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IN THE HIGH COURT OF JUSTICE
IN THE QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2

Wednesday 1st March, 2006

B e f o r e:

MR JUSTICE MITTING

CHIEF CONSTABLE OF MERSEYSIDE POLICE (APPELLANT)

- v -

(1) LEE HICKMAN
(2) LYNNE MARIE PRESTON (RESPONDENTS)

Computer-Aided Transcript of the Stenograph Notes of
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MR K HORNE (instructed by the Force Solicitor) appeared on behalf of the
CLAIMANT
MS S BROWNE (instructed by Messrs Jackson & Canter) appeared on behalf
of the DEFENDANT

J U D G M E N T

Wednesday, 1st March 2006

1. MR JUSTICE MITTING: This case concerns the overlapping statutory provisions available to a constable to seize cash. Section 19 of the Police and Criminal Evidence Act 1984 provides:

"(1) The powers conferred by sub-sections (2), (3) and (4) below are exercisable by a constable who is lawfully on any premises.

(2) The constable may seize anything which is on the premises if he has reasonable grounds for believing –

(a) that it has been obtained in consequence of the commission of an offence; and

(b) that it is necessary to seize it in order to prevent it being concealed, lost, damaged, altered or destroyed.

(3) The constable may seize anything which is on the premises if he has reasonable grounds for believing –

(a) that it is evidence in relation to an offence which he is investigating or any other offence; and

(b) that it is necessary to seize it in order to prevent the evidence being concealed, lost altered or destroyed."

2. Section 22 provides:

"(1) Subject to subsection (4) below, anything which has been seized by a constable or taken away by a constable following a requirement made by virtue of section 19 or 20 above may be retained so long as it is necessary in all the circumstances.

(2) Without prejudice to the generality of subsection (1) above –

(a) anything seized for the purposes of a criminal investigation may be retained, except as provided by subsection (4) below –

(i) for use as evidence at a trial for an offence; or

(ii) for forensic examination or for investigation in connection with an offence; and

(b) anything may be retained in order to establish its lawful owner, where there are reasonable grounds for believing that it has been obtained in consequence of the commission of an offence."

3. The common law position was that once criminal proceedings had concluded, the police had no power to retain possession of any property, including cash, against a superior claim by its owner, even if they reasonably believed, or even could prove, that it represented the proceeds of crime. The point was succinctly put by May LJ in *Webb v Chief Constable of Merseyside Police* [2002] QB 427 at page 446F to G:

"There is no statutory power to confiscate the proceeds of drug dealing within the United Kingdom where the person entitled to possession of the money is not convicted of a drug trafficking offence. I recognise that there may be circumstances where for a variety of reasons a prosecution may not take place. But that does not, in my view, justify expropriation by means of a defence to a civil claim for return of money which has been seized from persons who are not convicted."

4. Parliament changed that by the Proceeds of Crime Act 2002. Part 5 empowered the Director of the Assets Recovery Agency and a constable and an officer of HM Revenue and Customs to bring civil proceedings to recover or forfeit the proceeds of crime. Section 240 describes the general purpose:

"(1) This Part has effect for the purposes of –

(a) enabling the enforcement authority to recover, in civil proceedings before the High Court or Court of Session, property which is, or represents, property obtained through unlawful conduct,

(b) enabling cash which is, or represents, property obtained through unlawful conduct, or which is intended to be used in unlawful conduct, to be forfeited in civil proceedings before a magistrates' court or (in Scotland) the sheriff.

(2) The powers conferred by this Part are exercisable in relation to any property (including cash) whether or not any proceedings have been brought for an offence in connection with the property."

5. There is no time limit on the Director's powers but he cannot seize property. His powers are to apply to the High Court for a freezing order under section 245(a).
6. Chapter 3 of Part 5 establishes a summary procedure for forfeiting "cash". "Cash" is defined by section 316(1) as having the meaning set out in section 289(6) which provides:

"'Cash' means –

(a) coins and notes in any currency,

(b) postal orders,

(c) cheques of any kind, including travellers' cheques,

(d) bankers' drafts,

(e) bearer bonds and bearer shares,

found at any place in the United Kingdom."

7. Section 289(1) permits a constable who is lawfully on any premises and who has reasonable grounds for suspecting that there is on the premises cash which is recoverable property or intended by any person for use in unlawful conduct, the amount of which is not less than the minimum amount, to search for the cash there. Sections (2), (3) and (4) permit him to search a person for cash and to detain him for that purpose where he has like suspicions. The powers can only be exercised by a constable with the approval of a magistrate or a police officer of at least the rank of Inspector (section 290).

8. The relevant provisions of sections 294 and 295 provide:

"294(1) [An officer of Revenue and Customs] or constable may seize any cash if he has reasonable grounds for suspecting that it is –

(a) recoverable property, or

(b) intended by any person for use in unlawful conduct. ...

