Hilary Term
[2021] UKPC 5
Privy Council Appeal No 0050 of 2019

JUDGMENT

Powell (Appellant) *v* Spence (Respondent) (Jamaica)

From the Court of Appeal of Jamaica

before

Lord Hodge
Lady Black
Lord Lloyd-Jones
Lord Sales
Lord Hamblen

JUDGMENT GIVEN ON

22 February 2021

Heard on 12 October 2020

Appellant
B St Michael Hylton QC
Sundiata J Gibbs

(Instructed by Charles Russell Speechlys LLP (London))

Respondent (did not appear)
Interested parties
Oswest Senior-Smith
Denise Senior-Smith
Olivia Derret
(Instructed by Oswest Senior-Smith & Company)

LADY BLACK:

1. This appeal raises questions as to the procedure that must be adopted to commence proceedings for the forfeiture of cash pursuant to section 79 of the Proceeds of Crime Act (POCA).

The proceedings in outline

2. The focus of the dispute between the parties is the sum of JA$700,000 which was seized from the respondent, Patrick Spence, in June 2010 by the appellant, Detective Sergeant Pilmar Powell, on the basis that it was obtained through or intended to be used in unlawful conduct. The interested parties, Kurbriton Ltd and its director Frederick Graham, lay claim to the cash. Kurbriton Ltd deals in scrap metal, and its case is that it advanced the money to the respondent, as an independent scrap dealer, in order to enable him to make legitimate purchases of scrap metal for the company.

3. The seizure of the cash took place under section 75 of POCA, which empowers an authorised officer to seize cash in the circumstances set out in the section. Section 76 provides for the detention of seized cash, and sections 78 and 79 contain provisions dealing with what becomes of it in the longer term. Section 78 provides for the person from whom the cash is seized to make an application to a Resident Magistrate's Court (now known as a Parish Court, see further para 6 below) for the release of the cash. Section 79 provides for the authorised officer to make an application to a Resident Magistrate's Court for the forfeiture of it.

4. In this case, the interested parties applied in July 2010, pursuant to section 78, for the release of the cash and then, in May 2011, Sgt Powell filed and served a notice with a view to obtaining an order under section 79 for the forfeiture of it. From this, it is clear that there was a dispute about what should become of the cash, but the Board need not say anything about the merits of that dispute, because the issue that arises for determination relates solely to the procedure by which Sgt Powell sought to obtain a forfeiture order.

5. As will be explained below, forfeiture proceedings are required to be commenced by the lodging of a "plaint". In this case, Sgt Powell used a document entitled "Notice", accompanied by a supporting affidavit. At first instance, the Resident Magistrate held that an application in this form could not be treated as a plaint, because the requirements of section 143 of the Judicature (Resident Magistrates) Act ("the RM Act") were not observed. In his view, no valid claim had been commenced, and as there were therefore no proceedings before the court, he could not have recourse to section

190 of the RM Act, which permits a defect in proceedings to be corrected, or to Order XXXVI rule 23 of the Resident Magistrates' Court Rules ("the Rules"), which provides that non-compliance with the Rules shall not render proceedings void unless so directed. He therefore dismissed the forfeiture application, and his decision was upheld by the Court of Appeal. Sgt Powell now appeals to the Board.

Terminology

6. It should be noted that by virtue of the Judicature (Resident Magistrates) (Amendment and Change of Name) Act 2016, the Resident Magistrates' Courts have become the Parish Courts, Resident Magistrates have become known as Parish Judges, and the Judicature (Resident Magistrates) Act as the Judicature (Parish Courts) Act. However, these proceedings concern events occurring in 2010 and 2011, so, inevitably, the Resident Magistrate's judgment uses the old terms, and the Court of Appeal followed suit. For simplicity and consistency, the Board adopts the same terminology.

The legal framework

7. Part IV of POCA, in which sections 75, 76, 78 and 79 (mentioned above) are to be found, provides for civil recovery of the proceeds of unlawful conduct. It makes provision for certain applications to be made in the Supreme Court, and others to be made in a Resident Magistrate's Court. Specific provision is made by regulation for the procedure in the Supreme Court, it being required that Part IV proceedings be commenced by the service of a claim form. However, there are no regulations or court rules governing Part IV proceedings in a Resident Magistrate's Court. The Court of Appeal decided, in *Metalee Thomas v The Asset Recovery Agency* [2010] JMCA Civ 6, that, in those circumstances, matters must be commenced in accordance with the RM Act and the Rules.

