

BUSINESS INTERRUPTION COVER & POST-PLACEMENT DUTIES

EUROKEY RECYCLING LTD V GILES INSURANCE BROKERS LTD

In this recent case the Court not only gave some useful guidance on the duties owed by a broker to an insured when placing Business Interruption (BI) insurance but also on some issues of more general application. In particular the Court confirmed that once a placement is complete a broker does not have a duty to act on information received, where there is nothing to alert it to the potential impact of that information on the cover placed.

Background

Giles Insurance Brokers Ltd ('Giles') had placed stock, machinery and business interruption cover for Eurokey recycling Ltd ('Eurokey'), a waste recycling company, for a number of years. At the 2009 renewal meeting it was agreed that the BI sum insured would be increased from £800,000 to £2 million on the basis of a 12 month indemnity period and a projected turnover figure of £9 million. In 2010 cover was obtained with a new insurer, Paladin, this time on the basis of a BI sum insured of £2.5 million and an adjusted turnover figure of £11 million.

Eurokey was interested in obtaining premium finance and so, after the placement was complete, sent Giles its draft accounts for the year ended 31st August 2009. Giles forwarded these to Premium Credit Ltd without reading them and the loan was agreed. Giles was unaware that the accounts included a turnover figure of £17.6 million, meaning that the BI sum insured figure was far too low.

Eurokey suffered a fire at its main plant shortly after the policy incepted and subsequently accepted a reduced settlement under its BI policy on the basis that it was significantly underinsured. Eurokey then issued proceedings against Giles for the balance of its insurance claim, alleging that Giles was negligent in failing to arrange adequate levels of cover.

The Decision

The Judge acknowledged that a considerable factual dispute existed between the parties, particularly in relation to information provided on turnover, but preferred the evidence of the broker, Giles. He found that Giles had provided an adequate explanation of BI cover in 2009 when the sum insured was increased to £2 million. He also found that an adequate explanation had been provided in 2010, when one took into consideration what had been said in the renewal meeting the previous year. The Judge's view was that Giles had no reason to believe that the figures provided by the client were inadequate when advising on levels of cover and there was nothing to alert Giles to the fact that figures in the accounts subsequently provided gave cause for concern. On the facts of this case Giles was entitled to act as a post box and pass the accounts on without reading them.

The Judge recognised that placing BI cover is not a simple matter and outlined the following principles as applying to BI insurance:

- It is for the commercial client to calculate the BI sum insured and appropriate indemnity period but the broker has a duty to provide sufficient explanation to enable the client to do so.

- To do this the broker will need to take reasonable steps to establish the nature of the client's business and its insurance needs. This does not mean that the broker is expected to conduct a detailed investigation into the client's business. However, it is common practice now to offer clients an enhanced level of service for an additional fee and brokers need to remember that a client declining to pay for enhancement is not agreeing to a diminution in the normal (i.e. unenhanced) service that can be expected of its broker. The client, in such circumstances, is not to be treated as a "cut-price" client to whom less attention than usual, or a lower standard of service than is normally expected, can be applied.
- The nature and scope of a broker's obligation to assess a commercial client's BI insurance needs will depend on matters such as the client's sophistication and the number of times the broker has met the client in the past. Whilst BI is an insurance that is only going to be bought by commercial clients, who will have an understanding of their own business, the level of sophistication will still vary enormously and it cannot be assumed that an SME will understand the nature of the insurance.
- A client may not need annual repetition of advice previously given and understood but this will depend on the responsible personnel within the business remaining the same. It also assumes that the giving of advice can be properly demonstrated by documentation and the onus is likely to be on the broker to show this.
- If a client who appears well informed about his business provides a broker with information, the broker is not expected to verify that information unless he has reason to believe it is not accurate.

RISK MANAGEMENT MESSAGE

Although the guidance given by the Court was specifically in the context of BI insurance it reinforces some points of general application:

- The importance of keeping records of advice given at meetings. The advice given by the broker in the context of the 2010 placement was considered adequate when considered alongside the advice which the broker was able to demonstrate had been given at the previous renewal. The fact that the Court preferred the witness evidence of Giles to that of Eurokey was crucial to its successful defence of the case.
- What is required of the broker will depend to a degree on the sophistication of the client and this can vary enormously. SMEs, for example, cannot be assumed to have an understanding of insurance arrangements.
- A broker's duty to a client will not be diminished where its firm offers an enhanced service at additional cost which a client has decided not to pay for.
- A broker does not have a general duty to alert a client to a potential coverage issue post-placement where there is nothing to alert the broker to the information that may have an effect on cover. However, this point needs to be treated with caution since it arose out of a specific set of facts and in other cases it has been clear that a broker has a responsibility to do more than act as a mere post-box when handling post-placement information.

Finally, the Judge indicated that he would have awarded a discount of 50% for contributory negligence had Eurokey's claim against Giles been successful. This was on the basis that Eurokey understood the figures within its accounts and should have realised that they were not the same as the figures being used to obtain insurance. Whilst this is, again, fact specific, it is nevertheless a welcome observation from the Judge.

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