(RE)INSURANCE ALERT

EQUITAS LTD AND ANOTHER V WALSHAM BROTHERS & CO LTD

In *Equitas v. Walsham Bros*, the Commercial Court ruled on a number of key legal issues concerning the duties owed by Lloyd's brokers to remit funds promptly to clients and to reinsurers.

BACKGROUND

Equitas is the successor to Lloyd's syndicates writing non-life insurance business for the 1992 and all prior years of account. Equitas' case was that Walsham ought to have remitted substantial funds which it had received, either to the syndicates themselves before September 1996 or to Equitas thereafter, and that as a result of its failure to do so Equitas had lost substantial investment income. The funds broadly fell into two categories. First, client funds which Walsham had received from reinsurers or retrocessionaires in payment of claims or by way of returns of premium. Secondly, reinstatement premiums for passing on to reinsurers or retrocessionaires. Equitas' total claim amounted to about £14.9 million, of which about £11.8 million represented a claim for lost investment income. Walsham did not accept that it failed to make the payments claimed by Equitas, but it claimed that the evidence of payment had now been lost. Walsham also argued that Equitas' claims were time-barred in any event.

THE DECISION

The Commercial Court held that Walsham did have a continuing duty to Equitas to remit funds due to it (such that Equitas' claims to those funds were not time-barred), that Equitas is entitled to recover its lost investment returns on those amounts and that Walsham was not entitled to set off amounts it alleged was due to it against those sums.

Some of the key findings of Males J were as follows:

- The broker's contractual and restitutionary duty to remit funds reasonably promptly is an absolute duty which co-exists with a duty in tort to exercise reasonable skill and care (provided that duty was not inconsistent with, or excluded by, contract).

- Any cause of action for breach of such duties first accrued on the date when, acting with reasonable promptness, Walsham ought to have remitted the funds in question to the syndicates or to Equitas.

- Walsham's obligation to remit the funds to the syndicates was a continuing obligation which was breached afresh every day that Walsham failed to make a remittance. Males J reached this conclusion on the basis that the parties had a long-term continuing relationship in which the broker's role in collecting and remitting funds was central, in which reinsurance claims would be expected to come in and need to be dealt with over a period of years, with the broker under a continuing obligation to maintain accounts and administer the syndicates' reinsurance policies generally, and with heavy reliance known to be placed on the broker by the syndicates.

- The result of this was that a fresh cause of action accrued each day that the broker failed to pay the funds over, meaning that the claim was not time-barred. However, Males J noted that investment income lost as a result of failure to remit funds at some earlier stage cannot necessarily be recovered as a result of this conclusion.
- The law will proceed on the basis that, in a commercial context, a claimant kept out of its money has suffered loss as a result. A claimant can recover such losses by reference to the cost of borrowing to replace the money of which the claimant has been deprived, regardless of whether that is what the claimant actually did. The normal and conventional measure of damages for breach of an obligation to remit funds consists of compound interest. Males J held that Equitas was in principle entitled to damages at the rate of LIBOR plus a margin of 1%, compounded with appropriate rests.

COMMENT

This decision highlights that brokers should be aware that they may have a continuing duty to remit client and/or reinsurer funds promptly, and that a limitation defence is unlikely to succeed in circumstances where this continuing duty exists. Moreover, clients and/or reinsurers may be entitled to recover damages for lost investment returns on funds which have not been remitted promptly, albeit those damages will not necessarily extend to breaches committed more than six years before the commencement of the action. The case also highlights the importance of ensuring that brokers adopt a diligent approach to record-keeping so that they are able to produce evidence of payment and/or receipt of funds should the need arise.

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