

# Supreme Court hands down its decision in BPE Solicitors v Hughes-Holland (in substitution for Gabriel) [2017] UKSC 21

*Published 11 April 2017*

The Supreme Court this morning handed down its eagerly awaited decision in this case. The decision, which will be of particular interest to solicitors and their insurers, reinforces the SAAMCo doctrine particularly in the context of solicitors, where a Claimant claims damages in circumstances in which:

- (i) but for the negligence of the professional adviser, the Claimant would not have embarked on a course of action, such as entering into a transaction; but
- (ii) part or all of the loss which the Claimant has suffered resulting from that course of action arose from risks against which it was no part of the advisor's duty to protect the Claimant.

## Background

The Claimant, Mr G, agreed to loan £200,000 to a property company owned by his friend, Mr L. Mr G claimed that Mr L fraudulently induced him to make the loan by telling him that the money would be used to develop the property, against which the loan would be secured by way of a first legal charge. BPE Solicitors ("BPE") were instructed by the Claimant to draft a facility agreement to record the loan and the terms of repayment.

In fact, Mr L used the advance to pay off bank lending secured on the property. The property was never developed, and the loan was not repaid. Mr G exercised his rights under his charge to sell the property, but the sale only realised £13,000. Mr G brought proceedings against Mr L and BPE to recover his loss.

## First instance decision

BPE was held to have acted in breach of duty as the facility agreement had been negligently drafted. Mr G was held to be entitled to recover the entire sum lent from BPE. Although it was held that BPE had no duty to advise Mr G about the commercial risks of the development, they should have explained that the funds would, in fact, be applied for Mr L's benefit and that he did not have a stake in the project.

The Court held that if Mr G had been made aware of the true circumstances of the transaction, he would not have entered into it - a so-called 'no transaction' case - and he should be compensated in damages for all of the loss he suffered as a result of proceeding where he would not otherwise have done. The Judge concluded that, if the transaction had been structured in the way Mr G had thought, his investment would have been viable and he would have received a return.

## Court of Appeal

The Court of Appeal took a different approach:

- (i) Mr G was responsible. He had failed to take steps to consider a number risks.
- (ii) It applied SAAMCo principles to limit BPE's liability. BPE was not under a duty to advise on the commercial viability of the transaction, but only to draft the facility letter. Although the facility letter had been drafted negligently, the consequences of this did not extend to the entire loss. BPE was only liable for the foreseeable consequences of providing the wrong information to Mr G.
- (iii) BPE was not responsible for Mr G's losses in relation to the loan to Mr L. There was no evidence that Mr G's investment would have resulted in a return or an increase in the value of the property.

## Supreme Court's analysis

The Supreme Court agreed with the Court of Appeal.

- (i) First, the Court first considered the viability of the development project. Lord Sumption agreed with the Court of Appeal's analysis - for a number of reasons, this was a bad deal for Mr G.

(ii) The Court considered how SAAMCo would affect Mr G's recovery against BPE. In SAAMCo, a surveyor was not liable for a lender's loss on its loan which was attributable to a fall in the market following the valuation, even though the lender would not have entered into the transaction but for the surveyor's negligence.

The Supreme Court concluded that the decision in SAAMCo is often misunderstood. It relates to the scope of duty and not just causation and loss.

(iii) The Court re-emphasised the difference between professional 'advice' and 'information'. If the information provided is incorrect and if the Claimant, armed with the correct information, would not have entered into a transaction, then the professional's duty will be limited by reference to SAAMCo principles. If a Claimant can show that he/she has completely relied on professional advisors when deciding how to proceed, that Claimant may succeed in arguing that the professional has provided 'advice' rather than 'information'. The professional is therefore responsible for all recoverable losses.

(iv) The Court commented on the various decisions made in the three cases involving lender claims against solicitors; *Bristol and West v Fancy and Jackson* [1997] 4 All ER 582, including *Steggles Palmer* and *Colin Bishop*.

All of the facts of these cases are different but in each the facts reported to the lenders by the solicitors were all part of the lender's overall decision whether to lend. The solicitors had not assumed a duty to advise on all matters relevant to the lending decision. Accordingly, the Court concluded that these cases would be considered 'information' cases. It specifically overturned the decision in *Steggles Palmer*.

The Court concluded that BPE clearly did not assume responsibility for Mr G's decision to lend to Mr L. BPE's facility letter, although negligently drafted, did not influence Mr G's decision to lend. Whether the facility letter was correct or not, Mr G would have gone ahead but would never have recovered the advance. Mr G's loss was not within the scope of BPE's duty and "arose from commercial misjudgements which were no concern of (BPE's)".

Most interestingly, Lord Sumption found, in his analysis of the caselaw since SAAMCo, that the way that SAAMCo had been applied in decisions against solicitors was incorrect. He held that solicitors in conveyancing cases are to be regarded as "supplying specific information in accordance with the lender's standard reporting instructions" in the same way that a valuer does.

## DAC Beachcroft Comment

The case has potentially wide application. The decision was made in the context of a claim against solicitors, but it applies to any professional where the duty was to give 'information', as distinct from 'advice'. In that general sense, it reaffirms the essence of the SAAMCo decision. In today's economic and political climate, any course of action or transaction carries a number of risks. A professional will only be liable for the loss which flows from its negligence. It will not be liable at all where that loss would have been suffered anyway or where that loss was caused by factors which fall outside the scope of its duty to advise. This is likely to be relevant to most commercial transactions.

The decision is to be welcomed by professionals and their Insurers alike. It is likely to give confidence to professionals who often face claims where they have acted in breach of duty, but where there is little or no evidence that the breach has caused the Claimant loss. Professionals should, however, take care when considering the scope of their duty and whether, in fact, this extends to supplying advice, or merely providing information.

What is most striking about the decision, however, is the commentary on how SAAMCo has been applied to solicitors. In much of the case law, the solicitors' breaches have been held as falling into the 'advice' category, rendering the solicitors liable for all recoverable losses. Lord Sumption, delivering the unanimous judgment of the Supreme Court, has pronounced this to be incorrect. A conveyancing solicitor, the Supreme Court has held, is ordinarily providing 'information', in the same way that a valuer is.

The judgment will be welcomed by solicitors and their Insurers as it will enhance the ability to argue that tangential losses fall outside of the scope of the solicitor's duty, and represents a more equitable apportionment of responsibility than previous decisions allowed.

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