



Neutral Citation Number: [2024] EWHC 1039 (Comm)

Case No: CL-2023-000345

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS & PROPERTY COURTS OF ENGLAND & WALES**  
**KING'S BENCH DIVISION**  
**COMMERCIAL COURT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 8 May 2024

**Before:**

**MR JUSTICE PICKEN**  
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**BETWEEN:**

**NORMAN HAY PLC (in Members'  
Voluntary Liquidation)**

**Claimant**

**- and -**

**MARSH LIMITED**

**Defendant**  
  
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**Mr Graham Chapman KC and Ms Marie-Claire O'Kane (instructed by Mishcon de  
Reya LLP) for the Claimant.**  
**Mr Daniel Shapiro KC and Mr Hamish Fraser (instructed by DAC Beachcroft LLP) for  
the Defendant.**

Hearing date: 29 April 2024.  
Judgment provided in draft: 2 May 2024.  
  
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## JUDGMENT

**Mr Justice Picken:**

### Introduction

1. This is an application by the Defendant, Marsh Ltd ('Marsh') to strike out the claim brought against it by the Claimant, Norman Hay PLC ('Norman Hay'), pursuant to CPR r. 3.4, alternatively for summary judgment pursuant to CPR r. 24.
2. Norman Hay is a holding company, whose group companies were world leaders in specialist chemicals, sealants and surface coatings. Those companies were located in different jurisdictions throughout the world, and their employees frequently travelled for business purposes.
3. Marsh is a commercial insurance broker, specialising, *inter alia*, in advising upon and placing global programmes of insurance for groups of companies operating in different jurisdictions.
4. 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 policy year 2017/2018 and under a global liability programme for the policy years 2018/2019 and 2019/2020.
5. The claim brought in the present proceedings sees Norman Hay allege 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.
6. Specifically, the claim is brought following the sale of Norman Hay's subsidiaries to Quaker Specialty Chemicals Ltd ('Quaker') in October 2019. Under the terms of that sale, Norman Hay was required to indemnify Quaker in respect of liability relating to a claim brought by a Ms Heather Sage in respect of an accident which took place on 22 November 2018.
7. On 22 November 2018, the morning of Thanksgiving, Mr Nigel Kelsall, said by Norman Hay to be an employee of one of Norman Hay's subsidiaries, Internationale Metall IMPragneier GmbH ('IMP'), a German company acquired by Norman Hay in August 2017, was involved in a road traffic accident in Ohio in the USA whilst driving a hire car without insurance, having decided not to take out the same.
8. Mr Kelsall was tragically killed and Ms Sage, the driver of the other car involved in the accident, was seriously injured.
9. On 22 November 2020, Ms Sage issued proceedings in the US District Court Southern District of Ohio against various defendants including Norman Hay and IMP, alleging that: the accident was caused entirely by Mr Kelsall's negligence; Mr Kelsall was operating the hire care that he was driving at the time of the Accident in furtherance of IMP's business, in the course and scope of his employment or as agent for IMP; IMP, together with two US corporate defendants, were wholly-owned subsidiaries of Norman Hay, that the business interests of the corporations were inextricably bound and that Mr

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Kelsall was acting as agent for and/or in furthering the business interests of the corporate defendants at the time of the accident; and, as a result, the doctrine of *respondeat superior* applied with the result that the corporate defendants, including Norman Hay and IMP, were jointly and severally liable for the negligence of Mr Kelsall and thus jointly and severally liable to Ms Sage.

10. On 9 March 2021, the parties to the US Proceedings entered into a binding settlement agreement. Norman Hay maintains that it did so in reliance upon legal advice from specialist personal injury litigation US counsel.
11. Pursuant to the settlement agreement, Ms Sage's claims (and those of her children) were settled on terms that she be paid the total sum of US\$5,500,000. This was paid out of monies held in an escrow account which had been constituted as part of the sale to Quaker, so reducing the amount ultimately received by Norman Hay in that sale.
12. Before the settlement was entered into, Norman Hay was asked by Marsh how it could bring any claim given it was a holding company which was admittedly not Mr Kelsall's employer, and which did not appear to be legally liable to Ms Sage.
13. Marsh also made Norman Hay aware that, as far as Marsh was concerned, Norman Hay could have no claim against Marsh since a liability in law has to be established to obtain indemnity under a liability insurance policy. This included both when Norman Hay sent Marsh draft Particulars of Claim on 14 February 2020 (and so before the settlement with Ms Sage) and on 9 November 2021 (and so after the settlement). Both these drafts (like the Particulars of Claim which ultimately came to be served in the proceedings) pleaded Ms Sage's allegations but did not plead that Norman Hay or IMP were liable to Ms Sage.
14. This is an aspect which, as explained by Mr Shapiro KC on behalf of Marsh, was further pursued through a Request for Further Information which Marsh sent to Norman Hay on 12 July 2023, which described the Particulars of Claim as being "*inadequately particularised, defective, and are liable to be struck out*" and which, by Requests 6, 9-14, 18-22, 26-29 and 42-45, sought express confirmation as to whether Norman Hay was alleging that Norman Hay or IMP were legally liable to Ms Sage and, if so, on what basis.

**The claim brought against Marsh**

15. As to what, specifically, is alleged by Norman Hay against Marsh, Norman Hay alleges that Marsh acted in breach of contract and/or negligently when advising Norman Hay in relation to its worldwide insurance cover and when placing and renewing that cover. In particular, Norman Hay alleges that Marsh: failed to identify that Norman Hay's business was such that senior employees of both Norman Hay and companies in its group made frequent business trips on which they hired cars in respect of which adequate liability insurance was required; and failed to consider the terms and scope of a policy which IMP had (the 'IMP Policy') and which would have provided an indemnity to IMP in respect of any liability that IMP might have as Mr Kelsall's employer but which was cancelled on 30 June 2018 when the global policy was entered into adequately or at all, instead recommending that the IMP Policy be cancelled without identifying and/or advising Norman Hay that this would narrow the scope of cover available to IMP.

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16. Norman Hay alleges that, but for Marsh's breach of duty: Norman Hay and/or IMP would have had in place valid and effective insurance cover that would have provided an indemnity in respect of liabilities to Ms Sage arising from the accident such that Norman Hay would not itself have had to fund the settlement of those liabilities via the Sage Settlement; alternatively, as a result of Norman Hay's breaches of duty, Norman Hay has lost the opportunity of obtaining insurance cover that would have responded to the liabilities arising out of the accident.
17. Accordingly, Norman Hay claims from Marsh in these proceedings an indemnity, alternatively damages in respect of the liabilities arising from and in relation to the accident, including the Sage Settlement Sum and the costs associated with the same.

