

# SCOPE OF DUTY: THE PARABLE OF THE MOUNTAINEER'S KNEE, AND OTHER STORIES

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## 1. In the Beginning: SAAMCo

"It is never sufficient to ask simply whether A owes B a duty of care. It is always necessary to determine the scope of the duty by reference to the kind of damage from which A must take care to save B harmless"<sup>1</sup>

1. The question of whether a particular head of loss falls within the scope of a defendant's duty of care is not a new one in jurisprudence, but it really came to prominence in a series of cases arising from the negligent valuation of property for mortgage purposes before the property crash of the early 1990s. The common feature of these cases was that the fall in the market between the time of the valuation and the time the properties were sold significantly increased the losses suffered by the lenders when the borrowers defaulted on the secured advances. The leading case of this series is *South Australia Asset Management Corp v York Montague Ltd*<sup>2</sup>, affectionately referred to as "SAAMCo",

### At First Instance

2. SAAMCo started life as a collection of matters heard in various first instance courts, including 6 cases heard together by Phillips J under the title *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd*. In the titular case, Phillips J held the negligent valuer was not responsible for the portion of the lender's loss on the secured loan which was attributable to the fall in the property market after the valuation date, notwithstanding that:
  - i) in each case, the lender would not have entered into the transaction but for the valuer's negligence;
  - ii) in some of the cases, the lender would not have lent any sum at all (because a lesser loan would have fallen outside its own lending guidelines, or been of no interest to the borrower); and
  - iii) the adverse market movements were foreseeable.
3. The reason Phillips J gave was that the lenders has deliberately assumed the risk that they might suffer loss as a result of a fall in the property market - they did not rely upon the valuation to protect them from that risk, and thus no duty was owed by the valuer to protect them from (or compensate them for) this type of loss. In other words, where there are a

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<sup>1</sup> *Caparo Industries plc v Dickman* [1990] 2 AC 605, per Lord Bridge at page 627

<sup>2</sup>[1997] AC 191.

number of heads of risk, giving professional advice on just one of them should not make the advisor the underwriter of the entire venture. Phillips J thus sought to strip out the market loss from the damages award.

#### In the Court of Appeal

4. The Court of Appeal reversed Phillips J's decision<sup>3</sup>, instead distinguishing "no transaction" cases (where the transaction would not have proceeded at all, but for the negligence) and "successful transaction case" where it would have proceeded but on different terms. In the former case, but not the latter, the valuer was liable for the entire foreseeable loss flowing from the transaction.

#### In the House of Lords

5. Lord Hoffman (with whom the other Lords agreed) considered that the Court of Appeal, in assuming that the cases were about the correct measure of damages for the loss the lenders had suffered, had chosen the wrong place to begin. Instead, a correct description of the loss for which the valuer is liable had to precede any consideration of the measure of damages, and for this purpose it is better to begin at the beginning, and consider the lender's cause of action.<sup>4</sup> Normally the law limits liability for a breach of duty to those consequences which are attributable to that which made the act wrongful.
6. He famously illustrated the problem with the Court of Appeal's view by the parable of the mountaineer's knee:

*"A mountaineer about to take a difficult climb is concerned about the fitness of his knee. He goes to the doctor who makes a superficial examination and pronounces the knee fit. The climber goes on the expedition, which he would not have undertaken if the doctor told him the true state of his knee. He suffers an injury which is an entirely foreseeable consequence of mountaineering but has nothing to do with his knee.*

*On the Court of Appeal's principle, the doctor is responsible for the injury suffered by the mountaineer because it is damage which would not have occurred if he had been given correct information about his knee. He would not have gone of the expedition and would have suffered no injury. On what I have suggested is the usual principle, the doctor is not liable. The injury has not been caused by the doctor's bad advice because it would have occurred even if the advice had been correct."<sup>5</sup>*

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<sup>3</sup> [1995] 2 All ER 769

