SIB Quincecare claim: no loss suffered where SIB paid some creditors early (Stanford International Bank (in liquidation) v HSBC Bank PLC)

By a majority, the Supreme Court has dismissed Stanford International Bank's (SIB) appeal regarding a Quincecare duty claim against HSBC Bank Plc (HSBC) on 21 December 2022. The appeal concerned the question: even if HSBC did owe SIB the Quincecare duty and was in breach of this duty, did the breach give rise to any recoverable loss by SIB? Paul Downes KC, barrister at Quadrant Chambers, provides commentary on the case.

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Stanford International Bank Ltd (in liquidation) v HSBC Bank PLC [2022] UKSC 34

Background

SIB, a company incorporated in Antigua and Barbuda, went into liquidation in 2009. SIB was ultimately owned and controlled by Robert Allen Stanford. Most of SIB's business was selling investment products to international customers. However, during 2003 to 2009, SIB was being run as a large Ponzi scheme by Mr Stanford and some of his associates. Customer withdrawals and payments when investment products supposedly matured were being made from capital invested by other customers rather than investment proceeds. In 2008, many customers requested withdrawals from SIB fearing that it may become insolvent.

SIB had four bank accounts with HSBC Bank Plc ('HSBC'). These accounts were frozen by HSBC on 17 February 2009 following Mr Stanford being charged by the US Securities and Exchange Commission. Prior to the accounts being frozen, from August 2008, Mr Stanford purportedly authorised various payments from the accounts. This appeal concerns payments from the accounts totaling £116 million which were used to pay SIB's customers, some directly and some after money was transferred by HSBC to SIB's account with a different bank in Toronto (the disputed payments).

SIB's claim is that HSBC was on notice that the instructions to make the disputed payments may have been part of a fraud. Accordingly, it is alleged that HSBC was under a duty of care, known as the Quincecare duty, to refuse to accept Mr Stanford's instructions to pay out money from the accounts (the Quincecare claim). HSBC's application for summary judgment to strike out SIB's Quincecare claim was refused by the High Court. However, on appeal HSBC was successful. SIB now appeals to the Supreme Court.

This appeal is concerned solely with the following question: even if HSBC did owe SIB the Quincecare duty and was in breach of this duty, did the breach give rise to any recoverable loss by SIB?

Judgment

By a majority the Supreme Court dismisses the appeal. Lady Rose gives the lead judgment, with which Lord Hodge and Lord Kitchin agree. Lord Leggatt, in agreement with Lady Rose, gives a concurring judgment. Lord Sales gives a dissenting judgment.

The Supreme Court distinguishes between two sets of SIB's customers. First, customers who escaped without loss because they withdrew their funds (as they were contractually entitled to do) before the SIB scheme collapsed and so were paid from the disputed payments (referred to as the 'early customers'). Second, customers who risk losing almost all their money because they did not withdraw their funds before the collapse (referred to as the 'late customers')[8].

The majority hold that the disputed payments which relieved SIB of its liability to its early customers do not amount to a monetary loss [26];[29];[31]. In the hypothetical scenario where HSBC had complied with its Quincecare duty, SIB might have had an extra £116 million on liquidation. However, it also would not have discharged any of the debts it owed to the early customers so they would also claim a dividend in the insolvency alongside the late customers. As there would be an extra £116 million for the liquidators to distribute, all the customers would get, say, 12 pence in the pound rather than the early customers getting 100 pence and the late customers only five pence. But precisely the same amount of SIB's debt would be extinguished when the company is dissolved in both the hypothetical and real-world scenario [25]. There is therefore no recoverable loss.

The fairness or unfairness of the payments made is not a matter that the court can investigate or assess in this context [26]. That is a matter of policy within the applicable insolvency regime and an earlier set of proceedings in the Antiguan liquidation had determined that the liquidators could not recover payments made to the early customers.

Addressing a sub-issue, the majority hold that where a director, in breach of their fiduciary duties to a company, causes an insolvent company to pay off certain company debts, there may be cases where the director can be required to repay the insolvent company in respect of the payments. However, this fiduciary liability does not mean there is a more general principle that a person who is negligent can be liable where the negligence results in no monetary loss [34].

Lord Leggatt agrees with Lady Rose that SIB has not suffered loss because of the disputed payments [40];[55];[57];[86]. He holds that the fundamental principle of separate corporate personality means the interests of a company are in law distinct from those of the persons who have economic interests in the company. Thus, the losses suffered by a company are not the same as the losses suffered by its creditors. While there may be correlation between these different losses, in order to keep the law coherent, the distinction between them should not be blurred [81]. Lord Leggatt also agrees with the majority with regard to the sub-issue on the liability of directors [75].

Lord Sales dissents. In his view SIB has suffered a loss [91]. At the relevant times SIB was hopelessly insolvent. Therefore, SIB could not lawfully have paid the early customers the face value of the debts and, if it had not been deceived by Mr Stanford, it would not have chosen to do so; instead, it would have retained its money to spend on other, lawful purposes. Payment of more than was necessary to the early customers depleted SIB's assets which constitutes a loss to SIB [93]-[94]. It is not correct to treat the company as a pure abstraction [110]-[111]. When SIB paid the early customers, its corporate personality in law was a vehicle to protect the general creditors as a whole. The funds used to make the disputed payments will not be used to pay the general creditors as a whole, as they should have been. This diversion of funds is a loss to SIB [93];[100];[107]-[113];[117]. In relation to the sub-issue, Lord Sales holds that his view provides a clear explanation as to a director's liability in this context. In law, the interests of a company which is hopelessly insolvent are fully aligned with those of its creditors as a general body. If a company's money, under the control of the directors, is paid out to discharge the debts of some creditors out of the general body of creditors, the interests of the creditors as a general body, and hence the interests of the company, are prejudiced and this can give rise to recoverable loss [128]-[129].

Comment

Paul Downes KC, barrister at Quadrant Chambers

'This is an important case concerning the extent of an insolvent company's 'loss' where a dishonest director has caused it to pay some creditors in full, at the indirect expense of other creditors who were late in seeking repayment. The claimant was being run as a massive Ponzi scheme, the defendant bank was sued for breach of its Quincecare duty not to make payments where fraud was suspected. The Supreme Court found by a majority that the payments by an insolvent company, effectively preferring one group of creditors over another, did not cause the company any recoverable loss. The company's overall assets and liabilities remained the same.

However, Lord Sales' dissenting judgment is compelling. He argues that the payment of money unlawfully to one group of creditors deprives the company of the opportunity of using that money for

other lawful purposes, which is a tangible and recoverable loss. I am with Lord Sales. Surely the interests of the insolvent company are defined by the interests of the entire body of creditors. If one part of that body is preferred the company cannot be said to have been acting in the entire body's best interests. That disappointment in corporate expectation is a loss that the law should recognise.'

Source: Stanford International Bank Ltd (in liquidation) (Appellant) v HSBC Bank PLC (Respondent)

Interviewed by Ashling Gallagher

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