

Dispute Resolution
Case Law Update
Rosling King LLP



Overview

The Supreme Court has set new law when ruling in favour of the appellant in *Manchester Building Society v Grant Thornton UK LLP [2021] UKSC 20*. It was directed that the judgment be read together with the medical negligence case of *Khan v Meadows [2021] UKSC 21*. The two judgments are the most significant decisions on the scope of liability of professionals since (*SAAMCO*) (*South Australia Asset Management Corp. v York Montague Ltd [1997] AC 191*).

Background

Manchester Building Society ("**MBS**") engaged Grant Thornton UK LLP ("**GT**") as its auditor from 1997 to 2012. GT negligently advised MBS that an accounting treatment, "hedge accounting", could be applied to reduce the volatility of the mark-to-market ("**MTM**") value of swaps in its accounts.

In reliance on that advice, MBS entered into various fixed rate mortgages hedged against long term swaps under which it paid a fixed rate but received a variable rate.

The 2008 global financial crisis led to a fall in interest rates, with the effect that the MTM value of the swaps became negative. When GT's negligence was realised by MBS, it ceased to apply hedge accounting, closed out the swaps and, as a consequence, had to pay losses of over £32m on the swaps and transaction fees for breaking the swaps early.

MBS brought a claim in negligence against the GT. The issue was whether GT was liable for the MTM losses as well as the transaction fees.

In the Commercial Court at first instance, the Judge concluded that GT was not liable for the MTM losses as they did not fall within the scope of duty principle established by SAAMCO. The Court of Appeal also dismissed MBS's appeal, albeit on different grounds. It held that the Judge had not applied the SAAMCO principle correctly. The Court of Appeal found that this was an "information" case, as opposed to an "advice" case and held that the loss sustained by MBS was not within the scope of GT's duty of care. MBS subsequently appealed to the Supreme Court.

The Decision

The Supreme Court ruled unanimously in favour of MBS. The central question to the appeal was GT's scope of duty and whether accounting advice fell within it.

The Court, in both the MBS and Khan cases, held that when a claimant seeks damages for negligence, a series of questions would inevitably arise:

- Is the harm (loss, injury and damage) which is the subject matter of the claim actionable in negligence? (*the actionability question*)
- What are the risks of harm to the Claimant against which the law imposes on the Defendant a duty to take care? (*the scope of duty question*)
- Did the Defendant breach his or her duty by his or her act or omission? (*the breach question*)
- Is the loss for which the Claimant seeks damages the consequence of the Defendant's act or omission? (*the factual causation question*)
- Is there a sufficient nexus between a particular element of the harm for which the Claimant seeks damages and the subject matter of the Defendant's duty of care? (*the duty nexus question*)
- Is a particular element of the harm for which the Claimant seeks damages irrecoverable because it is too remote, or because there is a different effective cause (including novus actus interveniens) in relation to it or because the claimant has mitigated his or her loss or has failed to avoid loss which he or she could reasonably have been expected to avoid? (*the legal responsibility question*)

In seeking damages, these rules should be applied to place the claimant in the position that they would have been, but for the defendant's negligence.

The Court said "*it is better to begin at the beginning*" when looking at a claimant's cause of action, rather than take a pre-meditated approach. It ruled that the scope of duty of care assumed by a professional adviser is governed by the purpose of the duty, which should be assessed on an objective basis.

It went on to state that, "*in the case of negligent advice given by a professional adviser the Courts should look to see what risk the duty was supposed to guard against and then look to see whether the loss suffered represented the fruition of that risk*". In effect, Courts should focus on:

- The purpose of the advice; and
- The risk the advice was intended to protect against.

In MBS, the Court found that GT's advice fell within its duty of care. MBS asked GT whether it could use hedge accounting to implement its proposed business model, to which it

answered yes. This was advice was wrong and MBS suffered a loss, for which GT was deemed to be liable.

It should be noted that MBS was ruled to have been contributorily negligent and, as a result, a 50% reduction was applied to their loss. The Court ruled that they had been “*overly ambitious*” in their business model.

Commentary

This is an important change in the law on the scope of a professional adviser’s duty to its client.

When seeking professional advice, parties should make their adviser aware of the purpose of the advice and the risk which they are protecting against by obtaining it. In the event of a breach of duty, this will be key to determining the scope of the recoverable damages.

The Court highlighted that the principles outlined in SAAMCO could be applied more fluidly in the future, which could lead to an increase in professional advisory duty of care cases being brought before the Courts.

Claimants should be aware of the limits of counterfactual arguments, particularly in complex hypothetical circumstances. Such approaches have been used regularly in claims of this type, including in this case. The Court commented on how the two parties had spent a great deal of time and cost arguing a series of events which did not occur. This was not a determining factor in the Court’s decision. The Court stated that it will be more interested in the facts of the case, in particular the loss suffered, and applying the principles to those facts.

The Court rejected the distinction set by previous key authorities of assessing whether the professional had given “advice” or “information” to categorise the consequential scope of duty. It recognised that professionals offer a wide spectrum of advice, from a single piece of advice in a transaction to making decisions on behalf of a client.

Going forward, the Court held that greater emphasis should be placed on the specifics of what an adviser has been retained to do and for what purpose. Any retainer should be considered in precise detail to ascertain the scope of an adviser’s duty. If there nothing in writing, the Court can potentially look at assumptions made by a potential claimant as well as the relationship between the two parties.