<sup>4</sup> At page 211A-B

<sup>5</sup> At page 213 C-F

7. Lord Hoffman felt that making the doctor liable in that situation would offend against common sense, and that one could to a certain extent generalise the principle on which that response depends as follows:

*"...a person under a duty to take reasonable care to provide information on which someone else will decide upon a course of action is, if negligent, not generally regarded as responsible for all the consequences of that course of action. He is responsible only for the consequences of the information being wrong. A duty of care which imposes upon the informant responsibility for losses which would have occurred even if the information which he gave had been correct is not in my view fair and reasonable as between the parties. It is therefore inappropriate either as an implied term of a contract or as a tortious duty arising from the relationship between them.*

*The principle thus stated distinguishes between a duty to provide information for the purpose of enabling someone else to decide upon a course of action and a duty to advise someone as to what course of action he should take. If the duty is to advise whether or not a course of action should be taken, the adviser must take reasonable care to consider all the potential consequences of that course of action. If he is negligent, he will therefore be responsible for all the foreseeable loss which is a consequence of that course of action having been taken. If his duty is only to supply information, he must take reasonable care to ensure that the information is correct and, if he is negligent, will be responsible for all the foreseeable consequences of the information being wrong."*<sup>6</sup>

8. In answering the question "how is the scope of the duty of care to be determined?", Lord Hoffman said:

*"In the case of a statutory duty, the question is answered by deducing the purpose of the duty from the language and context of the statute: Gorris v Scott (1874) L.R. 9 Ex. 125. In the case of tort, it will similarly depend upon the purpose of the rule imposing the duty. Most of the judgments in the Caparo case are occupied in examining the Companies Act 1985 to ascertain the purpose of the auditor's duty to take care that the statutory accounts comply with the Act. In the case of an implied contractual duty, the nature and extent of the liability is defined by the term which the law implies."*<sup>7</sup>

9. He rubbished the distinction between the "no transaction" and "successful transaction" cases as irrelevant to the scope of the duty of care:

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<sup>6</sup> At page 214

<sup>7</sup> At page 212D

*"The distinction between the 'no-transaction' and 'successful transaction' cases is of course quite irrelevant to the scope of the duty of care. In either case, the valuer is responsible for the loss suffered by the lender in consequence of having lent upon an inaccurate valuation. When it comes to calculating the lender's loss, however, the distinction has a certain pragmatic truth. I say this only because in practice the alternative transaction which a defendant is most likely to be able to establish is that the lender would have lent a lesser amount to the same borrower on the same security. If this was not the case, it will not ordinarily be easy for the valuer to prove what else the lender would have done with his money. But in principle there is no reason why the valuer should not be entitled to prove that the lender has suffered no loss because he would have used his money in some altogether different but equally disastrous venture. Likewise the lender is entitled to prove that, even though he would not have lent to that borrower on that security, he would have done something more advantageous than keep his money on deposit: a possibility contemplated by Lord Lowry in Swingcastle Ltd. v. Alastair Gibson [1991] 2 A.C. 223 , 239. Every transaction induced by a negligent valuation is a 'no-transaction' case in the sense that ex hypothesi the transaction which actually happened would not have happened. A 'successful transaction' in the sense in which that expression is used by the Court of Appeal (meaning a disastrous transaction which would have been somewhat less disastrous if the lender had known the true value of the property) is only the most common example of a case in which the court finds that, on the balance of probability, some other transaction would have happened instead. The distinction is not based on any principle and should in my view be abandoned.<sup>8</sup>*

#### Calculating Losses - "the SAAMCo CAP"

**W= whole loss on the transaction**

**X = valuation figure given**

**Y = Market value at date of valuation**

**Z= value at date of realisation.**

10. Lord Hoffman's assessment of the damages was rather different to the approach of Phillips J:

- a. Phillips J stripped out from the overall loss on the transaction the proportion of the loss which could be attributed to the fall in the property market, by excluding from the recoverable damages the difference between the true value of the property at the date of valuation and its reduced value at the date of realisation ie **W- (Y-Z)**;

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<sup>8</sup> At page 218

b. Lord Hoffman limited the recoverable loss by subjecting it to a ceiling represented by the difference between the negligent valuation and the true value (**X-Y**), on the ground that the consequence of the valuation being wrong was that the lenders had (X-Y) less security than they thought they had.<sup>9</sup> In effect, this meant that the loss attributable to the negligence which caused the valuation to be wrong could not exceed what the lender could have claimed had the valuer warranted the valuation was right.

