This brings me back to the state of the market. We need to improve the quality of training of brokers and underwriters. We need to raise standards which have been allowed to drop. And finally, and probably most important of all, we need to return to profitability otherwise we will all join the ranks of the unemployed.

YOUELL - v- BLAND WELCH
by Martin Bakes and Liam Kennedy, Herbert Smith and Co.

I must begin by declaring an interest: my firm acted in this case for the defendant brokers who were ultimately held liable for 80% of the plaintiff's losses and I was involved in the handling of the case. Criticism of the judgment, now reported at [1990] 2 Lloyds 431, therefore risks accusations of sour grapes but, there again, a sycophantic case note would be appallingly tedious.

As in most cases the judgment turned on the facts and because the facts were unusual it may have little general impact on brokers and other professionals' liabilities. Nonetheless the case has a number of interesting aspects. It illustrates how difficult it is for professional people to define exhaustively the scope of their duties and to ensure that their clients are satisfied with what they have done. Perhaps this is not so surprising given that the relationship between the professional and his clients is hardly ever reduced to writing. As this case shows, however, even when there is documentation apparently regulating the relationship, it may be of little or no assistance.

The case involved a tripartite dispute between insurers, reinsurers and brokers. The contractual arrangements were complex. Against the background of the placement of one shipbuilding risk with the insurers the brokers put in place a reinsurance programme known as the Superhulls cover in order to provide reinsurance in respect of that and any similar shipbuilding risks that the insurers might underwrite. The relevant contracts were placed in 1973 and 1974. The claims under the contracts did not arise until 1978.

Insurers were liable under their policies and they sought to recover from their reinsurers. The reinsurers alleged that they were not liable because the reinsurance contract contained a 48 month limitation which, they said, operated as a "cut off" or "guillotine". The relevant part of the reinsurance policy wording stated:-

> "The reinsured shall cede to the reinsurers and the reinsurers shall accept by way of reinsurance of the reinsured their proportion of the reinsured's liability in respect of risks attaching for periods as original (up to but not exceeding 48

months) . . . . in respect of vessels . . . . whilst under construction . . . . and until handed over to and accepted by . . . . owners".

The claim arose after the expiry of the 48 month period. Insurers argued that the 48 month limitation was a limit on the type of risks covered by the reinsurance contract. In other words the reinsurance would only cover those insurances which were for an initial period of 48 months or less. Therefore if a risk was for an initial period of 48 months or less but was later extended beyond 48 months, it would be covered throughout by the reinsurance contract. On the reinsurers' case such a risk would be covered only until the expiry of the 48 month period but not thereafter (unless extended by agreement).

The issues between the insurers and reinsurers concerned the construction of the reinsurance policy and the admissibility of the slip. Although of interest to reinsurance practitioners they need not concern us here. Suffice it to say that reinsurers succeeded in their arguments before Mr. Justice Philips and that decision has recently been affirmed by the Court of Appeal.

That left the insurers to pursue a claim for breach of duty against the reinsurance brokers. To deal with that claim the judge, Philips J, had to consider the history of the insurance and reinsurance placements. He found:-

1. Sedgwicks (the reinsurance brokers) informed the insurers that excess of loss was available under the Superhulls cover without mentioning the fact that the Superhulls cover was subject to the 48 month clause.

2. Sedgwicks did not show the insurers the reinsurance slips.

3. It was reasonably to be inferred that the reinsurance offered was "as original" and the insurers so understood the position.

4. The insurers were induced by the availability of the Superhulls cover to write larger lines on this particular risk than they would otherwise have done.

5. Each of the insurers ordered reinsurance under the Superhulls cover.

6. In four cases written orders of reinsurance were sent by insurers to confirm their oral requests for this cover. Three of those orders specified the reinsurance order was "as original". It was, however, implicit that each of the insurers required reinsurance "as original".

