Feature

KEY POINTS

- The judgment of the Court of Appeal in *PAG v RBS* suggests *Hedley Byrne* is narrowly concerned with negligent misstatements within a wider "general principle" – but *Hedley Byrne* itself established the general principle.
- The disclosure obligations contended for by PAG were treated by the Court of Appeal, it is suggested incorrectly, as a novel duty, outside the established categories.
- The bank-customer relationship between RBS and PAG, *ex facie*, fell within an existing category of duty under a "general relationship" explicitly recognised in *Hedley Byrne* itself; the approach of the Court of Appeal, if not oversight, suggests that effect to policy was given at the expense of principle.

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Disclosure of risk in SME swap transactions: the Court of Appeal wreaks havoc with accepted principles

In this article, Paul Marshall continues his critique in (2017) 9 JIBFL 540 and considers the approach of the Court of Appeal in *Property Alliance Group Limited v The Royal Bank of Scotland*[1] to the mis-selling claims made by PAG and the court's rejection of a duty of care owed by RBS.

> "… I think there have been two major failures. One, the regulator should never have allowed access to the retail market for these complicated products, and that goes much wider than the swap products you are describing now …. Second … I think what boards allowed to happen was-business units who were eager to distribute these new products on which the margins were fat and where the senior management were persuaded [by statements to the effect] '[w]e are providing something that meets the needs of our customers …'. I think senior management or leadership were taken in by that. … inappropriate incentivisation is accountable for a lot of what has gone wrong." Sir David Walker, former Chairman of Barclays Bank Plc, evidence to the Treasury Committee Inquiry on Corporate Governance and Remuneration 22 May 2012.[2]

March 2018 brought unseasonal snow and the (joint) judgment of the Court of Appeal (Sir Terrence Etherton MR, Longmore and Newey LJJ) in *Property Alliance Group v The Royal Bank of Scotland Plc*. The trial was elevated to a "test case" and the appeal expedited.

Among claims that included fraud in connection with LIBOR manipulation, PAG sought damages against RBS for over £8m for its liability in breakage costs for four highly structured interest rate derivatives, allegedly mis-sold, the dimension of which was unexpectedly great following the collapse of interest rates in the financial crisis – a low frequency, very high risk "tail" event.

The decision is of importance, despite rather unusual facts, both for the approach adopted by the Court of Appeal in rejecting a duty of care upon RBS to explain or identify the contingent dimension of breakage costs or to disclose its internal "Credit Line Utility" (CLU) figure, and also for the representation and the contractual term that the court, reversing the trial judge, was willing to accept as necessarily implied in the underlying arrangements between RBS and PAG. This article is concerned with the approach adopted by the Court of Appeal to the mis-selling claims in rejecting a duty of care. The most interesting, if unconvincing, aspect of the decision is that the Court of Appeal considered it necessary to treat the mis-selling claims made by PAG as a novel duty situation – regardless of the issue of the scope of the duty alleged or any effective disclaimer. The decision merits consideration by the Supreme Court.

Shocks of the 1960s, not all unrelated, included the Beatles, the widespread use of recreational drugs, the Profumo affair[3] and the House of Lords' landmark decision in *Hedley Byrne & Co v Heller & Partners Ltd*.[4] The decision enables a defendant's actions to give rise to liability in tort for "pure economic loss" where there is an assumption by the defendant of responsibility (a legal construct), reasonable reliance by the claimant and resultant loss.

The decision has bequeathed a legacy of what Charles Dickens might have called "headaches judicial", and has been productive of confusion, doubt and error ever since. Nevertheless, the bank-customer relationship is a well-established *category* of relationship of "proximity" sufficient for a duty of care for liability for pure economic loss in tort. Lord Devlin, in his justly famous speech, said:[5]

> "I shall content myself with the proposition that wherever there is a relationship equivalent to contract, there is a duty of care. Such a relationship may be either general or particular. Examples of a general relationship are those of solicitor and client and banker and customer. For the former *Nocton v Ashburton*[6] has long stood as authority and for the latter there is the decision of Salmon J. in *Woods v Martins Bank Ltd*[7] which I respectfully approve. There may well be others yet to be established. Where there is a general relationship of this sort, it is unnecessary to do more than prove its existence and the duty follows."

