



Neutral Citation Number: [2021] EWCA Civ 24

Case No: A1/2020/0896(Y)

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE HIGH COURT OF JUSTICE TECHNOLOGY AND**  
**CONSTRUCTION COURT (QBD)**  
**Deputy High Court Judge Roger Ter Haar QC**  
**[2020] EWHC 985 (TCC).**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 15/01/2021

**Before:**

**LORD JUSTICE PETER JACKSON**  
**LORD JUSTICE COULSON**  
and  
**LADY JUSTICE ANDREWS**

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**Between:**

**MR RICHARD LARGE** **Appellant**  
- and -  
**(1) MR CHRIS HART (2) MRS KERRY HART** **Respondents**

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**Mr Simon Wilton** (instructed on a Direct Access basis) for the **Appellant**  
**Mr Jason Evans-Tovey**(instructed on a Direct Access basis) for the **Respondents**

Hearing date: 8th December 2020  
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**Approved Judgment**

“Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties’ representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30am, Friday 15<sup>th</sup> January 2021.”

## **LORD JUSTICE COULSON:**

### **1 INTRODUCTION**

1. This appeal raises a single issue: whether, on the particular facts of this surveyor's negligence case, the judge was right to assess the diminution in value in a way which rendered the appellant surveyor, Mr Large, liable for many of the financial consequences of the respondents' (the Harts) decision to purchase the property. As will become apparent below, I consider this to be an unusual case on the facts, and I am confident that this appeal gives rise to no departure from the well-known principles governing the measure of loss in negligent surveyor cases.
2. Not only is this an unusual case on the facts, but it is also in many ways a sad one. The Harts thought that they were buying their dream home on a cliff in Devon looking out to sea. Instead, their purchase of the property turned into a nightmare when it became apparent that the significant rebuilding works which had been carried out by the previous owners had been so badly done that eventually the only solution was demolition and reconstruction. But the circumstances have also been unfortunate for Mr Large, who provided a HomeBuyer's Report prior to the Harts' purchase of the property for a modest fee, and also provided subsequent advice for which he made no further charge, and who was found liable by the judge for damages in the sum of £389,000.
3. Nor have the unhappy consequences of these events been limited to the parties to this appeal. As part of these proceedings, claims were also brought against the Harts' conveyancing solicitors, Michelmores LLP ("Michelmores") and the architects responsible for the significant rebuilding works carried out at the property prior to the Harts' purchase, The Harrison Sutton Partnership ("Harrison Sutton"). The Harts' direct claims against Michelmores and Harrison Sutton were compromised when those defendants paid them a total of £376,000, but they are not yet free of this litigation: Mr Wilton, of behalf of Mr Large, told the court that contribution proceedings between the defendants remain to be concluded.
4. Although this appeal only goes to an issue as to the appropriate measure of loss, it is necessary to set out some of the factual background, which I do in Section 2 below. In Section 3, I set out the relevant parts of the judgment. In Section 4, I stress the limited scope of this appeal. Then in Section 5, I set out the law and, in Section 6, I set out my answers to the issues raised as to the appropriate measure of loss in this case. There is a short summary of my conclusions at Section 7. The court is very grateful to both counsel for their comprehensive written and oral submissions.

### **2 THE FACTUAL BACKGROUND**

5. The property is situated on a cliff above a beach in Devon. The views are magnificent, but the property could not be more exposed to the elements. Between 2009 and 2011, it was extensively rebuilt and extended. The architects were the original 3<sup>rd</sup> Defendants, Harrison Sutton.
6. Shortly after the completion of the rebuilding works at the property, the owners put it on the market. The Harts saw it and were considering whether to buy it. The original 2<sup>nd</sup> Defendants, Michelmores, were retained as their conveyancing solicitors. Mr Large

was retained to survey the property for the purposes of producing an RICS HomeBuyer's report.

7. Mr Large visited the property on 2<sup>nd</sup> November 2011 and produced the HomeBuyer's Report on the same day. He forwarded it to Mrs Hart by email the following day. Mr Large gave the property a generally clean bill of health, although he valued it at £1.2 million, as opposed to the figure which The Harts had originally offered, of £1.24 million. Although we were shown a number of the original documents relating to the Report it is, with one exception, unnecessary to refer to any of them.
8. The exception is the RICS HomeBuyer Practice Note. Two paragraphs should be noted:
  - (a) Paragraph 2.4, which provides:

