THE DUTIES OF INSURANCE BROKERS:

DEVELOPMENTS IN THE LAW

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The present author has elsewhere explored the inherent conflicts of interest faced by an insurance or reinsurance broker who follows usual market practice in the conduct of his business.[1] The purpose of the present article[2] is to place some recent case law developments into the general context of the established law, and also to consider whether the Contracts (Rights of Third Parties) Act 1999[3] is likely to have any impact on the scope of brokers' duties.

1 Basic Agency Principles

(a) The incidence of agency

It is generally accepted that a broker is the agent of the assured/reinsured, although increasing doubts have been expressed by the courts. In *Roberts v Plaisted*[4] the Court of Appeal could scarcely believe that a Lloyd's broker was - for the purpose of obtaining information from the assured as to the placement of a risk - the agent of an assured who he had never met before rather than the agent of an underwriter with whom he was in daily contact, and took the view that the law was in need of urgent reform. In *Winter v Irish Life*[5] the court's approach was that there was a rebuttable presumption that the broker was the agent of the assured, but that if it could be shown that the agent was acting for the insurers for any particular matter, the incidence of agency would be switched accordingly. It might be thought that the law is now reaching the position that the incidence of a broker's agency is fluid, and depends entirely on what the broker is doing and for which party. The most important decisions on this point are now *Re Great Western Insurance Co Ltd*[6] and *J A Chapman & Co Ltd v. Kadirga Denizcilik ve Ticaret.*[7] In the former, the Court of Appeal accepted that an insurer not registered or domiciled in the UK was nevertheless for regulatory purposes carrying on insurance business in the UK by reason of its use of UK brokers, who were authorised to filter risks and settle claims on behalf of the insurer. The Court of Appeal had little difficulty in accepting that in all of these activities, the brokers were acting as the insurer's agent. In the latter, Sir Brian Neill, speaking on this point with the agreement of Chapman and Waller LJJ,

1 The Duties of Marine Insurance Brokers in The Modern Law of Marine Insurance, ed Prof Rhidian Thomas, LLP, 1996.

2 Loosely based on a talk given to the British Insurance Law Association in May 1999.

3 At time of writing this legislation had not received the Royal Assent. The article is based on the wording of the Bill current in August 1999, which is unlikely to have changed prior to enactment.

4 [1989] 2 Lloyd's Rep 341.

5 [1995] 2 Lloyd's Rep 274. See also Searle v. A R Hales & Co [1996] LRLR 68.

6 [1999] Lloyd's Rep IR (August).

7 [1998] Lloyd's Rep IR 377.

recognised that a broker might act as a 'common agent' or even as an independent self-interested intermediary for certain purposes (in that case, when paying the premium under a marine policy). It might be added that the Insurance Ombudsman has ruled that in appropriate circumstances an insurer is to be regarded as bound by the acts, statements or knowledge of a broker.

All of this means that the traditional view of a broker's role is now under serious threat. The correct approach would now appear to be that it is necessary to look at what a broker is doing and why he is doing it in order to determine the incidence of his agency at any particular time. The analysis has two consequences. First, it may be necessary to reappraise certain decisions which have proceeded on the basis that the broker is the assured's agent. For example, the ruling in *Abrahams v Mediterranean Re*[8] that policy wording prepared by the broker is to be construed against the underwriters rather than the assured[9] might now proceed on the ground that the broker is, for this purpose, the underwriters' agent or at the very least an independent intermediary whose true function is market-making.[10] Secondly, it is should be formally recognised that brokers may commonly find themselves in a position involving a serious conflict of interest between the assured and the insurers. Obvious examples are: (a) where the broker holds a binding authority and is authorised to accept risks on behalf of insurers (the rule here being that the broker owes no duty of care to insurers in selecting acceptable declarations);[11] (b) where the broker - particularly at Lloyd's - is charged by insurers with the duty of obtaining adjusters' reports on the loss (the rule being that the broker is acting for the assured only);[12] and (c), most glaringly, where the broker agrees with, and receives from, insurers commission for introducing assureds while at the same time purporting to act as an independent adviser to those very assureds.

