REPORTABLE

KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG

REPUBLIC OF SOUTH AFRICA

Case No: 10142/2010

In the matter between:

DAVID JAFFIT	**PLAINTIFF**
And	
GARLICKE & BOUSFIELD INC.	**DEFENDANT/RESPONDENT**
And	
PKF (DURBAN) INCORPORTATED	**1ST THIRD PARTY/EXCIPIENT**
PATRICK ROBERT	**2ND THIRD PARTY**
NERAK FINANCIAL SERVICES (PTY) LTD	**3RD THIRD PARTY**

Case No: 10146/2010

In the matter between:

MERLIN STUART STOLS	**PLAINTIFF**
And	
GARLICKE & BOUSFIELD INC.	**DEFENDANT/RESPONDENT**
And	
PKF (DURBAN) INCORPORTATED	**1ST THIRD PARTY/EXCIPIENT**
PATRICK ROBERT	**2ND THIRD PARTY**
NERAK FINANCIAL SERVICES (PTY) LTD	**3RD THIRD PARTY**

Case No: 10144/2010

In the matter between:

ERROLL JAMES WATT	**PLAINTIFF**
And	

GARLICKE & BOUSFIELD INC. **DEFENDANT/RESPONDENT**

And

PKF (DURBAN) INCORPORTATED **1ST THIRD PARTY/EXCIPIENT**

PATRICK ROBERT **2ND THIRD PARTY**

NERAK FINANCIAL SERVICES (PTY) LTD **3RD THIRD PARTY**

Case No: 10145/2010

In the matter between:

NEIL DOUGLAS RODSETH **PLAINTIFF**

And

GARLICKE & BOUSFIELD INC. **DEFENDANT/RESPONDENT**

And

PKF (DURBAN) INCORPORTATED **1ST THIRD PARTY/EXCIPIENT**

PATRICK ROBERT **2ND THIRD PARTY**

NERAK FINANCIAL SERVICES (PTY) LTD **3RD THIRD PARTY**

Case No: 10186/2010

In the matter between:

TOWER BRIDGE SOUTH AFRICA (PTY) LTD **PLAINTIFF**

And

GARLICKE & BOUSFIELD INC. **DEFENDANT/RESPONDENT**

And

PKF (DURBAN) INCORPORTATED **1ST THIRD PARTY/EXCIPIENT**

PATRICK ROBERT **2ND THIRD PARTY**

NERAK FINANCIAL SERVICES (PTY) LTD **3RD THIRD PARTY**

Case No: 858/2011

In the matter between:

DYCOMBER (PTY) LTD	**PLAINTIFF**
And	
GARLICKE & BOUSFIELD INC.	**DEFENDANT/RESPONDENT**
And	
PKF (DURBAN) INCORPORTATED	**1ST THIRD PARTY/EXCIPIENT**
PATRICK ROBERT	**2ND THIRD PARTY**
NERAK FINANCIAL SERVICES (PTY) LTD	**3RD THIRD PARTY**

Case No: 1340/2011

In the matter between:

COTTON KING MANUFACTURING (PTY) LTD	**PLAINTIFF**
And	
GARLICKE & BOUSFIELD INC.	**DEFENDANT/RESPONDENT**
And	
PKF (DURBAN) INCORPORTATED	**1ST THIRD PARTY/EXCIPIENT**
PATRICK ROBERT	**2ND THIRD PARTY**
NERAK FINANCIAL SERVICES (PTY) LTD	**3RD THIRD PARTY**

JUDGMENT

MADONDO J

Introduction

[1] In each individual action the plaintiffs seek to recover from the defendant certain

specified amounts of money allegedly advanced or deposited by them in terms of various loan agreements purportedly entered into between them and the defendant though Collin Bernard Cowan (Cowan) who it is averred was the defendant's executive consultant and a practising attorney. In the alternative, plaintiffs`claims are based on written acknowledgements of debts and the bills of exchange.

[2] In each case the defendant denies that it concluded any agreements with any of the plaintiffs and that it executed any of the acknowledgments of debt and issued any of the bills of exchange sued upon. Further, the defendant denies representative authority of Cowan and pleads that Cowan concluded the aforesaid agreements for his own dishonest purposes and not for the purposes or in the interest of the defendant.

