



Press Summary

3 November 2021

Crown Prosecution Service (Appellant) v Aquila Advisory Ltd (Respondent)

[2021] UKSC 49

On appeal from [2019] EWCA Civ 588

Justices: Lord Lloyd-Jones, Lord Sales, Lord Burrows, Lord Stephens, Lady Rose

Background to the Appeal

Mr Robert Faichney and Mr David Perrin were directors of Vantis Tax Ltd (“VTL”). During this time, Mr Faichney and Mr Perrin (“**the directors**”) exploited their position in breach of their fiduciary duty to make a secret profit of £4.55m. The amount of £4.55m was also the benefit obtained by the directors from their crime of cheating the public revenue by dishonestly facilitating and inducing others to submit false claims for tax relief. VTL went into administration. Aquila Advisory Ltd (“**Aquila**”) was assigned VTL’s proprietary rights.

Following the directors’ criminal convictions, the Crown Prosecution Service (“**CPS**”) sought confiscation orders under the Proceeds of Crime Act 2002 (“**POCA**”) against them. Mr Perrin was ordered to pay £809,692 and Mr Faichney was ordered to pay £648,000 to the CPS. Aquila argued that the directors should be treated as having acquired the benefit of the secret profit on behalf of VTL. Aquila argued that, as a result, the £4.55m was beneficially owned by VTL under a constructive trust, and now the beneficial interest in that trust had been assigned to Aquila.

Thus, Aquila argued that because it had a proprietary claim to the secret profit of £4.55m, its claim takes priority over the confiscation orders, which do not give the CPS any form of proprietary interest. If this is correct, Aquila would be entitled to all of the directors’ assets, leaving nothing to satisfy the confiscation orders. At first instance, the trial judge granted a declaration that an amount of £4.55m was held on constructive trust in favour of VTL, whose rights had since been assigned to Aquila. Further, and in accordance with an agreement between the parties, the trial judge declared that the CPS was obliged to give instructions for the transfer of the net proceeds realised from all the assets listed in the confiscation orders to Aquila.

The CPS appealed to the Court of Appeal. The CPS argued that the directors' actions should have been attributed to VTL, and thus VTL should have been barred from recovering any proceeds of crime because of the principle of illegality. The principle of illegality is that a person should not be permitted to benefit from his or her illegal act. The Court of Appeal dismissed the appeal.

Judgment

The Supreme Court dismisses the Appeal. Lord Stephens gives the judgment, with which all members of the Court agree.

Reasons for the Judgment

Lord Stephens considers each of the CPS's three grounds of appeal in turn.

Ground 1 [63 – 81]:

The CPS argued that the Court of Appeal was wrong to conclude that in the case of a proprietary claim by a company against its directors to recover proceeds of crime received in breach of fiduciary duty, the illegality of the directors is not attributed to the company, notwithstanding that the company itself suffered no loss and stood to profit from the illegal acts.

The Court dismissed this argument and found that the reasoning in *Bilta (UK) Ltd v Nazir* [2015] UKSC 23 applies to this case, in that the unlawful acts or dishonest state of mind of a director cannot be attributed to the company to establish an illegality defence defeating the company's claim under a constructive trust.

Ground 2 [82 – 87]:

The CPS argued that the decision of the Court of Appeal is inconsistent with the regime established by POCA. It argued that POCA was intended to permit innocent third-party purchasers who have paid market value for criminal property to keep it, and for innocent third-party victims who have suffered loss as a result of criminal behaviour to be compensated, in each case in priority to the State, but not to permit third parties to otherwise benefit from criminal activity.

The Court found that the overall scheme of POCA is not to interfere with property rights. Furthermore, although there are specific provisions of POCA which allow the State to override property rights, these provisions were not engaged by the CPS in this case. As a result, the Court found the decision of the Court of Appeal was not inconsistent with POCA.

Ground 3 [88] :

The CPS argued that even if the unlawful conduct of the former directors cannot be attributed to VTL then the trial judge in the proper exercise of his discretion, ought not to have granted Aquila any declaratory relief.

The Court found that in this context, the constructive trust (and thus VTL's beneficial ownership of the secret profits) arose automatically when the directors breached their

fiduciary duties. At no stage did the directors own the secret profits in equity. The Court found that the trial judge's order recognised this reality, and was a proper exercise of his discretion.

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: [Decided cases - The Supreme Court](#)