

COMMERCIAL LEGAL EXPENSES INSURANCE – WHERE ARE WE TODAY? by Brian Raincock, The Legal Protection Group Ltd.

When I last spoke to the BILA meeting in 1984 I observed that the incidence of litigation was rising dramatically. One statistic that I rooted out at the time was that between 1979 and 1982 there had been a 36% rise in the number of cases entered into the High Court. Readers will be well aware that the trend has continued, with compound interest, since 1984 and there is no sign of it letting up. A more contemporary statistic reveals that between 1978 and 1988 within the Queen's Bench Division alone the number of proceedings entered rose by 56%. Nor does this increase appear to be slowing down. The Companies Court within the Queen's Bench Division recently recorded a 14% increase in hearings over the past year, with a 48% increase in the number of bankruptcy petitions which were issued. Matters are made still worse for the poor litigant by the well publicised and continuing rise in legal fees. A "top London solicitors" rate was quoted in 1984 as being £164 per hour, and I have no doubt that many litigants wish that were the case today when we hear talk of rates of £300 per hour.

A former High Court Judge Sir Melford Stevenson once remarked: "For most people embarking on litigation is a major financial hazard posing a problem of terrifying human dimensions". Together these factors alone would provide a rather bleak prospect for the man in the street or the small to medium-sized company faced with litigation. In 1983 Sedgwick's, together with several UK insurers, had produced a legal expenses scheme for solicitors which was intended to tackle the problem. It failed for two reasons. The first was that the timing of the scheme was unfortunate in that there was a total lack of market awareness allied to the fact that more sectors of the population could qualify for legal aid at the time. Secondly, the contract was too confusing and generally considered to have too many exclusion clauses. Nevertheless it remains a market to which a number of composite insurers are attracted and Sun Alliance/LPG, Royal/Care Assist and Cornhill/Allianz now all participate in the legal expenses market in the UK.

But where has the industry progressed in the last six years which have seen several twists and turns in the nation's economic fortunes? In 1984 for example the total premium income for commercial legal expenses business was an estimated £10 million. At the end of last year commercial business was worth £15 million; a rise of 50%. However, that £15 million in the UK still accounts for only 2% of the UK registered companies. By comparison the total UK market, again to the end of last year, was worth £50 million while the total market in (West) Germany was worth

around £1 billion for the same period. It would be fair to say that penetration of the market so far has been patchy but it is now growing fast as the public's awareness of this class of insurance becomes more widespread. This awareness is due in part to the industry's own efforts and advertising campaigns but also to the rather sensationalised reporting of costs which some recent cases such as the Guinness Trial, the Blue Arrow Case and the Zeebrugge ferry disaster have attracted. The development of legal expenses insurance is analogous to that of private health insurance – both spent a long time easing their way into the market followed by a rapid exponential growth. Certainly the defendants in the *Amstrad v Dixon* Intellectual Property case who infringed the copyright laws were grateful for the strength of a legal expenses insurance policy around them when it footed the £30,000 bill required to take their case to the House of Lords.

It (almost) goes without saying that the litigant must still have reasonable grounds to pursue or defend his case and that pre-existing conditions are excluded. What sort of things would a Commercial Legal Expenses policy cover today? While not exhaustive, a list of the major areas would include:

- Contractual disputes;
- Licence disputes;
- Employment disputes (plus compensation award cover);
- Criminal prosecution defence;
- Property disputes;
- Intellectual property infringement;
- Motor vehicle legal protection;
- Revenue and VAT disputes;
- Jury service allowance; and
- Data protection cover.

What else has changed over this period? As the industry has gained experience the areas of cover have been broadened significantly whilst the indemnity limits have also increased substantially. Thus a standard indemnity limit was said to be £25,000 per claim in 1984 with up to £50,000 per claim for intellectual property cases. Now more realistic figures would be £100,000 per standard claim up to an aggregate yearly limit of £1 million.

Nevertheless this form of insurance has both attractions and concerns for underwriters. For example they are selling in an otherwise soft market and at the time of writing there is considerable undercapacity in the market. Furthermore by stipulating precisely what constitutes "reasonable grounds" for litigation and by exercising some control over the activities of the appointed solicitors underwriters hope to build

a loyal and profitable account. However, it is still new ground for insurers and their greatest concern is the effect that the availability of legal expenses insurance may have on the behaviour of individuals and companies.