[3] In each case the plaintiffs have replicated an estoppel to the defendant's denial of authority of Cowan on the factual basis set out in each respective replication.

[4] The defendant has issued third party notices and joined the third parties to the action as the first third party, second third party and third third party respectively. Rule 13(1)(b) is relied upon to ground the third party proceedings, The issues are the authority of Cowan and any representations made by him together with the representations by the defendant which support the estoppel . It is submitted that these issues should be properly dealt together with actions.

[5] The defendant alleges that the third parties had a legal duty to have informed the defendant of the manner in which Cowan was conducting the money lending transactions which gave rise to the aforesaid various actions against the defendant.

[6] The third parties have filed exceptions to the third party notices. The exception raised by the first third party was dealt with separately under case no.10146/201.

[7] This application concerns the exception taken by the second third party and the third third party respectively. However, all the parties have agreed that the judgment on this exception must also be determinative of the similar issues raised in all other cases.

Parties

[8] The plaintiff is David Jaffit, a major male business man of 39 Park Street, Oaklands, Johannesburg Gauteng.

[9] The defendant is Garlicke & Bousfield Incorporated, a company duly incorporated according to the company laws of the Republic of South Africa, read with section 23 of the Attorneys Act no. 53 of 1979 with unlimited liability and with joint and several liability of the directors for the debts and liabilities thereof, carrying on the practice of a firm of attorneys at 7 Torsvale Crescent, La Lucia Ridge, Office Estate, Umhlanga Rocks, KwaZulu-Natal.

[11] The second third party is Patrick Robert, a financial adviser of 9 Milkwood drive,

Umhlanga Rocks, Kwazulu-Natal

[12] The third third party is Nerack Financial Services (Pty) Ltd a company with limited liability duly registered in terms of the company laws of the Republic of South Africa, having its registered office at 9 Milkwood Drive. However, for the sake of convenience and clarity, I would refer to the second third party as Robert and the third third party as Nerack.

Background

[13] The nature of the exception of the second and third third parties and the resultant issues can best be understood against the background of the facts pleaded in the plaintiff's particulars of claim, the defendant's plea and annexure to the second third party notice.

[14] The Plaintiff seeks to recover from the defendant the sum of R3500 000-00 together with interest thereon at 30% per annum, calculated from 5 October 2010 to date of payment. The pleaded facts in the plaintiff's particulars establish that the claim arises from the oral agreement allegedly entered into between the parties on 4 October 2010, and in terms of which the plaintiff would on 5 October 2010 deposit the sum of R3500 000-00 with the defendant by paying the aforesaid sum into DS&T Nominees Bank Account, an account operated by or for the defendant.

[15] The defendant would return the aforesaid amount (R3500 000-00) to the plaintiff by not later than the 30 November 2010 together with interest thereon at 30% per annum, calculated

from 5 October to date of payment. During the conclusion of the aforesaid agreement the plaintiff acted personally and the defendant was allegedly represented by its duly authorised representative Cowan, its executive consultant and a practising attorney.

[

16] On the same day, .i.e. 4 October 2010, the defendant executed an acknowledgment of debt and an undertaking to pay in writing through Cowan. The plaintiff personally accepted the aforesaid acknowledgment and undertaking on the same day in Johannesburg, Gauteng.

[17] In pursuance to the said agreement on 5 October 2010 the plaintiff deposited the sum of R3500 000-00 into the aforesaid bank account. However, on 30 November 2010 the defendant failed in terms of the agreement to make repayment of the said amount or to return the aforesaid amount to the plaintiff.

[18] The defendant is defending the plaintiff's claim on the basis that Cowan was not authorised to act on behalf of or to make representation that he was acting on behalf of the defendant in respect of the transactions on which the plaintiff relies for its claim.

[19] While in its plea the defendant admits that Cowan was its executive consultant and a practising attorney it denies that he entered into any such agreements as alleged for the purposes or in the interests of the defendant or for any purpose other than his own dishonest purpose.

