If the cap fits, wear it!

The distinction between the duty of a professional to ‘advise’ a client on what course of action could/should best be taken and to ‘provide information’ for the purposes of enabling a decision to be made was established in the case of South Australia Asset Management Corporation v York Montague Ltd (SAAMCO) [1996] UKHL 10. Pursuant to the SAAMCO principle, a defendant in breach of the duty to ‘advise’ will be liable for all of the foreseeable consequences of the advice given, whereas a breach of the duty to ‘provide information’ only exposes the professional to the consequences of the information being wrong. In other words, would the loss have been suffered even had the information been correct? In practical terms, the SAAMCO principle, or cap, limits the liability of a professional by reference to the scope of the duty which has been assumed.

The application of the SAAMCO principle where solicitors’ duties are concerned has now been considered by the Supreme Court in BPE Solicitors and another v Hughes-Holland (in substitution for Gabriel), an appeal from the Court of Appeal’s decision in Gabriel v Little [2013] EWCA 1513.

Background

The Claimant, a Mr Richard Gabriel, instructed the Defendant firm, BPE Solicitors in relation to a £200,000 loan that the Claimant intended to make to a friend and business associate, a Mr Peter Little. The loan was to be repaid within two years, together with interest at an agreed rate of 28% per annum. The purpose of the loan, as recorded in the facility letter (which was drafted by BPE), was to enable Mr Little, via one of his development companies, Whitesshore Ltd, to develop a property (against which the loan was to be secured by way of a first legal charge). In fact, it was Mr Little’s intention to use £150,000 of the loan to discharge an existing charge over the property and no substantive development was carried out. Mr Little defaulted on the loan and, save for a modest payment from Mr Little, the Claimant was unable to recover any of his investment via enforcement proceedings.

The Claimant pursued BPE on the grounds that they knew how the loan was going to be used but failed to warn the Claimant.

The Course of Proceedings

At first instance, the Judge held that, although BPE did not have a duty to advise the Claimant on the commercial risks involved in the transaction, BPE had failed to advise as to the true purpose of the loan and, as such, should be liable for all of the losses suffered by the Claimant as a result of him having entered into the transaction. This was an example of a “no transaction case”. In other words, the Court agreed that the Claimant would not have advanced the loan had he been made aware of its true purpose and the Claimant was awarded the entirety of his losses accordingly.

That decision was overturned by the Court of Appeal where it was held that, although BPE was in breach of its duty, that duty only extended to providing the Claimant with the information required to enable him to come to a decision: “…it was a duty to provide Mr Gabriel with information for the purposes of enabling Mr Gabriel to decide what commercial course of action he should take. It was not a duty to advise Mr Gabriel as to what course of action he should take or as to the commercial risks inherent in the loan…”

Applying the SAAMCO principle, the Court of Appeal Judgment was an example of the scope of a solicitor’s retainer being limited to a duty to provide information only. In the Court of Appeal’s view, the losses which were suffered by the Claimant were all foreseeable consequences of the commercial
risks (of which, in relation to this transaction, there were many), and did not fall within the scope of duty which had been assumed by BPE.

The Supreme Court’s Decision

In dismissing the Claimant’s appeal, the Supreme Court has emphatically reinforced the distinction established in the SAAMCO case. Lord Sumption, who gave the only judgment (with which the other members consented), agreed that BPE’s duty was to provide information only, as opposed to advice on whether the Claimant should have entered into the transaction. To find otherwise would, in the Court’s view, have resulted in a situation where a professional would become “….the underwriter of the financial fortunes of the whole transaction by virtue of having assumed a duty of care in relation to just one element of someone else’s decision…”.

In re-applying the principle that the defendant professional should only be liable for the consequences of the information having been wrong, the Court found that the £200,000 loan advanced by the Claimant would not have enhanced the value of the property, even had it been applied to the redevelopment. The Claimant was awarded £Nil in damages, on the basis that he would have been in the same position even had the information provided by BPE been correct.

It thus follows that only where a professional is under a duty to ‘advise’ (i.e. is responsible for guiding the entire decision-making process, as opposed to focusing on specific issues in order to enable the client to come to a commercial decision) will it be possible for the Claimant to recover the entirety of their losses on the basis that they would not have entered into the transaction had the breach not occurred. Crucially, and perhaps most significantly, the Supreme Court held that where a professional only had a duty to provide ‘information’, it did not matter whether: a) the information provided was critical to the decision-making process; or b) the information would have revealed that the transaction was a fraud (thus overturning the established notion that the SAAMCO principle can be circumvented where fraud is involved – see Steggles Palmer and Portman Building Society).

Conclusion

The decision should be of comfort to defendant solicitors and their professional indemnity insurers, permitting, as it does, the former to impose further restrictions on their liability by reference to the scope of duty which has been assumed. It is to be expected that canny lenders will no doubt seek to impose contractual provisions upon their panel solicitors in an attempt to circumvent the impact of the decision, and Insurers should bear this in mind when assessing risks. However, it should, in theory, now be far more difficult for claimants to recover all of their losses even when it is maintained that they would not have entered into a transaction had it not been for the incorrect information provided. Naturally, the financial implications for Insurers in successfully advancing this point, particularly where lender claims are concerned, could be significant.

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