SCOPE OF DUTY: SOME PRACTICAL CONSIDERATIONS FOR PROFESSIONAL ADVISORS AND THEIR CLIENTS

This article examines some practical consequences of the principle established in *South Australian Asset Management Corporation v York Montague [1996] UKHL 10* (the SAAMCO principle) and of the clarification provided by the Supreme Court in *BPE Solicitors v Hughes-Holland [2017] UKSC 21*.

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In *BPE Solicitors v Hughes-Holland [2017] UKSC 21*, the Supreme Court unanimously re-affirmed and clarified the principle established by the House of Lords in *South Australian Asset Management Corporation v York Montague [1996] UKHL 10*. This article examines some practical consequences of this principle (the SAAMCO principle) and of the clarification provided.

THE SUPREME COURT DECISION IN BPE SOLICITORS V HUGHES-HOLLAND

The facts

The defendant solicitors (BPE) had acted for Mr Gabriel when he made a loan to his friend Mr Little. Mr Gabriel was subsequently adjudicated bankrupt and his trustee in bankruptcy (Mr Hughes-Holland) took his place in the litigation.

The loan was made in connection with the development of a building owned by one of Mr Little's companies (High Tech). Mr Gabriel understood that the proceeds of the loan would be used to pay the costs of the development. In fact, Mr Little intended to, and did, utilise the main part of the proceeds to enable one of his companies (Whiteshore) to purchase the property from High Tech, enabling the latter to discharge an existing secured loan. The balance was used to discharge an existing VAT liability of High Tech. The development did not proceed. In due course the building was sold, but Mr Gabriel recovered nothing on the sale (because the proceeds did not cover the costs) and lost his entire advance less only a modest payment made by Mr Little.

The loan documentation drafted by BPE (a facility letter and a charge) was based on a draft prepared for an earlier transaction and stated that the loan would be "made available as a contribution to the costs of the development of the property" and that the purpose of the loan was to "assist with the costs of the development of the property". This reflected Mr Gabriel's understanding but not Mr Little's intention. The trial judge found that Mr Gabriel would not have made the loan if he had known of Mr Little's intention.

A curious feature of the case was that BPE's instructions to act for Mr Gabriel had been provided by Mr Little, who left a voice mail message for the solicitor involved informing him that he intended to sell the property to Whiteshore and that Mr Gabriel would lend him the money. The loan documentation as drafted did not, therefore, reflect Mr Little's actual intentions or the instructions he had provided to BPE (which BPE had not in fact confirmed with Mr Gabriel, their client).

The Claim

Mr Gabriel sued everyone involved, but his claims against Mr Little, High Tech and Whiteshore were dismissed at trial, as was a claim against BPE for dishonest assistance. Mr Gabriel also advanced a claim against BPE for negligence. That claim succeeded at trial and gave rise to the subsequent appeals.

The basis of the claim in negligence was that BPE should have explained to Mr Gabriel how the funds were in fact going to be applied. Instead of doing so, it negligently drafted the loan documentation in a manner which did not reflect Mr Little's intentions, and thereby misled Mr Gabriel into believing that the funds would be utilised in accordance with his understanding. Mr Gabriel claimed the whole of his lost advance

At trial, BPE argued that the development had never been viable, meaning that Mr Gabriel would have lost the whole of his loan even if the proceeds had been used as he intended. The trial judge agreed with BPE that if the development was "unviable and bound to fail so that Mr Gabriel would never have recovered his loan" then BPE would not be liable for the losses claimed. He nonetheless went on to say that he did not "think it would be right for me to conclude that this was necessarily going to be a doomed venture for Mr Gabriel from the outset". Having held that BPE had acted negligently he gave judgment in favour of Mr Gabriel.

The appeals

The Court of Appeal allowed BPE's appeal, holding that it was for Mr Gabriel to prove that if the proceeds of the loan had been used for the purposes of the development, then the value of the developed property would have been sufficient to enable him to recover his loan. Since he had not done so his damages were reduced to nil. (See *Gabriel v Little [2013] EWCA 1513.*)

The Supreme Court rejected an appeal by Mr Gabriel's trustee in bankruptcy (*Gabriel v Hughes-Holland [2017] UKSC 21*). There are two limbs to the decision. The first was essentially a factual issue and concerned whether or not the Court of Appeal had been entitled to substitute its conclusion as to the viability of the development for the trial judge's. Lord Sumption concluded that, irrespective of the burden of proof, the Court of Appeal had been correct. The development was never viable and Mr Gabriel would have lost his advance even if it had all been spent on the costs of development.

The second limb of the decision concerned the application of the SAAMCO principle, because the trustee's argument was that, even if it was correct that the development was never viable, Mr Gabriel was, as a matter of law, entitled to recover the whole of the losses which flowed from him having entered into a transaction which he would not have entered into if BPE had not been negligent (and had informed him of Mr Little's intentions).

