

SAAMCO – WHERE DO WE STAND FOLLOWING HUGHES-HOLLAND v BPE?

Introduction

1. On 22nd March 2017, the Supreme Court handed down its decision in *Hughes-Holland v BPE Solicitors LLP* [2017] UKSC 21. This was a highly-anticipated case containing a re-affirmation of the so-called “SAAMCO cap,” along with some helpful (although surprisingly brief) guidance as to how the principle applies in professional negligence cases.
2. The purposes of this paper are to:
 - a. Set out some background to the SAAMCO principle and the surrounding case law;
 - b. Examine the Supreme Court decision in *BPE*; and
 - c. Suggest an approach for practitioners seeking to determine what losses will be recoverable after application of the SAAMCO cap.

The SAAMCO Decision

3. In 1996 the House of Lords heard three appeals from decisions concerning a common question of principle: what is the liability of a valuer who provided a lender with a negligent overvaluation of property being offered to the lender as security? In particular, does it matter that the lender would not have lent if he had known the true position (i.e. a ‘no transaction’ case) where a fall in the property market after the date of the transaction greatly increased the lender’s loss? The case was reported as *South Australia Asset Management Corporation v York Montague Limited* [1997] AC 191 and has come to be known as ‘SAAMCO’ for short.
4. The facts of each of the three cases were as follows:
 - *South Australia Asset Management Corporation v York Montague Ltd*: the lenders advanced £11 million on a property valued at £15 million. The actual value at the time of the valuation was £5 million. Following the borrower’s default, the property was sold for £2,477,000. The lenders claimed the amount outstanding under the loan minus the net proceeds of sale plus interest. At first instance the judge awarded that sum minus 25% for contributory negligence.
 - *United Bank of Kuwait Plc v Prudential Property Services Ltd*: the lenders advanced £1.75 million on a property valued at £2.5 million. The actual value at the time of the valuation was between £1.8 and £1.85 million. Following the borrower’s default, the property was sold for £950,000. At first instance, damages were awarded to the lenders for all losses resulting from granting the loan, including those attributable to the fall in the property market.

- Nykredit Mortgage Bank Plc v Edward Erdman Group Ltd: the lenders advanced £2.45 million on a property valued at £3.5 million. The actual value at the time of the valuation was between £2 and £2.375 million. Following the borrower's default, the property was sold for £345,000. Again, at first instance, damages were awarded to the lenders for all losses resulting from granting the loan, including those attributable to the fall in the property market.

5. The principal issue before the Court of Appeal resulted from a challenge by the defendants that they should not be liable for losses that flowed from a fall in the value of the property after the date of the loan. The Court of Appeal upheld the principle that the negligent valuer in a "no transaction" case was liable for the whole risk of that transaction having taken place, and that included any loss attributable to the fall in the market. That was in contrast to what they termed a "successful transaction" case where, had the lender been properly advised, it would still have offered a loan to be secured against the property but of a lesser sum. In that successful transaction case, the Court of Appeal considered that the lender could only recover from the valuer the difference between what it had actually lost and what it would have lost if it had lent the lesser amount; therefore, the fall in the property market would not increase the valuer's liability.

6. When the valuer's appeals came before the House of Lords, Lord Hoffmann gave the lead speech with which the other Lordships agreed. He set out the issue for determination as:

"What is the extent of the liability of the valuer who has provided a lender with a negligent overvaluation of the property offered as security for the loan? The facts have two common features. The first is that if the lender had known the true value of the property, he would not have lent. The second is that the fall in the property market after the date of the valuation greatly increased the loss which the lender eventually suffered." (p.210 at C)

7. Lord Hoffmann considered that the Court of Appeal had started from the wrong place in considering the basis on which the lenders' entitlement to damages should be based. In his view, the correct place to start was the nature of the cause of action against the valuers.

8. There was no dispute that the valuers owed the lenders a contractual and tortious duty in respect of the valuations which they were providing but as Lord Hoffmann stated *"the real question in this case is the kind of loss in respect of which the duty was owed."*

9. Lord Hoffmann went on to distinguish between two categories of cases, namely:

(1) where a person is under a **duty to take reasonable care to provide information** on which someone else will decide upon a course of action; and

(2) where a person is under a **duty to advise someone as to what course of action he should take** which includes an obligation to take reasonable care to consider all the potential consequences of the course of action.

