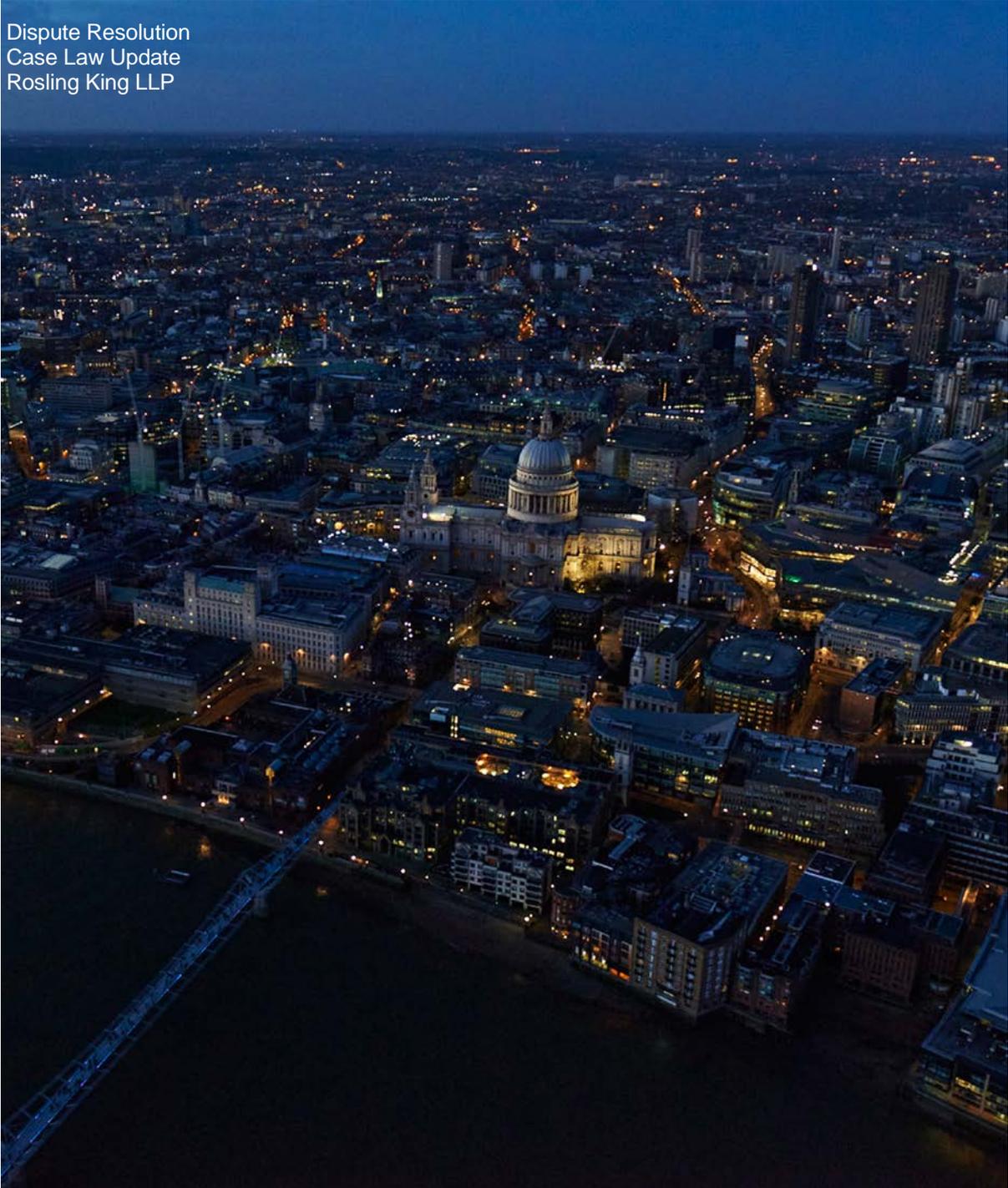


Dispute Resolution
Case Law Update
Rosling King LLP



The Background

In or around 2007, Mr Gabriel lent £200,000 (the “Loan”) to his friend, Mr Little, which Mr Gabriel believed would be used to finance a development project being undertaken by Mr Little. In fact, Mr Little intended to use the funds to discharge the existing charge on the property, not for development purposes.

