Neutral Citation No. [2004] NIQB 81

Ref: **CAMF5129**

Judgment: approved by the Court for handing down
(subject to editorial corrections)

Delivered: **26/11/04**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

Between:

BRIAN JEFFERS

Plaintiff;

-and-

NORTHERN BANK LIMITED

Defendant.

CAMPBELL LJ

[1] This matter came before me as the trial of preliminary issues in an action. For the purpose of the hearing of the summons it was agreed by the parties that statements of fact in the statement of claim were to be taken as being true

[2] These show that in 1994 Mr Barry Jeffers, a businessman of an entrepreneurial nature, became engaged in a venture to make and supply granite setts and cobbles. As he was a customer at the Waring Street Branch of Northern Bank ("the Bank") in Belfast he took advice from officials there before forming a company to carry on this new business.

[3] Stonebase Limited was the name given to the company and an account was opened in its name at the Waring Street branch of the Bank. Not only did Mr Jeffers have his personal account there but also a joint account with his wife and their home was mortgaged to the Bank.

[4] While the company was trading Mr Jeffers entered into a guarantee with the Bank as security for advances made to it. In addition the Bank obtained an all monies charge over his house.

[5] In 1995 a company called Albrighton plc ("Albrighton") opened negotiations with a view to a take over of Stonebase by a purchase of shares. While these negotiations were in train the manager of the Waring Street branch of the Bank revealed to Albrighton that it did not intend to advance any further credit to Stonebase and planned to appoint a receiver.

[6] Initially this information dampened the enthusiasm of Albrighton for a take over however after a short space of time it showed renewed interest in purchasing shares in the company. Negotiations had reached an advanced stage when Mr Alan Masterson of Northern Bank Leasing, a subsidiary of the Bank which had leased equipment to Stonebase, made further disclosures to Albrighton about the financial status of Stonebase.

[7] In close succession on at least six occasions the manager of the Waring Street branch of the Bank informed the managing director of Albrighton that in addition to the Bank appointing a receiver, it was the intention of Northern Bank Leasing to repossess machinery leased to the company as payments from Stonebase had fallen into arrears.

[8] Faced with these disclosures Albrighton terminated negotiations for the purchase of Stonebase and an opportunity for the introduction of funding for the company was lost. It did not recover from this blow and was wound up by order of the court on 11 November 1997.

[9] Prior to the commencement of proceedings to wind up the company the Bank issued proceedings for possession and sale of Mr Jeffers's dwelling house. An order was made in favour of the Bank on 21 December 1995 with a stay of execution to 30 October 1996.

[10] Mr Jeffers case is that as bankers to Stonebase, the Bank breached not only a contractual duty of confidentiality owed to the company but also a duty of care owed to him personally.

[11] By making these disclosures to Albrighton without the express or implied authority of Stonebase it is claimed that the Bank was in breach of each of these duties. It is accepted on behalf of Mr Jeffers that the information given by the Bank was neither false nor inaccurate and that there was no misstatement on its part

[12] At a review hearing before the Commercial Judge, it was indicated to the parties that they should attempt to agree the questions that the

Court was to be asked to determine. They have done so and these are the questions that have been agreed;

(i) Does the Defendant owe the Plaintiff, in his personal capacity as a customer, guarantor and mortgagor of his dwelling house in favour of the Defendant, a duty not to disclose to a third party, namely, Albrighton plc [and/or Northern Bank Leasing], information about another customer of the Defendant or the account or state of account of that other customer, namely the company Stonebase Limited (where the information alleged to have been disclosed is not alleged to have been incorrect)?

(ii) Does the disclosure of information (where the information alleged to have been disclosed is not alleged to have been incorrect) about the company Stonebase Limited or the account or state of account of the company Stonebase Limited to a third party, namely Albrighton plc [and/or Northern Bank Leasing], give rise to a cause of action for breach of the contract for personal banking services between the Plaintiff and the Defendant?

