

PRODUCTION OF BROKERS DOCUMENTS

It is increasingly common for brokers to be asked to produce their file for inspection. These requests can come from a number of sources such as the insurer, a regulator, a reinsurer exercising rights of inspection under a reinsurance contract, or simply the client himself. A request to inspect the file can be the first sign that there is a potential problem and, for this reason, all such requests should be approached with care.

1. CLIENT'S CONSENT

When dealing with a request for inspection, the first step should be to consider whether you are authorised to comply. Where the request comes directly from the client the position is straightforward. Under general agency law the broker is the agent of the client and holds documents created, whilst carrying out the client's instructions, on behalf of that client. The client is therefore entitled to call upon the broker, at any time, to make these documents available for inspection.

Where the request comes from a regulator the broker, generally, will be obliged by the regulatory regime to comply. Other than that, where the request comes from a party other than the client, the general rule is that the client's consent should be obtained before the inspection proceeds. If a reinsurer requests inspection pursuant to some contractual right of inspection under a reinsurance contract, the client's consent should be sought. This is to ensure that there has been no change to the contract or the relationship between client and underwriter, of which, as broker, you are unaware. If a request for inspection of documents comes from an insurer, then the *Goshawk v Tyser* judgment needs to be complied with (see below).

2. DOCUMENTS HELD ON THE CLIENT'S BEHALF

Having obtained any requisite authority from a client to a file inspection, you will then need to consider what documents you are required to produce. Documents held on the client's behalf will include contractual documentation, correspondence, notes of telephone calls with third parties and so on. It will not include a broker's own working papers, notes of internal meetings and conversations with colleagues which you will be entitled to remove before inspection if you choose to do so. The distinction between these two categories of documents can sometimes become blurred with internal comments being written on underwriter documents, conversations with clients being recorded on internal meeting notes and so on. The consequence of this is that the opportunity may be lost for the broker to separate out his own papers and withhold these from inspection.

3. DISCLOSURE OF DOCUMENTS IN LEGAL PROCEEDINGS

The other scenario in which a broker may find himself obliged to produce his documents is if a dispute arises between parties that cannot be resolved without resorting to litigation. The broker may have to disclose documents in the context of proceedings between a client and underwriter, or may himself be the target in legal proceedings brought by a dissatisfied client. The scope of documentation required to

be produced in this scenario is far wider than that outlined above. The broker may have to disclose all documents which he holds that are relevant to the matters in issue between the parties, regardless of whether they are helpful or detrimental to his position and regardless of whether they are internal documents or documents created on behalf of the client. It is therefore essential to have a good document management system so that such key documents can be readily identified.

Broadly, the only documents a broker will not have to disclose are those covered by legal professional privilege. This covers correspondence and documents between a party and their legal adviser created for the purpose of obtaining legal advice. In addition it covers documentation created where legal proceedings are reasonably contemplated. Legal professional privilege will therefore enable you, as broker, to consider a dispute frankly with your legal advisers without worrying that records of your discussions will subsequently have to be produced. Nevertheless, it is very important to be aware of its limitations. This privilege will only apply to documents that are created for the dominant purpose of seeking advice or in contemplation of litigation.

It is a mistake to presume that once a dispute has arisen, and legal advice has been sought, any written record of the problem will be immune from production. A memorandum reporting to the board of directors on an E&O problem, for example, will not have been created for the dominant purpose of obtaining legal advice and so will not be covered for this reason. Such documents must be kept to matters of fact and the temptation to record in-house opinions on the problem resisted. Likewise, if E&O matters are discussed at board meetings, any minutes taken should be limited to recording that the matter was discussed, rather than any opinions proffered in the course of that discussion. A report to the Griffin created for the purpose of obtaining legal advice on a problem may be privileged, but copies of that report, circulated to directors for risk management purposes, will not be: they were not created for the dominant purpose of obtaining legal advice from a professional adviser. Great care must therefore be taken to avoid creating prejudicial documents once a dispute has surfaced since those documents may then have to be disclosed.

4. PRODUCTION OF DOCUMENTS TO INSURERS (GOSHAWK V TYSER)

The Court of Appeal's judgment in the case of Goshawk v Tyser is important in providing some (though not complete) guidance to Brokers on the extent to which they may accede to requests from underwriters to inspect documents held by brokers.

THE BACKGROUND

The claim against Tyser arose as a result of it receiving such a request from solicitors acting on behalf of Goshawk's run-off managers. The request initially embraced a wide range of documents relating to viatical business underwritten by Goshawk. Due to the scope of the request, and the basis upon which it was made, Tyser was concerned that it fell outside of "the normal course of negotiating, maintaining and renewing" its clients' business, and, having discussed the position with the Managers, it sought its clients' consent to complying with the request. Some clients consented, but others refused.

As a result, Goshawk brought an action in the High Court against Tyser for an order that Tyser produce the documents of those clients whose consent Tyser had been unable to procure.

THE HIGH COURT DECISION

The action was brought on the grounds that it was “market practice” that brokers held documents to the order of underwriters. The Managers have always held the view, and continue to do so, that to rely on a defence of market practice is unsound, and the action against Tyser was defended on the basis that, in the circumstances of this request, Tyser’s duty was to put the interest of its clients first. Given the refusal of some clients to release documents to Goshawk’s solicitors and run-off agents, it would also be imprudent for Tyser to accede, as this would expose it to an allegation of breach of its duty to its principal. The High Court agreed with Tyser, and also held that there was no evidence of the market practice that Goshawk had asserted.

