The Court of Appeal for Bermuda

CIVIL APPEAL No. 21 of 2017

B E T W E E N:

RAYMOND DAVIS

Appellant

- v -

THE MINISTER OF FINANCE

1st Respondent

-and-

THE ATTORNEY-GENERAL

2nd Respondent

Before: **Baker, President**
Bell, JA
Smellie, JA

Appearances: Mark Diel, Marshall Diel & Myers Limited, for the Appellant
John Cooper, Williams Barristers & Attorneys, for the Respondent

Date of Hearing: **19 June 2018**
Date of Judgment: **14 August 2018**

JUDGMENT

Claim in negligence for economic loss- trial of preliminary issue – whether duty of care existed to update Cause Book of the Supreme Court to show that judgment had been satisfied – legal principles for the finding of novel duty of care

SMELLIE JA

Introduction

1. This is an appeal from a decision on a preliminary issue taken in the action as to whether the First Respondent ("the Minister") as judgment creditor owed the Appellant, as judgment debtor, a duty of care to update the Cause Book of the Supreme Court to show that judgment had been satisfied. The Appellant claims that as the result of the Minister's breach of this putative duty of care, he has suffered substantial economic loss.

2. Justice Hellman determined the issue in favour of the Minister and against the Appellant who now invites this Court, through Mr Diel, to hold to the contrary.

3. Mr Diel acknowledged, as Justice Hellman found, that there are no reported cases of a duty of care having been found on facts that are substantially the same as the facts of the present case and that it has been necessary therefore to resort to first principles in the field of the tort of negligence. These will come to be examined below after the following description of the circumstances of the case.

4. Justice Hellman tried the issue against the background of an agreed statement of facts and so the relevant facts are taken as helpfully set out in his judgment and, where necessary, as elaborated from the agreed statement of facts[1].

Background

5. The Appellant, apart from being a respected writer and political activist[2], is also a businessman and property developer and it is in these latter capacities that he brings this action.

[1] Which is itself significantly informed by the affidavit of lawyer Mr Ian Kawaley (until recently Chief Justice of Bermuda) who served as legal adviser to the Official Receiver/ liquidator in circumstances to be set out below; as well as by a report from the Ombudsman to whom the Appellant had also complained against the alleged failings of the Minister.

[2] In which endeavours he is known as Khalid Wasi.

6. In the 1990s he was the majority shareholder of a company known as Pembroke Laundromat Ltd ("the Company") which operated a laundry business in Pembroke. Disagreements arose between the Appellant and the minority shareholder Mr Collin Smith ("Mr Smith") and Mr Smith petitioned to wind up the Company on the just and equitable grounds, citing oppressive behaviour on the part of the majority shareholder. On the basis of Mr Smith's petition, the Court appointed the Official Receiver as provisional liquidator who duly certified that the Company, on account of its indebtedness, was insolvent. The liquidation therefore proceeded under the supervision of the Court.

7. Among the Company's creditors was the Government of Bermuda which had claims in the liquidation for various unpaid fees, taxes and levies amounting to BMD 101,203.00.

8. However, in three separate actions filed in 1996 personally against the Appellant and/or Mr Smith, the Government had also sued to recover various amounts of the unpaid debt. These actions were filed in Causes 1996/159; 1996/369 and 1996/385.

9. Judgment was obtained eventually in one of these three actions – Cause 1996/159 - for the amount of BMD 16,530.00. This was on the basis of a default judgment entered by the Minister on 25 September 1996 when the Appellant and Mr Smith failed to file a defence.

10. No judgment was obtained in either of the other two personal actions – Causes 1996/369 or Cause 1996/385 - and while they remained shown on the Cause Book as active until formally discontinued at the instance of the Minister on 28 July 2009, no claim in damages is made now about those actions. In the absence of a judgment having been obtained in either of them, no duty of care can be said to have arisen as neither gave rise to a lien under the Real Estate Assets Act

1787 ("the Act") - that which is claimed, as will be explained, to have given rise to the duty of care.

11. Accordingly, the complaint and this appeal relate only to the action in Cause 1996/159. That action, although satisfied by a payment made on 24 July 1997 (in circumstances to be further explained below), remained shown on the Cause Book as unsatisfied until circa 28 July 2009, when the Minister also formally notified the Registry of the Supreme Court that the default judgment had been satisfied.

12. The payment in satisfaction of the default judgment was not however, made in Cause 1996/159 but in the context of the liquidation of the Company. It came about as follows.

13. Mr Smith had in 1997 made a bid to the liquidator for the acquisition of the Appellant's majority shares in return for his payment, in part, of the Company's debts. He wished to take over the Company and continue to operate its laundromat business.

14. The Appellant agreed and a scheme of compromise and arrangement between the Company and its creditors was sanctioned by the Court. Included in the scheme was a payment, through the Liquidator, by Mr Smith of BMD 31,687.80 to the Minister in compromise and settlement of the debts owed to Government. The payment – that which was made on 24 July 1997 - was thus also meant to compromise the claims brought in the three personal actions, including Cause 1996/159 in which default judgment had been entered and which had triggered the operation of a lien under the Act.