The commission problem is one which perhaps merits some additional comment. Although it is increasingly common for commission to be agreed with the assured on a fee basis (a practice of increasing importance after the Finance Act 1994 and the imposition of insurance premium tax), in most cases commission is paid by insurer by means of deduction from premium, the entitlement to commission arising provided that the broker's efforts have been the effective cause of the policy.[13] The concept of payment by the insurer is based on custom and implied term[14], but is

8 [1991] 1 Lloyd's Rep 216.

9 Although it must be said that the courts have consistently refused to give underwriters the benefit of any ambiguity in policy exclusions in reliance on this principle.

10 As recognised by the House of Lords in Forsikrings Vesta v Butcher [1989] 1 All ER 402.

11 Empress v Bowring (1905) 11 Com Cas 107, distinguished on exceptional facts in Pryke v Gibbs Hartley Cooper [1991] 1 Lloyd's Rep 602.

12 North & South Trust v Berkeley [1971] 1 All ER 980.

13 It was accordingly held in Velos Group Ltd v Harbour Insurance Services Ltd [1997] 2 Lloyd's Rep 461 that commission is fully earned as soon as cover is placed, so that if the cover is cancelled the broker is entitled to retain commission.

14 Norreys v Hodgson (1897) 13 TLR 421; Workman v London & Lancashire Fire (1903) 19 TLR 360.

difficult to reconcile with the principle that the broker is the assured's agent, and the overriding and rigid equitable principle that an agent must not make secret profits. The common law notion that no conflict arises because the assured is aware that commission is payable, and must ascertain its level for himself, is scarcely an acceptable explanation.[15] While there are limits - the broker must account to the assured where commission is excessive[16] or paid under dubious circumstances,[17] and the Financial Services (Conduct of Business) (Product and Commission Disclosure) Rules 1994, made by SIB under the Financial Services Act 1986 require disclosure of commission levels before the proposal is signed for investment policy - the idea that an agent can receive effectively undisclosed commission from a person dealing with his principal has scarcely raised an eyebrow in the insurance context, but would be regarded as tantamount to corruption in the context of, eg, company directors.

Once there is general recognition of these conflicts, it might be possible to develop clear disclosure rules so that at every stage each party knows exactly what the broker is doing and on whose behalf. The pending review of the Insurance Brokers (Registration) Act 1977 following the passing of the Financial Services and Markets Bill some time in the year 2000 would provide an ideal opportunity for these issues to be addressed properly and effectively.

(b) Are duties of care owed to underwriters?

In the present state of the law, the general answer to this question is probably in the negative. There is probably no stronger candidate for a duty of care than the administration of a binding authority but, as noted above, a duty of care has been denied even in that situation. However, there may be an implied contract in some cases, eg, as regards signing indications at Lloyds, as was held in *GAFLAC v Tanter, The Zephyr,*[18] where broker was held to have entered into a separate contract with reinsurers despite acting for assured. This and other cases[19] raise but do not answer the intriguing question - virtually unanswerable by the application of ordinary agency principles - of whose agent the broker may be when carrying out the commonplace activity of setting up a reinsurance framework for as yet unidentified direct underwriters, almost inevitably without instructions from or knowledge on the part of the original client, the assured.

(c) Are duties of care owed to third parties?

A broker may well owe duties to a third party where there is a close relationship between the broker and the third party in question. Thus if the third party is an assignee or is otherwise known at the outset to be a person interested in the policy,

15 Green v Tughan (1913) 30 TLR 64.

16 Baring v Stanton (1876) 3 Ch D 502.

17 NV Rotterdamse v Golding Stewart Wrightson 1989, unreported.

18 [1995] 2 Lloyd's Rep 529.

