Loss of a chance in brokers' negligence cases: *Norman Hay plc v Marsh Ltd* [2024] EWHC 1039

In a claim against an insurance broker, when does the claimant need to prove on the balance of probabilities that the hypothetical cover would have responded, and when is this a loss of a chance issue? According to Picken LJ, where the essence of the claim is that the broker's negligence has resulted in no policy being available at all, there is – at least arguably – no need for the claimant to show on the balance of probabilities that the hypothetical insurer would in fact have been liable and would in fact have paid out on the policy.

Facts[1]

The claimant company, NH, had settled, for US$5.5m, a claim arising from a serious road traffic accident in the US allegedly caused by an employee of one of its subsidiaries. The employee had been driving a hire vehicle and had not taken out insurance as part of the hire arrangement. The basis for the claim against Marsh, NH's insurance broker, was based on the allegation that it had failed to arrange insurance that would have indemnified the claimant in the event of third party liability being incurred by employees driving hire cars in the course of NH's business.

Marsh applied for strike out and/or reverse summary judgment, arguing that Marsh could not be liable to NH because NH, a holding company, would have had no valid claim against any insurer because it could not have been legally liable to the third party. Indeed, Marsh said, it had not even been pleaded that NH had been liable to the third party.

The argument, in reliance on *Dalamd Ltd v Butterworth Spengler Commercial Ltd* [2018] EWHC 2558 (Comm), was that where the claimant claims to have been deprived of cover which would have indemnified in relation to a particular loss, the Court should determine on the balance of probabilities whether the claimant would have had a valid claim on the hypothetical policy. Since, in any claim against a hypothetical insurer, NH would have had to

[1] Simplified for ease of exposition

prove on the balance of probabilities that it was in fact liable to the third party, the same standard of proof should apply in the claim against the broker.

Decision

Picken J refused to strike out the claim on that basis. Although he accepted that, as between a policyholder and its insurer, actual liability in at least the amount of the settlement must be proved, it did not follow that the same was true as between client and broker. It was open to the court to consider whether the putative insurer would realistically have disputed the client's entitlement to payment. *Dalamd* was not authority for the proposition that the merits of the putative claim against the insurer always had to be determined on the balance of probabilities.

In particular, *Dalamd* was distinguishable because the issue in that case arose in the context of the claimant's decision, in the face of its insurer's initial declinature, to proceed straight to a claim against the broker. Butcher J held that it was necessary in "an action against the broker for a breach consisting simply of creating an uncertainty as to cover" for the Court to determine on the balance of probabilities whether the insurers were right to decline cover. The instant case was different because the effect of the broker's alleged negligence was to deprive the client of the opportunity of bringing an insurance claim at all – a scenario which Butcher J in *Dalamd* had accepted might give rise to "different considerations".

Accordingly, the claim was allowed to proceed.

Discussion

The judgment sets out a review of the caselaw and of passages in several leading textbooks, and the judge's synthesis of those authorities prompts some reflections about the application of the loss of a chance approach in brokers' negligence litigation generally.

At [87] and [89] the judge cited with approval a passage in *Simpson, Professional Negligence and Liability* in which was suggested that the approach in *Dalamd* gives rise to the risks inherent in conducting a "trial within a trial", which the loss of chance approach is designed to avoid, and a subsequent passage citing *Perry v Raleys Solicitors* [2019] UKSC 5 "which draws a 'bright line' distinction in negligence causation between (a) facts which the claimant has to prove about his own actions and (b) facts which the claimant has to prove about the actions

of others or about future events. Only the claimant's own actions have to be proved on the balance of probabilities; those in category (b) are assessed on lost chance principles."

The earlier discussion, however, is not entirely in keeping with that approach. At [66], for example, the judge appears to suggest that the claimant essentially gets "two bites at the cherry" when it comes to causation of loss; he said (emphasis added):

"In my view, Dalamd should not be treated as authority that the only way in which a claim against an insurance broker can succeed is if the Court is persuaded, on a balance of probabilities, that the claimant (the client of the insurance broker) would have recovered under the putative policy of insurance which, but for the broker's negligence, the claimant would have had. If that can be established, then, the claimant will recover in full; if, however, this is not established, but the Court were to conclude that the claimant has nonetheless been deprived of the chance that a recovery would have been made had the putative insurance been in place, then, there will be a recovery but it will not be in full and will instead be arrived at on a loss of chance (and so percentage) basis."