**Applicable principles**

18. There is no issue concerning the correct approach to be taken to applications of this nature.
19. Particulars of Claim may be struck out if they disclose no reasonable grounds for bringing the claim (CPR r. 3.4(2)(a)). The Notes to the White Book at 3.4.1 explain:
- “Grounds (a) and (b) cover statements of case which are unreasonably vague, incoherent, vexatious, scurrilous or obviously ill-founded and other cases which do not amount to a legally recognisable claim or defence ... .”*
20. The Notes at 3.4.2 further provide:
- “Paragraph 1.4 of the PD (Striking Out a Statement of Case), para.3APD.1, gives examples of cases where the court may conclude that particulars of claim disclose no reasonable grounds for bringing the claim: those claims which set out no facts indicating what the claim is about; those claims which are incoherent and make no sense; and those claims which contain a coherent set of facts but those facts even if true, do not disclose any legally recognisable claim against the defendant.”*
21. An application to strike out should not be granted unless the Court is certain that the claim is bound to fail: *Hughes v Colin Richards & Co* [2004] PNLR 35.
22. As for CPR r.24.3 and whether the claim has a real prospect of success, principles set out by Lewison J (as he then was) in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15] are well-known and do not need to be restated. For practical purposes, as Mr Shapiro KC observed, in this case at least, there is probably little difference between the CPR r.3.4(2)(a) test and that for CPR r.24.3.

**Marsh's position**

23. Marsh's position is that the claim should be struck out, alternatively that summary judgment should be entered for Marsh, for three reasons: first, because the claim as put is defective as a matter of law (the 'Liability Issue'); secondly, because Norman Hay has not suffered the loss for which it is claiming (the 'Loss Issue'); and thirdly, because Norman Hay cannot, and will not be able to, prove that the amount of the settlement was reasonable, including that it was at least liable in law to such an amount (the 'Evidence Issue').

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24. As to the Liability Issue, Mr Shapiro KC reminded the Court of the approach which is adopted in relation to liability insurance contracts. He did so by taking as an example the Chubb PA and Travel Policy, the insuring clause of which provides at Section B6 as follows:

*“If the Insured Person becomes legally liable to pay damages in respect of:*

- 1. accidental bodily injury (which shall include death, illness and disease) to any person; and/or*
- 2. accidental loss of or damage to material property, occurring during the Period of Insurance and arising out of a Journey”.*

25. Mr Shapiro KC noted, indeed, that the IMP Policy (which was subject to German law) had a similar requirement for legal liability.
26. As a result, Mr Shapiro KC submitted, an insured can recover an indemnity from its insurer only if the insured can demonstrate that it was legally liable to a third party. That can be established by a regular judgment. If, on the other hand, the insured enters into a settlement agreement with the third party, then, the insured will have to establish that the insured was liable as a matter of law before any entitlement to indemnity arises.
27. This, Mr Shapiro KC observed, was made clear in *Enterprise Oil Ltd v Strand Insurance Co Ltd* [2006] 1 Lloyd’s Rep 500, where Aikens J (as he then was) had this to say at [27]:

*“Again, generally speaking, in order to claim under a liability policy where the insured has settled the claim of the third party, the insured still has to demonstrate that it was or would have been liable to the third party. It cannot simply rely on the fact of the settlement to demonstrate either liability or that the amount of the settlement was reasonable. In order to show the settlement was reasonable, the insured must show that the amount of damage for which it would have been liable is at least as much as the amount paid under the settlement.”*

28. An allegation of liability, Mr Shapiro KC added, is insufficient, Aikens J pointing out at [65] that:

*“an insured can only be obligated to pay sums by law if there is an actual liability to do so. One cannot be obligated by law to pay sums if there is only an alleged liability”.*

29. In *Enterprise Oil*, the insured settled a claim brought against it in respect of alleged torts committed in Texas and subject to the law of Texas. The insured contended that, even if it was not strictly liable in Texan Law, it was sufficient for an indemnity if it could be shown that a Texan jury might have found liability. Aikens J rejected that contention, observing at [82]:

*“I will not consider any of their evidence on what a jury would be likely to find or could have found on particular topics. I have to decide what the outcome of the case would have been, applying Texas law and procedure to the facts as I find them and acting as both judge and jury”.*

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Under Texas law the assured was not legally liable in tort so the assured was not entitled to an indemnity from its liability insurers.

30. This is the approach, Mr Shapiro KC continued, that was adopted by Christopher Clarke J (as he then was) in *Omega Proteins v Aspen Insurance UK* [2010] EWHC 2280 (Comm) and by Flaux J (as he then was) in *Astrazeneca Insurance Co Ltd v XL Insurance (Bermuda) Ltd* [2013] EWHC 349 (Comm).
31. Mr Shapiro KC submitted that it is essentially this same approach which needs to be adopted when dealing with causation in the context of a professional negligence claim brought against an insurance broker where the claimant is alleging a failure to obtain insurance: the claimant must plead and prove that in the hypothetical counter-factual the insurance would have indemnified him.
32. In this respect, Mr Shapiro KC placed heavy reliance on *Dalamd Ltd v Butterworth Spengler Commercial Ltd* [2018] EWHC 2558 (Comm), a decision of Butcher J, who decided that it is for the Court to determine on the balance of probabilities whether the hypothetical policy was valid and whether there would have been cover in the absence of any negligence of the broker and that, so Mr Shapiro KC submitted, it is only questions as to what an insurer might have done as a matter of business or for commercial reasons which are to be determined on a loss of a chance basis.
33. It was Mr Shapiro KC's submission that there are good reasons for this approach, primarily because the basis on which it is decided whether or not there would be indemnity under a policy should be the same in a claim against insurers or a claim against insurance brokers. In any event, even if the correct approach was on a loss of a chance basis, it would be necessary for Norman Hay to show that it had lost a substantial chance of indemnity under the putative policy. Plainly, Mr Shapiro KC observed, if there is no entitlement to indemnity at all, there is no substantial chance of indemnity.
34. As to the Loss Issue, it appeared in the lead-up to the hearing that the objection being taken by Marsh was that Norman Hay did not itself pay Ms Sage what it was agreed she would be paid in settlement of her claim since it was Quaker, rather than Norman Hay, which paid the money.
35. Thus, in his skeleton argument, Mr Shapiro KC took issue with what is pleaded in the Particulars of Claim at paragraphs 27 and 37, as follows:

*"27. The Sage Settlement Sum was paid by the Claimant ... from funds held in an escrow account which had been constituted as part of the sale of the Claimant's former subsidiaries to the Buyer.*

...

