

# SAAMCO AND THE DISTINCTION BETWEEN ADVICE AND INFORMATION IN PROFESSIONAL NEGLIGENCE CLAIMS

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In this article, the implications of the decision in *BPE Solicitors v Hughes-Holland [2017] UKSC 21* are considered by Roger Stewart QC and Scott Allen, who appeared for BPE Solicitors in this case. This is an important decision that concerns the application of the SAAMCO principle in a solicitors' negligence claim.

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## INTRODUCTION

In this important decision, *BPE Solicitors v Hughes-Holland [2017] UKSC 21*, the Supreme Court has provided welcome clarification of the extent to which the SAAMCO principle is to be applied to solicitors and other professionals. In the process, the court, the sole judgment of which was given by Lord Sumption, has restated and provided further explanation of the SAAMCO principle, including Lord Hoffmann's distinction between the provision of "information" and "advice". It has overruled a series of cases which had been the source of much confusion about how the principle was to be applied to cases involving solicitors.

The result is a case that is required reading for all of those involved in claims against professionals and, indeed, for all professionals who are keen to understand the scope of their potential liability to clients, and how to restrict their liability in an effective manner.

## THE SAAMCO PRINCIPLE

In *South Australia Asset Management Corp v York Montague Ltd [1996] UKHL 10* (SAAMCO), the House of Lords established a "scope of duty" principle, which was used to limit the liability of valuers in respect of a negligent valuation provided for a lender. For more detail, see *Practice notes, Professional negligence: The SAAMCO principle* and *The scope of a defendant's liability for negligence*.

## THE CLAIM AGAINST BPE SOLICITORS

The claimant brought a negligence claim against its solicitors for losses he had suffered in relation to a loan he made to a third party. The claimant alleged that the loan agreement had been negligently drafted and that his solicitors had failed to advise that the loan would be used to discharge some of the third party's debts and not to develop a property. In *Gabriel v Little [2013] EWCA Civ 1513*, the Court of Appeal held that the solicitors only owed the claimant a duty to provide information, and not to advise on what course of action to take or as to the commercial risks of the relevant loan.

The Supreme Court dismissed the claimant's appeal, finding that the loss which he suffered would have been suffered even if the transaction had been precisely as the claimant believed it to be. The transaction was not viable because the funds available would not have enabled works to take place which would have led to the property in question becoming any more valuable. It was no part of the solicitors' duty to protect the claimant against loss of this kind.

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## IMPLICATIONS OF THIS DECISION

The key aspects of the decision are as follows:

- The principle in SAAMCO is a means of restricting a defendant's liability for loss, which is not based on causation. Rather it, and other principles which limit a defendant's liability, are based on a "developed judicial instinct about the nature or extent of the duty which the wrongdoer has broken" (*paragraph 20, judgment*). The relevant question is whether the loss which is claimed "flowed from ... the particular feature of the defendant's conduct which made it wrongful" (*paragraph 38, judgment*).
- Lord Hoffmann's advice/information distinction was said to have given rise to confusion because of the descriptive inadequacy of the labels. Lord Sumption explained the relevant distinction as follows:
  - An "advice" case, in which a professional will be liable for all the foreseeable consequences of a transaction entered into upon negligent advice, will only arise where the professional owes a duty to consider all relevant matters and not only specific factors within a client's decision: in other words, a case where the professional is responsible for guiding the whole decision-making process, and is responsible for the decision itself.
  - An "information" case is one where the professional contributes a limited part of the material on which their client will rely when making a decision, but the overall assessment of the commercial merits of the transaction is for the client. In such a case, the professional will be liable only for the financial consequences of the information which he provided being wrong, even if the information was critical to the decision of whether to enter into the transaction. Limiting the professional's liability this way is essential, as "[o]therwise 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 someone else's decision". (*Paragraph 41, judgment.*)
- Given a correct understanding of the advice/information distinction, Lord Sumption held that the following solicitors' cases were incorrectly decided:
  - *Steggles Palmer*, one of the conjoined decisions reported under the title *Bristol & West Building Society v Fancy & Jackson* [1997] 4 All ER 582; and
  - *Portman Building Society v Bevan Ashford* [2000] PNLR 344.

He held that these cases effectively applied the "no transaction" rule which the House of Lords had discredited within the SAAMCO decision. There is no basis for making the assessment of a claimant's damages dependent, not on the scope of the defendant's duty, but on the gravity of the particular breach and the judge's assessment of the quality of a claimant's reasons as to why, in possession of certain information, it would not have entered into a transaction.

- In an "information case", the burden of proof rests with a claimant to prove that the losses it claims fell within the scope of the defendant's duty and would not have been suffered even if the information provided by the defendant had been correct. This aspect of the decision, which is dealt with relatively shortly by Lord Sumption, could be of very real importance in cases where the hypothetical question of what would have happened had the defendant not been in breach of duty has a less than clear-cut answer.
- Lord Sumption recognised that the application of the SAAMCO "cap" or "restriction" on damages may, in valuers' cases, lead to a result that is not mathematically precise, due to the difficulty of stripping out the financial damage that has been suffered by reason of a range of commercial factors. However, "mathematical precision is not always attainable in the law of damages" and the SAAMCO principle is "essentially a legal rule which is applied in a robust way without the need for fine tuning or a detailed investigation of causation" (*paragraph 46, judgment*).