

Framing an action against a broker

Elements (1) to (3) must be satisfied

- (1) The broker owed a duty of care
 - A. When does a duty of care rise?
 - B. What are their requirements?
- (2) They breached their duty of care
- (3) The breach caused a loss to the insured
- (4) Contributory negligence
- (5) Elements

Element 1A: Duty of care

Duties arise –

- Before or upon the insured obtains cover
- To those intended to be covered in the policy (TPB)
- When a claim is unsuccessful
- During the insurance period

'Before or upon obtaining cover'

An insurance broker should –

- Explain to the client the relevant terms of the cover it has procured or is about to procure (premium, scope of cover, exclusions)
- Specifically draw the client's attention to its obligations while the contract is on foot

'Duty to those intended to be covered in the policy'

- A limited duty is owed to those intended to be covered in the policy obtained for the client.
 - *BP plc Ltd v Aon Risk Services of Texas Inc (2006) EWHC 424 (Comm)*

The broker should promptly inform the client if their proposal is unsuccessful and why

'Duty during the insurance period'

- If the broker becomes aware of information during the insurance period which suggests that cover might be jeopardised, it should specifically draw this to the client's attention, make recommendations and obtain instructions in relation to it

Element 1B: A broker's requirements

A broker's duty of care requires them to –

- Be clear about what the client (insured) wants and needs
- Communicate what precisely the insured needs to insure
- Advise the client the range of insurance policies that would meet the client's wants and needs and the relevant differences between them
- Duty to advise client about their pre-contractual duty of disclosure

'Be clear about what the client (insured) wants and needs'

- The broker must find out what insurance the client wants the broker to obtain by asking the client relevant questions
 - The questions to be asked are those 'which a competent broker might have been expected to ask in the circumstances.'
 - *Synergy Health (UK) v CGU Insurance Plc*
 - A broker will not be negligent if –
 - he fails to ask questions about the risk which he had no reason to ask or
 - if he does ask appropriate questions but the insured does not disclose important information to the broker.'
 - *Synergy Health (UK) v CGU Insurance Plc*

'Communicate what precisely the insured needs to the insure'

- This includes advising the insured –
 - **On the precise nature of cover** to be obtained
 - **On the range of insurance policies** that would meet the client's wants and needs and the relevant differences between them.
- This requires the broker to –
 - **be familiar with the general principles** of insurance law and agency law
 - **advise on the financial stability** of the insurer
 - *Zisopoulous v Barry Johnston Insurance Brokers.*
 - *In Zisopoulous*, the broker failed to meet this requirement and was held liable to the insured, as the insurer was financially unable to meet the claim.

- **take the client through –**
 - **recommended policies**
 - **pitfalls** of the area **of the cover and point these out to a client**, particularly if they intervene with validating an insurance cover
 - **securing a necessary cover** that meets the insured’s disclosed or ascertained needs
 - If there is any uncertainty about the scope of cover offered in a policy the broker should take reasonable care to make certain what is not certain.
- **any exclusions and limitations**
 - This duty gives the broker an opportunity to delete or amend exclusions or conditions in a policy or to extend cover by issuing an endorsement to a policy, even if this means a higher premium.

‘Duty to advise client about their pre-contractual duty of disclosure’

- An insurance broker engaged by a client to obtain or renew an insurance contract, must –
 - **Advise** the client of their pre-contractual duty of disclosure under s 21 and 22
 - **Explain** an insurer’s rights if the client breaches their duty of disclosure
 - **Indicate** to the client the sort of matters they need to disclose in order to discharge their duty of disclosure
 - Take reasonable steps to find out from the clients matters that ought to be disclosed: *Jones v Envirocom* [2010] EWHC 759, [56]

Element 2: A breach of the duty of care

The standard of care and skill determines the broker’s liability.

- In any contract between insurance broker and client there is implied by law a term that the broker will exercise reasonable skill and care in the performance of its retainer.
- **The standard of care is ‘assessed in the specialist context in which the broker operates’.** The precise nature of that duty depends on the client's instructions.
 - *Messagemate Aust v National Credit Insurance* [2002] SASC 327, [83]

Proving breach of the duty of care

- An insurance broker will breach its duty of care if what the broker did fell short of what it ought to have done.
 - This requires a plaintiff to call expert evidence as to ‘what a reasonably careful insurance broker would have done in the circumstances’.
 - However, this is not necessary if the broker’s breach of duty is ‘rudimentary and obvious’.

Element 3: Proving causation

TEST.

- If the client proves that (*Prosperity Advisers v Secure Enterprises*) –
 - If the broker had exercised reasonable care and skill, on a balance of probabilities, the client would have instructed the broker to seek cover for the risk; and
 - There was a substantial, not a speculative, prospect that the broker would have arranged cover for the risk by that policy or another policy

The court will do its best to value the lost opportunity, even if the chances of the risk being covered falls below 51%, so long as it is not so low to be speculative.

Examples of when an insured has been liable

- Failure to inform insured about an exclusion clause: *Norwest Refrigeration*
 - The broker did not advise the insured that there was an exclusion clause in the policy which stated that the insured had to provide a Certificate of Survey for a vessel. The insured's vessel was destroyed from a fire. The insurer relied on the exclusion clause. The insured then proved that the broker was negligent and was awarded damages for what the insured would have been paid if not for the exclusion clause.
- Failure to disclose insureds previous claims: *Unity Insurance Brokers v Rocco Pezzano*
 - The insurer declined a claim due to non-disclosure. The broker only disclosed one of the insured's 12 insurance claims over the past 13 years. The insurer said it would not have insured the risk if there had been proper disclosure. The insured settled its claim against the insurer for \$900,000 and sued the broker for \$800,000.
 - Evaluating the reasonableness of a settlement: see page 99.
- Failure to obtain workers' compensation: *Pennant Hills Restaurants*
 - An employee became a paraplegic. Pennant Hills was obliged to reimburse a statutory fund for the workers' compensation payment the fund had made and would make to the injured employee for the rest of his life.
 - The HC ordered the broker to compensate Pennant Hills for its liability to make payments into a statutory fund in respect of the worker's entitlements.
- Broker fails to convey material information to the insurer.
 - "Material" in this context means information to determine whether it should accept the risk and if so, on what terms or reject it *Mayne v Nickless; Sofia Optical*

- An otherwise proper insurance claim is valueless or reduced in value.
 - For example, a broker delays passing on information to the insurer for a claim and the insurer fails to pay the claim for breach of a prompt notification condition
- A broker makes an empty promise about a particular outcome, such as a certain type of cover will be procured

Element 4: Contributory negligence

Definition

- Contributory negligence is an insured's failure to take reasonable care for its own interests

Legislation

ICA s 54(2) or (4) allows an insurer's liability to be reduced in full or part because of this

Element 5: remedies

- File an action against the broker or add the broker in proceedings against the insurer

Go to the Financial Ombudsman to file a complaint