# **Assumption of Responsibility in Professional Liability Claims: Part 3**



**Introduction**  
  
In the typical professional liability claim, the claimant will be a former client. It will likely be common ground that the professional owed a coterminous duty in contract and at common law. The battleground will be over matters such as the scope of the duty, whether it was breached and whether any breach caused a loss. Less commonly, the claimant may be a third party which insists that, in carrying out services for its client, the professional also assumed a responsibility to that third party.

**This is the third in a series of notes which looks at assumption of responsibility in the professional liability field. It focuses on claims against valuers.**

**A: recap**

Part 1 traced the evolution of the law from the seminal decision of the House of Lords in *Hedley Byrne v Heller & Partners* [1964] AC 465. Several of the speeches referred to an assumption of responsibility, but subsequent cases confirmed that the duty was imposed by the court: it did not need to have been consciously accepted.

*Anns v Merton BC* [1978] AC 728 laid down a two-stage test to establish the existence of a duty. The first part involved considering whether there was a sufficient relationship of proximity between the parties for it to be in the reasonable contemplation of the defendant that careless by it was likely to cause damage to the plaintiff. If it was, the second part involved considering whether there were factors which might negative the duty which would otherwise arise.

The Australian courts rejected this approach. In *Council of the Shire of Sutherland v Heyman* (1985) 157 CLR 424, Brennan J preferred an approach by which the law developed “*incrementally and by analogy with established categories”.*

*Anns* was overruled in *Murphy v Brentwood DC* [1991] 1 AC 398. It was long thought that the House of Lords had, in the meantime, endorsed a threefold test in the case of *Caparo v Dickman* [1990] 2 AC 605: (a) that it was foreseeable that the recipient is likely to suffer damage if the advice is wrong, (b) that there is a sufficiently proximate relationship between the parties, and (c) that it is fair just and reasonable to impose liability.

In fact, as a trio of Supreme Court cases culminating in *NRAM v Steel* [2018] UKSC 13 stressed, *Caparo* endorsed the Australian approach and rejected unifying tests. *NRAM* also underlined that, for an assumption of responsibility to arise, it would need to be established that it was reasonable for the claimant to rely on the defendant and reasonably foreseeable by the defendant that it would do so.

Part 2 looked at the approach taken to claims against auditors by parties other than the company. We now turn to the position of valuers.

**B: CLAIMS AGAINSt valuers**

*Yianni v Edwin Evans* [1982] QB 438 was about the purchase of a house in Crouch End. The purchase price was £15,000 (the same house last sold in 2012 for just under £600,000). Mr and Mrs Yianni were able to advance 20% of this sum. They had to borrow the rest. They applied for a mortgage. The lender engaged Edwin Evans to value the house. They concluded that it was worth the asking price. But they failed to notice serious defects. These were so bad that the house was said by the Judge to be worth little more than its site value.

The Yiannis never saw the valuation report but drew inferences from a loan being offered. The expert evidence before the court was that about 90% of buyers relied on the valuation implicit in the offer of a mortgage. The Judge found that Edwin Evans knew that the house was at the lower end of the market, that the borrower would almost certainly be of modest means, and that such buyers would be certain to rely on its valuation. He went on to find that the Yiannis had, in fact, relied on the valuation. This was despite them not seeing it.

On this footing, the Judge held that a relationship of proximity existed to satisfy the first stage of the test in *Anns*. Turning to the second stage, he saw nothing to negative the duty which would otherwise arise. It followed that Edwin Evans were deemed to have assumed responsibility.

The reasoning might seem strained: if a borrower merely assumes that the lender would not have made a loan unless the valuer had given it certain advice, can he really be said to have relied on the valuation?

