Michaelmas Term
[2021] UKPC 30
Privy Council Appeal No 0127 of 2019

JUDGMENT

Charles B Lawrence & Associates (Appellant) *v* Intercommercial Bank Limited (Respondent) (Trinidad and Tobago)

From the Court of Appeal of the Republic of Trinidad and Tobago

before

Lord Briggs
Lady Arden
Lord Kitchin
Lord Burrows
Lady Rose

JUDGMENT GIVEN ON
22 November 2021

Heard on 5 October 2021

Appellant
Ramesh L Maharaj SC
Robert Strang
(Instructed by BDB Pitmans LLP (London))

Respondent
Michael Hylton QC
Prakash Deonarine
(Instructed by Myers Fletcher & Gordon (London))

LORD BURROWS AND LADY ROSE: (with whom Lord Briggs, Lady Arden and Lord Kitchin agree)

1. INTRODUCTION

1. This is a case about the loss recoverable by a lender consequent on a valuer's negligent valuation. The valuation was of land that the borrower's guarantor was providing as security, by means of a mortgage over the land, for the loan. The famous case of *South Australia Asset Management Corpn v York Montague Ltd* ("*SAAMCO*") [1997] AC 191 laid down that a valuer is not liable in the tort of negligence (or in contract) for loss caused by the valuer's negligence that falls outside the scope of the valuer's duty of care. This is the "scope of duty principle" (or "SAAMCO principle") which has recently been explored and explained by the Supreme Court of the United Kingdom in *Manchester Building Society v Grant Thornton UK LLP* [2021] UKSC 20; [2021] 3 WLR 81 and *Meadows v Khan* [2021] UKSC 21; [2021] 3 WLR 147 in the context of negligent advice or information given by an auditor and a doctor respectively. In this case, there is an interesting twist on the usual facts of a negligent valuation case because, as it transpired, the guarantor had no legal title to the land that was being mortgaged so that the land was of no value to the lender. That is, the security was worthless. The lender has recovered a substantial sum of damages by way of settlement of its claim against its attorneys for negligence in relation to the guarantor's defective title to the land. In assessing the damages for the negligent valuation, the central question we are asked to decide is how precisely the scope of duty principle applies on these unusual facts.

2. THE FACTS

2. The claimant lender, and the respondent in this appeal, is Intercommercial Bank Ltd ("the Bank"). It was approached for a loan by Singapore Automotive Trading Ltd ("Singapore"). Rafferty Development Ltd ("Rafferty") was to be the guarantor of the loan and there was to be a mortgage of land owned by Rafferty as security for the loan. Rafferty instructed the defendant valuer, Charles B Lawrence & Associates ("Lawrence") – the appellant in this appeal – to provide a valuation of land at Nos 60 to 69, San Fernando Bypass Road ("the Land") for the purposes of the proposed mortgage. Lawrence produced a report dated 10 December 2008 in which the Land was valued at $15m. Lawrence made clear in the report that the valuation assumed, amongst other matters, that a good marketable title could be shown, that planning permission would be granted for commercial development of the Land, and that the Land was free from all encumbrances with vacant possession. In February 2009, in

reliance on that valuation report, the Bank loaned $3m to Singapore with Rafferty as guarantor and with a mortgage of the Land as security for the loan.

3. Both Singapore and Rafferty defaulted on the loan without making any repayments. As a result, the Bank appointed a receiver to enforce the security but the highest bid it received in July 2010 was for only $2m. On 23 March 2012, the Bank issued a claim against Lawrence seeking damages in the tort of negligence for a negligent valuation report.

4. Subsequently, the Bank found out that Rafferty did not in fact have good title to the Land. The mortgage of the Land was therefore of no value. On 25 January 2013, the Bank brought an action against its own conveyancing attorneys, Lex Caribbean, for negligent failure to investigate title properly. In March 2014, that claim was settled for $2.4m.