“The inspection is not exhaustive, and no tests are undertaken. There is, therefore, a risk that certain defects may not be found that would have been uncovered if testing and/or a more substantial inspection had been undertaken. This is a risk that the client must accept. However, where there is ‘a trail of suspicion’ the surveyor must take ‘reasonable steps to follow the trail’. These reasonable steps may include recommending further investigation.”
  - (b) At Paragraph 4.7, which deals with the surveyor's overall opinion, sample summaries are set out in which that opinion might be conveyed. One option was described as “Price OK but common defects”; another was headed “Unwise to proceed at any price”; and another was “Opinion not possible”.
9. During November 2011, there were numerous exchanges between the Harts, Harrison Sutton, Michelmores, and Mr Large. These exchanges demonstrated a certain unease about the prospective purchase on the part of the Harts. In evidence, it appears that, although he did not advertise it at the time, some of that unease was shared by Mr Large. One major concern related to the general quality of the rebuilding works.
10. In connection with a possible mortgage, Michelmores' conveyancing documentation identified the possibility of obtaining a Professional Consultancy Certificate (“PCC”) in respect of the property. A PCC is appropriate where the property being purchased has not been constructed with the benefit of an NHBC scheme, but has been built under the supervision of an architect or other construction professional. That was directly relevant in this case: the extensive rebuilding works at the property were not covered by the NHBC, and the Harts, as the prospective purchaser, would have had no contractual claim against the contractors or Harrison Sutton if those works turned out to be defective. Thus the PCC was the best (perhaps the only) ‘insurance’ which the Harts could obtain in relation to the standard and quality of the extensive rebuilding works.
11. The blank copy of a PCC in the bundle made plain its scope and effect. It contained a number of declarations by the professional relating to periodic inspections of the work and conformity with drawings and instructions, and an express statement that the professional was aware that the certificate was being relied on by the first purchaser (ie the first purchaser of the property following the completion of the works). As we shall see, the experts in this case were agreed in their evidence that Mr Large should have advised that a PCC was obtained before the Harts purchased the property.

12. Michelmores failed to advise the Harts about the need for a PCC. Mr Large made no reference to a PCC in his report. However, the Harts raised the issue with him subsequently, endeavouring to work out if it was something that they needed before they purchased the property. On 17 November, in an email, Mr Large responded:

“It is not necessarily essential that a (PCC) is provided, but with a project of this size, stated as being managed by an architectural firm, it would not be unreasonable to ask for this. If such a certificate is not available, there may be little practical recourse if it were found that unseen deficiencies exist. You should seek advice from your legal adviser.”
13. Following these and other exchanges, on 23 November 2011, the Harts completed the purchase of the property in the sum of £1.2 million. However, when they arrived to take possession, they found a builder’s van on the driveway and the front door of the property removed. The builders told the Harts that they had been instructed to attend by Harrison Sutton, and that they were trying to fix the leaking front door. Unhappily, this was the precursor of months and years of worry and strain for the Harts, almost all damp-related. In the end, the advice was that, so badly had the rebuilding works been done, the property would have to be demolished and reconstructed.
14. Proceedings were issued shortly before the expiry of the limitation period, on 1 November 2017. For a period during the currency of the litigation, the Harts represented themselves. By the time of the trial they had instructed solicitors, Wright Hassell LLP. For the appeal, Mr Evans-Tovey (who did not appear below) appeared on their behalf on a Direct Access basis. Mr Wilton has acted for Mr Large throughout, originally through Kennedys LLP and, since September 2020, on a Direct Access basis.

### **3 THE JUDGMENT**

15. The trial was heard in the TCC in February 2020 by Roger Ter Haar QC, sitting as a Deputy High Court Judge (“the judge”). The judgment was dated 22 May 2020. The Neutral Citation Number is [2020] EWHC 985 (TCC).
16. The judgment dealt in detail with the factual background and the various witnesses. There were numerous disputes between the parties which the judge had to resolve in the first 137 paragraphs of his judgment but which do not arise for further consideration on this appeal.
17. Starting at [138], under the heading “Surveying a building which has recently been rebuilt”, the judge dealt with the risk that, because building works had been recently carried out at the property, a surveyor might be lulled into a false sense of security. Having set out some of the evidence, he asked at [156]:

“...Where does this leave me? My answer to that question is that the surveyor has a choice: either the surveyor can say that in truth he or she cannot say whether the property is (for example) actually weatherproof; or the surveyor has to dig very deep and analyse the built structure with a considerable level of scrutiny to advise whether there are areas in respect of which the advising surveyor has doubts...”

Then, having noted that this problem was particularly acute in the present case, at [159] he said:

“In my view, the only ways that the surveyor can protect the prospective purchaser are (1) to spell out the limitation on the advice given; (2) to be particularly alert to any signs of inadequate design or faulty workmanship; and (3) to draw attention in appropriate terms to protections available to the purchaser, including (on the facts of this case) a Professional Consultant's Certificate...”

18. From [160] onwards, the judge dealt with what he called “The problems of dampness at the property”. This identified “multiple problems of dampness”, as well as other (less significant) defects at the property. Many of these problems were admitted.
19. In the next section of the judgment, starting at [187], the judge addressed the question of whether Mr Large had been negligent in failing to draw attention to these defects in his report. This section again focused on the damp-proofing problems. At [192], the judge said:

“...However, it is clear that generally there was no evidence of damp-proof membranes. Generally, this was because the walls were rendered in such a way as to make it impossible to see whether there were or were not such membranes, although there were some locations where a damp-proof membrane should have been visible but was not.”

As the judge found, Mr Large simply could not say whether or not there was adequate damp proofing at the property [193]; moreover, there were signs that in some places there was none. Yet, instead of saying that he had not or could not inspect, Mr Large's report wrongly assumed that, because these features should have been present, they were.

20. At [195]-[196] the judge accepted the submissions made on behalf of the Harts that Mr Large should have reported that he could not see a visible damp-proof course at any relevant location and that further investigations were required, which in essence would require confirmation from Harrison Sutton and Building Control that there was adequate damp-proofing, with the potential to undertake opening up works, if those enquiries proved unsatisfactory. The judge gave further reasons for that conclusion at [197], noting the other signs of sloppy workmanship which Mr Large missed and to which he should have drawn attention.
21. In the next section of the judgment, starting at [200] the judge turned to the question of whether Mr Large had been negligent in respect of the advice as to the need for a PCC. He noted that Mr Large's report contained no advice that a PCC should be sought ([204]). What is more, as the judge noted at [205]-[206] the experts at the trial were agreed that Mr Large should have advised in his report that a PCC was necessary. The judge then went on to deal with the subsequent email of 17 November (paragraph 12 above), in which Mr Large had said that a PCC was not essential. The judge concluded at [210] that, because Mr Large said that he was aware that the property had been

completely rebuilt under the supervision of well-known local architects, that made it “particularly important” to obtain a PCC.

