The Scope of Negligent Misstatement

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Introduction

Negligent misstatement occurs where there is a representation of fact, which is incorrect, which is carelessly made, and is relied on by another party to their disadvantage. As explained in our previous article, for some time, it has been possible to claim for economic loss arising out of a negligent misstatement where no contractual or fiduciary relationship exists between the parties. This is provided, however, that a special relationship of sufficient proximity[1] exists between the parties.

The Supreme Court in its recent decision in *Walsh v Jones Lang Lasalle Limited [2017] IESC 38* has brought clarification to the interpretation of the law in relation to negligent misstatements in Ireland.

Facts

The plaintiff, David Walsh, a property investor (who had significant experience in the property market), was given a brochure by Jones Lang Lasalle Limited ("**JLL**"), a well-known firm of estate agents and auctioneers, in respect of a property, which he subsequently purchased. The brochure contained incorrect measurements for the property which resulted in it being described as almost 20% larger than it actually was. Mr. Walsh issued proceedings against JLL claiming that he had suffered a loss of €590,000.00 based on an estimate of the lost rental value into the future.

[1] *Hedley Byrne & Co. Ltd v Heller & Partners Ltd [1964] AC 465*

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The High Court, in awarding Mr. Walsh €350,000.00 in damages[2] in respect of the negligent misstatement, concluded that there was sufficient proximity between the parties to give rise to a duty of care and that the disclaimer was not effective to relieve JLL of liability for negligence in making such a statement. JLL appealed against the finding of liability (there was no appeal in relation to quantum).

The Supreme Court

The core fact in this case was that the measurement of the premises was incorrect. The legal issue was whether, in light of the disclaimer in the brochure produced by JLL, JLL were liable to Mr. Walsh in respect of that misstatement.

By a three to two majority[3] the Supreme Court overruled the High Court's finding that JLL owed a duty of care to Mr. Walsh. The Supreme Court confirmed that, at least at the outset, the approach to any disclaimer in a negligent misstatement case was to view it as a piece of evidence relevant to the question of whether a relationship existed sufficient to give rise to a duty of care and it was not appropriate to approach a disclaimer with the strictness that the courts analyse exemption clauses seeking to exclude liability which already exists. Examining the two page brochure which contained the incorrect measurements, the court noted that a disclaimer stated that *"every care"* was taken in preparation of the brochure but intending purchasers should *"satisfy themselves as to the correctness of the information given".*

Proximity Test

O'Donnell J in the Supreme Court summarised the High Court decision stating that the High Court had concluded that there was sufficient proximity between the parties to give rise to a duty of care (and perhaps that it was not necessary to distinguish between negligent acts and negligent statements) and that the disclaimer was not effective to relieve JLL of liability for negligence in making such a statement.

O'Donnell J commented that it was necessary to place this claim in a wider context. He commented that the proximity of the parties in this instance was created by the contract between the purchaser and the vendor, and arguably the contract between the vendor and its agents. It is against this background that the claim that the vendor's agents (JLL) owed to the purchaser a duty of care should have been approached.

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[2] The amount awarded to Mr. Walsh was that amount which Mr. Walsh had overpaid for the premises and was not based on his argument of loss of rental value.

[3] O'Donnell J., Laffoy J. and O'Malley J. agreed that the appeal should be allowed while McKechnie J. and MacMenamin J. dismissed it.

The Broad or Narrow Approach to Liability

The Supreme Court commented that the narrow version of Mr. Walsh's claim depends solely on the interpretation of the waiver for the purposes of the traditional law of negligent misstatement. The question is whether the relationship between the parties is sufficient to create a duty of care and a disclaimer can be an important piece of evidence in that regard. Mr. Walsh's case, on this narrow version, is simply that the terms of the waiver here are not sufficient to mean that a duty of care did not arise. A broader version of the claim would, however, involve a significant development of the law, and a blurring of the distinction between negligent misstatements and the law of negligent acts, if not its removal. On the traditional principles of negligent misstatement, a waiver is relevant when considering whether a duty of care can arise at all. However, if the case is approached on the basis that there was an existing duty of care by reason of the proximity of the parties, then the waiver becomes a clause excluding or limiting liability to which courts have traditionally applied a very strict analysis.

