Clear contract conditions reduce confusion over responsibilities and assist beneficial claims negotiation.

It is also vitally important that Assureds endeavour to stand by hard won court decisions and not give away any such benefits under contract. A classic example of this being the multitude of collateral warranties being signed and the consequent acceptance of liability for economic loss.

Another positive area of review could be the inclusion of limitations under contract whether by time, value or exclusion. It is appreciated that in these times of recession tough negotiating of contracts can be commercially unacceptable. However, if the Assured's wish to halt the advance in the cost of insurance then efforts in these directions will be required and any such efforts will prove beneficial to Assureds in forthcoming years.

1993 is the beginning of a hardening market. I do not believe that the reduction in direct market capacity will be great enough to allow the dramatic volatility of the mid-eighties although increases are inevitable.

It would be wise of all parties involved to encourage more restrictive contract conditions which will be to the advantage of Assureds whether covered by an insurance policy or not.

Finally, I would also like to encourage either continuing a more direct meetings by Insureds with Underwriters so that the difficulties and problems can be mutually understood. Insureds generally receive a better market reaction when they have put forward their viewpoints personally and such meetings certainly appear to give the Professional Indemnity policy an added value.

INSURANCE BROKERS' NEGLIGENCE
by Jonathan Mance Q.C.

1. Germany has a developed insurance market with brokers, insurers and the largest reinsurance company in the world. Yet insurance brokers' liability is in Germany an exotic topic. The majority of professional negligence claims there are against lawyers. Brokers and accountants feature only exceptionally. The latter may credit this in part to a statutory limitation of DM500,000 (about £200,000). But brokers benefit by no such legal advantage. I start therefore by asking what

are the features of English insurance which make a broker an almost inevitable co-defendant or third party in English insurance litigation?

2. There are I think four:

(I) the nature of the English insurance market: which is innovative, complex and fluid and broker-driven to a greater extent than other European insurance markets;

(II) the legal and financial participation of the English broker in transactions which he arranges;

(III) the state of English insurance contract law;

(IV) a certain isolation of insurance activities from the law which the last ten years of heavy insurance litigation has not fully redressed and has to some extent exacerbated.

These background features mean firstly that there is more scope for error, omission or even fraud, and secondly that when it occurs its potential effect is more likely to be serious.

3. A broker is a person, firm or company holding himself or itself out as acting for and giving independent advice to prospective insureds or reinsureds, and not therefore tied to any particular insurer[1]. That does not, as I shall show, mean that brokers may not and do not:

(i) acquire certain responsibilities towards insurers;

(ii) make contracts in their own right to assist their broking business generally; and

(iii) though this should only happen with the full and informed consent of their clients, even undertake certain activities on insurers' behalf.

4. Those who describe themselves, and carry on business, as brokers[2] require to be registered by the Insurance Brokers Registration Council ("IRBC") set up under the Insurance Brokers (Registration) Act 1977 and, if they are to place business at Lloyds, by the Council of Lloyd's under the Lloyds Broker Byelaw No. 5 of1988. The Act and Byelaw contain regulatory and disciplinary provisions. These are reinforced under the Act by a Code of Conduct issued by statutory instrument in 1977. Its detailed provisions although directed to the identification of unprofessional conduct are of great relevance to the scope of a broker's

common law duties of skill, care and diligence. This is still more emphatically so in the case of the Lloyd's Code of Practice issued in 1988 under paragraph 20 of the Byelaw. The more developed nature of the latter Code reflects a growth in awareness over a ten year period, during which there occurred some highly publicized insurance scandals involving broking houses, of the need for more coherent, thoughtful and legally oriented analysis of brokers' role and functions. The third piece of legislation governing the activities of insurance brokers is the Financial Services Act 1986, requiring brokers who advise on or arrange long term (life) insurance contracts within Schedule 1 of the Financial Services Act 1986 to be authorized in practice by FIMBRA and to comply with the rules of FIMBRA on matters such as financial resources and the conduct of business (including the principle of "best advice")[3].

(I) The nature of the English insurance market

5. English brokers have traditionally been at the cutting edge in the development of new business: devising new schemes, conceiving new risks, wordings and areas for insurance; selling their ideas to insurers and insureds alike, often offering the former underwriting services and pre-arranged reinsurance. To facilitate the placing of business the broker may develop schemes of reinsurance in London before ever a single insurance is conceived; he may by "line slips" arrange agreements between insurers (which bind the following market to accept the leading insurers' decisions) and between insurers and brokers. The broker's high profile carries a correspondingly high exposure to claims. As Sir Roger Ormerod observed in *Fors. Vesta v. Butcher* the broker's entrepreneurial role can lead to a failure to focus on the particular client's needs in the particular transaction.

1. See also the more expanded definition in Article 2 paragraph 1 of the Council Directive of 13 December 1976 on freedom of establishment and freedom to provide services in respect of the activities of insurance agents and brokers (77/92/EEC). The regulation of broking activities in the United Kingdom under the Insurance Brokers (Registration) Act 1977 is however restricted to those who call themselves brokers.

2. This highlights an unsatisfactory aspect of the current regulatory system. An intermediary not describing himself as a broker (but, say, as the euphonious "insurance consultant" or "adviser") is outside the 1977 Act although he may perform exactly the same role as a broker. Along with various other categories of intermediary, his conduct is regulated on a voluntary basis by the Code of Practice introduced by the Association of British Insurers for General Insurance Business. This Code does not apply to reinsurance business. (There is also a second ABI Code for "non-investment" Life Insurance business not falling within the Financial Services Act 1986.)

