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Case No: 2012 Folio 570

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Date: 12 July 2013

Before:

MR. ROBIN KNOWLES CBE QC
(Sitting as a Deputy High Court Judge)

- -

Between:

ARB INTERNATIONAL LIMITED	**Claimant**
- and -	
MR ROBERT STEVEN BAILLIE	**Defendant**

- -

MR. TIM MARLAND (instructed by **Watson Farley & Williams LLP**) for the Claimant
MR. RICHARD HARRISON (instructed by **Hextalls Limited**) for the Defendant

- -

JUDGMENT

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this judgment and that copies of this version may be treated as authentic.

Introduction

1. This case concerns what is called Mid Term Broker Change ("MTBC") at Lloyd's.

2. The Claimant ("ARB") is a Lloyd's insurance and reinsurance broker. Until late 2010 ARB's marine department transacted a considerable volume of reinsurance business with Watkins Syndicate 457 at Lloyd's ("Watkins"). Watkins is within the Munich Re group ("Munich Re"). Its managing agent is Munich Re Underwriting Limited.

3. In early 2010 ARB learned of a proposal by Munich Re to establish a new Lloyd's broker, Roanoke Insurance Brokers Limited ("Roanoke"). In relation to business in which Watkins was involved as underwriter, Munich Re's intention was that, for the future and where possible, Roanoke would be broker where previously ARB had been broker. Thus there would be an MTBC.

4. It is common ground that the contracts affected by the MTBC comprised:

   (1) binding authorities where the coverholders were service companies under the same ultimate ownership as Watkins ("Watkins Service Company Binders");

   (2) other binding authorities ("Non-Service Company Binders");

   (3) quota share reinsurance treaties;

   (4) excess of loss and facultative policies, including policies written on a declaration basis.

5. Between January 2010 and March 2011 the Defendant ("Mr Baillie") was the Managing Director of ARB. His responsibilities included compliance responsibilities. ARB alleges that his performance in that position fell below the standards that the law requires of someone in his position, especially in relation to the MTBC. The essence of ARB's allegation is that Mr Baillie caused or allowed ARB to lose out over the MTBC where it should not have done on commission in respect of contracts of the types just described. Mr Tim Marland, Counsel for ARB, has properly made it clear that it is not suggested that Mr Baillie acted improperly for personal gain.

6. ARB contends that had the MTBC been conducted as (on ARB's case) it should have been then ARB would have enjoyed an entitlement to commission on contracts (including for this purpose binding authorities, quota share treaties and declaration-based policies) until at least the expiry of the terms of those contracts.

Market Practice for an MTBC

7. Mr David Barrie and Mr John Holford were called as independent expert witnesses. Each has considerable relevant expertise and experience. So too did a number of the factual witnesses called.

8. I found the expert evidence of both Mr Barrie and Mr Holford useful. Having considered their reports, including their joint statement, and heard their oral evidence I am quite satisfied that there is no relevant standard or common market practice for an MTBC. Nothing in the testimony of the experienced factual witnesses persuaded me to any different conclusion.

9. In their joint statement dated 11 March 2013 Mr Barrie and Mr Holford wrote, and I accept:

> "The chief point on which we agree is that there are no hard and fast rules regarding [MTBCs]. Despite the laudable efforts of LIIBA to introduce guidelines for the market to follow, the reality is that every case is different from every other. …
>
> …
>
> We wish to point out that the absence of any hard and fast rules governing [MTBCs] means that practice has always varied not just from case to case but also from broker to broker.".

10. The reference by Mr Barrie and Mr Holford to "laudable efforts of LIIBA" was to draft MTBC "Best Practice Market Guidelines" circulated by the London & International Insurance Brokers' Association in November 2010. To these were annexed a draft transfer agreement which provided (in summary) for the outgoing broker to be entitled to all commission in relation to contracts transferred, except where, after the transfer date, the contract period was extended, new risks were included, or cover was increased.

