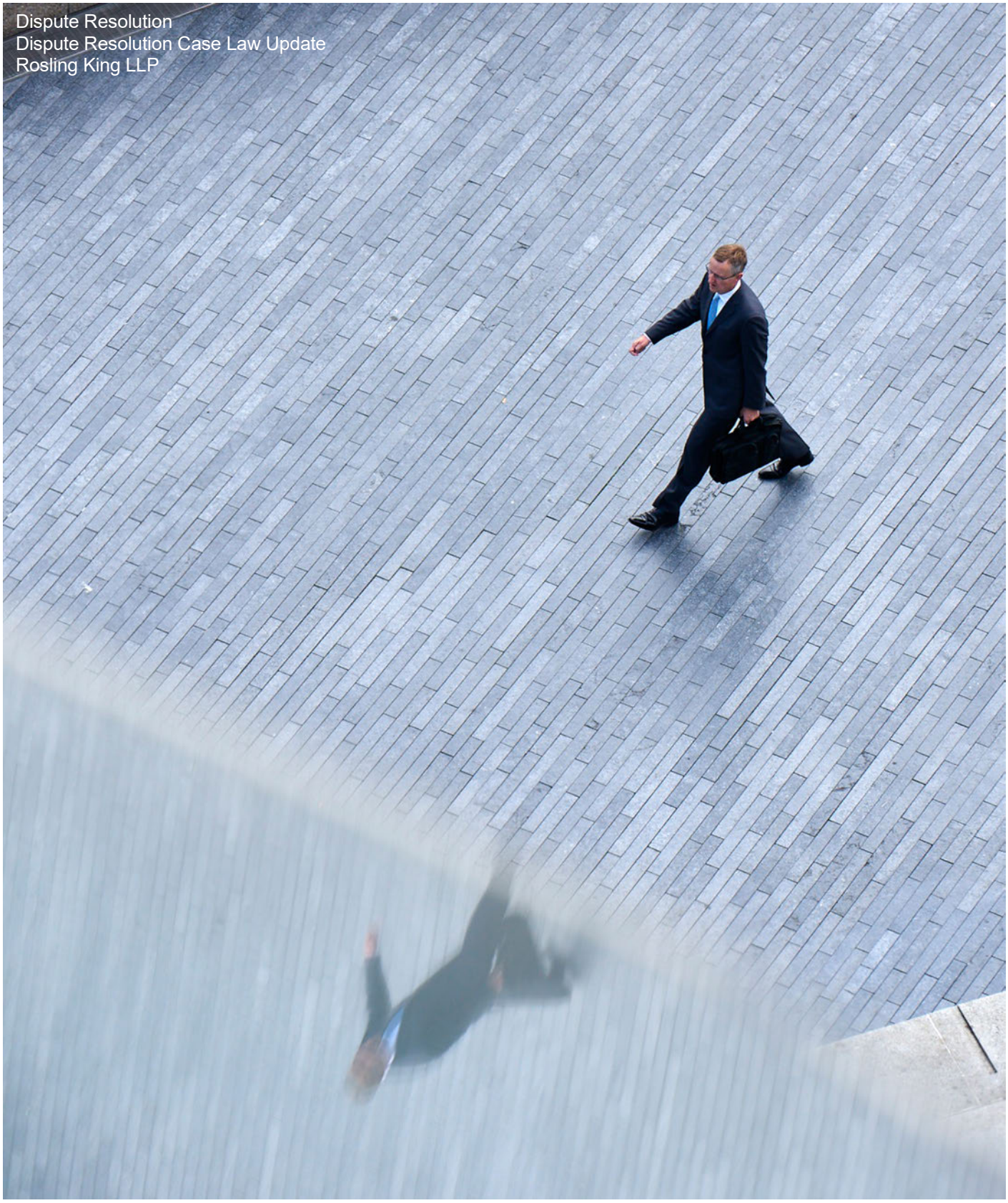
Dispute Resolution
Dispute Resolution Case Law Update
Rosling King LLP



Background to the Claim

The Claimant, Manchester Building Society ("**MBS**"), between 2004 and 2009 issued fixed rate lifetime mortgages. MBS then sought to hedge its interest rate risk on those mortgages by purchasing interest rate swaps. Between 2006 and 2012, MBS entered into swaps to hedge its UK mortgages, (valued at GBP 74.2m) and between 2008 and 2011, MBS entered into further swaps to hedge its Spanish mortgages (EUR 57m).

