IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
[2020] EWHC 3632 (Admin)

No. CO/883/2020

Royal Courts of Justice

Tuesday, 3 November 2020

Before:

THE RIGHT HONOURABLE LADY JUSTICE CARR DBE
THE HONOURABLE MR JUSTICE PICKEN

B E T W E E N :

FOOD STANDARDS AGENCY

Appellant

- and -

BAKERS OF NAILSEA LIMITED

Respondent

MR RICHARD WRIGHT QC and MR HOWARD SHAW appeared on behalf of the Appellant.

MR DAVID HERCOCK appeared on behalf of the Respondent.

J U D G M E N T

LADY JUSTICE CARR:

Introduction

1 This is an appeal by way of case stated under s. 111 of the Magistrates' Court Act 1980 ("s. 111") by the Appellant, the Food Standards Agency ("the FSA"), against the ruling dated 7 November 2019 of District Judge (Magistrates' Court) Taylor sitting at Yeovil Magistrates' Court ("the District Judge") as follows:

i) That three sets of applications for the issue of a summons ("the applications") served by the FSA against the Respondent, Bakers of Nailsea Limited ("BNL"), were invalid for failure to comply with Rule 7.2 of the Criminal Procedure Rules SI 2015 No.1490 (as amended) ("the CPR");

ii) That the District Judge consequently had no jurisdiction to try them, since they were a nullity.

2 The question that has been posed for the Court in the case stated by the District Judge on 25 February 2020 is as follows:

> "Did I err in law by concluding that the informations were nullities and that I had no jurisdiction to try them?"

The question assumes that the FSA is at liberty to contend that the District Judge did err in law in so concluding. Whether or not that assumption is correct is something that I consider below.

3 I record at the outset my gratitude to all counsel for their helpful written and oral submissions.

The relevant background in summary.

4 BNL is a food business operator and operated an abattoir at premises in Nailsea, near Bristol. The applications (also referred to as "informations") were served by the FSA against BNL as follows:

i) Informations dated 23 January 2019: relating to four allegations charged under the Food Safety and Hygiene (England) Regulations 2013 ("the 2013 Regulations"), offences alleged to have been committed between 17 January 2018 and 24 January 2018;

ii) Informations dated 19 March 2019: relating to two allegations charged under the 2013 Regulations, offences alleged to have been committed between 30 April 2018 and 4 May 2018;

iii) Informations dated 22 March 2019: relating to three allegations charged under the 2013 Regulations, offences alleged to have been committed between 16 April 2018 and 1 June 2018.

5 The allegations related to BNL's facilities for disinfecting tools, handwashing facilities and carcass trimming, alleged failures to comply with hygiene improvement

and remedial action notices and alleged breaches of Regulations 6, 9 and 19 of the 2013 Regulations.

6 Regulation 18 of the 2013 Regulations provides:

> "No prosecution for an offence under these Regulations, which is punishable under these Regulations under paragraph (2) of Regulation 19, shall be begun after the expiry of three years from the commission of the offence; or one year from its discovery by the prosecutor."

The preliminary hearing before the District Judge

7 The applications were listed to be heard before the Magistrates' Court on 26 April 2019. At that hearing BNL raised a number of preliminary points relating to jurisdiction and abuse of process. A preliminary hearing was listed accordingly before the District Judge on 6 and 7 November 2019.

8 One of the preliminary points raised was whether the applications were a nullity by reason of the FSA's failure to comply with the mandatory requirements of CPR 7.2(3)(b)(i). At paragraph 9 of the case stated the District Judge records:

> "Before me the appellant conceded that they had not complied with Rule 7.2(3)(b)(i) and, because of this failure, if the informations had not been validly laid, then it was now too late to lay fresh informations as they would be out of time. The issue before the court was whether the complete failure by the [FSA] to comply with Rule 7.2(3)(b)(i) meant that the informations purported to be laid were, as a consequence, invalid or not."

