SAAMCO AND
RECOVERABILITY OF LOSSES IN A FALLING MARKET

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Introduction

1. This short paper addresses the following:

   (1) The issue in SAAMCO;
   (2) An approach to SAAMCO: *Pearson v Sanders Witherspoon (A Firm)*;
   (3) Some exceptions to SAAMCO.

2. We address these points in turn below.

(1) SAAMCO

3. The starting point is, as it has been for over ten years, the Judgment of the House of Lords in *Banque Bruxelles Lambert SA* v *Eagle Star* [1997] AC 191 ("SAAMCO").

The Facts

4. In the three cases the subject of the appeals the defendants, as valuers, were required by the plaintiffs to value properties on the security of which they were considering advancing money on mortgage. In each case, the defendants considerably overvalued the property. Following the valuations, the loans were made, which they would not have been if the plaintiffs had known the true values of the properties.

5. The borrowers subsequently defaulted, and in the meantime the property market had fallen substantially, greatly increasing the losses eventually suffered by the plaintiffs. The plaintiffs brought actions against the defendants for damages for negligence and breach of contract. In the first case, the defendants had valued the property at £15m. and the plaintiffs had advanced £11m. to the borrower. The judge found that the actual value of

the property at the time of valuation had been £5m. Following the borrower's default, the plaintiffs had sold it for £2,477,000. The plaintiffs claimed as damages the outstanding amount of the loan less net recovery from realisation of the security plus unpaid interest. The judge gave judgment for the sum claimed less 25 per cent. in respect of the plaintiffs' contributory negligence.

6. In the second case, the defendants had valued the property at £2.5m. and the plaintiffs had advanced £1.75m. to the borrower. The judge found that the correct value had been between £1.8m. and £1.85m. Following the borrower's default, the property had been sold for £950,000. The judge gave judgment for the plaintiffs for damages to be assessed on the basis that they were entitled to recover all losses, including that attributable to market fall, sustained by reason of having made the advance to the borrower on the security of the property valued by the defendants.

7. In the third case, the defendants had valued the property at £3.5m. and the plaintiffs had advanced £2.45m. to the borrower. The judge found that the property had been worth £2m. or at most £2,375,000. Following the borrower's default, the plaintiffs had sold it for £345,000. The judge gave judgment for the plaintiffs for a sum including damages in respect of their loss attributable to market fall.

8. In the first case, leave was given by the judge for appeal direct to the House of Lords. In the second and third cases, the Court of Appeal dismissed appeals by the defendants.

The Decision

9. It was held, dismissing the appeal in the first case and allowing the appeals in the second and third cases, that the duty of the defendants in each case, which was the same in tort as in contract, had been to provide the plaintiffs with a correct valuation of the property, namely the figure that a reasonable valuer would have considered it most likely to fetch if sold on the open market; that where a person was under a duty to take reasonable care to provide information on which someone else would decide on a course of action he was, if negligent, responsible not for all the consequences of the course of action decided on but only for the foreseeable consequences of the information being wrong; that the measure of damages was the loss attributable to the inaccuracy of the information suffered by the

plaintiff through embarking on the course of action on the assumption that the information was correct.

10. In the first case the consequence of the valuation being wrong had been that the plaintiffs had had £10m. less security than they had thought; that if they had had that margin they would have suffered no loss and the whole loss had therefore been within the scope of the defendants' duty. In the second case the consequences of the valuation being wrong had been that the plaintiffs had had £700,000 or £650,000 less security than they had thought. The defendants had not been asked to advise on the risk of the borrower defaulting and any increased risk of default consequent on their overvaluation did not affect the scope of their duty to the plaintiffs; and that the damages should be reduced to the difference between their valuation and the correct valuation. In the third case the damages should similarly be reduced to the difference between the defendants' valuation and the true value of the property at the date of valuation

The Issue

11. The sole speech was given by Lord Hoffmann (all the other Lordships agreeing). Lord Hoffmann set out the issue in the case as follows (p.210 at C):

> "What is the extent of the liability of a valuer who has provided a lender with a negligent overvaluation of the property offered as security for the loan? The facts have two common features. The first is that if the lender had known the true value of the property, he would not have lent. The second is that a fall in the property market after the date of the valuation greatly increased the loss which the lender eventually suffered."

