



26 July 2018

PRESS SUMMARY

Banca Nazionale del Lavoro SPA (Respondent) v Playboy Club London Limited and others (Appellants) [2018] UKSC 43
On appeal from [2016] EWCA Civ 457

JUSTICES: Lady Hale (President), Lord Mance, Lord Sumption, Lord Reed, Lord Briggs

BACKGROUND TO THE APPEAL

In October 2010 Hassan Barakat, a Lebanese resident, wished to gamble at the London Playboy Club and applied at the club for a cheque cashing facility for up to £800,000. Playboy Club’s policy for gamblers like Mr Barakat was to require a credit reference from his bankers for twice the amount. To avoid disclosing the purpose of the credit facility, Playboy Club’s practice was to arrange for an associated company, Burlington Street Services Ltd (“Burlington”), to ask the customer’s bank for the reference. Mr Barakat gave as his bankers Banca Nazionale del Lavoro (“BNL”) in Reggio Emilia, Italy.

Burlington sent a Status Entry Request on Burlington’s headed paper to BNL. BNL stated that Mr Barakat had an account with them and that he was trustworthy up to £1,600,000 in any one week. Playboy Club granted the cheque cashing facility and increased it to £1.25m. Mr Barakat drew two cheques totalling £1.25m, made net winnings of £427,400 which were paid out to him by Playboy Club, returned to Lebanon, and was not seen again at the club. Both cheques were returned, and the club suffered a total net loss of £802,940 (including gaming duty). It was common ground between the parties that BNL had no reasonable basis for their reference. BNL held no account for Mr Barakat until two days after the reference was sent and that account had a nil balance until its closure on 14 December 2010.

In the High Court, the trial judge held that BNL owed a duty of care to Playboy Club in relation to its reference. The Court of Appeal disagreed holding that the only duty BNL owed was to Burlington, to whom the reference was addressed.

JUDGMENT

The Supreme Court unanimously dismisses the appeal. Lord Sumption gives the lead judgment with which Lady Hale and Lords Reed and Briggs agree. Lord Mance gives a concurring judgment.

REASONS FOR THE JUDGMENT

The principle espoused in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*, which permits recovery of pure economic loss for a negligent misstatement where a special relationship exists, is capable of further development. However, voluntary assumption of responsibility remains the foundation of this area of law [7].

The defendant's knowledge of the transaction, in respect of which the statement is made, is potentially relevant for several reasons. It identifies by name or description the person or group of persons to whom the defendant can be said to assume responsibility [10]. The representor must not only know that the statement is likely to be communicated to and relied upon by someone, it must also be part of the statement's known purpose that it should be communicated and relied upon by that person if the representor is to be taken to assume responsibility to them [11].

Playboy Club argued that the relationship between BNL and the Club was "equivalent to contract" due to Playboy Club's status as Burlington's undisclosed principal. The rule of English law that an undisclosed principal may declare himself and enter upon a contract is an anomaly that survives in modern law due to its antiquity rather than its coherence [12].

It does not follow that simply because a relationship is treated in law as a contractual relationship that it is legally the same as a contractual relationship or involves all the same legal incidents [13]. Whether a relationship is sufficiently proximate to create a duty of care is a question of fact from which the law draws certain conclusions. The liability of a contracting party to an undisclosed principal is a legal, as opposed to factual, construct. It creates contractual relations between parties who do not have a factual relationship with each other. Such a relationship is not necessarily proximate and lacks the element of mutual consent required to give rise to an assumption of responsibility [14]. The majority of the principles governing undisclosed principals are entirely inapposite to the law of tort. In particular, while the relationship between a contracting party and an undisclosed principal may be mutual in a contractual sense it lacks mutuality in tort [15].

BNL had no reason to suppose that Burlington was acting for someone else, and they knew nothing of the Playboy Club. It is plain that they did not voluntarily assume any responsibility to the Club [16].

Lord Mance writes a concurring judgment. There are passages in some authorities which suggest that there are two requirements for a duty of care to arise in respect of a representation: (a) the claimant must be a specific person or group to whom the responsibility may be said to have been undertaken, and (b) the representation must be made specifically in connection with a particular transaction or transactions of a particular kind made known to the representor [20]. Lord Mance does not consider that this claim should fail for want of communication of the purpose or kind of purpose for which an assessment of trustworthiness was required [22]. The claim fails in this case because BNL's representation was directed simply and solely to Burlington, who alone objectively requested the representation, and not to Playboy Club [24].

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:

<http://supremecourt.uk/decided-cases/index.html>