The House of Lords revisited the question in the conjoined appeals of *Smith v Eric S Bush*; *Harris v Wyre Forest DC* [1990] 1 AC 831

In the first case, Mrs Smith applied to a bank for a mortgage. The bank instructed a firm of surveyors named Eric S Bush to value the house she was proposing to buy. Mrs Smith signed a declaration that:

*I accept that the society will provide me with a copy of the report and mortgage valuation…. I understand that the society is not the agent of the surveyor or firm of surveyors and that I am making no agreement with the surveyor or firm of surveyors. I understand that neither the society nor the surveyor or the firm of surveyors will warrant, represent or give any assurance to me that the statements, conclusions and opinions expressed or implied in the report and mortgage valuation will be accurate or valid and the surveyor’s report will be supplied without any acceptance of responsibility on their part to me.*

A copy of the valuation report was duly sent to her. The bank advanced a loan. The purchase completed. Eighteen months down the line, the chimney crashed through the bedroom ceiling. This was because the chimney breast had been removed, leaving it unsupported. Eric S Bush had overlooked this.

In the second case. Mr and Mrs Harris applied to a local authority for funding. The authority obtained a valuation from a surveyor on its staff. The Harrises were also required to sign a declaration. This time it read:

*I/We enclose herewith valuation fee and administration fee £22.00. I/We understand that… the valuation …is intended solely for the benefit of Wyre Forest District Council in determining what advance, if any, may be made on the security and that no responsibility whatsoever is implied or accepted by the council for the value or condition of the property by reason of such inspection and report. (You are advised for your own protection to instruct your own surveyor/architect to inspect the property). I/We agree that the valuation report is the property of the council and that I/We cannot require its production.*

As in *Yianni*, the report was not supplied to the borrowers. The surveyor yet again missed a serious defect. The house was subject to settlement. The costs of putting this right were more than the Harrises had paid for it. Ironically, the problem was exposed when they came to sell the house and the same surveyor came out to value it for the new buyer,

It will be recalled from Part 1 that, in *Hedley Byrne*, a disclaimer was fatal to any assumption of responsibility. One might, at first blush, have expected the same outcome in this case. In the meantime, however, the Unfair Contract Terms Act 1977 had come into force. This, in the material part, provided that an exclusion of liability for economic loss would be ineffective unless it satisfied a requirement of reasonableness.

Both claims succeeded at first instance. The Defendants appealed. In *Smith*, the Court of Appeal held that the disclaimer did not meet the requirement of reasonableness. It dismissed the appeal. In *Harris*, a differently constituted Court of Appeal declined to follow this decision. As Kerr LJ observed in his judgment, it was conceded in *Smith* that a duty would have arisen but for the disclaimer.

The Court of Appeal disagreed with the Judge that the disclaimer had to be ignored when determining whether a duty would otherwise arise. Nourse LJ (with whom Caulfield J agreed) concluded that the existence of the disclaimer was enough to distinguish the present case from *Yianni*. Kerr LJ went further and concluded that *Yianni* was wrongly decided.

In the House of Lords, the Defendants drew from the speeches in *Hedley Byrne* a requirement that the defendant had voluntarily assumed responsibility. There was force in this. In *Hedley Byrne*, Lord Reid said:

*A reasonable man, knowing that he was being trusted or that his skill and judgment were being relied on, would, I think, have three courses open to him. He could keep silent or decline to give the information or advice sought: or he could give an answer with a clear qualification that he accepted no responsibility for it or that it was given without that reflection or inquiry which a careful answer would require: or he could simply answer without any such qualification.* ***If he chooses to adopt the last course he must, I think, be held to have accepted some responsibility*** *for his answer being given carefully, or to have accepted a relationship with the inquirer which requires him to exercise such care as the circumstances require.*

Lord Morris said:

*Leaving aside cases where there is some contractual or fiduciary relationship,* ***there******may be many situations in which one person voluntarily or gratuitously undertakes to do something for another person and becomes under a duty to exercise reasonable care****. I have given illustrations. But apart from cases where there is some direct dealing there may be cases where one person issues a document which*

*should be the result of an exercise of the skill and judgment required by him in his calling and* ***where he knows and intends that its accuracy will be relied upon by another****.*

Lord Devlin said:

*I have had the advantage of reading all the opinions prepared by your Lordships and of studying the terms which your Lordships have framed by way of definition of the sort of relationship which gives rise to a responsibility towards those who act upon information or advice and so creates a duty of care towards them.* ***I do not understand any of your Lordships to hold that it is a responsibility imposed by law*** *upon certain types of persons or in certain sorts of situations.* ***It is a responsibility that is voluntarily accepted or undertaken****, either generally where a general relationship, such as that of solicitor and client or banker and customer, is created, or specifically in relation to a particular transaction.*

(Emphasis added in each case.)