10. In cases falling within the first category, if the person is in breach of that duty, Lord Hoffmann concluded that that defendant is generally only responsible for the consequences of the information being wrong. It would be unfair to impose liability for losses which would have occurred even if the information he had provided had been correct.
11. In cases falling within the second category, if the person is in breach of that duty, Lord Hoffmann said that that defendant is generally responsible for all the foreseeable loss which is a consequence of that course of action having been taken.
12. It was expressly stated that the scope of the duty was unaffected by whether:
 - (a) the duty arose in tort or as an implied contractual term; and/or whether
 - (b) the case was a “no transaction” or “successful transaction” case.
13. On the facts, the House of Lords held that the scope of the valuers’ duty fell within the first category and as such they were only liable for the consequences of the valuation being incorrect. The valuers were therefore only liable for the difference between their negligent valuation and the correct valuation; that represented the scope of their duty. Accordingly, losses suffered falling within the scope of that duty were recoverable and losses falling outside that scope were not recoverable. This led to the popular terminology that there was a “SAAMCO cap” although it is properly not a cap but just a statement of the scope of the duty.
14. However, as will be seen below, while the decisions of the Court of Appeal were reversed the House of Lords did not rule that losses flowing from a decline in the value of the property fell outside the scope of duty and it is a misunderstanding of SAAMCO to think that it did.
15. The application of SAAMCO requires a two-stage approach as summarised by Lord Nicholls in Nykredit Mortgage Bank Plc v Edward Erdman Group [1997] 1 W.L.R. 1627, namely:
 - (1) what loss (if any) has been suffered on a simple ‘but for’ basis; and then
 - (2) what part of that loss is the consequence of the deficiency in the security.
16. Put another way:
 - (1) what overall loss has the lender suffered;
 - (2) what was the defendant required to do in order to discharge his duty of care; and

(3) what part of the lender's loss has been caused by the defendant's breach.

17. Thus it is clear in a valuer's negligence case that losses calculated under (1) may well include (as part of the loss) the fall in the value of the property. If, because of the facts of the case, the amount of the overall loss calculated under (1) that falls within the scope of duty established by (2) includes loss flowing from the fall in value then the recoverable loss will indeed include losses that flow from that fall in value.

Applying the principle to other professionals

18. While SAAMCO itself concerned valuers, the principle has been applied in a number of subsequent cases involving other professionals.

Solicitors

19. Generally assessing the scope of the solicitor's duty is straightforward because the retainer will impose a duty upon the solicitor to provide both information and advice. However, assessing what part of the lender's loss has been caused by the solicitor's breach of duty is more difficult, as recognised by Chadwick J. in Bristol & West Building Society v Fancy & Jackson [1997] 4 All ER 582:

"Where a loan is made on the basis of an incorrect and negligent valuation it is not difficult to find an answer to the question "what are the consequences of the valuation being wrong" by comparing the position as it was represented to be with the position as it actually was; and subtracting one valuation from the other. The position is, I think, potentially more complex where the negligence is that of a solicitor. The information provided (or which ought to be provided) by a solicitor carrying out his retainer in a domestic mortgage transaction goes beyond questions of value; although it may well be relevant to value. The information may simply go to title; in which case it may affect value directly, or it may affect the marketability of the property. The information may go to price; in which case it may affect value. The information may go to the borrower's intentions in relation to conditions in the offer of advance; in which case it may have no effect at all on the loss actually suffered by the lender... But, although the test may be more difficult to apply in cases against solicitors, it is necessary to attempt to do so; that is to say, to answer the question "what are the consequences of the information provided by the solicitor being wrong or incomplete" by comparing the position as it was represented to be with the position as it actually was."

20. The issue of solicitors' liability was also considered by the Court of Appeal in the case of (1) Haugesund Kommune and (2) Navrik Kommune v (1) Depfa ACS Bank and (2) Wikborg Rein & Co (2011) PNLR 14. In essence, the facts were:

- Two Norwegian municipalities entered into swap contracts with the bank.

- Wikborg Rein & Co solicitors advised the bank that (1) the swap contracts were not loans for the purposes of the relevant Norwegian local government legislation, (2) the municipalities had full capacity to enter into them and (3) a claim against a Norwegian municipality could not be enforced.
 - The swap contracts were subject to English law and jurisdiction.
 - In its first judgment the court held that (1) the swap contracts were invalid but the bank was entitled to recover the sums due in restitution and (2) the solicitor was in breach of its contractual duty to exercise reasonable skill and care in failing to advise the bank that the swaps were prohibited loans.
 - The court also held that had the bank been advised that the swaps were or might be prohibited loans it would not have entered into them.
 - The municipalities paid the bank the proceeds of the unsuccessful investments made pursuant to the swap transactions but could make no further payment. The bank therefore sought to recover the balance of the sums advanced under the swaps from the solicitor.
 - In its second judgment, the court held that the solicitors were liable for all the consequences of their negligent advice.
21. On appeal to the Court of Appeal, the solicitors argued that the scope of their duty was limited to giving specific advice on the capacity of the municipalities to enter into the swap contracts. They accepted that their advice had been wrong and that but for their negligence the bank would not have entered into the swap contracts. However, they submitted that they were not responsible for all the consequences of the advice having been relied upon, but only for the consequences of that advice being wrong which they said did not include the risk of the municipalities' failure to repay.
22. Rix LJ considered that the preliminary question was "*whether this was a 'category 1' case or 'category 2' case*" within the SAAMCO principle (category 1 being the duty to take reasonable care to provide information; category 2 being the duty to advise someone as to what course of action he should take). The solicitor contended for the former, the bank for the latter. Gross LJ and Peter Smith LJ agreed with the conclusions reached by Rix LJ on the issue although Gross LJ, delivering a short judgment, said that it did not matter whether it was a category 1 or category 2 case "*a distinction which, with respect, may perhaps be easier to state than to apply in practice*" whilst, at the same time reaching the same conclusion on the limits of the solicitor's duty as Rix LJ.
23. Rix LJ held that this was a category 1 case because:

