



What are the Chances? Recent brokers cases on breach, causation and loss.

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WHAT ARE THE CHANCES? RECENT BROKERS CASES ON BREACH, CAUSATION AND LOSS

Neil Hext QC and Miles Harris

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1. In this paper we consider issues of breach of duty, causation and quantum arising in professional liability claims against brokers in the light of four recent cases: *Avondale Exhibitions Limited v Arthur J Gallagher Insurance Brokers Limited* [2018] EWHC 1311 (QB), *Dalamd Ltd v Butterworth Spengler Commercial Limited* [2019] PNLR 6, *Channon v. Ward* [2018] Lloyd's Rep IR 239, and *Pakeezah Meat Supplies Ltd v. Total Insurance Solutions Ltd* [2018] EWHC 1141 (Comm).

Breach

The duties owed by brokers

2. When advising and assisting a client with placing and renewing insurance a broker's duties consist of taking reasonable steps to:
 - a. Identify and advise on the type and scope of cover the client needs by using information readily available and obtaining relevant information from the client;
 - b. Arrange cover that should be suitable to meet those needs;
 - c. Advise the client of the duty to disclose all material circumstances /make a fair presentation;¹
 - d. Explain to the client the consequences of failing to give disclosure/make a fair presentation;
 - e. Explain to the client what sort of matters ought to be disclosed as being material (or arguably material);
 - f. Elicit matters which ought to be disclosed but which the client might not think it necessary to mention, by asking appropriate questions a competent broker might ask in the circumstances.²
3. Establishing breach of duty is generally straightforward if a broker has: failed to give any advice on giving disclosure/making a fair presentation and the consequences of failing to do so; failed to put any cover in place; or failed to pass on material information to insurers that it knew³ or had been told by its client.

¹ Consideration will need to be given to whether the obligations the broker needed to advise on were those imposed by s.18 and 19 of the Marine Insurance Act 1906, or the Consumer Insurance (Disclosure and Representations) Act 2012 or the Insurance Act 2015, which was effective from 12 August 2016.

² See ICOBS §5.1.4, 5.3. and §5.3.2; *Jones v Environcom Ltd* [2010] PNLR 27, §53 and 54, per David Steel J; *Synergy Health (UK) Limited v CGU Insurance Plc* [2010] EWHC 2583 (Comm), §203 to 206 per Flaux J (as he then was) and *Jackson & Powell on Professional Liability*, 8th Ed., 16-044.

³ s.19 of the Marine Insurance Act 1906, which imposed an independent obligation on a broker to disclose matters, has been repealed but will be relevant to some older cases, such as *Avondale*. Although s.19 of the 1906 Act has been repealed, s.4(8)(b) of the Insurance Act 2015 provides that a broker's knowledge is imputed to his client.

4. Far more contentious and less predictable are arguments over whether a broker took reasonable steps to discharge (a) and (f) above. These are much more demanding duties. They require a broker to think carefully about all the relevant circumstances including the nature of the insured and its activities, the perils for which cover is sought, the information that has been provided already and the likely attitude of potential insurers. Assessing whether these duties have been breached is more complex too. Strongly disputed issues of both fact⁴ and law⁵ arise frequently.

Eliciting material information

5. In *Avondale* it was alleged that the broker had failed to take proper steps to bring to its client's attention the importance of making necessary disclosures and, in particular, had failed to elicit the fact⁶ that Mr Watkins had been convicted twice in the past.⁷ Failure to disclose these convictions was relied upon by insurers to avoid cover after fire damaged the insured's premises in August 2012. On many occasions over a period of around 5 years⁸ the broker had given advice on the obligation to give disclosure and what might constitute material facts in standard wording contained a suite of documents. For example, a Demands & Needs document had stated:

"If any of your information is incorrect or your requirements have altered in any way please contact us immediately. May we remind you that you have a duty to disclose all material facts. A material fact is defined as any information that may influence an underwriter's acceptance of a risk. If you are in any doubt whether a fact is material it MUST be disclosed, as failure to do so may invalidate your cover and could mean that part or all of a claim may not be paid. Your duty of disclosure does not apply solely at inception or renewal."

6. Further, on a number of occasions Mr Watkins had read and confirmed documents submitted to insurers that contained statements to the effect that none of the insured's directors had been convicted. For example, on the final renewal before the fire he did not correct a Statement of Fact that left blank a box for listing any "*convictions or criminal offences which are not spent under the Rehabilitation of Offenders Act*".
7. The claimant argued that the broker had acted in breach of duty by relying upon these documents because it was obliged to make enquiries of relevant facts and to explain the duty of disclosure orally. HHJ Keyser QC accepted that had Mr Watkins been directly asked about any previous convictions orally, then he would have answered honestly. Nevertheless, he found that the broker had not acted negligently.

⁴ e.g. What steps did the broker take to assess the client's needs? What advice was in fact given to the client?

⁵ e.g. Was the advice given competent?

⁶ Which the trial judge found the broker had not known.

⁷ In (i) 2005 for racially aggravated harassment, alarm or distress, failing to provide a specimen of breath and obstructing a constable; and 2009 for assault occasion actual bodily harm. He had served terms of imprisonment for both.

