Neutral Citation Number: [2025] EWCA Civ 58

Case No: CA-2024-001233

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
KING'S BENCH DIVISION
COMMERCIAL COURT
Mr Justice Picken
[2024] EWHC 1039 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/01/2025

Before:

SIR GEOFFREY VOS, MASTER OF THE ROLLS
LORD JUSTICE MALES
and
LORD JUSTICE BIRSS

- -

Between:

NORMAN HAY PLC (in Members' Voluntary Liquidation)	**Respondent /Claimant**
- and -	
MARSH LIMITED	**Appellant/ Defendant**

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- -

Daniel Shapiro KC & Hamish Fraser (instructed by **DAC Beachcroft LLP**) for the **Appellant**
Graham Chapman KC & Marie-Claire O'Kane (instructed by **Mishcon de Reya LLP**) for the **Respondent**

Hearing date: 21 January 2025

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Approved Judgment

This judgment was handed down remotely at 10.30am on Thursday 30 January 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

LORD JUSTICE MALES:

1. This is an appeal by the defendant insurance broker against the decision of Mr Justice Picken refusing to strike out the claim or grant reverse summary judgment. In summary, the issues are whether the claim is bound to fail because (1) the policy which it is alleged that the brokers negligently failed to arrange would not have provided the claimant with an indemnity in the events which occurred, and (2) the loss which the claimant suffered was merely a diminution in the value of a subsidiary company which is irrecoverable as reflective loss.

2. I have concluded that the appeal must be dismissed. Although there may be difficulties in the claimant's way, this case is not suitable for striking out or summary judgment and must go to trial.

The facts

3. The claimant in the action and the respondent to the appeal is Norman Hay Ltd ('Norman Hay'), a company which is now in members' voluntary liquidation. It is or was a holding company, whose subsidiaries were world leaders in specialist chemicals, sealants and surface coatings. The subsidiaries were located in different jurisdictions throughout the world and their employees frequently travelled for business purposes.

4. The defendant and appellant is Marsh Ltd ('Marsh'), a commercial insurance broker whose business includes advising upon and placing global programmes of insurance for groups of companies operating in different jurisdictions.

5. Marsh was retained by Norman Hay as the insurance broker to the companies within the Norman Hay group. In that capacity, Marsh placed cover on a country-by-country basis for the policy year 2017/2018 and under a global liability programme for the policy years 2018/2019 and 2019/2020.

6. In this action Norman Hay alleges, in outline, that Marsh failed to arrange worldwide (including US) non-owned auto cover under Norman Hay's group travel insurance policy. Non-owned auto cover is motor liability insurance cover in the event of cars being hired. It is said that, as a result, Norman Hay and a German subsidiary, Internationale Metall IMPrägneier GmbH ('IMP'), had no insurance in place which would or might have indemnified them against liability for a road traffic accident which occurred in Ohio in the United States when a car was driven by an employee of IMP without insurance.

7. The employee in question was Mr Nigel Kelsall. For the purpose of this appeal it was common ground that he should be treated as an employee, although if the case goes to trial Marsh may wish to contend that he was not an employee but an independent contractor. In November 2018 Mr Kelsall made a business trip to the United States. He hired a car and decided not to take out insurance. Having completed his business, he visited a friend in Ohio. On the morning of 22nd November 2018 he left his friend's house to drive to the airport, and was involved in an accident as a result of driving on the wrong side of the road. He was killed and Ms Heather Sage, the driver of the other vehicle, was seriously injured.

8. We were told that there is no issue in this action whether Mr Kelsall was negligent, but that there may be an issue whether at the time of the accident he was driving on his employer's business so as to render the employer vicariously liable for his negligence. There is, however, no doubt about the fact that he was on his way to the airport in order to return home at the conclusion of a business trip.

9. Ms Sage indicated that a claim would be made, not only against Mr Kelsall's estate, but also against Norman Hay and IMP.

10. In October 2019, before proceedings were issued by Ms Sage, Norman Hay decided to sell its subsidiaries, including IMP, to a buyer called Quaker Specialty Chemicals (UK) Ltd ('Quaker'). A price of £80 million was agreed. However, under the terms of the sale Norman Hay was required to indemnify Quaker in respect of liability to Ms Sage. For that purpose the sterling equivalent of US $8 million was deducted from the purchase price and paid into escrow.

