# LEGAL DUTIES AND RESPONSIBILITIES OF THE BROKER
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1. *Introduction*

(a) *An "Insurance Broker"*

There is a clear distinction between an "insurance broker" and other insurance intermediaries. A person can only define or style himself as an insurance broker if he complies with the qualifications for registration contained in Section 3 of the Insurance Brokers (Registration) Act 1977. Other categories of intermediary are limited only by the ability of insurance salesmen to invent new job descriptions. The insurance broker is generally thought, not least by himself, to be a more professional creature, in that he must either pass certain exams and/or obtain suitable experience over a number of years before he can be registered, in addition to which he:

(i) must have professional indemnity insurance;

(ii) must contribute to a levy to pay for his brethren who have defaulted or defected with client monies;

(iii) is governed by the Insurance Brokers Registration Council or its counterpart at Lloyds, and the relevant Disciplinary Committees;

(iv) is usually a member of BIIBA or the IIB.

However, whilst there clearly is a distinction, an insurance intermediary is subject to the same duties and obligations as a registered broker (*Harvest Trucking v Davies* [1991]).

(b) *Tort v Contract*

The relationship between the broker and his client is generally contractual, the broker agreeing to obtain insurance, the consideration being provided by his right to deduct commission from the premium. Contracts of agency are rarely reduced to writing or discussed other than in the barest outline; the only express term will usually be the request for insurance. Nevertheless, it is now clear that the broker's duties lie concurrently in tort and in contract.

In *Vesta v Butcher* [1988] O'Connor LJ commented:

> *"I start by pointing out that Vesta pleaded its claim against the brokers in contract and tort. This is but a recognition of what I regard as a clearly established principle that where under the general law a person owes a duty to another to exercise reasonable care and skill in some activity, a breach of that duty gives rise to a claim in tort notwithstanding the fact that the activity is the subject matter of a contract between them. In such a case the breach of duty will also be a breach of contract. The classic example of the situation is the relationship between Doctor and patient."*

Also in *Vesta v Butcher* (at first instance) Hobhouse J said:

> *"The Plaintiff's case was that there were concurrent contractual and tortious breach which could be put either as a claim in contract for breach of an implied term to exercise reasonable skill and care or as a claim in the tort of negligence. This was not in dispute before me as a correct analysis of the position. It is a status of professional relationship which is factually concurrent with a contractual relationship."*

The consequences of a concurrent duty in tort and contract are fourfold. First, the broker may be under wider duties of care and obligations in tort than he would be in contract, although this is now unlikely. Secondly, there may be limitation aspects. There is a six year time limit for claims both in tort and contract. The six year time limit in tort runs out from the date of the damage, whilst in contract it runs from the date of breach i.e. when the defective service is rendered or completed. In case of, say, non-disclosure by the broker, the date of the broker's breach of contract is clearly the date of such non-disclosure. One might think that the damage in tort is suffered when the insurer refuses to pay a claim, but *Iron Trades v Buckenham* [1990] states that the damage (in cases of non-disclosure) occurs upon placement. The six year time limit runs in tort and contract from this date.

However, the Latent Damage Act 1986 may extend the time limit *in tort only* from six years from the accrual of the cause of action to three years from the date when the insured acquired knowledge of the material facts relating to the damage. The fact that the broker can be sued in tort may

therefore be highly relevant to his possible liability.
The third consequence is that the Law Reform (Contributory Negligence) Act 1945 may apply, giving rise to an apportionment of liability between the broker and his client according to the court's evaluation of each party's "blame".
Any liability will, however, fall predominantly upon the broker. (After *Vesta v Butcher* liability can be apportioned both in tort and contract).
Fourthly, the court has confirmed that the insurance broker can be personally liable for failing to exercise due skill and care. In *Punjab Bank v De Boinville* [1992] Staughton LJ commented that:

> *"It is not every employee of a firm or company providing professional services that owe a personal duty of care to the client; it depends what he is employed to do. But here the individual brokers were evidently entrusted with the whole or nearly the whole of the task which their employers undertook. Whilst they were employed by the brokers I hold that as professional men they owed a duty of care to the bank, since the bank was a client of the brokers."*

It is the almost invariable rule that the broking firm or company concerned will be sued as an entity rather than the individual brokers selected for litigation. In this case the problem was that the plaintiffs could not determine for whom the individual brokers were acting when they potentially failed to discharge the duties of care and skilled owed, so they sued them personally.