6. Delicate problems of attribution of knowledge and responsibility may also arise:

(i) The broker as broker may have accumulated a store of general knowledge from his investigations or from activities for other principals. See Rule 3.1 of the Lloyds Code as to the use of such information. So far as the information is material to the particular risk, the broker owes a duty of disclosure to insurers on behalf of each prospective insured who uses his services.

But this only applies to the actual broker who succeeds in placing the insurance. There is no general attribution to a client of the knowledge of a broker whom he approaches, but who is unsuccessful in arranging the insurance: *Blackburn v. Vigors* [1887] 12 A.C. 531. The position is also different where the broker has on his own behalf arranged a facility, e.g. a line slip or cover, as a preliminary to placing individual insurances. Those who seek individual insurances are not to be taken as aware of the terms or basis of facilities to which they are not and never will be party: *Touche Ross v. Baker* [1992]. Accordingly it is possible that the broker may have agreed one thing with the market and another between the market and the client.

(ii) Or take the typical chain of brokers between prospective client and insurer, starting with a general or local broker and ending with more specialized or better connected brokers who are engaged to place or complete the particular business. There can be (a) problems of responsibility for the knowledge or conduct of others in the broking chain and (b) a general lack of transparency which increases the scope for misunderstanding or worse. Each broker in the chain will be jealous in the guarding of his business connection. The normal broking chain is therefore one where each broker is only in contractual relations with the next broker in the chain. Market practice is consequently for all communications to pass step by step up or down the chain. The risks to brokers are plain. The first broker is contractually responsible to the insured client for the act or omission of the last sub-broker in a chain below him, be it

3 The desirability of the present overlapping system of regulation of insurance brokers by the IRBC and FIMBRA in the sphere of "investment" type insurances may also be open to question.

failure to make a fair presentation of the risk to insurers, or receipt from insurers of claim monies not passed on up the chain. The sub-broker may be answerable to insurers for premium which he is unable to recover from the next broker up the chain. The propensity of any monies to flow like glue in the broking chain is well-proven. The brokers' "pot" is the traditional source of a healthy investment income. The disappearance or insolvency of any broker in the chain can result in loss falling arbitrarily on the last solvent broker. Where chains of brokers cross international frontiers, the view of a broker's responsibility in one country, say France or Belgium, may differ significantly from the English view - so that once again liability is arrested half way down the chain.

(iii) There can be a chain of insurances as business passes from insurers to reinsurer to retrocessionaire, the same broker often appearing and earning commission at successive stages. The broker may be the only person with a real overview of the whole structure[4], and the problems include the extent to which knowl -edge acquired or possessed by the same broker in different capacities should be attributed to his different principles. The different stages of the chain may become interdependent as for example where the broker promises or holds out the likelihood of reinsurance as an inducement to an insurer to accept insurance. The insurer may make it a condition of the insurance that reinsurance shall be obtained. Or he may simply rely on the broker in which case the question may arise whether the broker has undertaken as a matter of contract that insurance will be available, or merely indicated that he expects it to be and will exercise due skill and care to procure it. If the insurer does not at once order reinsurance, so that no reinsurance broking contract arises at the moment of writing the incoming business, the Court may have to decide whether the broker's assurances commit him to tortious responsibility (as was held in *Youell v. Bland Welch* [1990]2 L1.R. 431, 445/6 and 458/9).

4. Especially if some links are introduced for purely formal reasons, e.g. to overcome a lack of authorization to insure business in a particular jurisdiction (fronting).

7. During the 1970s and 1980s, with (a) hugely increased insurance risks, (b) London being forced to compete with protectionist markets overseas by offering innovative cover not available elsewhere and (c) new capital attracted into the reinsurance market by high interest rates, these features were carried to new extremes, with the development of "all manner of associations, pools and other structures" many of which proved disastrous. The widespread granting by insurers of underwriting agencies, binding authorities or (less problematically) line slips to brokers added the complexity and to the possibility of often unrecognized conflict of interests not to mention error or abuse. In order to achieve a proper separation of roles and interests in the Lloyds context, the broker barons were obliged under the Lloyds Act 1982 to divest themselves of their interests in underwriting agencies, although the feudal system may in retrospect perhaps be seen to have had some unforeseen advantages; the complete freedom from control by their client base which underwriting agencies now enjoy, the removal of the incentives for Lloyds brokers to place the best of their business in Lloyds and a certain opposition which has replaced the old partnership between syndicates and brokers has not always been to Lloyd's Names advantage. Generally, however, it can be said that there has been a forced recognition on insurers' part inside and outside Lloyds of the unwisdom of indiscriminate passing of the pen to brokers. A combination of underwriting misjudgment and natural and artificial catastrophes (including at random windstorms, the fall in the property market and the attitude of some American Courts to policy wordings) has resulted in frequent reluctance to meet claims and a search in various directions for other pockets to contribute.

(II) The legal and financial participations of brokers in insurance transactions.

8. The English broker's role has some eccentric aspects, which differentiates him from other agents.

(i) By a relaxation of ordinary agency rules, he can at least in marine insurance arrange prospectively for insurance to be available for as yet unidentified clients. If he then chooses to invite them to participate in such insurance, they can retrospectively take up the benefit of the agency and insurance.