11. On 22nd November 2020, Ms Sage issued proceedings in the US District Court for the Southern District of Ohio against various defendants including Norman Hay and IMP. She alleged that the accident was caused entirely by Mr Kelsall's negligence; that he was driving the hire car in furtherance of IMP's business in the course of his employment; and that not only IMP but also Norman Hay were vicariously liable, jointly and severally, for his negligence.

12. On 9th March 2021 Ms Sage's proceedings were settled on terms that she be paid the total sum of US $5,500,000. The settlement sum was paid from the escrow account. Its effect, therefore, was to reduce the amount received by Norman Hay for the sale of its subsidiaries.

Norman Hay's claim

13. In this action Norman Hay claims that Marsh acted in breach of its duties as an insurance broker in failing adequately to assess its insurance needs. It says that those needs included cover to indemnify it against liabilities arising from the use by employees of hire cars in the United States, and that Marsh failed to arrange such cover. It says that if such cover had been in place, it would not have had to fund the settlement of Ms Sage's claim and has therefore lost the sterling equivalent of US $5.5 million together with the costs of dealing with the claim.

14. Alternatively, if suitable cover was not available, Norman Hay says that it could have taken alternative steps, such as directing employees to purchase suitable cover themselves or to use private hire vehicles as an alternative to hire cars, in which case either there would have been insurance in place to fund the settlement or the accident would not have occurred because Mr Kelsall would not have been driving.

15. Finally, Norman Hay says that IMP did have worldwide (including US) non-owned auto cover, albeit with a limit of €3 million, which had been arranged by Marsh's German subsidiary and which Marsh negligently advised it to cancel when arranging the global liability programme, but that it did so without advising that as a result the scope of the cover which IMP had was reduced.

16. Marsh denies liability. It accepts that it was required to use the reasonable skill and care expected of a competent and professional insurance intermediary, but says that it was not retained to carry out a risk assessment or for risk consultancy services generally, and that it was Norman Hay's responsibility to provide Marsh with all relevant information about the group's business. It says further that worldwide non-owned auto cover is not typically provided in liability policies written in the United Kingdom and is not a feature of standard UK cover, so that it was under no obligation to arrange such cover or to advise about it.

17. Marsh says further that Norman Hay has not alleged in its pleadings that it or IMP was actually liable to Ms Sage, but has deliberately refrained from making such an allegation, with the consequence that an essential element of its cause of action is missing. That is because a liability insurance policy will only respond if the insured is liable to the third party and that it is not enough that the third party has made an allegation or even that the third party's claim has been reasonably settled. This is the first ground on which Marsh contends that the claim against it should be struck out or dismissed summarily.

18. Finally, Marsh says that Norman Hay has suffered no recoverable loss. The loss which is claimed represents a reduction in the value of Norman Hay's shareholding in its subsidiaries, which is irrecoverable, or alternatively is a loss suffered by the subsidiaries and not by Norman Hay. This is the second ground on which Marsh seeks a strike out or summary judgment.

The judgment

19. Mr Justice Picken acknowledged that in a claim against an insurer under a liability policy, the insured must prove that it was actually liable to the third party. But he held that the position was different in a claim against an insurance broker for failing to arrange insurance in the first place. In such a case, there was scope for a broader inquiry as to what would have happened, if the broker had not been negligent, in the event that the claimant had presented its claim to a putative insurer. That would require an assessment of the chance that the claim under the putative policy would have been met, including the chance that, irrespective of the strict liability position, the insurer would have taken what the judge described as 'a pragmatic and commercial stance'. This would need a factual (or counterfactual) inquiry which meant that there had to be a trial:

> '83. … This necessarily involves looking at loss of chance-type aspects: what type of policy would have been obtained; what conditions would that policy have contained; and what was the likely attitude of the putative insurer to being notified by Norman Hay of Ms Sage's claim. …'

Submissions on appeal

20. For Marsh, Mr Daniel Shapiro KC submitted that the judge adopted the wrong approach. It was an essential element of causation in Norman Hay's claim against Marsh that the policy which Marsh ought to have arranged would have responded to Ms Sage's claim; that a liability policy would only have responded if Norman Hay had actually been liable to Ms Sage; that Norman Hay had declined even to allege that it was liable; and that there was no room for an assessment of the counterfactual on loss

of a chance principles. The question whether Norman Hay was liable to Ms Sage therefore needed to be decided one way or the other, and in the absence of any allegation of such liability the only possible answer was that it was not so liable.

