Underwriter Access to Broker Files in the Lloyd's Market - Goshawk v Tyser

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Now that the House of Lords has refused Tyser leave to appeal, the Court of Appeal decision stands.

What happens if underwriters at Lloyd's, who have handed back to their insured's brokers all the documents which those brokers have shown them in the course of placing the insurance and making claims under it, subsequently have need of those documents in order to evaluate their exposure?

That was Lord Justice Rix's formulation of the question brought before the Court of Appeal in *Goshawk v Tyser*.

Goshawk's appeal called into question the unique position occupied by the broker in the Lloyd's market. This unique position had previously been considered several times by the English courts prior to *Goshawk v Tyser*, ((2006) 1 Lloyd's Rep 566).

Background

In both *Anglo-African Merchants Ltd v Bayley* ((1969) 1 Lloyd's Rep. 268) and *North and South Trust Co. v Berkeley* ((1970) 2 Lloyd's Rep. 467), the Commercial Court were asked to consider the practice in the Lloyd's market by which underwriters instruct their claims adjuster through the broker. In particular, the Court was concerned with whether the broker had any ground upon which to resist the request of their client, the insured, for a copy of the claims adjuster's reports held by the broker as a consequence of this practice.

In *Anglo-African*, Mr Justice Megaw concluded that the broker had no ground for resistance and expressed surprise that such a practice should exist between the broker and underwriters commenting:

> *"…a custom will not be upheld by the courts of this country if it contradicts the vital principle that an agent may not at the same time serve two masters…"*

Mr Justice Donaldson in *North and South* lamented the passing of two years since Mr Justice Megaw's judgment in *Anglo-African* with no change of practice in the Lloyd's market or testing of the issue with the Court of Appeal.

An attempt to reverse the line of authority, including *Anglo-African* and *North and South*, was made in *Pryke & Ors v Gibbs Hartley Cooper* ((1991) 1 Lloyd's Rep. 602). Expert evidence was led by underwriters to support the argument that an implied contract existed with the broker that placed a binding authority with their

coverholder. On this occasion, Mr Justice Waller rejected implication on the basis that the contract contended for was of uncertain ambit and necessarily produced a conflict position for the broker.

The Commercial Court decision

A similar assertion of an implied contract based upon the long established custom of the Lloyd's market was relied upon by Goshawk in the Commercial Court in *Goshawk v Tyser* before Mr Justice Clarke.

Ironically, the expert broker called by Tyser, Mr Blackburn, initially appeared to support the existence of the binding custom alleged by underwriters, before submitting an altered view in a second expert report. Footnotes to a draft Terms of Business Agreement ("TOBA") discussed between the Lloyd's Market Association ("LMA") and the London Market Insurance Brokers Committee ("LMBC") also referred to underwriters as "entitled" with respect to inspecting brokers' files.

Nevertheless, Mr Justice Clarke cited *Anglo African*, *North and South* and *Pryke* with approval in rejecting that Lloyd's market practice created any contractual entitlement for underwriters.

The appeal

On appeal, underwriters moved the focus of their case away from a contractual entitlement arising from a binding custom of the Lloyd's market. Before the Court of Appeal, Goshawk submitted that a contract between the underwriter and the broker was to be implied, incorporating the right to re-inspect. This was a corollary of an equivalent term to be implied into the contract of insurance with the insured.

Implied term

The answer for Lord Justice Rix to the question of re-inspection in the context of underwriters, brokers and the insured, lay in the unique way in which the Lloyd's market has always operated and the duty of good faith.

Against a background of a regime at Lloyd's whereby insurance must be placed through Lloyd's brokers and a practice whereby placing and claims documents are retained by brokers but not habitually by underwriters, Lord Justice Rix found that a term was to be implied into each insurance policy.

The term to be implied was that placing and claims documentation shown to underwriters and premium accounting documents necessary to the operation of the contract should be available in case of reasonable necessity.

Lord Justice Rix considered access to placing documents to be an *"essential and mutual part of the formation of the contract"* and *"part of the fundamental obligation of good faith"*.

Although satisfied that the implication was justified on the traditional basis as necessary for business efficacy, Lord Justice Rix considered this to be a case where implication can be informed by the duty of good faith, such as in *Phoenix v Halvanon* ((1985) 2 Lloyd's Rep. 599). In *Phoenix*, Mr Justice Hobhouse accepted an implied term requiring the reinsured to keep and make available to reinsurers proper accounting records as an obligation which "*would probably be imported by the duty of good faith*".

Lord Justice Rix drew support for his conclusion from the right of access recognised in the TOBA and the broker's position that they would (only) produce copies of the scratched insurance policies / slips.

Implied contract

The relationship between Goshawk and Tyser fell into two separate and distinct categories - the period prior to the parties entering the TOBA and the period post TOBA.

Pre -TOBA

Lord Justice Rix considered that where underwriters did not retain copies of documents themselves, it was both "*reasonable and necessary for documents retained by the brokers but not by underwriters to be available through the brokers to the underwriters*". Absent bad faith, the motivation behind an underwriter's request was said to be irrelevant.

