PRACTICE NOTE

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Banks' duties when providing bank references and other information to third parties

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This note provides an overview of the circumstances in which a duty of care may or may not arise when banks provide information on their customers to third parties. It is one of a suite of notes on banks' duties aimed at in-house legal counsel working at a bank.

Scope of this note

Providing information about their customers to third parties, such as in a bank reference, may give rise to a duty of care for banks. This note examines the circumstances in which a duty of care may or may not arise. It also provides an overview of related duties (for example, when a bank fails to provide an accurate reference), and data protection legislation, as well as the implications and risks for banks.

The note is part of a suite of notes on banks' duties. The other notes are listed below:

- Practice note, Banks' duties when executing client instructions: the Quincecare duty.
- Practice note, Banks' duties when providing advice and information.
- Practice note, Banks' duties: fiduciary duties owed by banks.
- Practice note, Banks' duties: equitable duties owed by mortgagees when exercising a power of sale.
- Practice note, Liability of banks for advice on regulated financial products.

The test for a duty of care

Historically, banks would provide references about a customer's creditworthiness to third parties. The reference would help the third party to decide whether to have business dealings with the customer. Such references now appear to be rare, but the case law built up on that topic has a wider application to banks' duties when providing information to third parties.

The leading case on bank references remains the decision of the House of Lords in *Hedley Byrne v Heller [1964] AC 465*, which was one of the most important cases of the 20th century. That case established that banks can owe a tortious duty of care when giving references (and more generally that tortious liability can exist for negligent misstatements).

Caparo test

Subsequent cases have established the principles that determine when a duty of care will arise. One approach is to look for evidence that the party making the impugned statements assumed responsibility to the other party for the accuracy of those statements.

Another approach is the threefold test in *Caparo Industries Plc v Dickman [1990] 2 AC 605*. The test comprises:

- Proximity between the parties.
- Foreseeability of loss.
- Fairness, justice and reasonableness of imposing a duty.

Particularly relevant for banks is the similar (albeit separate) four-part test suggested by Lord Oliver in *Caparo*. A duty of care will typically arise where:

- The advice is required for a purpose which is made known, either actually or inferentially, to the adviser at the time when the advice is given.
- The adviser knows, either actually or inferentially, that their advice will be communicated to the advisee in order that it should be used by the advisee for that purpose.
- It is known either actually or inferentially, that the advice is likely to be acted on by the advisee for that purpose without independent inquiry.
- The advice is acted on by the advisee to their detriment.

A third, "incremental" approach is to build on duties of care that are already established when considering whether to recognise a novel duty.

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The result is that banks generally have a tortious duty of care when providing references (unless they use a disclaimer (see Disclaimer)).

The application of a tortious duty of care to bank references also illustrates the similarities between the threefold test and Lord Oliver's four-part test:

- The third party's request for the reference creates the necessary proximity and puts the bank on notice that the third party will rely on the reference. This corresponds to the second and third parts of Lord Oliver's test.
- The bank's knowledge of the purpose of the reference creates the foreseeability of loss and fulfils the first part of Lord Oliver's test.
- The bank's special knowledge of its customer's financial position, together with the risk of loss to the third party if that position is not accurately described, means that it is fair, just and reasonable to impose a duty of care. The fourth part of Lord Oliver's test also focuses on the latter issue.

The same duty can arise when providing other information about customers to third parties. For example, in *So v HSBC Bank Plc [2009] EWCA Civ 296*, a bank employee stamped and signed letters of instruction to the bank stating that funds should be held in a segregated account. The employee also provided a reference letter confirming the good standing of the customers, who proved to be fraudsters. The court found that the bank would have had a duty of care to third parties who relied on the letters, but on the facts of the case the claimants did not do so. The claimants had in fact relied on the fraudsters' assurances, so the bank was not liable.

When the duty of care does not arise

Disclaimer

The bank in Hedley Byrne avoided owing a duty of care because it used a disclaimer. The effect was to negative any assumption of responsibility or to exclude any resulting liability.

Since that case was decided, the Unfair Contract Terms Act 1977 has come into force. It imposes a requirement of reasonableness on any notice seeking to exclude or restrict liability for negligence (section 2). This requirement of reasonableness is explained in section 11.

Although the courts have not considered this requirement in the context of bank references, certain factors suggest that using a disclaimer in that context is reasonable.