[20] The plaintiff has replicated to the defendant's plea and estoppel the defendant from denying the authorisation of Cowan as its representative on the grounds of its conduct relating to the finance bridging scheme operated by Cowan.In amplification of its replication in this regard, the plaintiff pleads that the defendant is estoppel from denying the authority of Cowan on the grounds that the defendant through its directors held out Cowan as its executive consultant and allowed him to practise publicly and openly from its offices as an attorney. Secondly, that the defendant knew that Cowan was conducting a bridging finance business as part of his practice housed in defendant's offices and advised the public accordingly. Thirdly, that it allowed the use of the defendant's account for the payment in and out of funds connected with bridging finance business. Lastly, that the defendant allowed Cowan to earn remuneration for and in the name of the defendant on each of the bridging finance transactions. In the premises, the plaintiff avers that the defendant represented expressly or impliedly, by words or conduct that Cowan was authorised to conduct a bridging finance business on its behalf in its interests or for its benefit.

[21] In the circumstances, the plaintiff submits that the defendant should reasonably have expected that bridging finance clients who dealt with Cowan would act on the strength of these representations. In conclusion, the plaintiff avers that he acted reasonably in accepting the correctness of the facts represented, relying thereon and in dealing with Cowan on the basis thereof.

[22] Acting in terms of Rule 13(1)(b) of the Uniform Rules of Court the defendant has caused

a third party notice to be issued and served on Robert and Nerak and thereby joined them to the action between the plaintiff and the defendant as the second and third third parties respectively.

[23] The Rule 13(1)(b) provides:

> "(1) Where a party in any action claims –
>
> a) …
>
> b) any question or issue in the action is substantially the same as a question or issue which has arisen or will arise between such party and the third party, and should be properly be determined not only as between any parties to the action but also as between such parties and the third party or between any of them, such party may issue a notice, hereinafter referred to as a third party notice …, which notice shall be served by the sheriff."

The basis of such joinder is that the questions or issues in the main action (between the plaintiff and defendant) are substantially the same as a questions or issues as between the defendant and the third parties ,the propriety of joinder is not in issue.

[24] The defendant's action will arise in the event of the court in the main action notwithstanding Cowan's absence of authority finds that the defendant is nevertheless bound in respect of the aforesaid transactions on the ground that Cowan was held out as being authorised and that by reason of such holding out the defendant is obliged to make payment to the plaintiff and other claimants. According to the defendant it will thereby suffer a loss and in respect of which it must be compensated.

[25] As a result, the defendant seeks an order declaring that if the Court finds that it is liable to the plaintiff or any other claimant in respect of any claim arising after the year 2002 or such later date as maybe determined Robert and Nerak are jointly and severally liable either solely or jointly and severally with the first third party to pay the defendant any such amount together with interest and any costs awarded against the defendant.

[26] In the annexure to the second party notice the defendant pleads that Cowan caused potential investors to be informed that that he (Cowan) would receive money from them and invest it so to obtain interest on the said monies for the investors and on the maturity of the investment would either pay the proceeds of the investment and the interest thereon to the investor or to the order of the investor or would reinvest the said proceeds on the same basis as the original investment. As an assurance of his undertaking Cowan gave each investor a written undertaking purportedly signed by him on behalf of the defendant that the money referred therein would be paid to the investor or to the order of the investor on the happening of the events referred therein from funds allegedly held at the disposal of the investor.

[27] In paragraph 21 to 25 (inclusive) the defendant alleges that Robert procured investors to invest with Cowan and he obtained from Cowan the aforesaid written undertakings and distributed them to investors. Secondly, that he facilitated the receipt and payment of funds so invested and the monies so received were paid into the bank account of his family trust, known as Nerak Trust, or to other unidentified accounts directly or indirectly controlled by him.

Thirdly, that Robert caused the monies paid into such accounts to be paid to persons other than those indicated in the letters of undertaking though he knew or ought reasonably to have known that the persons to whom funds were paid were not the persons to whom such funds should have been paid in accordance with the letters of undertaking.

[28] Further, it is alleged that Robert was informed by Cowan that he was acting on behalf of the defendant and that Robert believed that Cowan was so acting. By reason of the facts set forth, it is alleged that Robert knew that the operations conducted by Cowan were conducted irregularly and not in the manner in which any *bona fide* investment scheme would have been conducted.

