

The Importance of Time Limits in Forfeiture Appeals: James Fletcher

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James Fletcher examines the caselaw and discusses the importance of time limits in forfeiture appeals

Overview

In *R (on the application of Chief Constable of Lancashire Constabulary) v The Crown Court sitting at Preston v Kenneth Malin* [2021] EWHC 2869 (Admin), the High Court considered a judicial review arising out of Account Forfeiture applications pursuant to the Proceeds of Crime Act 2002.

The High Court dismissed the judicial review on basic public law principles. What is interesting is that while the judgment referred to the interplay between the appeal provisions and the Crown Court Rules permitting extensions of time, the ruling made no reference to the High Court case of *R v West London Magistrates Court (ex parte Lamai)* 6 July 2000, which held

that the 30-day time limit for forfeiture appeals is absolute and could not be extended. In *Lamai* permission to appeal was refused by the Court of Appeal, which found that the 30-day time limit did not offend against Convention Rights (see [2001] EWCA Civ 1501). Practitioners dealing with summary forfeiture should be aware of this case which remains of importance.

What was the factual background and argument?

On 31 October 2019 Magistrates granted an Account Forfeiture Order over the balance of money held in a company bank account, of which Mr Malin was the sole director.

Section 303Z14(2) of the Proceeds of Crime Act 2002 ("POCA") grants the Magistrates power to forfeit, in civil proceedings and on the balance of probabilities, the balance of a frozen bank account in so far that it is "*recoverable property*"; meaning property "*obtained by or in return for unlawful conduct*".

Section 303Z16(1) POCA allows an appeal to be made against a forfeiture decision to the Crown Court. Section 303Z16(2) provides that any appeal must be "*made*" before the end of the period of 30 days starting with the day on which the court makes the order or decision.

On 29 November 2019, Mr Malin emailed a form of appeal document to the Magistrates' Court. This was the last day of the 30 day time period for appealing.

However, the Chief Constable contended that Rule 7(2) of the Crown Court Rules, which governed to whom notice of appeal should be given, had not been complied with because he was not given notice of the appeal till 19 December 2019 and there had been no application for an extension of time.

Rule 7(2) of the Crown Court Rules provides that an appeal from the Magistrates Court shall be commenced "*by the appellant's giving notice of appeal ... in writing and ... to the designated officer for the magistrates' court ... [and] ... to any other party to the appeal*".

The Chief Constable considered the appeal was commenced out of time.

By way of decision dated 10 December 2019 the Crown Court of its own motion allowed the appeal to proceed but without hearing from the parties.

The parties asked the Court for the underlying reasoning for the decision to allow the appeal but were unsuccessful. Eventually, the Chief Constable asked the Crown Court to state a case, which the Crown Court refused to do on 3 July 2020.

The Judicial Review claim was lodged on 2 October 2020.

The Court's decision

The Court found the failure of the Crown Court to provide its reasoning for the 10 December 2019 decision unfortunate but considered the Pandemic may have had an effect upon the Court's record keeping.

The High Court noted that "The starting point must be the terms of **POCA** and the relevant rules."

The High Court noted that Rule 7(5) of the Crown Court Rules permitted the Crown Court to extend the time for giving notice of appeal either before or after time has expired on an application being made to it. But the Court found no application for an extension of time had been made by the interested party (judgment paragraph 32).

The Court considered that the judicial review proceedings were not well-founded for a number of reasons (judgment paragraph 34).

The request to quash decisions was out of time for any decision before 3 July 2020. That included all decisions save for the Crown Court's decision not to state a case (judgment paragraph 35).

The request to State a Case was misconceived; it was not being used as part of a case stated appeal but as a mechanism to find out more information about the reasoning behind the Crown Court's earlier order (judgment paragraph 36).

By 3 July 2020 the parties had sufficient information to pursue or defend an application to vary

the Court's Order dated 10 December 2019 (judgment paragraph 37).