## 2. General Duties

### (a) Primary Duty of Care

When a broker accepts instructions to carry out any task on behalf of his client, whether it is obtaining a quotation for an intended contract of insurance, obtaining the contract of insurance itself or an endorsement, or handling a claim, he must always exercise reasonable skill, care and diligence in carrying it out. A term to this effect is implied into his Contract of Agency, both at common law, and under the Supply of Goods & Services Act 1982.

The standard of care is not judged by reference to the particular expertise of the broker in question, but according to the skill and care appropriate to the profession in general, ie a standard which is ordinarily exercised by reasonably competent insurance brokers. It should be emphasised, however, that a court will not uphold the performance of a contract by a broker which is broadly in line with the performance of other brokers if the overall standard were considered by the court to be inadequate.

### (b) Duty to Discharge the Contract of Agency

The broker will be liable for any failure to obtain insurance unless he took all reasonable steps to effect the insurance but could not do so and he informed his principal or took all reasonable steps to do so. He will not be liable if the insurance was completely unobtainable.

Where details of the risk are clearly specified by the client, failure to obtain the requisite insurance may give rise to liability if the broker specifically agrees to obtain that insurance.

In *Waterkeyn v Eagle Star* (1920) the insured requested his brother to insure against the collapse of a bank in Russia following the Russian revolution, with the intention of obtaining insurance in respect of sums owed to the insured by the bank. The broker obtained insurance for physical damage to the bank but the court held that the broker was not liable when the bank became unable to return any monies previously lodged, because it was the only insurance available. It would be unlikely to uphold a similar decision today.

Usually the principal will define the scope of the insurance required and it will then be up to the broker to use his discretion in obtaining it. The broker would only be expected to take all reasonable steps to obtain the insurance and he does not guarantee that the insurance will be available as requested *(The Superhulls Cover Case* [1990]).

#### Incomplete or Ambiguous Instructions

Incomplete instructions from the insured, if capable of putting a reasonably competent broker on notice that they do not accurately reflect the insurer's requirements, must be investigated and confirmed by the broker. Where the

instructions are unclear, the broker is under a duty to resolve any ambiguity, and any failure to do so means that he will be making a value judgment which will result in liability if her errs.

(c) **Duty to Select Financially Sound Security?**

It is a fundamental principle that the brokers only broke, and that as agents they do not guarantee the performance of markets in which they place their clients' business. That is not to say, however, that they can never be liable for any collapse of their selected security.

There is very little English case law defining the extent of brokers' duties regarding their selection of security. From what little there is can be distilled the principle that the broker is under a duty to select an insurer which it reasonably believes to be solvent, which effectively means that it must be capable of meeting claims as they fall due. English courts have not yet provided any guidance to the extent of the investigations which the broker must carry out to satisfy this test. The only recent English authority concerning brokers and their obligations as to security is *Osman v J Ralph Moss Ltd* (1970) in which insurance brokers placed a contract of motor insurance with Belvedere Motor Policies Limited, a company whose shaky financial foundation was well known in insurance circles at that time. The Court of Appeal held that the brokers were guilty of negligence in recommending Mr Osman to insure with a company known to be in financial difficulties. In fact shortly after the contract had been concluded, a Winding Up Order was made against Belvedere and the brokers wrote in ambiguous terms to Mr Osman, suggesting that he insure with another company. However, he was a cabinet maker of Turkish origin; his ability to read and understand English was limited, and he did not understand that he did not have insurance. A few months later, he was involved in an accident with another car, and was only then informed that he was uninsured. He was fined £25 for driving without an insurance policy, and the Court of Appeal held not only that the letter sent by the brokers was grossly negligent and would not have aroused the suspicion that all was not well, but also that Mr Osman was entitled to recover the premium he had paid, the £25 fine which had been imposed, and various other costs, on the basis that these were reasonably foreseeable consequences of the broker's breach of duty to inform Mr Osman that he was uninsured.

