Solicitor's liability to opposing party

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Steel v NRAM Limited [2018] UKSC 13 (28 February 2018)

This case had an unusual dimension as the claim was brought by one party to an arm's length transaction against the solicitor who was acting for the other party.

It is well known that a solicitor owes a duty of care to the party for whom he is acting but generally owes no duty to the opposite party. The absence of that duty runs parallel with the absence of any general duty of care on the part of one litigant towards his opponent. This case illustrates that an assumption of responsibility by a solicitor towards the opposite party will be rarely established.

The appellant solicitor (**S**) acted for H, who owned a business park (comprising four different units) which had been bought with the assistance of a secured loan from the respondent bank (**N**). H also granted N a floating charge over all its assets.

In 2005, S acted for H on the sale of Unit 3, which was released from the security held by N in return for a partial redemption of its loan. During this process, S forwarded for execution by N deeds of restriction, by which its security was limited to Units 1, 2 and 4. N executed them and returned them to S, and the sale of Unit 3, unencumbered, then proceeded.

In 2006, S acted for H on the sale of Unit 1. N agreed to release this unit from its security upon receipt of a payment of £495,000, and it was understood by both parties that after the sale the security would remain in place for Units 2 and 4. At 5pm on the day before completion, S sent an email to N asking for a letter of non-crystallisation of the floating charge. The email said: *"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 N, 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 the head of N's Loan Review Team, who made no attempt to check the accuracy of S's statements against the material on N's file.

S accepted that the statement in the email was entirely inaccurate – S had never been instructed that the whole loan was to be repaid, and neither did S have a settlement figure for that repayment. At trial, S could not explain this error and was found to be guilty of gross carelessness.

When the error was noticed, N consequently issued a claim against S for damages suffered (almost £370,000) as a result of its reliance on the email. N alleged that S had owed it a duty of care and had made the statements in the email negligently. The claim was dismissed at first instance, but the appeal was allowed.

The Supreme Court unanimously allowed S's appeal, with the result that the claim failed. In so doing, the Supreme Court emphasised that in order for a representor to be liable for careless misrepresentation which causes economic loss, it is necessary 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.

The relevant authorities considered by the Supreme Court demonstrate 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.

This was not a special case. The first instance court had found that S generally expected N to check its requests before complying with them, and therefore that S had not foreseen that N would rely on its 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 N to have relied on the email. The Supreme Court held the first instance court 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. Where a fact is wholly within the knowledge of the representee, it is not reasonable for the representee to rely on the representation without checking its accuracy through independent inquiry.

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