11. The LIIBA draft did not and has not, I find on the evidence at trial, become the market standard. Nor did anything else in its place. Examples of other MTBCs were examined or encountered in the course of the trial. Each example depended on its own facts. It is fairly said on behalf of ARB that almost invariably there is an agreement between incoming and outgoing broker about what is to happen. But the content of that agreement will depend on the facts of the particular situation. And it will not always be the case that, as here, the incoming broker is in the same group as the underwriter.

Broker entitlement to commission; and costs and expense borne by the broker

12. The contract wordings relevant to the present case variously provide for commission as a percentage, of premium prior to deductions (a percentage of "Original Gross Rate") or of "net premium ceded hereunder".

13. It was common ground between the parties that in the case of excess of loss and facultative policies (other than policies written on a declaration basis), a broker's commission is earned if the broker is an effective cause of the placement of the contract in question. This common ground is not surprising given, for example, the decisions in Velos Group Ltd v Harbour Insurance Service Ltd [1997] 2 Lloyd's Rep 461 and Benfield Inc v Moline (2006, United States District Court for the District of Minnesota) as cited in XL Speciality Insurance Company v Carvill America Inc (Superior Court of Connecticut, May 31 2007, Beach J at [9] and [10]).

14. However the present case also and largely concerns binding authorities, quota share reinsurance treaties and declaration-based reinsurance policies. In briefest summary, a binding authority or "binder", in its Lloyd's meaning ("binder" can have a different meaning in the United States), is an authority given by an underwriter to an agent (a coverholder) to accept (write, or bind) risks on the underwriter's behalf. A quota share reinsurance treaty, again in briefest summary, is a treaty reinsurance under which the reinsurer agrees to accept a specified share of risks ceded to the treaty at inception or

over time. A declaration-based policy will, in briefest summary, involve periodic declarations of activity that engages risk and therefore causes premium to accrue.

15. In the case of the Watkins Service Company Binders, ARB had the very limited role as broker of issuing and processing pro forma binder wording. Neither party contends that ARB had a role in placement of the binders with coverholders. ARB nonetheless argues that commission must be earned if it did what it was asked to do, and that it had done that at the inception of the binder.

16. The parties are also at issue on the question of when the broker earns his commission in the case of Non-Service Company Binders, quota share treaties and declaration-based policies. ARB argues that commission is earned on placement. Mr Baillie's primary case is that in respect of binding authorities, quota share treaties and declaration-based policies the entitlement to commission does not arise unless and until the broker processes periodical accounts, declarations or bordereaux relating to premium in respect of risks written, ceded or declared under the binders, treaties or declaration-based policies.

17. In most discussions of these types of issue it is important to distinguish four things. First, what the broker does. Second, what the broker is being paid for. Third, when the broker becomes entitled to commission. Fourth, when commission is payable. Even in the case of policies where the parties agree that a broker's commission is earned if the broker is an effective cause of the placement of the policy in question, that identifies the point at which the broker becomes entitled to commission; it does not mean that that is all he does or all that he is being paid for.

18. The contract that is a binding authority, quota share treaty or declaration-based policy is unlike the contract that is a simple policy of insurance or reinsurance. The binding authority, quota share treaty or declaration-based policy does not on its own bind the risk in question so as to earn premium. Business still has to be written under the binder, ceded to the treaty, or written (declared) under the policy.

19. Of course the position may be varied by particular agreed terms but in my judgment the general position (not departed from in the case of the contracts at issue in the present case) is as follows:

    (1) Absent agreement to the contrary, the commission is earned (in the sense that this is the point at which the broker becomes entitled to commission) when the business is written under the binding authority, ceded to the quota share treaty or declared under the declaration-based policy.

    (2) The arrangements for reporting will evidence when this has happened. The broker may have done nothing more since the binder, treaty or policy was first entered into.

    (3) The commission remains related to the premium because the contractual obligation to pay commission engages when premium-generating business is written, ceded or declared. So to hold is not to allow "the mechanics of payment [to] alter the contractual obligation" (noting the caution in these terms in XL Speciality Insurance Company v Carvill America Inc (above) at [9]).