(ii) The broker's remuneration is in the form of commission agreed between him and the insurer, of which the insured is not likely to be volunteered knowledge. To this there has developed at

least one limited but important exception, the case of major industrial and commercial groups, for whom the major brokers now provide a comprehensive risk management service on the basis of a negotiated fee. Other insureds with less influence are in the hands of the broker and insurer as regards commission - and it is difficult to believe that the generosity of commission available has not from time to time influenced a broker to select an insurer whom he might not otherwise have regarded as suitable[5]. The broker's contract with an insurer for commission does not however carry with it any obligations of care and skill to the insurer. London market practice is that this commission does not appear on the policy. Where the slip method of placing is used, it appears on the slip, which perhaps for this reason is traditionally kept by the broker. Also on a slip, but not on the policy, are likely to be the terms of the leading insurers' authority agreed between broker an all insurers. The traditional method whereby a broker communicates a placing to his client (or to the next broker up the chain) is by a cover note stating for example "In accordance with your instructions we confirm that we have arranged the following insurance: . . ." There should then follow an accurate reproduction of all terms except the brokerage, coupled with identification of the security (i.e. the insurer or in the case of Lloyds that word). Inaccurate statements of the terms, or misstatement of the premium (with a view to the broker pocketing the difference in addition to any commission) are not unknown. *The Gemstones Case (Banque Keyser Ullman v. Skandia* [1991] 2 A.C. 249) evidences the pernicious practice of cover-noting a client before concluding the placement of 100% of the risk - now expressly proscribed in paragraph 6.2 of the Lloyd's Code. Brokers have even been known to issue cover notes when they have not succeeded in placing any part of the risk, and are in effect proposing to play the role of insurers themselves behind the scenes!

5. Apart from this there is a haphazard element about a system whereby rate increases for valid underwriting reasons (take the recent market wide increases for householders subsidence cover) lead to large increases in brokers' remuneration.

(iii) A broker placing marine insurance business or Lloyds business undertakes a personal responsibility to insurers for the premium[6]. The same custom may apply, although it as yet not judicially recognized in other analogous fields[7]. Brokers not indemnified by their client have been known simply to purport to cancel the insurance in order to obtain a refund of premium from insurers. Taking the law into their own hands in this way is entirely impermissible. Only a specific "Broker's Cancellation Clause" agreed with both client and insurer can entitle brokers to take so drastic as step. Brokers have normally neither actual nor ostensible authority to cancel an insurance once they have placed it.

(iv) Lloyds Intermediaries Byelaw No. 8 of 1988 requires a guarantee from Lloyd's brokers of payment of premium and performance by non-Lloyds intermediaries and of payment of premium by entities related to syndicate managing agents, in respect of the limited categories of business (e.g. personal lines and commercial motor) which Lloyds syndicates may accept direct without the intervention of a Lloyds broker.

(v) Brokers who place business are prima facie responsible for handling it to expiry without further consideration beyond the initial commission. This is by custom of the market or contractual implication a responsibility which they probably cannot unilaterally curtail. See paragraph 12 of the Lloyds Code. Moreover they are expected for this purpose to retain the placing file, many insurers having until recently kept only very limited records. The awesome significance of this at first sight innocuous responsibility is demonstrated by the catastrophe of asbestosis, which has required brokers to search their stores and mircofiche for up to fifty years or more. One of the largest London brokers is understood to retain 26 miles of records in

6. The old convention is that insurers are treated as having been paid the premium forthwith and as having relent it to the brokers.
7. A broker who pays premium to an insurance company in such other fields should be careful to ensure that he can prove the custom - if he wants an indemnity from his client: see *Wilson v. Avec-Audio Visual* [1974] 1 L1.R 81 (C.A.)

respect of long term insurance business still being run-off. The burden and cost which this involves tempt young insurance brokers to establish their own firms, free at one bound from the burden and cost, able to concentrate on broking new business and able to offer commission rates which reflect their lesser burden.

(vi) Brokers are required under the 1978 Act and the Lloyds Brokers Byelaw 1988 to operate insurance broking accounts, which are composite accounts for all their insurance business, not trust accounts, and out of which from time to time brokers have been known to fund to their clients claims as yet unpaid by insurers. Whether funding is always legally permissible under the rules which govern insurance broking accounts is an interesting topic outside the scope of this talk. Brokers have on occasion preferred to fund claims rather than to inform their clients of difficulties in collection from insurers. This is not solving but sitting on a problem, at least if the broker ever wishes to attempt to reimburse himself from his client or the insurer. Even the latter course will frequently mean that he must ask permission to borrow his client's name. Only if the insurance has been placed expressly in his name on behalf of his principal may he be able to invoke another unique rule whereby brokers in whose name insurances are effected may sue and recover the full amount payable on such insurances without joining their principals.

III The state of English insurance law

9. The single most obvious reason why claims against insurance brokers are commonplace is the very questionable stringency of a number of principles, which are preserved and enshrined in current law by a combination of case law, the unforeseen consequences of codification of marine insurance law in Sir Mackenzie Chalmer's 1906 Act and the power of the insurance lobby[8]. The present result is a body of legal principle which is probably the most favourable to insurers of any in the world. In other common law countries e.g. Australia there has as a result been considerable statutory intervention. In England the inevitable corollary of insurers' right to avoid liability on technical or unmeritorious grounds is that brokers are expected to advise, warn and protect their insureds against just such a possibility. The risk returns to the insurance market through the medium of brokers' E & O cover.

10. I shall cite just three examples of the stringency of English law. The first is the enforcement of basis of contract clauses, whereby matters in a proposal are created promissory warranties (and so strict conditions precedent to any liability) irrespective of their materiality, and the second the rule of law whereby breach of warranty enables avoidance irrespective of any relationship between the alleged loss and the breach and indeed even if the breach has been rectified prior to any loss. Neither result would be upheld under the German Insurance Contracts Law, paragraph 6.

