

BRIEFING

Accountants and Professionals Beware – the Supreme Court reframes the test for scope of duty in professional negligence claims

Manchester Building Society v Grant Thornton UK LLP [2021] UKSC 20 and *Khan v Meadows [2021] UKSC 21*

The Supreme Court recently handed down important judgments in the cases of *Manchester Building Society v Grant Thornton UK LLP [2021] UKSC 20* and *Khan v Meadows [2021] UKSC 21*, both of which concerned the scope of duty of professional advisors (a firm of expert accountants and a GP respectively). The judgments are intended to be read together, however this note will focus mainly upon the decision in the *Manchester Building Society* case. The decisions will potentially have significant consequences for professionals in terms of the extent of their liabilities to their clients in the event of a claim in negligence.

The judgments analysed the House of Lords decision in *Bank Bruxelles Lambert SA v Eagle Star Insurance Co Ltd; South Australia Asset Management Corp v York Montague Ltd [1997] AC 191 (SAAMCO)*, which has long been one of the defining authorities governing the recoverability of damages for economic losses suffered as a result of professional negligence. The Supreme Court, in its majority judgment, decisively moved away from the “advice” vs “information” distinction set out in the SAAMCO case, preferring instead to focus on the purpose for which the professional was engaged in order to determine the risk against which the advice was intended to guard and whether the loss suffered represented the fruition of that risk and was therefore recoverable.

The majority took the opportunity to provide general guidance regarding the proper approach to determining the scope of duty in professional negligence cases and sets out a useful 6-stage framework to assist in assessing whether a particular loss falls within the scope of the duty owed.

Facts

Manchester Building Society (MBS) is a small mutual building society, which provided lifetime mortgage products. Grant Thornton (GT), who acted as auditors of MBS, advised that its accounts could be prepared using a method known as “hedge accounting” and that using such a method would provide a true and accurate view of MBS’ financial position for the purposes of its regulatory obligations. In reliance on this advice, MBS entered into a series of long-term interest rate swaps to hedge the cost of borrowing money to fund its business model. It later transpired that this advice was incorrect and GT admitted negligence. In order to rectify its accounts, MBS was forced to close its interest rate swaps early, suffering a loss in excess of £32m. MBS subsequently sought to recover this loss from GT.

Both the judge at first instance and the Court of Appeal held the loss was not recoverable as it fell outside of the scope of duty principle set out in SAAMCO.





Supreme Court decision

The Supreme Court unanimously allowed the appeal, holding that the loss suffered by MBS fell within the scope of the duty of care assumed by GT, having regard to the purpose for which it gave its advice on the use of hedge accounting. GT was therefore liable to pay damages for the losses incurred in ending the interest rate swaps early, subject to a 50% reduction in damages to take into account contributory negligence on the part of MBS.

The majority judgment held that the scope of duty question should be located within a general conceptual framework in the law of the tort of negligence. The court analysed the scope of duty principle by setting out the following 6-stage framework (*MBS v GT* at [6]):

1. *"Is the harm (loss, injury and damage) which is the subject matter of the claim actionable in negligence? (the actionability question)"*
2. *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)"*
3. *Did the defendant breach his or her duty by his or her act or omission? (the breach question)"*
4. *Is the loss for which the claimant seeks damages the consequence of the defendant's act or omission? (the factual causation question)"*
5. *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 as analysed at stage 2 above? (the duty nexus question)"*
6. *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)"

The majority considered that the scope of the duty of care assumed by a professional adviser is governed by the purpose of the duty, which is to be judged on an objective basis by considering the purpose for which the advice was given. In this regard, it was held that *"one looks to see what risk the duty was supposed to guard against and then looks to see whether the loss suffered represented the fruition of that risk"* (*MBS* at [17]).

The court held that the loss suffered by MBS fell within the scope of duty of care assumed by Grant Thornton, when the purpose of the advice (namely to advise upon whether MBS could use hedge accounting to implement its business model within the relevant regulatory framework) was taken into account. Therefore, Grant Thornton was liable for the loss suffered by MBS, subject to a 50% reduction for contributory negligence.

Comment

This judgment is arguably positive for claimants insofar as the reframing of the scope of duty opens the door to recovery of losses which would not previously have been recoverable under the old SAAMCO regime. However, this remains a complex area of law which is ripe for disputes and litigation.

Accountants and other professional advisers would be wise to consider carefully the scope of work defined in their letters of engagement to limit, in as much as is possible, their potential future liabilities should matters go awry.

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