8. Two provisions of the RM Act and the Rules are particularly relevant to the mode of commencement.

9. First, there is section 143 of the RM Act which imposes a requirement that the actions and suits there specified shall be commenced by lodging a plaint. It reads:

> "143. All actions and suits in a Court which, if brought in the Supreme Court, would be commenced by writ of summons, shall be commenced by the party desirous of bringing such action, or some person on his behalf, lodging with the Clerk or Deputy Clerk or any Assistant Clerk, at the office of the Clerk of the Courts, or at any Court held within the parish, a plaint, stating briefly the names and last known places of abode of the parties, and naming

> a post office to which notices may be addressed to the plaintiff (to be called the plaintiff's address for service), and setting forth the nature of the claim made, or of the relief or remedy required in the action, in such short form as may be prescribed by any rules in force under this Act (or as nearly in such form as circumstances admit), and the Clerk or Deputy Clerk, or Assistant Clerk, shall note on such plaint the day of the lodging thereof, and shall file the same in his office, and shall as soon as possible enter the same in a book to be kept for this purpose in the office, and to be called the plaint book, every one of which plaints shall be numbered in every year according to the order in which it shall be entered; and thereupon a summons embodying the matter of the plaint, and accompanied by the particulars of the claim, if any, and stating the plaintiff's place of abode and address for service, and bearing the number of the plaint on the margin thereof, shall be issued by the Clerk of the Courts under his hand and the seal of the Court and shall be served on the defendant so many days before the day on which the Court shall be holden at which the cause is to be tried, as shall be prescribed by rules now or hereafter to be in force; and delivery of such summons to the defendant, or in such other manner as shall be specified in the rules now or hereafter to be in force, shall be deemed good service; and no misnomer or inaccurate description of any person or place in any such plaint or summons shall vitiate the same, if the person or place be therein described so as to be commonly known."

10. Secondly, there is Order XXXVI rule 19 of the Rules. Rule 19 deals with proceedings under any law not mentioned in the Rules, and it applies here in the absence of any specific reference to summary proceedings for the recovery of cash under POCA. It says:

> "19. Where by any Law not before-mentioned in these Rules, proceedings are directed to be taken in a Resident Magistrate's Court, such proceedings shall be commenced by action wherever there is a person against whom it can be brought, and if there is no such person, then the proceeding shall be commenced by petition."

11. In the present case, the Resident Magistrate held that, there being a person against whom the proceedings could be brought, rule 19 dictated that an action should be used rather than a petition. Turning to section 143, he recalled that proceedings for forfeiture of property are begun by claim form in the Supreme Court, and that claim forms had replaced the writs of summons to which reference is made in the first sentence of the section. It followed, he concluded, that section 143 required the action to be commenced by the lodging of a plaint. The appellant concedes that this is correct. Her argument is that, if the paperwork she used was deficient in any way, that was curable

by the court. It is therefore convenient to turn now to section 190 of the RM Act, which confers on the Resident Magistrate a power to remedy defects and errors in proceedings.

12. Section 190 provides:

> "190. The Magistrate may at all times amend all defects and errors in any proceeding, civil or criminal, in his Court, whether there is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend or not; and all such amendments may be made, with or without costs, and upon such terms as to the Magistrate may seem fit; and all such amendments as may be necessary for the purpose of determining the real question in controversy between the parties shall be so made."

13. This power applies to defects or errors in form, but not to defects which are matters of substance, see para 38 of the *Metalee Thomas* case (supra).

14. Finally, in this overview of the legal framework, a number of further provisions of the Rules require mention. In terms of the court form that it would have been appropriate to use in the present case to originate the proceedings, it is relevant to mention Order XXXVI rule 18. That provides:

> "18. All proceedings and documents shall be in Forms similar to the Forms in the Appendix A, where the same are applicable, and in cases where such forms are not applicable, or where no forms are provided, parties shall frame the proceedings or documents using as guides the Forms contained in the Appendix."