9 The case stated records specifically that counsel for the FSA conceded, both in writing and orally, that there had been non-compliance with CPR 7.2(3)(b)(i), "either directly or in a way that compliance could be inferred". The prosecution response to the defence note (2) dated 27 August 2019 stated at paragraph 32:

> "While the rule requires only that the application demonstrates that it is made in time and an argument might be constructed that it impliedly did so, that is not an argument that is pursued. These submissions proceed on the basis that there was indeed a failure to comply with r.7.2 in this regard".

The District Judge stated that he considered that he was entitled to rely upon this clear concession as a matter that was not in dispute. I refer below to the concession by the FSA as"the FSA's concession".

10 The District Judge concluded that the applications were, indeed, invalid, a nullity, and that he accordingly did not have jurisdiction to hear them.

The relevant rules

11 Part 7 of the CPR deals with "Starting a prosecution in a Magistrates' Court". Rule 7.1 is headed "When this Part applies". The relevant provision in force from 5 October 2015 to 5 April 2020 stated:

> "(1) This Part applies in a Magistrates' Court where-

(a) a prosecutor wants the court to issue a summons … under section 1 of the Magistrates' Courts Act 1980."

12 S.1(1)(a) of the Magistrates' Court Act 1980 provides:

"On an information being laid before a justice of the peace that a person has, or is suspected of having, committed an offence, the justice may issue a summons directed to that person requiring him to appear before a Magistrates' Court to answer the information."

13 Rule 7.2 is headed "Application for a summons etc.". On 2 April 2018, by virtue of the Criminal Procedure (Amendment) Rules SI 2018 No. 132, Part 7 of the CPR was amended so as to introduce Rule 7.2(3), including Rule 7.2(3)(b)(i). As so amended, Rule 7.2 reads materially (with emphasis added) as follows:

"(1) A prosecutor who wants the court to issue a summons must-

(a)serve on the court officer a written application; or

(b)unless other legislation prohibits this, present an application orally to the court, with a written statement of the allegation or allegations made by the prosecutor …

(3) An application for the issue of a summons … must-

(a)set out the allegation or allegations made by the applicant in terms that comply with rule 7.3 (Allegation of offence in application or charge); and

(b)demonstrate-

(i)that the application is made in time, if legislation imposes a time limit, and

(ii)that the applicant has the necessary consent, if legislation requires it."

(4) As well as complying with paragraph (3), an application for the issue of a warrant must-

(a)demonstrate that the offence or offences alleged can be tried in the Crown Court;

(b)demonstrate that the offence or offences alleged can be punished with imprisonment; …

(9) A single document may contain-

(a)more than one application; or

(b)more than one written charge.

(10)Where an offence can be tried only in a magistrates' court, then unless other legislation otherwise provides-

(a)a prosecutor must serve an application for the issue of a summons… on the court officer or present it to the court; or …

not more than 6 months after the offence alleged.

(11) Where an offence can be tried in the Crown Court then-

(a)a prosecutor must serve an application for the issue of a summons … on the court officer or present it to the court …

within any time limit that applies to that offence.

(12) The court may determine an application to issue or withdraw a summons …

(a)without a hearing, as a general rule, or at a hearing (which must be in private unless the court otherwise directs);

(b)in the absence of-

(i)the prosecutor,

(ii)the defendant;

(c)with or without representations by the defendant.

(13) If the court so directs, a party to an application to issue or withdraw a summons … may attend a hearing by live link or telephone."

14 Rule 7.3 is headed "Allegation of offence in application for summons, etc., or charge". The relevant provisions in force from 2 April 2018 state:

> "(1) An allegation of an offence in an application for the issue of a summons … must contain-
>
> (a) a statement of the offence that-
> (i) describes the offence in ordinary language and
> (ii) identifies any legislation that creates it; and
> (b) such particulars of the conduct constituting the commission of the offence as to make it clear what the prosecutor alleges against the defendant.
>
> (2) More than one incident of the commission of the offence may be included in the allegation if those incidents taken together amount to a course of conduct having regard to the time, place or purpose of commission."

