NEW SQUARE

Article written by Helen Evans, Thomas Ogden and Marie-Claire O'Kane on 4th January 2018.

Professional negligence round up: what were the key areas of development in 2017 and what are the battlegrounds for the future?

1. 2017 was a particularly significant year for professional liability cases, with a handful of problematic areas of the law receiving repeated consideration by the courts. Below we set out our thoughts on how the law has changed or been reaffirmed in these areas, explain whether there have been any discernible shifts in policy and identify further points ripe for dispute and development in 2018.

Low fee, low duty?

2. The first key topic to which the courts turned in a number of cases was the relationship between the fees charged by a professional and the standards expected of their work. Going into 2017, the scene was set by the Court of Appeal in *Minkin v Landsberg* [2016] 1 WLR 1489, which recognised that clients' financial constraints can lead to very narrow use of professional advisers (for instance to carry out discrete tasks such as merely formalising an existing agreement between divorcing spouses).

3. In 2017 the courts remained willing to focus on the size of a fee when considering the scope of a defendant professional's duties and the tasks that the professional could be expected to perform. In *Thomas v Hugh James Ford Simey Solicitors* [2017] 5 Costs LO 643, the Court of Appeal described a claims handling arrangement under which defendant solicitors were paid a fixed fee of £607 to pursue an industrial injury claim as not one which required them to "*turn over every stone*". This pragmatic approach was not confined to solicitors: in *Denning v Greenhalgh Financial Services Ltd* [2017] PNLR 19, a case where a defendant IFA was sued for not revisiting advice by a previous adviser, Green J was heavily influenced by the fact that the defendant was being criticised for not performing extra work which was not included in his fee.

4. The two cases referred to above suggest that a more defendant-friendly approach towards duty of care prevailed in 2017, an impression reinforced by *Bank of Ireland v Watts Group PLC* [2017] EWHC 1667 TCC, in which the court was prepared to turn the claimant's costs budget back against it. In *Watts,* the court criticised a claimant lender for a "*lack of realism*" in pursuing a negligence claim against defendant valuers who had only charged £1,500 for their services, when the expert evidence used to attack that work had cost £24,000 to obtain.

5. However, the news was not all pro-defendant. Notably, the repeated focus on the size of the fee did not mean that work involving no fee equalled a finding of no duty in *Burgess v Lejonvarn* [2017] PNLR 25. There, the Court of Appeal decided that an

architect providing gratuitous project management services for her former next door neighbours did owe a duty of care where the services were provided "*in a professional context and on a professional footing*".

6. The message therefore remains that duty of care remains a fact-sensitive issue, albeit one which the courts are more prepared to approach from the starting point that there are good policy reasons for recognising that duties can in some circumstances be narrow and confined.

<u>"Others may disagree"</u>

7. The issue of whether and when a defendant professional adviser owes a duty to warn about the risk of his views or his work being disputed also troubled the courts in 2017. In *Balogun v Boyes Sutton & Perry* [2017] PNLR 20 the Court of Appeal held that although the defendant solicitors had correctly interpreted the provisions of certain lease documentation, they had owed a duty to advise about the risk of a court coming to a contrary conclusion to their views. In *Barker v Baxendale-Walker Solicitors* [2017] EWCA Civ 2056 the Court of Appeal held that a firm of solicitors should have warned an investor about the risks of a tax scheme failing because of a conflicting view being taken about tax law. The Court of Appeal considered whether authorities about "*informed consent*" from the medical and financial context[1] were applicable to solicitors, but pointed out that in the case of legal advice there is "*no separation between the advice and any appropriate caveats as to risk. They are one and the same. The lawyer as part of the legal advice that he is providing must evaluate the legal position and determine whether in all of the circumstances, he should advise his client that there is a significant risk that the view he has taken…. may be wrong*".

8. It is a commonly pleaded defence in professional negligence claims that other advisers- particularly counsel- came to the same view as the impugned adviser at the time. However, *Barker v Baxendale Walker* cast some doubt on that "strength in numbers" type argument. In that case, it was held to be no answer to the criticism of the defendant solicitors that other advisers (including leading counsel and an employee of HMRC) had thought that the defendant's interpretation of tax law was right at the time. The Court of Appeal reached that view on the facts, dismissing the collection of other advisers as "*an unrepresentative group*" that fell short of being a "*body of expert professional opinion*". Whether this approach was merely a fact based decision or is fact part of a broader questioning of the *Bolam* test in professional negligence claims is likely to be an area of future dispute.

