Hilary Term
[2017] UKSC 21
On appeal from: [2013] EWCA Civ 1513

JUDGMENT

BPE Solicitors and another (Respondents) *v* Hughes-Holland (in substitution for Gabriel) (Appellant)

before

Lord Neuberger, President
Lord Mance
Lord Clarke
Lord Sumption
Lord Hodge

JUDGMENT GIVEN ON

22 March 2017

Heard on 14 and 15 December 2016

Appellant	*Respondents*
David Halpern QC	Roger Stewart QC
Adam Chichester-Clark	Scott Allen
(Instructed by Roose + Partners)	(Instructed by Beale & Company Solicitors LLP)

LORD SUMPTION: (with whom Lord Neuberger, Lord Mance, Lord Clarke and Lord Hodge agree)

1. The issue on this appeal is, in summary, what damages are recoverable in a case where (i) but for the negligence of a professional adviser his client would not have embarked on some course of action, but (ii) part or all of the loss which he suffered by doing so arose from risks which it was no part of the adviser's duty to protect his client against. The problem may be illustrated by one of the most celebrated legal parables of modern times, the story of the mountaineer's knee devised by Lord Hoffmann in the course of argument in *South Australia Asset Management Corpn v York Montague Ltd* [1997] AC 191, at p 213:

> "A mountaineer about to undertake a difficult climb is concerned about the fitness of his knee. He goes to a doctor who negligently makes a superficial examination and pronounces the knee fit. The climber goes on the expedition, which he would not have undertaken if the doctor had 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."

Like all parables, this one over-simplifies the issue and will not bear too much analysis. But it serves the purpose which its author intended, of introducing one of the main dilemmas of the law of damages.

The facts

2. Mr Richard Gabriel was adjudicated bankrupt in March 2014 and the present appeal is brought by his trustee in bankruptcy, Mr Peter Hughes-Holland. The appeal arises out of events in the days of his prosperity, when he was a semi-retired businessman with money to invest. The Judge described him as "astute", a "hard-headed businessman" and "undoubtedly knowledgeable in the field of property and generally conversant with property dealing."

3. Mr Peter Little was a builder and developer. He operated mainly through a company called High Tech Fabric Maintenance Ltd, which he owned and controlled. Until the events now to be described, Mr Little was a personal friend of Mr Gabriel.

4. In November 2007, the two men met in a pub. Mr Little told him that he was looking to borrow £200,000 in connection with a disused heating tower situated on Kemble Airfield in Gloucestershire, called Building 428. Mr Little gave Mr Gabriel to understand that the property belonged to him or at any rate to a company which he controlled. He said that planning permission had been granted for the development of the building as offices. He put forward a figure of about £200,000 for development costs, on the basis that he would do the building work himself using relatively inexpensive construction methods. Although Mr Little did not say so in terms, Mr Gabriel assumed that the £200,000 would be used to finance the development. After the meeting, Mr Gabriel visited the site, and formed the view that Building 428 was worth about £150,000 and that once developed it would be worth more than £400,000. Taking Mr Little's estimate of development costs at face value, he decided that the project was viable and that he would lend the £200,000 that Mr Little needed.

5. From the outset, Mr Little's intentions differed from the assumptions of Mr Gabriel. In the light of the Judge's findings, this must be regarded as a misunderstanding. Building 428 belonged to High Tech, subject to a charge in favour of a bank which secured a loan of £150,000. Mr Little intended to transfer it to a special purpose vehicle called Whiteshore Associates Ltd, which was to be used to carry out the development. Whiteshore was to pay £150,000 to High Tech for the building, which would be paid over to the bank in discharge of the loan and the charge. The purchase by Whiteshore was to be funded from the £200,000 borrowed from Mr Gabriel and the balance used to meet High Tech's liability for VAT. The Judge found that Mr Gabriel knew nothing about these plans, which were entirely inconsistent with his understanding of the transaction and would not have been acceptable to him. They meant that Mr Little, instead of contributing a property to the project and using the loan to develop it, proposed to contribute nothing to the project. The loan money would in effect be used to pay off a debt owed by his principal operating company to the bank, leaving nothing to fund the development unless it could be found from other sources. The Judge found that Whiteshore never had any assets or income other than Mr Gabriel's loan and the property purchased with it, and that there was some evidence that Mr Little's personal finances were under "some strain" from at least this time.

6. Mr Richard Spencer was an assistant solicitor at BPE Solicitors in Cheltenham. Mr Gabriel had instructed him earlier that year, in connection with a proposal to lend money for a rather similar scheme of Mr Little's concerning another property, which in the event had not proceeded. Mr Gabriel decided to instruct him to draw up a facility letter and a charge over Building 428. Mr Spencer received his instructions in a rather unconventional way. The Judge found that they came not from Mr Gabriel himself but from Mr Little, in a voicemail message left on his telephone. Mr Little told him that he intended to sell Building 428 to Whiteshore and that Mr Gabriel would lend him the money. Mr Spencer at no time sought

confirmation or clarification of these instructions from Mr Gabriel himself. He proceeded to draw up the facility letter and the charge. Unfortunately, he used as a template for the facility letter the document drafted for the abortive transaction earlier in the year. This contained statements to the effect that the loan moneys "will be made available as a contribution to the costs of the development of the property", and that the purpose of the loan was to "assist with the costs of the development of the property." Mr Spencer did not notice these statements and failed to remove them. They accordingly found their way into the documentation for Building 428 as executed, although they did not accord with Mr Little's actual plans or with the instructions that Mr Spencer had received from him. They did, however, accord with Mr Gabriel's understanding of what was proposed and served to confirm it.

7. On 7 December 2007 there was a completion meeting at BPE's offices attended by (among others) Mr Gabriel, Mr Spencer, Mr Little and his solicitor, The Judge found that at the meeting Mr Gabriel learned for the first time that Building 428 belonged to High Tech, that it was charged to the bank and that it was intended to discharge the bank's charge. But he was not told that this was to be funded with the loan moneys. The Judge found that Mr Gabriel was taken through the facility letter and read and noted the statements that the loan moneys were to be used to fund the development. He signed it and advanced the money on that basis. The judge found that he would not have done so if he had known the use which Mr Little in fact proposed to make of the loan moneys. The terms of the facility letter were that the loan would be drawn down on 13 December 2007 and repaid on 12 March 2009, together with a lump sum of £70,000, described as Mr Gabriel's "return".