11. As Lord Nicholls said in *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd (No 2)*<sup>10</sup> "A defendant valuer is not liable for all the consequences which flow from the lender entering into the transaction. He is not even liable for all the foreseeable consequences. **He is not liable for consequences which would have arisen (the fall in property prices) even if the advice had been correct.** He is not liable for those because they are the consequences of the risks the lender would have taken upon himself if the valuation advice had been sound"<sup>11</sup> [emphasis added]

12. The idea of the SAAMCo cap was born: ie that a lender, having demonstrated he had suffered loss as a result of the transaction, could recover damages limited to or "capped at" the amount of the overvaluation (effectively placing the lender in the position he would have been in had the advice been sound).

13. Lord Hoffman never much liked the idea of the "SAAMO Cap"<sup>12</sup>, saying it seemed odd to him to start by choosing the wrong measure of damages (the whole loss) and then correct the error by imposing a cap. In his view, the appearance of the cap was actually the result of a Claimant having to satisfy two separate requirements (1) to prove he has suffered a loss and (2) to establish the loss fell within the scope of the duty owed. Instead, he preferred start with the requirement that the Claimant's loss should be a consequence of the valuation being wrong. Normally they would come to the same thing - the consequence of the valuation being wrong is that the lender makes an advance which he thinks is secured to a correspondingly greater extent. But Lord Hoffman did not wish to exclude the possibility that other kinds of loss might flow from the valuation being wrong. Unfortunately, he did not give us any guidance as to what these might be.

## **2. The Middle - Examples of the Application of the SAAMCo Principle**

14. Although the case itself arose in the context of lender claims against valuers, the principle stated in SAAMCo was expressed as a general principle of the law of damages. Thus it has been subsequently applied to limit recoverable damages in a myriad of contexts, including:

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<sup>9</sup> At page 222

<sup>10</sup> [1997] 1 WLR 1627:

<sup>11</sup> At page 1631

<sup>12</sup> At pages 219H-220A

- i. claims by the purchaser of a negligently undervalued property against the surveyor

In *Capita Alternative Fund Services (Guernsey) Ltd v Drivers Jonas*<sup>13</sup>, surveyors had given negligent advice about the value and commercial prospects of a factory outlet shopping centre development. The purchaser claimed their whole loss on the transaction, but was limited to claiming the loss caused in consequence of the information provided by the Surveyors being wrong ie the difference between what the £62.85m it paid, and the £44.8m it would have paid had the Surveyors not been negligent.

- ii. claims by a lender against their solicitors, where the lender would not have lent against a property had the solicitors properly fulfilled their duties to the lender

For example, in *Credit & Mercantile v Nabarro*<sup>14</sup>, the claimant lender's solicitors negligently reported that the site did have planning permission. without reporting defects. The Solicitors, at a successful summary judgment hearing on a point of law, persuaded the Court that the lender had no real prospect of showing that they could be responsible for more than the difference between the hypothetical value of the Property if the planning permission could have been implemented and the actual value of the Property.