21. As to loss, Mr Shapiro submitted that as a matter of legal analysis the loss claimed was the reduction in the value of Norman Hay's shareholding in its subsidiaries, which was irrecoverable in law. The judge should have addressed this submission rather than saying that it stood or fell with the liability issue.

What kind of policy should Marsh have arranged?

22. Marsh has repeatedly claimed, with some justification, that Norman Hay's pleadings are vague and general. Unfortunately its proposed solution was a Request for Information with as many as 50 requests, almost all of which Norman Hay batted away by saying that its case was adequately pleaded and by repeating paragraphs of its existing pleadings. This exercise was therefore both wasteful and fruitless. What this relatively low value case needs is firm case management to identify what will be the real issues in dispute. However, that is not a matter for this court on this appeal. We must deal with the pleadings as they are.

23. Whether the claim should be struck out, or dismissed summarily, by reference to arguments about causation and loss seems to me to put the cart before the horse. In order for a court to consider whether a breach of duty caused a claimant loss, it needs to know what it is said that the defendant ought to have done. In the present case there needs to be clarity about the instructions given to Marsh, the responsibility which it undertook, and whether a reasonable insurance broker in Marsh's position should have arranged or advised about the availability of non-owned auto cover extending to the United States. That latter point will need to be dealt with in expert evidence if the case proceeds.

24. There needs also to be clarity about the terms of the putative insurance policy which it is alleged that Marsh should have arranged. For example, would this have been a conventional liability policy or some other kind of policy, such as a policy responding to claims made or occurrences, or a policy whereby the insurer is bound to follow the reasonable settlements of the insured, as described by Lord Justice Christopher Clarke in *AstraZeneca Insurance Co Ltd v XL Insurance (Bermuda) Ltd* [2013] EWCA Civ 1660, [2014] 2 All ER (Comm) 55 at [19]? If the latter, would such a policy have been available at a premium which Norman Hay was prepared to pay?

25. At present, although the parties' arguments have focused primarily on the position under a conventional liability policy, Norman Hay's pleading does not specify the terms of the putative policy which it is said that Marsh should have arranged. It says merely that Norman Hay has lost the opportunity of obtaining insurance cover that would have responded to the liabilities arising out of the accident and/or of avoiding or reducing those liabilities and other losses suffered as a result of the accident.

26. Without knowing the terms of the putative policy, it is not possible to dismiss this claim summarily on the basis that in any event the policy would not have provided cover. That is itself a reason why this appeal must fail, but I go on to consider the position on the assumption that the putative policy which Marsh ought to have arranged was a conventional liability policy.

A conventional liability policy

27. On that assumption, I would accept (and Mr Graham Chapman KC for Norman Hay did not dispute) that such a policy will only respond if the insured is actually liable to the third party. It is not enough that a third party such as Ms Sage makes a claim, or that her claim is reasonably settled, or even that the insured is held liable by a judgment of the court in which the claim is brought. This is clear from a number of cases, including the decision of this court in *AstraZeneca*, where Lord Justice Christopher Clarke said:

> '16. Under English law a liability policy is, generally speaking and in the absence of wording to the contrary, a policy which indemnifies the insured in respect of actual liability. That means that, in order to recover from his insurer the insured must show that he was liable to the person who claimed against him. Liability cannot be determined in a legal vacuum. Hence the need to assume, for this purpose, a correct application of the law governing the claim in question to the facts properly found.
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> 17. In the event of dispute the existence of liability has to be established to the satisfaction of the insurer, or, failing that, by the judge or arbitrator who has jurisdiction to decide such a dispute. It is not, therefore, necessarily sufficient for the insured to show that he has been held liable to a claimant by some court or tribunal or that he has agreed to settle with him. In practice the fact that this has occurred may cause or persuade the insurer to pay, but, if it does not, the insured must prove that he was actually liable. Under English law the ultimate arbiter of whether someone is liable, if insured and insurer cannot agree, is the tribunal which has to resolve their disputes (or any relevant appeal body). It may hold that there was in fact no actual liability and that an insured who thought, or another tribunal which decided, that there was, liability was in error either on the facts or the law or both.'

