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Favourite Cases: *Manchester Building Society* v *Grant Thornton UK LLP*

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Elizabeth Ovey

Call: 1978

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Starting from a traditional Chancery base of property, trusts and wills, Elizabeth's practice has developed to include substantial pensions, retail financial services and professional negligence work.

Reported at [2021] UKSC 20, [2021] 3 W.L.R. 81

The last time I was asked for my favourite case I picked the classic negligence case *Donoghue* v. *Stevenson* [1932] A.C. 562, on the ground that it was one of the foundations of what I find a very interesting area of practice, professional liability.

This time, in a (possibly temporary) switch of allegiance, I have moved on by some 90 years and picked a very recent Supreme Court decision in the field of professional liability, *Manchester Building Society* v. *Grant Thornton UK LLP*. *Donoghue* v. *Stevenson* concerned the question whether a manufacturer of ginger beer owed a duty of care while bottling the product to avoid including with the ginger beer any passing snails whose presence might prove detrimental to the consumer. *Manchester Building Society* v. *Grant Thornton* concerns the question what heads of loss are recoverable by someone who has been the victim of a breach of an admitted or proved duty of care.

The facts, in brief summary, were that in 2006 Manchester Building Society had some lifetime mortgage business which it had sought to hedge by entering into some interest rate swaps. From 2005 the society was obliged in preparing its accounts to show the swaps on its balance sheet at their fair market value, which was volatile because it was dependent on the view taken by the market of movements in interest rates. It sought advice from its auditors, Grant Thornton, on the question whether hedge accounting was possible. That would enable the society to set the swaps against the lifetime mortgages on the balance sheet, very substantially reducing the volatility. Grant Thornton advised that that was possible and audited the accounts for several years on that basis. The society continued with its existing arrangements and entered into more lifetime mortgages and interest rate swaps. In 2013 Grant Thornton advised that the earlier advice was wrong. The society had to account for the fair value of its swaps in its 2012 accounts without any hedging adjustment and to restate its 2011 accounts. Those adjustments showed a serious mismatch between the liability on the swaps and the value of the lifetime mortgages, a significant loss instead of a reasonable profit, a substantial reduction in net assets and a lack of required regulatory capital. The society was obliged to terminate its swap contracts at a cost of some £32 million.

The society brought proceedings against Grant Thornton claiming to recover, among other losses, the £32 million. Grant Thornton admitted negligence, but the society was unsuccessful at first instance as respects that claim, on the ground that Grant Thornton had not assumed responsibility to protect it from that loss, which was the result of market forces. The society was also unsuccessful in the Court of Appeal, on the ground that the case was an "information" case rather than an "advice" case for the purposes of the distinction drawn in *South Australia Asset Management Corporation* v. *York Montague Limited* [1997] A.C. 191 ("*SAAMCO*"), as explained in *Hughes-Holland* v. *BPE Solicitors* [2017] UKSC 21, [2018] A.C. 599. Grant Thornton were not liable for all the financial consequences flowing from what the society had done in the light of its advice, but only for the foreseeable consequences of its information about accounting treatment being wrong. The Court of Appeal held that the society had not suffered recoverable loss simply by terminating the swaps at their fair market value. If the information had been right, the society would have continued to hold the swaps (many of which were for a 50 year term) and the evidence did not show that it would then have been better off. It followed that recoverable loss had not been shown.

"The Supreme Court … allowed the appeal. All the members of the court upheld the basic proposition, frequently associated with SAAMCO, that a defendant is only liable for losses of a kind within the scope of the duty of care, but the majority offered a new framework for approaching issues relating to which losses fall within that description …"

The Supreme Court, sitting as a panel of seven justices, allowed the appeal. All the members of the court upheld the basic proposition, frequently associated with *SAAMCO*, that a defendant is only liable for losses of a kind within the scope of the duty of care, but the majority offered a new framework for approaching issues relating to which losses fall within that description. They regarded the advice/information distinction as potentially unhelpful (building on comments in *Hughes-Holland*) and concentrated primarily on the purpose of the duty, judged by reference to the reason the advice was given. In the case before them, the advice was given for the purpose of ascertaining whether hedge accounting could be applied to implement the society's proposed business model within the constraints of its regulatory framework and the loss thus fell within the scope of the duty. It was necessary, however, to allow for the profits made by the lifetime mortgage business and, following the conclusion reached at first instance on contributory negligence, a 50% deduction from the net loss was applied.

Those whose eyes have glazed over and who are yearning for the simplicity of snails in ginger beer bottles may be wondering why on earth this is my new favourite case, even if perhaps only temporarily. I offer two reasons.

The first is that I have struggled over the years with *SAAMCO.* I have found it one of those cases which, with a greater or lesser degree of effort and quantity of wet towels, I follow on its own terms, but I find difficult to apply to other facts. It makes sense in relation to a negligent valuer in a case where the lender would not have lent but for the negligent valuation, but the more one strays from the central facts, the more difficult it becomes. The *Manchester Building Society* case itself illustrates the potential difficulties. It is natural to say that Grant Thornton were advising about the correct accounting treatment, although equally they were not advising the society to adopt a particular business model. Based on the distinction between information and advice, the Court of Appeal decision was that the society recovered effectively nothing when one instinctively feels (or at least I instinctively feel) that Grant Thornton should be accountable for some of the losses suffered by the society. I hope, therefore, that the new framework will make it easier for clients to get to a fair solution.

The second reason is that the Supreme Court certainly has not made it <u>too</u> easy. The new framework envisages asking six questions which will no doubt themselves throw up their own difficulties. Two of the seven judges, while agreeing in the outcome, approached the matter in slightly different ways and here may lie the seeds of further argument in the future. After all, while not departing from *SAAMCO*, the Supreme Court, in the process of explaining *SAAMCO*, has undoubtedly changed the way issues of quantum will be approached. It would be a brave adviser who would suggest we have reached a final resting place; there will be a need for legal advice for some time to come. I rather hope, however, that the mountaineer whose knee features so prominently in *SAAMCO* has indeed reached a final resting place.

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