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Case No: CO/2056/2019

IN THE ADMINISTRATIVE COURT AT BIRMINGHAM

Birmingham Civil and Family Justice Hearing Centre
Priory Courts
33 Bull Street
Birmingham
B4 6DS

Tuesday, 5 November 2019

BEFORE:

LORD JUSTICE HOLROYDE
and
MRS JUSTICE JEFFORD DBE

BETWEEN:

BAPINDER SANDHU

Appellant

- and -

CHIEF CONSTABLE OF THE WEST MIDLANDS POLICE

Respondent

MR T SCHOFIELD appeared on behalf of the Appellant
MR R FORTT appeared on behalf of the Respondent

JUDGMENT
(Approved)

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LORD JUSTICE HOLROYDE: This is the judgment of the court, to which we have both contributed.

1. This appeal raises issues as to what must be proved before a magistrates' court can make an order for forfeiture of cash pursuant to section 298(2)(b) of the Proceeds of Crime Act 2002.
2. On 10 May 2017 a cash sum of £54,000 was seized from the appellant. On 18 December 2017 a magistrates' court made an order for the forfeiture of the cash. On 17 January 2019 the Crown Court at Birmingham dismissed an appeal against that order. The appellant now appeals by way of case stated against the decision of the Crown Court.
3. Throughout the proceedings in the lower courts, the respondent's case was presented as an application for forfeiture pursuant to section 298(2)(b) of the 2002 Act on the basis that the seized cash was intended to be used for money laundering offences in the future. It was not suggested that the respondent was able to prove that the source of the cash was a specific crime or crimes or one of a specific type of crime. The respondent relied on *Fletcher v Chief Constable of Leicestershire Constabulary* [2013] EWHC 3357 (Admin) ("*Fletcher*"). The appellant relied on *Angus v UK Border Authority* [2011] EWHC 461 (Admin) ("*Angus*").
4. The Crown Court heard evidence as to the circumstances in which the cash was found by police officers who executed a search warrant of the appellant's home. The appellant gave evidence as to what he said was the source of the cash. It is unnecessary for the purposes of this appeal to refer to the detail of any of that evidence. It suffices to say that at paragraph 24 of the Case Stated, the Crown Court records that it made findings of fact, against which there is no appeal, which included the following:

"(a) The appellant came into possession of significant sums of money, well in excess of his income and his capacity to save.

(b) The origin of that money is uncertain, but we are persuaded that it came from some form of criminal activity.

[...]

(d) We do not accept that the £85,000 transferred to the account of Mr

Nahal by the appellant was the appellant's life savings.

(e) The appellant was not concealing £54,000 in his safe for the reasons he claimed (that it was legitimate money and he feared that DC Hadley would seize it as he had earlier seized the £85,000 banker's draft). In reality the appellant was concealing the £54,000 because it was illegitimate money.

[...]

(g) The dates on the cash bands and all of the surrounding circumstances and material we have seen allows us to conclude that the £54,000 ... had a criminal origin but we do not know which type.

(h) No part of the £54,000 came from the appellant's inheritance of £50,000 in October 2014.

(1) The appellant has lied about the source of his money.

[...]

(n) Whilst the declaration of trust does not have a direct bearing on the recoverability of the seized £54,000, the appellant has fabricated the document at some point after 2003 and forged the signatures on it. He introduced it into evidence to assist his case. That has a significant effect on his credibility."

5. The Crown Court went on at paragraph 24 to express its overall finding and conclusion as follows:

"Even though the Chief Constable is unable to identify the type of predicate crime or crimes which generated the £54,000, we conclude that the £54,000 is recoverable on the basis that it had an unknown criminal origin but was intended to be concealed, transferred or converted at some future point, thus bringing it within section 298(2)(b) of the Proceeds of Crime Act 2002 following *Fletcher* ... and distinguishing *Angus* ... which was an authority concerning recovery under section 298(2)(a) of the Proceeds of Crime Act 2002."