This apparent approach chimes with the auditors’ cases reviewed in Part 2. It will be recalled that the courts distinguished between a scenario in which it is merely foreseeable that a third party might rely on the audit report and one in which the auditor entered into a closer relationship with the third party.

But the House of Lords rejected the argument. It inverted Lord Devlin’s analysis and stressed that responsibility did not have to be voluntarily assumed but, in the appropriate case, was deemed by the court to have been assumed.

With this established, Lord Griffiths adopted the same approach as the Judge: that an exclusion clause had to be ignored when determining whether a duty would otherwise arise. This must also be implicit in the reasoned speeches of Lords Templeman and Jauncey. Lords Keith and Brandon agreed with Lord Griffiths and Jauncey.

There is a suggestion in Lord Griffiths’ speech that the committee concluded that the 1977 Act required this approach. If it was, it is questionable whether this can be right. It is one thing to accept, as one must, that the Court of Appeal was wrong (*obiter*) to entertain an argument that the Act only applied to an exclusion of liability for breach of a duty and not the duty itself. It must also follow that the existence of a disclaimer alone cannot prevent a duty from arising. But it is quite another thing to say that it is not to be taken into account at all.

Indeed, as we saw in Part 2, subsequent courts have accepted that the presence or absence of disclaimers can be a relevant factor in the enquiry.

Counsel for the Defendants advanced the argument that no duty could arise where the valuer’s report was not supplied to the prospective borrower. It followed, they submitted, that *Yianni* was wrong. This did not meet with approval. *Yianni* was affirmed.

The threefold test, long associated with *Caparo,* actually had its origins in the speech of Lord Griffiths in *Smith*. He said:

*I therefore return to the question in what circumstances should the law deem those who give advice to have assumed responsibility to the person who acts upon the advice or, in other words, in what circumstances should a duty of care be owed by the adviser to those who act upon his advice? I would answer - only if it is foreseeable that if the advice is negligent the recipient is likely to suffer damage, that there is a sufficiently proximate relationship between the parties and that it is just and reasonable to impose the liability.*

Applying this to the facts of *Harris,* he had no difficulty in holding that a duty existed and that it was unreasonable to disclaim it. But he went on *obiter* to suggest constraints on the further expansion of the

law. He stressed that “[t]*here is no question here of creating a liability of indeterminate amount to an indeterminate class”* and added that:

*It would impose an intolerable burden upon those who give advice in a professional or commercial context if they were to owe a duty not only to those to whom they give the advice but to any other person who might choose to act upon it.*

He indicated that he would not be prepared to extend the duty to subsequent purchasers. He also left open the possibility that the position might be different where the property valued was something other than residential property at the cheaper end of the market. He gave as examples industrial property, large blocks of flats and very expensive houses.

On a narrow reading of his speech, he said no more than that it might be reasonable for valuers to limit their liability in such cases. But this needs to be read together with the speech of Lord Jauncey, whom it might be recalled went on to make a speech in *Caparo*. He concluded that Leading Counsel for the valuers in *Smith* had been right to concede that a valuer might not owe a duty of care to the buyer of a high value residential or commercial property.

Lord Jauncey had doubts about the claim against the local authority in *Harris* but, finding himself alone in this, came down in favour of allowing the appeal.

He and Lord Griffiths both recognised that the purpose of obtaining the valuation reports under consideration had been to comply with statutory requirements under the Building Societies Act 1986 and Housing (Financial Provisions) Act 1958, respectively. They did not consider this to deflect from the existence of a duty to the borrowers.

