Professional negligence: conveyancers' scope of duty revisited.

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THE *BPE SOLICITORS V. HUGHES-HOLLAND* DECISION.

1. A conveyancing solicitor retained by a lender to draft a loan facility and charge for a property development, who negligently fails to advise the lender about the purposes for which his loan will be applied, is not liable for losses that the lender would have incurred anyway because the project was not commercially viable.

2. The fact that that information was critical to the lender's decision (so that he would not have loaned the money had the true purpose of the loan been revealed to him) is not sufficient to override that principle. The lender is still not entitled to claim all losses that he has suffered by entering into the loan: BPE Solicitors v. Hughes-Holland [2017] UKSC 21 (SC).

3PB'S ANALYSIS.

3. **The decision.** BPE Solicitors is the long-awaited decision of the Supreme Court that provided an opportunity to reconsider the scope of duty principles established in SAAMCO.[1] It raised the familiar question of what damages are recoverable in a case where (i) but for the negligence of a professional adviser his client would not have embarked on some course of action, but (ii) part or all of the loss which he suffered by doing so arose from risks which it was no part of the adviser's duty to protect his client against.

4. **The facts.** The Claimant (**"C"**), a lender, had agreed with a friend (**"the Builder"**) to lend £200,000 in connection with a property development for the conversion of a disused heating tower. That friend was a builder, and C assumed that his loan would be used to finance the development. Taking at face value the Builder's estimate of the development costs, C formed the view that the project was viable and agreed to make the loan.

5. There was a misunderstanding. In fact, the Builder had *not* intended to use the loan to pay the developments costs. Instead he intended to pay off a debt secured over the property, and some other unconnected liabilities. That meant that there would be nothing left to finance the development, and the building costs would need to be found from other sources.

6. C instructed BPE Solicitors (**"the Solicitors"**) to draw up a facility letter and charge for the loan. The Solicitors had been told of the true purpose of the loan by the Builder. Negligently, the solicitor used a template when drafting the facility letter, and overlooked to remove a statement that the loan "*will be made available as a contribution to the costs of the development of the property*". That statement was wrong, given what the Solicitors had been told by the Builder, and C relied on it. Had C known of the true purpose of the loan, he would not have agreed to enter into the transaction.

7. The building work was never undertaken, and the loan was not repaid. When the property was sold, C lost all his money.

8. **Why the damages issue arose.** The development project was always unviable. Contrary to C's assumption, the value of the development would not be increased by spending £200,000 on development work. Consequently, had C been *properly* advised by the Solicitors and loaned the money, he would still lost his £200,000.

9. In a professional negligence claim against the Solicitors, C argued that he was entitled in law to the whole loss flowing from entering into the transaction because, but for the Solicitors' negligence, he would not have entered into it. The trial judge accepted that argument because "*[the] breach of duty meant that [C] was not able to know the true nature of the loan transaction into which he was entering*". The Court of Appeal reversed that decision.

10. **The Supreme Court's decision.** SAAMCO establishes that a court cannot begin to *assess* damages for the breach of a duty of care, without first considering the *nature* of the defendant's duty. A duty of care does not exist in the abstract, and it is necessary to consider the scope of the duty: to what *kind of damage* does it extend? *i.e.* against what kind of damage must the defendant take reasonable care to hold the claimant harmless?

11. C's argument in the Supreme Court was a direct challenge to the SAAMCO 'scope of duty' principle. The Supreme

[1] South Australia Asset Management Corpn v. York Montague Ltd [1997] AC 191 (HL).

Court dismissed that challenge. Three points of clarification are noteworthy.

12. **'Advice' and 'information' distinction is unhelpful.** This supposed distinction had grown since SAAMCO: where a professional is engaged to *advise* a claimant about entering into a transaction, he will be liable, if negligent, for losses sustained by the claimant entering into the transaction; conversely, where the professional is engaged merely to provide *information*, based on which the *claimant will decide* whether or not to enter into the transaction, the professional is liable only for the more limited loss suffered because that information is wrong. The Supreme Court doubted the helpfulness of that classification (at [39]).

13. It is the rationale underlying that distinction that is more important. A wider scope of duty is justified where, according to the terms of his engagement (at [40]):

    "*it is left to the adviser to consider what matters should be taken into account in deciding whether to enter into the transaction. His duty is 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 client will in principle be entitled to recover all loss flowing from the transaction which he should have protected his client against.*"

14. In other words, the wider the range of risks (relating to the proposed transaction) that the adviser has a duty to consider, then the responsibility retained by the client for the remaining risks will be correspondingly reduced. At the furthest end of the spectrum, the adviser's responsibility will ultimately extend to the decision itself (at [40]-[41]).