22. The judge also referred to Mr Large’s evidence at [211], to the effect that he was now feeling “uncomfortable with some elements of the quality of the finish and things like that, that made me wonder to what extent and whether they [Harrison Sutton] had in fact supervised the work...” Later in the same passage, Mr Large indicated that he was beginning to have his suspicions about the quality of the works which had been carried out. He did not share these concerns with the Harts.
23. It was submitted on behalf of the Harts that, in all these circumstances, in his report and certainly in his email of 17 November, Mr Large should have emphasised that obtaining the PCC was essential and something that had to be done prior to the Harts committing to the purchase of the property. The judge accepted that submission at [214]-[215], saying:

“214. In my judgment, given Mr Large's understandable reliance upon the previous role of the architects, and given the concerns which he was feeling by the time he advised in his email, and given that in my judgment he should have drawn attention to the need to obtain a Professional Consultant's Certificate in his report, I accept Ms White's submission on this point.

215. For the above reasons, I conclude that Mr Large was negligent in failing to recommend in his Report that a Professional Consultant's Certificate should be sought and in failing to advise in terms in his 17<sup>th</sup> November email that like the Completion Certificate from building control, it was essential that a Professional Consultant's Certificate should be sought.”

24. At [216] – [232] the judge addressed the issue of what the Harts would have done if Mr Large had given different advice. He summarised his findings of negligence in respect of the damp proofing and the PCC at [216]. He then went on to consider, if Mr Large had given proper advice on those two matters, what would have happened. At [220] the judge was in no doubt that, on both these points, in the absence of proper answers or a PCC from Harrison Sutton, the Harts would have withdrawn from the purchase of the property immediately, or having undertaken further investigations, would have withdrawn from the purchase at that point. He said that, in reaching that conclusion “I bear in mind the concerns which the Harts had already expressed about the property”.
25. At [222]-[228], the judge then dealt with, and rejected, an argument advanced by Mr Wilton to the effect that the alleged negligence on the part of Michelmores had broken the relevant chain of causation so as to prevent the Harts from recovering any damages from Mr Large. He also dealt at [229]-[230] with the question of whether Harrison Sutton would have provided a PCC, and concluded that if they had been asked, Harrison Sutton would not have provided a PCC: see in particular [231].
26. Accordingly, the judge said at [232] that the consequence was that, had Mr Large given the advice to the Harts which he had found Mr Large should have given, the Harts would not have purchased the property.
27. The final section of the judgment relevant to the appeal starts at [233] under the heading “Who is to bear the risk of unidentified defects?” It was agreed that damages were to

be assessed on the basis of diminution in value and that the property, without significant defects, was worth the £1.2million that the Harts had paid for it. The issue was the assessment of the diminution thereafter. The ambit of this dispute was noted at [237]. Mr Large argued that it should be the diminution in value arising from any defects that he negligently failed to report on in the HomeBuyer Report (which would make him liable only for defects he should have reported on but did not)<sup>1</sup>. As the judge noted at [246], this would involve the assessment of the extent to which any defects he should have noted and reported on would have reduced the value of the property below £1.2 million. On the other hand, the Harts argued that it should be the difference in value between the property with the defects as reported, and its value with all the defects which in fact existed.

28. The judge considered some of the surveyor cases, including *Philips v Ward* [1956] 1 WLR 471 and *Watts v Morrow* [1991] 1 WLR 1421. He also considered *South Australia Asset Management Corporation v York Montague Limited* [1997] AC 191 (“SAAMCO”) and *Hughes-Holland v BPE Solicitors* [2017] UK SC 21; [2018] AC 599. These latter two cases were important because of the need to decide for what kind of loss the Harts were entitled to compensation. This led to a consideration of the potential complexities involved in compensating claimants like the Harts who, as the judge had found, would never have bought the property but for Mr Large’s negligence.
29. The judge decided that, taking all these matters into account, the submissions put forward on behalf of Mr Large were wrong in principle and would lead to an assessment of damages which would not compensate the Harts for the consequences of his negligence. The judge said:

“247. On the facts of this case, that approach would be likely to produce a gross injustice and far from putting the Harts into the position the Harts should have been in if there had been no breach of duty, adopting that approach would have the opposite effect: the problem here is that the competent surveyor producing a HomeBuyer’s Report could not say one way or the other whether the property was defective in respect of the most important elements so far as this property was concerned, namely damp proofing. Thus the logic of the approach urged upon me on behalf of Mr Large would lead to a very low award of damages.

248. As Lord Hoffmann made clear in *SAAMCO*, the starting point is to ask what is the nature of the Claimants’ cause of action against the defendant surveyor? Whilst there were relatively minor defects to which I have held Mr Large should have drawn attention in his Report, the major findings of breach of his duty of care which I have made relate to a failure initially to recommend, and a later failure to recommend with sufficient emphasis, that obtaining a Professional Consultant’s Certificate was an essential precaution.

