Hilary Term
[2018] UKSC 13
On appeal from: [2016] CSIH 11

JUDGMENT

Steel and another (Appellants) *v* NRAM Limited (formerly NRAM Plc) (Respondent) (Scotland)

before

Lady Hale, President
Lord Wilson
Lord Reed
Lord Hodge
Lady Black

JUDGMENT GIVEN ON

28 February 2018

Heard on 7 November 2017

Appellants	*Respondent*
Alastair Duncan QC	Ronald Clancy QC
Chris Paterson	Graeme Hawkes
(Instructed by CMS Cameron McKenna Nabarro Olswang LLP)	(Instructed by TLT LLP)

LORD WILSON: (with whom Lady Hale, Lord Reed, Lord Hodge and Lady Black agree)

1. A makes a careless misrepresentation which causes economic loss to B. There was no contract between them. But did A owe a duty of care to B? No, said the trial judge. Yes, said the appellate court. So it is A who brings this further appeal.

2. Ms Steel, who was the first defender and is now the first appellant, is a solicitor. At the material time she was a partner in Bell & Scott LLP, a firm of solicitors in Glasgow, who were the second defenders and are now the second appellants; I will refer to them as "the firm". NRAM Ltd, until recently named NRAM Plc and, prior to that, named Northern Rock (Asset Management) Plc, was the pursuer and is now the respondent; I will refer to it as "Northern Rock".

3. Ms Steel and the firm appeal against an interlocutor issued by an Extra Division of the Inner House of the Court of Session (Lady Smith; Lord Brodie who dissented; and Lady Clark of Calton who agreed with Lady Smith) on 19 February 2016. By its interlocutor, the Inner House allowed Northern Rock's reclaiming motion in respect of an interlocutor which had been issued in the Outer House by the Lord Ordinary, Lord Doherty, on 5 December 2014. He had sustained the pleas in law of Ms Steel and the firm and had assoilzied them from the first conclusion of the summons. In other words he had dismissed Northern Rock's claim. The Inner House, however, sustained Northern Rock's second plea in law and substituted an award of damages in its favour against Ms Steel and the firm in the sum of almost £370,000, being the sum which the Lord Ordinary had assessed as the amount of damages payable by them to Northern Rock in the event that, contrary to his conclusion, they were liable to it at all.

4. For many years prior to 2007 Ms Steel had acted for Mr Hamish Munro. From 2005 onwards she also acted for a company in which he had an interest, namely Headway Caledonian Ltd; I will refer to it as "Headway".

5. In 1997 Headway had purchased Cadzow Business Park in Hamilton. The property, which comprised Units 1, 2, 3 and 4, had been registered in the Land Register under two separate titles. In order to make the purchase, Headway had borrowed part of the price from Northern Rock; and in return it had granted Northern Rock an "all sums" standard security over the property, which had been registered against the titles in 1998. Indeed in 2002 Headway had granted Northern Rock a floating charge over all its assets.

6. In 2005 Headway proposed to sell Unit 3 of the business park. Ms Steel acted for it in the sale. So she negotiated on Headway's behalf with Northern Rock for the release of the unit from its security. Northern Rock did not appoint solicitors to represent it in that regard; it was not its practice to do so in relation to a negotiation of that character. It agreed to release the unit from its security in return for a partial redemption of its loan, namely a repayment of almost £470,000. The transaction duly proceeded. Ms Steel forwarded for execution by Northern Rock deeds of restriction, by which its security was restricted to Units 1, 2 and 4. It executed them and returned them to her. The sale of Unit 3, unencumbered, then proceeded; and, on behalf of Headway, Ms Steel remitted the sum of almost £470,000 to Northern Rock.

7. Later in 2005 Headway proposed to sell a property in Lossiemouth over which Northern Rock held a standard security for a separate loan. Again, Ms Steel acted for Headway in the sale. Again, she dealt directly with Northern Rock in respect of the repayment of its loan and the discharge of its security. The sale, the repayment and the discharge all duly proceeded.

