

Introduction

Insurance brokers enter into contracts with the insured to provide for their insurance needs. The contractual and legal duties of a broker may be express, tacit or implied by law. Basic duties such as the scope of the broker's mandate should be expressly stated in the contract, but brokers commonly overlook their duties which arise from the contract of mandate which then can result in claims.

We have found in recent times that broker claims are on the increase. This increase could also be as a result of clients being more aware of the regulations and the laws relating to the duties of brokers combined with a difficult economic climate wherein clients are cash strapped and thus will try every avenue to recover from their broker where claims are not met by the insurer.

Claims Examples

Below are examples of claims which involve insurance brokers which we have noted over time:

Example 1

The insured was approached by the third party to attend to insure his marine vessel. The insured duly accepted the instruction and proceeded to arrange cover accordingly. In May 2017 the third party requested that the insured confirm with him whether he was insured for Hurricane Damage under the watercraft policy brokered by the insured given that his vessel would be in a zone where such cover would not ordinarily be accepted and to which the insured confirmed in the affirmative.

The vessel was damaged in Hurricane Irma in August 2017 and sought cover under his watercraft policy. There was no cover in place and as such the third party proceeded to issue and serve Summons on the insured for an amount of R 8 794 000.

The insured failed to properly consider the warranty and advised the third party that there was cover in place

Example 2

The insured is a Short Term Insurance Broker entered into a mandate agreement with the third party in or about September 2016. The third party is a Logistics Company. On 16

September 2016 a truck belonging to the third party was hijacked and all the goods that were being transported were stolen.

The third party on the 19th of September 2016 notified the insured of this claim. The insured immediately contacted the insurer requesting confirmation as to how a claim should be notified. It is important to note that the insured does not advise the insurer that the claim stemmed from a hijacking but merely mentioned it's a "claim". The insurer advised that the claim form should be submitted. The insured submitted the claim to the insurer on 2 October 2016. The claim was rejected by the insurer in terms of a warranty clause / Time Bar clause which provided that a hijacking claim must be submitted within **7 days from the date of the incident in writing**.

Because of the rejection the third party issued Summons for R 2 477 232.03 against the insured claiming that the insured's negligence (breaching its duty in inter alia submitting the claim timeously) had caused loss to be suffered.

The claim was settled for the full value including costs.

Example 3

The insured assisted the third party in obtaining motor vehicle insurance. The insurer avoided the third party's claim on the basis that no cover was in place.

The insured collected premium on behalf of the insurer and was responsible for paying over the premium to the insurer within 45 days of receipt of the bordereaux.

The policy was cancelled by the insurer because of non- payment of the premium.

The third party did however pay his November and December 2018 premium late however did attend to pay both premiums in January. The insured however failed to allocate the premiums correctly for December and January. As a result, thereof in February 2018 two premiums were debited from the third party's account and the second one was returned due to insufficient funds.

Due to the multiple non payments and well as the return of two debit orders (Nov and Feb) the insurer automatically cancelled the policy. The insured was unaware of this and only established what had happened when the third party enquired about the premium. The

insured sent an e-mail on the 7th of May to the insurer requesting to hold cover on the basis that the insured had no claims in the preceding 3 months however on the 8th of May the third party's truck was involved in an accident and OMI confirmed that no cover in place for the loss.

The insured made an administrative system error with regards the allocation of premium. This led to the policy being cancelled.

The insured has been sued for R 1.7 million.

Example 4

A claim against a large insurance broker for failing to give notice of a claim relating to potential negligence of a medical facility following the birth of a baby born with brain damage. The claim is for an amount of R13 million.

Example 5

A claim against a broker for failing to provide full disclosure to the current insurer of the reasons for a prior cancellation of a policy by another insurer for a particular insured. The insured then sustained property damage following a fire and the claim was rejected because of the non-disclosure. The claim was in the region of R30 million.

Example 6

A claim against a broker for failing to correctly utilise a business interruption calculator resulting in prejudice to the insurer in that it could not apply average to the claim alternatively did not purchase sufficient reinsurance for the loss. The claim is by the insurer against the broker for amount of R25 million alternatively R9 million.

Example 7

The insured was appointed as an insurance broker for purposes of procuring insurance cover for the third party's business. According to the mandate agreement the insured was to ensure inter alia that they conduct the necessary enquiries into the third party's business and obtain a proper understanding thereof to ensure proper cover was in place. The insured recommended that the third party insureds its business against fire, theft, electronic equipment and losses, money, motor vehicle loss.

No cover was obtained for business interruption cover. A fire broke out at the third party's premises and as a result could not supply its manufactured goods to its clients.

The insured has been sued for R 13 million based on his breach of duties and loss that the third party has suffered.

Apart from the claim examples listed above we have also seen many claims where an insured fails to add a vehicle onto an existing policy or where the insured fails to advise the third party of certain requirements in the policy which if not complied will result in no cover be extended.

Conclusion

An insurance broker has the duty to act in good faith. Clients place a special trust, confidence, and reliance in his / her broker and he is influenced by the broker who has a fiduciary duty to act in the best interests of his client. This requires the broker to perform the mandate in the interest of his client and to be open and honest in carrying out his mandate. This duty has both a common law and statutory basis. See s16 of Financial Advisory and Intermediary Services Act, No 37 of 2002.