

# No Pandemic Cover?

Claims Against Insurance Brokers

# Sources of Brokers' Duties

## Contract

- The core source of brokers' duties will be the contract pursuant to which they act.
- In particular, the contract will likely set out whether the broker has undertaken an advisory role in arranging cover and whether the broker should be providing an opinion on the scope of cover.
- The contract will also set out limitations on liability, although whether these are enforceable is another question entirely.
- The contract will expressly and impliedly incorporate a duty to use reasonable care and skill.

# Sources of Brokers' Duties

## Tort

- The existence of a concurrent duty of care in tort for brokers has been recognised for a long time with cases going back to the 1920s on the topic.
- This raises the potential for a duty of care that exceeds the duties which arise in contract if, as a matter of fact, the broker exceeds his contractual obligations and assumes responsibility for advice which goes beyond that which he was contracted to provide.

# Sources of Brokers' Duties

## Statute

- Under section 138D(2) of the Financial Services and Markets Act 2002:  
*“A contravention by an authorised person of a rule made by the FCA is actionable at the suit of a private person who suffers loss as a result of the contravention, subject to the defences and other incidents applying to actions for breach of statutory duty.”*
- Insurance brokers are governed by the Insurance: Code of Business sourcebook (ICOBS)
- Of particular relevance is ICOBS 5 which deals with identifying clients' needs and advising and ICOBS 6 which deals with the provision of information.

# Sources of Brokers' Duties

## Equity

- Brokers usually act as the agent for the insured which gives rise to fiduciary duties.

# Standard of Care

- In 1833 the standard of care was formulated on the basis that:  
*“...the defendant did not contract that he would bring to the performance of his duty, on this occasion, an extraordinary degree of skill, but only a reasonable and ordinary proportion of it; and it appears to us, that it is not only an unobjectionable mode, but the most satisfactory mode of determining this question, to show by evidence whether a majority of skilful and experienced brokers would have come to the same conclusion as the defendant. If nine brokers of experience out of ten would have done the same as the defendant under the same circumstances, or even if as many out of a given number would have been of his opinion as against it, he who only stipulates to bring a reasonable degree of skill to the performance of his duty, would be entitled to a verdict in his favour.”*  
Per Lord Tindal CJ in *Chapman v Walton* (1833)10 Bing. 57

# How might liability arise?

- In each case, it will depend on why the insured was not, in fact, insured for the business interruption consequences of the pandemic.
- Did the broker fail to adequately assess the client's needs?
- Did the broker fail to effect insurance which met the client's requirements?
- Did the broker have a discretion that he failed to exercise reasonably?
- Did the broker fail to advise on the terms of cover?
- Did the broker fail give proper advice?