[29] In the premises, the defendant avers that by reason of the fact that Robert knew that the undertakings were given purportedly on behalf of the defendant and that he believed that Cowan was acting on behalf of the defendant, Robert had a legal duty to inform the defendant of the manner in which Cowan was conducting the said operations. In breach of the said duty Robert negligently failed to inform the defendant of the manner in which Cowan was conducting the aforesaid operations which he could without difficulty have done.

[30] The defendant submit, that had Robert informed the defendant of the manner the operations were conducted, the defendant would immediately have taken steps to prevent Cowan from continuing the said operations or from operating them in a manner which could have caused the defendant to be bound. Further, that if the defendant had taken any such

steps, the defendant would have prevented the loss from occurring to it.

[31] The defendant alleges that when Robert committed a breach of duty he was acting in the course and within the scope of his employment with Nerak and as a consequence Robert's knowledge was the knowledge of Nerak. In the premises, the defendant alleges that any loss suffered by it was caused by the negligence and breach of duty by both Robert and Nerak.

[32] Robert and Nerak have excepted to the defendant's annexure to the third party notice on the basis that the facts alleged therein in paragraph 17 to 25, in particular, do not establish the grounds which gave rise to any legal duty of care on them (Robert and Nerak) to inform the defendant of the manner in which Cowan was conducting the said finance bridging scheme.

Issue

[33] The question to be answered in this matter is whether Robert and Nerak owed the defendant a legal duty to inform it of the manner in which Cowan was conducting the transactions which gave rise to various actions.

Legal Duty

[34] The existence or otherwise of the legal duty is a conclusion of law which must be reached upon objective consideration of all relevant circumstances. It has been argued on behalf of the defendant that such a consideration entails policy decisions and value judgments and that is an exercise which must be carried out in accordance with the spirit, purpose and

objects of the Bill of Rights. In support thereof, reference has been made to the case of Carmichelle v Minister of Safety and Security and Another 2001(4) SA 938(CC) at para 42-43.

[35] However, Mr Shaw QC for the defendant has submitted that the scope of the legal duty of the persons in the position of Robert and Nerak must be assessed against the background of the recognition by our courts of the unacceptability high rate of crime in South Africa, in particular, fraudulent activities. In support of this submission I have been referred to the case of Investigating Directorate: Serious Economic Offences and others v Hyundai Motor Distributors (Pty) Ltd and others 2001(1) SA545 (CC) at para 53.

[36] Factors which may be relevant in determining whether or not a legal duty exists are in Coronation Brick v Strachan Construction 1982(4) SA 371(D) at 384F-G articulated as follows:

> "In coming to its conclusion the court should, inter alia, have regard to the probable or possible extent of the foreseeable or foreseen loss. The degree of risk that the loss would be suffered as a result of conduct complained of; the value to defendant and/or society of the object which the defendant was seeking to achieve when he conducted himself in the manner complained of; whether they were reasonably practicable measures available to the defendant to avert the loss; what the chances had been that those measures would have been reasonably proportionate to the loss which plaintiff could have suffered"

The Coronation Brick case, was cited with approval in Bowley Steel (Pty) Ltd v Dalian Engineering (Pty) Ltd 1996(2) SA 393 at 399H-I.

[37] In the present case it has been submitted that the relevant factors for consideration are , inter alia : the value to society of combating white – collar crime; the foreseeable of harm resulting to the defendant; the unusual characteristics of the manner in which Cowan conducted the operations in question; Nerak's status as an 'authorised financial services provider' in terms of the Financial Advisory and Intermediary Services act no 37 of 2002 (FAIS) and Roberts status as a 'key individual' and a duly authorised representative of Nerak; the fact that reasonably practicable measure were available to Robert and Nerak to avert the loss; the fact that, had Robert and Nerak taken such measures, the loss would have been averted and the fact that no harm could have resulted to Robert or Nerak had either of them informed the defendant that Cowan was conducting the "operations" in question.

