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Case No: A3/2005/0850

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION, COMMERCIAL COURT
THE HONOURABLE MR JUSTICE CHRISTOPHER CLARKE
[2005] EWHC 461 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL
7th February 2006

B e f o r e :

SIR ANTHONY CLARKE MR
LORD JUSTICE RIX
and
LORD JUSTICE RICHARDS

Between:

Goshawk Dedicated Ltd (suing for and on behalf of all members of Lloyd's Syndicate 102 & 2021 for the 1999 year of account) and others — **Appellants/ Claimants**

- and -

Tyser & Co. Limited and another — **Respondents/ Defendants**

(Transcript of the Handed Down Judgment of
Smith Bernal WordWave Limited
190 Fleet Street, London EC4A 2AG
Tel No: 020 7421 4040 Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

Mr Geoffrey Vos QC & Mr Steven Berry QC (instructed by Messrs Berwin Leighton Paisner) for the Appellants
Mr Julian Flaux QC & Mr Richard Slade (instructed by Messrs Holman Fenwick & Willan) for the Claimants
Mr Robin Knowles QC (instructed by the Council of Lloyd's) for the Council of Lloyd's intervening

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HTML VERSION OF JUDGMENT

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Lord Justice Rix :

1. What happens if underwriters at Lloyd's, who have handed back to their insured's brokers all the documents which those brokers have shown them in the course of placing the insurance and making claims under it, subsequently have need of those documents in order to evaluate their exposure under it? That is the main issue raised by this appeal.

2. The underwriters say that under a term to be implied, as a matter of business necessity, into their contract of insurance with their insured, they are entitled to re-inspect those documents: and that in consequence of and as a corollary of that right they have a similar right, by way of implied

contract, against the insured's Lloyd's brokers to re-inspect those documents in the latter's hands.

3. The brokers say that there is no contract between them and their client's underwriters and no such implied term for re-inspection. If the underwriters want documents, they will be happy to provide them if their client consents, but otherwise their duty is to their client, not to their client's underwriters. If the client does not consent, the underwriters can only seek disclosure under the rules of procedure which govern in the context of legal proceedings.

The factual background

4. The claimants in this litigation, and in this court the appellants, are Lloyd's syndicates 102 and 2021 (the "syndicates"). Syndicate 102 entered into the relevant insurance for the years 1999 to 2003, and syndicate 2021 for the year 1999 alone. It will be seen below that during this period the date of 20 December 2001 may (the matter is in dispute) mark a watershed. Subject to that, there is no need to distinguish between the two syndicates.

5. The defendants, and in this court the respondents, are two associated firms of Lloyd's brokers (the "brokers"). Nothing turns on the distinction between them.

6. The insurance in question is "viatical" business. I take these facts more or less directly from the judgment below of Christopher Clarke J. Viatical companies purchase the life assurance policies of the terminally ill or those over 65, at a discount, with a view to profiting from the payout upon death in the event that the sum assured exceeds the purchase price of the policy and the premiums paid to keep it in force thereafter. The life assured may, of course, live longer than anticipated so that the payout is either delayed or never occurs at all because the life assured outlives the term of his term insurance. The viatical companies insured themselves with the syndicates against loss arising from such possibilities, a form of contingent cost insurance or CCI, where the contingency in question was that the life assured outlived his life expectancy by 24 months. The indemnity was the face value of the policy, which was assigned to the syndicates if a claim was paid. Medical examinations were required. Many of the policies contained a "basis of insurance" clause by which the supply of true and complete information by the insured was made the basis of the insurance or a condition precedent to it. Some of the policies referred, under the heading "Information", either to particular documents having been seen and noted and in some cases attached, or, more generally, to the information being "As per Tyser Special Risks Ltd file".

7. The insurance was placed by the brokers either directly with the syndicates, or, more usually, indirectly through the syndicates' agents, Merlin Underwriting Agency Limited who from 2000 onwards held a binding authority.

8. The volume of business was extremely large, in total over $1 billion. It has been unprofitable business and the syndicates are now in run off, managed by Cavell Managing Agency Ltd ("Cavell"). In order that the run off may be conducted satisfactorily and that the extent of

exposure can be calculated, the syndicates seek from the brokers documents in the following three categories:

> (1) *Placing* documents: ie documents contained in the brokers' placing files and shown at the time of placing of the insurance, including contractual documents such as the slips themselves but also other information made available to the underwriters at the time of placing.
>
> (2) *Claims* documents: ie documents contained in the brokers' claims files and presented to the syndicates or Merlin during the presentation of claims.
>
> (3) *Premium accounting* documents: ie documents relating to the collection, processing and accounting for the premium, showing premiums due, charged and paid for.

9. The first two categories of documents would have been shown to the syndicates or Merlin at the time of placing or presenting claims; the third category would for the most part have remained internal to the brokers.

