Supreme Court considers the application of SAAMCo to claims against lawyers

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The test for remoteness of damage in claims against lawyers is going to be examined today and tomorrow by the Supreme Court. The justices hearing the appeal include the president Lord Neuberger together with Lord Mance, Lord Clarke, Lord Sumption and Lord Hodge.

The appeal is from the Court of Appeal's decision in *Gabriel v Little* [2013] EWCA 1513 and is proceeding in the Supreme Court today and tomorrow under the name *BPE Solicitors and another v Hughes-Holland (in substitution for Gabriel)*. The appeal gives rise to the possibility that the court will reconsider the application of *SAAMCo* principles to claims against lawyers and other professionals. *SAAMCo* was decided by the House of Lords in 1997 and has allowed defendant professionals to argue that the type of loss for which they are liable is limited by reference to the scope of their duty to the claimant.

This is the first time that the Supreme Court will have considered the application of *SAAMCo* to claims against lawyers. There have been many cases in which it has been applied in the High Court and Court of Appeal. RPC has been at the forefront of its application in claims against lawyers. For example, in *Haugesund Kommune v Depfa ACS Bank* [2011] PNLR 344 it was successfully applied in the Court of Appeal to overturn a judgment against lawyers advising in a large banking transaction in which the claimant bank had entered into swap contracts with a counter-party that lacked capacity. It has been applied in numerous other financial "transaction claims" aswell as the large number of mortgage lending claims that are brought against lawyers and other professionals.

Background

In 2007 the claimant Richard Gabriel instructed BPE in relation to a loan that he intended to make to Whiteshore Ltd for £200,000. The loan was evidenced in a facility letter which provided for the repayment of the £200,000 on 12 March 2009 together with a return of £70,000 (amount to 28% interest per year). The loan was secured by way of a first charge on property which Whiteshore Ltd intended to develop. In fact, Whiteshore Ltd defaulted on the loan and

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Mr Gabriel's enforcement of his security realised £13,000. Mr Gabriel then issued proceedings against various parties including his solicitors BPE and the 50% owner of Whiteshore Ltd – Peter Little.

The judge at first instance held that BPE was in breach of its duty in drawing up the facility letter and in failing to inform Mr Gabriel of the intended use of the loans. The facility letter recorded that the purpose of the loan was to assist with the costs of development of the property and that is what Richard Gabriel had thought. In fact, £150,000 plus VAT of the loan was going to be passed to another of Peter Little's companies before Whiteshore Ltd could acquire the property. The judge awarded Mr Gabriel the whole of the loss that he sustained as a result of entering in the transaction.

The Court of Appeal Judgment

The main judgment was given by Lady Justice Gloster with Lord Justice Maurice Kay and Lord Justice Fulford agreeing. She held that the judge was wrong to hold that the losses sustained by Mr Gabriel were the type of losses that fell within the scope of BPE's duty to him. In her application of the *SAAMCo* principles she started by identifying that Mr Gabriel satisfied the threshold factual causation test – if he had been told that the loan was going to be applied in the purchase of the property and the discharge of an existing charge on it he would not have lent.

The next step was to consider whether the solicitors were giving advice about what course of action to take or merely providing information on the transaction to enable the client to decide. She held that it was an "information case". Accordingly it was necessary to consider what element, if any, was attributable to the information being wrong. The commercial terms of the loan and the underlying risks of the transaction were important to this issue and there was no proper criticism of BPE in relation to this. In particular, there was no contractual inhibition on the use to which the loan could be put and, on the evidence before the court, the overwhelming likelihood is that the money would never have been applied towards the development of the property.

Mr Gabriel's inability to recover his loan arose from the £13,000 value of the charged property at the date of enforcement and the absence of any controls over the use to which the loan could be put and Whiteshore Ltd's financial position. Those were all the foreseeable consequences of the commercial risks that Mr Gabriel took in deciding to proceed with the transaction. Accordingly the type of loss sustained by Mr Gabriel was not the type of loss that fell within the scope of BPE duty of care and his claim against the solicitors failed.

Discussion

This is an unusual case on the facts and there is always a risk of the law taking a wrong turn when having to grapple with such cases. Mr Gabriel is likely to challenge the categorisation of the case as an "information case". He is likely to say that it is an "advice" case, in which the lawyer was giving advice which was, or should be equated with, advice on whether to enter into the transaction. If he succeeds on this it would provide claimants with a line of argument on remoteness that is not currently available and weaken the force of the existing remoteness defences.

There is also the possibility of a more widespread re-consideration of *SAAMCo* principles. There has been a lot of authority on it since 1997 and extra-judicial comment by academics and judges. The justices have a busy Christmas with Gina Miller's judgment to write but it is difficult to imagine that they won't be tempted to re-examine the broad principles of remoteness in claims against professionals.

Procedural Delay

The Court of Appeal's judgment was handed down on 22 November 2013. The court ordered Mr Gabriel to pay BPE's costs of both the appeal and first instance hearing. Those costs amounted to £469,170 and Mr Gabriel was made bankrupt on 5 March 2014. The trustee in bankruptcy was appointed on 25 March 2014 and the right to pursue an appeal then vested in the trustee. In deciding whether to adopt the appeal the trustee sought clarification on whether his liability would extend to the costs of the proceeding below in addition to the costs before the Supreme Court. On 17 June 2015 Lord Sumption held that the trustee's potential personal liability arising out of his adoption of the appeal only extended to the costs before the Supreme Court. (See *BPE Solicitors and another (Respondents) v Gabriel (Appellant)* [2015] UKSC 39.)

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