⁸ Form around 2007 the client and insured had been Mr Watkins as a sole trader. In 2010 the business was transferred to the corporate entity of Avondale. At all times, the guiding mind was Mr Watkins, assisted by his wife.

8. In reaching this conclusion, HHJ Keyser placed weight on the fact that the claimant had not adduced any expert evidence on breach.⁹ Citing *Pantelli Associates Ltd v Corporate City Developments Number Two Ltd* [2010] EWHC 3189 (TCC)¹⁰ the judge stated that it was a “*matter of common sense*” that expert evidence on the professional standards of insurance brokers was necessary “*in most cases*”.
9. Proceeding without expert evidence, the judge started by observing that authority showed there was no “*immutable requirement*”¹¹ to give advice orally and that such an approach was too inflexible. The adequacy of communication must be assessed on a case-by-case basis.¹² Importantly in his view:
 - a. Although Mr Watkins was not sophisticated he was “*on the ball*”;
 - b. The material paperwork was not unduly long or dense and was clearly highlighted;
 - c. The Market Presentations and Statements of Fact were clear, concise and easy to read, verify or correct and time and again the need to check was identified;
 - d. The explanations given in writing were “*clear and full*”;
 - e. Although the explanations did not specify convictions as disclosable, (i) there was no expert evidence they should, (ii) it was impossible to set out all material facts meaning that any attempt to do so would be misleading, (iii) convictions were only especially significant with hindsight and (iv) the documents provided repeatedly mentioned convictions.
10. The Judge also rejected the claimant’s attempt to point to particular instances when it said fuller oral advice should have been. When the broker had been initially instructed in 2007 Mr Watkins had been in business for 20 years and was no novice. Although there had been a personnel change at the defendant, that did not impose any duty to give advice or make enquiries orally. Finally, it did not matter that the insured had changed from Mr Watkins as sole-trader to a company; the same people had remained involved.
11. By contrast, in *Dalamd* Butcher J held that the broker had acted in breach of the duty to take reasonable steps to elicit relevant information from the insured in connection with a policy provided by XL. It was common ground that on a number of occasions in the past advice had been given by the broker on the obligation to give disclosure and also that the individuals responsible for arranging the clients’ insurance were at all relevant times aware in general terms of that obligation. However, the Court found specific failures by the broker.
12. At the last renewal before the fire in October 2012, XL had been invited to rely, and had relied, on a proposal submitted originally in 2010 which had stated “*there have been no problems*” as a result of regular inspections of the insured’s premises by the HSE, EA and Fire Service. However, the broker had failed to obtain the original presentation and so did not actually know if facts had changed since 2010. Had the original presentation been obtained it would

⁹ “...The lack of expert evidence significantly limits, though it does not altogether exclude, the possibility of a finding that Giles’ conduct was such as to constitute a breach of the common-law duty or the contractual obligation to exercise reasonable skill and care...”

¹⁰ And the fact that expert evidence had been adduced in both *Jones v Environcom Ltd* (Supra) and *Synergy Health (UK) Limited v CGU Insurance Plc* (Supra)

¹¹ See *Synergy Health (UK) Limited v CGU Insurance Plc* (Supra)

¹² See §16 and 17

have been clear that it was necessary to inform XL of the fact that: (i) since January 2012 there had been warnings given by the HSE, EA and Fire & Rescue about excessive amounts of waste on site and the site's untidiness and (ii) there had been a fire at the premises on 27 November 2011 which had required attendance of the Fire and Rescue Service (albeit not a claim on any policy).

13. It is unsurprising that Butcher J found that the broker had acted in breach of duty in not obtaining the original presentation. However, he made findings of breach that were not dependent on this omission. He also criticised the brokers for not passing on a communication from XL about whether there was *"any further information which was material"* and not drawing properly to the clients' attention the need to make proper disclosure to each of the insurers they used in respect of a number of different risks: *"...there seems to have been no attempt to indicate to the insured the types of matters which might need to be disclosed."* In his view this was particularly the case because the broker knew of some of the arguably material matters (e.g. the EA inspection and the untidy state of the premises- as a result of the External Storage Condition Aviva had imposed), knowledge of which meant it was *"more incumbent upon them to raise with the insured whether there were any further related matters which required to be disclosed..."*
14. Specifically, the judge held there were two areas where the defendant needed to do more to elicit relevant facts regardless of whether there had been a previous presentation, namely:

"...The first was whether there has been any problems with HSE, the EA and the Fire and Rescue Service. This was necessary given that the risk was being placed on the basis of a document which indicated that there were no problems (albeit [the defendant] did not know its terms). But it was in any event a matter which was of potential materiality and which, in the light of [the defendant's] knowledge of the build-up of waste, they ought to have enquired about.

The second was as to the previous fire incidents. That is perhaps the most obvious example of the type of question that a broker ought to ask of a client in respect of a policy that covers property damage. I accept [the claimant's expert's] evidence that a reasonably competent broker ought to ask about previous fires and make it clear that that included fires that did not result in an insurance claim."

