GATEHOUSE CHAMBERS

Solicitors' and Barristers' Negligence
Scope of duty in light of Manchester Building Society v Grant Thornton

SAAMCo (South Australia Asset Management Corp v York Montague Ltd [1997] AC 191)

1. The '***SAAMCo*** principle' (sometimes referred to as the ***SAAMCo*** 'cap' because of its effect in some cases) is the principle that a professional is liable only for those losses that fall within the scope of their duties, so that there will not be recovery of losses falling outside that scope.

2. ***SAAMCo*** concerned claims by secured lenders against valuers who had negligently overvalued security properties. The borrowers defaulted and the properties were repossessed and sold. Between the date of advance and the date of sale the property market had fallen dramatically, reducing the recovery on sale and increasing the lenders' losses. The claimants sought damages to reflect the cost of their advances and associated realisation costs, minus the actual sum realised on sale (that is, at the price that had been obtainable after prices had fallen) - what we describe as the 'basic loss' calculated according to '***Swingcastle***' principles. The defendant valuers argued that such an approach would make them unfairly liable for the property crash.

3. The Court of Appeal found for the lender claimants, on the basis that they ought to recover all the losses they would have avoided had they not entered the transaction - that was their entire basic loss because **but for** the negligent valuations they would not have lent. The House of Lords overturned the Court of Appeal.

4. Lord Hoffmann gave the leading speech. The valuer was obliged to provide information about the value of the proposed security properties. It was for the lenders to use this information, along with other material they possessed, to decide whether (and if so, how much) they would lend. The valuer would not ordinarily be privy to the other material and considerations; the valuer's opinion on the commercial considerations behind the lending decision was not sought. Further "*Normally the law limits liability to those consequences which are attributable to that which made the act wrongful. In the case of liability in negligence for providing inaccurate information, this would mean liability for the consequences of the information being inaccurate.*"

5. Then gave the 'mountaineer's knee' example - a sort of 'entry level' parable meant to make the ***SAAMCo*** principle easier to understand:
"*A mountaineer about to undertake a difficult climb is concerned about the fitness of his knee. He goes to a doctor who negligently makes a superficial examination and pronounces the knee*

fit. The climber goes on the expedition, which he would not have undertaken if the doctor had told him the true state of his knee. He suffers an injury which is an entirely foreseeable consequence of mountaineering but has nothing to do with his knee."

> *"On the Court of Appeal's principle, the doctor is responsible for the injury suffered by the mountaineer because it is damage which would not have occurred if he had been given correct information about his knee. He would not have gone on the expedition and would have suffered no injury. On what I have suggested is the more usual principle, the doctor is not liable. The injury has not been caused by the doctor's bad advice because it would have occurred even if the advice had been correct..."*

6. Lord Hoffman also said: *"...a person under a duty to take reasonable care to provide information on which someone else will decide upon a course of action is, if negligent, not generally regarded as responsible for all the consequences of that course of action. He is responsible only for the consequences of the information being wrong. A duty of care which imposes upon the informant responsibility for losses which would have occurred* ***even if the information which he gave had been correct*** *is not in my view fair and reasonable as between the parties."*

7. The highlighted part "*even if the information which he gave had been correct*" is often overlooked but became important in the minority judgment of Lord Leggatt in ***MBS v GT***, as to which see below.

8. The principle makes a good deal of sense in the context of pure valuers, on the basis that on an accurate valuation the lenders (in general terms) would simply have lent less (rather than nothing at all) - hence ***SAAMCo*** 'cap' is difference between true value and value as reported. Arguably, it ought to be based on that difference value x LTV%; and the valuers in ***SAAMCo*** also argued that the fall in the market should apply to the 'capped'(or attributable) element as well; but the House of Lords rejected that approach. The ***SAAMCo*** principle has been accepted as being mathematically imprecise and a somewhat blunt tool, in that regard (see para 26 below).

9. Apart in very simple cases, however, the principle can be very much more difficult to apply when it comes to other professionals, particularly in relation to solicitors acting in transactional work (and also barristers, where barristers act in a similar capacity).

BPE v Hughes-Holland/ Gabriel v Little [2017] UKSC 21

10. The ***SAAMCo*** principle has frequently been distilled to a distinction between a duty to provide either 'information' or 'advice'. Did the professional assume responsibility only for the correctness of the information, or did they assume an advisory role and guide the client on the

merits of the transaction or process itself? This also became the focus in ***BPE v Hughes-Holland*** (aka ***Gabriel v Little***).

