



THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 321

Record Numbers: [536/2017]

[535/2017]

Birmingham P.  
Edwards J.  
McCarthy J.

BETWEEN/

SEAN MOYNIHAN

APPELLANT

- AND -

DISTRICT JUDGE ROSEMARY HORGAN & ORS

RESPONDENT

KENNETH FORDE

APPELLANT

-AND-

DISTRICT JUDGE ROSEMARY HORGAN & ORS

RESPONDENT

**JUDGMENT of Mr. Justice Patrick McCarthy delivered on the 19th day of December 2019**

**Introduction**

1. These appeals are from Orders of the High Court of 27th October, 2017 refusing orders of *certiorari* quashing certain committal warrants. Judicial review applications were commenced pursuant to leave given on 2nd March, 2015 in both proceedings on grounds irrelevant to this appeal. Subsequently leave to amend them was granted on 26th May, 2016 and those amended grounds were ultimately relied upon. The issues in each case, in point of law, are the same and accordingly can be dealt with together. In particular, it is contended that following orders for the estreatment of bail monies pursuant to s.9 of the Bail Act, 1997, as substituted by s.48 of the Criminal Justice (Miscellaneous Provisions) Act, 2009 ("the Act") for failing to appear in the relevant court on the appropriate day certain purported notifications ("notifications") to the appellants such estreatments were bad in form with the consequence that the warrants were in turn bad as made without jurisdiction.
2. The ground of appeal relied upon is as follows: -

*"The learned Trial Judge erred in law in failing to hold that as a pre-condition to committal warrant being issued in respect of the Appellant, Order 27, Rule 8 of the District Court Rules had obliged the Respondents to serve upon the Applicant a Notice under s.9(9) of the Bail Act 1997, as amended, (sic) [as substituted by s.48 of the Criminal Justice (Miscellaneous Provisions Act, 2009)] that confirmed to the requirements of what was provided for in S.I. 260 of 2010, thereby giving the Applicant warning that a failure to pay the sum specified in the Notice within a*

*specified period would lead to the issue of a warrant for his committal to prison without further notice to him."*

**The Facts: Mr. Forde**

3. Mr. Forde was arrested on the 19th of September, 2013 and charged with unspecified offences. He was brought before the District Court the next day. He agreed in writing to be bound by, and comply with, the conditions of a recognisance into which he entered, which included an acknowledgment that he owed the State the sum of €500 to the use of the Minister for Finance. He also thereby acknowledged that that sum was liable to estreatment if he failed to abide by its conditions which, obviously, included one to appear in court on a specified day and at a specified place and thereafter at every time and place to which, during the course of proceedings, the hearing might be adjourned until he was no longer required to answer the charge. The proceedings were adjourned from time to time – to September 26th, and, thereafter to October 10th, October 17th, November 14th and December 12th respectively. On that day he failed to appear and as a result an order pursuant to s.9(1) of the Act of 1997, as substituted, was made estreating the amount of €500 secure, affording Mr. Forde 28 days within which to pay and making provision for imprisonment for five days in default of payment within that time. A bench warrant was issued and was executed on the 20th of January, 2015. A notification was sent to the address given by the appellant on the same day by ordinary prepaid post, in accordance with s. 9(9) of that Act. Since he made default in payment the impugned warrant was issued on 20th February and executed. In conformity with the Act, the notification was so "given" by sending it to the address he had furnished by ordinary prepaid post. It might be noted in passing that he has deposed to the fact that he has been of no fixed abode and is not a permanent resident at that address. I do not think this is relevant: "address" in this context must mean that given by the accused.

