Manchester Building Society One Year On: Part 4

This is the fourth 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 3 we revisit an important opinion of the Privy Council concerning valuers.

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 based on *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 based on caselaw. In this note we look at the approach which the courts have taken in claims against solicitors.

In Part 2 we considered the approach adopted by the court in recent claims against solicitors. In Part 3, we turned to a claim against a medico-legal expert.

INTERCOMMERCIAL

We considered *Charles B Lawrence v Intercommercial* [2021] UKPC 30 in detail in a previous note. It will be recalled that it was an appeal to the Privy Council from the Court of Appeal of Trinidad and Tobago. The Appellant valuer had negligently overvalued a plot of land at $15m. The Respondent bank lent $3m.

The borrower never made any repayments. When the bank sought to enforce its security and sell the land, the best offer it received was $2m. It emerged that the valuer had wrongly assumed that the land was suitable for commercial development and that it was a vacant plot. Its true value was $2.375m.

That was not all, because it then became apparent that the borrower did not even have title to the land. The bank sued its conveyancers, who settled the claim for $2.4m. It then pursued the valuer.

The local courts approached the case on a 'no transaction' basis. This approach, discredited in England and Wales by *SAAMCO*, allows the claimant to recover all losses which flow from entering into the transaction in question. On this basis, the bank recovered the sum of $2.36m. This was arrived at by adding interest at the contractual rate of 15% to the amount of the loan and deducting the sum paid in settlement by the conveyancers.

The Trinidadian Court of Appeal concluded that interest should have been calculated at the statutory rate of 12%, not the contractual rate, and accepted that there should be a 20% deduction for contributory negligence. It otherwise did not interfere with the Judge's methodology. This reduced the bank's recovery by a little over 10%, to $2.07m.

The valuer appealed to the Privy Council. The Board applied the scope of duty question as defined in *Manchester Building Society.* It concluded that the purpose of the valuer's duty was to advise on the value of the land on the assumption that the borrower had good title. It was a lawyer's job to advise on title. Accordingly, it found that any losses which flowed from the defect in title must be excluded. It followed that the settlement with the conveyancers also had to be ignored when calculating the losses recoverable from the valuer.

Having established this, the Board agreed with counsel for the valuer that the right approach was to:

a. Deduct the amount which the land would have been worth on the assumption that there was good title from the amount of the loan: $625,000.

b. Deduct 20% from this figure for contributory negligence in accordance with the Court of Appeal's judgment: $500,000.

c. Add interest at statutory rate in accordance with the Court of Appeal's judgment: $833,204.

This amounted to a reduction of about 60% as against the sum which the Court of Appeal thought the claim was worth, and over 70% of the sum which would have been payable if the valuer had accepted the Judge's decision.

Perhaps of most interest for present purposes is the treatment of the *SAAMCO* counterfactual. As the law was commonly understood before *Manchester Building Society*, the appeal should have failed. If the valuation had been correct, the bank would have had ample security and would not have suffered loss.

The outcome contradicts the suggestion made by some commentators that *Manchester Building Society* has rendered the *SAAMCO* principle of very limited application.

The Board recognised that applying the *SAAMCO* counterfactual would contradict the conclusion it had reached. It drew from this that *Intercommercial* was a case in which the counterfactual would not be helpful.

This approach reinforces our scepticism as to whether the *SAAMCO* counterfactual has any remaining value after *Manchester Building Society*. The Supreme Court considered that it might usefully serve as a checking mechanism in some cases, but if it is to be rejected when it arrives at the 'wrong' answer, it is not easy to see the point of the exercise. Notably, *Intercommercial* is the only case we look at in this series where the *SAAMCO* counterfactual was considered at all.

PART 5

In Part 5, we discuss a case in which the analytical framework of *Manchester Building Society* was applied in a case involving allegedly negligent design by an engineer.