Causation disputes in brokers’ negligence claims following coverage declinature to be determined on a “balance of probabilities” basis

In a judgment of particular relevance to those involved in claims against insurance brokers, the High Court rejected a Claimant’s submissions that causation ought to be assessed on a “loss of chance” basis, raising the bar for claimants.

In Dalamd Ltd v Butterworth Spengler Commercial Ltd [2018] EWHC 2558 (Comm), the Claimant sought an indemnity from their insurers following the destruction of business premises. The Defendant Insurance broker had been retained to arrange insurance for the premises. The insurers rejected cover on the grounds of non-disclosure and misrepresentation of material facts. The Claimant did not challenge the declinatures. Instead, it brought a claim against the Defendant for negligence.

The Claimant alleged that the Defendant had failed to, *inter alia*, adequately advise as to what matters ought to be disclosed to insurers and to give proper disclosure of matters which it knew itself. The Court found there had been a breach of duty.

On the question of causation, the Court first considered whether the Claimant was required to show, as a matter of fact, that the claim on either policy had failed due to the Defendant’s negligence. Departing from previous case law, the Court found that, where the insurers’ declinature had not been challenged, the issue of whether the Claimant’s claim on the policy had indeed failed – i.e.: whether the policy was voidable - had to be determined on a yes/no basis on a balance of probabilities. The Court rejected the Claimant’s submission that it was sufficient to argue that the Defendant’s negligence had “impaired” such claim - i.e. whether the claim could be brought on a loss of chance basis.
The Court then deliberated on how it should approach a contention that the policies would not have responded, in any event, for reasons for which the Defendant was not responsible. It found that, again, this issue was to be determined on a “balance of probabilities” approach, determining whether the defence was or was not a good one.

The claim is interesting to those who advise on coverage disputes and/or defend claims against Insurance brokers. Future professional negligence claims against Insurance brokers will be assessed on a balance of probabilities basis rather than on a loss of chance basis. This significantly raises the burden of proof against a claimant.

This is the latest in a series of judgments which benefit the professional indemnity market.