NOTES FOR TALK

Brokers - The Law's Whipping Boys

By Alan Weir

NOTE 1

Tale of Tortworth Court

Jan 1989: Barnet Devanney instructed to insure Tortworth Court in names of FNCB and Quo Vadis.

March 1989: FNCB lends £2 m to Quo Vadis

March 1989: Insurance placed; sum insured increased to £23.25 million.

March 1990: Insurance renewed

Jan 1991: Tortworth Court damaged by fire

Jun 1991: Insurers repudiate liability

Feb 1992: FNCB sue Insurers for £3.4m (outstanding on loan)

Sept 1992: Quo Vadis sue for full reinstatement (£15m)

April 1993: Insurers offer £2.5 million to settle both cases

Dec 1994: Insurers offer £3.4 million to settle both cases

Feb 1995: FNCB sues Barnet Devanney

May 1995: Quo Vadis' case is dismissed for want of security for costs

June 1995: FNCB accepts £1.75 million in settlement

1997: Court of Appeal decides MGN case on the effect of a composite policy.

April 1998: Gage J. dismisses action against Barnet Devanney

July 1999: Court of Appeal upholds Bank's appeal.

NOTE 2

The Missing Clause

"*Mortgagees*

The Interest of the Mortgagee in this insurance shall not be prejudiced by any act or neglect of the mortgage or occupier of any building hereby insured whereby the danger of loss or damage is increased without the authority or knowledge of the mortgagee, provided that the mortgagee as soon as reasonably possible after becoming aware thereof shall give notice to the company and pay an additional premium if required."

NOTE 3

The Insurer's Attitude

"*… had that Mortgagee Protection Clause been included, the Bank would have known, as would the Insurers that the Insurers could settle the Bank's claim without being concerned about prejudicing their defence against Quo Vadis' claim."*

NOTE 4

The Broker as Lawyer

> *"Second it is not the function of an insurance broker to take a view on undetermined points of law."*

Morritt LJ then added:

> *"The protection to be afforded to the client should if reasonably possible be such that the client does not become involved in legal disputes <u>at all</u>. As in the case of a solicitor the insurance broker should protect his client from unnecessary risks including the risk of litigation see C.W. Dixey & Sons v. Parsons (1964) 192 Estates Gazette 197."* [Emphasis added]