Having said that and having accumulated some experience of underwriting it would appear that there is marginal profit to be made at the current premium rates although some believe that substantial increases in premium may be necessary in the future. Uninsured Loss Recovery, which is the largest single element in the legal expenses market, depends upon a number of labour intensive agencies which are costly to run and inevitably reduce the profit margins. Their activities may have masked some of the poor results being produced by DAS and Allianz. Furthermore the EC Directive which became law on 1 July last year insists that those general insurers who also own legal insurance subsidiaries must have an entirely separate claims handling service to avoid any suggestion of conflicting interests. The Directive goes on to ensure that clients also have complete freedom of choice when it comes to choosing a solicitor to advise on and represent their case.

What then is the future for legal expenses insurance? There is no doubt that a number of intermediaries have been slow to catch on, in particular, insurance brokers. However research has shown that nearly three quarters of them believe that legal expenses insurance will take off in the next decade. This welcome news must be tempered by their general ignorance of the product and whilst no insurance company would ever ignore the 'brokers' potential, solicitors are now being identified as potentially a much more productive distribution channel.

The market for legal expenses insurance as a stand-alone product is continuing to grow rapidly despite the lukewarm response from brokers. The composite insurers have however tried to sell (or give it away) as a "add-on" commodity type cover to many of their existing policies. This is not the long term answer and stand alone policies are the route to take in the future. It will also provide many new openings as solicitors encourage their clients to take out a policy. The benefit for the client is that he can act where necessary unburdened by financial constraint. As increasing numbers take out this form of insurance and as they become aware of its value, many solicitors for their part will waive commission as they see their client base retained. I am totally convinced that the market is ripe for development in this area as is Tony Holland, the President of the Law Society, who mentioned that this class of insurance "merited further examination" by the profession at the Law Society's National Conference held in Glasgow in October 1990.

In summary I believe that the general upturn in the fortunes of the economic market

after the recession will be followed by a resurgence in legal expenses business and this will be helped by the opportunities which the Single European Act will provide in Europe (and perhaps some former Eastern Bloc countries too). However, it will also be something of a double-edged sword for it will also produce increased competition from a number of already long-established players in the overseas market. We must ensure that we are ready and able to resist their challenge in the home market and develop our products overseas. It is a highly attractive but very challenging prospect.

The President's Lunch, December 1990
1. "BILA – THE BIRTH AND EARLY YEARS"
by Gordon W. Shaw, Vice-President of BILA

In 1959 and 1960, a group of international teachers and authors concerned with insurance law had several meetings in Luxembourg and Strasbourg, some of colloquia type and others less formal. Among their number were Professors Donati (Rome, Italy), Möller (Hamburg, Germany) and Hellner (Stockholm, Sweden). Also Enrenzweig (U.S.A.), Wets (Belgium), Portes Gil (Mexico), Garrigues (Spain), Halperin (Argentina) and Salzmänn (Switzerland). Not forgetting Professor Denis Browne, Queen Victoria Professor of Commercial Law, Liverpool University who co-authored the second edition with MacGillivray himself and was responsible solely for the third and, I believe, the fourth.

Donati and Möller founded AIDA, the International Association for Insurance Law, that year (1960) so this is AIDA's 30th anniversary. Shortly after, Browne held a seminar at Liverpool on insurance law and Donati, Möller and Hellner all attended, the first two with their wives.

Hugh Cockerell, then Secretary of the CII, was asked to rustle up some delegates. His invitation to me, then Liverpool manager for Hogg Robinson (Life and Pensions) was suitably flattering. He telephoned me thus: "Denis Browne is holding a colloquium in Liverpool next month. If you attend, at least it will cost the organizers nothing to secure a broker who has proved his ability to read and write." Greatly flattered by these encomia, I attempted to rescue the Donatis and Möllers from the cell-like closets into which each spouse was separately housed in a University Hall of Residence in the wilds of Sefton Park. At least I was able to give them an evening's tour of Chester and the Wirral. They greatly preferred my modest Country Club on the Wirral to the Chester pubs to which I also, a beer drinker then, unwisely exposed