<u>"I wouldn't start from here": *SAAMCO* and *Hughes-Holland*</u>

9. The classic conundrum of whether a professional should be held liable for loss that a claimant would have avoided if the professional had not been negligent, even though the loss occurred because of commercial problems for which the professional was not responsible resurfaced before the Supreme Court in *Hughes-Holland v BPE Solicitors* [2017] 2 WLR 1029. In that case, a businessman, Mr Gabriel, lent a friend £200,000 in the mistaken understanding that it would be used for the development of a disused water tower. Mr Gabriel's solicitors, BPE, were responsible for his

[1] *Montgomery v Lanarkshire Health Board (GMC Intervening)* [2015] UKSC 11 and *O'Hare v Coutts & Co*[EWHC 2224.

misunderstanding as to how the money was to be used but not for the fact that the development was a commercial disaster. Had Mr Gabriel known the truth about how the money was to be used, he would not have lent it. Could he recover?

10. The 1997 case of *SAAMCO*[2] had proceeded on the basis that starting from the perspective of the position that a claimant would have been in if the breach had not occurred was the "*wrong place to begin*". In *Hughes-Holland,* Lord Sumption took the same approach. He explained that the key issue is not the loss that a claimant could have avoided suffering if the defendant had not been negligent, but the extent of that loss which flows from a "*particular feature of the defendant's conduct that made it wrongful*". In Hughes-Holland, *"none of the loss which Mr Gabriel suffered was within the scope of BPE's duty. None of it was loss against which BPE was duty bound to take reasonable care to protect him. It arose from commercial misjudgements which were no concern of theirs"*.

11. In *Hughes-Holland,* the Supreme Court reaffirmed and explained the distinction between an "information" case and an "advice" case derived from *SAAMCO*. An "information" case is one where a professional merely provides part of the material on which a claimant depends when deciding what to do. An "advice" case is one where a professional has to consider "*what matters should be taken into account in deciding whether or not to enter into the transaction*" or is involved in "*guiding the whole decision making process*".

12. The temptation for courts who do not wish to be constrained by the restrictive approach to causation in *Hughes-Holland* is to find that professionals are "advisers" rather than "information givers". Is there any evidence of this occurring in controversial circumstances? In *Halsall v Champion Consulting* [2017] EWHC 1079 the court found that professionals presenting a tax scheme as a "*no brainer*" investment fell into the "advice" category with a wider potential liability for damages. More controversially however, in *Main & Ors v Giambrone v Law* [2017] EWCA Civ 1193, the Court of Appeal found that conveyancers receiving deposits in respect of a property development in Italy (which was allegedly a money-laundering front for the Italian Mafia and IRA) were "advisers". Although Jackson LJ disapproved the terms "information" and "advice" cases[3], he depicted the dispute as the latter, observing *"obviously the claimants decided whether or not they wanted to buy holiday homes in Southern Italy. But having taken that primary decision, they put themselves into the hands of Giambrone as their experienced Anglo-Italian lawyers."*

13. We suspect that in future, claimants will argue for a broad interpretation of the type of relationships in which clients are seen as "putting themselves into the hands" of their professional advisers in order to circumvent the constraints of *Hughes-Holland.*

<u>What loss?</u>

14. Another twenty year old decision, namely that of the House of Lords in *Nykredit v Edward Erdman Group Ltd* [1991] 1 WLR 1627, received reaffirmation in 2017. *Nykredit* is authority for the proposition that in a case involving a negligent valuation where but for a defendant's negligence the lender would not have lent,

---

[2] *South Australia Asset Management Corp v York Montague Ltd* ("or "*SAAMCO*")[1997] AC 191

[3] He preferred "category 1" and "category 2" cases.

when calculating loss the court has to compare what the claimant's position would have been if the defendant had fulfilled his duty with the claimant's actual position.

15. The point was revisited in *Tiuta International v De Villiers Surveyors Ltd* [2017] 1 WLR 4627. There, some valuers carried out two valuations of the same property. The lender lent £2.5m to a borrower in reliance on the first valuation. The lender then restructured the loan so that a second sum of nearly £3.1m was advanced. This was used to pay off the first loan (the liability for which had risen to £2.8m) as well as to provide additional funds of around £300,000. The same valuers appraised the property (negligently) for the second loan. The claim against the valuers was confined to the second loan rather than extending to the first as well because of *Preferred Mortgages v Bradford & Bingley Estate Agencies Ltd* [2002] EWCA Civ 322, which is authority for the proposition that where an original loan is paid off by a second loan, it is treated as having been redeemed. However by attempting to avoid the landmine of being found to have no cause of action in relation to the first loan, the claimant ended up with the problem of the defendant valuers relying on the existence of the first loan to cut down any damages payable in respect of the second.