20. It is natural that there will be occasions when the position is described in a shorthand form that is more general and, for the purposes of the matters in issue in this case, less accurate. This is conveniently illustrated in the following evidence of Mr Barrie (the independent expert called by ARB) in answer to Mr Richard Harrison (Counsel for Mr Baillie):

> "Q. So the mere placement of the binding authority doesn't involve any earned commission?
> A. You say that, but if you ask any insurance broker who placed a binding authority who is entitled to the commission or how much of the commission he's entitled to during the course of the next 12 months, he'll tell you that he placed the binding authority and therefore he's entitled to the lion's share of it. It doesn't actually, in practice, necessarily turn out that way, but you'll find brokers extremely persuasive about something that they have been instrumental in creating and placing."

21. The position in relation to entitlement to be paid a commission is not changed where premium is paid by instalments. Of course the timing of payment of that entitlement may be affected, unless a different agreement is reached in that regard. And the position may be different if the premium is earned pro rata through the life of the contract rather than earned at the outset but payable in instalments.

22. To take the approach described above is not to suggest that commission is paid by underwriters for the service of administering (say) the binding authority. Nor is it to suggest that commission is earned pro rata through the life of the contract. Of course those may be agreed in a particular case. And nor does the approach described challenge the decision in XL Speciality Insurance Company v Carvill America Inc (above) where the Court concluded that, where a contract between reinsurer and broker survives the termination of the contract between reinsured and broker and the appointment of a new broker, commission may still be payable to the original broker.

23. The approach addresses instead the general position as to when the commission is earned (the point at which the broker becomes entitled to commission). It is consistent with the summary expressed in the following terms by Waller J in John W Pryke and Others v Gibbs Hartley Cooper Ltd [1991] 1 Lloyd's Rep 602 at 614:

> "I think that the traditional view is that brokerage is promised and paid by the insurer for the introduction of business. The coverholder or insured is content for the broker to receive that brokerage because it constitutes remuneration for the services he has performed and is performing for the coverholder."

24. For separate reasons it is important to keep in mind that even where by placing Non-Service Company Binders, quota share treaties and declaration based policies the broker has "… performed the most important part of what it contracted to perform …" (see Harding Maughan Hambly Ltd v Compagnie Europeenne de Courtage D'Assurances et de Reasssurances SA and Assurances des Investissements Internationaux SA [2000] 1 Lloyd's Rep 316 at 336), the broker's role does not cease.

This is important in the present case because the broker may therefore have costs and expense to bear after the point at which he has earned his commission.

25. Thus, in business written under Non-Service Company Binders, just as with excess of loss and one-off facultative polices, there is usually a claims processing function to perform should claims arise. And in the case of Non-Service Company Binders there is also, usually, the task of processing premiums bordereaux. More generally the broker will be expected to be available to assist should questions or problems arise. These are examples, but they serve to make the point that after the broker becomes entitled to commission there is still work that will have to be done.

26. Then there are two possibilities that must be mentioned. First, that business written, ceded or declared will be cancelled and replaced at a future point, and that this may involve a return of some proportion of the commission. Second, that binding authorities, quota share treaties or policies written on a declaration basis are simply cancelled and replaced (thus terminating the relationship between reinsurer and broker: see above), or have transactions of minimal value processed under them.

27. Drawing from the above in the context of an MTBC, the following points are material:

    (1) The outgoing broker and the incoming broker might decide which should take responsibility for and bear the cost of further work required from a broker after the MTBC on business where the commission had already been received by the outgoing broker.

    (2) The outgoing broker and the incoming broker might decide which should enjoy commission earned on business that was not until after the MTBC written under a binding authority, ceded to a quota share treaty, or written (declared) under a declaration-based policy.

    (3) Consideration might be given by the outgoing broker to the possibility that it might find existing binding authorities, quota share treaties or policies written on a declaration basis are simply cancelled and replaced, or have transactions of minimal value processed under them.

