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Underwriting Agency Agreements – Running-Off to the Courts

Written by Simon Black, Solicitor

Tel 02 8273 9951
simon.black@wottonkearney.com.au

Temple Legal Protection Ltd v QBE Insurance (Europe) Ltd [2009] EWCA Civ 453

Insurers routinely look to develop their business by moving into new or expanding insurance markets. In many cases, the initial start-up costs of entering a new market or producing a new insurance product, coupled with a lack of existing in-house expertise and market reputation will encourage the use of underwriting agencies. Those agencies often have the benefit of an existing reputation, expertise in the specific market area and established contacts. The relationship between underwriter and agent is usually governed by an underwriting agency agreement or "binding agreement" (**Binder**).

On 6 April 2009 the Appeal Court of England and Wales dismissed an appeal of the UK High Court decision in ***Temple Legal Protection Ltd v QBE Insurance (Europe) Ltd [2008] EWHC 843***. The decision by Lord Justice Rix, Lord Justice Moore-Bick and Justice Bennett highlights the importance of carefully drafting Binders to ensure that both underwriters and their agents are fully aware of their rights and obligations in the event that the agency relationship is terminated. In particular, the case shows the importance of carefully articulating how existing insurances are to be "run-off" following the termination of a Binder.

The case also confirms that, as a general rule, an insurer's entitlement to revoke the authority of its agent will be unfettered in all but the most limited of circumstances.

The Facts

Temple Legal Protection Ltd (**Temple**) was a specialist legal expenses underwriting agency established in 1999 to take advantage of the boom in the UK "legal expenses" market following the introduction of the Conditional Fee Agreements (or *"no win, no fee"*) amendments implemented by the ***Access to Justice Act 1999***.

As an underwriting agent, Temple did not carry the financial risk in the legal expenses insurance cover it facilitated. Rather, it developed and marketed the insurance products which, over the years, were underwritten by a number of insurers pursuant to respective Binders. Temple entered into one such Binder with QBE Insurance (Europe) Ltd (**QBE**) (**the QBE Binder**).

The QBE Binder came into effect on 1 January 2006 and authorised Temple to write "after the event" (**ATE**) legal expenses insurance on behalf of QBE. The QBE Binder also authorised Temple

to sub-delegate authority to various "coverholders" – chiefly law firms whose clients required ATE cover.

An ATE insurance policy essentially provides cover for the costs incurred by a party in pursuing, or defending, litigation with the payment of premium usually deferred until the conclusion of the case. If the insured is successful, the insurer recovers the premium from the losing party. If the insured is unsuccessful the insurer pays the successful party's costs.

Relevantly, the termination provisions of the QBE Binder stated that:

+ Both parties must give 240 days' notice before terminating;
+ The QBE Binder would terminate automatically if Temple went into liquidation;
+ The QBE Binder would terminate automatically if Temple ceased to be authorised by the Financial Services Authority (FSA);
+ QBE was entitled to terminate the QBE Binder if Temple committed a material breach which it did not remedy within 60 days;
+ QBE was entitled to terminate the QBE Binder if Temple entered into a Binder with another insurer; and
+ Temple's authority to write insurance would cease immediately on termination but it would remain liable to conduct the run-off of existing insurances until their expiry or termination.

The relationship between Temple and QBE deteriorated rapidly and by August 2006 Temple gave notice that it wanted to terminate the QBE Binder. While the 240-day notice period specified under the QBE Binder would not expire until April 2007, Temple had entered into a new Binder with another insurer by October 2006.

As a result of Temple's actions in contracting with another insurer, QBE wrote to Temple in January 2007 terminating the QBE Binder with immediate effect. QBE informed Temple that it would assume all claims handling functions going forward and that Temple would not be entitled to conduct the run-off of existing insurances.

QBE wrote to a number of the coverholders informing them that Temple's authority had been revoked and asking them to deal directly with QBE in the future. Temple, in turn, wrote to the coverholders asking that they continue to deal with Temple and maintaining that the terms of the QBE Binder did not entitle QBE to take over the run-off of existing insurances.

The dispute went to arbitration.

The Decision at Arbitration

At arbitration Temple argued that it had a right to manage the run-off of the existing business on the basis that it was a party to the certificates of insurance. Temple also suggested that allowing QBE to take over the run-off of the existing policies of insurance would put Temple in breach of various contractual obligations it owed to third parties (the various coverholders and insureds).

Nonetheless, the arbitrator found that QBE was free to terminate Temple's authority to conduct the run-off by unilateral notice and had done so in its letter of January 2007.

Temple appealed the arbitrator's decision.

The High Court's Decision

On appeal the High Court held that neither the QBE Binder, its commercial context nor the indications of the general law of agency established an entitlement on the part of Temple to conduct the run-off. While the Court accepted that Section 10.2.2 of the QBE Binder imposed an *obligation* on Temple to deal with the run-off, it did not go so far as giving Temple an *entitlement* to do so. Section 10.2.2 of the QBE Binder stated that:

"unless otherwise agreed by QBE, Temple shall remain liable to perform its obligations in accordance with the terms and conditions of [the binder] in respect of all insurances bound to termination until every such insurance has expired or has otherwise been terminated".

The Court also considered it important that, if it were to accept Temple's interpretation of the QBE Binder, QBE would have been unable to prevent Temple from acting as "run-off agent" even in circumstances where Temple had acted

fraudulently or its directors were convicted of criminal offences.

While recognising that there were a series of complex relationships in place between QBE, Temple, the coverholders and the insured litigants, the Court held that any obligations owed by Temple to those third parties existed only so long as it was authorised by QBE. If the parties had intended for Temple to be entitled to conduct the run-off post-termination, the Court considered that such an entitlement would need to be clearly articulated in the QBE Binder. The Court considered that it was not.

Temple appealed the decision.

Decision of the Court of Appeal

In upholding the High Court's decision, the Court of Appeal confirmed that above all the relationship between QBE and Temple was one of principal and agent. That relationship was built on the principal's trust and confidence in the agent. In the Court's view it would be unusual and uncommercial *"for any principal who had employed an agent to manage some aspect of his business to be obliged to allow that agent to continue to act on his behalf once the necessary degree of trust and confidence had been lost"*.

The Court held that it was clear from the terms of the certificates of insurance that Temple was acting as the agent of QBE and that once its authority was revoked by QBE, coverholders would be obliged to deal directly with QBE or with another agent it appointed. Nothing in the QBE Binder made the continued involvement of Temple essential.

Finally, the Court held that a principal would always be entitled to revoke its agent's authority *"save in an extremely limited and rare class of case, which can be described loosely as an agency coupled with an interest"*. Temple's right to sub-delegate authority under the terms of the QBE Binder did not create an agency coupled with an interest so as to fall within that *"rare class of case"*.

Implications

In upholding the High Court's decision, the EWCA has highlighted the need for underwriters and their agents to take particular care in drafting underwriting agency agreements to ensure that:

+ the termination provisions of underwriting agency agreement are clear and unambiguous; and
+ the agency agreements should clearly specify the rights of the parties, including those arising out of post termination administration and the protection of their respective business interests.

In particular, underwriting agencies would be advised to take particular care to ensure that they preserve some control over the business that they have created and the contacts they have developed.

Given the Court's confirmation that an insurer's right to revoke the authority of its agent will be unfettered in all but the rarest of cases – underwriting agents would be well advised to pay particular attention to the way in which Binders are drafted to ensure their products, rights and market contacts are protected as much as possible.

For more information contact Andrew Moore on 8273 9943 or Simon Black