(iii) Does the disclosure of information (where the information alleged to have been disclosed is not alleged to have been incorrect) about the company Stonebase Limited or the account or state of account of the company Stonebase Limited to a third party, namely Albrighton plc [and/or Northern Bank Leasing], give rise to a cause of action in favour of the Plaintiff in negligence against the Defendant?

(iv) Is there an implied term in the contract for banking services with the Plaintiff in his personal capacity that the Defendant:

(a) Would act in respect of the company Stonebase Limited in a manner that would not lead to "personal financial catastrophe" for the Plaintiff in his personal capacity?

(b) Would support the company Stonebase Limited in an "appropriate" manner as alleged in the Statement of Claim?

(c) Would not expose the Plaintiff to any unnecessary or preventable personal financial risk or harm?

(v) Does the Defendant owe the Plaintiff, either in tort or under the contract for banking services between the Plaintiff in his personal capacity and the Defendant, a duty to pay to the Plaintiff monies lent by the Defendant to a third party, namely Stonebase Limited?

(vi) Does a breach of contract by the bank as regards Stonebase Limited, which exposes the plaintiff personally to greater financial risk and detriment, amount to a breach of the bank's contract with the plaintiff personally?

(vii) Does an act of negligence by the bank as regards Stonebase Limited, which exposes the plaintiff personally to greater financial risk and detriment, amount to negligence by the bank in respect of the plaintiff personally.

[13] There is an implied term in a contract between banker and customer that the banker will not disclose to a third party, without the consent of the customer whether express or implied, either the state of the customer's account, or any of his transactions with the bank or any information about the customer that has been obtained through the keeping of his account, unless the banker is compelled to do so by order of a Court, or the circumstances give rise to a public duty of disclosure, or the protection of the bank's own interests require it. (*Tournier v National Provincial and Union Bank of England* [1924] 1KB 461). Stonebase has therefore a cause of action against the Bank for breach of contract as a result of the unauthorised disclosures made by the Bank.

[14] The central issues are whether in addition to this breach of contract there is also a breach of any contract between Mr Jeffers and the Bank and in addition or in the alternative a breach of a duty of care owed by the Bank to him in his personal capacity.

[15] The House of Lords held in *Henderson v Merrett Syndicates Ltd (No.1)* [1995] 2 A.C. 145 that a contractual duty owed by A to B may coexist with a tortuous duty of care owed by A to C upon an assumption of risk.

[16] In the case under consideration there was not only a contractual relationship between A and B but also contractual relationships between A and C. as Mr Jeffers was a customer of the Bank and both a guarantor and a mortgagor. Where contracts exist they are to be taken to regulate the relationship between the parties. In *Tai Hing Cotton Mill Limited v Liu Chong Hing Bank Limited* [1986] 1AC 80 at 107 Lord Scarman said:

> "Their Lordships do not believe that there is anything to the advantage of the law's development in searching for a liability in tort where the parties are in a contractual relationship. This is particularly so in a commercial relationship. Though it is possible as a matter of legal semantics to conduct an analysis of the rights and duties inherent in some contractual

> relationships including that of banker and customer either as a matter of contract law when the question will be what, if any, terms are to be implied or as a matter of tort law when the task will be to identify a duty arising from the proximity and character of the relationship between the parties, their Lordships believe it to be correct in principle and necessary for the avoidance of confusion in the law to adhere to the contractual analysis: on principle because it is a relationship in which the parties have, subject to a few exceptions, the right to determine their obligations to each other, and for the avoidance of confusion because different consequences do follow according to whether liability arises from contract or tort, e.g. in the limitation of action."

[17] As Lord Goff commented in *Henderson* (at page 186) the issue in *Tai Hing* was whether a tortuous duty of care could be established which was more extensive that that which was provided for under the relevant contract. However in light of the observation of Lord Scarman it is appropriate that the questions for the Court should begin with the position in contract.