8. The existing planning permission had been granted in February 2004 and was due to expire in February 2009. It provided for 227 square metres (2,659 square feet) of office accommodation. The Judge found that Mr Gabriel understood that the development was to be carried out in accordance with the existing planning permission, but the details do not appear to have been discussed at the time of the transaction. He recorded Mr Little's evidence that he had always had it in mind to get planning permission for a somewhat larger office development on the site and that this possibility had been discussed with Mr Gabriel at the time of the transaction. The Judge made no finding to this effect, but it is consistent with Mr Gabriel's evidence that he was told at the outset that the square footage would be between 3,500 and 4,000, which substantially exceeded the square footage allowed by the existing planning permission. At some stage which is unclear but appears to have been early in 2008, Mr Little applied for an enhanced planning permission. The Judge recorded various conversations in the course of 2008 and 2009 in which he told Mr Gabriel about unspecified difficulties and delays in obtaining it. In July 2009, a further application was made for enhanced planning permission, which was granted in August 2009. The new planning permission was for a development of 398 square metres (3,283 square feet), including 103 square metres (1,108 square feet) of ancillary storage, plant and equipment space and staff facilities. This roughly

corresponded to the 3,500 to 4,000 feet which Mr Gabriel said had been mentioned to him in 2007. It represented a 45% increase in the usable office space and a 75% increase in the gross developed space envisaged in the original planning permission of 2004.

9. The transaction was a failure and Mr Gabriel lost all his money. The repayment date (12 March 2009) came and went without any significant construction work being carried out. No attempt was ever made to develop the property in accordance with either planning permission. In late 2009, Mr Gabriel took steps to exercise his power of sale. The property was put onto the market, but failed to find a buyer. Finally, in July 2010, it was sold by auction and fetched £13,000, which was entirely consumed by the expenses of sale. Whiteshore never made any payments under the facility agreement, and was eventually dissolved. Mr Gabriel recovered nothing except £8,191.56 which was paid by Mr Little personally.

The proceedings

10. Mr Gabriel sued Mr Little, Whiteshore and High Tech for fraud and negligent misrepresentation. He sued BPE for dishonest assistance in a breach of an implied trust of the loan moneys to apply them to the cost of development, and for negligence. The action was tried in May 2012 by Mr Robert Englehart QC sitting as a Deputy Judge of the Chancery Division. He dismissed all the claims against Mr Little, Whiteshore and High Tech. He held that there was no implied trust of the loan moneys, so that BPE could not be liable for dishonestly assisting a breach of it. Turning to the case against BPE in negligence, the Judge held that they had no duty to advise Mr Gabriel about the commercial risks associated with the project, but should have explained to him that the funds would be applied for Mr Little's benefit and that in reality he was not putting anything into the project. Mr Spencer failed to do that, and indeed negligently misled Mr Gabriel by allowing statements to appear in the loan documentation which suggested the opposite.

11. At the trial there was an issue, which assumed decisive importance on the subsequent appeals, as to whether if the £200,000 had in fact been spent on the development, it would have enhanced the value of the property. Mr Gabriel's case was 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 use of the loan moneys. BPE's case was that Mr Gabriel's loss arose from Mr Little's over-optimistic assessment of the likely cost of development, coupled with his own commercial misjudgements about the likely value of the property before and after development. Mr Spencer had no knowledge of or responsibility for these matters. His instructions were limited to drawing up the facility letter and the charge. BPE sought to make this case by proving that the development project was never viable. The costs would have been

greatly in excess of £200,000, with the result that when the money ran out the development would have been left incomplete and the property unsaleable. Mr Gabriel would therefore have suffered the same loss even if the transaction had proceeded as he had been led to expect.

12. The judge accepted Mr Gabriel's case on this point. The critical finding was at para 90 of his judgment:

> "I agree with Mr Davie that BPE would not be liable if what Mr Gabriel had in mind, that is expenditure of about £200,000 on a property which would not have an acquisition cost, was unviable and bound to fail so that Mr Gabriel would never have recovered his loan. Certainly, the evidence was to the effect that what was being proposed for Building 428 was likely to cost far in excess of £200,000. Nevertheless, I am not persuaded that no development whatsoever, particularly with Mr Little's own company doing the construction, could have been achieved so as to make Mr Gabriel's investment of £200,000 a viable proposition. Clearly, there would have been risks, not least from the unusual nature and location of the property, and it is quite possible that development plans would have required re-thinking. But, I do not think it would be right for me to conclude that this was necessarily going to be a doomed venture for Mr Gabriel from the outset."

13. Having concluded on these grounds that Mr Gabriel might have recovered his money if the transaction had been as he thought it was, the Judge held that any loss resulting from the transaction was foreseeable, and recoverable subject to contributory negligence and mitigation. He assessed it at £191,808.44, being the advance less the amount received from Mr Little, to which statutory interest was added from the date of drawdown.

14. The Court of Appeal allowed the appeal. The leading judgment was given by Gloster LJ, with which Fulford and Maurice Kay LJJ agreed. She found (para 81(ii)):

> "There was no positive evidence to the effect that, if £200,000 had been spent on developing the property, its value would have been such as to ensure recovery of Mr Gabriel's loan or, in other words, that the transaction was viable. On the contrary, such evidence as was before the judge suggested that expenditure in such amount would not have increased the value of the property. As Mr Stewart submitted, the judge, in my

> view wrongly, reversed the burden of proof by finding that the defendants had not persuaded him that no development was possible. That the value of the developed property, by the utilisation of funds of £200,000, would have been such as to ensure recovery of Mr Gabriel's loan was a matter for Mr Gabriel to allege and to prove."

The Court of Appeal accordingly held that the whole loss was attributable to Mr Gabriel's misjudgements and reduced the damages to nil. They also held, for largely overlapping reasons, that had there been any recoverable loss, it would have been reduced by 75% for contributory negligence.

15. Before this court, Mr Halpern QC, representing the Trustee, has attacked this result on a broad front. He submitted (i) that the Court of Appeal was not entitled to substitute its own assessment of the viability of the development project for that of the judge, and (ii) that even if it was entitled to do so, Mr Gabriel was entitled in law to the whole loss flowing from a transaction into which he would not have entered but for Mr Spencer's negligence.