19 In particular Youell v. Bland Welch & Co (No 2) [1990] 2 Lloyd's Rep 431; SAIL v. Farex Gie [1995] LRLR 116.

the broker will owe a duty of care.[20] This form of liability was confirmed by the House of Lords in *White v Jones,*[21] in which a duty of care was held to be owed by testator's solicitor to an identified disappointed beneficiary. At the other extreme, there is no general duty of care to unidentified and unidentifiable third parties as a whole: this was so held in *Federation General v Knott Becker,*[22] in which a third party failed in his action to sue a broker for not obeying the (subsequently insolvent) assured's instructions to obtain liability cover which would have provided indemnity against the very type of claim made by the third party.

There is, however, a middle category of third parties who derive from an identifiable class, but who have not been specifically identified at the date of the policy. A good illustration of the point is a policy issued to a CIF seller of goods. The nature of the transaction is that the goods are to be sold and the policy to be assigned to a buyer and thence to one or more sub-buyers. If the policy is inadequate, and the seller is a man of straw, can the ultimate purchaser sue the broker? The present law almost certainly prevents a duty of care arising between broker and ultimate purchaser, given the lack of initial identification. At this point it is necessary to consider the Contracts (Rights of Third Parties) Act 1999. The effect of the Act is that a third party can sue on a contract to which he is not a party if: (a) a contract term purports to confer a benefit on him; and (b) on a proper construction of the contract it appears that the parties intended the term to be enforceable by a third party; and (c) the third party is expressly identified by name, as a member of a class or as answering a particular description. Although all will depend upon the precise terms (if any) that a broker contracts with the assured, and on the manner in which the courts construe requirement (b), there is at the very least a respectable argument that a broker who sets up an insurance policy which is assignable and is intended to benefit as yet unidentified third parties, by definition acts for the benefit of those third parties.

(e) Legal responsibility for sub-brokers

This is an important question, as English brokers are regularly used as placing brokers for risks coming from abroad, placed by local producing brokers. Lloyd's brokers may also be used by English and overseas originating brokers to obtain access to the Lloyd's market. It is far from easy to reconcile the English cases. What is clear is that there is a contract between the assured and his producing broker, that there is a further contract between the producing broker and the placing broker, but that there is no contract between the placing broker and the assured.[23] In the absence

20 Bromley LBC v Ellis [1979] 2 Lloyd's Rep 210; Punjab National Bank v De Boinville [1992] 3 All ER 104.

21 [1995] 1 All ER 691.

22 [1990] 1 Lloyd's Rep 98.

23 See Prentis Donegan v. Leeds & Leeds Co [1998] 2 Lloyd's Rep 326, in which premium advanced by the placing broker was held to be recoverable from the producing broker but not from the assured, given the contractual structure set out in the text. The contrary assumption of a contract between the assured and the placing broker, adopted in Velos Group Ltd v. Harbour Insurance Services Ltd [1997] 2 Lloyd's Rep 461.

of any contract beween the placing broker and the assured, two questions arise. First, is the producing broker liable to the assured for the acts and defaults of the placing broker? Secondly, does the placing broker owe any duty of care to the assured? The precise relationships will be of particular significance where one of the brokers has become insolvent so that the assured has to look to the other, and also for the purpose of the apportionment of any liability between the brokers.

The first question is far from easily answered. In the general law an agent is liable to his principal for: (a) his own acts and defaults, including negligence in the selection of a sub-agent; and (b) the acts and defaults of a sub-agent in respect of matters delegated to the sub-agent. In *Youell v. Bland Welch (No 2)*[24] Phillips J applied the latter principle to reach a finding that the placing and producing brokers were each liable for failing to obtain appropriate reinsurance cover. However, the law is equally clear that where an agent appoints a sub-agent to perform a skilled operation on the part of the principal, the agent is not vicariously liable for the sub-agent's acts or defaults. This principle was applied in *Aiken v. Stewart Wrightson Underwriting Agencies*[25] to prevent Lloyd's members agents from facing liability for the conduct of Lloyd's managing agents. Every case may, therefore, give rise to complex factual inquiries.