Almost 40 years later, McHugh J, in the seven-judge High Court of Australia decision in *Perre v Apand Pty Ltd*,[8] reversing the full Federal Court, observed that:

> "[t]he continuing use of proximity as a duty indicator in England appears most clearly in *Caparo Industries Plc v Dickman*[9] where the House of Lords proposed a three-stage approach for determining duty ...".

But he gave an apt warning, recently reiterated by the Supreme Court: [10]

"… there is a danger that the *Caparo* test will be used as the test of duty in every case where duty is in issue. That would be to deny the operation of the established categories and the certainty that they provide. Even at its zenith, proximity was a rationale to be applied in aid of the principled development of new categories.[11] It was not meant to 'invade' the existing categories and wreak havoc with accepted and unproblematic principles developed within those categories."[12]

McHugh J addressed the question of the circumstances in which a duty of care in claims for pure economic loss will be imposed or denied where *outside* the established categories. Amongst relevant considerations, he said:

"[w]hat is likely to be decisive, and always of relevance, in determining whether a duty of care is owed is the answer to the question, 'How vulnerable was the plaintiff to incurring loss by reason of the defendant's conduct?' So also is the actual knowledge of the defendant concerning that risk and its magnitude."[13]

By (admittedly inexact) analogy, the owner of a lake in grounds open to visitors, who knows that crocodiles swim below the inviting surface, may not discharge a duty to visitors by erecting a warning "visitors should not swim in the lake". Still less is it a satisfactory response to a claim by the estate that the deceased could have made his own inquiries of the owner as to why visitors should not swim, but failed to do so.[14]

The outcome of the appeal in PAG just possibly, might have been the same on the facts had the court not felt it necessary to treat the circumstances as requiring to be addressed from first principles as a new category of duty. Nonetheless, that the court adopted the approach that it did, for reasons discussed, is both questionable and suggests that the decision owes a good deal more to policy[15] than to principle.

PAG is a property investor and developer. Between 2003 and 2014 it entered into eleven derivative trades with its bankers, RBS. Four of these were sold between 2004 and 2008. PAG brought proceedings against RBS claiming: (i) damages in tort, alleging that RBS had negligently mis-sold the products; (ii) that RBS had been dishonestly manipulating sterling LIBOR and had impliedly fraudulently represented that it had not done so, and would not do so, and that it was induced to contract for the swaps in reliance upon those representations; and (iii) damages for breach of an implied contractual term to the effect that, following transfer to RBS's distressed business unit (designated its "Global Restructuring Group") RBS (*inter alia*) could not call for re-valuation of PAG's property portfolio for purposes extrinsic to its legitimate business purposes and interests. In 2016 Mrs Justice Asplin dismissed all PAG's claims.[16] The Court of Appeal dismissed the appeal but overruled Asplin J on two points under issues (ii) and (iii) that are of importance, both for RBS[17] and also for other retail banks operating distressed business units, or for banks found by the FCA and the United States' Commodities and Futures Trading Commission to have manipulated sterling LIBOR.

ISSUES BEFORE THE COURT OF APPEAL

PAG's mis-selling contentions in the Court of Appeal were limited. There were three:

- RBS, having communicated to PAG *some information* about each of the four swaps, was under a duty to provide full and balanced information that extended to information about the contingent dimension of possible "break costs" of the products.[18] Failing to do so made the information that *was* provided incomplete, unbalanced and misleading;
- because RBS itself calculated the projected maximum dimension of its counterparty credit default risk over the term (tenor) of the hedges, that RBS designates CLU, against which it makes provision in its books (including for capital adequacy requirements), it ought to have provided *that CLU figure* to PAG. Its failure to do so made the information provided unbalanced and misleading;
- separately, each of the derivatives were *represented* by RBS to be "hedges", but were not in fact hedges within the meaning of that expression that PAG contended for. In reliance upon the expert opinion of Mr Hanif Virji, PAG contended that an "interest rate hedge" is "a product which if transacted mitigates the adverse consequences of changes in interest rates". At trial it was accepted by RBS's salesman that this was a fair definition, but Asplin J held this was not the way in which the expression, as a matter of *(mis) representation*, was understood by PAG at the time, a finding of fact the Court of Appeal was unwilling to disturb. That apart, Asplin J held that were the meaning of "hedge" to be that contended for by PAG, the conduct of RBS would have amounted to fraud. The Court of Appeal overruled that part of her decision. As against that *subjective* understanding, for the purposes of misrepresentation, the court attributed no *objective* meaning to the word "hedging" for the purposes of the contractual obligation under RBS's loan facilities (below).[19]

