



Supreme Court decision in *CPS v Aquila Advisory Limited* [2021] UKSC 49

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Where directors have committed criminal offences and where confiscation orders have been made against them, does recognition of a constructive trust over unauthorised profits made by directors by virtue of the same conduct and in breach of fiduciary duty result in the company profiting illegally from the proceeds of crime in particular where such recognition would frustrate the enforcement of the confiscation orders?

No, held the Supreme Court in a judgment handed down today in *Crown Prosecution Service v Aquila Advisory Limited* [2021] UKSC 49. The Supreme Court considered the inter-relationship of three Supreme Court decisions – *Jetivia SA (& another) v Bilta* [2015] UKSC 23 (“*Bilta*”) *Patel v Mirza* [2016] UKSC 42 and *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45 (“*FHR*”) and the consistency of those decisions in this context with the regime in Parts 2, 5 and 7 of the Proceeds of Crime Act 2002 (POCA) - confiscation, civil recovery and money laundering, respectively. A link to the judgment is [here](#) and the Supreme Court summary is [here](#).

AUTHOR



Stuart Ritchie QC

Call Date: 1995

Silk Date: 2012

Factual summary

Directors of a financial services company (Vantis Tax Limited - VTL) made an unauthorised profit of £4.55 million through a fraudulent scheme devised around the marketing to clients (and misuse) of a corporate tax avoidance opportunity based upon a potentially valuable software application. From the outset the directors misused the corporate opportunity represented by the tax avoidance scheme and unlawfully exploited VTL's software rights for personal profit.

The directors were convicted of cheating the Public Revenue and confiscation orders were made against them.

Aquila Advisory Limited, as assignee of VTL brought proceedings against the directors of VTL for breach of fiduciary duty to establish and enforce a constructive trust over their unauthorised profits. The CPS (who sought to enforce the confiscation orders) intervened to challenge the claim to a constructive trust on the basis that the acts and knowledge of the directors were to be attributed to VTL, such that the claim failed for illegality. At trial the only parties to the claim were the CPS and VTL. At trial and in the Court of Appeal Aquila's claim was successful. The CPS appealed to the Supreme Court.

The dispute

The "recoverable benefit" and the "available amount" (in each case within the meaning of POCA 2002 section 2) for the purpose of confiscation orders against the directors were each assessed by reference to assets which (as was common ground) would fall within the scope of the constructive trust (if recognised). Thus, the commercial reality of the claim was a battle for priority over the assets. At first instance [2018] EWHC 565 (Ch) and in the Court of Appeal [2019] EWCA Civ 588 Aquila's claim succeeded.

In the Supreme Court there were two central issues raised in the CPS grounds of appeal:

- 1) Where it was not alleged that VTL had suffered loss and was seeking to recover

(and benefit from) the proceeds of its directors' crime should the conduct and knowledge of its directors be attributed to the company?

The CPS contended that such an outcome was not precluded by *Bilta* and was supported by the policy considerations identified in *Patel v Mirza*.

- 2) Whether recognition of a constructive trust in favour of VTL/Aquila would be inconsistent with the regime under POCA which 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 otherwise to benefit from criminal activity (which the CPS contended would be the case if the trust was recognised).

Aquila contended that the case fell within the principles established in *Bilta*, that these principles were unaffected by *Patel v Mirza*, that POCA was an independent code which (except as expressly provided for) did not affect third party property rights and that the result contended for by the CPS could not stand with the decision in *FHR* to the effect that directors' unauthorised profits including bribes or secret commissions were held by the director on constructive trust for the benefit of the company.

The decision of the Supreme Court – key holdings

The Supreme Court dismissed the appeal on all grounds. Lord Stephens (with whom Lords Lloyd-Jones, Sales, Burrows and Lady Rose agreed) held that:

1. Although the law on illegality had been restated since *Bilta* in *Patel v Mirza* the reasoning in *Bilta* (built on the policy of avoiding illegality undermining the purpose of the legal rule in question), was entirely consistent with *Patel v Mirza* and had not been undermined by it [61].

The principles of illegality in *Patel v Mirza* did not arise [81].

2. The approach to attribution established in *Bilta* applied equally to claims by a company against its director to establish and enforce a constructive trust in respect of unauthorised profits made in breach of fiduciary duty. The knowledge or acts of a director were not to be attributed to the company in the context of claims by companies against their directors for breach of duty. There was no relevant distinction between claims by the company for loss and claims to strip profit. Any such distinction would be unprincipled and would introduce uncertainty into the law [63-80].
3. Such a result was not inconsistent with operation of the regime under POCA. The Supreme Court approved the approach of Sales LJ in the Court of Appeal in *R(Best) v Chief Land Registrar* [2015] EWCA Civ 17 to the effect that “*POCA is a separate regime operating according to its own distinct procedures and safeguards, and is not material to the issues before us*”. [82-87].

This decision has (it is suggested) gone a long way to addressing the issue of the interplay between the regime under POCA and enforcement of the common law which was raised by Lord Neuberger in paragraph 185 of

his judgment in *Patel v Mirza* where he said the following:

“This is not the occasion to discuss the effect of POCA, save to say that I would take some persuading that the common law should be influenced by the fact that POCA is or is not being invoked in any particular case, although the civil courts should not make any order, or at least permit the enforcement of any order, if its effect would run counter to the provisions of POCA or to any step which was being contemplated under POCA by the relevant authorities”.

The decision of the Supreme Court in *Aquila* suggests that the development and enforcement of the common law will, ordinarily, not be affected by the regime under POCA which takes effect according to its provisions and does not operate through the medium of public policy. The basic structure of the Act is to respect and not to interfere with third party property rights except where it expressly so provides.

For another day

It was not necessary for the Supreme Court to determine whether a party which transfers an interest under a constructive trust imposed over assets which represent the proceeds of crime commits an act of money-laundering, though the Supreme Court observed that it would be surprising if this were the case [86].

Stuart Ritchie QC acted for Aquila together with Martin Evans QC (33 Chancery Lane) and Sam Neaman (Littleton Chambers), instructed by Ryan Mowat and Hannah Fitzwilliam (Kingsley Napley).

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