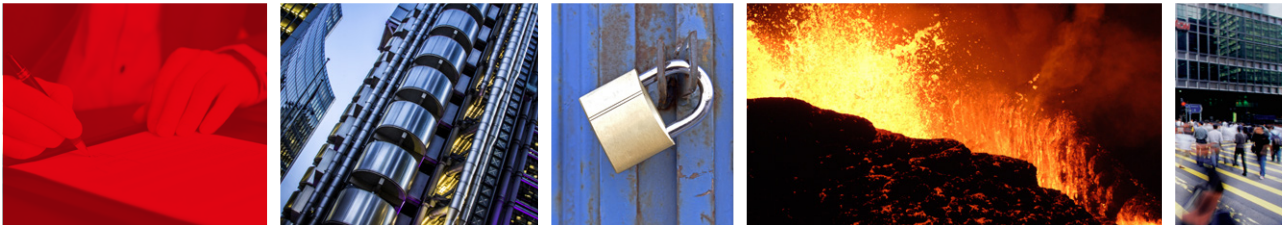




INSURANCE BULLETIN



Welcome to HFW's Insurance Bulletin, which is a summary of the key insurance and reinsurance regulatory announcements, market developments, court cases and legislative changes of the week.

1. Market developments

BIBA calls for the insurance industry to adopt the spirit of the Insurance Act
EIOPA publishes a final report on peer review on freedom to provide services

2. Court cases and arbitration

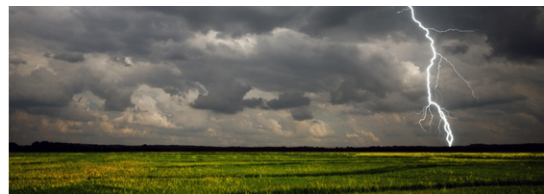
Negligent misstatements: financial references provided by banks – when does a duty of care arise?
Playboy Club London Ltd v Banca Nazionale Del Lavoro SpA

3. HFW publications and events

HFW attends onshore energy conference
HFW attends conference at the International Association of Insurance Law
HFW attending GAIF MENA Insurance and Reinsurance Conference

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hfw 1. Market developments

BIBA calls for the insurance industry to adopt the spirit of the Insurance Act

The British Insurance Brokers' Association (BIBA)¹ launched its guide on helping brokers affected by the Insurance Act 2015 (the Act) operate under the new framework for insurance law in the UK.

The guide, developed in conjunction with Mactavish, looks at what is meant by “fair representation” and “reasonable search” under the Act and aims to provide clarity around these principles.

The reforms brought in by the Act significantly change UK insurance law in order to offer insurers, brokers and policyholders a legal framework which is in line with the practices of today's insurance market.

BIBA believes this modernisation can only be achieved if its members are given a practical structure to ensure compliance with the Act with a consistent and fair approach, which is intended to be embodied in the guide.

For more information, please contact [Davinia Collins](#), Associate, London, on +44 (0)20 7264 8276, or davinia.collins@hfw.com, or your usual contact at HFW.

EIOPA publishes a final report on peer review on freedom to provide services

The European Insurance and Occupational Pensions Authority (EIOPA) published its final report on the peer review on the freedom to provide services on 13 May 2016.



BIBA believes this modernisation can only be achieved if its members are given a practical structure to ensure compliance with the Act with a consistent and fair approach, which is intended to be embodied in the guide.

DAVINIA COLLINS, ASSOCIATE

The right to provide insurance business in the European market on the basis of freedom of services (FOS) is recognised as an important way to achieve an integrated market. As such, EIOPA believes cooperation between the home and host state national competent authorities (NCAs) is fundamental.

Through the review, EIOPA aimed to clarify practices between NCAs and identify best practices, where possible.

Questionnaires were sent by the EIOPA Review Panel to NCAs in all 31 countries in the Economic European Area, which were supplemented by visits, teleconferences and written procedures conducted by the reviewers. The peer review was conducted from 1 January 2011 to 31 December 2013.

With regard to the supervision of insurance undertakings, the review found there were areas where a common approach between NCAs was either missing or insufficient.

Recommended actions on this point were issued to individual NCAs, to ensure a more consistent approach and enhance cooperation.

Conducting a peer review on FOS was acknowledged as being very wide in scope. A follow up to the peer review will be conducted on the recommended actions and to examine other relevant areas relating to FOS.

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¹ The UK's general insurance intermediary organisation



hfw 2. Court cases and arbitration

Negligent misstatements: financial references provided by banks – when does a duty of care arise? *Playboy Club London Ltd v Banca Nazionale Del Lavoro SpA*¹

Banks regularly provide financial references for their clients to confirm they believe they are able to pay their debts. This case considers whether a bank was negligent for providing a reference for its customer who was not able to do so. It demonstrates the limit on this duty, and will be of interest to banks providing such references as part of their business practice, and to insurers providing professional indemnity cover to banks.

