



Neutral Citation Number: [2019] EWCA Civ 40

Case No: A4/2018/1354

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
Mr. Justice Teare
[2018] EWHC 963 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/01/2019

Before :

LORD JUSTICE HAMBLÉN
LORD JUSTICE MALES
and
DAME ELIZABETH GLOSTER

Between :

MANCHESTER BUILDING SOCIETY
- and -
GRANT THORNTON UK LLP

Appellant

Respondent

Justin Fenwick QC, Rebecca Sabben-Clare QC and Harry Wright (instructed by **Squire Patton Boggs (UK) LLP**) for the **Appellant**
Simon Salzedo QC, Adam Rushworth and Sophie Shaw (instructed by **Taylor Wessing LLP**) for the **Respondent**

Hearing dates : 15/16 January 2019

Approved Judgment

Lord Justice Hamblen:

Introduction

1. This appeal concerns the liability of an auditor for losses incurred on long term interest rate swap agreements which were entered into in reliance upon negligent accounting advice and which were closed out at a loss when the negligent advice came to light.
2. In summary, an auditor negligently advises its client that it can apply an accounting treatment (hedge accounting) that will reduce the effect in its accounts of the volatility of the mark-to-market (“MTM”) value of swaps.
3. In reliance on that advice the client enters into a programme of fixed rate mortgages hedged against long term swaps under which the client pays a fixed rate and receives a variable rate.
4. As a result of the financial crisis and the consequent fall in interest rates the swaps go heavily “out of the money”. In other words, their MTM value becomes negative because the market’s expectation is that the client will suffer losses over the lifetime of the swaps because of the net payments it is expected to have to make under those contracts.
5. The auditor’s negligent error comes to light and the client is advised that it cannot continue to apply hedge accounting. The client then closes out the swaps and, in order to do so, it has to pay the MTM losses on the swaps (the “MTM losses”) and transaction fees for breaking the swaps early.
6. The essential issue raised in this appeal is whether the auditor is liable for the MTM losses as well as the transaction fees.
7. The trial judge, Teare J, held that the auditor, Grant Thornton (“GT”) was not so liable as it had not assumed responsibility for those losses, which were market losses due to the fall in interest rates.
8. The client, Manchester Building Society (“MBS”), appeals against that decision.
9. MBS contends that GT is responsible for the MTM losses because these losses flowed from the need to close out the swaps following the correction of the negligent advice as to the technical accounting treatment. In particular, in reliance on the *SAAMCO* line of authority recently reviewed by the Supreme Court in *Hughes-Holland v BPE Solicitors* [2017] UKSC 21 [2107] 2 WLR 1029, it contends that this is an “advice” case with the consequence that GT is liable for all the foreseeable consequences of MBS entering into the swap transactions in reliance on GT’s negligent advice. Alternatively, if this is an “information” case then GT is liable because, as the judge found, the MTM losses would not have been incurred if GT’s advice that hedge accounting could be applied had been correct.

The factual background

10. The factual background is set out in detail at [3]-[120] of the judgment. That factual summary is not challenged. It is not necessary to repeat it in this judgment and only

the most salient facts relevant to the appeal will be referred to, with references being given to applicable paragraphs in the judgment.

11. MBS is a small mutual building society [3]. GT is a well known firm of accountants which audited MBS's accounts from 1997-2012 [20].
12. Between 2004 and 2009 MBS issued a number of fixed interest lifetime mortgages. These were designed to release the equity in a house to its owner on terms that the loan and interest were not repayable until the owner either entered a care home or died. Until that time, which is necessarily uncertain, interest compounded. These lifetime mortgages were issued to UK owners ("UK lifetime mortgages") and also to owners of homes in Spain ("Spanish lifetime mortgages") [3] and [7].
13. MBS needed to hedge its interest rate risk (the risk that the variable rate of interest which it paid to acquire funds would exceed the fixed rate which it received from borrowers) and it did so by purchasing interest rate swaps [4].
14. Between February 2006 and February 2012 MBS entered into 14 interest rate swaps to hedge the UK lifetime mortgages. They had a notional value of £74.2m. Most had a period of 50 years [9] and [72-77].
15. Between July 2008 and January 2011 MBS entered into 14 interest rate swaps to hedge the Spanish lifetime mortgages. They had a total value of €57m [10], [94].
16. Before 2005 the UK Generally Accepted Accounting Principles ("UK GAAP") did not require swaps to be included on a balance sheet [11]. From 2005 onwards MBS was required to prepare its accounts in accordance with the International Financial Reporting Standards ("IFRS") [12]. This meant that swaps had to be brought on to its balance sheet, valued at fair value [13]. The fair value of a swap is its MTM value at that date, which is the market's assessment at that date of the future payments that will be made over the entire term of the swap between the counterparties, discounted to a net present value.
17. Accounting for the swaps at fair value meant that MBS's financial position, as stated in its accounts, would be at the mercy of movement in the fair value of the swaps, which would cause volatility in MBS's reported financial position [13].
18. Hedge accounting provided a potential solution to this problem of volatility. Where hedge accounting is permitted, adjustments can be made to the carrying value of the hedged item (here, the lifetime mortgages) which partially offset the changes in the fair value of the swap, thus reducing accounting volatility [13-15].
19. In April 2006, GT advised MBS that it could apply the hedge accounting rules under International Accounting Standard 39 ("IAS 39") to the interest rate risk under the lifetime mortgages and corresponding swaps [61]. As a result of GT's advice, MBS applied hedge accounting when preparing its financial statements for the years ending 31 December 2006 to 2011.
20. GT audited MBS's financial statements for these years and in each case signed an unqualified audit opinion. This confirmed GT's view that the financial statements gave

a true and fair view of MBS's financial position. Each audit repeated GT's advice that MBS was able to apply hedge accounting [95].