15. When the payment of BMD 31,687.80 was made no request was then made to the Minister by anyone that the judgment in Cause 1996/159 be marked in the

Cause Book as "satisfied". Nor, for that matter, was any request made that the claims in the other personal actions be marked as "discontinued".

16. Significantly however, on 17 October 1997, the petition to wind up the Company was discontinued by order made by consent of those interested in the liquidation - including the Appellant, Mr Smith and the Liquidator. According to the agreed statement of facts, an order was then filed with the Registry and entered to that effect by Hector Dwyer Associates, acting on behalf of the Appellant.

17. Regrettably from his point of view, the Appellant seems then not to have had in contemplation the separate matter of the personal actions, in particular that the judgment in Cause 1996/159 should be shown upon the Cause Book as satisfied; nor the implications in that regard, of the operation of the Act.

The Cause Book and the lien imposed by the Act.

18. From time immemorial, actions have been and are still recorded manually in the Cause Book maintained by staff at the Supreme Court Registry. The Cause Book contains a record of every action commenced in the Supreme Court of Bermuda. This record includes the names of the parties; when the action was commenced; and whether judgment has been awarded in favour of either party and, if so, in what amount. There is also a "remarks" column for every action in which is entered such details as when an action is discontinued and when judgment has been satisfied.

19. By convention (there being no rule mandating the practice) the attorney for the plaintiff (or defendant on a successful counterclaim) will write to the Registry to notify staff when the judgment in an action has been satisfied and the Registry will write back acknowledging receipt of the letter and inviting the attorney to attend at the Registry to update the Cause Book accordingly.

20. Though rather antiquated in today's age of information technology, this practice has worked for the purposes of the operation of liens under the Act, which is as follows.

21. In Bermuda, by operation of section 1 of the Act a judgment constitutes a lien on any real property owned by the judgment debtor[3]. See *Oatham v Dickens & Gibbons* [1977] Bda LR 1 SC per Summerfield CJ at para 12, following and applying the judgment of Smith AJ in *Cates and Panchard v Dill* [1956] Bda LR 1 SC. The lien runs with the land and will not be overreached even if the land is sold to a *bona fide* purchaser for value, as the judgment is deemed to constitute notice of the lien to any purchaser.

22. Accordingly and in order to moderate the effect of the Act, section 19(a) of the Supreme Court Act 1905 was enacted and provides that judgments shall, as regards *bona fide* purchasers for valuable consideration, affect real property (i.e: "lands, tenements and hereditaments") only as from the date on which they are signed. This was also acknowledged in *Cates and Panchard* (above) at para 65.

23. A prospective purchaser will likely refuse to engage in a land transaction with someone against whom an unsatisfied judgment is shown in the Cause Book. This is obviously because if the judgment is indeed unsatisfied, by virtue of the operation of the Act, the judgment creditor could levy execution against the land to enforce it, even if the transaction is complete and the land no longer belongs to the judgment debtor.

[3] Drafted in the expansive style of the late 18th Century, section 1 provides: "The houses, lands and other hereditaments, and real estate situated or being in Bermuda belonging to any person indebted, shall be liable to and chargeable with all just debts, duties and demands of what nature or kind soever, owing by any such person to Her Majesty, or any of her subjects; and shall and may be assets for the satisfaction thereof in like manner as real estates are by the law of England liable to the satisfaction of debts due by bond or other specialty; and shall be subject to the like remedies, proceedings and process, in any court in Bermuda, for seizing, extending, selling or disposing of any such houses, lands and other hereditaments and real estate, towards the satisfaction of such debts, duties and demands, and in like manner as personal estates in Bermuda are seized, extended, sold or disposed of, for the satisfaction of debts."

24. It is therefore important for a judgment debtor who owns land that once the judgment is satisfied the Cause Book is updated to record this fact. As Justice Hellman also noted, updating the Cause Book may also be important for other reasons, irrespective of whether the judgment debtor owns land, for example, for the purposes of his credit rating.

25. The contention of the Appellant is that the Minister owed him a duty of care in tort to take reasonable steps to have ensured that the Cause Book was updated to record the fact that the judgment against him in Cause 1996/159 had been satisfied.

26. It follows as he also contends, that the Minister's belated notification to the Registry in respect of Cause 1996/159 on 28 July 2009 (that mentioned above and given by the Second Respondent acting on the Minister's instructions), took place well after the breach of duty had occurred.

27. The Appellant contends that the breach of duty – the Minister's failure to act in a timely manner to have the Cause Book updated - resulted in economic loss in the amount of BMD 2,045,400.OO, the amount which he claims in damages in this action.

28. While the pleadings are not a model of clarity, one gleans from them that the gist of the claim is that the Appellant, as a town house property developer, had sold certain houses to purchasers to whom he granted second mortgages. That in February 2009, one of these mortgagors proposed to redeem his mortgage by payment of the then outstanding sum of BMD 50,000.00 and that the Appellant needed to receive this payment for the crucial purposes of another business venture.