**The Facts: Mr. Moynihan**

4. Mr. Moynihan was charged with offences under the Misuse of Drugs Acts, 1977-1984 on 19th April, 2014. He was granted so-called "station bail" pursuant to s.31 of the Criminal Procedure Act, 1967, as amended. One of the conditions of the recognisance into which he then entered was that he would appear in the District Court on 15th May, 2014 on the charges in question and at every place and time to which during the course of the proceedings the hearing might be adjourned until his presence was no longer required to answer the charges. He also acknowledged himself bound to the State in the sum of €150. The proceedings were adjourned from time to time and he appeared. He failed, however, to appear on 18th September and a bench warrant was issued.
5. As in Mr. Forde's case pursuant to s.9 of the Act of 1997 (as so substituted) that amount was estreated on that day with provision for payment within 21 days with imprisonment in default of payment for a period of seven days. A notification pursuant to s.9(1), in similar terms to that given to Mr. Forde, was sent to him at the address he had given. He too made default and accordingly a warrant for his imprisonment for seven days was issued on December 18th. The bench warrant was executed on September 30th. He was remanded in custody to October 3rd and from time to time thereafter, being again admitted to bail on October 17th, 2014. Thereafter he was informed by the gardaí on 21st

January, 2015 of the issue of the impugned warrant and that he should pay the sum within 14 days in default of which he would be liable to a custodial sentence: there was no obligation for them to do so. Mr. Moynihan says that he has no recollection of receiving the original notification or the letter from the gardai but again this is irrelevant for the same reason. Ultimately the charges against him were disposed of on pleas of guilty.

### **Representation**

6. Both appellants were represented at all times and must accordingly have been aware, or at least had constructive knowledge, of the estreatments and the provision for imprisonment in default of payment of the of the relevant amounts. At no time was any application made to vary or discharge the orders and we cannot understand why applications to vary or discharge were not made: this was the most straightforward, expeditious and least costly route which could have been pursued. The position might be different, of course, if the party was unrepresented either when the relevant orders were made or subsequently on the numerous occasions, in both cases, when the proceedings were before the court. This may have consequences in respect of costs.

### **The Law**

7. S.9(1) of the Bail Act, 1997, as substituted by s.48 of the Criminal Justice (Miscellaneous Provisions) Act, 2009 provides *inter alia* as follows: -

*“9 – (1) Where an accused person or a person who is appealing against a sentence of imprisonment imposed by the District Court (in either case referred to in this section as ‘the person’) is admitted to bail on entering into a recognisance conditions for his or her appearance before a specified court on a specified date at a specified time and place, and the person –*

- (a) fails to appear in accordance with the recognisance, or*
- (b) is brought before the court in accordance with subsection (7) and the court is satisfied that the person has contravened a condition of the recognisance,*

*the court may order –*

- (i) that any moneys conditioned to be paid under the recognisance by the person or any surety be estreated in such amount and within such period as the court thinks fit,*
- (ii) that any sums paid into court by the person or any surety be forfeited in such amount or amounts as the court thinks fit.”*

*The effect of these provisions is that where an accused person has been admitted to bail (under the Bail Act as amended), on entering into a recognisance conditional on him appearing may estreat it in such amount and within such period as it thinks fit, on his failure to appear.”*

Further, s.9(9) provides that: -

*“Where the court makes an order under subsection (2), notice shall be given to the person and any surety stating that an application to vary or discharge the order may be made to the court within 21 days from the date of the issue of the notice.”*

and s.9(10) provides that: -

*“On such an application, the court may vary or discharge the order if satisfied that compliance with it would cause undue hardship to the person or any surety”*

In the event of non-payment, s.12 provides for the issue of a warrant of committal for non-compliance: -

*“...and, for the purpose of determining the term of imprisonment to be served by the person or surety, the warrant shall be treated as if it were a warrant for imprisonment for the non-payment of a fine equivalent to the amount estreated under the said subparagraph (i) of subsection (1).”*

8. As will be seen from the above, an estreatment order does not automatically issue upon an individual's failure to appear, and it is open to such a person to make submissions as to why such an estreatment ought not to take place or as to any term of imprisonment imposed in default of payment. Furthermore, of course, after the service of the notice application may be made to vary or discharge it. There is no evidence to suggest that any representations were made on the dates upon which the estreatments took place to say nothing of the fact that no applications of any kind subsequently made in relation thereto, as referenced to above. Initially, it was not sought to impugn the notifications, or, on the basis of any infirmity in them, contend that the warrants were bad: proceedings were commenced on a different ground, viz because of supposed deficiencies on the face of the latter.
9. The District Court Rules deal with estreatment on O.27 rules 1 – 10 as amended. The relevant rule is r. 8 which is to the following effect: -