The viability of the development project

16. It is necessary to start with this question, because it provided the essential foundation for the Court of Appeal's reduction of the damages to nil. Mr Stewart QC, who appeared for BPE, accepted that unless the Court of Appeal was right to find that the development project was unviable, the judge's award of damages must be restored, subject only to abatement for contributory negligence.

17. I have cited the Judge's conclusion above. Gloster LJ appears to have rejected it mainly on the ground that he applied the wrong burden of proof. She considered that Mr Gabriel had the burden of proving that the project would have been viable, and had failed to produce positive evidence to that effect. She did, however, observe that "such evidence as was before the Judge" suggested that the expenditure would not have enhanced the value of the property, albeit without identifying what evidence she had in mind.

18. I shall deal later in this judgment with the burden of proof, which is a question of some general importance. But it is not decisive of the issue of fact, because in my judgment the evidence sufficiently showed that the value of the property would not have been enhanced by the expenditure of £200,000 on its development. My reasons are as follows:

(1) Building 428 was on any view an unattractive investment prospect. It was an old and run-down disused heating tower. The ground was contaminated by hydrocarbons, and to comply with the conditions of the two planning permissions, it would have been necessary to spend about £30,000 on decontamination before any development could start. The Judge recorded the view of the auctioneers employed in July 2010 (Allsop) that it would be a difficult lot to sell. Some of their reasons reflected the difficult conditions of the commercial property market in the aftermath of the financial crisis. But others would have been relevant factors at any time. In their opinion, the building was in an unattractive location for a developer, likely to have high development costs and unlikely to attract much interest. This judgment was borne out by the result of the auction.

(2) The evidence clearly established that expenditure on development would have enhanced the value of the property only if the development had been substantially completed. It follows that although Mr Gabriel's interest was in the value of the property as security for his loan, this was dependent on the viability of the development project, and in particular on there being enough money to complete it. It was not suggested that Mr Little would have had any resources available for completing it other than the £200,000 lent by Mr Gabriel. Mr Gabriel's prospect of getting his money back therefore depended mainly on the reliability of Mr Little's estimate of about £200,000 for the development costs.

(3) At the trial, most of the evidence about the costs of development related to the larger development envisaged in the planning permission of July 2009. It showed that Mr Middleton, an experienced quantity surveyor consulted by Mr Gabriel in November 2009, had estimated the cost of development in accordance with the 2009 planning permission at £468,359.98, not including VAT, fees or plastering to the water tower. Both of the expert quantity surveyors who gave evidence at the trial regarded this figure as too low. One of them (Mr Gabriel's expert) estimated the costs at £667,804.73, not including fees. All of these figures implied a large loss had the 2009 project ever been completed.

(4) What is less clear is the relationship between the cost of development according to the 2009 planning permission and the cost of development according to the somewhat more modest development authorised by the 2004 planning permission which had existed at the time of the transaction in 2007. One would expect the 2007 project to have cost less. It was, however, Mr Gabriel's own pleaded case that the "nature and cost of the required development/refurbishment" did not materially increase between November 2007 and November 2009. This may have reflected his understanding that a development of 3,500 to 4,000 square feet had always been envisaged. But

whatever the reason, he did not resile from it and the cross-examination by BPE's counsel of his expert valuer Mr Heming proceeded on that basis. Mr Heming accepted (on the same basis) that although development values were higher in 2007 than in 2009, a valuer of the security in 2007 would have concluded that the development project was unviable because £200,000 would not have been enough to complete it. Since the cost of development according to the 2009 plans was well over double and possibly as much as three and a half times Mr Little's estimate of 2007, the Judge's remark (para 49) that the figures "cast doubt" on the latter's reliability, seems to be something of an understatement. He did not make a firm finding of his own about the development costs, but accepted (para 90) that they were likely to be "far in excess of £200,000".

(5) This is consistent with Mr Little's conduct between 2007 and 2009. For most of that period, he was attempting to obtain the planning permission for the enlarged scheme that was eventually granted in August 2009. The probability must be that this was because the economics of the 2007 project were even less satisfactory than those of its successor.

(6) Against this background, it is right to draw attention to the extremely tentative and conditional basis of the Judge's conclusion. Having found that the development would cost much more than £200,000, he suggested that it was nevertheless "quite possible" that the development plans would have required some unspecified "rethinking", and declared that he was "not persuaded that no development whatever, particularly with Mr Little's own company doing the construction" would have enabled Mr Gabriel to recover his £200,000. He appears to have envisaged some unspecified modification to the plans. However, no such modification was proposed during the period between the making of the loan agreement and Mr Gabriel's exercise of his power of sale, and none was canvassed with the witnesses. It is therefore difficult to attach any weight to the hypothesis on which the Judge appears to have proceeded. What stands out is that even on that hypothesis, the Judge made no finding that it would have enabled Mr Gabriel to recover his investment, only that the possibility could not be ruled out. In the face of the evidence which I have summarised, this falls a long way short of a finding that this project was viable at any stage.

19. In my judgment, irrespective of the incidence of the burden of proof, the Court of Appeal was entitled to find that the expenditure of £200,000 would not have enhanced the value of the property. It follows from this that the factual basis of BPE's case on damages is sound. It remains to consider its legal basis.

The SAAMCO Principle

20. Courts of law, said Lord Asquith in *Stapley v Gypsum Mines Ltd* [1953] AC 663, 687, "must accept the fact that the philosophic doctrine of causation and the juridical doctrine of responsibility for the consequences of a negligent act diverge." What Lord Asquith meant by the philosophic doctrine of causation, as he went on to explain, was the proposition that any event that would have not have occurred but for the act of the defendant must be regarded as the consequence of that act. In the law of damages, this has never been enough. 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. The reason, as Lord Asquith pointed out, is that the law is concerned with assigning responsibility for the consequences of the breach, and a defendant is not necessarily responsible in law for everything that follows from his act, even if it is wrongful. A variety of legal concepts serves to limit the matters for which a wrongdoer is legally responsible. Thus the law distinguishes between a mere precondition or occasion for a loss and an act which gives rise to a liability to make it good by way of damages: *Galoo Ltd v Bright Grahame Murray* [1994] 1 WLR 1360. Effective or substantial causation is a familiar example of a legal filter which serves to eliminate certain losses from the scope of a defendant's responsibility. It is an aspect of legal causation. So too is the rule that the defendant cannot be held liable for losses that the claimant could reasonably have been expected to avoid: *Koch Marine Inc v d'Amica Societa di Navigazione ARL (the "ELENA D'AMICO")* [1980] 1 Lloyd's Rep 75. But the relevant filters are not limited to those which can be analysed in terms of causation. Ultimately, all of them depend on a developed judicial instinct about the nature or extent of the duty which the wrongdoer has broken.