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<sup>1</sup> Although Mr Wilton suggested during his submissions on appeal that that was not quite how he put it to the judge, that was plainly the thrust of his submissions (see also [237] where the extract from her submissions cited by the judge makes it clear that the Harts’ then counsel, Ms White, also thought that this was the argument being advanced on behalf of Mr Large).

249. The purpose of obtaining such a Certificate was precisely to obtain some form of protection against the presence of defects which a competent surveyor could not identify in a newly rebuilt house.

250. The approach advocated by Mr Wilton seems to me to transfer the risk of such unidentifiable defects entirely onto the Harts. In a situation where, on the facts of this case, Mr Large was already feeling some concerns about the quality of the redevelopment, this would be particularly inappropriate. Had the advice been given that it was essential that such a Certificate should be obtained before exchange, either such a Certificate would not have been forthcoming with the consequence that the transaction would not have gone ahead (as I have held was probable) or such a Certificate would have been provided and the transaction would have gone ahead, but in this situation at least a significant part of the risk of there being defects which could not be identified by a competent surveyor would rest with the architects.

251. Furthermore, the willingness of a firm of architects to issue such a Certificate would be an acid test of the architects' faith in the quality of the redeveloped building.

252. The analysis in Lord Sumption's judgment in *Hughes-Holland* of the advice/information dichotomy suggested by Lord Hoffmann in *SAAMCO* must be considered with particular care. Here what was needed by the Harts was clear and unequivocal advice that there were risks which simply could not be assessed and against which the Harts needed protection if they wished to proceed. Whilst this is not going so far as to say that Mr Large had "a duty to protect his client (so far as due care could do it) against the full range of risks associated" with the purchase of the Property, what they needed was advice which was so fundamental to whether the transaction should go ahead that Mr Large should be held to bear the consequences of such advice not having been given.

253. For these reasons, in my judgment this is not a case where the usual *Watts v Morrow* approach is appropriate. On the contrary, I accept that the proper approach is that set out in paragraph 91(b) of Ms White's submissions which I have set out at paragraph 237.

254. To be clear, that means that damages are to be assessed by assessment of the difference in value between the Property with the defects as reported to the Harts in the Report, and its value with all the defects which in fact existed."

30. That was the critical part of the judgment for the purposes of this appeal. Thereafter, the judge dealt with various issues as to the precise calculation of the diminution in value which no longer arise. Assessing the expert evidence, the judge calculated the diminution in value at £750,000. Giving Mr Large credit for the sum of £376,000 paid by the other defendants, that reduced the amount payable by Mr Large to £374,000, together with general damages for inconvenience and distress at £15,000, making a total of £389,000.

#### **4 THE LIMITED SCOPE OF THE APPEAL**



31. On behalf of Mr Large, Mr Wilton originally sought permission to appeal on the findings of breach (ground 1), causation (ground 2), and the measure of loss (ground 3). The judge refused to grant permission on grounds 1 and 2, but said that “the third ground of appeal seems to me to raise arguable points as to the correct valuation of damages on the findings which I made”. The application for permission to appeal was renewed to the Court of Appeal, but permission was not extended beyond ground 3, namely the correct measure of loss in the light of the judge’s findings.
32. The scope of this appeal was therefore limited. In my view, there are four critical findings from which Mr Large cannot now escape. The first is that, in accordance with the findings at [187] – [199] of the judgment, he was negligent in respect of the damp and damp-proofing, in particular because: (i) he failed to see some of the general warning signs of poor workmanship; (ii) he did not see visible damp proofing in places where he should have expected to see it; (iii) he wrongly assumed – without evidence – that damp-proofing was present because the rebuilding works had only recently been completed; and (iv) he should have advised that further investigations were required.
33. The second critical finding was that, in accordance with [200]-[215] of the judgment, Mr Large was negligent in failing to advise, either in his report or in his email of 17 November, that: (i) a PCC was crucial; (ii) the purpose of the PCC “was precisely to obtain some form of protection against the presence of defects which a competent surveyor could not identify in a newly rebuilt house” [249]; and (iii) the Harts should not proceed with the purchase without a PCC.
34. The third critical finding was that, in accordance with [216]-[232] of the judgment, if Mr Large had given the advice which the judge found he should have given, the Harts would not have bought the property (see [232] in particular).
35. The fourth critical finding was at [252], set out at paragraph 29 above, that the Mr Large’s negligence had deprived the Harts of “advice which was so fundamental to whether the transaction could go ahead that Mr Large should be held to bear the consequences of such advice not having been given.”
36. Accordingly the issue on appeal is whether the measure of loss taken by the judge in the light of those findings of fact and causation was wrong in principle. It is important to make this clear at the outset of the analysis because some of Mr Wilton’s submissions, particularly parts of his written skeleton arguments, went well beyond those clear parameters and sought to reopen some of the judge’s findings of fact. Whilst that was perhaps understandable in the circumstances, it was not permissible.
37. The limited scope of this appeal is important for another reason. At the close of his oral submissions, Mr Wilton made much of the fact that, if his appeal was not allowed, the decision in this case might be taken to have radically altered the usual approach of the courts to damages in negligent surveyor cases. I do not agree. The criticality here of obtaining a PCC, given the extensive rebuilding works that had been carried out at the property without any records of compliance or satisfactory completion, together with the suspicions that were beginning to creep into Mr Large’s mind (as well as those of the Harts), and the exceptionally exposed nature of the site, combined to give rise to an unusual situation which is markedly different to the vast majority of negligent surveyor cases.

