Divided ruling on solicitor's professional negligence conveyancing claim

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Property analysis: David Bowden, freelance independent consultant, comments on the consequences of the Court of Session's decision in Northern Rock Asset Management v Steel and talks to Paul Parker, a barrister specialising in professional negligence law at 4 New Square, about what lessons can be learned from this case.

Background

Northern Rock Asset Management PLC v Jane Steel and Bell & Scott LLP [2016] CSIH 11 CA7/13 19 February 2016

The Inner House of the Court of Session in Scotland, in a controversial majority ruling, has overturned a first instance ruling. The majority construed a routine email sent to a lender by a borrower's solicitor about completion to give rise to a positive duty of care to the lender. It is likely that this case will go on final appeal to the Supreme Court of the United Kingdom.

What were the facts in these cases?

David Bowden (DB): Headway Caledonian Limited (HCL) owned a business park near Glasgow comprising four units. HCL had granted a standard security over the business park to Northern Rock plc (NRAM). In 2005 HCL sold Unit 3 and NRAM agreed to restrict its security in return for a partial loan redemption payment.

HCL then agreed to sell Unit 1 of the business park. In September 2006 NRAM emailed HCL to confirm that it would accept £495,000 from the sale of Unit 1 in reduction of HCL's loan. NRAM's email was forwarded to the solicitor acting for HCL. NRAM was unrepresented. The sale of Unit 1 settled on 23 March 2007 and the discharge was sent by NRAM to the solicitor. It was subsequently registered.

Later in 2007 HCL sold the other units. On each occasion NRAM provided letters of non-crystallisation but no payments in redemption of the loan were agreed or made by HCL. HCL continued to pay loan interest to NRAM until April 2010. HCL then went into liquidation, with the loan to NRAM still outstanding.

NRAM sued the conveyancing solicitor and her firm seeking damages for losses which it claimed to have suffered as a result of its reliance on negligent misstatements made in the solicitor's email. NRAM argued that the solicitor owed it a duty to take reasonable care that the statements made in the email were accurate. NRAM said it had reasonably relied on what she told it and had been misled into discharging the security over the business park. The solicitor and the firm denied that they owed a duty of care to NRAM.

What did the critical email say?

DB: At 5pm on 22 March 2007 the solicitor emailed NRAM (at its office in Doxford Park in England) attaching a discharge for the security held by NRAM. The full text of the email can be read in the judgment,

In the email, the solicitor was mistaken. HCL's loan from NRAM was only being partially redeemed. She did not have a settlement figure for full redemption of the loan. She should have attached a deed to restrict the security rather than to discharge it.

What did Lord Doherty decide in the Outer House?

DB: Lord Doherty handed down his reserved judgment following a contested trial on 5 December 2014 (see *NRAM plc v Steel and another* [2014] CSOH 172, 2014 Scot (D) 3/12).

The judge found that it was not reasonable for NRAM to rely on the information contained in the solicitor's email without checking its accuracy. A prudent bank taking the most basic precautions would have checked the information provided by

seeking clarification from the solicitor and/or looking at its file. A solicitor would not foresee that the bank would not carry out checks on the information. The solicitor therefore did not owe NRAM a duty of care in the circumstances.

There were some factors that favoured the imposition of a duty of care. The solicitor's email:

- contained no disclaimer
- had a degree of urgency in its tone
- was communicated directly to NRAM rather than to professional advisers
- came from a trustworthy source—a solicitor

However, NRAM was not vulnerable or dependant. It was a commercial bank. It had the ability to obtain legal advice—internal or external—if required. Moreover, the critical information in the email was factual and concerned matters that could have been checked very easily and very quickly by NRAM. Indeed, that information conflicted with what had previously been understood and arranged between HCL and NRAM. In some respects the email was vague and ambiguous—the subject field of the email referred only to Unit 1 and it did not state what the settlement figure was, or by whom the solicitor had been provided with that information. In the judge's words, the email 'cried out for clarification'.