ASPECTS OF INTEREST RATE DERIVATIVES

Derivatives are of two main kinds, futures and options. Interest rate swaps are futures contracts. It is obvious, but important, that the "product" of derivative contracts is nothing tangible (hence their name) but, rather, risk itself and its location (incidence). The party paying the fixed rate, where linked to an underlying liability – typically with SMEs, debt finance – is buying protection against the risk of rising interest rates. In a "vanilla" swap the risk of rises in rates is exchanged for the loss of the benefit of a fall in rates – an analogue of the ancient example of the farmer[20] foregoing profits in the event that crop prices rise after fixing. Detached from an underlying risk associated with an interest in a person, asset or benchmark, an interest rate swap is a speculative instrument – a "speculation" in contradistinction to a "hedge".[21] An instrument at inception may thus be both a hedge and a speculation, depending upon whether there exists an underlying commercial interest in the reference entity (loan etc) in connection with which protection (hedging) is sought. A derivative sold to hedge a loan for a term that exceeds the term of the loan, necessarily ceases to be a "hedge" and represents, *at the time of sale*, a speculation from the date of expiry of the term of the loan – even if it is anticipated that further facilities may be taken in the future. Sight of this elementary point may sometimes be lost.

A simple interest rate "collar" is sold as a means of limiting interest rates between pre-agreed levels and involves two derivative contracts – a "cap" and a "floor". Under netting arrangements for the floor the buyer receives payments at the end of each period in which the interest rate is below the agreed strike rate. In almost all OTC retail sales, the SME is the seller of the floor. As accepted by RBS's witnesses at trial in PAG, the premium – "price" – for the floor will be reflected, typically but not necessarily, in the headline rate of the cap and an SME selling a floor will thus typically achieve a lower cap rate in exchange for a floor. The cost of buying a cap to protect against increasing interest rates can thus be defrayed by the revenue from selling a floor – in many cases the two eliminate each other – known as a "zero-cost collar". The actual cap strike rate and the floor strike rate may be changed to achieve the objective required – level of protection and premium. Accordingly, "vanilla swaps" and "collars" are concerned with fundamentally different things. While vanilla swaps are concerned with protection against rising rates, a collar is concerned with the *amplitude* of potential variations between the cap rate and the floor rate (or floor *rates* in a structured collar with more than one floor). Collars therefore require the evaluation of interest rate *volatility*. Data on volatility is not publicly available. It is available to banks and derived from a variety of sources and modelled mathematically. Modelling interest rate volatility is a core bank function. While elementary, it is important.

THE HEDGING PRODUCTS SOLD BY RBS

The Court of Appeal recorded that :

> "[a] critical feature of the factual context is that under each loan facility agreement RBS required[22] PAG to enter into and maintain an interest rate hedging agreement acceptable to RBS. The purpose of such a hedging agreement was plainly to ensure that PAG would be protected against *increases* in interest rates which might otherwise undermine PAG's ability to pay the interest due on its outstanding loans from RBS".[23]

Further, in a later section of the judgment, not dealing with the mis-selling issues, the court recorded that:

> "RBS was undoubtedly *proposing* the swap transactions with their reference to LIBOR as transactions which PAG *could and should* consider as fulfilment of the obligations contained in the loan contracts" (emphasis supplied).[24]

The essential features of the four products[25] are set out in the judgment.[26]

The terms of the loan facilities that the products sold by RBS were to "hedge" are not set out in the Court of Appeal's judgment. Nevertheless, in fairly crude terms, if the four products (that exhibit a complex transfer of risk under floors, no-cost breakage options to RBS and extendable features at RBS's option, sold by PAG with the premium defraying the cap) were not quite an exchange of "a birthright for a mess of pottage",[27] the products were akin to a series of one-way bets in favour of RBS, where the substantial risk lay with PAG, *augmenting* the interest rate risk that otherwise attached to PAG's loan facilities. While the (objective) meaning of "hedging instrument"[28] may be elastic, there is a point at which elastic breaks.

