

# EQUITABLE COMPENSATION AND THE SAAMCO PRINCIPLE

When things go wrong in property transactions, solicitors tend to make obvious and attractive defendants. They are insured and can provide substantial monetary redress. Moreover, they may well have held deposits or mortgage monies on trust. This opens up the possibility of claims for breach of trust. Such claims continue to prove popular; unlike claims in negligence, liability for breach of trust is strict and the onus is shifted onto the trustees to prove that their conduct was honest and reasonable and that they ought fairly to be excused from liability for breach of trust (see Trustee Act 1925, section 61). But a crucial question is whether the remedies for breach of trust are more generous to claimants than those in tort or contract. The decisions of the House of Lords in *Target Holdings Ltd v Redferns* [1996] A.C. 421 and the Supreme Court in *AIB Group (UK) Plc v Mark Redler & Co* [2014] UKSC 58; [2015] A.C. 1503 suggest not, at least where the trust relationship between claimant and defendant arises as an incident of a contractual arrangement. A similar approach was ostensibly adopted by the Court of Appeal in the recent decision of *Main v Giambrone & Law (a firm)* [2017] EWCA Civ 1193, but the result of the case is more generous to the claimants than that reached in *Target* and *AIB*. It is unclear whether *Target* and *AIB* can be satisfactorily distinguished on their facts. The Court of Appeal also applied the SAAMCO principle regarding “scope of duty” to equitable compensation for the first time. This development was perhaps predictable in the wake of *AIB*, but deserves critical attention.

Two Italian companies planned to build luxury apartments in Southern Italy. The apartments were sold “off-plan” as holiday homes to people living in the UK and Ireland. Unfortunately, only a very small number of apartments were completed and conveyed to purchasers. There are currently investigations into allegations that the whole project was a money laundering operation organised by the IRA and Italian Mafia. Most disappointed purchasers rescinded their contracts of purchase but were unable to recover their deposits. They sought redress against their solicitors, Giambrone, a firm of Italian lawyers practising in London and Italy to whom the developers referred prospective purchasers. Once purchasers had paid an initial deposit of €3,000, they were sent a retainer letter by Giambrone. After signing preliminary contracts, the purchasers then transferred to Giambrone deposits ranging between £30,000 and £105,000. Giambrone held the deposits on trust, with the

authority to release them upon the issue of a bank loan guarantee in compliance with Italian Decree 122/05. Giambrone wrongly released the deposit monies without such guarantees being in place: Decree 122/05 required a guarantee to be issued by a financial institution listed in Article 107 of the Consolidated Law on Banking and Credit, but Giambrone released the deposit monies upon receipt of guarantees from institutions listed in Article 106. The institutions listed in Article 106 were not as strong as those listed in Article 107. The unauthorised misapplication of trust monies by Giambrone constituted breaches of trust.

The Court of Appeal had to decide what remedy should be awarded following Giambrone's breaches of trust. (For reasons of space, further discussion of the nature of the breaches of duty committed by Giambrone is not possible in this note.) Before *Target Holdings*, the purchasers would have been able to take an account of the trust fund, falsify the wrongful disbursement and recover the amount of the misapplied deposits from their solicitor-trustees. But in the wake of *Target Holdings* and *AIB*, the focus is now on "equitable compensation" and the loss caused to a beneficiary by a breach of trust. Giambrone argued that this meant that the purchasers should not receive any compensation, since the events in Italy did not (somewhat oddly) trigger the obligation of the guarantors to pay out (at [47]), so even if an Article 107 guarantee had been obtained the claimants would still have lost their deposits. In other words, it did not matter to the purchasers' ultimate financial position that the guarantee was issued by an institution listed in Article 106 rather than Article 107.

