



26 October 2011

PRESS SUMMARY

Gale and another (Appellants) v Serious Organised Crime Agency (Respondent) [2011] UKSC 49

On appeal from [2010] EWCA Civ 759

JUSTICES: Lord Phillips (President), Lord Brown, Lord Mance, Lord Judge, Lord Clarke, Lord Dyson, Lord Reed

BACKGROUND TO THE APPEALS

The Serious Organised Crime Agency ('SOCA') obtained an order under Part 5 of the Proceeds of Crime Act 2002 ('POCA') for the recovery of property to the value of £2m from the appellants. The order was made on the basis that the court was satisfied pursuant to section 241(3) of POCA on the balance of probabilities (the civil standard of proof) that the property was derived from criminal activity in the form of drug trafficking, money laundering and tax evasion, offences for which the appellants had not been convicted. Mr Gale had been acquitted of drug trafficking in Portugal and criminal proceedings in Spain against him were discontinued.

The appellants argued that the application of the civil standard of proof, rather than the criminal standard of beyond reasonable doubt, breached their right to a fair trial under article 6 of the European Convention on Human Rights. They asked the court either to interpret s 241 to require the application of the criminal standard of proof, or to make a declaration of incompatibility pursuant to section 4 of the Human Rights Act 1998. The judge, Griffith Williams J, refused to do so and the appellants' appeal to the Court of Appeal on this issue was dismissed.

The appellants also objected to the making of an order under section 246 of POCA that they should bear the costs of the report made by the Interim Receiver appointed by the court in connection with the recovery proceedings against them. The High Court had refused to make such an order, but this decision was reversed by the Court of Appeal.

JUDGMENT

The Supreme Court unanimously dismisses the appeal on the article 6 and the costs issues. Lord Phillips gives the main judgment on the first issue and Lord Clarke on the second. Lord Brown and Lord Dyson add concurring judgments on the first issue.

REASONS FOR THE JUDGMENT

The article 6 issue

The appellants' case was that an essential stepping stone towards proving that the relevant property was the product of crime was proof that the appellants were guilty of criminal conduct. In these

circumstances it was argued that they were entitled to the presumption of innocence afforded by article 6(2), and that rebutting this required proof of guilt to the criminal standard. Further, it was said that no adverse finding could be made which implicated the first appellant in the conduct of which he had been acquitted in the Portuguese criminal proceedings [14].

Having reviewed the case law of the European Court of Human Rights at Strasbourg on the application of article 6(2) after a person has been acquitted in criminal proceedings, Lord Phillips observed that some of the decisions were mutually inconsistent. However, a common factor in cases involving subsequent proceedings was that the court required a procedural connection between the two sets of proceedings before article 6(2) applied to civil claims [21]. In this case, the link between the Portuguese proceedings and the English civil proceedings was not there. The English court was not precluded from considering the evidence which formed the basis of the charges in Portugal [35].

In the absence of such a link, there was no reason in principle why confiscation should not be based on evidence which satisfied the civil standard of proof, notwithstanding that such evidence had proved insufficiently compelling to found a conviction on the application of the criminal standard [44]. The starting point was possession of property by the appellants for whose provenance they were unable to provide a legitimate explanation. There was an abundance of evidence which implicated them in criminal activity that provided the explanation for the property that they owned [55].

Lord Brown remarked that an authoritative Grand Chamber decision from Strasbourg clarifying and rationalising this ‘whole confusing area’ of the court’s case-law was required [117]. Lord Clarke agreed [60]. Lord Dyson was less critical of the Strasbourg case-law than Lord Phillips [131] but agreed that in this case there was no sufficient link between the two sets of proceedings. The English civil proceedings were not a direct sequel or consequence of any criminal proceedings and none of the judge’s findings specifically called into question the correctness of the first appellant’s acquittal in Portugal [142].

The costs order

Lord Clarke stated that the costs issue raised a single question of principle: whether an order for costs in favour of SOCA made against a person for whom a recovery order has been made can include the investigation costs incurred by the interim receiver appointed under POCA. In this case, the receiver’s investigation took over three years and culminated in a final report of over 400 pages, in part because of a failure of the first appellant to cooperate with the receiver. The costs paid by SOCA totalled some £1m [72].

The jurisdiction to award costs was governed by section 51 of the Senior Courts Act 1981 which makes the costs of or incidental to proceedings recoverable at the discretion of the court, subject to any express rules [76]. The investigative costs in this case were plainly costs of or incidental to the proceedings. Investigative work was an essential part of civil recovery proceedings [79]. Nothing in POCA or in the Civil Procedural Rules precluded the court from making the order [81]. The position of a receiver appointed under Part 5 of POCA was significantly different from an ordinary receiver. As well as the duty to investigate, he had no power to sell the assets nor did he have a lien over them for his costs. There was a much closer relationship between the parties and an interim receiver. The Supreme Court agreed with the Court of Appeal that it would decline to follow the decision of the Court of Appeal in Northern Ireland in *SOCA v Wilson* [2009] NI 28, and dismissed the appeal [109].

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. Judgements are public documents and are available at:

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