6. The Crown Court posed three questions of law for the opinion of this court in the following terms:

"(a) Does the Chief Constable have the burden of proving to the civil standard of proof the class of predicate crime in applications for the forfeiture of cash under section 298(2)(b) of the 2002 Act in circumstances where the Chief Constable's case is that the seized cash was intended to be used in money laundering offences in the future?

(b) Is the test requiring the identification of the class of predicate crime the same in respect of applications made under section 298(2)(a) and 298(2)(b)?

(c) Was the Crown Court wrong in law to take into account the evidence of the fact of the previous cash seizure (in contrast to the evidence which gave rise to that seizure, which was not heard) when those proceedings had been resolved earlier in the applicant's favour?"

7. It is convenient to address that third question first. The factual background is that in October 2014 a sum of £85,989 was seized from the bank account of a Mr Nahal in the form of a banker's draft made payable to the appellant. A magistrates' court ordered forfeiture of that sum, but an appeal to the Crown Court was not resisted by the authority. It appears that the problem which the authority faced was that the money had not existed in "cash" until the banker's draft was obtained. Mr Schofield for the appellant submits that since the £85,989 had been returned to the appellant, and no further attempt made by the authority to seize or freeze it in any way, it should have been treated as money legitimately in the possession of the appellant and should therefore not have featured at all in the Crown Court's consideration of the issues relating to the £54,000. Mr Fortt for the respondent submits that the Crown Court inevitably had to consider the £85,989 because it was part of the appellant's explanation for why the £54,000 had been kept in cash rather than banked. Moreover, submits Mr Fortt, the £85,989 was in any event part of the overall picture of the appellant's financial affairs.
8. In our judgment there is no substance in the point raised by Mr Schofield. We do not accept that it was an error of law on the part of the Crown Court to have regard to the fact of the seizing and return of the £85,989. We agree with Mr Fortt that it was necessary to consider that money, because the appellant referred to it as part of his evidence relating to the £54,000, and in any event we do not see how the Crown Court could have excluded from its consideration this aspect of the appellant's financial affairs. There may be many reasons why the authority, having felt constrained to withdraw resistance to the appeal in relation to the £85,989, had not chosen to make any further attempt to seize that sum. It is not possible to regard their inaction as confirmation that the £85,989 was of entirely innocent origin.
9. We therefore turn to questions (a) and (b). It is convenient to consider these together and to begin by setting out the material parts of the relevant sections of the Proceeds of Crime Act 2002. We start with some of the provisions in Part 5 of the Act, which is

concerned with the civil recovery of the proceeds of unlawful conduct. By section 240(1)(b) the general purpose of Part 5 includes:

"enabling property 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 ..."

10. As will be seen, later provisions of Part 5 similarly refer to the two distinct situations of property obtained through unlawful conduct and property which is intended to be used in unlawful conduct.

11. By section 241:

"(1) Conduct occurring in any part of the United Kingdom is unlawful conduct if it is unlawful under the criminal law of that part.

[...]

(3) The court ... must decide on a balance of probabilities whether it is proved—

(a) that any matters alleged to constitute unlawful conduct have occurred, or

(b) that any person intended to use any property in unlawful conduct."

12. Section 242 is headed "Property obtained through unlawful conduct". It provides:

"(1) A person obtains property through unlawful conduct (whether his own conduct or another's) if he obtains property by or in return for the conduct.

(2) In deciding whether any property was obtained through unlawful conduct—

(a) it is immaterial whether or not any money, goods or services were provided in order to put the person in question in a position to carry out the conduct,

(b) it is not necessary to show that the conduct was of a particular kind if it is shown that the property was obtained through conduct of one of a number of kinds, each of which would have been unlawful conduct."

13. Chapter 3 of Part 5 of the 2002 Act relates to the recovery of cash in summary proceedings. Sections 294 and 295 provide for the seizing and detention of cash. The issues in this appeal relate to section 298, which by subsection (1) permits an application for forfeiture of detained cash to be made to a magistrates' court. By subsection (2):

"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 person for use in unlawful conduct."

14. For convenience we will refer to subparagraphs (a) and (b) of section 298(2) as the first and second limbs respectively. In relation to the first limb, it is necessary to consider sections 304(1), which provides: "(1) Property obtained through unlawful conduct is recoverable property".

