Has the tide turned on the extent of losses that can be claimed against Solicitors?

In a unanimous decision in the case of Gabriel v Little and BPE solicitors LLP the Court of Appeal has reinforced the recent run of decisions against Solicitors limiting losses where the scope of duty is limited to providing “information” (as per Lord Hoffman in Saamco). Despite cases such as Portman BS v Bevan Ashford where full losses were awarded on what was, in essence, an “information” style retainer, the Court of Appeal now appears to be slow to allow full losses. In this case the Court of Appeal was content to follow the Saamco ratio in relation to Solicitors; in information cases the loss must flow from the breach of that duty otherwise losses will not be recoverable.

The facts

Gabriel, the claimant, a wealthy experienced businessman, agreed to lend £200,000 to Little, a property developer and close friend at the time, in relation to the proposed refurbishment of a disused airfield building which Little owned through one of his companies. The loan was for 15 months with the principal plus interest of £70,000 to be repaid. The deal was done over lunch in a pub and the case hinged on a dispute between them as to what was agreed.

Little claimed the agreement was that the money would be first used for the purchase of the site by a new company and discharge of a bank charge. Gabriel claimed the money was to be used only for refurbishment/development costs. The project failed and Gabriel lost his entire investment. He sought recovery of that sum from Little and BPE.

BPE were instructed by Gabriel to obtain a first legal charge over the property but told not to do any searches. The legal charge was obtained and was effective but the decrease in value of the site meant only £13,000 was achieved on its sale once Gabriel had repossessed the site. Gabriel argued had he known his money went to acquisition and discharge of a charge and not to development works he would not have lent and thus sought his entire losses from BPE.

Key facts:

The Claimant agreed to lend £200,000 to a property developer

The case hinged on a dispute between them as to what was agreed.

The case demonstrates the Courts are not prepared to allow commercially aware Claimants to recover losses which in reality are result of deals gone wrong simply because the professional adviser has made a mistake.

Lady Justice Gloster: thus Mr Gabriel has to show not merely that BPE was in breach of a duty which was owed to him but also that it was a duty in respect of the kind of loss which he had suffered.

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The Judge at first instance found that BPE were negligent in failing to clarify the nature of the transaction and that although they were not instructed to advise on the commercial aspects of the transaction the scope of duty was sufficient to encompass the entirety of Gabriel's loss. The Judge appeared to be allowing full losses pursuant to a category 2 case despite finding BPE’s duty was a category 1 case, as per Lord Hoffman in Saamco. BPE appealed.

The Appeal

There were various facets of the appeal but this article deals only with the principle issue on scope of duty and loss.

The Court of Appeal found it difficult to accept the Judge's finding of fact that Gabriel was ignorant of the true nature of the transaction as he was present at a lengthy completion meeting, but accepted they were bound by those findings.

Nevertheless, Lady Justice Gloster giving the leading judgement said "Mr Gabriel has to show not merely that BPE was in breach of a duty which was owed to him but also that it was a duty in respect of the kind of loss which he had suffered."

To determine the scope of BPE’s duty the Court of Appeal held the Judge had to analyse whether the case was one of providing information so the client could decide what commercial course of action he should take, or whether there was a duty to advise on which course of action to take and/or advise of the inherent commercial risks. The Court of Appeal found the duty came within category 1 of Lord Hoffman’s categorisation and thus was a duty to provide information only. Lady Justice Gloster found the Judge at first instance wrongly equated BPE’s duty with a category 2 duty. Once that had been decided, the court then had to decide what were the losses arising from that.

Importantly, Lady Justice Gloster went on to say “...the fact that, if the duty had been fulfilled, the claimant would have made no loan at all, does not predicate that a claimant will recover his losses in full, or even to a limited extent.” In the circumstances of this case the court found that the commercial aspects of the deal and the extent that each party was going to contribute to it, whether by way of the proposed works, property or cash, were outside BPE’s remit and no advice was requested or required. It was thus held that it was not possible to characterise the losses incurred as the “the foreseeable consequences of the information being wrong” (per Lord Hoffman, Saamco). The Court found the project was highly speculative in any event and thus it was highly unlikely Gabriel would have got his money back in any event.

Lady Justice Gloster concluded “whether one approaches the matter by asking the question whether the losses fell within the scope of BPE’s duty, or were caused by breaches of such duty, the judge was wrong to hold BPE responsible for Gabriel’s losses.” The appeal was therefore allowed.
Conclusion

It has been all to easy for Claimants to say, notwithstanding their solicitor owes them an information type duty, that they should nevertheless be allowed full losses because if the information had been correct they would not have proceeded with the transaction, thus enabling the argument that the losses flow directly from the information being wrong. The Steggles v Palmer and Portman BS v Bevan Ashford line of authorities since 2000 have caused Defendant Solicitors real difficulty in reducing the losses arising from their mistakes. This decision, which follows other recent cases such as Haugesunde and Lloyd's Bank v Crosse and Crosse, does show the tide is turning and the judicial application of Saamco to the solicitors’ profession appears to be more in line with Lord Hoffman’s reasoning. The decision should reinforce the defence of cases where scope of duty and causation are real issues.

Beale and Company Solicitors LLP acted for BPE.

November 2013

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