However, in *Bristol and West Building Society v Fancy & Jackson*<sup>15</sup>, a collection of cases decided a few months after SAAMCo, Chadwick J decided in *Steggles Palmer*, (a case involving a back to back sales and sub-sale which the bank's solicitor failed to report) that the solicitor should be responsible for the entire loss on the loan account, because the lender had been deprived of the opportunity to make the decision it would have made if fully informed (ie not to lend). Chadwick J seemed to be influenced by the gravity of the breach and the fundamental nature of the information which was not imparted by the solicitors to the bank's decision, which was thus entirely tainted. This reasoning was also applied by the Court of Appeal in *Portman Building Society v Bevan Ashford*.<sup>16</sup>

- i. claims against architects

In *HOK Sport Ltd v Aintree Racecourse Ltd*<sup>17</sup>, the defendant architects gave wrong advice on the possible capacity of a new racecourse stand. Their liability was limited to

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<sup>13</sup> [2011] EWHC 2336

<sup>14</sup> [2014] EWHC 2819

<sup>15</sup> [1997] 4 All ER 583 (nb overruled by *Hughes-Holland v BPE*, see below)

<sup>16</sup> [2000] PNLR 344 (nb overruled by *Hughes-Holland v BPE*, see below)

<sup>17</sup> [2002] EWHC 3094 (TCC)

the prospective shortfall in ticket monies, and did not extend to other losses caused by the lessened profitability of the scheme.

- ii. non-lender claims against solicitors.

In *Pearson v Sanders Witherspoon & Another*<sup>18</sup> The Claimant had instructed solicitors to act in proceedings against Ferranti which they did not progress with reasonable speed. As a foreseeable consequence, by the time judgment was granted in the proceedings, the defendant was insolvent and unable to satisfy it. At first instance the judge awarded damages based on the lost chance of successfully obtaining and enforcing judgment had the proceedings come to trial in a timely fashion. The Court of Appeal reversed the decision. The duty of a solicitor in acting for a client in litigation was to act with all due expedition and not to cause delays. The kind of loss which the duty was to guard against was loss flowing from the loss of the right of action, as where the claim is struck out. The loss flowing from an inability to enforce judgment was a different type of loss, and:

*"Reasonableness, fairness and justice as between solicitor and client do not require the imposition of a duty on the solicitor arising simply from the retainer to protect the client against the risk of a judgment not being enforced through impecuniosity of the defendant, at least without responsibility being assumed by the solicitor or sufficient notice of that impecuniosity making it reasonable fair and just to extend the duty to cover that loss. Here foreseeability of the possibility of Ferranti's collapse was not sufficient to trigger an extension of the duty until the press reported that their future was dubious. That fact ought reasonably to have spurred the solicitors into action"*<sup>19</sup>

Another example is *Haugesund Kommune v Depfa ACS Bank*<sup>20</sup>, in which the Court found that a bank's loss due to the impecuniosity of the counterparties to swap transactions or their unwillingness to abide by the decision of the English court was not within the scope of the duty of solicitors who had negligently advised on the legal capacity of the counterparties to enter into the transaction - Rix LJ held it was an "information" case because legal capacity was only one factor in the bank's wider assessment of whether to lend the money, with which the solicitors were not concerned:

*"It is of course true that Depfa would not have entered into the transactions at all unless it could be advised that the contracts were valid and within the kommunes' capacity. In effect, that causal connection between advice and loss goes without saying in all such cases. It is not in itself the reason for finding that the scope of duty concerned embraces all the loss consequential upon entering into the*

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<sup>18</sup> [2000] Lloyd's Rep PN 151

<sup>19</sup> At page 160 (per Ward LJ).

<sup>20</sup> [2011] 3 All E.R. 655

*transaction concerned. For these reasons it does not seem to me that it is a sufficient explanation for characterising a case as a category 2 case to say that, without the forthcoming albeit negligent advice, the transaction concerned would not have been "viable". That is simply another way of saying that, if the claimant had not received the advice it did, it would not have entered into the transaction. A lender who is given a negligent overvaluation does not know that his transaction is not viable on the basis of the true value of the property concerned: but if he would not have gone ahead had he known the truth, it is because the transaction was not commercially viable, or not safely so. Alternatively, if he would have gone ahead even on the basis of that true value, for instance because he was content to rest on the safety of the borrower's covenant alone and was not concerned with the passing value of the property, then there has been no reliance and for that separate reason no relevant loss."*<sup>21</sup>

