Supreme Court decision in *Steel and another (Appellants) v. NRAM Ltd (Respondent) (Scotland)* [2018] UKSC 13 – handed down 28 February 2018

The Supreme Court today handed down judgment in the case of *Steel v. NRAM*, considering the circumstances in which a solicitor for one party to a transaction may owe a duty of care and be liable for negligent misstatement to the other party. In unanimously allowing the appeal, they have reaffirmed the primacy of the test: was the reliance of the other party reasonable and was it foreseeable? They concluded that the lender's reliance on statements by the borrowers' solicitors, without independently checking those statements against its own records, was neither. They therefore restored the decision of the Lord Ordinary that the lender's claim failed. Although a Scottish case, the principles considered and applied were the same as in England and Wales.

The facts

Ms Steel and her firm Bell & Scott LLP (together the Appellants) acted over many years as solicitors for the Borrower company. The Borrower owned 4 units on an industrial estate. NRAM made a loan to the Borrower secured by an all monies charge registered against all the properties and also a floating charge. In 2006 the Borrower wished to sell part of the security. NRAM agreed, on condition that £495,000 of the loan was repaid, with the balance to be secured by the existing security over the remaining 2 units. The sale was to complete on 23 March 2007.

At 5 p.m. on the day before, Ms Steel emailed NRAM (who were not represented by solicitors) asking for execution of two draft deeds of discharge which were attached and asking for a letter of non-crystallisation of the floating charge. She stated in her email that the whole loan was to be paid off and she had a settlement figure for this. These statements were wholly mistaken and made without any authority from her client.

However, her request was not queried by NRAM, nor checked by them against their records of their agreement with the Borrower. Instead NRAM simply arranged for the discharges to be executed and the letter provided. The charges were all discharged without anyone noticing the error, and the other units were subsequently sold free of the bank's charges. The Borrower continued to pay the interest on the outstanding loan until 2010 when it went into liquidation. Only then was the mistake discovered by NRAM.

NRAM brought a claim for negligent misstatement against Ms Steel and her firm. The bank was unsuccessful before the Lord Ordinary, who held that NRAM's reliance on the solicitor's email, without any independent checks, was neither reasonable nor foreseeable. However, the Inner House allowed the bank's reclaiming motion (appeal), on the basis that there had nevertheless been an assumption of responsibility by Ms Steel towards NRAM. Damages of £369,81.18 were awarded. The solicitors appealed to the Supreme Court.

There was no dispute that, if a duty of care was owed to NRAM, then it had been breached.

The decision of the Supreme Court

In its decision handed down on 28 February 2018, the Supreme Court unanimously allowed the appeal and restored the original decision. Lord Wilson gave the lead judgment, with whom Lady Hale, Lord Reed, Lord Hodge and Lady Black all agreed.

In doing so, Lord Wilson took the opportunity both to restate the general principles which apply in determining whether a duty of care is owed in relation to negligent statements that cause economic loss, and also to review the particular cases considering when a solicitor for one party may owe a duty of care to another party.

Lord Wilson's starting point was *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465. He emphasised that at the heart of that decision was the need for the representee reasonably to have relied on the representation and for the representor reasonably to have foreseen that he would do so [19]. While likely to be linked, these are two separate enquiries. They amounted to an assumption of responsibility.

Lord Wilson said that subsequently it has become clear that not all cases of negligent misstatement could be despatched simply by reference to the question of whether the representor had "assumed responsibility" to the representee. An important example was the three-way relationship in the cases of *Smith v Eric S Bush* and *Harris v Wyre Forest District Council* [1990] 1 AC 831. This had led Lord Griffiths in those cases to propound the threefold test of whether: (1) it was foreseeable that, if the information was given negligently, the claimants would be likely to suffer damage; (2) there was a sufficiently proximate relationship between the parties; and (3) it was just and reasonable to impose the liability [20-21]. He said that this test was considered shortly afterwards by the House of Lords in *Caparo Industries Plc v Dickman* [1990] 2 AC 605. However, far from approving the threefold test, the House in *Caparo* had queried its utility, as a number of recent decisions of the Supreme Court on duty of care have now noted. Lord Wilson reaffirmed that it is preferable for the law to develop novel categories incrementally and by analogy with established categories [22].