21. This is not a new idea, although it took some time for its significance to be fully appreciated. In *Roe v Ministry of Health* [1954] 2 QB 66, 85, Denning LJ pointed out that questions of duty, causation and remoteness were intimately linked and all directed to the same fundamental question: "Is the consequence fairly to be regarded as within the risk?" In *Council of the Shire of Sutherland v Heyman* (1985) 157 CLR 424, 487, Brennan J pointed out that the statutory duty of a local authority to approve building plans could not be made the basis of a general duty to protect a subsequent purchaser against even foreseeable problems in the course of construction:

> "It is impermissible to postulate a duty of care to avoid one kind of damage - say, personal injury - and, finding the defendant guilty of failing to discharge that duty, to hold him liable for the damage actually suffered that is of another and independent kind - say, economic loss. Not only may the respective duties differ in what is required to discharge them; the duties may be owed to different persons or classes of persons. That is not to

> say that a plaintiff who suffers damage of some kind will succeed or fail in an action to recover damages according to his classification of the damage he suffered. The question is always whether the defendant was under a duty to avoid or prevent that damage, but the actual nature of the damage suffered is relevant to the existence and extent of any duty to avoid or prevent it."

22. In *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound)* [1961] AC 388, the Privy Council reframed an issue which had been presented as depending on remoteness of damage in terms of the scope of the duty owed in tort. Viscount Simonds, delivering the advice of the Board, observed, at p 425:

> "It is, no doubt, proper when considering tortious liability for negligence to analyse its elements and to say that the plaintiff must prove a duty owed to him by the defendant, a breach of that duty by the defendant, and consequent damage. But there can be no liability until the damage has been done. It is not the act but the consequences on which tortious liability is founded. Just as (as it has been said) there is no such thing as negligence in the air, so there is no such thing as liability in the air … It is vain to isolate the liability from its context and to say that B is or is not liable, and then to ask for what damage he is liable. For his liability is in respect of that damage and no other."

23. In *Caparo Industries plc v Dickman* [1990] 2 AC 605, the House of Lords held that a company's auditor was not liable for negligent statements in his statutory report which led the plaintiff to make an offer for the company's shares. The reason was that the purpose of the auditor's report was limited to enabling shareholders to make informed decisions about the exercise of their rights under the constitution of the company. It followed that no duty was owed to non-shareholders. It also followed that, although a duty was owed to shareholders, the auditor's legal responsibility to them did not extend to investment decisions that they might make in reliance on his report. Lord Bridge, citing Brennan J's observation, said (p 627):

> "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."

Lord Oliver in the same case at p 654 said:

> “To widen the scope of the duty to include loss caused to an individual by reliance upon the accounts for a purpose for which they were not supplied and were not intended would be to extend it beyond the limits which are so far deducible from the decisions of this House.”

24. This principle underwent considerable development as a result of a number of cases arising from the negligent valuation of property for security purposes before the property crash of the early 1990s. The leading case is the decision of the House of Lords in *South Australia Asset Management Corpn v York Montague Ltd* [1997] AC 191 (“*SAAMCO*”), but the principle for which it is authority was subsequently elaborated in two further decisions of the House, *Nykredit Mortgage Bank Plc v Edward Erdman Group Ltd (formerly Edward Erdman) (No 2)* [1997] 1 WLR 1627 and *Platform Home Loans Ltd v Oyston Shipways Ltd* [2000] 2 AC 190.

25. The *SAAMCO* litigation involved a number of actions which had been decided together in the High Court by Phillips J under the title *Banque Bruxelles Lambert SA v Eagle Star Insurance Co* [1995] 2 All ER 769. He held that the valuer was not liable for that proportion of the lender’s loss on the loan which was attributable to the fall in the market after the valuation date, even though (i) 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 even have lent a lesser sum, either because a lesser loan would have fallen outside its lending guidelines or because it would have been of no interest to the borrower; and (iii) adverse market movements were foreseeable. The reason, as expressed in the submission of counsel which Phillips J accepted (p 805), was that the lender

> “deliberately assumed the risk that they might suffer loss as a result of a fall in the property market. They did not rely upon John D Wood’s valuation to protect them against that risk. In these circumstances John D Wood owed no duty to protect BBL from this type of loss.”

At pp 806-807, Phillips J stated the principle as follows:

> “Where a party is contemplating a commercial venture that involves a number of heads of risk and obtains professional advice in respect of one head of risk before embarking on the venture, I do not see why negligent advice in respect of that head of risk should, in effect, make the adviser the underwriter of the entire venture. More particularly, where the negligent advice relates to the existence or amount of some security

> against risk in the venture, I do not see why the adviser should be liable for all the consequences of the venture, whether or not the security in question would have protected against them."

26. The Court of Appeal [1995] QB 375 reversed Phillips J's decision on damages and rejected the principle which he had applied. They distinguished between "no transaction cases", in which the transaction would not have proceeded but for the defendant's negligence and "successful transaction" cases in which it would have proceeded but possibly on different terms or for a different amount. The Court of Appeal held that once it was proved that the lender would not have made the particular loan but for the valuer's negligence, the valuer was liable for the entire loss flowing from the transaction so far as it was foreseeable.