15. Part 7 of the 2002 Act is concerned with money laundering, which is defined by section 340(11) as including an act which constitutes an offence under sections 327, 328 or 329. Omitting provisos which are not relevant in the present case, those sections provide as follows:

"327 Concealing etc

- (1) A person commits an offence if he—
- (a) conceals criminal property;
 - (b) disguises criminal property;
 - (c) converts criminal property;
 - (d) transfers criminal property;
 - (e) removes criminal property from England and Wales or from Scotland or from Northern Ireland."

"328 Arrangements

- (1) A person commits an offence if he enters into or becomes concerned in an arrangement which he knows or suspects facilitates

(by whatever means) the acquisition, retention, use or control of criminal property by or on behalf of another person."

"329 Acquisition, use and possession

(1) A person commits an offence if he—

- (a) acquires criminal property;
- (b) uses criminal property;
- (c) has possession of criminal property."

16. For the purposes of Part 7 "criminal property" is defined in section 340(3):

"(3) Property is criminal property if—

- (a) it constitutes a person's benefit from criminal conduct or it represents such a benefit (in whole or part and whether directly or indirectly), and
- (b) the alleged offender knows or suspects that it constitutes or represents such a benefit."

17. The proper interpretation of section 242(2)(b) of the 2002 Act was considered by a Divisional Court (Lord Thomas LCJ and Nicola Davies J) in *Angus*. The lower court in that case had been satisfied that the seized cash was property obtained through unlawful conduct on the basis that it had been obtained as a result of criminal activity, but that such activity had not been specified or identified. On an appeal by way of case stated, the court reviewed earlier case law, both civil and criminal, none of which had specifically considered the provisions of section 242(2)(b) in the context of a cash forfeiture case. It approved the approach which had been taken to the recovery of civil assets in *R (on the application of the Director of the Assets Recovery Agency) v Green* [2005] EWHC 3168 (Admin) and held that the same approach must be adopted in a case of cash forfeiture. At paragraph 29 Nicola Davies J (with whose judgment the Lord Chief Justice agreed) concluded:

"Applying the provisions of section 242(2)(b) of the Act, our answer to the question is as follows: in a case of cash forfeiture, a customs officer does have to show that the property seized was obtained through conduct of one of a number of kinds each of which would have been unlawful conduct."

18. Thus the decision in *Angus* is authority for the proposition that when considering the first limb of section 298(2), an applicant authority must establish on the balance of probabilities that the cash was obtained through one of a number of kinds of conduct, each of which would have been unlawful conduct. Under the first limb, accordingly, it is not enough for an applicant authority to establish only that the cash was obtained through criminal conduct of a kind which could not be identified.
19. Reliance was placed on that decision by the appellant in *Fletcher*, a case in which an honest man engaged in work at an unoccupied and derelict property had found and reported to the police a concealed box containing a large amount of cash. The lower courts ordered forfeiture of the cash. On an appeal by way of case stated, it was held by Lewis J that the Crown Court had been entitled to find on the balance of probabilities that the cash had originally been obtained by unlawful conduct of an unidentifiable kind, and that the hider had intended to use it in unlawful conduct, because almost any use of the cash would almost inevitably have involved an offence under section 327 of the 2002 Act.
20. Lewis J then went on to consider whether on a proper interpretation of section 298(2)(b) the money could lawfully be forfeited. It was submitted on behalf of the appellant that it could not, for to permit forfeiture would produce the absurd result that money which could not be forfeited under section 298(2)(a), for the reasons given in *Angus*, could nonetheless be forfeited under section 298(2)(b). Lewis J rejected that submission. He noted that the second limb focuses on whether the cash is intended by any person to be used in unlawful conduct as that term is defined in section 241 of the 2002 Act. He referred to *R v Anwoir and others* [2008] EWCA Crim 1354 ("*Anwoir*"), in which the Court of Appeal, Criminal Division had held that for the purposes of sections 328 and 340 of the 2002 Act, there were two ways in which the prosecution could prove the property derived from crime:

"a) by showing that it derives from conduct of a specific kind or kinds and that conduct of that kind or those kinds is unlawful, or

b) by evidence of the circumstances in which the property is handled which are such as to give rise to the irresistible inference that it can only be derived from crime."