11. The claimant brought a claim against his solicitors for losses he had suffered after making a secured loan to a third party in connection with a development. The third party defaulted, leaving a large shortfall despite the repossession and sale of the secured property. The claimant alleged that his solicitors had failed to advise him that the third party intended to use the loan to discharge some debts and not to develop the secured property as the claimant had believed would be the case, a belief reinforced by the solicitor's negligent drafting of the loan agreement.

12. At first instance, the claimant established that, but for the defendant's negligence, he would not have made the loan. Importantly, the judge also accepted that, had the loan been used to develop the property, it would have improved the value of the property so that the loss that was suffered when the claimant's loan was ultimately enforced would have been reduced. However, the Court of Appeal overturned this factual finding and held that, even if the loan had been used to develop the property, it would not have been improved in value and the claimant would have suffered the same amount of loss in any event. The claimant argued that, nevertheless, if he had been told of how the third party intended to use the loan, he would have appreciated the transaction was not viable and not made any loan to the third party. On this basis, he argued he was entitled to all his losses from the transaction.

13. Applying *SAAMCo*, the Court of Appeal held that the solicitors only owed the claimant a duty to provide discrete information and advice to allow the claimant to decide for himself whether to make a loan to the third party and not to advise on what course of action to take or as to the commercial risks of the relevant loan. Accordingly, the solicitors were only liable to the extent that loss was attributable to something wrong in the information they provided. As the claimant would (as a matter **of fact**) have suffered the same losses even if the loan had been used to develop the property his losses were not attributable to the solicitor's failure to report how the third party intended to use the loan but, instead, to his decision to make the loan. The claimant was prepared to risk the possibility that the third party would default and the property would not increase in value despite being developed and so could not recover damages from his solicitors for those risks eventuating. The claimant alone was responsible for the decision to make the loan.

14. The Supreme Court dismissed the claimant's appeal and upheld the decision of the Court of Appeal.

15. Lord Sumption commented that the information/advice distinction in *SAAMCo* had:

> *"...given rise to confusion largely because of the descriptive inadequacy of these labels. On the on face of it they are neither distinct nor mutually exclusive categories. Information given by a professional man to his client is usually a specific form of advice, and most advice will involve conveying information. Neither label really corresponds to the contents of the bottle.*
>
> However, Lord Sumption then went on to, to some extent, reinforce the information/advice distinction. He stated that:
>
> *"The nature of the distinction is, however, clear from its place in Lord Hoffmann's analysis as well as from his language..."* (para 39).

16. An *"adviser"* was someone who was *"...responsible for guiding the whole decision-making process..."* who therefore *"...has a duty to protect the client (so far as due care can do) against the full range of risks associated with the transaction..., the client will not have retained responsibility for any of them..."* (para 40).

17. Where someone provided only *"information"*, *"...legal responsibility does not extend to the decision itself...even if the material which the defendant supplied is known to be critical to the decision to enter into the transaction, he is liable only for the consequences of its being wrong and not for the financial consequences. Otherwise the defendant would become the underwriter of the financial fortunes of the whole transaction..."* (para 41).

18. Having both criticised the descriptive inadequacy of the advice/information labels but then also to some extent reinforced them, Lord Sumption also set out (at para 44) that:

> *"A valuer or a conveyancer, for example, will rarely supply more than a specific part of the material on which his client's decision is based. He is generally no more than a provider of what Lord Hoffmann called "information". At the opposite end of the* ***spectrum****, an investment adviser advising a client whether to buy a particular stock, or a financial adviser advising whether to invest self-invested pension fund in an annuity are likely, in Lord Hoffmann's terminology, to be regarded as giving "advice". Between these extremes, every case is likely to depend on the range of matters for which the defendant assumed responsibility and no more exact rule can be stated."*

19. Whilst the concept of a spectrum makes some sense, the examples given by Lord Sumption have sometimes been seen as somewhat unhelpful. Solicitors, including conveyancing solicitors, are frequently in possession of and under a duty to provide advice on aspects of a transaction which are fundamental, and at least as fundamental as the matters a financial adviser deals with, in effect 'guiding' the decision-making process. At the other end, a professional is very rarely fully in charge of guiding the decision-making process. Even a trusted financial adviser, charged with searching the market for investment products and in possession

of infinitely more information and understanding than a naive high net worth investor client, still does not take the ultimate decision and may not be aware of all of the factors (familial, other commercial interests, peculiar taxation effects) that have a bearing on the decision. In one sense, nearly all cases are information cases and it was unhelpful to perpetuate and advice/information distinction of any kind (or even a spectrum - which connotes ultimately having two ends where one is pure information and the other is pure advice, which may never really exist).