(3) This section does not authorise the seizure of an amount of cash if it or, as the case may be, the part to which his suspicion relates, is less than the minimum amount.

295(1) While the [officer of Revenue and Customs] or constable continues to have reasonable grounds for his suspicion, cash seized under section 294 may be detained initially for a period of 48 hours. ...

(2) The period for which the cash or any part of it may be detained may be extended by an order made by a magistrates' court or (in Scotland) the sheriff; but the order may not authorise the detention of any of the cash –

(a) beyond the end of the period of three months beginning with the date of the order,

(b) in the case of any further order under this section, beyond the end of the period of two years beginning with the date of the first order."

9. The grounds upon which orders for extension may be made by a court are set out in subsections (5) and (6) and are:

"(5) The first condition is that there are reasonable grounds for suspecting that the cash is recoverable property and that either –

(a) its continued detention is justified while its derivation is further investigated or consideration is given to bringing (in the United Kingdom or elsewhere) proceedings against any person for an offence with which the cash is connected, or

(b) proceedings against any person for an offence with which the cash is connected have been started and have not been concluded.

(6) The second condition is that there are reasonable grounds for suspecting that the cash is intended to be used in unlawful conduct and that either –

(a) its continued detention is justified while its intended use is further investigated or consideration is given to bringing (in the United Kingdom or elsewhere) proceedings against any person for an offence with which the cash is connected, or

(b) proceedings against any person for an offence with which the cash is connected have been started and have not been concluded."

10. "Recoverable property" includes property into which the proceeds of criminal conduct can be traced, see section 305(1), which provides:

"Where property obtained through unlawful conduct ('the original property') is or has been recoverable, property which represents the original property is also recoverable property."

11. Seized cash must be placed at the first opportunity in an interest-bearing account (see section 298). An application for forfeiture may be made to a Magistrates' Court (see section 298(1)). Section 298(2) provides:

"The court ... may order the forfeiture of the cash or any part of it if satisfied that the cash or part –

(a) is recoverable property, or

(b) is intended by any persons for use in unlawful conduct."

12. Subsection 4 provides:

"Where an application for the forfeiture of any cash is made under this section, the cash is to be detained (and may not be released under any power conferred by this Chapter) until any proceedings in pursuance of the application (including any proceedings on appeal) are concluded."

13. The scheme of these provisions is clear. Once cash is seized by a constable, he must either apply to a Magistrates' Court within 48 hours, whereupon the cash will be

retained until the proceedings are determined, or apply or to a Magistrates' Court for an order for further detention under section 295 which can be made for three months at a time but in the aggregate for not more than two years.

14. The basic question raised by this appeal is: can cash seized under section 19 be re-seized subsequently under section 294? Mr Horne submits that it can be, and can be at any time. Ms Browne accepts that it can be, but only within a very short period, 48 hours, of seizure under section 19.

15. The facts were not in dispute and are set out in an agreed chronology:

"19th August 2003 – 77 Grovehurst Avenue was searched. This was the home address of Lynne Marie Preston, who lived there at that time with her son Lee Hickman. £6,756 and a quantity of cannabis was seized under Section 19 of the Police and Criminal Evidence Act 1984 (PACE)".

16. I interpose that the time the minimum amount of cash which could be seized under section 294 of the 2002 Act was then £10,000.

"20th August 2003 – £6,756 was retained under Section 22(1) of PACE 1984.

13th October 2003 – Lee Hickman was charged with possession of a controlled drug with intent to supply.

16th March 2004 – Statutory Instrument 2004 No 420 came into force, which meant that the amount now recoverable under Part 5 of PCA 2002 was reduced from £10,000 to £5,000.

29th March 2004 – Lee Hickman pleaded guilty to simple possession of cannabis, and was sentenced to a 12 month conditional discharge."

17. I interpose that no order for forfeiture of the cash was made under section 298(2) of the 2002 Act or for deprivation of Lee Hickman's interest in it under section 143 of the Powers of Criminal Court (Sentencing) Act 2000.

"18th May 2004 – A telephone call was made to DC Jenkins by RM Broudie, informing Mr Jenkins that £6,000 belonged to their then client, appellant Mrs Preston.

13th August 2004 – Proceedings were issued under the Police (Property Act) 1897 for the return of the money by Mrs Preston."

18. For 15th September 2004 there was set out in the chronology slightly different accounts of what had occurred but, as was correctly accepted, they made no difference in practice. I deal with the matter on the same basis as did the District Judge, that DC Garvey seized two cheques drawn on a police bank account at St Anne's police station, one made out to Mrs Preston and one made out to Lee Hickman.

"16th September 2004 – The Police made an application to the Liverpool City Magistrates' Court for forfeiture under PCA 2002."