In particular, the recipient of the reference will usually be a business, and so should have the knowledge and resources to manage credit risk without relying exclusively on a bank reference. Even when the recipient has limited knowledge and resources, the bank will usually not charge a fee for the reference, and it is more reasonable to seek to exclude liability when the bank is not directly making a profit. Each case will depend on its own circumstances.

Unknown recipient and unclear purpose

No duty of care arose in another important case about a bank reference, *Playboy Club London Ltd v Banca Nazionale Del Lavoro SPA [2018] UKSC 43, [2018] 1 WLR 4041*. The issue there was that the bank needed to understand two things before a duty could arise:

- The bank needed to know that the third party requesting the reference was not doing so on its own account. The request in that case was ostensibly made on behalf of a named company, with no indication that another party, a casino, sought to rely on the information. The bank could owe a duty to the named company, but not to the casino of which it had no knowledge.
- The bank needed to know the broad purpose of the request. In *Playboy*, the purpose was to decide whether to allow a gambler to play on credit, whereas the only stated purpose was "business" (although the Supreme Court held that that may have been sufficient).

These two points correspond to the first and second parts of Lord Oliver's test in *Caparo* (see above), and illustrate the importance of considering the principles under which a duty can arise.

Related duties

The focus of this note has been on cases in which the bank provided a reference with its customer's permission and the reference was incorrect. Related duties can arise in similar situations.

Failure to provide a reference with permission

A bank might provide an unfavourable reference without permission.

In this case, it could be liable to its customer in negligence or in breach of contract (since banks have a contractual duty of confidence (*Tournier v National Provincial and Union Bank of England [1924] 1 KB 461*) and customers do not impliedly consent to the provision of references (*Turner v Royal Bank of Scotland plc [1999] 3 WLUK 446*)).

Liability to the customer could also arise if the bank failed to provide an accurate, favourable reference on request.

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Fraud and negligent misrepresentation

In more extreme cases, the bank can be liable for deceit (also called fraud). For example, the *Playboy* case turned into a deceit claim after the negligence claim failed.

Liability for deceit as to a person's creditworthiness is, however, restricted by section 6 of the Statute of Frauds Amendment Act 1828 (Lord Tenterden's Act). Such a claim must be based on a written representation of creditworthiness, which must be signed by the person making it (and an email signature or similar is enough).

This restriction also applies where the claim alleges negligent misrepresentation under the Misrepresentation Act 1967, but not where it alleges negligent misstatement under the Hedley Byrne principle.

Data-protection legislation and other duties

A bank can also, in principle, incur liability to its customer for breach of confidence, misuse of private information, defamation and breach of data protection legislation. Of these, the most significant is data protection.

The General Data Protection Regulation ((EU) 2016/679) (GDPR) was preserved as the UK GDPR on the UK's exit from the EU, and thereafter may diverge from EU law. Article 5 sets out six principles for processing data relating to living individuals. These include a requirement to satisfy one of six lawful grounds for processing data (such as informed consent, necessity to perform a contract, or the "legitimate interests" of the data controller). Another requirement is to keep the data accurate and up to date.

Particularly relevant for banks is the application of these principles to credit reference agencies. The credit industry together with the Information Commissioner's Office has published guidance on the topic for customers (see SCOR: Principles for the Reporting of Arrears, Arrangements and Defaults at Credit Reference Agencies (July 2016)). The courts have generally supported the practice of making credit references, but the reference should say if the credit agreement is unenforceable under the Consumer Credit Act 1974 (see *McGuffick v RBS [2009] EWHC 2386* and *Grace v Black Horse Ltd [2014] EWCA Civ 1413*).

Implications and risks for banks

The most obvious implication is that a bank must take care when providing information about customers to third parties. There is little case law to indicate the required standard of care, but presumably the bank will be judged by industry standards.

In practical terms, a bank should have procedures to determine who is authorised to give information about customers to third parties and to ensure that any such information is genuinely required and accurate. Staff may require training accordingly. In case something does go wrong, it would be wise to include appropriate disclaimers, and to keep records of what was done and why. The essential points to include in the disclaimer are that the bank does not accept responsibility for the contents of the reference and excludes liability to the recipient to the extent permitted by law.

If the bank is found to be in breach of its duty, damages will be assessed on the usual principles. For example, it might be that the third party would have suffered the same loss in any event, in which case the bank's breach did not cause any loss. Similarly, principles of remoteness and contributory negligence can reduce a bank's liability. These principles only apply to negligence liability and not to deceit.

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