Neutral Citation Number: [2019] EWCA Civ 588

Case No: A3/2018/0827

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
MANN J
HC-2016-001812
[2018] EWHC 565 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 9 April 2019

Before :

LORD JUSTICE PATTEN
LORD JUSTICE HAMBLEN
and
LORD JUSTICE HOLROYDE

- -

Between :

THE CROWN PROSECUTION SERVICE	**Appellant**
- and –	
AQUILA ADVISORY LIMITED	**Respondent**

- -
- -

Julian Christopher QC and **Ben Douglas-Jones QC** (instructed by **The National Proceeds of Crime Unit**) for the **CPS**
Jonathan Brettler and **Sam Neaman** (instructed by **Beers LLP**) for the Respondent

Hearing date : 13 March 2019

- -

Approved Judgment

Lord Justice Patten :

1. Put at its simplest, the issue on this appeal is whether the Crown Prosecution Service ("CPS") has a claim under a confiscation order which it can enforce against the identified proceeds of a fraud in priority to the proprietary claim of a company whose directors were the chief engineers of the fraud. The company in question, Vantis Tax Limited ("VTL"), is now in liquidation and faces substantial claims by investors who have also suffered loss as a result of the fraud. But the CPS contends that the rights of VTL to recover the proceeds of the fraud from its directors on the basis of a claim for breach of fiduciary duty should not be allowed to defeat the effect of the confiscation order. This can be achieved, they say, by attributing the fraud of the directors to VTL so as to debar recovery by the company under the *ex turpi causa* rule. For this argument to succeed the CPS accepts that the facts of this case must be treated as distinguishable from those considered by the Supreme Court in *Bilta (UK) Ltd v Nazir* [2015] UKSC 23 ("*Bilta*").

2. After a trial in the Chancery Division, Mann J decided that the respondent to this appeal, Aquila Advisory Limited ("Aquila"), which has acquired the choses in action and property rights of VTL from its liquidators, was entitled to assert a proprietary claim to the funds in dispute in priority to the claim of the CPS: see [2018] EWHC 565 (Ch). The CPS now appeals against the judge's order with the permission of Henderson LJ on the ground that he should have attributed the actions of the directors to VTL and therefore treated its claim to recover the proceeds of the crime as barred by the principles of illegality.

3. The judge made detailed findings of fact about the fraud, none of which is challenged on this appeal, and I can therefore summarise the facts and the procedural history relatively shortly.

4. VTL was incorporated on 22 December 2003. In February 2004 Mr Robert Faichney became managing director and in May 2004 Mr David Perrin was appointed deputy managing director. Both men had previously worked for HMRC. VTL was formed to offer tax planning services to clients. In June 2004 Mr Faichney (later assisted by Mr Perrin) introduced a business plan as part of which VTL would develop and produce a piece of software called Taxcracker. Its primary purpose was to allow financial advisers to identify high net worth individuals who might benefit from the tax planning services offered by VTL but in time Mr Faichney and Mr Perrin realised that it had potentially wider applications and a potential value which could be used to facilitate a particular tax avoidance scheme promoted by VTL.

5. The scheme in question sought to take advantage of the provisions of s.587B of the Income and Corporation Taxes Act 1988 which allow an individual taxpayer to claim relief in respect of the value of shares in a quoted trading company which are given to charity. The scheme set up by VTL to exploit this relief involved the formation of a company in which VTL's taxpayer clients would subscribe for shares at a relatively nominal price. The company would then acquire assets which would increase its share price and the shares would be given to charity at a much higher valuation than their subscription price. The taxpayer could then claim relief against tax based on the higher valuation.

6. The first such scheme involved the formation of a company called Clerkenwell Medical Research plc ("CMR"). The subscription price was 3p per share but at the time of the transfer to charity the shares were valued at £1. The increase in value was attributed to the acquisition of the Taxcracker software developed under the name of the Qaria concept. Under the terms of their contracts of employment any intellectual property ("IP") rights attaching to the development of the Qaria concept by Mr Faichney and Mr Perrin belonged to VTL which had funded the project. But, notwithstanding this, Mr Faichney and Mr Perrin arranged for a purported assignment of the IP rights to CMR using an entity described as the Richardson Trust as the purported assignor in the relevant documentation. The judge found that the Richardson Trust probably does not exist and was used as a means of transferring the profits from the tax schemes to Mr and Mrs Faichney and Mr and Mrs Perrin. More to the point, the Richardson Trust never had title to the IP rights.