The judge went on to say that as a result "it would be open to NH to invite the Court at trial to conclude that, had a liability policy been in place which covered US hire car risks, then, NH would have obtained an indemnity either in full (if NH can establish that it was liable to Ms Sage as she alleged) or in a lesser amount assessed on a loss of a chance basis because the Court is persuaded that, in all likelihood, the putative insurer would have taken a pragmatic and commercial stance which would have seen it pay a partial indemnity".

At first glance these remarks appear to sit uneasily with the approach taken in loss of a chance claims in other contexts, for example solicitor's negligence, where it is generally accepted that any claim for the loss of a benefit that would have had to be conferred by a third party is assessed on a loss of chance basis (and accordingly the claimant is unlikely ever to recover "in full" what he or she would have gained if the lost opportunity had come to fruition: it is not open to such a claimant to elect to prove that). There is also a lack of clarity around the nature of the loss of chance analysis, where "likelihood" only applies to the threshold test. Although it is often said in the context of mishandled litigation that, as a matter of common sense, the valuation of the lost claim is approximately the same as the value for which it would "probably" have settled, it is suggested that it is helpful to keep the questions conceptually

distinct: it is not necessary in a lost litigation claim to show that the opposing party would (probably) have settled, although a claim's having "more than nuisance value" is relevant to the question of whether the claimant has in fact lost anything of any value at all.

At [84] the judge drew a distinction between a case like *Dalamd*, where the court said that "the issue of whether or not the policy was voidable depends on the facts in existence at the time of the placement or renewal of the insurance [so] this approach [i.e. the balance of probabilities] is consistent with the ordinary approach of the courts to determining matters of past fact" and the instant case, which "entails asking what would have been the position had there been a policy of insurance in place [and] necessarily involves looking at loss of chance-type aspects" concerning the nature and terms of the hypothetical insurer and policy itself.

It is important to remember that *Dalamd* did not rule out the use of a loss of chance analysis altogether – it still applied to the question of whether the (actual) insurer would have taken the coverage points available "as a matter of business". The aspect of uncertainty that was dispensed with was uncertainty as to what would have been decided about the validity of those points had the coverage dispute been determined by an arbitrator or judge. Consistency with Perry, though, would entail treating that decision, too, as a loss of chance question, potentially to the detriment of claimants.

Can these apparent inconsistencies be reconciled? Perhaps. The "two bites" analysis is derived from Lord Diplock's speech in *Fraser v Furman* [1967] 1 WLR 898, where he said:

""What damage they have suffered does not depend upon whether Eagle Star [the insurer] 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 employers have lost is the chance of recovering indemnity from the insurers. If Eagle Star 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 employers would be entitled to no damages. The court must never consider in that event, what were the chances that an insurance

[2] The question falls away, for those practising law in the 21st century.

company of the highest standing and reputation, such as Eagle Star, notwithstanding their strict legal rights, would, as a matter of business, have paid up under the policy."

In other words, if on a particular set of facts the insurer would not have been entitled in law to refuse to indemnify, the court will assume that the insurer would have followed the law. This could be seen as a policy-based presumption, similar to the rationale underlying *Perry* which is that the law will not allow a claimant to assert that he or she would have brought a dishonest claim. But the contrary conclusion does not prevent the claimant from asserting that some payment would have been forthcoming as a matter of business, as accepted in *Dalamd*. It remains open to the court to determine that the merits of one position or the other were so strong that no, or very little, loss of a chance discount is applicable. In *Dunbar v A&B Painters Ltd* [1986] 2 Lloyd's Rep. 38,[3] the insurer was legally entitled to refuse to indemnify, but the court concluded that the chance of the insurer repudiating the claim was nil.

Surely, though, as Simpson suggests, there will remain cases where it is inappropriate to try the "past facts" in the brokers' negligence claim in order to determine whether the insurer would have been legally entitled to refuse the claim in the first place. In such a case, it may be the broker who chooses to raise the loss of a chance analysis in the hope of reducing the value of a reasonably strong claim.

Conclusion

As this was an application for early disposal of the claim, Picken J's decision of course has no binding significance, but simply reflects his view that the point is arguable. However, the decision is consistent with earlier caselaw which provided the genesis for the loss of a chance analysis to causation in professional negligence, and is encouraging for claimants and those who represent them, suggesting that *Dalamd* may be restricted to cases where a broker is sued in relation to a dispute on an existing policy without an attempt to pursue the insurer.

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[3] A brokers' negligence claim which was actually the source of the loss of a chance doctrine as applied to solicitors' negligence claims in *Allied Maples Group v Simmons and Simmons* [1995] 1 WLR 1602.