Importantly, he said, *Caparo* had reasserted the need for a representee to establish that it was reasonable for him to have relied on the representation and for this to have been foreseeable. Salient features, according to *Caparo*, would be that the representor knew that it was very likely that the representor would rely on the statement and do so without independent inquiry. Lord Wilson cited with approval the statement of Neill LJ in *James McNaughton Paper Group Ltd v Hicks Anderson & Co* [1991] 2 QB 113 that it is necessary to consider whether the representee should have used their own judgment or sought independent advice, especially in business transactions conducted at arm's length, where it might be very difficult to prove that it was reasonable to do otherwise [23]. In practice, he said, the concept of assumption of responsibility remains the foundation of liability in negligent misstatement cases, even though it may require cautious incremental development to fit some cases [24].

However, the present case fitted the concept of "assumption of responsibility" perfectly, and there was no need to consider incremental development. The unusual feature of the case was that the claim was brought by one party to an arm's length transaction against the solicitor for the other party. Lord Wilson affirmed the general principle in *Ross v Caunters* [1980] Ch 297 that a solicitor generally owes no duty of care to the opposite party [25].

He then reviewed six authorities considering situations in which a solicitor had, or had not, been held to owe a duty of care to an opposing party [26 – 32]. Sometimes this was because the solicitor had stepped outside their normal role, for example where solicitors for a father had promised the mother they would not allow his passport out of their sight if she agreed to it being taken to the Kuwaiti embassy - *Al-Kandari v J R Brown and Co* [1988] QB 665. In general however, said Lord Wilson, the solicitor will not assume responsibility towards the opposite party unless it was reasonable for the latter to have relied on what the solicitor said and unless the solicitor should reasonably have foreseen that he would do so. This was especially relevant in a claim against a solicitor by the opposing party because "*the latter's reliance in that situation is presumptively inappropriate*" [32].

Here, the Lord Ordinary had held that the crucial point was that NRAM had failed to check the accuracy of Ms Steel's representations against its own records prior to executing and returning the deeds of discharge. The Lord Ordinary had concluded that Ms Steel had generally expected NRAM to check her requests before complying with them and had not foreseen that they would rely on her assertions without checking their accuracy. Further, it was reasonable that she had not foreseen this. Any prudent bank taking the most basic precautions would have checked the accuracy of her representations by reference to their own file, or asked for clarification, before complying with her requests [33].

Lord Wilson said this raised an interesting question as to the extent which the Inner House was entitled to go behind what was an evaluative conclusion by the Lord Ordinary. However, the Supreme Court could bypass this because they could simply hold that he was right. A commercial lender about to implement an agreement with a borrower relating to its security does not act reasonably if it simply relies on a description of terms put forward by or on behalf of the borrower. The lender knows the terms of the agreement. Here the bank's officers had immediate access to the correct terms literally at their finger-tips. No decided case had been identified where an adviser had been held to have assumed responsibility for a careless misrepresentation about a fact which was wholly within the knowledge of the representee. This was because in such a case, it would not be reasonable for the representee to rely on the representation without checking its accuracy, and it was reasonable for the representor not to foresee that he would do so [38].

Discussion

Following this decision of the Supreme Court, it would appear that one can divide into three categories the cases where a party has suffered loss through relying on a statement made by the solicitor for an opposing party:

1. Cases where the solicitor is essentially passing on information from the opposing party, which is not known to the claimant. In such cases, the opposing party may have liability for the misrepresentation, but the solicitor is unlikely to have. An example considered in *Steel* was *Gran Gelato Ltd v Richcliff (Group) Ltd* [1992] Ch 560.

2. Cases where the solicitor takes on responsibility for personally saying or doing something which they are peculiarly able to do, and which the claimant cannot know or control, such as certifying that a security is binding on the opposing party or that legal advice as to the meaning of the document has been given to the opposing party. In such cases, the solicitor may well have liability to the claimant because the two stage test of reasonable reliance and foreseeability is met. Examples considered in *Steel* included: *Allied Finance and Investments Ltd v Haddow and Co* [1983] NZLR 22 and *Connell v Odlum* [1993] 2 NZLR 257 and *Dean v Allin and Watts* [2001] EWCA Civ 758, [2001] 2 Lloyd's Rep 249, as well as the *Al-Kandari* case.

3. Cases where the information is either also within the knowledge of the claimant, or which the claimant could check by instructing its own advisers. In such cases the claimant will not succeed, because it will not be able to show that its reliance was either reasonable or foreseeable. *Steel* now falls into this category.

Members of Hailsham Chambers professional negligence team have extensive and detailed expertise in negligent misstatement claims against solicitors and are very happy to advise and assist in such cases.

Nicola Rushton QC, Hailsham Chambers

Wednesday 28th February 2018