The second question was considered in *Tudor Jones II v. Crowley Colosso.*[26] Here, a tortious duty of care was assumed. The assured had instructed the producing brokers to obtain insurance for a construction project, and the instructions were passed to placing brokers. However, the policy contained an exclusion which effectively defeated the assured's purposes but which the placing brokers had not drawn to the attention of the producing brokers. Langley J proceeded on the assumption that a duty of care was owed by the placing broker, and held that the duty had been broken. The action was in fact brought by the producing broker, which had indemnified the assured and had taken an assignment of the assured's rights against the placing broker, and the issue for the court was apportionment of liability between them, Langley J apportioning the blame one-third to the producing brokers and two-thirds to the placing brokers. This case has to be distinguished from *Pangood Ltd v Barclay Brown & Co; Bradstock Blunt & Thompson Ltd (third party),*[27] in which it was held that a placing broker was not under any duty of care to the assured to warn the producing broker of the presence in a policy on a nightclub of a standard form 'auditorium warranty' under which various fire precautions were to be taken by the assured. The Court of Appeal's decision turned on the fact that the placing brokers did not anticipate that the assured would rely upon them to explain the terms of the policy. The distinction between the two cases appears to turn upon the degree of

24 [1990] 2 Lloyd's Rep 431.
25 [1995] 2 Lloyd's Rep 618.
26 [1992] LRLR 619.
27 1999, unreported.

expertise of the producing broker: if that broker is dealing with familiar and standard policy terms, the responsibility to explain them rests with him, whereas if the policy is unusual or emanating from a different jurisdiction the placing broker is under a duty to elaborate its terms and their implications.

Once again the impact of the Contracts (Rights of Third Parties) Act 1999 falls to be considered. It will be recalled that a third party has a claim under a contract to which he is not a party if : (a) a contract term purports to confer a benefit on him; and (b) on a proper construction of the contract it appears that the parties intended the term to be enforceable by a third party; and (c) the third party is expressly identified by name, as a member of a class or as answering a particular description. Where a producing broker appoints a placing broker to act in relation to a specified risk, element (c) is satisfied. It is less certain whether the courts would accept that conditions (a) and (b) could be satisfied in circumstances in which the law did not impose a duty of care upon the placing broker towards the assured. However, once again, the argument in favour of liability under the Act is not easily dismissed, and the fact that there is no tortious liability cuts both ways in any analysis of the Act.

2 Duties of Brokers

(a) Regulation

The optional registration scheme established by the Insurance Brokers (Registration) Act 1977 is well known, and the only comment which need be made here is that the legislation regulates the use of the word 'broker' rather than the activity of broking, given that an unregistered person can carry on broking activities provided that the word 'broker' is not used to describe those activities. Such light-handed regulation is a nonsense, and must be seen in its historical context of a Private Members' Bill which reached the statute book without the consideration that a public bill now receives. By a recommendation issued in 1991, the European Commission indicated that it was contemplating EC legislation on brokers, aimed at harmonising national rules on the regulation of brokers in order to boost the provision of insurance services across EC borders. The 1992 Recommendation would establish an authorisation requirement for brokers, with authorisation being available only to brokers who are adequately trained and experienced. In their conduct of business, brokers will be obliged to disclose any economic ties with one or more insurers, and to spread the placing of business amongst a number of insurers in order to secure independence from insurers. In 1997 the European Commission announced that it was actively considering the publication of a draft directive on these matters. The EC initiatives, coupled with the pending Financial Services and Markets Bill 2000, promise an interesting time ahead.

(b) Selecting the insurer and the policy

The general obligation of the broker is to obey instructions, both express and implied (eg, by the custom of the Lloyd's or London market), but only to the extent of

