



## Manchester Building Society One Year On: Part 6



This is the sixth in a series of reflections on *Manchester Building Society v Grant Thornton* [2021] UKSC 20 a year on from the judgment being handed down.

### INTRODUCTION

In Part 1, we revisited the key points arising from *Manchester Building Society*. In summary, the central analytical framework involves asking six questions: the actionability question, the scope of duty question, the breach question, the factual causation question, the duty nexus question and the legal responsibility question. In asking the scope of duty question, the court will look at the purpose of the duty which is in turn informed by working out the risk which the duty was meant to guard against. The 'advice' and 'information' labels based on *SAAMCO* were disapproved of. The *SAAMCO* counterfactual, which asks whether the losses claimed would have been suffered if the defendant had been right, was reduced to a checking mechanism which would not be useful in every case.

We then reflected on our experience since *Manchester Building Society* was decided and made some general observations based on caselaw. In Part 2, we considered the approach adopted by the court in recent claims against solicitors. In Part 3, we turned to a claim against a medico-legal expert and in Part 4 revisited an important Privy Council opinion in a valuers claim. Part 5 focussed on a claim against a civil engineer. In Part 6, we look at the approach adopted by the High Court in a case against a firm of accountants.

### Townsend Harrison

In *Knights v Townsend Harrison* [2021] STC 2119 (Comm), the Defendant accountants had introduced the Claimants to promoters of tax avoidance schemes and an investment scheme. HMRC unravelled the tax schemes. The investment product proved to be a Ponzi scheme.

The court's approach is of interest beyond the application of *Manchester Building Society* and we look at it in a little more depth than some of the other cases we have considered in this series.

### The Parties

Mr Knights had tried his hand at several different businesses, from motor spares, through financial services to selling artificial plants. In this latter venture, he had been very successful.

Notwithstanding his business experience, and his willingness to enter into the various schemes under scrutiny, Mr Knights presented himself as being inexperienced and unsophisticated in financial matters. He maintained that he had a conservative attitude to risk.

Townsend Harrison were engaged as accountants for Mr Knights and his companies. According to Mr Knights, their pitch to him was that, while any accountant could balance the books, they would provide

more options on how to deal with his finances and tax liabilities. They would, he claimed, help him “get to the next level”.

Their engagement letter recited that they were not authorised by the FCA to conduct investment business but could provide limited investment services where these arose out of or were complementary to their accountancy services. They went on to say that they might, “*advise you on your investments generally, but not recommend a particular investment or type of investment*”.

The case concerned various different schemes. We do not propose to delve into their complexities but it is necessary to say a little about each of them.

## The OneE scheme

Townsend Harrison arranged seminars for its clients at which a company named OneE Tax Limited promoted its ‘disguised remuneration’ tax avoidance scheme. The firm stood to earn a commission if clients signed up.

In 2013, Mr Knights decided to participate in the OneE scheme. He claimed in evidence that Townsend Harrison had assured him that the scheme was very safe and that he had nothing to lose. The accountant alleged to have said this firmly denied it.

Townsend Harrison sent very detailed limitation of liability letters to Mr Knights and his company before they entered into the scheme. The thrust of these was that:

- a. Any tax avoidance scheme carries risk.
- b. HMRC:
  - i. would be likely to open an investigation into the tax affairs of anyone who joined the scheme.
  - ii. was actively seeking to close loopholes and
  - iii. may not agree with OneE’s interpretation of the law.
- c. Townsend Harrison could not give any advice on, or guarantee the success of, the scheme.
- d. Advice should be sought from OneE.

OneE also sent Mr Knights an engagement letter, which he signed. This again warned that there were risks in tax avoidance schemes and specifically that there was a risk that participants in the scheme might end up paying more tax than they would otherwise have done.

In 2017, the law tilted in favour of HMRC in its continuing battle against disguised remuneration schemes. In *RFC (2012) v Advocate General* [2017] UKSC 45, the Supreme Court agreed with the Revenue that monies paid to Glasgow Rangers players under a similar scheme to that operated by OneE was taxable remuneration. The controversial ‘loan charge’ legislation then came into force, retrospectively taxing income earned through this sort of scheme.

HMRC issued a demand to Mr Knights’ company. He agreed terms of settlement.

## The Elysian scheme

Also in 2013, Townsend Harrison introduced Mr Knights to Newport Financial Management LLP. They hosted a joint seminar at which Newport promoted the Elysian pension liberation scheme. Mr Knights’ evidence was that Townsend Harrison had described the scheme as “*exciting*” and, again, suggested

that there was nothing to lose by joining it. This was disputed. Townsend Harrison sent Mr Knights a limitation of liability letter in similar terms to that relating to the OneE scheme.

It appears that HMRC had not issued any demand by the date of trial but had indicated a determination to challenge the Elysian scheme. The expert witnesses agreed that any challenge would likely succeed.

## The CWM investment

The CWM investment was a foreign exchange investment scheme promoted by an intermediary named Square Mile North East Limited. It promised a guaranteed return of at least 5% and stop loss protection limiting any loss to 10% of the sums invested.

The intermediary contacted Townsend Harrison and offered a commission for introducing clients to the scheme. Mr Knights' evidence was again that Townsend Harrison had pitched the scheme to him as "exciting". They again denied this. They had to accept that they had done some investigations into the companies involved but maintained that this was for their own peace of mind rather than as part of the services provided to Mr Knights.