3. THE JUDGMENTS OF THE COURTS BELOW

5. In the High Court of Trinidad and Tobago, the judge, Madam Justice Jones, decided, amongst other matters, as follows (CV No 2012-01258):

(i) Applying *Caparo Industries Plc v Dickman* [1990] 2 AC 605, a duty of care was owed by Lawrence to the Bank in relation to the valuation report even though the Bank was not the client of Lawrence.

(ii) There was a breach of that duty of care by Lawrence in two respects. First, Lawrence valued the Land on the basis that it could be developed commercially whereas it should have been valued on the basis that it could only be developed for residential use. According to the evidence of the expert witness preferred by the judge, the value of the land for residential development, as at December 2008, was $2,375,000. Secondly, Lawrence failed adequately to draw attention to the fact that there were occupiers on the Land so that it was not a cleared site.

(iii) All the loss suffered by the Bank in having entered into the loan agreement was factually caused by Lawrence's breach of duty and, subject to deducting the loss recovered in the settlement with the Bank's attorneys, was recoverable as damages from Lawrence. Moreover, there was no contributory negligence by the Bank.

6. The judge assessed the damages as being $2,361,636.70 as at 14 March 2014 (which is the date she took as the date of payment of the settlement sum in respect of the Bank's claim against its attorneys). This was worked out as: the loan paid ($3m) plus the contractual rate of interest of 15.75% up to 14 March 2014 minus the settlement sum of $2.4m. She therefore awarded damages of $2,361,636.70 plus the contractual rate of interest from 14 March 2014 until the date of judgment which was 16 October 2014.

7. Lawrence appealed to the Court of Appeal of Trinidad and Tobago on several grounds. These included that the judge's findings as to Lawrence's negligence should be reversed, that the awarding of the contractual rate of interest was incorrect, and that there should have been a deduction from the damages for the Bank's contributory negligence.

8. The Court of Appeal (Rajkumar JA, with whom Archie CJ and Smith JA agreed) (Case No 318 of 2014) dismissed the appeal and upheld the findings and decision of the judge subject to two points. First, the Court of Appeal decided that the appropriate rate of interest to be added was the statutory rate of 12% (per annum) not the contractual rate of interest of 15.75% (per annum). Secondly, there should have been a 20% reduction for the Bank's contributory negligence in not sending its own officers to inspect the Land as that inspection would have revealed the presence of the occupiers.

9. According to the Court of Appeal, therefore, the damages to be awarded were the loan paid of $3m, plus interest at the rate of 12% from the date that the loan was paid until the date of judgment of the High Court, minus the settlement sum of $2.4m. From that sum, there should be a deduction of 20% for the Bank's contributory negligence. Although the Court of Appeal did not itself specify what sum of damages was thereby arrived at, there is no dispute that that sum was $2,070,379. Interest on that sum would then accrue (under section 25 of the Supreme Court of Judicature Act (Trinidad and Tobago)) at the rate of 12% from the date of judgment before the High Court (16 October 2014) to the date of payment.

4. THE CENTRAL LEGAL ISSUE ON THIS APPEAL: THE SCOPE OF DUTY PRINCIPLE

(1) The submissions on the scope of duty principle

10. Lawrence has appealed, as of right, to the Board. The central submission of Ramesh L Maharaj SC, counsel for Lawrence, is that the decision of the Court of Appeal (and of the trial judge) is incorrect as a matter of law because it is contrary to the

"scope of duty principle" established in *SAAMCO* and recently explained in *Manchester Building Society v Grant Thornton UK LLP* and *Meadows v Khan*. He submits that the loss suffered by the Bank can, and should properly, be split into two distinct losses. First, the loss suffered because the Land was overvalued as being for commercial use rather than residential use (assuming that there was good title to the Land); and, secondly, the loss suffered because the title to the Land was defective. He submits that the second loss was outside the scope of Lawrence's duty of care and therefore irrecoverable. It was outside the scope of Lawrence's duty of care because it was no part of the job of Lawrence to investigate title to the Land. That was the job of the conveyancing attorneys.