8. In 2006 Headway entered into heads of agreement for the sale of Unit 1 of the business park in Hamilton for £560,000. Ms Steel was instructed to act on its behalf in the proposed sale. Either she or Mr Munro himself asked Northern Rock to release Unit 1 from its security. Northern Rock obtained a valuation of Units 2 and 4 in the sum of £1,425,000. It noted that its loan to Headway then secured on the three units was about £1,222,000 and decided to require repayment of £495,000 in return for the release of its security upon Unit 1, which would leave the balance of its loan apparently well secured upon Units 2 and 4. In September 2006, by email to Mr Munro, Northern Rock therefore confirmed that it would release its security upon Unit 1 in consideration of a repayment of £495,000 by way of reduction of the loan. By its email Northern Rock made clear that it expected its security to remain in place in relation to Units 2 and 4 unless and until they were also sold. Mr Munro at once forwarded Northern Rock's email to Ms Steel. Headway accepted its terms.

9. Ultimately it was agreed that the transaction of sale would settle on 23 March 2007. Several weeks beforehand Mr Munro had, by email, instructed Ms Steel that, upon settlement, she should remit £470,000 (later corrected to £495,000) to Northern Rock and should remit the balance of the proceeds to Headway.

10. At 5.00 pm on 22 March 2007, namely the eve of the proposed settlement, Ms Steel sent to Northern Rock the email which is central to these proceedings. She wrote:

> "Subject: headway caledonian limited sale of Pavilion 1 Cadzow Park Hamilton (title nos …)
>
> Helen/Neil
>
> I need your usual letter of non-crystallisation for the sale of the above subjects to be faxed through here first thing tomorrow am if possible … marked for my attention - I have had a few letters on this one for previous other units that have been sold. I also attach discharges for signing and return as well as the whole loan is being paid off for the estate and I have a settlement figure for that. Can you please arrange to get these signed and returned again asap.
>
> Many thanks
>
> Jane A Steel
>
> …"

11. On any view this was an extraordinary email. It was quite wrong for Ms Steel to say that the whole loan was to be paid off. It had never been suggested to her, or at all, that the whole loan was to be repaid. Her instructions from Headway had never been to that effect. On the contrary, and as she had been told, Northern Rock's loan was to be reduced by repayment only of £495,000 and its security upon Units 2 and 4 was to remain. Equally, it was quite wrong for Ms Steel to say that she had a settlement figure for repayment of the whole loan. She had no such thing. Northern Rock had never supplied such a figure to her; it would have been irrelevant.

12. In evidence to the Lord Ordinary given seven years later, Ms Steel said that she accepted that she must have sent the email but said that she had no recollection of having done so and that she could not explain why she had so misrepresented the nature of the proposed transaction between her client and Northern Rock. No doubt Ms Steel is usually a solicitor of the utmost competence but on this occasion she was guilty of gross carelessness.

13. Labouring, as she was at the time when she sent the email to Northern Rock, under the misapprehension that Headway was undertaking to repay the whole loan secured on the remaining three units, Ms Steel attached to it not the two draft deeds of restriction of Northern Rock's security to Units 2 and 4 which would have been

appropriate to the agreement reached, but, instead, two draft deeds of discharge of its security upon all three units, being one deed for each of the two registered titles.

14. Ms Steel's email, addressed to Helen and Neil at Northern Rock, was read by Mr (Neil) Atkin, a case manager, and, at 8.58 am on 23 March 2007, attached to an email of his own, he forwarded it and its attachments to Mr Clarke, who, as the head of the Loan Review Team, had authority within Northern Rock to authorise discharges. One minute after receiving the two emails Mr Clarke, who had read them albeit not Ms Steel's attachments, forwarded them to Ms Harrison in Northern Rock's administration team. Mr Clarke had made no attempt to check the accuracy of Ms Steel's statements against the material on Northern Rock's file. Ms Harrison apparently understood, and correctly understood, that, by forwarding the emails to her, Mr Clarke was authorising her to cause the deeds of discharge to be executed as well as to draft, for his signature, the requested letter of non-crystallisation of the floating charge over Unit 1.

