

Outsourcing Credit Approval Functions

> *Bartle v GE Custodians Ltd*

- > Could the knowledge of TML, a "mortgage originator" be attributed to the lender?
- > In some respects, particularly management of the loan book, TML was agent of GE but the contractual arrangements were set up on the basis that except where expressly provided, TML was an independent contractor.

**Outsourcing Credit Approval Functions
~continued~**

- > Arguable that in some respects TML was agent of GE (for instance in obtaining valuations and arranging credit insurance).
- > But held as much for policy (in relation to the relevant statutory scheme) as any other reason that TML's knowledge should be attributed to GE

Attributing a Principal Debtor's
Knowledge and Actions to a Lender
~continued~

> Where does that leave agency? Cf comments
of CA in *Etridge*:

"... the supposed agency is highly artificial. In most
cases the reality of the relationship is that the
creditor stipulates for security, and in order to raise
the necessary finance the principal debtor seeks to
procure the support of the surety. In doing so he is
acting on his own account and not as agent for the
creditor."

Attributing a Principal Debtor's
Knowledge and Actions to a Lender
~continued~

> But see now *Dollars & Sense v Nathan* in
which Rodney Nathan (in effect the principal
debtor) forged his mother's signature to a
guarantee which was incorporated in a
registered mortgage. By reason of Land
Transfer Act, Dollars & Sense could rely on
the mortgage (but with statutory
compensation available to Mrs Nathan)
unless Rodney's fraud was attributed to it.

Attributing a Principal Debtor's
Knowledge and Actions to a Lender
~continued~

> See comments of Supreme Court:

"It will in a particular case be very much a question of
factual assessment and judgment whether the
borrower has indeed acted as an agent for the lender
to obtain signature or has merely acted as the conduit
for the delivery of the documents. But to say that it is
never possible for the borrowers to act as agent, as
was suggested by the Court of Appeal in *Etridge*, is to
fail to appreciate the realities of cases like the
present."

**Attributing a Principal Debtor's
Knowledge and Actions to a Lender**
~continued~

- A lender is on inquiry where the transaction, from the point of view of the guarantor, is non-commercial.

**Attributing a Principal Debtor's
Knowledge and Actions to a Lender**
~continued~

- Once on inquiry, the lender should take reasonable steps to satisfy itself that the practical implications have been brought home to the guarantor; but
- The same solicitor can act for both the guarantor and the principal debtor providing it is acknowledged on all sides that in relation to the guarantee, the solicitor acts for the guarantor.

**Attributing a Principal Debtor's
Knowledge and Actions to a Lender**
~continued~

- The importance of policy, see Lord Nicholls' speech in *Etridge*, (a) the need to ensure that homeowners are free to use the equity in their homes for business purposes, and (b) the vulnerability to abuse of a guarantor in a familial or emotional relationship with the principal debtor.
- Law-making character of the way in which these considerations were balanced.

Attributing a Principal Debtor's
Knowledge and Actions to a Lender
~continued~

- New approach, based on *Barclays Bank plc v O'Brien*; *Wilkinson v ASB Bank Ltd*; *Royal Bank of Scotland plc v Etridge (No 2)*; and *Hogan v Commercial Factors Ltd*.

Attributing a Principal Debtor's
Knowledge and Actions to a Lender
~continued~

- Three issues:
- (1) Was the guarantor subject to undue influence or misrepresentation?
 - (2) If so, were the circumstances as known to the lender such as to put the lender on inquiry as to the risk of undue influence or misrepresentation?
 - (3) If so, did the lender act in such a way as to insulate itself from the consequences of such undue influence or misrepresentation?
- For a guarantor to avoid liability in these circumstances all three issues must be answered in his or her favour (that is, issues (a) and (b) "Yes" and (c) "No").

Attributing a Principal Debtor's
Knowledge and Actions to a Lender
~continued~

- Establishing undue influence / misrepresentation is often not hard, as the principal debtor may accept (or at least not strenuously resist) the allegation; this for reasons based around family dynamics and perhaps self-interest.
- So the second and third issues are very important from the view point of a lender.