7. CMR was incorporated in Jersey in September 2004. A private placing memorandum invited subscriptions for its 0.1p ordinary shares at 3p each. The shares were to be listed on the Channel Islands Stock Exchange. The purpose of the company was said to be the acquisition and exploitation of the Qaria concept software. By March 2005 some £1.24m had been raised from subscriptions for shares. In consideration of the purported assignment of the IP rights to CMR, the company paid £500,000 to Mrs Perrin which was shared between her, her husband and Mr and Mrs Faichney. The assignment, as the judge found, was misleading on at least three levels. The Richardson Trust did not own the IP rights; Mr Faichney and Mr Perrin knew that they had no right to assign the rights which belonged to VTL or to receive the £500,000; and Mr Perrin and Mr Faichney were acting in breach of fiduciary duty to VTL in seeking to profit from the use of its property.

8. But of course the fraud extended beyond VTL. In April 2005 VTL wrote to its clients who had subscribed for shares in CMR telling them that the value to be inserted in the transfer forms to the charities was £1 per share. This valuation was, the judge found, false and dishonest because CMR did not have the IP rights and there was nothing to justify that share price. But, in ignorance of the true facts, the taxpayers transferred the shares at this value, made successful claims for tax relief on that basis and thereby caused HMRC to give them tax credits which could not be justified.

9. Mr Faichney and Mr Perrin then replicated the CMR scheme on three further occasions using companies called Modia plc, Your Health International plc and Signet Health International plc. In August 2005 CMR purported to assign the software rights to Modia in return for a payment of £2m. The rights were then purportedly assigned on successively to the other two companies to provide the documentation used to justify the enhanced valuation of the shares in each case. A total of £4.55m was transferred to the Perrins and Faichneys via the Richardson Trust. The judge held that each of the schemes involved valuations of the shares which were unjustified and dishonest.

10. In June 2006 HMRC raided the premises of VTL and in 2009 Mr Faichney and Mr Perrin were charged with offences of cheating the Revenue by dishonestly facilitating and inducing others to submit claims for tax relief. They were convicted and orders were made under s.6 of the Proceeds of Crime Act 2002 ("POCA") for the confiscation of assets representing the £4.55m which the Crown Court judge determined represented the proceeds of their crime. HMRC have taken steps to reverse and recover from the

taxpayers involved the tax credits obtained under the various schemes (apart from the subscription price itself) and the individuals concerned have been left with claims against VTL.

11. In January 2010 Mr Faichney and Mr Perrin brought a claim against VTL and its associated companies in the Vantis group for unpaid salary and wrongful dismissal. This was met with a defence and counterclaim in which VTL alleged that the claimants had acted in breach of fiduciary duty both in equity and under the provisions of s.175 of the Companies Act 2006 when they used VTL's Qaria IP rights as the basis of the tax schemes described earlier. The £4.55m in profits derived from the four schemes was alleged to be held on constructive trust for VTL (and now for Aquila as assignee) as representing the proceeds of the unlawful use of the company's property in a scheme which was also of itself a breach of the fiduciary duties owed by directors to VTL and other companies in the Vantis group.

12. A perhaps unusual factor of the case, as the judge pointed out, is that although Mr Faichney and Mr Perrin undoubtedly sought to exploit VTL's Qaria software rights as part of the four dishonest tax schemes which they devised, the IP rights were in fact never transferred out of the company. The assignments, like everything else, were a fiction But the judge held that this made no difference for the purposes of the company's claim that the directors had made an unauthorised secret profit by exploiting the opportunity which their position in the company and VTL's ownership of the Qaria concept gave to them:

> "40. However, the facts of this case are a little unusual. In what one might call the more normal case, a director commits the wrong by entering into a transaction which, in itself, is a genuine transaction. In the present case the directors did not enter into something which could be seen to be a genuine transaction when they procured the first purported assignment by the trust. The trust had nothing to assign, and assigned nothing. CMR, and the succeeding companies, actually acquired no legal rights at all, albeit that they de facto had the benefit of the IP rights. The trust, Mr Faichney and Mr Perrin were not entitled to receive the money they did receive vis-à-vis CMR because they did not sell CMR what CMR purported to buy. The intellectual property rights remained in VTL.
>
> 41. Nonetheless, that does not seem to me to make any difference as between the directors and VTL. They still obtained money by pretending (albeit to themselves as directors of CMR) that they owned an asset they did not own, in circumstances in which their company VTL did own it, and in which they were in a position to enter into the transaction by virtue of their knowledge of the affairs and plans of VTL. They extracted payment for what they "sold". All that is within the vice covered by the no-profit rule (though it obviously also contains a number of other vices), so that the proprietary consequences follow. It is not unlike a director who licences or lets out his company's property, pretending it to be his, and pockets the licence fee or rent. I consider that such a director

> would hold the money on trust for his company. So too did Mr Faichney and Mr Perrin (or Mrs Perrin as trustee of the purported Richardson Trust) hold the £4.55m on trust for VTL. That is now represented by the totality of their assets."