20. "*As for the SAAMCO "cap" or restriction which excludes loss that would still have been suffered even if the erroneous information had been true,*" Lord Sumption said, "*that is simply a tool for giving effect to the distinction between (i) loss flowing from the fact that as a result of the defendant's negligence the information was wrong and (ii) loss flowing from the decision to enter into the transaction at all*" (para 45).

21. Lord Sumption made a point of holding that the reasoning in ***Steggles Palmer*** (within the 1997 ***Bristol and West v Fancy and Jackson*** case) and ***Portman Building Society v Bevan Ashford*** (2000) was wrong, because their effect was to make the measure of damages dependent not on the scope of the defendant's duty, but on the gravity of the particular breach and the court's assessment of the objective quality of the reasons why the lender would have refused to proceed.

Assetco Plc v Grant Thornton UK LLP [2020] EWCA Civ 1151

22. The appellants, GT, were auditors for the respondents Assetco. GT appealed against an order awarding damages of over £22.36 million to Assetco for the negligent audit of its accounts.

23. GT's unqualified audit report showed that the group, of which Assetco was the holding company, was successful and increasingly profitable, but in fact the group was insolvent. GT admitted breach of duty in failing to identify management fraud, and that absent negligence the it would have been revealed that the business of the respondent was ostensibly sustainable only because of dishonest representations made by senior management. The true situation became apparent two years later and Assetco entered into a scheme of arrangement. It succeeded in its claim for damages in respect of (i) the sums it had provided to loss-making subsidiaries during the period when it should not have continued its business, expenses that would not have been incurred absent the negligence and had Assetco had the opportunity to enter into a scheme of arrangement at the appropriate earlier time, and (ii) a payment made under a fraudulent related-party transaction.

24. GT appealed *inter alia* on the grounds that the judge had been wrong to find that the losses for which Assetco claimed damages were within the scope of its duty of care and that its breaches were the legal cause of those losses.

25. On that part of the appeal, the Court of Appeal dismissed the appeal, stating that the ***SAAMCo*** principle was the default prism through which to view scope of duty **but** expressly contemplating that there would be scenarios where the ***SAAMCo*** principle would *not* apply. The principle was not a rigid rule of law: it was simply a tool for determining the loss flowing from the negligently wrong information as opposed to the loss flowing from entering into the transaction at all. See, in particular, para 78, 89, 101 and 102 in the judgment. At para 102, David Richards LJ said: "*the **SAAMCo** principle…is not a rigid rule of law but, as Lord Sumption in* [sic] ***Hughes-Holland*** *at [45], "simply a tool" for determining the loss flowing from the negligently wrong information as opposed to the loss flowing from entering into the transaction at all. If, in a particular class of case it is incapable of achieving that determination, it is not a tool which the court will use*".

26. The Court of Appeal's comments appeared to run counter to Lord Sumption's analysis in ***BPE v Hughes-Holland*** which made clear that ***SAAMCo*** principle *always* applies: it is a fundamental principle. It may not be *easy* to apply on the facts of a particular case, but applied it must be. Lord Sumption's reference, at para 45 in the judgment in ***BPE v Hughes-Holland***, to the ***SAAMCo*** 'cap' being "*simply a tool*" did not suggest that the ***SAAMCo*** principle was a tool that could be picked up and used, or not, depending on the circumstances of a given case. He was talking only about the 'cap' (which can perhaps be equated with the ***SAAMCo*** 'counterfactual' as we go on to discuss in relation to ***MBS v GT***, below) and it is clear (from the overall tenor of his judgment, and particularly from para 29, 31 and 46) that in ***BPE v Hughes-Holland*** Lord Sumption simply meant that there was no 'special magic' to the ***SAAMCo*** principle and that it was merely the crystallisation of and driven by the logic (as Lord Sumption, and Lord Hoffmann before him in ***SAAMCo*** itself, saw it) of distinguishing between loss flowing from incorrect information and loss flowing from advice guiding the claimant as to whether to enter into the transaction at all. At para 46, Lord Sumption alluded to the point about whether the ***SAAMCo*** 'cap' ought to take into account the LTV ratio in lender claims, and went on to state: "*It is fair to say that as a tool for relating the recoverable damages to the scope of the duty the SAAMCO* ***cap*** *or restriction may be mathematically imprecise. But mathematical precision is not always attainable in the law of damages.*"

