

Court of Appeal distinguishes *Target* and *AIB*

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In a recent decision the Court of Appeal¹ distinguished *Target* and *AIB* on the applicable remedy arising out of a breach of trust in a commercial transaction. It also applied *SAAMCo* post *BPE* and held that the case fell within category 2 – the claimants' loss did fall within the defendants' scope of duty.

The court held that where the trustees' professional obligation in a commercial transaction was only to safeguard the trust fund until a condition was met, and they had no positive role in satisfying that condition, the equitable compensation payable where the funds had been paid out without the condition being satisfied was the full amount of the fund. This was so even where satisfaction of the condition would not have prevented the claimant beneficiaries from losing all of their money.

Background

The background to the claim was a proposed development of holiday homes in Italy by two Italian registered companies. They entered into agreements with an Irish company to promote the sale of the apartments "off plan" to individuals in England and Ireland in exchange for a 31% commission of the sale prices. The defendant solicitors were also signatories to each of the agreements – the Italian developers authorised them to collect the deposit and the commission. The solicitors agreed to release the deposit only following a "written ratification" of the preliminary contract by the relevant Italian

developer and the issuing of a "regular Invoice" from the Irish promoter to the Italian developer.

A number of purchasers subsequently agreed to buy the apartments. They each paid an initial deposit of €3,000. The defendant solicitors then sent an engagement letter inviting their instruction on the transaction. They subsequently provided a due diligence report and reports on title. In a separate letter the firm made it clear that it was only able to advise on the legal aspects of the purchase. Upon signing the purchase contract the purchasers paid the defendant solicitors a deposit of between £30,000 and £105,000. The solicitors acknowledged receipt of the deposit and confirmed they would only release the deposit upon receipt of the vendor's counterpart and issue of a bank loan guarantee "in compliance with Italian Decree 122/05". That provision required the builder to provide security for the funds paid (and to be paid) by the purchaser.

The solicitors subsequently released the deposits without any fully compliant guarantees being provided. They paid 38%

Any comments or queries?

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1. *Main and others v Giambrone & Law and others* [2017] EWCA Civ 1193.

of the deposits to the Italian developers and 62% to the Irish promoter as commission. Ultimately only a small number of the apartments were completed and conveyed to the purchasers. Planning permission was suspended in June 2008 and all construction work then stopped. By 2013 the Italian police had taken possession of the entire development as a result of concerns of money laundering. Most of the solicitors' clients rescinded their purchase contracts but never managed to recover their deposits. 185 of them then brought proceedings against the solicitors.

First instance decisions

The judge at first instance held a trial of generic issues and held that the solicitors were in breach of their duty of care to the purchasers in eight respects. These included a finding that the solicitors were in breach of trust in paying out the deposits without the requisite guarantees being in place. The majority of the claimants then sought summary judgment to recover equitable compensation on that ground. The judge held in favour of the majority of the claimants on that application and held that it was not appropriate to grant relief under section 61 of the Trustee Act 1925.

The appeal – Court of Appeal

On the appeal the defendant solicitors argued that the judge had been wrong to award equitable compensation because even if compliant guarantees had been obtained the claimants would still have lost all of their money. It was common ground that the guarantees would not have paid out in the circumstances that arose. Accordingly, the defendants said that the compensation should be nil. The claimants' case was that the defendants' causation argument was not engaged and that there was an obligation to repay the entirety of the funds paid out.

The Court of Appeal considered the House of Lords and Supreme Court decisions in *Target Holdings Ltd v Redferns [1996] 1 AC 421* and *AIB Group (UK) Plc v Mark Redler & Co Solicitors [2015] AC 1053*. In those cases the defendant solicitors had successfully deployed causation arguments to defeat claims for breach of trust. In *Target* Lord Browne-Wilkinson held that equitable compensation makes good the loss suffered by a beneficiary "which, using hindsight and common sense, can be seen to have been caused by the breach". Lord Toulson declined to qualify that in *AIB* and went on to say that the measure of loss for equitable compensation in cases such as *Target* was the same as it was in contract, not because of any disapplication of the relevant equitable principles, but because the trust was part of the machinery for the performance of a contract and that was relevant for the purpose of looking at what loss was attributable to the breach of trust - "... it would be artificial and unreal to look at the trust in isolation from the obligations for which it was brought into being.". He finished (at 76) saying "What has to be identified in each case is the content of any relevant obligation and the consequences of its breach.".

Lord Justice Jackson held that the first step, following those authorities, was to determine the obligation of the solicitors that had not been performed. Here, that was to receive whatever guarantees were provided, determine whether or not they were compliant, and release the deposits only if they were compliant. There was no obligation to procure compliant guarantees or otherwise liaise with the providers of the guarantees. In that respect the position was different to the position in each of *Target* and *AIB*. In those cases the solicitors had been under a positive obligation to secure and remove a charge (respectively) over the relevant property prior to releasing the trust funds.

Lord Justice Jackson held that if the solicitors had complied with their duty not to release the deposits unless compliant guarantees had been provided the claimants would not have suffered the losses that they did. The deposits would have remained in the solicitors' client account. Accordingly, the case turned on the characterisation of the solicitors' obligations. He went on to add that where in *AIB* the trust was part of the machinery for the performance of the underlying contract, the trust in the current claim was only part of the machinery for the performance of the retainer.

The SAAMCo point

The defendant solicitors also argued that the claim for the lost deposits in negligence and breach of trust were prevented by a proper application of the principles set out in *South Australia Asset Managements Corporation v York Montague Ltd* [1997] AC 191. They said that this was a case where they were liable only for the specific consequences of their advice or information being wrong. They were not liable for all of the consequences of the claimants entering into the transaction.

The Court of Appeal considered Lord Sumption's re-examination of SAAMCo in the recent decision in *Hughes-Holland v BPE Solicitors and another* [2017] UKSC 21. Lord Justice Jackson drew attention to his re-examination of the advice and information categories.

"... The true distinction between categories 1 and 2 does not depend upon information or advice. The distinction lies in whether D is building the whole decision making process or merely providing part of the material on which C will rely ... In a category 2 case "it is left to the advisor to consider what matters should be taken into account when deciding whether to enter into the transaction." ... Valuers and conveyancers usually fall into category 1. They provide part of the material on which the client bases its decision."

Lord Justice Jackson held that the present case was not a conventional conveyancing situation. The claimants had no knowledge of Italian law and conveyancing procedures and the solicitors decided what information they needed and provided that to them. They guided the whole decision making process in that they decided what protection they needed, what sums they should pay out and when it was safe to pay it out. In particular, they had advised that the claimants would be adequately protected by the guarantees.

Accordingly, if and to the extent that the claims rested upon negligent information or advice the claim was a category 2 case and the loss that the claimants suffered fell within the scope of the solicitors' duty of care.

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