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The Advisor or the Client – Who made the decision?

Earlier this year, in *Manchester Building Society v Grant Thornton UK LLP [2019] EWCA Civ 40*, ('the MBS Claim') the Court of Appeal provided welcome guidance on the scope of a financial professional's 'assumption of responsibility' for a claimant's losses in professional negligence cases. The guidance also contained helpful clarification on the application of the well-known SAAMCo principle to claims against financial professionals.

The SAAMCo principle (established in 1997 by the House of Lords after the property crash in the early 1990's, which led to a spate of lender claims against property valuers) limits recovery of damages from a negligent advisor to losses which fall within the scope of the advisor's duty.

Importantly, the principle distinguishes between a professional's duty to advise and their duty to give information – a distinction which is not always readily apparent from the retainer but the importance of which, in terms of professional negligence claims, has been unanimously reaffirmed by the Court of Appeal in the MBS Claim. The facts of the MBS Claim are set out below, but in summary, the Court of Appeal upheld the decision (but not the reasoning) of the first instance decision and determined that:-

1. An "advice" case is where the financial professional (accountant, auditor or IFA, etc) is responsible for guiding the <u>whole</u> decision-making process of its client. It will have considered and decided what facts and matters are to be taken into account and advised its client whether or not it should enter into a particular transaction. This is a wide duty and the professional will have assumed responsibility for <u>all</u> foreseeable consequences of its client entering into that transaction.

2. An "information" case is where the financial professional has given advice on only one specific (or narrow) element of its client's decision (e.g. accounting advice); in which case, the professional is only responsible for the foreseeable losses relating to that specific aspect of the advice/information being wrong.

The Court of Appeal further clarified that in such "information" cases, the professional will only be responsible for losses which would not otherwise have been suffered if the information/advice had been correct.

<u>Brief Facts of the MBS Claim</u>

In this case, MBS's auditor, Grant Thornton ("GT"), had advised MBS that to reduce the effect of any volatility in the true/current value of long-term interest rate swaps and lifetime mortgages ("the Swaps"), MBS could apply a certain accounting practice known as "hedge accounting" to record the value of the Swaps in its accounts.

MBS relied on the advice and entered into further Swaps. The financial crisis then hit and the value of the Swaps fell. MBS subsequently learned that it was, in fact, unable to rely on hedge accounting, and its balance sheet was exposed to the true market value of the Swaps. This resulted in MBS having to "break" (i.e., terminate) the Swaps. MBS pursued a claim against GT for the loss on the Swaps (£32.5million) plus the transaction costs to break the Swaps (£285k).

<u>Decision</u>

It was held that the accounting treatment was only one specific element in MBS's overall decision to purchase Swaps. Further, that GT had not advised MBS in relation to its business activities or the commercial merits of entering into the Swaps; and it had not advised that MBS would never be exposed to losses on the Swaps.

In so finding, the Court of Appeal concluded that: (i) GT was not the 'decision maker' (MBS had its own commercial reasons for entering into the Swaps); and (ii) MBS's losses (caused as a result of market conditions) would have been suffered *even if* GT's advice had been correct (the evidence suggested that if the advice was correct, MBS would have held the Swaps to term and would, in fact, have suffered even greater losses).

The effect of the Court of Appeal decision meant that fortunately for GT, it was held responsible for only limited transaction costs (£285k) and not *all* of the alleged losses claimed by MBS (some £32million).

Comment

This is a welcome case that reinforces the point that financial professionals should not be responsible for the losses flowing from the commercial decisions of their clients. However, in cases where a Claimant might be aggrieved that their business activities have not delivered the expected return, and their adviser is found to have given incorrect advice relating to the same, which was relied on by the Claimant, the advisor risks a successful claim against it for all foreseeable losses suffered by the Claimant.

To guard against this, there is now ever more reason for professional advisors to ensure that their engagement letters to clients and their advice/s clearly set out the scope (and limitations) of their advice. Where only limited advice about a transaction is being provided, then the retainer should expressly say so. Where there are other factors that drive a client's decision-making process, for their own protection, we recommend that the advisors record the factors in writing to their clients and/or keep detailed attendance notes of any and all conversations about the advice. This will assist the evidential hurdle faced by a professional advisor attempting to rebut an allegation that he or she was responsible for the 'whole decision'.

In cases where the professional advisor gave only limited "information" advice, clients may attempt to argue that all of their losses flow from that advice. In such cases, we are likely to continue to see the debate focus on whether or not the loss would have been suffered *even if* the advice had been correct.

Contact

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Date: August 2019
Applicable Law: UK (England and Wales)