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CHANCERY AND COMMERCIAL

The Department

The Chancery and Commercial Department at Cobden House provides expertise in every area of Chancery and Commercial law, including company law, construction, contract, insolvency, landlord and tenant, private client, taxation, probate and family provision, property, partnerships, professional negligence and trusts.

The Department prides itself on delivering accurate legal analysis, practical advice and a high standard of advocacy. Members can also deliver CPD accredited seminars at solicitors' offices on request.

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Contract

Wood v Capita Insurance Services Ltd [2017] UKSC 24

The appellant, Capita, had purchased an insurance business from the respondents. The sale agreement had incorporated warranties that the respondents did not know of any claims that their customers may have against the business, and also provided indemnities by which the respondents undertook to pay to Capita:

"An amount equal to the amount which would be required to indemnify the Buyer [...] against all actions, proceedings, losses, claims, damages, costs, charges, expenses and liabilities suffered or incurred, and all fines, compensation or remedial action or payments imposed on or required to be made by the Company following and arising out of ***claims or complaints*** *registered with the FSA, the Financial Services Ombudsman or any other Authority against the Company, the Sellers or any Relevant Person and which relate to the period prior to the Completion Date pertaining to any mis-selling or suspected mis-selling of any insurance or insurance related product or service."* (Emphasis added.)

Following its purchase of the business, Capita undertook a review, and discovered mis-selling of insurance policies. It reported the mis-selling to the FSA, and agreed to pay compensation in the sum of £7m. In the original High Court action, Popplewell J held that the respondents were required to indemnify Capita, even though there had been no "claim" or "complaint", merely an agreement by Capita.

The Court of Appeal reversed that decision, holding that the indemnity was limited to losses arising from "claims or complaints".

The Supreme Court unanimously upheld the Court of Appeal, stating as follows:

(i) At Paragraph 10, that the Court's function is to *"ascertain the objective meaning of the language which the parties have chosen [...] [by] consider[ing] the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, giv[ing] more or less weight to elements of the wider context in reaching its view as to that objective meaning".*

(ii) Approving the guidance on contractual interpretation which the Supreme Court gave in *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900, that *"interpretation is a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense".*

(iii) At Paragraph 11, that *"in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause [...] and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest".*

(iv) *"Similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms."*

(v) At Paragraph 13, that *"textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation".*

(vi) At Paragraph 24, that both the High Court and the Court of Appeal had correctly sought to *"weigh both the language of the disputed clause and the commercial considerations",* and that the different conclusions were caused by an *"opaque provision, which could have been drafted more clearly".*

(vii) That, to interpret the provision, *"it is necessary to place the clause in the context of the contract as a whole, to examine the clause in more detail and to consider whether the wider relevant factual matrix gives guidance as to its*

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meaning in order to consider the implications of the rival interpretations".

(viii) At Paragraphs 27 and 28, that *"the contractual context is significant in this case [...] [and] all of the parties to the [agreement] were commercially sophisticated and had experience of the insurance broking industry".*

(ix) That *"business common sense is useful to ascertain the purpose of a provision and how it might operate in practice. But in the tug o' war of commercial negotiation, business common sense can rarely assist the court in ascertaining on which side of the line the centre line marking on the tug o' war rope lay, when the negotiations ended".*

(x) A *"textual interpretation"* of the clause meant that both types of loss set out in the indemnity – being *"(1) all actions, proceedings, losses, claims, damages, costs, charges, expenses and liabilities suffered or incurred",* and *"(2) all fines, compensation or remedial action or payments imposed on or required to be made by the Company"* – were subject to all three of the restrictions: *"(A) following and arising out of claims or complaints registered with the FSA, the Financial Services Ombudsman or any other authority against the Company, the Sellers or any Relevant Person (B) (i) and which relate to the period prior to the Completion Date (ii) pertaining to any mis-selling or suspected mis-selling of any insurance or insurance related product or service".*

(xi) At Paragraph 36, that whilst this interpretation involved *"an element of tautology [...] tautology in commercial contracts is not unknown and the verbal exuberance (or torrential drafting) of (1) makes tautology difficult to avoid"*.

(xii) Also, at Paragraph 37, that the use of commas was not *"a strong pointer in favour of Capita's interpretation, both because there are no set rules for the use of commas and in any event the draftsman's use of commas in this clause is erratic".*

(xiii) Returning to *"commercial considerations", "had [the] clause stood on its own, the requirement of a claim or complaint by a customer and the exclusion of loss caused by regulatory action which was otherwise prompted might have appeared anomalous. But [the] clause is in addition to the wide-ranging warranties [...] which probably covered the circumstances which eventuated",* and *"it is not contrary to business common sense for the parties to agree wide-ranging warranties, which are subject to a time limit, and in addition to agree a further indemnity, which is not subject to any such limit but is triggered only in limited circumstances".*

(xiv) In conclusion, that while from Capita's standpoint the agreement *"may have become a poor bargain [...] it is not the function of the court to improve their bargain".*

The case illustrates the paramount importance of a "textual" interpretation in circumstances where a number of commercially sensible interpretations are available.

