



However, the Court of Appeal held that the loss was attributable to Mr Gabriel's own misjudgement and reduced damages to nil.

Advice and information cases

The Supreme Court unanimously upheld the Court of Appeal decision, with Lord Sumption giving the leading judgment.

Lord Sumption held that the distinction between advice and information cases has caused confusion because of the 'descriptive inadequacy of those labels' and that what is required is an analysis of what made the defendant's conduct wrongful.

He held that where an adviser is retained to advise a client whether to enter into a transaction, their duty will be to consider all relevant matters. If anything is overlooked or misjudged, and that proves critical to the decision, then the client will be entitled to recover all loss arising from the transaction.

Where an adviser only contributes part of the information on which the client relies in making the decision whether to enter into a transaction, other relevant considerations are matters for the client. The adviser will only be only liable for the financial consequences of the information being wrong and not all loss arising from the transaction, if this is greater. The fact that the information provided by the adviser is critical to the decision to enter into the transaction will not turn it into an advice case.

The Supreme Court's decision overruled the *Steggles Palmer* and *Colin Bishop* decisions, holding that the solicitors had not assumed responsibility for identifying all the matters relevant to the lenders' decision or for advising them whether to proceed. The duty of solicitors depended on their retainer, which was agreed before any breach of duty occurred. These cases fell within the information category.

Duty of care

The legal burden of proving any point rests with the person who is asserting it as part of their case. In these *SAAMCo* cases, the lender is required to prove that it was owed the relevant duty of care.

BPE's instructions were limited to drafting

the facility agreement and the charge. They did not know about the likely costs of the proposed development, the financial capacity of Mr Little to fund the development, or the value of the property in its developed state.

BPE was not legally responsible for Mr Gabriel's decision to lend the money but only for confirming his assumption about one of a number of factors in his assessment of the transaction. If that had been explained, 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 still not have been completed nor the loan repaid.

Future guidance

The Supreme Court has made it clear that:

- An analysis of the defendant's conduct is required;
- Where an adviser is retained to advise a client whether to enter into a transaction, the client will be entitled to recover all loss arising from the transaction;
- Where an adviser is retained to provide part of the information on which the client is relying, the claim will fall into the information category and the adviser will only be only liable for the financial consequences of the information being wrong;
- The fact that the information provided by the adviser is critical to the decision will not turn it into an advice case;
- The duty owed by a solicitor will depend on the retainer; and
- The burden of proof lies on the claimant to prove that it was owed a duty of care.

The decision has been helpful in providing guidance on the application of the *SAAMCo* principle and the distinction between advice cases and information cases. We would recommend that solicitors and their professional indemnity insurers resist any attempt by lenders to alter the terms of retainers, including the Council of Mortgage Lenders' handbook, expanding their duty of care to the role of adviser, thereby becoming the 'underwriter of the financial fortunes of the whole transaction'.