10. The brokers have, with the consent of many if not most, but not all, of their clients, already produced a very large quantity of documents. In some cases, however, consent has been refused. In other cases, the clients are uncontactable or unresponsive. The brokers are concerned about repercussions for themselves if they produce documents without their clients' express consent.

11. Even so, and before these proceedings had been commenced, the brokers had produced, irrespective of client consent, all contractual placing documents, viz "placing slips, LPSO policies, endorsements and bordereaux". I quote from the skeleton argument prepared for the brokers for this appeal. The skeleton continues –

> "53.1 …and other placing information has been disclosed where the clients consented.
>
> 53.2 Where clients (eg Viaticare) have consented to disclosure of claims files, Tysers have disclosed such files. A number of clients have refused consent (including Legacy Benefits, although…they had permitted inspection of files relating to twenty pending claims immediately prior to the trial and…they are prepared to permit access to files on certain terms).
>
> 53.3 The judge ordered disclosure of accounting information for business transacted after 20 December 2001 pursuant to clause 8.1.1 of the TOBA [see below]. Those documents have been disclosed.

> 53.4 Thus, the documents which Tysers are not prepared to disclose to the syndicates are placing information and claims files where either Tysers' client had expressly refused consent to such disclosure or Tysers cannot contact the client but have grounds for believing…that it is not in the clients' best interests to make such disclosure."

12. The reference to TOBA is to the Terms of Business Agreement which pursuant to paragraph 5(4) of the Lloyd's Broker Byelaw 17/2000 Lloyd's brokers were required to enter into with managing agents as from 1 January 2002. In fact the syndicates' managing agents and the brokers signed a final version of a model TOBA, developed by the Lloyd's Market Association (LMA) and the London Market Insurance Brokers Committee (LMBC), in the immediate run-up to that deadline, viz on 20 December 2001. Hence the date to which I have referred above. As the brokers' skeleton quoted above indicates, the judge ordered production of accounting documents pursuant to TOBA as from that date, but was not prepared to do so for the period prior to that date. However, he made no final determination as to what documents fell within this ruling, while indicating certain provisional views. The brokers have not appealed against this ruling, and have produced what appears to have been accepted to be the relevant documents. Post TOBA accounting documents have therefore been disclosed and do not figure in this appeal.

Market custom or practice

13. A major part of evidence and submission at trial was devoted to the syndicates' attempt to prove a binding market custom at Lloyd's to the effect that underwriters were entitled to obtain the documents in question from their insured's Lloyd's brokers. The judge declined to find such a custom, and no appeal is now pursued by the syndicates from that finding. Nevertheless, they still maintain that TOBA reflects an earlier market practice that, where documents were not retained by the underwriters but passed back to the brokers, the brokers would permit re-inspection by the syndicates.

14. For these purposes they rely on the evidence of the parties' expert witnesses at trial and on certain Codes, to which I refer below, as well as on TOBA itself.

15. As for the expert evidence, it was, as far as remains relevant, as follows. Mr Berry, the expert called on behalf of the syndicates, described the space difficulties which had of old discouraged underwriters from retaining copies of material brought to their boxes by brokers. The position had improved somewhat in the new Lloyd's building and with the advent of computers, and he could not say there was a uniform practice that underwriters did not retain copies of documents on placing; however, there was an accepted and understood market practice that underwriters were entitled to obtain production to them of copies of any documentation made available by the brokers at placing and remaining on their files. As for claims documents, these were invariably kept only by the brokers, the market could not work if underwriters could not routinely access those claim files, and he had never known an occasion when an underwriter's request had been

refused.

16. Mr Blackburn, the expert called on behalf of the brokers, in his original report said that where an underwriter did not retain copies of placing material it was an established Lloyd's market practice that "the broker will make the document[s] available to the underwriter". In his second report, however, he qualified that original opinion to the effect that a broker could refuse a request for access to placing information where either the client expressly refused consent or the broker considered that it was not in his client's interests to permit access. The position was the same in respect of claims files, save where the underwriters had paid for the production of a report. If anything, the greater tendency nowadays for underwriters to retain material meant that "I don't think these days you can say anyone is entitled to see anything in accordance with market practice".

17. The judge found that the expert evidence reflected to some degree the witnesses' standpoint born of their different professional experience on either side of the underwriter/broker divide. Mr Berry had been an underwriter, Mr Blackburn a broker. Mr Berry could not understand how a broker could be justified in refusing access to material which an underwriter had seen before; Mr Blackburn regarded the interests of the client as paramount, even where they conflicted with an undertaking given to the underwriter, eg to hold documents for "safekeeping".

18. The judge's conclusion (at para 38) was that the evidence –

> "falls considerably short of establishing a custom, as opposed to a common or habitual practice."