*37. But for the Defendant's breaches of duty as set out above, the Claimant and/or IMP would have had in place valid and effective insurance cover that would have provided an indemnity in respect of liabilities to Ms Sage arising from the Accident such that the Claimant would not itself have had to fund the settlement of those liabilities via the Sage Settlement."*

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Mr Shapiro KC submitted that this is wrong since it was Quaker which paid the settlement sum since, pursuant to Clause 9 of the relevant sale contract, the sums paid into escrow were paid by Quaker, not Norman Hay.

36. In the event, however, as Mr Shapiro KC explained during his oral submissions, this is not a point which Marsh pursued. Marsh's objection was, instead, a second point raised in Mr Shapiro KC's skeleton argument, namely that it is not open to Norman Hay to claim damages on the basis (which Mr Shapiro KC suggested Norman Hay has put forward) that reflects the reduced sale value of its subsidiaries after the monies had been paid out of escrow since nowhere has it been alleged in the Particulars of Claim that Marsh was under a duty to Norman Hay to protect the market value of its shareholding in its subsidiaries.
37. Lastly, as to the Evidence Issue, Mr Shapiro KC submitted that, since in order to recover under a liability policy in respect of a settlement entered into, a claimant is obliged not just to establish that it was, in fact, legally liable to the third party but also that the amount of the settlement was reasonable and the extent of the legal liability to the third party was at least in the amount of the settlement (see, for example, *Enterprise Oil* at [27] and *Technip Saudi Arabia v Mediterranean & Gulf Cooperative Insurance and Reinsurance Co* [2023] EWHC 1859 (Comm) at [7]), it is not sufficient to do as Norman Hay has done in this case and merely plead and assert that it relied upon legal advice whilst refusing to state what the legal advice was. The legal advice, Mr Shapiro KC submitted, has to be disclosed in order to establish reliance and, furthermore, to enable reasonableness to be considered.
38. Norman Hay refuses, Mr Shapiro KC suggested, to disclose such advice, other than in return for Marsh agreeing to waive any right to seek surrounding documents or further legal advice. Absent disclosure, Mr Shapiro KC submitted, Norman Hay's claim will fail because Norman Hay will be unable to establish reliance or that the settlement was reasonable. As such, it would be a waste of costs and Court resources to allow a hopeless claim to proceed. This is an additional reason why Norman Hay's claim has no real prospect of success.

**Norman Hay's position**

39. Mr Chapman KC, on behalf of Norman Hay, submitted, as to the Liability Issue, that Marsh is simply wrong on the law since it is not necessary for Norman Hay to show that it was liable in law to Ms Sage and that it would have recovered under any insurance policy in the sense that the putative insurer under such a policy would have been legally bound to indemnify Norman Hay in order to succeed in its claim against Marsh.
40. In support of this submission, Mr Chapman KC relied upon various authorities (including, most importantly, *Fraser v Furman* [1967] 1 WLR 898), along with a number of academic works.
41. In *Fraser* an industrial company (the insured) was sued by an employee who had suffered personal injury in the workplace. The insured's brokers had negligently failed to obtain insurance against such claims. The brokers argued that since the insurance would have contained a standard clause requiring the insured to take reasonable precautions for the safety of its employees, and that since on the facts it had not done

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so, the claims against insurers would have failed in any event and so the brokers' negligence had caused no loss. The Court of Appeal rejected this argument, holding that the insurers in question would not have relied upon the protection of such a clause. Diplock LJ explained at [904], as follows:

*“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 never 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.”*

42. Mr Chapman KC submitted that the approach described in *Fraser* is the right approach in a case such as the present also, noting that this is consistent with what is stated in *Jackson & Powell on Professional Liability* (9<sup>th</sup> Ed.) at paragraphs 16-168 to 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.*

*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.”*

43. Mr Chapman KC referred also to *McGregor on Damages* (21<sup>st</sup> Ed.) at paragraph 10-081:

*“Loss of a chance has appeared in actions against insurance brokers by their clients for inadequately insuring them. These claims have from time to time been met with the argument that no action lay because the clients would not have been able to claim on the policy which should have eventuated on the ground that some fault on the client's part would in law have allowed the insurance company to repudiate the policy. The courts, however, have seen the issue as one of the degree of chance that the insurance*



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*company would in practice have repudiated on account of the insured's fault. In the result they have in some cases held that in practice there would have been no repudiation and have allowed full recovery, as in **Fraser v B.N. Furman (Productions)** and **Dunbar v A. & B. Painters**, while in others the full claim has been discounted, by one third in **Everett v Hogg Robinson**, and by 70 per cent in **O. & R Jewellers v Terry and Jardine Insurance Brokers**. It was necessary in this last case to assess the chance not only of whether the insurance company would have taken the defence on the policy available to it but also of whether, had the broker's duty been performed, the claimant would have had any policy at all. It was the assessment of the loss of this double chance which led to the very substantial discount there. ... ."*

44. Mr Chapman KC submitted that the same approach can be seen described in *Clerk & Lindsell on Torts* (24<sup>th</sup> Ed.) at paragraphs 9-286 to 9-287:

*"It is not enough for the claimant to show that the broker was negligent: he must in addition show that the broker's negligence caused the loss he is complaining of. So a client cannot complain if the insurance that should have been obtained would not in fact have covered him in the events that happened, and a fortiori if he would have been uninsurable even if the broker had acted properly. Again, if it is plain that, even assuming the broker had placed the risk properly, the underwriters would have rightly refused to pay anything for some unconnected reason, then there will be no substantial damages. However, this is a difficult plea to sustain: in the absence of convincing evidence that the claim would not in fact have been paid, the claimant is likely to succeed.*

*In many cases of the above type, it will be found that there was some likelihood that the insurer would in fact have paid even if not liable to do so, whether ex gratia or for other good commercial reasons. Since the claimant can recover only his actual loss, it follows that in such a case damages may have to be reckoned on the basis of the loss of a chance of receiving payment, on the principle of the decision in **Allied Maples Group Ltd v Simmons & Simmons**. So in **Everett v Hogg Robinson Ltd**, brokers negligently made a misrepresentation to the underwriters which the latter correctly invoked to avoid liability. The brokers argued that the underwriters would, even absent the misrepresentation, have repudiated on the basis of the assured's undisclosed claims record, but Kerr J found that the underwriters would probably have compromised the claim for commercial reasons, and merely reduced the award by one-third to take account of the possibility that they would not have. Where the claimant's putative right against the underwriters is uncertain – for instance where it is arguable whether non-disclosure would have allowed repudiation at all – and the assured reasonably accepts a settlement of his claim, he is it seems entitled to recover the difference between the amount received under the settlement and the full amount."*

45. As for *Dalamd*, Mr Chapman KC submitted that that case addressed different issues to those relied upon by Marsh on the present applications. In that case, the issues were whether (a) an insured had to prove on the balance of probabilities that cover was not available under the policy put in place by the broker on account of the broker's negligence and (b) whether, if the broker contended that cover under the policy might not have been available on other grounds (such as breach of a condition for which the broker was not responsible) whether that issue also fell to be determined on the balance of probabilities. The Court held that in both cases the issue fell to be determined on the balance of probabilities.