[18] In advancing the case on behalf of Mr Jeffers his counsel Mr Coyle, did not rely upon any express contractual term founding his argument on an implied term. He submitted that in the contract between Mr Jeffers as surety and the Bank it was to be implied that in financing the business of Stonebase the Bank would not expose Mr Jeffers to unnecessary financial risk.

[19] One of the principles to be applied in the implication of terms into a contract is that the term must be necessary to give business efficacy to the contract. As Lord Wilberforce said in *Liverpool City Council v Irwin* [1977] AC 239, 254;

> "such obligation should be read into the contract as the nature of the contract itself implicitly requires, no more, no less: a test , in other words, of necessity."

[20] It is difficult to see any necessity for such a term to be implied into a contract of guarantee or a mortgage. If for example there are two sureties the creditor can proceed against one or both at his own choosing. This is likely to be to the detriment of a surety required to meet the full liability and left to recover the excess of his own liability from the other surety. Equally it is not necessary for such a term to be implied into a mortgage as

the mortgagee can choose his remedy and the time of exercising it though this may be to the detriment of the mortgagor.

[21] The relationship between a bank and a customer with a current account is that of debtor and creditor and a statement of the general obligations on both sides is found in the judgment of Atkins LJ in *Joachimson v Swiss Bank Corporation* [1921] 3 KB 110 at 127.There are a number of defined circumstances in which the actions of a banker that are to the detriment of a customer may make the banker liable in damages for breach of contract for example by the wrongful dishonour of a cheque. There is however no basis for the implication of a general duty not to act to the detriment of a customer and there may be circumstances when a bank is obliged to do so in order to protect the interests of its own shareholders or where compelled by law. I do find any necessity for such a term to be implied into the contract between Mr Jeffers as the holder of a personal account and the Bank.

[22] I turn now to consider the existence of a duty of care which was also canvassed by counsel on behalf of Mr Jeffers.

[23] In *White v Jones* [1995] 2 AC 207 at 274 F Lord Browne-Wilkinson said;

> "I am not purporting to give any comprehensive statement of this aspect of the law. The law of England does not impose any general duty of care to avoid negligent misstatements or to avoid causing pure economic loss even if economic damage to the plaintiff was foreseeable. However, such a duty of care will arise if there is a special relationship between the parties. Although the categories of cases in which such special relationship can be held to exist are not closed, as yet only two categories have been identified, viz. (1) where there is a fiduciary relationship and (2) where the defendant has voluntarily answered a question or tenders skilled advice or services in circumstances where he knows or ought to know that an identified plaintiff will rely on his answers or advice. In both these categories the special relationship is created by the defendant voluntarily assuming to act in the matter by involving himself in the plaintiff's affairs or by choosing to speak. If he does so assume to act or speak he is said to have assumed responsibility for carrying through the matter he has entered upon. In the words of Lord Reid in Hedley Byrne [1964] A.C.

> 465, 486 he has "accepted a relationship . . . which requires him to exercise such care as the circumstances require," i.e. although the extent of the duty will vary from category to category, *some* duty of care arises from the special relationship. Such relationship can arise even though the defendant has acted in the plaintiff's affairs pursuant to a contract with a third party."

[24] Mr K M Stanton has noted "In practice, many banking activities are bound to impact in financial terms on parties other than the bank's customer. However, in spite of the origin of the *Hedley Byrne* principle being in the banking sphere, there is little evidence of tort having any real impact on standard banking practice." (PN 1998 14(3) 131-135). It is not surprising therefore that Mr Coyle, was unable to refer me to any authority where in a situation similar to the present a duty of care has been held to be owed to a third party

[25] That there is no fiduciary relationship between a banker and customer was established by *Foley v Hill* (1848) 2 HL.Cas 28 and no basis exists for any other special relationship with Mr Jeffers such as those referred to by Lord Browne-Wilkinson.