19. Since there is no appeal against that finding, it is unnecessary for me to go further into the judge's reasons for that conclusion. However, it appears to allow that a common or habitual practice had prevailed, albeit that in more recent years it had been overtaken or had to be seen as reflected by the express provisions of TOBA and the Codes which had preceded it. To some extent the judge modelled his conclusion against the background of the regime which those Codes and TOBA revealed. I therefore turn to them.

The Codes and TOBA

20. The first such Code of Practice (the "Lloyd's Code") was promulgated in July 1988 with effect from 1 November 1988. It provided –

> "3. Confidentiality of Client Information
>
> (1) Any information acquired by an insurance broker from his client shall not be used or disclosed except in the normal course of negotiating, maintaining, or

> renewing a contract of insurance for that client or unless the consent of the client has been obtained or the information is required by a Court of competent jurisdiction."

21. That of course begs the question of what is involved in the negotiating and maintenance of a contract of insurance. The Introduction to the Code had also stressed that it was a fundamental principle that brokers should place the interests of their clients before all other considerations.

22. A new Code came into effect on 24 November 1994. The relevant principles were expressed in very similar terms save that "or in handling a claim for that client" had been added to the list of exceptions where disclosure was permitted (see para 2.B.(19)).

23. A third Code, called the Commercial Code of the General Insurance Standards Council (the "GISC Code"), came into force on 3 July 2000, that is to say during the period of these insurances. This stated:

> "Confidentiality and Secrecy.
>
> 44. Members will ensure that any information obtained from a Commercial Customer will not be used or disclosed except in the normal course of negotiating, maintaining or renewing insurance for that Commercial Customer, unless they have their Commercial Customer's consent, or disclosure is made to enable GISC to fulfil its regulatory function, or where the Member is legally obliged to disclose the information."

24. Thus reference to claims handling had dropped out again; and an additional reference to legal obligation had entered.

25. The parties entered into a final version of the model TOBA, as required by Lloyd's Broker Byelaw 17/2000, on 20 December 2001. The critical clauses are clauses 2.2 and 8.1, as follows:

> "2. Scope
>
> 2.2 Nothing in this Agreement overrides the Broker's duty to place the interests of its client before all other considerations nor shall this Agreement override any legal or regulatory requirement (whether obligatory or advisory) which may apply to the Broker, the Managing Agent, or the placing of any insurance business.
>
> 8. Access to Records
>
> 8.1 The Broker agrees to allow the Managing Agent on reasonable notice to inspect

and take copies of the following:

8.1.1 the accounting records pertinent to any Insurance Business including information relating to the receipt and payment of premiums and claims and documentation such as any insurance contract or slip endorsements, addenda or bordereaux in the possession of the Broker relating to the Insurance Business; and

8.1.2 documents as may be in the possession of the Broker which were disclosed to the Managing Agent by the Broker in respect of any Insurance Business including, but not limited to, documentation relating to the proposal for the Insurance Business, the placing thereof (including endorsements and restatements) and any claims thereunder."

26. Clause 9 is also relevant:

"9. Confidentiality

Each of the parties will treat information received from the other relating to this Agreement and to the Insurance Business as confidential and will not disclose it to any other person not entitled to receive such information except as may be necessary to fulfil their respective obligations in the conduct of the Insurance Business and except as may be required by law or regulatory authority…"

27. Thus it will be seen that, for the first time at any rate expressly, clause 8.1 imposes on brokers a contractual obligation, reflecting the requirements of the Lloyd's market, to disclose to underwriters' managing agents placing, claims and accounting records such as those which have been sought in these proceedings by the syndicates.

28. In the draft model TOBA published in February 2001 which had preceded the final version the matter of "Access to Records" had been dealt with in the following terms:

"The broker agrees to allow the Managing Agent access to all documents used in the negotiation of any insurances which the Broker places with the Managing Agent subject to the terms of this Agreement and shall allow the Managing Agent the right to make copies or extracts of any such records. Such right of access shall be at the discretion of the Broker but shall not be unreasonably withheld."

29. A "Guidance Note" commented:

"1. Where the broker's papers are created in the course of an agency for the Assured as principal, the broker owes a duty of confidentiality and therefore cannot allow third parties to inspect any of their files unless the Assured first grants

permission.

2. The exception to this rule, pursuant to London market practice, is that a Managing Agent is entitled to inspect those documents which they saw at the time of placement (e.g. placing presentation with supporting documents, information sheets, slips, any endorsements, policy wordings in draft and final form, and so forth). This is what is meant in the TOBA by "*All documents used in the negotiation…*" No other documents may be inspected by a Managing Agent without the consent of the Assured."

30. In the final version of TOBA the class of documents dealt with under clause 8 is extended to claims and accounting documentation, and the reference to "London market practice" has been lost. However, in the light of the judge's findings and the Guidance Note, I have no reason to doubt the existence of such a market practice (even if not amounting to a custom) at least in relation to placing documentation and at any rate in the period prior to TOBA.