Whilst Appendix A does not contain a form specifically tailored to forfeiture proceedings, it is common ground that the appropriate form is Form 5, the contents of which are (as nearly as it is possible to reproduce them in this judgment) as follows:

> No of Plaint
>
> In the Resident Magistrate's Court in the Parish of _____ to be holden at
>
> Plaintiff, of

whose Postal Address is _____

and Defendant, of

in the Parish of

Court Fees Amount claimed £

for

Bailiff the particulars of which are hereunto annexed.

Postage Filed by

Solicitor's Costs The above Plaint was lodged with me _____ on the _____ day of _____ 19 _____

Clerk of the Courts.

15. Also material is Order XXXVI rule 13(a) which provides:

> "13(a) Where by these Rules any party is required to give notice according to a Form mentioned in the Appendix A it shall be sufficient if the notice given complies substantially with such Form."

16. Order XXXVI rule 21 requires that the Rules be adhered to, providing:

> "21. No practice shall prevail in any Court except as provided by these Rules, nor shall any matter be added to or taken from any Form in the Appendix A whereby any obligation shall be imposed upon any suitor or any, Officer of the Court to which he is not liable under statute or these Rules."

17. However, Order XXXVI rule 23 provides that non-compliance does not automatically render the proceedings void. It provides:

> "23. Non-compliance with any of these Rules or with any Rule of Practice for the time being in force shall not render any proceedings void unless the Court shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the Court shall think fit."

The appellant's submissions to the Board

18. The appellant invites the Board to infer from the above provisions that it is intended that a degree of informality should be accepted in the Resident Magistrates' Courts, and that those courts should amend where appropriate so as to correct defects and get to the real issues between the parties. She invites attention to the fact that section 143 itself says that the plaint must be "in such short form as may be prescribed by any rules in force under this Act *(or as nearly in such form as circumstances admit)*" (emphasis added). Likewise, Order XXXVI rule 18 requires only that proceedings and documents be in forms "similar" to those in Appendix A, and Order XXXVI rule 13(a) provides that where a party is required to give notice according to a form in Appendix A, it is sufficient if the notice "complies substantially" with the form.

19. The appellant submits that her "Notice" document incorporated all the information required by section 143 and Form 5 and that, notwithstanding that it was entitled "Notice" and not "Plaint", it was effective to bring the matter before the court. She does not accept that there was in fact any breach of the Rules, but points out that even if there was, Order XXXVI rule 23 provides that non-compliance does not render the proceedings void. If necessary, the court should have had recourse to section 190 and amended her document to entitle it "Plaint", the defect being no more than a defect in form.

20. Furthermore, the appellant submits that the Resident Magistrate should not have relied, as part of his reasoning for his conclusion that the court's jurisdiction had not been invoked and that there was no valid claim which could be amended, upon the failure of the Clerk to carry out the administrative acts required by section 143, including issuing a summons for service on the defendant. The appellant relies upon the case of *R v Manchester Stipendiary Magistrate, Ex p Hill* [1983] 1 AC 328. The issue there was what constituted the laying of an information in a criminal case before the magistrates' court, thus giving the court jurisdiction. In his speech, with which the other members of the Judicial Committee of the House of Lords agreed, Lord Roskill said that the jurisdiction of the court did not depend upon a summons or warrant being issued. What was required was the laying of an information before the magistrates' court in a criminal case, and the making of a complaint to the magistrates' court in a civil case. Once the information had been received at the office of the clerk to the justices, it had been laid, and similarly with a complaint. No more was required of the prosecutor or the complainant to launch the proceedings. As Lord Roskill said, "What

happens thereafter is not within the province of the prosecutor or of the complainant but of the court" (p 343C).

The interested parties' submissions to the Board

21. The interested parties submit that the Resident Magistrate and the Court of Appeal were correct. They stress the invasive nature of the POCA forfeiture provisions and the importance of proper protection for the property rights of individuals.

22. In their submission, in the present case, the court's jurisdiction was never invoked, and the section 190 power could not be used to cure defects because there were, in fact, no proceedings to amend. They argue that the appellant's document was simply not a document commencing proceedings, and this, in their submission, is fatal to any attempt to correct matters. The fact that the names and addresses of the parties, the nature of the claim, and the relief sought, are set out is not sufficient to give the document the characteristics of an originating document, they say. They place reliance on the fact that it had the wrong title and was marked with the court number which had been assigned to the appellant's earlier interlocutory, and separate, application, under section 76, for the continued detention of the cash. In addition, they rely on non-compliance with the provisions relating to copies of the particulars of the claim (see in particular Order VI rule 1 and Order II rule 7).

