DISCLAIMER CLAUSES – CAN YOU RELY ON THEM?

INTRODUCTION

Griffin has issued a number of bulletins highlighting the ways in which a broker can unwittingly assume duties to parties other than its client, a risk brokers share with other professionals. The Commercial Court recently gave judgment in a case (*Barclays Bank plc v Grant Thornton UK LLP 18th February 2015)* concerning the extent to which a firm of auditors could rely on disclaimers of liability in audit reports which it had prepared. This Commercial Court decision highlights the value to any professional, including an insurance broker, of a clearly worded disclaimer of liability, particularly where it is anticipated that any report or advice given to a client is likely to be forwarded to a third party.

BACKGROUND

This recent case arose out of the administration of the luxury Von Essen hotels chain in April 2011. Grant Thornton had prepared non-statutory audit reports for Von Essen, which Barclays Bank required under the terms of its loan facility with the hotels chain. The report contained a disclaimer clause on the first page stating that the report was made solely to the company's director and included the statement:

"To the fullest extent permitted by law, we do not accept or assume responsibility to anyone other than the company and the company's director as a body, for our audit work, for this report, or for the opinion we have formed."

Von Essen subsequently went into administration and Barclays argued that Grant Thornton owed it a direct duty of care, since the auditors were aware that the bank would rely on the audited reports. The allegation made by Barclays was that Grant Thornton should have uncovered what it considered to be fraudulent overstatements in the hotels' group accounts, and that its failure to do so resulted in the bank suffering loss when Von Essen could not repay the loan.

Grant Thornton denied any negligence but, in any event, asserted that the claim brought by Barclays had no real prospect of success in view of the disclaimer clauses. It was this issue, as to whether there could be no liability to Barclays because of the existence of the disclaimer clauses, which came before the Court.

THE DECISION

The Court found in favour of Grant Thornton, ruling that the claim brought by Barclays had no realistic prospect of success in the face of the disclaimer clause in the reports. The Court considered that the clause had been sufficiently brought to Barclays' attention by appearing on the first page of each report and that it did not constitute an unreasonable exclusion clause under the Unfair Contract Terms Act 1977 ("UCTA"). The Judge found that there was nothing unreasonable in expecting sophisticated commercial parties, a bank in this instance, to be bound by the terms of such a clause.

RISK MANAGEMENT MESSAGE

This decision highlights the importance of including suitably worded disclaimer clauses in documents prepared for clients, particularly where such documents are likely to be seen by third parties. In this case the Judge made clear that had a disclaimer clause not been included, a duty of care could have been owed to the third party bank.

Griffin recommends taking the following steps to minimise the potential E&O exposure in this area:

- Include a suitable disclaimer when preparing any report for a client, to provide protection in the event that the report is relied on by a third party - Griffin can provide suitable wordings;

- Where possible avoid direct contact with third parties, with any copy of a document prepared for a client being provided by the client to the third party – in setting out the background facts of this case in his Judgment, the Judge noted that there had been no communication between Grant Thornton and Barclays in relation to the work conducted or the report issued (unlike previous projects where Barclays had instructed Grant Thornton directly concerning Von Essen's affairs, entered into an engagement letter with them and paid them a fee) and that it was Von Essen that had sent the report to Barclays;

- Particular caution is required where a third party requesting information about a client is a small business or consumer - there may be scope for argument as to the reasonableness of a disclaimer clause under the provisions of UCTA, in any document prepared for the client which is then passed to them.

This bulletin is for general information purposes only and does not provide a comprehensive or complete statement of the law relating to the issues discussed nor does it constitute legal advice. In addition, by its nature, this bulletin may be superseded by subsequent regulatory or legal developments. Professional advice should be sought where appropriate in relation to any particular circumstances.

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First Issued: June 2015
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