15. The important clarification provided by BPE Solicitors is that the extent of the adviser's liability is not increased simply because the particular information on which he was asked to advise was important or critical to the client (at [42]). Thus, even though the purpose of the loan (which the Solicitors' negligence had concealed) was critical to the lender's decision, the fact that he was not advised about it did not make the Solicitors liable for all losses flowing from C's entry into the transaction. The Solicitors were liable only for the information (*i.e.* the purpose of the loan as stated in the facility document) being wrong. Since C would have lost his money even if the purpose of the loan had been correctly revealed, the Solicitors were not liable in damages (at [54]-[55]).

16. **Nothing to do with causation.** The Supreme Court has clarified that the 'scope of duty' principle has nothing to do with causation (at [36]). It is an essential part of formulating the defendant's duty. Thus, the Solicitors were not liable for the losses of the (unviable) transaction, because they had not "*assumed responsibility*" for the lender's decision to invest (at [54]).

17. **How to exclude irrelevant losses (the SAAMCO cap).** Part of the reason why SAAMCO has proved controversial lies in the manner in which the court isolates and removes losses that are *outside* the professional's scope of duty.

18. An adviser whose duty is limited to providing specific information, is liable only for the consequences of that advice being *wrong* (as opposed to the consequences of his client entering into the transaction at all). To identify the relevant losses, the House of Lords in SAAMCO therefore evaluated what the client's position would have been had the information been *correct*. Any losses that he would still have suffered are irrecoverable.

19. That approach had been described as the 'SAAMCO cap' because it was essentially negative in its operation. The client is *prima facie* entitled to the entire loss flowing from his entry into the loan transaction, *except* those which would still have been suffered if the relevant information had been correct (at [31]). The appellant criticised that rule as arbitrary. The Supreme Court disagreed. Although it appears to be a cap, the purpose of the exercise is to identify and award loss that falls *within* the defendant's duty. It is a justifiable tool for assessing loss, even if it is mathematically imprecise (at [46]).

IMPACT OF THE DECISION

20. The root-and-branch challenge to the SAAMCO scope of duty principle was perhaps ambitious. It is logical and fair to hold a professional adviser responsible only for those losses that are connected to whatever circumstances make his breach of duty wrongful. That is so even if the rule does not operate with mathematical precision.

21. BPE Solicitors demonstrates that the rule is of general application to all professionals, including conveyancers (at [47]). The decision also provides welcome clarification that the distinction between '*advice*' and '*information*' cases, or '*transaction*' and '*no transaction*' cases, is over simplistic. It is better to ask whether, depending on the

matters falling within the adviser's retainer, the client retained responsibility for evaluating any residual risks of the transaction.

22. A more questionable development is the Supreme Court's suggestion (at [53]) that the claimant bears the burden of proof (*e.g.* on the facts, C bore the burden of proving that the property development *would* have been financially viable).[2] It raises the prospect of a defendant raising spurious hypothetical arguments for a claimant to disprove. Lord Sumption's reason for that conclusion is that the scope of duty principle "*is not a principle of assessment*" but "*an essential part of the claimant's case that he was owed a relevant duty*" (at [53]). Even so, there is much to be said for the contrary argument that the defendant should bear the burden of proof.

23. The Supreme Court accepted that the scope of duty principle is one of several means by which the law assigns responsibility of a breach of duty. It reflects a policy choice (at [20]). As noted by Lord Hoffmann in SAAMCO, the principle underlies the consideration of breach of any duty imposed by the law "*whether in contract or tort or otherwise*" (cited in BPE Solicitors, at [28]).

24. The all-important context of the rule in professional negligence cases is that the duty will ordinarily arise from a contractual obligation. In that context the SAAMCO principle has been described as one that relates to the remoteness of damages. It operates as an exclusionary rule, and is a departure from the ordinary rule that a contract breaker will be liable for damage of a kind that is within the contemplation of the parties at the time of making the contract.[3] If so, the burden of displacing the usual rule should rest on the party attempting to do so. Although those cases were not concerned with contractual duties *to take care*, there is no sound reason for treating contractual duties differently. Further, where a professional owes concurrent duties of care in tort and contract, the stricter, *contractual* rules on remoteness should apply because it is the contract that provides the foundation of the assumption of responsibility.[4]

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[2] This part of the decision will not bind a future court because it was unnecessary for the decision (see at [18]-[19]).

[3] Transfield Shipping Inc v. Mercator Shipping Inc [2009] 1 AC 61 (HL) at [14]-[16], [21]; Siemens Building Technologies FE Ltd v. Supershield Ltd [2010] 2 All ER (Comm) 1185 (CA), at [40], [43]; John Grimes Partnership Ltd v. Gubbins (2013) 146 ConLR 26 (CA), at [20], [24].

[4] Wellesley Partners LLP v. Withers LLP [2016] Ch 529 (CA), at [68]-[69],[80]