

05 October 2018

DALAMD LIMITED V BUTTERWORTH SPENGLER COMMERCIAL LIMITED
[2018] EWHC 2558 (Comm)

BEFORE: MR JUSTICE BUTCHER

CASE SUMMARY

An assured operated a waste recycling facility. It held two relevant policies of insurance, with different insurers. The insurers both claimed that they were entitled to avoid the relevant policies for material non-disclosure. The assured, and the lessor of the premises, which was a co-insured under the first of the policies, assigned their causes of action to the claimant, which sued the defendant insurance broker in negligence. The broker was held liable for failing to give the assured adequate advice about its disclosure obligations and failing to disclose to the insurer material facts known to it. However, the assured could only recover damages in respect of one of the policies. In respect of other policy, the defendant's negligence was not causative of the assured's loss, because it had not affected the lessor's claim under the policy. Furthermore, on a balance of probabilities, that policy would in any event not have responded by reason of a breach of condition, for which the broker was not responsible.

The assured, initially a company called “Doumac”, operated a waste recycling facility. The facility, and its plant and machinery, were entirely destroyed by fire on 21 October 2012.

Doumac held two policies of insurance, including buildings insurance with Aviva Plc, under which policy the lessor of the premises (“Widnes”) was a co-insured, and plant and machinery cover with XL London Market Limited (“XL”). The policies were placed by the defendant insurance broker- in March 2012 and October 2012, respectively. Doumac went insolvent in July 2012; its business was taken over by a new company, “JLS”, which continued to operate the premises under a licence from Widnes.

Following the fire, JLS claimed under the policies. Aviva disputed liability, claiming that it was not under any liability because (i) it was entitled to avoid the policy by reason of non-disclosure or of or a misrepresentation as to Doumac’s insolvency, or (ii) because of breach of an ‘External Storage Condition’ by the storage of waste in close proximity to the recycling sheds. XL claimed to be entitled to avoid its policy on the basis of non-disclosure of previous fire incidents, and the concerns which various authorities had had as to the state of the site.

JLS and its assignee (the claimant), did not pursue any claims against the insurers, but instead issued a claim against the defendant broker. The claimant alleged that the defendant had failed to exercise reasonable care and skill in obtaining suitable insurance cover, and had failed to give adequate guidance as to JLS’s disclosure obligation or to disclose material facts known to the defendant.

Butcher J approved the explanation of insurance brokers’ duties in *Jackson & Powell on Professional Liability* (8th Ed, 2017) at [16-044] and in *Jones v Environcom* [2010] Lloyd’s Rep IR 676 (*per* David Steel J). These duties include identifying the type and scope of cover that would be suitable for the client, taking reasonable steps to arrange cover in accordance with the client’s instructions, and having regard when placing the insurance to the assured’s disclosure obligations.

The Court held that the defendant was negligent in: (i) failing to inform Aviva of Doumac's insolvency, a matter known to it; (ii) failing to advise JLS or Widnes of the need to obtain cover for loss of rent; and (iii) failing to elicit from JLS – and to cause JLS to disclose to XL – the existence of previous fire incidents and issues which had arisen with the authorities as a result of a build up of waste. The defendant was not negligent in any other respect. In particular, it was not liable for JLS's breach of the External Storage Condition, since this had been specifically drawn to JLS's attention by Aviva prior to the fire and had not been rectified. In weighing up the parties' evidence on these questions of fact, Butcher J observed, at [61], that *'[a]s with most commercial cases, the most reliable evidence is provided by the contemporary documentation and the inferences which can be drawn from it.'*

Having found the defendant negligent in these respects, the Court had to decide the proper approach to causation. The Court found that where the claim made is that the brokers' negligence rendered the policy voidable, the issue of whether the policy was voidable is, in the ordinary case, to be determined on the balance of probabilities. Similarly, if it is contended that the policy would not have paid by reason of the existence of some other defence, unconnected with the brokers' negligence, the applicability of that other defence is to be determined on the balance of probabilities, and there should be a further assessment of the chance of the insurer not taking or pursuing the point.

On the facts, that approach gave rise to the following conclusions:

- (1) Aviva would not have been entitled to avoid Widnes's cover by reason of the non-disclosure of Doumac's insolvency. In any event, Aviva would not have been under any liability under the policy by reason of the breach of the External Storage Condition, and it was very unlikely that Aviva would not have pursued this defence as far as trial. The claimant could not, therefore, recover damages in respect of the Aviva policy.
- (2) XL would have been entitled to avoid the policy for non-disclosure of previous fire incidents and of the build-up of waste (in respect of which the defendant was negligent). There was no other basis on which XL could have avoided the policy. The claimant was therefore entitled to recover from the defendant brokers the amount which would have been recoverable from XL (£1.6m) in respect of the plant and machinery destroyed by the fire.

NOTE: This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments of the Commercial Court are public documents and are available at: <https://www.bailii.org/ew/cases/EWHC/Comm/>