15. Such is the reach of the SAAMCo decision, that it has also been applied in circumstances where its application has been criticised as being unnecessary or inapt<sup>22</sup>. For example, in *Greenway v Johnson Matthey Plc [2016] EWCA Civ 408*, the trial judge (upheld on Appeal) took the view, partially with reference to SAAMCo, that the scope of an employer's duty did not extend to protection against economic or financial loss suffered without personal injury - but this result is not a consequence of the SAAMCo distinction, but the recognised policy that, in general, employers do not owe a duty to protect the employee against incurring pure economic loss (see *Spring v Guardian Assurance Plc [1995] 2 A.C. 296*).

16. As to cases on the other side of the line, where SAAMCo principle has been raised and found not to apply, examples include:

i. *Aneco Reinsurance Underwriting Ltd v Johnson & Higgins Ltd*<sup>23</sup>

The claimant reinsurer proposed to reinsure a book of excess of loss business, but only if he could retrocede \$11m of the risk. He instructed a broker to place the retrocession. The broker reported that he had placed it, but he failed to present the risk fairly to the retrocessionaires, with the result that after the claimant had written the reinsurance his retrocession was avoided. The claimant claimed to be entitled to recover the entire loss, \$35m, which had been incurred on the reinsurance on the basis that he would not have entered into it if he had not been assured that the retrocession was in place and (by implication) enforceable. The House of Lords, in agreement with the Court of Appeal, classified it as an "advice" case (which ironically meant that, although the claimant had apparently been content to assume an exposure of \$35m on the reinsurance with protection by way of retrocession for only

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<sup>21</sup> at para [75]

<sup>22</sup> Douglas Brodie, in his article *SAAMCo - twenty years on*, Rep. B. 2016, 133, 6-7

<sup>23</sup> [2001] 2 All E.R. (Comm) 929)

\$11m, they recovered the whole \$35m as damages, two thirds of which they would have suffered even if the retrocession had been effective). The critical feature of the case which led to this result was that the broker's responsibility was found to extend beyond the placing of the retrocession to the entire transaction including the writing of the reinsurance itself, and particularly reporting to the reinsurer the market's highly adverse assessment of the reinsured risk<sup>24</sup>

ii. *Rubenstein v HSBC Bank*<sup>25</sup>

A bank had given an investor negligent investment advice, which he had relied on, and in consequence suffered a loss on his capital. The Court at first instance recognised this was an advice case, but considered the loss was too remote, and thus was not caused by that negligence but by unprecedented market turmoil.

The Court of Appeal upheld the investor's appeal: unlike the doctor in Lord Hoffman's example, who did not recommend that his patient go mountaineering but merely told him his knee was in good shape, the bank had recommended the investment to the investor : it had "put him in it". Rix LJ recognised that, if such an investment goes wrong, there will nearly always be other causes (bad management, bad markets, fraud, political change etc): but it will be an exercise in legal judgment to decide whether some change in markets is so extraneous to the validity of the investment advice as to absolve the adviser for failing to carry out his duty or duties on the basis that the result was not within the scope of those duties.<sup>26</sup>

Here the loss of capital from market movements was a danger the investor had specifically wanted to guard against, and should be recoverable. Where the obligation of the bank was not merely to avoid injuring the claimant but to protect him from the very kind of misfortune which has come about, it was not helpful to make fine distinctions between foreseeable events which are unusual, most unusual, or of negligible account.

### Criticisms

17. The decision of the House of Lords in SAAMCo has faced significant academic criticism. For example, Professor Jane Stapleton has cogently argued<sup>27</sup> that what makes a negligent valuation wrongful is that it is *careless*, not that it is *not true*. She suggests the House of Lords introduced an inappropriate hint of warranty liability by asking the question what

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<sup>24</sup> see paras 16–17 (per Lord Lloyd of Berwick), para 40 (per Lord Steyn).