He went on to consider the meaning and effect of documentation passing between the insurers and the brokers in early 1974. The brokers prepared for signature by insurers and the insurers duly signed an order letter addressed to the brokers, the material parts of which were as follows:-

> "Further to our verbal authority for you to place a reinsurance which follows on the basis of the attached reinsurance copy contract, we are writing to confirm those instructions and to confirm with you the specific points which you have asked us to comment on in this letter.
>
> 1. The reinsurance order is on the basis of the broad insuring conditions in the attached contract . . . . . .
>
> 4. This reinsurance will apply in the above form and in accordance with the attached contract wording unless you receive from us any specific declarations or variations which might be required when you will obviously have to obtain reinsurers specific agreement".

Attached to each copy of the order letter was a document setting out the terms of the reinsurance as they appeared in the reinsurance slip. In particular the document set out the terms of the slip relating to the period of the reinsurance as follows:-

> "Continuous open cover commencing 1st January 1974 and/or as original subject to 60 days cancellation clause to any anniversary date (not to apply to risks for which reinsureds are already committed on which are already ceded hereunder). Risks attaching basis for periods as original but not exceeding 48 months any one risk".

Mr. Justice Philips heard a great deal of evidence about the individual insurers recollections of the order letter and the document. Each underwriter said that he must have read the 48 month clause and must have understood it to mean what they were contending it meant as against the reinsurers because a clause that imposed a cut-off would, in their view, have rendered the reinsurance unacceptable. The judge rejected this evidence in these terms:

> "It is a remarkable fact that not one of the eight insurers raised a query with the brokers about the clause when they subsequently received documentation containing it. I am not persuaded that this was because, in the case of each of the insurers, those who read the clause decided that it was a clause which related to attachments and was not a cause for concern. I view with scepticism the unanimity and vigour with which each witness stated the manner in which he must have interpreted the clause in 1974. If the meaning of the clause seems so

obvious to all it is surprising that, when reinsurers repudiated liability on the ground that the 48 month clause had cut off the cover, there was not an immediate and powerful reaction from the insurers that the reinsurers construction of the clause was misconceived. No such reaction occurred. I think that the insurers attitude to the 48 month clause has been coloured, quite naturally, by the effect that it has had in this case. It was not true to say, in 1973, that a 48 month cut-off rendered the Superhulls cover worthless. It simply left a potential exposure, the significance of which depended upon the view of the risk of construction overrun taken by the individual underwriter. I am not persuaded that in 1974 each of the insured must have read the 48 month clause, duly considered its meaning and reached the conclusion that it could only relate to attachments".

The judge concluded that:-

"In each individual case . . . . the most likely explanation for inertia on the part of the insurer is that either he failed to notice the 48 month clause or failed to apply his mind carefully to its import".

This conclusion and his earlier remarks are to be contrasted with his other factual findings numbered 1 to 6 which I have set out above because, in essence, the evidence which formed the basis of those findings was all of the same nature, i.e. a reconstruction of what must have happened in the knowledge (with hindsight) of the impact of the 48 month limitation. The judge's approach led him therefore to consider the effect of the order letters on earlier breaches of duty which depended upon his findings of fact. This led to what at first sight seems an odd result difficult to reconcile with the long standing and well established principle that a party signing a document is, in the absence of fraud, misrepresentation or a plea of non est factum, bound by the contents of the document. If a person signs a document without taking the trouble to read it, he must be treated as having adopted it. *(Lewis v. Great Western Railway (1860 5H & N867, Biggar v. Rocklife Assurance Company (1902) 1 K.B. 516 The Luna (1920) P22, L'Estrange v. F. Graucob Limited (1934 2 K.B. 394, McCutcheon v. MacBrayne (1964) 1 WLR 124, O'Connor v. Kirby (1972) 1 QB 90, The Polyduke (1978) 1 LI LR 211)*, In view of the judge's remarks about the underwriter's evidence it might perhaps be thought that the best evidence of what had occurred 16 years before was the documentation and, in particular, the signature by the underwriters of the order letter.

Furthermore the decision might be taken as eroding the principle underlying the cases referred to above, that save in exceptional circumstances, and subject to arguments about the meaning of words in documents, a person who has signed a document ought not, in the interests of certainty, to be able to resile from it at a later date by evidence

about what he understood the document to mean. It remains to be seen whether the judgment will be used as a vehicle for such arguments but, it is submitted, if it is, courts ought not to allow it any rein.