This might seem to jar with the position adopted towards audit reports in *Caparo*. Lord Jauncey evidently saw no such tension. In his speech in *Caparo*, he explained *Smith* as a case in which the valuation reports were prepared for particular transactions in which it was highly probable that the borrowers would rely on them.

*Smith* remains good law but has been recognised as something of an outlier. In *Williams v Natural Health Foods* [1998] 1 WLR 830, Lord Steyn identified it as a case decided on special facts. In *Saddington v Colleys* [1999] Lloyd’s Rep PN 140, Balcombe LJ said that it “*represents* *the high-water mark in this field”*.

Schiemann J (as he then was) heard *Beaumont v Humberts* [1988] 29 EG 104 after his judgment in *Harris* had been overturned by the Court of Appeal but before the case reached the House of Lords. Mr Beaumont bought an unusual house in Dorset. It had originally been a number of cottages and a barn. It had evolved over the centuries into a single house. The purchase price was £110,000, which – believe it or not - was then over three times the national average. Mr Beaumont engaged Humberts to carry out a survey, but not a valuation.

He applied to a bank for a loan of £30,000. With his application, he enclosed Humberts’ survey report. He expressed the hope that it would be unnecessary to incur the costs of another survey. The bank asked Humberts to conduct a valuation using its standard form. This had a box for an insurance reinstatement value. Humberts populated it with the figure of £175,000.

The bank did not provide a copy of the report to Mr Beaumont, but it told him of Humberts’ reinstatement valuation. It advised that he should obtain buildings insurance for at least this sum, which he did.

By then, Mr Beaumont had independently arrived at a figure of £170,000. The Judge found that he was reassured by the valuer’s assessment but would not have commissioned a valuation of his own if the bank had remained silent about the appropriate figure.

The house burned down. Mr Beaumont made a claim on the policy. The true reinstatement cost turned out to be more like £300,000. Mr Beaumont sued everyone in sight: his solicitor, the bank and the valuer. The claims against the solicitor and the bank fell away. The claim against the valuer failed at first instance.

The Judge held that no duty existed. Material to this was the existing relationship between the parties. The reasoning was that Humberts were entitled to assume that, if Mr Beaumont wanted their advice on reinstatement value, he would have asked for it. For good measure, Judge held that Humberts had not been negligent and that, even if they had, it had not caused any loss. This, he indicated, was because Mr Beaumont would have used his own slightly lower figure if he had not been told of Humberts’ assessment. This was obviously the wrong counterfactual.

By the time that Mr Beaumont’s appeal was considered, the House of Lords’ decisions in *Smith* and *Caparo* were available. Applying the principles distilled from them to the facts of the instant case did not produce a clear answer. The Court of Appeal split three ways.

Staughton LJ agreed with the Judge that no duty arose. He distinguished *Smith* on the basis that it could not be said here that it was likely that Mr Beaumont would rely on Humberts’ assessment of reinstatement value. He also agreed that there was no negligence.

Taylor LJ (as he then was) concluded that the existing relationship between the parties told in favour of a duty, not against one. He considered that, as in *Smith*, there was an overwhelming probability that Mr Beaumont would rely on the valuation. He acknowledged that the house was not at the lower end of the market as were those in *Smith* but added that nor could it be characterised as “*very expensive*”. Nevertheless, he agreed with Staughton LJ that Humberts had not been negligent.

Dillon LJ was also satisfied that a duty existed. He considered it unnecessary on the facts to explore whether the sophistication of the buyer or the value of the property might make a difference to the outcome. Alone on the panel, he found negligence made out.

In the Scottish case of *Wilson v DM Hall* [2004] ScotSC 268, Mr Wilson was an inexperienced property developer. He applied to a bank for a loan to fund a project to demolish a former clubhouse and replace it with a small block of flats. The bank engaged DM Hall to advise, among other things, on the market value of the completed units. It arrived at a value broadly in line with Mr Wilson’s projections.