    (4) Consideration throughout would need to be given to the interests of policyholders.

    (5) Consideration might be given by the outgoing broker to the reputational importance to it of a smooth transfer.

The duties owed by Mr Baillie

28. There was no material issue between the parties over the relevant duties owed by Mr Baillie to ARB as its Managing Director. From the authorities cited at the trial, the position may be summarised sufficiently for the purposes of this judgment as follows:

(1) As a fiduciary, he had "the obligation of … single-minded loyalty": Sinclair Investments (UK) Ltd v Versailles Trade Finance Limited and Others [2010] EWHC 1614 (Ch); [2011] 1 BCLC 202 at [26] per Lewison J (as he then was).

(2) By statute, he was required to "exercise … the care, skill and diligence that would be exercised by a reasonably diligent person with (a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by the director in relation to the company, and (b) the general knowledge, skill and experience that the director has.": section 174 Companies Act 2006.

(3) As a company director, he was under "… a continuing duty to acquire and maintain a sufficient knowledge and understanding of the company's business to enable [him] properly to discharge [his] duties as director[]": Re Barings plc and Others (No 5) [1999] 1 BCLC 433, 489 per Jonathan Parker J (as he then was); approved on appeal at [2001] BCC 273 at [36] per Morritt LJ (as he then was).

(4) As to delegation: "Whilst directors are entitled (subject to the articles of association of the company) to delegate particular functions to those below them in the management chain, and to trust their competence and integrity to a reasonable extent, the exercise of the power of delegation does not absolve a director from the duty to supervise the discharge of the delegation functions … the extent of [that] duty, and the question whether it has been discharged, [being matters that] must depend on the facts of each particular case, including the director's role in the management of the company.": Re Barings plc and Others (No 5) (above) at 489 and at [36].

File transfer

29. It is common ground that client files were transferred over from ARB to Roanoke while Mr Baillie was in charge. The parties disagree over the extent to which ARB was required to comply with file transfer instructions given by or on behalf of the relevant client, or simply in the interests of the client, where agreement about commission on transfer of the business had not yet been reached between the two brokers. No question of a broker's lien arises on the facts in this case.

30. On this issue in my judgment the answer is plain. In the ordinary course, as part of its duty to a client ARB was obliged to carry out the client's instructions to transfer client files, and to carry those instructions out promptly. Instructions in the interests of the client take similar priority. There may be limited exceptions for some parts of the contents of the files, and (as Mr Steve Russ pointed out in his evidence) there may need to be arrangements to allow the outgoing broker future access, but it is not necessary to identify or elaborate on those here. The regulatory principle of "treating customers fairly" also demands this approach to client file transfer. ARB would have had no right to delay transfer as a lever in a negotiation with Roanoke over which of ARB and Roanoke was entitled to what commission as a result of the MTBC.

31. I note also that there was evidence that after Mr Baillie's departure, and after Mr Simon Palmer had taken charge, file transfers were also allowed before agreement

about commission on transfer of the business. It was Mr Palmer who led the criticisms of Mr Baillie in this matter, including from the witness box.

Business transfer

32. In their joint expert statement dated 11 March 2013 Mr Barrie and Mr Holford wrote, and I accept:

> "… We consider that because of the unusual nature of the book of business involved in the current case (ie the overarching involvement of the Watkins syndicate) it is difficult to apply normal conventions to the allocation of brokerage in the event of a MTBC. …".

33. If ARB had refused to cooperate with the MTBC in ways other than file transfer would the response have been simply to cancel and replace the existing binding authorities, quota share treaties or policies written on a declaration basis, or have minimal valued transactions processed under them? On the evidence I have heard there is a real possibility that this would have happened. Mr Baillie was right to warn the executive board of ARB about it in an email of 13 May 2010.