reasonableness: the broker does not guarantee that he will be able to fulfil his instructions. More specifically, the broker must: select a solvent insurer;[28] find a policy which provides value for money;[29] ascertain the assured's requirements, not just from the assured's own instructions[30] but also from market practice current at the date on which the instructions were given;[31] warn the assured of any particular clauses which may give rise to difficulty;[32] and draft the policy wording for submission to the assured and the leading underwriter, ensuring that required risks are covered[33] and that there are no problematical conflict of laws issues.[34] These principles are well known, but a number of points which arise from them are worthy of emphasis. First, the law tests the actions of the actual broker against the notional actions of a prudent broker, as established by expert evidence. A claimant will not succeed by showing that the broker did not obtain the cover requested, but must go further and show that a prudent broker could not have done so. Secondly, what is prudent in any set of circumstances depends to a substantial extent upon market practice, so that prudence may involve something more than adherence to express instructions. In *O'Brien v Hughes-Gibb*[35] brokers instructed to obtain mortality cover on the racehorse 'Shergar' chose not to take up the offer of free theft insurance available from other insurers. This conduct was held not to be a breach of duty, but only on the ground that a prudent broker would not have bothered with obtaining theft cover as racehorse kidnapping was not thought to be a significant risk: Rattee J's judgment proceeded on the basis that evidence of a widespread market practice of taking up the offer of free theft insurance would have produced a different result. Thirdly, the prudence or otherwise of the broker's conduct has to be considered in the context of the market as it operated at the time, and not with hindsight. O'Brien is a good illustration, although this very point was at the heart of the Court of Appeal's reversal of the judgment of *Gage J in FNCB Ltd v. Barnet Devanney (Harrow) Ltd.*[36] Here, brokers obtained a composite policy on a property, covering the separate interests of borrower and secured lending bank. The insurers raised various defences, all relating to breach of duty by the borrower, and purported to avoid its liabilities against both borrower and bank. The bank negotiated a small settlement

28 Osman v Moss [1970] 1 Lloyd's Rep 313; Bates v Robert Barrow [1995] 1 Lloyd's Rep 680.

29 Moore v Morgue (1776) 2 Cowp 479.

30 Assuming that these are clear: see National Insurance and Guarantee Corporation v Imperio Reinsurance Co and Russell Tudor-Price [1999] Lloyd's Rep IR 241, in which the reinsured's instructions were inadequate to convey the intention.

31 United Mills v Bray [1952] 2 All ER 225 which concentrated on the assured's express instructions is doubtful in the light of later cases, such as O'Brien v Hughes-Gibb [1995] LRLR 80 and FNCB Ltd v Barnet Devanney (Harrow) Ltd [1999] Lloyd's Rep IR 43, reversed [1999] Lloyd's Rep IR (September).

32 Pangood Ltd v Barclay Brown & Co; Bradstock Blunt & Thompson Ltd (third party) CA, 1999, unreported; Bollom & Co Ltd v Byas Moseley 1999, unreported.

33 Youell v Bland Welch (No 2) [1990] 2 Lloyd's Rep 431.

34 Forsikrings Vesta v. Butcher [1989] 1 All ER 402.

35 [1995] LRLR 80.

36 [1999] Lloyd's Rep IR 43, reversed [1999] Lloyd's Rep IR (September).

with the insurers, and claimed the balance from the brokers. The bank's argument was that the policy had not contained any form of mortgagee protection clause operating to sever the interests of the borrower and the bank, thereby giving the bank rights against the insurers completely independent of those of the borrower. The brokers' defence was that such severance existed as a matter of law so that a mortgagee protection clause was unnecessary, and the mere fact that prudent brokers operating in the market at the time insisted upon the insertion of such clauses simply meant that those brokers had not appreciated the law. Gage J agreed with that analysis, but the Court of Appeal rejected it, holding that at the relevant time the principle of severability had not been fully established in the common law and that at best the position was uncertain: as it was a broker's duty to protect the assured from uncertainty and litigation, the failure to obtain a mortgagee protection clause was in breach of their duty.

(c) Completing the proposal

If the broker completes the proposal, he must make sure that he provides information to the insurer given to him by the assured, although if there are errors it may be difficult to prove whether they are the assured's fault or the broker's fault. As is shown by *O'Connor v Kirby,*[37] if the assured cannot demonstrate how the false information reached the form, he will not succeed in a negligence action. The broker is also required to draw the assured's attention to the duty to disclose material facts not asked of the assured.[38] The cases proceed on the basis that the broker is the agent of the assured for this purpose. However, it might well be worth arguing, should the point come up again, that the broker is in reality the insurer's agent at this stage in the process, given that the broker is being paid commission by the insurer to obtain applications which mature into policies.