11. My third example is in practice even more evident-especially in relation to claims against brokers. It relates to the principles governing disclosure and misrepresentation. The Courts, largely as a result of the decision in *Container Transportation International v. Oceanus Mutual Underwriting Association Limited* [1984] 1 L1. R. 476 (C.A.), have created a structure which has no parallel in either common law misrepresentation or the principles of *Hedley Byrne v. Heller*. The remedy is avoidance ab initio. The actual insurer need not show that he was in any way influenced. His evidence appears strictly to be irrelevant. It is enough if the matter not disclosed or misrepresented would have been material to the hypothetical prudent insurer. (It is open to question whether this means all hypothetical prudent insurers. The Courts have not fully faced the fact that different underwriters may and do adopt very different underwriting approaches for very different reasons.) The insured's or even his broker's own appreciation or lack of appreciation of the materiality is irrelevant. Moreover the test of materiality is not whether the matter misrepresented or withheld would have led to a different underwriting decision, or to different terms, but whether it would have been a matter of which the hypothetical prudent insurer would have wished to know[9]. Finally the Court will give weight to expert evidence

8. On 3rd March 1993 however in *Pan Atlantic Insurance Company Limited v. Pine Top Insurance Company Limited* a Court of Appeal composed of the Vice-Chancellor (Sir Donald Nicholls), Farquharson L.J. and Steyn L.J. demonstrated a strong distaste for one of the principles to which I shall refer (that in *Container Transportation International v. Oceanus Mutual Underwriting Association Limited* [1984] 1 L1. R. 476 (C.A.) The Vice-Chancellor with the agreement of the other members of the Court called for law reform, and Steyn L.J. delivering the leading judge ment administered the significant antidote to existing stringency identified in the next footnote.

9 This is the test stated in *Container Transportation International v. Oceanus Mutual Underwriting Association Limited* [1984] 1 L1. R. 476 (C.A.) In *Pan Atlantic Insurance Company Limited v. Pine Top Insurance Company Limited* on 3rd March 1993, the Court of Appeal interpreted this test as asking whether a prudent underwriter, if he had known of the undisclosed facts (or, in a case of misrepresentation, if the facts had not been fairly presented), would have regarded the risk as increased beyond what was disclosed on the actual presentation. This represents a welcome and valuable alleviation, although it remains to be seen whether it is capable of absolutely general application: compare, for example, the principle accepted in MacGillivray (8th Ed. paragraph 604) that in non-marine insurance a prior refusal by another insurer is of itself material.

given by insurers in deciding these matters[10]. As it is, the traditionally brief process of placing on the London market can be the subject in Court of an exhaustive theoretical analysis which can bear no resemblance to the real world. Small wonder that insurers who are looking around for an answer to a claim which they do not like can usually find some pretext for asserting a right to avoid for non-disclosure or misrepresentation. Small wonder that the broker is then first in the client's firing line. After all he at least should have had a better idea than the insured what might interest a prudent insurer. The *Bolam*[11] defence that if he was wrong in his assessment of what was material, nevertheless the broker's view was one which at least a reasonable broker might have held is not one which I have heard successfully advanced in this field. Even where the insured did not tell the broker the full picture, it may be possible to show that the broker did not do all he should to explain and investigate the matters material for disclosure: see paragraph 5.2 of the Lloyds Code. This is often I believe a particularly cogent complaint with foreign insureds. One need only contrast this position with Germany where the Bundesgerichtshof has recently held that an insurer who has failed to take reasonable care to evaluate a risk (which if he had taken it would have led to his discovering the truth) cannot subsequently claim to avoid even on grounds of concealment; or with the United States where good faith is commonly used in the context of insurers' duty to meet claims - where it can carry a heavy sanction in damages.

12. The insurance industry has escaped statutory regulation on these matters (a) by issuing two non-statutory, self-denying statements of insurance practice and (b) by establishing the office of the Insurance Ombudsman, in each case only in the case of and in favour of private insureds. There are plenty of small or foreign or other companies left to sue their brokers. There will be those who would echo the traditional excuse that reputable insurers would not

10 Why should not the actual underwriter have to justify his actual underwriting decision? Why is it not sufficient that he would benefit from an ordinary presumption that a matter which insurers generally would have regarded as material is likely to have been material to him? Cf *Pan Atlantic Insurance Company Limited v. Pine Top Insurance Company Limited* [1992] 1 Ll. R. 101 (Waller J) (aff'd C.A. 3/3/93.

11 *Bolam v. Friern Hospital Management Committee* [1957] 1 W.L.R. 582; and Maynard v. West Midlands R.H.A. [1984] 1 W.L.R. 634 (H.L.).

take unmeritorious points against commercial insureds. To them I would only say that it depends upon who the insured is, how much money is at stake, what is the financial position of the "reputable insurer" and who are the "reputable insurer's" reinsurers. Its a sad fact that if you ask a German insurer what will be its best defence against the incursion of English insurers into traditional German insurance territory pursuant to the liberalized open market introduced by the European Court in the Schleicher decision[12] and the Third Directive, he is likely to say two things: First, if you insure in London, when will you get your policy issued? Second, if you have a claim, will it be paid? The hard commercial reality is that insurers will often use any tools which they may have to defend claims, and brokers will then be the clients' next target. It is not easy to say when change will come, since review in the House of Lords could at best operate piecemeal. The European Commission has for the time abandoned an attempt at a unifying directive on insurance contract law. There is in the pipeline a directive on Unfair Contract Terms which (unlike the U.K. Unfair Contract Terms Act 1977) does not exclude insurance, but does not appear apt to affect the fundamental common law approach.