## 5 THE LAW

38. We were taken to the well-known trinity of negligent surveyor cases: *Philips v Ward*, *Perry v Sidney Philips & Son* [1982] 1 WLR 1297 and *Watts v Morrow*. *Philips v Ward* established that the proper measure of damages was diminution in value not the (higher) cost of repair. The Court of Appeal recognised that, if the report had dealt properly with the bad state of the timbers, Mr Philips would either have refused to buy the house, and therefore suffered no damage, or bought it for a sum which represented its fair value in its bad condition. In *Perry v Sidney Philips*, this court reiterated that the proper measure of damages was the difference in price between what the plaintiff paid for the property and its market value as it should have been described at the time of purchase.
39. The difficulties in *Watts v Morrow* stemmed from the fact that there was a significant difference between the sum produced by the diminution in value calculation, and the actual cost of the repairs. This court held that, in the absence of any warranty by the surveyor that the condition of the property had been correctly described in the report, there was no basis for awarding damages on the basis of the cost of repairs. The proper measure of damages was limited to the difference between the value of the property as it was represented to be and its value in its true condition. It was not obviously a ‘no transaction’ case: whilst Mrs Watts said that if she’d known of the defect she would not have gone ahead with the purchase, Mr Watts was more equivocal on that point, but maintained that he would have only bought it on the basis of a substantial reduction in the price.
40. As a matter of general principle, Ralph Gibson LJ noted in *Watts v Morrow*:
- “One further matter must, I think, be examined. It is, I think, clear law that where a claimant is caused to enter into a transaction in consequence of negligent advice, as in the case of a surveyor employed under the ordinary contract, the claimant may be entitled to all the losses incurred as a result of entering into the transaction where he would not have entered into the transaction if properly advised and the losses are caused by entry into the transaction and by extrication from it.”
41. As to what might be called the ‘cap’ cases, although we were taken to *SAAMCO*, the focus of counsel’s arguments was *Hughes-Holland*, where Lord Sumption sought to explain (and in some respects, explain away) certain aspects of Lord Hoffmann’s speech in *SAAMCO*. Paragraph 1 of Lord Sumption’s judgment makes it plain that the case was dealing with the situation where, but for the negligence of a professional advisor, his client would not have embarked on a particular course of action, but that part or all of the loss which he suffered by doing so arose from risks which it was no part of the advisor’s duty to protect the client against.
42. In *SAAMCO*, Lord Hoffmann had sought to distinguish between ‘advice’ and ‘information’. At page 214 he said:
- “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.”

43. Having considered that and other passages in *SAAMCO*, and the subsequent criticisms made of them, Lord Sumption said in *Hughes-Holland*:

“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.”

44. Similar points arose in *Manchester Building Society v Grant Thornton UK LLP* [2019] EWCA Civ 40; [2019] 1 WLR 4610 and even more recently in *Asset Co PLC v Grant Thornton UK LLP* [2020] EWCA Civ 1151. In my view these later cases seek to apply the reasoning in *Hughes-Holland* to the facts of the particular case; they do not seek to identify any new principles. Both cases stress that the *SAAMCO* approach is “simply a tool for determining the losses which fall within the scope of the defendant’s duty”. As David Richards LJ put it at [102] of *Asset Co*, the *SAAMCO* principle:

“...is not a rigid rule of law but, as Lord Sumption in *Hughes-Holland* at [45] said, “simply a tool” for determining the loss flowing from the negligently wrong information as opposed to the loss flowing from entering into the transaction at all. If in a particular class of case it is incapable of achieving that determination, it is not a tool which the court will use.”

45. Finally, I should refer to *Thompson v Christie Manson and Woods Ltd* [2005] EWCA Civ 555. This was very much a case on its own facts. At first instance, the judge had found that Christie’s had been negligent in describing two vases in the relevant sale catalogue in 1994 as “Louis XV”, without qualification, in the absence of a clear indication that they had been made in Paris rather than Italy. He held that the damages should be the difference between what the claimant paid for the vases and their actual value, with the calculation of the latter taking into account evidence subsequently available to the court.
46. The Court of Appeal overturned the judge’s decision on liability, so its subsequent remarks as to the calculation of loss were *obiter*. May LJ said that the measure of damage would be the difference between what the claimant paid for the vases and their value at auction in 1994 if Christie’s had described them as “probably Louis XV”, so that the judge had been wrong to take into account subsequent information in calculating the measure of loss. In referring to the negligent surveyor cases, May LJ said at [131]:

“It is, I think, implicit in each of these cases that the surveyor would not be liable for, and the measure of damage would not embrace, a concealed defect which the surveyor did not spot, *but without negligence*.” (Emphasis added)

