

B. DUTIES AND RESPONSIBILITIES OF THE INSURANCE AND REINSURANCE BROKER

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Stuart Westgarth, the Assistant Secretary of the Association, delivered the paper, the first part of which is reproduced below, at the Queenstown segment of the Eleventh Annual General Meeting and Conference. The paper canvasses many of the recent decisions in Australia, New Zealand and the United Kingdom which deal with the liabilities of brokers, as well as much of the relevant legislation in our region.

"Oh, dry the starting tear, for they were heavily insured". (Sir W. S. Gilbert, 1836-1911).

1. Introduction

To do this topic justice, one could write a tome. Fortunately, that temptation has been resisted and what follows is an overview of the duties and responsibilities of the broker. Of necessity some areas have been overlooked and others dealt with inadequately.

2. Some General Principles

The broker is generally the agent of the insured (or the person seeking insurance). By and large, the law of principal and agency will govern the legal relationship between the broker and the insured (or applicant for insurance) who is his principal and it will also govern the relationship between the broker and the insured on the one hand and a third party (such as the insurer) on the other.

Brokers are professional insurance advisors, holding themselves out as having a sound knowledge of insurance practice and the insurance market as well as an ability to advise clients on legal aspects of insurance. The position of brokers is to be contrasted with that of insurance agents who are usually the agents of the insurers.

Sometimes the functions of the broker may extend to acts which constitute him the representative of the insurer. For example, the broker may engage loss assessors on behalf of the insurer to assess a claim. This may put the broker into a position of conflict — that is, a conflict of interest as to his duty to the insured on the one hand and to the insurer on the other. The case of *Anglo-African Merchants Ltd v. Bayley*¹ illustrates the point. The insurer instructed the broker to engage a loss assessor to investigate the facts. The broker did so and refused to disclose the report to the insured. The Court held that the broker was, in following those instructions, acting as agent of the insurer while still being the insured's agent. There was a conflict of duty. Megaw J. was highly critical of the broker. He said that

¹ [1970] 1 Q.B. 311.