Griffin Bulletins

31. The same practice is reflected in a Bulletin on "Release of Files" issued in 1990 by Griffin Managers Ltd, managers of a mutual insurance association which insured about a quarter of Lloyd's brokers. The Bulletin stated –

> "Requests for the release of files to insurers have traditionally been complied with for the simple reason that underwriters have kept very few documents themselves. The insurance market has not always been as litigious as it is today and there was therefore no good reason for not complying with such a request. The changed atmosphere of today's environment however means that these requests now need to be considered extremely carefully…
>
> Generally the insurer will be entitled to see the slip and policy wording and little else. However as a matter of practice, the broker should obtain his principal's consent to the release of any document including placing information originally shown to the insurer. In this way he will protect himself from any future allegations of breach of duty by his client. It is worth emphasising that the broker has little to lose by refusing to disclose documents to the insurer since the insurer's only remedy is to seek formal discovery of the documents in question…"

32. A further Griffin Bulletin ("Producing Your File") was issued in April 2002, in the new era of TOBA. It stated –

> "It is increasingly common for a broker to be asked to produce his file for inspection…Although it is by no means always the case, a request to inspect the

> file can be the first sign that there is a potential problem. For this reason all such requests should be treated as matters of priority and approached with care…
>
> Where the request comes from a regulator such as GISC 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 must be obtained before the inspection proceeds...
>
> If the broker has agreed as coverholder under a binding authority, or under a TOBA with a managing agent, to allow access to records, the client's consent should still be sought before access is allowed…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…Always check with your client that they are happy before you proceed."

33. This is practical advice from those who have to protect and indemnify brokers. It is therefore necessarily defensive, and no doubt practical, advice and does not seem to me to throw any real light on the matter.

The judgment

34. Before the judge the syndicates did not advance the argument which they now put in the forefront of their submissions, that a term for the production of the documents requested is to be found, as a matter of necessary implication, in the insurance contract between them and their insured. No point is taken on this appeal that the argument is not available to the syndicates (and no issue of foreign law has been argued on this appeal), but on behalf of the brokers it is submitted that its background is not conducive to its acceptability.

35. Thus the judge only had to consider the argument that there was such an implied term arising in a contract directly between brokers and syndicates. Moreover, it was not suggested that before TOBA any such express contract existed between such parties. Therefore, a contract had to be implied, and not merely an additional term of an existing contract. Moreover, the contract had to be implied against the background of no such implication being contended for in the underlying insurance contract between underwriters and insureds.

36. In these circumstances it is perhaps not surprising that the judge should have concluded that it was not possible to imply the contract contended for. Having rejected the submission that there was a binding custom ("certain, notorious and reasonable") such as that contended for by the syndicates, and having pointed out in that context that such a custom would involve obliging a broker to disclose documents against his client's objection or best interests and would therefore be unreasonable, he was able to deal with the implied contract theory in a single brief paragraph (at para 42) thus:

> "It is apparent that there are several different ways of dealing with the tension between the interests of the broker and his clients and the requirements of the underwriter, and it is not clear to me that the method of doing so inherent in the implied contract relied on must necessarily be the applicable one."

37. The judge went on to consider the position under the TOBA regime, when there undoubtedly was a contract between brokers and syndicates, and one moreover which dealt expressly with the topic of access to records. He concluded nevertheless that, although clause 8.1 would on its own terms cover documents requested in the present case, that clause was overridden by clause 2.2, which was a paramount clause with precedence. He said –

> "46. Not without some hesitation I have come to the conclusion that clause 2.2 is, where it applies, capable of "trumping" clause 8.1. In other words the obligation to grant access to documents will not arise if to do so would be inconsistent with the broker's duty to place the interests of his client before all other considerations. Whether that would be so must depend on all the facts of any given case. But, if the broker has genuine, and not spurious or wholly irrational, grounds to regard it as against the interests of his client to produce the placing and claims information the TOBA does not, in my view, require him to do so…
>
> 48. I recognise that this construction introduces a serious limitation on the operation of clause 8. This is particularly so, if, as seems to me to be the case, the obligation of the broker to place the interests of its client before all other considerations introduces a degree of subjectivity, since, if the broker genuinely thinks that his clients may be prejudiced by giving access to the information, and there are grounds for such belief, his duty is not to disclose. Different brokers may take different views. But this construction does not deprive the clause of all content. In some cases the broker may not be able plausibly to assert that his duty to his client would be overridden if he were to have to provide the material. Further, unless clause 2.2 is to be interpreted in this way, it, itself, is devoid of content."

38. The judge therefore held that clause 2.2 did prevent disclosure of the placing and claims documentation requested (at para 56). However, he held otherwise in relation to the accounting documents since he considered that for these purposes the brokers had no genuine grounds to fear that production would be against their clients' interests (at para 57).