(d) Advice once risk has incepted

The broker is required to give advice on the meaning of the policy, and any advice that is given may attract liability, whether it is of fact or law. Usually, the broker will revert to the underwriter in the event of a problem of construction, and the underwriter will almost inevitably demand a higher premium for an endorsement which encompasses the assured's query. It is strongly arguable that the the broker is in breach of duty in failing to give independent advice without reference to the underwriter. This could be another situation in which the agency of the broker could be regarded as with the underwriter rather than the assured. Where the policy has been renewed, the broker must inform the assured of any significant changes in the cover or the conditions of the policy,[39], and if the assured has suffered a loss, the

37 [1972] 1 QB 90.

38 Commonwealth Insurance v Groupe Sprinks [1983] 1 Lloyd's Rep 67; The Moonacre [1992] 2 Lloyd's Rep 501. The proposition nevertheless appears to have been doubted in Warren v Sutton [1976] 2 QB 276.

39 Mint Securities v Blair [1982] 1 Lloyd's Rep 188.

broker must advise whether or not there is a valid claim.[40] Each of these situations calls out for a reappraisal of the rule fixing the incidence of agency with the assured rather than the insurer: the practical result would be that in the event of a problem the insurers would pay under the policy and seek indemnification from the brokers, rather than the assured having to sue the insurers and then, if unsuccessful, the brokers.

(e) Progressing claims

It is the broker's duty to do everything necessary to prosecute a claim, without seeking additional payment, at least in the Lloyd's market. This will include not losing details of the identities of reinsurers.[41] In *National Company for Co-operative Reinsurance v. St Paul Reinsurance Co Ltd*[42] the assured's broker submitted fraudulent evidence to the court in support of the assured's case. It was held that the assured was bound by the agent's conduct and was personally liable to meet the insurer's costs awarded on an indemnity basis to take account of the additional length of the trial caused by the presentation of fraudulent evidence.

3 Liabilities of Brokers

(a) Measure of damages

If the broker leaves the assured underinsured or uninsured, the damages awardable against him will include the loss of policy moneys, as well as the wasted costs of suing the insurer.[43] The broker does not face liability if obedience to his instructions would not have produced a valid policy,[44] and damages will in any event be reduced proportionately to the extent that the insurer has an independent defence not based on broker's breach of duty.[45]

(b) Contributory negligence

It was established by Hobhouse J and the Court of Appeal in *Forsikrings Vesta v Butcher*[46] that damages awarded against a broker are subject to deduction for contributory negligence whether the action against him is framed in contract or tort. However, the courts are unwilling to make deductions, in the light of the consideration that the assured relies upon the broker. There is no decided consumer case in which a deduction has been made.[47] As regards commercial insurances and

40 Harvest Trucking v Davis [1991] 2 Lloyd's Rep 638.

41 Grace v Leslie & Godwin [1995] LRLR 472.

42 1998, unreported.

43 Seavision v Evenett and Clarkson Puckle, The Tiburon [1992] 2 Lloyd's Rep 26.

44 Newbury International Ltd v Reliance National Insurance [1994] 1 Lloyd's Rep 83.

45 Fraser v Furman [1967] 3 All ER 57; Everett v Hogg Robinson [1973] 2 Lloyd's Rep 217; O & R Jewellers v. Terry [1999] Lloyd's Rep IR (August).

46 [1988] 1 All ER 19 followed by Phillips J in Youell v Bland Welch (No 2) [1990] 2 Lloyd's Rep 431.