It is therefore clear that a court would hold a broker liable to his principal if he placed insurance with an insurer of doubtful financial status, integrity or ability to pay claims, when such knowledge is generally available, since to do so is to fail to exercise reasonable care. Finally, in *Dixon v Hovill* (1828) it was said by the judge that:

> *"It never was intended that the names of the underwriters should be submitted to the insured for previous approbation, but merely that they should be unexceptionable names; names of persons competent to pay in case of loss."*

However, any doubts entertained by the broker at the time of placing should be brought to the attention of the insured and full instructions sought.

(d) **Duty of Confidentiality**

Any agent is under a clear duty not to discuss with any third party information which is confidential to his principal. This can sometimes create problems for brokers since they often act for both parties to the contract of insurance e.g. in respect of claims negotiations. However, the courts prefer to find that the broker is acting as the agent of one party or the other in the absence of the insured's express consent to the broker's duality of interest, and therefore information supplied by one party to the broker (whilst he is acting for that party) is and should remain confidential to that party. A problem may arise where the broker suspects that the client is making a fraudulent claim. What should he do?

He is of course subject to the IRBC Code of Conduct (1978) which provides that brokers *"shall place the interests of their clients before all other considerations"* and that *"information acquired by an insurance broker from his client shall not be used or disclosed except for the normal course of negotiating . . . or unless the consent of the client has been obtained . . ."*

However, Fundamental Principal A of the Code states that *"Insurance Brokers shall at all times conduct their business with utmost good faith and integrity"* and Principle B requires brokers to *"have proper regard for*

*others*". In fact the situation is ameliorated by a common law exception to the duty of confidentiality, that of the public interest. This enables individual rights to be overriden by the exposure of actual or contemplated fraud and constitutes a good defence to any claim for breach of confidence. The broker will also attract qualified privilege from liability for defamation.

Lloyd's brokers are specifically required to request the insured to make *"the necessary, true, fair and complete disclosure"* of the facts, failing which they are obliged to report any likely misconduct to the Head of the Regulatory Services Group under Byelaw No. 11 of 1989.

(e) **Duty to Execute the Contract Personally**

The relationship between principal and agent is confidential and fiduciary which gives rise to a specific obligation upon the broker to perform his role personally.

However, this general rule is of limited application because the authority of the broker to delegate can in many cases be implied e.g. whenever clients specifically request insurance at Lloyd's, a non-Lloyd's broker has to use a Lloyd's broker. The broker may also delegate where the principal is aware that the broker intends to delegate, where the involvement of any sub-agent is administrative and does not involve any confidential matters or the exercise of judgement or discretion, or where delegation is normal and acceptable in the ordinary course of business.

The dominant presumption behind delegation is that the broker remains responsible to the client, and the sub-agent becomes responsible to the broker. Privity of contract between the sub-agent and the principal can be created by the principal conferring express or implied authority to create such privity or by ratification of the principal – sub-agent relationship.

(f) **Duty to Account and Not to Make Secret Profits**

Every agent is under a clear duty to account and to pay his principal any sum collected upon the principal's behalf without undue delay.

However, the position of the broker is anomalous in that he need not disclose his commission to the insured unless specifically requested to do so. The broker is therefore exempt from one of the main principles of agency law which states that the agent must make full disclosure of any personal interest to the principal and account to him for all sums received from any other party. The rationale for this exception is that the contract of agency contains an implied term that the broker will be remunerated by receiving a commission from the underwriter, but this will only work if the commission is not excessive, or in any way influences the broker to place the insurance with a particular insurer which is less beneficial to the insured. Certainly any commission substantially above market rates should be disclosed to the insured and indeed must be disclosed (under the Code of Conduct) if specifically requested.

Secret profits are any sums above the amount which the broker is entitled to receive, which are paid as a result of the exercise of his authority or discretion. There need be no dishonesty or fraud, merely a financial advantage to the broker which accrues by virtue of his position. It does not matter that the principal would not have been able to obtain the same benefit.

