Supreme Court judgment on *SAAMCo*

March 2017

On 22 March 2017 the Supreme Court handed down its decision on the application of *SAAMCo* to claims against professionals. The judgment was made on the appeal by a claimant in *BPE Solicitors and another v Hughes-Holland (in substitution for Gabriel)*. The judgment of the court was given by Lord Sumption 21 years after he appeared as an advocate in *SAAMCo* in 1996.

The Supreme Court has affirmed and clarified the principles laid down by Lord Hoffmann in *SAAMCo* and subsequently in extra-judicial commentary. It has also overruled certain authorities previously used to circumscribe the effect of *SAAMCo*. It is a welcome and hugely important authority for professionals and their insurers in limiting the liability of professionals for negligence.

Background

In 2007 the claimant Richard Gabriel instructed the firm of solicitors BPE in relation to a £200k loan to be made to Whiteshore Ltd. The loan was documented in a facility letter which provided for repayment on 12 March 2009 of the full amount plus interest of £70k. It was secured by way of a first charge on Whiteshore's intended development property. Mr Gabriel's belief was that his loan was going to be used to develop the property. In fact, the transaction was unviable from the outset and Whiteshore subsequently defaulted on the loan with no substantial development ever having taken place. Mr Gabriel's enforcement of security only realised £13k. Mr Gabriel brought a claim against BPE and others seeking to recover the full amount of his loss.

The First Instance judgment

The court at first instance held that BPE was in breach of duty in drawing up the facility letter and in failing to advise Mr Gabriel of the intended use of the loans. The money was not going to be used, as Mr Gabriel thought, for the development of the property. £150k plus VAT of it was to be passed to another of Mr Little's companies before Whiteshore could acquire the property. Mr Gabriel would not have entered into the transaction at all had he been aware of this. He was awarded the whole of the loss sustained as a result of entering into the transaction.

Court of Appeal judgment

The Court of Appeal 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. Lady Justice Gloster gave the leading judgment with which Lord Justice Maurice Kay and Lord Justice Fulford agreed. She applied the *SAAMCo* principles in a conventional way. She held that the case was an "information" rather than "advice" case and that no element of the loss was attributable to the information being wrong; the transaction had been unviable from the outset.

Any comments or queries?

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Supreme Court judgment

The appeal by Mr Gabriel was made on the basis that the Court of Appeal had not been entitled to substitute its own assessment of the viability of the transaction and that, in any event, he was entitled to whole loss flowing from entering into the transaction upon the negligent advice.

The judgment of the court was given by Lord Sumption. He rejected both grounds of appeal.

The Court of Appeal had been entitled to substitute their own assessment of the viability of the transaction. Importantly, they were correct in identifying that the burden of proof in relation to the facts that engaged the *SAAMCo* principle was on Mr Gabriel. It was an essential part of establishing the claimant's case. It was not a point going to the abatement or avoidance of damage on which the burden fell on the defendant. In any event, there were ample grounds for the finding that the transaction was unviable. Mr Gabriel would have lost his money even if it had been applied towards the development.

The more interesting aspects of the judgment are in relation to the *SAAMCo* principle itself. The solicitors had not assumed any responsibility for Mr Gabriel's decision to lend money to Mr Little. He was only responsible for failing to dispel Mr Gabriel's misunderstanding about the intended use of the funds. However, no part of the loss that Mr Gabriel suffered was attributable to that assumption being wrong. They arose from Mr Gabriel's own commercial decisions.

The judge at first instance had held that the firm was responsible for the decision to enter into the transaction because their breach meant that Mr Gabriel was not able to understand the nature of the transaction that he was getting into. This relied upon principles set out in cases dealing with the application of *SAAMCo* to conveyancing transactions and in particular the cases decided by Chadwick J in *Bristol and West Building Society v Fancy & Jackson (a firm)*.

In one such case – *Steggles Palmer* – the solicitors were held to be responsible for the whole of the losses from the lending transaction because the information that they had failed to report would have revealed that the borrower was dishonest. The honesty of the borrower was fundamental to the decision to lend. Importantly, Lord Sumption held that Chadwick J's decision in *Steggles Palmer* was incorrect. It wrongly reverted to the transaction/no transaction principles that had been rejected in *SAAMCo* itself.

He also held that the Court of Appeal's decision in *Portman Building Society v Bevan Ashford (a firm)* was wrongly decided for the same reason. This was a decision that was criticised at the time and regarded as wrongly decided by many.

In the remainder of the judgment, Lord Sumption provides clarification and guidance on the application of the *SAAMCo* principles and in particular the factual spectrum determining whether a case is an advice or information case. He expressed the view that Rix LJ was right in holding that *Haugesund Kommune v Depfa ACS Bank (Wikborg Rein & Co, Part 20 defendant) (No 2)* was an information case. The "legal capacity" of the borrower was only one factor in the decision to lend.

And the House of Lords had been right to classify *Aneco Reinsurance Underwriting Ltd v Johnson & Higgins* [2002] PNLR 8 as an "advice" case. This was because "... the broker's responsibility was found to extend beyond the placing of the retrocession to the entire transaction including the writing of the reinsurance itself ...".

He addressed the criticisms that have been made by academics and others of the "*SAAMCo* cap" methodology. In *SAAMCo* itself this was the two stage test of first

working out the total loss from entry into the transaction and then capping it by reference to the extent of the overvaluation at the time of the transaction. The criticism is that this does not effectively distinguish between loss flowing from the decision to enter into the transaction and loss flowing from the information being wrong. In particular, it does not necessarily exclude all loss that is attributable to matters outside the responsibility of the professionals.

Lord Sumption accepted and confirmed that the correct approach was to identify the loss that "... is within the scope of the defendant's duty, not on the exclusion of loss which is outside it. ...". He said that in simple cases this may amount to the same thing. He accepted that the two stage *SAAMCo* cap method did not systematically strip out loss arising from matters which were outside the responsibility of the professional and went on to accept this:

"... It is fair to say that as a tool for relating the recoverable damages to the scope of the duty the *SAAMCO* cap or restriction may be mathematically imprecise. But mathematical precision is not always attainable in the law of damages. ..."

Comment

The decision of the Supreme Court will be welcome to professionals and their insurers. It provides useful clarification on the principles and removes the *Steggles Palmer* qualification to the application of *SAAMCo*. This is likely to be decisive in a number of ongoing and future claims.

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