Article written by Katie Powell on 31st May 2018.

Avondale Exhibitions Limited v Arthur J Gallagher Insurance Brokers Limited [2018] EWHC 1311 (QB): the extent of a broker's duty to advise an insured about disclosure of material facts

Avondale Exhibitions v Arthur J Gallagher concerned a claim by a company against its insurance broker arising from an insurer's decision to decline cover.

In giving judgment for the defendant insurance broker, HHJ Keyser Q.C. (i) endorsed the statements of David Steel J in *Jones v Environcom Limited* [2010] EWHC 759 (Comm) and Flaux Jin *Synergy Health (UK) Limited v CGU Insurance Plc* [2010] EWHC 2583 (Comm) as to the scope of an insurance broker's duties, and (ii) held that the lack of expert evidence significantly limited, albeit did not altogether exclude, the possibility of a finding that the insurance broker had acted in breach of its duty to exercise reasonable skill and care.

Clare Dixon of 4 New Square, instructed by **Simmons & Simmons**, successfully represented Arthur J Gallagher Insurance Brokers Limited. The decision is considered by **Katie Powell** of 4 New Square.

THE BACKGROUND FACTS

The claimant company ("Avondale") was run and owned by Mr Watkins and his wife. The defendant insurance broker (referred to in the judgment by its previous name, "Giles") had arranged a policy of Commercial Combined insurance for Avondale since 2007 and for the years 2010/2011, 2011/12 and 2012/13 with QBE Insurance ("QBE").

On 26 August 2012, there was a fire at Avondale's business premises, causing serious damage to the premises and destroying trading stock. Avondale made a claim under the Commercial Combined policy for the year 2012/13. Following investigations, QBE declined cover and avoided the policies for 2010/2011, 2011/12 and 2012/13 on the grounds that Avondale had failed to disclose two criminal convictions of Mr Watkins. It was common ground between the parties that QBE was entitled to decline cover and avoid the policies on this basis.

Avondale advanced two cases against Giles:

(i) Avondale's primary case was that it had informed Giles of the convictions and that Giles was in breach of its duty of care in failing to pass on the information to QBE. Giles disputed that it had

been told of the convictions. However, Giles accepted that, if it had been, it would have been a breach of duty on its part to fail to pass on this information to QBE.

(ii) Avondale's secondary case was that, regardless of whether or not it did inform Giles of the convictions, Giles was in breach of its duty of care in failing to take proper steps to bring to its attention the importance of making the necessary disclosure and to elicit the relevant information. In response, Giles maintained that it had discharged its duties and made sufficiently clear what was required of Avondale by way of disclosure.

THE ISSUES AND THEIR RESOLUTION

Issue 1: Was Giles told of Mr Watkins' convictions?

This was a dispute of fact. The Judge preferred Giles' evidence on whether it had been told of Mr Watkins' convictions, holding that, contrary to Mr and Mrs Watkins evidence, neither told Giles of Mr Watkins' convictions. Giles' case was substantially assisted in this regard by the sheer number of proposal forms and other documents that Mr and Mrs Watkins had signed (both in relation to the Commercial Combined insurance policy and in relation to separate motor insurance policies) in which they had wrongly endorsed statements to the effect that Mr Watkins had no convictions and (in relation to the motor insurance policies) no fixed penalties. In this context, it was perhaps unsurprising that the Judge (i) was unconvinced by Mr and Mrs Watkins' explanation that they had happily signed these numerous documents, oblivious to the declarations contained within them, and (ii) when forced to choose between conflicting accounts about what was alleged to have been said in the course of oral exchanges, preferred Giles' evidence on these points.

It followed that Avondale's primary case failed on the facts.

Issue 2: Was Giles in breach of its duty of care in failing to take proper steps to bring to Avondale's attention the importance of making the necessary disclosure to elicit the relevant information?

In considering the scope of Giles' duty in this regard, the Judge cited and adopted the *obiter* statements of David Steel J in *Jones v Environcom* and of Flaux J in *Synergy Health v CGU Insurance*. He also endorsed the statement in Simpson, *Professional Negligence and Liability* to the effect that there is no general rule about whether specific oral advice as to material disclosure must be given or whether a specific enquiry regarding a material piece of information must be made: *"[t]he adequacy of communication ought to be assessed on a case-by-case basis"*.

Hence the Judge went on to consider the case on its facts.

(i) The Judge observed that no expert evidence had been advanced by Avondale to support its case on breach of duty. Whilst the lack of expert evidence did not "*altogether exclude… the possibility of a finding that Giles's conduct was such as to constitute a breach"*, it significantly limited the possibility of such findings. Hence the decision by Avondale to ask the court to find that Giles fell below the requisite standard without adducing any expert evidence as to the standards in that profession was "*striking and significant"*.

(ii) Whilst Avondale had placed reliance on Mr Watkins' lack of sophistication, and it was true that Mr Watkins did *not "give the impression of peculiar intelligence or education or of unusual business acumen"*, the Judge was not inclined to place particular weight on this argument; there was nothing to suggest that Mr Watkins "*was not as savvy as an ordinary businessman"* and Mr Watkins gave *"every impression of having paid more attention to the detail of his insurances than he was willing to admit in evidence."*

(iii) The Judge was also unimpressed by Avondale's argument that "*the sheer bulk of documentation*" provided by Giles made it unreasonable to expect Avondale to read and appreciate the relevant documents. The Judge noted that the material paperwork was "*both limited in amount and clearly highlighted*" and that Giles "*identified specific documentation and made clear the need to check the accuracy of the information provided to the insurers.*"

(iv) Finally, the judge did not consider that Avondale's attempt to identify particular occasions when specific oral enquires or advice should have been given improved Avondale's case. He noted that every engagement of a broker has an initial occasion of contact and other potential triggers for specific advice to be given. The question was whether, on the facts, the specific duty contended for arose. In his view, no such duty did arise.

Disposal

The Judge therefore dismissed Avondale's claim in its entirety.

COMMENTARY

Whilst the judgment is primarily concerned with disputes of fact, it has significance on three broader bases:

First, the *obiter* statements of David Steel J in *Jones v Environcom* and of Flaux J in *Synergy Health v CGU Insurance* as to the scope of a broker's duties form part of the *ratio* of the Judge's decision in this case (albeit that it appears to have been common ground that the obiter statements correctly reflected the law). These statements are likely to prove difficult to challenge in future.

Second, the Judge's careful analysis of the specific facts and circumstances of the case, particularly in relation to Avondale's reliance on the "sheer bulk of documentation" sent by Giles and Mr Watkins' lack of sophistication, show how fact specific each case is. Stock arguments frequently deployed in claims against insurance brokers cannot be relied upon to survive judicial scrutiny without careful regard and tailoring to the facts of the case.

Third, the case serves as a reminder of the importance of obtaining expert evidence to support claims for breach of duty against insurance brokers. Approving a passage in *Jackson & Powell* that had been cited by Coulson J in *Pantelli Associates v Corporate City Developments Number Two Ltd* [2010] EWHC 3189), the Judge observed that only cases where *"the practice or conduct complained of has no rational basis or is so obviously unsupportable as to require no such evidence for it to be found to be negligent"* were likely to justify a finding of breach of duty without expert evidence. Henceforth, and in the absence of an overwhelming factual case, it will be a bold claimant who seeks to establish liability against an insurance broker without expert evidence.

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