## **6 ANALYSIS**

### ***6.1 The Measure of Loss on the Facts***

47. The essential question for the judge was to ascertain the kind of loss against which Mr Large was under a duty to protect the Harts. On the facts of this case, Mr Large had not only to inspect and report properly on the condition of the property; he was also obliged to make appropriate recommendations as to any further investigations which he thought necessary. The judge found that there was a clear trail of suspicion which, in accordance with the RICS Practice Note (paragraph 8(a) above), should have led Mr Large to advise that further investigation/enquiries into the state of the property were necessary.
48. In addition (and crucially), because of what the judge said was the fundamental importance of the PCC, Mr Large should have advised the Harts that, unless there was a PCC, they should not purchase the property. In the words of the RICS Practice Note (paragraph 8(b) above), he should have said that it was “unwise to proceed at any price” without a PCC.
49. The judge deftly summarised Mr Large’s central failing at [252], when he said that “here what was needed by the Harts was clear and unequivocal advice that there were risks which simply could not be assessed and against which the Harts needed protection if they wished to proceed.” In other words, because of the particular breaches of duty on the part of Mr Large, the consequence of the Harts entering into a transaction into which they would not have entered if they had been properly advised meant that the risk of latent defects rested with Mr Large. The judge found that Mr Large was obliged to protect the Harts against the risks of going ahead without that further investigation and, in particular, without the PCC. On the facts, therefore, he found that that advice was so fundamental that Mr Large had to bear the consequences of his failure to give that advice.
50. These findings meant that this was not a typical negligent surveyor case, and the conventional measure of loss (a comparison between the value of the property in the condition it was reported to be in, and the condition it should have been reported to be in) was not applicable. The conventional measure of loss would not have compensated the Harts for the consequences of the crucial failings found by the judge, namely the advice that should have been given – but was not – as to further investigations into the damp-proofing and the need for the PCC.
51. It is also right to point out that, although it could be said that the effect of the judge’s decision was to render Mr Large liable for latent defects which he could never have reasonably spotted on his inspection, that rather overstates what actually happened. Here, the principal defects (whether patent or latent) concerned the absence of proper damp-proofing; that was why, in the end, the Harts were advised that the property needed to be knocked down and reconstructed. Although on the judge’s findings, Mr Large could not have been expected to see all of the damp-proofing defects, he should

have seen enough to give rise to a trail of suspicion which (when taken together with the need for a PCC which would have covered all aspects of the rebuilding works in any event) ought in turn to have led him to give very different advice.

52. So this is not a case on its facts where the measure of loss adopted by the judge has rendered the surveyor liable for, say, extensive structural problems with the foundations which he could not have been reasonably expected to spot on his inspection. Moreover, to the extent that it has rendered him liable for some latent defects unconnected with damp-proofing which he could not have been expected to spot on inspection, that was the direct consequence of his critical failure to advise that a PCC was necessary before the Harts purchased the property.
53. Accordingly, on the particular facts of this case, as found by the judge and in respect of which there can be no appeal, the measure of loss applied by the judge was appropriate. As he pointed out, correctly, any other measure of loss would not have compensated the Harts for the consequences of Mr Large's negligence.

## **6.2 By Reference to the Authorities**

54. Do any of the authorities to which I have referred require or suggest a different answer? In my view, they do not. Indeed, on a proper analysis, I consider that the authorities support the judge's approach.
55. I have explained why the conventional approach to the assessment of diminution in value in a negligent surveyor case, such as *Watts v Morrow*, would not meet the facts of this case (as the judge himself noted at [253]). The failure to advise about the fundamental need for a PCC, for example, meant that this was a very different case to the typical negligent surveyor claim reflected in the trinity of cases to which I have referred. That is also true, in a different context, of *Thompson*: there the negligence was confined to the entry in the catalogue. There was no failure to advise about the absence of something that was fundamental to any decision to purchase the vases in the first place.
56. That said, there are observations in those authorities which are of relevance to the appeal. For example, I have set out what Ralph Gibson LJ said in *Watts v Morrow* at paragraph 40 above. To use his phraseology, the measure of loss identified by the judge was broadly the result of the Harts entering into the purchase of the property, which they would not have done if Mr Large had given the appropriate advice. Moreover, it is to be noted that the measure of loss applied by the judge does not include all of the financial consequences of that transaction. For example, the Harts did not contend that Mr Large was responsible for the funding costs, or any increases in those costs, or any capital value losses due to a fall in property values: see Mr Evans-Tovey's supplemental skeleton argument at paragraph 17. Those losses would not have been recoverable from Mr Large because they would not have been referable to his negligence. In my view, the judge correctly identified the measure of loss referable to the risks which were Mr Large's responsibility, rather than other elements, such as the cost of the mortgage and the like, which were not risks in respect of which he was engaged to provide protection.
57. Similarly, I have noted at paragraph 46 above what May LJ said in *Thompson* about the negligent surveyor cases, that the surveyor would not generally be liable for defects which he *non-negligently* failed to spot. But again, this is a different case because, on

the facts, it was Mr Large's negligence, particularly in connection with the absence of the PCC, which meant that the Harts bought a property riddled with damp-proofing defects, some concealed but some not. Thus May LJ's important caveat ("but without negligence") distinguishes this case from the conventional negligent surveyor cases.

