



22 April 2015

PRESS SUMMARY

Jetivia SA and another (Appellants) v Bilta (UK) Limited and others (Respondents) [2015] UKSC 23

On appeal from [2013] EWCA Civ 968

JUSTICES: Lord Neuberger (President), Lord Mance, Lord Clarke, Lord Sumption, Lord Carnwath, Lord Toulson, Lord Hodge

BACKGROUND TO THE APPEAL

Bilta (UK) Ltd was compulsorily wound up in November 2009 pursuant to a petition presented by HMRC. Bilta’s liquidators then brought proceedings against its two former directors (“**the directors**”) and against Jetivia SA, (a Swiss company) together with Jetivia’s chief executive (“**the appellants**”). The claim alleges that the appellants and the directors were parties to an ‘unlawful means conspiracy’ to injure Bilta by a fraudulent scheme, which involved the directors breaching their fiduciary duties as directors, and the appellants dishonestly assisting them in doing so. The conspiracy alleged is that between April and July 2009, the directors caused Bilta to enter into a series of transactions relating to European Emissions Trading Scheme Allowances (commonly known as ‘carbon credits’) with various parties, including Jetivia, and that those transactions constituted what is known as a ‘carousel fraud’, a species of VAT fraud. The liquidators now claim (i) through Bilta, (a) damages in tort from each of the four defendants, (b) compensation based on constructive trust from the appellants, and (ii) directly from each of the four defendants, a contribution under section 213 of the Insolvency Act 1986.

The appellants applied to strike out Bilta’s claim on the basis (i) that the appellants were bound to defeat the claims against them on the basis of a defence of illegality and, (ii) in relation to the section 213 claim, that it could not be invoked against the appellants as section 213 does not have extra-territorial effect. In essence, the appellants’ argument on illegality was that Bilta’s claims against its directors are barred by reason of the criminal nature of Bilta’s conduct while under their control. Allegedly, Bilta’s function was to serve as a vehicle for defrauding HMRC, and the appellants argued that the doctrine of illegality bars Bilta from suing the directors as a means of recovering the company’s loss for the benefit of the company’s creditors. This raises the issues of (i) the purpose of the illegality defence and its application in relation to Bilta’s claims and (ii) the circumstances in which the knowledge of directors and other persons is attributed to a legal person such as a registered company.

JUDGMENT

The Supreme Court unanimously dismisses the appeal both in relation to the illegality defence and in relation to section 213. On the first ground, the Court unanimously holds that the illegality defence cannot bar Bilta’s claims against the appellants on the basis that the conduct of the directors cannot be attributed to the company in the context of a claim against the directors for a breach of their duties. On the second ground, the Supreme Court holds that section 213 of the Insolvency Act 1986 has extra-territorial effect, and therefore can be invoked against the appellants.

REASONS FOR THE JUDGMENT

Attribution

A company has separate legal personality, but it can act only through its directors and agents. In most circumstances the acts and state of mind of a company’s directors and agents can be attributed to the

company by applying the rules of the law of agency; however, whether an act or state of mind is attributed to a company depends upon the context in which the question arises [41, 92, 181]. When the question of attribution arises in the context of an agency relationship, the nature of the principal's or other party's claim is highly material [87-91, 202].

In an action like the present for breach of duty against directors for using the company to commit a fraud on a third party in a way alleged to have caused the company loss, it is inappropriate to attribute to the company the fraud to which the alleged breach of duty relates, even if it is being practised by a person whose acts and state of mind would be attributable to it in other contexts [7-9, 71, 181]. As between the company and a defrauded third party, the company should be treated as a perpetrator of the fraud but in the different context of a claim between the company and the directors, the defaulting directors should not be able to rely on their own breach of duty to defeat the operation of the provisions of the Companies Act in cases where those provisions were intended to protect the company [42-43, 208]. A claim by a company against its directors could be said to be the paradigm case where attribution is inappropriate [89]. For these reasons all of the members of the Supreme Court would dismiss the appeal on the illegality defence.

The purpose and scope of the illegality defence

Lord Neuberger (Lord Clarke and Lord Carnwath agreeing) and Lord Mance all consider that this is an inappropriate case in which to decide, on a general basis, the proper approach to the defence of illegality, though they (together with Lord Toulson and Lord Hodge) emphasise the need for a review of the law of illegality by the Supreme Court in an appropriate case [15-17, 34, 174].

Lord Toulson and Lord Hodge express the view that the defence of illegality is a rule of public policy which depends on the nature of the particular claim brought by the claimant and the relationship between the parties [122]. In this case, the fiduciary duties of a director of a company which is insolvent requires the director to have proper regard for the interests of its creditors [123-126]. Such protection would be empty if it could not be enforced [127]. The doctrine of illegality has been developed on the ground of public policy and in the circumstances of this case, to allow the directors to escape liability for breach of their fiduciary duty on the ground that they were in control of the company would undermine the duty in the very circumstances in which it is required [129-130].

Lord Sumption, by contrast, regards the defence of illegality as a rule of law, independent of any judicial value judgment about the balance of the equities in each case [62]. Lord Sumption expressly disagrees with the 'statutory policy' argument put forward by Lord Toulson and Lord Hodge.

Does Section 213 of the Insolvency Act 1986 have extra-territorial effect?

The Supreme Court unanimously holds that section 213 does have extra-territorial effect. Section 213 provides a remedy against any person who has knowingly become a party to the carrying on of that company's business with a fraudulent purpose. The provision is directed against (a) parties to a fraud and (b) persons involved in the carrying on of the now-insolvent company's business. The context of section 213 is the winding up of a company registered in Great Britain; however, the effect of such a winding up order is worldwide. It would seriously handicap the efficient winding up of a British company in an increasingly globalised economy if the jurisdiction of the court responsible for the winding up of an insolvent company did not extend to people and corporate bodies resident overseas who had been involved in the carrying on of the company's business [108, 213]. Moreover Section 238, a provision in similar terms to section 213, has previously been held by the Court of Appeal to apply without territorial limitations [110, 214].

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:

www.supremecourt.uk/decided-cases/index.html