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Supreme Court to hear solicitor's negligence claim made by lender who failed to check its own file

Jane Steel and Bell & Scott LLP v. Northern Rock Asset Management PLC
UKSC 2016/0111

Article by David Bowden

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Executive speed read summary

The Supreme Court of the United Kingdom has sensibly granted permission for a final appeal by a solicitor and her firm facing a claim for negligence against it by a slap dash lender. The Inner House of the Court of Session in Scotland, in a highly controversial majority ruling, in February 2016 overturned a sensible first instance ruling made by the Lord Ordinary. In a strained ruling, the majority in the Inner House managed to construe 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. At trial, Lord Doherty ruled that a prudent bank taking the most basic precautions would have checked the information provided by seeking clarification or looking at its own file. The trial judge ruled that the conveyancing solicitor did not owe the lender a duty of care. The Supreme Court will hear this case towards the end of 2017 and it is hoped that the atrocious decision of the Inner House will be overruled. The Supreme Court will have an opportunity to ensure that professional negligence claims of this nature will be put back to where practitioners always understood them to be following the House of Lords ruling in *Smith* v. *Eric S. Bush* [1990] 1 AC 831 a generation ago.

Jane Steel and Bell & Scott LLP v. Northern Rock Asset Management PLC
UKSC 2016/0111 *8 November 2017*
Supreme Court of the United Kingdom (Lords Neuberger PSC, Carnworth and Hodge JJSC)

What are the facts?

Headway Caledonian Limited ('HCL') owned a business park near Glasgow. It comprised 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 (Helen Steel) and her firm (Bell & Scott LLP) 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 that 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?

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 text of this email said:

> ***'Subject:** headway caledonian limited sale of Pavilion 1 Cadzow Park Hamilton (title nos LAN 6421 and LAN 124573)*
>
> *Helen/Neil*
> *I need your usual letter of non-crystallisation for the sale of the above subjects to be faxed through here first thing tomorrow am if possible to 0141 221 0123 marked for my attention - I have had a few letters on this one for previous other units that have been sold. I also attach discharges for signing and return as well as the **whole loan** is being paid off for the estate and I have a settlement figure for that. Can you please arrange to get these signed and returned again asap.*
>
> *Many thanks*
> *Jane A Steel*
> ***Jane Steel***
> ***Partner***
> *For Bell & Scott LLP'*
>
> (Emphasis added)

Ms Steel 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 happened in the Outer House of the Court of Session?
Lord Doherty handed down his reserved judgment following a contested trial on 5 December 2014 **[2014] CSOH 172 CA7/13.** The trial 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. It had a degree of urgency in its tone. It was communicated directly to NRAM rather than to professional advisers. It also 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 happened in the Inner House of the Court of Session?
There were 2 issues on the 1st appeal:

- Did the Lord Ordinary err in law in holding that Ms Steel 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?

In a reserved judgment handed down on 19 February 2016 the Inner House (by a 2-1 majority) over ruled the judge below - **[2016] CSIH 11 CA7/13**. Lady Smith and Lady Clark each gave a separate judgment which was to allow the appeal. All three judges agreed that the Lord Doherty's assessment of damages at just under £370,000 was correct

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 Ms Steel 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 Ms Steel 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 Ms Steel 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 Ms Steel had assumed responsibility given that there was reasonable foresight of significant economic loss suffered by NRAM in a sufficiently proximate relationship with Ms Steel who had previously shown herself to be a trustworthy source.

What did the dissenting judge in the Inner House rule?
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 emphasized 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.

What was the criticism of the Inner House judgement?
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 his 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 486-487 and *Pickersgill v Riley* **[2004] UKPC 14, [2004] PNLR 31** at [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 his non-client counterpart will depend on the characteristics of that non-client counterpart, characteristics of which the solicitor may hardly be cognizant.

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, e.g. *Penn v Bristol & West B S* **[1997] 1 WLR 1356**, *Excel Securities plc v Masood* **[2010] Lloyd's Rep PN 165**, *Frank Houlgate Investment Co Ltd v Biggart Baillie LLP* **[2011] CSOH 160, [2012] PNLR 2**, and *Cheshire Mortgage Corpn Ltd v Morna Grandison* **[2012] CSIH 66** among others. 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 paragraph [69] of his opinion:

> *"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 Ms Steel, 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 happened in the Supreme Court?
The solicitors sought permission for a final appeal by which, when granted, they would then be seeking to over-turn the majority judgement of the Inner House and to restore the judgement of the Lord Ordinary in the Inner House. Fortunately on 8 November 2016 a panel of 3 Supreme Court Justices has granted permission for a final appeal.

When is this case likely to be heard?
It should come on for hearing in quarter 4 of 2017. It is unlikely to meet the criteria for expedition. Although a case from Scotland, it is one based on common law negligence and will have UK wide implications.

24th November 2016

David Bowden is a solicitor-advocate and runs David Bowden Law which is authorised and regulated by the Bar Standards Board to provide legal services and conduct litigation. He is the cases editor for the Encyclopedia of Consumer Credit Law. If you need advice or assistance in relation to consumer credit, financial services or litigation he can be contacted at info@DavidBowdenLaw.com or by telephone on (01462) 431444.