58. The judge's approach is also supported by the analysis in *Hughes-Holland*. There, as I have noted, the Supreme Court was concerned with the assessment of damages where part or all of the loss arose from risks which, in Lord Sumption's words, "it was no part of the advisor's duty to protect his client against." That is not this case. On the contrary, the judge expressly found that it was part of Mr Large's duty to protect the Harts against the losses they claimed; indeed, he expressly used the word "protection" in [252] when he concluded that the diminution in value in this case had to be calculated by reference to the value of the property as it stood, defects and all.
59. Furthermore, at [41] of *Hughes-Holland*, set out at paragraph 43 above, Lord Sumption, when dealing with what is sometimes called an "information" case – which was Mr Wilton's submission on appeal here – said that the professional advisor "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*". That is why, whether the shorthand is apt or not, lawyers still refer to 'the SAAMCO cap': it is only relevant if the financial consequences of entering into the transaction are greater than the financial consequences of the negligence. Here, on the judge's findings of fact and causation, the financial consequences of that which Mr Large failed to do were the same as the financial consequences of the Harts entering into the purchase of the property. The consequences of the latter were not greater than the former, so there was no need for the SAAMCO cap.
60. In this way, what would appear to be the right measure of loss on the particular facts of this case is not contradicted by the authorities; on a proper analysis, it is supported by them. I therefore turn to Mr Wilton's submissions to see if there is anything which my analysis has so far overlooked.

### 6.3 Mr Wilton's Submissions

61. Mr Wilton first relied on the trinity of negligent surveyor cases to argue that the diminution in value was to be assessed as the difference between the value as represented by Mr Large and the value reflecting the condition in which he should have reported the property to be. Anything else would result in Mr Large being treated as if he had given a warranty as to the condition of the property. In my view, for the reasons that I have given, that submission ignores the particular facts of this case as found by the judge. Mr Wilton's preferred method of assessment might compensate the Harts for the simple defects which Mr Large should have reported on but missed, but it would not compensate them for his failure to advise that further investigations were required into the damp proofing and, in particular, his failure to advise as to the criticality of a PCC. Accordingly, Mr Wilton's starting point would not compensate the Harts for the loss that they suffered as a result of Mr Large's negligence.
62. The core of Mr Wilton's submissions then focussed on SAAMCO, *Hughes-Holland*, and the subsequent cases. He argued that Mr Large was providing information, and was not an advisor in the sense of advising the Harts about all the risks involved in the purchase of the property. He submitted that, for a house purchase, a surveyor can never

be “the advisor” in the sense in which it is used in the authorities. He also said that the “advice” and “information” categories were binary and that there could never be any sort of hybrid situation. In consequence, Mr Wilton said, the judge fell into the classic trap which *SAAMCO* was designed to correct.

63. In *SAAMCO*, Lord Hoffmann used the analogy of the mountaineer whose knee had been wrongly passed fit by a doctor, went out climbing and had an accident which was the foreseeable consequence of mountaineering and nothing to do with the condition of his knee. Even though he would not have been climbing but for the doctor’s wrong advice, he could not claim compensation from the doctor: as Lord Hoffmann put it, “the injury has not been caused by the doctor’s bad advice because it would have occurred even if the advice had been correct”. For these purposes, therefore, Mr Wilton suggested that the Harts had become Lord Hoffmann’s mountaineer, claiming all the losses caused by their purchase of the property against Mr Large merely because, as a result of other failings on his part, they would not have bought the property at all.
64. Despite the skill with which they were advanced, I consider that there are a number of complete answers to these submissions.
65. First, at no point anywhere in his careful judgment does the judge suggest that all that Mr Large was doing here was providing “information”. By contrast, he repeatedly referred to the “advice” which Mr Large should have given but failed to give. This is particularly apparent at [252] and the reference to the advice that Mr Large had a duty to provide “which was so fundamental to whether the transaction should go ahead”. In those circumstances, I consider that, by suggesting that this was an “information” case, Mr Wilton was seeking to go behind the factual findings of the judge. The judge plainly did not think that this was an “information” case; had he done, he would have said so. Instead, his factual findings point firmly the other way.
66. Secondly, I reject the submission that the categories of “advice” and “information” are mutually exclusive. They are not rigid categories which do not permit any sort of hybrid: at [39] of his judgment in *Hughes-Holland*, Lord Sumption explains why they are not mutually exclusive. Depending on the particular facts of the case under review, it is quite possible for a professional advisor to be providing both information and advice. What matters is a consideration of the duty overall, so that the court can assess whether or not the professional had a duty to protect his or her client against the particular losses claimed.
67. Thirdly, it seems to me that this was, at the very least, a hybrid case. The judge expressly recognised at [252] that he could not go so far as to say that Mr Large had “a duty to protect his client (so far as due care could do it) against the full range of risks associated” with the purchase of the property. So he could not say that, to put it crudely, Mr Large was 100% an advisor. But on the issue of the negligent advice concerning the need for further investigation and in particular the need for a PCC, the judge said that that was crucial advice for which Mr Large was responsible. To translate that into the categories relied on by Mr Wilton, it seems to me that the judge was saying that, although this could perhaps be categorised as a hybrid case overall, on this critical issue, it was much closer to an “advice” case than an “information” case.
68. Fourthly, and related to the previous point, the nuanced approach adopted by the judge in the present case was in accordance with the recent authorities. As David Richards LJ



stressed in *Asset Co*, the *SAAMCO/Hughes-Holland* approach is simply a tool by which the judge can assess the correct measure of loss. It is not a principle of law, much less a rigid classification that has to be followed in every case. The judge correctly used it to check whether or not the measure of loss was the consequence of the particular failures on the part of Mr Large which he had found.