The Reasoning

12. In relation to the Court of Appeal's Judgment, as Lord Hoffmann commented (at p.210 at G to 211 at A):

> "Much of the discussion, both in the judgment of the Court of Appeal and in argument at the Bar, has assumed that the case is about the correct measure of damages for the loss which the lender has suffered. The Court of Appeal began its judgment, at pp. 401-402, with the citation of three well known cases (*Robinson v. Harman* (1848) 1 Exch. 850, 855; *Livingstone v. Rawyards Coal Co.* (1880) 5

App.Cas. 25, 39; *British Westinghouse Electric and Manufacturing Co. Ltd. v. Underground Electric Railways Co. of London Ltd.* [1912] A.C. 673, 688-689) stating the principle that where an injury is to be compensated by damages, the damages should be as nearly as possible the sum which would put the plaintiff in the position in which he would have been if he had not been injured. It described this principle, at p. 403, as "the necessary point of departure."

13. Lord Hoffmann said, however, (at p.211 A to B):

> "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."

14. Lord Hoffmann's core reasoning was as follows (p.211 at H):

> "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. Both of these requirements are illustrated by *Caparo Industries Plc. v. Dickman* [1990] 2 A.C. 605."

15. This was further explained by Lord Hoffmann (at p.212 at B):

> "As Lord Bridge of Harwich said, at 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."
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> In the present case, there is no dispute that the duty was owed to the lenders. The real question in this case is the kind of loss in respect of which the duty was owed."

16. Lord Hoffmann continued, using the now (in)famous mountaineer example (at p. 213 at C-F):

> "Rules which make the wrongdoer liable for all the consequences of his wrongful conduct are exceptional and need to be justified by some special policy. Normally the law limits liability to those consequences which are attributable to that which made the act wrongful. In the case of liability in negligence for providing inaccurate information, this would mean liability for the consequences of the information being inaccurate.

> I can illustrate the difference between the ordinary principle and that adopted by the Court of Appeal by an example. 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.
>
> On the Court of Appeal's principle, the doctor is responsible for the injury suffered by the mountaineer because it is damage which would not have occurred if he had been given correct information about his knee. He would not have gone on the expedition and would have suffered no injury. On what I have suggested is the more usual principle, the doctor is not liable. The injury has not been caused by the doctor's bad advice because it would have occurred even if the advice had been correct."

17. Lord Hoffmann also drew an important distinction between a person under a duty to take reasonable care to *provide information* on which someone else will decide upon a course of action and a duty to *advise* someone as to what course of action he should take (see p.214 at A-F):

> "Your Lordships might, I would suggest, think that there was something wrong with a principle which, in the example which I have given, produced the result that the doctor was liable. What is the reason for this feeling? I think that the Court of Appeal's principle offends common sense because it makes the doctor responsible for consequences which, though in general terms foreseeable, do not appear to have a sufficient causal connection with the subject matter of the duty. The doctor was asked for information on only one of the considerations which might affect the safety of the mountaineer on the expedition. There seems no reason of policy which requires that the negligence of the doctor should require the transfer to him of all the foreseeable risks of the expedition.
>
> I think that one can to some extent generalise the principle upon which this response depends. 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."

18. Turning now to the case of *Nykredit Mortgage Bank plc* v *Edward Erdman Ltd* [1997] 1 WLR 1627, at p. 1631, Lord Nicholls of Birkenhead said:

> "However, for the reasons spelt 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 (the fall in property prices) 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 by the lender to the valuer."

19. This passage from Lord Nicholls' speech firmly underlines what some regard to be the potentially surprising extent of what has come to be known as the SAAMCO principle.

(2) *Pearson v Sanders Witherspoon & Another*

20. The case of *Pearson v Sanders Witherspoon & Another* [2000] Lloyd's Rep PN 151 and [2000] PNLR 110 is a very helpful example of the application of SAAMCO principles.

The Facts

21. The relevant facts were as follows. The claimant was the proprietor of a petrol service station. In 1984 he contracted with Ferranti International Plc ("Ferranti") to reconstruct his forecourt and supply and install the latest computer-operated petrol pumps. The work was done and the system installed, but the claimant was unable to pay and instructed the first defendant to act on his behalf in staving off Ferranti's claim. In July 1986 Ferranti issued a writ claiming damages and the claimant counterclaimed for damages based on the allegation that the computer did not act in concert with the pumps. In May 1987

Ferranti obtained summary judgment on the bulk of its claim. In September 1987 the claimant intimated that he might launch separate proceedings against Ferranti for loss of petrol caused by leaking tanks or computer error, but he did not issue his writ until June 1988. In it he claimed damages of £29,000. On the day before the trial of Ferranti's action he settled the claim by agreeing to pay the company £16,500 and costs which were subsequently taxed at £7,759.

