



Informing Progress - Shaping the Future

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Norman Hay PLC v Marsh Ltd EWCA Civ 58: A Comprehensive Analysis

1. Introduction

The Court of Appeal's decision in *Norman Hay PLC v Marsh Ltd* is a significant authority on broker liability, the assessment of loss of chance in insurance disputes, and the interface between policyholder claims against insurers and brokers. The case provides essential guidance on how courts should approach causation, quantification of loss, and the procedural management of complex insurance disputes, particularly those involving cross-border risks and the settlement of third-party claims.

2. Background and Factual Matrix

2.1 The Parties and the Insurance Placement

Norman Hay PLC (NH): A UK-based holding company with international subsidiaries, including IMP, a US-based entity.

Marsh Ltd: A leading insurance broker engaged by NH to arrange global insurance coverage, including non-owned auto liability insurance for subsidiaries.

2.2 The Underlying Incident

In 2018, an employee of IMP was involved in a serious road traffic accident in Ohio, causing catastrophic injuries to Heather Sage, a third party.

IMP, and by extension NH, faced a substantial personal injury claim in the US. NH ultimately settled the claim for \$5.5 million.

2.3 The Insurance Dispute

NH discovered that Marsh had failed to arrange adequate worldwide non-owned auto coverage for IMP, leaving NH uninsured for the Sage claim.

NH sued Marsh for professional negligence, alleging that Marsh's failure to procure appropriate coverage caused NH to suffer loss (the settlement sum), or at least the loss of a chance to be indemnified by an insurer.

3. Procedural History

Marsh applied to strike out NH's claim, arguing that NH could not establish it would have been legally liable to Sage (a prerequisite for indemnity under a liability policy).

The High Court refused to strike out the claim, holding that the assessment of loss in broker negligence cases involves the loss of a chance doctrine, not the strict "but for" test applicable to direct insurance claims.

Marsh appealed, raising issues of causation, reflective loss, and the sufficiency of NH's pleadings.

4. Legal Principles and Issues

4.1 Broker's Duty of Care

Insurance brokers owe a duty to exercise reasonable skill and care in advising clients on their insurance needs and arranging appropriate coverage.

Failure to do so can result in liability for losses suffered by the client as a result of being uninsured or underinsured.

4.2 Loss of Chance Doctrine

Where a broker's negligence deprives a client of the possibility of indemnity, the loss is assessed on a "loss of chance" basis.

The court must evaluate the likelihood that, but for the broker's negligence, the client would have obtained coverage, and the insurer would have indemnified the claim.

This approach recognises that real-world insurance disputes often involve commercial negotiations, uncertainty, and settlements, rather than binary outcomes.

4.3 Causation in Insurance vs. Broker Claims

Against Insurers: The insured must prove actual legal liability to a third party and that the loss falls within the policy terms.

Against Brokers: The claimant must prove, on the balance of probabilities, that the broker's breach caused the loss of a real and substantial chance of indemnity, even if actual liability is uncertain.

4.4 Reflective Loss and Standing

Marsh argued that NH's loss was reflective of a loss suffered by IMP, its subsidiary, and thus irrecoverable.

The Court noted that NH had made the settlement payment directly, and that the reflective loss doctrine may not bar the claim. This issue was left for trial.

4.5 Use of Privileged Material

NH relied on privileged legal advice to justify the reasonableness of the Sage settlement.

The Court held that the issue of privilege waiver and admissibility should be determined at trial, not on a strike-out application.

5. The Court of Appeal's Reasoning

5.1 Dismissal of the Strike-Out Application

The Court of Appeal upheld the High Court's refusal to strike out the claim, emphasising that:

The assessment of loss in broker negligence cases is inherently fact-sensitive and rarely suitable for summary determination.

The "loss of chance" doctrine requires the court to consider the likelihood that an insurer would have indemnified NH, taking into account commercial realities, the possibility of settlement, and the insurer's own risk appetite.

5.2 Distinction Between Insurer and Broker Claims

The Court drew a clear distinction between:

Claims against insurers, which require proof of actual liability and policy response; and

Claims against brokers, which require an assessment of the lost chance of indemnity, not the certainty of outcome.

The Court cited *Perry v Raleys Solicitors* UKSC 5, confirming that the lost chance analysis applies to third-party conduct (here, the hypothetical insurer's response), while the claimant's own actions are judged on the balance of probabilities.

5.3 Commercial Realities in Insurance Disputes

The Court recognised that insurers often settle claims for commercial reasons, even where legal liability is arguable.

The assessment of loss must take into account not only strict legal entitlements but also the pragmatic likelihood of settlement or indemnity in the real world.

5.4 Reflective Loss and Direct Loss

The Court acknowledged the complexity of the reflective loss doctrine in group company structures.

It left open the question of whether NH's loss was irrecoverable as reflective loss, noting that NH's direct payment of the settlement may distinguish the case from classic shareholder claims.

6. Implications for Insurance Practice

6.1 For Brokers

Risk Management: Brokers must be meticulous in identifying and arranging coverage for all relevant risks, especially in cross-jurisdictional contexts.

Documentation: Comprehensive records of advice, instructions, and coverage placements are essential to defend against future claims.

Client Communication: Brokers should clearly explain the scope and limitations of placed policies and confirm clients' understanding.

6.2 For Policyholders

Evidence Preservation: Policyholders should retain all correspondence with brokers and insurers, as well as internal risk management policies.

Settlement Strategy: When settling third-party claims, policyholders must be able to justify the reasonableness of the settlement, particularly if seeking to recover from a broker.

6.3 For Insurers

Claims Handling: Insurers should be aware that courts may assess their likely response to hypothetical claims in broker negligence litigation, including commercial settlement dynamics.

Policy Wording: Clear and unambiguous policy terms can help reduce the scope for disputes over coverage and indemnity.

6.4 Litigation Strategy

The decision discourages premature strike-out applications in broker negligence cases, as courts are likely to require full factual exploration at trial.

The case highlights the importance of expert evidence on insurance market practice and insurer behaviour in assessing loss of chance.

7. Conclusion

Norman Hay PLC v Marsh Ltd provides authoritative guidance on the assessment of loss in broker negligence claims and the application of loss of chance principles in insurance disputes. The decision clarifies that:

Policyholders deprived of coverage by broker negligence are entitled to recover the value of the lost chance of indemnity, not just losses that would have been indemnified as a matter of strict legal liability.

Courts will take a realistic, commercial approach to assessing the likelihood of insurer indemnity, recognising that settlements and pragmatic decisions are part of the insurance landscape.

The case has significant implications for brokers, who must ensure robust risk identification and communication, and for insurers, who may find their hypothetical conduct scrutinised in broker litigation.

Legal practitioners should follow further developments at trial, particularly on the reflective loss and privilege issues, as these may further shape the law in this area.

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