

Snapshot: Supreme Court holds no attribution where director's "secret" profits in issue

Insights - 26/11/2021

The United Kingdom's Supreme Court has recently delivered helpful guidance on the principles to be applied when dealing with attribution of knowledge between a company and its wrongdoing directors; particularly in the context of breaches of duty by directors in exploiting corporate opportunities belonging to the company to receive secret profits.

It is well settled that, where an agent makes a secret profit by virtue of a principal-agent relationship, the profit is automatically held on constructive trust for the principal. In the corporate context, a director who has breached a fiduciary duty, and received secret profit, will hold that profit on constructive trust for the company.

However, the question before the Supreme Court was whether directors are able to deny a company's proprietary claim to the secret profits on the basis that their unlawful conduct should be attributed to the company in circumstances where the company did not suffer loss but would instead stand to receive a windfall. In other words, would it be appropriate for a company to profit from its directors' illegality while denying attribution of that illegality?

The Supreme Court reaffirmed the well-known principles set out in *Jetivia SA v Bilt* [2015] UKSC 23 (and applied in *Singularis Holdings Ltd (in liquidation) v Daiwa Capital Markets Europe Ltd* [2019] UKSC 50) that a director who profited from his own breach of duty cannot attribute his knowledge to a company and rely on an illegality defence, even where the company was involved in the fraud or illegality arising from the director's breach of fiduciary duty.

It went on to find that, properly applied, there was nothing in *Bilta* to suggest that it would be appropriate to create an exception to the normal rule simply because the company itself did not suffer a loss as a result of the director's breach. *Bilta* was concerned with ensuring that proper importance was accorded to the significance of the duties owed by directors.

If the orthodox application of the rules of attribution were to be disapplied in these circumstances, this rationale would be negated. In particular, the Supreme Court considered that the availability of a proprietary claim, through the imposition of a constructive trust, was critical in ensuring a directors' compliance with their duties and, without it, one of the guards against the temptation of self-interest would be lost.

Accordingly, the Supreme Court considered that the directors' illegality should not be attributed to the company such that the directors held the secret profits on constructive trust for it.

The decision is particularly relevant to Cayman Islands insolvency, fraud and asset recovery practitioners who regularly consider the availability of claims against current and former directors who have profited from a breach of their duties through fraud or otherwise. It should also serve as a useful warning to directors about the importance of adhering to their fiduciary duties, given the proprietary nature of the relief potentially available to an applicant company.

Crown Prosecution Service (Appellant) v Aquila Advisory Ltd (Respondent) [2021] UKSC 49

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