The one thing surely that a party's signature to a document indicates is that that party has read the document. The judge's finding that insurers had not noticed the 48 month clause formed the basis of this finding that they were guilty of contributory negligence. Had insurers read the 48 month clause and understood it to mean what the judge found that it meant, they could plainly have had no complaint against the brokers and in effect the judge reached his conclusion when he said:-

> "I accept the way that the brokers put their case to this extent. If the circumstances were such that it was reasonable to conclude that the insurers were aware of the nature of the limitation of the cover, that the insurers conduct represented that the cover was nonetheless satisfactory to them, then they implicity represented that they would not claim any right that depended upon an assertion that the limitation of cover was unsatisfactory".

He went on to find that the brokers had failed to make out that case on the facts. He found that when viewed objectively insurers conduct did not unequivocally represent that they were aware of the existence and nature of the 48 month limitation. He gave reasons for this conclusion which can be found at page 451 of the report. The only reason which is in truth capable of surviving insurers signature of the document was that the 48 month clause was unclear. However, even that is, as a matter of principle, unfounded because when considering documents signed by parties, what the court should be concerned with is not lack of clarity but rather with what, applying the usual rules of construction, the words mean.

Interesting as these points are in the context of the particular case, it is however doubtful whether they will be of immense practical significance. It was generally agreed that the documentation in this case was unusual. It is unusual for insurers to sign documents which regulate in any way the relationship between them and the brokers. In this case the judge found that the order letters had no contractual effect. If these documents did not have the effect then it is likely that in the vast majority of cases for breach of professional duty there will be little or no contractual documentation and the court will, in the usual way, have to determine the incidents of the relationship by reference to professional rules and practice.

The key to the case was in large measure how the judge treated the order letter and the oral evidence. In essence the brokers case was that if one started with the order letter and looked at the case against the background of that letter, the claim against

them ought to fail. In the event however that judge made his findings of fact and only then went on to consider the effect of the letter.

There is nothing in the decision which detracts from the earlier well established rule that where a broker has obtained insurance which does not comply with his original instructions and sends cover notes recording the insurance which he has in fact obtained, he cannot escape liability on the basis that the client should have detected the fact that the insurance obtained did not comply with his original instructions *(Dickson - v - Devitt (1917) 86 LJKB 315, General Accident - v - Minet (1942) 74 LI LR* 1).Indeed, the judge used those cases to support his judgment, although the brokers argued that they were distinguishable. Furthermore, the decision does not detract from the basic principle that the professional person and the client can agree in writing the scope of the professional's responsibilities and provides specifically for those circumstances in which the professional will be in breach of duty and those where the professional will not be in breach of duty. All that the judge decided in this case was that they had not so agreed to the extent argued by the brokers.

There are other points in the case which may prove to be of general importance in considering claims against insurance and reinsurance brokers. The judge found that the brokers owed a duty to the insurers to protect them against exposure consequent upon the operation of the 48 month cut-off. He considered this allegation against the role that brokers customarily play where they have broked both original insurance and reinsurance. It remains to be seen whether in subsequent cases it will be contended that a broker owes a general duty to obtain extensions or remind his clients that his policy is due for renewal. There does not seem to be any reported case in England suggesting the existence of such a general duty. In one Canadian case, *Morash v. Lockhart & Ritchie Limited (1978) 95 D.L.R. (3d) 647,* an insurance agent was held liable for failing to notify the plaintiff that his policy was not being automatically renewed. In the *Morash* case, the insurance agent had represented the plaintiffs for twenty years and throughout that period had always automatically taken action to effect renewals when required without waiting for instructions. The case may therefore be seen as one in which, in the words of Ryan J. :-

> "The Defendant by its past conduct created for itself a self imposed duty in law to renew the Plaintiff's policy or at least to have advised the Plaintiff that it had expired."

In that case the Plaintiff only recovered 25% of his loss because 18 months had passed between the lapsing of the policy and the inevitable fire and it was held that the Plaintiff's failure to discover that he was uninsured was itself negligent. In the light of the decision in the *Superhulls* case and *Morash v. Lockhart,* the position would still

seem to be that there is no general duty on a broker to take unsolicited action to effect renewals of clients' policies prior to their expiry, but that in certain circumstances a broker by his conduct may place himself under such a duty.