21. GT admitted in its Defence that its advice and audits were negligent. There were various reasons why MBS was not entitled to apply hedge accounting, including that the long duration of the swaps did not match the lesser duration of the mortgages and the proposed substitution of mortgages was impermissible [22-26]. In summary, GT was negligent in failing to advise MBS in April 2006 and on the occasion of each audit thereafter that it could not apply hedge accounting [27].
22. From April 2006, MBS relied on GT's advice on the applicability of hedge accounting when entering into further lifetime mortgages and the swaps. In particular, had GT advised that hedge accounting could not be applied, MBS would not have taken out any more long-term swaps from April 2006 and would have broken the swaps it held at that point [127].
23. In March 2013 GT informed MBS that hedge accounting may not be applicable. This was confirmed by PwC. The consequent changes to the accounting position meant that MBS did not have sufficient regulatory capital [115]. Accounting for the fair value of the swaps meant that MBS's profit for 2011 of £6.35 million became a loss of £11.44 million, and its net assets were reduced from £38.4 million to £9.7 million.
24. The fair value of the swaps was heavily "out of the money" at this point because the variable rate of interest had dropped since the financial crisis, leading the market to forecast that the variable rates would be less on average than the fixed rates payable by MBS over the unexpired period of the swap, so that MBS would be the net payer. By the third quarter of 2012 MBS had already had to provide £32.29 million in cash collateral to the swap counterparties as a result of the swaps being "out of the money" [111].
25. Because of the volatility to which MBS's balance sheet was now exposed, the decision was taken, with the encouragement of the regulator, to close out the swaps [119], [143]. They were broken at their fair value on 6 and 7 June 2013 of £32.7 million [119]. Transaction costs of £285,460 were also incurred [211].
26. MBS incurred various other losses, such as costs of advice and redundancy [120], [223-225]. Some of these were the subject of claims, but only the MTM losses are in issue on this appeal. MBS contends that its losses go well beyond anything ever claimed in the action. The re-stated financial position was so bad that the regulator would not permit MBS to continue new lending.

The judge's decision

27. The judge made a number of findings relevant to the issues on appeal.
28. The judge found that cause in fact or "but for" causation was established [124-128]. He accepted MBS's case that but for GT's negligence MBS would not have entered into further long-term swaps after 11 April 2006 and would have closed out those it had entered into before then.

29. The judge further found that cause in law had been established and that GT's negligence was an effective cause of the loss [140-149]. In particular, the judge found at [146] that:

"146. To say that the Defendant's negligence merely provided the opportunity for the Claimant to suffer loss caused by the financial crisis of 2008 and the resulting substantial and sustained fall in interest rates and was not an effective cause of the Claimant's loss would, in my judgment, seriously underplay the causative potency of the Defendant's negligence. The use of hedge accounting was intended, as recognised by the Defendant in November 2005, to mitigate the effects of volatility in the fair value of the swaps. Once it was appreciated that hedge accounting was not available in 2013 the Claimant's balance sheet was exposed to the full and unrestrained effects of volatility in the fair value of the swaps and it was those effects which led to the Claimant deciding to close down the swaps and thereby to incur a substantial loss. In my judgment the Defendant's negligence was an effective cause of the loss suffered in 2013 when the swaps were closed down. Applying the Claimant's submission there was a very close connection between the negligence and the loss. Applying the court's common sense, as the Defendant submitted the court should do, it is sensible to find that the Defendant's negligence was an effective cause of the loss suffered in 2013 in circumstances where the use of hedge accounting was intended to mitigate the effects of volatility in the fair value of the swaps and it was such volatility which led to the closure of the swaps in 2013."

30. The judge recognised that the accounting treatment of the swaps is different from the actual economic consequences of the swaps, but found at [149] that:

"...although it is obviously right to say that the accounting treatment does not cause the volatility of interest rate swaps, the accounting treatment nevertheless has a real effect in determining the extent to which that volatility affects the reported profits and hence the Claimant's available regulatory capital. It also affects the regulator's view of what amount of regulatory capital is required. It was the volatility of the balance sheet which led to the swaps being closed in 2013. Of course, the decision of the Claimant to purchase the swaps and the subsequent fall in interest rates were also effective causes of the Claimant's loss in 2013 but there can be more than one effective cause of loss; and in the case of the Claimant's loss in 2013 I consider that there were."

31. The judge further found that the losses sustained by MBS when it broke the swaps were the reasonably foreseeable consequence of GT's negligence [167] [177] and were not too remote [201].

32. The judge considered a number of authorities and in particular *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1997] AC 191, commonly referred to as *SAAMCO*, and *Hughes Holland*. The case before him had been argued by both sides on the basis that, in line with those authorities, he should consider whether this was an “advice” case (as MBS argued) or an “information” case (as GT argued) and approach the issue of damages according to which category the case fell into.
33. The judge rejected this approach and considered that the relevant question was whether the losses sought to be recovered were losses in respect of which the defendant has assumed responsibility [160]. As he explained at [150]-[151]:

“150. It is now well established that when assessing a defendant’s responsibility for losses the court must, having determined that the defendant’s negligence was an effective cause of the losses (as opposed to providing the occasion or opportunity for the losses to be incurred), then determine whether the losses were within the scope of the defendant’s duty. In determining the latter question it is not possible to lay down hard and fast rules. In *Hughes-Holland v BPE Solicitors* [2017] 2 WLR 1029 Lord Sumption, having postulated two extreme cases, one involving a valuer or conveyancer and the other an investment adviser, none of which are to be found in the present case, said at paragraph 44:

“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.”