The Court of Appeal held that the purchasers could recover the value of their lost deposits. Jackson L.J., who gave the leading judgment, thought that three key authorities needed to be considered: *Canson Enterprises Ltd v Boughton & Co* (1991) 85 DLR (4<sup>th</sup>) 129, *Target*, and *AIB*. Although the decision of the Canadian Supreme Court in *Canson* was thought to be helpful by the House of Lords in *Target* and Supreme Court in *AIB*, it is worth highlighting once more that *Canson* did not concern a breach of trust, but rather breach of duty by a fiduciary who was not a trustee. The fiduciary did not owe custodial duties regarding the claimant's property. The continued muddling of claims for breach of trust and claims for breach of fiduciary duty undermines confidence in the reasoning of the courts. *Target* and *AIB*, on the other hand, were directly on point and are worth outlining briefly.

In *Target*, Redferns was a firm of solicitors acting for both the borrowers and the lender, Target Holdings ("Target"). Redferns held the mortgage advance of around £1.5 million on a bare trust for Target, with authority to release the

money to the borrowers only upon receipt of the executed conveyance and mortgage of the property. In breach of trust, Redferns released the money before the documents were executed. The property was in due course found to be worth only £500,000. However, soon after the breach of trust the relevant mortgage documents were executed and received by Redferns. The House of Lords held that the solicitors would only be liable if Target could prove that its loss would not have occurred but for the early payment of the money without taking any security.

In *AIB*, Mark Redler & Co (“Redler”) was a firm of solicitors which was retained to act for the Sondhi family and AIB, a Bank, on the re-mortgage of the Sondhis’ family home. AIB advanced £3.3 million to Redler for this purpose. The mortgage monies were only to be released in exchange for a fully enforceable first legal charge over the property, but in breach of trust Redler advanced the monies without fully redeeming a first legal charge over the property already held by Barclays. Barclays therefore retained a first legal charge over the property of around £300,000. The Supreme Court refused to order that Redler reconstitute the trust fund to the tune of £3.3 million. AIB could only recover the loss it had suffered as a result of the breach of trust: £300,000.

*Giambrone* seems remarkably similar to these cases. Even if Giambrone had received valid guarantees in accordance with Decree 122/05, then the purchasers would still have lost their deposits; Giambrone argued, therefore, that no substantial remedy should be ordered. But the Court of Appeal held that *Target* and *AIB* could be distinguished. Jackson L.J. said (at [60]-[61]) that the “essential difference between this case and *Target* or *AIB* is the solicitors’ role in relation to the security. ... Giambrone’s role was to receive whatever guarantees the developers provided and to check whether or not they complied with Decree 122. ... The position was different in *Target* and *AIB*. 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.”

This distinction is novel, and may be an initial move to try to restrict the scope of *AIB*. That decision departed from previous orthodoxy in rather brusque fashion based upon somewhat unsatisfactory reasoning that should perhaps be revisited by the Supreme Court (see e.g. Davies (2015) 78 M.L.R. 672). In any event, on the facts of the cases, it is not clear that the solicitors in *Target*, for example, were under “a duty to take active steps”. If valid charges could not be

granted, then the solicitors would not have been under an “active duty” to do anything further. But even if this factual distinction were to be accepted, it is not clear *why* it should make a difference to the remedies awarded.

Jackson L.J. thought that Giambrone’s duty was “an obligation to act as custodians of the deposit monies indefinitely” (at [62]), and this more passive duty could be contrasted with the active duty owed in *Target* and *AIB*. However, this distinction is very thin indeed: in both *Target* and *AIB* the duty of the trustees was to act as custodians of the mortgage monies too. The judgment of the Court of Appeal may well encourage claimants to argue that the trustees should simply have remained as custodians in order to obtain more generous relief, but courts are likely to struggle simultaneously to apply such a test and distinguish *Target* and *AIB*. It is unclear why the “active duty” present in *Target* and *AIB* should swallow up and effectively render redundant the “custodial duty” owed by the trustees.