29. However, as asserted in his pleadings "*The mortgagee (sic) failed to pay the monies due to the purported outstanding judgments (sic) for fear of having the*

transaction set aside as a fraudulent conveyance"; implying that this was the result of the judgment in Cause 1996/159 still then appearing in the Cause Book in February 2009, as unsatisfied.

30. Non-payment of the mortgage sum is alleged to have had a catastrophic effect on the Appellant's financial affairs, described in his pleadings as: "'*a domino effect' of financial failure on several matters."* Hence the alleged substantial amount of damages claimed as mentioned above.

Duty of care – the legal principles.

31. It is acknowledged by Mr Diel that the duty allegedly owed by the Minister is not one imposed by statute. More particularly and as already mentioned, there are no rules of court imposing a duty, on either a successful judgment creditor or unsuccessful judgment debtor, to update the Cause Book once judgment has been satisfied. It follows that either the duty of care exists at common law or it does not exist at all.

32. In his recourse to first principles, Mr Diel relies of course, upon the very familiar and seminal statement of what has come to be called the "*good neighbour principle*" by Lord Atkin from *Donoghue v Stephenson* [1932] AC 562 at 580:

> *"You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called into question."*

33. Lord Atkin's statement of principle (or test) has come to be accepted in the case law as requiring three elements for the existence of a duty of care –there must be reasonable foreseeability of harm, a close relationship of "proximity" between

the parties and it must be fair, just and reasonable to impose liability for the harm.

34. Once satisfied, this test has over the years usually been found sufficient to justify the imposition of a duty of care and liability in negligence for its breach, in cases involving personal injury[4] or damage to property[5].

35. It is to be immediately emphasized however, that foreseeability of harm, such as might be assumed here on the part of the Minister had he been obliged to contemplate the consequences of failing to have the Cause Book updated, would not be enough. The other aspects of the test must also be satisfied and it is the manner in which this is required for the purposes of liability in tort for pure economic loss that requires careful further examination.

36. The category of cases in which a duty of care could be found to exist has never been closed. The case law reveals different circumstances in which the existence of the duty of care and liability for pure economic loss as the result of its breach, have been found.

37. But research has revealed no decided case based on circumstances like those of the present case in which a duty of care has been found.

38. I therefore accept, as did Justice Hellman below, that the enquiry to be undertaken here is whether the decided cases provide an answer by way of principled analogy.

39. The development of the case law in this area has not been along a straight line of trajectory. The cases over the years have shown contraction and expansion in

[4] As in *Donoghue v Stephenson* itself.
[5] As classically explained in the *Wagon Mound (No. 1)* [1961] A.C. 338

the willingness of the courts to admit of the existence of the duty in cases of pure economic loss. As explained in *McGregor on Damages*[6] , a primary reason for this judicial caution has been the recognition of the judges of the dangers of founding a duty of care in tort in circumstances where the duty would be owed even to persons who might not have been within the reasonable contemplation of the defendant at the time of his impugned act or omission.

40. In other words, the concept of "proximity" becomes rather elastic when one is contemplating the vast expanse of persons who could suffer economic loss, as distinct from foreseeable personal harm, as a result of a negligent act or omission.

41. Several of the leading cases which discuss this problem of proximity and assumption of responsibility dealt with claims relating to damages arising, not from circumstances like those of the present case but from circumstances of asserted reliance on negligent statements. The principles are nonetheless applicable here by analogy.

42. The concern over founding a duty of care on circumstances which would be too wide, can be elucidated for example, by comparison of the approaches taken in two of the leading cases.

43. We see that while in 1963 the House of Lords would have been willing in *Hedley Byrne & Co v Heller & Partners*[7] to expand the law to found a limited duty of care in respect of pure economic loss and impose liability for a negligent letter of reference issued by a banker to clients who wished to know whether it was safe to extend trade credit[8]; later, in *Caparo Industries v Dickman*[9] auditors were

[6] Eighteenth Edition, Ch 4 "The General Problem of Limits", at para 4-004
[7] [1964] A.C. 465.
[8] But for the banker's stipulation or disclaimer that the letter had been issued "without responsibility."
[9] [1990] 2 A.C. 605

found to owe no duty of care to investors who relied upon their negligent audit of a company for buying its shares.

44. As found by their Lordships in *Hedley Byrne*, there had been an assumption or "*acceptance of responsibility*" by the banker in *Hedley Byrne* to the plaintiff, to ensure the accuracy of the letter of reference, as to the financial standing of the subjects of the letter. The necessary relationship of proximity was found to have arisen because the banker knew or ought to have known that reliance was being placed upon his special skill or judgment as expressed in the letter of reference[10].