15. Butcher J also held that even if one disregarded the previous presentation and the obligation to elicit material information, the defendant broker had acted negligently. It had known of the accumulation of waste at the premises and the fact Novae had cancelled a previous policy after the fire in January 2012 because the risk was unacceptable and there had been breaches of the EA Licence. However, it had not disclosed these facts to XL. In reaching this conclusion he favoured the evidence of the claimant's expert, rejecting the defendant's expert's contention that these matters were not relevant because XL was providing a CAR policy in respect of mobile plant.
16. Butcher J's approach in *Dalamd* suggests that in order to fulfil its obligation to elicit potentially material facts, a broker is likely to need to: (i) consider the kind of perils insured and make enquiries about events relating to such perils (whether or not they resulted in a claim) and any facts relevant to the risk of those perils eventuating; (ii) consider what facts are already

known to it that might be material and make enquiries arising from those facts; and (iii) (at least on a renewal) consider any previous statements to insurers and enquire regarding any events or facts relevant to the information provided in those statements, particularly if it might render anything previously stated false or misleading.

Recommending Cover

17. By contrast, Butcher J rejected an allegation that the broker in *Dalamd* had failed to provide competent advice on Business Interruption cover. The insured client had only taken out standalone Increased Cost of Working (“ICOW”) cover (i.e. cover that was not part of gross profit cover). *Dalamd* argued that this was clearly not appropriate because in the event of a major peril destroying the premises ICOW would not help because little could be done to mitigate the loss of profit until property and plant were reinstated. It alleged that this was not explained either to Doumac or to JLS when it took over the business in August 2012.
18. The dispute centred on the question whether any explanation of standalone ICOW was given by the broker. However, the judge preferred the evidence of the broker, a Mr Thomson, that he had discussed BI cover on multiple occasions with the client and had given full explanations of *inter alia* the different types of BI cover and how ICOW would work as standalone cover before recommending that the full suite of cover be taken out. He said the insured had nonetheless chosen to take out standalone ICOW cover.
19. Mr Thomson’s account was accepted partly because of his performance in evidence, which Butcher J considered generally fair and essentially reliable. However, the judge was also strongly influenced by contemporary documents including: (i) a minute of a meeting produced by Mr Thomson and sent to insured: *“The following uninsured risks were discussed at length...The relative merits of other forms of business interruption was discussed including Stock debris removal, Increased cost of Working and Additional Cost of Working ...”* and (ii) an email sent by Mr Thomson to the placing broker saying *“...They would have liked to take the full Gross Profit cover but unfortunately finances dictate that this is not possible at the moment...”*
20. The judge felt these indicated there were *“lengthy discussions of BI cover and of its various types”* and that there was an awareness that standalone ICOW was less satisfactory than gross profit cover: *“...the various discussions did provide Andrew McQueen with an adequate explanation of the difference between the different types of cover and that if he had been in doubt as to how they worked he would have contacted Andrew Thomson for further explanation, which he did not”*
21. The Judge also rejected a suggestion that the advice given on BI cover needed to be repeated when JLS took over the business of Doumac. He expressed this conclusion at a level of principle and was, again, influenced by the expert evidence, this time favouring the defendant’s expert’s view:

“...if a broker has adequately explained the existence of an uninsured exposure but been told by the client that cover for it is financially unaffordable, he does not necessarily have to go through a consideration of the same exposure with the insured

every time there is a mid-year review. Mr Powell's evidence was that a broker might not do such an exercise every year, although he should still do it periodically and that to raise it each year might be unwelcome to the client. I accept this as well, though what might be needed must depend on the precise circumstances"

22. These parts of *Dalamd* show that a broker is likely to discharge its duty of care, at least when dealing with a commercial client with some experience, by giving a full and proper explanation of the kinds of cover available to the client so as to enable them to make an informed choice as to what to select. While a good broker might descend to making more specific recommendations or to point out particular limitations of cover, given, for example, the nature of an insured's business (such as the limitations of standalone ICOW in *Dalamd*), a failure to highlight such matters and/or to give more positive advice in the light of them cannot be assumed to demonstrate negligence.

Evidence

23. *Avondale* and *Dalamd* also contain valuable lessons on evidential matters when seeking to address issues of breach.
24. Firstly, Butcher J's explanation of his findings in favour of the broker in *Dalamd* regarding standalone ICOW cover¹³ shows, again, the importance of contemporary emails and minutes. Although none of these provided a blow-by-blow account of what advice was given they did lend weight to the broker's contention that he gave full advice. Combined with a plausible performance by a witness, such contemporary documents are always vital, particularly for brokers struggling to recall what are often routine and relatively short meetings some years ago. In prefacing his assessment of the evidence he had heard, Butcher J echoed other commercial judges by saying that "*As with most commercial cases, the most reliable evidence is provided by the contemporary documentation and the inferences which can be drawn from it.*"¹⁴ This approach was famously expressed by Leggatt J (as he then was) in *Gestmin SGPS SA v. Credit Suisse (UK) Ltd.* [2013] EWHC 3560 (Comm), at [15] – [22] where he said:

"...the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts...it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."

25. Secondly, a striking feature of the two cases, especially *Avondale*, is the importance attached to expert evidence (or the absence thereof).

¹³ And also the advice the broker gave on the External Storage Condition where there was, among other things, an email to Aviva from the broker seeking an extension of the condition, indicating that there had been a discussion between broker and insure concerning the condition.