What were the central issues in this appeal?

DB: There were two issues on this appeal:

- Did the Lord Ordinary err in law in holding that the solicitor owed no duty of care to NRAM when she made the erroneous statements that led to the discharge of the entire security?
- Did the Lord Ordinary err in law in assessing damages on the basis of assuming NRAM would recover £70,351.50 from the liquidator of HCL?

What submissions did the lender make?

DB: The relevant authorities demonstrate the importance of considering the precise circumstances of the individual case when determining whether or not a duty of care arose. A key feature of this case was that the solicitor was acting wholly without instructions, on her own and outwith her mandate. There had plainly been an assumption of responsibility by the solicitor but the Lord Ordinary had failed to apply the test of 'assumption of responsibility' properly in the circumstances of this case set out in *Customs and Excise Commissioners v Barclays Bank plc* [2007] 1 AC 181, [2006] 4 All ER 256.

There were, in fact, seven factors taken together which showed that a duty of care arose:

- the community of interest between the parties
- the trust engendered from previous dealings
- the unequivocal terms of the body of the email
- that the solicitor could have qualified (but did not) her assertions as being based on information provided by her client
- the information in the email was conveyed in an unequivocal and unqualified manner
- the urgency and clear impression that the solicitor expected a prompt response, and
- that the solicitor had no instructions that the loan was being wholly repaid

Smith v Eric S Bush (a firm), Harris v Wyre Forest District Council [1990] 1 AC 831, [1989] 2 All ER 514 makes clear the need to consider the degree of reliance which the adviser should, in the particular circumstances, reasonably have anticipated would be placed on its accuracy by the recipient of the information.

It is 'fair, just and reasonable' to impose a duty of care here because the solicitor was acting without authority. It was clear from the facts that the solicitor ought to have foreseen that NRAM would rely on her email, reposing a default level of trust and confidence in her and there was no doubt that there was sufficient proximity between them. The imposition of a duty of care would be a sensible and just outcome.

What submissions did the conveyancing solicitor make?

DB: To succeed, NRAM had to show that the judge below had gone plainly wrong or that he reached findings or conclusions that no reasonable judge could have made or that his findings cannot reasonably be explained. It was not for an appeal court to interfere with the trial judge's evaluation of the facts or the inferences drawn by him. It was not reasonable for NRAM to rely on the solicitor's email without checking their file. It was not reasonably foreseeable that NRAM would fail do this. The solicitor did not cause NRAM to enter into an agreement with HCL but rather she got the terms of their contract wrong.

A duty of care to NRAM by the solicitorl was not established. The solicitor did not assume responsibility for advising NRAM about the terms of the loan agreed between them and its borrower. That was a matter for the individual who had actually discussed and agreed it with NRAM. Thus put, the argument seemed to be that she had not acted alone. An appeal court could not go behind the trial judge's finding that it was not reasonable to rely on the email.

What ruling did the majority of the Inner House give?

DB: Lady Smith and Lady Clark each gave a separate judgment which was to allow the appeal.

Lady Smith noted that generally the law imposes a duty not to cause unintentional but foreseeable harm. It was recognised that a legal duty exists not to cause economic loss by means of a careless or negligent communication. Lady Smith also noted the importance of the fact that the solicitor had no actual or ostensible authority for making the series of critical statements in the email of 22 March 2007 or to call for the discharges to be executed by NRAM. Lady Smith recognised the greater likelihood of it being concluded that a solicitor who makes representations to another party to a transaction—and/or calls on them to execute important documents—without having any authority to do so owes a duty of care.

It was of critical importance to have regard to the precise circumstances in which the communication was made. It was therefore relevant that the solicitor was acting within the area of her professional skill and there had been previous similar dealings in the past. Although the heading of the relevant email conflicted with the misleading text, it had not been regarded as doing so at the time and the message itself was clear and unequivocal.

