Brokers – a new legal battleground

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Recent months have produced two interesting cases concerning insurance brokers. In each case the Court has considered certain obligations of the broker and made findings which are either in part unexpected or raise questions which the Courts are likely to reconsider.

The first case is *Dunlop Hayward v. Barbon Insurance*, which is already much commented upon. The problem arose out of common circumstances - a group (including Dunlop Hayward) involved with property related activities had insurance including excess layer cover for valuation activity. The group was acquired by Erinaceous which sought cover, mid term, on no worse terms than existing. Erinaceous instructed a broker (HPC) which in turn asked another broker (Forbes) to place the excess layer. Forbes placed as they were instructed by HPC but not on the terms which Dunlop Hayward instructed HPC. There was confusion amongst the brokers about the instruction. In particular, while Dunlop Hayward still wanted an excess layer (£10 million excess £10 million) for its property *valuation* work. HPC erroneously instructed Forbes, to obtain cover only for property *management*. Inevitably there was a valuation related claim which excess layer insurers were able to decline because there was no cover for valuation issues. DHL naturally claimed against HPC, who in turn claimed against Forbes. The case produces two points of interest in relation to contributory liability.

The Court found HPC liable for failing to obtain the insurance coverage sought but HPC argued that Dunlop Hayward was contributorily negligent because they failed to identify the limitation in the excess layer cover in the policy documents. The Judge declined to find fault with the insured. The Court expected any coverage problem to be brought to the insured's attention, rather than expecting the client to check the broker had done his job properly by investigating the policy documents. That is understandable, but must surely depend on the facts. If a client had read papers and identified an issue it seems unlikely that they could be fully excused. Perhaps the Court's will just take some time to accede to this view – just as in the 1990's when it took some time to accept the contributory negligence of lenders.

The main interest in *Dunlop Hayward v. Barbon Insurance* however, lies in the Court's approach to the position of the placing broker. The relationship of the placing broker with the producing broker and the ultimate client has been examined in detail before – a notable example is *BP v. Aon*. In this case the Court considered the relationship between the insured, the producing and the placing broker with care as it had to determine whether to impose a tortious duty of care between the placing broker and the insured. It examined the contractual chain to see if there was an intention to avoid tortious liability. This seems a good starting point – what had the parties agreed? That was not the starting point in this case however. Had it been, the Court could have reached no other conclusion than that Forbes had done exactly what they were instructed to do. Despite that, the Court found them contributorily liable to HPC for failing to secure what Dunlop Hayward asked HPC to obtain.

Forbes were liable for failing to challenge the instructions from HPC because in the previous year the excess cover included valuation liability. The Judge felt challenge (or "clarification") was appropriate if instructions appeared to be ambiguous, illogical, potentially disadvantageous or inconsistent. While this is understandable in a perfect world of limitless time (or expense), it seems impractical and generally unworkable. Why should you not be able to rely on your

instructions and/or why should you be compelled to question them particularly, if you are instructed by another professional? Why should you have to extend the scope of your retainer? This is an issue for all professionals, not just insurance brokers. One crumb of comfort may be that the liability of the placing broker was limited to 20% (still a substantial real figure).

In *Jones v. Environcom*, the question of contributory negligence was revisited (but not as between brokers) as well as a broker's duty to explain the disclosure obligation. In that case insurers sought to avoid a property and business interruption cover on the basis that the waste management business, Environcom, had failed to disclose a series of fires as well as the use of plasma guns, which were likely to cause fires. The case with the insurers settled leaving Environcom with a significant loss which they sought to recover by alleging their brokers, Miles Smith, had failed adequately to explain their disclosure obligations. Miles Smith alleged that Environcom were contributory negligent because they had sent a series of explanations of an insured's disclosure obligations to Environcom. This did not help them; the judge felt that most of the advice provided by Miles Smith was either provided at the wrong time or in documentation which was "severely inadequate". In addition they provided "summaries" which did not address the duty of disclosure. The Judge concluded, as in *Dunlop Hayward v. Barbon Insurance*, that if a broker provides a summary the client is entitled to rely on it rather than actually reading the documents which might have revealed the summary was wrong. What is the moral? It's simple – if you summarise something then get it right.

The real interest in this judgment, though, lies in the fact that the judge set out the basis of brokers' duties to explain the disclosure obligation (based upon Insurance Conduct of Business Sourcebook (ICOBS)), and none of that should be controversial. However, he went on to say that brokers were under a duty to exercise reasonable care to "*elicit matters which ought to be disclosed*" and that he felt it would ordinarily require "*a specific oral or written exchange*" for the broker to satisfy himself that the client understood his duties. This may be controversial as this will require time and expense not practicable on the margins of some direct insurance, and certainly unrealistic for internet business. Surely this, again, is the counsel of perfection advocated in *Dunlop Hayward v. Barbon Insurance*. While that case dealt with the placing broker ironically, *Jones v. Environcom* seems to open a further question for that broker.

It seems that brokers' duties will continue to come under the judicial spotlight for months to come.

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