STANDING ON YOUR RIGHTS: Norman Hay PLC v Marsh Ltd [2025] EWCA Civ 58

The recent Court of Appeal case of *Norman Hay v Marsh Limited* [2025] EWCA Civ 58 (30th January 2025) has clarified the law on damages in an insurance brokers' case.

Facts

The Claimant company was Norman Hay. An employee of IMP, a subsidiary of Norman Hay, travelled to the US and was killed in a driving accident in which the driver of the other car (a Ms Sage) was seriously injured. Ms Sage wished to bring a claim against the employee's estate and also Norman Hay (and IMP) as vicariously liable for his negligence. Norman Hay cannot claim relevantly on its insurance policy as the policy does not cover claims in the US for hire car accidents and sued its insurance broker (Marsh) for failing to recommend or obtain such insurance. Ms Sage's case was settled on terms by Norman Hay and IMP.

Summary Judgment Application

Amongst the defences raised by Marsh was that Norman Hay had not even alleged that it was liable to Ms Sage and therefore no insurance policy would have paid out (as it is a necessary element of a claim on such a policy that the insured is liable to the third party). On this point (and others[1]) Marsh sought summary judgment which was refused at first instance by Picken J but Marsh appealed to the Court of Appeal.

Relevant Law

The Court of Appeal confirmed that its earlier decision in *Fraser v B.N. Furman (Productions) Ltd* [1967] 1 WLR 898 remained good law.

It is long-established that in order to succeed in a claim against an insurer, an insured must plead and prove that it is actually liable to the third party. Even if the insured has settled with the third party or obtained a judgment against it by a tribunal, it is still required, if the insurer refuses to meet this liability and puts that liability into question, to show that it was in fact liable to the third party notwithstanding the settlement or judgment. The court may hold that there was in fact no actual liability and that an insured who thought, or another tribunal which

[1] There was an argument on reflective loss which did not advance matters according to the CA.

decided, that there was liability was in error either on the facts or the law or both: *AstraZeneca Insurance Co Ltd v XL Insurance (Bermuda) Ltd* [2013] EWCA Civ 1660, pars 16 – 17)

However, no such rule applies to a claimant (*ex hypothesi* not insured) in its claim against an insurance broker for failing to recommend or obtain appropriate insurance for it. That is because of the more expansive approach to proving loss in negligence cases of this kind which is determined on the basis of the loss of a chance. The claimant in such a case may say (in order to establish causation) that had such a policy or term of policy been taken out that an insurer would not necessarily have stood on its strict contractual rights (to avoid cover or indeed dispute that any cover existed) but might have for a range of reasons determined that the prudent or proper approach would be to make payment to the claimant insured in whole or part.

That is the logic of the reasoning in *Fraser v BN Furman*, supra, in which Diplock LJ said: "What damage [the claimants] have suffered does not depend upon whether [the insurers] would have been entitled as a matter of law to repudiate liability under their standard policy, but whether as a matter of business they would have been likely to do so. What the [claimants] have lost is the chance of recovering indemnity from the insurers. If [insurers] would not have been entitled to repudiate liability in law, *cadit quaestio*[2]; the damages recoverable would amount to a full indemnity. Even if they would have been entitled in law, however, to repudiate liability, it does not in my view follow that the [claimants] would be entitled to *no* damages. The court must next consider in that event, what were the chances that an insurance company of the highest standing and reputation… notwithstanding their strict legal rights, would, as a matter of business, have paid up under the policy."

The Court of Appeal in *Norman Hay* endorsed what was said by Diplock LJ in *Fraser v BN Furman* and also invoked the statement in *Perry v Raleys Solicitors* [2019] UKSC 5, [2020] AC 352 to the effect that (at par 20): "For present purposes the courts have developed a clear and common-sense dividing line between those matters which the client must prove, and those which may better be assessed upon the basis of the evaluation of a lost chance. To the extent (if at all) that the question whether the client would have been better off depends upon what the client would have done upon receipt of competent advice, this must be proved by

[2] The issue does not arise.

the claimant upon the balance of probabilities. To the extent that the supposed beneficial outcome depends upon what others would have done, this depends upon a loss of chance evaluation."

Norman Hay – Decision

On the facts of *Norman Hay,* the CA stated that the case was not apposite for summary judgment.

a) Although the case pleaded may have been rather vague and general and lacked specificity as to the putative policy which should have been in place, this was not fatal to the claim.

b) In assessing the case on established loss of chance principles, the actual liability of the insurer would of course be of relevance. If it were clear that the liability of the insurer was clear then there would be no loss of a chance discount. Equally if it were clear that there would be no claim then the claim would not reach the standard of a real and distinct as opposed to merely negligible prospect of success (par 35).

c) The key point – it seems – was the fact that a court at trial would have to determine whether Norman Hay was itself liable to Ms Sage (as to which there was presently "no basis" to assume that it was) but that IMP clearly would have had a claim on a conventional insurance policy were its employee to have been acting in the course of his employment.

d) This was summarised by Males LJ at par 36: "So what would the putative insurer have done if faced with a claim for indemnity? Would it have taken the somewhat academic point that the only valid claimant was IMP and not Norman Hay, or would it have taken the pragmatic view that as it was going to have to pay anyway, it might as well take over the defence of the claim by Ms Sage?"

Some might feel that the claimants did quite well in the outcome. But, ultimately, the complaint that Norman Hay refused to plead that either it or IMP was actually liable to Ms Sage was not a "knock-out blow". Even if Marsh could prove at trial that neither Norman Hay

nor IMP were, despite the substantial settlement sum paid to her, actually liable to Ms Sage, that would be just one factor in the counterfactual analysis as to the assessment of the loss sustained by Norman Hay.

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