A secret profit becomes a bribe if it comes to the broker via a third party in order to ensure that the broker advises or takes action which is not impartial or disinterested and may not necessarily be in his client's best interest. There is an irrefutable presumption that the agent is influenced by any bribe and the motive for payment is irrelevant. The irony here, of course, is that the broker is deemed in law to have been paid by the insurer (a third party) for introducing business to the insurer. By its very nature it falls within the definition of a bribe.

Another excellent example of a "bribe" is the payment of a profit commission to a broker. Profit commissions are often paid to insureds to encourage them to improve their loss records or indeed to discount the cost of insurance to reflect goodwill etc. However, brokers may also benefit from profits made by their clients through broker's profit commission clauses, the most obvious example being an open cover through which the broker makes declarations to the insurer in respect of several clients. The lack of a single client makes it administratively difficult for a conventional

profit commission clause to apply and the clause is therefore a specific inducement for the broker to place his client's business with that insurer. These clauses are not included in the policy wordings and the possibility that the broker may benefit is therefore concealed from the insured.

The effects of accepting secret profits can be serious. The insured could avoid the contract ab initio. He is entitled to recover the money paid, as it is regarded as a gift from the insurer, whether he avoids or affirms. The broker may even be subject to criminal sanctions.

Although an insurance broker is governed by the general law of agency, he can sometimes take advantage of certain anomalies in insurance practice, one of which is that he need not disclose his commission provided it is reasonable, unless asked. The definition of commission can become blurred and brokers therefore aggregate their commission with their brokerage. This has the sanction of market practice, for what that is worth. Thus, provided all payments to the broker do not amount to what is more than reasonable payment in total for services rendered, there should not be any problem. It is also a technicality that profit commission is actually a bribe, as is brokerage, in that it is paid by the other party, because this is the accepted method of doing business by all parties.

## (g) Duties Specifically Assumed

### (i) Acting as Principal

The broker may assume responsibilities independently as a principal during the discharge of his contractual duties. A good example is the voluntary assumption of responsibility in *The "Zephyr"* (1985) in which the broker indicated to the leading underwriter that his line would sign down to approximately one third. The leading underwriter relied on this statement, but the broker only managed to reduce the line by 13% and the broker was held to have been under a collateral contract with the underwriter to the effect that he would use his best endeavours to sign down the slip, which he had failed to do so. The broker was therefore liable.

Clearly anyone who accepts a responsibility to do something may be

liable if they fail to discharge that responsibility, if it is binding (or perhaps an estoppel results). In *Pryke v Gibbs Hartley Cooper* the brokers agreed to investigate and report on the operation by a coverholder of a binding authority. The brokers were aware that underwriters would rely on their findings. They were accordingly liable when they failed to exercise reasonable case in reporting properly and fairly.

Further, even though the following market may not specifically have relied upon the brokers to report back to them, they were directly in the brokers' contemplation as persons likely to be affected by any failure to report accurately on the coverholder's position and the brokers will therefore owe the following market a duty to exercise due care and skill in accurately reporting the coverholder's position to the leading insurer *(Pryke v Gibbs Hartley Cooper* (1991)).

(h) **Premium**

Section 53 of the Marine Insurance Act 1906 makes the broker liable to the insurer for marine premiums. This applies to Lloyd's and non-Lloyd's business. The Lloyd's broker may also be liable to Lloyd's underwriters for non-marine premium, but outside Lloyd's brokers are not liable for non-marine premium.

(i) **Claims**

The potential obligation of the broker to pursue claims on behalf of the insured is currently of considerable interest in the market owing to the claims now being made in respect of insurances placed many years ago (e.g. for asbestosis). The insured will rarely establish the obligations of the broker in respect of claims prior to the conclusion of the contract of agency and there is a great deal of argument concerning the position. In contracts placed at Lloyd's the assistance of the broker in pursuing claims may be implied into the contract of agency by custom, market usage and the fact that the Lloyd's underwriter is theoretically not directly accessible to the insured.

