

BROKER NEGLIGENCE: CASE LAW UPDATE BUSINESS INTERRUPTION AND CONTRIBUTORY NEGLIGENCE

This Bulletin provides an update on a recent case, *Infinity Reliance Ltd v Heath Crawford* [2023], which highlights the importance of insurance intermediaries providing clients with sufficient advice on the different types of available business interruption (“BI”) insurance. In this instance the intermediary was ordered to pay £2.3 million in damages for losses arising from its failure to advise.

The case also highlights how contributory negligence can be a valuable defence to a liability claim against an intermediary. In this instance, the court considered reducing the damages awarded by up to 40%.

BACKGROUND

Infinity Reliance Ltd (“Infinity”) sold gifts online, from a warehouse where it stored and distributed them. In May 2021, a fire broke out at the warehouse. Infinity lost over £12m in sales, and spent £2m fitting out new premises to get its business back up and running. Infinity claimed against its commercial combined policy, which the defendant insurance broker (“HC”) had placed with Aviva.

Aviva accepted Infinity’s claim, but argued that Infinity was significantly underinsured. The BI sum insured was based on Infinity’s calculated gross profit of £24.9 million. However, Infinity’s actual profit was almost £33 million. Therefore, Aviva applied average, which resulted in Infinity recovering only 74% of its losses. This amounted to a recovery of £9.25 million, instead of £12.17 million.

Aviva also argued that there was no cover available for the costs that Infinity had spent fitting out alternative premises.

Infinity subsequently claimed against HC for its uninsured losses, alleging that:

1. HC provided Infinity with misleading information and advice as to how to calculate its gross profits (and therefore the BI sum insured), which led to Infinity purchasing insufficient BI cover.
2. HC should have recommended that Infinity purchase BI cover on a “declaration-linked” basis (rather than a “gross profit sum insured” basis) which would have produced a full recovery under the policy. Infinity had historically purchased such cover, which allowed it to declare the actual performance of its business at the end of the policy period, and pay an adjusted premium in return for the correct amount of BI cover over that period. However, in 2018 HC had recommended that Infinity purchase BI cover on a gross profit sum insured basis, which required Infinity to estimate its gross profits in advance and therefore exposed Infinity to underinsurance if the calculation was wrong.
3. HC failed to obtain a sufficient understanding of Infinity’s business, resulting in a failure to recommend additional cover for the costs of fitting out alternative premises.

THE BROKER'S DEFENCES AND THE COURT'S FINDINGS

HC accepted that it had provided misleading information and advice as to how to calculate its gross profits, and that this had caused Infinity some loss. However, HC argued that Infinity had contributed to that loss by calculating the BI sum insured incorrectly.

In addition, HC raised a causation defence that, even if it had recommended declaration-linked BI cover or additional cover for fit out costs, Infinity would not have purchased such cover in any event. HC relied specifically on Infinity's desire for certainty in relation to its BI premiums.

The Court found that HC was liable in all three respects alleged by Infinity:

1. HC had provided Infinity with a generic document entitled "*How to Calculate Gross Profit*" which contained general information and advice which did not apply to the policy wording that Infinity purchased. However, the Court concluded that Infinity also bore a degree of fault in its resultant underinsurance, as it had not calculated its gross profits correctly in any event. As a result, the Court concluded that the loss recoverable from HC should be reduced by 20%. Had it not been for HC's additional failure to recommend declaration-linked BI cover, the Court had considered reducing the damages by 40%.
2. A reasonably competent broker would have recommended declaration-linked cover to an insured in Infinity's position, particularly given Infinity's unpredictable turnover. The Court was satisfied that had HC properly advised Infinity in 2020 in relation to the types of BI cover available, and the benefits of declaration-linked BI cover, Infinity would have purchased it.
3. HC should have asked more relevant and necessary questions as to how Infinity would cope if there was a major problem at its business premises, which would have resulted in Infinity identifying the potential need to purchase additional cover for fit out costs.

RISK MANAGEMENT MESSAGE

This case is a useful reminder that brokers should maintain records that clearly show:

1. Specific advice (rather than generic guidance) has been given as to how the insured should calculate gross profit estimates / BI sums insured, with reference to the terminology used in the actual policy wording that is being proposed.
2. Clients have been advised on the different types of BI cover that are available, in order that the insured can make an *informed* decision of the most appropriate type of cover for its business. This applies equally when placing new business, and when renewing existing business.

It also highlights the type of reduction in damages awards that a contributory negligence defence can lead to – in this case up to 40%.

This bulletin is for general information purposes only and does not provide a comprehensive or complete statement of the law relating to the issues discussed nor does it constitute legal advice. In addition, by its nature, this bulletin may be superseded by subsequent regulatory or legal developments. Professional advice should be sought where appropriate in relation to any particular circumstances.

All rights reserved. No part of this publication may be reproduced in any material form, whether by photocopying, scanning, downloading to computer or otherwise without the written permission of Griffin Managers except in accordance with the provisions of the Copyright, Designs and Patents Act 1988.

First Issued: March 2024
© Tindall Riley & Co Limited

Managers: Griffin Managers
Regis House
45 King William Street
London EC4R 9AN
Telephone 020 7407 3588
Email griffin@tindallriley.com
www.griffin-insurance.co.uk