[38] Negligent conduct giving rise to damages is not actionable per se. It is only actionable if the law recognises it as wrongful. However negligent conduct manifesting itself in the form of a positive act causing physical damage to the property or person of another is *prima facie* wrongful. See *Minister of Safety and Security v Van Duivenboden 2002(6) SA 431 (SCA); [2002] 3 All SA 741 para 121; Gouda Boerdery Bpk v Transnet 2005 (5) SA 490 (SCA); [2004] 4 All SA 500 para 12.*

[39] Wrongfulness depends on the existence of a legal duty not to act negligently. The criterion for the determination of wrongfulness is a 'general criterion of reasonableness; i.e. whether it would be reasonable to impose a legal duty on the defendant. See *Government of the Republic of South Africa v Basdeo and another 1996(1) SA 355(A) at 367 E-G; Gouda*

Boerdery Bpk, supra, at para 12.

[40] The reasonableness referred to in decided cases does not pertain to the reasonableness of the conduct itself which is an element of negligence, but it concerns reasonableness of imposing liability on the defendant. See Anton Fagan: ` Rethinking wrongfulness in the law of delict` (2005) 122 SALJ 90 at 109. In Trustees Two Oceans Aquarium Trust v Kantey & Templer 2006 (3) SA 138 (SCA) at 144E para 11, it was stated that likewise, the legal duty referred to in this context must not be confused with the duty of care in English law which straddles both elements of wrongfulness and negligence. See also *Knop v Johannesburg City Council 1995 (2) SA 1 (A) at 27B-G; Local Transitional Council of Delmas v Boshoff 2005(5) SA 514 (SCA) at para 20.*

[41] A particular omission or conduct causing pure economic loss is wrongful only if the public or legal policy considerations require that such conduct, if negligent, is actionable and that legal liability for the resulting damages should follow. Where the negligent conduct causing pure economic loss or consisting of an omission is not wrongful, the public policy or legal policy considerations determine that there should be not liability, that the potential defendant should not be subjected to a claim for damages his or her negligence notwithstanding. In such event, the question of fault does not even arise. The defendant enjoys immunity against liability for such conduct whether negligent or not. See *Telematrx (Pty) Ltd v Advertising Standards Authority SA 2006(1) SA 461 (SCA) at 469 para 14; Trustees, Two Oceans Aquarium Trust v Kantey and Templer 2006(3) SA 138 (SCA) at 144C para 10.*

[42] Where a legal duty has its origin in the common law, breach of that duty gives rise to an action for damages only where it is justified by policy considerations. See *Steenkamp NO v Provincial Tenderboard Eastern Cape 2006(3) SA 151 (SCA) at 161 para 22*

[43] In *Trustees, Two Oceans Aquarium Trust v Kantey and Templer 2006(3) SA 138 (SCA,).t*he appellants being trustees of a trust which leased and operated an aquarium, claimed the respondent for damages in delict for pure economic loss resulting from the negligent design by the respondent structural engine of the exhibit tanks at the aquarium. They alleged that the respondent's negligence arose prior to the conclusion of a contract between them, but that, even at that stage the respondent was under a legal duty to act without negligence in deciding upon an appropriate design for the tanks. The respondent excepted to the appellant's particulars of claim on the basis that the facts pleaded failed to establish the existence of the legal duty alleged.

[44] At p147 G-I – 149A para 20, the court held that negligent omissions and negligently caused pure economic loss were wrongful, and therefore actionable only were the defendant had been under a legal duty not to act negligently. The existence or otherwise of such a legal duty was determined upon consideration of relevant public or legal policy that was consistent with constitutional norms. It was, further, stated that the approach of our courts is not to extend the scope of Acquilian action to new situations unless there are positive policy considerations that favour the extension. In this case the court was of the view that there was

no need for the extension sought because it was intended from the outset that if the project proceeded at all, it would be governed by a contractual relationship that would be created once the trust was formed, and secondly, it was foreseen from the outset that the trust could not possibly suffer any damages through the negligent conduct of the respondent prior to the conclusion of the contract.

[45] The court, further, held that the trust could have protected itself against the risk of harm caused to it by the respondent's negligent conduct by inserting, either in the agreement between the joint venture and the respondent in the context of formal appointment of the respondent appropriate contractual stipulations covering even conduct that occurred prior to the formation of a trust. The court concluded by holding that there was in general no reason to extend Aquilian action to rescue a plaintiff who was in the position to avoid the risk of harm by contractual means, but who failed to do so.