27. In fact, it appears now that the decision in *Assetco* was part of a building judicial movement to try, to some extent, to water down the ***SAAMCo*** principle (or, at least, play down the importance of the 'cap' or '***SAAMCo*** counterfactual'), culminating in ***MBS v GT***.

Manchester Building Society v Grant Thornton UK LLP [2021] UKSC 20 and *Khan v Meadows* [2021] UKSC 21

28. The Supreme Court convened the same panel of seven judges for the appeals in - (i) the auditor case ***Manchester v. Grant Thornton*** [2021] UKSC 20 and (ii) clinical negligence case ***Meadows v. Khan*** [2021] UKSC 21 - judgments should be read together (references below are to ***Manchester*** unless indicated otherwise).

29. Facts of ***Manchester***:

a. The claimant ('C'/ 'Manchester') was a building society, which entered into two key sets of financial instruments. (i) Lifetime (aka equity release) mortgage loans entered into with 50+ year olds borrowing at fixed interest rate: not obliged to repay capital/interest until death/sale. Advances were funded by borrowing at variable rates so vulnerable to interest rises: these were volatile products ordinarily requiring more regulatory capital. (ii) Interest rates swaps in order to hedge the volatility of the mortgage loans. Manchester required the mortgages and swaps to match - in duration and amount - to avoid requiring extra regulatory capital.

b. The defendant ('D'/'Grant Thornton') were Manchester's auditors - in the mid 2000s advised Manchester could use 'hedge accounting' which wipes volatility off the balance sheet including for regulatory capital purposes. Effectively: advised that the hedge was expected to be highly effective.

c. Relying on that advice, Manchester retain mortgages and existing swaps and entered further swaps. But entered very long term swaps: likely to mature much later than mortgages and unlikely to be able to substitute new mortgages to match the terms of the swaps.

d. After the 2008 economic crash interest rates fell. In March 2013 D realised it had made an error and 'put its hands up' - restated accounts without using hedge accounting. End result: reduced net assets from £38m to £10m and Manchester had insufficient regulatory capital.

e. Manchester was forced to close out swaps at a loss of c£32m and sold mortgage book for small profit (which they gave credit for when claiming damages for the loss on the swaps).

30. The decision:

a. Teare J found for Grant Thornton: D had not assumed responsibility for the losses - Manchester formed their own decision to enter swaps, understood the true nature of the decision, and commercially misjudged which swaps to enter. If he had found D liable, would have found Manchester liable for 50 percent contributory negligence.

b. Court of Appeal upheld Teare J's decision but for different reasons. This was an 'Information' case and matter of C's commercial wisdom in entering the swaps, for which D was not responsible.

c. The Supreme Court: both Teare J and the Court of Appeal were wrong, C's losses *were* within D's scope of duty but there should be a 50 percent reduction for contributory negligence. Although all Justices agreed on the result, their reasoning was not unanimous: (i) Majority judgment is Hodge/Sales plus 3 others agreeing; (ii) Leggatt gave his own judgment; (iii) as did Burrows.

31. There are three key parts of the decision, in our view.

32. (1) - the 'information/advice' distinction:

a. Majority: too rigid, stop trying to shoehorn cases into distinction (para 19 in ***MBS***).

b. Leggatt: dispense with information/advice (para 92 in ***MBS***)(majority agreed (para 22 in ***MBS***)).

c. Leggatt: look at any limits on adviser's contribution to decision-making (para 92 in ***MBS***).

d. And: scope of duty does not depend on importance of contribution to decision-making - reiterating disapproval of ***Steggles Palme***r line of authority.