19. The District Judge's findings are set out in the case, and are:

"(a) On the 19th August 2003 £6,756 was properly seized under Section 19 Police and Criminal Evidence Act 1984. There is also no doubt that its continued retention at that time under Section 22 was lawful.

(b) Its seizure was justified in that it provided possible evidence into drug supply, and under Section 22(1) there is a general power to retain as long as it is necessary in all the circumstances. The circumstances are further defined under Section 22 so that monies could be retained for evidence or forensic examination in connection with an offence.

(c) Lee Hickman was charged on 13th October 2003 with possession with intent to supply. This was not proceeded with but the lesser charge of simple possession was pleaded to. Up until that day the monies could have been properly held under Section 22 Police and Criminal Evidence Act 2004.

(d) Under Section 22(2)(b) the Police may also retain money to establish its lawful owner, where there are reasonable grounds for believing it has been obtained in consequence of the commission of an offence. The Police's rights under the Police and Criminal Evidence Act ceased by acceptance of a lesser plea on 29th March 2004, when no Forfeiture Order was made.

(e) If the legal retention under Section 22 Police and Criminal Evidence Act 1984 had expired the position would revert to the common law. Here the Police would be under a duty not to retain the money for longer than is reasonably necessary to complete their investigation. In *Gough v Chief Constable of West Midlands* (2004) the Court of Appeal has confirmed that the Police do not have powers beyond the completion of their investigation and also confirmed the Police powers over retained property do not go on for ever, and that the former owner's rights are superior to theirs. Further retention after proceedings are disposed of is tortious. (*Elias v Pasmore* 1934 QB 164). Once the case is disposed of articles should be returned (*Ghani v Jones* 1970 1 QBD 693 and 708).

(f) The Police in this case were told by RM Broudie's (Mrs Preston's then Solicitors) of a claim in a phone call. They were further told in Lee Hickman's original interview to them 13th August 2004. Mrs Preston then issued a Police Property Act Summons requiring the return of the seized money to her. The return date of the Summons was 16th September 2004.

(g) On 15th September 2004 the day before the Summons was due to be

heard the Police purported to seize money first seized on 19th August 2003 under the PCA 2002.

(h) Unfortunately for the Police, on 19th August 2003 the minimum amount that could be seized was £10,000, even though it was subsequently decreased by the PCA 2002 (Recovery of Cash in Summary Proceeding; – Minimum Amount) Order for 2004. This came into force on 16th March 2004 and was not retrospective.

(i) The Court after 21st February simply has in front of it an Application under the PCA 2002. The original application by Mrs Preston under the Police Property Act was withdrawn in September. Those proceedings were instituted by her, and not the Police (as in the case of Gough v Chief Constable, West Midlands) until that matter had been transferred to the County Court."

20. Thus far, there is no challenge to the District Judge's findings. The heart of his conclusions on the issues before me is in paragraphs (j) and (k) of the case:

"(j) By the 16th September 2004 the Court rules that the Police had a very tenuous link to the monies which had been seized on the 19th August 2003. By electing to issue proceedings under the PCA at this time they were not acting in accordance with the Act.

(k) The second seizure on 15th September 2004 was at the very least artificial and related to an amount of under £10,000. The original seizure was under the Police and Criminal Evidence Act 1984. They cannot have a second seizure in the circumstances of this case. The defendants were deprived of the hearing for a continued retention of the money."

21. I find those paragraphs difficult to understand, in particular the sentences:

"By electing to issue proceedings under the PCA at this time they were not acting in the accordance with the Act" and
"The defendants were deprived of the hearing for a continued retention of the money."

22. The premise of the District Judge's conclusion appears to be that the police were not entitled to seize under section 19 of the 1984 Act and then re-seize under section 294 of the 2002 Act, at least after the police power to retain cash under section 22 had lapsed on 29th March 2004 when Lee Hickman was convicted of the offence of simple possession and no order for forfeiture or deprivation was made.

23. The questions posed by the case are:

"1. Can money seized under the provisions of the Police and Criminal Evidence Act 1984 be re-seized under the Proceeds of Crime Act 2002?

2. The original monies seized in the case amounted to less than £10,000. Can there be a re-seizure under the Proceeds of Crime Act 2002 when at the time of the first seizure the legal minimum amount allowed was £10,000 under the Proceeds of Crime Act 2002?"