69. Fifthly, returning to Lord Hoffmann's parable of the mountaineer (and acknowledging the various criticisms to which it has been subject over the years), it seems to me that the judge did not fall into the trap the analogy was designed to illuminate. The mountaineer could not recover the damages for his injury from the doctor because those injuries would have happened "even if the advice had been correct". By contrast, it seems to me that the Harts can recover the losses identified by the judge because those losses would not have happened if Mr Large's advice had been correct.
70. Underlying many of Mr Wilton's submissions was the point that, in the present case, it was Michelmores who were the professionals advising the Harts generally on the transaction. He said that, as a result, they were the "advisors" for the purposes of *SAAMCO* and *Hughes-Holland*. Prima facie, it appears that they were negligent: certainly that was the judge's working hypothesis on the separate point as to whether or not their negligence broke the chain of causation. So Mr Wilton argued that, because there was in existence an advisor, who would be liable for all the Harts' losses, it was wrong in principle to make Mr Large (who was not an advisor for all purposes) liable for the same losses.
71. In my view that submission fails at its final hurdle. For present purposes, I accept that Michelmores were advisors and that they were negligent; I also accept that they were therefore liable for the loss identified by the judge. But that does not, on the facts of this case, reduce or obliterate Mr Large's joint and several liability to the Harts for the same loss. Of course, if the view was taken by those advising Mr Large that he should bear a much smaller percentage than Michelmores of the overall loss, to reflect their respective roles, then that is a matter for the outstanding contribution proceedings between them. It does not affect the measure of loss recoverable from Mr Large by the Harts.
72. During his oral submissions, Mr Wilton indicated that there might be some sort of alternative measure of loss. By reference to paragraphs 26 and 27 of his supplemental skeleton, he suggested that there might be a way to reflect the matters on which Mr Large failed to give proper advice in the assessment of the diminution in value, which would not give rise to the sort of figures that the judge identified. There were a number of difficulties with that proposition.
73. First, this was not an alternative which was offered to the judge. Secondly, it was not an alternative that was the subject of any expert evidence at the trial. Neither of these points is academic. If it is said that a possible alternative should have been considered by the judge, that alternative would have needed to be formulated and advanced in the evidence at trial. That did not happen.
74. Thirdly, the precise formulation of this proposed alternative proved all but impossible, which doubtless explains why it was not in the submissions or the evidence before the judge. The relevant part of the supplemental skeleton put the alternative in this way: "although no expert evidence addressed the specific scenario arrived at by the judge ie

what would have been apparent had Mr Large advised as he should have done, it is inherently likely that any prudent purchaser would have been concerned by the picture which would have emerged, and that the market would have paid commensurately less for the property”.

75. With respect, as a mechanism to assess loss, that is impossibly vague. The damage suffered by the Harts cannot be sensibly assessed or quantified using that formulation. Moreover the submission rather misses the point. This case was not so much about what might have become “apparent” if better advice had been given; it was more about the failure to identify and advise on the scale of the risks that the Harts were running because so much was unknown and questionable. Paying “commensurately less” for the property therefore does not meet the reality of what it was that Mr Large failed to do, or the judge’s conclusion that, if they had known of the risks, the Harts would simply not have bought the property at all.
76. I conclude, having considered Mr Wilton’s oral submissions on the unexplored alternative methodology, that there was nothing to gainsay the proposition that, to the extent that the loss caused by Mr Large’s failure to advise on the risks could be properly assessed and quantified, that was precisely the measure of loss which the judge arrived at. In short, there was no practical or realistic alternative methodology for assessing the diminution in value.
77. In the end, notwithstanding the acuity of Mr Wilton’s submissions (as might be expected from such an experienced professional negligence practitioner), I have concluded that there was no answer to the simple point that, on the particular facts of this case as found by the judge, he awarded to the Harts compensation for the loss which Mr Large had a duty to protect them against.

## **7 CONCLUSIONS**

78. I consider that the judge adopted a thoughtful approach to an unusual case. The measure of loss identified was appropriate for this case because of the particular findings of negligence and causation that he had made.
79. For these reasons, I would dismiss the appeal. I reiterate that, if those advising Mr Large consider that the losses for which he has been found liable are too great when compared with, say, the sums paid by Michelmores, then his recourse lies in the ongoing contribution proceedings.

## **LADY JUSTICE ANDREWS:**

80. I agree that the appeal should be dismissed for the reasons given by my Lord, Lord Justice Coulson. However, in the light of the submissions made by Mr Wilton regarding the potential impact of this decision on future cases concerning the measure of damages for surveyors’ negligence, I simply wish to add my own strong endorsement to what my Lord has said about the unusual nature of this case. The critical feature is that, on the judge’s findings, there were no losses attributable to risks other than the risks against which Mr Large had a duty to safeguard the Harts.
81. This was not just a case about a failure to spot, and draw attention to, certain defects that one might expect to be picked up on a HomeBuyers’ survey. It was about a failure

by the surveyor to convey to the clients (i) the limitations of the protection that the survey afforded them, because there were material risks which he was unable to assess, and (ii) in the light of this, the need for them to take further action in the form of further investigations and, crucially, obtaining a PCC, which was essential. In my judgment it does not matter whether one characterises that breach of duty as a failure to inform them or a failure to advise them or as a mixture of the two. The key point is that Mr Large failed to say what he should have said to the Harts about matters that were fundamental to whether the transaction should go ahead. If he had said those things, they would not have bought the property.

82. The judge had to assess the loss which flowed from the specific failings that he found the Harts had established, and for the reasons given by my Lord, he was right to conclude that the conventional measure of damages would not have compensated them for that loss.

**LORD JUSTICE PETER JACKSON:**

83. I agree with both judgments.