Gary Lewis

Landlord and Tenant

Cardiff City Council v Lee [2016] EWCA Civ 1034

On 19th October 2016, the Court of Appeal handed down its judgment in respect of the correct procedure to be adopted by landlords when seeking to enforce a suspended possession order.

Mr Lee was an assured tenant of the Council who was made subject to a 2-year suspended possession order. On breach, the Council sought to enforce the order by requesting the court office to issue a warrant of possession. Mr Lee's subsequent application to suspend was dismissed. On appeal, the Court held that, before requesting the warrant of possession, the Council should have applied for permission to issue under CPR r83.2 before going on to waive that procedural defect under CPR r3.10.

In dismissing Mr Lee's further appeal, the Court of Appeal confirmed that where a landlord wishes to enforce a suspended possession order because the tenant has breached, CPR 83.2 requires the landlord to apply for the Court's permission before the warrant can be issued. This provided important protection for tenants against unscrupulous landlords and should not be taken lightly. However, CPR r3.10 provides that an error of procedure does not invalidate any step in proceedings unless the Court orders otherwise. The Court could therefore, and on the facts of the instant case was right to, remedy the Council's procedural error in circumstances where the Court had nonetheless heard the application to suspend the warrant.

It therefore follows that, if seeking to enforce a suspended order following breach (whether on grounds of rent or otherwise), all landlords are required to apply for permission to issue a warrant in Form N325A. While the Court retains the power to remedy a landlord's failure, it is likely to be more reluctant to do so following the Court of Appeal judgment and the clear warning now given via the online PCOL service.

Arron Walthall

Insolvency

Express Electrical Distributors Ltd v Beavis [2016] EWCA Civ 765

In this case, the Court of Appeal clarified the test to be applied for retrospective validation orders under section 127 of the Insolvency Act 1986. Applications for validation orders are often made after a company is wound up, as any transfers it made after presentation of the winding up petition are automatically void unless validated by the Court.

The company that was wound up in this instance – Edge Electrical Limited ("Edge") – had purchased electrical goods on short-term credit from its usual supplier – Express Electrical Distributors Ltd ("Express"). Although it received the goods pre-petition, it paid the £30,000 purchase monies post-petition. Having received payment, Express continued to supply goods to Edge until it became aware that a petition had been presented. Express subsequently sought retrospective validation of the £30,000 payment on the grounds that it had been made in good faith in the ordinary course of business. District Judge Obodai rejected its application at first instance and both HHJ Hodge QC and the Court of Appeal upheld her decision.

When considering the case, the Court of Appeal held that the same principles apply to retrospective applications as to prospective applications [24]. It emphasised the importance of the pari passu principle (that an insolvent company's assets should be divided rateably amongst the company's unsecured creditors) [20, 34, 46] and held that:

The true position is that, save in exceptional circumstances, a validation order should only be made in relation to dispositions occurring after presentation of a winding up petition if there is some special circumstance which shows that the disposition in question will be (in a prospective application case) or has been (in a retrospective application case) for the benefit of the general body of unsecured creditors, such that it is appropriate to disapply the usual pari passu principle

[20, 24, 56]

The Court expressly left open the question of whether retrospective applications should be considered with the benefit of hindsight, as it was unnecessary on the facts of the case [26]. However, it noted that case law suggests that that would be the correct approach.

Given that Edge had already received the electrical goods, there was nothing further to be gained by paying the £30,000; doing so would not, therefore, have been in the interests of the general body of creditors [27]. The fact that the payment persuaded Express to continue supplying Edge with goods for a short period was not, in itself, sufficient [31].

The Court did, however, note that retrospective validation orders might be granted to validate a post-petition sale of an asset at full market value (subject to the particular facts of the transaction) [43]. Validation orders might also be made to enable a company to fulfil its obligations under a contract if the anticipated profits are likely to exceed the cost of honouring the obligations. Similarly, a validation order may be appropriate if it is clear that selling the business as a going concern would be more beneficial than an asset break-up [21]. Although the Court did not express a definitive view, it also mooted the possibility of a validation order in circumstances where a director deceives a creditor into dealing with the company [24].

To conclude, it is now clear that the Court is unlikely to validate the payment of unsecured pre-liquidation debts, even if the goods were supplied and the payment was made in good faith and in the ordinary course of business [52, 55]. Whilst there are still questions remaining within this area of law, the case provides welcome clarification as to the test to be applied and the circumstances in which a retrospective validation order can be made.

Sarah Jameson

Professional Negligence

BPE Solicitors v Hughes-Holland [2017] UKSC 21

Facts

Mr Hughes Holland ('H') was the trustee in bankruptcy of Mr Gabriel ('G'). Mr Little ('L') represented to G that he was the owner of a property, or controlled a company that owned the property, which required £200,000 to be developed. L also represented to G that the property had planning permission. As such, G agreed to loan L £200,000 and assumed that it would be used to develop the property. In fact, L's intentions were to use G's money to redeem a charge over the property and pay off the company he owned.