39. Somewhat paradoxically, therefore, the judge's conclusions were that the brokers had no TOBA obligation to disclose placing and claims documentation all of which the syndicates had seen before, whereas the brokers did owe a duty to disclose accounting documents, even though these on the whole would not have been previously seen by the syndicates.

The submissions

40. On behalf of the syndicates, Mr Geoffrey Vos QC submitted that it was a term of the insurance contracts between the syndicates and their insureds, necessarily to be implied for the sake of business efficacy, that they would permit inspection, through their Lloyd's brokers, of placing and claims documentation previously shown to the syndicates but retained by the brokers and not by them; and also pre TOBA accounting documents. He was joined in that submission by Mr Robin Knowles QC, on behalf of the Council of Lloyd's, which has been given leave to intervene.

41. For these purposes Mr Vos and Mr Knowles emphasised the following matters. The placing and claims documents had already been seen by the syndicates, therefore there was no issue of confidentiality in respect of them; nor could it sensibly be against the interests of the insureds for the syndicates to see the same documents again. It was in everyone's interests for the syndicates to be guided by what the documents said rather than by mere recollection of what they said. If there was a prospect of litigation, it would be avoided best by knowledge rather than ignorance. The principle could be seen at work in the voluntary disclosure of the contractual documents which had already taken place. In any event, in the context of a contract of good faith, all documents presented to underwriters as part of the placing were necessary to a true appreciation of the contract. The contract simply would not work without underwriters having available to them such documents: they could not estimate their exposure or take proper account of the validity of claims. The practice at Lloyd's, which was idiosyncratic, was the background to the necessity which gave rise to the term. It was not suggested that the term operated where underwriters had retained the documents, but in the present case they had not.

42. As for accounting documents, the position here was a little different, for the relevant documents had not been seen before: but TOBA's clause 8.1 recognised that the essence of the matter was to put such documents into the same category as placing and claims documentation. This was because the accounting for the premium was done by the brokers, and underwriters were entitled to check that it had been done correctly. The documents were needed for the very reason that they related to the working out of the contract but were not available to underwriters save on their request.

43. On behalf of the brokers on the other hand, Mr Julian Flaux QC submitted that the alleged implication was unnecessary and unreasonable, and therefore impermissible. In the first place, it was not accepted that the placing documents had not been retained by the syndicates. In any event, it could not be known at the time of contract whether or not they had been retained (or copied) and thus the premise for the implication could not be mutually established. The requests were reasonably believed to be simply a prelude to an attempt to find reasons to decline liability and to create litigation. It was a device to avoid the need for invoking the procedural code for disclosure within (or, pursuant to CPR 31.16 in advance of) litigation. As Hoffmann LJ said in *SAIL v. Farex Gie* [1995] 1 LRLR 116 at 151:

> "If [reinsurers] are not entitled to inspection as a matter of contractual right and a dispute arises, English law gives them no procedural means of inspection unless they are first able to raise a triable issue on the material otherwise available to them."

44. As for claims files, paid claims were a closed book. The position of (pre TOBA) accounting documents was a fortiori.

45. As for the position between syndicates and brokers, Mr Vos and Mr Knowles submitted, on the basis that an implied term for the production of the relevant documents had been established as between syndicates and their insureds, that a contract to similar effect was necessary as between the parties to the appeal. Pre 20 December 2001 and TOBA the contract was necessary because at Lloyd's everything operated between underwriters and brokers: underwriters may not even know who their insureds are. Post TOBA, the matter was simply governed by clause 8.1. On the stated basis, there was no conflict between clauses 8.1 and 2.2 to resolve since the insureds were separately obliged under their insurance contracts to allow production of the documents in question. It was therefore unnecessary to resolve any issue as to the precedence of the two clauses. The brokers had no ground to resist disclosure, because their clients had no ground.

46. Mr Flaux, however, submitted that in the pre-TOBA period it was impossible to construct an implied contract out of nothing. It was fatal to the implication of any contract that the parties, here the brokers and the syndicates, would or might have acted as they did without any such contract: *Baird Textiles Holdings Ltd v. Marks & Spencer plc* [2001] EWCA Civ 274, [2002] 1 All ER (Comm) 737, at paras 18/21 and 62. In any event, all the reasons which supported his submissions in relation to the unreasonableness of implying a term into the insurance contracts operated in this context as well. As for TOBA, although that created a contract between the brokers and the syndicates, nevertheless in the absence of any implied term in the insurance contracts the judge had been right to hold that clause 2.2 took precedence over clause 8.1 for the reasons that he gave.

Is a term to be implied into the insurance contracts between the syndicates and their insureds?