45. In *Caparo*, on the other hand, the auditors were found not to have assumed responsibility to potential investors in the shares of a company to ensure the accuracy of their audit report. This was so because the investors had not been privy to the contractual engagement of audit as between the auditors and the company, nor, therefore, were they entitled to the fiduciary obligations which arose from that engagement. The imposition of a duty of care in tort in those circumstances was seen as likely to have opened the floodgates to claims from all and sundry for any purpose for which they may choose to rely upon a negligent audit. As Lord Bridge described the mischief in *Caparo* (above at p 621 C):

> *"To hold the maker of the statement to be under a duty of care in respect of the accuracy of the statement to all and sundry for any purpose for which they may choose to rely on it is not only to subject him, in the classic words of Cardozo C.J to "liability in an indeterminate amount for an indeterminate time to an indeterminate class": see Ultramares Corporation v Touche (1931) 174 N.E. 441, 444; it is also to confer on the world at large a quite unwarranted entitlement to appropriate for their own purposes the benefit of the expert knowledge or professional expertise attributed to the maker of the statement.*"

[10] All as explained at p 486 per Lord Reid; at pp 502- 503 per Lord Morris at pp 514-515 per Lord Devlin.

46. The approach taken in *Hedley Byrne* (and in other cases in which a duty of care and liability for economic loss had been found to arise from negligent statements) was examined and explained in *Caparo*[11] in these terms:

> "*... looking only at the circumstances of these cases where a duty of care in respect of negligent statements has been held to exist, I should expect to find that the "limit or control mechanism .. imposed upon the liability of a wrongdoer towards those who have suffered economic damage in consequence of his negligence"*[12] *rested in the necessity to prove, in this category of the tort of negligence, as an essential ingredient of the "proximity" between the plaintiff and the defendant, that the defendant knew that his statement would be communicated to the plaintiff, either as an individual or as a member of an identifiable class, specifically in connection with a particular transaction or transactions of a particular kind (e.g in a prospectus inviting investment) and that the plaintiff would be very likely to rely on it for the purpose of deciding whether or not to enter upon that transaction or upon a transaction of that kind.*"

47. And later:[13]

> "*Some of the speeches in the Hedley Byrne case derive a duty of care in relation to negligent statements from a voluntary assumption of responsibility on the part of the maker of the statements. In his speech in Smith v Eric S Bush [1989] 2 W.L.R. 790, 813, Lord Griffiths emphatically rejected the view that this was the true ground of liability and concluded that: "The phrase 'assumption of responsibility' can only have any real meaning if it is understood as referring to the circumstances in which the law will deem the maker of the statement to have assumed responsibility to the person who acts upon the advice.'*

[11] Per Lord Bridge at p 621 D-F.
[12] Citing, according to the law reporter's note: *Candlewood Navigation Corp. Ltd v Mitsui O.S.K. Lines Ltd* [1986] A.C. 1, 25.
[13] At page 623 B-C.

> *I do not think that in the context of the present appeal anything turns upon the difference between the two approaches.*"

48. And still later from his speech[14] and to my mind of particular importance to the outcome of the present case, comes the following passage which emphasizes the importance of recognizing that the test for finding a duty of care in a case of economic loss may not depend only upon whether or not the loss was foreseeable:

> "*The only other English authority to which I need refer in this context is JEB Fasteners Ltd v Marks, Bloom & Co [1981] 3 ALL E. R. 289, a decision at first instance of Woolf J. This was another case where the plaintiffs, who had made a successful take-over bid for a company in reliance on audited accounts which had been negligently prepared, sued the accountants for damages. Woolf J. held that the auditors owed the plaintiffs a duty of care in the preparation of the accounts. He relied on both Anns case[15] [1978] A.C. 728 and Scott Group Ltd v McFarlane [1978] 1N.Z. L.R. 553, in reaching the conclusion that the duty could be derived from foreseeability alone. For reasons already indicated, I do not agree with this. It may well be however, that the particular facts in the JEB case were sufficient to establish a basis on which the necessary ingredient of proximity to found a duty of care could be derived from the actual knowledge on the part of the auditors of the specific purpose for which the plaintiffs intended to use the accounts.*" [Emphasis added]

49. The *Anns* case came in for further criticism from the House of Lords a year later in *Murphy v Brentwood* [1991] 1 A.C. 398 where they expressly disapproved of the second stage of the following two stage test pronounced in it by Lord Wilberforce (at pp 751-752):

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[14] At p. 625 B - D

[15] *Anns v Merton London Borough Council [1978] A.C 728* in which the House of Lords held that a local authority could be liable to successive purchasers for negligently approving the construction of a defective building.