*“8. (a) where an accused person who is admitted to bail on his or her entering into a recognisance with or without a surety or sureties conditioned for his or her appearance before a specified court on a specified date and at a specified time and place fails to appear in accordance with his or her recognisance and the court issues a warrant for the arrest of a person, the court shall order the recognisance of the person and of any surety or sureties to be estreated and shall order the forfeiture of the amount paid into court by the accused person and any surety or sureties.*

*(b) Where a person is brought before a court pursuant to section 9(6) and the court is satisfied that the person has contravened a condition of his or her recognisance, the court shall order the recognisance of the person and of any*

*surety or sureties to be estreated and the moneys paid into court by the accused person and any surety or sureties or any part thereof to be forfeited.*

- (c) *Notice of the order in the Form 27.9 Schedule B. shall be served on the accused and on any surety or sureties by prepaid ordinary post."*

We think it necessary to set out here the terms of the notice prescribed by the Form: -

*"S.I. No. 260 of 2010*

*No. 27.9*

*Schedule B*

*O.27, r.8*

*BAIL ACT 1997 Section 9(9) (inserted by Criminal Justice (Miscellaneous Provisions) Act 2009, Section 48)*

*ORDER OF ESTREATMENT/FORFEITURE OF BAIL MONEYS*

*District Court Area of*

*District No.*

*Accused ..... of .....*

*†Surety ..... of .....*

*\*Case No: .....*

*\*Fine No: .....*

*\*Charge Sheet/Summons: .....*

*At a sitting of the District Court at ..... on the ..... day of ..... 20 ..... the Court, in accordance with section 9(1) of the Bail Act 1997 (inserted by section 48 of the Criminal Justice (Miscellaneous Provisions) Act 2009) ordered that the recognisance entered into by you as \*accused/†surety on the ..... day of ..... 20..... be estreated as \*you/†the accused failed to comply with the conditions of the said recognisance.*

*The effect of this order is that:*

- \* (i) an estreatment order has been made against*

*\*you the accused in the sum of €..... to be paid within a period of .....*

*†you the surety ..... in the sum of € ..... to be paid within a period of  
.....*

*Payment by you on foot of this order of estreatment should be made to the  
District Court Clerk at the address below. Cheques, postal orders, or money  
orders should be crossed and made payable to the said Clerk.*

*IF YOU FAIL TO PAY THE SAID SUM WITHIN THE PERIOD SPECIFIED A WARRANT  
FOR YOUR COMMITTAL TO PRISON IN DEFAULT OF PAYMENT WILL BE ISSUED  
WITHOUT FURTHER NOTICE TO YOU.*

*[Emphasis in original].*

*\* (ii) the sum of € ..... paid into court by*

*\*you the accused be forfeited in the amount of € .....*

*†you the surety be forfeited in the amount of € .....*

*\* (iii) a \*bank \*building society \*credit union \*An Post deposit book having been  
accepted as security for the amount of the recognisance, the said \*bank \*building  
society \*credit union \*An Post is required to pay into court the amount of € .....  
from the moneys held by you on deposit therein.*

*\* (iv) ..... of ..... is appointed receiver to take possession or control of your  
property and to manage or otherwise deal with it in accordance with the  
directions of the court.*

*An application to vary or discharge this Order may be made to the court within 21  
days from the date of issue of this notice.*

*Dated this .... day of ..... 20 ....*

*Signed .....*

*District Court Clerk*

*District Court Office at .....*

*To ....., \*Accused/†Surety*

*of ....."*

10. The defect which exists in both of these cases is that the endorsement (rightly characterised, for practical purposes, as the "Penal Endorsement", which can be seen on the Form) to the following effect – "If you fail to pay the said sum within the period specified, a warrant for your committal to prison in default of payment will be issued without further notice to you." was omitted.