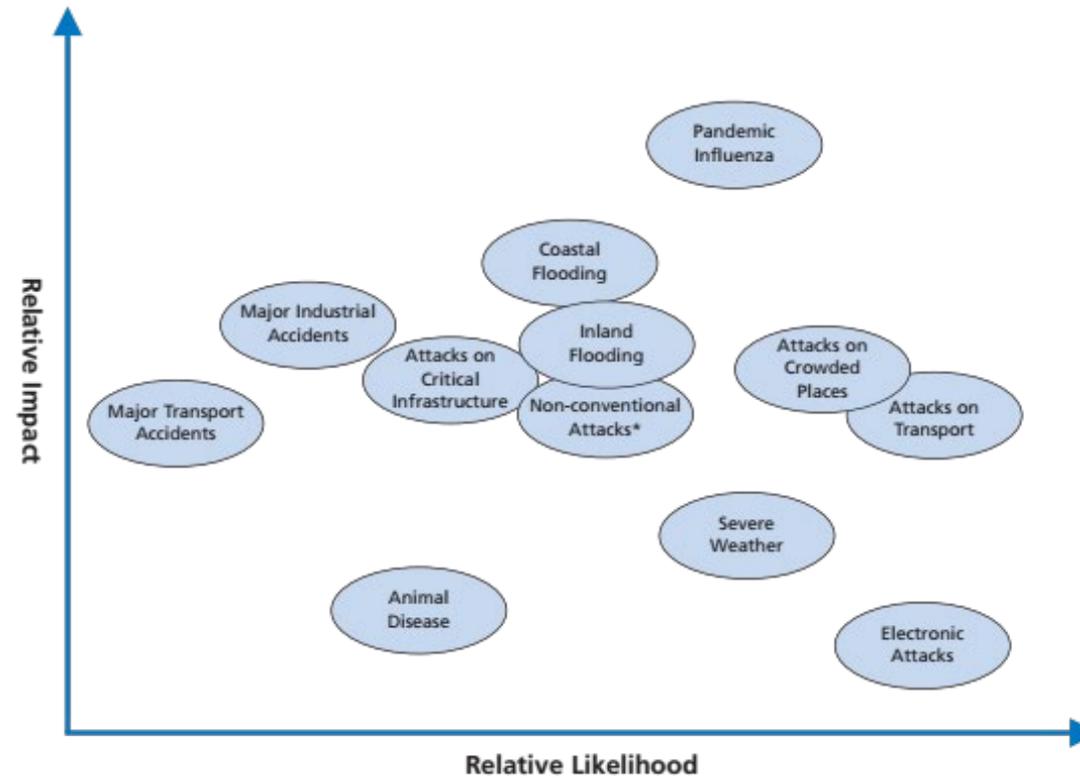
# Pandemic Points

- Based on the FCA test case it appears likely that some business interruption policies will respond to the pandemic and some will not.
- But pandemics have been on the National Risk Register since 2008.
- And it wasn't considered an inconsequential risk either...

# Pandemic Points

National Risk Register (2008)

Figure 1: An illustration of the high consequence risks facing the United Kingdom



# Pandemic Points

- The risk register focusses predominantly on the risk of influenza but it also notes the emergence of SARS and Covid-19 is not the first disease to hit the headlines in the last 20 years.
- MERS, bird flu, swine flu have all been in the headlines.
- If you are in the business of risk management, should you have been giving a high level of priority to the potential disruption of a pandemic?
- Should brokers have been alert to limitations on cover arising as a result of disease?

# Pandemic Points

- If, however, non-responsive policies were widespread, would a broker be negligent in recommending one for his client or not advising on the point?
- If 9 out of 10 brokers say they would not, Lord Tindal CJ's formulation would seem to suggest they are not negligent.
- But it is open to the court to reject the view of the profession if the court concludes that the view of the profession is not a reasonable one (*Bolitho v City & Hackney HA* [1998] A.C. 232)
- If you were covered for flooding or severe weather events, shouldn't you also be covered for pandemics?

# Damages

- The starting point for measuring damages is that a claimant is entitled to the difference between what they were paid by any insurance and what they would have been paid had the broker acted properly.
- But if the policy that was required was more expensive than the policy the client had, would the client have taken out the more expensive policy?
- If it can be proved that the client, if properly advised, would not have taken the more expensive cover, the negligence is not causative of the loss.

# Damages

- Further losses?
- It was held by the Court of Appeal in *Ramwade Ltd v WJ Emson & Co Ltd* [1987] R.T.R 72 that consequential losses were not recoverable. The plaintiff was seeking to recover hire charges for hiring a replacement lorry when his broker's negligence meant he was not insured. This was rejected by the Court of Appeal on the basis that he could not recover as a result of his own impecuniosity (no longer good law) or on the basis that he could not recover damages on damages, his hire losses arising out of the defendant's failure to pay damages to him sooner.

# Damages

- But in *Arbory Group Ltd v West Craven Insurance Services (A firm) [2007] PNLR 23*, it was held by the High Court that consequential loss of profits were recoverable in the context of business interruption insurance.
- The whole purpose of business interruption insurance is to inject additional funds into a going concern. The failure to adequately insure a business is not just that it will not receive the insurance payout but also that this may adversely affect the profitability of the insured's business and this is a reasonably foreseeable consequence of a breach of duty by a broker.
- Of course, if the pandemic means there were no profits to be made, the point may quickly become moot.

# Key Points

- Businesses which are not covered by business interruption insurance are likely to be well advised to consider the potential of a claim against their broker.
- But the critical thing in most cases will be the facts. What was the broker asked to do? What did the broker do? What did the contract provide for?
- A key factor is likely to be the view the courts take on the risk of a pandemic. Should this have been considered a real and significant risk prior to 2020? Does it make sense that a business interruption policy might respond to weather events but not to a pandemic?