15 Rule 7.4 is headed "Summons, warrant and requisition". The relevant provisions in force from 2 April 2018 state:

> "(1) A summons … may be issued in respect of more than one offence;
>
> (2) A summons … must-
>
> (a) contain notice of when and where the defendant is required to attend the court;
>
> (b) specify each offence in respect of which it is issued;
>
> (c) in the case of a summons, identify-
>
> (i) the court that issued it, unless that is otherwise recorded by the court officer; and
>
> (ii) the court office for the court that issued it …
>
> (3) A summons may be contained in the same document as an application for the issue of that summons …
>
> (5) Where the court issues a summons-
>
> (a) the prosecutor must-
>
> (i) serve it on the defendant; and
>
> (ii) notify the court officer; or
>
> (b) the court officer must-
>
> (i) serve it on the defendant; and

(ii)notify the prosecutor …

(7) Unless it would be inconsistent with other legislation, a replacement summons … may be issued without a fresh application … where the one replaced-

(a) was served under Rule 4.4 (Service by leaving or posting a document); but

(b) is shown not to have been received by the addressee.

(8) A summons … issued to a defendant under 18 may require that defendant's parent or guardian to attend the court with a defendant, or a separate summons … may be issued for that purpose."

The FSA's challenge in summary

16 The FSA, through fresh counsel, now seeks to resile from the FSA's concession, arguing that it was wrong in law. It wishes to contend that there is no requirement in CPR 7.2 to state expressly:

i) the legislation giving rise to any time limit;
ii) the specific time limit relevant to the offence charged;
iii) the date on which the time limit expires;
iv) the reason why the application is made within the relevant time limit.

17 Mr Wright QC for the FSA developed ten points before the court this morning:

i) The purpose of CPR Rule 7.2(3)(b)(i) is to identify the principle that the obligation is on the prosecutor to demonstrate that the proceedings in question have been brought in time;

ii) CPR Rule.7.2(3)(b)(i) does not, on its face, impose any mandatory requirements as to how it should be demonstrated that the application is made in time, if legislation imposes a time limit. CPR Rule 7.2(3)(a) expressly requires that an application for a summons must set out the allegation or allegations in terms that comply with CPR Rule 7.3 (i.e. it must contain certain specific statements). In stark contrast, there is no express requirement in CPR Rule 7.2 to identify and state legislation giving rise to a time limit or any applicable time limit. Thus, where CPR Rule 7.2 requires specific information to be included, it expressly identifies the nature of that information. The FSA submits that a requirement to "demonstrate" is very different from a requirement to make a statement. A requirement to identify the relevant legislation and dates for time limits cannot be read into the word "demonstrate";

iii) Thus, had a particular type of information been required by the CPR, the rules would have said so in terms;

iv) There is good practical reason why there should be no further requirements, given the wide scope of submission that would otherwise be demanded;

v) The court is presumed to know of the relevant time limits. The requirement is to identify as necessary the facts within that time limit, rather than to identify the time limit itself;

vi) Only where an application is issued outwith the 12-month period and a date of discovery is being relied upon would additional information on the face of the application be required. Where the time limit provision indicates that proceedings must be commenced within one year from the date of discovery, compliance with that time limit is clearly demonstrated when the application for a summons is made within one year of the date of the offence. The FSA accepts that, where an offence is discovered more than one year after its commission, but within three years of its commission and, therefore, within the three-year longstop time limit, a prosecutor would have to provide further information in the application in order to demonstrate that the application was made within time. It is suggested that there would be a degree of flexibility as to how the prosecutor could do that, perhaps by email and accompanying memo or by reference to a witness statement, for example;

vii) Where an application is received by a court and a summons is issued, then, by definition, the court has been satisfied that it has been demonstrated that the application was made in time. The remedy, if the application were out of time, is for the court to decline to issue it;

viii) The final three points overlap and can be summarised as follows. Once a summons is issued, as here, provided that it discloses an offence known to the law and within jurisdiction and is within time, it is not a nullity: it is a valid summons. On the basis that a summons exists, there is, effectively, a presumption of validity, but it would then be open to a respondent to argue a lack of jurisdiction or that the summons had been issued out of time. The remedy for non-compliance with what is suggested to be only a procedural rule is not to render otherwise valid proceedings irregular. Such a result would not be in accordance with the overriding objective under the CPR. Thus, on the facts here, submits the FSA, the date of the alleged offence specified in each application, together with the date on which each application was served, demonstrated that the FSA had commenced proceedings within the relevant timeframe. The FSA had thus complied with CPR 7.2(3)(b)(i). The fact that the court issued a summons, as already indicated, is said to be *prima facie* evidence that the court at the time of issuing was satisfied that the applications were validly served.

