



When the buck does not stop with the broker

There have been a number of cases over the past few years clarifying and stressing the duties of a broker to its client. The Eurokey case, therefore, serves as a timely reminder that the client also has a number of responsibilities to fulfil during the underwriting process if it wants to be confident it has appropriate cover.

Background

In a negligence claim brought by Eurokey Recycling Ltd (Eurokey) against its former insurance brokers, Giles Insurance Brokers Limited (Giles) the High Court considered the extent of a broker's duty to advise, particularly in relation to Business Interruption cover.

Following a fire at Eurokey's main site in Enderby it became apparent that Eurokey was grossly underinsured in respect of stock, machinery, and business interruption cover. Having threatened to avoid cover by reason of under-insurance the insurer and Eurokey entered into a settlement by which £820,000 was paid out under the combined commercial policy (the insurer paid out in full on the property policy).

Eurokey brought a claim against Giles for the shortfall between the settlement sum and the sum which it contends it would have recovered (along with consequential losses) had it been properly advised and insured.

Brokers' duties

The case takes a close look not only at the extent of a broker's duty to its insured but also the responsibilities of a potential insured, particularly in relation to the provision of financial information.

The legal principles surrounding brokers' duties are fairly settled and at a minimum a client would expect their broker to:

- take reasonable steps to ascertain the nature of the client's business and its insurance needs;
- take reasonable steps to ensure that the client fully understands the policy and in particular any terms which may not be commonly understood or have a different technical definition to their typical business use;
- take reasonable care that a client is aware of and understands its duty of disclosure;

- having exercised the above obligations, to exercise reasonable care to adhere to the client's express instructions as to the cover to be obtained.

The detail of how the above principles are put into practice will depend to a large extent on the individual circumstances of the specific client being advised.

Client responsibilities

A large part of the Eurokey Claim was in relation to the specific advice received from Giles regarding Business Interruption Cover. However, it is likely that the principles regarding client responsibility are applicable across a range of insurance covers, particularly those clients which are more sophisticated.

1. Client Circumstances

It is not new law that the extent of a broker's duty to advise can be dependent on the sophistication of his client. However, the Eurokey case gives some further guidance on the level of sophistication necessary to reduce a broker's duties and brings some clarification to this principle.

- The lack of reference to client sophistication at ICOBS 6.1.5 to 6.5.7 does not prevent a broker relying on his client's level of sophistication in order to tailor his advice.
- The insurance industry, unlike some other parts of the financial services industry, does not have standard procedures for the identification and recording of sophisticated clients.
- The fact a client is a commercial enterprise is not, in and of itself, enough to mark them as sophisticated. For example, an SME is not as likely as a large corporate to have an understanding of a complex product such as Business Interruption Cover.

Furthermore, in the case in question, the Court took into account, not only client sophistication, but also past advice provided by the broker. The Court held that, as a matter of common sense a client may not need annual repetition of advice previously given and understood.

In order to protect clients this principle is subject to two important caveats:

- the personnel at the client responsible for insurance remains the same; and
- it can be demonstrated that the advice referred to was in fact given - in this regard, the broker is likely to need to produce a contemporaneous record of the advice given.

2. Client information

As mentioned above, a broker continues to have a responsibility to explain the cover being sought and to advise particularly on any unfamiliar policy terms/definitions.

In relation to Business Interruption Cover the broker must give the client sufficient explanation of the cover and any technical or defined terms to allow the client to calculate the sum insured and the appropriate indemnity period.

For example, in Business Interruption Cover "Insurable Gross Profit" is a term of art which means something very different from what any experienced business might expect.

However, crucially, it is not the broker's responsibility to undertake the necessary calculation himself.

Furthermore, provided that a client appears to be well informed about his business, a broker is not expected to verify information received from him unless the broker has a reason to believe that the information is not accurate.

The onus is, therefore, very much on the client to ensure that they fully understand how to calculate any necessary figures to be supplied to the insurer and that they are confident in the accuracy of those figures.

Conclusion

Many businesses rely heavily on brokers to help them place appropriate insurance for their needs. However, clients, particularly sophisticated ones have certain responsibilities too. In order to ensure that insurance responds when it should it is necessary for both the broker and the client to be fully involved and engage appropriately in the underwriting process.

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