There was an alternative remedy, namely Rule 5A(9) of the Crown Court Rules which entitled the Chief Constable to apply to vary an order of the Crown Court made without a hearing or in the absence of a party.

For those reasons the case was remitted to the Crown Court for it to consider the applications to vary the Court's order of 10 December 2019 and for the issue of whether an extension of time could or should be made.

Analysis

Ultimately, the Court fell back on basic public law reasoning to dismiss the judicial review.

What is interesting is that nowhere within the judgment is reference made to the *Lamai* rulings which provides that the 30-day time limit cannot be extended.

Lamai, was a cash forfeiture case decided under the provisions of the Drug Trafficking Act 1994 ("DTA") which has now been repealed and replaced by the Proceeds of Crime Act 2002. Under s.43 DTA the Magistrates Court could forfeit cash being imported or exported that represented someone's proceeds of drug trafficking.

In *Lamai* a forfeiture order was made. Section 44(2) of the DTA provided an appeal to the Crown Court "before the end of the period of 30 days beginning with the date on which it is made". The appeal provisions under POCA are similarly expressed.

In *Lamai* the notice of appeal was made 6 days out of time, but the Crown Court purported to grant leave to appeal out of time. The Court eventually withdrew its order after hearing inter partes submissions but Mr Lamai then sought permission to bring judicial review of the Court's decision to withdraw the extension of time.

The only issue for the Court was whether the Crown Court had jurisdiction to give an extension of time to appeal beyond the 30 days stated in the Statute.

The Court considered Rule 7(5) of the Crown Court Rules which stated:

(5) The time for giving notice of appeal (whether prescribed under paragraph (3), or under an enactment listed in Part I of Schedule 3) may be extended, either before or after it expires, by the Crown Court, on an application made in accordance with an paragraph (6).

All the parties agreed that Rule 7(3) did not apply to forfeiture appeals because there was no offender, no sentence and the 21 day time limit referred to in Rule 7(3) was not the same for forfeiture appeals. HMRC argued that the appeal provisions under the Drug Trafficking Act 1994 were not listed in Part 1 of Schedule 3 and therefore there was no jurisdiction to extend time to appeal in forfeiture cases.

The Court ruled that: "There is and was no jurisdiction in the Crown Court to extend the period of 30 days and the appeal must therefore be out of time." Permission to appeal to the Court of Appeal was refused.

The latest version of Rule 7(5) of the Crown Court Rules currently in force is in the same terms and Part 1 of Schedule 3 does not include the Proceeds of Crime Act 2002.

It, therefore, remains the position that time to appeal is 30 days with no provision for extension of that time under the Crown Court Rules.

Therefore, rather than whether there is jurisdiction to extend time to appeal, perhaps the more interesting question that the Crown Court will have to decide in Malin's case is whether the original appeal notice emailed to the Magistrates Court within the 30-day time limit was sufficient to "make" an appeal, or whether non-compliance with Rule 7(2) of the Crown Court Rules resulted in the appeal being "commenced" out of time. Is this procedural failure in relation to providing notice to the other side sufficient to prevent an appeal? There have been a number of cases, including the case stated appeal of *Chief Constable Merseyside Police v Reynolds* [2004] EWHC 2862 (Admin) which have emphasised that the Rules governing forfeiture applications were directory and not mandatory and a failure to comply did not rob the

Court of jurisdiction. Could this reasoning be applied to the Crown Court Rules, especially if the Chief Constable has suffered no prejudice?

James Fletcher practises in both civil and criminal law. He is a specialist in Asset Recovery and Proceeds of Crime work. He has significant expertise in dealing with Account Freezing and Forfeiture applications. He is instructed on behalf of businesses, by individual members of the public and by Government departments. James has been featured in Chambers and Partners in the field of Proceeds of Crime and Asset Forfeiture work (all circuits) since 2014 and has been “Top Ranked” since 2016. James is ranked as a Tier 1 leading individual in The Legal 500 for POCA and Asset Forfeiture (London Bar).