151. In determining the matters for which the Defendant assumed responsibility Lord Sumption said the question to ask is whether the loss flowed from the particular feature of the defendant’s conduct which made it wrongful; see paragraph 38. The court must obviously pay close attention to the particular facts of the case before the court. Little is to be gained by considering whether the present case is to be regarded as an “advice” case or an “information” case (labels which have been used in the cases) because, as Lord Sumption said at paragraph 39 in *Hughes-Holland v BPE Solicitors*:

“Turning to the distinction between advice and information, this has given rise to confusion largely because of the descriptive inadequacy of these labels. On the 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.””

34. In considering that question the judge recognised that MBS had a cogent case:

“161. Applying this guidance there is a cogent argument in support of the Claimant’s case. The context in which the Defendant approved the Claimant’s Hedge Accounting Policy on 11 April 2006 was that the change in accountancy standards from UK GAAP to IFRS required derivatives such as interest rate swaps to be entered on the Claimant’s balance sheet. Before that change the Claimant’s balance sheet was not affected by changes in the fair value of the derivatives. After that change the balance sheet had to record such changes. In consequence, the balance sheet was exposed to volatility in interest rates which would affect the fair value of the swaps and hence profits and regulatory capital. The use of hedge accounting was designed to protect the balance sheet from such volatility and its consequences. It was in those circumstances that the Defendant approved the Claimant’s Hedge Accounting Policy. The nature of the advice given, by approving the Hedge Accounting Policy, was that the Claimant could use hedge accounting. It was given in circumstances where the Defendant knew that the Claimant wished to use it to protect itself from volatility in the fair value of interest rates swaps and the consequences that such volatility had on the balance sheet of the Claimant and hence on its profits and regulatory capital position. The losses incurred when breaking the swaps were fairly attributable to that negligent advice because, in circumstances where hedge accounting was discovered to be not available, the balance sheet was fully exposed to volatility in the fair value of the interest rate swaps and they had to be closed out at a cost which reflected their fair value. Of course, the losses were also attributable to the sustained fall in interest rates which had occurred following the financial crisis of 2008. But having regard to the context in which the Defendant’s advice was given and its nature the losses remain fairly attributable to the Defendant’s negligence. Can it properly be concluded that the Defendant assumed responsibility for losses of the type which were sustained in 2013 when, following the realisation that hedge accounting was not available, the interest rate swaps were closed? Since the Defendant had advised, by approving the Claimant’s hedge accounting policy, that the Claimant could protect its balance sheet, and hence its regulatory capital position, from volatility in the interest rate swaps and since the losses were sustained, when that advice was found to be incorrect, because the Claimant could not allow its balance sheet, and hence its regulatory capital position, to be exposed to that volatility, those losses, which reflected the fair value of the swaps, were not only the reasonably foreseeable consequence of the Defendant’s negligence but also flowed from the particular feature of the Defendant’s conduct which made its advice wrongful. It can therefore be concluded that the losses were the type of loss in respect of which the Defendant assumed responsibility.”

35. He also, however, recognised the cogency of GT's case:

“175. But there is also a cogent argument to the contrary. First, hedge accounting is concerned with the manner in which swaps and mortgages are presented in the published accounts of the Claimant. It is not concerned with protecting the Claimant from losses which would flow from its purchase of interest rate swaps in circumstances where there had been a sustained fall in interest rates, for example, the cost of putting up collateral or the costs of termination of the swaps in the event that a counterparty exercised its right to terminate the swap. Second, although hedge accounting had the effect of protecting the Claimant's published profit and capital (and in particular its regulatory capital) from changes in the fair value of the swaps, such changes were nevertheless real and exposed the Claimant to the risk of considerable loss notwithstanding the application of hedge accounting. It was because of such changes that the Claimant had to put up collateral (see paragraph 111 above) and that the regulator feared that a counterparty might exercise its right to terminate the swaps (see paragraphs 104 and 112 above) as Mr. Cowie appreciated (see paragraph 114 above). Third, that risk of loss came about by reason of the risk that interest rates might fall, as they in fact did after the financial crisis of 2008. Fourth, had the parties been asked in 2006 whether the Defendant, by advising that hedge accounting could be used, was assuming responsibility for the risk of loss to the Claimant in the event that there was a sustained fall in interest rates I do not consider that they would have replied that the Defendant was. Certainly the Defendant would not have said that it was doing so. I also think it improbable that Mr. Cowie would have said that the Defendant was doing so. He would have recognised, as Mr. Gee did in his evidence, that the decision to purchase the swaps was taken for commercial reasons on which the Defendant gave no advice. An impartial observer of the dealings between the Claimant and Defendant from November 2005 until April 2006 would not have concluded that the Defendant was assuming responsibility for the risk of loss to the Claimant in the event that there was a sustained fall in interest rates. He (or she) would have appreciated that, although the apparent availability of hedge accounting enabled the Claimant to make use of interest rate swaps, the decision whether or not to use interest rate swaps as a hedge was one for Mr. Cowie and the board to take depending upon their assessment of the commercial wisdom (or otherwise) in doing so.”

