Supreme Court revisits SAAMCO - the importance of the retainer

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In *Manchester Building Society v Grant Thornton UK LLP* [2021] UKSC 20, the Supreme Court examined how the principles established by *South Australia Asset Management Corpn v York Montague Ltd* [1997] ('SAAMCO') should be applied when an auditor has been negligent.

The Judgment has wide-ranging implications because the Court also provided *"…general guidance regarding the proper approach to determining the scope of duty and the extent of liability of professional advisers in the tort of negligence."*

SAAMCO

In SAAMCO, the Court drew a distinction between a duty to provide information to enable clients to decide on a course of action (an "*information case*"); and a duty to advise clients what specific course of action to take (an "*advice case*"). The negligent provider of information is only liable for the foreseeable consequences of the information being wrong. The negligent adviser, on the other hand, is liable for all losses which flow from the course of action taken.

Whether a case is an "*advice case*" or an "*information case*" is fact-sensitive but a solicitor rarely supplies more than a specific part of the material on which the client's decision is based. In the majority of cases, therefore, the solicitor is liable only for the financial consequences of the specific information provided being wrong, and not all the consequences of the transaction.

Manchester Building Society -v- Grant Thornton - background

The case concerned "*hedge accounting*" and fixed rate lifetime mortgages. Grant Thornton (GT) advised the Claimant building society (MBS) that it could manage the volatility on its balance sheet and keep its regulatory capital at a level it could afford by entering into interest rate swaps. GT admitted that this advice, and the audits that were signed off in the years that followed, were negligent. The advice exposed MBS to the risk of loss by having to break the swaps when it was realised that hedge accounting could not in fact be used to manage the regulatory capital demands.

At first instance, Teare J found that the losses MBS sustained when closing the swaps - roughly £33 million - were reasonably foreseeable. He decided, however, that the losses were the result of market forces (a substantial and sustained fall in interest rates) for which GT had not assumed responsibility at the time they gave negligent advice.

MBS appealed Teare J's ruling on several grounds, including that he had made an error of law by failing to consider whether GT were advisers or mere providers of information. MBS argued that this was an "*advice*" case and that GT were responsible for all reasonably foreseeable consequences of their advice being wrong, regardless of whether there had been an assumption of responsibility.

The Court of Appeal agreed that Teare J's reasoning was flawed but considered that his conclusion was right. The Court found that this was an "*information case*" and that the losses sustained in closing out the swaps fell outside the scope of GT's duty of care.

Supreme Court Decision

The Supreme Court allowed MBS's appeal and found that GT were liable for losses resulting from closing out the interest rate swaps. The distinction between advice cases and information cases was criticised as misleading and the court said these descriptions should be dispensed with as terms of art.

Lord Hodge identified six questions that are likely to arise when a Claimant seeks damages for negligence, the second of which is:

*"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);*

It was the Scope of Duty question that was central to GT's appeal. In Lord Hodge's view, the scope of the duty of care assumed by a professional adviser is governed by the purpose of that duty, judged on an objective basis by reference to the

purpose for which the advice is being given. Accordingly, *"in the case of negligent advice given by a professional adviser one looks to see what risk the duty was supposed to guard against and then looks to see whether the loss represented the fruition of that risk."*

The purpose of GT's advice was *"… to ensure that the society had accurate advice about the proper accounting treatment of the mortgages and swaps on which it could rely in taking commercial decisions …"* GT's negligent advice that hedge accounting was permitted resulted in MBS adopting this business model, exposing it to the capital demands that hedge accounting was supposed to avoid. GT owed a duty to protect MBS against this risk and the cost of closing out the swaps was attributable to that risk.

Comment

The Supreme Court has abolished the distinction between advice and information cases; and has made it clear that the purpose for which advice is given will be a key factor in determining whether a professional is liable for any losses incurred by the client if that advice proves to be wrong.

Solicitors should therefore consider the "*purpose of duty*" question at the start of the retainer and agree with their clients why advice is being sought. The letter of engagement should describe that purpose clearly and accurately. In complex matters, it may be advisable to make a contemporaneous note recording the solicitor's understanding of why the client is seeking advice. The scope of the retainer should be kept under review as the matter progresses and any changes recorded in writing.

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