[46] A plaintiff must allege and prove the existence of a legal duty without having recourse to the terms of the contract. Once it becomes necessary for a plaintiff to rely on the terms of a contract to prove the legal duty, his claim does not arise *ex delicto*. See *Lillicrap, Wassenaar and Partners v Pilkington Brothers (Pty) Ltd 1985 (1) SA 475(A).*

[47] In the present case the defendant's loss complained of can only arise in the event of the finding that the defendant was contractually liable to the plaintiff or is estoppels from denying the representative authority of Cowan. Our law does not under those circumstances recognise

a delictual duty towards a party such as in the position of the defendant. See *AB Ventures v Siemens 2011 (4) SA 614 (SCA) 623.*

[48] If the defendant is held liable to the plaintiff, it seeks to recover from Robert and Nerak only in the event that the defendant is estoppel from denying the authority of Cowan to represent it. In the circumstances, the defendants' liability arises not from contract but from estoppel. Where there is estoppel there could have been no consensus between the parties and therefore no contract. See Rabie (1992), The Law of Estoppel in South Africa at 11to12

[49] The plaintiff and Robert and Nerak have sought reliance on the dicta in AB Ventures Ltd v Siemens Ltd case on the ground that the defendant would be stopped on the ground that it by its conduct held out Cowan as its duly representative. The dicta in AB Ventures Ltd v Siemens Ltd case, is to the effect that there is no cause for the law to be extended to provide a remedy for a party who, by its own contractual act, took upon itself the risk of liability.

[50] It has been argued on behalf of the defendant that such a contention by the plaintiff and the second and third parties is untenable since the defendant, if it is liable to the plaintiffs it would be the victim of Cowan's operations. It cannot therefore be legitimately argued that the defendant could and should have taken steps to protect itself from becoming a victim of fraud. Nor can be a question of the defendant having brought liability upon itself contractually, as it was the case in AB Ventures case. Likewise the defendant was not in a position to protect itself against liability to the plaintiff by contractual means.

[51] However, in my opinion the position would be different if the defendant is found to have been aware of Cowan's operations and that possessed such knowledge it allowed its bank account to be used for such operations. In that event, the defendant cannot be heard to claim to be a victim of fraud. It would by such conduct have expressly represented to the plaintiffs or whoever was dealing with Cowan that he was its duly representative.

[52] In *Cape Town Municipality v Bakkerud 2000(12) SA 1047 (SCA) at 1054 – 1055, paras 8, 9 and 10,* it was stated that special circumstances must be established for liability to flow from an omission. However, a more flexible and all – embracing approach to the question whether a person's omission to act should be held unlawful or not must be preferred. See *Corbett JA Aspects of the Role of Policy in the Evaluation of our Common Law (1987) 104 SALJ 52 at 56; Cape Town Municipality case, supra, at 1057E.*

[53] It has been argued that Robert was no more than an insurance intermediary with no relationship with the defendant. The fact that Robert was aware that Cowan was acting on behalf of the defendant did not create a relationship between him and the defendant. The pleaded facts in the defendant's annexure to second third party notice clearly establish that Robert acted in concert with Cowan in that he procured investors for him and he also allowed his family trust account and other unidentified accounts, which were directly or in directly controlled by him , to be utilised for the scheme. Further, funds were paid out of such accounts to people who were in terms of the written undertaking not investors. Assumedly, such

withdrawals required his authority and he did give it. In the circumstances, it cannot be correct to say that he had a mere knowledge of the operations in question.

[54] Section 7 (1) of the FAIS provides that a person may not act or offer to act as a financial services provider unless such person has been issued with a licence under section 8. Subsection (3) of the section prohibits a financial services provider or representative from conducting financial services relating to business with a person rendering financial services who is not in possession of the required licence. Robert being a key individual in the employ of Nerak, a financial services provider, both with vast knowledge of the requirements and responsibilities imposed by FAIS, should and they ought to have satisfied themselves, before procuring investors for Cowan and Robert allowing his accounts to be used for the scheme, that Cowan was a licencesed and authorised financial services provider by demanding him to produce the necessary licence. If he could not produce any, to approach the defendant in this regard since Cowan had purported to act on behalf of the defendant.