> "*Through the trilogy of cases in this House – Donoghue v Stephenson [1932] A. C. Hedley Byrne & Co Ltd v Heller & Partners Ltd [1964] A.C. 465 and Dorset Yacht Co Ltd v Home Office [1970] A.C. 1004, the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter – in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise: see Dorset Yacht case [1970] A. C. 1004 PER Lord Reid at p. 1027.*"

50. In expressing on behalf of the House their Lordships' disapproval of the second stage of Lord Wilberforce's two stage test, Lord Keith explained (at p 461):

> *"I observe at this point that the two-stage test has not been accepted as stating a universally applicable principle. Reservations about it were expressed by myself in Governor of Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd [1985] A.C. 210, 240, by Lord Brandon of Oakbrook in Leigh and Sillavan Ltd v Aliakmon Shipping Co Ltd [1986] A.C 785, 815 and by Lord Bridge of Harwich in Curran v Northern Ireland Co-ownership Housing Association Ltd [1987] A.C 718. In Council of Shire of Sutherland v Heyman (1985) 157 C.L.R. 424, where the High Court of Australia declined to follow Anns, Brennan J. expressed his disagreement* with Lord Wilberforce's approach, saying, at p. 481:
>
> > "*It is preferable, in my view, that the law should develop novel categories incrementally and by analogy with established categories, rather than by a massive extension of a prima facie duty of*

> *care restrained only by indefinable 'considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed'."*
>
> *In the Privy Council case of Yuen Kun Yeu Attorney-General of Hong Kong [1988] A.C. 175, 191, that passage was quoted with approval and it was said, at p. 194:*
>
> > *"In view of the direction in which the law has since been developing, their lordships consider that for the future it should be recognized that the two-stage test … is not to be regarded as in all circumstances a suitable guide to the existence of a duty of care."*
>
> *Finally, in Yuen Kun Yeu, at p.193, and in Hill v Chief Constable of West Yorkshire [1989] A.C. 53, 63, I expressed the opinion, concurred in by the other members of the House who participated in the decisions, that the second stage of the test only came into play where some particular consideration of public policy excluded any duty of care. <u>As regards the ingredients necessary to establish such a duty in novel situations, I consider that an incremental approach on the lines indicated by Brennan J. in the Shire of Sutherland case is to be preferred to the two-stage test</u>".*[emphasis added]

51. This brings the discussion to the most recent authoritative decision on the principles applicable to the determination of the existence of a duty of care in negligence for pure economic loss - that in *Customs and Excise Commissioners v Barclays Bank plc* [2007] 1 AC 181. Like Justice Hellman, I find the pronouncements in the case, given against the background of the development of the law as outlined above, to be particularly helpful to the resolution of the issue in the present case.

52. In *Customs and Excise,* the plaintiff Commissioners obtained a freezing injunction against two companies prohibiting them from dealing with their

assets which included two specified accounts at the defendant Barclays Bank. The injunctions had been obtained to secure the recovery by the Commissioners of VAT collected by the two companies but which they had failed to pay over to the Revenue. The bank was notified of the injunction but breached it by permitting payments out of the accounts. The Commissioners sued the bank for negligent breach of a duty of care claimed to have been owed by the bank not to allow the payments once the bank was notified of the injunction.

53. The House of Lords held unanimously that the bank owed no such duty of care and so was not liable for the loss arising from the payments. That the bank could not be understood as having voluntarily assumed responsibility for its actions so as to give rise to a duty of care towards the Commissioners; that the court exercised its injunctive jurisdiction on the basis that its orders were enforceable only by way of its power to punish for contempt and the notified party's only duty was to the court; that it would not be analogous or incremental to any previous decision if a non-consensual order were to be recognized as giving rise to a duty owed to the party who obtained it; and that, since its operation would be productive of unjust and unreasonable results, it would not be fair, just and reasonable to recognize a duty of care in such circumstances[16].

54. Recognizing that the tests used in considering whether a defendant sued as causing pure economic loss owed a duty of care disclosed no single common denominator by which liability could be determined, their Lordships were unanimous in holding that the Court should instead focus its attention on the detailed circumstances of the case and the particular relationship between the parties in the context of their legal and factual situation taken as a whole[17].

[16] As taken from the head note.
[17] As summarised in the first head of the ration as taken from the headnote.

55. Nonetheless, by reference to the principles emanating from the earlier case law (of which an outline is attempted above), Lord Bingham identified three tests which he described in the following terms:[18]

> "*The parties were agreed that the authorities disclose three tests which have been used in deciding whether a defendant sued as causing pure economic loss to a claimant owed him a duty of care in tort. The first is whether the defendant assumed responsibility for what he said and did vis-à-vis the claimant, or is to be treated by the law as having done so. The second is commonly known as the threefold test: whether loss to the claimant was a reasonably foreseeable consequence of what the defendant did or failed to do; whether the relationship between the parties was one of sufficient proximity; and whether in all the circumstances it is fair, just and reasonable to impose a duty of care on the defendant towards the claimant (what Kirby J in Perre v Apand Pty Ltd (1999) 198 CLR 180, para 259 succinctly labelled "policy"). Third is the incremental test, based on the observation of Brennan J in Sutherland Shire Council v Heyman (1985) 157 CLR 424, 481 , approved by Lord Bridge of Harwich in Caparo Industries plc v Dickman [1990] 2 AC 605, 618 , that: [(as quoted above but repeated here for convenience)]:*
>
> *"It is preferable, in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of prima facie duty of care restrained only by indefinable 'considerations which ought to negative, or reduce or limit the scope of the duty or the class of person to whom it is owed'".*

56. Their Lordships in their respective speeches laid different emphasis on different aspects of the three tests. As Justice Hellman did below, it is appropriate here to consider the applicability to the circumstances of the present case of each aspect in turn.