27. The House of Lords allowed the appeal. They accepted the principle underlying Phillips J's decision, but their reasoning was more elaborate and the way in which they applied it was different. The leading speech was delivered by Lord Hoffmann, with whom the rest of the Appellate Committee agreed. The essential distinction which underlies the whole of his analysis is between the assessment of the loss caused by the breach of duty and the extent of the defendant's duty to protect the claimant against it. Referring to the principle applied by the Court of Appeal, that damages should be such as to put the claimant as nearly in the position that he would have been in had the breach not occurred, Lord Hoffmann said, at p 211:

> "I think that this was the wrong place to begin. Before one can consider the principle on which one should calculate the damages to which a plaintiff is entitled as compensation for loss, it is necessary to decide for what kind of loss he is entitled to compensation. A correct description of the loss for which the valuer is liable must precede any consideration of the measure of damages. For this purpose it is better to begin at the beginning and consider the lender's cause of action."

28. He then referred to the nature of the valuer's duty in the case before him. The purpose of the valuation was to form part of the material on which the lender was to decide whether, and if so how much he would lend, what margin, if any would sufficiently allow for foreseeable valuation errors or a future fall in the market, accidental damage to the property and any other contingencies that may happen.

> "On the other hand, the valuer will not ordinarily be privy to the other considerations which the lender may take into account, such as how much money he has available, how much the borrower needs to borrow, the strength of his covenant, the

> attraction of the rate of interest or the other personal or commercial considerations which may induce the lender to lend."

Referring to the decision in *Caparo*, he said:

> "A duty of care such as the valuer owes does not however exist in the abstract. A plaintiff who sues for breach of a duty imposed by the law (whether in contract or tort or under statute) must do more than prove that the defendant has failed to comply. He must show that the duty was owed to him and that it was a duty in respect of the kind of loss which he has suffered."

29. Against this background, Lord Hoffmann expressed the principle thus, at p 214:

> "It is that 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."

30. Lord Hoffmann did not, however, assess the damages as Phillips J had done, by simply stripping out the proportion of the loss that could be attributed to the fall in the market. Instead, he limited the damages 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 had been correct: see pp 222-223. In effect this meant that although the measure for breach of warranty differs from the measure of damages for breach of a duty of care, the loss attributable to the negligence which caused the valuation to be wrong could not exceed what the lender could have claimed if the valuer had warranted that it was right. Lord Hoffmann derived this principle from the earlier decisions of the House in *Swingcastle Ltd v Alastair Gibson* [1991] 2 AC 223 and *Banque Keyser Ullmann SA v Skandia (UK) Insurance Co Ltd* [1991] 2 AC 249. He justified it on more general grounds at pp 213-214:

> "It would seem paradoxical that the liability of a person who warranted the accuracy of the information should be less than that of a person who gave no such warranty but failed to take reasonable care."

31. The principle thus stated is, as Professor Murdoch has described it in an illuminating article, an "essentially negative one": 'Negligent Valuers, Falling Markets and Risk Allocation', [2000] 8 *Tort Law Review*, 183, 198. The lender is prima facie entitled to the entire loss flowing from his entry into the loan transaction, *except* those which would still have been suffered if the property had been worth what the valuer said it was worth. In the follow-on appeal in *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd* [1997] 1 WLR 1627, Lord Nicholls, with the concurrence of the rest of the Appellate Committee, described the two stages of the inquiry at p 1631. The first stage in a case where the lender would not have entered into the transaction but for the breach of duty, was to compare the position had he not entered into it with his actual position. This meant comparing the amount of the loan with the value of the real and personal rights obtained. Turning to the second stage, he said:

> "However, for the reasons spelled out by my noble and learned friend, Lord Hoffmann, in the substantive judgments in this case [1997] AC 191, 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 even if the advice had been correct. He is not liable for these because they are the consequences of risks the lender would have taken upon himself if the valuation advice had been sound. As such they are not within the scope of the duty owed to the lender by the valuer."

32. This has commonly been referred to as the "SAAMCO cap", as indeed it was in the course of argument in this case. But Lord Hoffmann himself, at pp 219-220, rejected the label, essentially because the two stages described by Lord Nicholls were directed to different things. The first involved ascertaining what loss the claimant would have avoided if the defendant had performed his task carefully, as he should have done, whereas the second involved awarding only that part of the loss which was within the scope of the defendant's duty. He put it this way:

> "An alternative theory was that the lender should be entitled to recover the whole of his loss, subject to a 'cap' limiting his recovery to the amount of the overvaluation. This theory will ordinarily produce the same result as the requirement that loss should be a consequence of the valuation being wrong, because the usual such consequence is that the lender makes an advance which he thinks is secured to a correspondingly greater extent. But I would not wish to exclude the possibility that other kinds of loss may flow from the valuation being wrong, and in any case, as [Counsel] said on behalf of the defendants York Montague Ltd, it seems odd to start by choosing the wrong measure of damages (the whole loss) and then correct the error by imposing a cap. The appearance of a cap is actually the result of the plaintiff having to satisfy two separate requirements: first, to prove that he has suffered loss, and, secondly, to establish that the loss fell within the scope of the duty he was owed."

33. Lord Hoffmann made a similar point in his speech in the *Nykredit* appeal, again with the concurrence of the rest of the Committee. After explaining that the true measure of damages was the loss attributable to the information being wrong, he said:

> "It is of course also the case that the lender cannot recover if he is, on balance, in a better or no worse position than if he had not entered into the transaction at all. He will have suffered no loss. The valuer does not warrant the accuracy of his valuation and the lender cannot therefore complain that he would have made more profit if the valuation had been correct. But in order to establish a cause of action in negligence he must show that his loss is attributable to the overvaluation, that is, that he is worse off than he would have been if it had been correct."

The result, as Lord Hobhouse put it in *Platform Home Loans Ltd v Oyston Shipways Ltd* [2000] 2 AC 190, 210, is that the damages

> “are confined to that part of the plaintiffs’ basic loss caused by the defendants’ negligence which can be equated in money terms to the amount of the defendants’ overvaluation.”

34. The decision in *SAAMCO* has often been misunderstood, not least by the writers who have criticised it. The misunderstanding arises, I think, from a tendency to overlook two fundamental features of the reasoning.

35. The first is that 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. Lord Hoffmann made this point in the *Nykredit* case. Speaking of the decision in *SAAMCO*, he said (p 1638):

> “The principle approved by the House was that the valuer owes no duty of care to the lender in respect of his entering into the transaction as such and that it is therefore insufficient, for the purpose of establishing liability on the part of the valuer, to prove that the lender is worse off than he would have been if he had not lent the money at all. What he must show is that he is worse off as a lender than he would have been if the security had been worth what the valuer said.”

