Manchester Building Society
One Year On: Part 2

This is the second in a series of reflections on *Manchester Building Society v Grant Thornton* [2021] UKSC 20 a year on from the judgment being handed down.

In Part 2 we focus on the approach adopted by the courts in recent claims against solicitors.

INTRODUCTION

In Part 1, we revisited the key points arising from *Manchester Building Society*. In summary, the central analytical framework involves asking six questions: the actionability question, the scope of duty question, the breach question, the factual causation question, the duty nexus question and the legal responsibility question. In asking the scope of duty question, the court will look at the purpose of the duty which is in turn informed by working out the risk which the duty was meant to guard against. The 'advice' and 'information' labels originating from *SAAMCO* were disapproved of. The *SAAMCO* counterfactual, which asks whether the losses claimed would have been suffered if the defendant had been right, was reduced to a checking mechanism which would not be useful in every case.

We then reflected on our experience since *Manchester Building Society* was decided and made some general observations on subsequent caselaw. In this note we focus on the approach which the courts have taken in claims against solicitors.

AURIUM

Aurium Real Estate v Mischcon de Reya [2022] EWHC 1253 (Ch) is a case we have looked at in detail before. It will be recalled that it was a claim by a property developer concerning advice about a proposal to build around a leaseholder which refused to surrender its lease. The scheme amounted to a breach of covenant. The leaseholder sued. This triggered a chain of events which led to the Claimant losing its investment of over £50m. The claim comprehensively failed.

Of particular interest for present purposes is the court's approach to the scope of duty question. It rejected arguments for a liberal construction of a client care letter and declined to conclude that the retainer had been varied by conduct where that would have involved the solicitor being required to give advice on a fundamentally different subject matter. It also rejected the Claimant's formulation of the risk which the duty was meant to guard against on the grounds that the risk contended for depended on commercial factors. This has potentially wide application.

SPIRE PROPERTY

The topic of the duties owed by a well-known firm of solicitors to a property developer arose again in the recent Court of Appeal case of *Spire Property Development v Withers* [2022] All ER (D) 81 (Jul). This was a case involving assumption of responsibility. Withers had acted for the developer in the purchase of two superprime properties in 2012.

Two years later, the developer discovered that high voltage cables ran beneath the properties. This impacted on its proposed scheme. The developer went back to Withers with a series of questions, seeking to establish why this had not been picked up. In this exchange, the developer indicated that it would have expected some sort of easement to be required and asked whether this would need to be registered against the title to the land. It continued, *"perhaps we could argue that no permission has been granted and therefore we could potentially ask for the cable to be moved NOT at our expense".*

In responding, Withers outlined the circumstances in which a utility company might obtain a wayleave over land and suggested that it was possible that one may have been granted some time ago to a predecessor in title.

The Judge agreed with the developer that, on a true construction of the correspondence, Withers had assumed a duty to advise on the utility company's rights of access and how the developer might get the cables moved at that company's expense. Withers were, he concluded, in breach for neglecting to advise that any historic wayleave would be likely to have expired. The Court of Appeal disagreed.

The developer made submissions about the purpose of Withers' duty, but Carr LJ[1], giving the main judgment, concluded that the purpose test was inapposite here. Having observed that the six questions are not prescriptive, she said:

> *"the purpose test was formulated in order to address the recoverability of damages; to that end it is relevant to ask whether the scope of the professional's duty extended to certain risks in respect of activities which the professional was required to perform. The purpose test addresses the question of scope of duty in law (and the SAAMCO principle), rather than the extent of the duty in the first place".*

Elsewhere in her judgment, Carr LJ used 'scope of duty' to refer to the extent of the duty, so cannot have been suggesting that these were different concepts. The distinction, it seems, is between a case in which what might be called the full *SAAMCO* analysis needs to be carried out to establish whether losses are recoverable and one in which scope of duty is the only question arising.

Carr LJ usefully summarised the learning from established authorities on determining the scope of a solicitor's duty, as follows:

1. A solicitor's duty is limited to carrying out the work which it has agreed to do.

2. It needs to give advice reasonably incidental to that work.

3. What is reasonably incidental will depend on all the circumstances, including the level of sophistication of the client.

4. More burdensome responsibilities are likely to be placed on solicitors if their clients are inexperienced or vulnerable and more limited responsibilities for experienced or sophisticated clients.

5. Allegations that the solicitor is expected to take expensive and burdensome allegedly incidental steps are unlikely to find favour with the court.

6. Regard may be had to the level of fees charged.

7. A duty to warn may arise in certain circumstances, but there needs to be a clear and strong nexus between the retainer and the matter which it is said should have been warned about.

8. Whether a duty has been assumed needs to be judged objectively in context and without the benefit of hindsight.

[1] Notably, a professional liability silk at 4 New Square before her elevation

On the facts, the Court of Appeal concluded that Withers had only been asked to comment on what had happened in 2012, not what might happen in the future. Carr LJ observed that no advice was given about what might be done about the cables and that, if the developer had really been expecting such advice, it would no doubt have followed this up. This is an objection which can frequently be made against allegedly expansive duties. She also made clear that the subjective understanding of the developer's witnesses did not determine the scope of duty assumed. This is again a point of wider application.

PART 3

In Part 3 we will review an unusual case concerning a claim against a medico-legal expert.

Further Information

Given the generality of the note it should not be treated as specific advice in relation to a matter as other considerations may apply.

Therefore, no liability is accepted for reliance on this note. If specific advice is required, please contact one of the Partners at Caytons who will be happy to help.

Caytons
Changing Perceptions

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