11. It is not in debate that the Rules of the District Court, as a form of secondary legislation, have the force of law (see *Shell E & P Ireland Limited v. McGrath and Ors.* [2013] 1 IR 247.
12. The respondents say that notwithstanding the defect, the notice is good, because O.12 r. 8 itself does not explicitly say that such penal endorsement is required. They further say that even if the notice is not in what they describe as "the exact terms set out in Form 27.9 Schedule B" O. 12 r. 8 and O. 15 affords a complete answer to the deficiency.

O. 12 r. 8 provides that: -

*"No departure from any prescribed form, or omission of any of the particulars required by any prescribed form, or use of words other than those indicated in any prescribed form, vitiates or makes void the proceedings or matter to which the form relates, if the form or the words is, in the opinion of the Court, otherwise sufficient in substance and effect."*

and O. 12. r. 15 is to the effect that: -

*"Subject to any provision of an enactment, non-compliance with these rules does not render any criminal proceedings void, but in the case of non-compliance, the court may direct that the proceedings be treated as void, or that they be set aside in part as irregular, or that they be amended or otherwise dealt with in such manner and on such terms consistent with Statute as the court thinks fit."*

13. It is submitted that what arises here is a mere departure from form or, at most, a non-compliance with the Rules and that the notifications are not thereby vitiated.
14. I do not think that O.12 r. 8 nor O. 12 r. 15 are applicable to the defects which exist. With respect to O.12 r. 8 it is undoubtedly the case that even if a departure from the Form would not vitiate it would be so if, but only if, "the Form or the words used be otherwise sufficient in substance and effect". It is plain that these cases do not fall in to this category because they do not inform either the appellants of the penal consequences of a failure to obey the orders of which notification is given. To put the matter differently, a form of words sufficient to give such notice would suffice even if it was not, verbatim, in the terms of the prescribed form. The purpose of the penal endorsement is to tell the accused of the consequences in unambiguous terms. No alternative form of words is used in this case which could be said to be "otherwise sufficient in substance and effect." With respect to O. 12 r. 15, I think that this is directed towards substantive proceedings and especially to the procedure to be adopted in terms of their commencement or pursuit.

#### **Discussion and Conclusion**

15. What then are the legal consequences of the defects? Obviously s.9 of the Act as substituted, must be read with the District Court Rules. Accordingly, when the requisite notice under the Act does not comply with the Rules, as here, it is, in principle, no notice at all. The question then is whether or not where notification has not been given a warrant issued to enforce the order is good. I think such a warrant is void.

16. Taking the relevant provisions of the Act it is clear that there are effectively a number of conditions precedent to the issue of a warrant. Obviously, a default must be shown that is to say, non-payment within the period prescribed.
17. It seems to me that the relevant provisions both of the Act and the Rules constitute a scheme to enforce the conditions in recognisances and each step or element in the process of enforcement must be followed. Thus notification, as a step in the scheme or process, is a condition precedent to enforcement. That must be so. An order for estreatment gives rise to the duty to pay a sum of money and thus affects rights or imposes liabilities. Most fundamentally it makes – or in any event did so in these cases – provision or imprisonment to enforce any payment. All of this may occur without prior notice to the accused; without more it might constitute a departure from one of the elements of constitutional justice. There are sound practical reasons why estreatment with, *inter alia*, provision for imprisonment to enforce payment in given circumstances, is necessary at, say, the default of appearance stage. Far reaching orders can be made by courts *ex parte* (which is what occurs in this type of order). Constitutional justice is afforded by the power to vary or discharge an order by giving the accused an ample opportunity to be heard before his interests are, with finality, adversely affected. He is given notice of the proceedings to permit him be so heard and to ensure that he is aware of his procedural rights and the consequences of failing to act (the latter by means of the penal endorsement). This is done without undermining the practical reasons for an initial order made without notice by the application of the scheme or process.
18. I would therefore allow these appeals.