Jackson L.J. also distinguished *Target* and *AIB* since on the facts of *Giambrone* there was a causal link between the breach of trust and the loss of the deposits, unlike in the earlier cases. His Lordship observed – consistently with the guidance from the Supreme Court – that “equitable compensation and contractual damages run in tandem” (at [63]). But it is not clear that the contractual measure of damages would cover all the loss suffered. That depends on what would have happened if Giambrone had not paid the money away without a guarantee compliant with Decree 122/05. If no compliant guarantee would have been received, then the result seems correct since Giambrone should have had the deposit monies. But if Giambrone would have received a compliant guarantee, then no loss would have been caused by the breach; the case is then similar to *Target* and *AIB*. Unfortunately, no finding of fact in this respect seems to have been made by the trial judge, who appeared to agree with the claimants that, unlike for claims in tort or contract, “it was not necessary to demonstrate that an individual Claimant would not have proceeded with a purchase where breach of trust was relied upon” ([2015] EWHC 3315 (QB) at [17]).

In *Target* (at 436) Lord Browne-Wilkinson said: “I have no doubt that, until the underlying commercial transaction has been completed, the solicitor can be required to restore to client account moneys wrongly paid away”. In *AIB*, the Supreme Court held that the underlying transaction had been completed “as a commercial matter”, even though the requisite first legal charge was never obtained, because the relationship between the borrowers and the bank became one of contractual borrower and lender (see e.g., *AIB* at [74]). It may be that in

*Giambrone* the Court of Appeal did not think that the commercial transaction was completed because the proper guarantees were not received. This strict approach to completion would be attractive since it enables the parties to dictate precisely what constitutes “completion”. However, it would also cast some doubt upon the lax test of the Supreme Court. If the Court of Appeal in *Giambrone* had concluded that the transaction was completed because the monies had been released in return for a guarantee – just as in *AIB* the monies were released in return for a charge – then the loss should have been assessed by contrasting the purchasers’ position with the guarantees actually received against the position they would have been in with the proper guarantees. On that basis, no loss would have been suffered by the purchasers.

In any event, the Court of Appeal thought that compensation at common law would be subject to the *SAAMCO* principle, and held that equitable compensation should also be subject to the same restriction (at [64]). This assimilation of *SAAMCO* into the equitable sphere follows logically from the decision of the Supreme Court in *AIB* that equitable compensation is focussed on loss in a similar manner to compensation at common law. Yet given the difficulties that courts have faced in applying the *SAAMCO* principle, it is to be expected that it will be a further source of difficulty when dealing with equitable compensation. Indeed, the *SAAMCO* principle does not even seem very helpful when considering the breach of the custodial duty at issue in *Giambrone*; Jackson L.J. thought (at [84]) that the purchasers suffered a “direct loss” as a result of this breach, and the very purpose of the custodial duty was not to pay the money away without receiving appropriate guarantees. As a result, there should be no “cap” on liability as a result of the *SAAMCO* principle.

However, Jackson L.J. did consider fully the impact of *SAAMCO* on a claim for equitable compensation “[i]f and in so far as the claimants’ claims rest upon negligent information or advice” (at [83]). In *South Australia Asset Management Corporation v York Montague Ltd* [1997] AC 191 at 214 Lord Hoffmann drew a distinction between cases where a party is under 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”. But the division between “information” and “advice” can be misleading. Jackson L.J. preferred to differentiate (at [75]) between “(1) cases where D is liable for the specific consequences of its information or advice being negligently wrong and (2) cases where D is liable for all the consequences flowing from C entering into a transaction in reliance on D’s negligent advice”. Solicitors generally fall within category 1, since they only provide part of the

material on which the client bases its decision. This point was forcefully made very recently by Lord Sumption in *Hughes-Holland v BPE Solicitors* [2017] UKSC 21, who criticised earlier cases (such as *Bristol and West Building Society v Fancy & Jackson (a firm)* [1997] 4 All ER 582 and *Portman Building Society v Bevan Ashford (a firm)*[2000] PNLR 344) which had held that solicitors fell within Category 2. Lord Sumption was clear that even though a breach of duty by a solicitor may be very grave indeed and crucial to the client's going ahead with a transaction, that was insufficient to transform the case from Category 1 to Category 2. Solicitors "rarely supply more than a specific part of the material on which his client's decision is based" (*BPE* at [44]). They are therefore very different from investment advisers who advise clients what to do with their money: such advisers will generally fall within Category 2.