A financial reference was provided by Banca Nazionale Del Lavoro SpA (the bank) for Mr Hassan Barakat (the customer) to Burlington Street Services Ltd. (the agent), which was acting on behalf the Playboy Club London Ltd. (the club). The club operated a casino at which the customer requested a cheque cashing facility. Before authorising the facility, the club appointed the agent to seek a financial reference in strict confidence, without naming the club. It was understood that the reference would confirm the customer's means and standing and trustworthiness to meet a financial commitment of £1.6 million. A reference was provided but cheques presented by the customer later proved to be counterfeit and unpaid debts were left totalling £802,940. Upon investigation, it transpired that the customer's bank account with the bank had always maintained a nil balance. The club successfully claimed against the bank for providing a

negligent misstatement, and this report covers the bank's appeal.

The main question to answer in the appeal was whether the bank owed a duty of care to anyone other than the agent, and if so, whether that included the (undisclosed) club? Lord Justice Longmore considered that since *Hedley Byrne & Co. Ltd. v Heller & Partners Ltd.*² there must be a "special relationship" between the advisor and advisee for the advisor to be liable for a negligent misstatement. To establish this, since *Caparo Industries Plc. v Dickman*³, it has been customary to enquire: (1) if the defendant assumed responsibility to the claimant (the "assumption of responsibility test"); (2) (a) whether the loss was a foreseeable consequence of the defendant's actions or inactions, (b) the relationship of the parties was sufficiently proximate, and (c) it is fair, just and reasonable to impose a duty of care on the defendant towards the claimant (the "threefold test"); and (3) whether the addition to existing categories of duty is incremental and by analogy with existing categories. Longmore LJ noted these guidelines were applied



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TOM COOMBS, ASSOCIATE

in *Customs and Excise Commissioner v Barclays Bank Plc*⁴, and that case included the following key paragraph in its judgment: "*In these cases in which the loss has been caused by the claimant's reliance on information provided by the defendant, it is critical to decide whether the defendant (rather than someone else) assumed responsibility for the accuracy of the information to the claimant (rather than to someone else) or for its use by the claimant for the one purpose (rather than another).*"⁵ It was this passage that Longmore LJ referred to in his judgment, to help him decide whether the factual differences with *Hedley Byrne* afford a meaningful distinction.

On the facts, this case was distinguished from *Hedley Byrne*, since, unlike that case, the bank was not aware that: a) the reference would be used by another (i.e. the club) as the bank only knew the agent (and was unaware they were acting for the club), and b) the purpose of the reference was for gambling. Therefore, there was no assumption of responsibility, and it was difficult if not impossible to describe the bank and club as having a "special relationship". That was not the end of the enquiry, since although the assumption of responsibility is sufficient on its own to establish a duty, it is not a necessary condition for liability, and further consideration would be required. The threefold test in *Caparo* was considered, and it was held that there was no "sufficient proximity"

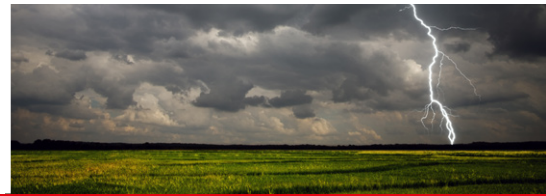
1 [2016] EWCA Civ 457.

2 [1964] AC 465.

3 [1990] 2 AC 605.

4 [2007] 1 AC 181.

5 Para 35, [2007] 1 AC 181.



between the bank and club, nor was it considered fair, just and reasonable to impose a duty of care, when the club deliberately concealed its existence (albeit standard practice). It was held no duty of care existed.

The bank in this case did not appear to exclude liability for making such a statement. Many banks do have exclusion clauses, and although the decision did not go against the bank, nevertheless it remains prudent to do so, and to ensure policies and procedures are in place to ensure all references contain a liability exclusion. If it is not possible to fully exclude liability, our view is that banks should restrict in the references who may rely on it, and the purpose of the reference. In different circumstances this claim could have prevailed, and such claims may be covered under a bank's Professional Liability cover in its Financial Institutions insurance.

Link: <http://www.baillii.org/ew/cases/EWCA/Civ/2016/457.html>

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hfw 3. HFW publications and events

HFW attends onshore energy conference

On Wednesday 18 May, HFW Partner **Sam Wakerley** attended an onshore energy conference in Dubai. The conference explored the issues and challenges specific to onshore energy, which includes oil and gas, power and energy construction, and addressed the topical insurance, technical, claims and legal issues.

HFW attends conference at the International Association of Insurance Law

On Monday 23 May, HFW Partner **Guillaume Brajeux** attended a conference in Paris at the International Association of Insurance Law (AIDA France) titled "Les assurances d'un produit livré".

HFW attending GAIF MENA Insurance and Reinsurance Conference

HFW Partners **Costas Frangeskides** and **Sam Wakerley** are attending the GAIF MENA Insurance and Reinsurance Conference in Beirut from Tuesday 24 May to Thursday 26 May.

Lawyers for international commerce

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