47. This is the first and underlying issue. In my judgment, the submissions of Mr Vos and Mr Knowles are to be preferred. The background is a regime at Lloyd's whereby insurance must be placed through Lloyd's brokers and a practice, at any rate in the past even if now in decline, whereby placing and claims documentation is retained by brokers but not by underwriters. Even in today's more organised and computer assisted world and more litigious environment, clause 8.1 recognises the need to make the relevant documentation available to underwriters. Indeed, my understanding is that, even in today's world, where placing material is more often than in the past forwarded to underwriters for their prior consideration (and not merely put briefly before their eyes at a face to face encounter at the underwriters' box), with the result that underwriters have a good opportunity to retain such placing material for themselves especially where it is available to

them to be stored electronically on their computer systems, it remains the case that claims files are in general maintained only by brokers.

48. Of course, if the placing and claims documentation is retained by underwriters, then barring mishap, such as loss of the documents through fire or other misfortune, there is no necessity to go to the brokers for their production. But clause 8.1 recognises an obligation on brokers to permit inspection and copying irrespective of the circumstances in which the need arises. (No doubt, in the absence of need, no request is made.) As between underwriters and their insureds, therefore, against the background of this regime and practice, it can be seen that, at least where documents are not retained – being something falling within the contemplation of the insureds given the practice spoken of and/or the situation now formalised by TOBA – it is both reasonable and necessary for documents retained by the brokers but not by underwriters to be available through the brokers to the underwriters. Otherwise the contract could not effectively or safely be operated.

49. The matter can be tested by reference to the signed or scratched contractual documents themselves, which the brokers in this case have always been prepared to produce, and did. How can an insurance contract be operated unless these documents are in the hands of both parties? The parties are not to be supposed to have to operate their contract in the dark. Such documents will often, as here, refer expressly to information produced as part of the placing of the contract and to its place in the brokers' file, and sometimes make that information the basis of the contract. But even where they do not, information in fact provided as part of the placing is an essential, and mutual, part of the formation of the contract. It is part of the fundamental obligation of good faith. Thus what is requested in these proceedings is not production for the first time of the insureds' private documentation which might reveal that there had been non-disclosure on the part of the insureds. It is merely re-production of what the insureds had originally disclosed to underwriters, as a matter of good faith, in the making of a purportedly fair presentation. If the disclosure of this information was thought at the time to be necessary for the purpose of making the contract, I cannot understand what embarrassment or other difficulty there could be about its availability to underwriters who have not retained it. Such documentation is discrete, not voluminous, defined by its prior use in placing and presentation and thus not open-ended nor expanding, and it therefore should be easily identifiable.

50. The same may be said about claims documentation. It is not concerned with the formation of the contract, but again the subject matter of discussion is not the insureds' or brokers' private documentation, but discrete and identifiable material which has already been presented to underwriters for the purpose of making claims. Where those claims are ongoing, they cannot be resolved without mutual access to the documentation. But even where earlier claims have been settled, it is quite possible to see that the resolution of ongoing claims cannot be achieved without access to earlier claims documentation. The issue has been argued as a matter of principle, so that I am not presented with any submission that a particular request is unnecessarily or unreasonably wide. I would nevertheless contemplate the possibility that the implied term, because it is born of necessity and must be reasonable, should not be interpreted to permit of unnecessary or

unreasonably wide requests. However, in the present case the claims files requested (see Schedule 1 to the syndicates' points of claim) are limited to "the Portsmouth claim" and to the "44 Legacy Benefits claims". I have no reason to think that those requests are unreasonably wide. The fact that the syndicates are now in arbitration with Legacy Benefits, or that they have previously been afforded some access to twenty files in that context, as the court has been informed through additional evidence filed by the brokers for the purposes of this appeal, does not seem to me to take the matter any further.

51. The position of accounting documents is somewhat different, but falls within the same essential reasoning. It is both reasonable and necessary for premium accounting documents to be available to the underwriters. In this case the documents in question have not been seen before by the underwriters, but they reflect the working out, albeit by one party's brokers for the benefit of both parties, of the premium to be paid. No problem will usually arise where the premium is simply stated in lump sum form. Where, however, the premium is rated, or depends on declarations, its working out becomes more complicated. The premium is of course the essential price to be paid to underwriters by insureds for their cover. The rate is set by the contract, but the amounts to be paid have to be worked out and depend on information often to be derived from the insureds alone. In my judgment it is both necessary and reasonable for the underwriters to have access to the essential documents of that process, otherwise a matter of mutual agreement becomes an entirely unilateral process.

52. It does not follow, however, that the full schedule of documents requested by the syndicates in this case (see Schedule 2 to the points of claim) would be within the rationale of the necessary implication. It seems to me that the essence of that rationale is that the brokers have to disclose premium accounting documents which are necessary to the operation of the contract, in the sense that such documents adequately reveal the basis on which the premium has been calculated and paid. But that rationale does not extend to a policing or investigatory function, as might occur in litigation. In the context of his ruling on clause 8.1.1 of TOBA, the judge reserved for future debate whether the requested documents fell within the wording of that clause: and the parties were able to reach agreement for themselves. In this court, similarly, we have not heard specific argument addressed to the application of an implied term to the Schedule 2 requests. I am confident, however, that the parties would similarly be able to resolve this question for themselves.