[55] Section 13(2)(a)(b) of FAIS requires an authorised financial services provider to at all times satisfy himself or herself that the provider's representative and key individuals of such representative are, when rendering a financial services on behalf of the provider, competent to act, and comply with the requirements contemplated in paragraphs (a) and (b) of section 8(1) and subsection (1) (b)(ii) of the section (s13) , and to take reasonable steps to ensure that representatives comply with any applicable code of conduct as well as with other applicable laws on conduct of business.

[56] Robert is alleged to have had knowledge that the operations conducted by Cowan were conducted irregularly and not in a manner in which any bona fide investment scheme would have been conducted. Also, that the undertakings given by Cowan to the investors were purportedly to have been given on behalf of the defendant. Robert procured investors to invest with Cowan and obtain from Cowan undertakings which he, in turn, handed over to investors. A person who is a financial services provider must have personal character qualities of honesty and integrity, competence and operational ability to fulfil the responsibilities imposed by the Act and must be financially sound. *See section 8(1) (a) (b) and(c) (i) (ii) of FAIS.* Regard being had to the fact that funds were paid out of the accounts controlled by Robert to people who were not listed in the undertakings of the policies, Robert was fully aware that Cowan was dishonest in his operations of the scheme in question, but he did not disassociate himself from him.

[57] Section 13(1)(b)(i) and subparagraphs 1(aa)(bb) prohibits a person from acting as a representative of an authorised financial services provider unless such person is able to provide confirmation, certified by the provider to clients that a service contract or other mandate to represent the provider exists, and that the provider accepts responsibility for those activities of the representative that have been performed within the scope of, or in the course of implementing such contract or mandate. Though in the present case it has been stated that Robert obtained undertakings from Cowan and handed them over to the investors Robert knew that such undertakings had not been issued by the defendant. This is evidenced, firstly by the

fact that the defendant's bank account was not used to deposit the funds collected from the investors but Robert's family trust account and other unidentified accounts controlled by him instead, and, secondly, that the monies which had been so deposited were paid out of such accounts to people who were not listed in the undertakings. This, in my view, was sufficient to inform Robert that the scheme was not only conducted irregularly, but also unlawfully and that such activities constituted fraud and /or theft.

[58] In the circumstances, Robert knew very well that the undertakings were not intended to protect investors but only to deceive them into believing that they had some kind of assurance in the event of anything went wrong in the operation of the finance bridging scheme. Therefore, it follows that Robert foresaw the possibility of Cowan's conduct causing the defendant economic loss in the event of claims by investors against the defendant arising out of such operations.

[59] I now, turn to decide whether Robert and Nerak can be had liable under Acquilian action for pure economic loss sustained by defendant as a result of the irregular and unlawful operations of Cowan. See Indac Electronics (Pty) Ltd vs Volkskas Bank Ltd 1992 (1) SA 783. I am not satisfied that a reasonable person in the position of Robert possessed the knowledge of irregularity and unlawfulness inherent in the operation of Cowan would have kept silent and continued participating in the operation of the scheme in question. Obviously, a reasonable person in the position of Robert will have taken steps to avert the loss occurring to the defendant. This would have been a simple matter had Robert complied with the statutory

responsibilities imposed on him and Nerak by the provisions of FAIS. See also McCann vs Goodall Groups Operations (Pty) Ltd 1995 (2) SA 718 (C) 727 E – F.

[60] Needless to state, that the manner in which the investment scheme was conducted with Robert actively participating therein created a duty on Robert or Nerak to inform the defendant of Cowan's operations. Had Robert notified the defendant of the said operations the possibility was too great that the defendant would have taken urgent steps to prevent the loss from occurring. Also, had Robert demanded a licence to operate and the undertaking duly signed by the defendant from Cowan at the first instance, he would have nipped the operations in the bud or the loss might have been too minimal.