BPE Solicitors (“BPE”) were instructed by Mr Gabriel to draft the facility letter and the charge for use by the parties. The facility letter prepared by BPE was based on a precedent and incorrectly represented that the purpose of the Loan was to “*assist with the costs of the development of the property*” (which accorded with Mr Gabriel’s understanding of the Loan, but did not reflect the reality of the transaction, of which BPE ought to have been aware). Mr Gabriel’s understanding of the transaction was reinforced by the contents of the facility letter and he signed and advanced the Loan on that basis. The development was a failure and Mr Gabriel was unable to recover the Loan.

Mr Gabriel pursued a number of claims in respect of his loss, including an action in negligence against BPE. He asserted that he was entitled to damages for the entire loss suffered by entering into the transaction on the basis that he would not have done so had he been made aware of the true purpose of the Loan. He argued that BPE had been negligent in their drafting of the facility letter and had further failed to advise him that the Loan would be used to discharge pre-existing debts and not for the purpose of developing the property. BPE argued that Mr Gabriel’s loss arose from a commercial misjudgement, for which they had no responsibility as their instructions were limited to drawing up the facility letter and the charge.

Whilst the High Court found that BPE were negligent and Mr Gabriel was entitled to recover his full loss from them, the Court of Appeal overturned this decision, finding that BPE only owed Mr Gabriel a duty to provide information, not to advise him on what course of action to take or as to the commercial risks of the Loan. It applied the principle from the leading case of *South Australia Asset Management Corp v York Montague Ltd [1997] AC 191* (“SAAMCo”) and held that BPE was only responsible for the foreseeable consequences flowing from the information being wrong or incomplete.

The Court of Appeal held that in light of the commercial features of the development project, there was always a risk that Mr Gabriel would not recover the Loan. In the circumstances, Mr Gabriel’s loss was not within the scope of BPE’s duty.

Mr Gabriel was made bankrupt in March 2014. His trustee in bankruptcy, Mr Hughes-Holland, appealed the Court of Appeal decision to the Supreme Court in December 2016. Judgment was handed down on 22 March 2017.

The Supreme Court dismissed the Appeal and upheld the Court of Appeal decision.

It distinguished those cases where a professional (such as a solicitor) is only supplying information or advice which forms one of a number of factors relevant to the decision whether to proceed with the transaction. For the Appeal to succeed, it must be demonstrated that

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protecting Mr Gabriel from loss of the relevant kind was within the scope of BPE's duty, as established in SAAMCo.

It was held that where the professional's role is to supply only part of the material which the client will consider in making their own decision on the basis of a broader assessment of the risks in the transaction, a professional has no legal responsibility for the client's decision. They are providing information and not advice.

The SAAMCo cap was held to be the tool to be used in assessing the loss flowing from the fact that as a result of the defendant's negligence the information was wrong.

BPE did not assume responsibility for Mr Gabriel's decision to lend the money to Mr Little. They were instructed to draft the Loan documentation and nothing more. As a result, BPE's legal responsibility was to confirm Mr Gabriel's assumption about one of a number of factors in his assessment of the merits of the development project. Even though the information provided by BPE was incorrect, Mr Gabriel would still have lost his money and so none of the loss he suffered was within the scope of BPE's duty. The loss was a consequence of a commercial misjudgement.

Commentary

The decision of the Supreme Court is of significant importance in the area of professional negligence litigation. The decision confirms that professionals, including solicitors, will only be liable for the foreseeable consequences flowing from their negligence. This will have to be assessed case by case on the facts. Relevant facts will be the scope of the client's instructions and whether the professional was asked to provide information or to advise on the transaction as a whole.

This decision also has major impact for mortgage lenders and those instructing professionals as it will be important to consider whether the professional is being retained only to provide information or to advise on the merits of a particular proposed transaction.

For further information, please contact [Georgina Squire](#) or the Partner with whom you usually deal.