“For these purposes, I am prepared to assume with Lord Lloyd in Aneco¹, that category 2 reflects the primary category, and category 1 reflects the exceptional cases. Nevertheless, it seems to me that it is difficult to see Wikborg Rein’s duty as being that of a general, as distinct from a specific kind. Wikborg Rein was asked to advise about a specific question, the validity of the proposed swap contracts. It did not have a general retainer to report or notify problems about the proposed transactions. It was not concerned with the creditworthiness of the Kommunes. It warned Depfa that it could not execute a judgment against the Kommunes, so that in that different sense, its contractual rights could not ultimately be vindicated or, one might say, be enforced. In such circumstances, Depfa knew that it ultimately relied on the creditworthiness and good faith of the Kommunes: and on those qualities Depfa made up its own mind and was wholly confident.”

24. Had the loss been caused as a result of the invalidity of the transactions then that would plainly have been within the scope of the solicitor’s duty. However, the court concluded that the bank was unable to establish that the loss was caused by the invalidity as opposed to the impecuniosity of the municipalities and therefore the appeal was allowed.

Surveyors

25. The SAAMCO principle was considered by Eder J. in Capita Alternative Fund Services (Guernsey) Ltd v Drivers Jonas (A Firm) [2011] EWHC 2336 (Comm); 139 Con. LR. 125. The facts of that case were complicated and are set out in full in the 122 page judgment. However, in summary:

- Capita acquired a property (‘the Dockyard’) for £62,850,000 to develop it into a factory outlet shopping centre.
- Capita alleged that it retained the defendant surveyors and property consultants, to advise them in relation to the acquisition of the Dockyard and that they provided positive advice about its commercial prospects and valued it in the sum of £62,850,000 with certain tax allowances and £48,150,000 without those allowances.
- Capita alleged that the defendant’s advice substantially overstated the commercial prospects and the value of the Dockyard and that their approach to assessing the commercial prospects and value was fundamentally flawed.
- Capita’s submission was that this was a SAAMCO Category 2 ‘advice’ case where the defendant was effectively advising them whether or not to proceed with the transaction. They therefore claimed damages, in excess of £16 million, for all the losses they had suffered as a result of entering into the transaction.

¹ Aneco Reinsurance Underwriting Ltd (In Liquidation) v Johnson & Higgins Ltd [2001] UKHL 51 where the defendant reinsurance broker was held liable for the claimant’s total loss because it was the broker’s duty to advise the claimant that reinsurance was not available.

- There was no letter of instruction or letter of retainer setting out the work which the defendant was required or agreed to do.

26. After carrying out a thorough and detailed review of the evidence Eder J. rejected Capita's argument that the defendant should be liable for all of their loss caused by entering into the transaction. Although the terminology used in Depfa was not used, the Judge concluded that the defendant's duty to Capita was a 'category 1' as opposed to a 'category 2' duty :

"It was the valuation figure which was critical with regard to the purchase price of Dockside. Whether viewed in tort or in contract, the scope of the Defendants' duty was, in my judgment, to take reasonable care to ensure that the valuation was accurate. In my judgment, that is what Capita was reasonably entitled to expect and the liability that the Defendants could reasonably have thought they were undertaking was limited to any relevant inaccuracy in the valuation which they provided in April 2001....As in Nykredit, the Defendants would not in my view have incurred any liability if any part of the advice which they provided to justify their valuation had been wrong but (perhaps on account of a compensating error) the valuation itself had been correct. I accept that in certain circumstances, a valuer may be liable for giving negligent advice independent of his valuation see e.g. Merivale Moore Plc v Strutt & Parker [2000] PNLR 498 and K/S Lincoln v CB Richard Ellis Hotels Ltd [2010] PNLR 31. But it does not seem to me that such possibility is relevant in the circumstances of the present case." (paragraphs 306-307)

27. Following the SAAMCO principle therefore, the defendant was held liable to Capita for the consequences of the information (i.e. the valuation) being wrong which had resulted in Capita paying £18.05 million more for the Dockyard.
28. The case proceeded to the Court of Appeal [2012] EWCA Civ 1417; [2013] 1 E.G.L.R. 119 but only on the question of quantum.