<sup>25</sup> [2012] EWCA Civ 1335

<sup>26</sup> At para 103

<sup>27</sup> "Negligent Valuers and Falls in the Property Market" (1997) 113 LQR 1

position the Claimant would have been in had the valuation been true and capping damages on that basis. Rather, when dealing with liability for breach of an obligation of care, the correct test is determining first the consequences of the information being given carelessly and therefore asking where the Claimant would have been had he received a careful valuation (though it is also necessary to determine for which of these consequences liability should attach eg all those which are foreseeable, or only certain ones).

18. Further, Lord Hoffman construed the scope of a valuer's duty in terms of the inaccuracy of the valuation, rather than its carelessness, because he thought it would be paradoxical if the liability of a person who warranted the accuracy of the information should be less than that of a person who made no such warranty but failed to take reasonable care. But Professor Stapleton saw no problem jurisprudentially with a contractual warranty leaving you worse off than an entitlement to due care.
19. She also posits that the central problem is actually drawing the line between types of foreseeable "but for" consequences to divide those which attract liability from those which don't - once done this, can be packaged as anything (duty/ remoteness/ causation etc), but the central problem is the line drawing itself, and being explicit about the factors taken into account, rather than falling back on inappropriate mechanical tests.
20. Indeed, Lord Hoffman's distinction between "advice" and "information" is problematic if slavishly applied because in everyday language these terms are often used synonymously. They are semantically inadequate to convey Lord Hoffman's true distinction effectively - ie where the line should be drawn..
21. The mathematical imprecision of the SAAMCo cap has also been criticised - if the over-valuation is sufficiently great, a lender could recover its entire loss (including capital and interest). Indeed, in the lead case in SAAMCo litigation itself -where York Montague overstated the value of a property by 3x, valuing it at £15, instead of £5M - as the lender advanced £11M and the Property was sold for £2.477M, the £10M cap exceeded the loss. By contrast, if the over-valuation is more modest, the lender's loss is capped. In neither case is any account taken of how the lender's loss is made up eg by identifying that part which results from a fall in the property market. Thus the restriction does not actually systematically exclude loss arising from collateral risks with which the defendant was not concerned.

### **3. The End?: Hughes - Holland v BPE Solicitors<sup>28</sup>**

22. The Supreme Court revisited SAAMCo (for the first time in a solicitor's negligence case) earlier this year in *Hughes-Holland v BPE Solicitors* [2017] UKSC 21, [2017] 2 WLR 1029.

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<sup>28</sup> [2017] UKSC 21, [2017] 2 WLR 1029

## Facts

23. Mr Little told Mr Gabriel that he wanted to borrow £200,000 for the proposed development of a disused heating tower on Kemble Airfield. Mr Gabriel agreed to lend the money on the assumption that it would be used to finance the project. In fact the building belonged to a company which was owned and controlled by Mr Little, and was subject to a bank charge in for £150,000. Mr Little further intended to transfer the building to a special purpose vehicle which was to be used to carry out the development. The purchase by the SPV – which had no other funds – was to be funded from the £200,000.
24. An assistant solicitor at BPE acted for Mr Gabriel. . The solicitor drafted a facility letter and a charge by recycling a document from an earlier abortive deal, which contained statements that the loan moneys would be made available to assist with the costs of the development of the property. This unwittingly confirmed Mr Gabriel's misunderstanding of the arrangement. The project was a failure with no construction work ever carried out, and Mr Gabriel lost all his money.
25. The judge at first instance was not persuaded that the development was inevitably doomed, and awarded damages of £191,808.44, being the whole of Mr Gabriel's losses arising out of the transaction<sup>29</sup>: BPE appealed to the Court of Appeal, which held that £200,000 of expenditure would not have increased the value of the property, that the project was never viable, and the loss had been attributable to Mr Gabriel's commercial misjudgements, and therefore reduced the damages to nil <sup>30</sup>:. Mr Gabriel now bankrupt, his trustee in bankruptcy appealed to the Supreme Court, which dismissed the appeal.