15. On that morning of 23 March 2007, the two deeds of discharge were therefore executed on behalf of Northern Rock; a letter of non-crystallisation was drafted and signed by Mr Clarke; and copies of all of them were at once faxed to Ms Steel. Thus it was that, on that same day, upon her undertaking to deliver the original deeds of discharge to the solicitors for the purchasers within seven days, Ms Steel settled the sale of Unit 1 on Headway's behalf. She remitted £495,000 to Northern Rock, which received it on 27 March and apparently raised no question about the amount of it. On that day it posted the original deeds of discharge to her and two days later, in compliance with her undertaking, she forwarded them to the purchaser's solicitors, who caused them to be registered in the Land Register. Thus was Northern Rock's security on Units 2 and 4 discharged.

16. Until 2010 Headway continued to make interest payments to Northern Rock on the balance of the loan. Headway then went into liquidation; and it was at that time, according to evidence given on behalf of Northern Rock, that it discovered that its security for the loan had been discharged. Units 2 and 4 had, however, by then been sold. As had been foreshadowed in 2006, Headway had sold them later in 2007; Ms Steel had again acted for it in the sales and she had extracted from Northern Rock the necessary letters of non-crystallisation of the floating charge. One might expect that, when alerted to the proposed sales and if continuing to believe that its standard security upon the units remained in place, Northern Rock would then have purported to enforce it. But there is no evidence to that effect. These later events are shrouded in mystery.

17. The court will proceed, as invited, on the basis that, by the email dated 22 March 2007, Ms Steel and the firm caused both the discharge of Northern Rock's security over Units 2 and 4 and, resulting therefrom, an ultimate loss to it, net of

recovery elsewhere, of almost £370,000. It notes, however, that the issue in the case might well have been cast in terms of whether they were the cause of Northern Rock’s loss rather than whether they owed a duty of care to it.

18. In *Customs and Excise Comrs v Barclays Bank Plc* [2006] UKHL 28, [2007] 1 AC 181, Lord Mance at para 85 described the case of *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 as “the fountain of most modern economic claims”. In the *Hedley Byrne* case the appellant asked its bankers to inquire into the stability of a company and, in response to the inquiry, the company’s bankers, acting (so it was assumed) carelessly, gave false information about the company, which it expressed as “without responsibility” but on which the appellant relied to its detriment. Because of the disclaimer the appellant’s claim against the company’s bankers failed. The House of Lords held, however, that in the absence of the disclaimer the bankers would have owed a duty of care to the appellant. At p 529 Lord Devlin held that, in the absence of a contract between a representor and a representee, a duty of care in making the representation arose only if the representor had assumed responsibility for it towards the representee; and he proceeded to interpret all five of the speeches delivered in that case as requiring that the responsibility should have been voluntarily accepted or undertaken. The assumption of responsibility could, he explained at pp 529 and 530, be express or implied from all the circumstances. Lord Pearce added at p 539 that liability in such circumstances could arise only from “a special relationship”.

19. What is noteworthy for present purposes is the emphasis given in the decision in the *Hedley Byrne* case to 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. This is expressly stressed in the speech of Lord Hodson at p 514. In fact it lies at the heart of the whole decision: in the light of the disclaimer, how could it have been reasonable for the appellant to rely on the representation? If it is not reasonable for a representee to have relied on a representation and for the representor to have foreseen that he would do so, it is difficult to imagine that the latter will have assumed responsibility for it. If it is not reasonable for a representee to have relied on a representation, it may often follow that it is not reasonable for the representor to have foreseen that he would do so. But the two inquiries remain distinct.

20. In the decades which followed the decision in the *Hedley Byrne* case, it became clear that not all claims in tort for losses consequent upon representations carelessly made could satisfactorily be despatched by reference to whether the representor had assumed responsibility for it towards the representee. A case in point is the situation in which the representor is bound by a contract with a third party to make a representation upon which the claimant has relied: an analysis of whether, in making the representation in those circumstances, he has voluntarily assumed responsibility for it towards the claimant would be artificial. Thus in *Smith v Eric S Bush* and *Harris v Wyre Forest District Council* [1990] 1 AC 831 the claimants, in

purchasing their houses, had relied on information about their condition contained in reports given by surveyors pursuant to contracts between them and prospective mortgagees. The House of Lords held that the surveyors owed duties of care to the claimants. Lord Griffiths at p 862 explained that the law did not - in the context before the court - ask whether the surveyors had voluntarily assumed responsibility towards the claimants in giving the information. But he did so in terms which were arrestingly wide. He said that the test of an assumption of responsibility was neither helpful nor realistic (or, he added at p 864, at any rate not so in most cases) and that it had meaning only if it referred to the circumstances in which the law deemed responsibility to have been assumed. In effect Lord Griffiths was suggesting that the test identified only a conclusion rather than a criterion.