18 Accordingly, it is said that the District Judge was wrong in law to conclude that the FSA had failed to demonstrate that the applications had been made in time and so failed to comply with CPR 7.2, and wrong in law to conclude that the proceedings were thereby invalidated, that the applications were a nullity and the court had no jurisdiction.

19 Mr Wright further argued, as he must, that the FSA is entitled to advance this argument on appeal, notwithstanding the FSA's concession. He contends that a concession regarding statutory interpretation of the law, which is wrong in law, is not a valid concession. Reliance is placed on *Whitehead v. Haines* [1965] 1 QB 200 ("*Whitehead"*) where Winn J stated (at 209D to E):

> "In my judgment, it would not be right for this court to decline to entertain and determine, on an appeal raised by a case stated, a point

> of pure law open on the facts found in that case to a defendant convicted on a criminal charge which, if sound, might afford him a defence, merely because that legal objection to the charge has been first appreciated after his conviction. In particular, it appears to be essential to the due performance of justice that the court should not uphold a conviction for an offence non-existent in law."

20 Mr Wright submits that the concession here was not a factual concession nor was it a concession of mixed fact and law, as was the case in *R v. E* [2018] EWCA 2426 Crim. ("*R v. E"*) and *R. v. R* [2015] EWCA Crim. 1941 ("*R v. R"*). It is said that it is not in the interests of justice for a prosecution to be halted as a nullity on an erroneous basis. In his words, the FSA should not be "stuck with it".

21 Finally, I record that the FSA's skeleton argument contains a brief undeveloped submission that, even if the applications were invalid, the District Judge had jurisdiction "having regard to the overriding objective of the Criminal Procedure Rules". It is suggested that a breach of a procedural rule does not override or trump the jurisdiction of a court to try an information which identifies an offence known in law, contains the essential ingredients of the charge, has been granted with any necessary authority to prosecute and has, in fact, been brought in time.

22 This submission falls outside the grounds of appeal which were lodged after the case stated was issued. The grounds of appeal, fairly read, are confined to the single contention that the District Judge was wrong in law to conclude that the prosecution had failed to comply with CPR r.7.2(3)(b)(i). Mr Wright points to the breadth of the question in the case stated, but, as indicated, the grounds postdate that. Analysis of this issue would require consideration, as Mr Hercock for BNL points out, of an extensive line of authorities and jurisprudence which have not been placed before the court, with the result that the court is not equipped to deal with the argument in any event. For these reasons, I decline to entertain the additional argument.

<u>BNL's response in summary</u>

23 BNL resists the appeal. First, the FSA having decided not to pursue the argument before the District Judge, and the FSA having expressly conceded that there had been a failure to comply with CPR r.7.2(3)(b)(i), BNL contends that it is not now open to the FSA to pursue the ground advanced an appeal. *Whitehead* cannot assist the FSA. Further, it cannot logically be contended that the District Judge was wrong in law to conclude that the FSA had failed to comply with the requirements of CPR r.7.2(3)(b)(i), because it is said that the point was not in dispute. Reliance is placed on *Lycamobile UK v. London Borough of Waltham Forest* [2014] EWHC 1829 Admin.("*Lycamobile"*) (at [17] to [20]). Mr Hercock suggests that the FSA's approach goes beyond the parameters of an appeal by way of case stated under s.111; reference is made to the statement of Sir Brian Leveson P in *Lycamobile* (at [24]):

> "In my judgment, short of allegations of incompetence, it is not the role of the court to remedy failures by advocates adequately to put their case in the court below or otherwise to rule in circumstances which did not, in fact, generate a decision of the court which can properly be challenged".