53. Although I am satisfied that the implication is to be made on the traditional basis that it is necessary for business efficacy, it seems to me that the insurance context, where good faith operates, supports that conclusion. It is not a question of whether a refusal to allow access amounts to a breach of the duty of good faith: Mr Flaux's submissions in this regard were therefore, it seems to me, beside the point. It is rather that the duty informs the content of the contractual obligation at the time of contract: see *Manifest Shipping Co Ltd v. Uni-Polaris Insurance Co Ltd (The Star Sea)* [2001] UKHL 1, [2003] 1 AC 469, *per* Lord Hobhouse of Woodborough at para 52. This is particularly apparent, it seems to me, in relation to placing documentation, but its influence extends to the other classes of documents as well. An example

of such an implication, made for the purposes of business efficacy but informed by the insurance context of good faith, can be found in *Phoenix General Insurance Co of Greece SA v. Halvanon Insurance Co Ltd* [1985] 2 Lloyd's Rep 599 at 613/614, where Hobhouse J accepted an implied term which extended to the obligation to keep proper accounting records and to make them reasonably available to reinsurers as being something which "would probably be imported anyway by the duty of good faith" (at 614).

54. The question arose in the course of submissions as to the width of the implied term contended for. Mr Vos made it clear that his term only embraced the situation where underwriters had not in fact retained the placing and claims documentation in question (this aspect of the matter does not relate to accounting documents, since they would not previously have been disclosed). As pleaded, the implied term is to the effect that –

> "when the [brokers] took away and retained and maintained the documents and information made available to or shown to the [syndicates] in the placing and claims files there arose a contract, implied by law, alternatively by business necessity, alternatively as a matter of obviousness, by which the [brokers] agreed to retain and maintain the said documents and information, and allow the underwriters on reasonable notice to inspect and take copies of the said documents and information…[T]he said implied contracts apply to the slip, and or policy wording…"

55. Thus Mr Vos did not submit that the implied clause would necessarily operate where the request for access was premised on some other consideration, such as the loss of retained documentation in fire, flood or other disaster, or because of some computer failure, or simply through unexplained unavailability. He submitted, however, that his factual premise operated in this case, and that this had never been seriously disputed. He also submitted that his implied term would operate whether or not the insured knew (through his broker's knowledge) that the documents in question had not been retained by underwriters. In that respect he seems to me to be going beyond the pleaded case, which appears to be premised upon the brokers' knowledge that they "took away and retained" the relevant documentation.

56. These submissions set up a possible issue or issues of fact. In their points of claim the syndicates pleaded (at para 3) that they had not retained the documentation sought; but in their points of defence (at para 4) the brokers made no admission in this regard. The syndicates are now managed in run-off and the current managers have no real insight into the facts as they occurred: but the documentation in question is not in the syndicates' files. Mr Vos says that there was no issue at trial on this question, and certainly none appears from the judgment below.

57. In my judgment, however, the implied term is not created by the act of unilateral retention by the brokers. That is, it seems to me, far too case specific for a matter of this kind which depends in origin and in part on market practice and now, since TOBA, is covered by a solution (as between

brokers and underwriters) which represents a model for the Lloyd's market as a whole and in which sole retention by brokers is not a condition precedent. What is critical, it seems to me, is that, in a market where traditionally, even if less so nowadays, the placing and claims documents shown to underwriters are kept by brokers and not by underwriters, there is an implied obligation in the insurance contract itself that those documents should be available to underwriters where that is reasonably necessary. Such necessity may arise because, as was traditionally the case with respect to placing documents or as appears to remain the case with respect to claims documents, they are not retained by underwriters, or because they have been lost. There is no obligation, however, to provide underwriters with what they have already got; and there is no obligation to provide underwriters with what the brokers have not retained. We are not here concerned with whether there is an obligation of retention (but see *Johnston v. Leslie & Godwin Financial Services Ltd* [1995] LRLR 472). In these circumstances, the question of the insureds' or their brokers' knowledge is not problematical. They know, at the time of contract, of the practice of the market and the material possibility therefore that placing and claims documents will have been retained only by brokers; or may have been lost; and they know of TOBA, which reflects a market solution. The necessity to which the implied term answers is therefore within their contemplation.

58. I would therefore hold that in the Lloyd's market there has at all relevant times been a term to be implied in the insurance contracts between underwriters and insureds to this effect: that placing and claims documents which have been previously shown to underwriters, and premium accounting documents which are necessary to the operation of the contract, where retained by the insureds' Lloyd's brokers, should be available to underwriters in case of reasonable necessity. Availability includes the right to take copies. There was no discussion before us of the question of cost and expense, but I would hold that the costs of inspection and copying fall to be met by the underwriters who make the request.

