

Guidance from the Privy Council on the SAAMCO principle

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In *Charles B Lawrence & Associates v Intercommercial Bank Ltd* [2021] UKPC 30 (“*Lawrence*”) the Judicial Committee of the Privy Council has given some further guidance on the SAAMCO principle. That principle, established in *South Australia Asset Management Corp v York Montague Ltd* [1997] AC 191 (“SAAMCO”), concerns what losses will be recoverable in tort by a third party against a negligent valuer with whom they do not have a contractual relationship. While *Lawrence* concerned the classic case of the valuation of land, the Supreme Court of the United Kingdom has itself recently handed down two other cases dealing with SAAMCO in the auditing and medical context. *Lawrence* itself is of note as it stands as a cautionary tale for third parties to: (i) carefully check the scope of duty alleged to arise before relying on a report; and (ii) how to apply the counterfactual question proposed by Lord Hoffmann in SAAMCO.

Background

In *Lawrence*, Intercommercial Bank Ltd (“the Bank”) issued a \$3 million loan to Singapore Automotive Trading Ltd (“Singapore”) guaranteed by Rafferty Development Ltd (“Rafferty”). It was proposed that the loan would be secured by a mortgage over land owned by Rafferty. Rafferty instructed Charles B Lawrence & Associates (“Lawrence”) to provide a valuation of the land, and a valuation of \$15 million was given on the basis of a commercial use. Importantly, that valuation was given with an express note in the report that the valuation assumed, among other things, that good marketable title could be shown. Relying on the valuation, the Bank made the loan to Singapore secured by the proposed mortgage. Subsequently, Singapore and Rafferty defaulted, and the Bank sought to sell the land. On doing so, it found its highest bid was \$2 million on the proper basis of a residential use. The Bank then sought to sue Lawrence in the tort of negligence for a negligent valuation report. Importantly, after this, the Bank discovered that Rafferty did not have good title to the land at all, and the mortgage securing the loan was of no value. The Bank successfully settled a claim against its own conveyancing attorneys for \$2.4 million in respect of their negligent failure to investigate the title properly.

Decision

Lord Burrows and Lady Rose gave the judgment of the Board. The case turned on the scope of the SAAMCO duty. In doing so, it was crucial to consider the reason why the advice or information was being given. On the facts, it was clear that Lawrence had valued the property on the assumption there was good legal title to the land. Indeed, the Bank was not looking to Lawrence for such confirmation of good title. It was also for this reason that the Board found the settlement between the Bank and the conveyancers to be irrelevant to the claim against Lawrence; quality of title was not within the scope of Lawrence’s duty. As a result, the Board determined to strip out of the total loss factually caused to the Bank that portion attributable to the defect in title rather than the overvaluation based on commercial not residential use. The figure for loss could be achieved by taking away from

the loan the value of the land assuming title was good. This had been determined below to be the sum of \$2,375,000, so the base damages were \$625,000. A sum for the contributory negligence of the Bank (20%) and appropriate interest (at 12%) was then applied to reach the damages figure of \$833,204 before judgment interest.

The Board then went on to consider the counterfactual test posed by Lord Hoffmann in *SAAMCO*. When using this test, one asks the question whether the claimant would have suffered the same loss if the information or advice given were true. If the answer is yes then the scope of the duty does not extend to that loss. On the facts, the Board noted that the counterfactual test would contradict its judgment. If Lawrence's valuation of \$15 million had been correct, the Bank would still have entered the loan, and would have had sufficient money to meet the losses on sale. The Board noted it might be possible to "correct" the result in the counterfactual to match their own judgment, but preferred the position that the test be used flexibly as a useful cross-check on the scope of duty in most but not all cases. The counterfactual test must be understood as being of a second-order importance, and cannot be determinative in all cases. This was one such case.

Comment

Reliance on a third party valuation is often fraught with difficulty; the third party will often not have sufficient control over the situation to influence the terms of the *SAAMCO* duty. The facts of *Lawrence* are rather extreme because the lack of good title made the mortgage worthless, but it was still possible to attribute some loss to the negligence of *Lawrence*. However, notwithstanding the extremity of the facts, the case serves as a warning to practitioners to insure against a constrained scope of duty. As to the *SAAMCO* counterfactual; this stands as a compelling case where the counterfactual hinders more than it helps. Practitioners should guard against the undiscerning application of Lord Hoffmann's counterfactual test.

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