Various Claimants v Giambrone
[2017] EWCA Civ 1193

Summary

Facts

The claimants – who lived in the UK and the Republic of Ireland – paid deposits of between £30,000 and £150,000 when contracting to buy 'off plan' apartments that were to be built by two firms of developers on two adjoining sites in Calabria, in southern Italy. The deposits were accepted by the defendant solicitors, who were acting on behalf of the claimants, and were paid over by the defendants to the developers.

Under Italian law, every time the developers entered into a contract with one of the claimants, the developers were supposed to ensure that a guarantee was issued by a bank, insurance company, or a similar registered body that would protect the claimant in the event that the developers went bust before completion and allow the claimant to recover any monies paid in advance from the guarantor. Unfortunately, the defendants paid the claimants' deposits over to the developers without making sure that any effective guarantees of those deposits had been put in place by the developers.

The development ran into trouble when it was alleged that the development project was bound up with a money laundering scheme being operated by the Mafia and the IRA. The police took possession of the development site, after only a few of the apartments had been built. The developers never went bust, and so even if the guarantees that were supposed to protect the claimants had been valid, they could not have been enforced against the institutions issuing them. However, the claimants were unable to recover their deposits from the developers. They consequently sued the defendants, claiming that the defendants were liable to them for the value of their deposits.

Foskett J found at first instance that the defendants had committed various wrongs in the way they had represented the claimants, and handled their affairs, including committing a breach of trust by paying the claimants' deposits to the developers when no effective guarantees to protect the claimants were in place. The claimants argued that this breach of trust that the defendants were summarily liable to repay them the value of their deposits. Foskett J agreed, and the defendants appealed.

Decision

The Court of Appeal upheld Foskett J's decision. The defendants had sought to rely on the House of Lords' decision in *Target Holdings Ltd* v *Redferns* [1996] 1 AC 421, and the UK Supreme Court's decision in *AIB Group (UK) Plc* v *Redler* [2015] AC 1503 to argue that the fact that they had committed a breach of trust did not make them liable to the claimants for the loss of their deposits. Their argument was that if the guarantees had been in place – and the defendants had therefore not committed a breach of trust by paying the deposits over to the developers – the claimants would still have lost their deposits, and were therefore no worse off as a result of the defendants' breach of trust than they would have been had no breach occurred.

The Court of Appeal disagreed. Jackson LJ held (at [59]) that 'The duty or obligation of the solicitors was to receive deposits from purchasers and to hold that money as custodians until the developers provided compliant guarantees' (that is, compliant with Italian law).

Until such guarantees were provided, the defendants were duty bound to hang on to the claimants' deposits as no such guarantees were ever provided, the defendants would still be in possession today of the claimants' deposits. It followed that if the defendants had performed their duty, the claimants would not have lost their deposits – the deposits would still have been in the defendants' hands, waiting to be reclaimed by the claimants.

Jackson LJ distinguished *Target Holdings* and *Redler* on the basis that 'In *Target* the solicitors were under a duty to take active steps to secure a charge over the property, before releasing the monies. In *AIB* the solicitors were under a duty to take active steps to secure the removal of prior charges before releasing the money' (at [61]). Had the solicitors done their duty in both of these cases, the claimants in those cases would still have suffered the loss of which they complained.

In *Target*, Target lent a firm called Crowngate £1.525m to purchase land in Birmingham which Target believed was worth £2m. In fact, the land was worth considerably less. Crowngate was effectively only going to pay £775,000 for the land, and it or its associates would pocket the difference between what Target was lending it to pay for the land and what it would actually pay. The loan was never repaid and Target suffered a big loss when it could only sell the land – over which it had a first charge – for £500,000. Target then discovered that Redferns, the solicitors who acted for Target, had disobeyed instructions by handing over Target's loan money to Crowngate *before* Crowngate had bought the land, and therefore before a charge could be created over the land for Target's benefit. The charge was created a month later, but as we just saw, only allowed Target to recoup £500,000 of the £1.525m that it lent Crowngate. Target sued Redler, claiming that Redler had committed a breach of trust by prematurely paying Crowngate the loan money, and was therefore liable to repay that money to Target on the basis that any payments out of a trust fund that have been made in breach of trust result in the trustee being held liable to reconstitute the trust fund by the amount of the unlawful payment, thereby 'falsifying' the payment out. The House of Lords held that Target's claim could not be supported: had Redferns not committed its breach of trust, and had paid Crowngate the loan money at the right time, Target would have suffered exactly the same loss that it had actually suffered.