Lord Sumption considered the relevant case law and various criticisms that had been made of the SAAMCO principle. Lord Sumption affirmed the SAAMCO principle, namely that a professional under a duty to take reasonable care in relation to the provision of information will, if negligent, be responsible for the consequences of that information being wrong and not for all of the consequences of the course of action taken by the claimant who received the information. He went on to conclude that the decisions of Chadwick J in *Steggles Palmer [1997] 4 All ER 582* and the Court of Appeal in *Portman Building Society v Bevan Ashford [2000] PNLR 344* had been wrong. Lord Sumption stressed the need to distinguish between:

- Cases in which the professional provided information (or supplied material) which the client then used to assess whether to enter into a transaction.

- Cases in which the professional provided advice to the client as to whether or not to enter into the transaction.

A professional who is negligent in the provision of information is only responsible the consequences of the information being wrong. He is not legally responsible for the client's decision. It is only when the professional is negligent in the provision of advice that he is responsible for the whole of the (foreseeable) consequences of the client entering into a transaction he would not otherwise have entered into.

THE CLARIFICATION

Lord Sumption's judgment clarifies a number of important points:

- It is always necessary to distinguish between "information" cases (in which the professional provides only part of the material to be relied on by the client in making his own decision as to whether to proceed) and "advice" cases (in which it is for the professional to identify and consider all relevant matters which need to be taken into account when deciding whether to proceed).

- Even when the "information" provided is of crucial or critical importance, and is pivotal to the client's decision making, the distinction is still relevant. 'Information' does not become "advice" merely because it is important or fundamental (as in *Haugesund Kommune v Depfa ACS Bank [2011] EWCA Civ 33*) or would tend to show that the transaction is not viable (as in *Portman Building Society v Bevan Ashfield and Banque Keyser Ullmann v Skandia Insurance Co [1991] 2 AC 249*).

- Care needs to be taken with nomenclature. "Information", properly so called, is often provided by way of advice. If a professional advises as to (for example) the value of a property he is still providing "information" for the purposes of the SAAMCO principle. The same is true if he advises (or fails to advise) as to the existence of a sub sale.

- In "information" cases, the burden of proof is on the claimant to establish that the loss he is claiming was in fact caused by the falsity of the information provided. It is not sufficient for the claimant to prove that he sustained loss by entering into the transaction and to leave it to the professional to show that some or all of that loss was the consequence of other causes.

PRACTICAL CONSEQUENCES

For a professional defending a claim, the SAAMCO principle is always important, because it will enable a negligent professional to avoid liability for losses suffered by the client in appropriate circumstances. Each party to a professional relationship therefore needs to be aware of the principle both at the time when the professional is acting and during any subsequent litigation. In particular:

- It is in both parties' interests to clarify the terms of the retainer and any subsequent changes to it. This will not necessarily be determinative of the scope of the professional's duty, but will go a good way towards reducing the scope for argument.

- A client seeking advice as to whether or not to enter into a transaction should make this clear, and not just seek information as to one aspect of it.

- A professional, on the other hand, should take care not to 'over market' the services he is providing so as to give the impression that he is providing advice as to the viability of the transaction when in fact he is merely providing information as to one aspect of it.

- A claimant bringing a claim against a professional who has only provided information needs to be realistic about his ability to prove, as a necessary part of his case, that the loss was indeed a consequence of the relevant negligence, and not of entering into a transaction that was in any event flawed. This may involve proving a (difficult) negative.

- A professional defending a claim should seek clarification, as early as possible, as to exactly how the claimant intends to establish that the loss claimed was within the scope of the duty.

Both parties to any professional negligence claim will want to be able to assess where they stand at the earliest possible opportunity. They may also seek to avoid the costs of a full trial by seeking summary determination of part or all of the claim (a subject considered in my previous article, *Handle with care: summary judgment and striking out*

in professional liability cases). In *Williams and another v HCB Solicitors Ltd [2017] EWCA Civ 38*, the Court of Appeal stressed that controversial points about scope of duty should be decided at trial, no doubt because, as the Court of Appeal has recently reiterated in *Hughmans v Dunhill [2017] EWCA Civ 97*, "the extent of a retainer and the existence of a duty of care is acutely fact dependant". If, however, the scope of the retainer is defined with sufficient clarity:

- Both parties will be better able to assess the strengths and weaknesses of their position.
- Summary determination of part of all of the claim may be possible.
- It may, in the light of the clarification provided by Lord Sumption (particularly in relation to the burden of proof) be possible to identify issues that can be determined as preliminary issues (as suggested in the postscript to Moore-Bick LJ's judgment in *Tiuta International Ltd v De Villiers Surveyors Ltd [2016] EWCA Civ 661*).

If, for example, Mr Gabriel's claim arose again, and the viability of the development were tried as a preliminary issue, then (subject to any arguments about contributory negligence) Mr Gabriel would have been entitled to judgment if he had been able to establish the viability of the project (the burden being on him) and (based on the judgment of Lord Sumption) the claim would be dismissed if he could not.