As lawyers focussed on the legal aspects of the purchase of property, it is suggested that Giambrone ought to have fallen within Category 1. That would be consistent with the thrust of Lord Sumption's reasoning in *BPE*. Yet Jackson LJ held that "this was not a conventional conveyancing situation" (at [82]) and therefore fell within Category 2, exposing Giambrone to liability to compensate for all the losses suffered by the claimants, rather than just the consequences of the information provided being wrong (which would have been nothing). The basis of this conclusion is flimsy. Jackson L.J. pointed out that the claimants were buying properties in Italy with no knowledge of Italian law, but even if the properties were in England it is not evident that many claimants would have much knowledge of English property law either. Nevertheless, his Lordship thought that Giambrone "were (albeit imperfectly) guiding the whole decision-making process" (at [82]). It is not clear why he reached this conclusion; it does not seem unusual that the solicitors "were telling the clients what protection they needed, what sums they should pay out and when it was safe to pay those sums out" (also at [82]). His Lordship considered that Giambrone undertook "much wider obligations" (at [25]) than simply advising on legal aspects of the purchase – despite this restriction being stated by Giambrone in a letter to its clients – but simply referred vaguely to "documents quoted in paragraphs 21-24" to justify this finding. Reading those documents, it seems clear that Giambrone was offering legal advice on legal aspects of the transaction, and no more than that. References to the "necessary due diligence" it undertook to carry out, and even to "a multiple object investigation aiming at determining the feasibility of the targeted purchase" should be read in that context: the focus of the lawyers was on the legal aspects of the transaction.

It is therefore suggested that the Court of Appeal was wrong to conclude that – to the extent that the claim rested upon negligent information or advice –

this was a Category 2 rather than a Category 1 case. After all, Giambrone could not have advised on matters such as valuation of the properties, and that was clearly outside the scope of their duties. Moreover, they were only retained *after* the purchasers had paid the initial €3,000 and decided to purchase a particular property. As a result, it is difficult to see how Giambrone was in a similar position to the investment adviser who advises a client what to do with its money (taken as a typical case falling within Category 2). Jackson L.J. thought that, having taken the primary decision to buy property in southern Italy, the claimants “put themselves into the hands of Giambrone as their experienced Anglo-Italian lawyers” (at [83]), but this is no different from ordinary property transactions in the purely domestic context.

Superficially, the decision of the Court of Appeal in *Giambrone* looks unremarkable. Their Lordships apply the language of “equitable compensation” to remedies for breach of trust, rather than the traditional language of “account” and “falsification”, which is in line with *AIB*. And, given the focus on compensation, it is consistent to employ a “scope of duty” analysis and the *SAAMCO* principle. Yet the application of these notions to the facts is problematic, and is likely to continue to pose problems in future cases. It may be that the Court of Appeal was influenced by the merits of the case: Avvocato Giambrone, described by Jackson L.J. as “the moving force” (at [5]) in *Giambrone*, lost his entitlement to practise in England as a result of a decision of the Solicitors’ Disciplinary Tribunal following an investigation into misconduct relating to bulk conveyancing on behalf of clients purchasing properties abroad. However, it may be that the solicitors in *Target* also participated in the fraud perpetrated on the lender (see e.g. *Target* at 432) but that did not cloud the issues of legal principle on an application for summary judgment. *Giambrone* does not sit easily with the recent decisions of the Supreme Court in both *AIB* and *BPE*.

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