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46. Neither (a) nor (b), Mr Chapman KC submitted, are in issue in this case. Instead, Marsh seeks to contend that the claim is hopeless because it fails to plead that Norman Hay was liable in law to Ms Sage such that any insurer under the cover that ought to have been put in place would have been liable in law to provide an indemnity to Norman Hay. This is wrong, Mr Chapman KC submitted, as a matter of an analysis of the Particulars of Claim which plead, in terms that, but for Marsh's negligence, Norman Hay would have had an indemnity that would have responded to the liabilities arising from the accident. It also ignores, he noted, the alternative bases upon which Norman Hay says that, given competence on the part of Marsh, it would have avoided the liabilities arising from the accident. In pleading the relevant counterfactuals and in its approach to causation and loss, Mr Chapman KC suggested that the pleading reflects an orthodox approach and that, in any event, there is no requirement for Norman Hay to plead and prove on the balance of probabilities that the insurer under the putative policy that should have been put in place would have been liable in law to indemnify Norman Hay in respect of the accident.
47. Turning to the Loss Issue, as previously mentioned, Mr Shapiro KC's stance in his skeleton argument was to take issue with the suggestion made by Norman Hay that Norman Hay had itself paid the settlement monies to Ms Sage. Although not ultimately pursued by Mr Shapiro KC, it is worth mentioning what Mr Chapman KC's answer to this point was.
48. Mr Chapman KC reminded the Court that the accident took place on 22 November 2018. He went on to explain that Norman Hay turned, as a result, to explore its insurance position. In addition, the fact of the accident was disclosed by Norman Hay prior to the sale of its four trading divisions, and addressed in the resulting Share Purchase Agreement entered into with Quaker on 16 July 2019.
49. Clause 9.1 of that agreement contained an indemnity by which Norman Hay agreed to:
- "indemnify the Buyer against and covenants to pay the Buyer an amount equal to the Recoverable Liabilities when the Buyer or any Group Member incurs or suffers, in each case arising out of, or in connection with, the Indemnified Incident."*
50. The *"Indemnified Incident"* was defined as:
- "the motor accident which occurred on 22 November 2018 in Ohio, US and in which Mr Nigel Kelsall, a sales director for certain Members was fatally injured and in which Ms Heather Sage was injured."*
51. *"Recoverable Liabilities"* were defined as:
- "all Losses, liabilities, claims, Costs, damages and expenses that the Buyer or any Group Member does or will incur or suffer, all claims or proceedings made, brought or threatened against the Buyer or any Group Member by any person and all Losses, liabilities, claims, Costs, damages and expenses the Buyer or any Group Member does or will incur or suffer as a result of defending or settling any such actual or threatened claim or proceeding."*
52. Schedule 9 (*"Escrow Accounts"*) made express provision for the *"Held-Over Amount"* in respect of potential liabilities to be held in escrow and provided at paragraph 14 that:

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*“Once any Relevant Claim which is the subject of any Held-over Amount has been agreed or determined, then the Seller and the Buyer shall jointly instruct the Escrow Agent to pay the relevant Withdrawal Amount to the Buyer out of such Held-over Amount, and then pay the remainder (if any) of the Held-over Amount to the Seller, in each case from the relevant Escrow Account.”*

53. Mr Chapman KC explained that the settlement sum was thereafter paid by Norman Hay through a joint instruction with Quaker from the funds held in the escrow account, resulting in a lesser purchase price ultimately being paid to Norman Hay which was equal to the amount of the settlement sum. That, Mr Chapman KC noted, is the loss that has been sustained by Norman Hay which it seeks to recover from Marsh in these proceedings. As such, he submitted, Norman Hay’s loss is the orthodox brokers’ negligence-type loss, namely the pecuniary loss sustained as a result of being uninsured for a particular event, as described in *Jackson & Powell* at paragraph 16-133:

*“... Typically a claimant in a broker’s negligence action will have suffered a loss for which it is not properly insured (because no insurance was in place at all, or because the policy in place did not respond to the loss for some reason, or because the sums insured were inadequate). Usually, the claimant’s allegation against its broker is that, but for the broker’s negligence, it would have been properly insured and would have received a payment from an insurer for some or all of its loss.”*

54. The source of Marsh’s confusion, as Mr Chapman KC put it and submitted, appears to be that it confuses type of loss with the manifestation of the loss: the fact that the loss - in the form of the settlement sum for which Norman Hay was uninsured - manifested in a reduced payment price payable upon the sale does not change the fundamental nature of the loss claimed from Marsh, which is the amount of liability in respect of which Norman Hay was uninsured as a result of Marsh’s negligence. There is no requirement for a claim in professional negligence that the sums lost due to a defendant’s negligence move directly from the claimant to a third party.
55. Otherwise, Mr Chapman KC confirmed that Norman Hay was not seeking to put its damages claim on a basis which reflects the loss in value of its subsidiaries in the Quaker sale. It follows that there is nothing in Mr Shapiro KC’s submission that it is incumbent upon Norman Hay to plead a different case as to Marsh’s alleged breaches of duty.
56. As to the Evidence Issue, Mr Chapman KC submitted that it would be *“wildly premature”* to strike out the claim or give summary judgment in circumstances where disclosure has not yet been given, witness statements have not yet been exchanged and expert evidence (if any) has not yet been served.
57. It would also, he submitted, be wrong to do so given that in *BP plc v AON Ltd* [2006] EWHC 424 (Comm) Colman J observed that:

*“the fact that the terms of a settlement were entered into upon legal advice establishes, at least, that those terms were prima facie reasonable. It is then for the defendant to displace that inference by evidence to the contrary, by establishing, for example, that some vital matter was overlooked ... .”*

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Norman Hay, Mr Chapman KC submitted, will properly be able to establish that the settlement with Ms Sage was entered into upon legal advice (by way of witness statement in the usual way), and that at that point the onus will shift to Marsh to displace the inference that the terms were *prima facie* reasonable.

