SAVED BY ADEQUATE ADVICE

The UK High Court's recent decision in *Eurokey* demonstrates the high standard of conduct required of brokers when placing business interruption cover. The decision, which is likely to be accepted by Australian courts in future, requires brokers to take steps that aren't always considered. BY **DAMIAN CLANCY** AND **RORY BUTLER**

EUROKEY RECYCLING LTD VS GILES INSURANCE BROKERS LTD

THE CASE

In Eurokey Recycling Ltd v Giles Insurance Brokers Ltd [2014] EWHC 2989 (Comm), the property of the insured was damaged by a fire, which occurred in May 2010. The broker had arranged combined cover for the insured, including cover in respect of business interruption.

The company's turnover rose from £3.2 million in 2005 to £16.8 million in the financial year ending August 2009.

Evans, a representative of the broker, met with Bisland, a representative of the insured, in February 2009 regarding renewal of the policy for 2009/2010. Evans brought a pre-renewal report and went through it line-by-line with Bisland. In relation to business interruption cover, the figure of £800,000 was crossed out and replaced with a figure of £2 million.

The products liability section of the pre-renewal report required the broker to insert the turnover figure. Evans inserted a figure of £11 million. The court also accepted Evans' evidence that he gave Bisland a detailed explanation of how to calculate gross profits at this meeting, for the purposes of business interruption cover. The pre-renewal report was completed on the basis of the insured's 2006/2007 accounts, as its 2007/2008 accounts had not been finalised at the time of the February 2009 meeting.

Renewal of the insured's policy was due in April 2010. Evans and Bisland met on 5 March 2010. There was a dispute as to what Bisland told Evans regarding the insured's projected turnover, however, it appears that Evans left the meeting believing that the correct figure was £11 million. There was a further meeting on 9 April 2010 where Evans provided to Bisland a renewal report, which stated that the insured's annual turnover was £11 million. The next day, the renewal report was emailed to the insured. Bisland said that he never noticed the relevant figures in any of these documents, which consisted of 15 pages. Bisland then instructed the broker to place cover with Paladin on 13 April 2010.

Following the fire, the insured sued the broker for £2.9 million in respect of the business interruption component of its claim.

THE DECISION

The High Court of England held that the insured should fail in relation to its business interruption cover claim as the cover was placed after adequate explanation of the relevant calculations and information required.

> "THE BROKER WILL NEED TO TAKE REASONABLE STEPS TO ASCERTAIN THE NATURE OF THE CLIENT'S BUSINESS AND ITS INSURANCE NEEDS."

While a broker is not expected to calculate the business interruption sum insured or choose an indemnity period, both of which are matters for the commercial client, the broker must provide sufficient explanation to enable the client to do so.

In order to do this, the broker will need to take reasonable steps to ascertain the nature of the client's business and its insurance needs. However, an insurance broker providing this type of service is neither required nor expected to conduct a detailed investigation into a client's business.

The nature and scope of a broker's obligation to assess a commercial client's business interruption insurance needs will depend upon the particular circumstances of the case, including the client's sophistication. In that regard, although business interruption insurance is for commercial clients, the level of client sophistication will vary.

If a client who appears to be 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 that it is not accurate. Further, although as a matter of common sense a client may

not need annual repetition of advice previously given and understood, this assumes that the personnel responsible has remained the same.

In this case, the judge himself agreed that the concept of gross profits is not difficult to grasp and that the broker was not at fault.

THE IMPACT ON BROKERS

Most insurance brokers would agree that when a client does not have business interruption cover and an unforeseen event occurs, which interrupts the conduct of their business for at least eight to 12 weeks, that client's business is highly unlikely to recover from the interruption.

We have seen a growing number of cases where clients make claims against their insurance brokers for failing to advise them to obtain or retain business interruption cover, or failing to advise them of the importance of ensuring that their level of business interruption cover is adequate to cover the client's annual fees and income.

Surprisingly, the law of Australia presently lacks a comprehensive statement of principle in this area. However, the decision in Eurokey is consistent with the underlying principle in previous Australian cases.

Brokers must adopt a proactive approach in ensuring that their client understands the importance of having business interruption cover and how the cover functions. In particular, brokers must take care to advise the client that almost all business interruption cover wordings contain underinsurance clauses, which effectively reduce the extent of client's indemnity by an amount proportionate to the extent of the underinsurance.

If nothing else, the decision in Eurokey aptly demonstrates the onerous degree of proactivity that courts require of brokers; the broker is effectively required to facilitate an understanding in the client's mind, which enables the client to conceptualise the consequences of the cover and the policy provisions. ■

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