36. Although both these paragraphs summarise the parties' arguments, they also involve relevant findings being made.
37. The judge said that he had not found the question of assumption of responsibility easy to answer and that his mind had wavered [176]. His ultimate conclusion, however, was

that GT had not assumed responsibility for the MTM losses for the reasons set out in [179]:

“179. Ultimately, as with so many questions with which courts must wrestle, it is necessary, having examined the evidence and the opposing arguments, to stand back and view the matter in the round. Having done so it seems to me a striking conclusion to reach that an accountant who advises a client as to the manner in which its business activities may be treated in its accounts has assumed responsibility for the financial consequences of those business activities. I do not consider that the objective bystander, or indeed the parties themselves, viewing the matter in 2006 would have concluded that the Defendant had assumed responsibility for the Claimant “being out of the money” on the swaps in the event of a sustained fall in interest rates. Although it can be said, as I have attempted to explain, that the particular manner in which the Claimant suffered the loss on the swaps (that is, by deciding to close the swaps out when it was appreciated that the Defendant’s advice was wrong) flowed from the particular feature of the Defendant’s conduct which made it wrongful, the very same loss would have been sustained had the counterparty decided to close the swaps, as the regulator feared might well happen and as Mr. Cowie appreciated. That circumstance illustrates, it seems to me, that the loss suffered by the Claimant, looked at broadly, sensibly and in the round, was not in truth something for which the Defendant assumed responsibility or the “very thing” to which the Defendant had advised the Claimant would not be exposed. Rather, the loss flowed from market forces for which the Defendant did not assume responsibility. Just as the Defendant had not assumed responsibility for the losses which would have been incurred had a counterparty exercised its right to terminate a swap, so the Defendant had not assumed responsibility for the very same losses which were incurred when the Claimant decided to close the swaps out, notwithstanding that that decision was taken because the advice given by the Defendant had been wrong.”

38. The judge then considered and rejected GT’s case that MBS would in any event have been forced to close out the swaps by the regulator [181]-[189].
39. Although on his approach it was not necessary for his decision, the judge then addressed the question of whether the MTM losses would not have been incurred if GT’s advice had been correct – damages on the basis of taking account of what is commonly referred to as the “*SAAMCO* cap” [190-200].
40. The judge accepted MBS’s argument that it was sufficient for it to show that it would not have closed out the swaps in 2013 in order to prove its claim for the MTM losses, stating that:

“193. I accept the submission of counsel for the Claimant. *SAAMCO* and *Hughes-Holland* identify the question, would the

losses have been incurred had the information or advice provided by a defendant been true, as a “tool” for determining whether the defendant assumed responsibility for such losses (see *Hughes-Holland* at paragraph 45). I have already determined the question of responsibility in the Defendant’s favour. But I would not have reached the same decision by reference to this particular “tool”. On the facts of the present case the losses would not have been incurred had the information or advice been correct. The Claimant would not have incurred the costs of closing out the swaps because the swaps would not have been closed out.

.....

198. The enquiry required by both *SAAMCO* and *Hughes-Holland* is whether at the time the loss was incurred it would still have been incurred even if the defendant’s advice or information had been correct. In the present case it would not. If the Defendant’s advice had been correct the Claimant would not have broken the swaps in 2013 and so would not at that time have incurred the loss which in fact it did.”

41. In those circumstances it was not necessary for the judge to determine MBS’s alternative case that it could in any event show that the losses incurred in 2013 would not have been incurred in the future, but he found that that case was not proven:

“199. It is accordingly unnecessary for the court to consider the alternative case advanced by the Claimant in the event that it is, contrary to my decision, necessary for the Claimant to show, on the balance of probabilities, that the losses incurred in 2013 would not have been incurred in the future. I ought however to express my view on this alternative case in case my decision on the Claimant’s primary case is wrong. I shall do so shortly. Although Mr. Gee put forward two scenarios as to what might have happened in the future (which led to much expert comment and analysis and many pages of closing submissions) he fairly recognised that this was speculation and that what would in fact happen would depend upon

“the attitude of the FCA and PRA toward lifetime mortgages, the capital position of the Society over time, the capital requirements imposed upon the Society over time, movements in interest rates, movements in the rate at which new lifetime and standard fixed rate mortgages could be written, house price inflation and the overall risk appetite and profile of the Society.”

200. In this he was, in my judgment, entirely correct. Trying to predict what is likely to happen to financial markets, interest rates, the fortunes of the Claimant and the views of the regulator over the next 30 or more years is an impossible task. Possibilities

may be suggested but what is more likely than not to happen is a very different matter. Thus, if it is necessary for the Claimant to establish on the balance of probabilities that the sums paid in 2013 would not have had to be paid over the next 30 or more years the Claimant is, in my judgment, unable to do so. Indeed, the Claimant (inevitably) did not address the uncertainties mentioned by Mr. Gee. Rather, the Claimant concentrated upon seeking to establish a case that its mortgage business was profitable and that it would continue to be so well into the future when new (profitable) mortgages would be issued as existing lifetime mortgages were redeemed. But even if this could be established on the balance of probabilities the Claimant would still be unable to establish on the balance of probabilities that it would not continue to have had to pay out on the swaps for the remaining life of the swaps (over 30 years), thereby incurring the losses it incurred in 2013. I have therefore not addressed the many pages of closing submissions on the question of the alleged present and future profitability of the Claimant's business. The Claimant submitted that the court's task is "do its best to assess what would have happened." I must disagree. The real question on the Claimant's alternative case is whether the Claimant can show, on the balance of probabilities, that it would not have continued to pay out on the swaps throughout their life. The Claimant has, understandably, not attempted to show that."

42. The judge determined claims for various other heads of loss and the issue of contributory negligence. The judge found that if he had awarded the MTM losses as damages he would have reduced them by 50% on account of MBS's contributory negligence. In particular, he found that MBS had been negligent in failing to realise that its hedge accounting policy did not allow for substitution and did not reflect MBS's intention to hedge using 50-year swaps which would last much longer than the initial mortgages [251].