13. There is no challenge to this part of the judge's reasoning. Mr Christopher QC for the CPS accepts that what the directors did amounted to a breach of the fiduciary duties which they owed to VTL and that the consequence of that breach of duty is that the company has a proprietary claim to the £4.55m based on a constructive trust: see *FHR European Ventures LLP v Makarious* [2015] AC 250 ("*FHR*"). Their case, as I mentioned earlier, is that the fraud of Mr Faichney and Mr Perrin should be attributed to VTL so as to engage the *ex turpi causa* principle and therefore bar the enforcement of the company's proprietary claim.

14. Before I come to what is essentially an issue of attribution, it is important to emphasise that the CPS does not rely on the provisions of POCA or the confiscation orders themselves as creating some form of statutory intervention or override to displace the equities which would otherwise attach to the £4.55m. Mr Christopher accepts that once the Crown Court has determined the recoverable amount of the proceeds of crime under s.6 of POCA and the available amount under s.9 then the confiscation order which it must make under s.6(5)(b) operates simply to require the defendant to pay the recoverable amount. It does not give the CPS any form of proprietary interest in the defendant's available assets or any priority over other claims and interests in those assets. In short, the rights of the CPS to the property as against third parties are no greater than those of the defendant himself. Transposed to the present case, this means that the CPS has no claim to the £4.55m (which belongs in equity to Aquila) unless the constructive trust is rendered unenforceable by the *ex turpi causa* rule or some other available principle of illegality or public policy.

15. The liability of a fiduciary such as a director to account for a secret profit made by the unauthorised use or exploitation of the company's assets or his position within the company is treated as an incident or application of the basic principles of agency so as to give the company or other principal a direct proprietary interest in the property which the agent acquires. The generality of the rule was confirmed by the Supreme Court in *FHR* where Lord Neuberger of Abbotsbury PSC said at [7]:

> "The principal's right to seek an account undoubtedly gives him a right to equitable compensation in respect of the bribe or secret commission, which is the quantum of that bribe or commission (subject to any permissible deduction in favour of the agent—eg for expenses incurred). That is because where an agent acquires a benefit in breach of his fiduciary duty, the relief accorded by equity is, again to quote Millett LJ in the *Mothew* case, at p 18, "primarily restitutionary or restorative rather than compensatory". The agent's duty to account for the bribe or secret commission represents a personal remedy for the principal against the agent. However, the centrally relevant point for present purposes is that, at least in some cases where an agent acquires a benefit which came to his notice as a result of his fiduciary position, or pursuant to an opportunity which results from his fiduciary position, the equitable rule ("the

> rule") is that he is to be treated as having acquired the benefit on behalf of his principal, so that it is beneficially owned by the principal. In such cases, the principal has a proprietary remedy in addition to his personal remedy against the agent, and the principal can elect between the two remedies."

16. It is clear from the approval by the Supreme Court of the decision of the Privy Council in *Attorney General for Hong Kong v Reid* [1994] 1 AC 324 that the principal's right to recover the secret profit under a constructive trust applies even when the profit derives from bribery or some other unlawful or disreputable conduct that would not have represented an opportunity which the agent's principal would or should have taken advantage of had its existence been disclosed.

17. Various arguments for and against the ability of the principal to recover the bribe or other secret profit have been offered in academic articles and in the decided cases. Commentators have referred to the principle that an agent should not be allowed to rely on his own wrong as a justification for retaining the benefit. But in the decision of the Court of Appeal in *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2012] Ch 453 it was suggested that the benefit should not be recoverable unless the agent had taken advantage of an opportunity that was "properly that of the [principal]": see at [88].