NOTE 5

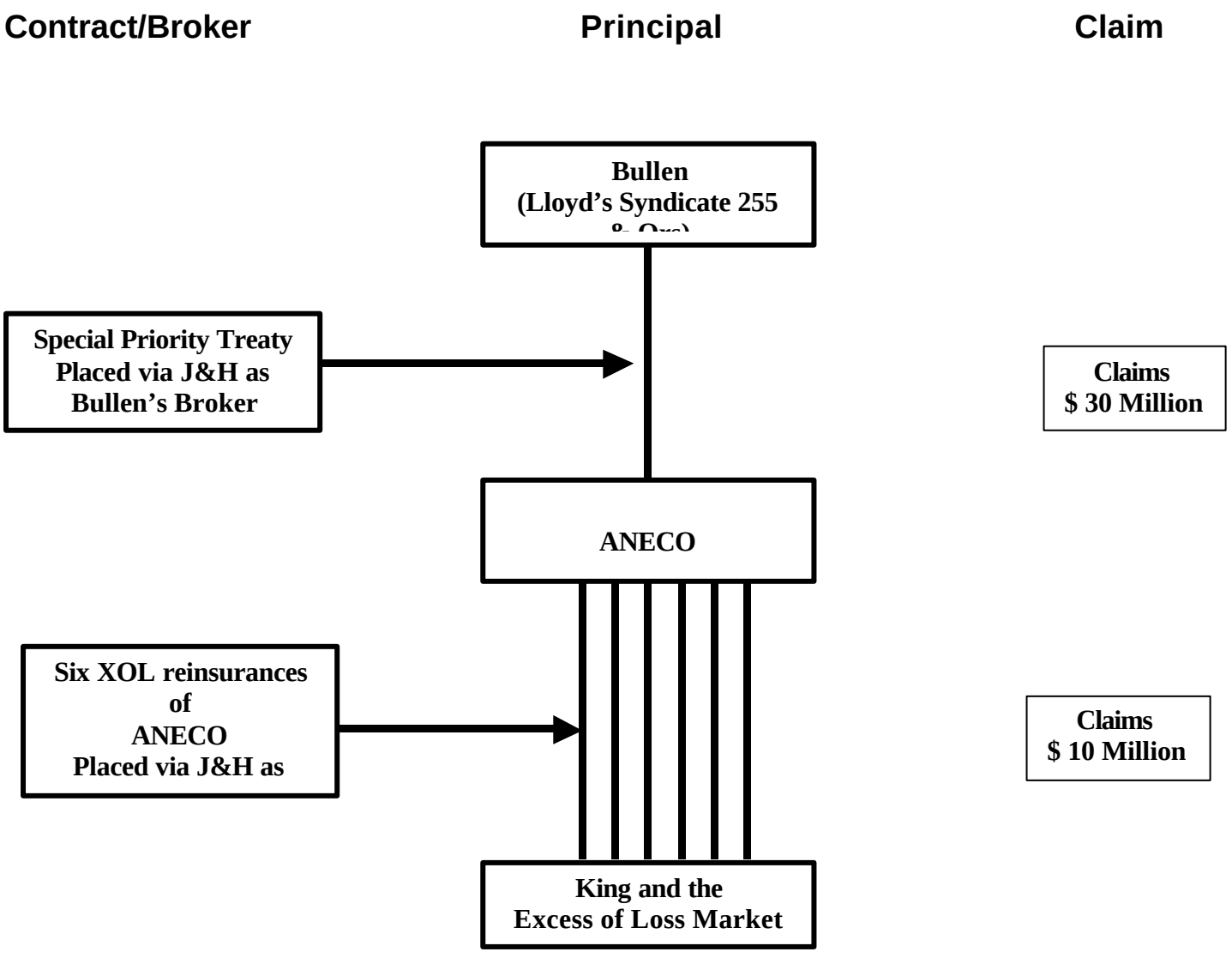
Dixey v. Parsons – The Obvious Danger

"*It did not follow, of course, that because a solicitor made a mistake he was negligent. All a solicitor was paid to do was to take reasonable care. He did not warrant to his client never to make a mistake. The difficulty from the defendant's point of view was that anyone would jump to the conclusion that a psychologist's consulting room was a quasi-medical establishment. In such circumstances it was highly imprudent of the late Mr. Parsons to allow his clients, the plaintiffs, to sign the sublease. … In preparing a lease, as in the present case, a solicitor was presented with what was an obvious danger. It would not do for him to say that in his view it was all right. There was an obvious danger that a different view might be taken. In the present circumstances the ordinary careful solicitor in his normal state would have gone to see his clients and advised them not to sign* [the lease]." [Emphasis added].

Note 6

ANECO v Johnson & Higgins

The relationship between the Parties



NOTE 7

The Wisdom of Bullen (and of Aneco)

Mr Justice Morison:

> *"The papers accompanying the ISI [security] rating showed*
>
> *a) Aneco to be making underwriting losses in three of the past five years;*
>
> *b) as a proportion of its net premium income, its technical reserves were only 7% above the minimum which [a prudent broker] would have been prepared to accept;*
>
> *c) its liquidity had been deteriorating since 1983;*
>
> *d) it was a small company by any standards as the size of shareholders fund showed and its capital base would have been eroded if its parent reneged on its obligation to repay the debt it owed to Aneco.*
>
> *This was a long way short of the sort and size of security that Mr. Bullen was looking for. ...*
>
> ***Mr Bullen ought not to have regarded [ANECO] as a medium sized company which was suitable for taking a 30% share in the [Special Priority Treaty]. The amount of aggregate ceded to it, was in my judgement,***

greatly in excess of what any competent underwriter could properly have ceded to a company of that size and financial standing."