The issues on the appeal

43. MBS appeals against the judge's decision on grounds which may be summarised as follows:
- (1) The judge erred in law in approaching the issue of liability on the basis of assumption of responsibility rather than by following the approach set out in *SAAMCO* and *Hughes-Holland* of considering whether this was an "advice" or "information" case.
 - (2) The correct analysis is that GT provided advice to MBS about whether it could apply hedge accounting and this is an "advice" case. It follows that GT is liable for all of the reasonably foreseeable consequences of that advice being wrong, which, on the findings made, includes the MTM losses.
 - (3) Even if this is an "information" case, the judge's decision was wrong because it failed to hold GT liable for the reasonably foreseeable consequences of the information being wrong. The judge found that the MTM losses would not

have been incurred if GT had been correct that MBS could apply hedge accounting. It follows, necessarily, that they were a loss within GT's scope of duty.

- (4) If the judge was correct in law to approach the issue of liability for incorrect information as one of assumption of responsibility, he reached the wrong conclusion. His conclusion was inconsistent with his own findings on other issues and made without proper analysis of GT's obligations.

44. By its Respondent's Notice GT relies on the following alternative grounds for supporting the decision:

(1) If the judge did not find that this was an "information" case then he should have done so.

(2) MBS failed to prove it would not have suffered the loss in any event.

(3) The MTM losses were not caused in law by GT's negligence.

45. I shall address each of MBS's grounds of appeal, having regard to the Respondent's Notice grounds as and when appropriate.

(1) Whether the judge erred in law in approaching the issue of liability on the basis of assumption of responsibility rather than by considering whether this was an "advice" or "information" case.

46. The *SAAMCO* case concerned the liability of a valuer for foreseeable market related losses suffered by a lender who provided a loan on the basis of the valuer's negligent valuation. The House of Lords held that the valuer was not liable for all the foreseeable losses suffered as a result of entering into the loan transaction, but only for what the lender would have lost if the valuation had been correct. Lord Hoffmann explained the applicable principle as follows at p 214:

"It is that 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. It is therefore inappropriate either as an implied term of a contract or as a tortious duty arising from the relationship between them. The principle thus stated distinguishes between a duty to *provide information* for the purpose of enabling someone else to decide upon a course of action and a duty to *advise* someone as to what course of action he should take. If the duty is to advise whether or not a course of action should be taken, the adviser must take reasonable care to consider all the potential consequences of that course of action. If he is negligent, he will therefore be responsible for all the

foreseeable loss which is a consequence of that course of action having been taken. If his duty is only to supply information, he must take reasonable care to ensure that the information is correct and, if he is negligent, will be responsible for all the foreseeable consequences of the information being wrong.”

47. The *SAAMCO* principle has led to a distinction being drawn between “advice” cases (sometimes referred to as “category 2 cases”) and “information” cases (sometimes referred to as “category 1 cases”). It has also given rise to what is generally referred to as the “*SAAMCO* cap”, namely the principle that in an “information” case the recoverable damages exclude losses which would still have been suffered even if the erroneous information had been correct.
48. *SAAMCO* has been considered in a number of subsequent cases, including, in particular, *Nykredit Mortgage Ltd v. Edward Erdman Group* [1997] 1 WLR 1627, *Platform Home Loans v. Oyston Shipways* [2000] 2 A.C. 190, and *Aneco Reinsurance Underwriting Ltd v. Johnson & Higgins Ltd* [2001] UKHL 51, [2002] 1 Ll.R.157. The applicable legal principles have now been authoritatively explained and restated in the judgment of the Supreme Court in *Hughes-Holland*, in which the lead judgment was given by Lord Sumption with whom the other Justices agreed.
49. As Lord Sumption explains, the *SAAMCO* principle is a legal filter used to eliminate certain losses from the scope of a wrongdoing defendant’s responsibility. Effective causation, remoteness, and failure to mitigate are other such filters [20].
50. The *SAAMCO* principle provides such a filter in cases where foreseeable losses are suffered as a result of entering into a transaction in reliance on negligent advice and/or information. Such losses will often satisfy the filters of effective causation and remoteness, but to be recoverable they must also satisfy the filter provided by the *SAAMCO* principle.
51. In order to recover the foreseeable loss suffered as a result of entering into the transaction it is necessary to show that it is an “advice” case. An “advice” case is where “it is left to the adviser to consider what matters should be taken into account in deciding whether to enter into the transaction. His duty is to consider all relevant matters and not only specific matters in the decision”. He is “responsible for guiding the whole decision making process” [40]. In such circumstances “the adviser’s responsibility extends to the decision” to enter the transaction and he is liable for the foreseeable losses flowing from having entered into it.
52. Unless the adviser is “responsible for guiding the whole decision making process” in the way described, it is an “information” case. In an “information” case the adviser or information provider is not responsible for the decision to enter into the transaction and is accordingly not responsible for all the foreseeable financial consequences of so doing. He is only responsible for the foreseeable financial consequences of the information or advice being wrong [41].
53. In order to determine what are the foreseeable financial consequences of the information or advice being wrong it is necessary to exclude all losses which would have been suffered if the information or advice had been correct – the “*SAAMCO* cap”. As Lord Sumption explains at [45], this is “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". It reflects "the award of loss which is within the scope of the defendant's duty" rather than "the exclusion of loss which is outside it" [46].