Each trade was stated to be subject to an ISDA Master Agreement of 7 October 2004. The schedule stated that each party would be deemed to make familiar "assessment and understanding" and "non-reliance" representations. The "short-form" confirmations ("Post-Transaction Acknowledgements") included "important" notes and some information and warnings in general terms[29] and replicated the "non-reliance" and "assessment and understanding" ISDA terms. These were accepted by PAG as precluding an advisory duty owed by RBS to PAG.[30] However understandable,[31] whether that concession was rightly made is perhaps doubtful given the continuing uncertainty about the correctness of doctrine of "contractual estoppel",[32] yet to be considered or authoritatively explained by the Supreme Court.

THE COURT OF APPEAL'S APPROACH

A tendency is sometimes discernible, both in first instance judgments and in judgments of the Court of Appeal, for references to precedent to be indirect. Modern applications surprisingly often are favoured over direct reference to older decisions of high authority. *PAG v RBS* is an instance. In Asplin J's evaluation of the authorities relevant to determining whether there was a duty of care owed to PAG by RBS, and if so, its scope, there is no reference to *Hedley Byrne*.[33] Although the central mis-selling claims were for economic loss caused by alleged negligence, Asplin J considered *Hedley Byrne* exclusively through the prism[34] of the interpretation of that decision in *Thornbridge v Barclays Bank Plc*,[35] (a decision where permission to appeal was given, but settled on terms). In *Thornbridge*, Judge Moulder held that "a duty to take reasonable steps to communicate clearly or fairly introduces notions going beyond the accuracy of what is said which is the touchstone of the *Hedley Byrne* duty". That formulation is wrong. Apart from such indirect references to *Hedley Byrne*, the issue of the duty of care alleged by PAG and its scope was analysed by Asplin J under two first instance decisions, *Bankers Trust International Plc v PT Dharmala Saki Sejahtera (No 2)*[36] and *Crestsign v National Westminster Bank Plc*[37] (the latter, another decision where permission to appeal was granted, but settled). *Bankers Trust* was an application of principles identified by the Court of Appeal (Croom-Johnson, Glidewell and Kerr LJJ) in *Cornish v Midland Bank Plc*.[38] But *Cornish* itself was an explicit application of *Hedley Byrne* on the *insufficiency* of the explanation given by Midland Bank.[39] *Bankers Trust* concerned two long-term *speculative*[40] swap transactions in the early 1990s,[41] recognised as such by the counterparty, DSS. In relation to the second transaction, Mance J held that, once BTI had made representations to DSS concerning the nature of risks associated with the transaction, a duty not to carelessly misstate facts would have been breached to the extent that any representations made were inaccurate. The duty would have obliged BTI, as representor, to "present the financial implications of the proposal by a properly constructed graph and letter. The downside and upside of the proposal should have been presented in a balanced fashion …".

The court recorded that Asplin J did not approach her analysis on the footing that PAG's primary case was based on breach of the *Hedley Byrne* common law duty not carelessly to misstate (*sic*) but held:

> "[w]e consider that the Judge was correct to reject both the allegation of breach by RBS of the *Hedley Byrne* duty *and the existence of a*

wider duty that would have included a duty to disclose the CLU figure"[42] (emphasis supplied).

For reasons discussed, questionably, the Court of Appeal distinguished Mance J's dictum in *Bankers Trust*. The court began by observing[43] that in a number of decisions there is "a broad distinction between a *Hedley Byrne* duty not to mislead and a more general advisory duty", the latter being said[44] to be founded on *Cornish v Midland Bank*. Having identified that doubtful and heterodox[45] distinction, the court went on to distinguish *Bankers Trust*:[46]

"… In *Bankers Trust* itself the factual context was that the bank put forward an explanation that entering into the proposed substitute swap would improve the risk exposure of the customer. It was against that factual background that Mance J held… that the duty not carelessly to misstate facts obliged the bank to present the financial implications of the proposal by a properly constructed graph and letter, which presented the downside and upside of the proposal in a balanced fashion. Those are not the facts of the present case."