## Reasoning

26. Lord Sumption pointed out that the decision in SAAMCo has often been misunderstood, not least by the writers who have criticised it, and the misunderstandings arose from a tendency to overlook two fundamental features of the reasoning:
  - a. First, where the contribution of the defendant is to supply 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.
  - b. Secondly, the principle has nothing to do with legal causation as that expression is usually understood (despite Lord Hoffmann's later more cautious extra-judicial

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<sup>29</sup> [2013] BCLC 750

<sup>30</sup> (2013) 16 ITEL 567

thoughts<sup>31</sup>) - it is accepted the whole loss suffered by the claimant is properly attributable to them having entered into the transaction as a matter of 'but for' causation. The essence of the decision is the scope of the duty. In SAAMCo, if one started with the proposition that the valuer was responsible for the consequences of the loan being made, there is no logical basis for limiting the recoverable damages to the amount of the over-valuation. But that is not where you start. You start with the proposition that the valuer is only responsible for the lender having too little security. The lender itself is responsible for the decision to lend at all.

### *Advice v Information*

27. Lord Sumption rejected a distinction based on advice/information, because of the descriptive inadequacy of these labels: '*On the face of it they are neither distinct nor mutually exclusive categories. Information given by a professional man to his client is usually a specific form of advice, and most advice will involve conveying information. Neither label really corresponds to the contents of the bottle.*'<sup>32</sup>
28. However, the nature of Lord Hoffman's distinction was clear - it is the difference between the defendant who takes responsibility for guiding the whole decision making process for their client - whose duty is to consider all relevant matters - and the defendant who contributed a limited part of the material on which his client will rely in deciding whether to enter a transaction. In the former case the defendant's responsibility extends to the decision itself, in the latter the client retains responsibility for the decision. 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 it being wrong, and not for the whole financial consequence of entering into the transaction in so far as these might be greater.
29. It is now abundantly clear that the fact that the material contributed by the defendant is known to be critical to the client's decision whether to enter into the transaction or not does not turn it into an "advice" case. Accordingly the Supreme Court over-ruled Chadwick J's reasoning in *Bristol and West Building Society v Fancy & Jackson (a firm)* [1997] 4 All ER 582 and the decision of the Court of Appeal in *Portman Building Society v Bevan Ashford (a firm)* [2000] PNLR 344.
30. Lord Sumption identified a spectrum of possibilities

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<sup>31</sup> 'Causation' (2005) 121 LQR 592

<sup>32</sup> At paragraph 39

*'...because categorisation is inevitably fact-sensitive, I doubt whether it is helpful to describe either of Lord Hoffmann's categories as "normal" or "special". A valuer or a conveyancer, for example, will rarely supply more than a specific part of the material on which his client's decision is based. He is generally no more than a provider of what Lord Hoffmann called "information". At the opposite end of the spectrum, an investment adviser advising a client whether to buy a particular stock, or a financial adviser advising whether to invest self-invested pension fund in an annuity are likely, in Lord Hoffmann's terminology, to be regarded as giving "advice". Between these extremes, every case is likely to depend on the range of matters for which the defendant assumed responsibility and no more exact rule can be stated.'*<sup>33</sup>

31. The critical point on the facts before the Court was that BPE had not assumed responsibility for Mr Gabriel's decision to lend money. Their instructions were confined to drawing up the facility agreement and the charge, nothing more. They knew nothing about the nature of the proposed development, its likely cost, Mr Little's own financial position or the value of the property in its developed or undeveloped state. The only ground upon which the Judge had held BPE were responsible for the decision was that BPE's breach of duty "meant that Mr Gabriel was unable to know the true nature of the loan transaction into which he was entering". But the mere fact that a breach of duty caused a party to proceed where he would otherwise have withdrawn is a characteristic of all "no transaction" cases, and Lord Hoffman discredited the Court of Appeal's distinction between "no transaction" and "successful transaction" cases in SAAMCo.
32. On the footing that BPE were not legally responsible for Mr Gabriel's decision to lend the money, only for confirming his assumption about one of a number of factors in his assessment of the project, the next question the Supreme Court asked themselves was "what, if any, loss was attributable to that assumption being wrong?". The answer was that, even had it been right, Mr Gabriel would still have lost his money because the expenditure of £200,000 would not have enhanced the value of the property - the development would have been left incomplete, the loan unpaid and the property substantially worthless when it came to be sold in a depressed market under the chargee's power of sale. But crucially, none of the loss Mr Gabriel suffered was loss against which BPE was duty bound to take reasonable care to protect him, rather *"it arose from commercial misjudgements which were no concern of theirs"*<sup>34</sup>.