[26] I was invited by Mr Coyle to apply to the facts the well known three fold test of foreseeability and proximity and fairness, justice and reasonableness as explained by Lord Bridge in *Caparo Industries plc v Dickman* [1990] 2 AC 605 at 617-8. This is one of what has been described by Brooke LJ as a "battery of tests" (*Parkinson v St James NHS Trust* [2002] QB 266 at para.50) that are available. The others are described concisely in Clerk and Lindsell in Torts 18th Ed. (2000) para 7.95 as the 'assumption of responsibility test' of Lord Goff in *Henderson v Merrett Syndicates Ltd* (supra) and the 'incremental approach' suggested by Lord Bridge in *Caparo.*

[27] Before any particular test is adopted it is helpful to keep in mind the observation of Cooke P. in *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 N.Z.L.R. 282 where he said;

> "A broad two- stage approach or any other approach is only a framework, a more or less methodical way of tackling a problem. How it is formulated should not matter in the end. Ultimately the exercise can only be a balancing one and the important object is that all relevant factors are weighed. There is no escape from the truth that, whatever formula is used, the outcome

> in any grey area case has to be determined by judicial judgment. Formulae can help organise thinking but they cannot provide answers."

[28] In *Wells v First National Commercial Bank* (30 January 1998) a decision of the Court of Appeal,(mentioned by Mr Stanton in the article referred to earlier) the question was did a bank owe a duty of care to the intended beneficiary of an irrevocable instruction to pay given by a customer to the bank? The Court answered in the negative as there was no relationship between the plaintiff and the bank and the facts did not bring the case within the exceptional area where there is no other effective remedy available and for example the peculiar status of a solicitor is involved.

[29] Mr Coyle relied upon a decision of the Court of Appeal in *Chapman v Barclays Bank PLC* [1998] PNLR14. Mr Chapman was a director and shareholder of a group of companies. Barclays Bank provided overdraft facilities for the group and indicated an intention to cancel these facilities. The group of companies made a proposal to the Bank and before making a decision the Bank called for an independent report. A well-known firm of accountants provided a report and recommended the appointment of an administrator. Some inaccuracies were found in the report and it was agreed that a report free from defects should be prepared. Acting on the inaccurate report the Bank petitioned and obtained an administration order and in due course the Group of companies went into liquidation. The plaintiff claimed that if an accurate report had been obtained the companies would not have gone into liquidation and he would not have suffered loss. The issue was whether the plaintiff could establish that the Bank owed him a duty of care.

[30] Otton LJ having referred to the fact that;

> "The plaintiff was not a customer of the bank, the bank was not in a position where advice was sought or given. There were no circumstances from which it can be inferred that the bank assumed any responsibility towards Mr Chapman."

went on to conclude that the plaintiff did not satisfy the first of the *Caparo* conditions as there was no proximity between the parties.

[31] Mance LJ in agreeing with Otton LJ added that he would accept as conceivable that there could be circumstances where a company was faced with a financial crisis which would be of the greatest significance for its controllers and owners, where a bank or its reporting accountants might assume some duties towards the controllers or shareholders.

[32] Applying the three stage *Caparo Industries* test. Mr Jeffers had his personal account at the same branch as Stonebase and it was there that he entered into a guarantee on behalf of the company and created the charge over his own home against the borrowings of the company. It was therefore plain to the Bank that if the company failed Mr Jeffers, a customer of the Bank, was likely to suffer economic loss. Although there was such foresight of financial loss to Mr Jeffers this alone is not sufficient to create a duty of care.

[33] There must be proximity between the Bank and Mr Jeffers. Mr Coyle relied on the fact that in *Chapman* the plaintiff, was not a customer of the bank and that Mr Jeffers was not only a customer of the Bank but had also taken advice from it on the formation of Stonebase.

[34] In response Mr Shaw QC (who appeared with Mr Jonathan Dunlop for the Bank) submitted that the fact that the parties had such a business connection was insufficient to satisfy the proximity test. Mr Jeffers must also show that the Bank had assumed responsibility towards him. This he suggested was also absent in *Chapman* as may be seen from the judgment of Otton LJ at paragraph 27.

