Judgments

QBD, ADMINISTRATIVE COURT

CO/2436/09

Neutral Citation Number: [2009] EWHC 3862 (Admin)

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

THE ADMINISTRATIVE COURT

Royal Courts of Justice

Strand

London WC2A 2LL

Thursday, 18th June 2009

B e f o r e:

MR JUSTICE MITTING

Between:

THE QUEEN ON THE APPLICATION OF ATWAL

Claimant

v

BARKING MAGISTRATES' COURT

Defendant

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(Official Shorthand Writers to the Court)

Mr M Glover (instructed by Awami Law) appeared on behalf of the **Claimant**

Mr R Shetty (instructed by Legal Services) appeared on behalf of the **Defendant**

J U D G M E N T

(As Approved by the Court)

1. MR JUSTICE MITTING: This is an application for permission to challenge by judicial review the decision of District Judge Walker on 18th February 2009 at Barking Magistrates' Court, to decline to hear an argument that forfeiture proceedings, under section 298(1) of the Proceeds of Crime Act 2002, that had been conducted before him could be said to be an abuse of the process of the court.

2. The background can be shortly stated. On 15th January 2008 the claimant's property at 59 Southbourne Gardens, Ilford, was searched. A substance believed to be a controlled drug was seized together with cheques to the value of £44,000 odd and cash of £54,695. On 16th January 2008 the Commissioner of the Metropolitan Police applied to the court to detain the cheques and cash pending further enquiries. The court authorised detention for 3 months. On 14th April 2008 the Commissioner applied for a further order permitting detention of part of the cash. The cheques were released, as was £18,266.80 of the received cash. The court made an order therefore only in relation to the remainder of the cash, £36,428.20. On 9th July 2008 a further order for a further 3 month retention of that sum was made.

3. On 1st October 2008 the Commissioner applied for forfeiture of the detained cash under section 298(1). The claimant submitted, or intended to submit that the proceedings were an abuse of the court's process and the hearing was listed before the district judge on 18th February 2009. At that hearing, counsel for the claimant and for the Commissioner both submitted that the court had jurisdiction but the district judge concluded that he did not. In his judgment, of which there is an agreed note signed and approved by him, he recited the well-known history of the abuse of process jurisdiction in the Magistrates' Court and observed:

"Neither party has shown me any clear authority importing the criminal concept of an abuse of process into civil proceedings such as these.

The difficulty I face is in these circumstances is that I am told there is no doubt setting out the basis on which it would be proper for me to act, should I be satisfied that it is right to do so by finding that an abuse of process has taken place in civil proceedings such as these."

He noted a submission of counsel for the Commissioner that it would not be right to carry over the abuse of process learning derived from the criminal proceedings into the civil jurisdiction. The district judge's conclusion was shortly stated:

"I am not satisfied that I have the power to refuse to hear the Commissioner, even if the points made by the respondent were in due course to be made out.

Further, it seems to me that the proper place is for the complaint to be made in is in the course of the trial and if I am able to accede to them then I can take them into account when assessing whether or not the property is recoverable.

I am not therefore prepared to rule that I should stay these proceedings."

4. If the district judge, having considered the detailed skeleton arguments submitted, had concluded that although he had jurisdiction to entertain an application to stay the proceedings for an abuse of process, nevertheless the grounds did not justify him doing so, then I would, without hesitation, have rejected this application for permission. But he did not do that. What he did was to say, as the foundation of his decision, that he was not satisfied that he had the power to refuse to hear the Commissioner's application on the grounds of abuse of process.

5. The point is one of possible general importance. I therefore give permission for the application for judicial review and conduct that review today. There is no doubt, and there never has been any doubt, that in civil proceedings a court has jurisdiction to protect its procedures by the abuse of the process doctrine. That is clearly set out in CPR 3.42(b) which provides:

"The court may strike out a statement of case if it appears to the court -

(b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings..."

The notes of that order set out the traditional heads under which proceedings have been stayed or struck out as an abuse. In headline form they are that the proceedings are an attack upon an earlier decision, that the litigation is pointless and wasteful, that that has been unconscionable delay. However, as the notes to CPR 3.4 acknowledge the categories of conduct which might be categorised as abuse of process are not closed.

Proceedings such as forfeiture proceedings, which are civil proceedings, could be stayed as an abuse of process if the court concluded that the proceedings were brought for an improper purpose or were otherwise an abuse of power.

6. In forfeiture proceedings, as in ordinary civil proceedings, the categories of abuse are not closed. Whether or not they include, as Mr Pownall wished to submit to the district judge, the proposition that if the Commissioner has not undertaken a full and satisfactory investigation into the grounds upon which he relies and to possible answers to it, the proceeding are an abuse, is another matter.

7. If the material before the district judge has been fully deployed before me, I might have been able to rule that the grounds on which the claimant relies to stay the proceedings as an abuse were not capable of justifying that course.

8. Both Mr Glover, for the claimant, and Mr Shetty for the Commissioner submit and accept that that would not be an appropriate course. I would certainly be hesitant about doing it given the fact that I do not have a full grasp of the material which might be put forward in support of the argument. In particular I have not seen an obvious and critical document - the statement of the police officer, supporting the application for forfeiture.

