28 February 2018

PRESS SUMMARY

Steel and another (Appellants) v NRAM Limited (formerly NRAM Plc) (Respondent) (Scotland) [2018] UKSC 13
On appeal from [2016] CSIH 11

JUSTICES: Lady Hale (President), Lord Wilson, Lord Reed, Lord Hodge, Lady Black

BACKGROUND TO THE APPEAL

The First Appellant, Jane Steel, is a solicitor. In 2007 she was a partner in Bell & Scott LLP, the Second Appellant, who were a firm of solicitors in Glasgow. In her capacity as a solicitor Ms Steel had, for many years, acted for a Mr Hamish Munro, and subsequently a company in which he had an interest – Headway Caledonian Ltd. This company was the registered owner of Cadzow Business Park in Hamilton, a property which comprised four different units, and had been registered with the Land Registry in two separate titles. When the business park was purchased Headway Caledonian had granted the Respondent, NRAM, an 'all sums' standard security over the property, which had been registered against the titles in 1998. In addition, in 2002, Headway had granted NRAM a floating charge over all its assets.

In 2006 Headway entered into a contract for the sale of Unit 1 of the park and a request was duly made to NRAM to release this unit from its security. This was agreed by NRAM, in consideration of a repayment of £495,000, and it was understood by both parties that after the sale the security would remain in place in relation to Units 2 and 4 (Unit 3 having already been sold in 2005). The sale was due to complete on 23 March 2007. At 5pm on 22 March Ms Steel sent an email to NRAM asking for a letter of non-crystallisation of the floating charge, and for the execution of two draft deeds of discharge. Ms Steel wrote: "I also attach discharges for signing and return…as the whole loan is being paid off for the estate and I have a settlement figure for that." This request was not queried by NRAM, and the two deeds of discharge (which referred to the discharge of security over all three of the remaining units, rather than just Unit 1) were executed and a letter of non-crystallisation drafted and signed. The letter was signed by Mr Clarke, the head of the Loan Review Team, who made no attempt to check the accuracy of Ms Steel's statements against the material on NRAM's file.

It has since been accepted by Ms Steel that the statement in her email was entirely inaccurate – she had never been instructed that the whole loan was to be repaid, and neither did she have a settlement figure for that repayment. At trial, Ms Steel could not explain this error, and the fact that the security had been discharged went unnoticed by NRAM until 2010 when Headway Caledonian went into liquidation. NRAM consequently issued a claim against Ms Steel (and Bell & Scott LLP) for damages suffered as a result of its reliance on her email of 22 March 2007. NRAM alleged that she had owed it a duty of care and had made the statements in the email negligently. The Lord Ordinary dismissed the claim, but the Inner House allowed NRAM's reclaiming motion, and substituted an award of damages in its favour of £369,811.18.

JUDGMENT

The Supreme Court unanimously allows the appeal and restores the interlocutor of the Lord Ordinary. Lord Wilson gives the judgment, with which Lady Hale, Lord Reed, Lord Hodge and Lady Black agree.

REASONS FOR THE JUDGMENT

The starting point, when considering whether someone is liable for a careless misrepresentation which causes economic loss, is the case of *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465. What lay at the heart of that decision was the need, in order for the representor to be liable, for the representee reasonably to have relied on the representation, and for the representor reasonably to have foreseen that he would do so [**18-19**].

However, it has since become clear that not all claims in tort for losses resulting from careless representations can easily be resolved by reference to this concept of assumption of responsibility. This was what prompted Lord Griffiths, in *Smith v Eric Bush; Harris v Wyre Forest District Council* [1990] 1 AC 831, to propose a threefold test that required (1) that it was foreseeable that, were the information given negligently, the claimants would be likely to suffer damage; (2) that there was a sufficiently proximate relationship between the parties; and (3) that it was just and reasonable to impose the liability [**20-21**]. This test was considered in *Caparo Industries Plc v Dickman* [1990] 2 AC 605, and for many years the court in *Caparo* was considered to have indorsed it. However, as has already been explained by the Supreme Court in other recent cases, the court's decision in *Caparo* was actually more nuanced than has often been allowed, and in fact the case is notable for its reassertion of the need for it to be reasonable for the representee to have relied on the representation, and for the representor to have reasonably foreseen that they would so rely [**22-23**].

Indeed, it is now clear that this concept of assumption of responsibility remains the foundation of liability for a careless misrepresentation, although the concept may sometimes require cautious incremental development in order to fit cases to which it does not readily apply [**24**]. Such development is unnecessary here, however, as the concept fits the case perfectly [**25**]. Consideration of six relevant authorities demonstrates that a 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 the opposite party would actually rely on the statement. These ingredients of reasonable reliance and foreseeability are particularly relevant to a claim against a solicitor by the opposing party, because it is presumed to be inappropriate for a solicitor to assume such a responsibility towards the other side [**32**].

In this case, the Lord Ordinary had found that Ms Steel generally expected NRAM to check her requests before complying with them, and therefore that she had not foreseen that they would rely on her assertions without checking their accuracy. In addition, any prudent bank taking basic precautions would have checked the accuracy of such statements, and it was therefore not reasonable for NRAM to have relied on the email [**33**].

The majority of the Inner House however had disagreed, and held that there were certain circumstances which led to the conclusion that Ms Steel had assumed responsibility for the representations in the email, such that the court did not even need to consider whether NRAM should have checked its file. These circumstances included, amongst other things, Ms Steel's area of expertise, and the fact the NRAM had not instructed solicitors [**34**]. The approach of the majority was, however, incorrect. Nothing in the relevant case law supports a conclusion that it is not always necessary for a representee to show that it was reasonable of it to have relied on the relevant representation. This is an essential element of the concept of assumption of responsibility [**35**]. Moreover, the Lord Ordinary was correct to find that a commercial lender about to implement an agreement relating to its security does not act reasonably if it proceeds upon no more than a description of the agreement's terms put forward by the borrower [**38**].

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:
http://supremecourt.uk/decided-cases/index.html