34. The real possibility becomes a practical certainty in the case of the Watkins Service Company Binders. The limited involvement, and relevance, of ARB is shown by the inclusion of a provision in each binding authority in these terms:

> "It is hereby understood and agreed that the involvement of [ARB] is purely that of an administrator of this facility. It is further understood that all premium and claim payments are handled between the Coverholder [ie Watkins service companies] and Underwriters [ie Watkins] without the involvement of [ARB]."

35. It is common ground that in respect of the Watkins Service Company Binders, Mr Baillie approved e-mail exchanges dated 27 to 29 September 2010. By these, Watkins' managing agent agreed that all commission due in respect of the months up to and including September 2010 would be paid to ARB, not Roanoke. Mr Baillie did not insist on a formal written agreement. It is common ground that ARB's appointment as broker of record in respect of (at least) the majority of the Watkins Service Company Binders was terminated with effect from 30 September 2010.

36. The parties do not agree whether in respect of the Watkins Service Company Binders Mr Baillie should be credited with procuring the payment of July, August and September 2010 commission to ARB. It is not in dispute that the commission was paid to ARB but ARB disputes that the payment of such commission was anything to do with Mr Baillie or was ever in issue. Mr Patrick Riordan of Watkins thought this was generous to ARB, and I accept his view as genuinely held. But in my view nothing material turns on this issue. Certainly no valid criticism is to be made of Mr Baillie in respect of the payment of July, August and September commission.

37. There was a period of unsuccessful negotiation over transfer arrangements during 2010. Mr Sarkis, a former non-executive director of ARB and a witness for ARB,

played a material part in these negotiations but was not available for cross examination at trial. Examination of the negotiations reveals that the focus tended to be on the reward that ARB should have for the assistance that it could give Roanoke with a smooth transfer, including of relevant employees.

38. In the end Mr Baillie signed Transfer Documents on behalf of ARB in respect of contracts that were described at trial as "Tranche 1" contracts. The signed Transfer Documents included a Commission Entitlement clause providing for the incoming broker to receive any commissions on any accounts processed by them after transfer. They also provided that the handling of (among other things) all claims matters and run-off as at the transfer date or arriving after that date should (except as otherwise provided) be the responsibility of Roanoke.

39. In respect of contracts described at trial as "Tranche 2" contracts there was no formal written agreement in respect of any transfer of business prior to files being transferred. There is an issue whether there was a verbal agreement between Mr Baillie and Mr Riordan as to commission entitlement, and if so in what terms. Having heard them both give evidence, and considered the contemporaneous correspondence, and having regard to the context, I am not satisfied on the balance of probabilities that ARB and Roanoke reached agreement over "Tranche 2" contracts. It does not appear that that led to there being a material difference in the treatment of "Tranche 2" contracts as compared with "Tranche 1".

40. From the point of transfer Roanoke serviced the accounts; that is, it took on any remaining broker work that would otherwise have fallen to ARB and involved ARB in further costs and expense. This included broker work on business for which ARB had received the commission. I accept that on some accounts the amount of this remaining work was modest. On others it was at least harder to predict.

41. After Mr Baillie's departure in early 2011, ARB was later to negotiate further with Roanoke and Munich Re's managing agent over ARB's claim to a better position in relation to commission. The negotiations led to a compromise in 2012. ARB says that that result supports its case. Mr Baillie says that it does not, and moreover it removes any arguable loss on the part of ARB. ARB counters that its negotiating position had by the time of the compromise been damaged by the decisions that Mr Baillie had made in 2010 in relation to MTBC.

42. My own assessment is that the later compromise is not a reliable guide to what should or should not, or could or could not, have been done in 2010. It is the product of a series of commercial decisions reached in 2011-2012. Those decisions will have been influenced by commercial considerations at that point, some at least of which might be unrelated to the merits of the claim to commission, including (as Mr Riordan noted in evidence) "what it might cost us thereafter to debate the matter further". The decisions will also have been influenced by differing assessments of the merits reached by different people. The costs of litigating a dispute will also no doubt have had some influence.