24. Ms Browne submits that section 295 provides for strict time limits for the police detention of cash seized under section 294. I agree that it does, but they only apply from the moment of seizure under section 294. The application must be made to the Magistrates' Court within 48 hours for an order for forfeiture, unless the court extends the time for continued detention under either of the conditions set out in section 295(5) or (6). But it does not provide any assistance as to the time at which seizure (my emphasis) must occur. No time limit is fixed by section 294 or section 295, nor is there any sensible reason why it should be. The Director of the Assets Recovery Agency is not similarly constrained in the exercise of his powers which are exercisable in the case of cash as well as other property. Seizure under section 294 may, in my opinion, occur at any time. Is there a special limitation on the exercise of the power to seize under section 294 because a different statutory power under section 19 has been exercised in relation to the same property? I can see no principled reason why there should be. A police officer entering premises for the first time cannot know what he will find. If he expects to find cash, he cannot know how much he will find and whether it is above or below the statutory minimum for the purposes of seizure under section 294.
25. The object of Part 5 of the 2002 Act is set out in section 240. It is to recover or forfeit the proceeds of crime. The two words describe the same result, albeit achieved by different statutory procedures. Parliament cannot have intended to restrict the power of a constable using one of the two routes by which that result can be achieved in a manner other than that expressly set out in section 295. Can a constable seize cash which is already in the possession of the police? The answer is clearly yes, just as seizures under section 19 can be, and are routinely, made of property in the possession of the police at a police station following the arrest and search of a suspect.
26. The definition of cash for the purposes of section 294 and section 396(1) and 289(4) by reference to it being "found" in the United Kingdom does no more than define the territorial extent of the power within which seizure may lawfully occur. It does not require that the cash be in the possession of another person, or of a person other than a police officer, before it can be seized by a constable.
27. I have considered whether or not the statutory provisions that I have analysed infringe the first protocol of Article 1 of the European Convention on Human Rights. I conclude unhesitatingly that they do not. The circumstances in which seizure may occur are prescribed by law in sections 294 and 295.
28. The answer to the first question posed by the District Judge, "Can money seized under the provisions of the Police and Criminal Evidence Act 1984 be re-seized under the Proceeds of Crime Act 2002?" is yes, and to the second question, "Can there be a re-seizure under the Proceeds of Crime Act 2002 when at the time of the first seizure the legal minimum allowed was £10,000 under the Proceeds of Crime Act 2002?" is

yes, provided at the time of the seizure under section 294 the amount was above the statutory minimum which then applied.

29. I have not addressed in this judgment, as the District Judge did not address, a further issue raised by Mrs Preston whether or not the exercise of the power of seizure under section 294 was, in the circumstances of this case, an abuse of that power, so that proceedings for forfeiture brought pursuant to it are an abuse of process. It is unfortunate that the District Judge has not made findings on that question because, had he done so, it may have been possible for these proceedings to be determined in one go. As it is, that question will have to be remitted to him for further determination.
30. MR HORNE: In terms of consequential orders, I invite the court, first of all, to remit the application under section 298 to the Magistrates' Court.
31. MR JUSTICE MITTING: Yes.
32. MR HORNE: And to quash the order of costs made by the District Judge against the appellant in the lower court.
33. MR JUSTICE MITTING: Yes.
34. MR HORNE: Before I address the question of costs in this appeal, I have spoken to my learned friend and it is, I think, likely that she will be asking for permission to appeal. Certainly the research that I have done tends to indicate that no appeal lies to the Court of Appeal from this court because it is --
35. MR JUSTICE MITTING: These are civil proceedings and this judgment is final.
36. MR HORNE: Yes. I can take the court through the statutory provisions if need be, but certainly my reading of the statute is that no appeal arises.
37. MR JUSTICE MITTING: It does not.
38. MR HORNE: In relation to the question of costs, I ask for an order that the respondent, Lynne Preston, pay the appellant's costs of this appeal to be assessed by way of detailed assessment if not agreed, but not to be enforced without an inquiry into her means because she is publicly funded.
39. MR JUSTICE MITTING: Yes.
40. MR HORNE: That is the order I seek.
41. MR JUSTICE MITTING: Thank you. Ms Browne?
42. MS BROWNE: My Lord, yes. The only comments I make in relation to my learned friend's application are in relation to the cost application, and can be quite shortly put. I submit that, given the Case Stated raised issues of some public importance, it was right that the respondent defended the application in the way that it has been and so for those reasons I do resist the application for costs.

43. MR JUSTICE MITTING: Yes. I make absolutely no criticism whatsoever of you for advancing the arguments you have because, as you rightly observed, this is a case of wider importance than just the facts of this case, but those who participate in proceedings unsuccessfully, I am afraid, have orders for costs made against them even though they may not be enforceable.
44. Do you agree about the nature of the proceedings and the lack of the right of appeal?
45. MS BROWNE: Yes.
46. MR JUSTICE MITTING: Very well. The consequential orders are that the case be remitted to the District Judge for further hearing under section 298. I quash the order for costs made by him below. I order that the second respondent, Mrs Preston, pay the appellant's costs to be the subject of a detailed assessment if not agreed and, in any event, not to be enforced without an inquiry into her means.
47. Thank you, Ms Browne, for the succinct submissions you made, even though you were unsuccessful.