

NRAM Ltd v Steel [2018] UKSC 13

Summary

In 1997, Headway Caledonian Ltd bought the Cadzow Business Park in Hamilton (made up of four units) with the assistance of a loan from Northern Rock, the now defunct building society. The loan was secured by a charge over the units making up the Business Park. In 2005, Headway sold one of the units (unit 3) and the defendant solicitor Jane Steel acted for Headway in the sale. At that point, Northern Rock's assets were being managed by NRAM Ltd (formerly Northern Rock (Asset Management) Ltd), and NRAM agreed to release its charge over unit 3 in return for being paid £470,000 out of the sale of unit 3.

In 2006, it was proposed that Headway do the same with another one of the units (unit 1), and NRAM (which was at that point owed £1.22m by Headway) agreed that it would release its charge over unit 1 in return for being paid £495,000 (out of the sale price for unit 1 of £560,000). This would have left the remaining £725,000 that Headway owed NRAM secured by a charge over units 2 and 4. It was agreed that unit 1 would be sold on 23 March 2007. The day before the sale was due to go through, Steel sent NRAM, and asked NRAM to sign and return to her, some documents that had the effect of releasing the charge not just over unit 1 of the Cadzow Business Park, but units 2 and 4 as well. In her covering e-mail, Steel represented that 'the whole loan is being paid off for the estate and I have a settlement figure for that' – thus creating the impression that the entire £1.22m that Headway owed NRAM was to be paid back the following day, with the result that NRAM's security over units 1, 2 and 4 should be discharged. NRAM duly signed and sent back the documents Steel sent them. However, the following day, when unit 1 was sold, NRAM was paid the originally agreed £495,000 and not £1.22m. This left NRAM being owed £725,000 by Headway, but with no security to protect it in the event that Headway failed to repay the debt.

Strangely, NRAM never objected to the fact that it had only been paid £495,000 on the sale of unit 1. Nor did it take any steps to enforce the security that it might have thought it still had over units 2 and 4 when those units were later sold by Headway. Headway went into liquidation in 2010, still owing NRAM money, and NRAM had no effective security that would enable it to recover the money owed to it. So NRAM sued Steel in negligence, claiming that their loss was attributable to her negligent misrepresentation in her e-mail that the entire loan to Headway was going to be paid off the following day. When Steel was asked why she had sent an e-mail containing such a misrepresentation, she could not explain how she came to send such an e-mail. It was accepted at all levels that her sending the e-mail was grossly careless.

At first instance, it was decided, however, that Steel's carelessness did not make her liable to NRAM for the money it had lost. It was held that it had not been reasonable to rely on Steel's statement in her e-mail to NRAM what the effect of the 23 March 2007 transaction would be, and this meant Steel had not owed NRAM a duty of care in making that statement. On appeal, the finding of the first instance judge was reversed. The case went to the UK Supreme Court, which reinstated the decision of the first instance judge. Lord Wilson gave the only judgment and held (at [19]) that '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' lay 'at the heart' of the House of Lords' decision in *Hedley Byrne & Co Ltd v Heller & Partners* [1964] AC 465 as to when a duty of care would be owed in a case of negligent misrepresentation. He went on to find that 'a commercial lender about to implement an

agreement with its borrower referable to its security does not act reasonably if it proceeds upon no more than a description of its terms put forward by or on behalf of the borrower' (at [38]), with the result that Steel could not have been said to have 'assumed a responsibility' to NRAM in stating that the entire loan to Headway would be paid off on 23 March 2007, and consequently did not owe NRAM a duty of care in making that statement.

Comments

Lord Wilson's judgment is dangerous in so far as it creates the impression that in a case where 'A makes a careless misrepresentation which causes economic loss to B [and] there is no contract between them' (at [1]), all that needs to be shown – for the purpose of establishing that A owed B a duty of care – is that B reasonably relied on A's representation and A should have reasonably foreseen that B would so rely. If this is correct, then *Williams v Natural Life Health Foods Ltd* [1998] 1 WLR 830 looks as though it was wrongly decided.

In that case, the claimants were supplied a report that misled them into thinking that they had good prospects of making a success of opening a health food store in Bristol. The report was supplied to them by the Natural Life Health Foods company, but was actually written by Mistlin, the sole owner of the company. Having lost all the money they invested in opening the health food store, and finding that Natural Life Health Foods was not worth suing, the claimants tried to sue Mistlin instead, arguing that he had owed them a duty of care in writing his report. Their claim was dismissed on the basis that Mistlin had not 'assumed a responsibility' to the claimants. But in *Williams*, it was reasonable for the claimants to rely on the report that Mistlin prepared, and Mistlin must have foreseen that they would rely on that report. So why was there no 'assumption of responsibility' in *Williams*? In *McBride and Bagshaw*, we suggest that what lies at the heart of the concept of an assumption of responsibility is an *assurance* – A assumes a responsibility to B, if A assures B (or gives B the reasonable impression that he is assuring B) that B can safely rely on him in some way. Such an assurance (or the reasonable impression thereof) was missing in *Williams* – *Mistlin* never assured the claimants in that case that they could safely rely on him to have taken care in preparing his report: it was the *Natural Life Health Foods* company that gave them that assurance.

It is not, of course, suggested that Lord Wilson meant to overrule *Williams*, or meant to depart from the established jurisprudence on when we can and cannot say that A 'assumed a responsibility' to B. Probably influenced by the way in which the first instance judge approached the case, he simply expressed himself in a very infelicitous way in finding that Steel did not owe NRAM a duty of care in sending NRAM her e-mail on 22 March 2007. Nor is it suggested that Lord Wilson went wrong in finding that Steel did not 'assume a responsibility' to NRAM in sending that e-mail. He did not. When Steel sent her e-mail, she was simply informing NRAM of what her understanding was of the effect of the 23 March sale of unit 1. She gave no assurance that she could be relied upon to have taken care in reaching that understanding. Nor could her position as a solicitor mean that she reasonably gave the impression that she could be relied on to have taken such care, given that she was not acting for NRAM but for Headway. Steel was simply telling NRAM, 'This is my understanding of what is happening tomorrow – given this, could you sign these documents and return them to me?' She was not saying (and did not reasonably give the impression of saying), 'This is my understanding of what is happening tomorrow and you can rely on me to have taken care to ensure that my understanding is correct – so given this, could you sign these documents and return them to me?'

As such, the result in the *NRAM* case seems perfectly correct; it remains to be seen whether the way in which that result was arrived will have some nasty side effects for our future understanding of when a duty of care is and is not owed under *Hedley Byrne*.

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