In *Redler*, a couple called the Sondhis wanted to remortgage their home in 2006 (note the date). The idea was that AIB would lend the Sondhis £3.3m, and £1.5m of that would be used to pay off the existing Barclays mortgage on the Sondhis' home, and the loan to the Sodhis would be secured by a new mortgage for AIB's benefit over the Sondhis home, which was valued at £4.25m. The solicitors handling the transaction were Mark Redler, the defendants. AIB transferred the £3.3m that was going to be loaned to the Sondhis to Mark Redler, and then Mark Redler made the mistake of only paying Barclays £1.2m, which was insufficient to discharge the mortgage Barclays had over the Sondhis' home. When this was discovered, AIB agreed with Barclays that Barclays still had a charge for £300,000 over the house, and Barclays accepted that the house was subject to a second mortgage for £3.3m in AIB's favour. After the financial crash in 2008, the Sondhis were unable to keep up the repayments on their mortgage, and their house was repossessed and sold in 2011 - but by now the house was only worth £1.2m. After Barclays had taken the first £300,000 from the proceeds of sale, this left AIB with only about £900,000 - so they had lost £2.4m on the loan to the Sondhis. AIB sued Redler, arguing that Redler had committed a breach of trust in handing over £2.1m to the Sondhis without getting in return the security (a first mortgage over the Sondhis' home that Redler was supposed to get). AIB therefore argued that Redler were liable to pay AIB back the money it had unlawfully handed over to the Sondhis – that is, £2.1m. The UK Supreme Court disagreed, holding that had Redler not committed a breach of trust, and obtained the first charge that it was supposed to obtain, AIB would only have been £300,000 better off when the Sondhis defaulted (because the first £300,000 from the sale of

the Sondhis' house would have gone into AIB's pockets and not Barclays') and all Redler were therefore liable to AIB for was £300,000.

The Court of Appeal in *Giambrone* distinguished both of these cases on the basis that the defendants in those cases had breached an 'active duty' to obtain something for the claimants – and were therefore liable only for the difference that their failure to obtain that thing (temporary in *Target Holdings*, permanent in *Redler*) had made to the claimants. In contrast, the defendant solicitors in *Giambrone* were not under any such active duty to obtain anything for the claimants. The guarantees that were supposed to be secured for the claimants were to be secured by the developers, not the defendant solicitors (at [60]). The defendants' duty was simply to hang on to the claimants' deposits until those guarantees were in place, and had the defendants done their duty, the claimants would have been better off today by the amount of those deposits.

Comments

There is no doubt that the defendant solicitors should have been held liable to the claimants for the loss of their deposits. The record shows that they were guilty of numerous failures to look out for the claimants' interests which, if they had not occurred, would have prevented the claimants from going forward with what turned out to be a terrible deal for them.

The interesting question is whether the defendants should have been held liable to the claimants if the *only* thing they did wrong was to pay the claimants' deposits to the developers when there were no effective guarantees in place to the protect the claimants' payments should the developers go bust. So let's imagine a situation where the defendants undertook to act on behalf of the claimants in relation to a development where there was no reason for the defendants to think that there were any problems with the development or the developers, and the only thing the defendants did wrong was that they handed over the claimants' deposits to the developers when there were no adequate guarantees in place to protect the claimants' investment should the developers go bust. (Consistently with this being the *only* thing the defendants did wrong, they took reasonable steps to check that adequate guarantees were in place before handing the deposits, but the developers had forged the guarantees in question and had taken steps to ensure that any checks that the defendants made on the guarantees would be passed.) In this *Faultless* case where the defendants still committed a breach of trust by breaching their strict custodial duty not to hand over the claimants' deposits to the defendants when adequate guarantees were not in place, would the defendants be held liable for the loss of those deposits?