This is why in *SAAMCO* itself Lord Hoffmann had rejected the distinction made by the Court of Appeal between “no transaction” and “successful transaction” cases. It was “irrelevant to the scope of the duty of care”: p 218C-D, G.

36. The second fundamental feature of the reasoning follows from the first. It is that the principle has nothing to do with the causation of loss as that expression is usually understood in the law. Lord Hoffmann made this point immediately after the observation which I have quoted from *Nykredit*:

> “It is important to emphasise that this is a consequence of the limited way in which the House defined the valuer’s duty of care and has nothing to do with questions of causation or any limit or ‘cap’ imposed upon damages which would otherwise be recoverable. It was accepted that the whole loss suffered by reason of the fall in the property market was, as a matter of causation, properly attributable to the lender having entered into the transaction and that, but for the negligent valuation, he would not have done so. It was not suggested that the

> possibility of a fall in the market was unforeseeable or that there was any other factor which negatived the causal connection between lending and losing the money … Nor, if one started from the proposition that the valuer was responsible for the consequences of the loan being made, could there be any logical basis for limiting the recoverable damages to the amount of the overvaluation. The essence of the decision was that this is not where one starts and that the valuer is responsible only for the consequences of the lender having too little security."

Criticisms

37. Once the reasoning in *SAAMCO* and *Nykredit* is properly understood, it is possible to address some of the criticisms which have been directed against them, criticisms which Mr Halpern QC has adopted on behalf of the Trustee on this appeal. They revolve around three main matters. The first is the question whether it is correct to describe the limitation on damages in *SAAMCO* and *Nykredit* as having nothing to do with causation. The second is the distinction between information and advice in Lord Hoffmann's formulation of the principle. The third is the operation of the so-called "cap" or, as I would prefer to call it, the restriction on the damages that may be recovered.

38. The first criticism was among those made by Professor Jane Stapleton in a case note on *SAAMCO*, "Negligent valuers and falls in the property market" (1997) 113 LQR 1. She argued (p 3) that it was always necessary to determine what the consequences of the breach of duty were even though it was also necessary to determine for which of those consequences liability should attach, e.g. all foreseeable consequences or only certain foreseeable ones. This criticism, which was put before the Appellate Committee in *Nykredit*, may have influenced the two-stage analysis adopted by Lord Nicholls and Lord Hoffmann in that case: see paras 32-33 above. Lord Hoffmann himself, speaking extra-judicially has subsequently acknowledged its force: "Causation", (2005) 121 LQR 592. "When one considers what causal relationship is required," he observes at p 596,

> "one is really speaking about extent of the liability and not about the scope of the duty. … I shall try to mend my language in future. But I will say this. There is a close link between the nature of the duty and the extent of the liability for breach of that duty."

It is, however, clear that Lord Hoffmann regarded the point as a mere question of terminology, which did not go to the real principle being applied. The scope (or "nature") of the duty remained in his view a critical factor in determining the extent of liability. I agree with this. Questions of causation are normally concerned with identifying the consequences which flow from the breach. If the SAAMCO principle is to be classified as a principle of causation, it is certainly not directed to that question, as the House of Lords pointed out in *Nykredit*. The question which it poses is rather whether the loss flowed from the right thing, ie from the particular feature of the defendant's conduct which made it wrongful. That turns on an analysis of what did make it wrongful. Whether one describes the principle in *SAAMCO* and *Nykredit* as turning on the scope of the duty or the extent of the liability for breach of it does not alter the way in which the principle applies. It is clear that Lord Hoffmann did not accept Professor Stapleton's more fundamental criticisms of the so-called "SAAMCO cap" in his lecture of 2005, any more than he had accepted them in *Nykredit*.

39. Turning to the distinction between advice and information, this has given rise to confusion largely 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. The nature of the distinction is, however, clear from its place in Lord Hoffmann's analysis as well as from his language.

40. In cases falling within Lord Hoffmann's "advice" category, it is left to the adviser to consider what matters should be taken into account in deciding whether to enter into the transaction. His duty is to consider all relevant matters and not only specific factors in the decision. If one of those matters is negligently ignored or misjudged, and this proves to be critical to the decision, the client will in principle be entitled to recover all loss flowing from the transaction which he should have protected his client against. The House of Lords might have said of the "advice" cases that the client was entitled to the losses flowing from the transaction if they were not just attributable to risks within the scope of the adviser's duty but to risks which had been negligently assessed by the adviser. In the great majority of cases, this would have assimilated the two categories. An "adviser" would simply have been legally responsible for a wider range of informational errors. But in a case where the adviser is responsible for guiding the whole decision-making process, there is a certain pragmatic justice in the test that the Appellate Committee preferred. If the adviser has a duty to protect his client (so far as due care can do it) against the full range of risks associated with a potential transaction, the client will not have retained responsibility for any of them. The adviser's responsibility extends to the decision. If the adviser has negligently assessed risk A, the result is that the overall riskiness of the transaction has been understated. If the client would not have entered

into the transaction on a careful assessment of its overall merits, the fact that the loss may have resulted from risks B, C or D should not matter.

41. By comparison, in the "information" category, a professional adviser contributes a limited part of the material on which his client will rely in deciding whether to enter into a prospective transaction, but the process of identifying the other relevant considerations and the overall assessment of the commercial merits of the transaction are exclusively matters for the client (or possibly his other advisers). In such a case, as Lord Hoffmann explained in *Nykredit*, the defendant's legal responsibility does not extend to the decision itself. It follows that 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 its being wrong and not for the financial consequences of the claimant entering into the transaction so far as these are greater. Otherwise the defendant would become the underwriter of the financial fortunes of the whole transaction by virtue of having assumed a duty of care in relation to just one element of someone else's decision.

