REVISITING THE DECISION IN ORIENTAL INSURANCE BROKERS LIMITED VERSUS TRANSOCEAN UGANDA LIMITED, SUPREME COURT CIVIL APPEAL NO. 55 OF 1995. THE ROLE AND AUTHORITY OF INSURANCE AGENTS IN UGANDA

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Introduction.

In a contract of insurance, there are intermediaries through whom business is transacted and these include among others; agents and brokers. The reason is that most times insurers and some times the insured are companies who can only act through agents ranging from directors and senior management down to junior employees and also other local agents soliciting proposals for insurance. For the case of Uganda, Insurance companies must be bodies corporate under s.4 of the Insurance Act.

Agency relation between the broker, insurer and insured.

Though some writers do not distinguish between brokers and agents[1], in Uganda a clear distinction has been made.[2] An insurance broker has been defined as a person not being an agent, and acting as an independent contractor for commission or other remuneration, who solicits or negotiates insurance business on behalf of an insured or prospective insured other than himself,[3] whereas an insurance agent has been defined as a person appointed and authorised by an insurer to solicit applications for insurance or negotiate for insurance coverage on behalf of the insurer, and to perform other functions, that may be assigned to him by the insurer, and who in consideration for his services receives commission from the insurer.[4]

The role of insurance agents and brokers was considered by Oder J in the case of Oriental Insurance Brokers Limited V Transocean Uganda Limited[5]. In that case the Appellant who were

[1] Macgillivray on Insurance Law: relating to all risks other than marine, Eleventh Edition, Sweet & Maxwell 2008.
[2] Insurance Act 1996.
[3] S.2 of The Insurance Act, 1996.
[4] S.2 of The Insurance Act, 1996.
[5] Supreme Court Civil Appeal No. 55/95

insurance brokers' procured insurance covers for the Respondent from two insurers to wit; NIC and UICL but their contract with the Respondent was terminated before they received premium from the Respondent and as such remained indebted to the insurers. The Appellant made the claim in the suit as the Respondent's insurance broker for gross premiums due from the Respondent to the two insurers and as agent of the insurance companies.

The substance of the Respondent's defence was that the sum claimed by the Appellant was due to NIC and UICL and did not belong to the Appellant; that the Appellant had no authority to sue the Respondent for money owed to the third parties; and lastly that the Respondent had always been willing to effect payment of any indebtedness to NIC and UICL either directly or through their authorised agents.

The issue before court was whether the Appellant after arranging the insurance covers for the insured, was entitled to receive premium from the insured on behalf of the insurers and also deduct their commission as brokers?

Oder JSC, after considering several authorities held that the brokers were entitled to receive premium from the insured from which they would get their commission, he cited the sections of the Insurance Statute now the Insurance Act 1996 on the definition of brokers and agents and the brokers duty to remit premium to the insurer. That if the insurance broker is under a duty to remit premium to the insurer then he must have a right to receive it from the insured in the first place.

In his words, he summarized the legal principles governing the relationship between the insured, the broker and the insurer as follows:

"(I) Unless otherwise agreed, where insurance policy is effected on behalf of the insured by a broker, the broker is directly responsible to the Insurer for the premium. The insurer looks to the broker for his premium, and through the broker, as a rule, upon the happening of a loss the insurer receives notice of any claim.

(ii) As a general rule, the insured is liable to the broker for premium as money paid on his behalf whether or not they have been paid over by the broker to the insurer. As regards

any particular policy the premium is treated by the broker, and the insurer as having been paid upon the completion of the contract.

(iii) The insured is not, as a rule, liable for the premium to the insurer, but only to the broker.

(iv) The broker can sue the insured for premium even though he has not paid the insurer, and if he has paid it he has a lien upon the policy unless otherwise agreed.

(v) Generally, the principles of the law of agency apply to the relationship between the broker and the insurer on the one hand and between the broker and the insured on the other. Where the insurer holds out the broker as his agent, the broker has ostensible authority to bind the insurer as his principal."

As observed by the learned judge[6], the principles of the law of agency apply to the relationship between the broker and the insurer on the one hand and between the broker and the insured on the others. When the agent for each party carries out their instructions properly, no complication arises and the acts of the agent are imputed to and bind the principals. Complications arise however when an agent makes a mistake or fails to follow instructions with the result that his principal on discovering the fact, seeks to avoid responsibility for what the agent has done. Whether he can do so depends on whether the agent acted within the scope of his authority or not. If he acted within the scope, the principal is bound by the acts of his agent regardless of the agent's mistake and its prejudice to himself. In the case of Zurich General Accident & Liability Insurance Co. Versus Rowberry[7] where the assured's brokers were authorised to nominate an air port in France to which the assured was to travel for the purposes of a travel insurance cover and mistakenly nominated Paris in place of Nice, the assured was bound to accept an insurance in that form and to pay the premium.

