BPE v Hughes-Holland (Gabriel): a New Dawn of Saamco

The Supreme Court gave a landmark judgment today on how claims against solicitors, and indeed any professional, should be assessed in one of the most important decisions this decade for those involved in professional negligence claims.

Ever since the leading valuers’ negligence case of Saamco was decided in 1996, attempts to apply the rationale of Saamco and the infamous Saamco “cap” to other professions has been muddled and inconsistent.

In the first case against a firm of solicitors to reach the Supreme Court since Saamco, the Supreme Court has now provided much needed clarity on how to assess claims against solicitors and other professionals by providing clarity on:

- The advice/information distinction;
- There no longer being exceptions to the rule that in information retainers the professionals are only responsible for the consequences of their information being wrong;
- That the burden is on the Claimant to prove what losses would have been suffered if the professional’s advice had been correct; and
- The Saamco “cap” is the correct way to approach loss, however mathematically imprecise it may be.

This is undoubtedly good news for professionals and their Professional Indemnity Insurers. Here Rhian Howell, Partner at Beale & Company and lead lawyer on the successful Defence team for BPE, outlines the facts and what professionals and insurers need to do next.

The Facts

Gabriel, a very wealthy businessman, made a loan to a close friend, Little and one of his companies. Gabriel instructed BPE, a firm of solicitors, to obtain security for the loan by way of legal charge on the land. A legal charge was obtained and no issues arose out of the loan. However, a facility letter, drafted as part of a previous aborted transaction, wrongly referred to the loan being used towards development costs of the land. In fact, the loan by Gabriel was used by Little to discharge an existing charge. Gabriel and Little fell out and Little defaulted on the Loan. Gabriel subsequently took possession of the land but only managed to recover £13,000 on the sale of the land due to the
intervening property crash in 2008. Expert evidence adduced by both Gabriel and BPE at Trial found that the business venture was always doomed to fail; even if the loan monies had been used to develop the land, the loan amount was insufficient to complete any development and thus the development would have been left partially completed. The experts both agreed the land would therefore have been worth very little, if anything. Gabriel sued BPE alleging that if he had known the money he was lending to Little was going to be used to develop the land, he would never have lent the money. Gabriel claimed his full losses from making the loan.

First Instance

At first instance, the Trial Judge accepted BPE’s retainer was an ‘information retainer’ pursuant to Saamco, and therefore BPE should only be liable for the consequences of their advice/information being wrong. Despite that, full losses were awarded by the Trial Judge on the basis that the Trial Judge accepted Gabriel would not have gone ahead if he had known his money was to be used to discharge Little’s existing debts.

Court of Appeal

BPE took the matter to the Court of Appeal. The Court of Appeal overturned the Trial Judge’s finding on the basis Gabriel’s losses were caused by his disastrous decision to lend in a transaction that was doomed to fail from the outset, and was not caused by anything done or not done by BPE. The Court of Appeal went further and said that even if they were wrong about that, they would have found Gabriel up to 75% contributorily negligent as he had personally negotiated the transaction, BPE had no involvement or knowledge of the transaction (BPE’s retainer being limited to drafting the security), and Gabriel’s failure to obtain any valuation evidence or insist on staged payments on completion of phases of the works.

The Supreme Court

Gabriel applied for leave to appeal to the Supreme Court and prior to leave being obtained he made himself bankrupt. The Trustee in bankruptcy adopted the appeal.

In a unanimous decision, the Supreme Court upheld the Court of Appeal’s decision and have now provided some clarity on how claims against solicitors and other professionals should be assessed. Lord Sumption gave the Leading Judgment. In summary:

1. Lord Sumption has provided much needed clarity on the advice/information retainer distinction, making it clear that confusion has arisen because of the ‘descriptive inadequacy of these labels’, saying ‘neither label really corresponds to the contents of the bottle’. Lord Sumption has held that unless the professional is retained to advise the client whether to enter into the transaction, all other cases against professionals will fall into the information category (paragraphs 39 to 41 of the Judgment). He says:
“It follows that even if the material which the defendant supplied is known to be critical to the decision to enter into the transaction, he is liable only for the financial consequences of its being wrong and not for the financial consequences of the claimant entering into the transaction so far as these are greater. Otherwise the defendant 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 some one else’s decision”.

2. As a result, the well known cases of Steggles Palmer (from Bristol & West Building Society v Fancy & Jackson (a firm) [1997] 4 All ER 582) and Portman Building Society v Bevan Ashford (a firm) [2000] PNLR 344 have now been overruled by the Supreme Court. There are no longer exceptions to the rule that in information retainers the professionals are only responsible for the consequences of their information being wrong. A professional is not responsible for the full transactional losses of a claimant when it was the claimant’s decision to enter into the transaction in question.

3. Lord Sumption further held that the burden is on the Claimant to prove what losses would have been suffered if the professional’s advice had been correct. An important further blow to Claimants.

4. Finally, Lord Sumption reaffirmed that the Saamco “cap” is the correct way to approach loss, however mathematically imprecise it may be.

Conclusion

In conclusion, Saamco has not only been reaffirmed, we now have an improved position as a result of the Supreme Court’s decision today in BPE. Unless it can be said that the professional was retained and gave advice on whether a claimant should enter into a transaction, the ‘no transaction case’ is now truly dead. Indeed, if a professional defends a claim on the basis that the wrong information complained of by a claimant has not caused the losses, the burden is now on the claimant to prove that. This decision has not only narrowed the exposure for professionals, it has made it much harder for claimants to pursue their claims. We finally have a position where professionals no longer appear to be expected to under-write claimants’ risks and business ventures.

Professionals and their Insurers should immediately review all live cases and those cases which may fall into the Steggles Palmer/ Portman categories should now see a significantly improved defence.

Rhian Howell and Warren Owen of Beale & Company Solicitors LLP acted for BPE.

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