

1. The Court of Appeal has laid down some important and useful guidance for practitioners and their clients when dealing with third party interests in proceedings under the Proceeds of Crime Act 2002 ('POCA').

Background

2. In this case, Mr Forte had been convicted and sentenced for his role in a fraud. When it came to confiscation proceedings, the court had to determine the amount that was available to him. Ms Vale was Mr Forte's ex-wife, and a matter in dispute was the extent to which Ms Vale was the beneficial owner of two assets; the former matrimonial home, and a bank account.

The procedure to be followed

3. Section 10A of POCA states that where, in confiscation proceedings, it appears to the court that a person other than the defendant has, or may have, an interest in property which may be used to satisfy a confiscation order:

- a. *The court may if it thinks it appropriate to do so, determine the extent (at the time the confiscation order is made) of the defendant's interest in the property.*
 - b. *Further, the court must not exercise its power [to make a confiscation order] unless it gives to anyone who the court thinks is or may be a person holding an interest in the property a reasonable opportunity to make representations to it.*
4. As the Court of Appeal noted in this case, if civil proceedings were instituted to determine parties' interest in property, there would be statements of case, service of witness statements, and disclosure of documents. None of this is prescribed in

confiscation proceedings, but *judges dealing with the determination of the property rights of non-parties to confiscation proceedings under section 10A POCA will be careful to ensure that the procedures adopted are fair and enable an accurate determination of the issues.*

5. Although not set out explicitly by the court as to what this procedure should be, by reading the judgment the minimum expected is that:
 - a. A third party will have permission to intervene in the proceedings;
 - b. A third party is entitled to see the prosecution's case, and to have service of the relevant documents;
 - c. A third party is entitled to give evidence.

The standard and burden of proof

6. The Court of Appeal went on to consider the standard and burden of proof in cases where a court is determining a third-party interest in confiscation proceedings.
7. At paragraph 15 the Court answered those questions:
 - a. *The law [...] should be that which applies to civil proceedings. [...] As the party making the assertion, it falls to the prosecution to prove it. The standard of proof is the civil standard.*
 8. In this case, the prosecution was asserting that the beneficial ownership of the former matrimonial home was 50/50 between the two parties, contrary to the legal ownership, which was fully with Ms Vale.

9. Conversely, in a case where third parties assert that they are the beneficial owners of property that is legally owned by a defendant facing POCA proceedings, the burden of proof will be on that third party.

Evidence

10. The court went on to consider when silence or a failure to give evidence can convert into evidence.

11. In this case, the third party, Ms Vale, chose not to give evidence. As these are confiscation proceedings, there is no statutory inference against either a defendant or a third party. However, after reviewing the authorities, the Court of Appeal did state that while *in civil proceedings there is no free-standing adverse inference which may support the opposing party's case [...] the civil judge is entitled to have regard to the fact that a party who could have contradicted the opposing case has chosen not to do so.*

12. This principle can further be summarised as this: *the silence of one party in the fact of the other party's evidence may convert that evidence into proof in relation to matters which are, or are likely to be, within the knowledge of the silent party and about which that party could be expected to give evidence. Thus, depending on the circumstances, a prima facie case may become a strong or even an overwhelming case. But, if the silent party's failure to give evidence (or to give the necessary evidence) can be credibly explained, even if not entirely justified, the effect of his silence in favour of the other party may be either reduced or nullified.*

13. In the specific facts of this case, there were a number of documents which, the judge found, had required explanation, and as Ms Vale had not given evidence the judge had drawn an inference against her.

14. This case therefore both explains how an inference from silence could be drawn in confiscation proceedings, and adverts to the importance of properly advising a client about giving evidence.

Endorsements and conference notes

15. Ms Vale appealed in part on the basis that her representation had been incompetent and had failed to call her to give evidence despite her wish to do so. The Court of Appeal found it inconceivable that Ms Vale did not know that she could give evidence and stated that *if she had expressed a clear conclusion that she did want to give evidence we have no doubt that he would have called her. Why would he not?*
16. There was no endorsement signed in this case but there was no criticism made of that by the Court of Appeal, who distinguished third party confiscation matters from criminal trials, where endorsements cover extremely important decisions with statutory consequences. However, the Court did criticise the lack of a conference note.

Speak Now

17. In the appeal Ms Vale sought to rely on fresh documents that she had not relied on in the confiscation proceedings. Ms Vale had not provided a witness statement but had attempted to submit documents through her appeal counsel's written submissions. The Court of Appeal disapproved of this approach, with the following comments:
 - a. *We consider that it is appropriate in these essentially civil proceedings to apply a strict test for the admission of fresh evidence. All the documents which [...] now seeks to adduce could, with reasonable diligence, have been adduced before the judge.*
18. As there was no witness statement from Ms Vale, the documents meant very little. The Court read them *de bene esse*, but having considered them, declined to admit them to the appeal.

Former marital homes

19. In this case, the prosecution alleged that the divorce between Mr Forte and Ms Vale was a sham, to protect assets. The Court of Appeal considered the case of *Prest v Prestodel Resources Ltd [2013] 2 AC 415* and divined the following two principles:

- a. The issue before the court will be resolved only by a careful analysis of the facts, and
- b. That the fact that the property concerned was a matrimonial home is highly relevant to ascertaining the beneficial ownership.

20. In the instant case, as the prosecution alleged the sham, and asserted that the parties were living together as man and wife in the former matrimonial home, the court drew the inference, unrebutted by either party, that the divorce was in fact a sham. While the Court does not go to far as to lay down a presumption or automatic inference that matrimonial homes must be held on trust for both spouses, this is ‘highly relevant’ to that determination.

Lessons

21. These are the important lessons from this case:

- a. If you represent a third party in POCA proceedings, where the ownership of property is to be disputed, your client is entitled to see the prosecution’s case and to take part in proceedings;
- b. If the prosecution is alleging a different beneficial ownership to a legal ownership, they have the burden of proof, to the civil standard;
- c. If there is a provisional case against your client, they will need to consider carefully whether or not to give evidence, as not giving evidence could lead to an inference being drawn against them;

- d. Counsel/solicitors should take a full conference note, that in particular covers advice on giving evidence. An endorsement might also be a sensible idea;
- e. A witness statement, or at the very least a position statement attaching or exhibiting the relevant documents, should be considered for the confiscation hearing. The Court of Appeal are very unlikely to allow fresh evidence into appeal proceedings relating to confiscation;
- f. Where the property concerned is the matrimonial home, there needs to be cogent evidence that the property is no longer held on trust for both parties, if at one point it was.

To view the judgement please click [here](#).

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