(IV) The isolation of insurance and the law.

13. It is only in the last fifteen years or so that English insurance litigation has dominated the Commercial Court. The workings of the market and the activities of intermediaries have been scrutinized as never before. More recently a whole code of subordinate legislation has in the context of Lloyds tackled problems of role and responsibility in a commendably comprehensive fashion. It would not be right to ignore the work of the Chartered Insurance Institute and its tuition courts and literature in a previous period, but the market as a whole has begun to develop much more generally and consistently a new understanding and ethos as to legal principle, roles and responsibilities. Employees with legal qualifications are now more frequently to be found in the market, although still probably more on the claims side than the underwriting.

14. Brokers still do not always appear to understand the basic concept that no man may serve two masters without full and informed consent. The practice of employing brokers to assist insurers in relation to claims handling retains some hold, despite castigation in the Courts in the 1960s and 70s. It is very doubtful whether brokers who do participate in this practice do so on the basis suggested in paragraph 9.6 of the Lloyds Code.

12. *Netherlands and U.K. v. Germany* (Case 205/84).

15. Far too little attention is given to elementary problems deriving from deep-rooted market practice, such as the use of the abbreviated slip and the delayed preparation of a fuller policy wording. What if a loss occurs before the wording is finalized? No use then to say that matters such as arbitration clauses, proper law or jurisdiction would have been dealt with in the formal wording. Policy wordings have traditionally been given a low standard of priority and attention. Brokers have placed business without real thought as to the relationship of insurances and reinsurances. *Vesta v. Butcher* [1989] 1 L1.R. 331 is a classic example where the original domestic insurance was subject to Norwegian law under which the healthy rule applies that breach of warranty does not avoid a contract of insurance unless relevant to the actual loss. The reinsurance was governed by English law and incorporated the same warranty. The House of Lords had to sidestep a conclusion that the reinsurance could be avoided under the stringent English law rule whereas the insurance remained binding under the more relaxed Norwegian approach, by treating the English reinsurance as incorporating the warranty only in its Norwegian significance. This incidentally also side-stepped a further finding by the judge that if the reinsurance was voidable the brokers were partly (25%) at fault, since Vesta as insurers had asked them to have the clause modified or eliminated and the brokers had failed to raise the matter with reinsurers. The judge found that, had the brokers raised the matter with reinsurers, reinsurers would have been sufficiently keen on the business to agree a modification which would have meant that the actual claim remained payable despite the breach of warranty. On the other hand he found that Vesta themselves were 75% at fault in failing to follow up the broker's failure to arrange any such modification. The case is authority for the proposition that the Law Reform (Contributory Negligence) Act 1945 allows apportionment of liability in both contract and tort where there are concurrent liabilities for failure to exercise reasonable skill and care. Both Courts also accepted that an insurance brokers owes concurrent contractual and tortious duties. The House of Lords did not have to consider these points.

16. Should not brokers develop far more general use in insurance policies clauses which mitigate the extreme strictness of the English law governing non-disclosure, misrepresentation and breach of warranty? I am not here to emphasize the virtues of the Bar Mutual Indemnity Fund Limited rules, but in them as in other modern professional negligence policies (including brokers' own) and certain financial insurances (e.g. the ill-starred class of mortgage indemnity policies) it is usual now to find clauses precluding avoidance for innocent non-disclosure. And if such clauses are included, do brokers give their wording sufficient attention? It

is no use precluding avoidance if the insurer can turn round and claimdamages for common law misrepresentation or under *Hedley Byrne v. Heller* by actually showing that he would not have accepted the risk but for the misrepresentation.

17. And what of the position when brokers are asked by clients to confirm that a particular situation or risk is covered by the insurance? Some brokers will still give such assurances off their own bat, without contacting insurers. And if they do contact insurers, what happens if no endorsement is agreed and in a subsequent year a new insurer or a new syndicate underwrites the slip? Brokers and insurers too often pin their faith on the "spirit" of the insurance, gentlemanly behaviour on the part of insurers and broking skills or pressure on their own part to see them through any problems which may arise. The law does not always match their expectations. Yet it has been for many years clear that those who perform services in fields which are ultimately dependant on the law for their effect give advise and make assumptions as to the legal position at their peril. If brokers take it on themselves to give what is in effect legal advise without consulting a solicitor and without qualification, they carry a substantial risk if it is found to be wrong: *Sarginson v. Keith Moulton* (1942) 73 L1. L.R. 104; *O'Donoghue v. Harding* [1988] 1 L1.R. 281. In the former case the broker's advice was not only inadequately researched but wrong; in the latter it was given off the broker's own bat without checking with underwriters, but proved happily right.

18. Lastly under this head I would mention the perennial problem of record-keeping. The genius of the London market broker has been said to be his ability to condense the most complex of risks into the brief confines of a slip. But if you look for a record of his instructions or the information which he imparted to the insurer at the time, it has to be added that some brokers have been second only to many insurers in their failure to keep adequate records of their activities, and that the only profession which can claim an even worse record is probably the Bar in the making of notes of conferences. Lord Taylor's predecessor, the founder of English commercial law, Lord Mansfield, said in *Pawson v. Watson* (1778) 2 Campbell 785:

> "I have repeatedly, at Guildhall, cautioned and recommended it to the brokers, to enter all representations made by them in a book. That advice has been followed in London [he added a little optimistically]. But it appeared lately at the trial of a cause, that at Bristol, they make no entry in their books, nor keep they any instructions."