The claim against a broker

28. However, I agree with the judge that, while this would be the position if Norman Hay were suing the insurer under a conventional liability policy, a claim against a broker for negligently failing to arrange a policy at all is different. The judge quoted at length from the decision of Mr Justice Butcher in *Dalamd Ltd v Butterworth Spengler Commercial Ltd* [2018] EWHC 2558 (Comm), [2019] PNLR 6, but it is sufficient to refer to the leading decision of this court in *Fraser v B.N. Furman (Productions) Ltd* [1967] 1 WLR 898.

29. In that case the client was liable to an employee for an accident at work and sued its broker for failing to arrange employer's liability cover. It was not in dispute that, if such cover had been arranged, it would have been with Eagle Star and the policy would have contained a condition precedent requiring the insured 'to take reasonable precautions to prevent accidents and disease'. The broker argued that this clause would have given the insurer a defence, because the client had failed to take such precautions: hence the

accident. This argument was rejected on two distinct grounds. First, on its true construction, the condition precedent provided the insurer with a defence only in cases of recklessness, as distinct from negligence, by the employer. As the employer had not been reckless, the insurer would have been liable.

30. Second, and relevant for present purposes, on the assumption that the condition precedent would have provided the insurer with a good defence if it had chosen to take the point, it was necessary to consider whether it would, as a matter of business, have done so. This was a question of fact, to be assessed on loss of a chance principles. (Although the headnote says that this question had to be decided on a balance of probabilities, that is not what the judgment says, but in any event the later decision of this court in *Dunbar v A & B Painters Ltd* [1986] 2 Lloyd's Rep 38 confirms that assessment on loss of a chance principles is the correct approach). On the facts, Lord Justice Diplock held that it was so extremely unlikely that the insurer would have taken the point that the claimant was entitled to recover against the broker in full.

31. Lord Justice Diplock stated the principle in this way:

> 'The breach of contract in not obtaining an employer's liability indemnity policy is admitted. The employers are accordingly entitled to be put in the same position, so far as money can do so, as if the contract had been performed by the brokers. No question of remoteness of damage obviously arises in this case. If the contract had been performed by the brokers, the employers would have been parties to a policy of insurance against employer's liability in standard form underwritten by a first-class insurance company of the highest reputation. As a result of the breach, they were not insured at all.
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> What damage they have suffered does not depend upon whether Eagle Star 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*; 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 next consider in that event, what were the chances that an insurance 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.'

32. Indeed, the argument of counsel which Lord Justice Diplock rejected, 'that, where an agent employed to enter into a contract has failed to do so, the only measure of damages is what the principal would have recovered under the contract if the third party to the contract had exercised all his legal rights in resisting the principal's claim', appeared to me to be very similar to the argument advanced by Mr Shapiro in this case almost 60 years later.

33. The approach described by Lord Justice Diplock in *Fraser v Furman* is in accordance with the general principle as to when claims have to be assessed by reference to loss of a chance, as explained by the Supreme Court in *Perry v Raleys Solicitors* [2019] UKSC 5, [2020] AC 352:

> '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 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.'

34. I agree, therefore, with the summary set out in *Jackson & Powell on Professional Liability*, 9th edition (2022), paras 16-168 and 16-169:

> 'The fundamental principle governing the measure of damages is that the claimant should be put, so far as money can do so, in the position he would have been in had the defendant discharged his duty. In claims against insurance brokers, the claimant typically alleges that he was uninsured when, but for his broker's negligence, he would have been insured. Therefore the main (and often the only) item of damages claimed is the amount which would have been payable by the insurers (or reinsurers) but for the broker's breach of duty. If there is no doubt that the insurers (or reinsurers) would have satisfied the client's claim, then this loss is plainly recoverable.
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> In assessing the claimant's loss, the court is not strictly concerned with what the insured was entitled to recover under the relevant policy of insurance (where some policy was arranged). Instead, the court has to assess, on the balance of probabilities, what would have occurred had there been no breach of duty by the broker. Consequently, if the court finds that an insurer would or might have made a payment to the claimant but for the broker's negligence, then the claimant will recover damages even if (as a matter of law) the claimant would not have been entitled to any payment from the insurer. The court will assess the likelihood that the claimant would have received a payment from the insurer. If, as a result of the broker's negligence, there is uncertainty as to the claimant's likely recovery from the insurer, then such uncertainty will be resolved in favour of the claimant.'