The Court of Appeal found that in addition to the term implied into insurance contracts permitting an underwriter to demand inspection of documents, "*business necessity does require a contract directly between brokers and underwriters*". Indeed, TOBA was introduced to formulate (by way of express contract) the terms on which brokers and underwriters deal with one another. Lord Justice Rix's judgment continued:

> *"… In circumstances where the documentation is retained in London with the brokers, it would be highly unbusinesslike to suppose that the parties contracted on the basis that underwriters would need to apply directly to the insureds wherever they were in the world in order to obtain documentation which ex hypothesi they needed to obtain from their Lloyd's brokers, rather than to the brokers themselves.*

It is the brokers who maintain contact with their clients and have their contact details. Because the contract as between underwriters and their assureds is to provide disclosure through the Lloyd's brokers, and because business necessity requires that the disclosure be done in London, where the documents are, it would be absurd for the brokers to be able to say that the underwriters' rights must be pursued elsewhere by reference to their principals…"

Therefore, the judge found that a contract existed between the underwriter and the broker for the period of time prior to the existence of the TOBA.

Post -TOBA

Clause 8 of the TOBA provided that underwriters were entitled to inspect documents as follows:

"8. Access to Records

8.1 The Broker agrees to allow the Managing Agent on reasonable notice to inspect and to take copies of the following:

8.1.1 the accounting records pertinent to any Insurance Business including information relating to the receipt and payment of premiums and claims and documentation such as any insurance contract or slip endorsements, addenda or bordereaux in the possession of the Broker relating to the Insurance Business; and

8.1.2 documents as may be in the possession of the Broker which were disclosed to the Managing Agent by the Broker in respect of any Insurance Business including, but not limited to, documentation relating to the proposal for the Insurance Business, the placing thereof (including endorsements and reinstatements) and any claims thereunder."

At first instance, Mr Justice Clarke had effectively rendered underwriters rights under clause 8.1 redundant. Mr Justice Clarke held that clause 2.2 of the TOBA "*trumped*" the operation of clause 8.1 as it required the broker to "*place the interests of its client before all other considerations*".

Having implied a term as between the insured and underwriter allowing re-inspection, Mr Justice Rix was not required to consider whether clause 2.2 of the TOBA did in fact "*trump*" clause 8.1 because the issue of the conflict of the broker fell away. By virtue of the implied term the insured had already agreed to disclosure of documents within the possession of the broker covered by clause 8.1 of the TOBA.

Comment

The Court of Appeal's judgment in *Goshawk v Tyser* marks a watershed in the evolution of the legal recognition of customs of the Lloyd's market. Through the implication of a term as between the underwriters and the insured, Lord Justice Rix has neatly side-stepped the basis upon which the courts had previously refused to grant legal recognition and enforceability to the customs that existed in the market as between brokers and underwriters. Thus, the Court of Appeal were left a free hand, despite previous cases such as *Anglo African*, *North and South*, *Pryke* and Mr Justice Clarke's first instance judgment, to recognise, in effect, a limited exception to the long held view that the broker cannot serve two masters.

Undoubtedly, the decision has been welcomed by all in the Lloyd's market, with the potential exception of the brokers and those who predominantly underwrite brokers E&O policies. This recognition of the historic practice in the market that brokers keep documents shown to underwriters will provide certainty. Nevertheless, as Lord Justice Rix has made clear from his limited prescription of the implied term, it is essential that underwriters continue to make copies of all placing and claims documents presented to them by brokers, in case the broker's file is for good reason not available, or access is delayed.

Tyser sought permission to appeal the decision to the House of Lords. This was refused by the Court of Appeal and has now also been refused by the House of Lords.

Nevertheless, Lord Justice Rix's judgment in the Court of Appeal could in the future be challenged or distinguished based on comments by Mr Justice Morison and the Court of Appeal in *Bonner v Cox Dedicated Corporate Member Limited* ((2005) Lloyd's Rep. I.R. 569 and (2006) 1 All E.R. (Comm.) 565).

In *Bonner* reinsurers sought implication of terms as between them and the reinsured concerning their reinsured's acceptance of risks. The implication sought by the reinsurers was rejected both by Mr Justice Morison and the Court of Appeal. The Court of Appeal in *Bonner* was satisfied that pre-contractual disclosure and the opportunity to regulate such obligations by the use of express terms was adequate. Although the Court of Appeal did not expressly overrule Mr Justice Hobhouse in *Phoenix* (expressly relied upon by Lord Justice Rix in *Goshawk v Tyser*), it appears doubtful whether the ratio of Mr Justice Hobhouse's judgment can survive the Court of Appeal's decision in *Bonner*.

If the Court of Appeal's judgment in *Goshawk v Tyser* were to be in future re-considered in that Court, it may be argued based upon *Bonner* that the underwriter and insured

had ample opportunity to provide an express term dealing with access to the records of the broker, making implication an unnecessary luxury. Hopefully that will be resolved for the future by express terms in a new TOBA or by the terms of a new standard form slip in the market.

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