Lady Smith also considered whether or not the Lord Doherty below gave careful consideration to the question of whether or not the solicitor fell to be treated by the law as having assumed responsibility for the misstatements and their consequences. Lady Smith made reference to the following signposts which she considered critical in assessing the merits of the appeal, namely whether:

- there has been an assumption responsibility
- the loss was reasonably foreseeable, and
- the imposition of a duty of care would be fair, just and reasonable

Having taken the above into account, it was held that the solicitor had assumed responsibility given that there was reasonable foresight of significant economic loss suffered by NRAM in a sufficiently proximate relationship with the solicitor who had previously shown herself to be a trustworthy source.

All three judges agreed that the Lord Doherty's assessment of damages at just under £370,000 was correct.

What did the dissenting judge in the Inner House say?

DB: Lord Brodie, dissenting, held that the Lord Doherty below had taken into account the various factors relied on by NRAM. His conclusion was that it was not reasonable for NRAM in such a position to rely on the misstatement without checking its accuracy was 'one that as the reasonable man on the bench he was equipped to make'. The Supreme Court of the United Kingdom had emphasised the limited power of an appeal court to reverse the findings of a first instance judge who had heard the evidence. Lord Doherty below had not made any error in his approach to the evaluation of the unchallenged findings in fact. It was therefore Lord Brodie's opinion that the Inner House was not better placed to substitute its own decision.

Will there be a final appeal to the Supreme Court of the United Kingdom?

DB: As this appeal judgment was handed down after 22 September 2015, the provisions of the Courts Reform (Scotland) Act 2014 apply. This brings to an end the former practice that Scottish appeals could go to the Supreme Court without permission where two senior counsel certified the appeal as fit.

As the Inner House was divided, an application for permission for a final appeal was inevitable. The solicitors acting for the solicitor have duly asked the Inner House for permission to appeal. The deadline for the solicitors for NRAM to lodge their objections was 8 April 2016. The decision of the Inner House on permission is now awaited.

If the Inner House refuses permission, the solicitor will then have to ask the Supreme Court directly for permission to appeal. Such permission will normally only be given if the appeal raises a point of general public importance, and in deciding whether it does, the Supreme Court will benefit from the Inner House's view on whether an appeal should be given permission to proceed.

What status does this ruling have for courts in England and Wales?

DB: This is a ruling from the Inner House of the Court of Session so judges in Scotland in the Outer House or in Sheriff Courts must follow it. However, the Court of Appeal in London is not bound to follow this ruling. Judges sitting in England and Wales in either the High Court or County Court must follow decisions of the Court of Appeal and Supreme Court. They are not bound by a Scottish decision even one from the Inner House. In *Caulfield v Marshalls Clay Products Ltd* [2004] EWCA Civ 422, [2004] All ER (D) 292 (Apr) Laws LJ said that:

> '[I]t would be a constitutional solecism of some magnitude to suggest that by force of the common law of precedent any court of England and Wales is in the strict sense bound by decisions of any court whose jurisdiction runs in Scotland only or-most assuredly-vice versa.'

Laws LJ said (in relation to employment tribunals) that 'as a matter of pragmatic good sense' lower courts in 'either jurisdiction will ordinarily expect to follow decisions of the higher appeal court in the other jurisdiction (whether the Court of Session or the Court of Appeal) where the point confronting them is indistinguishable from what was there decided'.

When cases do reach the higher appeal courts in England, decisions from the Inner House can fare poorly. For example, the commercial agents ruling in *King v T Tunnock Ltd* [2000] IRLR 569 was not followed by the Court of Appeal and was doubted as correct by the House of Lords in *Lonsdale (t/a Lonsdale Agencies) v Howard & Hallam Ltd* [2007] UKHL 32, [2007] 4 All ER 1. In addition, on connected lender liability, the decision in *Durkin v DSG Retail Ltd* [2014] UKSC 21, [2014] 2 All ER 715 saw the Supreme Court overrule the Inner House and restore a sheriff court ruling.

What are the practical implications of this decision?