#### *Burden of Proof*

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<sup>33</sup> At paragraph 44

<sup>34</sup> At paragraph 55.

33. While Lord Sumption recognised that the question of who bore the burden of proving facts which engaged the SAAMCo principle was not straightforward, he considered the Court of Appeal had been right to consider it lay upon the Claimant:

*The legal burden of proving any averment of fact lies upon the person who is required to assert it as part of his case. In the ordinary course, this means that the claimant has the burden of pleading and proving his loss, whereas the defendant has the burden of proving facts (such as failure to mitigate) going to avoid or abate the consequent liability in damages. The practical effect of the principle formulated in SAAMCO in cases such as this is to limit the amount of the damages recoverable in respect of loss flowing from the claimant's decision to enter into a transaction. But it is not a principle of assessment, let alone of avoidance or abatement. It is an essential part of the claimant's case that he was owed a relevant duty<sup>35</sup>*

#### *The SAAMCo Cap*

34. Lord Sumption defended the cap as simply a tool for giving affect to the distinction between (i) loss flowing from the defendant's wrong and (ii) loss flowing from the decision to enter into the transaction at all. He rejects the criticism that the restriction does not systematically exclude losses arising from collateral risks with which the Defendant was not concerned, on the basis that:

*"The principle laid down in SAAMCO depends for its application on the award of loss which is within the scope of the defendant's duty, not on the exclusion of loss which is outside it. In a simple case, they may amount to the same thing. It may, for example, be possible in a valuation case to strip out the effect of the fall in the market if that is the only extraneous source of loss. Even there, however, the exercise will be complicated by the common practice of lenders to allow a margin or "cushion" between the loan and the value of the property to allow for contingencies including some adverse market movement. Where the loss arises from a variety of commercial factors which it was for the claimant to identify and assess, it will commonly be difficult or impossible as well as unnecessary to quantify and strip out the financial impact of each one of them. In York Montague's case, the valuer's duty had been to value the property at £5m instead of £15m. Given his duty to exercise reasonable care to get it right, £10m was the measure of the increased risk to which he exposed the lender by getting it wrong. That increased risk was the maximum measure of his own responsibility for what happened, and therefore provided the limit to what was recoverable by way of damages. It is fair to say that as a tool for relating the recoverable damages to the scope of the duty the SAAMCO*

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<sup>35</sup> At paragraph 53

*cap or restriction may be mathematically imprecise. But mathematical precision is not always attainable in the law of damages. As Lord Hobhouse observed in Platform Home Loans Ltd v Oyston Shipways Ltd [2000] 2 AC 190 , 207, the 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.”<sup>36</sup>.*

### **Postscript**

35. *Hughes-Holland* will now be the first, and probably last, port of call for questions of the scope of the duty of care, and identification of recoverable damages, in professional negligence cases.
36. But, while the carefully reasoned judgment of Lord Sumption is a model of clarity,. it doesn't necessarily have the answer to every scope of duty question that might arise in the context even just of solicitor's negligence. For instance, how apt is it to assist our understanding of cases involving a long term retainer for the conduct of litigation (as opposed to a transactional case) , such as *Pearson* above?.

**Holly Doyle, Guildhall Chambers**  
**Ben Holt, Veale Wasborough Vizards**  
**October 2017**

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<sup>36</sup> Paragraph 46

