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FOIL UPDATE 3rd May 2023

Legal advice: duty of care to third parties

IN BRIEF

The Court of Appeal upheld the findings of the court below that Leading Counsel providing tax advice to a finance company did not owe a duty of care to third parties who subsequently invested in the scheme set up by the finance company.

McLean and others v Thornhill (2023) EWCA Civ 466

The claimant/appellants were investors in a number of failed film finance tax schemes. The defendant/respondent was Andrew Thornhill KC, a well-known specialist in tax

The claimants alleged that Mr Thornhill owed them a duty of care which he breached, by negligently advising on the tax implications and asserted tax benefits for investors in the schemes; by approving statements about those implications and tax benefits in the Information Memorandum (IM) by which each scheme was promoted; by expressly agreeing to be named in the IM as having provided advice and for that advice to be made available to potential investors; and subsequently by reconfirming his advice. They claimed that if Mr Thornhill had acted competently, he would have declined to endorse the schemes and/or advised and warned of the significant risk that the schemes would be successfully challenged. Had he done so, the schemes would not have been promoted at all and/or the appellants (who relied on Mr Thornhill's advice) would not have invested in any of them.

At first instance the judge dismissed the claims on six bases. In this appeal, the claimants challenged the judge's conclusions on the following four issues:

i) Whether he was correct to find that Mr Thornhill owed no duty of care to investors in advising on tax matters in respect of the Scheme in his opinions (which he consented to

be shown to the appellants), and in approving and endorsing the tax aspects of each IM; and in reviewing and confirming his advice on subsequent occasions.

ii) Whether he was correct to find that a reasonably competent tax silk could have given the tax advice and endorsed each IM as Mr Thornhill did.

iii) If the judge was wrong about both of these questions, whether he was nevertheless correct to find that if Mr Thornhill had provided advice claimed to be competent (including giving warnings of significant risk), the Scheme would still have been promoted by (with appropriate risk warnings), and the appellants would still have invested in the Scheme,

iv) Whether the judge was correct to find that in deciding to invest in the Scheme, the appellants did not rely on Mr Thornhill's advice and on the fact that the Scheme was endorsed by Mr Thornhill.

Having considered the applicable legal principles, the Court of Appeal held that the judge was correct to conclude that a correct application of the principles set out in *NRAM (2018)* meant that a duty of care did not arise in this case. Taking all the factors identified into account, including in particular the terms of the IM, the subscription agreement and checklist, fairly understood, it was objectively unreasonable for investors to rely on Mr Thornhill's advice without making independent inquiry in relation to the likelihood of the Scheme achieving the tax benefits; and Mr Thornhill could not reasonably have foreseen that they would not do so.

The conclusion that the judge was correct to find no duty of care arose also meant that the challenge to the judge's finding, that the Unfair Contract Terms Act 1977 did not apply so as to make the warranties in the subscription agreement and checklist subject to the requirement of reasonableness within section 2, did not arise. The point was not fully argued on this appeal. However, this court's provisional view, in agreement with the judge, was that the warranties were not a disclaimer of responsibility at all, and this was not the basis of his finding that there was no duty of care. The warranties were not in substance and effect "no reliance" clauses, nor did they seek to limit liability for an obligation that had been undertaken. Instead, taken together with the terms of the IM and its warnings, the subscription agreement and checklist, they delineated or set the boundary of the primary obligations owed.

In any event, even assuming that UCTA 1977 applied, the judge's finding that the warranties in the subscription agreement (and the checklist) were not insufficiently clear disclaimers of responsibility to satisfy the test of reasonableness could not be impugned as plainly and obviously wrong.

The question of breach also did not arise in light of the conclusion that no duty of care arose. Nevertheless, since it was fully argued, and in case the point might have future relevance, the appellate court dealt with it.

In the circumstances of this case and in light of his findings, had the judge addressed the gravamen of the appellants' case on breach, he could not but have concluded that no reasonably competent tax silk could have expressed such an unequivocal view in relation to the three statutory tests. Accordingly, notwithstanding the presence of IFAs and the requirement for investors to take their own tax advice on the tax consequences of the Scheme, reasonably competent tax advice should have identified the risks. To this extent only, the judge was wrong to conclude that had a duty of care been owed by Mr Thornhill to the appellants, it would not have been breached.

Causation and reliance again did not arise, but the appellate court dealt with the appellants' generic case on causation, albeit briefly.

Even if Mr Thornhill negligently overstated his advice, the appellate court was not persuaded that non-negligent advice would have warned that there was a significant risk of a successful challenge to this Scheme. This was the appellants' own self-imposed threshold for success on causation on the above basis. The appellants came nowhere close to establishing this or that the IM would have had to be differently worded, for the reasons given by the judge. As the judge held, Mr Thornhill could at one and the same time hold and express a very firm view as to the answer to the trading question, while acknowledging that an alternative view might be taken by others.

For all these reasons, the Court of Appeal concluded that the appeal should be dismissed. As the judge correctly held, it was not reasonable for investors, in light of the terms of the IM, subscription agreement and checklist and given the factual circumstances and context, to rely on Mr Thornhill's advice and opinions without independent inquiry, and it was not reasonably foreseeable by Mr Thornhill that they would do so. Accordingly, Mr Thornhill owed no duty of care to potential investors for the advice and opinions he gave in relation to the Scheme, and in approving the IM. The full judgment is available at: McClean & Ors v Thornhill [2023] EWCA Civ 466 (28 April 2023) (bailii.org)