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SAMPLE ARTICLE
DUTY OF CARE OWED BY BROKERS AND SUB-BROKERS
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A recent court decision has again put a spotlight on the duty of care that brokers owe those parties for whom they arrange insurance.

Introduction

An insurance broker acts as the link between clients and insurance companies, employing his specialised knowledge of the insurance market to find and arrange suitable insurance policies for private individuals, for companies and for other organisations. The general view is that while, an insurance broker is engaged by the insured to seek cover on the latter's behalf, the broker claims his remuneration from the insurer. Since he is acting merely as a 'placing' or 'introducing' agent his work normally finishes when the appropriate policy cover has been obtained.. However, in certain circumstances he may be a 'continuing' insurance adviser to the insured during the term of the policy or become his agent in any claims notification.

Various rules govern who may become an insurance broker. A broker may be an individual, a partnership or a company. There may be circumstances where, under the tortious rules of "assumption of responsibility" and under the broader umbrella of regulated activities of the Financial Services Markets Act, 2000 ("FSMA"), an employee or a bank may be termed an insurance broker.¹

An insurance broker/intermediary is defined in the FSMA² as:

"A person who, in the course of any business or profession, invites other persons to make offers or proposals or to take other steps with a view to entering into contracts of insurance with an insurer other than a person who only publishes such invitations on behalf of or on the order of, some other person."

A broker's conduct is regulated both by statute and by codes of conduct³. The nature of the broker's duties depends on whether the duty is contractual, tortious, equitable or fiduciary. And the broker may be liable concurrently in contract and tort⁴. However, in most cases, the extent of liability will be the same.

Duty of Care and Skill

A number of important decisions over the least twenty years have focussed on the quality of the duty, on the circumstances in which that duty can be delegated and on how damages should be calculated. The broker's basic duty of care arises out of the contract of agency between the broker and the insured and it is well established in law that the broker is required to exercise reasonable skill and care in the performance of his various functions on behalf of the insured. In *Eagle Star Insurance Company Ltd v National Westminster Finance Australia Ltd*⁵, the Court held that the broker's duty was to use all reasonable care and skill in seeking to obtain the cover in a geographical location chosen by the insured, in this case London.

¹ *European International Reinsurance Co. Ltd v Curzon Insurance Ltd* [2003] EWCA Civ 1074.

² Interim Prudential Rules, Insurance at Chapter 11.

³ Conduct of business rules made under the Financial Services Act, 1986 ("FSA"), and the General Insurance Business-Code of Practice, drawn up by the Association of British Insurers ("ABI").

⁴ *Henderson v Merrett Syndicates Limited* [1995] 2 AC 144.

⁵ *Eagle Star Insurance Company Ltd v National Westminster Finance Australia Ltd.*(1985) 58 A.L.R. 165.

In *Youell v Bland Welch & Co Ltd*⁶, the Court held that the brokers were in breach of duty in (1) failing to draft the contract wording with proper skill and care; in (2) failing to inform the insurers that the reinsurance cover obtained did not comply with the cover ordered and in (3) failing to take steps to procure extensions of cover when the 48-month term expired.

Position of Sub-Brokers

Although a broker is required to perform his duties personally, he can delegate his duties to another with the insured's consent. It was held in *Prentis Donegan & Partners Ltd v Leeds & Leeds Inc*⁷ that the sub-broker was the agent of the original agent, and that there was no privity of contract between the sub-broker and the insured. However, in certain circumstances, a sub-broker, notwithstanding the lack of privity of contract, may be liable to the insured, as:

- (1) When the sub-broker acknowledges that he is holding monies on behalf of or to the account of the insured. In this event an action for monies had and received, may lie⁸;
- (2) When a sub-broker may be directly accountable to the insured for secret profits⁹; and
- (3) When a sub-broker may, if he has undertaken or assumed responsibility towards the insured, be held to owe a duty of care in tort to the insured¹⁰.

***BP plc v Aon Limited & Aon Risk Services of Texas, Inc*¹¹**

The Commercial Court in *BP plc v Aon Limited & Aon Risk Services of Texas, Inc*¹² dealt with the issue of whether and to what extent a sub-broker owes a duty of care in tort to an insured in circumstances where there is no contractual relationship between the two parties. In this case, BP sought to establish that Aon London, a sub-broker with which it had no contractual relationship, owed it a duty of care and was liable for losses, which it allegedly suffered due to Aon London's negligence. BP's contractual relationship being with Aon Risk Services of Texas, Inc (Aon Texas)

The Court held that, in determining whether Aon London owed a duty of care to BP, the key consideration was Aon London's behaviour towards BP. Applying this test to the facts of the case, the Court concluded that Aon London had assumed a responsibility to BP. The factors which led the Court to this conclusion were the close and direct links between BP and Aon London and the opinion BP must have had of the key role Aon London played in broking the open cover in Europe.

The Court considered whether the existence of the service agreement with Aon Texas changed this provisional conclusion and held that the existence of the agreement would not mean that BP was less likely to believe that, by its conduct, Aon London was undertaking to accept personal responsibility for the performance of its services as a broker.

⁶ *Youell v Bland Welch & Co Ltd*. [1990] 2 Lloyd's Rep 431.

⁷ *Prentis Donegan & Partners Ltd v Leeds & Leeds Inc*. [1998] 1 Lloyd's Rep 326.

⁸ *IGI Insurance Co v Kirkland Timms Ltd*. (unreported) 5th December 1985.

⁹ *Powell & Thomas v Evan Jones & Co*. [1905] 1 KB 11.

¹⁰ *BP plc v Aon Limited & Aon Risk Services of Texas, Inc* [2006] EWHC 424 (Comm).

¹¹ *Ibid*.

¹² *Ibid*.

The Court finally held that there was clearly no contract to limit or eliminate the liability of Aon London to BP. Therefore, the Court concluded that Aon London had assumed responsibility to BP to provide its broking services with the proper professional skill and care on which BP had relied.

Conclusion

The decision in *BP plc v Aon Limited & Aon Risk Services of Texas, Inc*¹³ establishes that a sub-broker can owe a duty of care to an insured with which it has no direct contractual relationship. This case also reiterates that the mere fact that the parties were in a direct or indirect contractual relationship would not in itself amount to a reason why duties could not also be owed in tort where a voluntary assumption of responsibility has been otherwise established.

The content of this paper does not constitute legal advice and should not be relied on as such. Specific advice should be sought about your specific circumstances.
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¹³ Ibid.