Until 2005, the UK accounting principles did not require such swaps to be included on balance sheets. From 2005 however, the swaps needed to be included at fair market value. The inclusion of the swaps, the value of which were subject to market fluctuations, introduced volatility into MBS's reported financial position.

In April 2006, the Defendant, Grant Thornton UK LLP ("**GT**"), advised MBS that it could apply hedge accounting when preparing its financial statements for the years 2006 to 2011. It was undisputed that this advice was negligent, and that MBS relied on it when entering into further lifetime mortgages and swaps from 2006.

In 2013, GT corrected its advice. The resultant changes to the accounting position meant that MBS no longer had sufficient regulatory capital, and after adjusting for the fair value of the swaps at that date, MBS suffered a loss of £32.7m on the swaps, together with transaction costs of £285,460.

The First Instance Decision

The matter went before Teare J in 2018. At first instance, Teare J found that causation in law and fact had been established. However, Teare J also considered *SAAMCO*, and rejected this approach. He considered instead that the relevant test was whether the losses sought to be recovered were losses for which GT had "*assumed responsibility*".

Teare J held that GT had not assumed responsibility for the loss in value of the swaps, as this loss flowed from market forces and not from the advice of GT. The transaction costs of breaking the swaps, however, had been assumed by GT, and so GT was held liable for these.

The Appeal

MBS appealed this decision on the basis that the Judge should have followed *SAAMCO* and determined this to be an "advice" case. Alternatively, even if this was an "information" case, the Judge was wrong because the losses were reasonably foreseeable, and so the losses were within GT's scope of duty.

The Court of Appeal considered *SAAMCO* and recent case law which followed it and, although it noted the "descriptive inadequacy" of the "advice" and "information" labels, confirmed that *SAAMCO* was the correct test. It went on to give a flow chart-style summary of the analysis that should be undertaken when considering *SAAMCO* claims:

1. First, consider whether the case is one of "advice" or "information";

2. Where it can be shown that it has been "left to the adviser to consider what matters should be taken into account in deciding whether to enter into a transaction", it will be an "advice" case, and the duty of the defendant is "to consider all relevant matters and not only specific matters in the decision". In such instances, the defendant is "responsible for guiding the whole decision making process";

3. In "advice" cases, the defendant will have assumed responsibility for the decision to enter into the transaction, and so will be liable for all of the foreseeable losses arising from it;

4. If it is not an "advice" case, it is an "information" case;

5. In "information" cases, the negligent adviser/information provider will only be responsible for the foreseeable consequences of the advice and/or information being wrong;

6. When considering losses in "information" cases, the Court must consider what losses would have been suffered if the advice and/or information had been correct. It is only losses which would not have been suffered in such circumstances that are recoverable.

The Court found that this was a *SAAMCO* "information" case as, although GT gave accounting advice, it was not involved in the decision to enter into the swaps. The Court explained that "*what matters is not whether advice is given, but the purpose and effect of the given advice*". It is therefore necessary to show that the defendant giving the advice had some responsibility for "*guiding the whole decision making process*".

The Court of Appeal also noted that MBS had received fair value for the swaps and stated that receiving fair value does not ordinarily give rise to a loss. It was held that the breaking of the swaps merely crystallised the losses that resulted from the swaps being "out of the money", but it did not create the losses, which were instead caused by market forces.

Conclusion

This judgment is helpful in that it reaffirms and further clarifies the *SAAMCO* test, and provides a helpful flow chart system for analysing the scope of duty in "advice" and "information" cases.

It is also helpful in the way it classifies "information" cases as being all those which do not meet the test of "advice" cases. The key test for recoverability in "information" cases is whether the same loss would have been suffered if the advice had been correct. The impact

of market forces should therefore take losses outside of the scope of foreseeable losses in "information" cases where the defendant has not been "*guiding the decision making process*".

From a risk management perspective, it is therefore important for anyone giving advice or providing information in relation to transactions to be clear about the scope of the advice or information that they are giving. Professional advisers should make it clear whether they are assuming responsibility for the entirety of a transaction, or whether they are only advising or providing information in respect of a discrete part. They should also make clear that the advice or information being given is for the party who instructed the adviser, and that the adviser assumes no responsibility for reliance on that advice/information by third parties.

Advisers should also avoid acting in such a way that they can be said to be guiding the decision making process, for example by providing unsolicited advice on commercial strategy or commenting on information which is outside of the scope of the retainer, unless they are willing to accept responsibility for the entire outcome of the transaction..

For further information, please contact Georgina Squire or the Partner with whom you usually deal.