11. Consequent on that submission as to the correct law, Mr Maharaj submits that the correct calculation of the damages should be as follows. One should take the loan sum paid of $3m and deduct the residential value of the land at the date of the loan (assuming that there was good legal title to the Land) which was $2,375,000. That gives a sum of damages for the loss claimed by the Bank of $625,000. One should then deduct from that the 20% contributory negligence of the Bank. Applying section 25 of the Supreme Court of Judicature Act (Trinidad and Tobago), one should then add interest of 12% on the damages from the date of the loss to the date of judgment. According to Mr Maharaj, that would yield a sum of $833,204 which differs from the Court of Appeal's assessment (of $2,079,379) by $1,246,175. Interest on the sum of $833,204 would then accrue at the applicable rate (of 12%) from the date of judgment before the High Court (16 October 2014) to the date of payment.

12. Mr Maharaj points out that, in the Court of Appeal, Rajkumar JA correctly stated, at para 59d, that "[Lawrence] is not responsible for the value of the security in this case being zero". But, he submits, Rajkumar JA failed to go on to apply the logic of that reasoning to the assessment of the damages.

13. In contrast, Michael Hylton QC, counsel for the Bank, submits that the Court of Appeal's reasoning and conclusions were correct. Applying the scope of duty principle, the purpose of the valuation report was for a loan to be obtained from the Bank and that is what happened. The scope of Lawrence's duty of care therefore extended to include all reasonably foreseeable losses consequent on the Bank's decision to provide the loan. It was also critical that the report did not merely negligently advise on the value of the property. It also negligently advised that the Land was vacant when it was not, because there were occupiers, and the loan would not have been made at all had there not been that particular negligence.

(2) The correct approach

14. The Board agrees with the submissions of Mr Maharaj. Subsequent to the decisions of the lower courts in this case, it has been made clear by the Supreme Court in *Manchester Building Society v Grant Thornton UK LLP* and *Meadows v Khan* that, in determining the scope of the duty of care, it is particularly important to consider the purpose of the advice or information being given. As Lord Hodge and Lord Sales said in their leading judgment in the former case (agreed with by Lord Reed, Lady Black and Lord Kitchin) [2021] UKSC 20; [2021] 3 WLR 81, at para 4:

> "the scope of the duty of care assumed by a professional adviser is governed by the purpose of the duty, judged on an objective basis by reference to the purpose for which the advice is being given…"

And again, at para 17, they said:

> "in the case of negligent advice given by a professional adviser one looks to see what risk the duty was supposed to guard against and then looks to see whether the loss suffered represented the fruition of that risk."

Similarly, in their leading judgment in *Meadows v Khan*, [2021] UKSC 21; [2021] 3 WLR 147, Lords Hodge and Sales (with whom Lord Reed, Lady Black and Lord Kitchin agreed) said at para 41:

> "In addressing the scope of duty question in the context of the provision of advice or information, the court seeks to identify the purpose for which that advice or information was given. Where the claimant has asked for advice about a risk or about a proposed activity which involved that risk, the court asks: 'what was the risk which the advice or information was intended and was reasonably understood to address?'."

It is clear, not least from the assumptions expressly specified by Lawrence in the valuation report, that the purpose of Lawrence's report was to value the property on the assumption that there was good legal title to the Land. It was not the purpose of Lawrence's report to advise on, or give information about, the title to the Land. It is

clear that the Bank was not looking to Lawrence's report to advise on, or give information about, the title to the Land. That was a matter for a lawyer not a valuer.

