

Update

Continuing duties of brokers

English statute provides that claims for damages for breach of contract and for tort become time-barred six years after the cause of action arises. Broadly, time will start to run from either the date of a breach of contract or the date when damage is suffered.

However, the precise nature of a broker's duties will influence the issue of how long a claimant has to bring a claim. For example, in a 1995 case, *Johnston v Leslie and Godwin*¹, Clarke J held that an insurance broker owed a continuing duty to the reinsured to maintain records so as to assist the making of claims. Accordingly, even though the relevant documentation had been lost by the broker at some point during the 1970s, the reinsured was still able to bring a claim in the mid 1990s because the broker had been in a continuing breach of contractual duty ever since the reinsured had requested the documentation.

Similarly, in *HIH Casualty & General Insurance v JLT Risk Solutions*², the Court of Appeal upheld the finding at first instance that a broker owes a continuing duty to advise its client to any potential coverage issues after it has placed reinsurance cover for its client (although the facts of the case were unusual).

The issue of a continuing duty was raised again in the recent case of *Equitas Ltd v Walsham Brothers*³. Here it was alleged that the defendant broker had failed to remit to Equitas substantial sums (namely, payments of claims and returns of premium from its reinsurers and reinstatement premiums to its reinsurers). The exact nature of the broker's duty was the subject of analysis by the judge, Mr Justice Males.

He concluded that the broker had a contractual duty to remit funds promptly and he was prepared to assume that this was an absolute duty (not just a duty to exercise due diligence). Counter-intuitively, it was the broker which was arguing for a higher standard of duty (because it wished to argue that an absolute duty would be inconsistent with the existence of a duty of care in tort). However, the judge found that an absolute duty can co-exist with an implied duty to take reasonable care.

Nor did it matter here whether the broker also owed a common law duty since any cause of action in tort would accrue (and the limitation period would begin to run) on the same date as the cause of action in contract. However, it was confirmed that the broker did owe a duty of care in tort (provided that that duty was not inconsistent with, or excluded by, contract).

The judge's key ruling was that, although the "starting point" was that a duty to remit funds is likely to require performance once and for all, in this case that duty was a continuing one because of certain key features. These included the fact that the parties' relationship was a long-term one, in which the broker's role in collecting and remitting funds was central. Furthermore, reinsurance claims would have been expected to come in and be dealt with over a period of years. Similarly, the

1 [1995] LRLR 472

2 [2006] Loyd's Rep IR 493

3 [2013] EQHC 3264 (Comm)

broker had a continuing obligation to deal with claims and administer the relevant policies over a number of years. It was therefore known that Equitas would place a heavy reliance on the broker. In short, not only was the relationship between the parties a continuing one, it also suggested a continuing obligation.

Furthermore, had an honest and conscientious Lloyd's broker discovered that he had mistakenly failed to remit funds more than six years after he ought to have done so, he would have "rightly" concluded that he was still under a duty to remit those funds at that point (and indeed it may even have been reprehensible or dishonest for him not to do so).

As a result, a fresh cause of action arose on each and every day when the broker failed to make a remittance which it ought to have made and the claim was not time-barred.

The judge went on to find that the broker also had to pay damages for the investment income that Equitas would have earned on the monies in question. However the claim for any such income lost more than six years before the proceedings began would be time barred unless Equitas could prove exceptional circumstances, such as deliberate concealment on the broker's part.

Comment

This particular case related to reinsurances into and out of Lloyd's. Are brokers under a similar continuing duty to pass on claims monies and premiums to insurance companies? The judge took account of evidence that syndicates' managing agents relied heavily on Lloyd's brokers to retain records at the time these particular contracts were written, over 20 years ago. However he tested his conclusion by asking rhetorically whether an honest broker who had held premium and claims monies for more than six years would seek to retain them by asserting time bar. This strongly suggests that he would have been minded to reach the same conclusion in the company market context.

The relationship between a reinsured and its reinsurance broker is one of principal and agent. This means that the broker owes fiduciary duties to the reinsured, one of which is to provide details of all monies received (which the broker had done in this case). Demanding an account is a useful first step if the reinsured is not sure that all monies have been passed on. It could be particularly important if there were any doubts about the long-term solvency of the broker concerned.

Further information

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