A Broader Perspective

~Attribution in other Legal Contexts~

Policy

Lord Hoffmann in *Meridian*:

- › "It is a question of construction in each case as to whether the particular rule requires that the knowledge that an act has been done, or the state of mind with which it was done, should be attributed to the company. ... Each is an example of an attribution rule for a particular purpose, tailored as it always must be to the terms and policies of the substantive rule."

Attributing a Principal Debtor's Knowledge and Actions to a Lender

- › The usual context, a guarantor (often a wife) resists liability on the basis of the undue influence/misrepresentation of the principal debtor (often the husband) and seeks to attribute the principal debtor's actions (or knowledge of them) to the lender.

Attributing a Principal Debtor's Knowledge and Actions to a Lender ~continued~

- › Traditional approach (see *Contractors Bonding Ltd v Snee*), attribution possible if principal debtor is the agent of the lender or if lender has notice, actual or constructive, of undue influence.

A Broader Perspective

~Attribution in other Legal Contexts~

Non-delegable duty of care

Note:

- ▶ the policy overlay in relation to particularly dangerous activities;
- ▶ The organisation overlay particularly in relation to hospitals and non-employed specialist medical staff.

A Broader Perspective

~Attribution in other Legal Contexts~

What do we mean by agency?

Lord Wilberforce in *Morgans v Launchbury* :

- ▶ "I accept entirely that "agency" in contexts such as these is merely a concept, the meaning and purpose of which is to say "is vicariously liable," and that either expression reflects judgment of value - respondeat superior is the law saying the owner ought to pay."

A Broader Perspective

~Attribution in other Legal Contexts~

▶ Gleeson CJ in *Scott v Davis*:

- ▶ "Lord Wilberforce made the point that to describe a person as the agent of another, in this context, is to express a conclusion that vicarious liability exists, rather than to state a reason for such a conclusion."

▶

A Broader Perspective

~Attribution in other Legal Contexts~

- ▶ Section 3 of the Contributory Negligence Act
- ▶ "Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the Court thinks just and equitable having regard to the claimant's share in the responsibility for the damage"

A Broader Perspective

~Attribution in other Legal Contexts~

- ▶ Attributing negligence of the solicitor to the client, *Byron Avenue*:
- ▶ "It is difficult to see why the local authority should be worse off where a solicitor has failed to take these precautions than where the fault is simply that of the purchaser. As well, the practical result of holding that a client is not responsible for the fault of the solicitor is to require an extremely awkward circularity of action, with the local authority

A Broader Perspective

~Attribution in other Legal Contexts~

- ▶ required to join the solicitor and seek contribution, a course which may run into difficulties over privilege between the purchaser and solicitor. In a case in which a solicitor had negligently failed to make appropriate inquiries, it is far simpler for the client to sue the solicitor.
- ▶ Accordingly, and for very pragmatic reasons, I am of the view that the fault of a solicitor who fails to make appropriate inquiries may be attributed to the client."

Circumstances in which the Actions or Knowledge of Third Parties may be Attributed to a Bank or other Financier

A paper delivered to the Banking & Financial Services Law Association Conference
Queenstown
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By
The Hon Justice William Young KJZM

Preliminary Comments

- > Where B has performed a service at the request of and for the benefit of A, there is sometimes an issue whether the actions or knowledge of B should be attributed to A.
- > A prerequisite for attribution is that B was acting, at least in a broad sense, at the request of A.
- > Cases where B is the employee of A usually present no difficulty, although cf *Meridian*.
- > Attribution in other cases tends to be seen as turning on agency but the theme of the paper is that a formal agency approach is simplistic.

A Broader Perspective

~Attribution in other Legal Contexts~

- > Contributory negligence, the "both ways rule" in simple cases and the need for a value judgment in more complex cases.
- > Non-delegable duties of care.
- > Problems with using agency as a test for vicarious liability.
- > The need for a policy judgment, cf *Meridian*.