That, of course, is correct.[47] Not least, PAG was buying *hedging protection* under swap transactions that RBS proposed to PAG for the purpose of fulfilment of its contractual obligations under the loan contracts. The Court of Appeal characterised the decision in *Hedley Byrne* as a "standard duty … not to misstate" "including by omission"[48] and said that "[i]t is not suggested by PAG that any of the formal transaction documents for the four Swaps or any communications by RBS to PAG in connection with the Swaps contained information that was inaccurate. Rather, its case is that, in relation to the entire course of dealings between RBS and PAG concerning the Swaps, RBS was in breach of the *Hedley Byrne* duty by failing to present a full and proper explanation since it omitted to disclose the potential size of the cost to PAG of breaking the Swaps in the future, and in particular in failing to disclose the CLU or at least to present PAG with worked break cost scenarios".

As to the CLU, in argument, what in fact this represented was considered by the court to be somewhat unclear, Longmore LJ observing "… we just don't have any idea, really, of what goes into it. I think that's really quite unsatisfactory". The court nonetheless held[49] that:

"[t]he CLU is the product of the *subjective view of RBS* about many matters, including possible movements in interest rates in the future and the length of the outstanding term of the swaps at the time of the break, *(sic)* and involves a complex computer programme into which is fed a large number of different scenarios. It is an internal and *subjective assessment* by RBS of risk inherent in the swaps. Whether or not PAG and its advisers had the sophistication and IT facility to carry out a similar exercise, based on their own predictions of possible future movements in interest rates over the period of the Swaps, is not to the point" (emphasis supplied).

Whether it is accurate to describe the CLU as a "subjective" matter is doubtful. The methodology is well understood and applied consistently – which is why it is a useful measure for banks in their evaluation of counterparty credit risk. A perhaps clearer explanation, *given by RBS itself*, is recorded in the judgment of Mrs Justice Rose in *London Executive Aviation v RBS*[50] (January 2018), albeit recorded as *a CLU that was disclosed* by RBS to its customer in the context of a forex product:

"This [given] CLU figure represents with 95% confidence, based on historic rate movements, the most that the Bank would expect to lose in the event of your default on this trade. Clearly this impact would only be felt to this extent in the event of aggressive $ strengthening. *Put another way, according to our calculations, and with a 95% confidence level, this is the maximum negative value that we foresee this trade accruing from a close out/ valuation standpoint*"[51] (emphasis supplied).

The Court of Appeal observed that "[f]or present purposes, the importance of [*Hedley Byrne*] is that it identified that relationships might give rise to a duty to take care, not limited to contractual relationships or relationships of fiduciary duty, where there is an assumption of responsibility"[52] and "[a]t its most basic, this is a duty not carelessly to make a misstatement. What amounts to a misstatement in this context will depend upon the factual circumstances of the relationship and identification of the matter for which the defendant has assumed responsibility …".[53]

Having adopted the narrowest possible interpretation of *Hedley Byrne*, the Court of Appeal recorded an important submission for PAG: *so far as the CLU figure lay outside the scope of a Hedley Byrne-type duty of care*, then it nevertheless represented a "breach of the common law duty to take reasonable care when providing information to ensure that such information is both accurate and fit for the purpose for which it is provided to enable the recipient to make a decision on an informed basis".[54] That duty was described as a "mezzanine"[55] or intermediate duty, a formulation adopted in *Crestsign*[56] described by the deputy judge as less onerous than a "wide duty to give advice" (*sic*) but "wider than the duty not to misstate".[57] Without specific reference at all to any of the speeches in *Hedley Byrne* the Court of Appeal held that:

"[i]f RBS was under a duty to disclose the possible or probable size of future break costs at any time during the lifetime of the Swaps, that could only have arisen under one or more of the three tests for tortious liability summarised by Lord Bingham in *Customs and Excise Commissioners v Barclays Bank plc*.[58] None of them are satisfied in the present case."[59]

In doing so, the disclosure obligations contended for by PAG were treated by the Court of Appeal as *a novel duty situation* outside the established categories, thereby confining *Hedley Byrne* to misstatements:

"[t]he *Hedley Byrne common law duty of care not to misstate is*, then, merely one example of *a more general principle* that a defendant's assumption of responsibility may give rise to a duty of care – giving rise to pure economic loss.."[60] (emphasis supplied).

