BRIEFING NOTE

INSURANCE BROKERS IN THE FIRING LINE: ACTION AVAILABLE IN NEGLIGENCE FOR "LOSS OF A CHANCE": NORMAN HAY PLC v MARSH Ltd

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Introduction

It is common practice for insurers to negotiate the settlement of significant claims by adopting a three-pronged strategy: (i) denying any liability to indemnify; (ii) contesting the amount of the indemnity (if they are liable to indemnify); and (iii) notwithstanding (i) and (ii), offering a settlement amount in recognition of the costs and risks of litigating the claim if not settled.

In the recent case of *Norman Hay PLC v Marsh Ltd [2025] EWCA Civ. 58,* the English Court of Appeal recognised this practice in the context of a broker's negligence claim, allowing the claim in negligence to continue against the broker on the basis that even if the policy which the broker should have secured would not have responded to the claim, the broker's failure to secure cover might have caused the insured to lose the chance of a recovery from insurers.

Facts

The facts of the matter are tragic. Whilst driving a rental car in the United States, an employee of the claimant, Norman Hay PLC ("NH"), was killed in an accident in which the passenger was severely injured. The passenger brought proceedings against NH and others. NH settled those proceedings before trial for US$ 5.5 million which it then sought to recover from Marsh on the basis that Marsh had failed to arrange cover that would have responded to NH's liability.

Marsh sought to dismiss the claim by summary judgment, in other words "no case to answer". Marsh submitted that if it had arranged cover then the cover that it would have arranged would have been an indemnity policy. Proceeding on that basis, NH would have to establish that it was in fact liable to the passenger whose claim it had settled. In the circumstances, NH could not prove that liability and therefore the indemnity policy would not have responded. As a consequence, NH had not suffered any loss and no cause of action arose against Marsh.

The Court of Appeal, agreeing with the Court of First Instance, held that a claim in negligence against an insurance broker for failing to arrange cover demands an enquiry wider than a legal analysis as to whether the claim would have been covered by the policy that had not been secured. Specifically, the Court must enquire as to what would have happened if the policy had been arranged and the claim had been presented to an insurer underwriting the cover.

Particularly, whether there was a possibility or chance that an insurer would take a "pragmatic and commercial" stance when presented with the claim. In other words, whether the insurer of the policy that the broker should have secured would have agreed either to a settlement of the passenger's claim and/or to indemnify NH, albeit at a discounted amount, rather than incur the costs and run the risks of allowing the passenger's (or NH's) claim to proceed to trial.

If the answer to that enquiry was that there was a possibility that if the cover had been secured then the insurer would have taken a pragmatic and commercial stance and offered an indemnity amount to NH then, by reason of the broker's actions, NH had suffered loss and had a potential action in negligence against the broker for the loss of that chance.

In the circumstances, Marsh's summary judgment application to strike out NH's claim was rejected. Consequently, the claim is proceeding to determine whether NH did have and/or lose a chance to make a recovery from the insurance market and, if so, what was the amount of the insurance recovery that it would have made. This will inevitably result in competing evidence from experienced independent underwriters as to whether, had the policy been secured, an indemnity would have been provided and, if so, the amount of that indemnity.

Takeaways

The Court of Appeal's judgment confirms that in circumstances in which one party's liability (here the broker) to a second party (here the insured) turns on what a third party (here the underwriter) would have done (if the policy had been secured), then the Court is required to enquire into and assess the loss of the insured's chance, if any. In considering that loss of chance, the Court must consider the business practices and standards of the underwriter and not confine itself to a strictly legalistic analysis of the policy that should have been secured.

Observation

In Asia, actions against insurance and reinsurance brokers are few and far between, a reflection of the high standards within the broking profession. But they are on the increase as more complex risk programmes are brokered through the major insurance centres around the region and more significant and frequent losses are reported to those programmes. The *Norman Hay* decision is a sobering reminder that legal actions can and are prosecuted against brokers even when all that is claimed is the loss of a chance of recovering an indemnity.

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