16. The Supreme Court agreed with the defendant valuers' stance. It held that *"it does not follow from the fact that the advance under the second facility was applied in discharge of the advances under the first, that the court is obliged to ignore the fact that the lender would have lost the advances under the first facility in any event"*. However, Lord Sumption left open the possibility that the lender could have sued the valuers for the loss attributable *"to the extinction of that [first] liability which resulted from the refinancing of the existing indebtedness"*. We therefore suspect that in cases of successive loans, claims are either formulated more broadly in future so as to bring the first loan into play and/or that claimants attempt Lord Sumption's suggestion of basing a claim on the lost chance to sue on the first loan.

<u>Avoided loss</u>

17. The issue of when a benefit enjoyed by a claimant after suffering a loss is collateral and therefore does not have to be taken into account in calculating loss is a troublesome feature of professional negligence cases. It often arises in professional negligence cases concerning the acquisition of unsatisfactory property or investments, which are later sold or restructured. However, recognising a benefit which is truly collateral is often harder than it sounds. These difficulties troubled the courts in 2017 and led to some clearer guidance being given.

18. In *Swynson v Lowick Rose LLP* [2017] 2 WLR 1161 Lord Sumption observed that *"broadly speaking collateral benefits are those whose receipt arose independently of the circumstances giving rise to the loss."* The examples of this type of benefit that he identified were gifts, insurance payments and disability pensions enjoyed by claimants. He stated *"as between the claimant and the wrongdoer, the law treats the receipt of the benefit as tantamount to the claimant making good the loss from his own resources, because they are attributable to his premiums, his contributions or his work"* (p. 1167).

19. In *Swynson v Lowick Rose,* the court considered whether a payment made to a claimant to relieve loss by a closely connected party can be a collateral benefit capable of being ignored when assessing damages. In *Swynson*, a claimant company made three loans to a borrower in reliance on negligent advice. The borrower did not repay the loans

but the controlling shareholder of the claimant company did. Lord Sumption decided that the fact that the loans had been redeemed by the shareholder in the claimant was no more relevant than whether they had been redeemed by money from the bank or an unconnected third party. The payments could not be regarded as "collateral" (and therefore capable of being ignored) because they discharged the very liability which amounted to the claimant's loss and went to the very heart of the claim.

20. In *Tiuta* (see paras 15-16 above) the claimant tried to get round the problems posed by the combined effect of *Preferred Mortgages* and the defendant valuers' defences by arguing that the redemption of the first loan was a collateral benefit which should be ignored when calculating loss. However, this argument failed because, as Lord Sumption pointed out, *"the concept of collateral benefits is concerned with collateral matters. It cannot be deployed so as to deem the very transaction that gave rise to the loss to be other than it was".*

21. The final issue of "avoided loss" that is relevant to professional negligence claims arose in 2017 in the context of a shipping dispute. The issue in question was when steps taken by a claimant that have led to his loss being reduced should be ignored when assessing damages.

22. If a claimant fails to take adequate steps to mitigate his loss, he is punished by not being able to recover for loss than the court thinks he should have avoided. If a claimant takes steps to mitigate, then he is not able to recover for loss that he has in fact avoided. However, it is not always easy to tell when a claimant has taken steps as a consequence of a defendant's breach or in order to mitigate his loss so that the steps have a bearing on the outcome. In *Fulton Shipping v Globalia Business Travel ("the New Flamenco")* [2017] 1 WLR 2581 the Supreme Court had to consider whether the repudiation of a charterparty was the cause of a subsequent sale of a vessel at a profit (or whether the sale was an act of mitigation by the ship owners). It decided on the facts that it was neither. We consider that the case is likely to have a bearing on professional negligence cases concerning, for instance, claimants acquiring defective real property and subsequently selling it.[4] It is often difficult to tell when a court will regard the subsequent sale as forming part of the same transaction or loss and when it will see the subsequent sale as unconnected. The issue is closely bound up with date of assessment of damage[5], which we see as another area calling out for clarification in 2018.

Author Contact Details: **hm.evans@4newsquare.com**, **t.ogden@4newsquare.com**, **m.o'kane@4newsquare.com**.

[4] Previous examples of this sort of case include *Hayes v Dodd* [1990] 2 All ER 815.

[5] The general rule, which is not immutable, is that damages are assessed as at the date of breach.