Insurance Intermediaries and the Law of Agency

by

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Being an extract from a paper read to B.I.L.A.
on 21 November 1973

Out of the numerous legal questions that may arise in any of the intermediary relations and call for comparison with the continental European situation there are three problems I would like to single out either because, as in the first two cases, they have come to the fore in recent judgments in our courts or, in the third case, because there is a fundamental difference between English and continental law. All three affect brokers, not agents, in matters of fundamental importance in national and international insurance.

1 Anglo-African Merchants Ltd. v. Bayler (1969) 1LL.L.R 274 North & South Trust Co. v. Berkeley (1970) 2 LL.L.R 467

First there have been two recent judgments in which Megaw J. and Donaldson J. have considered the relation of the broker with both assured and insurers. Both cases are concerned with papers prepared by surveyors and loss adjusters. In the earlier one Megaw J. ruled that brokers were not entitled to withhold such papers from their clients on the instructions of the lawyers who acted for the insurers.

In the latter one, Donaldson J. went further and considered that any action on the part of the broker at the request of the insurers was in breach of his fundamental obligation to act solely as agent of the assured. Under that ruling the broker seems barred from his customary role as a channel of communication between insurers and such experts as the insurers would normally use to help in the settlement of claims - however much such action may be in accordance with standard practice and fundamentally in the interest of his client.

Ways and means have been explored whereby these traditional functions of the broker might be rehabilitated by informed consent from the client, but the practical difficulties of obtaining it have been found to be such that it will probably need legislation to rectify the position.

In continental law it is well recognised that the broker stands between the parties - that he has rights and duties vis-a-vis both assured and insurer, and that he is not solely and exclusively the agent of the assured.

2 Jaglom v. Excess Insurance Co. Ltd (1971) 2 LL.L.R 171

Second, there has been another decision by Donaldson J. which - with the greatest respect - many of us think a mistaken evaluation of the slip whereby the broker traditionally concludes insurance contracts in the market. The judge said that "each underwriter who agrees to take a line is making and not accepting an offer. That offer is on the terms of the slip as at the time he sees it, but he retains the right to modify that offer to accord with different terms inserted by underwriters taking subsequent lines, the intention being that, in the absence of special agreement to the contrary, all the matters ultimately evidenced by the initialled slip shall be on identical terms. The extent to which an amendment by an underwriter involves a broker in a duty to resubmit the slip to an undrwriter w o has previously taken a line without the amendment is a matter to be determined in accordance with the practice of the market, but all underwriters are to be deemed to have offered to accept the risk for their respective proportion on the terms of the slip in its finally amended form, whether or not they know of subsequent amendments.... the offers remain open to acceptance by the assured until the risk is fully subscribed or the assured through his broker affirms the transaction although not fully subscribed, whichever first occurs."

To re-establish the traditional interpretation we obtained a market understanding to the effect that both Lloyd's and Companies have always considered - and are still of this view - that subject only to the terms of the slip itself an insurer is legally bound the moment he initials the slip whether or not it is subsequently completed.

Here again, legislation would ultimately be desirable preceded by a comparative review of the broker's function and methods in the various markets and legal systems.

3 Section 53 Marine Insurance Act (1906)

Third, there is the obligation, known only to English and Dutch law, whereby the broker acts as principal and is himself liable for the premium. It is an absolute liability, not a delcredere, and a source of the broker's great strength in both countries. It does not exist elsewhere and in the other legal systems the assured himself owes the premium to the insurers.

This difference will be increasingly important as insurance transactions across national frontiers become liberalised. An instance can be found in the latest draft directive on co-insurance published by the Brussels commission in July 1973. It provides in Article 6 that the law of the country of the assured or where the

risk is situated should only apply to the intermediary. That, however, seems quite impracticable: assume a French risk co-insured at Lloyd's: would it be realistic to take such a risk out of the normal relation of broker and underwriter? Or, conversely, a U.K. risk co-insured by a German broker in his market: would he be willing to assume a liability which is alien to his traditional role bound up with a different market structure and probably not very well understood outside Britain?

Brussels Directives

This reference to the proposed liberalisation of co-insurance brings me to mention the great impetus which EEC insurance legislation seems to have been given of late. Almost ten years of calm and stagnation followed the adoption of a general programme in 1961. Then, in 1970, a wind of change began to blow under a new team in the commission. Since Britain's entry progress has been considerable. In particular the two directives on establishment in non-life insurance reached port: they were issued on the 31 July and published on the 16 August 1973. They are important also from the point of view of agency law as they deal with the transaction of business by branches and agents within the EEC. Moreover, they provide for bi-lateral arrangements with third countries and it is important to bear in mind in any comparative analysis of agency law that insurance works on a worldwide plane. Legal systems outside Europe and, in particular, that of the U.S.A. - the greatest insurance market of all - should not be neglected.

The next set of directives is likely to include on the one hand those on life assurance and on the other hand freedom of services especially for commercial, industrial, marine and aviation risks.

Life assurance directives will affect agents who are of crucial importance in the different national networks of agents. Freedom of services for insurers will have to be supplemented by similar freedom for brokers but it has not yet been formulated. The two directives on intermediaries so far prepared only deal with establishment. They have the relatively modest aim to remove discrimination and do not attempt to fit the present patchwork into a single pattern.