Manchester Building Society
One Year On: Part 1

Caytons
Changing Perceptions

Introduction

Just over a year has now elapsed since the Supreme Court handed down judgment in *Manchester Building Society v Grant Thornton* [2021] UKSC 20. It was one of the most important professional liability decisions of 2021 and attracted considerable commentary at the time. First impressions varied as to where this left the law and what its implications might be. We are now able to draw on experience of applying the judgment to real world cases and assessing how claimants seek to apply it. Subsequent court decisions involving a range of professions have furthered our understanding.

This is the first in a series of reflections. In Part 1 we recap on the Supreme Court's judgment and draw on our experience over the past year. In subsequent parts, we will review the approach which the courts have taken in cases involving different professionals and draw conclusions.

RECAP

The Supreme Court framed the proper approach as a series of six questions: Is the loss actionable? ('the actionability question') What is the scope of the defendant's duty? ('the scope of duty question') Was the defendant in breach of duty? ('the breach question') Did any breach cause the loss? ('the factual causation question') Is there a sufficient nexus between the duty and the loss? ('the duty nexus question') Is there any other reason why some or all of the loss is irrecoverable? ('the legal responsibility question').

The court disapproved of the 'information' and 'advice' labels derived from *SAAMCO*. It amplified Lord Sumption's observation in *BPE v Hughes-Holland* [2017] UKSC 21 that what these labels previously denoted were two ends of a spectrum. When asking the 'scope of duty question', it was necessary to establish the purpose of the duty owed by the defendant. This, in turn, was informed by determining the risk which the duty was meant to guard against. The *SAAMCO* counterfactual question (would the loss have been suffered if the defendant had been right?) was demoted to a checking mechanism which would not be useful in every case.

REFLECTION

That Grant Thornton lost in the Supreme Court illustrates that the *Manchester Building Society* approach makes it easier for claimants to succeed in complex auditor's claims of the sort under consideration there. In many other cases, however, we are increasingly of the view that the decision is, if anything, helpful to defendants.

Caselaw so far does not lend support to the proposition that *Manchester Building Society* has drastically limited the application of *SAAMCO*, as some commentators suggested at the time. It has reinforced our scepticism about this analysis. Indeed, the Privy Council has shown that the

downgrading of the *SAAMCO* counterfactual can result in losses being irrecoverable even if they would have been avoided if the professional's advice had been right.

The 'six tests' are, in our view, a useful analytical exercise, although it is now clear that they are not prescriptive. As will be seen in this series, the courts have sometimes preferred a more holistic approach. The 'scope of duty question' forces the parties to focus on what the professional agreed to do. The engagement letter or equivalent will be central to this analysis, but the wider course of dealings will also be important. As the majority of the Supreme Court anticipated, reflecting on the scope of duty question provides a complete answer to some claims.

Experience suggests that this analysis will, more often than we would have anticipated a year ago, produce a seemingly obvious answer to questions about the purpose of the duty and the risk which it was meant to guard against. It will help expose as artificial attempts to formulate the duty by working backwards from the problem which caused the loss. However, a very recent Court of Appeal decision suggests that it will not always be appropriate to apply the purpose test.

As we will explore in this series, court decisions since *Manchester Building Society* suggest that the courts will be slow to fix professionals with liability for work of a different character from that outlined in their engagement letters or for matters outside their sphere of expertise.

Our initial expectation that the 'information' and 'advice' labels might continue to be used informally has not been borne out by experience. On reflection, we consider their demise to be for the best.

It is more cumbersome to distinguish between, on the one hand, cases in which *"on analysis the adviser has assumed responsibility for every* aspect *of a transaction in prospect for his client*" and, on the other, *"cases where the professional adviser contributes only a small part of the material on which the client relies in deciding how to act".* But we have found that the answer to the scope of duty question often makes it unnecessary to spend much time deciding whether a given case falls within one of what we now must think of one of the extremes of the *SAAMCO* analysis or somewhere in between.

We are fortified in our initial view that the *SAAMCO* counterfactual is now largely redundant. It was considered in only one of the cases which we will review in this series and there rejected because it produced the wrong answer. The caselaw confirms, as we suspected may be the case, that it is at the discretion of the court whether to apply the counterfactual and clarifies what should be done if it produces a different answer.

PART 2

In Part 2, we will reflect on the courts' approach in recent claims against solicitors, including the interesting decision of the Court of Appeal in *Spire Property Development v Withers* [2022] EWCA Civ 970 in which judgment was handed down last week.

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