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The new era post of professional liability

Lawyers should be concerned, when negotiating the terms of a retainer, to make the scope of their duty clear, explains **Georgina Squire**



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The much anticipated Supreme Court decision in *BPE v Hughes*

Holland in March 2017 has provided guidance on the application of causation principles to claims against professionals, something which the court described as 'one of the main dilemmas of the law of damages'.

Mr Gabriel agreed to lend the sum of £200,000 to Mr Little for the purpose of developing a property which Gabriel understood (erroneously) was owned by Little, or a company controlled by him. Instead, the money was used in the purchase of the property, leaving no surplus for development costs.

BPE Solicitors were instructed to draw up a facility letter and a charge. Unfortunately, when preparing the documents, BPE failed to adapt the precedents used and so, unwittingly,

confirmed Gabriel's incorrect understanding of the purpose of the loan. The transaction was a failure and Gabriel issued a number of claims, including proceedings against BPE for negligence.

The Supreme Court gave detailed consideration to the leading authority in this field, the *SAAMCo* case. Lord Sumption made it clear that, when assessing what loss a negligent professional adviser will be liable for, one must look at the scope of the professional's duty to their client and whether the loss complained of flows from it.

The court highlighted that a professional adviser will usually only supply information by way of pieces of information on which the client will then make their own decision about the transaction – in this instance the decision to lend. The professional can only be responsible for the foreseeable consequences of the information they are required to give being wrong. Where a decision is made on a broader assessment of the risks, or on a wider transaction, unless specifically advised to be responsible for it, the professional adviser is unlikely in future to have any responsibility for that decision, or as a result, the losses which flow from it.

On the facts before it, the Supreme Court determined that, while negligent, BPE did not assume responsibility for

Gabriel's decision to lend. They were instructed solely to draw up the facility agreement and the charge. Although the documentation was negligently drafted, this was not the cause of Gabriel's loss, which arose from his own commercial misjudgement and failure to consider the risks of the transaction. The transaction would not have been viable even if Gabriel's understanding of it had been correct. As a result, Gabriel could not recover his losses associated with the failed loan from BPE.



It is expected that there will be satellite litigation on the questions of scope of duty and loss

Application in practice

The Supreme Court distinguished between professionals providing advice and those providing information to their clients. They used the example of an insurance or reinsurance broker as someone who is often instructed to put together a transaction – when they find and negotiate with and

then structure the insurers' participation in a policy.

Lord Sumption indicated that they are likely still to be liable for all the consequences of the transaction failing as they were instrumental in its creation. That situation is now distinguished from the likes of a solicitor acting for a mortgage lender, who is on a retainer only to advise on specific parts of a transaction and so will be responsible only for the losses which flow directly from their negligence.

Going forward, the terms of a professional's retainer will be central to establishing the scope of their duty to their client. If it is intended that the professional should be responsible for all aspects of the transaction, this should be made clear in the retainer. In the absence of such provisions, claimants are unlikely to recover their full loss in a negligence claim. Conversely, professionals should be concerned, when negotiating the terms of a retainer, to make the scope of their duty clear – including whether they are giving advice on the transaction as a whole, or providing information in relation to a part or parts of it.

In practice, the application of these new principles is unlikely to be straightforward until we see how the courts apply them in future cases. It is expected that there will be satellite litigation on the questions of scope of duty and loss. **SJ**