21. Lewis J held at paragraph 28 that on the facts found by the Crown Court all the elements of section 289(2)(b) were satisfied and the Crown Court had been entitled to make the order for forfeiture.
22. In reaching that decision Lewis J acknowledged the force of the argument that it led to an apparent oddity in having two tests for forfeiture, one requiring a more difficult test, namely that the type of criminal conduct be identifiable, than the other, which requires only that the cash be shown to come from some criminal activity, even if it be unidentifiable. He accepted that probably the overwhelming majority of cases falling within the first limb of section 298(2) could also fall within the second limb. He nonetheless concluded as follows at paragraph 34:

"Ultimately, however, given the wording of section 298(2)(b) and given the present breadth of the section 327 offence, the fact of that matter is that that situation is unavoidable. If the money comes from some criminal activity, it is criminal property. If a person intends to transfer or convert or remove the money from the United Kingdom, then the person intends to use it in unlawful conduct. In those circumstances, section 298(2)(b) applies and permits the forfeiture of the property. That conclusion is consistent with Parliament's intention. Parliament intended to enable property obtained through unlawful conduct or intended for use in unlawful conduct to be liable to forfeiture as appears from the preamble and the structure of the Act. Section 298(2)(a) and (b) achieve that purpose. The Act was not intended to restrict forfeiture to cases of property being obtained through criminal conduct. It intended to provide for forfeiture in a broader range of cases. The fact there may be very many cases where property could be forfeited under 298(2)(b), but could not be forfeited under section 298(2)(a) of the 2002 Act would not, therefore, lead to results which are contrary to the Parliamentary intention. In the circumstances, therefore, in my judgment, on a proper interpretation of section 298(2)(b), the cash was capable of being forfeited in the present case on the basis of the inferences that the Crown Court drew."

23. In the present case Mr Schofield on behalf of the appellant criticises the decision in *Fletcher* on the ground that it reverses or undermines the decision in *Angus*. He submits that section 242(2)(b) of the 2002 Act applies to both limbs of section 298(2) and that *Angus* provides an authoritative interpretation of section 242(2)(b) which must be applied in all applications for cash forfeiture in which it is alleged that the cash has a criminal origin. It follows, he submits, that in this case, as in *Angus*, it was necessary

for the respondent to show on the balance of probabilities that the cash seized from the appellant was the proceeds of an identifiable class of criminal conduct. Mr Schofield points to the wide ambit of the offences created by sections 327 to 329 of the Act: if cash is the proceeds of crime, then the spending of it, or even the retaining of it, will constitute one of those offences. Thus, he argues, the prospect that cash will be laundered in the future is implicit in every application under section 298(2)(a). It is, he submits, irrational and unfair to enable the relevant authority to avoid the requirement to identify the class of predicate crime by simply proceeding on the basis of the second limb and relying on the decision in *Fletcher*. He suggests that the parties in *Fletcher* do not seem to have drawn the court's attention to what Mr Schofield refers to as the general application of section 242(2)(b) to all applications under section 298(2). He relies on the fact that in *Angus* at paragraph 23 the court held that *Anwoir* had limited effect in the context of that case, being a criminal case under different provisions under Part 7 of the 2002 Act in which section 242 had not been considered.

24. For the respondent, Mr Fortt submits that section 242(2)(b) is only concerned with property which has been "obtained through unlawful conduct" and is not applicable to an application for forfeiture under section 298(2)(b). The decision in *Angus*, which was concerned with an application under section 298(2)(a), therefore cannot assist the appellant. *Fletcher* was specifically concerned with section 298(2)(b), and for the reasons given by Lewis J in his judgment in that case, the Crown Court here was correct to order forfeiture. Mr Fortt argues that paragraph 23 of *Angus* cannot be read across to circumstances such as the present. Under section 298(2)(b) the court must consider whether the use of the cash would constitute unlawful conduct. In circumstances such as the present, that makes it necessary to consider the money laundering offences under Part 7 of the Act, and although *Anwoir* related to an offence specifically under section 328, the reasoning in it must apply with equal force to offences under sections 327 and 329. Thus, in circumstances such as these, when considering whether the use of the cash would constitute unlawful conduct, *Anwoir* makes clear that proof of a money laundering offence does not require the identification of a specific type of criminality.
25. We are grateful to both counsel for their submissions.

