

THE HIGH COURT

2019 564 CA

IN THE MATTER OF SECTION 39 OF THE CRIMINAL JUSTICE ACT 1994

BETWEEN:

STEPHEN FOWLER

APPELLANT

-V-

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

Judgment of Mr. Justice Alexander Owens delivered on 3rd March 2020

1. This is an appeal from an order of the Circuit Court. The respondent seeks an order under s.39 (1) of the Criminal Justice Act 1994 that €26,000 cash seized from the appellant under s.38 (1A) of that Act on 19th July 2017 be forfeited as representing the proceeds of crime or as intended by a person for use in connection with criminal conduct.
2. At the outset of the hearing it was asserted that an order of the District Court dated 20th October 2017 under s.38 (2) and (3) authorising continued detention of the cash was made out of time and that it followed that I did not have jurisdiction to make an order under s.39 and should dismiss the application. The argument advanced was that an order of the District Court made on 20th October 2017 was invalid because the period of detention of the cash authorised by a previous District Court order had expired.
3. In my view, this point may be misconceived and much of the argument in the appeal may have proceeded on the basis of an incorrect premise. I refer to the District Court order dated 21st July 2017. There is an ambiguity in the phrasing of the operative part of this order which authorises the period for further detention of the cash under s.38 (2) as follows: "*... for a period of three months (being a period not exceeding three months) from the date of this order until the 19th day of October 2017*".
4. The District Court is taken to know that the word "*month*" in an Act of the Oireachtas means "*calendar month*". The order authorised the further detention of the cash for a period of three calendar months beginning on 21st July 2017 and then made it clear that the court was not extending the period beyond the three calendar months. The words "*... until the 19th day of October 2017*" miscalculate the date of expiration of the three-month period and, in my view, they are surplusage which do not cut down the period authorised, which was three calendar months. The period of three calendar months ran from 21st July 2017, which was the starting date. As I read the order, this period expired at midnight on 20th October 2017 and not at midnight on 19th October 2017. The order of the District Court of 20th October 2017 was made within the period when the authorisation given by the District Court on 21st July 2017 was in force.
5. As this point about the meaning of the July order was not drawn to my attention or argued, I will go on to consider what the position would be if I were wrong in my conclusion as to its effect. Any claim that the District Court lacked jurisdiction to make the seven renewal orders and authorise the continued detention of the cash, starting with the order on 20th October 2017, was a matter which should have been pursued in the

District Court and followed up by judicial review. The applications to the District Court for the authorisations were on notice to the appellant. No point was made about the invalidity of the order dated 20th October 2017 or any of the later orders until the forfeiture application was brought to the Circuit Court.

6. The basis of my jurisdiction is set out in s.39 (1) of the Act. The application to forfeit the cash must be made "*while the cash is detained under that section*"; referring back to the provisions of s.38 (1A) and (2) which authorise seizure and detention of the cash. A number of consecutive orders were made by the District Court authorising detention of the cash, ending with an order which was in force when the application was made to the Circuit Court. Another matter which the respondent was obliged to establish in order to invoke my jurisdiction was that the cash was "*seized under section 38*". This is demonstrated to my satisfaction in the paragraphs of the affidavit of Garda John McWeeney which explain the circumstances in which the cash was seized from the appellant's car during a drugs search and detained.
7. The general rule is that objections based on lack of jurisdiction must be made as soon as is reasonably possible. The appropriate mode of proceeding in this case was to challenge the jurisdiction of the District Court to make an order authorising the further detention of the cash on 20th October 2017 or to seek an order annulling that order and look for the return of the cash. This point could have been made in the District Court at the hearing on 20th October 2017 and if the District Court did not accept the point it was then open to the respondent to seek judicial review or to appeal to the Circuit Court.
8. Judicial review is subject to Order 84 r.21 (1) of the Rules of the Superior Courts which obliges an applicant to move promptly and in any event within three months from the date when grounds for the application first arose or six months when the relief sought is certiorari, unless the Court considers that there is good reason for extending the period within which the application shall be made. It is well-established that these time limits cannot be circumvented by resorting to alternative legal avenues to seek a remedy that would be time-barred if it had been the subject of judicial review proceedings.
9. While it is correct that legislative and contractual provisions which result in forfeitures of property are construed strictly, the legislative scheme here provides that the continued detention of the cash is subject to a range of judicial controls and oversight. The District Court is involved in each period of three calendar months while the cash is detained. The continued detention of the cash in accordance with the statutory scheme must be authorised by order of that Court. The appellant was given prior notice of each of the applications to the District Court to authorise continued detention of the cash. The District Court was at each stage of this process subject to judicial oversight in that orders made by that court could have been appealed or challenged on judicial review.
10. The appellant made no point about absence of jurisdiction of the District Court to authorise the continued retention of the cash or even reserved his position on that issue at the appropriate time and I am unwilling to entertain that point now. The only point which he advanced during the several outings in the District Court took issue with the