33. (2) - scope of duty test:

a. Majority's 6 stage test:

> *"(1) Is the harm (loss, injury and damage) which is the subject matter of the claim actionable in negligence? (the actionability question)*
> *(2) 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)*
> *(3) Did the defendant breach his or her duty by his or her act or omission? (the breach question)*

(4) Is the loss for which the claimant seeks damages the consequence of the defendant's act or omission? (the factual causation question)
(5) 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)

(6) 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 (including novus actus interveniens) in relation to it or because the claimant has mitigated his or her loss or has failed to avoid loss which he or she could reasonably have been expected to avoid? (the legal responsibility question)" (para 6 in ***MBS***)

b. Re Stage 2: the scope of duty question: *"In our view, 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 reason why the advice is being given*** *(and, as is often the position, including in the present case, paid for)"* (para 13 in ***MBS***; our emphasis in bold).

c. Leggatt: *"scope of the defendant's duty … depends on identifying the matters relevant to a decision to be taken by the claimant which the defendant has undertaken responsibility for assessing and advising the claimant about … may be defined by express agreement or, in the absence of such an agreement, is implied from the role of … professional person as … conventionally understood (or … prescribed by statute) and by the objective purpose of the advice"* (see ***Khan*** para 96).

d. <u>**Key difference** between the judgments</u>:

   i. Majority: *"important to have regard to the commercial reason, as appreciated by Grant Thornton, why advice about this was being sought and why this was fundamental to the society's decision to engage in the business of matching swaps and mortgages"* (para 38 in ***MBS***);

   ii. Leggatt: *"the defendant's awareness that the claimant is relying on its advice for a particular purpose does not itself make the defendant responsible for the claimant's failure to achieve that purpose … the adviser's knowledge of the claimant's commercial reason for wanting its advice and of the reliance that will or may be placed on that advice goes only to the foreseeability of any resulting losses and does not itself make the adviser liable for such losses where (as in*

this case) the adviser is responsible for providing only part of the material relevant to the claimant's decision" (para 160 in ***MBS***).

34. (3) Does C's 'basic loss' falls into scope of D's duty?

a. Majority: apply stage 5 the duty nexus question and see whether there is a 'sufficient nexus'. This is a flexible/fluid concept (amenable to justice in individual cases?) but the judgment contains very little explanation (and there is therefore uncertainty).

b. Leggatt: similar but (at least) terminologically different analysis - he considers there needs to be a *"causal relationship … between what made the information or advice wrong and the loss. What makes information or advice wrong is the existence of facts or matters which the adviser has misrepresented or failed to report"* (para 96 in ***MBS***) and *"I understand the word "nexus" to be another term for what I refer to…as a causal connection"* (para 97 in ***Khan***). More developed than the majority's rationale? *"Whether and, if so, how [C] relied on the correctness of the [advice] is relevant to the … basic loss. But it is not relevant to the question … of whether the basic loss which the society has established flowed from any of the matters of which Grant Thornton negligently failed to inform … and which made its advice incorrect"* (para 148 in ***MBS***).

c. Burrows: should avoid the "*novel terminology of the "duty nexus"*" (para 212 in ***MBS)***.

d. 'Demotion' of the ***SAAMCo***/Hoffmann counterfactual to a mere *"cross-check"*:

i. Majority: *"the use and … correct framing of the counterfactual scenario follows from the prior question, … may be regarded as a useful cross-check … but … should not be regarded as replacing the decision that needs to be made"* (para 23 in ***MBS***).

ii. Leggatt: *"should not be seen as a mechanical exercise … are cases in which a counterfactual cannot be applied … not be assumed that necessary or helpful"* (para 105-106 in ***MBS***).

e. However, the 'true' counterfactual in ***Manchester*** shows that even using that tool, the loss was within the scope of duty - see Burrows: *"had it been true that there was an effective hedging relationship … the break cost (of £32.7m) would clearly not have been suffered … the net loss of £26.7m is recoverable"* (para 209 in ***MBS***).