21. Lord Griffiths, with whom three other members of the committee agreed, proceeded at p 865 to propound a threefold test by reference to which the surveyors owed a duty of care to the claimants. The test required first that it was foreseeable that, were the information given negligently, the claimants would be likely to suffer damage; second that there was a sufficiently proximate relationship between the parties; and third that it was just and reasonable to impose the liability.

22. Months later the threefold test propounded by Lord Griffiths was addressed by the House of Lords in *Caparo Industries Plc v Dickman* [1990] 2 AC 605. The claimants had taken over a company in reliance on its accounts and alleged that the defendants had negligently discharged their statutory functions in the course of their audit of them. For years afterwards the speeches in the House were taken to have indorsed the threefold test. In fact, however, Lord Bridge of Harwich, with whom three other members of the committee agreed, observed at p 618 that the concepts of proximity and fairness were so imprecise as to deprive them of utility as practical tests; and Lord Oliver of Aylmerton suggested at p 633 that the three suggested ingredients of the so-called test were usually facets of the same thing and that to search for a single formula was to pursue a will-o'-the-wisp. That the House in the *Caparo Industries* case did not indorse the threefold test was explained by Lord Toulson in *Michael v Chief Constable of South Wales Police* [2015] UKSC 2, [2015] AC 1732, at para 106; and it has recently been underlined by Lord Reed in *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4, paras 21 to 29. In the *Caparo Industries* case both Lord Bridge at p 618 and Lord Oliver at p 633 quoted with approval the remarks of Brennan J in *Sutherland Shire Council v Heyman* (1985) 60 ALR 1, 43-44 that it was preferable for the law to develop novel categories of negligence incrementally and by analogy with established categories; and, as Lord Reed has explained in the *Robinson* case, it was by declining to accept that the law should develop incrementally to the point for which the claimants contended that the House in the *Caparo Industries* case determined to allow the auditors' appeal.

23. More important for present purposes is the reassertion in the *Caparo Industries* case of the need for a representee to establish that it was reasonable for him to have relied on the representation and that the representor should reasonably have foreseen that he would do so. Thus at pp 620-621 Lord Bridge observed that a salient feature of liability was that the representor knew that it was very likely that the representee would rely on the representation; and at p 638 Lord Oliver observed that a usual condition of liability was that the representor knew that the representee would act on it without independent inquiry. Some months later, in *James McNaughton Paper Group Ltd v Hicks Anderson & Co* [1991] 2 QB 113, the Court of Appeal, confronted with a similar claim against company accountants, rejected it by reference to the decision in the *Caparo Industries* case. But Neill LJ expanded on the need for foreseeability of reliance. At pp 126-127 he said:

> "One should therefore consider whether and to what extent the advisee was entitled to rely on the statement to take the action that he did take. It is also necessary to consider whether he did in fact rely on the statement, whether he did use or should have used his own judgment and whether he did seek or should have sought independent advice. In business transactions conducted at arms' length it may sometimes be difficult for an advisee to prove that he was entitled to act on a statement without taking any independent advice or to prove that the adviser knew, actually or inferentially, that he would act without taking such advice."

24. In July 1994, in *Spring v Guardian Assurance Plc* [1995] 2 AC 296, the House held that, in writing a reference for the claimant who had worked for them and who was now seeking work elsewhere, the defendants owed a duty of care to him. Lord Goff of Chieveley explained at p 316 that the basis of his conclusion was that the defendants had assumed responsibility to the claimant in respect of the reference within the meaning of the *Hedley Byrne* case. Weeks later, in *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145, the House held that underwriting agents at Lloyd's owed a duty of care to a member in their conduct of his underwriting affairs even in the absence of any contract between them. In a speech with which the other members of the House agreed, Lord Goff held at p 181 that the case should be decided by reference to the concept of an assumption of responsibility. In *Williams v Natural Life Health Foods Ltd* [1998] 1 WLR 830. Lord Steyn remarked at p 837 that there was no better rationalisation for liability in tort for negligent misrepresentation than the concept of an assumption of responsibility. It has therefore become clear that, although it may require cautious incremental development in order to fit cases to which it does not readily apply, this concept remains the foundation of the liability.