[18] Op cit, para 4.

57. Assumption of responsibility, according to Lord Mance at para 83, was on any view a core area of responsibility for economic loss, noting at para 85, that the concept derives from the "*fountain of most modern economic claims, Hedley Byrne & Co v Heller..",* citing the well-known exposition of the concept from Lord Devlin's speech (at p 529) where he held that the special relationships which give rise to a duty of care included relationships:

> *"which…are equivalent to contract that is , where there is an assumption of responsibility in circumstances in which, but for the absence of consideration, there would be a contract.*"

58. As stated by Lord Hoffman at paras 35 and 36 of *Customs and Excise,* whether there has been an assumption of responsibility drew attention to the fact that*: "duty of care is ordinarily generated by something which the defendant has decided to do… the law of negligence does not impose liability for mere omissions".*

59. However, as Lord Hoffman had himself also earlier recognized in *Stovin v Wise* [1996] AC 923 HL, that principle is not absolute, an omission can also be reflective of an assumption of responsibility:

> "*There may be a duty to act if one has undertaken to do so or induced a person to rely upon one doing so…"*

60. As seen from the foregoing discussion of the case law, assumption of responsibility has typically been found in cases where information was provided by a defendant to a plaintiff and relied upon by the plaintiff resulting in economic loss - *Hedley Byrne* being the classic example[19].

[19] Another well-known example was *Henderson v Merret Syndicates Ltd* (No 1) [1995] 2 AC 145, in which the House of Lords held that the managing agents of a Lloyds syndicate owed a duty of care to the Names for the consequences of their conduct in underwriting contracts of insurance.

61. This is obviously not the situation in this case where what is asserted instead as founding the duty and its breach is first the obligation or responsibility to update the Cause Book once judgment was satisfied and then the failure or omission to do so.

62. As to the application of the three-fold test, as Lord Bingham observed at in *Customs v Excise* at para 6, it provides no straightforward answer to whether or not, in a novel situation, a party owes a duty of care. He referred to *Caparo,* in which Lord Bridge stated at p 618:

> *"..the concepts of proximity and fairness embodied in these additional ingredients are not susceptible of any such precise definition as would be necessary to give them utility as practical tests, but amount in effect to little more than convenient labels to attach to the features of different specific situations which, on a detailed examination of all the circumstances, the law recognizes pragmatically as giving rise to a duty of care of a given scope."*

63. Perhaps by way of closest analogy to the present case, there are some situations in which the law has already come to recognize that proximity and fairness do <u>not</u> give rise to a duty of care in tort.

64. For instance, it must now be taken as settled that neither the opposite parties to contested court proceedings nor their legal representatives owe a duty of care to the other side in the context of those proceedings. This is as Lord Rodger stated in *Customs and Excise* itself at para 47:

> "*When parties embark on contested court proceedings, even under the rules of procedure in force today, they are entitled to treat the other side as opponents whom they wish to vanquish. So they do not owe them a duty of care: Business Computers International Ltd v Registrar of Companies [1988] Ch 229. Equally, when the parties*

> *employ solicitors and counsel to act for them in the proceedings, in general, those representatives owe no duty of care to the other side: Al-Kandari v J R Brown & Co [1988] QB 665, 675 F-H per Bingham LJ."*

65. As a practical example of this principle, Mr Cooper cited (as he did to Justice Hellman below) the case of *Horner v W D Irwin & Sons Ltd and others* (1972) N.I.L.R. 202. This is a case from Northern Ireland in which it was held that the solicitors for judgment creditors did not owe a duty of care to the judgment debtor to inform the bailiff that judgment had been satisfied and so avoid the negligent sale of his property in purported satisfaction of the judgment.

66. Nor, moreover, does an order of the court give rise to a tortious duty of care. As Lord Hoffman stated at para 39 of *Customs and Excise*: "*The order carries its own remedies and does not extend any further*."

67. As to the incremental test, Lord Bingham in *Customs and Excise* at para 7 inclined to the view that it was no substitute for a close examination of the facts of a given case to see whether they comported with any of the identifiable principles:

> "*The incremental test is of little value as a test in itself, and is only helpful when used in combination with a test or principle which identifies the legally significant features of a situation. The closer the facts of the case in issue to those of a case in which a duty of care has been held to exist, the readier a court will be, on the approach of Brennan J adopted in Caparo Industries plc v Dickman, to find that there has been an assumption of responsibility or that the proximity and policy conditions of the threefold test are satisfied. The converse is also true.*"

68. Lord Bingham's speech from *Custom and Excise* was broadly followed and applied by Kawaley J. (as he then was) in *Benjamin v KPMG Bermuda* [2007] Bda

L.R. 22 in striking out a claim for breach of duty of care brought against auditors by reinsurers on the basis that they knew or ought to have known that their audit, undertaken for their client insurance company, would be relied upon by the reinsurers for regulatory and other purposes. This was an unsurprising outcome in circumstances where the plaintiff, in purporting to have relied upon the defendant's assumption of responsibility towards it, could nonetheless have obtained its own independent advice or verification, as the learned judge also found by reference to *Caparo Industries v Dickman* (citing in particular, Lord Oliver's speech at pp 638-641).