22. No further steps were taken by the claimant in his action and Ferranti tried unsuccessfully to have the action struck out for want of prosecution. In October 1992 the claimant instructed the second defendant in place of the first defendant, but he became dissatisfied with their services as well and instructed a new firm of solicitors in November 1993.

23. The claimant's financial position became critical and a receiver was appointed to run his business in March 1993. In December 1993 receivers were appointed to run Ferranti. The matter eventually came to trial in January 1996, when Ferranti was no longer professionally represented. The judge, His Honour Judge Thornton, QC, entered judgment for the claimant in the sum of £567,723.94 together with interest making a total of £1,063,707.10, but Ferranti had no assets and the judgment remained wholly unsatisfied. The claimant issued proceedings against the first and second defendants for damages.

24. At the trial of the action against the defendants the judge, Gage J, found that the first defendant had not progressed the action with reasonable speed after December 1988 and that the trial should have occurred in January 1992. He also held that the second defendant could not have obtained a date for trial against Ferranti until the summer of 1994, by which time Ferranti was in receivership, so that the claim against the second defendant failed. He found that the first defendant was aware of Ferranti's financial difficulties from 1989 onwards. He held that the first defendant had a duty, in conducting the litigation on the claimant's behalf, to take reasonable steps to guard against the foreseeable risk of Ferranti becoming insolvent or dissipating assets in such a way as to render judgment valueless and to take reasonable steps to avoid the consequences of the risk becoming a reality. If the first defendant had acted properly, the trial would have occurred in January 1992 and judgment would have been obtained before Ferranti went into receivership, but by its culpable delay the first defendant was in breach of its duty to

the claimant and that breach was the effective and dominant cause of the loss which the claimant suffered.

25. In assessing damages the judge took into account the claimant's overall prospects of success and his prospects of success on the quantum of his claim and concluded that it was appropriate to discount the damages awarded by the judge at trial in 1996 by two-thirds; that sum in round figures (including interest) was £355,000. A discount had then to be given to reflect the chances that the claimant would have been able to execute any judgment against Ferranti. He held that the probability was that any judgment obtained at that date would have had a reasonable prospect of being successfully executed and he allowed a modest discount of 10 per cent to allow for the chance that the judgment might not be enforced. He therefore assessed the value of the claimant's lost chance of obtaining a valuable judgment in January 1992 at £315,000.

The Decision

26. For present purposes the relevant part of the Court of Appeal's Judgment was that the duty of a solicitor in accepting a retainer to act for a client in litigation was to act with all due expedition and not to cause delays. The kind of loss against which it was the duty to guard the client was that which flowed from the loss of the right of action, as where the claim was struck out. The loss flowing from the inability to enforce any judgment obtained was a different kind of loss; it was a loss at one removed from the conduct of the litigation to trial and judgment. A solicitor was not under a duty to protect the client against the risk of judgment not being enforceable through impecuniosity without assuming responsibility for that issue or without sufficient notice of that impecuniosity so as to make if fair, just and reasonable to extend the duty to cover that loss.

The Reasoning

27. The sole speech was given by Lord Justice Ward. Looking at the Lloyd's report (at p. 157 at col. 1 and p. 157 col. 2), Ward LJ referred to the case of *Galoo*, stating as follows:

> "The judge dealt with the law. Counsel then appearing for the plaintiff relied on well-known passages in *Galoo Ltd* v *Bright Grahame & Murray* [1994] 1 WLR 1360 to support his proposition that the question of causation should be dealt with as a matter of common sense. Mr Livesey, QC, for the first defendant, relied on the

speech of Lord Hoffmann in *Banque Bruxelles Lambert SA* v *Eagle Star Insurance Co Ltd* [1997] AC 191 that the decision depended on the scope of the duty of care which he said did not include a duty to guard against insolvency: foresight of the existence of a risk was not enough as there had to be awareness of the probability of Ferranti's insolvency.