25. The legal consequences of Ms Steel's careless misrepresentation are clearly governed by whether, in making it, she assumed responsibility for it towards Northern Rock. The concept fits the present case perfectly and there is no need to consider whether there should be any incremental development of it. Nevertheless the case has an unusual dimension: for the claim is brought by one party to an arm's length transaction against the solicitor who was acting for the other party. A solicitor owes a duty of care to the party for whom he is acting but generally owes no duty to the opposite party: *Ross v Caunters* [1980] Ch 297, 322. 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: *Jain v Trent Strategic Health Authority* [2009] UKHL 4, [2009] AC 853. Six authorities, briefly noticed in chronological order in what follows, may illumine inquiry into the existence of an assumption of responsibility by a solicitor towards the opposite party.

26. First, the decision of the Court of Appeal of New Zealand in *Allied Finance and Investments Ltd v Haddow and Co* [1983] NZLR 22. The claimant had agreed to make a loan to X and to take security for it on a yacht. The defendants, who were X's solicitors, certified to the claimant that the instrument of security executed by X in relation to the yacht was binding on him. In fact, as the defendants knew, it was not binding on him because he was not, and was not intended to become, the owner of the yacht. The court held that the defendants had owed, and breached, a duty of care to the claimant. Richardson J said at p 30, in terms which the other members of the court echoed:

> "This is not the ordinary case of two solicitors simply acting for different parties in a commercial transaction. The special feature attracting the prima facie duty of care is the giving of a certificate in circumstances where the [defendants] must have known it was likely to be relied on by the [claimant]."

27. Second, the decision of the Lord Ordinary, Lord Jauncey, in the Outer House in *Midland Bank Plc v Cameron, Thom, Peterkin and Duncans* 1988 SLT 611. The pursuer had made a loan to X in assumed reliance on a statement by the defenders, who were X's solicitors, about the extent of his assets. The statement was materially inaccurate. But the pursuer's claim against the defenders failed. Having referred to the *Hedley Byrne* case as the proper starting point and to the *Allied Finance* case, the Lord Ordinary observed as follows at p 616:

> "In my opinion four factors are relevant to a determination of the question whether in a particular case a solicitor, while acting for a client, also owes a duty of care to a third party: (1) the solicitor must assume responsibility for the advice or information furnished to the third party; (2) the solicitor must

> let it be known to the third party expressly or impliedly that he claims, by reason of his calling, to have the requisite skill or knowledge to give the advice or furnish the information; (3) the third party must have relied upon that advice or information as matter for which the solicitor has assumed personal responsibility; and (4) the solicitor must have been aware that the third party was likely so to rely."

The Lord Ordinary concluded that the pursuer was able to establish none of the first three of the four factors.

28. Third, the decision of the Court of Appeal in *Al-Kandari v J R Brown and Co* [1988] QB 665. The claimant, a mother of two children, feared that the father would abduct them to Kuwait. The court had made an order which, with their consent, obliged the defendants, who were the father's solicitors, to retain possession of his passport on which the children were registered. With the mother's consent, the solicitors allowed their agents to take the passport to the Kuwaiti embassy for alteration on condition that it would never be out of their sight. In fact the embassy insisted on retaining it overnight. The solicitors did not inform the mother that the embassy had retained the passport nor that (as they knew) the father was due to attend there on the following day. The embassy released the passport to the father, who abducted the children to Kuwait. The court held that, in failing so to inform the mother, the solicitors had breached a duty of care to her. Both Lord Donaldson of Lymington MR at p 672 and Bingham LJ at p 675 explained that, in agreeing to become obliged to retain possession of the father's passport, the solicitors had stepped outside their role as his solicitors and assumed responsibility towards the mother.