Practical impacts/consequences

35. Whilst ***MBS v GT*** has helpfully stripped away the false binary of information vs advice, and confirmed that (whether or not you look at it as involving a spectrum) it is simply about

establishing whether the loss relates to the scope of duty (possibly with the help of the ***SAAMCo*** counterfactual, possibly not) i.e. is there a 'nexus' (or to use Lord Leggatt's terminology 'causal connection' between the underlying problem and the loss), that greater flexibility may prove problematic in some scenarios:

a. Pure valuers remain a relatively simple proposition given their more limited role and the relative mathematical ease of separating out components of loss.

b. However, for claims against conveyancers and solicitors more generally, it opens up a wider range of potential outcomes in cases. There must now be greater scope to argue that a greater range of losses, possibly but not usually the entire basic loss, is within the scope of a conveyancer's duties, depending on the 'nexus' between the losses and the duties said to have been breached

36. There is also therefore the distinct possibility that there will be fewer 'winner takes all' type cases - particularly against solicitors - i.e. on the one hand fewer cases like ***Hughes-Holland*** where the solicitor, despite being negligent, won entirely; and on the other, no cases like ***Steggles Palmer*** where the solicitor was fully liable despite e.g. part of the lender's loss being attributable to a fall in the market. The Court may be prepared to use the more flexible principles in ***MBS v GT*** to find some middle ground of responsibility for some losses and not others.

37. Overall, ***MBS v GT*** it is probably more claimant friendly than defendant friendly. It doesn't represent a shift back to ***Steggles Palmer*** in terms of the rationale (i.e. this is not about finding exceptions to the application of ***SAAMCo***: ***SAAMCo*** *always* applies), but for different reasons, it probably goes in that general direction - it's enough for the claimant to establish that it was the type of risk the professional was to guard against, it fell within the purpose of their instruction, and there's a 'nexus' between the loss and the subject matter of the duty (or in Lord Leggatt's view, between the loss and the underlying problem).

38. The ***SAAMCo*** counterfactual may help as a tool, but it's not going to determine recoverability of loss, so the claimant ***can*** argue for 'no transaction' type losses even where on a strict counterfactual analysis the loss (or perhaps some of it) would have been suffered even if the information given by the professional had been correct.

39. Provided there is a sufficient nexus, whatever that means, the no transaction losses could be awarded. However, determining whether that nexus exists is an extremely fact-sensitive exercise.

40. However, this all makes predicting outcomes, advising on quantum and settlement and parties therefore reaching a mutually acceptable deal, potentially more difficult. If it has taken the Supreme Court 2 goes at it in 4 years, and even in the latest attempt there are three different

approaches (majority; Leggatt; Burrows), how are ordinary lawyers, advising in cases day-to-day, supposed to know what the answer is in any given case?

41. It may be that that uncertainty will make it even more likely that commercial deals are done at mediation/early in the course of cases. Claimants are less likely to be able to go for a straightforward 'advice' categorisation (which would often mean full 'no transaction' losses are recoverable) but they are also more likely to be able to claim at least some substantial damages, meaning defendants and their insurers are perhaps more likely to be 'on the hook' for some damages (and, moreover, therefore, some costs on both sides) than they were before.

42. The overarching lesson is that any case will benefit from considering these issues as early as possible and with a deep level of analysis:

    a. As a claimant, highlights the importance of setting out the particulars of negligence (in the letter of claim, and later in the POC) carefully and relating them to the types or sections of the loss which are claimed, by way of risk to be guarded against, purpose of instruction and finding some nexus to hang it on;

    b. As a defendant, should be looking for the disjunct between negligence and loss i.e. that there is no nexus, and using the *SAAMCo* counterfactual as much as possible.

Barristers

43. There is an increasing tendency to consider claims against barristers, and quite understandably so. In our view, it remains the case that generally barristers have more restricted scope of duty than solicitors anyway, but there are an increasing number of areas in which barristers are becoming more vulnerable to allegations of a wider scope of duty (and may be even more vulnerable given the majority approach in *MBS v GT*):

    a. Barristers acting in non-contentious business, such as tax advice - inherently in more of a quasi-solicitor or tax adviser role;

    b. Barristers with authority from the BSB to conduct litigation - are in essentially in the same category as solicitors conducting litigation;

    c. Direct access barristers - who may be dealing with contentious or non-contentious work - although the client remains responsible for matters such as service of pleadings in litigation, the barrister may find their scope of duty otherwise somewhat widened as a result of the lack of interposition of a solicitor in the relationship. the 'purposes for which they are instructed' can be impliedly quite broad - unless very carefully crafted client care letters have been used (and often they are not);

d. Did the barrister realise that the client would rely on their advice to inform the client on wider commercial issues, notwithstanding they were not within the express terms of the retainer?

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