Mr Wilson secured funding and built out the project. The flats did not sell. The bank went into possession. Mr Wilson blamed it all on DM Hall. But the Outer House of the Court of Session concluded that it owed him no duty. It accepted submissions on behalf of DM Hall that a property developer is in an altogether different position from a residential purchaser. It held that it was not reasonably foreseeable that Mr Wilson would rely on its valuations to determine the sale price of the flats.

*Wilson* was cited at first instance in the English case of *Scullion v Bank of Scotland* [2011] 1 WLR 3212. This was a case about buy-to-let property. Mr Scullion bought a flat with the aim of letting it to tenants. He was directed to it by some sort of consultant who was said to have taken advantage of him.

He applied for a loan through a mortgage broker. In the process, he unwittingly became party to a mortgage fraud. The lender instructed Colleys, which was part of the same group, to prepare a valuation report. Colleys identified a market value of £353,000 and an achievable rent of £2,000 per month. The purchase went ahead. Mr Scullion struggled to find a tenant. When he did, it was at a rent closer to £1,000 per month. He decided to dispose of the flat. It achieved a sale price of £270,000.

The Judge held that Colleys owed a duty of care to Mr Scullion and that both its market valuation and assessment of achievable rent were negligent. He found that Mr Scullion had suffered no loss from the overvaluation but was entitled to damages for the costs of servicing the loan.

In the Court of Appeal, Lord Neuberger MR (with whom Etherton and Gross LJJ agreed) ended his judgment by stating that it gave him no satisfaction to allow the appeal. He acknowledged that Mr Scullion was deserving of the court’s sympathy but was forced to conclude that it would be unprincipled to hold that a duty existed.

He had no difficulty in distinguishing *Smith*. He identified four grounds for doing so. First, the purchase of investment property is commercial in nature. Buyers of such property are, he suggested, likely to be wealthier and more commercially astute than owner occupiers. He concluded that it was far less obvious that they would be likely to rely on the lender’s valuation.

Secondly, the court did not have expert evidence, equivalent to that available in *Smith*, from which to conclude that it was likely that buy-to-let investors commonly relied on lenders’ valuations.

Thirdly, he formed the view that a valuer could reasonably expect a buy-to-let investor to obtain more granular advice on the prospect of letting the property than the achievable monthly rent.

Fourthly, and it has to be said least convincingly, he found that the valuer would appreciate that the lender was primarily interested in the capital value of the flat which went to the strength of its security.

Towards the end of his judgment were glimpses of how he might have approached a case on different facts. In arguing against the existence of a duty, Counsel for Colleys sought to rely on a disclaimer in the bank’s documents. The argument gained no traction. But this was only because Colleys was unaware of the disclaimer. Lord Neuberger accepted that it went to the question of whether it had been reasonable for Mr Scullion to rely on the valuation.

It is implicit in his reasoning that the existence of a disclaimer is relevant to the determination of whether a duty existed. Indeed, following *NRAM* it can be seen that the question of reasonable reliance is not separate from that enquiry but central to it.

Lord Neuberger also appeared willing to accept as a matter of principle that a duty might not exist in a case involving property somewhere between the extremes identified in *Smith*, but he was not convinced that the flat differed by any order of magnitude from the houses considered in that case.

*Omega Trust v Wright & Sons* [1997] 1 EGLR 120 involved a different factual scenario. The claim was advanced by two lenders. A valuer named Barker & Co had provided a company’s existing lenders with a valuation of properties held as security. The company looked to refinance. It approached Omega Trust for a loan. Omega invited the Finindus bank to participate. Finindus agreed, subject to a valuation. Omega instructed Barker & Sons to provide one. It said nothing about Finindus.