¹⁴ At §61

26. This approach was consistent with the words of Andrews J in the recent case of *Shaw v Leigh Day (a firm)* [2018] EWHC 2034 (QB) where she suggested that even in a solicitor's negligence case it might have a greater role than many have believed:

"8. It is not enough to show that a different solicitor may have taken a different view or a different course, let alone that the client felt that the solicitor could have done more. That is why the court will rarely hold a professional to be in breach of duty in the absence of assistance from a suitably qualified expert who can explain why in his or her opinion the acts or omissions complained of fell below the standard of professional competence that would have been expected in those circumstances. No expert evidence was called in this case.

9. Of course, not every case of professional negligence requires expert evidence to support it, and there may be cases where the breach of duty is obvious, for example where it is possible to demonstrate, by reference to established authority, that the wrong legal advice was given, or where the solicitor fails to issue proceedings within the limitation period that would otherwise have had a realistic prospect of success. However, this is not such a case."

27. It is also right that expert evidence was adduced in both *Jones v Environcom Ltd* and *Synergy Health (UK) Limited v CGU Insurance Plc* (Supra). However, there is undoubtedly a tension between the approach of HHJ Keyser QC and the views expressed by Leggatt J in *Involnert Management Inc v Aprilgrange Ltd & Ors.* [2015] 2 C.L.C. 307 at [294] to [297]:

"I am doubtful of the value of much of the evidence from broking experts which was adduced in this case and is typically adduced in cases of this kind. It is common place, and this case was no exception, for broking experts to be asked to give their opinions on whether the defendant brokers owed duties to do the various things which they were allegedly negligent in failing to do. The general duties of insurance brokers have, however, been considered by the courts in many cases and, to a substantial extent, have become a matter of law...

295. Certainly there are circumstances in which the question whether a broker owes a duty to do something which he has not been expressly asked to do depends at least in part upon the scope of the responsibilities which a broker ordinarily expects and is expected to perform...

296. Once the relevant general principle or accepted practice has been identified, however, the question becomes one of its application to the circumstances of the particular case. This is frequently a fact-sensitive exercise. For example, what matters a broker has a duty to explain to the client or is entitled to assume or accept without question is likely to depend on the level of knowledge and sophistication of the client or of the individual(s) giving instructions on the client's behalf, as reasonably perceived by the broker. At this level of specificity, there will necessarily be no practice that all competent brokers in the particular situation normally follow..."

28. It is not clear why the absence of expert evidence was considered so important in *Avondale*. Whether explanations and questions need to be given orally or in writing is not something to be judged by reference to what only brokers might do. The fact that it is not necessarily negligent to deal with matters in writing is self-evident, indeed the more common criticism is that explanations were only oral. Whether or not competence would require an explanation

orally is something a judge can justly determine by considering all the factual circumstances including the nature and complexity of the advice being given and the characteristics of its recipient.

29. Further, the scepticism expressed by Leggatt J chimes with our experience in the Courts. Some judges are hostile and will refuse permission for any expert broking evidence on breach, while others assume it to be essential without question, others query its need on a case-by-case basis. We would suggest that the safest course is to ensure that you seek permission for broking evidence particularly if you are a claimant, perhaps taking a copy of *Avondale* with you. If you are refused it then at least you have an answer for a judge who takes the same approach as HHJ Keyser QC in *Avondale*.

Causation

30. Brokers' cases can give rise to some complex causation issues. If the broker's breach is simply that it failed to get sufficient insurance, the problem may be relatively straightforward: what would the claimant have received under the policy had there been no underinsurance. But where, because of the broker's breach of duty, the insurer has taken a point that goes to the validity of the cover, or that otherwise potentially invalidates the claim, there are a number of factual questions that arise.
31. First, is there a loss? It is, of course, one thing to say that insurers refused to indemnify. But it is another as to whether they were right about that. On one view, the insured has only suffered a loss if he has *in fact*, as a result of the broker's breach, ended up in a situation in which he has no rights against insurers. This raises the question whether the claimant has to prove that a claim against insurers would have failed, or whether it is enough simply to show that the broker's breach has impaired the claim.
32. Second, on the assumption that there is a loss, what would have happened if the broker had not been in breach? Would the claimant have done what needed to be done to get insurance? (e.g. would disclosure have been given?). What would insurers' reaction have been? Would they have insured in any event? If so, on what terms and would they have been acceptable to the claimant? If not, would alternative insurance been available, and would the claimant have been prepared to take it?
33. If insurance would have been in place, would it have paid out? There may have been other reasons – nothing to do with the broker's breach – that would have given rise to a defence. Would insurers have relied upon those reasons? If so, would the claimant have pursued insurers, and would they have settled? If they would not have settled, would the claimant have pursued the matter to trial and won?
34. These issues give rise to questions about how the court is to approach them, whether on an all or nothing, balance of probabilities, basis, or on the basis of loss of a chance.

Is there a loss?

35. In *FNCB Ltd v. Barnet Devanney* [1999] Lloyd's Rep IR 459, an insurance policy was taken out in respect of a property in Gloucestershire. The policy was in the name of the owner of the

property and of the bank that had loaned £2m as mortgagee. The property was damaged in a fire. Insurers refused to indemnify on a number of grounds including non-disclosure and breach of condition, both on the part of the owner but not the bank. The bank sued insurers but settled for a fraction of its loss. It then brought proceedings against the broker that had placed the relevant policy.