At the very least, submits Mr Hercock, permission should only be granted to the FSA to change its position "very exceptionally" (see *R v. E* and *R v. R*).

24 Beyond that Mr Hercock submits that Part 7 of the CPR requires an application for the issue of a summons to have particular content. It sets out a series of mandatory requirements for an application for the issue of a summons to be valid. Following the introduction of CPR r.7.2(3)(b)(i) in April 2018, it was mandatory, if legislation imposed a relevant time limit, for an application to demonstrate that the application was in time. The rule is said by Mr Hercock to be designed to ensure that the Magistrates' Court, which is required to establish that the alleged offence is not time barred, is "fully assisted in relation to any applicable time limit by those making the application". If an application for the issue of a summons does not comply with the statutory requirement in r.7.2(3)(b)(i), then it is a nullity and has no legal effect.

Analysis

25 I address BNL's procedural objection first. There was a clear and valid concession by the FSA that the applications did not comply with CPR r.72(3)(b)(i). There was an open, conscious and expressed decision that, to the extent that there might be a debate about that, the point was not being pursued: to the extent that it might be argued that the FSA had "impliedly" demonstrated that they were in time, that "was not an argument that [was] pursued".

26 Compelling circumstances would be needed in order to persuade this court to allow the FSA, a sophisticated and fully-represented party, to resile from this position.

27 I do not consider that *Whitehead* assists the FSA. In *Whitehead*, a defendant was convicted of breaching a condition of a music and dancing licence, granted under the Public Health (Amendment) Act 1890. The hearing before the Justices proceeded on a "tacit assumption" that, if the performance was not licensed, it contravened the legislation in question (see 208G). On appeal, the defendant was permitted to advance a new point of law relating to the proper construction of the statute so as to contend that the licence condition was *ultra vires*.

28 There is a number of material distinctions to be drawn. First, the decision in *Whitehead* was concerned to address the fact that a defendant should not be convicted of an offence that did not exist in law. That is not this case. Secondly, the ground that the FSA seeks to advance does not raise a pure point of law. It relates to a question of mixed fact and law. Thirdly, most significantly, the ground that the FSA seeks to advance is not a new point first appreciated after the decision below; quite to the contrary, it was a point expressly considered and discarded. There was no "tacit assumption" on the issue.

29 As for the additional matters relied upon by BNL, I am not attracted to the argument that the District Judge did not make any ruling on the question of compliance. This is not a situation akin to that in *Lycamobile*, where the relevant issue was withdrawn from the debate. Whether or not the applications complied with CPR r.7.2(3)(b)(i) was something upon which the District Judge did rule, as reflected in the question posed by him in the case stated, albeit that it was a ruling based on a concession. He made the order that each application was a nullity. Nor do I necessarily accept that the approach of the FSA in some way goes beyond the jurisdictional parameters of an appeal by way of case stated.

30 But I do very much accept that, having made the FSA's concession, permission should only be granted to the FSA to change its position on appeal if there are exceptional circumstances justifying such latitude. In *R v. E* Sir Brian Leveson P stated (at [19]):

> "… the court referred the parties to the decision of this court in *R v. R* … Dealing with concessions made during the course of the hearing in the Crown Court, it was made clear:
>
> '53. Before leaving this part of the case, three other issues must be addressed. The first is to underline one of the "overarching principles" set out in the Review of Efficiency in Criminal Proceedings 2015. The principle is "getting it right first time" and its relevance to the present case arises from the fact that the appellant's stance before this court is substantially different from that adopted before [the trial judge]. Before the judge, as discussed in further detail below, the appellant essentially acquiesced in the judge's proposals as to disclosure. The appellant's case below was that, with more time, they could and would comply with the requirements canvassed with the parties by the judge. On appeal, the case is that those proposals were misconceived with regard to the stage of initial disclosure imposed upon them under protest and led the parties and the case on to the wrong road.
>
> 54. Changes of case of this nature are disconcerting and potentially very wasteful of time and costs. Whether or not in the present proceedings the appellant is permitted to change its case on appeal, it must be emphasised that parties generally can have no expectation that such a course will be open to them; save, very exceptionally, a party is not permitted to acquiesce in an approach to the case before the judge at first instance and then renounce its agreement and advance a fundamentally different approach on appeal. Parties must get it right first time.'"