15. The Board is therefore seeking to exclude from the total loss factually caused to the Bank by Lawrence's negligence that element of the loss that is outside the scope of Lawrence's duty of care because it is attributable to the defect in title rather than to the overvaluation being based on commercial not residential use. That exclusion is satisfactorily achieved on these facts by taking as the starting point the loan made ($3m) and deducting the actual residential value of the Land at the date of the loan on the assumption that there was good title to the Land ($2,375,000). That is precisely the submission as to the starting point for the correct calculation made by Mr Maharaj. We further agree with his submissions as to the effect of contributory negligence and interest as set out in para 11 above. It was also made clear by both parties at the hearing that it had been accepted throughout that the pleaded claim was limited to recovery of the loss suffered at the date when the loan was made and not some later date so that the relevant actual value of the Land was the value at the date the loan was made.

16. In considering the application of the scope of duty principle, it is particularly helpful to compare this case with *Meadows v Khan*. In that case the defendant doctor (Dr Hafshah Khan) was in breach of her duty of care to the claimant patient (Omodele Meadows) when she indicated to her that she was not a carrier of the haemophilia gene. The claimant had approached the general practice surgery, as the defendant knew or ought to have known, for the specific purpose of ascertaining whether or not she was a carrier of the haemophilia gene and hence what the implications of that would be if she were to become pregnant. She went on to give birth to a son who suffered not only from haemophilia but also from autism. It was accepted by the defendant doctor that it was reasonably foreseeable that the claimant could give birth to a baby that suffered from a condition such as autism as well as haemophilia. Further, the evidence was that if the claimant had been told that she carried the haemophilia gene, she would have taken steps to ensure that she did not continue with a pregnancy that was going to lead to the birth of a child with haemophilia and so would not have incurred the costs associated either with her son's autism or with his haemophilia. The Supreme Court held that, while the losses consequent on the haemophilia were within the scope of the defendant's duty of care, the extra losses attributable to the autism were outside the scope of the defendant's duty of care and therefore irrecoverable. This was because the purpose of the advice or information was to advise or inform the claimant in respect of the risks of giving birth to a child with haemophilia. The purpose of the advice or information was not to ascertain the general risks of pregnancy, including the risk of autism.

17. Comparing *Meadows v Khan* to the facts of this case, one can see that, just as the haemophilia loss, but not the autism loss, was within the scope of the doctor's duty of care so here the commercial, rather than residential, overvaluation loss, but not the defective title loss, was within the scope of the valuer's duty of care. And in each case that conclusion follows from the purpose of the advice or information given by the professional and hence the risk that was being guarded against.

(3) The *SAAMCO* counterfactual?

18. The Supreme Court in *Manchester Building Society v Grant Thornton UK LLP* (at paras 23-27) and *Meadows v Khan* (at para 53) explained that the counterfactual test, put forward by Lord Hoffmann in *SAAMCO*, should be regarded as a flexible and useful cross-check for deciding on the scope of the duty of care in most but not all cases. In applying the counterfactual test (and extending it to advice as well as information in line with the Supreme Court's criticism of that distinction), one asks, in summary, would the claimant still have suffered the same loss if the information or advice had been true? If the answer is "yes", the scope of the duty does not extend to the recovery of that loss. If the answer is "no", the scope of the duty does extend to the recovery of that loss.

19. Applying that counterfactual test to the facts of this case would contradict our view, set out above, that the defective title loss was outside the scope of Lawrence's duty of care. Had Lawrence's valuation of $15m been correct, the Bank would still have entered into the loan, taking the mortgage over the Land as security, but would not have suffered the same (or indeed any) loss. This is because, as the Land would have been worth $15m (assuming no defect in title), the Bank would have had adequate security to cover the guarantor's default in repaying the loan. It may be that one could modify the counterfactual in order to reach the "correct" result but, in our view, this merely serves to reinforce the point made by the Supreme Court that the counterfactual is of second-order importance as regards establishing the scope of the duty and is a helpful cross-check of that scope in most *but not all* cases. This is one of the cases where it is unhelpful.