G instructed BPE Solicitors ('BPE') to draft a facility letter and charge over the building. However, L conveyed the instructions to BPE, meaning that BPE unintentionally confirmed that G's money would be used to develop the property when this was never the intention of L.

The transaction failed and G lost all his money.

Case History

At first instance, the trial judge upheld a claim of negligence against BPE on the grounds that it should have explained to G that the money would in fact be used for the benefit of L or his company. The judge awarded G the entirety of his loss, thereby accepting that G would not have entered into the transaction without L's representations.

The Court of Appeal overturned the trial judge's decision, reducing damages to zero and attributing G's loss to his own commercial misjudgements.

Decision of the Supreme Court

Dismissing the appeal, Lord Sumption, giving the only judgment of the Court, held that BPE had not assumed responsibility for G's decision to enter into the transaction with L. BPE merely (and inadvertently) confirmed G's incorrect assumption. Therefore, given that G would not have stood to recoup his investment even if that assumption was correct, G could not recover any damages. None of the loss was within the scope of BPE's duty. [55]

The following points from the Court's reasoning are worthy of note.

Burden on Claimant

The Supreme Court reinforced the point that the Claimant bears the burden of proving that his loss falls within the scope of the Defendant's duty. [53]

Scope of Duty

The majority of the Court's judgment is directed to the clarification of the SAAMCO principles. SAAMCO held that where the scope of the duty is to provide information only, the Defendant will only be liable for loss caused by the information being wrong.

Fundamentally, the SAAMCO test is directed at the scope of duty and not at causation.

It is further a two-stage enquiry:

(1) The Claimant must prove that he has suffered loss;

(2) The Claimant must show that the loss fell within the scope of the duty.

Whilst this might sound like money for old rope, the Court endorsed Lord Hoffmann's explanation in SAAMCO itself that viewing the principle as a cap means starting with the wrong measure of loss (the whole loss) and then deducting the portion of it which falls outside the duty. This is wrong in principle and may lead to errors. Lord Sumption phrases the SAAMCO test as 'a restriction on the damages that may be recovered' [37]

Elaborating on how to decide what the scope of the duty is, the Court endorsed the distinction between advice cases and information cases. In advice cases 'it is left to the adviser to consider

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what matters should be taken into account in deciding whether to enter into the transaction' [42]. In contrast, a Defendant providing information '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' [41]. The fact that the Claimant would not have entered into the transaction without that piece of information does not transform an information case into an advice case.

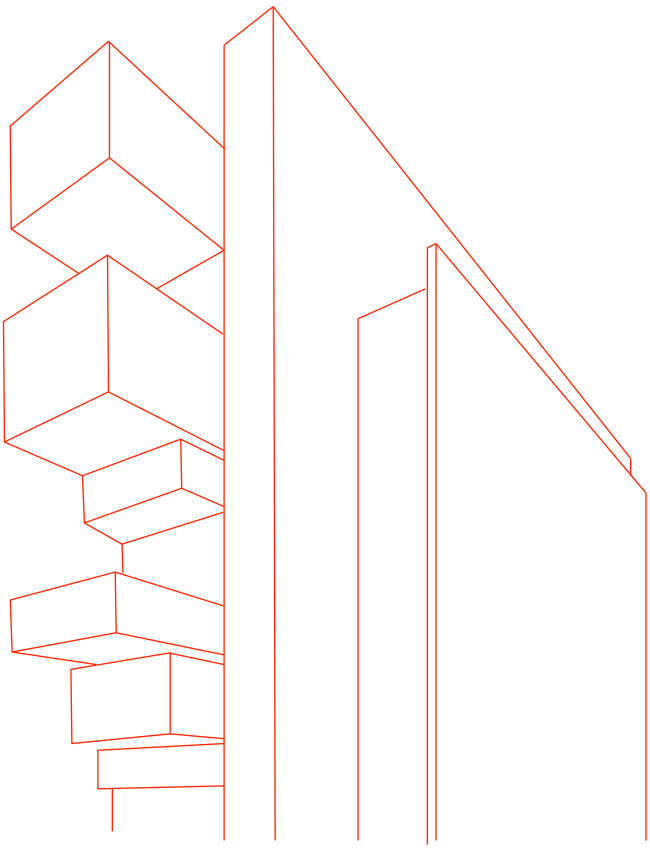
The Court held that where the Defendant's advice is limited to only a portion of the factors the Claimant will take into account when making a commercial judgement, the Claimant's decision to enter into a transaction does not fall within the scope of the Defendant's duty.

Practical Way Forward

It is clear from the judgment that clarifying the scope of your instructions is key to limiting the scope of your duty. Lord Sumption placed weight on the fact that BPE were instructed to draw up documentation only.

The second point to take away is the Court's continued readiness to acknowledge commercial realities when assessing these cases.

Even with the special relationship between BPE Solicitors and G, the Court took into account the autonomy of G in making his own commercial decisions. It is not incumbent upon the solicitor to handhold the client through each and every part of the transaction, provided of course that this has not been agreed as within the scope of the solicitors' instructions.



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