That formulation may be doubted. The wider "general principle" is in *Hedley Byrne* itself.[61] It is unclear why so frequently *Hedley Byrne* is treated as though restricted to little more than authority for a non-contractual duty, in particular circumstances, not to "negligently misstate".[62] Lord Devlin said that such a duty was already established by *Nocton* *v Ashburton* where Lord Haldane had not, in his judgment, intended to confine his statement that a [person] may come under a special duty to exercise care in giving information to cases of breach of fiduciary duty.[63] The reason for *Nocton* frequently being treated as confined to breach of fiduciary duty was that the issue for decision concerned a fiduciary relationship. Similarly, the fact that *Hedley Byrne* concerned a statement by a bank may be the explanation for it being often treated as confined to negligent misstatements. But Lord Goff in *Henderson v Merrett Syndicates Ltd*,[64] emphasised the "breadth of the principle underlying the case",[65] to be discerned in the speeches of Lords Reid and Devlin. Lord Pearce said that persons "*holding themselves out in a calling or situation or profession [who] take on a task* … are in particularly close proximity to those who, as they know, are relying on their skill and care although the proximity is not contractual"[66] (emphasis supplied). Similarly, Lord Morris[67] Lord Devlin[68] and Lord Pearce[69] all said that reliance would be reasonable where the maker of the statement was possessed of special skill.[70] An assumption of responsibility was treated by their lordships as a kind of proximity. Lord Morris said that "[i]ndependently of contract, there may be circumstances where information is given or where advice is given which establishes a *relationship* which creates a duty not only to be honest but also to be careful", the inquiry becomes "an inquiry as to *whether there was a relationship* between the parties which created a duty".[71] Lord Devlin referred to the "definition of the *relationship* which gives rise to a responsibility towards those who *act upon information or advice* and so creates a duty of care towards them … It is a responsibility that is voluntarily accepted or undertaken, either generally where a general relationship, such as solicitor and client or banker and customer,[72] is created, or specifically in relation to a particular transaction."[73] He added that: "Where there is a general relationship of this sort, it is unnecessary to do more than prove its existence and the duty follows".[74] PAG and RBS plainly had such a relationship.

CONCLUSION

It is difficult to see why, given the speeches of Lords Morris and Devlin in *Hedley Byrne*, in circumstances where information concerning risk is provided by a bank to its customer in connection with a product to be entered into *in satisfaction of a bank-imposed contractual requirement*, the *relationship* between RBS and PAG should not have been found to be *paradigmatic* in satisfying the requirement of proximity. This, *a fortiori* where the Court of Appeal said that the four products were "undoubtedly" proposed by RBS "as transactions which PAG could and *should* consider as fulfilment of the obligations contained in the loan contracts".[75] Lord Devlin explicitly tied the conception of proximity to that formulated and articulated by Lord Atkin in *Donoghue v Stevenson*[76] as founding a (general) normative proposition of law.[77] To put it in McHugh J's formulation in *Perre v Apand*,[78] the question of whether a duty is owed is whether the defendant, in pursuing a course of conduct that caused injury to the plaintiff, or failing to pursue a course of conduct that would have prevented injury to the plaintiff, should have had[79] the interest or interests of the plaintiff in contemplation before he or she pursued *or failed to* pursue that course of conduct.[80]

As noted,[81] in *PAG* the Court of Appeal said that the tests for determining whether a defendant owed a duty of care in tort in a claim for pure economic loss were the three identified by Lord Bingham in *Customs and Excise Commissioners v Barclays Bank plc*[82] (a novel duty claim), including in the second the three "tests" under *Caparo Industries v Dickman*,[83] the second of which is "proximity" and the third whether it is "fair just and reasonable to impose a duty", but held *none* to be satisfied.[84]

Only a few weeks before the judgment in *PAG* was given, in the Supreme Court decision *Robinson v Chief Constable of West Constable of West Yorkshire*[85] Lord Reed observed that "long-established principles of the law of negligence … have been eroded in recent times by uncertainty and confusion".[86] In few areas has this been more apparent than in financial services law.[87] Lord Reed noted that Lord Browne-Wilkinson had explained in *Barrett v Enfield London Borough Council*[88] (in words that echo those of McHugh J in *Perre v Apand*):

> "'Once the decision is taken that, say, company auditors though liable to shareholders for negligent auditing are not liable to those proposing to invest in the company … that decision will apply to all future cases of the same kind.'"