(4) The settlement with Lex Caribbean

20. What is the relevance, if any, of the Bank's settlement with its conveyancing attorneys, Lex Caribbean, for $2.4m? It is important to see that, on the approach taken by the lower courts, this settlement sum was deducted. That is most obviously explained by saying that the settlement sum was a direct compensating advantage or collateral benefit that went to reduce the factual loss of the Bank and the deduction

therefore avoided double recovery. The similarity between that settlement sum and the actual value of the Land meant that the Court of Appeal (albeit by flawed reasoning) arrived at a figure for damages that was closer to the correct sum than one might have expected. However, it can be seen from Mr Maharaj's submissions set out at para 11 above, that, because interest was being applied to the wrong amount of loss, the Court of Appeal's assessment of the damages was still incorrect by the substantial amount of $1,246,175.

21. Once one correctly applies the scope of duty principle, it can be seen that the settlement with Lex Caribbean is irrelevant. This is because the loss attributable to the defective title was outside the scope of Lawrence's duty of care. It has already been excluded as being irrecoverable by the Bank from Lawrence. There is no prospect of double recovery, given that it is not suggested that the sum received from Lex Caribbean exceeded the loss properly attributable to the defective title. The fact that the Bank managed to obtain a settlement with Lex Caribbean in relation to its negligence in respect of the defective title is, therefore, irrelevant.

22. A useful analogy may here be drawn by varying the facts in *Meadows v Khan*. Let us assume that, in that case, the claimant mother had also been negligently advised on the risk of autism (but not haemophilia) by a third party. The fact that she may have successfully recovered damages for the autism losses from that third party would have had no effect on the damages she was entitled to recover from Dr Khan because the autism losses were outside the scope of Dr Khan's duty of care and therefore irrecoverable from Dr Khan. Any damages for the autism losses (assuming not duplicating the haemophilia losses) would therefore not have been deductible from the damages she was entitled to recover from Dr Khan.

(5) The negligence in relation to the occupiers

23. We have seen that the judge found that Lawrence was negligent not only in relation to the commercial, rather than residential, overvaluation but also because Lawrence failed to draw attention sufficiently to the fact that there were occupiers on the Land so that it was not a cleared site. What effect, if any, does that finding have on the reasoning that we have so far set out?

24. The simple answer is that it has no effect. There are two explanations for this. The first is that the fact that Lawrence was also negligent in relation to there being occupiers on the site has no bearing on our reasons for deciding that the scope of Lawrence's duty did not extend to loss attributable to the title to the Land being defective. This additional finding of negligence was merely a different breach of the

same duty of care in valuing the land. The second explanation is that, in any event, the evidence in relation to the occupiers is unclear. As the judge indicated at paras 35 and 96 of her judgment, we do not know the precise nature of the occupation (whether it was by squatters or tenants). It follows that we also do not know how easy it would have been to clear the Land or the effect of the occupiers on the value of the Land. There was no finding of fact by the judge as to whether the presence of the occupiers reduced the value of the land below the figure of $2,375,000 as the actual residential value of the Land at the date of the loan (on the assumption that there was good title to the land). There is therefore nothing to suggest that the additional negligence increased the recoverable loss.

25. It is true that the judge concluded, at para 97, that, had the valuation report properly drawn attention to the site not being a cleared site, the Bank would not have entered into the arrangements it did with Singapore (ie it would not have made the loan to Singapore) and would therefore not have suffered any of the loss claimed. But on this appeal Mr Maharaj has not sought to deny that all the claimed loss was factually caused by Lawrence's negligence, whether because of the commercial, rather than residential, overvaluation, or because of the failure to report on the occupiers. In other words, the assumption in this appeal has been that, whichever breach of duty one relies on, the Bank would not have gone ahead with making the loan to Singapore.

5. CONCLUSION

26. For these reasons, the appeal is allowed. Damages for the Bank against Lawrence are to be assessed according to the formulation and figures submitted by Mr Maharaj as set out in para 11 above.