

Dixon Coles & Gill v Baines [2021] EWCA Civ 1097

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Getting the balance right. A sigh of relief for innocent partners...

Introduction

In determining, for the first time, whether the Partnership Act 1890 operates so as to render innocent partners ‘party or privy’ to the frauds of another partner, Asplin LJ, Nicola Davies LJ and Sir Timothy Lloyd allowed the appeal against the Judgment given below by HHJ Saffman and found that the 1890 Act provides for no such thing.

Facts

At the centre of the proceedings was former law firm, Dixon Coles & Gill (‘DCG’); which, at the relevant time had three partners: Mrs Linda Box (‘Box’), Mr Julian Gill (‘Gill’) and Mrs Julia Wilding (‘Wilding’). Prior to the events to which the matter related, the Diocese of Wakefield (‘the Diocese’) had been a client of DCG for many years.[1]

In 2015, Gill discovered that Box had been making unauthorised payments from DCG’s account: over the years, she had misappropriated sums into millions of pounds held on behalf of the Diocese and other clients. She was expelled from DCG in January 2016; thereafter being struck off as a solicitor and, having pleaded guilty to offences of dishonesty, was sentenced to a term of imprisonment.

The Proceedings

By way of the proceedings, the Diocese claimed an account (on the basis of wilful default), against Box, Gill and Wilding, of DCG’s dealings with all moneys, investments and assets possessed or received by DCG or by Box as trustees for the Diocese.[2] It was estimated that the sum received by DCG amounted to c.£942,000. [3] Despite accepting that Gill and Wilding were innocent to the fraud; the claim was brought on the basis that DCG was liable to make good the loss under section 11 of the Partnership Act 1890 and, as a corollary, Gill and Wilding would be liable jointly and severally for the appropriate sums under section 12 of the same.

Gill and Wilding defended the claim against them on the basis that the claims made by the Diocese were statute-barred insofar as they arose more than six years before the issue of the Claim Form.[4]

The Law

The relevant provisions of the Partnership Act 1890 are sections 11 and 12:

11. In the following cases; namely—(a) Where one partner acting within the scope of his apparent authority receives the money or property of a third person and misapplies it; and (b) Where a firm in the course of its business receives money or property of a third person, and the money or property so received is misapplied by one or more of the partners while it is in the custody of the firm; the firm is liable to make good the loss.

12. Every partner is liable jointly with his co-partners and also severally for everything for which the firm while he is a partner therein becomes liable under either of the two last preceding sections.

Introduced by section 8 of the Trustee Act 1888, section 21 of the Limitation Act 1980 provides as follows:

(1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being

an action –

(a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or

(b) to recover from the trustee trust property or the proceeds of trust property in the possession of the trustee, or previously received by him and converted to his use. ...

(3) Subject to the preceding provisions of this section, an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of limitation is prescribed by any other provision of this Act, shall not be brought after the expiration of six years from the date on which the right of action accrued.

The Decision of HHJ Saffman [2020] EWHC 2809 (Ch)

The Diocese sought summary judgment against Gill and Wilding.[5]

The issue for the Court to determine was whether the two innocent former partners could benefit from the limitation defence afforded by section 21(1)(a) of the Limitation Act 1980. In order to do so, they would need to satisfy the Court that despite the relevant provisions of the Partnership Act 1890 rendering them liable for the wrongdoing of Box, they were not ‘party or privy’ to the same for the purposes of section 21(1)(a) of the Limitation Act 1980 and accordingly, they were protected by the six-year limitation period established by section 21(3).

By order dated 1 December 2020, HHJ Saffman ordered an account against Gill and Wilding, with the transactions to which the limitation issue was relevant being included in the same. The crux of the Judgment, handed down on 28 October 2020, was contained in paragraph 137 (emphasis added):

*“I do not see a realistic basis for arguing that Mr Gill and Mrs Wilding are not party or privy to the fraud where the Partnership Act fixes them with a direct liability in respect of Mrs Box’s fraud. I accept that in one very obvious sense they are not party or privy because they knew nothing about the fraud but the fact is that **the Partnership Act deems them to have been party or privy in the context of actions undertaken by the errant partner in the ordinary course of business or within the scope of apparent authority – as the conveyancing transactions quite obviously were.**”[6]*

The Decision of the Court of Appeal [2021] EWCA Civ 1097

HHJ Saffman granted permission to Gill and Wilding to appeal his decision.

Citing policy reasons, the argument before the Court of Appeal made on behalf of the Diocese was, *inter alia*, that Gill and Wilding cannot rely upon section 21 of the Limitation Act 1980 to void themselves of liability when they were, at the time of the fraud, partners of the dishonest Box, and the fraud was committed in the ordinary course of the partnership business. The innocent partners, as opposed to the innocent client, ought to be the ones to bear the risks.

In response to this submission, the Court of Appeal raised the corresponding policy underlying the Limitation Act 1980. An innocent client has the right to pursue an innocent partner within the 6-year time period provided for in section 21(3) of the Limitation Act 1980; but an innocent partner should not, as a general principle, be at risk of being sued for ever.

Further, referring to section 8 of the Trustee Act 1888 (and its introduction of section 21 into the Limitation Act 1980), the Court of Appeal stated ‘*it would seem surprising*’[7], if the limitation defence afforded to an innocent trustee by way of that section was not available in:

'the not uncommon situation where a fraud is committed in the ordinary course of a partnership business, by abstracting money held on behalf clients in respect of which all the partners are trustees, but only one partner is guilty of the fraud and the other or others are entirely innocent'

And:

'[I]t would be all the more surprising to find that this was the effect of the Partnership Act, passed only two years later, which says nothing at all on the point, or that the partnership relationship had that effect despite the silence of the 1890 Act on the point.'[8]

In summary, it was found that there was no provision in the Partnership Act 1890, nor any authority before the Court, to support the proposition that all partners, even if entirely innocent, are 'party or privy' to their dishonest partner's frauds merely by reason of the partnership relationship.

The appeal was therefore allowed and HHJ Saffman's order for an account was set aside insofar as it related to the transactions in respect of which the limitation defence had been raised.

Conclusion

As recognised by the Court of Appeal:

'[I]t is perhaps surprising that the point has not arisen for decision in the 130 years since the two nineteenth century Acts were passed.'[9]

For now at least, the decision has welcomingly clarified the liability of innocent partners caught up in these unfortunately not unusual situations.

[1] Following a reorganisation, the Diocese of Wakefield was absorbed into the Diocese of Leeds.

[2] Other related remedies were also sought.

[3] The Diocese accepted that of that c.£942,000, it had received about £150,000.

[4] The Claim had been issued on 25 September 2018.

[5] Another application was also sought, but this concerned an issue not material to the subsequent appeal.

[6] See the Court of Appeal Judgment, at paragraph 19.

[7] Ibid, paragraph 44.

[8] Ibid.

[9] Ibid.