 2021 which covered the Supreme Court Ruling handed down on 15 January 2021 regarding the Financial Conduct Authority (FCA) test case on Business Interruption Insurance and Claims arising out of business closures caused by the COVID-19 pandemic and the resulting Government response.

Many businesses had believed that they had sufficient cover by way of their Business Interruption Insurance policies.

Whilst the Supreme Court Judgment is generally good news for small businesses it is also likely that many small businesses may still find themselves unable to claim on their Business Interruption Insurance policies, as upon proper analysis, some policies will not respond to their claim. Where the Insurer declines cover, businesses may look to a claim against their Insurance Broker for failing to obtain the cover (or sufficient cover).

This briefing focuses on Negligence Claims which may be brought against Insurance Brokers as a result of failing to obtain sufficient cover for businesses which has resulted in them being unable to recover their losses in respect of business interruption caused by the COVID-19 pandemic.

THE DUTY OF INSURANCE BROKERS

It is of course well known that an Insurance Broker advises, arranges, and negotiates insurance on behalf of their clients. They have a professional duty (as well as a contractual duty) to advise their clients in respect to insurance products suitable to their clients' business requirements and further to advise on appropriate and sufficient cover for the individual business. This would include advising in respect to any restrictions in place on the cover that has been recommended.

BREACH OF DUTY

For there to be claim, a duty of care must be established and that duty must have been breached. How far the duty extends is measured by establishing, on an individual case basis, what the reasonably competent Insurance Broker would have advised/recommended in terms of cover for the specific business. This will require an analysis of the business type, size, sophistication and the instructions the business gave to the Broker. In the current context it is noteworthy that the leading textbook on BI Insurance states that the risk of business interruption loss arising from infectious diseases is of particular concern to hospitality industry businesses.

The Insurance Broker may have breached the duty by failing to obtain BI cover at all, or by failing to obtain the right kind of cover to respond to losses caused by the pandemic.

CAUSATION

Once a business can establish that their Insurance Broker has breached their duty of care, it needs to be shown that 'but for' that breach of duty, the business would have taken out Business Interruption Insurance cover (or sufficient Business Interruption Insurance cover) which would have responded to the business's claim in respect to its losses. What would have to be shown is that, had there been no negligence the business would have had insurance which did cover its loss, whereas in fact it has either no cover at all or cover which does not respond to or cover its loss.

The first step here would be to establish what cover was available at the time the policy was taken out and whether any such policy would have responded to the particular claim being made by the business. It would be considered whether on the facts, the insurer of any such policy would have declined to respond to the claim in any event. If so, the loss suffered would not have been caused by the Broker's negligent advice.

One then needs to assess whether the business would have taken out the cover (or a more extensive policy) and in doing so the premium for such would need to be considered i.e. had the

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business been properly advised as to the cover required (and available) would it have paid (or been able to pay) the increased premium the insurer would have demanded?

In circumstances where the answer to that question is no, maybe because the premium would have been simply too high, then the loss cannot be said to have flowed from the Broker's failure to advise. Thus, the Broker's negligence did not cause the loss and the claim would fail.

However, if it can be shown had the business been advised in respect to Business Interruption insurance cover, sufficient cover would have been available in the market and taken out, then it can be shown that as a result of the brokers breach of duty, the business has suffered loss and thus their claim can be successfully established.

HAS THE CHAIN OF CAUSATION BEEN BROKEN?

An Insurance Broker may defend a claim in negligence on the basis that the chain of causation was broken by the business itself. For example, whilst losses may have resulted by the failure of the Broker to advise a business to obtain Business Interruption Insurance, the insurer would not have responded in any event due to the actions of the business, for example due to another breach of the policy for which the Broker was not responsible.

LOSS

Only losses sustained, which are reasonably foreseeable as a direct result of the Insurance Broker's negligence advice, can be recovered. Thus, the Insurance Broker may raise arguments that some losses for instance were incurred as a result of market trends or the businesses response to the pandemic.

The assessment of quantum is the amount which would have been paid out under the alternative policy which it is said the business would have had if the broker had not been negligent. This in turn, will involve consideration of the limits of and the mechanism for assessing loss in any such policy.

CONCLUSION

Insurance Brokers are of course an attractive avenue for claims particularly given they are likely to have Professional Indemnity Insurers and cover which is likely to respond to claims for

negligence such as these. However, each case will turn on its own facts and therefore businesses should seek specialist legal advice if they find that their Insurance Broker failed to acquire adequate cover (or any cover at all) and that has resulted in their insurer declining to respond to their claim following the Supreme Court's ruling.

PEACE OF MIND THROUGH DIFFICULT TIMES

This document was prepared on **19th March 2021**, however in these uncertain times, the only thing we can say for certain is that nothing will stay the same for long.

It is entirely possible, therefore, that since this document was prepared new legislation may have been introduced which means that all or part of this briefing no longer reflects the current law.

Because of this, we ask you to consider that, although correct at time of printing, information in this sheet may no longer be up to date and it is always best practice to consult with a lawyer about anything contained in this briefing.

Our lawyers are available to help answer any of your questions about this issue or to help with any other legal concern you have.

Please contact Fraser Dawbarns directly for up-to-date information on your specific circumstances.

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