



1 July 2020

## PRESS SUMMARY

**R v Hilton (Respondent) (Northern Ireland)**

**[2020] UKSC 29**

**On appeal from: [2017] NICA 73**

**JUSTICES:** Lord Kerr, Lord Wilson, Lord Lloyd-Jones, Lord Briggs, Lady Arden

### BACKGROUND TO THE APPEAL

On 22 September 2015 Bernadette Hilton was convicted of three offences contrary to section 105A of the Social Security Administration (Northern Ireland) Act 1972. Following conviction, Ms Hilton was committed to the Crown Court and that court was asked to make a confiscation order under section 156 of the Proceeds of Crime Act 2002. The application was heard by His Honour Judge Miller QC on 20 October 2016. He made a confiscation order in respect of £10,263.50, which was the equivalent of Ms Hilton's half share of her matrimonial home. Ms Hilton appealed against the order.

The Court of Appeal decided that section 160A(2) of the Proceeds of Crime Act 2002 required that, at the time of making a confiscation order, the Crown Court must give to anyone who is thought to hold an interest in the property an opportunity to make representations on whether a confiscation order should be made and, if so, in what amount. The failure to give Ms Hilton's estranged partner and the building society the chance to make representations was "fatal to the decision of the judge" and the confiscation order was thus invalid. The Director of Public Prosecution appeals to this Court.

The Court of Appeal certified the following points of law of general public importance:

- "1. Where property is held by the defendant and another person, in what circumstances is the court making a confiscation order required by section 160A of the Proceeds of Crime Act 2002, in determining the available amount, to give that other person reasonable opportunity to make representations to it at the time the order is made?"
2. If section 160A does so require, does a failure to give that other such an opportunity render the confiscation order invalid?"

### JUDGMENT

The Supreme Court unanimously allows the appeal. It holds that the questions certified do not arise on the present appeal because a determination under section 160A was not made. Lord Kerr gives the judgment.

## REASONS FOR THE JUDGMENT

The Proceeds of Crime Act 2002 provides for two stages to confiscation proceedings: the first is the making of the confiscation order itself and the second the order securing its enforcement. The first stage is dealt with in sections 156 and 163B and envisages that the *making* of a confiscation order should be straightforward, indeed quasi-automatic [8]. Section 160A of the Act provides that

- (1) Where it appears to a court making a confiscation order that
  - (a) there is property held by the defendant that is likely to be realised or otherwise used to satisfy the order, and
  - (b) a person other than the defendant holds, or may hold, an interest in the property, the court may, if it thinks it appropriate to do so, determine the extent (at the time the confiscation order is made) of the defendant's interest in the property.
- (2) The court must not exercise the power conferred by subsection (1) unless it gives to anyone who the court thinks is or may be a person holding an interest in the property a reasonable opportunity to make representations to it.
- (3) A determination under this section is conclusive in relation to any question as to the extent of the defendant's interest in the property that arises in connection with -
  - (a) the realisation of the property, or the transfer of an interest in the property, with a view to satisfying the confiscation order, or
  - (b) any action or proceedings taken for the purposes of any such realisation or transfer.

The critical question is whether, at the stage of *making* the order, the Crown Court judge made a *determination* of the extent of Ms Hilton's interest in the jointly owned property under section 160A. If made *on foot of such a determination*, the confiscation order becomes immutable unless there is an appeal [11] – [14]. A determination under section 160A therefore effectively extinguishes the opportunity for third parties to make later representations. On the other hand, the judge can at this stage form a view of the extent of the interest of the person in question, here Ms Hilton, *without* making a determination under section 160A.

Parliament intended this to be the case, as is evident from the provisions relating to the *second*, enforcement stage of a confiscation order [14]. In particular, section 199(8) provides that a court must not order enforcement unless it gives persons holding interests in the property a reasonable opportunity to make representations. This section is important because it was retained in the legislation despite the introduction of section 160A. Furthermore, subsection 8B to section 199 proceeds on the premise that section 160A and section 199 continue, in relevant circumstances, to co-exist [16] – [18]. Reading these sections together, it is clear that section 160A does not purport to occupy the field. The opportunity to make representations at the enforcement stage continues to apply either because a determination under section 160A has not been made or because the conditions in section 199(8B) are met. The fundamental point is that, at the enforcement stage, third party rights may continue to be considered [18].

Essentially, therefore, where the court makes a section 160A determination, third parties must be afforded the chance to make representations at the stage of *making* the confiscation order, as provided for by section 160A(2). But where the court does *not* make a section 160A determination and rather simply forms a view, at this *first* stage of the process, of the extent of the interest of the person in question, it will have to give third parties the chance to make representations at the *enforcement* stage. Where the court does not make a section 160A

determination, therefore, it is not incumbent upon it to give third parties the chance to make representations at the *first* stage of the process (the making of the order) because they will have the chance to do so at the *second* stage (enforcement) before the confiscation order is enforced.

The Court of Appeal's judgment is premised on the proposition that on every occasion that third party interests arise, the court must proceed under section 160A. This is contrary to the conclusion reached that the introduction of section 160A has not modified the opportunity available to the Crown Court to make a confiscation order *other than* under section 160A. The consequence of the Court of Appeal's approach would involve a collapse of the traditional two stages – the making of an order and the enforcement of it – into one hearing with all the panoply of investigation of the merits of the rights of third parties, such as a former partner and the building society in the present appeal. This would inevitably introduce a cumbersome procedure to the making of the confiscation order [23].

This was not intended. The making of a confiscation order would no longer be straightforward, much less quasi-automatic [8] if section 160A had to be applied in all its rigour in every case where third-party interests arose [24]. The enactment of the section was designed to streamline the system, not to complicate it. Section 160A simply introduces a procedure allowing third parties to make representations at the confiscation stage, but *only* where the Crown Court makes a *determination* under section 160A [27]. No determination under section 160A was made here [28]. For this reason, the answer to the questions certified is that they do not arise on the present appeal. The appeal is therefore allowed [29].

*References in square brackets are to paragraphs in the judgment.*

#### **NOTE**

**This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:**

<https://supremecourt.uk/decided-cases/index.html>