54. In summary, in the light of the clarification provided in *Hughes-Holland* and subject to the full exposition there provided, the application of the *SAAMCO* principle may generally be addressed by considering the following:
- (1) It is first necessary to consider whether it is an "advice" case or an "information" case. This is a necessary first step because the scope of the duty, and therefore the measure of liability, is different in the two cases.
 - (2) It will be an "advice" case if it can be shown that it has been "left to the adviser to consider what matters should be taken into account in deciding whether to enter into the transaction", that "his duty is to consider all relevant matters and not only specific matters in the decision" and that he is "responsible for guiding the whole decision making process".
 - (3) If it is an "advice" case, then the negligent adviser will have assumed responsibility for the decision to enter the transaction and will be responsible for all the foreseeable financial consequences of entering into the transaction.
 - (4) If it is not an "advice" case, then it is an "information" case and responsibility will not have been assumed for the decision to enter the transaction.
 - (5) If it is an "information" case, the negligent adviser/information provider will only be responsible for the foreseeable financial consequences of the advice and/or information being wrong.
 - (6) This involves a consideration of what losses would have been suffered if the advice and/or information had been correct. It is only losses which would not have been suffered in such circumstances that are recoverable.
55. This was clearly a case in which the *SAAMCO* principle applied. MBS's claim is for the foreseeable financial consequences of entering into the swaps in reliance on GT's negligent accounting advice. In my judgment the judge's approach should accordingly have been to consider whether this was an "advice" or "information" case, as both parties submitted.
56. The judge did not do so largely because of Lord Sumption's reference to the "descriptive inadequacy of these labels" [39]. As Lord Sumption there explains:
- "On the 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".
57. The descriptive inadequacy of the labels used does not, however, undermine the fact that there is a clear and important distinction between the two categories of case. Indeed, Lord Sumption stated in the same paragraph that:

“The nature of the distinction is, however, clear from its place in Lord Hoffmann’s analysis as well as from his language.”

He then went on to describe and define the distinction between the two categories of case in [40] and [41], as summarised above.

58. It is right to observe that Lord Sumption refers to assumption of responsibility during the course of his judgment and that when he addresses the facts at [54] the question he considers is: “whether BPE Solicitors assumed responsibility for Mr Gabriel’s decision to lend money to Mr Little.” That is because determining whether it is an “advice” or “information” case involves a decision as to assumption of responsibility. If it is an “advice” case, as defined by Lord Sumption, then the defendant will have assumed responsibility for the decision to enter into the transaction; if it is an “information” case, then the defendant will only have assumed responsibility for the consequences of the advice or information being wrong. In accordance with the guidance provided by the authorities and, in particular, *Hughes-Holland*, this issue is to be addressed by considering whether it is an “advice” case or an “information” case, rather than by asking an open-ended question as to the extent of assumption of responsibility.
59. For all these reasons I consider that the judge did err in approaching the issue of liability on the basis of assumption of responsibility rather than considering whether this was an “advice” or “information” case.

(2) *Whether this is an “advice” case.*

60. Although the judge asked whether this was an “information” case, he did not directly answer that question. He did, however, state as follows at [172]:
- “172. I accept that it can be said, as Mr. Gee accepted, that the Defendant provided one piece of information or advice and that the Claimant’s decision to enter into the swaps was based upon not only that information or advice but also upon other (commercial) considerations as to which no advice was given by the Defendant...”
61. Whether or not that is a finding, it is clearly a correct description of the role which GT’s advice played in the decision to enter into the swaps.
62. The judge further found at [222] and [233] that MBS entered into the swaps for commercial reasons in respect of which no advice had been given by GT.
63. On the undisputed facts and the judge’s findings, it is apparent that this is not an “advice” case, as defined by Lord Sumption in *Hughes-Holland*. GT gave accounting advice. It was not involved in the decision to enter into the swaps. MBS did not leave it to GT “to consider what matters should be taken into account in deciding whether to enter into the transaction”, nor was its GT’s duty “to consider all relevant matters and not only specific matters in the decision”, nor was GT “responsible for guiding the whole decision making process”.
64. It is correct that GT gave advice but, as explained by Lord Sumption, what matters is not whether advice is given, but the purpose and effect of the advice given. In order to

be an “advice” case, the advice needs to involve responsibility for “guiding the whole decision making process”, which GT’s accounting advice manifestly did not.

65. MBS sought support for its argument from the decisions of the House of Lords in *Aneco* and of the Court of Appeal in *Main v Gaimbrone* [2018] PNLR 17.
66. In *Aneco* reinsurance brokers negligently failed to advise that there was no market for proposed retrocession cover for a book of reinsurance business. This was held to be an “advice” case and the brokers were held liable for the entire transaction, including the writing of the reinsurance. Reliance was placed, in particular, on Lord Lloyd’s judgment at [16] where he stated as follows:

“At the very least [the brokers] owed a duty to inform Aneco whether or not reinsurance was available. If they had performed that duty carefully, they would have told the insurers that reinsurance was not available, in which case “the whole thing would have collapsed”, as the brokers well knew.”
67. In the present case it was submitted that similarly the proposed lifetime mortgage/swaps business “would have collapsed” if GT had performed its duty carefully.
68. *Aneco* was considered by Lord Sumption in *Hughes-Holland* at [43]-[44]. He held at [43] that:

“...The critical feature of the case which led to this result was that the broker’s responsibility was found to extend beyond the placing of the retrocession to the entire transaction including the writing of the reinsurance itself: see paras 16–17 (Lord Lloyd of Berwick), para 40 (Lord Steyn)...”
69. On the basis that the broker assumed responsibility for the decision to enter into the entire transaction, the decision in *Aneco* can be said to be consistent with *Hughes-Holland*. Lord Sumption did, however, doubt some of the statements made in that case and observed at [44] that:

“...In my judgment the decision in *Aneco* is not authority for any general proposition of law beyond the particular factual context of that case....”
70. *Aneco* can accordingly provide little assistance to MBS. In any event, it is plain that GT’s responsibility was limited to the giving of accounting advice, and never came close to extending to responsibility for the entire lifetime mortgage/swaps business.
71. In *Giambrone* the defendant was a law firm who had advised the claimants that they would be adequately protected by bank loan guarantees provided by property developers. The claimants bought holiday homes off-plan and paid the necessary deposits in reliance on this advice. Later, it became apparent that the property development was a money laundering scam by the mafia. The Court of Appeal upheld Foskett J’s decision that the claimants were entitled to recover all of their losses and one ground of the decision was that it was an “advice” case.