[61] The next question to decide is whether Robert's negligent and wrongful conduct is actionable. In Woodcock Street Investments (Pty) Ltd vs CAG (Pty) Ltd (formally Cardno Davies Australian (Pty) Ltd) [2004] HCA16, vulnerability to risk was held to be a critical issue in deciding whether Acquilian liability should be extended in a particular situation. In Trustees, Two Oceans Aquarium Trust case, it was held that the concept of vulnerability developed in Australian jurisprudence will only be satisfied where the plaintiff could not reasonably have avoided the risk by other means, for example, by obtaining a contractual warranty or cession of rights. In this case it was held that the Acquilian remedy should not be extended to rescue a plaintiff who was in the position to avoid the risk of harm by contractual means but who failed to do so. The facts of the present case show that there was no contractual nexus between the plaintiff and the defendant and that the defendant can only be held liable on the basis of

estoppel. It therefore stands to reason that the defendant in the circumstances could not have avoided the harm by contractual means. The defendant did not know and was not aware of the irregularity and unlawfulness of the operations conducted by Cowan and it was in the circumstances, more vulnerable to risk. Accordingly, this case is distinguishable from Trustee, Two Oceans Aquarium Trust case.

[62] In Cape Town Municipality case supra, at 157 para 17, it was held that the court in considering whether or not a legal duty should be imposed in a given situation, the balance ultimately struck must be harmonious with the public's notion of what justice demands. The decision whether an Acquilian remedy can be extended in the circumstances to cover the situation in which the defendant finds itself involves the weighing and the striking of a balance between the interests of the parties and that of the community. See Minister of Law and Order vs Kadir 1995 (4) SA 303 (A) at 318 E – H.

[63] In this regard, the Constitutional Court in Carmichelle case, supra, at 957 para 43 stated the following:

> "….This is a proportionality exercise with liability depending upon the interplay of various factors. Proportionality is consistent with the Bill of Rights, but that exercise must now be carried out in accordance with the 'spirit, purport and objects of the Bill of Rights and the relevant factors must be weighed in the context of a constitutional State founded on dignity, equality and freedom and in which government has positive duties to promote and uphold such values."

[64] Where necessary this Court has jurisdiction to develop the common law so to cover the present situation and to extend the Acquilian liability in order to afford the defendant a remedy. Section 39 (2) of the Constitution provides how the common law should be developed; not only must the common law be developed in a way which meets the section 39 (2) objectives, but it must be done in a way most appropriate for the development of the common law within its paradigm. See Commercial case, at 962B.

[65] The public consideration is to stem the tide of economic offences; fraudulent activities and corruption, in particular, which do not only involve patrimonial prejudice to the State, institution, person or individuals but are also of a serious and complicated nature and exacerbate social ills. See Investigating Directorate case, at supra. I, therefore, agree with Mr Shaw for the defendant that the legal duty of Robert and Nerak must be assessed against this background.

[66] I now turn to determine whether the conduct of Robert and Nerak was wrongful and actionable at the hands of the defendant. In A B Ventures, supra, at 616 E, it was held that such question is quintessentially decided on exception. The conduct of Cowan acting in concert with Robert exposed the defendant to the risk of pure economic loss. Since the defendant was not aware of the operations of Cowan it could not have protected itself from such risk. The social and legal policy as well as the legal convictions of the community in the circumstances of this case calls for the extension of Acquilian remedy for the protection of persons in the position of

the defendant. See also A B Ventures at 617 paras 7 and 8. This would, I feel, accord with the spirit and purport of the Constitution.

Conclusion

[67] In the premises, I find that the pleaded facts in the annexure to the second third party notice are sufficient to justify the conclusion that Robert and Nerak owed the defendant a legal duty to inform the defendant of the operations of Cowan and that their failure to do so is actionable.

Order

[71] In the result, the following order is made:

(1) The second and third parties' exception to the annexure to the second third party notice is dismissed with costs.

(2) The second and the third parties are ordered to pay the costs jointly and severally the one paying, the other to be absolved.

(3) Such costs to include costs consequent upon the employment of two counsel.

Date judgment reserved: 5 December 2011

Date judgment delivered: 27 January 2012.

For plaintiff: Troskie SC

Instructed by: David Randles c/o Austen Smith Shepstone & Wylie

REF: CC Smythe

For defendant: Shaw QC with

Salmon SC

Instructed by: Garlicke & Bousfield c/o/Venn Nemeth & Hart

REF: Mr R Stuart -Hill