29. Fourth, the decision of Sir Donald Nicholls V-C in the High Court in *Gran Gelato Ltd v Richcliff (Group) Ltd* [1992] Ch 560. The claimant wished to purchase an underlease from the first defendant. The claimant's solicitors inquired of the second defendants, a firm of solicitors acting for the first defendant, whether any provisions in the headlease might affect the length of the underlease. The negative answer of the second defendants was a misrepresentation, which, following its purchase of the underlease, caused loss to the claimant. The Vice-Chancellor held that it had a valid claim against the first defendant but that the second defendants had themselves owed no duty of care to it. He observed at pp 571-572 that only in special cases, such as the *Allied Finance* case, would a solicitor owe a duty of care to the opposite party and that there was nothing special about the case before him.

30. Fifth, the decision of the Court of Appeal of New Zealand in *Connell v Odlum* [1993] 2 NZLR 257. Prior to his marriage to W, the claimant wished to enter with her into an agreement of which the statutory effect would be to contract them out of

the law's general provisions for the making of financial adjustments between them in the event of separation. Pursuant to one of the statutory requirements, the defendant, who was W's solicitor, certified that, prior to her signing the agreement, he had explained its effect to her. Following separation a judge found that he had not explained its effect to her and held that the agreement was void. The Court of Appeal held that it was highly arguable that, in giving the certificate, the defendant owed a duty of care to the claimant and that the claim should not be struck out. Thomas J explained at p 269 that the claimant had relied, and had been expected by the defendant to rely, on the certificate as a feature of the validity of the agreement and that there had been the necessary assumption of responsibility towards him on the part of the defendant.

31. And sixth, the decision of the Court of Appeal in *Dean v Allin and Watts* [2001] EWCA Civ 758, [2001] 2 Lloyd's Rep 249. The claimant proposed to lend money to W and X on the security of property owned by Y and Z. W and X instructed the defendants, their solicitors, to effect the security in favour of the claimant, with which Y and Z were willing to co-operate. The loan was made on the footing that the security was in place. But the defendants had carelessly misunderstood what was legally required in order to effect the security. In due course Y and Z established that the purported charge on their property was ineffective. The court held that the defendants had owed, and breached, a duty of care to the claimant. Robert Walker LJ explained in summary, at para 69, that the provision of effective security was of fundamental importance to the claimant and that, as the defendants knew or should have known, he was relying on them in that regard.

32. Perhaps it helps only slightly for us to have been reminded in the authorities cited above that Ms Steel and the firm are liable to Northern Rock only if it was a special case. Probably of greater assistance is the analysis in the *Al-Kandari* case that the solicitors owed a duty of care to the opposite party because they had stepped outside their normal role. But the six authorities cited above demonstrate in particular that the 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 he would do so. These are, as I have shown, two ingredients of the general liability in tort for negligent misrepresentation; but they are particularly relevant to a claim against a solicitor by the opposite party because the latter's reliance in that situation is presumptively inappropriate. Thus the reasonableness of the claimant's reliance and of the defendant's foreseeability of it comprised the special feature which gave rise to the liability in the *Allied Finance* case and in the *Dean* case and to the arguable liability in the *Connell* case; and, although the claim in the *Midland Bank* case failed for other reasons, the fourth of the requirements valuably identified in Lord Jauncey's judgment was that the solicitor should have been aware that the pursuer was likely to rely on what he had said.

33. In dismissing Northern Rock's claim the Lord Ordinary held that the crucial question arose from the fact that, prior to executing and returning the deeds of discharge, it had failed to check the accuracy of the representations made by Ms Steel in the email dated 22 March 2007 against the material on its file. Had it done so, it would have seen immediately that it was entirely inappropriate for it to accede to her invitation to execute the deeds of discharge. Having heard her evidence, the Lord Ordinary found that, although she knew that Northern Rock was acting without solicitors in relation to the sale of Unit 1 and to the two earlier sales, she had generally expected it to check the propriety of her various requests before complying with them. Notwithstanding her inability, when giving evidence, to recall her state of mind when sending the email, the Lord Ordinary therefore found that Ms Steel had not foreseen that Northern Rock would rely on her assertions in it without checking their accuracy. He then proceeded to ask whether it was reasonable for her not to have foreseen that it would do so. His answer was that any prudent bank taking the most basic precautions would have checked the accuracy of her representations by reference to its file or indeed by asking for further clarification of an email which he had found in some respects to be vague and ambiguous; that it was therefore not reasonable for Northern Rock to have relied on her representations without thus checking their accuracy; and that it was reasonable for Ms Steel not to have foreseen that it would do so. That the Lord Ordinary had been entitled to reach this crucial conclusion formed the basis of Lord Brodie's dissent upon the appeal to the Inner House.