43. For present purposes, it is important to keep in mind that, as seen from the earlier section of this judgment dealing with the subject of broker entitlement to commission,

there is more to that subject than simply placing the binding authority, quota share treaty or declaration-based policy.

44. The shorthand referred to at paragraph 20 above perhaps shows that some will feel strongly or strongly hold the opinion that the subject is simpler. Indeed the shorthand may lie behind some of the strength of feeling between the parties in the present case. The context of an MTBC may increase the strength of opinion or feeling on the subject: as Mr Barrie said in evidence "almost every case of a [MTBC] is going to be an emotional affair". Without any disrespect to those feelings or opinions, but with the benefit of the evidence (including expert evidence), materials and submissions at this trial, I find that there is more to the subject when binding authorities, quota share treaties and declaration-based policies are involved, as in the present case. I note also that even the draft LIIBA guidelines envisaged different treatment for broker commission where, after the transfer date, the contract period was extended, new risks were included, or cover was increased.

45. The fact is that the basis on which business was transferred in the present case addressed the five material points summarised at paragraph 27 above.

Alleged breach by Mr Baillie of his duties

46. Were any of the acts or omissions of Mr Baillie, individually or collectively, a breach of the duties he owed to ARB? In my judgment, the answer is no.

47. Mr Baillie acted with loyalty to ARB and not in his own interests or those of anyone else. I do not find a shortfall in the care, skill and diligence that he exercised.

48. I am satisfied that he had a sufficient knowledge and understanding of the company's business to enable him to discharge his duties as its Managing Director, and in respect of compliance. That does not mean that he knew all there was to know, including especially about points of insurance and reinsurance law and practice where the views and experience of others in the market differ. But he knew enough to do his job and, so far as material to this case, he had the experience to know when to take a view or make a business judgment.

49. I am left in no doubt that the course taken was within Mr Baillie's authority as Managing Director; there were no standing orders nor was there a company practice requiring the matter to be referred to the Board, and the matter fell more naturally within the operational province of a Managing Director rather than the Board.

50. It was said that concerns about the course he was taking were raised with Mr Baillie by Mr Stephen Horsfield and Ms Melanie Tatham of ARB's staff. As Mr Horsfield claimed no expertise, concerns raised by him should be treated as questions. Ms Tatham did not make an impressive witness; her recollection was poor and this cast real doubt on the quality of the evidence in chief set out in her witness statement. In the end, Mr Baillie still had to make business judgments and I do not find these were outside the range open to him.

51. Mr Baillie did not seek legal advice to establish ARB's rights prior to any transfer of business. Should he have done so? To my mind this too is a matter of judgment on which Mr Baillie is not to be criticised. Legal advice would have involved cost. True it had been taken on at least some other of the few occasions of MTBC in which ARB had been involved. However nothing I have seen or heard at trial leads me to the view that this was an area in which legal advice should always be taken. External lawyers were involved in the earlier unsuccessful negotiations in 2010 and those lawyers do not appear to have suggested that legal advice should be taken over commission entitlement after the negotiations had broken down. Even if taken, the legal advice could easily have been less than conclusive. It was legitimate for Mr Baillie to take into account the fact that negotiations over the MTBC had already broken down and that he would not wish ARB to be in litigation.

52. Mr Baillie entrusted some responsibility for the transfer of files to Mr Russ, one of a number of members of ARB's staff due to transfer to Roanoke. ARB contends that Mr Russ had a conflict of interest which made this delegation unsuitable. Mr Baillie is further criticised for subsequently delegating responsibility for file transfers to Mr Alistair Conway and Mr Horsfield, ARB maintaining that he knew neither of them had the relevant expertise.

53. In my judgment staff who were to transfer to Roanoke could be expected to comply with their duties to ARB before that transfer. ARB did not have a lot of staff, and Mr Baillie was entitled to take a practical view having regard to the limited resources available to him.

