In The Supreme Court of Bermuda

CIVIL JURISDICTION

2015: No. 283

IN THE MATTER OF AN APPLICATION UNDER SECTION 48A OF THE PROCEEDS OF CRIME ACT 1997

BETWEEN:

KENITH CLIFORD BULFORD

Plaintiff

-and-

THE DIRECTOR OF PUBLIC PROSECUTIONS

Defendant

Before: **Hon. Chief Justice Hargun**

Appearances: **Mr Jerome Lynch, QC and Ms Sara Tucker, Trott and Duncan Limited, for the Plaintiff**
Mr Alan Richards, Senior Crown Counsel (Specialist), Department of Public Prosecutions, for the Defendant

Date of Hearing: **2 December 2019**

Date of Judgment: **13 December 2020**

JUDGMENT

Application to set aside order of the forfeiture: whether notice should have been given to the Plaintiff of the hearing in relation to forfeiture under section 48A (4) of the Proceeds of Crime Act 1997; effect of failure to give such notice

Introduction

1. These proceedings commenced by Originating Summons dated 10 July 2015, seek to set aside an Order made under section 48A of the Proceeds of Crime Act 1997 on 10 January 2014. The application is made on the ground that the factual circumstances were such that the Court should have given notice to the Plaintiff of the forfeiture hearing and should have been given an opportunity to state his claim in relation to the funds in question.

Factual background

2. On 5 March 2013, Wanda Bowen and Melinda Bean were arrested at the LF Wade Airport on suspicion of money laundering offences as they attempted to board their British Airways flight. Ms. Bowen and Ms. Bean between them carried the bulk of the currency which was calculated at $314,950 stored in sneakers in their suitcases ("the Funds"). They also had mixed currency on their person totaling $1,478.

3. Mr Bulford, the Plaintiff in these proceedings, was also arrested that same day at LF Wade Airport on suspicion of money laundering. Mr Bulford had on his person $10,040. He was tried after and separately from Ms. Bowen and Ms. Bean, with his Indictment being produced nearly a year after those against Ms. Bowen and Ms. Bean. A *Nolle Prosequi* was entered with respect to Ms. Bean.

4. On 14 October 2013, Ms. Bowen pleaded guilty to money laundering in respect of the Funds. During Ms. Bowen's sentencing, the Crown requested both incarceration and a forfeiture order for the assets seized. The Crown with the consent of the Defence obtained an order of forfeiture under section 48A of the Proceeds of Crime Act 1997. The transcript of the sentencing hearing shows that the Court was advised that the wrapping removed from the cash seized from Ms. Bowen and Ms. Bean was sent for DNA analysis which matched the profile for

Mr Bulford. The Court was advised that Mr Bulford was "*the other party involved*" in the money laundering offence to which Ms. Bowen was pleading guilty and consenting to a forfeiture order. Hellman J, with the consent of Ms. Bowen, ordered that the amount of $314,950 in US currency be forfeited to the Crown and deposited into the Confiscated Assets Fund.

5. The Crown after taking possession of the sums, then tried the Plaintiff for the same amount of $314,950, in US currency to which Ms. Bowen had pleaded guilty and consented to a forfeiture order, and the $10,040 found on the Plaintiff. On 4 May 2015, the Plaintiff was tried on an Amended Indictment of 2 Counts of money laundering before a jury in respect of the Funds.

6. The Plaintiff admitted during his trial that the sums seized belonged to him but they were earned legitimately. On 18 May 2015, the Plaintiff was found not guilty by a unanimous verdict of jury of possessing the Proceeds of Crime contrary to section 45 of the Proceeds of Crime Act 1997.

7. On 19 May 2015, the Bermuda Police Service returned the sum of $10,040 under Count 2 and failed to deliver the sum under Count 1 totaling $314,950 on the basis that those funds were already the subject of a forfeiture Order made by Hellman J on 10 January 2014.

Rival contentions

8. Section 48A of the Proceeds of Crime Act 1997 provides that:

> *"(1)The court by or before which a person is convicted of a money laundering offence may make a forfeiture order in accordance with the provisions of this section.*

(2)Where a person is convicted of a money laundering offence, the court may order the forfeiture of any property which, at the time of the offence, he had in his possession or under his control and which he used or intended to use for the purposes of the offence.

(3) Where a person is convicted of a money laundering offence, the court may order the forfeiture of any property which wholly or partly, and directly or indirectly, is received by any person as a payment or other reward in connection with the commission of the offence.

(4)Where a person other than the convicted person claims to be the owner of or otherwise interested in anything which can be forfeited by an order under this section, the court shall give him an opportunity to be heard before making an order."

9. Mr Lynch, QC seeks to set aside the original Order made by Hellman J on 10 January 2014. In making this application, Mr Lynch accepts that it would be open to the enforcement authority to commence civil proceedings for the recovery of the Funds, if the enforcement authority continued to believe that the Funds were the proceeds of unlawful conduct. He accepts that such proceedings can be commenced under section 36A of the Proceeds of Crime Act 1997 which provides that the enforcement authority may recover, in civil proceedings before the Supreme Court, property which is, or represents, property obtained through unlawful conduct. The purpose of this application, Mr Lynch submits, is to afford Mr Bulford an opportunity to be heard in relation to any such application.

