‘Information’ or ‘Advice’?
Construction Professionals Beware!

The Supreme Court recently provided guidance on the operation of the ‘SAAMCO’ cap in the landmark case of *BPE Solicitors & Anor vs Hughes-Holland (in substitution for Gabriel) [2017] UKSC 21 (‘BPE Solicitors v Hughes-Holland’). Beale & Company Solicitors LLP acted on behalf of BPE Solicitors. A full summary of the background and judgment can be found [here](#).

This article considers the key points of the judgment and its potential impact on construction professionals (which has recently been the subject of much comment and hypothesis from practitioners). However, the recent decision in *Bank of Ireland and another v Watts Group Plc [2017] EWHC 1667 (TCC)*, considered below, goes some way to clarifying the principles set out in *SAAMCO* and *BPE Solicitors v Hughes-Holland* and their application to construction professionals.

**Background**

By way of a reminder, the principle developed by the House of Lords in *South Australia Asset Management v York Montague Ltd [1997] A.C. 191 (‘SAAMCO’)* was that a distinction must be drawn between: (1) a duty to provide information to enable someone to decide on a course of action; and (2) a duty to advise someone as to what course of action to take. It was held that the negligent adviser would be responsible for all the foreseeable loss consequent upon the advised course of action; in contrast, the negligent supplier of information would be responsible for all the foreseeable consequences of that information being wrong only.

In *BPE Solicitors vs Hughes-Holland*, the Court drew a distinction between: (1) ‘advice’ cases, i.e. where it is the adviser’s duty to consider what matters should be taken into account in deciding whether to enter into a transaction; and (2) ‘information’ cases, i.e. where the supplier of information contributes
only a limited part of the material on which the client relies in deciding whether to enter into a transaction.

It was held that, in the event that a party’s duty is to consider all relevant matters, and one of those matters is considered negligently, it will be liable for all losses flowing from the client’s decision to enter into the transaction. The Court considered that this comprised an ‘advice’ case. Conversely, in circumstances where a party’s contribution is to simply supply material for the client to take into account in coming to a decision on the basis of a broader assessment of the risks as to whether to enter into a transaction, it cannot be liable for the consequences of the client’s decision. The Court held that this fell within the description of an ‘information’ case.

The Court therefore clarified that a professional is not responsible for a claimant’s full transactional losses in circumstances where it was the claimant’s decision to enter into the transaction in question but rather only the financial consequences of the information in question being incorrect.

Although the case was decided in relation to a professional negligence claim against a firm of solicitors, the decision effectively applies to any professional (including construction professionals) who provides either ‘advice’ or ‘information’. Importantly, BPE Solicitors v Hughes-Holland also confirmed that the burden is on a claimant to prove what losses would have been suffered if the professional’s advice had been correct. This provides further protection to potential defendants.

**Bank of Ireland and another v Watts Group Plc [2017] EWHC 1667 (TCC)**

The Bank of Ireland (the ‘Bank’) sought damages for losses caused by the alleged negligence of Watts Group Plc, the monitoring surveyor, in relation to a development undertaken by a borrower. The Bank agreed to lend £1.4m to the borrower to fund the project on the basis of the monitoring surveyor’s ‘initial appraisal report’ in respect of the borrower’s building costs estimates.

Following the drawdown of the loan, the borrower entered creditors’ voluntary liquidation. Building work ceased and the incomplete property was sold, causing the Bank to suffer a loss of approximately £750,000.
In summary, the Bank alleged that the monitoring surveyor’s appraisal was negligent and that had it been properly prepared, it would not have allowed the drawdown of the loan.

The Court rejected all allegations of negligence. Furthermore, the Court held that the Bank’s case would have failed on grounds of causation. Significantly, the Court found that the claimed loss was irrecoverable in any event as this was an ‘information’ case, rather than an ‘advice’ case, for the purposes of the test set out in SAAMCO and clarified by BPE Solicitors v Hughes-Holland. The monitoring surveyor could only therefore be liable for the financial consequences of the estimated building costs being wrong and not for the financial consequences of the Bank entering into the transaction. Furthermore, the Court found that the claimed loss was irrecoverable in any event as this was an ‘information’ case, rather than an ‘advice’ case, for the purposes of the test set out in SAAMCO and clarified by BPE Solicitors v Hughes-Holland. The monitoring surveyor could only therefore be liable for the financial consequences of the estimated building costs being wrong and not for the financial consequences of the Bank entering into the transaction. Furthermore, the Court held that the true cause of the Bank’s loss was its decision to lend in contravention of its lending policies and guidelines.

The Court’s finding that the monitoring surveyor’s report constituted ‘information’ rather than ‘advice’ will provide comfort to project monitors and other construction professionals. It is however important to remember that each case will turn on its specific facts. The Court also confirmed the decision in BPE Solicitors v Hughes-Holland, namely that a negligent professional will not be liable where loss is caused by factors which fall outside the scope of its duty. Both decisions should be borne in mind by professional consultants engaged on construction projects.

Further Examples

The following examples further illustrate the application of the principles set out in SAAMCO and BPE Solicitors v Hughes-Holland to construction professionals:

A consultant may provide information to an employer about the pros and cons of various procurement routes. The financial losses for which the consultant may be liable in the event that the advice is negligent may be significantly less compared to those in circumstances where the consultant explicitly advises as to which course of action to take.

Alternatively, a consultant may be engaged to provide traffic forecasting advice, e.g. to estimate the number of vehicles using a said road(s), so as to enable a third party to produce a financial model with a view to assessing the financial viability of a subsequent toll road scheme. In such a case, it is likely that the professional
consultant will be deemed to be supplying ‘information’ given the limited scope of his or her instruction.

An architect may be engaged in relation to the design and construction of a shopping centre. In the event that, during the design development stage, the architect fails to warn the developer of the reduction in size / capacity of the shopping centre which was consequent upon changes made to the design, could the architect be liable to the developer if the developer alleged that it was unable to take an informed decision as to whether to proceed with the project?

Given the fact that the architect may not be privy to the range of information that would be available to the developer to take into account when deciding whether to proceed with the construction of the shopping centre, the architect would likely be liable for its information being incorrect only and not for the whole potential transactional losses. Alternatively, an architect may provide a range of information which is intended to assist a developer in deciding whether to carry out a development. It is likely that this could constitute an ‘advice’ case and that the architect may be liable for the whole transactional losses.

**Conclusion**

It will not always be clear whether a construction professional’s retainer falls within either the ‘advice’ category or the ‘information’ category; the services provided by the construction professional under their retainer may not necessarily fall at one or other end of the spectrum but within the continuum in between.

Construction professionals should however be aware that they may take on further significant liabilities if they assume responsibility for advising a client on the proper course of action, rather than advising on discrete issues which together enable a client to decide on the proper course of action.

Notwithstanding the above, in the event that the intention is to provide ‘advice’, construction professionals must ensure that they understand the risks, including the additional losses, for which they may be liable as a result of any negligent advice. Construction professionals are advised to factor such risks into the contract sum and to ensure that adequate contractual protection
is in place, e.g. a limitation of liability. Similarly, if the intention is to provide ‘information’, the scope of services should reflect this.

It is important to stress that *BPE Solicitors v Hughes-Holland* makes it clear that most professional retainers will be ‘information’ retainers; ‘advice’ retainers will be very much the exception. In order to constitute an ‘advice’ retainer, construction professionals will need to explicitly advise a client as to what particular course to follow. Appointments / retainer letters are therefore even more important. Construction professionals should be aware that clients will seek to widen the scope of the retainer in order to circumvent *BPE Solicitors v Hughes-Holland*.

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