Outside Lloyd's the broker's obligation will be considerably harder to

prove and in some areas, such as motor insurance, the broker will charge a fee for his services.

In *Anthony Gibb Sage Ltd v Euro Afro Traders Ltd* (unreported 1981) the Court of Appeal was faced with the insured's argument that *"a broker who agrees to negotiate the formation of a contract of insurance thereby undertakes the shadowy obligation to pursue a claim if it comes to his notice that the adventure, the subject matter of the insurance contract, has met with a catastrophe so that a claim is on foot"* and that the broker should therefore be liable for failing to inform the insured of the correct procedure for making an insurance claim. Their Lordships considered the possibility that *"the duty of a broker extends in some respects to pursuing a claim which falls due under the policy"* as *"interesting and startling"*. Nevertheless, there are cases to the contrary such as *Minett v Forester* (1811) and *Bousfield v Cresswell* (1810).

Whether or not the broker is obliged to pursue a claim, if he receives instructions to do so and decides not to do so, he would be well advised to inform the insured immediately in order to avoid liability. In *Jameson v Swainstone* (1809) the insured successfully showed that he had been led by the two year silence of the broker to believe that the claim had been settled and that he had therefore been deprived of the opportunity to enforce his policy.

### (j) Duty to Insurers

The broker's responsibility to make full and fair presentation of the risk to insurers has always been expressed as a personal obligation, in that he is obliged to disclose all relevant information of which he is aware under Section 19 of the Marine Insurance Act 1906. If he makes any misrepresentation to insurers there is no reason why insurers should not sue him under the *Hedley Byrne v Heller* principle, a proposal endorsed by Waller J in *Pryke v Gibbs Hartley Cooper* [1991]. Normally the insurer will simply avoid the insurance and the question will not arise, but if he is unable to do so (perhaps because the jurisdiction of the contract of insurance rules that any avoidance is ineffective), then the insurer may well wish to sue the broker. Further, although *Banque Financiere* [1990] states that the remedy for any breach of good faith is rescission, and not damages,

it is possible that a broker may in an appropriate circumstance owe a duty of care in respect of disclosure, breach of which may well sound in damages (*Pryke v Gibbs Hartley Cooper*).

## 3. Conflicts: The Broker – Whose Agent?

A fundamental premise of insurance broking is that the broker is usually the agent of the insured. It is of course vital that *"an agent for one party should not act for the opposite party in connection with the same transaction without the latter's informed consent" : Eagle Star v Spratt* [1971].

Brokers continue to fail to understand the basic concept that no man can serve two masters without the full and informed consent of both. The problem with the insurance markets, and particularly Lloyd's, is that in order to function efficiently the broker may have to discharge a number of functions, which may produce a potential conflict of interest.

### Claims: Settlement Facilities

An excellent example is the handling of claims. A broker will pursue a claim apparently on behalf of his client, the insured, from the appointment of an apparently impartial loss adjuster through negotiation to settlement. However, the insurer may not want to tie up his claims department with small claims, or claims within (say) 25% of the policy limit. He may therefore authorise the broker to conclude a settlement up to a specified level. The broker will rarely inform the insured, because to do so would mean that he would (at least) insist on settlement to that limit. There is a clear conflict of interest which could give rise to a claim on the basis that the broker, on settling the claim on behalf of the insurer, has failed to obtain the best possible deal on behalf of his primary client, the insured. The broker could also be liable to the insurer if he "over settles" a claim.

### Claims: Documentation

Another common problem occurs when brokers are involved in a claim, although specifically acting for the insured, and they are asked to instruct loss adjusters or solicitors to investigate and prepare a report. Even though they may see the contents of the report, they are not allowed to divulge those contents to the insured, despite a clear breach of the contract of agency by serving two

masters. Lloyd's Code of Conduct 9.6 states that:

> *"A Lloyd's broker should not, without the fully informed consent of both parties, act for both his client and insurers during the claims settling process if by doing so he would be undertaking duties to one principal which are inconsistent with those owed to the other. In any event, a Lloyd's broker who receives or holds on behalf of the insurers concerned an adjuster's report or similar document relating to an insurance claim made by his client should only do so on the basis that the information in the report may be imparted to the client."*

Despite having been adversely commented upon by the Fisher and Neill Reports, the practice continues today.

