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Insights

PROFESSIONAL ADVISERS BEWARE – CHECK THE TERMS OF YOUR ENGAGEMENT

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The scope of duty and the extent of liability of professional advisers are two hotly contested issues at the core of many a dispute between professional advisers and their clients in *negligence claims*.

For the last 24 years, the judgment in *South Australia Asset Management Corp v York Montague Ltd*, popularly referred to as *SAAMCO*, has been the leading authority setting out the principle of scope of responsibility that a court must consider when assessing a negligent adviser's responsibility for a claimant's losses. Briefly put, if the conduct complained of falls outside that scope, there may be no claim at all (the *SAAMCO principle*).

Over the years, multiple views have developed as practitioners struggled to apply the *SAAMCO principle to differing facts. Claimants have often struggled to construct a "SAAMCO counterfactual" showing that the correct information/advice would have resulted in no loss.*

Many will, therefore, welcome the recent clarification provided by the Supreme Court in *Manchester Building Society v Grant Thornton UK LLP* and *Khan v Meadows*. A majority approved a test comprising six questions formulated by Lord Hodge and Lord Sales (who gave the lead judgment).

The SAAMCO principle

SAAMCO involved claims brought by lenders who had suffered losses as a result of valuers' negligent valuations. In determining the extent of the duty owed by the valuers, the House of Lords distinguished between a duty to provide information to enable someone to take a commercial decision (an "information" case) and a duty to advise someone as to the course of action to take (an "advice" case). In an "information" case, the defendant would only be liable for losses sustained as a result of the information being incorrect. In an advice case, liability extends to all foreseeable loss arising as a result of that course of action being taken.

The *SAAMCO* case also gave rise to the so-called "*SAAMCO* cap" on liability. This provided that, in an information case, a claimant cannot recover losses that would have been sustained in any event, that is, if the information had been correct.

Manchester Building Society v Grant Thornton UK LLP

The case involved a claim brought by Manchester Building Society (MBS) against its auditor, Grant Thornton (GT), arising out of negligent advice given by GT regarding the accounting treatment of interest rate swaps relating to its lifetime mortgage portfolio.

GT had negligently advised MBS in 2006 that it would be able to make use of an accounting treatment known as “hedge accounting”, which would allow it to reduce the volatility of the mark-to-market value of the swaps on MBS’s balance sheet. In reliance on that advice, MBS acquired and issued lifetime mortgages and entered into swap transactions in order to hedge its interest rate risk.

In 2013, MBS discovered that GT’s advice had been incorrect and it could not in fact make use of hedge accounting. As a result, MBS incurred a mark-to-market loss of £32.7m.

Khan v Meadows

Ms Meadows is the mother of a child with haemophilia and autism. Before her pregnancy, Ms Meadows asked Dr Khan to establish whether she carried the haemophilia gene. Following blood tests, the mother was wrongly led to believe that any child she had would not have haemophilia. Had Ms Meadows known that she carried the haemophilia gene, she would have undergone foetal testing for haemophilia when she was pregnant. This would have revealed that the foetus was affected. Ms Meadows would then have chosen to terminate her pregnancy, and her child would not have been born.

Ms Meadows sought damages from Dr Khan based on wrongful birth. To bring up a child with haemophilia alone would result in extra costs of £1.4 million. To bring up her actual son, with autism and haemophilia, would result in extra costs of £9 million. She argued that Dr Khan was liable for all the consequences of the pregnancy. Dr Khan admitted liability for the consequences of the child’s haemophilia, but denied liability in relation to the autism.

Supreme Court decisions

In *MBS v GT*, the Court found that the loss suffered by MBS (that is, the mark-to-market loss of £32.7m) was the very loss that the MBS had sought to guard against by asking for the advice, and that it therefore fell within the scope of GT’s duty of care. The question then was whether MBS would still have incurred a loss had it acted the same way in maintaining the swap arrangements if GT’s initial advice had been correct. The answer to this question was no and therefore the loss was recoverable.

In *Khan*, the Court found that the risk that Dr Khan had taken, and which Ms Meadows had wished to guard against, was that the baby would be born with haemophilia and not the risk that it would be born with unrelated autism. Therefore, the losses associated with the child’s autism were not recoverable. The question for the Court here was whether Ms Meadows would have incurred the loss if she had acted the same way by having the baby if Dr Khan’s advice had been correct (that

Ms Meadows was not carrying the haemophilia gene). The answer was yes because the baby would have been born with autism; therefore, the loss arising from the autism was irrecoverable.

In the view of the majority, when looking at the case of negligent advice given by a professional adviser, one should look at what risk the duty was supposed to guard against and then consider whether the loss was suffered because the risk materialised.

The six stage test

The Court considered it helpful to look at the questions that arise when a claimant seeks damages from a defendant in the tort of negligence:

- Is the harm (loss, injury and damage) which is the subject matter of the claim actionable in negligence (the actionability question)?
- 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)?
- Did the defendant breach its duty by its act or omission (the breach question)?
- Is the loss for which the claimant seeks damages the consequence of the defendant's act or omission (the factual causation question)?
- 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)?
- 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 or because the claimant has mitigated its loss or has failed to avoid loss which it could reasonably have been expected to avoid (the legal responsibility question)?

The Court explained that applying this analysis values the claimant's entitlement to damages in accordance with the principle that the law seeks to put the claimant in the position it would have been without the defendant's negligence, so far as money can do so.

Thoughts

The Supreme Court's 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 is welcome. The counter-factual analysis suggested by Lord Hoffmann in *SAAMCO* has been put into its proper place: it is now to be seen only as a "useful cross-check" – in some but not all cases – to test whether the loss claimed does indeed fall within the scope of the duty.

Professional advisers across all sectors should take note. This judgment could open the door to *new professional negligence claims* where a claimant may previously have struggled to construct a "*SAAMCO* counterfactual" showing that the correct information/advice would have resulted in no loss.

Going forward, professional advisers (and those drafting *professional appointments*) will need to pay close attention to the terms of their engagement and ensure that these set out clearly the purpose of their advice so as to ensure that their liability is clearly delineated.

It will be interesting to see if these decisions result in more focus on *caps on liability* and a further hardening of the *PI* market (if that is even possible!).

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