36. The criticism made of the broker was that it failed to include in the policy a standard clause protecting the mortgagee against default on the part of the mortgagor. Such clauses were in common use and did not give rise to any additional premium. That criticism was upheld in the court of appeal. However, the broker argued that it had not caused the bank loss because, as a matter of law, it could not have been affected by the default of the property owner since the policy was a composite policy. That that was so was established by a court of appeal decision that post-dated the fire. Thus, the claim against insurers, if pushed to trial, would have succeeded.
37. However, the court of appeal rejected the broker's causation defence. At the date of the settlement, the legal position was uncertain. Had the broker included a mortgagee protection clause in the policy, the position would have been clear and insurers would have paid. Thus the broker was responsible for the difference between the full amount of the bank's loss less that which had been recovered by way of settlement with insurers. It was not an answer to the claim against the broker that the claim against insurers would in the event have succeeded.
38. This decision has proved to be controversial. It has meant that a claimant is not obliged to press to trial what may be a good claim against insurers, and can instead settle at a sum perhaps significantly below its true entitlement and sue the broker for the shortfall. The broker can only challenge the settlement if it can show that the settlement was unreasonable. This is notoriously difficult to do. For these reasons *FNCB* has long been unpopular with those who insure brokers, since they consider (with perhaps some justification) that they are being asked to compensate for loss that ought to have been borne by the original insurers.
39. Does the same logic apply where the claimant considers that the claim against insurers is so poor that it does not think it worth pursuing insurers? This question was another of the issues that arose in *Dalamd*. There, both insurers declined to indemnify the claimant on various grounds, including non-disclosure for which the claimant blamed the defendant broker. Having put its claim to insurers, the claimant did not pursue it further and instead sued the broker.
40. At trial, the claimant argued that that the broker's negligence had created a situation in which the insurers both had a defence that was reasonably arguable. In those circumstances, seeking to apply *FNCB*, the claimant said that it was entitled to turn to the broker to make good its loss. The court disagreed. Butcher J distinguished *FNCB* on the basis that that was a case in which the claimant had entered into a reasonable settlement with insurers. In *Dalamd* there was no such settlement; the claimant had simply decided to pursue the broker alone.
41. Butcher J considered that the approach contended for by the claimant made "*unduly favourable to the insured an action against the broker for a breach consisting simply of creating an uncertainty as to cover by comparison with the insured's action against the insurer who, [where a claim against that insurer would have succeeded], is in breach of its obligation to indemnify*" (at [132]). Moreover Butcher J made the point that, where the claimant sued both insurer and broker, the issue as to the insurer's liability would be dealt with on a "yes/no" basis with the facts being determined on a balance of probabilities basis. It was unsatisfactory,

he said, for the broker's potential liability to be dealt with differently just because the insurer had not been pursued.

42. That decision is likely to introduce further complexity into claims against brokers because the parties will need to consider to what extent further evidence is required in order to deal with the notional (non-)liability of the insurer. Where, for example, one is dealing with material non-disclosure, expert underwriting evidence may be required, and consideration will need to be given as to whether evidence from the underwriter him- or herself is necessary.
43. From a claimant's perspective it will make sense specifically to interrogate the defendant's position on the insurer's liability. In a case in which it seems clear for example that, because of the non-disclosure for which the broker is being blamed, it is likely that the insurer would have had a good defence, the claimant will want to ensure that the defendant has been given a formal opportunity to concede the issue, perhaps by way of notice to admit facts. Where a defendant requires the issue to be litigated, the consequence may be that the claimant will bring proceedings against both insurer and broker, with all of the attendant costs risk that that will entail for the parties.
44. In this context, it should be noted that the introduction of the Insurance Act 2015 may have a similar effect, because the number of cases in which insurers have a clear defence in relation to the entirety of the loss is likely to diminish.
45. Where the claim against insurers is settled, one would expect the position to remain governed by *FNCB*, and the burden will be on the broker to show that the settlement was unreasonable.

What would have happened but for the breach?

46. The analysis that is applicable to this issue will depend upon the nature of the problem that the has been encountered in relation to the insurance. For example, where the allegation is that the broker failed properly to warn the insured about the existence of an insurance warranty or condition, the primary question will be whether, properly advised, the claimant would have complied with that term. Because that is a question of what the claimant would have done, it falls to be resolved on a balance of probabilities basis. If the claimant would have complied with the term, it will normally follow that the insurance would have paid out, and the claimant will recover.¹⁵
47. Other types of breach can give rise to the need for more complex analysis. The decision in *Channon v. Ward* [2018] Lloyd's Rep IR 239 gave rise to a good example. The defendant broker failed to place professional indemnity insurance for his accountant client. Claims eventually came in against the accountant relating to advice that he had allegedly given to certain investors about loaning money to a property company that he controlled. The loans were not repaid and the investors sued the accountant. He brought proceedings against the broker alleging that, had insurance been in place, it would have covered him for the claims. In due course the accountant settled with the investors on the basis (in part) that he would pass on to them what he was able to recover from the broker.