...

The high-water mark for the common sense test is *Galoo Ltd* v *Bright Grahame Murray* [1994] 1 WLR 1360, 1374, where Glidewell LJ said:

> The passages which I have cited from the speeches in *Monarch Steamship Co. Ltd* v *Karlshamms Oljefabriker A/B* [1949] AC 196 make it clear that if a breach of contract by a defendant is to be held to entitle the plaintiff to claim damages, it must first be held to have been an effective or dominant cause of his loss. The test in *Quinn* v *Burch Bros (Builders) Ltd* [1966] 2 QB 370 that it is necessary to distinguish between a breach of contract which causes a loss to the plaintiff and one which merely gives the opportunity for him to sustain the loss, is helpful but still leaves the question to be answered. How does the court decide whether the breach of duty was the cause of the loss or merely the occasion for the loss?
>
> The answer in my judgment is supplied by the Australian decisions to which I have referred (*Alexander* v *Cambridge Credit Corporation Ltd* (1987) 9 NSWLR 310 and *March* v *E & MH Stramare Pty Ltd* (1991) 171 CLR 506), which I hold to represent the law of England as well as of Australia, in relation to a breach of duty imposed on a defendant whether by contract or in tort in a situation analogous to breach of contract. The answer in the end is "By the application of the court's common sense". ..."

28. However, as Ward LJ stated (at p. 157 col. 2): "The correct approach for ascertaining compensation for loss is now laid down in a trio of recent cases in the House of Lords. In *Banque Bruxelles Lambert SA* v *Eagle Star* [1997] AC 191...".

29. Ward LJ went on to explain the relevant principles (and the application of the same to the facts of the case before him) in more detail (p. 160 col. 1):

> "In my judgment the implication of a duty does not follow as a matter of course from the foreseeability of the consequences. That was made clear in *Nykredit* where the negligent valuer was held "not even liable for all the foreseeable consequences". Something more than foreseeability is required. Lord Bridge had said in *Caparo* at page 617/18:
>
> > What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed, a relationship characterised by the law as one of "proximity" or "neighbourhood" and that the situation should be one in which the court

considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other party.

Thus, it seems to me that one must consider the extent of the solicitors' knowledge and the degree of foreseeability as part and parcel of ascertaining where the reasonableness, fairness and justice of the case lies."

30. Applying the relevant principles to the facts of the case before him, Ward LJ stated as follows (p. 160 col. 2):

"However, in August 1991, the *Daily Mail* reported that "Ferranti Clings On". That was the article which reported that "Ferranti's future looks dubious". That was undoubtedly information which ought to have woken the sleeping dogs. It was information passed to the solicitors. By virtue of their retainer, they would have assumed the responsibility for responding to changes of event and for adapting the tactics of the litigation to meet changed circumstances. This was a change which justified action. Although they were already negligent in failing to prosecute the claim with due expedition, justice, fairness and reasonableness now demanded that they become responsible for the risk of a successful judgment being unenforceable. They now came under a fresh duty to act swiftly to bring the action to trial. It is for the consequences of the breach of that duty they should be liable.

No response was forthcoming from them. If they had reacted with due and proper diligence, the solicitors would, on the judge's timetable, have been able to obtain a date for hearing 18 months later, i.e. by about April 1993. The trial was expected to last for four weeks and time for writing judgment had to be allowed, say another four weeks. Thus the plaintiff ought to have had his judgment in June 1993, very approximately six months or less before the receivers moved in.

In my judgment, the duty of the solicitor in accepting the retainer to act for a client in litigation, is the duty to act with all due expedition and not to cause delays. The kind of loss against which it is the duty to safeguard the client is the kind of loss which flows from the loss of the right of action as where the claim has been struck out. The loss flowing from the inability to enforce any judgment actually obtained is, in my view, a different kind of loss. It is a loss at one remove from the conduct of the litigation to trial and judgment. Gage J was right to have regard to general policy and to the notions of justice and fairness to decide whether the duty is extended to cover that risk. With respect to him, I disagree with his conclusion. In my judgment, policy demands that delay in litigation be eradicated but those demands do not extend as far as imposing upon solicitors the risk of non-recovery of a judgment debt. Reasonableness, fairness and justice as between solicitor and client do not require the imposition of a duty on the solicitor arising simply from the retainer to protect the client against the risk of a judgment not being enforced through impecuniosity of the defendant, at least without responsibility being assumed by the solicitor or sufficient notice of that impecuniosity making it reasonable, fair and just to extend the duty to cover that loss. Here foreseeability of the possibility of Ferranti's collapse was not sufficient to trigger an extension of the duty until the press reported that their future was dubious. That fact ought reasonably to have spurred the solicitors into action. In my judgment, they should not be held to be liable for the consequences of any delay before the notional date

when the plaintiff could have had his judgment, June 1993. The assessment of the chances of recovering the fruits of that judgment must be viewed in that light."