Financial advisors

29. The issue of liability of financial advisors was considered in the case of Rubenstein v HSBC Bank plc [2012] EWCA Civ 1184. Mr and Mrs Rubenstein were customers of HSBC and, having sold their house in 2005 for £1.25m, they wanted to invest the sale proceeds whilst they went into rented accommodation and searched for a new house. They wanted the best risk-free investment with the highest yield but were clear that they could not afford any risk to the capital.
30. The Rubensteins took advice from a financial adviser in the Bank's private client department who recommended a particular investment product to them. The Rubensteins expressly stated that they could not afford to accept any risk in the investment of the principal sum and asked the advisor to confirm what – if any – risk was associated with the product. The Judge held at first instance that "no risk to capital" (i.e. the minimum possible risk) was to be the sine qua non of the investment. The Bank's advice was that they viewed "this investment as the same as cash deposited in one of our accounts" and, more spectacularly, "...the risk of default of one of the accounts is similar to the risk of default of Northern Rock" (this was in 2005!).

31. The Rubensteins had originally hoped to buy a new house within 6 to 12 months, however, they could not find a house they liked for 3 years. In September 2008 the global financial difficulties struck and the weekend before Lehmans went down they decided to withdraw their investment. They could not initially withdraw all of their funds because of the rules of the investment but they were eventually offered a guaranteed 50% of the fund value with the remaining 50% either to be left in long term or withdrawn at a discount.
32. The Rubensteins accepted the discount and sued the Bank for the shortfall claiming it was caused by the Bank's breach of contract and negligence. At first instance [2011] EWC 2304 (QB), [2012] PNLR 7, the Judge held that:
- a. there was a contract to give advice (i.e. it was not "execution only");
 - b. the advice that the product was as safe as a cash deposit was a breach of contract / negligent;
 - c. the failure of the adviser to consider other funds as alternatives was also a breach of contract / negligent;
 - d. the risks were not adequately explained to the Rubensteins and the Bank was therefore also in breach of statutory duty (i.e. FSMA and the COB rules); and
 - e. the Rubensteins invested in the product in reliance on the advice given and would not have done so if the risks had been properly explained.
33. However, notwithstanding the Judge's conclusions on breach he only awarded the Rubensteins nominal damages. Although the Judge accepted that but for the Bank's negligence the Rubensteins would not have invested in the product but would have invested safely elsewhere, the trial Judge held that the loss was unforeseeable and too remote and had been caused not by the advice but by "market hysteria" and "unprecedented financial turmoil". The Judge considered that the risk in the product was only marginally higher in 2005 than a conventional deposit and the loss was triggered by subsequent events. If those were not events of a kind which were foreseeable he said that it could not be said that the structure of the product truly caused the loss.
34. This was an echo of the defence arguments in SAAMCO that the defendant valuer was not liable for losses that flowed from a fall in the value of the property after the date of the valuation / loan. However, as we have seen above, SAAMCO did not decide that the valuer was not responsible for losses that flowed from a fall in value but decided that any defendant was only liable for losses that fell within the scope of his duty.

35. Both parties appealed to the Court of Appeal [2012] EWCA Civ 1184; [2013] 1 All E.R. (Comm) 95. The Court of Appeal in considering the matter distinguished between two types of risks which the Rubensteins faced, (1) risk of default of the institution (“default risk”) and (2) risk of market movements (“market risk”). The Court of Appeal held that:

- a. the Rubensteins were alive to the default risk but had no idea that they were exposed to the market risk;
- b. the Judge had failed to draw an adequate distinction between default risk and market risk;
- c. there was no loss for depositors or investors in the alternative products available; and
- d. the Rubensteins’ loss was caused by market movement in the assets held by the fund, i.e. by market risk.

36. The Court of Appeal gave some useful guidance on the application of SAAMCO, stating that where there is a claim for breach of statutory duty the scope of the statutory duty must be considered before considering the contractual or tortious obligations. At paragraph 114 Rix LJ said:

“As Lord Hoffmann pointed out in SAAMCO in the passage cited at [45], in a case of statutory duty the question as to scope of duty is to be answered by reference to the statute itself, and in such a contest the position in relation to negligence and contract will fall in behind the statutorily discerned purpose. If, however, the position in tort and contract, absent the context of statutory duty, might lead to a separate result, as it might, there seems to me to be no profit in considering that position first in a case where breach of statutory duty has been established. To do so increases the risk of error.”

37. The Court of Appeal judgment is a useful reminder on the causation and remoteness principles to be applied in contract and tort and the distinctions between them. In terms of SAAMCO, Rix LJ referred to it as the “balancing act” and concluded that:

“Where the obligation of a defendant is not merely to avoid injuring his claimant but to protect him from the very kind of misfortune which has come about, it is not helpful to make fine distinctions between foreseeable events which are unusual, most unusual, or of negligible account (cf Lord Reid in The Heron II). Whether the test of remoteness is expressed in the classic terms in the leading authorities, or has to reflect that sense of balance (an exercise in judgment) to which Lord Hoffmann referred in SAAMCO...or has to take account of the manner in which the scope of duty may extend responsibility for even unusual events...in my judgment it should not be said that the loss which Mr Rubenstein has suffered by reason of HSBC’s breach is to be regarded as too remote.”