[35] The assumption of responsibility test features in the speeches of Lord Goff in *Spring v Guardian Assurance plc.* [1995] 2AC *296* and in *Henderson* (supra). In *White v Jones* (supra) at 274 B Lord Browne-Wilkinson explained the phrase as referring to " a conscious assumption of responsibility for the task rather than a conscious assumption of legal liability to the plaintiff for its careful performance."

[36] In the current edition of *Clerk & Lindsell on Torts* 18th ed. (2000), para 7-95 it is noted that ;

> "Different views have been expressed as to the relationship of the threefold test and assumption of responsibility. Lord Goff in *Henderson*181C-D, regarded 'assumption of responsibility' as rendering any inquiry into the threefold criterion of fairness as being superfluous. An alternative view regards 'assumption of responsibility' as a sub-set of proximity."

[37] Whether the assumption of responsibility is applied as a separate test or as an aspect of proximity it is an essential consideration. In the statement of claim it is said that Ms. Lee Taylor who was manager of the Waring Street branch;

> "without permission of the Plaintiff, advised Albrighton plc that the Defendant had no intention of supporting the company any further and intended to appoint a Receiver."

And continues,

> "Prior to the said finalization of the terms of that revived deal, the said Ms Lee Taylor again in breach of the code of confidentiality approached the said Peter Woodman on at least six occasions in close succession advising him that in addition to the Defendant appointing a Receiver, its associated leasing company the Northern Bank Leasing Group would repossess machinery for arrears of payment under the lease."

[38] On these facts if the Bank assumed responsibility towards anyone it was Albrighton and it is difficult to see how by disclosing the information it was in any sense assuming responsibility towards Mr Jeffers. Unlike the solicitor in *White v Jones* who was to draft a will under which the plaintiffs were the intended beneficiaries and the managing agents in *Henderson* who had accepted responsibility for the interests of the plaintiff names, the Bank had not assumed any role on behalf of Stonebase or Mr Jeffers in the negotiations taking place between Stonebase and Albrighton.

[39] For the third *Caparo* test to be satisfied it must be just, fair and reasonable in all the circumstances of the case to impose a duty of care. In *Wells* (supra) both at first instance and in the Court of Appeal the Court took the view that finding in favour of the plaintiff would revolutionise banking law by creating a widely applicable duty. I agree with the learned author of *Winfield and Jolowicz on Tort* 16th edn. at page 106 that the question of what is fair, just and reasonable may not lend itself to "bright line" rules . He goes on to cite a passage in *Barrett v Enfield LBC* [2001] "AC 550 at 560 where Lord Browne–Wilkinson cautioned against applications to strike out "in an area of the law which [is] developing…[where] it is of great importance that such developments should be on the basis of actual facts found at trial not on hypothetical facts assumed (possibly wrongly) to be true…".

[40] With this in mind I come to apply the remaining test. So far as the Bank was concerned Mr Jeffers was the "owner" of the company. It must have been aware of the financial status of the company and so conscious of the importance to Mr Jeffers of the negotiations with Albrighton. On the other hand a development of the law resulting in a bank in its dealings with one customer owing a duty of care to other customers known by it to

be guarantors of the account of the former or controlling shareholders in it or even employees, could have a significant impact on the business of banks in general.

[41] In S*utherland Shire Council v Heyman* (1985) 60 A.L.R. 1 at 43 Brennan J said:

> "It is preferable in my view, that the law should develop novel categories of negligence incrementally…".

[42] In the sphere of banking law it would be a considerable step beyond the existing position to hold that there is a duty of care in a situation such as this. In my judgment the test of justice, fairness and reasonableness is not satisfied. This is not an exceptional case as Stonebase, its liquidator or his assignee, has an effective remedy against the Bank and is entitled to seek damages for breach of contract.

[43] In the absence of any breach of a contract between Mr Jeffers and the Bank or of a duty of care the questions are each answered in the negative.