42. What is clear is that the fact that the material contributed by the defendant is known to be critical to the claimant's decision whether to enter into the transaction does not itself turn it into an "advice" case. Otherwise all "no transaction" cases would give rise to liability for the entire foreseeable loss flowing from the transaction, which is the very proposition rejected in *SAAMCO*. I respectfully agree with the careful analysis of this point by Rix LJ, giving the leading judgment in the Court of Appeal in *Haugesund Kommune v Depfa ACS Bank (Wikborg Rein & Co, Part 20 defendant) (No 2)* [2011] 3 All ER 655. The facts of that case were that a firm of lawyers had negligently advised that a Norwegian local authority had legal capacity to enter into a loan agreement, when it did not. A local authority's legal capacity to borrow might fairly be thought fundamental to any decision to lend it money, and the evidence was that but for the lawyer's advice the bank would not have lent. But under Norwegian law the debt would not have been enforceable against the assets of the authority even if legal capacity had existed, making the debt in effect one of honour only. Rix LJ held that it was an "information" case, because legal capacity was only one factor in a wider assessment of whether to lend the money, with which the lawyers were not concerned. At para 75, he said:

> "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 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 [sc 'advice'] 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."

43. *Aneco Reinsurance Underwriting Ltd v Johnson & Higgins* [2002] PNLR 8 was a case which on its facts fell on the other side of the line. The claimant reinsurer proposed to reinsure a book of excess of loss business. He intended to proceed 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. This had the ironic consequence 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 $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: see paras 16-17 (Lord Lloyd), 40 (Lord Steyn). In particular, his duty was found to include reporting to the reinsurer the market's highly adverse assessment of the reinsured risk.

44. It is right to say that at para 11 of his speech in *Aneco*, Lord Lloyd seems to have regarded the principle laid down in *SAAMCO* as turning on ordinary principles of foreseeability and remoteness considered in leading cases such as *Czarnikow v Koufos* [1969] 1 AC 350. This may be why he regarded the "advice" category as representing the ordinary rule, and the "information" category as exceptional: see paras 12-13. But, with respect, foreseeability was assumed in *SAAMCO*. For that reason, and 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. In my judgment the decision in *Aneco* is not authority for any general

proposition of law beyond the particular factual context of that case. The fullest statement of the law was that of Lord Millett at para 66. Lord Millett dissented on the facts, but the parties to this appeal agreed that, subject to one reservation, his summary of the law was correct. I think that they were right to do so. The reservation has no bearing on the present case. It is that Lord Millett confined his analysis of the law to the scope of the duty, and did not deal with the question of causation of loss. Normally, all the foreseeable loss flowing from the transaction will be treated as having been caused by the breach of duty, albeit that only that part of it which flows from the information being wrong will be recoverable as damages.

45. As for the SAAMCO "cap" or restriction, which excludes loss that would still have been suffered even if the erroneous information had been true, that 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. Mr Halpern submitted that the distinction is incoherent, because it does not achieve the professed object of the principles stated by Lord Hoffmann. Similar criticisms have been made by academic commentators, including Professor Stapleton and Professor Murdoch. It is of course true that the restriction does not systematically exclude loss arising from collateral risks with which the defendant was not concerned. Thus in the lead case in the *SAAMCO* litigation itself, York Montague overstated the value of the property by a factor of three, valuing at £15m a property worth £5m. Damages were limited to £10m, which exceeded the whole of the loss flowing from the transaction including the loss flowing from the fall in the market. The whole of that loss was accordingly awarded. In other cases, where the negligence of the valuer was less egregious, only part of the loss on the loan account was recoverable.

46. Criticism of this result is in my opinion unjustified. 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* 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, at 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."

Conveyancers

47. Most cases about negligent valuation have specific features which are not necessarily characteristic of other professional negligence cases. But the principle stated in *SAAMCO* was expressed as a general principle of the law of damages. It has subsequently been applied, as we have seen, by the House of Lords to cases of information negligently provided by an insurance broker and by the Court of Appeal to negligent legal advice. However, much the most fertile area of development has been a body of case law concerning the liability of conveyancing solicitors for negligence in reporting on title or related matters to a prospective mortgage lender. Mr Halpern relies on these cases as qualifying the application of the principle. It is therefore necessary to say something about them.

48. The background to most of the conveyancing cases was similar to that of the valuation cases. As a result of a steep fall in the residential property market in the early 1990s many mortgage lenders were left with non-performing loans for which the property no longer provided full security. Some of them sued solicitors who had negligently failed to report at the time of the conveyance on some matter which they said would have deterred them from entering into the transaction if they had known of it. In each case, the lender sought to recover the entire loss on the relevant loan account from the solicitor. The pathfinder was the Bristol and West Building Society, which brought 87 actions against solicitors on this basis. Eight of them were heard together by Chadwick J. Judgment was given on these cases under the title *Bristol and West Building Society v Fancy & Jackson (a firm)* [1997] 4 All ER 582 in July 1997, a few months after the decision in *SAAMCO* but before the important elucidations in *Nykredit*.

49. Chadwick J found that in three of the eight cases the lender would have refused to proceed if the solicitor had complied with its duty to report some relevant fact. These were accordingly "no transaction" cases. He resolved them as follows:

> (1) The first of the three cases, *Fancy & Jackson*, was straightforward. The solicitor completed the transaction without obtaining a search certificate to establish title, but the certificate, if it had been obtained, would have been clear. There was therefore no recoverable loss.

(2) In *Steggles Palmer*, the solicitors failed to report that the transaction was by way of sale and sub-sale under which a connected intermediate vendor made a profit of £7,000. If the lender had known this, it would have concluded that the borrower was dishonest and would have refused on principle to lend to him. The judge held the solicitors liable for the entire loss on the loan account, because "the defendants should be responsible for the consequences of the society not being in the position to take the decision which it would have taken if the defendants had done what they should have done" (p 622e-f).

(3) *Colin Bishop* was another case of back to back sale and sub-sale with an uplift of £25,000, about a third of the purchase price, but in this case there was no reason to think that the borrower was connected with the intermediate vendor. That would have made no difference to the lender's decision. They would still have walked away from the transaction because they had a strict policy of not lending where the proposed purchase was linked to a prior transaction, whether the parties were connected or not. Chadwick J had doubts about the objective rationality of the lender's policy, but he accepted that it existed and would have been applied (p 619a-d). It followed that the existence of linked transactions was just as fundamental to the lender in *Colin Bishop* as it was in *Steggles Palmer*. But it was not as fundamental to the Judge. He appears to have distinguished between the two cases because of the quality of the lender's reasons for walking away. In *Steggles Palmer* the lender would have refused to proceed because the borrower was an unacceptable counterparty, whereas in *Colin Bishop*, objectively the problem need not have been fundamental because it could have been rectified by a further valuation (p 622g-j). The Judge therefore concluded that in *Colin Bishop* if the true value corresponded to the lender's valuation (a question which had yet to be determined), there would be no loss, whereas such a finding would not in his view have been relevant in *Steggles Palmer*.