THE COURT OF APPEAL’S VIEW

Goshawk took the matter to the Court of Appeal. No appeal was made against the High Court’s finding that there was no market practice as had been argued by Goshawk, but the Court of Appeal ruled that:-

- in the Lloyd’s market there is an implied term in insurance contracts (policies) between the insured and Lloyd’s underwriters that the underwriters must be able to re-inspect placing and claims documents that they have previously seen;
- provided that underwriters have not retained copies themselves; and
- that the broker has retained copies; and
- there is an absence of bad faith.

The Court of Appeal also held that in order that the implied term in the policy can be put into effect, business necessity and “London market practice” require an implied contract to exist between the broker and Lloyd’s underwriters.

THE EFFECT

The effect of the ruling was to narrow the scope of documents which a broker can make available to underwriters, and the occasions when it may do so, compared to what had previously been understood to be the case.

Prior to the Court of Appeal’s ruling, the codes of practice for brokers required a broker to consider whether the request was made “in the normal course of negotiating, maintaining and renewing business”. If it was, brokers could release information without the need to revert to clients for consent. Brokers did not need to establish whether underwriters had retained copies themselves, and were not obliged to confine access to those documents previously seen by underwriters. They now need to observe these restrictions.

A DEGREE OF UNCERTAINTY

The application of the ruling appears to be restricted to policies which are (a) placed at Lloyd's and (b) governed by English law, or a foreign law which would imply a similar term into the policy as a result of that law recognising a practice that the judge found has existed in Lloyd's. That leads to a number of questions – not least:-

- Is a broker expected to know what the situation under a foreign law is and, therefore, whether a contract will be implied between it and underwriters?
- What position, should a broker take if a demand is received for access to documents, under a non-English law policy, and which the insured is not prepared to countenance?
- Is the broker entitled to override the insured's objections with impunity?

Tyser's application for leave to appeal was turned down by the House of Lords and so there remains a degree of uncertainty about these issues. However, there are a number of practical points that arise out of the judgment, which we address in our risk management message at the end of the Bulletin.

5. LMA 5050

Members should be aware of an "Access to Records" clause entitled LMA 5050 which was produced by the NMA in late 2005. The wording of the clause is as follows:

"The Insured shall make available to the Underwriters at all reasonable times, and the Underwriters through their designated representatives shall have the right to inspect and copy at their own expense, during the period of this insurance and thereafter, all books, papers and other records of the Insured and its agents or brokers in connection with this Policy or the subject matter hereof."

Members will note that this clause gives Underwriters far wider access to records than they would otherwise be entitled to. At the time of its production it prompted LMBC to issue a circular (number 97/2005) pointing out that the wording did not reflect what was previously agreed between it and the NMA and included in the specimen TOBA provided by the LMBC. The Association wrote to the Membership in December 2005 recommending that, at the very least, the specific consent of the Insured should be obtained in writing prior to this clause being agreed.

We have become aware that this clause has now been included in a number of LMA standard wordings. We are also aware that a similar clause, giving this wide access to records but without the entitlement to take copies, has been included in other standard wordings. Unless this degree of access is something to which the client/Insured has expressly agreed in writing, we would recommend that any attempt by Underwriters to include these Access to Records clauses in a wording should be strongly resisted.

6. RISK MANAGEMENT MESSAGE

- i. Treat any request to inspect your file as a matter of importance that should be given a reasonable degree of priority.

In particular remember:

- that a well-documented file is a broker's best defence to any complaint made by a dissatisfied client - ensure that your files will withstand scrutiny;
- that a request to inspect your file can be the first indication that there is a problem so approach the exercise with caution;
- your client's consent may be required before any inspection can proceed;
- you are entitled to review your broking file for documents that do not have to be produced before proceeding - the Griffin is happy to assist in this process;
- where legal proceedings are underway you may be obliged to produce all relevant documents that you hold unless legal professional privilege applies;
- avoid creating prejudicial documents whilst handling a problem - these may subsequently have to be disclosed;
- electronic files should be treated in the same way as paper files and the rules concerning production and privilege will equally apply.

ii. Practical considerations following *Goshawk v Tyser* are:

- Brokers should ensure that they have an accurate record of what has been shown to underwriters. One way of doing this is to keep those documents filed separately from other documents that may have been received from the client, or may have been created in the course of acting for that client, but which have not been shown to underwriters as part of the placing or claims process. These documents might, for example, include the bulk of your correspondence with the client.
- Bear in mind that if client correspondence is shown to underwriters at the time of placing a risk or getting a claim paid underwriters will be able to see those documents again.
- On receipt of a request for re-inspection from underwriters you should ask them to confirm that they have not themselves retained any copies of the documents that they are requesting. If they have, the *Goshawk* decision holds that they have no right to re-inspection.
- If you have concerns that a request is being made otherwise than in good faith, we would recommend that you contact the Griffin for guidance. This is particularly important if the request is outside of what you would feel to be the normal course of negotiating, maintaining and renewing the insurance of your client.
- As the position is unclear with regard to policies which are subject to foreign law, as a safeguard, you should (if possible) insert a clause in all

your client TOBAs stating that, under English law, you may now be under a legal obligation to underwriters to allow them to re-inspect placing and claims documents. Some of your clients, especially those overseas, may still insist that their prior permission is sought. In this situation you should contact the Griffin to discuss how best to seek to manage the potential conflict of interest that may arise.

- Where a request is received from a third party (not underwriters) no documents should be provided without the consent of the broker's client or in accordance with the terms of any court order.
- Resist any attempt by underwriters to include LMA 5050 in an insurance contract.

This bulletin is for general information purposes only and does not provide a comprehensive or complete statement of the law relating to the issues discussed nor does it constitute legal advice. In addition, by its nature, this bulletin may be superseded by subsequent regulatory or legal developments. Professional advice should be sought where appropriate in relation to any particular circumstances.

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