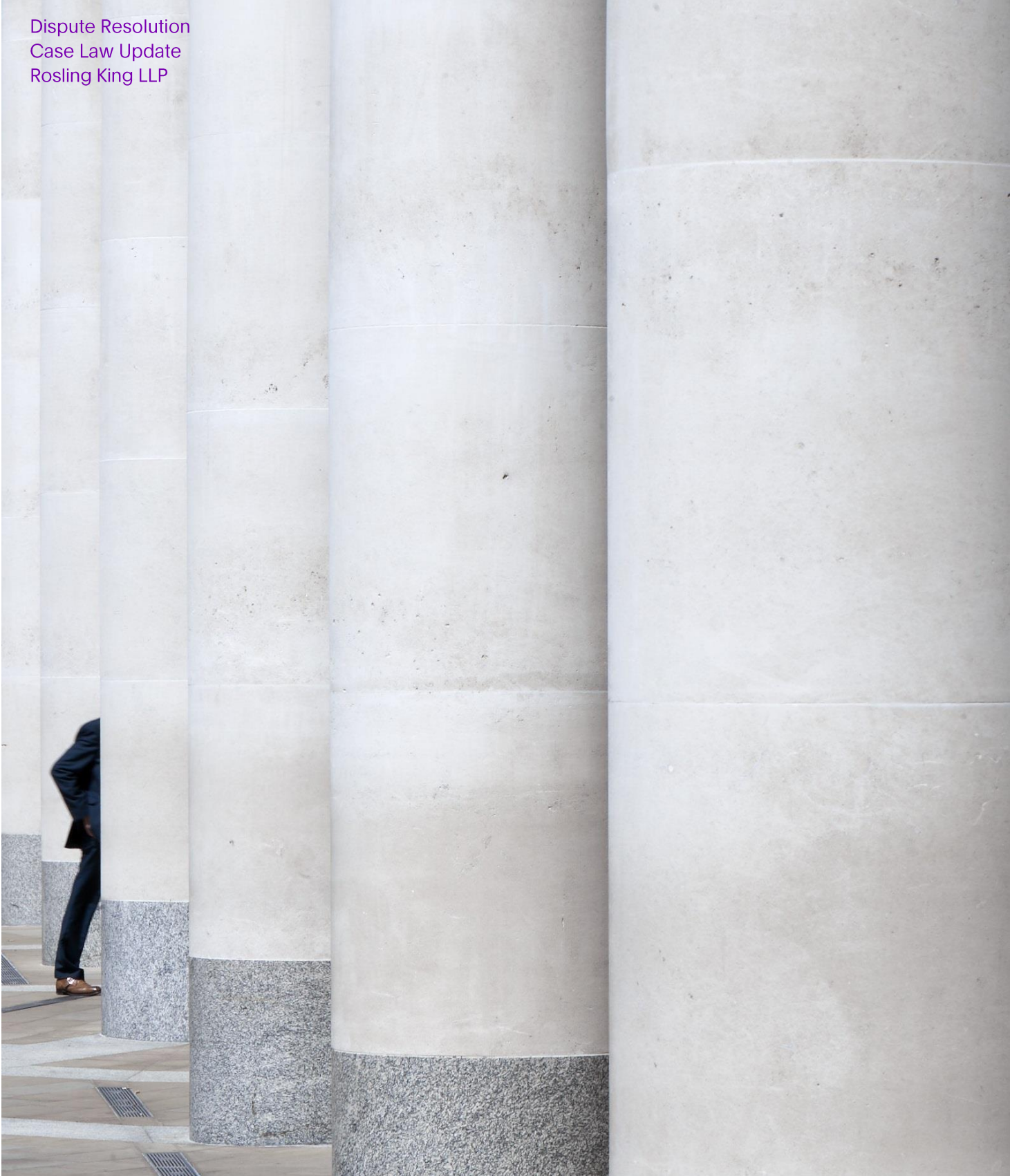


Dispute Resolution
Case Law Update
Rosling King LLP



Charles B Lawrence & Associates v Interco Commercial Bank Ltd (Trinidad and Tobago) [2021] UKPC 30

Over 25 years ago the seminal decision in South Australia Asset Management Corporation v York Montague Ltd (“SAAMCo”) set down the principle that a valuer is not liable in negligence or in contract for loss that falls outside the scope of its duty of care. Whilst this so-called SAAMCo principle remained settled law until very recently, practitioners and the Courts have regularly grappled with its application in practice to the particular facts of each case and a wealth of case law followed in its wake. However, perhaps in recognition of the convoluted case law in this area, the scope of duty question was recently re-cast by the Supreme Court decisions in Manchester Building Society v Grant Thornton UK LLP [2021] UKSC 20 (“MBS”); and Khan v Meadows [2021] UKSC 21 (“Khan”) and a new test for determining the scope of duty of care of a negligent professional was set down.