23. The interested parties say that it is indeed material that the appellant's document was not treated by the Registry as an action, with the result that necessary steps were not taken there in relation to it. These included that it was not executed by a Clerk, no Plaint Number was assigned, and no summons was issued. Furthermore, the duties which were payable on commencement of proceedings were not paid.

24. To permit the appellant's document to stand as a plaint in these circumstances would, the interested parties submit, be to permit too great a derogation from what is required, and without any reason for the departure having been put forward. In so far as the Rules (Order XXXVI rules 13 and 18) appear to permit a relaxation of formality, they do not stretch as far as the situation that appertained here. As for Order XXXVI rule 23, the appellant's non-compliance was not only with the Rules, but also with section 143 of the RM Act.

25. The interested parties invite the Board's attention to a number of authorities to support their argument that irregularities can only be cured if a commencement document has been filed, drawing a distinction between cases where there was a commencement document, but in the wrong form, and the defect was cured, and cases where there was no commencement document and nothing could be done. Particular reliance is placed upon *Pritchard v Deacon* [1963] Ch 502 as illustrative of the latter

category of case. In the interested parties' submission, the same analysis applies in the present case.

26. *Pritchard v Deacon* concerned an attempt to commence proceedings under the Inheritance (Family Provision) Act 1938. The widow of the deceased had six months from the date of probate of the will to apply for reasonable provision to be made for her from the estate. Within the six months, her solicitor presented a summons to the Pontypridd District Registry of the High Court and it was accepted and sealed there. The Rules of the Supreme Court provided, however, that an originating summons was to be "sealed in the Central Office" of the High Court in London, rather than in a District Registry, and it was when it was sealed in the Central Office that it was deemed to be issued. This was fatal to the widow's claim. It was held that the failure to comply with the requirement to issue the originating summons out of the Central Office was not a mere irregularity, but a fundamental defect which rendered the proceedings a nullity. As there were no operative proceedings, it followed that there was no room for the application of RSC Order 70 rule 1 (which was in very similar terms to Order XXXVI rule 23).

Discussion

27. The Board differs from the Resident Magistrate and the Court of Appeal. In its view, Sgt Powell's application was effectively commenced by the filing of the Notice, notwithstanding discrepancies between the paperwork used and the conventional form of a plaint. In so far as amendment was thought to be required to bring the documentation into line with the procedural requirements, there was power in the court to amend under section 190 of the RM Act.

28. The Board accepts the appellant's submission that it is apparent from the legal framework set out earlier that proceedings in a Resident Magistrate's Court are intended to accommodate a degree of informality. As section 190 of the RM Act clearly shows, the intention is that the court's ability to determine the real question in controversy between the parties should not be frustrated by defects and errors in the proceedings, whether or not they are the fault of a party. Whilst the interested parties are right to point out that Order XXXVI rule 23 is directed to ensuring that non-compliance with the Rules does not render any proceedings void, and cannot assist where there is non-compliance with statute, it is nevertheless relevant as a further demonstration of the intention to prevent an over-technical approach in the court. And as the appellant submits, there are also further similar indications in other provisions of the Rules, as well as in section 143 of the RM Act itself. An analysis of the legal implications of the process adopted by the appellant must be carried out with this tolerant approach borne fully in mind.

29. When the contents of Sgt Powell's Notice are compared with the contents of Form 5 of Appendix A (see para 14 above), it can be seen that, leaving to one side for a moment the question of the Plaint Number, it contained the information that would have been entered on Form 5. Taking the details in the order in which they feature on Form 5, Sgt Powell's Notice:

i) Stipulates the relevant Resident Magistrate's Court;

ii) Names Sgt Powell as the person making the application and gives an address for service for her;

iii) Names the interested parties and the respondent as persons to whom notice is being given, giving their addresses;

iv) Stipulates the nature of the claim (an application under section 79 of POCA for the forfeiture of the cash seized from the respondent);

v) Sets out who filed the document; and

vi) Has been stamped with a receipt stamp from the court.