31 There is no good, let alone an exceptional, reason to allow the FSA to change its stance on appeal. The FSA simply wants to have a second bite at the cherry. To allow it to do so would not be in accordance with the overriding objective and the important principle of "getting it right first time". This is not contrary to the interests of justice: there is nothing contrary to the interests of justice in the circumstances of this case in tying the FSA to the express and considered position that it took below on the very point in issue.

32 The question posed by the case stated remains for us to consider, even if only briefly and even although, if the FSA is right, as Mr Wright put it, the FSA would be "winning the battle but losing the war".

33 Before setting out what I consider to be the correct position as a matter of construction, it is worth noting that the setting of time limits for the prosecution of offences is designed to have two important consequences: first, to provide protection to the citizen who may have committed a criminal offence and, secondly, to bring about, in the authority having responsibility for the prosecution, an efficient and timely investigation of the offence (see *Tesco v. Harrow London Borough Council* [2003] EWHC 2929 Admin. at [25]).

34 I would reject the FSA's construction of and approach to CPR r.72.(3)(b)(i) for the following reasons:

i) The Magistrates' Court carries out a judicial function when considering whether to issue a summons or warrant and needs to establish, amongst other things, whether the alleged offence is time barred (see *R (Key and Another) v.*

Leeds Magistrates [2018] 2 CrApp R 27). The FSA's position that there is no requirement to draw attention to any applicable time limit is contrary to the clear purpose of the rule, namely to ensure that the court is properly and fully assisted on what is a without notice application'

ii) If the FSA's construction were correct, CPR r.7.2(3)(b)(i), and, indeed, 7.2(3)(c)(ii) and 7.2.(4), would be otiose. Compliance with r.7.2(3)(a) would be enough to satisfy the requirements of CPR r.7.2;

iii) CPR rule 7.2(3) must be taken to have been introduced for a reason. As a matter of objective construction, it must have been intended that compliance with CPR r.7.2(3)(b)(i) would entail something more than merely setting out the allegation of the offence (which was already required by the pre-existing rule);

iv) An ordinary and natural interpretation of the language of the rule is that there must at least be a reference to the applicable time limit, otherwise it is not "demonstrated" that the application is made in time. The need for such a reference is supported by the fact that not all offences are subject to a legislative time limit. An application that is silent on the question of time limit could be apt to mislead;

v) "Demonstrate" is a verb connoting a positive action or the taking of a positive step. CPR r.7.2(3)(b)(i) does not say merely that it must be apparent from the application that it is in time. This construction is confirmed by the wider use of the word "demonstrate"; particularly in CPR r.7.3(2)(b)(ii) where plainly something more is required to be stated;

vi) There are obvious complications that would arise out of the FSA's construction not least because, as the FSA recognises, some time limits, as in the present case, run from the date of discovery of the offence. The mere identification of the fact of the alleged offence will not necessarily demonstrate whether or not the application has been served in time. The FSA's proposed solution to these problems involves the introduction of different responsibilities for different categories of cases with different requirements under CPR r.7.2(3)(b)(i), depending on the legislative regime applicable to the offence in question. This is not an appealing result in a context where a simple rule for participants in criminal cases is, objectively construed, intended. By contrast, I do not accept that there would be any material practical problems in requiring the provision of specific information in relation to limitation such as to comply with CPR 7.2(3)(b)(i).

35 For these reasons, the FSA's concession was, in my judgment, in any event made correctly.

36 In those circumstances, having ruled that it is not open on this appeal for the appellant to argue otherwise, it follows that the applications are to be treated as a nullity and the District Judge had no jurisdiction to entertain them. For these reasons, I would not allow the FSA to resile from the FSA's concession and, in any event, answer the question posed for the court in the negative.

MR JUSTICE PICKEN: I agree.

CERTIFICATE

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