Thanks to the recent Privy Council decision of Charles B Lawrence & Associates v Interco Commercial Bank Ltd (Trinidad and Tobago) [2021] UKPC 30, practitioners now have helpful guidance on how the Courts will apply the re-cast test for determining scope of duty of care. In particular, this decision shows a willingness by the Courts to depart from SAAMCo principles in favour of the new approach where the facts require it.

Background

Intercommercial Bank Ltd (the “Bank”) received a request from a borrower for a loan, which was to be secured by way of a mortgage over a piece of land owned by Rafferty Development Limited (the “Guarantor”), who would also guarantee the loan. The Bank instructed Charles B Lawrence & Associates (“CBL”) to value the Land for secured lending purposes. CBL valued the land on the basis that: (a) good marketable title could be shown; (b) planning permission would be obtained for the purposes of commercial development; and (c) that the land was unoccupied.

CBL negligently assessed the value of the land at \$15 million and, in reliance on that valuation, the Bank loaned \$3 million to the borrower. When the borrower defaulted on repayment of the loan it transpired that the Guarantor in fact had no legal title to the land, rendering the security meaningless. It also became apparent that CBL had overvalued the land, as it could only ever have been used for the purposes of residential development. The land was also occupied.

The Bank brought an action against its conveyancing lawyers (which settled prior to trial). The question before the Court was to what extent the loss suffered by the Bank fell within

the scope of duty of CBL.

Appeal to the Privy Council and its Judgment

The Privy Council held that there were two distinct losses suffered by the Bank due to the overvaluation of the land on the one hand, and the defective title on the other.

CBL contended that the loss suffered due to the defective title was outside the scope of its duty of care because (a) the duty to investigate title fell to the Bank's lawyers; and (b) the valuer was not instructed, nor expected to, investigate title. CBL was not, it was argued, responsible for the security being worthless.

The Privy Council agreed, reiterating the need to consider the purpose of the advice or information when considering scope of duty by asking 'what was the risk that the advice or information was intended to address?'. The Privy Council found that it was not within the scope of CBL's duty to give advice on legal title, and so the loss attributable to the defect in title should be deducted from the losses recoverable by the Bank.

Case Law Commentary

In MBS, the Court suggested that there are six questions to ask in such claims, including that it was important to consider the purpose of the advice or information being given. The Court should ask itself: What are the risks of harm to the claimant that the duty was supposed to guard against, and does the loss suffered represent the fruition of that risk?

In applying this test, the Court noted that it was not the purpose of the valuer's report to advise or give information about the title to the land. That was a matter for a lawyer, not a valuer and the loss suffered due to the defective title was outside the scope of duty of the valuer.

Of particular interest was the application by the Privy Council of the SAAMCo counterfactual test i.e. would the Bank have suffered the same loss if the information or advice was correct? The MBS decision explained that the SAAMCo counterfactual test, which had been steadfastly applied by lawyers since that decision, should instead be regarded as a helpful cross-check for deciding on the scope of the duty of care. However, this would not be appropriate in each case.

The Court proved willing to depart from the SAAMCo counterfactual test in this case since it contradicted their conclusions on the basis of the test applied in MBS and Khan. Had the

valuation been correct, the bank would not have suffered the same loss, as it would have had adequate security to cover the Guarantor's default. This was, the Court concluded, one of the cases where the SAAMCo test was unhelpful.

Practical Considerations

The application by the Court of the principles in MBS and Khan provides useful guidance for practitioners on the Court's approach to scope of duty of care in the post-MBS era. Whilst previously practitioners struggled to shoehorn a case into either an "advice case" or an "information case", this decision demonstrates a much more fluid approach by the Courts and a move away from categorising cases as being 'advice' or 'information' cases, which is likely to be welcomed by claimants and lead to a greater proportion of liability apportioned to professional advisors. Professionals will also now find it much more difficult to escape liability on the basis that the claimant would have suffered a loss in any event.

As always, this case sounds a cautionary note to all professionals to ensure that the scope of duty of care is made clear and agreed at the outset of a retainer, and that the exact purpose of an instruction is understood and documented.

For further information, please contact [Laura Matthews](#) or the Partner with whom you usually deal.