

Newsflash

"My Broker Burned Down My Premises!"

Can an insurance broker be blamed for a fire at a client's premises? **Philip Atkinson** and **Joanne Staphnill** consider the recent Court of Appeal decision in *Jones v Environcom Ltd & Anor* [2011] EWCA Civ 1152.

In this appeal Environcom argued, in effect, that if the brokers had given proper advice that its business was effectively uninsurable, it would have changed its business practices so that the uninsured fire would never have occurred. Instead of just alleging that it was the brokers' fault that Environcom was uninsured, the fire itself was blamed on the brokers!

Environcom did not succeed. Environcom had not pursued this argument at first instance, so the Court of Appeal was able to refuse the appeal for technical civil procedure reasons, and did not formally need to determine whether the brokers owed any such duty in this case.

The Court of Appeal clearly had its doubts about whether brokers are generally responsible for their clients' property as opposed to just their insurance cover. Environcom had not specifically alleged that its brokers had taken on any additional duty to advise Environcom about the conduct of its business so as to eliminate risk. However, many brokers do complement their core broking services with risk management advice, so this case highlights an important issue.

If a broker offers risk assessment and management as part of its service, then it is possible (depending on the circumstances) that a claimant could succeed with an argument that a fire (or other loss) was the broker's fault. This could put the broker on the hook for any loss not covered by insurance, even if the lack of insurance was not the broker's fault. Brokers that offer risk assessment and management services should consider whether they have sufficient exclusions or limitations of liability in place, to mitigate the risk of a big compensation claim.

Factual background of the Environcom case

Environcom's business was recycling electrical goods waste. Miles Smith Insurance Brokers had placed commercial combined insurance covering property and business interruption risks for them for a number of years. There was a serious fire at Environcom's premises and they put in an insurance claim. The insurer declined the claim and sought to avoid the policy on the grounds of non-disclosure related to the use of plasma cutters in the process of de-manufacturing fridges, as well as the occurrence of other fires and previous claims.

The insurer applied for a declaration of non-liability and Environcom joined the brokers as a third party to the proceedings alleging negligence in the broking of the policy. The insurer and Environcom settled their disputes at mediation, Environcom receiving £950,000 inclusive of costs. Environcom continued proceedings against the brokers for the balance of their losses, alleged to be around £6million, on the basis that they failed to advise properly about the duty of disclosure, which led to the declinature of the claim.

The first instance decision

In the first instance decision¹, although the client succeeded in proving that the brokers had breached their duty to advise about proper disclosure, Mr Justice David Steel held that Environcom had failed to prove that they had suffered any loss as a result. He concluded that if insurers had known the full story of the history of the client's fires and the dangers inherent in their business practices, neither they nor any other insurer would have been willing to insure the client on any terms. Even if some form of insurance had been available, it would have included warranties against the use of plasma cutters, which had probably caused the fire.

The Appeal

The Court of Appeal dismissed Environcom's appeal. In the Court of Appeal Environcom put its case slightly differently. It sought to argue that, if it could establish that it would have followed advice from the brokers to reduce the risks inherent in its business (presumably such as discontinuing use of plasma cutters), the consequence would have been that the fire would not have occurred at all.

Environcom's argument was, in effect, that the loss did not arise out of the failure to obtain cover, but out of failure to ensure that Environcom's working practices were such as to render cover unnecessary. It was said that the brokers were therefore liable for causing the fire itself, not just for causing the failure of cover by failing to advise about proper disclosure.

This led to the procedural issue of whether this new presentation of the case, not pleaded at the first instance trial, could be raised on appeal.

The possibility of the client running a "no fire" case against the brokers had been aired very briefly during the trial during closing submissions² and addressed in the first instance Judgment³. The Judge noted that the claim was not pleaded at that stage in any alternative way, but if it had been, he considered that the loss claimed was not of the kind or type which the brokers ought fairly to be taken to accept liability. Even taking the issue of remoteness by reference to more traditional lines, the Judge was not persuaded that the loss sustained was within the reasonable contemplation of the parties as likely to result from the breach of retainer. He considered that the fire and consequential loss was not caused by the brokers, but by the client's own failure to identify and enforce appropriate fire precautions by way of changes in the whole working process without which the process was effectively uninsurable.

In the Court of Appeal, Lord Justice Rix noted in passing that it seemed on its face that the trial Judge's reasoning that the loss was not within the reasonable contemplation of the parties as likely to result from breach of the retainer had much to commend it. However, those observations were *obiter dicta*.

On Appeal, the client had sought permission to amend its case to plead the "no fire" point. Lord Justice Rix commented on how the proposed draft pleading did not contain any account of the alleged duty of the brokers and its breach of which the new case was the alleged consequence:

"It is, after all, one thing to take a view, on a hypothetical basis which the judge had in any event rejected, as to whether a fire could or would have been avoided: it is quite another thing to identify and define the necessary duty, its breach, its scope, and in this context decide whether a broker is responsible for his client's property as distinct from its insurance cover."⁴

As the Court of Appeal noted, permission to introduce a late pleading which raises a fundamentally new case is unlikely to be granted even in the court of first instance. A new point of law may be raised on appeal, but normally only when there is no possibility of injustice occurring. The Court concluded the "no fire" case was a complex issue of mixed fact and law that had not been pleaded or analysed at first instance (save in the judge's brief concluding and dismissive observations), so it was not in the interests of justice or fairness to allow the application.

Summary

Uninsured clients will always try to push the envelope of brokers' duties in order to obtain compensation. At the same time, all brokers operate in a competitive market and often provide 'added value' services such as risk management advice to differentiate themselves. Brokers should consider whether any ancillary services they offer could result in unexpected liabilities.

- 1 Jones v Environcom Ltd & Anor [2010] EWHC 759 (Comm) (15 April 2010)
- 2 See Jones v Environcom Ltd & Anor [2011] EWCA Civ 1152 at paras 14-17
- 3 Jones v Environcom Ltd & Anor [2010] EWHC 759 (Comm) at paras 108-109
- 4 Jones v Environcom Ltd & Anor [2011] EWCA Civ 1152 at para 20

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