The Steggle Palmer principle – a different rule where the information is ‘fundamental’?

38. Alongside these cases, there was an emerging view that even a breach of duty falling within Lord Hoffmann’s “information” category might in some circumstances lead to recovery of all foreseeable

losses. This principle was derived from Bristol & West, where four cases of solicitor's negligence were considered together. By way of brief overview, the facts and decision in each case were as follows:

- Fancy & Jackson: A solicitor failed to obtain an official Land Registry search prior to completion. They were held not liable for any loss because, although the lender would not have authorised the advance, the loss was not caused by the absence of the official search certificate – it would have occurred anyway. Nominal damages were awarded.
- Cooke & Borsay: A solicitor failed to ensure that the lender obtained a properly executed mortgage deed by the wife before releasing the advance. They were held liable for all the losses on the basis of breach of warranty of authority, i.e. for the difference in the value of security over the whole property and the husband's share only.
- Colin Bishop: A solicitor failed to report that the transaction was a 'back to back' transaction with an uplift of £25,000 in consideration. They were held liable on the basis not that the lender would have withdrawn from the transaction but that it would have been unwilling to lend without a further valuation. If the original valuation overvalued the property, the solicitor would be liable for the difference between the value represented and the true value. If it did not, the solicitors were not responsible for any loss. In this case, the solicitor was held liable for losses suffered by the security being less valuable than it thought, not for other losses (e.g. fall in market).
- Steggles Palmer: A solicitor failed to report that the transaction was proceeding by way of a sub-sale, failed to inform the lender that they had seen no evidence that the balance of the purchase price had been paid by borrower to vendor and breached its fiduciary duty in failing to notify the lender that they were also acting for the vendor. There was no evidence that the valuation was wrong or affected by these matters. The solicitor was held liable for all of the loss (subject to contributory negligence and mitigation arguments) notwithstanding the lender's reliance on the valuation because, had the lender been told what it should have been, it would have been unwilling to lend to that particular borrower.

39. The difference in treatment of the Colin Bishop and Steggles Palmer cases generated some interest and controversy. On their face, the cases are factually similar, but Chadwick J felt able to reach differing conclusions, apparently on the basis that the information negligently withheld in Steggles Palmer was more fundamental to the lender's view of the entire transaction.
40. The judgment attracted criticism as being inconsistent with the SAAMCO principle. However, in Portman Building Society v Bevan Ashford (A firm) [2000] PNLR 344 the Court of Appeal approved the decision. In that case, the solicitor was acting for both lender and borrower and, in breach of its

retainer, failed to notify the lender that part of the vendor's price was to be met from a second charge. The lender found out about the second charge only a week after completion of the transaction. The solicitor contended that the lender could then have taken possession of the property and realised its security, without any loss at that time. However, the Court of Appeal held that the solicitor should be liable for the whole loss, since the borrower had acted fraudulently, and the purchase was not viable at all since the borrower's income could not support his total borrowings. Otton LJ, giving the lead judgment, said that *"the answer to this issue is to be found in the particular facts of this case"* and:

"Longmore J. was correct to follow the reasoning of Chadwick J. [in Bristol and West] in the application of the SAAMCO principle and has the effect that where a negligent solicitor fails to provide information which shows that the transaction is not viable or which tends to reveal an actual or potential fraud on the part of the borrowers, the lender is entitled to recover the whole of its loss. In other words, the whole of the loss suffered by the lender is within the scope of the solicitor's duty and is properly recoverable."

41. The Court of Appeal refused to apply the Steggles Palmer approach in Lloyd's Bank Plc v Crosse & Crosse [2001] PNLR 830 where a solicitor had failed to inform the lender that there were restrictive covenants affecting the security, even though the borrower would not have bought the property had he known of the restrictive covenants, so no loan would have been made. The Court held that the defendant was only liable for the difference between the value of the security with and without the restrictive covenants. Jonathan Parker L.J. said that the lender's reliance on the fact that had the restrictive covenants been known about, no transaction would have taken place, was an attempt to resurrect the no transaction / successful transaction approach which had been rejected in SAAMCO.

Summary of the position

42. To summarise, the broad position prior to BPE was:
- a. The SAAMCO principle had been firmly established and applied in a number of cases.
 - b. The precise boundaries of what was within the scope of duty of care was perhaps difficult to predict, but there was some guidance in the decided cases as to which way the courts would lean for each type of professional.
 - c. The "information/advice" distinction expounded by Lord Hoffmann was being applied, but there was fairly strong judicial support that, even in an information case, liability could extend to the full extent of the losses suffered from a transaction, if the information that had been negligently withheld indicated fraud or non-viability of the whole enterprise.

