“Few insurance brokers are aware of one the most serious implications of the FSA’s (ICOB) regulations,” warned James Dingemans, QC, at the BIBA conference this year.

He pointed out the ICOB source book contains detailed guidelines and rules of conduct. Breach of these will result in a penalty, but that may not be all.

Breach of the ICOB rules can also be actionable at the suit of a private person if as a result of a breach the individual suffers a loss.

The other duties of a broker, which are not contained in the ICOBs but exist in common law, can also give rise to a civil action in negligence and contract. And, the evidence adduced from the breach of ICOBs may be used to support a civil liability claim.

Mr Dingemans went on to forewarn of the elephant traps for brokers – and I strongly endorse his opinions.

The effect of the ICOB rules has been to re-emphasise the “professional” responsibilities of the broker for which an inadvertent breach can result in a claim for negligence.

Those responsibilities are not new but, in practice, it is often easier to prove a breach of a regulation than to prove negligence.

Now, having proven breach of an ICOB rule, a claimant could be advised to bring a separate claim in negligence based upon the assumption that if there was a breach of regulation there is likely to have been negligence as well.

Experience so far suggests brokers have been so concerned with compliance of the things that can be easily measured and ‘tick-box’ checked that they have overlooked the Exocet missile, ‘duty of care’, tucked quietly away behind the rules.

Mr Dingemans also made an overarching point in his presentation. He said the law will judge an insurance practitioner according to the law pertaining to a broker’s duty of care and sometimes this will not accord with what might, wrongly as it turns out, be perceived as acceptable market practice.

Case law is littered with examples of decisions that seem, to the experienced insurance practitioner, to be contrary to what they believed to be usual practice.

In summary, Mr Dingemans was saying that the broker must now be prepared to be judged as a professional and such standards are above those of a salesperson.

This of course brings into sharp focus, yet again, the question of the differences between charging fees and receiving commission.

So, with the help of Mr Dingemans, I have compiled some top tips:

• make it clear to your client what you have agreed to do and, where applicable, what you have not agreed to do. Take proper notes at meetings, confirm it all in writing with your client and make sure you action the points that you have agreed to action, because of your professional knowledge and skill
As client and regulatory expectations increase, so it is a fundamental necessity for insurance brokers to manage and transfer risk.

James Dingemans, QC, speaking at the BIBA conference this year

Not so many years ago, material information was closely aligned with utmost good faith and where material information had not been disclosed an insurer may decide to overlook it, if it was not too serious.

Nowadays, almost every claim is meticulously examined for breach of material disclosure. The goal posts have changed and so it has become one of the broker’s principal duties to protect their client from this pitfall.

It could be argued that merely restating the client’s duty of disclosure in large print at the time of renewal, is not enough.

Do not rely on previous declarations and information, check it with the client.

Brokers acquiring business will often rely upon information received from a previous broker and present this to a new insurer. Mr Dingemans advice is – don’t.

He says the fact that a previous broker accepted the information and recommended a particular type of policy does not mean that

a) the information accepted was correct and/or

b) the policies placed were appropriate.

It is also important brokers buy the right cover for themselves.

Richard Bowdidge, partner of First City Partnership, says: “In our experience, many brokers are unaware of the elephant traps described by James Dingemans QC and their PI insurances are not designed to fill the gaps. BIBA’s accredited brokers are specialists and can add valuable advice based on the top tips in this article and more besides.”

Roger Flaxman is BIBA’s professional indemnity consultant and managing director of Flaxman Partners

PROFESSIONAL INDEMNITY

• sort out remuneration; who is going to pay it and when it is going to be paid. If, as is currently being suggested, brokers are to routinely charge a small commission as well as a fee, it is essential the client understands this in advance and agrees to it. Hidden remuneration will not be tolerated.

• decide who is your client and ensure everyone agrees this. This applies to all professionals; it is remarkable how many times a professional deals with a party in good faith only to find that they are not the ultimate decision maker, or client. This is particularly important in the case of companies who are themselves subsidiaries or associates of conglomerates. Knowing your client determines to whom you have a duty of care.

• know what the law expects of you. Brokers must ascertain their client’s needs by instructions or otherwise; they must use reasonable care and skill to procure the cover their employer has asked for, either expressly or by necessary implication; and if they cannot obtain what is required, they must report in what respects they failed and seek alternative instructions.

If you can’t get clear instructions from your client, your duty is to assess the risk that should be insured... but if you cannot obtain appropriate cover then you must report failure to the client, promptly.

This imposes a real need for broking firms to supervise the less experienced brokers in their team and it suggests that a mature and experienced client-facing practitioner could be an excellent investment as a mentor and wise head in the firm’s management of risk.

Exclusions, conditions and, particularly, conditions precedent should be clearly pointed out and explained to the client. Indeed they should. The practical problem with this, as brokers know so well, is that very often there are so many of them that, in writing, the client may not read them.

There was recently a case of a firm of brokers acting for a farmer and his sons, none of whom were interested in insurance.

Failure by the farmers to comply with alarm and security warranties resulted in avoidance of their policy and the broker was accused of failing properly to bring to the attention of the farmers the appropriate clauses. Evidence showed that they had done so but, it was found, once was not often enough. This reinforces the point that a broker will be judged as a professional, not as a post box.

An experienced insurance broker will know what should be brought to the client’s attention and how.

Verbal instructions, whether by telephone or other unwritten means, are always troublesome. In particular, it is important to make a written note of client’s verbal instructions and act upon them.

It is good practice to send a letter or email concerning the verbal instructions, thereby giving the client an opportunity to reflect, confirm, deny or correct them. And tell the client about the need to give material disclosure.

Material disclosure is a recurring elephant trap. An insured rarely understands what is meant by material information. Indeed, unless one has spent several years actively in the insurance industry, it is impossible to know what underwriters would usually consider as material to them.

James Dingemans, QC, speaking at the BIBA conference this year

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