

SAAMCO – Revisited and Rebooted

***BPE Solicitors v Hughes-Holland* [2017] UKSC 21**

1. In *South Australia Asset Management Corp v. York Montague Ltd* [1997] A.C.191 (“SAAMCO”) Lord Hoffmann enshrined the principle that damages claimed for the negligence of a professional adviser must fall within that adviser’s “*scope of duty*”. Two decades on, Lord Sumption (giving the sole judgment of the Supreme Court in *BPE Solicitors v Hughes-Holland* [2017] UKSC 21) has reaffirmed Lord Hoffmann’s analysis in that case. In doing so, he has given sharper definition to some of the reasoning in SAAMCO and reduced the scope for its misapplication.

Facts

2. In late 2007 Mr Gabriel agreed to lend £200,000 to a company owned by his friend Mr Little. He did so on the assumption that Mr Little, through his company Whiteshore, would use the loan to redevelop a disused heating tower, which Mr Little would then sell on at profit. Under the terms of the loan, Mr Gabriel would be repaid £270,000 after 15 months. Mr Little’s intentions as to the money were very different. The tower was owned by another of his companies (High Tech) and was subject to a charge securing a £150,000 bank loan. Mr Little intended to, and eventually did, use Mr Gabriel’s money to permit Whiteshore to buy the tower from High Tech, and to discharge the bank loan. The balance of the loan monies was put to various other uses. Mr Gabriel was unaware of Mr Little’s intentions as to the loan monies, but his solicitors, BPE, were. Mr Gabriel instructed his solicitors to draw up a loan facility agreement and charge but sought no advice.

3. Mr Gabriel's solicitor used a template facility letter from an earlier aborted transaction, stating that the loan moneys would be used to assist with development costs. By doing so he unintentionally embedded Mr Gabriel's misunderstanding as to Mr Little's plans.

4. The development never took place and the monies were never repaid. Whiteshore went into liquidation. Mr Gabriel sued Mr Little and High Tech for fraudulent misrepresentation, dishonest assistance in a breach of trust, knowing receipt of trust money and monies had and received. Those claims were successfully resisted at trial. Mr Gabriel's separate claim in negligence against his solicitors succeeded. The trial judge held that Mr Gabriel would not have lent the money had he known of Mr Little's true intentions and that his solicitor should have explained that the funds were going to be applied substantially for Mr Little's benefit, who in reality was not putting anything at all into the project.

5. Both BPE and Mr Gabriel appealed to the Court of Appeal, which dismissed Mr Gabriel's appeal against the dismissal of his claims against Mr Little and High Tech¹. BPE succeeded in its appeal, the Court of Appeal holding that (i) Mr Gabriel was unable to show that the value of the tower, as developed, would have been such as to ensure recovery of his loan; as such he had not proved any loss and that (ii) the losses claimed fell outside of the scope of BPE's duty, which was only a duty to inform, and not to advise on a course of action.

6. Mr Gabriel then declared himself bankrupt. His trustee in bankruptcy appealed to the Supreme Court. The trustee contended that (i) Mr Gabriel was entitled in law to all losses flowing from a transaction into which he would never have entered but for the solicitor's negligence and that (ii) the Court of Appeal's negative findings as to the financial viability of the project had insufficient evidential basis.

¹ Matthew Bradley acted for Mr Little and High Tech throughout, and was led by Patrick Green Q.C. (both of Henderson Chambers) in the Court of Appeal.

Supreme Court Decision

7. All aspects of the Court of Appeal's decision were upheld. The Supreme Court's decision is important for claims concerning professionals of all types and will now be the leading case on the application of the principles in *SAAMCO*, which Lord Sumption noted had often been misunderstood.

8. In summary of the Supreme Court's decision:

- a. A variety of legal concepts serves to limit the matters for which a wrongdoer is legally responsible. "But for causation" is generally a necessary condition for the recovery of a loss, but it is not always a sufficient one.
- b. There are various other "legal filters" which might potentially restrict the availability of damages to a claimant, and not all of them can be analysed in terms of causation. The "scope of duty" principle enshrined in *SAAMCO* is one such filter. The question it poses is "*whether the loss flowed from the right thing, i.e. from the particular feature of the defendant's conduct which made it wrongful. That turns on an analysis of what did make it wrongful*". It makes no odds whether one describes the principle as turning on the "scope of the duty" or instead as turning on the "extent of the liability for breach of the duty".
- c. In cases where the principle in *SAAMCO* is engaged, the claimant bears the burden of proving the necessary facts to show that the losses claimed fell within the scope of the relevant duty.
- d. Whether or not protecting the Claimant from loss of the relevant kind fell within the scope of the Defendant's duty may depend on whether or not the case is an "information" or "advice" case. However these labels (as adopted in *SAAMCO*) suffer from a "*descriptive inadequacy*".

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- i. In an “advice” case, where it is left to the adviser to consider what matters should be taken into account in deciding whether to enter into the transaction, the professional is responsible for guiding the whole decision-making process and so is under a duty 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 adviser will be liable for **all the foreseeable losses** occasioned by entry into the transaction. If the adviser has negligently assessed risk A and so understated the overall riskiness of the transaction, such that his client entered into a transaction he otherwise would not have, it is immaterial that the loss may have resulted from risks B, C or D – the adviser is on the hook.
 - ii. “Information” cases suffer from misleading nomenclature. “Information” given by a professional man to his client is usually a specific form of advice, and most advice will involve conveying information. The real distinction lies in whether or not the adviser contributed a **limited part of the material on which his client relied** in deciding whether to enter into a prospective transaction - against a background in which the process of identifying the other relevant considerations and the overall assessment of the commercial merits of the transaction remained the client’s exclusive preserve. In such “limited professional contribution” cases, the adviser is liable only for the financial consequences of the advice or information being wrong, and not for the financial consequences of the claimant entering into the transaction, in so far as they are greater.
 - e. Importantly, in an “Information” case, even if the limited professional contribution does prove to be critical to the transaction such that, without it, the client may or would never have entered into the transaction, the analysis relevant to “information” cases (above) does not alter. To hold otherwise would render the adviser *“the underwriter of the financial fortunes*

of the whole transaction by virtue of having assumed a duty of care in relation to just one element of someone else's decision."

- f. On the basis of that reasoning, the Supreme Court overruled the oft-discussed decisions in *Bristol and West Building Society v Steggles Palmer* [1997] 4 All ER 582 and *Portman Building Society v Bevan Ashford (a firm)* [2000] PNLR 344.
 - g. The "SAAMCO cap", which excludes loss that would still have been suffered even if the erroneous information had been true, is simply 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.
9. Applying those principles to the case before them, the Supreme Court held that:
- a. BPE had not assumed responsibility for G's decision to lend money to Whiteshore. Their instructions were to draw up the documentation, and no more. They were not legally responsible for his decision to lend the money, but were responsible for confirming Mr Gabriel's (incorrect) assumption about the use to which the money would be put, which was one of a number of factors relevant to his assessment of the decision to make the loan. They would have been liable for any loss attributable to his assumption being wrong.
 - b. However, even had Mr Gabriel been right to assume that the loan would be spent on development, he would still have lost all of his money.
 - c. None of the loss he suffered was within the scope of BPE's duty. It arose from commercial misjudgements which were no concern of theirs.

Matthew Bradley