Hughes-Holland v BPE

43. The original parties to the case were Mr Gabriel and Mr Little, who prior to the incidents giving rise to the claim had been friends. By the time the case reached the Supreme Court, all of the claims against

Mr Little had failed, and Mr Gabriel had been declared bankrupt and replaced in proceedings by his trustee in bankruptcy, Mr Hughes-Holland. The case may therefore be seen referred to as either *Hughes-Holland v BPE* or *Gabriel v. Little*.

44. The facts can be briefly stated. Mr Gabriel lent £200,000 to a company called Whiteshore Ltd which was owned by Mr Little and others. That loan was secured by a charge over a property. The company was an SPV established for the purpose of that property's redevelopment. Mr Gabriel assumed that the money that he was lending to the enterprise would be used to redevelop the property; in fact, it was to be used to pay off a previous loan taken out by Mr Little and secured by a separate charge over the same property. There would therefore be very little money left with which to carry out the redevelopment works.
45. BPE solicitors were engaged by Mr Gabriel to draw up the facility letter and charge. They became aware of the true structure of the deal, but negligently failed to pass that information to Mr Gabriel. They also inadvertently included in the draft documentation a statement confirming that the money was to be used for the redevelopment works.
46. The company defaulted on the loan and Mr Gabriel exercised his right to sell the property, but unfortunately only realised some £13,000. Mr Gabriel brought a claim against Mr Little for repayment of the loan as well as a claim against BPE for negligent advice, breach of fiduciary duty, breach of trust and dishonest assistance.
47. At first instance, *[2012] EWHC 1193 (Ch)*; *[2013] 1 BCLC 750*, the claims for dishonest assistance, breach of fiduciary duty and breach of trust were dismissed. However, the court found BPE in breach of duty in failing to exercise reasonable care and skill in drawing up the facility letter and in failing to inform Mr Gabriel of the intended utilisation of the loan. The court said that although BPE was under no duty to advise as to the commercial risk inherent in the loan, it was their duty to inform him that the funds were to be applied substantially for the benefit of Mr Little.
48. BPE appealed to the Court of Appeal, and the appeal was allowed. It held that the judge had effectively reversed the burden of proof by requiring the defendant to show that the project would not have been viable even if the money had been spent as Mr Gabriel understood it would be. In fact, such evidence as was before the trial judge tended to support the opposite conclusion; that the project was doomed to failure in any event. The losses suffered by Mr Gabriel were caused by his own misjudgements about the viability of the project, and did not fall within the scope of the solicitor's duty of care.

Supreme Court decision

49. The appeal to the Supreme Court was made on two grounds:

- a. The Court of Appeal had been wrong to substitute its own view of the viability of the project for that of the trial judge.
 - b. Mr Gabriel was entitled to recover the full losses flowing from the transaction, which would not have been entered into had the defendants not been negligent.
50. Lord Sumption gave the judgment of a unanimous Supreme Court, and rejected the appeal on both grounds. As to the first issue, he agreed with the Court of Appeal that the evidence before the trial judge clearly showed that the project was not viable, for six reasons:
- a. The building was “on any view an unattractive investment prospect,” being a disused heating tower in a far from ideal location.
 - b. The evidence showed that the value of the property would only have been enhanced once the project was completed. The adequacy of Mr Gabriel’s security therefore depended on the initial cost projections proving to be accurate.
 - c. The evidence at trial tended to suggest the project as planned in 2009 (and for which permission had been obtained) would run over budget, and generate a significant loss.
 - d. While the position was less clear regarding a more restrictive development plan for which permission had been obtained in 2004, it was likely that the position was much the same as for the 2009 scheme.
 - e. The fact that Mr Little had sought permission for the enlarged 2009 scheme indicated that the 2004 scheme had economic prospects at least as poor as the revised 2009 scheme.
 - f. The judge appeared to have based his conclusions on some unspecified modification to the 2004 scheme proving to be viable, but there was no evidence to support that suggestion.
51. Turning to the issue of legal principle, Lord Sumption set out some of the context and cases leading up to the SAAMCO decision. He noted that the courts have adopted a “variety of legal concepts” by which the boundaries of liability have been determined. Many of these “filters” may be characterised as issues of causation, but not all of them. “Ultimately,” he said, “all of them depend on a developed judicial instinct about the nature or extent of the duty which the wrongdoer has broken.”
52. Lord Sumption then sought to clarify some aspects of the SAAMCO principle, with the aim of answering some of the criticisms that have been levelled against it:

- a. SAAMCO is not, in his view, an aspect of causation, which is primarily concerned with the question of “what losses flowed from the breach?” Instead, SAAMCO is directed to the different issue of whether “losses flowed from the right thing.”
- b. He acknowledged that some confusion is caused by the “information/advice” distinction, because the labels themselves have some “descriptive inadequacy.” Nonetheless, Lord Sumption reaffirmed the distinction, characterising the difference between the two as follows:

“In cases falling within Lord Hoffmann's “advice” category, 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 factors in the decision. If one of those matters is negligently ignored or misjudged, and this proves to be critical to the decision, the client will in principle be entitled to recover all loss flowing from the transaction which he should have protected his client against...”