For the next 200 hundred years experience would suggest that the Bristol practice found substantial support. But the last two decades has without question brought an improvement in standards of documentation of both instructions and placing information, and at best to a process of independent peer review within broking firms prior to the issue of a cover note at the conclusion of the placing. Compare also the 1978 Code with the specific provisions of paragraphs 3.1 and 5.4 of the Lloyd's 1988 Code.

Specific areas

19. Against this background I shall look at some of the areas where brokers have found themselves particularly exposed in recent times. I will not focus on obvious areas of default: failure to arrange insurance as instructed or on appropriate terms or to pass on information received; or fraudulent misappropriation of premiums or claims. Let me start with the legal nature of an insurance broker's responsibility towards his client. It is established at Court of Appeal level that an insurance broker in common with professionals generally owes to his client duties which sound in both contract and tort: *Vesta v. Butcher; Youell v. Bland Welch* [1990] 2 L1. 431, 459 (Phillips J.); *Punjab National Bank v. de Boinville* [1992] 1 L1. R. 7 (Dillon, Staughton and Mann L.JJ., judgments given 17th May 1991)[13]. This is of particular importance in two respects, firstly because it enables the Courts to apportion liability in appropriate cases under the Law Reform (Contributory Negligence) Act: cf *Vesta v. Butcher;* and secondly because it enables clients to invoke the protection of the Latent Damage Act 1986 (section 14A of the Limitation Act 1980) albeit only in respect of their tort claim, so as to extend the limitation period from 6 years from the accrual of the cause of action to 3 years from the date when the clients acquired knowledge of the material facts about the damage and that it was attributable to their broker's act or omission. For these pragmatic reasons it is to be hoped that the English Courts will at this point make a stand on the long retreat from *Anns v. Merton.* The lesson of Lord Wilberforce's ill-fated attempt to express a general principle of tortious responsibility will not have been applied if Lord Scarman's dictum in *Tai Hing Cotton* [1985] A.C. 80, 107 is itself treated as establishing an inflexible principle that tortious responsibility for the exercise of due skill and care cannot co-exist with contractual relationship. The Courts were, it is submitted, right to conclude that the principle governing professions applies to insurance brokers whether on the basis that broking is a profession or on the basis that the principle may extend to analogous commercial relationships.

20. With whom then is the contractual relationship? *The Punjab National* case discusses the complications which can arise when, as increasingly occurs, one party to a proposed transaction (e.g. a mortgage, lease or credit transaction) stipulates that the other party shall arrange for insurance for the first protection. The insurance which B is required to arrange may be taken out by B in A's name or by B in his own name and then assigned to A. In either case the question arises with whom the broker is in contractual relationship. *Punjab National* embraced both types of insurance. But on the facts the Court held that in each case the broker had a contract with the bank-whilst contemplating that he might also have a contract with the borrower, Esal. As to the possibility that the latter hypothesis might have involved the broker in a conflict of interests, Staughton L.J. said sardonically (p. 34):

> "...I am not so impressed with the broking skills deployed on this occasion as to infer, without any evidence, that Wrights must have refused to act for two clients."

21. The same case illustrates problems arising from the fluidity of broking personnel within the insurance market. The key individuals were a Mr. De Boinville and a Mr. Deere. They commenced the arrangement of the policies as employees of F.E. Wright, but moved to another firm, Fieldings, in late May 1983. Esal were aware of the change but the Punjab National Bank were not. In consequence on ordinary agency principles, the Bank could continue to hold Wrights liable for any defaults of Messrs. De Boinville and Deere occurring prior to the date when the Bank learned of their change of employment. But a contract was also to be inferred between the Bank and Fieldings because the latter had submitted a cover note and a request for premium to the Bank upon which the Bank had acted. The Court left open the question whether Fieldings could incur liability under this contract for past broking defaults. Finally Messrs. De Boinville and Deere had been known to be operating within the Fieldings fold under the guise of their own company Pacrm. Ltd. which it was envisaged would become a Fieldings subsidiary and be used to provide them with commission and a share of profits. But Hobhouse J. had no difficulty in brushing away the suggestion that Fieldings had been acting as sub-brokers to Pacrm. Ltd. The Bank required and got the services of a Lloyds broker, not of a worthless shadow.

13. Cf also *SCOR v. ERAS* [1992] 1 L1. R. 570 (Mustill, Nourse and Nicholls L.JJ., whose judgments stating only that there was a good arguable case for saying that there were concurrent duties were it seems given without reference to the earlier Punjab case.

22. Can the insured have a tortious remedy against a broker with whom he has no contract? This question frequently arises where there is a chain of brokers, and the client is unable to have recourse against the broker with whom he does have a contract, either because the law governing that broking relationship does not make that broker vicariously responsible for the defaults of brokers lower down in the chain or for the more mundane reason that the first broker is or would become insolvent. The traditional and probably the better view is that the sub-broker may be liable for breach of fiduciary duties in the transaction but will without more owe no duty of care to the insured: cf by analogy *Calico Printers v. Barclays Bank* (1931) 145 L.T. 51.

23. But the *Punjab National* case illustrates that the tort of negligence is not an entirely spent force even as between non-contracting parties in the commercial context. See also *ERAS v. SCDR* [1992] 2 L1.R. 570, 597/9. In the former case, claims were made against Messrs. De Boinville and Deere personally by the Bank as well as against their employers from time to time. It is not every employee of a firm or company who owes a duty of care to tort to the client; it depends on what he is employed to do. But here the two individuals were effectively in charge of the whole broking transaction. Applying *Ministry of Government v. Sharp* [1970] 2 Q.B. 233 the Courts held that they owed the Bank a duty of care.