54. Having seen and heard Mr Russ, Mr Conway and Mr Horsfield, I am satisfied they were people with whom this work could be entrusted, and who could be relied upon to raise questions where they felt uncertain. ARB says that, as a marine hull and liability broker who did not deal with cargo, Mr Horsfield was an unsuitable delegate for transfer-related work. I do not think that follows. True, Mr Horsfield doubted his own technical and compliance expertise, but in my view he underestimated the contribution he could make.

55. If the delegation just referred to was permissible, did Mr Baillie fail to provide any or any adequate supervision of the delegation? The members of staff involved were responsible members of a numerically limited staff. The transfer of files was not an area of activity of great complexity. Mr Baillie was entitled in my judgment to make the assessment that if the staff were uncertain or problems arose the staff involved would ask for guidance or assistance, as Mr Horsfield did. Although he could have supervised more or differently, Mr Baillie's supervision of the discharge of the delegation functions was, on the facts of this particular case, sufficient. He had other responsibilities to fulfil too, in other areas of ARB's business, including those that would be part of its future.

56. Mr Baillie also took into account the fact that Roanoke would do any required work after transfer, however modest (as in the case of business written under the Watkins Service Company Binders, or in the case of business that would "follow the settlement"). He was entitled to give that some weight both because of the costs and expense saved to ARB but more importantly because it would help a smooth transfer in the interests of the clients. Broader considerations of the reputation of ARB in the

market also tended in favour of not allowing the transfer to be disruptive. Again there had already been negotiations that had not succeeded. At base, there is no escaping the fact that ARB had little or no bargaining position in relation to the MTBC at that point. Its marine department had been living on borrowed time in relation to business with Watkins.

57. The independent experts have a contribution to make here too. Mr Barrie, with little difference from Mr Holford, would accept a description of an MTBC involving binding authorities, quota share treaties or declaration-based policies as "normal" when the incoming broker took over the administration of previous years of account ("all the legacy") and received commission on business written, ceded or declared from the date of transfer.

58. Despite the absence of a market practice in relation to MTBCs, that view of two independent experts further supports the conclusion I have reached that Mr Baillie is not to be judged as falling below the standards required of him as Managing Director. As it happens the practical arrangements would also be in line with what Mr Barrie described: he pointed out that at Lloyd's the transfer of the UMR (unique market reference) number from one broker to the next, supported by a slip agreed by underwriters, would thereafter see processing and payment flow through the incoming broker.

59. One of the witnesses called by Mr Baillie was Mr Howell, a former director of ARB and now retired after 48 years of working in the London insurance market. His experience included MTBCs albeit in the non-marine market and not where the underwriter and transferee broker were in the same group. His evidence was as follows:

> "… what happened in this case is typical of what generally happens when there is a [MTBC]. Upon instructions from the client/coverholder the files are passed from the existing broker to the new broker. Once the transfer has taken place the existing broker gets no further commission, which goes to the incoming broker. Equally, the incoming broker takes over handling the run-off business for the outgoing broker, thus relieving the outgoing broker of this responsibility. … If no such deal had been agreed, it would have been quite easy for the incoming broker to place the new contracts for all new business, and simply leave the displaced broker to handle the run-off of all prior contracts, without receiving any further income."

I do not conclude that Mr Howell has identified a market practice, but I do conclude that the evidence he gives, which I accept, further shows that Mr Baillie's approach is not to be condemned.

Causation and Loss

60. Had I found that Mr Baillie was in breach of duty, did the Claimant suffer loss as a result, and if so what was that loss? Within this issue the following particular questions arise:

(1) Is the loss the commission which ARB alleges was payable to it, or is it the sum which would have been recovered in negotiations with Roanoke?

(2) If the latter, would ARB have recovered more on account of its claim for commission than it received from Roanoke in June 2012 as a result of the fresh negotiations leading to settlement and, if so, how much more?

61. Given my findings elsewhere I will express my conclusions shortly. On the evidence I would conclude as follows having regard to the matrix of considerations referred to in this judgment:

(1) The loss would have been the sum which would have been recovered in negotiations.