Where the existence or non-existence of a duty of care has been established, a consideration of justice and reasonableness forms part of the basis on which the law has arrived at the relevant principles. It is therefore unnecessary and inappropriate to reconsider whether the existence of the duty is fair, just and reasonable (subject to the possibility that this court may be invited to depart from an established line of authority). Nor, *a fortiori*, can justice and reasonableness constitute a basis for discarding established principles and deciding each case according to what the court may regard as its broader merits. Such an approach would be a recipe for inconsistency and uncertainty, as Hobhouse LJ recognised in *Perrett v Collins*:[89]

> "'… It is normally only in a novel type of case, where established principles do not provide an answer, that the courts need to go beyond those principles in order to decide whether a duty of care should be recognised.'"[90]

It remains unclear as to why, in *PAG v RBS*, *Hedley Byrne* did not itself provide the "established principles" for a framework for analysis of the duties of disclosure for which PAG contended to which Lord Reed referred in *Robinson*. Whether or not the duty extended so far, or was effectively disclaimed, are different questions. It is doubtful whether, by adopting the distinction drawn by the court between supposed *Hedley Byrne* and *Cornish v Midland Bank* duties,[91] the decision in *PAG v RBS* affords the kind of legal "sure guide" in a commercial context that Lord Bingham of Cornhill considered to be necessary, writing and speaking extra judicially in *Law as the Handmaid of Commerce*.[92] To adopt the analogy of Lord Atkin's in *Donoghue v Stevenson*, one is left wondering whether, as a matter of policy, the Court of Appeal "passed by on the other side".[93] ■

1 [2018] EWCA Civ 355.

2 https://publications.parliament.uk/pa/cm201213/cmselect/cmtreasy/uc72i/uc72i.htm