26. At the heart of Mr Schofield's argument was his submission that section 242(2)(b) is of general application in any circumstances in which forfeiture is sought of cash said to have been acquired by criminal conduct and, in particular, is applicable to both the first and second limbs of section 298(2). We are unable to accept that submission. It is in our view clear that section 242(2)(b) does no more than provide a definition, for the purposes of Part 5 of the 2002 Act, of the words "property obtained through unlawful conduct". We see no basis on which that definition can be said to be relevant to the distinct situation, contemplated throughout Part 5, of property which is intended to be used in unlawful conduct. In the present case the relevant unlawful conduct is conduct which constitutes an offence under section 327 of the 2002 Act.
27. It follows that the decision in *Angus*, which was concerned with section 242(2)(b), does not in our view provide the support for this appellant which Mr Schofield claims from it. It would be relevant to an application for forfeiture based on the first limb of section 298(2) but is not relevant to an application such as this based on the second limb. Mr Schofield relied on the fact that in *Angus* the court did not expressly limit its decision to applications under the first limb but instead used language which he suggests can properly be regarded as intended to be of wider application. We are unable to accept that argument. The court in *Angus* was concerned with an application under the first limb and makes no reference to the second limb at all. We cannot think that the court intended its judgment to extend to a point which did not arise and was not considered in the judgment.
28. As for the second limb, the decision in *Fletcher* is directly in point, and we respectfully agree with Lewis J's analysis in that case.
29. As we have indicated, the unchallenged finding of the Crown Court in the present case was that the cash seized from the appellant came from some form of criminal activity, although the type of activity could not be identified, and that the appellant intended at some future time to conceal, transfer or convert it. *Anwoir*, which is Court of Appeal authority binding on this court, makes clear that for the purposes of section 327 of the Act, it is not necessary to show the precise type of crime from which the property was acquired if the circumstances are such as to give rise to an irresistible inference that it could only be derived from crime. In those circumstances the Crown Court was in our

judgment correct to order forfeiture. It was entitled to infer on the balance of probabilities that the cash came from criminal activity and that the appellant's intended use of it would constitute a money laundering offence. The cash was therefore "criminal property" as defined in section 340(11) of the 2002 Act, and the appellant's intended use of it would be a criminal offence and would thus be "unlawful conduct" as defined in section 241(1). Thus all the necessary elements for an order pursuant to section 298(2)(b) were established.

30. We agree with Mr Schofield that this interpretation produces what may at first glance seem an odd result, in that it appears to relieve the relevant authority of a burden which it would carry if it brought its application under subparagraph (a). However, like Lewis J in *Fletcher*, we regard that as the inescapable result of the statutory provisions and consistent with the intention of Parliament. In particular, we agree with Lewis J at paragraph 30 of his judgment that the interpretation for which Mr Schofield contends would make it necessary to read into the statute words which are not there. Further, we accept Mr Fortt's submission that it is difficult to see why, in a provision which in appropriate circumstances would permit the seizure of money of undoubtedly innocent origin, Parliament should have intended to exclude the seizing of property which was clearly criminal. We would further observe that Mr Schofield's argument involves an assumption that the burden on the authority proceeding under limb two will in all circumstances be less than if proceeding under limb one. We do not think that is correct. It seems to us that the second of the two approaches permitted by *Anwoir* sets a high bar for a prosecuting authority, particularly where cash is seized which cannot be ascribed to a particular kind of criminal activity.
31. It follows that in our judgment the answer to all three questions posed by the Crown Court is "No", and we accordingly dismiss this appeal.

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