

Is there a duty of care? (Lecture B1324 – 10.20 minutes)

The case of *McLean v Thornhill* (2022) deals with a series of tax avoidance schemes involving participation in film distribution LLPs which were sold, via independent financial advisers, to various wealthy investors 20 years ago. The schemes were unsuccessful and HMRC pursued the investors for the tax which they had underpaid, together with substantial interest charges. It was heard in the High Court towards the end of 2021 and a 117-page judgment was handed down by Zacaroli J on 8 March 2022.

The claimants were a group of wealthy individuals who, between them, invested more than £100,000,000 in the film schemes, seeking to offset tax liabilities of approximately £40,000,000. When the schemes failed to deliver the intended tax advantages, the participants brought claims in negligence against Andrew Thornhill QC (T), a well-known tax barrister, who had acted as adviser to the promoters of the schemes. Although T had not advised – or indeed interacted with – them, the claimants argued that T owed them a duty of care because his advice had been referred to in the information memoranda, through which the schemes were promoted and which were made available to potential investors on request.

Zacaroli J ordered a trial of 10 sample claimants' claims in order to determine common issues which would bind all the claimants together and also to highlight any issues which were specific to the sample. However, in the end, the High Court judge rejected the claims at almost every level, holding that there was:

- no duty of care;
- no breach of duty; and
- no causation of loss.

For example, on the duty of care issue, the judge, applying the principle derived by the House of Lords in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* (1964), held that T owed no duty of care to potential investors.

The circumstances of the investments made it clear that it was:

- not reasonable for investors to rely on T rather than on their own tax advisers; and
- not reasonably foreseeable to T that they would rely on him.

In particular, the information memoranda had clearly advised potential investors to consult their own advisers on the tax aspects of the film schemes and no investor was allowed to subscribe without warranting that he or she had relied solely on their own independent advisers.

Additionally, such wealthy investors could reasonably be expected to have access to skilled advice. And, of course, they knew that T was acting for the promoters who were selling the schemes.

It should be remembered that the *Hedley Byrne* case examined the situation where there had been negligent misstatements and negligent advice. The claimants had relied to their detriment on references provided by the defendant bank. The House of Lords recognised that, although, in that particular case, the defendant did not owe a duty of care to the claimants in view of the fact that the

references had been given 'without responsibility', in principle such a duty could be owed where there was no contractual relationship between the parties.

However, the five judges in the House of Lords were concerned to ensure that any claim for negligent misstatement leading to economic loss should be contained and, in order to achieve this, they introduced the principle that liability depended on the existence of a 'special relationship' between the parties based upon 'an assumption of responsibility' by the maker of the statement.

As mentioned above, Zacaroli J stated that T owed no duty of care to the claimants in respect of the advice which he gave in relation to the film schemes. The investors were not T's clients and his advice was never communicated to them. In the judge's words:

'No reasonable investor could have understood that T was making any statement or providing any advice to them at all. An implicit statement by (the promoters) that the tax analysis in the information memoranda was consistent with T's advice to (the promoters) is insufficient, in my judgment, to amount to the provision of advice by T to any potential investor.'

Furthermore (and, in the speaker's opinion, probably as important as anything else in the case), each of the claimants had warranted that they had read and understood the terms of the information memoranda and were aware of the risks involved.

It is difficult to see how this case could have turned out in any other way.

Contributed by Robert Jamieson