¹⁵ Unless the broker can show that the loss would not have occurred at all but for the breach of the term, in which case a scope of duty issue potentially arises: see *Jones v. Environcom* [2010] Lloyd's Rep IR 676 at [106-109] (and on appeal, [2012] Lloyd's Rep IR 277 at [34]).

48. The court of appeal held that, in those circumstances, the task of the court, as a matter of evaluative judgment, was to assess in monetary terms the difference between the position the accountant found himself in and the position he would have been in if he had been insured, assessed on an expectation or loss of a chance basis. The enquiry focused on two matters. First, what would the putative insurers have done when presented by the accountant with notice of the claims made against him. Second, what would the accountant's response have been to the stance adopted by insurers. See [27].
49. As to the first question, the court below found that the accountant would have told his insurers that the claims arose out of disappointment on the part of the investors at the losses of a trading company of which he was a director and were nothing to do with his role as an accountant. Against that background, the judge found that insurers would certainly have sought to deny that the claims were covered, principally on the basis of two exclusions in the Accountants' Approved Wording (including one that excluded trading losses and liabilities).
50. As to the second, the judge found that, faced with that refusal, the accountant himself would not have challenged it. Accordingly, he held that there was no substantial (as opposed to merely speculative) chance that the claimant would have been in a different position had there been insurance, and awarded the claimant nothing.
51. On appeal, with a view to getting something for loss of a chance, the claimant sought to displace the certainty with which the judge had concluded that insurers would have denied liability by asserting, on the basis of some of the expert evidence at trial, that insurers would have taken legal advice. That attempt failed. The court of appeal concluded that it was pure speculation that advice would have been taken and that this did not produce a loss of a chance result. The claimant's challenge to the factual question of what the claimant would have done in the face of insurers' refusal also failed.
52. Avoidance for non-disclosure can give rise to a similarly complex inquiry. The starting point is whether, on the balance of probabilities, given proper advice, the insured would have disclosed the relevant information. Then one has to consider whether insurers would have insured in the light of that information, and if so, on what terms. If not, would alternative insurance have been available? Would different terms have been accepted by the insured? In the context of the evaluation of what insurers would have done, the test is loss of a chance rather than balance of probabilities.

Insurers with an alternative defence – balance of probabilities or loss of a chance?

53. What happens where there was an alternative ground upon which insurers were arguably entitled to resist payment, for which the broker was not responsible? That situation arose in *Dalamd*. There, the buildings insurers, Aviva, declined to indemnify on the basis of non-disclosure of the insolvency of a company related to the insured (which had previously been the insured under the policy). This non-disclosure was the fault of the broker. However, Aviva also denied liability on the separate basis that the insured was in breach of an external storage condition, which required that storage of waste material be kept a certain distance from the perimeter of the buildings. The broker was not responsible for this latter issue.
54. The broker contended that, even if it had not been in breach, the claim against Aviva would have failed for breach of the external storage condition. That gave rise to an interesting question as to whether the issue should be determined on a balance of probabilities basis or as a loss of a chance.

55. There was no dispute that loss of a chance applied where one was assessing whether insurers would either decided not to take the point, or otherwise to settle the claim (see *Fraser v. Furman* [1967] 1 WLR 898; *Everett v. Hogg Robinson & Gardner Mountain (Insurance) Ltd* [1973] 2 Lloyd's Rep 217). But the judge found that there was no chance of either of those things on the facts of this case. So the question was, how does one approach what a court would have done had a claim against insurers been pressed to judgment (in the light of no non-disclosure defence being available)?
56. That issue had previously been addressed in the context of solicitors' indemnity cases. In *Hanif v. Middleweeks* [2000] Lloyd's Rep PN 920, the defendant solicitor negligently permitted the claimant's claim against insurers in respect of a fire to be struck out. The solicitor argued that the claim would have failed because, amongst other things, the claimant had deliberately set fire to the property. Notwithstanding the fact that the judge found that there was a 75% chance of insurers defending the claim on that basis. Nevertheless, on a loss of a chance basis, the judge awarded damages. The solicitor argued in the court of appeal that that was the wrong approach and that the judge, having in effect found that there was arson, should have awarded nothing. The court of appeal upheld the judge's analysis. The correct approach in a case like this was to determine the prospects of the claim against insurers succeeding.
57. In *Dalamd*, Butcher J took a different approach. He noted that there were a number of cases in which the court appeared to have decided the question of whether there was an alternative defence on an all or nothing basis. The question of the insurers' putative liability depended on facts which existed at the time either of placement or of the occurrence of the loss. Moreover, it was again relevant that, in the event that both insurers and the broker were parties to the action, the insurers' liability would be determined on the balance of probabilities, and the manner of determining the broker's liability should not depend upon whether the insurers were at the time of trial still parties to the action. See [136-137].
58. Hence one determined the putative fate at trial of the alternative argument open to insurers on a balance of probabilities basis. Butcher J said that it might be different in a case in which the broker's negligence had deprived the insured of the opportunity of having its claim under the insurance determined by a court.