10. Mr Lynch argues that the purpose of section 48A (4) is preserve the owner's rights and the rights of third parties. He says in this case, Mr Bulford was denied his rights with respect to the monies because he was (a) not given notice of the order sought despite the Crown's continued emphasis that he was the owner and

(b) he was not afforded an opportunity by the Court to be heard before the Order was made in the earlier proceedings, as the owner of the sums forfeited.

11. In this regard Mr Lynch relies upon the fact that the Court was made aware at the sentencing hearing that Mr Bulford was an involved third party in relation to the Funds. He submits that the remit of the Court was engaged for the purpose of section 48A (4) once it was seized of the information contained in the DNA report. He also makes the point that Mr Bulford should not be made to suffer merely because the Crown failed to charge him or have him stand trial in tandem with Ms. Bowen. Had he been tried together with Ms. Bowen, he would have been aware of any forfeiture hearing and could have taken the appropriate steps to protect his interest, including seeking a stay of any such proceedings.

12. Mr Richards asked the court to look carefully at the precise terms of section 48A (4). He says that section 48 (4) is only engaged when a person "*claims"* to be the owner of or otherwise interested in anything which can be forfeited by an order under this section. He says that in this case Mr Bulford never claimed that he was the owner of or otherwise interested in the Funds. He points out that prior to trial Mr Bulford declined to state any claim to the cash, giving a "no comment" interview to the Police and making no assertion between seizure on 5 March 2013 and his being charged with money laundering nearly a year later. At the time of the forfeiture Order and despite having been deprived of the Funds for some 10 months, Mr Bulford made no assertion of any such ownership or interest.

Discussion

13. *In R (on the application of Galldorf Takarmanvgvgvarto es Kereskedelmi Zartkoroen Mokodo Reszvenytarsasag v Folkeston Magistrates Court* [2017] EWHC 2019) (Admin), the Court was concerned with an application to set aside a forfeiture order made under Proceeds of Crime Act 2002, section 298, in circumstances where the forfeiture proceedings had been concluded in relation to

seized cash and where the Claimant, who was the lawful owner of the cash, had not been notified of the forfeiture proceedings. In setting aside the forfeiture order, Goss J accepted the submission that an interested party who had not been given notice of a forfeiture hearing, should not be deprived of an opportunity to advance its claim. The requirement of notice was a fundamental principle of natural justice and the court's jurisdiction was exercisable even if the tribunal had behaved with complete propriety and even if there had been no misconduct or misbehaviour on the part of the prosecutor. Goss J was satisfied that in the absence of any statutory provision providing an appropriate remedy to a party in the situation of the Claimant, the court should exercise its inherent jurisdiction and grant the relief sought in the claim.

14. The fundamental principle of *audi alterem partem* in the context of forfeiture proceedings was emphasised in the earlier case of *The Queen on the Application of Harrison v Birmingham Magistrates Court, Chief Constable of West Midlands Police* [2011] EWCA Civ 332, where Hooper LJ said at [60]:

> *"I have to say that I find this a very plain and obvious case. If the appellant is right when she says that she knew nothing of the crucial hearing, then the simple fact is that the State has confiscated what she says is her property in circumstances which can now be seen to have denied her the due process of the law in breach of the most elementary principle of natural justice, the right to be heard. The principle of audi alterem partem, that no man or woman is to be condemned unheard, is one of the oldest rules of our administrative law. It goes back at least four centuries, for it is to be found in Boswel's Case (1606) 6 Co Rep 48b and Bagg's Case (1615) 11 Co Rep 93b. If the appellant is right in her denial of knowledge of the hearing, then she has been the victim of a miscarriage of justice, a miscarriage of justice which we would merely be compounding if we did not intervene. As I commented in ex parte Marsh at [50]:*

> *"Mr Marsh was denied a fair trial. Justice was not done. It is the historic and vital function of [the Administrative] court when exercising its supervisory jurisdiction over Justices to ensure, if not that justice is done, at the very least that demonstrated injustice is not allowed to continue uncorrected."*

15. In his First Affidavit, Mr Bulford states that he was not aware beforehand that Ms. Bowen was going to plead guilty to the money laundering offence. Further, he was not aware beforehand that Ms. Bowen was going to consent to the Funds being forfeited to the Crown. He says that he became aware of these matters afterwards. In his Second Affidavit he complains that during the course of his own proceedings he received no notice of the application by the Crown for the forfeiture of the monies intended to be seized and was therefore not permitted to respond or make any representations to the Court opposing such order on its own behalf.

16. I accept Mr Lynch's submission that in giving effect to section 48A (4) a distinction should be made between the giving of "notice" and the making of a "claim" by a third party to the funds in question. Here, I am satisfied that the Court was in possession of sufficient material in relation to the potential interest of Mr Bulford in the Funds and that he should have been given notice so as to allow him to make any representations to the Court he considered appropriate. In any event, having regard to the fact that Mr Bulford maintains in sworn evidence that he was wholly unaware of the forfeiture proceedings and that he has been denied an opportunity to make representations to the Court in relation to his interest in the Funds, he should be afforded such an opportunity. In all the circumstances, exercising the inherent jurisdiction of the Court, I order that the original order made by Hellman J on 10 January 2014 is set aside. In making this Order, I reiterate that it is open to the enforcement authority to make the necessary

application under section 36A if the enforcement authority continues to take the view that Funds constitute the proceeds of wrongful conduct.

17. I will hear the parties in relation to the issue of costs, if required.

Dated 13 December 2019

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NARINDER K HARGUN

CHIEF JUSTICE