**Discussion**

58. Having considered these various submissions, I have reached the clear conclusion that it would not be appropriate in this case either to strike out Norman Hay's claim or to give summary judgment dismissing it. I say this for a number of reasons.
59. First, as Mr Shapiro KC acknowledged during the course of argument, since he no longer took the position in relation to the Loss Issue that Norman Hay could not establish its loss because the settlement monies were paid to Ms Sage out of escrow and since Mr Chapman KC explained that Norman Hay was not seeking to claim a loss based on a reduction in the value of any subsidiary, the Loss Issue stands or falls with the Liability Issue; there is no freestanding objection.
60. Secondly, as to the Evidence Issue, I agree with the submissions made by Mr Chapman KC as just described that it would be wrong to stop Norman Hay's claim at this early stage on the basis that documents which Marsh says should be disclosed have yet to be disclosed when the disclosure stage has not yet been reached; indeed, the first Case Management Conference is not due to take place until 12 June 2024.
61. Thirdly and, in the circumstances, most importantly, I am not persuaded that Mr Shapiro KC is right in what he submitted in relation to the Liability Issue.
62. As to this, Mr Shapiro KC was clearly right when he submitted that, under a liability policy, it is necessary, if an insured is to recover, that it be established by the insured that it was liable to the third party which has alleged that the insured is liable. That, generally speaking, is, indeed, the position, as was made clear by Christopher Clarke LJ (as he had become) on appeal in *Astrazeneca v XL Insurance (Bermuda)* [2013] EWCA Civ 1660 at [16] to [22]:

*“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. ...*

*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.*

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18. *This principle is potentially very inconvenient for insureds. It may mean that they face weak or dubious claims, which it would be commercially expedient to settle, but in respect of which, if they settle, they may not recover against the insurer because the claims cannot be shown to be well founded. In such a situation they may have to soldier on with the defence and hope to persuade the insurer that it is in his best interests to allow them to settle before trial and to indemnify them when they do, on the basis that, if they lose, the insurer is more likely to have to pay, and to pay more than he would if there was no settlement. Even if they are held liable, this may not in practice, and does not in law, mean that they are automatically covered. The insurer may still say that they were not liable.*

...

21. *That liability policies require the establishment of actual liability is apparent from considerations of language and English authority. As to the former, 'liability' prima facie means the state of being liable and not alleged liability. ...*

22. *As to the latter, the principle is summarised in MacGillivray on Insurance Law (12th edition) at 29–006 as being that 'liability insurance provides an indemnity against actual established liability as opposed to mere allegations'. The position which I have set out in paragraphs 17 and 18 above is vouched or supported in several cases which the judge considered including: **West Wake Price & Co v Ching** [1957] 1 WLR 45, 48–51; **Commercial Union Assurance v NRG Victory Reinsurance** [1998] 2 Lloyd's Rep 600; **MDIS v Swinbank** [1999] 1 Lloyd's Rep IR 516, 524; **Structural Polymer Systems Ltd v Brown** [2000] Lloyd's Rep IR 64, 67; **Thornton Springer v NEM Insurance Co Ltd** [2000] Lloyd's Rep IR 590 [34]; **Enterprise Oil**, which contained a pro-insured policy interpretation clause ('In the event of any conflict of interpretation between the various clauses and conditions the broadest and least restrictive wording to the benefit of the insured shall always prevail'); and **Omega Proteins v Aspen Insurance UK Ltd** [2010] EWHC 2280 (Comm)."*

63. More recently, the same point was made by Jacobs J in **Technip** at [7]:

*"The basic rule under English law is that where a policyholder settles its liability to a third party claimant, and wishes to claim under its liability policy, it is not sufficient for the policyholder simply to establish the reasonableness of the settled amount. In order to succeed, the policyholder must prove (i) that it was in fact legally liable ..., and (ii) that the amount for which it would have been liable had the matter been litigated is at least as much as the amount paid under the settlement ..."*

64. It does not follow, however, that the position is the same as between a claimant in an insurance broking claim and the insurance broker defendant since I agree with Mr Chapman KC when he submitted that, whilst it is quite clear that an insured must prove, as a matter of contract, that it is entitled to be indemnified under the policy according to its terms, the position is not the same where the claim is against an insurance broker in negligence. In the latter context, there is scope for a broader inquiry as to what, had the broker not been negligent, would have happened in the event that the claimant (here Norman Hay) had presented a claim to its putative insurer. That necessarily requires there to be an assessment of the chance that the claim under the putative policy would have been met. That will include the Court asking itself whether, realistically, the

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putative insurer would in the present case have told Norman Hay that it should, in effect, act as a prudent uninsured in dealing with Ms Sage's claim or whether, as Mr Chapman KC would suggest, the more likely position would be that the putative insurer would have engaged with Norman Hay in dealing with the claim and provided an indemnity of some sort.

65. That this is the position – that there is a difference – is borne out by the commentaries to which Mr Chapman KC referred and to which I have already made reference: *Clerk & Lindsell, McGregor* and *Jackson & Powell*. What is described in these passages (and in these cases) is consistent with insurance broking claims being considered on the basis of lost chance principles.
66. In my view, *Dalamd* should not be treated as authority that the only way in which a claim against an insurance broker can succeed is if the Court is persuaded, on a balance of probabilities, that the claimant (the client of the insurance broker) would have recovered under the putative policy of insurance which, but for the broker's negligence, the claimant would have had. If that can be established, then, the claimant will recover in full; if, however, this is not established, but the Court were to conclude that the claimant has nonetheless been deprived of the chance that a recovery would have been made had the putative insurance been in place, then, there will be a recovery but it will not be in full and will instead be arrived at on a loss of chance (and so percentage) basis. In other words, I do not consider that *Dalamd* lays down an absolute rule that the merits of an alternative defence available to the putative insurer always have to be determined on a balance of probabilities and that it is not also open to the Court to assess the likely value of the claim against the insurer on a lost chance basis that takes into account the prospect of the insurer taking the position that it is not obliged to meet the claim.
67. In the present case, this means that it would be open to Norman Hay to invite the Court at trial to conclude that, had a liability policy been in place which covered US hire car risks, then, Norman Hay would have obtained an indemnity either in full (if Norman Hay can establish that it was liable to Ms Sage as she alleged) or in a lesser amount assessed on a loss of a chance basis because the Court is persuaded that, in all likelihood, the putative insurer would have taken a pragmatic and commercial stance which would have seen it pay a partial indemnity, thereby avoiding the risk that Ms Sage's claim was not settled and so she ended up receiving more than the US\$5.5 million which she agreed to accept and that the insurer was ultimately found to be liable to provide a full indemnity – in each case, with substantial costs having been incurred in the meantime.
68. It is necessary, in the circumstances, to consider *Damald* in a little detail. In that case, as explained by Butcher J at [126], there were two issues:

*“(1) what Dalamd must show in relation to Aviva's and XL's avoidance, and (2) what proof is required in respect of what would have happened had Butterworth Spengler not acted in breach of duty.”*

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69. As to the first of these issues, Butcher J said this at [127]:

*“The first issue relates to whether Dalamd must show that the claim on the Aviva or XL policy would have failed as a result of Butterworth Spengler’s negligence. Dalamd submitted that it was ‘emphatically not necessary’ for it to prove that. Instead, it contended that it was enough to show simply that Butterworth Spengler’s negligence had ‘impaired’ the insured’s claims under those policies. What was meant by this was explained as follows: ‘In other words, it is enough to show that [Butterworth Spengler’s] negligence has provided the insurer with a reasonably arguable ground to defend liability.’ It was said that this was so, because it was part of the broker’s duty to protect his client from unnecessary risks, including the unnecessary risk of litigation. ... .”*

70. As to the second issue, Butcher J explained at [128], as follows:

*“The second issue relates to how the court should approach a contention that, but for the defendant’s breach, the policy would in any event not have responded by reason of some other point for which the brokers were not responsible, such as, in the case of the Aviva policy here, a breach of the External Storage Condition. Dalamd submits that in this regard, issues as to what the claimant would have done are to be determined on a balance of probabilities basis, but other issues are to be determined on a loss of a chance basis. That includes not only whether insurers would have taken the other point, and whether they would have compromised the case if that point had stood alone, but also what the court would have decided if the point had been maintained to trial by insurers. ... .”*

71. He, then, set out the position adopted by the insurer in that case (also represented by Mr Shapiro KC) at [129]:

*“To these contentions, Butterworth Spengler answered that, in relation to both aspects, they were not in accordance with authority, and were unprincipled. They submitted that in a case, which they submitted this one was, where what the insured was claiming was that breach of the brokers’ duty had caused it the loss of an indemnity under the policy, the issues were to be approached as follows. First, questions as to whether the policy was valid or was voidable by reason of the brokers’ negligence were to be determined either as a matter of law (if applicable) or, insofar as factual issues were concerned, on the basis of the balance of probabilities on the material before the court in the action against the brokers. Secondly, questions of whether there was some other ground, for which the brokers were not responsible, on which the insurance would not have provided an indemnity, for example breach of warranty or condition or the application of an exclusion, were also to be determined as a matter of law (if applicable) or on the basis of the balance of probabilities. However, issues of what the insurer might have done as a matter of business – for example that it might not have taken the other point, or might have compromised it – were to be determined on the basis of loss of a chance. What the court would not do, however, was to determine on a loss of a chance basis what another court would have decided had the other point been pursued to trial against insurers. Butterworth Spengler submitted that their contention that these were the correct approaches was supported by **Fraser v Furman** [1967] 1 WLR 898 and by **Dunbar v A&B Painters** [1986] 2 Lloyd’s Rep 38, and also by other brokers’ negligence cases, including **Everett v Hogg, Robinson** [1973] 2 Lloyd’s Rep 217,*

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***Gunns v Par Insurance Brokers [1997] 1 Lloyd's Rep 173 and RR Securities v Towergate Underwriting Group Ltd [2016] EWHC 2653 (QB).***

72. Butcher J, then, turned to the first issue. Although this is not an issue which applies in the present case, it is nonetheless necessary to consider what he had to say because later, at [137], he appears to refer back to the reasoning that he used in answering the first issue. At [130], he said this:

*“In my judgment, in relation to the first aspect, the position contended for by Dalamd is not established by authority, and would produce potentially anomalous results. The effect of Dalamd’s case is that, if the insurer puts forward an arguable defence based on the brokers’ breach of duty, then the insured would be able not to pursue the insurer, to claim against the broker and, if there were no other point by reason of which it was said that the policy would not have paid, to recover in full. While, according to Dalamd, it would be open to the broker to say that the insured had been unreasonable in failing to sue the insurer, this, Dalamd said, would be an argument that the insured had failed to mitigate the loss caused by the broker’s conduct in having ‘impaired’ its claim, and it would be difficult for the broker to succeed on such an argument because the duty to mitigate is a low one, and furthermore the burden of establishing a breach of that duty would fall on the brokers.”*

73. He continued at [131]:

*“What this would mean is that it would be open for an insured, faced, for example, with an assertion by an insurer in correspondence of what is merely an arguable defence based on the broker’s negligence, not to pursue the insurer but to proceed against the broker and recover the entirety of the indemnity, notwithstanding that a court actually determining the matter would have found that the insurers’ defence was clearly a bad one. On Dalamd’s case the broker could only defend itself by showing that the insured had unreasonably failed to mitigate its loss.”*

74. He added at [132]:

*“In my judgment the approach contended for by Dalamd makes unduly favourable to the insured an action against the broker for a breach consisting simply of creating an uncertainty as to cover by comparison with the insured’s action against the insurer who, in the type of case I have mentioned in the previous paragraph, is in breach of its obligation to indemnify.”*

75. He said this at [133]:

*“It is the case that, if a breach of duty by the broker has caused the insured’s position to be uncertain, and as a result of that uncertainty, the insured has made a reasonable settlement with the insurer, then the insured can sue the broker for the difference between the amount of the settlement and an indemnity under the policy, without having to establish in that action that the defence for which the broker was responsible was a good one. That is what was decided in **FNCB v Barnet Devanney** and in **Ground Gilbey Ltd v Jardine Lloyd Thompson UK Ltd [2011] PNLR 15.**”*



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76. He continued at [134] by saying this:

*“On the other hand, I was shown no authority in which, where there had been no settlement with insurers, and where the insured had sued the brokers on the basis that they were in breach of duty in failing to make proper disclosure or to ensure that proper disclosure was made to insurers, the court awarded damages without a finding or concession that the policy was actually voidable. Instead, in **Everett v Hogg Robinson** (at 222) and in **Dunbar v A&B Printers** (at 40: ‘... the fact that they were entitled to repudiate ...’) the court proceeded on the basis of whether there had actually been an entitlement on the part of insurers to avoid, not whether there was an arguable case that there had been an entitlement to avoid.”*