Quantification of Loss

59. Where the loss of a chance principle does apply, the range of possible outcomes can be quite wide and difficult to predict. *Pakeezah Meat Supplies Ltd v. Total Insurance Solutions Ltd* [2018] EWHC 1141 (Comm) perhaps provides a recent useful illustration of the manner in which it might be approached. In that case, insurers had declined to indemnify in respect of a fire on the grounds of non-disclosure (a) of the fact that various companies associated with the insured had become insolvent, and (b) of the capacity of two free-standing deep fat fryers at the premises. The claimant blamed the broker for these non-disclosures, and a default judgment was granted with damages to be assessed.
60. At the assessment, the question arose as to what, if any, discount should be applied to reflect the possibility that the insured would have experienced difficulty in obtaining insurance in the light of the information that would (on the premise of no breach of duty) have been disclosed. The court accepted that, given the relatively standard nature of the risk, and the type of premium with which the court was concerned, the chance of either piece of information preventing insurance being obtained from somewhere was fairly low. However, there remained a possibility that, while existing insurers might not have insured because of the

frying equipment, other insurers might not have insured because of the financial issues. Damages were assessed at 75% of expected indemnity.

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***Disclaimer:** this handout is not to be relied upon as legal advice. The circumstances of each case differ and legal advice specific to the individual case should always be sought.*

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What are the Chances? Recent brokers cases: Breach, Causation & Loss

Neil Hext QC & Miles Harris

1. Breach

Brokers' Duties

1. Identify client's needs and advise on suitable cover
2. Arrange cover to meet needs
3. Advise of duty of disclosure/fair presentation
4. Explain consequences of not discharging duty
5. Explain what sort of matters are material
6. Elicit matters which ought to be disclosed

Avondale Exhibits Limited v Arthur J Gallagher [2018]



Avondale: The Facts (2)

*“If any of your information is incorrect or your requirements have altered in any way please contact us immediately. May we remind you that you have a duty to disclose all material facts. A material fact is define as any information that may influence an underwriter’s acceptance of a risk. If you are in any doubt whether a fact is material it **MUST** be disclosed, as failure to do so may invalidate your cover and could mean that part or all of a claim may not be paid. Your duty of disclosure does not apply solely at inception or renewal.”*

Avondale: The Facts (3)

Convictions or criminal offences which are not spent under the Rehabilitation of Offenders Act?

Avondale: Judgment (1)

“...The lack of expert evidence significantly limits, though it does not altogether exclude, the possibility of a finding that Giles’ conduct was such as to constitute a breach of the common-law duty or the contractual obligation to exercise reasonable skill and care..”

Dalamd Limited v Butterworth Spengler



Dalamd: Facts (1)

- Tenant: JL Sorting Limited (“JLS”)
- Landlord: Widnes Land Partnership Limited (“Widnes”)
- JLS a phoenix
- Prior to 2 August 2012 tenant and operator of facility was Doumac

Dalamd- Facts Increased Cost of Working (“ICOW”) (2)

Minute: “The following uninsured risks were discussed at length...The relative merits of other forms of business interruption was discussed including Stock debris removal, Increased cost of Working and Additional Cost of Working...[Andrew McQueen] to discuss with fellow directors and advise if cover is required...”

Email- “...They would have liked to take the full Gross Profit cover but unfortunately finances dictate that this is not possible at the moment...”

Dalamd- Cover for 2011/12

Doumac:

- Material damage, ICOW/Additional ICOW and stock debris removal cover with Novae
- CAR cover with XL

Widnes:

- Buildings and property owner's liability cover with Novae

Dalamd- Storm January 2012



Dalamd- Aviva take over from Novae

- EA inspect and report breach of Licence.
- XL indemnify Doumac for conveyor damage
- Novae pay Doumac £125k for ICOW & then cancel
- 14 March 2012- Aviva provide cover in place of Novae subject to External Storage Condition

Business Interruption Advice

- Documents show: *“lengthy discussions of BI cover and of its various types”*
- *“...the various discussions did provide Andrew McQueen with an adequate explanation of the difference between the different types of cover and that if he had been in doubt as to how they worked he would have contacted Andrew Thomson for further explanation, which he did not”*

Business Interruption Advice

“...if a broker has adequately explained the existence of an uninsured exposure but been told by the client that cover for it is financially unaffordable, he does not necessarily have to go through a consideration of the same exposure with the insured every time there is a mid-year review. Mr Powell’s evidence was that a broker might not do such an exercise every year, although he should still do it periodically and that to raise it each year might be unwelcome to the client. I accept this as well, though what might be needed must depend on the precise circumstances”



Eliciting information and disclosing to XL

- Knew of some arguably material matters and that meant is was *“more incumbent upon them to raise with the insured whether there were any further related matters which required to be disclosed...”*
- *“The first was whether there has been any problems with HSE, the AE and the Fire and Rescue Service. This was necessary given that the risk was being placed on the basis of a document which indicated that there were no problems (albeit Butterworth Spengler did not know its terms). But it was in any event a matter which was of potential materiality and which, in the light of [D’s] knowledge of the build-up of waste, they ought to have enquired about.”*

Eliciting information and disclosing to XL (2)

“The second was as to the previous fire incidents. That is perhaps the most obvious example of the type of question that a broker ought to ask of a client in respect of a policy that covers property damage. I accept [the claimant’s expert’s] evidence that a reasonably competent broker ought to ask about previous fires and make it clear that that included fires that did not result in an insurance claim.”