30. From this list, it can be seen that the Notice also satisfies the requirements prescribed in section 143 as the essential contents of a plaint.

31. The affidavit which accompanied the Notice sets out particulars of the claim, including the circumstances in which the cash was seized and the reasons why an order for forfeiture is said to be justified. And the Notice document itself gives notice that the parties should attend on 31 May 2011 for the hearing of the application, or an order may be made in their absence.

32. The interested parties place heavy weight on the use of the wrong reference number and the wrong title in Sgt Powell's Notice. As their counsel put it in oral submissions, by virtue of the fact that the heading of the Notice was not in accordance with the RM Act, the function of the Clerk was unwittingly ousted, because the Registry did not treat this as a new and originating action. However, the Board does not attribute the same significance to the absence of processes within the court office as do the interested parties. Section 143 does, of course, stipulate the steps in the court office that should attend the commencement of an action by plaint. But the Board agrees with the appellant that *R v Manchester Stipendiary Magistrate, Ex p Hill* (see para 20 above) is instructive, in differentiating between the steps that must be taken by the person

initiating the proceedings and the steps which are to be taken in the court office. A failure to take steps in the court office, for whatever reason, should not be seen as preventing the action having been validly commenced. The same applies, in the Board's view, to the fact that no duties were exacted from the appellant on the filing of the Notice.

33. Special mention should, perhaps, be made of the fact that no summons, with particulars of the claim, was issued by the Clerk. In this regard, it is material to recall that the respondent and the interested parties were served with the Notice and supporting affidavit and appeared before the Resident Magistrate, not taking any point on the form of the proceedings. Whilst not in the precise form of a summons, the appellant's documentation had therefore fulfilled the role of a summons with particulars of the claim. It is also worth noting that, as well as the appellant's application, the Resident Magistrate had before him an application by the interested parties for the release of the seized cash, and that too was in the form of a notice with supporting affidavit. As para 1 of his judgment records, it was the Magistrate himself who raised the question of whether the matters were properly before him, not the parties.

34. In all the circumstances, the Board is of the view that the Notice was, in substance, a plaint satisfying the requirements of section 143. Such defects as there were in it were matters of form only. It operated to commence the proceedings in the Resident Magistrate's Court and, in so far as the documentation required any amendment at all (for example if it was considered necessary to correct the title from "Notice" to "Plaint"), the Magistrate had power under section 190 to amend. Similarly, those matters which required attention in the court office could have been put in order.

35. The Board is fortified in this conclusion by the decision in *R (Chief Constable of North Wales Police) v Anglesey Justices* (2008) 172 JP 225. There, proceedings under section 2 of the Dogs Act 1871 should have been commenced by the making of a complaint. However, the police officer used a pro forma for use in the laying of an information, and the summons prepared by the court was also a pro forma in general use in criminal cases. The Divisional Court took the view that the essential question was whether what was lodged at court was in substance a complaint. Whilst it was regrettable that the officer had used a form which was generally used for laying an information in a criminal matter, it was apparent on the face of the document that he was in fact seeking to invoke the jurisdiction under section 2, and the proceedings had, in fact and in law, been initiated by complaint and not by information. It is relevant to note that the Divisional Court took into account that statute had deliberately permitted informality (as is the case with the RM Act and the Rules here) and considered that, in those circumstances, it would be wrong to impose rigid procedures.

36. Section 190 provides that amendment may be "upon such terms as to the Magistrate may seem fit". Had the Magistrate recognised that he had power to cure defects in the proceedings and taken the view that any amendment was required to put

the appellant's documentation in order, the Board considers that he would inevitably have made it a term of the amendment that the requisite duties for the issue of a plaint be paid. However, since the Board has now concluded that the requisite information is already incorporated in the Notice and affidavit, it can see no real point in those documents being amended. The Notice is capable of standing as the plaint, notwithstanding its title. That leaves the question of the duties payable on issue of a plaint. They remain outstanding and clearly are owed by the appellant, and they will have to be paid before the forfeiture application proceeds further.

Conclusion

37. For the reasons set out above, the Board will humbly advise Her Majesty that the appeal should be allowed.