77. He concluded in relation to the first issue at [135], as follows:

*“Given that the issue of whether or not the policy was voidable depends on the facts in existence at the time of the placement or renewal of the insurance this approach is consistent with the ordinary approach of the courts to determining matters of past fact. Furthermore, there appears to me to be a good reason why, at least in the ordinary case, that should be the basis on which the issue is assessed. That reason is that, in cases of alleged brokers’ negligence, it is a commonplace that both the insurer and the broker are sued, very often in the same action. Manifestly, as against the insurer, the issue of whether the policy is or is not voidable has to be determined on a yes/no basis (i.e., as a matter of law, if and insofar as applicable, or insofar as issues of fact arise, on a balance of probabilities). In my judgment the issue should be determined against the broker on the same basis, and there should not be the possibility of a different basis depending on whether the insurer is and continues to be a party to the proceedings (and does not, for example, settle them).”*

78. Butcher J, then, turned to the second issue (which does apply in the present case), saying this at [136]:

*“As to the second aspect, I accept Mr Shapiro’s submission that the approach he advocated was that adopted in **Fraser v Furman**. There the Court of Appeal first decided whether there would have been a good defence open to the (putative) insurers based on breach of a reasonable precautions clause, and held that there would not have been as a matter of construction and given the facts of the case (905B–907H), and then, as an alternative ground, considered whether the putative insurers, Eagle Star, would have taken the point. Similarly, in **Everett v Hogg, Robinson** the way in which the court dealt with the question of whether there was a different point than that for which the brokers were responsible which would have precluded an indemnity was first to consider whether that different point was a good one (223 RHC), and then to consider whether it would have been taken by (re)insurers and, if it would have been, whether it would have been settled. It also appears to be the approach adopted in **Dunbar v A&B**, in that at 40 LHC May LJ accepted that the facts of the accident meant that insurers could have relied on Memo 2 to escape liability, but then found that the judge had correctly come to the conclusion that insurers would not have taken the point. Equally, in **Gunns v Par Insurance Brokers** the approach of Sir Michael Ogden QC (sitting as a Deputy High Court Judge) was to decide whether or not the facts were such that the policy would not, in any event, have responded to the loss by reason of breach by the insured of a reasonable precautions clause (at 177-178). ... .”*

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79. He went on at [137]:

*“By reason of considerations similar to those I have referred to in relation to the first aspect, there are good reasons why this should be the approach of the courts. The issue of whether there was a defence by reason of some other non-disclosure for which the brokers were not responsible, or of breach of a condition or the application of an exclusion for which they were not responsible, depends on facts which existed at the time, depending on the nature of the point, either of placement or of the occurrence of the putatively insured loss. Furthermore, in an action against the insurers, the application of such defences would necessarily be decided on the basis of a determination as to whether the defence was or was not a good one (namely, as a matter of law if and insofar as applicable and on the balance of probabilities as regards any issues of fact). The basis on which they are decided in a claim against the brokers should not depend on whether the insurers are (or are still at the point of trial) parties to that action.”*

80. He, then, considered **O&R Jewellers** ([1999] Lloyd’s Rep. IR 436) at [138]:

*“Mr Hext QC relied heavily in this context on the decision in **O & R Jewellers v Terry**. In that case the judge, Sir Godfray Le Quesne QC, sitting as a Deputy High Court Judge, included a number of uncertainties in his overall assessment of the insured’s chance of recovering the full claim of £850,000. These included not just the issues of whether insurers would have taken other points, and whether they would have compromised them and if so for how much, which, as I have said, are matters which have been assessed on such a basis in other cases, but also ‘If fought to a finish, with what result?’ Mr Hext QC relied on this to contend that the court should not decide whether the other point which insurers might have taken was correct, but simply to decide the chances of how it might have been decided had insurers been pursued to trial and the point then argued. I do not consider that that case is persuasive authority that that is the right approach, and the judge in that case does not appear to have been addressed with arguments on the point similar to those which I have heard. In any event, I consider that the approach which I have attempted to summarise above, is that which is consistent with the preponderance of authority.”*

81. He continued at [139]:

*“I did not find persuasive Mr Hext QC’s submission that that approach was unsatisfactory because it would mean the decision of issues on a yes/no basis in the absence of underwriters. The evidence of underwriters would be admissible and could be adduced by either party, if relevant. In any event it is a commonplace for issues to be resolved on the balance of probabilities even though parties involved in the underlying events are not party to the proceedings.”*

82. He concluded at [140]:

*“As I think Mr Shapiro accepted, there may perhaps be cases in which, by reason of particular facts, the insured may be able to contend against the insurance broker that it has, in effect, deprived the insured of the opportunity of having its claim under the insurance determined by a court, and that in such circumstances different considerations may apply in relation to one or the other of the two issues I have*

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*discussed above. I agree with him, however, that the present case is not pleaded on that basis, and Dalamd adduced no evidence to support such a case.”*

83. I do not read what Butcher J was saying in *Dalamd* as precluding the case which Norman Hay wishes to advance in the present case. To repeat, it is only the second scenario which is applicable in these proceedings, not also the first. This is significant because, although at [137] Butcher J referred to “*considerations similar to those I have referred to in relation to the first aspect*” when going on to explain why he had decided as he had in relation to the second aspect, this is not a case (unlike *Dalamd*) where the claimant (here Norman Hay) has chosen not to pursue its insurer and instead only to bring a claim against its broker. This is for a straightforward reason: Norman Hay does not have an insurance policy under which it could bring a claim – precisely because, so Norman Hay alleges, of negligence on Marsh’s part; there is, as Mr Chapman KC put it, no insurer “*on the scene*”.
84. Furthermore, but for essentially the same reason (and again unlike in *Dalamd*), this is not a case where, as Butcher J put it at [137], anything “*depends on facts which existed at the time, depending on the nature of the point, either of placement or of the occurrence of the putatively insured loss*” since the present case involves consideration of a counterfactual which entails asking what would have been the position *had there been* a policy of insurance in place (which there was not). 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. This involves, in turn, a weighing of contingencies which *Dalamd* did not require because, to repeat, in that case there was an actual insurer and an actual policy of insurance, yet the claim was not brought against that insurer and under that policy but instead only against the broker.
85. It is for this reason that Butcher J made the observations that he did at [132] to [134] in particular. Those observations do not apply in the present case because there is no insurance policy under which Norman Hay could bring a claim against its insurer. As such, this is the type of case which Butcher J had in mind at [140], when he noted, in effect, that the position might be different where the claim against the broker is that the broker “*has, in effect, deprived the insured of the opportunity of having its claim under the insurance determined by a court*”. That is the present case; it was not the position in *Dalamd*.
86. The view which I have reached concerning *Dalamd* is shared by *Simpson, Professional Negligence & Liability*, where the point is introduced at paragraph 10.269.1 in this way:
- “All these cases were analysed on the basis of lost chance principles. In Dalamd Ltd v. Butterworth Spengler Commercial Ltd however, Butcher J held that where the broker alleges that the claim would have failed anyway (because of an alternative defence by the insurer), the causation analysis has two stages. The first is to decide whether the alternative defence was a good one or not, which is done in the ordinary way by legal analysis and balance of probabilities (the burden being on the broker to prove that the alternative defence was a good one). The second is to decide (if the alternative defence is held to be good) whether the insurer would have taken the point, and if so with what result: this is a lost chance analysis. The lost chance analysis does*