contention that the cash was the proceeds of crime. This was not an issue which the District Court could entertain. The appellant's suggestion that an affidavit claiming that the source of the cash was a compensation payment, the proceeds of sale of a car and so forth, had the effect of preserving his entitlement to challenge jurisdiction on a basis which was not even thought about until the application was made to the Circuit Court to forfeit the cash has no merit.

11. I now turn to the material placed before me on affidavit. The issue which arises is whether this material is sufficient to satisfy me on the balance of probabilities that the cash directly or indirectly represented the proceeds of crime or was intended for use in connection with criminal conduct. This requires me to look at the admissible evidence and ask myself whether I can infer on the balance of probabilities that the cash comes within the ambit of s.39 (1) of the 1994 Act. When I invited submissions on the matter no objection was taken by the appellant to the admissibility of material obtained from some sources referred to by Garda John McWeeney in his affidavit. The 1994 Act does not contain provisions similar to those contained in s.8 of the Criminal Assets Bureau Act 1996 and s.8 of the Proceeds of Crime Act 1996. Some of the material relied on by the respondent is of the sort which might support belief evidence. I have disregarded this material. The Revenue certificate dated September 2017 has not been signed as required by s.63A (3) (c) of the 1994 Act, as inserted by the Disclosure of Certain Information for Taxation and Other Purposes Act 1996. I have only had regard to the evidence relating to the circumstances of the seizure and the explanations provided by Mr. Fowler to the gardaí. He did not put any evidence before the Court and the evidence tendered by the Director of Public Prosecutions was not challenged.
12. It is clear that this money was seized by the gardaí in highly suspicious circumstances. A brown paper bag was found in the tool box of the appellant's van which contained two bundles of cash notes totalling €26,000. The appellant immediately gave a false account that the money was held by him as safe-keeper for his father's retirement money and other cash as he lived down the country. He then refused to provide his father's details and did not trouble himself to accept the garda invitation to attend at Ronanstown Garda Station to oversee the counting of the cash. He knew there was exactly €26,000 in the bag. He did not bother to reply to a letter seeking his father's contact details.
13. Instead, he provided an affidavit sworn on 24th November 2017 denying that the cash was proceeds of crime or intended for use in criminal activity and giving a series of very improbable explanations for its source. It is very difficult to think up a credible explanation as to why Mr. Fowler would have this amount of cash in a bag in the tool box of his car which does not involve the money being either the proceeds of crime or intended for use in crime. His suggestion that the cash was his father's and his more recent *volte-face* explaining that it represented a personal injuries award in 2012 or the sale of a car in 2017 at three times the price it was bought for and redundancy money got in 2011 and 2012 are equally incredible.

14. What inference can I draw from the circumstances in which this cash was found and from this avalanche of obvious untruths? What this money was doing in his car boot in a tool box is unexplained. The only inference I can draw as a matter of probability is that the money is the proceeds of crime or for use in criminal activity. There is no evidence to support any other possible explanation, such as that the money was got out of an account to pay a builder in cash or was cash income or was otherwise legitimately sourced.