Paul Parker (PP): This decision signposts the fact that the courts may not yet be ready to adopt as cautious an approach towards the imposition of liability on solicitors as may be desirable. The opportunity in this case to demonstrate that a sophisticated commercial entity is responsible for its own acts/omissions—in particular where, as here, the bank was not even the client of the professional facing blame—has not been grasped.

Two practical legal consequences flow from this decision and from the scenario that it illustrates.

First, it would appear that a solicitor acting for the other side in a transaction, or for a third party, will now have to have regard to the degree of commercial sophistication of their counterpart. This would be an unwelcome extension of the principle, applicable as between solicitors and their own clients and explained in cases such as *Carradine Properties Ltd v D J Freeman & Co* [1999] Lloyd's Rep PN 483 at paras [486], [487] and *Riley v Pickersgill* [2004] UKPC 14, [2004] All ER (D) 407 (Feb) at para [7], that the scope of the duty owed varies depending on the characteristics of the client. This decision serves to instruct that the existence of a duty and (if in existence) scope of the duty owed by a solicitor to their non-client counterpart will depend on the characteristics of that non-client counterpart, characteristics of which the solicitor may hardly be cognisant.

Second, it may be that the door is better now open for a species of breach of warranty of authority claims. In the non-litigation context, breach of warranty of authority claims against solicitors have most commonly arisen in the case of forgery and/or identity fraud, for example:

- *Penn v Bristol and West Building Society* [1997] 3 All ER 470
- *Excel Securities plc v Masood* [2009] EWHC 3912 (QB)
- *Frank Houlgate Investment Company Ltd v Biggart Baillie LLP* [2011] CSOH 160, [2012] PNLR 2, 2011 Scot (D) 12/11, and
- *Cheshire Mortgage Corn Ltd v Grandison* [2012] CSIH 66, 2013 SC 160

It is clear from such cases that a cause of action for breach of warranty of authority will lie, in the words of Lord Doherty at para [69], 'where the agent transacts without his principal's authority because in transacting as he does he exceeds the scope of his authority'.

There was no issue as to breach of warranty of authority in this case, and so in this appeal, because the parties had proceeded on the agreed basis that NRAM had no such claim against the solicitor—an agreed basis on which Lord Doherty had had very considerable doubts. Given, however, that liability for breach of warranty of authority is strict and not dependent on the presence of negligence on the solicitor's part, claimants/pursuers may be better served, in cases where their opponent's solicitor has acted in an unauthorised manner or made unauthorised representations, in focusing on that solicitor's warranty of authority rather than attempting to fashion a duty of care, even despite the assistance which this decision undoubtedly now gives.

What action should lawyers take in light of this decision?

PP: Plainly, the solicitor's starting-point must be to check with their client that the proposal, or request, or representations, about to be made to the other side are on instructions. It is clearly a matter of professional judgment as to what to seek specific instructions on and what not to. But on the 'big things'—for example, replies to enquiries (*Gran Gelato Ltd v Richcliff (Group) Ltd* [1992] Ch 560, [1992] 1 All ER 865), certificates of authenticity (*Allied Finance and Investments Ltd v Haddow & Co* [1983] NZLR 22), the putting in place of effective security in a quasi-joint venture situation (*Dean v Allin & Watts* [2001] EWCA Civ 758, [2001] All ER (D) 288 (May)), seeking discharges of mortgages (this decision) etc—the client's specific instructions should be sought and obtained.

That apart, there are three steps that a conveyancing solicitor should also be able to carry out quickly and inexpensively:

- they should check whether the other side to the transaction is or is not legally represented
- if the other side is not legally represented in the transaction, the solicitor should carry out a brief internet background check on them to form a view as to the level of their commercial sophistication, including the presence (or otherwise) of in-house legal counsel—that should inform the tenor of their correspondence with them
- in any event and above all, the solicitor should include a disclaimer of responsibility in the body of their correspondence—properly drafted, the disclaimer ought to be effective to negate the reliance necessary for the cause of action to arise

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