9. Accordingly, my task is limited to declaring that the district judge's view that he had no jurisdiction to entertain an abuse application is wrong. I will hear submission on whether or not it is necessary for me to direct that he should go on to hear and determine the abuse application.

10. MR GLOVER: The points that I wish to make on that are as follows. There is a little difficulty in the Magistrates' Court in the first instance in getting listing of an abuse of process argument in proper order. In fact you may have noted in one of the authorities a source relied on in my skeleton argument that there is sometimes, that was a decision in the case of R v Altershot Newport ex parte Daniel Benjamin Anderson. In that case the Magistrates' Court refused to postpone the trial pending abuse of process argument on the advice of the clerk. The court of course found that wrong. Again there has been a slight concern in the way the Magistrates' Court has approached this application and in particular the way the (inaudible) court which is hearing the applicant notwithstanding our application for permission for judicial review and also was a meritorious application for judicial review. Moreover, Mr Shetty may recall this, although the district judge made a particular ruling on it, he certainly indicated that in his view, until there is a successful outcome for any of the other hearings, the court proposed he felt that the court would just carry on regardless in the forfeiture matter. One has some sympathy for that in so far sometimes people propose unmeritorious applications or appeal in the Crown Court or permission for judicial review and one cannot expect the Magistrates' Court to allow its process, to let its process be stayed indefinitely. But there has been a degree of reluctance, we say, to deal with things in good and proper order and that is why I proposed earlier, it might be appropriate to make sure we are not having to come back to this court to trouble this court again.

11. MR JUSTICE MITTING: But the district judge can be expected to take notice of a declaration. But I am at the moment reluctant to tie his hands as to how he deals with it. It would be a perfectly sensible course to list the abuse hearing immediately before the full hearing, the full hearing to follow if the abuse argument was rejected. Especially if, as I am inclined to think, the arguments relied upon in support of the application to stay are actually closely intertwined with the general merits. One thing that the district judge might do is to try to isolate and say: these arguments are going to the general merits and not the abuse. I will deal discretely with the abuse arguments which may not have a great deal left in them at the time, if he does undertake an exercise and so it is to avoid endless delay in the conclusion of the hearing.

12. MR GLOVER: My Lord, I think the point was raised before the Aldershot case, the idea that the abuse of process argument to stop matters going further, for example, the pleas were put it and criminal

proceeding. In this case we certainly want to have our abuse of process argument in the earlier stage. In this case it concerns the costs. In the full hearing of whether or not there should be forfeiture, rather than a costs (inaudible) that account. The abuse of process of argument gets to be made.

13. MR JUSTICE MITTING: I quite see if you had clear grounds for saying that the proceedings were an abuse of a kind traditionally recognised. But these are not in that category. In consequence, I doubt if there is much to be said by running what may well turn out to be the same argument twice. I think it is likely to be more effective if the district judge hears the abuse argument first certainly. But if he rejects it - - I do not prejudge that - - goes onto the main hearing. You do not want to have the same material deployed twice on the same occasion.

14. MR GLOVER: My Lord the points one might put in relation to that are, for example, the defendant in that matter the defendant before you, my Lord, may if this abuse of process argument had been successful wish to go and gather more information to meet the probability test which (inaudible) forfeiture hearing. Additional evidence and all that.

15. MR JUSTICE MITTING: So in effect this is a matter of case management. It is not right for me, it is a case management that I only partly- -

16. MR GLOVER: That is why I was simply saying it would be that declaration which goes before my Lord. Those are arguments for the district judge if necessary.

17. MR JUSTICE MITTING: All I decide is the clear question of principle. You could not possibly have succeeded on any other grounds.

18. MR SHETTY: My Lord I do not seek to persuade you any further on that my Lord. My Lord I add nothing in addition in relation to the hearing.

19. MR JUSTICE MITTING: You would have difficulty to do so. Thank you both.

20. MR GLOVER: I do apologise. Before the court rises, it has been many years since I was last in the Administrative Court, and I am not familiar with the situation of costs. Is my client able to seek costs from Central Funds or something similar?

21. MR JUSTICE MITTING: This is not criminal proceedings so no, the answer is there is not.

22. MR GLOVER: Right.

23. MR JUSTICE MITTING: Mr Shetty does not have costs ordered against him provided he does not play an active and losing part in the proceedings and you do not get costs against a Magistrates' Court.

24. MR GLOVER: If I am instructed to come back to my Lord on that, might I have permission to go back on that if there is some principle?

25. MR JUSTICE MITTING: Do it on paper.

26. MR SHETTY: Can I add one thing? There was a previous order that my learned friend alluded to, staying the current magistrates case which for some reason the magistrates were still insistent upon pro-

ceeding despite knowledge of this application. For the avoidance of doubt, could your Lordship so state that stay is now lifted.

27. MR JUSTICE MITTING: I lift the stay.

28. MR SHETTY: I am grateful.

29. MR JUSTICE MITTING: If you do make representations as to costs, it will only be that they might be paid out of Central Funds. I make it clear now there can be no order for costs against the Commissioner because of the proper and helpful part he has played.

30. MR GLOVER: Indeed my Lord. It is delightful to see Mr Shetty but I am not trying to line Mr Shetty up for anything additional.