“By comparison, in the “information” category, a professional adviser contributes a limited part of the material on which his client will rely in deciding whether to enter into a prospective transaction, but the process of identifying the other relevant considerations and the overall assessment of the commercial merits of the transaction are exclusively matters for the client (or possibly his other advisers). In such a case, as Lord Hoffmann explained in Nykredit, the defendant's legal responsibility does not extend to the decision itself.”

- c. While some commentators have argued that the operation of the SAAMCO cap does not achieve its purported objectives, Lord Sumption regarded these criticisms as “unjustified.” While noting that it may be difficult to distinguish between recoverable and irrecoverable losses in complex cases, and that the SAAMCO cap may be a “mathematically imprecise” tool, he concluded that it was a justifiable method for limiting recovery. “Mathematical precision is not always attainable in the law of damages,” he noted.

53. Having made those general remarks about the SAAMCO cap, he made some particular comments about its application to conveyancers. He rejected the approach adopted by Chadwick J in Steggles Palmer of identifying certain types of information as “fundamental” to the transaction, allowing recovery of all losses flowing from it. In Lord Sumption’s view, such an approach was inconsistent with SAAMCO – all “no transaction” cases, he noted, have the feature that the information was critical to the decision to enter the transaction. He held that there was no relevant distinction between Steggles Palmer and Colin Bishop, and the former (along with the Court of Appeal case of Portman Building Society v Bevan Ashford) was wrongly decided.
54. Lord Sumption then turned to apply the principle to the present case. He asked whether BPE had assumed a responsibility for Mr Gabriel's decision to lend the money, and concluded that they had not. Accordingly, they were not liable for all of the financial consequences of that decision, only for those arising from their confirmation of his assumption as to how the money would be used. In light of his

earlier conclusion that the project was not viable and would have failed in any event, he held that there was no loss falling within BPE's duty of care. Accordingly, the appeal was dismissed.

Applying the law post-BPE

Scope of duty – the test

55. Those hoping for comprehensive analysis and guidance from the Supreme Court as to how to determine whether a particular loss is within or outside the scope of the duty may be disappointed. Lord Sumption's judgment does little to lay down general principles to assist in this regard. It does however affirm the distinction drawn by Lord Hoffmann in SAAMCO between a duty to provide advice, and a duty to provide information. It also sets out a somewhat clearer definition of what is contained in each of those categories.
56. The judgment also highlights the fact that the SAAMCO scope of duty question is related to remoteness of damage, and tracks the emergence of the principle as a mechanism by which the courts control the extent to which losses may be recoverable. Frustratingly, however, it does not expound any unifying theory about how these concepts relate to one another, nor why discussion in terms of the SAAMCO cap comes to the fore in professional negligence cases, while remoteness is the driver in the contractual context. The case of Rubenstein, where Rix LJ hinted at a movement towards a more unified approach to these issues, was not even referred to in the judgment, nor in argument.
57. What does emerge is the somewhat unsatisfactory position that the extent of a wrongdoer's liability depends on "*a developed judicial instinct about the nature or extent of the duty which the wrongdoer has broken.*" That is hardly a helpful statement of principle for practitioners seeking to know how best to advise their clients. It remains an issue to be determined on the particular facts of each case.
58. The decided cases do however give some guidance as to how the courts will approach the question of scope of duty, and there are themes that emerge.
 - **Agreement between the parties.** Although an obvious point, the terms of a professional's retainer and any explicit correspondence between the parties will always be the starting point. In Rubenstein, the fact that the claimant had specifically asked for an investment product without risk to the capital was critical in the court choosing to extend the duty to cover all of the consequences of its selection. Conversely, in Hagiusund Kommune, the bank had been engaged to provide an answer to a specific question – the validity of the swaps contracts. Their duty therefore did not extend beyond that specific issue.
 - **Broad assumptions based on the professional's label.** In BPE, Lord Sumption discussed valuers, conveyancers and investment advisers, noting that the former will generally be regarded as having a duty to give information, and the latter advice. In the absence of specific agreement

about the services to be provided, these fairly broad assumptions about the usual role of particular professionals will likely have significant influence.

- **Purpose of the duty.** In *Rubenstein*, a cornerstone of the court's reasoning was the fact that the adviser came under statutory duties which were intended to protect the client against the consequences of misselling. This justified extending liability to all of the consequences of recommending an inappropriate investment product.