31. The short points that we would like to address are: (1) what the orthodox SAAMCO approach is, (2) the rejection of the *Galoo* "common sense" approach in *Pearson*, (3) how SAAMCO was applied and (4) the *Caparo* approach also adopted in *Pearson*.

(3) Some Exceptions to SAAMCO

32. Two Commonwealth authorities provide useful examples of a negligent defendant being held liable for the financial consequences of a falling market:

(1) *McElroy Milne v Commercial Electronics Ltd* [1993] 1 NZLR 39; and

(2) *Kenny & Good Pty Ltd v MGICA (1992) Ltd* [2000] Lloyd's Rep PN 25.

33. In both cases the claimants were entitled to recover the entire loss caused by the falling market. Analysing those cases assists in identifying the factual scenarios in which losses may be recovered and therefore the limitation of the apparent "rule" in SAAMCO against such recovery.

McElroy Milne v Commercial Electronics Ltd

34. *McElroy* pre-dates SAAMCO and was cited with approval by Lord Hoffman (at p.219 at B):

> "I need mention by way of illustration only one such case. In McElroy Milne v. Commercial Electronics Ltd. [1993] 1 N.Z.L.R 39, a solicitor negligently failed to ensure that a lease granted by his developer client contained a guarantee from the lessee's parent company. The result was that the developer, who had intended to sell the property with the benefit of the lease soon after completion, found himself in dispute with the parent company and was unable to market the property for more than two years, during which time the market fell. The New Zealand Court of Appeal held that the developer was entitled to the difference between what the property would have fetched if sold soon after its completion with a guaranteed lease and what it eventually fetched two years later. The solicitor's duty was to take reasonable care to ensure that his client got a properly guaranteed lease. He was therefore responsible for the consequences of his error, which was producing a situation in which the client had a lease which was not guaranteed. All the reasonably foreseeable consequences of that situation were therefore within the scope of the duty of care. The only issue was whether the client's delay in selling

> the property negatived the causal connection between that situation and the ultimate loss. The Court of Appeal decided this question on orthodox lines by asking whether the client had reacted reasonably to his predicament."

35. This approval was relied upon by Lawrence Collins J in his thorough review of the relevant authorities in *Greymalkin Ltd v Copleys (A Firm)* [2004] PNRL 44 for a seemingly wide proposition:

> "A claimant may recover the difference between what the property would have been worth but for the negligence, and the price for which he eventually disposes of it (or could dispose of it), provided the delay in selling the property is reasonable and does not negative the causal connection between the negligence and the ultimate loss" [at paragraph 80].

The Facts

36. The defendant solicitors were instructed to secure a lease guaranteed by Studio Australia Pty Ltd, the lessee's principal shareholder, but Studio was never made a party to the agreement. When the lessee repudiated the lease the plaintiff developer sued the defendant for damages in negligence for failing to bind Studio to the agreement to lease. The value of the property sold fully leased and occupied six months after completion was $5.25m. The High Court assessed the value at the date of trial at $4m. Damages were assessed at $1.25m, discounted by 25% for contingencies (e.g. enforcement difficulties even if the lease had been guaranteed).

37. The defendants appealed on damages only, contending that the measure of damages should be limited to the value of the guarantee which they had negligently failed to procure.

The Decision

38. The NZ Court of Appeal held, per Cooke J (at p. 41), "*... in the end assessment of damages is a question of fact: that there is no such thing as a rule, as to the legal measure of damages, applicable to all cases: and that the ultimate question as to compensatory damages is whether the particular damage claimed is sufficiently linked to the breach of the particular duty to merit recovery in all the circumstances*".

