

PROFESSIONAL DUTIES OF INTERMEDIARIES SOME RECENT DEVELOPMENTS

Intermediaries, like all professionals, face a constant challenge to ensure they are meeting legal and regulatory obligations. The bar on what is expected seems to continually rise. At the Technical Forum in September 2021, partners from international law firm CMS considered three recent cases in this area. We set out below the general risk management message from each case, as well as looking at the FCA's recent consultation on a new consumer duty of care.

MANCHESTER BUILDING SOC V GRANT THORNTON

The issue in this case was the extent to which a professional adviser should be responsible for losses incurred by its client, when advice given turns out to be incorrect.

Grant Thornton (GT) acted as auditor of Manchester Building Society (MBS). MBS entered into lifetime mortgages with customers but borrowed money short term. To hedge against fluctuations in short term interest rates MBS entered into interest rate swaps. From 2005 the relevant accounting standards required MBS to record its interest rate swaps on its balance sheet. It also created a Hedge Accounting Policy to reduce the volatility in the valuation of its assets/liabilities that the interest rate swaps would introduce, which would also significantly reduce the regulatory capital it was required to hold and which GT advised was consistent with the relevant accounting standards. MBS relied on GT's advice that the Hedge Accounting Policy was appropriate in deciding to significantly expand its lifetime mortgage business. In 2013 MBS discovered the Hedge Accounting Policy was not in fact consistent with the relevant accounting standards and had to close out the swaps at a loss in the region of £30m.

MBS sued GT for the loss suffered as a result of closing out the swaps, on the basis that it would not have expanded its lifetime mortgage business had GT given the correct advice in 2005. GT successfully defended its position at first instance and at the Court of Appeal, but lost when the case went before the Supreme Court. The majority decision was that the loss suffered by MBS was within the scope of GT's duty because the purpose of GT's audit engagement was to provide the company and its shareholders with accurate financial information so that appropriate management and governance decisions could be made; and there was a sufficient nexus between the loss suffered and that duty.

Risk Management Message

The legal reasoning behind the decision is complex and the case is also based on unusual facts. Nevertheless, it does highlight the importance of engaging with a client from the outset and reaching a clear agreement about the scope of the instructions being given. It illustrates the importance of understanding why any particular advice is being sought by the client and how advice which is given may impact on subsequent decisions made.

ABN AMRO BANK v RSA & OTHERS

This case focuses on the broker's duty to arrange cover which "clearly and indisputably" meets its client's requirements, and to protect the client against an unnecessary risk of litigation. It demonstrates how a largely successful outcome for a client can leave the broker with rather less cause for celebration, where legal proceedings have been required to achieve that result. It was the subject of a Griffin bulletin earlier this year (*The Costly Game of Having to Prove You're Right - The Duty to Arrange Cover that Clearly & Indisputably Meets Clients' Requirements*) ([Bulletin 2021/02](#)).

Risk Management Message

The case is again fact specific, but provides a useful reminder of some of the broker's obligations when placing business. These were set out in our previous bulletin and are included here for ease of reference:

- consider whether any specialist or unusual clauses extend the scope of cover to risks which would ordinarily be placed in alternative insurance markets;
- consider whether specialist brokers, with sufficient expertise in those markets, should be consulted (whether internally or externally);
- ensure the client fully understands why, and gives informed consent, when using underwriters who do not specialise in the type of cover being sought;
- have appropriate discussions with underwriters to ensure that the effect of any specialist or unusual clauses is sufficiently clear and understood by all parties; and
- make sure that any such discussions are properly documented on file. Keeping a complete record of all advice and guidance given will be essential should any dispute arise at a later date between the insured and insurers.

EQUITAS V SANDE INVESTMENTS

In this case Equitas was seeking to recover sums collected by Sande on behalf of Lloyd's syndicates, which it argued should have been remitted to it. The two issues to be considered were:

- whether Sande had acted as a broker and so owed all the associated duties; and
- whether the claims were time barred.

In its earlier case against Walsham Brothers, Equitas had successfully established that similar claims were not time barred. In that case it had not been disputed that Walsham was a full Lloyd's broker and owed a continuing duty to pay all sums collected to Equitas. It was found that this continuing duty meant a new cause of action accrued each day the funds were not remitted, which is why the claims were not time-barred.

In the Sande case it was found that Sande was not a Lloyd's broker, had not held out that it was and did not owe any duties to Equitas. As a consequence, there was no continuing duty which could be breached and no new cause of action accruing each day. On that basis the claims were time barred.

Risk Management Message

This case provides a clear message that where firms collect funds in their capacity as brokers, it is essential to keep diligent records. The continuing duty to remit funds, and the accrual of a new cause of action each day that duty is not discharged, means that what might be considered historic claims will not become time-barred. That being the case, a clear record of the position in the event of challenge must be retained.

FCA Consultation on new Consumer Duty of Care

The proposed new consumer duty of care was considered. The consultation reflects the FCA's concern that consumers receive information which is misleading or difficult to understand, and products or services which don't represent value. The proposed new duty would be introduced as a new Consumer Principle which would be in addition to the FCA's existing Principles for Businesses. It goes further than Principle 6 which states a firm must pay due regard to the interests of its customers and treat them fairly. The duty would be underpinned by setting expectations for how a firm must meet its duty.

Details of the proposed new duty can be found in the slides and recording of the presentation, as can more details of the cases referred to above. The slides and recording are available on Griffin's Member portal. Staff at all Members are encouraged to register on the portal if they have not already done so. This can be done by following this link <https://portal.griffin-insurance.co.uk/register>.

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