**Binding Authorities**

Another good example concerns the operation of binding authorities. Where an insurer has issued a binding authority to the broker, this enables him to issue policies in the insurer's name. The commonest form of such a facility is the provision of immediate but temporary motor insurance cover. This may leave him open to claims from the insurer for "dumping" second-rate risks into it, or from an insured for not obtaining the best insurance available.

Where the broker arranges a binding authority for a coverholder, the broker remains the agent of the coverholder (insured) pursuant to the contract of agency, but he may also be liable to the insurer in tort arising out of their relationship. Although a binding authority is not a contract of insurance or of good faith, a broker is still personally obliged to reveal to the insurer any unusual or unexpected features of the proposed coverholder. Any failure to delineate any unusual feature of the coverholder could result in liability for negligent misrepresentation on the basis that if the broker knew of some unusual feature of the coverholder which would not normally be present in the circumstances, his failure to disclose it could be taken as a representation that it was not there at all: *Pryke v Gibbs Hartley Cooper Ltd* [1991].

The second is the fact that although the broker is not under any obligation to the insurer to investigate or report on the position of the coverholder during the currency of the binding authority, if he voluntarily undertakes to carry out an

investigation into the coverholder's activities, and to report back to the leading insurer, then he will be under a duty to perform that task with reasonable care and skill.

4. **Acting as Agent Only**

The traditional view of the broker is that as an agent he simply effects the instructions of his principal, on the basis that his principal understands his own needs and instructs the broker to fulfil them. On this view the broker is no more than a robot. Thus where the broker failed to enquire as to whether additional insurance would be required to cover goods at the packers prior to transit (which was insured), he was not at fault or liable, because he was entitled to assume that the insured conducted his business prudently and had obtained the appropriate insurance *(United Mills Agencies v Bray* [1951]. However, the broker is theoretically more proficient than a mere agent, since he has to fulfil certain requirements as to skill, ability and competence before using the appellation, and today he must satisfy a higher standard of care than in the past in ensuring that the insurance obtained must meet the insured's real requirements as precisely as possible. The broker's duties today extend beyond doing what he has been asked to do.

This view is supported by:

(a) **Code and Regulation**

The overriding principles contained in the IBRC (Code of Conduct) Approval Order 1978 state that the broker shall conduct his business with utmost good faith and integrity, presumably both towards the insurer and insured, and *"shall do everything possible to satisfy the insurance requirements"* of his clients and shall provide advice objectively and independently. Carrying out these principles will involve the broker dispassionately considering his principal's apparent wishes, and informing him of their adequacy or otherwise, and taking care to ensure that his needs are adequately fulfilled;

(b) **Case Law**

In *McNealy v The Pennine Insurance Co Ltd* [1978] the broker failed to

ascertain whether the insured fell within the category of an uninsurable part-time musician, which of course he did. Lord Denning MR said that *"It was clearly the duty of the broker to use all his reasonable care to see that the assured ... was properly covered"*. Waller LJ said that *"It was clearly his [the broker's] duty, in my view, to make as certain as he reasonably could that the [assured] came within the categories acceptable to the [insurer]"*. The Court of Appeal found that recording the insured's response to the questions on the proposal form was not enough, and that a more active role should have been played by the broker.

The obligation was taken further by Hobhouse J in *General Accident Fire & Life Assurance Corporation v Tanter, The "Zephyr"* [1984] where he commented that *"... It is the broker's duty to do his best to see that the assured's obligations of disclosure and absence of misrepresentations are fulfilled. The broker's skill and expertise extends beyond merely giving his client advice and complying with his client's instructions. He must make use of his knowledge of the market and use appropriate skills."*

The requirement of the broker to advise his client does not extend to areas outside his expertise e.g. matters of law, although he is expected to have a working knowledge of those areas relevant to his practice.