39. Cooke J proceeded on an analysis of remoteness of damages, holding (at p. 41) that whilst foresight or contemplation of damage are always important considerations they are rarely the only considerations. He stated that the following factors may be relevant to seeking a just balance between the parties: "*directness, 'naturalness' as distinct from freak combinations of foreseeable circumstances, even perhaps the magnitude of the claim and the degree of the defendant's culpability*". He held that on the facts of the case "*loss of that value should be seen as sufficiently with the contemplation or foresight of the solicitors to justify imposing liability for it on them*". It was relevant to Cooke J's finding on remoteness of damage that the defendant was aware that the claimant proposed to sell the development as soon as possible after completion (at p.44).

40. Regarding the quantification of the loss Cooke J held:

> "Possibly there may be some cases where a depressed market could not be said to be sufficiently clearly and strongly or naturally related to the breach of duty to warrant imposing liability. But in this case it is not enough in my opinion to say that the market fell to an extent never expected by the appellant. Part of the very purpose of the guarantee is to protect against market deterioration. The more serious the deterioration, the more important the guarantee. Like the others disadvantaged by the crash the appellant has to accept that the consequences of failure to carry out its responsibilities. All factors relevant in considering remoteness appear to me to point to its liability."

41. Hardie Boys J gave a short judgment in which he developed this point further:

> "It was essential to the present respondent's purpose that the buildings be leased to a tenancy of unquestionable financial soundness. Only then could it be sold without difficulty and to best advantage … In these circumstances it was plainly foreseeable that the failure to obtain the guarantee at the contract stage left the respondent vulnerable to a change of heart by Studio; and that its absence at the market stage was very likely to cause both delay in finding a purchaser and a reduction in the price that could be obtained; and further, that delay at that later stage left the respondent vulnerable to the vagaries of the market itself. Thus on any view of likelihood, the delay in selling, and the fall in market price occurring because of it, were reasonably foreseeable consequences of this contractual breach."

42. On assessment of damages, McKay J held (at p. 52) that a comparison of the value of the property with and without the guarantee at the time of breach would have been the correct

measure of damages if the development was intended to be held for the long-term, but that because it was known to the defendant that the intention of the developers was to sell the property soon after completion it was "*clearly within the reasonable contemplation of the appellant that the failure to obtain a parent company guarantee of the lease could affect the sale, either by causing it to take longer to find a buyer, or by adversely affecting the price*."

Analysis

43. All three judgments proceeded from the starting point of foreseeability of loss, in particular with *Hadley v Baxendale (1854) 9 Exch 341,* the starting point criticised by Lord Hoffmann in SAAMCO as set out above.

44. To the extent that Lord Hoffmann approved of *McElroy* in SAAMCO, it was not in the context of deciding whether or not the falling market necessarily was within the scope of the solicitors' duty (i.e. the first step required). Lord Hoffmann used the case as an illustration of the mitigation cases that proceeded on the basis that "*the reasonably foreseeable consequences of the plaintiff's predicament are plainly within the scope of the duty*" (218 at H). Scope of duty was therefore not seen to be in issue and remoteness of damage was decided on established principles.

45. However, on the facts of *McElroy*, it is likely that a foreseeability of damage approach would lead to the same result as a scope of duty analysis, because the defendants were instructed to achieve a guarantee, the purpose of which was to protect against a fall in the market (Cooke J) and provide a fully guaranteed property ready for sale (McKay J).

46. This is a case in which the information / advice dichotomy is not easy to apply, as the defendant solicitors were instructed to achieve a concrete result for the claimants, rather than provide information or advice. It is likely that the duty to put in place a guarantee would be seen as more exacting than the provision of information, with the consequence that the defendants would be held to have effectively taken on responsibility for achieving the result required and the risk of not doing so, thereby exposing themselves to the full consequences of not achieving that result. For an interesting comparison of the

application of the information / advice split to duties of valuers and solicitors in the same transaction see *Preferred Mortgages Ltd v Shanks* [2008] PNLR 20.

47. Where it is difficult to fit a defendant's actions into this dichotomy, it is worth remembering that the general rule is that a professional will be liable for the foreseeable consequences of his negligence including the adverse consequences of entering into a transaction with a third party provided the consequences are within the scope of the duty of care; the limitation of scope to the giving of information is an exception to that rule [see *Aneco Reinsurance Underwriting Ltd v Johnson & Higgins Ltd* [2001] UKHL 51 per Lord Lloyd at [13]].