72. MBS relied, in particular, on the following passages from the judgment of Jackson LJ at [82]-[87] (emphasis added):

“[82] The claimants were buying properties in Italy and had no knowledge of Italian law and conveyancing procedures. Giambrone decided what information the claimants needed and provided that information to them...Giambrone were (albeit imperfectly) guiding the whole decision-making process. They were telling the clients what protection they needed, what sums they should pay out and when it was safe to pay those sums out.

[83] ...in my view this is a category 2 case. Obviously the claimants decided whether or not they wanted to buy holiday homes in Southern Italy. But having taken that primary decision, they put themselves into the hands of Giambrone as their experienced Anglo-Italian lawyers.”

73. These passages reflected Jackson LJ’s recognition at [81] that the decision in *Hughes-Holland* meant that in order to be an “advice” case it is necessary to show that the defendant “is guiding the whole decision making process” and that it has been left to him “to consider what matters should be taken into account when deciding whether to enter into the transaction”. It was held that Giambrone had assumed that role, but GT played no such role in the present case.

74. For all these reasons, it is clear that this is an “information” case and, in so far as this was not found by the judge, he should have so found.

(3) If this is an “information” case, whether the judge’s decision was wrong because it failed to hold GT liable for the reasonably foreseeable consequences of the information/advice being wrong.

75. If, contrary to its primary case, this is an “information” case then MBS contends that, in accordance with the *SAAMCO* principle and the decision in *Hughes-Holland*, it is entitled to recover losses which would not have been incurred if GT’s information/advice in relation to hedge accounting had been correct. On the judge’s own findings, the MTM losses would not have been so incurred.

76. MBS refers to the findings at [193] and [198] referred to above and, in particular, the express finding at [198] that:

“...If the Defendant’s advice had been correct the Claimant would not have broken the swaps in 2013 and so would not at that time have incurred the loss which in fact it did.”

77. If the judge was correct so to find, then MBS’s case is indeed made out. GT, however, contends that the judge erred in so finding and that, on a proper analysis, he should have found that MBS had not proved its loss.

78. In relation to the burden of proof GT refers to and relies upon *Hughes-Holland* at [53] where Lord Sumption stated as follows:

“The burden of proof

53. The Court of Appeal considered that the burden of proving facts which engaged the *SAAMCO* principle lay upon the claimant. This is not a straightforward question, but in my judgment they were right about this. The legal burden of proving any averment of fact lies upon the person who is required to assert it as part of his case. In the ordinary course, this means that the claimant has the burden of pleading and proving his loss, whereas the defendant has the burden of proving facts (such as failure to mitigate) going to avoid or abate the consequent liability in damages. The practical effect of the principle formulated in *SAAMCO* in cases such as this is to limit the amount of the damages recoverable in respect of loss flowing from the claimant’s decision to enter into a transaction. But it is not a principle of assessment, let alone of avoidance or abatement. It is an essential part of the claimant’s case that he was owed a relevant duty. As Lord Hoffmann expressed it in *SAAMCO*, at p 220:

“The appearance of a cap is actually the result of the plaintiff having to satisfy two separate requirements: first, to prove that he has suffered loss, and, secondly, to establish that the loss fell within the scope of the duty he was owed.”

79. GT contends that:

- i) The MTM losses flow from interest rate movements, that is, market forces. Those losses do not flow from breaking the swaps, which is just the crystallisation of the market losses (in the sense that it prevents the realisation of further losses or gains if the market subsequently moves). If an asset falls in value and, for different reasons, then has to be sold, the loss does not flow from the sale, but the market fall.
- ii) In order to prove a loss in the present case MBS would have needed to establish that the MTM losses would not have been incurred had they continued to hold the swaps. As the judge found at [200], this could not be proved.
- iii) The only losses, in this case, which flow directly from breaking the swaps are the transaction costs, for which GT has been held liable.

80. In my judgment, it is a striking feature of the case that MBS’s claim for damages consists of the fair value of the swaps which it held. Receiving fair value does not ordinarily give rise to any loss.

81. If, for example, the swaps had been “in the money” at the time that GT’s negligent advice was discovered, the swaps would probably still have had to be closed out because of the unacceptable accounting volatility involved in continuing to hold them. In such circumstances the closing out of the swaps at fair value would not have given rise to any loss.