3 Catalyst for the eventual collapse of the Macmillan administration in 1964 (though Macmillan resigned in 1963).

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4 [1964] AC 465.
5 *Ibid*, p 530.
6 [1914] AC 932.
7 [1959] 1 QB 55.
8 [1999] HCA 36, (1999) 198 CLR 180.
9 [1990] 2 AC 605.
10 In *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4 (below).
11 *Pyrenees Shire Council v Day* [1998] HCA 3; (1998) 192 CLR 330, 360-361 per Toohey J.
12 *Perre v Apand Pty Ltd*, *loc cit.*, para [79].
13 *Ibid*, para [104].
14 Asplin J, [2016] EWHC 3342, para [191], Court of Appeal, *loc cit.*, para [86]: "Yet, PAG never requested any worked break cost scenarios or information from RBS about the amount of the CLU…".
15 ie "fair just and reasonable" – the third of the "tests" in *Carparo v Dickman* – *viz* "policy" per Kirby J in *Perre v Apand Pty Ltd* (1999) 198 CLR 180, para [259].
16 [2016] EWHC 3342 (Ch).
17 Especially, following publication by Parliament in February 2018, under parliamentary privilege, of the unabridged, critical, "Promontory Report" (2016) undertaken for the FCA pursuant to s 166, FSMA 2000: https://www.parliament.uk/documents/commons-committees/treasury/s166-rbs-grg.pdf
18 *viz* the illustrative liability of PAG for RBS contingent balance sheet, or "Mark to Market" (MTM), value of those products as assets of RBS in the event PAG elected to break the products early.
19 nn. 22, 23, 24 below.
20 See generally, *Against the Gods, The Remarkable Story of Risk*, Peter L Bernstein John Wiley & Sons 1996 Ch 18, Side Bets.
21 For the distinction: *Financial Services Law*, Professor Joanna Benjamin, Oxford, 2013 (re-print), paras 5.06, 5.09 and herein n 8.
22 "The Borrower shall ensure that an interest rate hedging instrument(s) acceptable to the Bank and at a level, for a period and for a notional amount acceptable to the Bank is entered into and maintained".
23 Paragraph [91].
24 Paragraph [133] – the word "should" merits particular attention, but the information/advice distinction is beyond the scope of this discussion. In any event, PAG accepted that a claim for advice was precluded: n 30 below.
25 *'Multi Callable Libor Value Collar'* (6 October 2004), *'Libor Cancellable Discount Swap (Bank)'* (25 September 2007), *'Libor Collar'* (14 January 2008) *and a 'Switchable Libor to base rate callable swap'* (16 April 2008).
26 Paragraphs [10]-[20].
27 Genesis 25:29-34.
28 See n 22 above.
29 For the detail, [2018] EWCA Civ 355, paras [12]-[15].
30 [2016] EWHC 3342 (Ch) para [175].
31 Given *Springwell Navigation Corp v JP Morgan Chase Bank* [2010] EWCA Civ 1212.
32 See eg the discussion in (2017) 32 JIBFL 540.
33 *Loc cit.*, paras [194]-[205].
34 *Loc cit.*, para [184].
35 [2015] EWHC 3430 (QB).
36 [1996] CLC 518.
37 [2014] EWHC 3043.
38 [1985] 3 All ER 513.
39 Croom-Johnson LJ p 517, esp. Glidewell LJ p 520.
40 pp 555D-E, 575F-H.
41 Before the discovery by retail banks of the profitable nature of selling complex interest rate derivatives to SMEs. *q.v* Sir David Walker's comments at the start of this discussion.
42 Paragraph [56].
43 Paragraph [66].
44 Paragraph [65].
45 *q.v.* the speeches of Lords Morris and Devlin in *Hedley Byrne loc. cit.* at pp 502, 509.
46 Paragraph [66].
47 But cf n. 24 above and para [133] of the CA's judgment.
48 Paragraphs [66] and [67].
49 Paragraph [80].
50 [2018] EWHC 74 (Ch).
51 *Ibid*, para [34].
52 Paragraph [58].
53 Paragraph [64].
54 The formulation of the Court of Appeal of this argument at para [43] – it may be that this is the source of the approach adopted by the court.
55 A usage the court deprecated – para [67].
56 *Loc cit.*
57 *PAG v RBS* (CA) para [43] *Crestsign* at paras [135]-[136].
58 [2007] 1 AC 181.
59 Paragraph [77].
60 Paragraph [63].
61 *q.v.* the speech of Lord Goff in *Henderson v Merrett Syndicates* [1995] 2 AC 145.
62 eg in *Thornbridge*, *loc cit.*
63 *Hedley Byrne*, p 523.
64 [1995] 2 AC 145.
65 *Ibid*, p 180.
66 *Hedley Byrne*, p 538.
67 *Ibid*, p 494-495.
68 *Ibid*, p 529.
69 *Ibid*, p 539.
70 See also *Henderson v Merrett, loc cit.*, the speeches of Lords Goff and Griffiths.
71 *Hedley Byrne*, p 502.
72 n 5 above.
73 Page 529.
74 *Ibid* and for the full statement see n 5 above.
75 Paragraph [133].
76 Page 514-515 and 531.
77 Page 531.
78 Paragraph [100].
79 *viz* the normative proposition referred to at n 77.
80 Lord Atkin in *Donoghue v Stevenson* [1932] AC 562, 580.
81 n 58.
82 [2007] 1 AC 181.
83 [1990] 2 AC 605.
84 Paragraph [77].
85 *Loc cit.*
86 Paragraph [3].
87 Exacerbated by similar uncertainty in contract law, most particularly in connection with the juridical basis for "contractual estoppel", a doctrine frequently asserted but, to date, never satisfactorily explained.
88 [2001] 2 AC 550, 560.
89 [1999] PNLR 77, 90-91.
90 Robinson *per* Lord Reed paras [26], [27].
91 Paragraph [133] n 44 above.
92 Lives of the Law, Essays and Speeches, Oxford 2011, p 293.
93 Luke 10, 31-32.

Further Reading:

- Travels in unreality: hard cases for SMEs and the making of English financial law (2017) 9 JIBFL 540.
- "Every word you just said was wrong": holding banks to higher standards (Part One) (2018) 4 JIBFL 218.
- "The enforcement of basic norms of commerce and of fair and honest dealing": holding banks to higher standards (Part Two) (2018) 5 JIBFL 294.