ADT -v- BINDER HAMLYN
CREATING DUTIES TO NON-CLIENTS

The High Court decision in the case of ADT -v- Binder Hamlyn acts as a reminder to brokers of the importance of guarding against the creation of duties and liabilities to those who are not direct clients.

Following the decision of the House of Lords in 1963, a "Hedley Byrne" duty arises between parties where information or an opinion is given orally, or in writing, when it is know that this information or opinion will be relied upon by the person to whom it has been given or whom it is known will see it. The duty can arise even where there is no contract or payment made for the opinion given.

The judgment in the Binder Hamlyn case emphasises the dangers to which professionals may be exposed during the course of conducting their everyday business when making statements upon which reliance is placed by those other than the direct client.

Binder Hamlyn had acted as auditor of Britannia Securities Group (BSG). ADT was negotiating to buy BSG and had seen Binder Hamlyn's audit reports. Binder Hamlyn, in response to questions put to them by ADT, made a statement to ADT that BSG's audited accounts showed a true and fair view of BSG's financial position and that Binder Hamlyn was not aware of anything that had affected BSG's financial position since those accounts had been signed. The Judge found that Binder Hamlyn knew, or ought to have known, of the importance placed upon their statement by ADT and that ADT would rely upon it.

ADT bought BSG and subsequently discovered that the accounts had been negligently prepared and were inaccurate. ADT sued Binder Hamlyn who, as a result of the statement given to ADT, were found liable to ADT for the difference between the price actually paid and the price which would have been paid had the audit been properly carried out.

The danger of this potential liability to non-clients exists for brokers as much as for other professionals. An example of circumstances which could give rise to such a liability would be where a marine broker confirms to a mortgagee bank that a marine hull policy is in place and the premiums are up to date. The Bank would not have an existing relationship with the broker but as a result of the broker providing information, upon which it should know that the Bank may rely, the broker may create a duty of care to the Bank. If the information is wrong, the broker could be found liable to the Bank for any damage resulting from the negligent statement.

THE RISK MANAGEMENT MESSAGE

Where a broker is requested to provide information or an opinion directly to, or for use by, a party which is not a client, and particularly in circumstances where he should be aware that that party is going to rely on such information, great care must be taken.

The following points should be borne in mind by brokers who find themselves in this situation:

- Generally the threshold of assumption of duty to the inquiring party is low.

- Whenever possible, brokers should endeavour to provide any information or opinion given in response to third party requests to their client/principal, and avoid dealing directly with the non client. Where information or an opinion is to be passed directly to a non-client then the client's consent should be obtained beforehand and, where appropriate, a "caveat" should be given.

- If the broker indicates clearly, and preferably in writing, that he accepts no responsibility to any non-client for information or opinions given, it may be possible to raise a defence to an allegation of reliance by the non-client. Please contact Griffin Managers if you require advice on the wording of a suitable caveat.

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First Issued: 1996. This Issue 2012