18. This controversy has been laid to rest by the decision in *FHR* which has confirmed that the principal is entitled in equity (as against the agent) to a bribe or other secret profit notwithstanding the circumstances in which it was obtained. At [33]-[35] Lord Neuberger said:

> "33. The position adopted by the respondents, namely that the rule applies to all unauthorised benefits which an agent receives, is consistent with the fundamental principles of the law of agency. The agent owes a duty of undivided loyalty to the principal, unless the latter has given his informed consent to some less demanding standard of duty. The principal is thus entitled to the entire benefit of the agent's acts in the course of his agency. This principle is wholly unaffected by the fact that the agent may have exceeded his authority. The principal is entitled to the benefit of the agent's unauthorised acts in the course of his agency, in just the same way as, at law, an employer is vicariously liable to bear the burden of an employee's unauthorised breaches of duty in the course of his employment. The agent's duty is accordingly to deliver up to his principal the benefit which he has obtained, and not simply to pay compensation for having obtained it in excess of his authority. The only way that legal effect can be given to an obligation to deliver up specific property to the principal is by treating the principal as specifically entitled to it.
>
> 34. On the other hand, there is some force in the notion advanced by the appellant that the rule should not apply to a bribe or secret commission paid to an agent, as such a benefit is different in quality from a secret profit he makes on a

> transaction on which he is acting for his principal, or a profit he makes from an otherwise proper transaction which he enters into as a result of some knowledge or opportunity he has as a result of his agency. Both types of secret profit can be said to be benefits which the agent should have obtained for the principal, whereas the same cannot be said about a bribe or secret commission which the agent receives from a third party.
>
> 35. The respondents' formulation of the rule has the merit of simplicity: any benefit acquired by an agent as a result of his agency and in breach of his fiduciary duty is held on trust for the principal. On the other hand, the appellant's position is more likely to result in uncertainty. Thus, there is more than one way in which one can identify the possible exceptions to the normal rule, which results in a bribe or commission being excluded from the rule: see the differences between Professor Goode and Professor Worthington described in paras 10 and 32 above, and the other variations there described. Clarity and simplicity are highly desirable qualities in the law. Subtle distinctions are sometimes inevitable, but in the present case, as mentioned above, there is no plainly right answer, and, accordingly, in the absence of any other good reason, it would seem right to opt for the simple answer."

19. The decision in *FHR* therefore prevents a director in the position of Mr Faichney and Mr Perrin from asserting a right to retain the secret profit against VTL based on the fact that it has been obtained by fraud. The imposition of the constructive trust in favour of the company as principal simply recognises that the agent cannot use his position or the assets of the company to benefit himself. The property which he acquires is therefore necessarily held by him for the benefit of his principal regardless of the circumstances in which it was obtained.

20. On one view this ought to be the end of the case. If the CPS has no better rights to the £4.55m against VTL than the directors then they are bound by the consequences of the directors' breach of fiduciary duty. But Mr Christopher contends that it would be both counter-intuitive and wrong for VTL's rights against its former directors to take precedence over the operation of a confiscation order which is intended to forfeit to the Crown what are undoubtedly the proceeds of crime. This, he submits, can be prevented by attributing to VTL the fraud of its directors and thereby neutralising the company's assertion of its proprietary claim by the application of the *ex turpi causa* principle.

21. In *FHR* the Supreme Court did not have to consider any arguments based on attribution or illegality because the only issue of ownership was as between the claimant and its agents. Its endorsement of the principle that the agents necessarily acquired the property for their principal and could not rely on their own wrong in order to claim the property for themselves was therefore sufficient to decide the appeal. No third party rights were involved nor did the case involve a broader claim for compensation against the agents for having exposed their principal to a liability to third parties.

22. Those issues did, however, arise in *Bilta* where the director defendants had used a company as part of a VAT carousel fraud. This involved transactions under which a company within the chain became entitled to reclaim input tax from HMRC and Bilta became obliged to account for output tax. The input tax was paid but removed from the scheme leaving Bilta insolvent and unable to meet its liabilities to HMRC which exceeded £38m. Bilta (through its liquidators) sued the directors for an unlawful means conspiracy. They were alleged to have acted in breach of fiduciary duty by removing from the company the means of paying the output tax due and thereby exposing it to the liability to HMRC. In response, the directors contended that Bilta was, through its directors, a party to the VAT fraud and was therefore precluded by the *ex turpi causa* principle from seeking to recover equitable compensation from its co-conspirators.