Authority of an agent

Authority to bind the principal arises in many instances, apart from express authority that a principal expressly bestows on an agent; an agent can also have implied authority to do all things necessary in the ordinary course of business for the efficient and proper performance of his

[6] Supreme Court Civil Appeal No. 55/95
[7] [1954]2 Lloyd's Rep.55

duties. A broker may also derive authority from the powers which either practice of usage regards as usually attaching to the position which he occupies in a particular market. Where a broker is held out by the insurer as his agent, the broker has ostensible authority to bind the insurer as his principal.

Ostensible authority is the authority ordinarily attaching to the position or office in which the principal has placed the agent or to the credentials which he has permitted him to hold regardless of any special limitations imposed on the agent by the principal as a term of the agency relationship. A third party is entitled to assume that the agent's actual authority is commensurate with his ostensible authority unless he knows or has reasons to suspect that in the dealings in question, the agent is exceeding his authority by disregarding limitations imposed on him by his principal. The principal cannot subsequently disavow the acts of his agent on the grounds that the later exceeded his actual authority and instructions when doing business with the third party.

The basis of this rule is therefore an estoppel against the principal. A representation by the agent that he himself has a particular authority does not bind the principal unless, exceptionally, the later has authorised the agent so to represent. Express representation by the principal is not necessary. It suffices for him to allow the agent to hold a position on which he might ordinarily be expected by outsiders to have authority to perform the act in question or alternatively to acquiesce in the agent representing himself to have an authority which he did not in truth possess.

In the case of Wills Faber and Co. Versus Joyce[8] where a broker's authority had expired but no notice of the fact had been given by the underwriter for whom he had been acting for two years, either to those with whom the agent had been doing business or at Lyolds generally, the underwriter in an action on policies effected by the agent was estopped from contending that the policy were concluded without his authority. However, if a third party dealing with the agent has notice that the latter is exceeding his authority, he cannot rely on the agent's ostensible authority as it might appear to others.

Ratification of the agent's unauthorized act by the principal.

[8] (1911)27TLR 388

Where acts committed by an agent are not within his ostensible authority, it will only bind the principal if he thereafter ratifies them. Ratification may be expressed or implied. It will be implied whenever the conduct of the principal or his duly authorised agent is such as to show that he adopts the transaction in whole or in part regardless of his subjective intention so longer he or his agent as the case may be has full knowledge of the material circumstances in which the un authorised agent acted. A principal cannot ratify a contract which he could not in the first instance have made and an agent cannot on behalf of the principal ratify a contract made by another agent or a sub agent unless the agent purporting to ratify has either authority to make the contract or authority to ratify it. The right to ratify a contract must be exercised within a reasonable time, the right by its nature by an election to confirm and not to repudiate.

A contract made in the name of the principal without his authority may be ratified by the principal even though the agent making the contract intended to make it for his own benefit but in order to found ratification, a contract made without authority must be professedly made on behalf of some principal either named or unnamed. If the agent makes a contract without stating that he is acting as an agent, his intention to make it on behalf of a particular principal is immaterial and doesn't entitle the principal to ratify it.

Ratification does not automatically relieve the agent from personal liability to his principal for his excess authority. The agent of an insurer will also be liable to the insured for breach of warranty of authority. This is because a person purporting to contract on behalf of another impliedly warrants that he has the authority of that other to make the contract and he does not have, he must compensate the other contracting party for any damages resulting from the breach of warranty. An agent cannot rely on his own breach of warranty of authority to rescind a contract. An agent will still be liable even if the assured did not make inquiry where if he had made the inquiry would have known the truth.

Agent's duty towards insured

As towards the assured, the agent owes his client a duty to exercise reasonable skill and care in the performance of whatever instructions he has accepted. This duty of care arises both out of contract between them and also in tort out of his professional status. The requisite standard is to be stated objectively by court. The law does not expect an extra ordinary degree of skill but the

standard of skill and diligence ordinarily to be expected of other persons of average capacity and ordinary ability in his position. The agent's responsibility towards his client requires him to ascertain the client's needs by instructions and to advice the client on the options available to him so that he can make an informed choice. Where the agent is insufficiently familiar with a particular market to give advice un aided, it is negligence to give advice without seeking assistance.