59. There was also some discussion before us as to the relevance of the motivation of the requesting underwriters. It was submitted that the syndicates' motive was to undertake an investigation to see whether they could resist liability, even to the point of finding a ground for avoidance of their contracts. To this end Mr Flaux sought to rely on inferences which he said could be drawn from the new evidence relating to the disputes which have broken out in the US in relation to Legacy Benefits. The syndicates for their part submitted that the documentation was needed by their run-off managers so that they could take stock of contractual exposure. It seems to me that, at any rate in the absence of bad faith, motivation, as is usually the case, is not relevant. It is hard enough to make sound distinctions about one's own motives, let alone another's. In commercial matters a simple rule is best. The documents in question are those already seen by underwriters, or necessary to the working out of premium payable under the contract. They are needed on the premise that they are not otherwise available to the underwriters. It is undesirable to compel parties to litigation simply in order for them to know what their contractual rights and obligations are. I would therefore hold that in the absence of bad faith motivation is irrelevant.

Is there a contract between the syndicates and the brokers for production of the documents?

60. It is of course common ground that there is such a contract since 20 December 2001, as found in TOBA, but two questions remain. One relates to the existence of such a contract in the pre-TOBA period, and the other is as to the effect of TOBA and the relationship between clauses 2.2 and 8.1.

61. As for the post-TOBA period, no problem, as it seems to me, remains. There plainly is a contract between the syndicates and the brokers, for production of the relevant documents within clause 8.1. There is no longer any possible conflict between clause 8.1 and clause 2.2, because the brokers' clients and principals have themselves agreed that such documents in the possession of their brokers should be disclosed by their brokers to their underwriters.

62. In the circumstances it is unnecessary to consider, as the judge had to do, whether clause 2.2 overrides clause 8.1. Since it is unnecessary, I will do no more than observe that I consider this question as very much an open one. It seems to me that it may after all be easier to give clause 2.2 a full and proper content while at the same time giving effect to clause 8.1, than vice versa.

63. As for the period before TOBA, however, the position is more controversial. The syndicates, and Lloyd's, submit that, once an implied term in the insurance contract itself is established, a contract directly between underwriters and brokers presents no difficulty. The brokers, however, submit that if the premise is established, then there is no need for any separate contract between brokers and underwriters: the syndicates can pursue their rights directly against their insureds.

64. In my judgment, however, business necessity does require a contract directly between brokers and underwriters. At Lloyd's the underwriters deal with brokers and through brokers. It is for that reason that TOBA was created, to formulate the terms on which underwriters and brokers deal with one another. It would be unrealistic to suppose that there was no contract between them prior to TOBA, especially against the background of the practice found to exist in the period before TOBA and referred to, for instance, in the judge's own finding as well as in the draft model TOBA which recognised the "London market practice" under which a managing agent was entitled to inspect documents which they had seen at the time of placement. In circumstances where the documentation is retained in London with the brokers, it would be highly unbusinesslike to suppose that the parties contracted on the basis that underwriters would need to apply directly to the insureds wherever they were in the world in order to obtain documentation which ex hypothesi they needed to obtain from their Lloyd's brokers, rather than to the brokers themselves. It is the brokers who maintain contact with their clients and have their contact details. Because the contract as between underwriters and their assureds is to provide disclosure through the Lloyd's brokers, and because business necessity requires that the disclosure be done in London, where the documents are, it would be absurd for the brokers to be able to say that the underwriters' rights must be pursued elsewhere by reference to their principals.

65. Thus in *The Zephyr* [1984] 1 Lloyd's Rep 58 Hobhouse J held (at 85) that in the context of a

market which recognised the existence of a duty of care of a broker to take reasonable steps to see that a signing down indication is achieved, and where the broker's role was "one where he is the servant of the market", the broker's voluntary assumption of responsibility was decisive. Although that case was brought in tort, the language is as close to contract as it is possible to go. And in *SAIL v. Farex* at 156 Saville LJ referred to *The Zephyr* and said –

> "a broker carrying out instructions on behalf of an intending assured may have to undertake obligations to others in order to perform his mandate".

66. In my judgment the brokers were obliged, in the period prior to TOBA, to perform the duty undertaken by their principals, the insureds, to make available documents necessary for the effective performance of the insurance contracts. They were authorised to do so. Business necessity, reflected in a market practice and ultimately enshrined in a model contract designed for that market, required them to do so.

Conclusion

67. In the circumstances, I would allow this appeal and declare that, subject to elucidation in respect of the accounting documents sought in Schedule 2, which absent agreement might have to be resolved in the commercial court, the brokers are obliged, on reasonable notice, to allow the syndicates to inspect and copy the documents sought by the syndicates.

Lord Justice Richards:

68. I agree.

Sir Anthony Clarke, MR:

69. I also agree.

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