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*not extend to deciding the percentage chances of the insured succeeding at trial if the insurer would have taken it that far this was to be answered 'yes/no' at the first stage."*

87. There is, then, this observation at paragraph 10.269.2:

*"It is suggested that this approach should be treated with some care. There may be cases in which it is appropriate for the judge at the broking trial to reach a final determination of the merits of the insurer's alternative defence: if it is a simple point of policy construction on agreed facts, for example, or an obvious point about the extent of cover. If the alternative defence is more complex, however, then conducting a 'trial within a trial' of its merits carries clear risks. The material available to the broking trial judge may be much more limited than that which would have been before the notional judge at the insurance trial, in which the insurer would have had to give disclosure. Important witnesses may be absent and time may have affected the recollection of those who do attend, if negotiations with the insurer were protracted."*

88. This is followed by paragraph 10.269.3, as follows:

*"For these reasons in the analogous context of claims for negligence against solicitors in conducting litigation, where the solicitor says that the claim would have failed anyway the weight of the authorities is generally against the trial judge trying the merits of the original action. So **Daland** should not, it is suggested, be treated as laying down an absolute rule that the merits of an alternative defence available to the insurer always have to be determined on a balance of probabilities, as opposed to assessing the likely value of the claim against the insurer (given the possibility of that defence) on a lost chance basis."*

89. I agree with this. I agree also with what *Simpson* goes on to say in paragraph 10.269.4:

*"This is consistent, it is suggested, with the decision of the Supreme Court in **Perry v. Raleys Solicitors**, which draws a 'bright line' distinction in negligence causation between (a) facts which the claimant has to prove about his own actions and (b) facts which the claimant has to prove about the actions of others or about future events. Only the claimant's own actions have to be proved on the balance of probabilities; those in category (b) are assessed on lost chance principles. In the context of claims against solicitors for the negligent conduct of underlying litigation, the only action of his own which the claimant has to prove is that he would have brought the claim: if that is proved, generally speaking causation is established and what would have happened thereafter (which measures the strength of the claim) goes into the lost chance analysis. Translating that approach in to claims against broker, the only action of his own which the insured needs to prove is that he would have mounted a claim against the insurer even in the light of the alternative defence. What would have happened thereafter is dependent on the actions of others. If the alternative defence can be shown to be in the 'clearly right/clearly wrong' class then the case would lend itself to *Butcher J's* approach, but in other cases it would be better for causation to be assessed on a broad view of the merits of the insurer's putative position."*

90. The fact that *Simpson* and the other commentaries to which I have been taken by Mr Chapman KC support the view which I have reached is significant in the context of what are, after all, summary-type applications. I do not consider it appropriate, in the circumstances, either to strike out or to give summary judgment dismissing the claim.

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91. This leaves one further matter. That is Mr Shapiro KC's suggestion that Norman Hay has not, to date, put forward a loss of chance case; indeed, Mr Shapiro KC suggested in his reply submissions that it was only when Mr Chapman KC was addressing the Court in his submissions that such a case was, for the first time, advanced.

92. I do not agree with Mr Shapiro KC about this since paragraph 41 of the Particulars of Claim pleads as follows:

*“Alternatively, as a result of the Defendant’s aforesaid breaches of duty the Claimant 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 the liabilities and other losses it has in fact suffered as a result of the Accident, including, in particular, avoiding the need to provide the SPA Indemnity and to fund the Sage Settlement Sum.”*

93. I appreciate that this does not spell out that Norman Hay's case is that the putative insurer would be expected to adopt a pragmatic and commercial stance if faced with a claim by Norman Hay based on the fact that Ms Sage had herself made a claim. It may be that such a case should be set out more clearly in the Particulars of Claim, but this is not a reason to strike out or give summary judgment dismissing the claim.

94. The more so, given that paragraph 39 of the Particulars of Claim goes on to plead as follows:

*“In the premises, but for the Defendant’s aforesaid breaches of duty, one way or another insurance cover would have been in place that would have provided an indemnity (in full or, in the alternative, at least in substantial part) in respect of the liabilities arising from the Accident and the Claimant itself would not have been subject to an uninsured claim and liability in respect of the same.”*

This paragraph underlines the fact that Norman Hay's case is that “one way or another” it would not have had to fund the settlement with Ms Sage; that, indeed, is what paragraph 39 goes on to state in terms.

95. Furthermore, paragraph 39 follows what is pleaded in paragraph 38, which (without quoting directly) is that:

(1) Effective cover was available and in place under the IMP Policy. Had the existence of this effective cover for IMP been identified by Marsh, then, Norman Hay would have given instructions for that cover to be retained (even if only for the benefit of IMP) rather than have it cancelled and would have instructed Marsh to seek such cover for Norman Hay and other companies in its group under the global insurance programme.

(2) Alternatively, if liability cover had not been available as part of the global programme of insurance arranged by Marsh, had Norman Hay been made aware by Marsh of the absence of such cover then it would have issued a standing instruction (similar to the instruction it in fact issued after the accident) that its employees should ensure that when hiring cars on business trips the maximum available insurance cover was obtained and that private hire vehicles were to be used wherever possible. In those circumstances, Mr Kelsall would have been obliged to

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take out adequate insurance when hiring the car in which he was killed and/or used a private hire car instead.

96. On either scenario, Norman Hay's losses would have been avoided irrespective of establishing liability to Ms Sage and entitlement to an indemnity under the global insurance programme. As such, I agree with Mr Chapman KC when he submitted that, in any event, regardless of whether Mr Shapiro KC was right in relation to his submissions concerning *Dalamd*, these are aspects which Norman Hay should be permitted to put forward as part of its case. Nothing that Marsh has had to say on these applications impacts upon them. It follows, therefore, that there will, in any event, need to be a trial to deal with them.

**Conclusion**

97. It follows that Marsh's applications must fail and are dismissed.