(2) Given the strength of Watkins' and Roanoke's position including in relation to cancellation, I am not satisfied on the balance of probabilities that ARB would have recovered more. Notwithstanding the evidence about the possibilities of a "Forbes-type deal" (a reference to an earlier MTBC which had brought a transfer of the same book of business in 2001) I do not accept that was a reliable parallel in the circumstances of 2010.

Expenses

62. It is also said that Mr Baillie wrongfully claimed and received reimbursement of expenses to which he was not entitled. The sums involved are modest in amount, but the subject is important. The focus was on Mr Baillie having frequent meals at ARB's expense and with the same people, and on an overnight hotel stay in London.

63. Mr Kenneth Woodhams was Mr Baillie's predecessor. He gave evidence of (to use his words) a "very, very liberal" regime over meal expenses within ARB. No evidence was given about the tax treatment of these expenses whether for ARB as employer or Mr Baillie as employee. Some, and not just ARB under new management, would criticise Mr Baillie for having continued the regime. However he was able to demonstrate that it could bring the benefit of otherwise free advice and guidance to ARB's benefit from those who were entertained. If ARB had wanted to change the regime it was for the Board to signal that to Mr Baillie. It did not do so, and in the end ARB has not satisfied me that Mr Baillie was not entitled to reimbursement.

64. On the hotel stay, at a hotel at Tower Bridge, I regret to have to conclude that, under cross examination from Mr Marland that was entirely appropriate, Mr Baillie did not give a full and frank account as to how this booking had come about and came to be used.

65. He made the arrangements himself using "an email offer" he had received. His explanation at first, in a schedule supplied to the Court and verified by a statement of truth from him, was that he booked the room because a flight was "scheduled to arrive back at Gatwick quite late". I accept Mr Baillie's evidence that he travels very badly. Given the seriousness of the allegation to follow, I do not disbelieve his statement that originally a late return was envisaged.

66. However Mr Baillie was shown documents in cross examination indicating that he was informed some 20 days before the hotel booking was confirmed that the flight would in fact return at midday. Mr Marland fairly put to him the allegation that he booked the room "knowing full well that [he would] be back at Gatwick at midday". Mr Baillie gave, in my assessment, no good answer. He was clearly uncomfortable with the subject and sought to avoid it. Far more importantly than the modest sum at issue, his response threw into doubt the truthfulness of his original account.

67. I make every allowance for possible lack of memory about a small item in financial terms, but I am still left with a strong impression that Mr Baillie retained more knowledge than he offered in the witness box. In the result however I conclude that ARB has not shown he had no entitlement to the reimbursement he took. Though the evidence is incomplete, there is just sufficient evidence that the booking was made and used to help him refresh or recover in connection with an overseas trip for ARB.

68. I ask myself whether Mr Baillie's unreliability as a witness in this particular is an illustration of unreliability more generally as a witness. I conclude that it is not. Having heard his evidence as a whole, elsewhere that evidence was credible and clear enough. Indeed it is that that makes his treatment of the hotel stay stand out for its unsatisfactoriness.

Counterclaim

69. Mr Baillie was dismissed for gross misconduct over the view taken by ARB, now led by Mr Palmer and Mr James Bristow, about the transfers. He was working his notice at the time. Mr Baillie raises a counterclaim for wrongful dismissal and on this he is entitled to succeed. Quantum is agreed, subject to the deduction of taxation.

Conclusions

70. Each case will depend on its facts. Was it wrong in all the circumstances of this particular case for Mr Baillie to let this particular book of business go to Roanoke on the basis that post-transfer commission would go to Roanoke, whether as the result of an agreement to that effect or not? In my judgment it was not.

71. The claim fails. The counterclaim succeeds. I will approve a form of order from a draft to be settled by Counsel.

72. I am very grateful to Counsel and to the teams behind them for ensuring that the respective cases at trial were advanced and conducted sensibly and professionally despite the strength of feeling between the parties.