

AM I REALLY LIABLE TO NON-CLIENTS?

Since the High Court's 1995 decision in *ADT v Binder Hamlyn* (see Griffin [Bulletin 96/03](#)) Members have been well aware of how easy it can be for professionals to assume, unintentionally, a duty to third parties who are not their clients – even when no contract between them exists. In that case, the disastrous potential consequences of even monosyllabic responses direct to a third party's inquiry of a professional were illustrated. Binder Hamlyn were auditors to Britannia Securities Group (BSG), a company which ADT was acquiring. ADT, having seen Binder Hamlyn's audit reports, asked Binder Hamlyn's audit partner whether he stood by his accounts of BSG and whether he had anything to add. The audit partner, who knew of ADT's proposed acquisition, replied only "yes" and "no". The Court considered that Binder Hamlyn knew ADT would rely on these two answers. It interpreted them as a statement to ADT that BSG's audited accounts showed a true and fair view of BSG's financial position and that Binder Hamlyn were not aware of anything that had affected BSG's financial position since those accounts had been signed. After the transaction was complete, the accounts were found to be inaccurate due to negligent preparation. ADT sued Binder Hamlyn who, as a result of just two words, were held liable to ADT for the £65 million difference between BSG's price and its value, plus £37 million in interest!

Binder Hamlyn was an auditor's liability case, but its principles apply to any profession. For instance, if a marine broker were to confirm to a mortgagee bank that a marine hull policy is in place and the premiums are up to date, knowing that the bank is likely to rely on that confirmation, the broker could well assume a duty to the bank, despite the bank's not having an existing relationship with the broker. If the confirmation was wrong the bank could sue the broker.

The Court of Appeal provided further guidance on the context in which professionals may be held to have assumed a duty to third parties in the case of *Precis v William M Mercer Ltd* [2005]. *Precis* was deciding whether to acquire Stove Group Plc, and raised enquiries concerning Stove's main pension scheme – without explaining the purpose of their queries – with Mercer, the scheme actuaries. The scheme actuary sent certain documents, including an actuarial valuation report ("AVR") on the scheme's pension fund, to Stove and to *Precis*' solicitors, by way of response. The AVR put the value of the scheme's deficit at £1.35 million. The scheme actuary did not confirm the AVR's accuracy, however; she had not been asked to, and at no time did anyone at Mercer ever speak to anyone at *Precis* directly. The solicitors reported back to *Precis*, recommending that *Precis* seek its own actuarial opinion on the scheme's value. Ignoring this advice and relying on the AVR's figures, *Precis* made an offer for Stove. After the acquisition it was discovered that the AVR was wrong, and Stove had to fund a substantially greater scheme deficit of £4.5 million.

Precis sued Mercer for breach of duty with respect to the AVR's accuracy. *Precis* lost, despite there being no argument between the parties as to the AVR's inaccuracy, or that *Precis* relied on the AVR in making its offer for Stove. The Court considered that, on the facts, Mercer had assumed no duty to *Precis*. The AVR had been drawn up for the purposes of reviewing Stove's pension scheme contribution levels, not for the purposes of acquisition, which Mercer knew nothing about – it knew a transaction between *Precis* and Stove was envisaged, but nothing about what kind. In fact, Mercer had had no direct contact with *Precis*. Accordingly, it could not be said to have accepted responsibility to *Precis* for the AVR's content. The Court also held that if Mercer had attracted liability, the award against it

would have been discounted by 25% by reason of Precis' contributory negligence in failing to get independent actuarial advice, as recommended by its solicitors.

THE RISK MANAGEMENT MESSAGE

The Precis decision is useful. Whilst it leaves the principles of Binder Hamlyn unchanged, it demonstrates the courts' willingness to limit the application of a duty to situations in which professionals know (or should know) the purpose for which their information has been requested and relied upon, and in which they accept responsibility for that information regardless. There are, however, steps which Members can take to help them demonstrate unwillingness to assume a duty to anyone but their client, even when responding to a request for information or an opinion to a third party - particularly in circumstances where the member should be aware that the third party will rely on such information. The following steps should be borne in mind by brokers who find themselves in this situation:

- Remember that, generally, the threshold of assumption of duty to the inquiring party is low.
- Avoid direct contact with the third party whenever possible, endeavouring instead to provide any information or opinion given in response to third party requests directly to their client/principal.
- Where information or an opinion is to be passed directly to a non-client then the client's consent should be obtained beforehand. Whether the information is to be passed to the client or to the third party, an appropriate caveat as to (1) the use for which the information is intended and (2) who is entitled to rely on that information should be included.
- Indicate clearly, in writing, that you accept no responsibility to any non-client for information or opinions given. This may be helpful in raising a defence to an allegation of reliance by the non client if it becomes necessary at a later date. Please contact Griffin Managers if you require advice on the wording of a suitable caveat.

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