Townsend Harrison's compliance officer expressed concerns internally about the scheme, suggesting, "This is really quite horrid!". She recommended that the practice's limitation of liability letters be revisited to avoid any suggestion of advice to enter the scheme. After the practice had obtained answers to questions it raised with the promoter, she commented:

*"I am still very nervous about the whole thing – a return of 5% per month when only 10% of the capital...is invested is a very high return & I'm still in the "it looks to [sic] good to be true [camp]"*

*Put it this way, I wouldn't put £100k of my own money in...Which is probably why I'll never be loaded [or bankrupt depending on your perspective]"*

None of this was passed on to Mr Knights. He was, however, supplied with a document to self-certify as a high net worth individual and a limitation of liability letter to the effect that Townsend Harrison did not provide any advice about the scheme, could not advise on, or guarantee the success of, the investment and that Mr Knights should discuss the scheme with the promoter and/or an IFA. Mr Knights' evidence was that he did not read the letter, but he conceded that he would have understood it if he had.

For the first four months after Mr Knights joined the scheme, he received the expected payments. They then stopped. CWM's offices were subsequently raided by the police. It appears to have been running a Ponzi scheme. Several million pounds of investors' monies were lost.

## The Quibic scheme

In the same year, Townsend Harrison introduced Mr Knights to another disguised remuneration scheme operated by Quibic Tax Limited. This involved the purchase and resale of gold with the proceeds being paid into what was described as an employee benefits scheme.

Mr Knights' evidence was that Townsend Harrison assured him that the worst-case scenario was that the tax he had saved would have to be paid later but this was again denied. Townsend Harrison sent him a similar limitation of liability letter as it had sent for the other schemes.

HMRC again challenged the scheme but Mr Knights entered into a relatively favourable settlement which appears to have left him better off than if he had never entered into the scheme.

## The witnesses

As in the *Mischcon de Reya* case we looked at earlier in this series, the Judge reminded himself of the *Gestmin* guidelines about the inherent fallibility of human memory and the risk that witnesses will reconstruct events to fit their preferred narrative without deliberately misleading the court. Having done so, he found Mr Knights to be an honest witness but unreliable because he had reconstructed events in his own favour. He did not accept that Townsend Harrison had given the assurances he claimed about the attractiveness of the schemes and the limited risks involved.

More generally, the Judge concluded that Mr Knights had played down his level of sophistication and appetite for risk. This was in part informed by the fact that, even after the CWM investment failed, Mr Knights continued to invest in complex and risky schemes.

The Judge was, if anything, even less impressed with Townsend Harrison's main witness. His initial impression was that the witness was lying to, but he ultimately concluded that he was being overly defensive and, like Mr Knights, reconstructing events to suit his own case.

## No duty of care

Townsend Harrison's Counsel relied by analogy on authority concerning duties owed by a bank to its customers. Drawing on this, he argued that, for a duty to arise, the defendant must have given what could properly be described as advice *and* to have assumed responsibility for it. The Judge rejected the analogy. He concluded that the relationship between a bank and its customer is of a different nature from that of accountant and client. He accepted, however, that the test was whether responsibility had been assumed. He cited a passage from Lord Reid's speech in the seminal accountants' liability case of *Hedley Byrne v Heller & Partners* [1964] AC 465 to the effect that the existence of a disclaimer of the sort contained in the limitation of liability letters is one of the facts relevant to answering the question. He seemingly did not consider *Manchester Building Society* to be of any assistance on the question of whether a duty of care arose.

He concluded that Townsend Harrison assumed no duty of care towards Mr Knights. He placed significant weight on the limitation letters although it seems doubtful from his judgment as a whole that he would have reached a different conclusion if these had not existed.

The Judge indicated that, on the appropriate facts, a duty might arise even if the accountant did not give affirmative advice. He added that there may be circumstances where an accountant is under a duty not to introduce an unsuitable client to an unsuitable scheme. There might even be circumstances where the accountant was required to give advice on a tax scheme and the implications of entering into it. But this would depend on establishing that the accountant reasonably foresaw that the client would rely on the accountant when entering into the scheme *and* that the client did, in fact, reasonably rely on it.

## No breach

He concluded that none of this applied on the facts here. Mr Knights was not an unsuitable client to introduce to a tax avoidance scheme. He was an experienced businessman who had demonstrated a level of sophistication and attitude to risk.

Although he acknowledged that legislation was tightening against disguised remuneration schemes at the time in question, the Judge noted that HMRC had lost the *Rangers* case in the lower courts. It could not, therefore, be said that the schemes were bound to fail. This suggests that the bar for establishing that a scheme is unsuitable is set high. The Judge also observed that most of the schemes were underpinned by advice from tax Counsel. This lends support to the view of *Salzedo and Singla on Accountants' Negligence and Liability* that accountants, like solicitors, are entitled to rely on Counsel's advice unless it is obviously wrong.

## Causation not made out

The Judge was not satisfied on the balance of probabilities that causation could be established. This was because Mr Knights conceded in cross examination on the OneE scheme that he may still have gone ahead if he had known that there was a risk that PAYE and National Insurance contributions might be payable. He also conceded that he was aware of a risk that tax might be payable if the Elysian scheme failed.

## Scope of duty

It was only at this stage of the analysis that the Judge recited the six tests from *Manchester Building Society*. He concluded somewhat briskly that, if the Claimants had otherwise succeeded, he was satisfied that the losses suffered would have fallen within the scope of duty.

It might be objected that it was not open to him to reach this conclusion in circumstances where he had not determined the purpose of the hypothetical duty or the risk that it was meant to guard against. The riposte to that would presumably be that, once it is assumed that Townsend Harrison were under a duty to advise on the risks of entering into the schemes and/or not to recommend the schemes to the Claimants, it must follow that there is sufficient nexus between that duty and losses flowing from the failure of the schemes.

## Further Information

Given the generality of the note it should not be treated as specific advice in relation to a matter as other considerations may apply.

Therefore, no liability is accepted for reliance on this note. If specific advice is required, please contact one of the Partners at Caytons who will be happy to help.

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