The creation of a general duty on the part of the brokers to take routine and unsolicited action to effect renewals would be undesirable. It is unquestionably good business practice and indeed in the broker's own interest to remind clients as a matter of routine that their policies are due to expire. However, it is difficult in principle to see any justification for such a general duty. When a broker has been instructed to place a policy and has done so, he has fulfilled his contract and complied fully with his client's instructions. It is difficult to see why he should be asked to undertake any ongoing services on an open-ended basis unless specifically required to do so by the client. Furthermore, as a matter of policy, it is perhaps right that responsibility ought to remain with insureds and reinsureds to look after their own interests in this regard. It is a relatively easy matter to make a note in a diary to check that your insurances are up to date. If you are reminded by the broker you should be grateful for his efficiency but, if you are not, that is something you ought to be prepared to accept is really your own fault.

Finally, the judge's findings of contributory negligence show once again that courts generally are keen to find a vehicle wherever possible for apportioning liability where they think that both parties bear a measure of responsibility. This is perceived, with some justification, as a means of doing justice between the parties, and a means of avoiding having to deal with very complex causation arguments. It is however fairly typical now for courts to find themselves considering cases where there are allegations of both breach of contract and tort and the court has to tread delicately through the minefield by identifying the nature of the duties alleged to have been breached and then disposing of arguments consisting typically of (a) a break in the chain of causation, (b) contributory negligence, (c) breach of the duty to mitigate. These arguments have traditionally been viewed as distinct, in principle, although it has sometimes been capricious as to which of them the court has selected in order to achieve what it considers to be the right result, i.e. some form of apportionment. This is not a happy state of affairs and some measure of clarity is now needed before the courts are submerged beneath a welter of authority. In particular it has to be decided whether all these rules are rooted in the same principle or not and, then, whether in determining their application the same standard is to be used. In general a court will be more prepared to make findings of contributory negligence as opposed to novus actus or a failure to mitigate probably because by the first route the judge is able to apportion liability whereas by the last two the effect upon the plaintiffs' claim for damages must follow the finding as a matter of course. The judge took the traditional route and was not prepared to find either a novus actus or a breach by the plaintiffs

of the duty to mitigate. He found that when a plaintiff is unaware of the defendant's breach of duty, the implications of his conduct do not fall to be determined according to the doctrine of mitigation but according to general principles of causation.

KNOCK FOR KNOCK AGREEMENTS IN THE CONSTRUCTION INDUSTRY
by David Rogers, Davies Arnold Cooper

Insurers are quite used to receiving claims from construction incidents. However, insurers wish to ensure perhaps unsurprisingly, that when a claim is made it is dealt with as quickly and as economically as possible. Delay simply incurs additional legal costs, often enhances the value of the claim and, of course, is unsatisfactory from the victim's point of view as well as insurers. However, this aspiration on the part of insurers rarely finds the appropriate response from the insureds in the construction industry.

Often, the standard forms of contract contain so-called indemnity clauses but what do these clauses provide? They provide that one party is responsible save insofar as he has been negligent or contributed towards the incident. In short, the heading of indemnity clause is a total misnomer and, in reality, the clause does nothing but return the parties to what is in fact their common law position. These clauses can be found in the standard JCT form, in the ICEE forms and, generally, they do nothing to assist or minimise the handling of claims involving injuries to persons on large construction projects. Indeed, they hamper the situation.

Let us take the classic situation which is all too common and familiar to scaffolding companies. They attend on site and they carry out their works, the job is completed and they remove the scaffolding. Nobody has suggested to them that their scaffolding is inadequate or that the failure to carry out some aspect of the quite stringent regulations relating to scaffolding has resulted in an incident. Eighteen months later, the injured man sues his employers, the employer in turn claim against the main contractors and the main contractors claim against the scaffolders. We have had an injured man whose claim has been delayed for at least 18 months to 2 years whilst one party or the other has been blaming somebody else resulting in three, four, or sometimes five party litigation. At that point, often the insurers of the Defendants or Third Parties will, if the claim is modest, simply dispose of the claim upon an economic basis often not caring whether or not there is really a responsibility on the part of their insured. Alternatively, they will refuse to become involved in the claim