# BROKER NEGLIGENCE: CASE LAW UPDATE
# CAUSATION DEFENCES

Causation is, often, an important defence to a negligence claim against an insurance intermediary. This allows an intermediary to argue that even if it has breached a duty of care, no loss has been caused by that breach. This Bulletin provides an update on a recent case, *George on High -v- (1) Alan Boswell (2) New India [2023]*, which highlights the importance of causation defences regarding: (i) policy interpretation; (ii) an insurer's imputed knowledge; and (iii) an insurer being prevented from declining cover. It also provides a warning of the potential pitfalls intermediaries face if they do not provide cover that clearly identifies all the entities that are intended to be insured.

In this case the broker was able to successfully argue its actions had not caused any loss to its client.

## BACKGROUND

The broker placed property damage and business interruption cover for a hotel that was destroyed by fire in 2019. A claim for £2,250,000 was submitted to the insurer on behalf of the named insured in the policy, the freeholder of the hotel: "*The George on High Limited t/a The George in Rye*" ("**GOH**"). The insurer accepted liability for GOH's property damage claim.

A BI claim was also submitted on behalf of George on Rye Ltd ("**GOR**"), which operated the hotel's business. The insurer argued GOR was not a named insured in the policy and declined GOR's claim.

GOR commenced proceedings against the broker, alleging that the broker had negligently failed to ensure GOR was named as a policyholder. The broker then joined the insurer into the same proceedings as a co-defendant on the basis that the policy did actually provide cover for GOR.

## THE CAUSATION DEFENCES

The broker admitted GOR should have been named as a policyholder but denied liability based on two main causation defences:

1. ***Policy Interpretation and the insurer's knowledge of material facts***

The Court had to consider whether GOR was an insured even though it was not named in the policy. The Court found GOR was an insured because:

a) The insurer knew policy premiums were paid by GOR, not GOH.

b) The insurer's third-party claims handlers (i.e. the insurer's agents) knew that GOR operated the business.

c) The insurer's third-party claims handlers had, in the past, agreed claims made by GOR.

d) The insurer's third-party claims handlers had, in the past, referred to GOR as the policyholder.

e) The insurer had declined GOR claims in the past on various grounds, but never on the basis that GOR was not an insured.

f) It would not be commercially sensible for GOR to pay policy premiums if only GOH was a named insured.

Therefore, the Court found a reasonable person would have understood "*The George on High Ltd t/a The George in Rye*" to mean that GOR was a named insured.

A notable aspect of this matter was that the insurer argued that the third-party claims handlers' knowledge of GOR's involvement should not be imputed to the insurer because the insurer's underwriting team did not have the same knowledge. The Court disagreed based on Section 5 of the Insurance Act 2015, which states that information known to the insurer includes matters known to the insurer's agent.

***2. The insurer is prevented from declining cover***.

The Court also found that the insurer was prevented from declining cover because of the way it had previously acted (referred to legally as "*estoppel by convention*"). The Court considered the following conduct by the insurer prevented it from denying cover:

a) The parties to the insurance contract all intended for GOR to be insured.

b) The policy included cover for loss to the business, which GOR operated.

c) The insurer had, historically, paid claims on the basis GOR was an insured.

d) The insurer, via its agent (the third-party claims handlers), acted as though GOR was insured.

e) GOH and GOR had paid the policy premiums because the insurer had represented, by its conduct, that they were both covered.

## RISK MANAGEMENT MESSAGE

This case highlights the need for intermediaries to identify and name all insureds in policy documentation.

Accordingly, it is important to understand a client's corporate structure and, if information is unclear, further enquiries should be made. A failure to do that could expose a broker to a substantial professional indemnity claim.

Ensuring policy wordings name the correct insureds is always going to be the best defence for a broker. Although this case was decided on its own facts, it is a useful reminder that, sometimes, an intermediary will have to rely on a causation defence. It shows that the scope of an insurer's knowledge can be extended to include what was known by its agents and that, in certain situations, an insurer's actions will prevent it from denying cover.

This case is also a reminder that the Court will look at what the commercial purpose of a wording is but, that said, there is uncertainty as to how the Court will decide what the commercial purpose is in any given set of facts. It is always better for the intermediary to clearly record the agreed terms in the policy wording.

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