

Binding Authorities – A Legal Perspective

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Topics

- Importance of binders to the market
- Historical context – cautionary tales
- Current framework at Lloyd's
- Sphere Drake v Euro International
- Temple Legal v QBE
- Dispute resolution
- Conclusions

LMA Model Binding Authority Agreements – Guidance to Coverholders, July 2013

"Coverholders are critical business partners to the Lloyd's market, bringing to the market around a third of its business. They are highly knowledgeable and professional participants in the underwriting process and the Lloyd's market wants to continue building long term profitable relationships with the coverholder community."

Lloyd's Vision 2025

To Be The Global Centre for Specialist Insurance and Reinsurance

What will Lloyd's Be?

- *Lloyd's will be a market where entrepreneurialism and innovation will thrive, underpinned by robust risk and performance management.*

Distribution

- *Coverholders and service companies will provide efficient access to local markets.*

Current framework at Lloyd's

- Lloyd's Act 1982 – section 6
- Intermediaries Byelaw (No 3 of 2007), as amended
- Code of Practice
- Coverholder Toolkit

LMA Binding Authority Wordings Committee

- LMA 3113 Worldwide excluding USA/Canada
- LMA 3114 USA
- LMA 3115 Canada

Market Bulletin Y4739

Coverholder approval, restricted coverholders and
Consumer Product Binding Authorities

Sphere Drake Insurance Limited v Euro International Underwriting Limited

[2003] EWHC 1636 (Comm) Mr Justice Thomas

“It would more accurately be described as deliberately accepting business known to produce losses in excess of the premium charged on the backs of reinsurers who would be expected to pay the losses for even less premium.”

Sphere Drake Insurance Limited v Euro International Underwriting Limited

"He had paid no proper attention to the internal controls in place and had failed to conduct any inspection or audit. Mr Broad's [the underwriter's] conduct had fallen well below that which was to be expected of any competent underwriter; if he had not acted with such gross negligence and dereliction of duty (which SD's internal controls failed to prevent), the dishonesty of EIU [the coverholder] and SCB [the brokers] would have been investigated long before it was."

Sphere Drake Insurance Limited v Euro International Underwriting Limited

"I have no doubt that the relationship [with the coverholder] was one that gave rise to, and was understood to give rise to, the highest degree of trust between SD and those who were authorised to underwrite."

Henderson v Merrett Syndicates Limited

[1995] 2 A.C. 145 House of Lords

Lord Browne-Wilkinson

"The phrase, fiduciary duties, is a dangerous one, giving rise to a mistaken assumption that all fiduciaries owe the same duties in all circumstances. That is not the case. Although, so far as I am aware, every fiduciary is under a duty not to make a profit from his position (unless such profit is authorised), the fiduciary duties owed, for example, by an express trustee are not the same as those owed by an agent."

Henderson v Merrett Syndicates Limited

"The existence of a contract does not exclude co-existence of concurrent fiduciary duties (indeed the contract may well be their source); but the contract can and does modify the extent and nature of the general duty that would otherwise arise."

Temple Legal Protection Limited v QBE

[2009] EWCA Civ 453 Court of Appeal

- Relationship with Temple defined by binder contract
- Affirmed fiduciary nature of relationship
- Temple under duty to perform certain functions, but no right to do so.
- Temple's authority was not irrevocable by reason of:
 - (a) Its interest
 - (b) Its own continuing obligations to coverholders

When the relationship breaks down – dispute resolution

- LMA 3113, 3114, 3115
- Arbitration clauses
- Letters of request
 - witnesses
 - document production

Document production

Hiscox v Dickson Manchester

[2004] EWHC 479 (Comm) Mr Justice Cooke

- Binding authority cancelled following change in ownership of coverholder
- Dispute about inspection rights. Arbitration clause.
- Court ordered access on defined terms – section 44 Arbitration Act 1996

Investigating the coverholder's conduct

Pryke v Gibbs Hartley Cooper Limited

[1991] 1 Lloyd's Rep 202 Mr Justice Waller

- Coverholder exceeded authority under binder (financial guarantee)
- Settlement with insureds following US litigation
- Binding authorities not contracts of insurance nor uberrimae fidei
- Brokers, while paid by underwriters, owed no obligation to underwriters
- Having elected to investigate, brokers owed duty to take care

Conclusions

- Regulatory framework
- Bespoke wordings
- Inspections and audits
- Fiduciary duties
- Termination

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