47 The word 'consumer' here is intended to describe an assured not skilled in insurance matters and not possessing significant negotiation power. Cf Bollom & Co Ltd v Byas Moseley 1999, unreported, where no deduction was made.

reinsurance, a deduction of 20% was made in *Youell v. Bland Welch (No 2)*, with regard to a reinsured who failed to read documentation presented to him by brokers for approval. Subsequently, in *National Insurance and Guarantee Corporation v Imperio Reinsurance Co and Russell Tudor-Price,*[48] a reinsured's damages were reduced by 30% where the brokers were asked to obtain an extension to reinsurance cover and submitted to the reinsured for approval wording which, on even a cursory reading, did not meet the reinsured's needs. It was held that the benchmark figure for deduction on the ground of contributory negligence in a reinsurance case is 20%, and the uplift was justified in the present circumstances as the breach of duty was readily apparent.

(c) Other defences

Where the broker is in breach of duty, the prospects of establishing a defence against the assured based on the assured's conduct are remote. If the assured has ratified unauthorised conduct by the broker, such ratification does not operate as an automatic defence to the broker in respect of a claim against him for breach of duty. The questions of ratification and exoneration are distinct, as was pointed out in *Suncorp v. Milano.*[49]. If this was not the case, as was pointed out by Colman J in *National Insurance and Guarantee Corporation v. Imperio Reinsurance Co UK Ltd and Russell Tudor-Price*, "ratification would operate as a shield for professional agents which could be justified neither conceptually nor as a matter of justice".

Where a broker is in breach of duty to his client, and the client becomes aware of that breach but does not renew his demand to the broker to fulfil the instructions originally given by the client, such conduct may amount to waiver on the basis that the twin requirements of waiver - knowledge and unequivocal affirmation - have been satisfied. However, waiver and equivalent defences may be difficult for the broker to establish. In *National Insurance and Guarantee Corporation v Imperio Reinsurance Co and Russell Tudor-Price*, the second defendants, brokers, were instructed to obtain an extension to reinsurance cover; having purported to do so, the brokers submitted the new wording to the reinsured who, without subjecting the wording to any detailed linguistic analysis, informed the brokers that the wording "seemed to do what we wanted it to do". Colman J held that the reinsured was not to be taken to have knowledge of the brokers' breach of duty and the response to the brokers did not amount to an unequivocal act of affirmation, so that neither of the two requirements for waiver had been established. Colman J also dismissed a defence based on estoppel, which similarly required an unequivocal act by the reinsured.

48 [1999] Lloyd's Rep IR 241.
49 [1993] 2 Lloyd's Rep 225.

(d) Limitation of actions

An action against a broker accrues on the date of his negligent act: in the case of an unfair presentation to the insurer, which allows the insurer at a later date to avoid the policy, time begins to run from the date of the unfair presentation and not from the date of the insurer's avoidance.[50] In *Imperio v Heath*[51] it was decided that a broker's breach of fiduciary duty - while not technically subject to a limitation period - is to be treated by analogy (under the Limitation Act 1980, s 36) in the same way as a contract or tort action.

4 Conclusion

Readers may regard this article as a curious mixture of narrative and criticism of the law. If so, its objectives have been met. The litigation spawned directly and indirectly by the Lloyd's affair has led to a sustained examination of the practices upon which the London market has long been based, and in many situations those practices have been found not to comply with legal principle. A number of those cases have involved brokers, and all too often the manner in which brokers conduct their business has not been able to withstand judicial scrutiny. The framework of liability, which this article has attempted to describe, is now established. However, further questions have in that process been raised about the very basis of liability.

Readers with nothing better to do might usefully spend a few minutes in considering what the implications might be of a reversal of the incidence of a broker's agency, or possibly a move to the position of 'common agency' in which every act of a broker has to be assessed for its agency implications on its merits. If the initial horror of contemplating such an exercise can be overcome, some readers may well conclude that either of these alternative approaches might produce a position far more akin to market practice than the law presently accepts.

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50 Iron Trades Mutual v Buckenham [1990] 1 All ER 808; Islander Trucking v Hogg Robinson [1990] 1 All ER 826; Knapp v Ecclesiastical Insurance [1998] Lloyd's Rep IR 390.

51 1999, unreported.