82. Provided fair value is received it should not in principle make a difference if the swaps happen to be “out of the money” at the time of closing out. In such circumstances MBS is relieved of its obligation to make further payments under the swaps, the market estimate of the present value of its obligation to do so being the fair value of the swaps.
83. There are cases in which being forced to make a sale results in a distress price being received and that may result in a recoverable loss, but that is not this case. MBS accepts that fair value was received.
84. MBS contends that what creates a loss is the fact that as a result of GT’s negligence the swaps all had to be closed out in 2013. That begs the question of what is the relevant counter-factual. If the complaint is having to close out the swaps then the counter-factual would be continuing to hold them and, in the absence of any other positive case, holding them to term. At the time of closing out the swaps in 2013, the best evidence of what the position would be if the swaps were held to term is their fair value. That fair value represents the market’s assessment at that time of the net payment that will be made over the entire term of the swaps between the counterparties.
85. It might be that by the time of the trial a better estimation could be made because by then the remaining term of the swaps would have been less. That was not, however, the case advanced by MBS, nor would it have assisted it. As the judge found at [197] the MTM value of the swaps, if MBS had continued to hold them to the date of trial, had gone even further against MBS. The evidence was that the MTM value of the swaps as at trial was negative £56 million and, moreover, MBS would by the date of trial have been making payments to its counterparties under the swaps for an additional five years.
86. The difficulties raised by MBS’s approach are illustrated by the example raised by Males LJ in argument of swaps with a remaining term of 5 years in 2013. On MBS’s case all that needs to be proved is the loss suffered on the closing out of the swaps in 2013 and that entitles them to damages of £32.5 million. On this example, however, it would be known at the date of the trial that had the swaps been held to term MBS would have had to pay out £56 million. Clearly, there could be no recoverable damages in such a case.
87. The fact that the swaps extend further into the future is no reason in principle for a different approach. MBS submitted and the judge accepted at [197] that an enquiry as to whether MBS would be “out of the money” over the entire lifetime of the swaps would be “speculative and inconclusive, depending upon many and varied possible future events”. But that does not mean that the MTM value is meaningless or that it can be dismissed as speculation. As with any discounted cash flow analysis of future earnings, events may prove the analysis wrong, but the MTM value nevertheless represents the best available evidence of the fair value of the swap in question, an assessment of value in a sophisticated market which is regarded as sufficiently reliable to require inclusion as an asset or liability on a company’s balance sheet in order to comply with IFRS. By closing out the swaps, MBS incurred a liability to pay their negative MTM value, but also obtained the (equal) benefit of removing a liability from its balance sheet.
88. In my judgment, these considerations show that this is a case in which, in order to prove that it would not have suffered the MTM losses if GT’s advice had been correct, MBS had to do more than establish the fact of the MTM losses. It also had to prove the

counter-factual, namely that that loss would not have been suffered had it continued to hold the swaps. This is an aspect of proof of loss. It is not a matter of avoidance or abatement.

89. It might be, for example, that MBS could show that had it not been compelled to close the swaps out in 2013 it would have closed them out at a later and more advantageous time. If that could be established that would be an example of a loss caused by the need to close out the swaps in 2013. That was not, however, MBS's case.
90. MBS did seek to show at trial that, if the information supplied by GT had been correct, then MBS would have undertaken other profitable transactions over the period for which the swaps would have been current and beyond, which would have offset the losses on the swaps. But it was found that MBS could not prove this for the reasons set out by the judge at [200], as cited above.
91. On appeal Mr Fenwick QC for MBS sought to contend that there was no need to do more than prove the MTM loss because of the in-built profit margin in its mortgage/swaps business. It was said that "the result on the swap was immaterial to MBS because it was cancelled out by the variable rate that MBS was paying to fund the mortgages and the higher fixed rate that MBS was earning from them."
92. There are no findings to support such a case and the margin analysis case advanced at trial was found not to be proven. In the terms advanced, it also assumes a perfect hedge, which there clearly was not, as the judge found – see [76], [90], [239].
93. In support of his conclusion that MBS did not need to do more than prove the MTM loss the judge observed that neither *SAAMCO* nor *Hughes-Holland* involved a damages enquiry into the future. But, neither of those cases involved a claim for loss based on closing out a long term swap at a fair value based on estimated future loss. The loss claimed itself looks to the future, as does any relevant counter-factual.
94. That the MTM losses reflect market forces is supported by the judge's reasoning in [179] where he holds that GT had no responsibility for the MTM losses. He there held that "the loss flowed from market forces" and that the parties would not have considered that GT was assuming responsibility for MBS "being "out of the money" on the swaps in the event of a sustained fall in interest rates".
95. The fact that the swaps were heavily "out of the money" at the beginning of June 2013 was the result of market forces. The closing out of the swaps at fair value on 6 and 7 June 2013 crystallised the loss resulting from the swaps being "out of the money", but it did not create that loss.
96. For all these reasons, I consider that the judge was wrong to find that MBS had established that the MTM losses would not have been incurred had the information or advice been correct and that, on his own findings at [200], this had not been proven. If so, then the judge reached the correct overall conclusion in relation to the non-recoverability of the MTM losses and the appeal must be dismissed.

(4) Whether the judge reached the wrong conclusion if he was correct in law to approach the issue of liability for incorrect information as one of assumption of responsibility.

97. In the light of my conclusion that this was not the correct approach in law but that the judge reached the correct overall decision this issue does not arise.
98. If, as I have found, this is an “information” case it follows that GT did not assume responsibility for the swap transactions but only for the financial consequences of its advice as to hedge accounting being wrong. MBS has not proved that the MTM losses would not have been suffered if that advice had been correct and the judge was accordingly correct to dismiss that claim.
99. Whilst, as discussed above, it is possible to envisage circumstances in which a damages claim would have succeeded, as the judge observed at [179] it would be:

“...a striking conclusion to reach that an accountant who advises a client as to the manner in which its business activities may be treated in its accounts has assumed responsibility for the financial consequences of those business activities...”

Conclusion

100. For the reasons outlined above, I would dismiss the appeal.

Lord Justice Males:

101. I agree.

Dame Elizabeth Gloster:

102. I also agree.