69. There Lord Oliver explained what is meant in this context by a defendant's knowledge of a third party's reliance on his advice or representations:

> "*The most recent authority on negligent misstatement in this House*[20]*…does not, I think, justify any broader proposition than that already set out, save that they make it clear that the absence of a positive intention that the advice shall be acted upon by anyone other than the immediate recipient – indeed an expressed intention that it shall not be acted upon by anyone else- cannot prevail against actual or presumed knowledge that it is in fact likely to be relied upon in a particular transaction without independent verification.*"

70. For present purposes, it is appropriate to underscore the requirement not only that the defendant knows or can be presumed to know that his representations will be relied upon but also that it will be relied upon without independent verification. In other words, that the plaintiff will likely not seek otherwise to ascertain the facts.

71. The concept of reliance as it has emerged from the cases involving negligent statements or representations as an essential ingredient for the existence of a

[20] A reference to *Smith v Eric S. Bush and Harris v Wyre Forest District Council* (above) also reported as this conjoined appeal at [1990] 1A.C 831

duty of care, arises in the present case also of course, only by way of analogy with those cases which involved negligent statements or representations[21]. Here the concept can arise only in terms of whether the Minister knew or ought to have known from the then prevailing circumstances, that the Appellant would have relied upon him "without independent verification", given what Mr Deil contends was his assumption of responsibility in the special position as judgment creditor, to ensure the updating of the Cause Book.

Application of the principles to the particular facts of the present case.

72. Taking the approach advised by Lord Bingham, one looks to see whether the facts of this case, when examined in light of the applicable legal principles, can appropriately be found to have given rise to a duty of care on the part of the Minister which he breached.

73. Here again it is essential, as a first principle, to emphasize that in a case alleging pure economic loss, foreseeability is not sufficient. Even if it could be found that the Minister foresaw or ought to have foreseen that failure to notify the Registry to update the Cause Book would cause economic loss to the Appellant, that by itself would not be sufficient.

74. On the strength of the case law as examined above, there must also be found on the part of the Minister, either an assumption of responsibility on which the Appellant was entitled to rely or a showing that a relationship of proximity between the Minister and the Appellant existed such as to make it fair just and reasonable to find that the duty of care was owed. These questions must also be considered in the context whether the novel circumstances presented here, arising as they did out of adversarial litigation, justify the incremental expansion of the categories of cases in which a duty of care in tort is owed.

[21] Further clear expositions of the concept were identified by Kawaley J. in the *Benjamin* case (above, at p9) as coming from the judgment of the Privy Council in *Mutual Life* v *Evatt* [1971] AC 793 at 804 and from Lord Denning's judgment in *Dutton* v *Bognor Regis* U.D.C. [1972] QB 374

75. Certainly, no expressed assumption of responsibility arose on the part of the Minister and Mr Diel on behalf of the Appellant did not contend otherwise. In the context of the compromise of the debts owed to Government, the Minister gave no undertaking that he would notify the Registry that judgment had been satisfied in Cause 1996/159. No such responsibility arose from the order of judgment either, which went only so far as expressed in terms.

76. Mr Diel's primary contention is rather that it was only the Minister, as successful plaintiff and judgment creditor, who could have ensured that the Cause Book was updated by notifying the Registry that judgment was satisfied. That the Minister should therefore be regarded as having impliedly undertaken to do so or be deemed to have assumed the responsibility for notifying the Registry. As put by Mr Diel in written submissions to this Court:

> *"To look at the situation in Bermuda in relation to the Cause Book it may be useful to ask the question "Who else, apart from the Plaintiff could mark the Cause Book as satisfied or discontinued"? The answer is no-one. A Defendant certainly cannot do so as this would give no certainty whether the action was indeed over or settled. The Court staff equally could not do so without the Plaintiff requesting it as they would have no way of knowing whether the judgment or action had been paid or settled. Thus the only person who could do so was the Plaintiff*."

77. Thus, in effect, that the Minister either implicitly assumed responsibility to update the Cause Book or should be deemed to have done so.

78. There is however, as already mentioned, no rule imposing the responsibility on the Minister and so no rule that would have prevented the Appellant himself from applying to the Registry, upon proof of the judgment having been satisfied, for updating the Cause Book. Equally, no rule preventing the Appellant in the

event of refusal by the Registry, from applying to the Court for an order directing the Registry.

79. This is all as found by Justice Hellman below in the context also of directing the procedure which should be adopted in the future by a judgment debtor who has paid the judgment debt and seeks to ensure, in the absence of confirmation by the judgment creditor, that the Cause Book is updated. His directions recognize the availability of the inherent jurisdiction of the Supreme Court as a Superior Court of Record for ensuring the due execution of its process and, in the continuing absence of rules, these are directions which I would endorse.