24. As a yet further extension of tortious liability, the Court held that Fieldings owed the Bank a duty of care in tort, before any contract came into existence by the delivery of a cover note and payment of premium. The mere fact that the Bank had some probable financial interest in the two insurances which at that stage were going to be taken out in Esal's name would not have sufficed, but the actual position was that Fieldings knew that the Bank was intended to take an assignment of the insurances and was active in giving instructions for the insurance to be effected. Applying the famous analogy of *Ross v. Caunters* [1980] Ch. 297, where a solicitor was held to owe a duty to an intended beneficiary disappointed by the solicitor's negligence in preparing a will, the Court held that Fieldings did owe such a duty. This type of incremental extension of tortious duties outside the contractual nexus has I believe a useful role in commercial relationships. It fill a gap which would not exist at all in legal systems which recognize the concept of a contract for the benefit of third parties enforceable by the third party (such as the German or Scots). A case on the other side of the line in English law is *MacMillan v. Knott, Becker Scott* [1990] 1 L1. R. 98. The context was alleged negligence of the broker responsible for placing the E & O insurance of another company (which happened itself to be an insurance broker) which

went into liquidation. Had the insurance been effective, rights under it would have been transferred to the plaintiff claimant by virtue of the Third Party (Rights against Insurers) Act 1930. The 1930 Act does not however, even in cases of compulsory insurance, assign to third party claimants the benefit of any negligence claim against a broker responsible for placing the insurance. There was also held to be no duty of care owed by the placing broker to the third party claimant, albeit his role was to place insurance to cover third party claims.

25. I have been speaking of duties to the insured and persons on the insured's side of the fence. Brokers may incur liabilities to insurers. I leave aside situations where the broker is in fact acting as the insurer's agent, e.g. under a binding authority.

26. The broker's responsibility to make full and fair presentation to insurers has traditionally been expressed as a personal obligation, in so far as he is himself possessed of material information: see e.g. *Blackburn v. Vigors* [1887] 12 App. Cas. 531 and Marine Insurance Act section 19. If he makes a positive misrepresentation to insurers there seems no reason why insurers may not sue him under the principle in *Hedley Byrne v. Heller:* see *Pryke v. Gibbs Hartley Cooper* [1991] 1 L1.R. 602, 616 per Waller J. Normally the insurer will avoid the insurance and the question will not arise, but suppose he cannot (e.g. because the insurance is adjudicated upon in hostile territory where avoidance is ineffective or unwise, or because it contains an anti-avoidance provision). Further although Lord Templeman in Banque Keyser Ullman teaches us to be careful about any idea that duties of good faith sound in damages, it remains possible that brokers may in appropriate circumstances owe a duty of care in respect of disclosure.

27. In the *"Zephyr"* [1984] 1 L1. R. 54 the broker had developed a curious habit of persuading insurers to put down on the slip far larger lines than he or they intended that they should ultimately bear. The size of the lines was to be reduced by obtaining far in excess of 100% subscription and then signing down each line pro rota. However a casualty occurred before this process had been completed. Hobhouse J held that the broker had undertaken to use reasonable skill and diligence in completing the process, that they had failed to do so, that they were liable in tort to underwriters accordingly. The Court of Appeal reversed this conclusion in the case of insurers to whom the broker had made no direct statement about his intentions to arrange a signing down, and questioned whether the liability to insurers to whom a direct statement had been made ought not to have been based on implied contract.

28. In *Pryke v. Gibbs Hartley Cooper* [1991] 1 L1.R. 602 the brokers had placed a cover with Lloyd's underwriters acting in so doing on behalf of the coverholders. A problem arose under the cover, which the brokers then volunteered to the leading underwriters to investigate and report upon. They failed to do so adequately and were held (despite the *"Zephyr"*) liable in tort to the lead underwriter and, by an interesting extension, to the whole following market.

29. Where is the balance of responsibility when it comes to detecting that the insurance arranged does not provide what is required? The English Courts have placed it firmly on the broker. This is understandable in the case of both domestic and commercial insureds. It is more notable when the client is himself a professional insurer seeking reinsurance. For this situation *Youell v. Bland Welch* is authority. The insurers, Lloyds marine syndicates, were being offered the opportunity to insure four of the largest ship-building risks (LNG superhulls - hence the case's alternative name). But to do so they needed reinsurance which in view of the size of the risk could only be found in the non-marine market. The brokers arranged a reinsurance facility, but failed to inform the insurers clearly when requesting them to insure the risk (or indeed subsequently) that the reinsurance would be subject to a 48 month limit. The judge (Phillips J. held the brokers negligent in those respects and also in failing to draft an unambiguous reinsurance wording, and to take any steps to protect the insurers when as happened the process of ship-building was delayed so as to extend beyond 48 months[14]. The final breach is a good illustration of the broker's continuing duty. The brokers had sought to fix the insurers with knowledge of the terms of the reinsurance by the in many ways commendable procedure of writing expressly to the insurers asking them to confirm by signature the reinsurance order on terms attached to the letter. Unfortunately, since the brokers did not draw attention to the deficiencies in the period of cover and had not drafted the terms with clarity, this procedure was largely ineffective. It could not transfer to the insurer the broker's obligation of exercising due skill and care in checking the terms. It could not give rise to any estoppel. The most that it could yield was the 20% reduction in liability which as I have said Phillips J. thought that the insurers' failure to read and question the documentation merited under the Contributory Negligence Act.

14. He held that the first breach sounded in tort alone (since at the time when the brokers told the insurers, that reinsurance was available and the insurers wrote the incoming risk, instructions to place reinsurance had not yet been given at least in most cases and so no contract existed between them). He held that the other breaches sounded in contract and tort.