35. That is not to say that the putative insurer's liability will be irrelevant in evaluating the counterfactual in the event that Norman Hay is able to establish a breach of duty by Marsh. It is a factor which will need to be considered. For example, if it were clear that there would be a valid claim under the putative policy, there would be no need to apply

any discount to reflect the uncertainty of recovery. Conversely, if it were clear that there was no valid claim, the case would not reach the standard of a real and distinct, rather than merely negligible, prospect of success which must be shown before assessment of loss of a chance can arise (*Perry v Raleys Solicitors* at [34]).

36. How the claim against the putative insurer should be assessed will be a matter for trial. On the face of things, however, the position seems straightforward. Unless Ohio law is materially different from English law (and there is no pleading to suggest that it is) there appears (though we have heard no substantive argument on the point) to be no basis on which Norman Hay could have been liable to Ms Sage, as it was not Mr Kelsall's employer. Conversely, and subject to the arguments about whether Mr Kelsall was an employee or an independent contractor and whether the accident occurred in the course of his employment, IMP clearly would have had a valid claim to be indemnified under a conventional liability policy. 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?

37. For all the reasons I have given, the complaint that Norman Hay refuses to plead that either it or IMP was actually liable to Ms Sage is not the knock-out blow that Mr Shapiro maintains. If Marsh can prove at trial that neither Norman Hay nor IMP were, despite the substantial settlement sum paid to her, actually liable to Ms Sage, that will be one factor in the counterfactual analysis as Lord Justice Diplock explained in the passage I have cited at [31] above.

Loss

38. I agree with the judge, at any rate for the purposes of this strike out/summary judgment application, that the question of loss does not require separate consideration. The settlement of Ms Sage's claim was entered into on behalf of all the defendants in the Norman Hay group. If, as a practical matter, the putative insurer had taken over the defence of the claim, it seems likely that it would have funded the settlement without distinguishing between the position of different companies in the group and Norman Hay would not have had to pay. However, if for some reason it had insisted that its only liability was to IMP and not Norman Hay, it ought to have been a straightforward matter for Norman Hay to take an assignment of IMP's claim against the putative insurer. In either case, it is not so clear that Norman Hay has not suffered any loss that its claim ought to be struck out or dismissed summarily.

39. Further, although no submissions were addressed to us about reflective loss and the relevant authorities were not cited, I would observe that Marsh was engaged by Norman Hay to arrange insurance cover for all of the companies in the group. Accordingly, subject to the question of precisely what Marsh undertook to do, it may well have owed a duty to Norman Hay to arrange for IMP to have suitable insurance in place. Presumably that was because Norman Hay as the parent company wished to protect the value of its shareholdings. In those circumstances I would not accept without hearing argument that Norman Hay does not itself suffer a loss in the event that, as a result of Marsh's negligence, one of its subsidiaries faces a claim for which it is uninsured.

Other matters

40. Finally, it is necessary to recall that Norman Hay has alternative ways of putting its case which do not depend on Marsh having arranged a putative insurance policy. One such case is that, if it had been told that non-owned auto cover was not available, instructions would have been given to group employees which would have avoided the problem. Another case is that the existing IMP policy would not have been cancelled and would have provided cover up to €3 million. As the judge said, Marsh's application does not impact on these ways of putting the case, which would have to go to trial in any event.

Conclusion

41. There are factual issues which need to be resolved in this case, which is not suitable for striking out or summary disposal. I would dismiss the appeal.

LORD JUSTICE BIRSS:

42. I agree.

SIR GEOFFREY VOS, MR

43. I also agree.