An agent must make reasonable skill and care to procure the cover that the client had requested and if he negligently fails to effect a valid insurance in accordance to his instructions, he will be held liable to his client for loss so caused and will forfeit his rights against the client in consequence. The agent must comply with the client's instructions and departs from them at his peril. He has no right to substitute his own judgment with that of the client unless his instructions are silent on a particular matter to be covered. During the completion of the proposal form, the agent has a duty to take reasonable skill and care in assisting his clients to complete the form and ensure that the answers given are correct.

An agent should exercise reasonable diligence in taking steps to take an insurance or renew of cover and will be held liable to the assured for loss covered as a result of unreasonable delay. Whether the agent must treat it as a matter of urgency depends upon his knowledge for the need for expediton. In the case of Cork Russell & Co. Verus bray Gibb & Co.[9] where a broker was instructed on a Friday afternoon to procure cover on a cargo which arrived in London on the following Monday and failed to do so in time, it was held that he was not negligent as he did not know the anticipated date of arrival and therefore the reason for urgency and was not bound to try to get cover before close of business on Friday.

The agent must take reasonable care to see that his client is properly covered such as checking that non of the particular insurance company's category of un acceptable risk apply to the client. In the case of Strong and Pearl Versus S. Harrison & Co.[10] where the owners of a vessel told their brokers that they would be leaving on board and using a petrol engine the brokers were negligent in obtaining a standard lying up policy which excluded residence on board and warranted that petrol was not used.

[9] (1920)3 Lyolds Report 17
[10] (1926)25 Lloyds Report 504

The broker should also draw to the client's attention any exclusion clause contained in the insurance cover. He must also ensure that the policy contains an appropriate special clauses normally available on the market to protect his client from unnecessary risk including the risk of litigation. He must also disclose to his client the consequences of under insurance. If he procures a policy from insurers whom he ought to know are in danger of going out of business, he will be responsible for the client obtaining a worthless policy in consequence. It is not the duty of the client to ensure that the broker does his work diligently.

Agents liability towards insured

When an agent has failed to effect or renew a valid insurance in accordance with his instructions and is liable to the client as a result, the basic measure of damages in the event of a loss is the amount necessary to place the client in the same position as if the insurance had been made or renewed as instructed, this is the amount the client would have been able to recover from the insurer.

However, where the policy would have been void or voidable and therefore unenforceable, the principal has no right to damages against an agent as stated by Lord McCardie J in the case of Thomas Cheshire & Co. Versus Vughan Brothers & Co.[11] The rationale is that the court ought not to give any effect directly or indirectly to a type of policy that Parliament has declared shall be entirely null and void.

Agent's duty towards insurer

The insurer's agent on the other hand may range from the directors of the company to local agents (all agents ranking downwards from the manager of an insurance company to commission agents soliciting proposals for insurance from door to door). Directors have implied authority to do everything necessary to carry on the business of the company in a customary and proper manner for example concluding contracts of insurance. The law does not prescribe the duties of the directors but this may be found in the memorandum and articles of Association. The authority of the directors may also be extended by shareholders in a general meeting.

Local agents do not have authority to conclude contracts of insurance. Their primary function is to introduce new business and forward proposals to the directors for approval. However, if a

[11] (1920)3KB 240

local agent is in possession of a company's cover notes or blank policies, he may have ostensible authority to conclude the contract. An agent does not possess authority to accept new risk for the insured or alter terms or conditions of written insurance. Agent have the authority to receive premiums which should be payable by cash or cheque but not on credit.

Dual role of agent

Where an agent plays a dual role; where he is an agent of the insurer employed to solicit proposals and after that helps the insured to fill in the proposal forms, he becomes the agent of that insured for that purpose but such practice should be avoided in case of possibility of conflict of interest.

Regulation of intermediaries.

In Uganda insurance intermediaries are regulated under the Insurance Act 1996, Insurance brokers and agents are licensed by the Insurance Regulatory Authority and must meet the required qualifications[12] . An insurance broker has a duty to pay premium collected from the insured over to the insurer and are paid by way of commission.[13] Insurance brokers are also required to be bodies corporate under s.73 of the Insurance Act[14]

Conclusion

The very nature of insurance business by itself being transacted through intermediaries incorporates principles of principal agency relationship. The agent owes extensive duties to the principal whether it is a broker and an insured or an agent and the insurer. The principal must also take responsibility for the agent's authorised acts.

FURTHER READING

1. MacGillivray on Insurance Law. Eleventh Edition, Sweet &Maxwell.
2. JOHN BIRDS: Modern Insurance Law 2nd Edition London, Sweet & Maxwell.
3. The Marine Insurance Act 11 of 2000.
4. The Insurance Act 42/2000.
5. The insurance Act 1996 Cap 213 Laws of Uganda.

[12] S.75
[13] S.88
[14] Insurance Act 1996.