

## UPDATE ON INSURANCE BROKERS

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19 October 2006

### Sub-broker's Duty of Care in Tort

*BP Plc v (1) Aon Ltd (2) Aon Risk Services Of Texas Ltd* [2006] Lloyd's Rep. IR Plus 8 (Comm) (Colman J)

In this claim the Claimant was looking to establish a claim in tort against a sub-broker, due to limitation difficulties. Colman J applied the "assumption of responsibility" test, derived by *Hedley Byrne* and approved by the House of Lords in *Williams v Natural Life Foods* [1998] 1 WWLR 728. In *EIRC v Curzon* [2003] the Court of Appeal had held that it would be too rigid to state that only a direct assumption of responsibility would create liability by various broking entities. In *BP v Aon*, Colman J found that only an assumption of responsibility test could establish a duty of care in sub-broking cases involving commercial entities. This case may proceed to the Court of Appeal and, if so, we can expect authoritative guidance on establishing a duty of care owed by sub-brokers to the insured.

### Recovery of internal managerial and staff time spent mitigating brokers' conspiracy to defraud

*R+V Versicherung v Risk Insurance & Reinsurance Solutions* [2006] EWHC 42 (Comm) (Gloster J) & [2006] EWHC 1705 (Tomlinson J)

As a matter of principle, the costs of wasted staff time spent on the investigation and/or mitigation of a tort was recoverable, notwithstanding that no additional expenditure loss, or loss of revenue or profit could be shown, subject to the proviso that it had to be demonstrated with sufficient certainty that the wasted time was spent on investigating and/or mitigating the relevant tort. To be able to recover, some significant disruption to the business had to be shown, in other words, that the staff had been significantly diverted from their usual activities.

### **Post-placement duties**

[HIH Casualty & General Insurance v JLT Risk Solutions](#) [2006] EWHC 485 (Comm)  
(Langley J)

In this decision an insurance broker was found to be under a duty post-placement to alert insurers as to matters of potential concern on coverage in respect of its reinsurance. The decision illustrates the fact sensitive nature of post-placement duties such as that alleged here, the existence of extent of which will turn on the facts of each case.

[Great North Eastern Railway v JLT Corporate Risks Ltd \(2006\)](#) [2006] EWHC 1478  
(Comm) (Cresswell J)

Commercial Court willing to admit expert evidence concerning an alleged continuing duty upon brokers when a policy was renewed which included a particularly restrictive exclusion clause.

[Goshawk Dedicated Ltd v Tyser & Co Ltd](#) [2006] 1 Lloyd's Rep. 566 (Sir Anthony Clarke MR, Rix LJ, Richards LJ)

Lloyd's brokers were obliged, pursuant to an implied term in the insurance contracts between the Lloyd's syndicates and their insureds, to allow syndicates in run-off to inspect placing and claims documents that had previously been shown to the syndicates and premium accounting documents that were necessary to the operation of the contract, where reasonably necessary.

[John Gaughan v Tony McDonagh & Co Ltd](#) [2006] Lloyd's Rep IR 230 (Comm) (Gloster J)

A claim brought more than 6 years after placement survived a limitation strike out/summary judgement application because the breach of duty relied upon related to a communication from the broker made in connection with the correction of a policy wording.

## **Insurance Conduct of Business Rules (ICOB)**

It is now nearly 2 years since the ICOB rules came into effect. Breaches of ICOB Rules are, unless stated otherwise, also actionable by a private person (including a sole trader) who suffers a loss as a result by virtue of s. 150(1) & (2) of the FSMA2000, whether in court proceedings or in pursuit of a complaint with the Financial Ombudsman Service.

For commercial clients the rules have evidential value in establishing negligence – thus far the rules made actionable for commercial client under s.150(3) are limited to the right to interest on late payment of motor claims and the rules preventing exclusion or restriction of duties or liabilities arising under the regulatory scheme.

Claimants' advisers ought by now to be familiar with the advantages of relying upon the rules, which in many cases will make it unnecessary to ponder the precise extent of the brokers' duties to their insured clients. For example, the obligation to take appropriate instructions, to consider such matters as the policyholder's existing cover and to recommend suitable policies that reflect the policyholder's demands and needs is spelt out in detail. As post 15<sup>th</sup> January 2005 claims come in, we can expect the ICOB Rules to play an every increasing role in claims.

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19 October 2006

**Richard Harrison's** principal areas of practice are commercial litigation and arbitration, insurance and reinsurance, professional negligence (accountants, the legal profession, construction professionals, financial advisers and insurance/reinsurance brokers) and employment law.

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