80. It having been open to the Appellant to apply for the updating of the Cause Book, it would not be fair to hold that the Minister implicitly assumed the responsibility or should be deemed to have done so. Nor can it now properly be found that the Minister must have understood that the Appellant would have relied solely upon him to do so. None of this can be found to have arisen from the context merely of the conventional practice by which a successful plaintiff's lawyer would write to the Registry informing that judgment had been satisfied. As shown above from the agreed statement of facts[22], a defendant (or respondent in the case of a petition) may prompt a plaintiff or may himself take steps to notify the Registry for the purposes of updating the Cause Book. This was done by the Appellant himself in relation to the resolution of the petition in the liquidation proceedings.

81. Finally, on the question of assumption of responsibility, the test, it must be remembered, is an objective one. It is not simply a test of whether a defendant - here the Minister - subjectively regarded himself as having assumed the responsibility. The test as Lord Griffith said in *Smith v Eric Bush* (above) is rather

[22] And as explained also in the Kawaley affidavit (at para 5) that it was he who on 22 January 2001, had written on behalf of the Appellant- the sole defendant to those proceedings - requesting that Cause 1996/385 be discontinued

whether in all the circumstances the law should deem the defendant to have assumed the responsibility.

82. Viewed in that light against the background of the circumstances of this case the test is not satisfied.

83. The Minister may well objectively have felt that the Appellant, in whose interest it was to do so, would have seen to the updating of the Cause Book himself.

84. Returning to Lord Bingham's formulation as including the three-fold test, nor, in my view, can it be said (even assuming foreseeability of loss) that the relationship between the parties here was one of sufficient proximity such as in all the circumstances, it is fair just and reasonable to impose a duty of care on the Minister towards the Appellant.

85. So as to distinguish this case from the facts of *Customs and Excise* in which no duty of care was found to exist in the context of adversarial litigation, Mr Diel emphasized that the duty of care is contended to have arisen here not in the course of but in the aftermath of the litigation in Cause 1996/159. That once settled by the satisfaction of the debt, the adversarial relationship between the parties was transformed into one of neighbourly proximity so as to have imposed the duty of care upon the Minister to update the Cause Book. As the successful plaintiff the Minister, in keeping with Lord Atkin's dictum, should have had in mind the consequences under the Act for the Appellant as his "neighbour", of his extant judgment shown upon the Cause Book in relation to any land the Appellant owned.

86. But here again when the circumstances are objectively considered, I do not see why a duty of care should be found to have existed. The Minister would have had no reason, if he had thought about the matter at all, to think that the Appellant as his erstwhile adversary in litigation, would be relying on him to do what he

could do for himself by way of applying to the Registry to update the Cause Book. When the relationship is viewed also in that light, it would not be fair, just and reasonable to hold that the duty of care existed.

87. Finally, the notion of an incremental expansion of the categories of cases so as to find for the existence of a novel duty of care in the circumstances of this case must, for all the foregoing reasons, also be rejected.

88. As Lord Bingham observed in *Caparo*[23] , "*the incremental test is of little value in itself and is only helpful when used in combination with a test or principle which identifies the legally significant features of a situation."*

89. In circumstances as found here, where it would be neither appropriate to hold that the Minister had assumed a responsibility toward the Appellant nor to find a relationship of such proximity as to have given rise to the alleged duty of care, it simply would not be fair just or reasonable to recognize a duty of care by analogy with any established category.

90. In addition to those considerations, there would be a legitimate concern of policy that the duty would be owed to too wide and indeterminate a class of potential claimants. Not only the registered owner but also might anyone else having an interest in land adversely affected by the statutory lien, complain about economic loss arising from a failure by a successful judgment creditor to update the Cause Book.

91. For all the foregoing reasons I would dismiss the appeal.

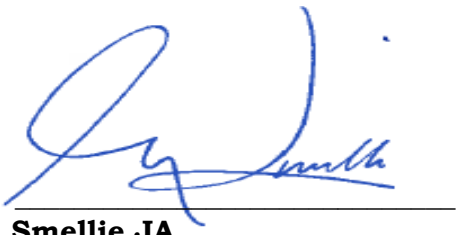
BAKER P:

[23] Above, at para 7.

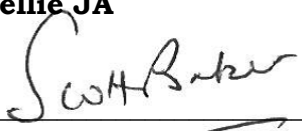
92. I agree that the appeal should be dismissed for the reasons so clearly expressed by my Lord. I would, however, just add this. The procedure of recording actions manually in a cause book belongs to a bygone age and it is necessary in an era of modern technology to devise a system more in keeping with the needs of the present day.

BELL JA:

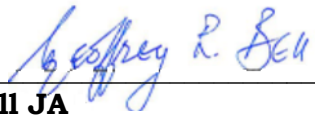
93. I also agree.



Smellie JA



Baker P



Bell JA