Evidence- The importance of the Documents

“As with most commercial cases, the most reliable evidence is provided by the contemporary documentation and the inferences which can be drawn from it.”

Evidence- The importance of the Documents (2)

“...the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses’ recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts...

...it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth.”

Leggatt J, *Gestmin SGPS SA v. Credit Suisse (UK) Ltd.* [2013] EWHC 3560 (Comm), at [15] – [22]

Expert Evidence (1)

“I am doubtful of the value of much of the evidence from broking experts which was adduced in this case and is typically adduced in cases of this kind. It is common place, and this case was no exception, for broking experts to be asked to give their opinions on whether the defendant brokers owed duties to do the various things which they were allegedly negligent in failing to do. The general duties of insurance brokers have, however, been considered by the courts in many cases and, to a substantial extent, have become a matter of law...

Expert Evidence (2)

“...Once the relevant general principle or accepted practice has been identified, however, the question becomes one of its application to the circumstances of the particular case. This is frequently a fact-sensitive exercise. For example, what matters a broker has a duty to explain to the client or is entitled to assume or accept without question is likely to depend on the level of knowledge and sophistication of the client or of the individual(s) giving instructions on the client's behalf, as reasonably perceived by the broker. At this level of specificity, there will necessarily be no practice that all competent brokers in the particular situation normally follow...”

Leggatt J, *Involnert Management Inc v Aprilgrange Ltd & Ors.* [2015] 2 C.L.C. 307 at [294] to [297]

Expert Evidence (3)

“Barristers and solicitors who practise in the field of insurance and reinsurance need to understand practical aspects of the business...a lawyer who has specialised in insurance and reinsurance cases for at least ten years will have acquired considerable practical knowledge of how insurance and reinsurance business is conducted...Such practical knowledge will inform and assist their legal analysis and their ability to give effective representation and advice...there is no such thing as insurance or reinsurance “itself” which is separate and distinct from the law of insurance and reinsurance...”

Leggatt LJ, *Tonicstar Ltd v Allianz Insurance plc* [2018] Bus. L.R. 2347, at [14]- [19]

2. Causation

Is there a loss?

- *FNCB v. Barnet Devanney* [1999] Lloyd's Rep IR 459
 - Property insured in name of owner and mortgagee bank
 - Following fire, insurers refuse to indemnify on grounds of non-disclosure and breach of condition by owner
 - Bank issues against insurers but settles for a fraction of its loss
 - Bank then sues broker – should have included mortgagee protection clause in policy
 - Broker alleged that claim would have succeeded against insurers – causation defence
 - Rejected by CA – broker's breach made legal position uncertain; broker responsible for shortfall between bank's loss and settlement with insurers

Is there a loss?

- *Dalamd v. Butterworth Spengler*
 - Insurers repudiated on a number of grounds – only some of which broker responsible for
 - But for broker's breach, would claimant have succeeded against insurers?
 - Claimant did not sue insurer – no settlement
 - *FNCB* distinguished: would have made “*unduly favourable to the insured an action against the broker for a breach consisting simply of creating an uncertainty as to cover by comparison with the insured's action against the insurer who, [where a claim against that insurer would have succeeded] is in breach of its obligation to indemnify...*”
 - Balance of probabilities applied

What would have happened but for breach?

- *Channon v. Ward* [2018] Lloyd's Rep IR 239
 - Broker fails to place PI insurance for accountant client
 - Claims made against accountant by investors in his property business
 - Accountant sues broker and settles with investors
 - CA: “*the task of the court, as a matter of evaluative judgment, to assess in monetary terms the difference between the position [the accountant] finds himself in and the position he would have been in if he had been insured, assessed on an expectation or loss of a chance basis.*”
 - What would putative insurers have done when presented with notice of claims?
 - What would accountant's response have been?

Alternative defences: loss of a chance?

- *Dalamd*: Aviva repudiated claim on a number of grounds, including alleged breach of external storage condition for which broker not responsible
- Question of whether insurers would have taken the point or whether they would have settled both “loss of a chance”
- But what about where claim would have gone to trial?
- Solicitors’ indemnity cases: *Hanif v. Middleweeks* [2000] Lloyd’s Rep PN 920 – loss of a chance analysis adopted

Alternative defences: loss of a chance?

- *Dalamd*: in context of brokers’ cases, if question is what would have happened but for broker’s negligence on basis that claim against insurers would have gone to trial, one determines that issue on a balance of probabilities – i.e. on a “yes/no” basis, would the claimant have defeated the alternative defence
- Might be different if broker’s breach deprived claimant of opportunity of having its claim determined by a court

Quantification of loss

- Where loss of a chance applies, range of possible outcomes wide and difficult to predict
- Useful recent example: *Pakeezah Meat Supplies v. Total Insurance* [2018] EWHC 1141 (Comm)
 - Two grounds of non-disclosure
 - What would have happened had disclosure been given – would insurers have insured?
 - Relatively standard risk with modest premium – chance of either piece of information preventing insurance being obtained fairly low
 - But there remained a possibility: damages assessed at 75% of expected indemnity



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