34. But the majority in the Inner House took a different view. Lady Smith held that circumstances were present which led to the attribution to Ms Steel of an assumption of responsibility for the representations in the email towards Northern Rock without any need for the court to inquire whether it should have checked its file. These circumstances were said to be that Ms Steel was a solicitor; that her representations fell within her area of expertise; that, as she knew, Northern Rock was not represented by solicitors; that Headway had not given her actual or even ostensible authority to make the representations; that, by her email, she was demanding an urgent response; and that the transaction between Headway and Northern Rock was not at arm's length.

35. With great respect, I would not accept that all the circumstances were as described by Lady Smith. Whether Headway had conferred on Ms Steel ostensible authority to make the representations had not been fully explored before the Lord Ordinary - and rightly so because for obvious reasons no claim was brought against Headway and because an agent may well owe a duty of care to a third party even if he is acting within the scope of his authority. And, although Headway and Northern Rock were not engaged in hostile litigation, I find it impossible to subscribe to the suggestion that they were not at arm's length in relation to the removal of security over Unit 1. Overarchingly, however, neither the general jurisprudence relating to liability in negligence for a misrepresentation leading to economic loss nor the

focussed jurisprudence relating to a solicitor's liability to the opposite party in that regard supports a conclusion that it is not always necessary for the representee to establish that it was reasonable for him to have relied on the representation. On the contrary, the reasonableness of his reliance on it is, as I have explained, central to the concept of an assumption of responsibility.

36. Lady Smith added however that in any event Ms Steel should have foreseen that Northern Rock would rely on her representations without checking their accuracy. There was, so she said, no expert or other evidence in relation to the basic precautions taken by a lender to which the Lord Ordinary had referred and no scope for judicial knowledge to be taken of them; and it was likely and therefore foreseeable that Northern Rock would simply rely on Ms Steel's representations.

37. Resolution of the further appeal to this court could no doubt be based on inquiry into whether Lady Smith and Lady Clark were entitled to depart from the Lord Ordinary's conclusion that it was not reasonable for Northern Rock to have relied on Ms Steel's representation without inquiry. How does the law classify a trial judge's conclusion that it was not reasonable for a party to act as it did? It is not a conclusion of fact. It is a judgement referable to an already established fact and, albeit required by law, it is not a judgement about what the law is. So it is difficult to pigeon-hole it as a conclusion either of fact or of law or even in my view as a conclusion of mixed fact and law. It is, rather, an evaluation; and in *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33, [2013] 1 WLR 1911, Lady Hale at para 203 recorded all members of the court as having agreed that an appellate court needed to be satisfied that an evaluative conclusion of a trial judge was wrong before it could be set aside.

38. But in my view this court does not need to explain why the Lord Ordinary cannot be said to have been wrong in concluding that it was not reasonable for Northern Rock to have relied on Ms Steel's representation without inquiry. We should bypass examination of whether he was wrong and should hold positively that he was right. We should accept 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. The lender knows the terms of the agreement and indeed, as in this case, is likely to have evolved and proposed them. Insofar as the particular officers in Northern Rock who on 23 March 2007 saw and acted upon the email had never been aware of the terms or had forgotten them, immediate access to the correct terms lay - literally - at their finger-tips. No authority has been cited to the court, nor discovered by me in preparing this judgment, in which it has been held that there was an assumption of responsibility for a careless misrepresentation about a fact wholly within the knowledge of the representee. The explanation is, no doubt, that in such circumstances it is not reasonable for the representee to rely on the

representation without checking its accuracy and that it is, by contrast, reasonable for the representor not to foresee that he would do so.

39. This court should allow the appeal and restore the Lord Ordinary's interlocutor.