23. The Supreme Court held that this defence was not open to the directors. Although their conduct could for certain purposes be attributed to the company, it was not just or right to do so when the claim against the directors was by the company which was the victim of the misconduct which had caused it injury. At [41]-[43] Lord Mance JSC said:

> "[41] As Lord Hoffmann made clear in *Meridian Global*, the key to any question of attribution is ultimately always to be found in considerations of context and purpose. The question is: whose act or knowledge or state of mind is *for the purpose* of the relevant rule to count as the act, knowledge or state of mind of the company? Lord Walker said recently in *Moulin Global* [2014] 3 HKC 323 at [41] that 'One of the fundamental points to be taken from *Meridian* is the importance of context in any problem of attribution'. Even when no statute is involved, some courts have suggested that a distinction between the acts and state of mind of, on the one hand, a company's directing mind and will or 'alter ego' and, on the other, an ordinary employee or agent may be relevant in the context of third party relationships. This is academically controversial: see Professor Peter Watts, *The company's alter ego – an impostor in private law* (2000) LQR 525; Campbell and Armour, *Demystifiying the civil liability of corporate agents* (2003) CLJ 290. Any such distinction cannot in any event override the need for attention to the context and purpose in and for which attribution is invoked or disclaimed.
>
> [42] Where the relevant rule consists in the duties owed by an officer to the company which he or she serves, then, whether such duties are statutory or common law, the acts, knowledge and states of mind of the company must necessarily be separated from those of its officer. The purpose of the rule itself means that the company cannot be identified with its officers. It is self-evidently impossible that the officer should be able to argue that the company either committed or knew about the breach of duty, simply because the officer committed or knew about it. This is so even though the officer is the directing mind

> and will of the company. The same clearly also applies even if the officer is also the sole shareholder of a company in or facing insolvency. Any other conclusion would ignore the separate legal identity of the company, empty the concept of duty of content and enable the company's affairs to be conducted in fraud of creditors.
>
> [43] At the same time, however, if the officer's breach of duty has led to the company incurring loss in the form of payments to or liability towards third parties, the company must be able as part of its cause of action against its officer to rely on the fact that, in that respect, its officer's acts and state of mind were and are attributable to the company, causing it to make such payments or incur such liability. In other words, it can rely on attribution for one purpose, but disclaim attribution for another. The rules of attribution for the purpose of establishing or negating vicarious liability to third parties differ, necessarily, from the rules governing the direct relationship inter se of the principal and agent."

24. Lord Sumption preferred to formulate the principle as an exception to what would otherwise be a general rule of attribution but nothing turns on this for present purposes. *Bilta* confirms that a director sued by a company for loss caused by a breach of fiduciary duty cannot rely on the principles of attribution to defeat the claim even if the scheme involved the company in the fraud or illegality. As Lord Sumption said at [89]-[90]:

> "[89] A claim by a company against its directors, on the other hand, is the paradigm case for the application of the breach of duty exception. An agent owes fiduciary duties to his principal, which in the case of a director are statutory. It would be a remarkable paradox if the mere breach of those duties by doing an illegal act adverse to the company's interest was enough to make the duty unenforceable at the suit of the company to whom it is owed. The reason why it is wrong is that the theory which identifies the state of mind of the company with that of its controlling directors cannot apply when the issue is whether those directors are liable to the company. The duty of which they are in breach exists for the protection of the company against the directors. The nature of the issue is therefore itself such as to prevent identification. In that situation it is in reality the dishonest directors who are relying on their own dishonesty to found a defence. The company's culpability is wholly derived from them, which is the very matter of which complaint is made.
>
> [90] This would be obvious if the company were suing the agent for a criminal or dishonest act committed against it where there was no third party involved: for example where the agent had embezzled the company's funds and made off with them. This was the situation before the Court of Appeal in *A-G's Ref*

(*No 2 of 1982*) [1984] 2 All ER 216, [1984] QB 624, when the notion of attribution and the inference of consent were alike rejected. The position would have been no different if consent had been more than an inference, for example because the fraudsters had procured the company's express consent in their capacity as its sole directors or shareholders: see *Petrodel Resources Ltd v Prest* [2013] 4 All ER 673, [2013] 2 AC 415 (at [41]). As Lord Browne-Wilkinson put it in *R v Gomez* [1993] 1 All ER 1 at 40, [1993] AC 442 at 496–497:

> 'It would offend both common sense and justice to hold that the very control which enables such people to extract the company's assets constitutes a defence to a charge of theft from the company. The question in each case must be whether the extraction of the property from the company was dishonest, not whether the alleged thief has consented to his own wrongdoing.'