59. On the other hand, there are factors which following *BPE* we know cannot be relevant, including:

- **Seriousness of the breach.** The *Steggles Palmer* approach was specifically overruled in *BPE*, with Lord Sumption holding that Chadwick J was wrong to "make the measure of damages depend not on the scope of the duty but on the gravity of the particular breach."
- Whether the claimant would have entered into the transaction but for the negligent information. It was held in *SAAMCO* that this was insufficient to find that the duty was to provide advice, and this was reaffirmed in *BPE*.

Quantifying the claimable losses

60. Lord Sumption did provide some further discussion about the extent of liability on each side of the "information/advice" distinction. In relation to cases of advice, the position appears relatively straightforward. The defendant will be liable for "all loss flowing from the transaction which he should have protected his client against."
61. Where the duty is to provide information, the position is more difficult. Here, the professional "is liable only for the financial consequences of its being wrong and not for the financial consequences of the claimant entering into the transaction so far as these are greater." How are such losses identified?
62. The approach taken in *BPE* appears to be the same as that which was originally adopted in *SAAMCO*. The court will assume that the information negligently provided was correct, and then ask itself what losses the claimant would have suffered as a consequence. In *SAAMCO*, the House of Lords concluded that, if the lender had had the security which they thought they had, it would have been sufficient to secure the entire loan and they would have suffered no loss. Therefore, the full extent of the losses were recoverable.
63. Conversely, in *BPE*, even if Mr Gabriel's assumption that the money would be used for development purposes were true, he would still have lost all of his money because the development work would not have delivered any increase in value. Accordingly, none of the loss was within the scope of the duty.
64. This suggests that an approach which may help in identifying the scope of the duty in information cases is as follows:

- a. Identify the incorrect information negligently provided;
 - b. Determine what would have happened had that information been true; and
 - c. Compare the position determined at stage (b) with the true position; the difference will be the recoverable loss.
65. Not only does this help to quantify recovery, it can also bring into focus what needs to be proved at trial in order to bring a successful claim. The key will be to formulate the correct comparator at stage (b). This is what caught out the claimant in BPE – they failed to sufficiently describe the counterfactual scenario of what would have happened had the assumption made been correct, leaving the Supreme Court open to conclude that no loss would have been suffered in any event.
66. Cases of pure omissions, however, present an additional challenge. In a Steggles Palmer type example where the alleged negligence consists of a failure by a professional to tell their client of some relevant fact, how can the claimant formulate a scenario for comparison? In BPE, the approach adopted was to identify what facts Mr Gabriel had assumed to be correct in the *absence* of being told the correct position by the solicitor. In that case, his assumption was that the funds would be used to complete the development work, so the court was able to compare the position if that assumption had been true with what in fact happened.
67. Applying this approach, practitioners may be able to get an idea of what the court will regard as within/outside the scope of the duty in an omissions case by applying the following approach:
- a. Identify a failure by the professional to tell the client about X;
 - b. Identify Y, some assumption made by the client in the absence of being told X;
 - c. Work out what would have happened if Y were true, keeping all other factors constant; and
 - d. Compare this scenario to what actually happened.
68. This presents some intriguing possibilities for savvy claimants who have the benefit of expert advice at an early stage. In any one case, there might have been multiple assumptions made by the client, and it may be open to them to select that which gives the most advantageous outcome to their claim.

Hard cases, bad law?

69. Is the decision in BPE something to be welcomed? Defendants will likely be highly satisfied with the outcome, as it re-affirms a line of defence by which they can shield themselves against parts of potentially very large claims. It provides particular comfort for those who fall within the categories Lord Sumption identified as often providing information – conveyancers and valuers. Such defendants

appear likely, in the absence of special circumstances or particular terms of their retainer, to be able to escape liability for all of the consequences of their negligence.

70. This is particularly important as a result of the very low fees often charged by such professionals, as it helps to keep the risk assumed commensurate with the rewards available. However, one could ask whether this is an entirely good thing as a matter of policy. Should the law be protecting practitioners from the full consequences of their negligence, supporting an environment of very low fees, or encouraging more care by transferring more of the risk to professionals who make negligent mistakes?
71. Similarly, is it helpful or desirable to exclude from the question of scope of duty the seriousness of the breach? Arguably, attaching greater liability to breaches of duty with more severe consequences for the client could be a tool to do justice in an appropriate case. Where (as in BPE) a professional actually has in their possession clear evidence that might protect their client from disastrous financial consequences, is it helpful to exclude as a relevant consideration the fact that the information (which easily could and should have been passed on) showed the entire transaction to be flawed from the outset?

Conclusions

72. While BPE is a helpful restatement of the law and provides confirmation of the distinction between providing advice and information, determining the precise scope of the duty remains problematic in practice. The Supreme Court did not provide any more detailed guidance as to what factors will be considered, and we are left to wait for further developments to know more fully which way “judicial instinct” will point. It is hoped that the method suggested here will give some guidance to those needing to advise clients as to the likely extent of liability in an “information” case.

Sarah McCann and Laurence Page

Hardwicke