The Approach to any Disclaimer in Negligent Misstatement

O'Donnell J held that *Hedley Byrne*[4] was particularly relevant to the present case. Quoting extensively from *Hedley Byrne* and Kenny J. in *Bank of Ireland v Smith & Ors [1966] I.R. 646*, he said it is clear that, at least at the outset, the approach to any disclaimer in negligent misstatement was to view it as a piece of evidence relevant to the question of whether a relationship existed sufficient to give rise to a duty of care, and that it was not appropriate to approach a disclaimer with the strictness that the courts analyse exemption clauses seeking to exclude liability which already exists.

McCullagh v. Lane Fox & Partners Ltd. [1996] P.N.L.R. 205 was quoted by the court as the case which has a similar fact pattern to the present matter. In that case, the Court of Appeal of England and Wales held that the disclaimer prevented any assumption of responsibility, and therefore, any duty of care arising. That case, O'Donnell J commented, was authority for the continued application of the approach set out in *Hedley Bryne* where the disclaimer is viewed not as an exemption clause but rather as part of the evidence as to whether a risk had been assumed, and a duty of care arose. This must be assessed in light of all of the facts, and in particular, the structure of the transaction which takes place in a relationship between each of the parties controlled by contract[5].

Interpreting the disclaimer objectively, and reading it as a whole, the Court held that the disclaimer was not immaterial, that JLL did not owe a duty of care to Mr. Walsh and was therefore not in breach of that duty. Considering the matter objectively there was no assumption of responsibility on

[4] The decision in *Hedley Bryne v Heller* [1964] AC 465 was accepted as representing Irish law in the case of *Securities Trust Ltd. v Hugh Moore & Alexander Ltd. [1964] IR 417*.
[5] It was noted relevant that the special relationship and assumption of liability were alleged to arise from the terms of particulars made available generally rather than any special interaction between the employee of JLL and Mr. Walsh.

the part of JLL in relation to the task of furnishing accurate internal measurements and the consequence was that the law imposed no duty of care on JLL.

The conclusion that JLL did not owe a duty of care to Mr. Walsh in respect of the accuracy of the internal measurements of the property as shown in the brochure furnished by JLL to Mr. Walsh spelled the "*death knell*" of Mr. Walsh's claim against JLL for damages for negligent misstatement.

Wildgust Application

Mr. Walsh argued that the judgment in *Wildgust*[6] now permitted a court to approach a case of negligent misstatement on the same legal basis as any claim made in reliance on negligent acts. Consequently, he argued that the traditional issues arising in the area of negligent misstatement such as special relationship, assumption of responsibility, reliance etc. could be dispensed with, and the issue could be approached simply on the basis of whether the relationship gave rise to a duty of care, and whether the disclaimer successfully excluded any liability for breach of that duty.

O'Donnell J stated that *Wildgust* it is not authority for the proposition that cases of negligent misstatement do not require a consideration of whether there has been an assumption of risk on the part of the maker of a statement, or more broadly whether the circumstances are such as to give rise to a duty of care[7].

Dissent

MacMenamin J in his dissent held that there was a duty upon JLL to take reasonable care to provide accurate information and that they were in breach of that duty. He was of the view that there is only one answer to the question, whether, objectively considered, the information on the website created a relationship of proximity between the parties? He held it did. Equally, he held that there is only one answer to the question as to whether it is fair, just and reasonable to impose a duty of care. In his view, it was.

He was of the view that the trial judge carefully analysed each of the principles identified in *Wildgust*. The trial judge held the foreseeability and proximity tests to be satisfied. He was satisfied there was communication to a member of an identifiable class who would rely upon it. MacMenamin J stated that the trial judge correctly held that the waiver carried with it a representation from a firm of the highest integrity that every care had been taken in preparing the brochure. He concluded that the information given was for a specific purpose, actually made known to the purchaser, in circumstances where the firm should have known that the information would be relied on, and acted upon. He held on the facts that the remainder of the disclaimer had no legal efficacy. He upheld the judgment of the High Court, and dismissed the appeal.

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[6] *Wildgust v Bank of Ireland and others* [2006] 1 I.R. 570.
[7] O'Donnell J held that it is clear that the case is only authority for the proposition that it is not necessary to show individual reliance by the plaintiffs in a particular situation like that of Mr. Wildgust.

Comment

This case provides welcome guidance from the Supreme Court as to liability for negligent misstatements and the significance of a disclaimer in determining whether a duty arises on the part of the author of the statement in favour of those who rely on it. It would be unwise, however, to interpret the case as meaning that a disclaimer will always prevent liability arising. Claims of negligent misstatement require a consideration of whether there has been an assumption of risk on the part of the maker of a statement, or more broadly whether the circumstances are such as to give rise to a duty of care.

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