Barker & Sons retyped their existing report to address it to Omega. The report contained a disclaimer, which read:

*This report shall be for private and confidential use of the clients for whom the report is undertaken and should not be reproduced in whole or in part or relied upon by third parties for any use whatsoever without the express written authority of the surveyors.*

The Judge held that they owed a duty to Finindus. He was satisfied that they ought to have foreseen that it was a reasonable possibility that the loan might not be made solely by Omega. Leading Counsel for the valuer was surely right to object that this was to place the bar too low. The Court of Appeal declined to deal with the point. It did not need to. This was because it held the disclaimer to be effective. Henry LJ, who gave the main judgment, made the following statement of principle

*It seems to me that this professional valuer, valuing expensive properties in a commercial context, was entitled to know who his client was and to whom his duty was owed. He was entitled, it seems to me, to refuse to assume liability to any unknown lender, indeed, I would go further and say that he is entitled to refuse to assume liability to any known lender to whom he had not agreed.*

*Scullion* and *Omega* *Trust* were relied on by the valuers in *Rehman v Jones Lang Lasalle* [2013] EWHC 1339 (QB). The Claimants were a brother and sister from Bradford. They sought a loan to buy a warehouse and yard in Grimsby. It was tenanted by what appears to have been a cold storage business.

The lender sought a valuation from Jones Lang Lasalle. It produced two reports. In them it advised that the site was worth about £7m tenanted and £4m with vacant possession. There was a dispute of fact over who the first report was prepared for, but the second was undoubtedly prepared for the lender. There was again a disclaimer of liability to anyone except the client.

The sale went ahead through an SPV. The tenant went out of business. The Claimants obtained another valuation which put the value of the site at between £1.5m and £2m. They sued Jones Lang Lasalle It applied for summary disposal on various grounds. Of relevance for present purposes was that the Claimants had no reasonable prospect of establishing a duty of care.

The District Judge dismissed the application. Jones Lang Lasalle appealed to the Judge. Its Counsel painted in broad strokes. This, she said, was a commercial case like *Scullion* and the valuer was entitled to assume that the Claimants would not rely on its reports.

The Claimants’ Counsel insisted that the enquiry was more granular. The nature and value of the transaction, he said, were but ingredients in the mix. He submitted that the sophistication of the Claimants would need to be tested at trial. He drew on aspects of the factual background which might point to an existing relationship of the sort found to exist in *Beaumont*.

The Judge went as far as to accept that it would be rare for a duty to arise in a commercial transaction involving high value property. But she declined to go further and conclude that the tests for summary disposal were met. She accepted the Claimants’ submissions that the question was too fact sensitive.

The disclaimer was a different matter. The Judge accepted the argument that the Claimants could not get past *Omega*. It would, she indicated, require “*something most unusual*” to depart from the general proposition that a surveyor valuing expensive commercial property is entitled to disclaim liability to third parties. In circumstances where the Claimants had not identified any basis for such a departure, she was satisfied that their statements of case disclosed no reasonable grounds for bringing a claim on the second report and that the claim had no realistic prospect of success.

**C: DISCUSSION**

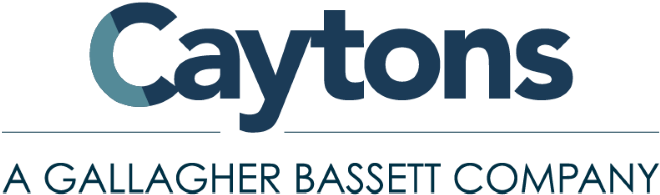
*Smith* is a problematic case. It has been identified as a high-water mark. The courts have shown some reluctance to extend it beyond cases involving the valuation of residential property at the lower end of the market. A valuer will be on firmer ground in a case concerning commercial property. A duty may well not come into existence at all. Even if it otherwise would, a disclaimer of liability is much more likely to be upheld. Similar considerations are likely to apply in cases of high value residential property. Between the extremes, there is more uncertainty. The outcome is likely to be fact specific.

**D: coming up**

In Part 4, we consider cases involving insurance professionals. Subsequent parts will look at cases involving lawyers and construction professionals.

# 

**Further Information**



Given the generality of the note it should not be treated as specific advice in relation to a matter as other considerations may apply.

Therefore, no liability is accepted for reliance on this note.

If specific advice is required, please contact one of the Partners at Caytons who will be happy to help.

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