Kenny & Good v MGICA

48. MGICA was a decision of the High Court of Australia, which post-dated SAAMCO in the context of valuers' negligent over-valuation. The High Court held that the defendant valuers were liable for the full financial consequences of the drop in the market's value. The case highlights the importance of the terms of the valuation as the basis for the scope of duty.

The Facts

49. The defendant valuers were engaged by a bank to value a residential property for the purpose of enabling a decision to be made about the provision of mortgage finance. It was stated in the valuation that both the mortgagee and MGICA, the claimant mortgage insurer, might use and rely on the report in the same manner as the bank.

50. The defendants valued the property at $5.5m. on completion and stated in the valuation that the property was "*suitable security for investment of trust funds to the extent of 65% of our valuation for a term of 3-5 years*". In reliance upon this $3.575m. was lent to the property owner. The true value of the property was $3.9m. to $4m. The owner defaulted and the mortgagee took possession. The property was sold seven months later for $2.65m. due to a substantial drop in the residential property market. MGCIA had indemnified the mortgagee for the loss it had sustained and sought to recover the difference between the amount loaned and the amount realised on sale from the valuers.

51. Lindgren J declined to follow the House of Lords decision in SAAMCO, preferring instead the Court of Appeal's concept of a "no transaction" case. He found the defendants liable for the losses incurred by the claimants including those that flowed from the fall in the market. The Full Federal Court dismissed the appeal and the valuers appealed to the High Court on the basis that the courts below had failed to apply SAAMCO and had erred in law in not excluding damages which resulted from a drop in the market.

The Decision

52. The headnote in the Lloyds Reports states that SAAMCO was not followed in this decision. However, although the five judgments proceed on separate bases, three of those five applied a scope of duty approach to the particular facts of that case in line with SAAMCO.

53. Gaudron J, at p. 29, identified the mortgagee's "*interest which calls the valuer's duty of care into existence*" as "*recouping what is due under the mortgage in the event of default*", from which point it is "*a matter of common sense to treat the loss arising from inability to recoup as flowing from breach of that duty*". The event of default was held to be a foreseeable risk of which the foreseeable possibility of a decline in market value was a significant factor [p. 30]. Gaudron J further recognised that "but for" was a necessary but not sufficient condition of causation, but relied upon the fact that the valuation was a "*decisive consideration*" in MGICA's decision to insure the loan.

54. McHugh J set out a very wide scope of duty, "*where a valuer owes a duty of care to an aggrieved party in respect of a valuation, the duty of the valuer is to take reasonable care to protect that person from financial loss in relying on the valuation*", but held that absent a "*special arrangement*" the valuer will not be responsible for an unforeseen drop in market value because, by definition, it is unforeseen and the damage is therefore too remote. He concluded at p. 37 that the facts of the case did create a special arrangement, because the terms of the instruction meant that the valuer was warranting that for the period of up to five years the amount of $3.575m. could safely be lent on the property.

55. Gummow J did apply a scope of duty analysis by focussing upon the specification of the content of the duty of care [see p.39]. In this case the valuation was not prepared, as would be the case in a normal valuer / lender case, for information on the current value of a security, but pursuant to a contract that identified MGICA as entitled to rely upon the statement that the property would be suitable investment for 65% of the valuation over 3 to 5 years.

56. Kirby and Callinan JJ also found for MGICA on the basis of the terms of the instructions and the purpose of the valuation which was to enable the lender to decide whether to lend at all, rather than just how much to lend [see p. 42 and 45]. They defined the duty upon the valuer [at p. 46] as, "*a duty to exercise reasonable care inter alia to enable the respondent to decide whether to enter into an insurance transaction, which turned out to be imprudent, at all, if an accurate valuation suggested that it should not*."

Analysis

57. Although the relevant passages from SAAMCO were quoted in the judgment, none of the judges expressly based their decision upon the distinction between providing information and advice. However, it is clear from the judgment that for all the judges, except Gaudron J, the effect of the terms of the instructions was that the valuer was effectively advising that the transaction could be entered into, rather than simply providing information in relation to the transaction. To this extent the judgment is in accordance with the House of Lords decision in SAAMCO, applied to the particular facts of that case.

BEN LYNCH
CHRISTOPHER STONE
DEVEREUX CHAMBERS
12th October 2010