The logic of the Court of Appeal's position in *Giambrone* is that the defendants *would* be held liable in *Faultless* and would be reduced to throwing themselves on the mercy of the court and asking to be exempted from liability under s 61 of the Trustee Act 1925, on the basis that they acted reasonably in the circumstances. And yet, at a doctrinal and substantive level we can ask whether things should get that far. A case can be made at both levels that the defendants should not be held liable, even in principle.

At a doctrinal level, the defendants obviously breach their custodial duty in *Faultless* by handing the claimants' deposits over when no adequate guarantees were in place. But there are two ways of characterising that breach: (a) the defendants *paid* the claimants' deposits over when no adequate guarantees were in place; (b) the defendants paid the claimants' deposits over *when no adequate guarantees were in place*. There is a 'but for' causal relationship between breach (a) and the claimants' ultimate loss of their deposits – had the defendants not paid the deposits, the claimants would still have them – but there is no 'but for' causal relationship between breach (b) and the claimants' ultimate loss of their deposits –

had adequate guarantees been in place when the defendants paid the deposits over, the deposits would still have ultimately been lost. Were this a tort law case, the court would decide the case on the basis that the defendants' breach should be characterised as (b), rather than (a), as that is more advantageous to the defendants (*The Empire Jamaica* [1957] AC 386) – in which case the defendants would not be held liable to the claimants. Why should the position be any different in equity?

Perhaps the position would be different if there were some substantive merit to the claimants' claim in *Faultless*, but there is not. The claim of the claimants in *Fautless* would have as little merit as the claims of the claimants in *Target* or *Redler*. In all three cases, the claimants entered into a transaction that turned out to be a bad deal for them, and were consequently seeking to escape the consequences of that transaction – and they were seeking to do so at the expense of the defendants, who had not contributed *in any way* either to the claimants' decision to enter into what turned out to be a bad deal, or to the state of affairs that made the transaction such a bad one to enter into. In other words, in all three cases, the claimants screwed up and were trying to rely on a technical point about the falsificatory nature of remedies for a breach of trust in order to make their screw up the defendants' problem. It would be strange if the claimants were allowed to do this in equity. After all, the equitable jurisdiction came into being to prevent claimants who had the law on their side bringing claims that had no substantive merit (an early example was the case where a defendant paid a debt that she owed the claimant, but forgot to take from the claimant and destroy the deed proving the debt, and then the claimant sued the defendant on the deed for the debt that had already been paid). Given this, it would be odd if equity were itself to allow claimants to rely on equitable rules and principles in order to bring claims against other people that have no substantive merit. Some academics who specialise in this field are willing to allow this to happen. Perhaps they do this as a way of falsifying John Selden's (1584-1654) observation that 'Equity is a roguish thing' which – in so far it depends on the conscience of the Lord Chancellor – might equally be made to depend on the length of the Lord Chancellor's foot. Or, perhaps, they employ this as a shibboleth (Judges 12:5-6) to allow 'true' equity lawyers to distinguish themselves from mere dabblers in the subject. Either way, we should not follow them, and our highest court rightly refused to do so in *Target* and then in *Redler*. However, the Court of Appeal's decision in *Giambrone* indicates that where a custodial duty is breached by a trustee, the courts may well be willing to don the equitable hairshirt stitched by our true believer academics out of the old caselaw and find that even in a case like *Faultless*, the defendants will be made to bear the costs of the claimants' foolishness (subject, of course, to the courts' discretion to absolve them of liability under s 61 of the Trustee Act 1925).

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