50. I respectfully doubt whether these are rational distinctions. In all three cases, the solicitors were on the face of it supplying specific information in accordance with the lender's standard reporting instructions. The lender would in due course take it into account in deciding whether and if so how much to lend, along with other important information for which the solicitors had no responsibility, such as the valuation of the property, the amount of the loan, and the borrower's capacity to service it. The solicitors had not assumed responsibility for identifying all the matters relevant to the lender's decision or for advising them whether to proceed. That was a matter for the lender, and would depend not just on the whole of the material before it but on its internal guidelines and lending policies and the judgment of individual loan officers. All of these cases therefore came within Lord Hoffmann's "information" category.

51. Mr Halpern relied on the decision in *Steggles Palmer* for the proposition that nonetheless where the defendant ought to have reported some fact which was fundamental to the claimant's decision whether to proceed, the whole loss flowing from the transaction was recoverable as such. I agree that that is what Chadwick J appears to have decided in *Steggles Palmer*, but I consider that he was wrong to do so. The facts of *Steggles Palmer* were no different in any legally relevant respect from those of *Colin Bishop*. The duty of the solicitors depended on their retainer, which was agreed before any breach of duty occurred and appears to have been in substantially similar terms in both cases. In both cases, it extended to the care with which the solicitor answered the questions in the lender's standard reporting instructions, but not to the decision whether to proceed with the transaction. It followed that the loss flowing from the decision to lend could not as such be within the scope of their duty. Chadwick J's approach was to make the measure of damages depend not on the scope of the duty but on the gravity of the particular breach and on his assessment of the objective quality of the reasons why the lender would have responded by refusing to proceed. In effect, he reverted in *Steggles Palmer* to the distinction between "no transaction" and "successful transaction" cases which had been rejected in *SAAMCO*. His observation that the lender had been deprived of the opportunity to make the decision that he would have made is only another way of saying that this was a "no transaction" case.

52. For the same reason, I consider that the Court of Appeal was wrong to apply the reasoning in *Steggles Palmer* in *Portman Building Society v Bevan Ashford (a firm)* [2000] PNLR 344, where the facts were indistinguishable. Otton LJ, delivering the leading judgment, declined to ask himself whether the scope of the solicitor's duty extended to the lender's decision or only to the material which the solicitor contributed to that decision, because in his view the distinction was irrelevant in a case where the facts withheld were sufficiently grave. He put the point in this way, at p 359:

> "where a negligent solicitor fails to provide information which shows that the transaction is not viable or which tends to reveal an actual or potential fraud on the part of the borrowers, the lender is entitled to recover the whole of his loss. In other words, the whole of the loss suffered by the lender is within the scope of the solicitor's duty and is properly recoverable."

This involves the same error as affected Chadwick J's analysis in *Steggles Palmer*, namely that the mere fact that the breach of duty caused the lender to proceed when he would otherwise have withdrawn was enough to make the solicitors legally responsible for the lender's decision and all its financial consequences. All "no transaction" cases have this characteristic, whether or not the fact withheld or misrepresented goes to the viability of the transaction or the honesty of the counterparty, because in all of them the fact withheld or misrepresented is *ex*

hypothesi sufficiently fundamental to have caused the lender to walk away had he known the truth. It is right to add that in at least one of the three cases before the House of Lords in *SAAMCO* (the *York Montague* case) the information withheld went to the viability of the transaction, and that in *Banque Keyser Ullmann v Skandia Insurance Co* [1991] 2 AC 249, which was regarded in *SAAMCO* as an application of the same principle, the information withheld not only went to the viability of the transaction but would also have revealed the dishonesty of the counterparty. Yet it was not suggested in either case that these were relevant considerations.

The burden of proof

53. The Court of Appeal considered that the burden of proving facts which engaged the *SAAMCO* principle lay upon the claimant. This is not a straightforward question, but in my judgment they were right about this. 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. As Lord Hoffmann expressed it in *SAAMCO*, at p 220:

> "The appearance of a cap is actually the result of the plaintiff having to satisfy two separate requirements: first, to prove that he has suffered loss, and, secondly, to establish that the loss fell within the scope of the duty he was owed."

Application to the present case

54. The first question is whether BPE Solicitors assumed responsibility for Mr Gabriel's decision to lend money to Mr Little. In my judgment, it is clear that they did not. Their instructions were to draw up the facility agreement and the charge, nothing more. Mr Spencer did not know and did not need to know what had passed between Mr Gabriel and Mr Little, except that they had agreed upon a loan of £200,000 secured by a charge on Building 428. He knew nothing about the nature of the proposed development, its likely cost, the financial capacity of Mr Little to fund it without Mr Gabriel's loan or the value of the property in its developed or undeveloped state. Indeed, he does not even appear to have known of Mr Gabriel's assumption about the use to be made of the loan moneys. He simply included in the draft facility agreement by oversight language which by an unhappy chance

confirmed that assumption. The only ground on which the Deputy Judge held that BPE were responsible for the decision was that, applying the approach adopted in *Bristol and West Building Society v Fancy & Jackson* and *Portman Building Society v Bevan Ashford*, "Mr Spencer's breach of duty meant that Mr Gabriel was not able to know the true nature of the loan transaction into which he was entering" (para 91). As in the two building society cases, this simply meant that this was a "no transaction" case in the discredited taxonomy of the Court of Appeal in *SAAMCO*.

55. On the footing that 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 project, the next question is what if any loss was attributable to that assumption being wrong. The answer is that if it had 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 into a depressed market under the chargee's power of sale. None of the loss which Mr Gabriel suffered was within the scope of BPE's duty. None of it was loss against which BPE was duty bound to take reasonable care to protect him. It arose from commercial misjudgements which were no concern of theirs.

Contributory negligence

56. In these circumstances, no question of contributory negligence arises.

Conclusion

57. I would accordingly dismiss the appeal.