



22 March 2017

PRESS SUMMARY

BPE Solicitors and another (Respondents) v Hughes-Holland (in substitution for Gabriel) (Appellant) [2017] UKSC 21
On appeal from [2013] EWCA Civ 1513

JUSTICES: Lord Neuberger (President), Lord Mance, Lord Clarke, Lord Sumption, Lord Hodge

BACKGROUND TO THE APPEAL

Mr Hughes-Holland is the trustee in bankruptcy of Mr Gabriel, a semi-retired businessman and friend of Mr Little. In November 2007, Mr Little told Mr Gabriel that he was looking to borrow £200,000 in connection with the development of a disused heating tower in Gloucestershire. Mr Little gave Mr Gabriel to understand that the property belonged to him or to a company that he controlled. He added that planning permission had been granted for development of the property as offices, which would cost in the region of £200,000, on the basis that he would carry out the building work himself. Mr Gabriel assumed that the £200,000 would be used to finance the development, although this was not expressly stated by Mr Little. In fact, the building belonged to a company, High Tech, subject to a charge in favour of a bank, securing a loan of £150,000. Mr Little intended to transfer the property to a special purpose vehicle (SPV), which would use Mr Gabriel's funds to pay High Tech, which would use them to discharge the loan and charge. The judge subsequently held that Mr Gabriel knew nothing of these plans, and he would not have signed the loan documentation had he done so.

Mr Spencer was an assistant solicitor at BPE Solicitors, whom Mr Gabriel instructed to draw up a facility letter and a charge over the building. The instructions in fact reached Mr Spencer from Mr Little, who told him that he intended to sell the building to the SPV and that Mr Gabriel would lend him the money. Mr Spencer did not clarify or confirm these instructions with Mr Gabriel and used a template from an earlier abortive transaction, stating that loan moneys would be used to assist with development costs. He thereby unintentionally confirmed Mr Gabriel's incorrect understanding of Mr Little's plans.

The transaction failed and Mr Gabriel lost all his money. Mr Gabriel sued Mr Little, High Tech and the SPV for fraud and negligent misrepresentation; and BPE for dishonest assistance in a breach of an implied trust and for negligence. The judge dismissed all the claims against all the parties with the exception of those in negligence against BPE. He held that BPE should not have included the reference to the proposed use of the loan money in the documentation and should have explained to Mr Gabriel that in reality the money would be applied for the benefit of Mr Little or his companies.

The judge accepted Mr Gabriel's case that he was entitled to damages representing the entire loss which he had suffered by entering into the transaction, on the ground that he would not have done so had he not been misled about the proposed misuse of the loan moneys. He did not accept that the venture was doomed from the outset. The Court of Appeal allowed BPE's appeal and held that the whole loss was attributable to Mr Gabriel's misjudgements and reduced to the damages to nil.

JUDGMENT

The Supreme Court unanimously dismisses the appeal. Lord Sumption gives the judgment, with which the other Justices agree.

REASONS FOR THE JUDGMENT

The first issue relates to the viability of the development project. On this, the Court concludes that the evidence sufficiently showed that the value of the property would not have been enhanced by the expenditure of £200,000 on its development. [18].

On the claim for damages, it is generally a necessary condition for the recovery of a loss that it would not have been suffered but for the breach of duty, but it is not always a sufficient condition [20]. In cases where the defendant is supplying information or advice concerning only part of the factors relevant to the decision whether to proceed with the transaction, it must also be demonstrated that protecting the Claimant from loss of the relevant kind was within the scope of the Defendant's duty: see *South Australia Asset Management Corp'n v York Montague Ltd* [1997] 1 AC 191 (“SAAMCO”), as subsequently elaborated in *Nykredit* and *Platform Home Loans* [24, 27].

Lord Hoffmann limited the damages in *SAAMCO* to the difference between the valuation and the true value, on the ground that the recoverable loss could not exceed what the lender would have lost if the valuation has been correct [30]. This has commonly been referred to as the ‘SAAMCO cap’. In *Nykredit*, it was held that there were two stages to the enquiry. The first was directed to ascertaining the loss which the claimant would have avoided if the defendant had performed his task carefully; and the second to awarding only that part of the loss which was in the scope of the defendant's duty [32].

The decision in *SAAMCO* has often been misunderstood, often from a tendency to overlook two fundamental aspects of the reasoning: (i) where the contribution of the defendant is to supply part only of the material which the client will take into account in making his own decision on the basis of a broader assessment of the risks, the defendant has no legal responsibility for his decision [35]; and (ii) the principle has nothing to do with the causation of loss as that expression is usually understood in the law [36]. The ‘SAAMCO cap’ is simply a tool for giving effect to the distinction between: (i) loss flowing from the fact that as a result of the defendant's negligence the information was wrong and (ii) loss flowing from the decision to enter into the transaction at all [45].

There is no exception to proposition (i) above, for cases where the Defendant fails to provide information which shows that the transaction was fraudulent or not viable or otherwise fundamental to the decision to proceed: *Bristol and West Building Society v Steggle Palmer* [1997] 4 All ER 582 and *Portman Building Society v Bevan Ashford (a firm)* [2000] PNLR 344 overruled.

The Court of Appeal was correct to treat the burden of proving facts which engaged the principle in *SAAMCO* as lying upon the claimant. The principle is not one of assessment or avoidance; rather it is an essential part of the claimant's case that he was owed a relevant duty [53].

It is clear that BPE Solicitors did not assume responsibility for Mr Gabriel's decision to lend money to Mr Little – their instructions were to draw up the documentation, nothing more. BPE was only legally responsible for confirming Mr Gabriel's assumption about one of a number of factors in his assessment of the project. If that assumption had been right, Mr Gabriel would still have lost his money and so none of the loss he suffered was within the scope of BPE's duty. It arose from commercial misjudgements which were no concern of theirs [55].

References in square brackets are to paragraphs in the judgment

NOTE: This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at: <http://supremecourt.uk/decided-cases/index.html>