30. *Youell's* case is instructive on the measure of damages recoverable from a broker who fails to procure the insurance which is required or is guilty of some non-disclosure or misrepresentation which renders it voidable. It is easy for a broker then to allege that the required insurance would not have been available. Easy to allege but far from easy to prove. Omnia praesumuntur contra spoliatorem. There is some Commonwealth authority that a Court may even award damages for the chance that substitute insurance might have been available: *Cee Bee Marine v. Lombard Insurance Co.* [1990] 2 N.Z., L.R. 1. In Youell's case however insurers finessed the plea by admitting it and alleging that in that event (i.e. without reinsurance) they would never have entered into the insurance at all. The judge had to accept what was as a result common ground, although he was inclined to think that insurers'

> "change of tack as to the feasibility of arranging the required cover reflected a skilful tactical manoeuvre rather than a belated appreciation that the brokers' case on the impossibility of obtaining cover "as original" was incontrovertible".

Insurers thereby increased their potential claim, since it now embraced not only the part of their exposure which would have been reinsured but also the whole of their exposure on the original insurance.

31. Brokers have found it an uphill task to argue that, although their negligence may have contributed to the insurer's ability to avoid, still there was some other ground not attributable to their negligence which would anyway have justified avoidance. The question then is not whether the insurers could in law have avoided on the other ground, but whether they would in fact have done so: *Fraser v. Furman* [1967] 1 W.L.R. 898. If the Court concludes that some compromise would in likelihood have been achieved (but for the brokers' negligence) it may give damages reflecting the value of the lost compromise. Again this may be a situation where the Court will assess that chance that insurers would have insisted on the other defence, and base its award accordingly: *Dunbar v. A.&B. Painters* [1988] 2 L1R. 38.

32. Lastly, let me say a few words about the selection of appropriate insurers. The 1978 Code says flatly:

> "Although the choice of an insurer can only be a matter of judgment,

> insurance brokers shall use their skill objectively in the best interests of their client."

There is, I have always felt, rather more scope for science in this than this paragraph acknowledges, and the Lloyd's Code paragraph 4 adds significantly to the position where a broker proposes foreign insurers. There are credit ratings (Standard and Poors) and DTI returns that may be inspected. Brokers have security committees. There is little doubt about their potential liability for negligence: see *Hurrell v. Bullard* [1863] 3 F. & F. 445; *Osman v. Ralph Moss* [1970] 1 L1. R. 313. Once again the broker who chooses an insurer can not pass the responsibility for vetting his security to the client by the simple expedient of asking the client to approve the security.

33. The one area where vetting of security has not generally been regarded as arising in the last century and more is in the placing of business at Lloyds. This confidence in Lloyds has been reflected in the traditional practice of Lloyds brokers to state "Lloyds" and not to list individual syndicates as the security on their cover notes. It may be doubted whether this can now be sustained. First, it has not been unknown for particular Lloyds syndicates to establish reputations regarding the handling of claims which might be thought to mark them out as less acceptable security than others. Secondly, recent catastrophic losses incurred by some syndicates at Lloyds may suggest a need to view syndicates on a more individual basis. The Lloyds broker may have to resume some of the duties of his 18th century predecessor attractively described in D.E.W. Gibbs's Study of Lloyds published in the halcyon days of 1957 before the physical and financial storms which have blown through the market:

> "There seems to be no doubt that the insurance broker in the eighteenth century was not a feather-bedded person. His duties were many and exacting. He had to do all that his twentieth-century successors have to do in obtaining the best terms for his client; but he had another duty of which a modern Lloyds broker is happily free - he had to guess correctly the means of the different underwriters, distinguish between the strong men and the weaklings, and see to it that, if possible, no policy sent out by him was signed by a man of doubtful standing. It must have been a difficult matter but somehow the brokers tackled it. They knew their men; they detected the first sign of recklessness in an underwriter."

Perhaps it was the labour of this task (which, pace Gibbs, might have some relevance in the modern market) which led one broker, according to Gibbs, to cry to a Parliamentary Commission enquiring into the London insurance market in 1810.

> "The labour, . . . the agitation of mind, the perpetual vexation, is not to be described. I would rather begin the world again and pursue any other line. It is painful to a degree; we can hardly ever satisfy our principal. If men got their twenty or thirty thousand a year the trouble is not too great for the compensation they receive."

34. Perhaps with even greater justification than his predecessor, the modern broker can claim to belong to a profession from which much is expected, to whom all to little thought or praise is assigned when all is going well (indeed the pressure is then frequently on him to rebate his commission and arrange lower rates) and yet to whom blame is only to easily allocated when things go wrong. The consolation is that standards of broking and underwriting and awareness of the legal implications of brokers' roles and responsibilies are I believe substantially higher than in the not so distant past, even if the lawyers seeing the behaviour of the minority fringe may still from time to time have another impression.

BOOK REVIEWS
1. Butterworths Insurance Law Handbook, Third Edition, Edited by Digby C. Jess 965 Pages £39.50

In their Preface the publishers state that, in publishing the Handbook, it is their aim to make available in a convenient and up-to-date form "all insurance legislation."

This most useful publication achieves that aim. For any busy lawyer or insurance practitioner it is essential that he is able quickly to gain access to the texts of relevant statutes and statutory instruments and, whether one is dealing with an insurance contract law problem or a problem concerning regulation, the salient texts are there.

We have therefore everything from the relevant provisions of the Life Assurance Act 1774, the Gaming Act 1845, the Marine Insurance Act 1906, the Third Parties