Where the directors simply embezzle the company's funds the question of attribution arises but the illegality defence does not. There is no wrongdoing by the company. But the analysis would be precisely the same if there were. This was the position in *Belmont Finance Corp Ltd v Williams Furniture Ltd* [1979] 1 All ER 118, [1979] Ch 250, where the directors' scheme for abstracting the company's assets necessarily involved a criminal contravention by the company of the Companies Act. The Court of Appeal declined to attribute knowledge of the conspiracy to the company so as to make it party to the scheme. This was because the company's claim was against the directors who had authorised the transaction. They could not raise the illegality defence by fixing the company with knowledge of their own plans, for the same reason that the defendants in *A-G's Reference* (*No 2 of 1982*) could not raise the defence of consent on that basis. This is so whether the company is a one-man company or not, because the objection to the attribution of the culpable directors' state of mind to the company is that they are being sued for abusing their powers. It is the same objection whether they were one, some or all of the directors and whether or not they were also shareholders. In *Belmont Finance* it was held on appeal from the judgment after trial that the directors' knowledge was not to be attributed to Belmont although the transaction was formally approved by the Board and completed under the company's seal: see *Belmont Finance Corp Ltd v Williams Furniture Ltd* (*No 2*) [1980] 1 All ER 393 at 398. If the fraudulent agent cannot raise the defence of illegality in these circumstances, the same must be true of third parties who are under an ancillary liability for participating in the fraudulent agent's wrong: co-conspirators,

> aiders and abetters, knowing assisters and receivers, and so on. That was the basis on which in *Belmont Finance* it was held that the companies who sold the Maximum shares at an overvalue and acquired Belmont's shares were potentially liable along with the culpable directors of Belmont."

25. In the light of these authorities it is not, I think, open to this Court to fashion some exception to accommodate the facts of this case. Even if one can attribute the criminal conduct of Mr Faichney and Mr Perrin to VTL so that it would, if charged, have been a proper defendant to the indictment that is not sufficient to override the ability of the company, as between it and the directors, to assert its proprietary claim over the £4.55m. The CPS, as I have explained, has no better rights against VTL than Mr Faichney and Mr Perrin and, as between them and the company, the rights of the latter clearly prevail. The only remedy available to the CPS in a case like this would be to add the company to the indictment and then, if convicted, to seek a confiscation order directly against the company.

26. The Supreme Court has considered the principle of illegality more recently in *Patel v Mirza* [2016] UKSC 42 where it declined to follow the decision of the House of Lords in *Tinsley v Milligan* [1994] 1 AC 340 and instead fashioned a more generalised approach to the enforceability of illegal transactions. The case was not concerned with the issues of agency or attribution that arise in the present appeal and there is nothing in any of the judgments to suggest that the principles established in *Bilta* require to be re-considered in the light of a test based on what would be harmful to the integrity of the legal system. All I would say about *Patel v Mirza* is that insofar as confiscation orders under POCA entered into the discussion about the enforcement of illegal contracts, none of the members of the Supreme Court who considered this matter appear to have thought that the making of a confiscation order should alter or influence the outcome dictated by the relevant common law principles: see e.g. Lord Neuberger at [185]. The same view was expressed by Sir Terence Etherton C in his judgment in the Court of Appeal in *Top Brands Ltd v Sharma* [2015] EWCA Civ 1140 at [48].

27. Mr Christopher therefore accepted that *Patel v Mirza* does not add anything to his case in terms of supporting different considerations of public policy from those which informed the earlier decisions of the Supreme Court in *FHR* and *Bilta*. He must either persuade us to modify the consequences of those decisions in their application to the present case or the appeal must fail.

28. For the reasons I gave earlier, I do not consider that it is open to us to attribute the actions of Mr Faichney and Mr Perrin to VTL so as to defeat the company's equitable title to the £4.55m. The present case does not lie outside the range of the factual situations considered in *Bilta*. In particular, it is clear from what was said in *Bilta* that the company's participation through its directors in criminal conduct is not enough to justify the application of a different rule in relation to the ownership (as between the company and its directors) of the proceeds of the fraud. The argument of the CPS would entitle the directors to assert a title in the proceeds of crime adverse to the company which, as Lord Neuberger explained in *FHR*, would put the principal in a worse position than if no impropriety or criminality was involved in the breach of duty.

29. I would therefore dismiss the appeal.

Lord Justice Hamblen :

30. I agree.

Lord Justice Holroyde :

31. I also agree.

© Crown copyright