## 5. Avoiding Liability: The Myth of Cover Notes

Brokers usually place a great deal of reliance upon clauses in cover notes which require the insured to comment if the security obtained is inadequate or if they are otherwise unhappy with any part of the policy. An immediate problem is that the cover has been placed and, unless there is a termination clause, little can be done to remedy the situation. The best that can usually be achieved is for the broker to reach some accommodation with the insurer, which usually means that the insurer retains some premium for the time on risk, which the broker may have to pay. Two recent cases have made it very clear that such clauses will rarely be of benefit.

In *The Moonacre* [1992] the brokers obtained information from the insured during a telephone conversation in response to a question in the proposal form which they had unfortunately mis-interpreted. When the insured was unable to obtain payment from the insurers, the brokers contended that he had been

contributorally negligent because he had failed to check the copy of the proposal form later sent to him, together with the policy. They alleged that he should have appreciated that the question had been wrongly answered and that he should have informed the brokers so as to enable them to correct the mistake. The judge held this argument to be entirely misconceived. The insured as a layman was clearly entitled to rely on the broker's skill and judgment in identifying the information required to answer the question. It was no part of the insured's duty to second-guess his own professional advisor and there was therefore no fault or liability on his part. This case confirmed a case in 1963 in which a judge commented:

> *"I am the last person ever to think that any insured ever reads his policy through from end to end. I am quite satisfied that it is only the very, very exceptional person who ever does."*

In *The "Superhulls Cover" Case* [1990] a similar position arose. The brokers failed, amongst other things, to inform the insurers properly of the reinsurance that had been obtained and specifically failed to draw their attention clearly to a cut-off clause. The brokers relied upon the fact that they had sent each insurer a copy of the reinsurance contract with a letter confirming the reinsurance attained, which had been signed by reinsurers and returned without comment. It was alleged by the brokers that the insurers had assumed a contractual or common law duty to check that the terms attached to the letters were satisfactory. The judge said that he could not accept this submission because:

> *"A broker who has undertaken a contractual duty to exercise skill and care for his client cannot transfer to the client the duty of checking that such care had been exercised by the expedient of sending such a letter, with the result that if both broker and client failed to exercise care, the loss falls on the client ... I can see no justification for imposing on the client a duty owed to the broker to check the suitability of the cover obtained with a degree of care similar to that which the broker is paid to employ when obtaining it."*

One of the arguments raised in this case was that the broker's contractual requirement had been varied, but the judge dismissed this argument on the basis that the confirmatory letter was merely a confirmation of instructions

given, rather than a variation of those instructions to reflect the inadequate cover obtained.
Brokers cannot therefore rely on the expertise or inclination of the insured to check that the insurance obtained is adequate, although brokers *may* sometimes be able to avoid liability in part if the insured is professionally associated with the insurance business, e.g. if he is a reinsurer, or if he has *actually* spotted an error but has failed to take any remedial action. In *General Accident Fire & Life Assurance Corporation Ltd v Minet* (1942), Atkinson J stated that:

> *"It may very well be that if the defect is so obvious that it springs to the eye and had been indeed observed by the insured, use might be made of the point."*

In the *Superhills* case, the judge commented that:

> *"The client who signs a letter such as the order letter thereby exposes himself to the risk of an estoppel ... if there is an obvious defect in the cover, a waiver or an estoppel may result."*

It is not absolutely clear whether or not the insured *must* actually notice the defect and appreciate it fully, or whether the defect simply has to be *so obvious* that it could not be ignored.

## Conclusion

The role of the broker is continually being examined by the courts and appears to be expanding. He may be personally liable. He may be liable in tort. He may be liable to third parties – *The "Zephyr"* (1984) confined the broker's representations on signing down to the leading underwriter and not the following market, but in *Pryke v GHC* (1991) the duty which the broker voluntarily accepted to investigate the coverholder was extended to the whole market. Of course it is difficult for a broker to understand and comply with his obligations if the courts move the goal posts occasionally, but that is one of the penalties of being a professional, especially in an area in which various duties have been deliberately left unclear.