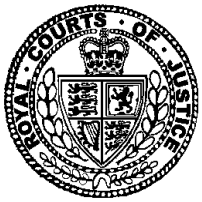

Neutral Citation Number: [2023] EWHC 3315 (Admin)

Case No: CO/0987/2023

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/12/2023

Before :

LORD JUSTICE BEAN
MRS JUSTICE TIPPLES
- - - - - - - - - - - - - - -

THE KING ON THE APPLICATION OF	**Claimants**
(1) KINGDOM CORPORATE LTD	
(2) ALAEDDIN KAMAR	
- and -	
(1) COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS	**Defendants**
(2) THAMES MAGISTRATES' COURT	

- -
- -

Jonathan Lennon KC (instructed by **Rahman Ravelli**) for the **Claimants**
Tom Rainsbury (instructed by **HMRC Solicitors**) for the **First Defendant**
The Second Defendant did not appear and was not represented

Hearing date: 7 December 2023
- -

Approved Judgment

This judgment was handed down remotely at 10.00am on 21 December 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Bean:

1. On 13 January 2023 HMRC obtained authority to conduct a search of the business premises of Kingdom Corporate Ltd ("KCL") under s 289 of the Proceeds of Crime Act 2002 ("POCA"). They attended the premises on 16 January 2023 and found bundles of approximately £350,000 in cash and foreign currency of a further £50,000 or thereabouts. The second Claimant, Mr Kamar, a director of KCL, failed to inform HMRC of a safe hidden in the kitchen area. According to the evidence of HMRC officers, when it was discovered he stated that there was no money in it. He also said that he did not have the keys as someone had stolen the keys from his bag years ago; and that the safe was last opened in 2006.

2. A locksmith attended and drilled a hole in the safe, revealing large wads of banknotes. Mr Kamar then provided a key to the safe. The money was seized at 17:38 that afternoon by HMRC officer Imogen Johnson.

3. On the morning of 17 January 2023 Ms Johnson emailed the North London Magistrates' Court with this request:

> "I would like to book a slot for a 1st detention Hearing for Stratford Magistrates Court for 2pm on Wednesday 18th January 2023. The 48 hour time period expires at 17:38 hours so grateful if you can assist."

4. She attached a form (Form A) an HMRC standard form headed "Application for Continued Detention of Seized Cash". Nisha Patel, an officer of the Magistrates' Court, replied advising that the application had been listed to be heard at 14:00 the following day.

5. The parties duly attended at Thames Magistrates' Court at 14:00 on Wednesday 18 January 2023, each side being represented by counsel. They were initially informed that the hearing would take place in Court 3. The list caller in Court 3 explained that the magistrates were dealing with custody cases and HMRC's application would have to wait until after those cases. The parties then waited for over an hour and a half, with counsel and HMRC officers making numerous visits to Court 3 to seek an update. At approximately 16:00, counsel for HMRC addressed the bench and legal adviser and made it clear that the case was an urgent cash detention application which had to be dealt with before 17:30. This was to no avail. At 17:00, the list caller explained that Court 3 had shut for the day. The parties were then told that Court 7 would hear the application after their custody cases. After a further period of waiting, counsel for HMRC was advised that Court 7 would be closing. The parties were then told that Court 6 would hear their application.

6. The case was called on at 17:20 in Court 6 before two lay magistrates sitting with a legal adviser. Copies of the Information, photographs and forms were handed up. Ms Johnson confirmed the contents of the Information. At 17:32, she was cross-examined. At 17:48, the Bench retired. At 17:50, the Bench returned. According to the attendance note of Mr Khan of Rahman Ravelli, solicitors for KCL and Mr Kamar, the decision to grant an order for continued detention of the cash was announced before an objection was raised by counsel for KCL and Mr Kamar that time had run out at 17:38 and the order was thus out of time. The legal adviser had apparently advised the Bench that,

since the case had been called on before 17.38, the order had been validly made. Mr Rainsbury, for HMRC, does not argue that the legislation can be interpreted in that way.

7. On 20 January a lawyer in HMRC's legal department emailed the Claimants' solicitors to tell them that HMRC proposed to "re-seize the monies and have a fresh detention order be applied for and heard on Tuesday 24 January". The response was that the Claimants required the return of the cash by 23 January and warned that any attempt to seek a further cash detention order would be resisted. HMRC in turn notified the Claimant's solicitors that the "administrative return and re-seizure" would occur at HMRC's regional centre at Stratford, East London, on 23 January, should they wish to be present to observe it.

8. On 23 January an HMRC officer, Mr Keith Hedinburgh, re-seized the cash at the Stratford regional centre. He did so there due to the obvious security risks posed by transporting large amounts of cash. The Claimants did not attend.

9. On 24 January the hearing of HMRC's second application took place at Thames Magistrates' Court before District Judge McIvor. Ms Cassidy-Taylor of the Claimants' solicitors has provided a witness statement setting out what occurred at the hearing. Ms Becerra of HMRC applied for an order for the further detention of seized cash. She said it was not in dispute that the original detention order had been made outside the 48 hour time limit and accepted that that order had thus been unlawful. Counsel for the Claimants opposed the application and argued that the original order had been made in excess of the court's jurisdiction and was void *ab initio*. The District Judge ruled in favour of HMRC. There is no transcript of her oral ruling, but a note of it reads as follows:-

> "I am satisfied that HMRC was entitled to lawfully reseize money yesterday. It would be absurd if the cash had to be physically returned to the Respondent (including by way of electronic transfer) simply in order for it to be immediately reseized. This is £350,000 in cash and it has to be properly cared for. I rule that HMRC's re-seizure of the cash yesterday was lawful and their application for a cash detention order can be renewed under section 295 of POCA 2002."

10. She granted an order for the detention of the cash for six months. She expressed the view that the first detention order (made by the lay Bench on 18 January) had been "null and void". Mr Lennon KC, on behalf of the Claimants against whose property it was made, submits that, though wrong in law, it was a valid order and had to be obeyed until set aside. For my part I think Mr Lennon is right, but I do not think that it affects the outcome of the appeal.

Sections 294-298 of POCA 2002

11. Sections 294-297 provide, so far as material:

> 294.
>
> (1) An officer of Revenue and Customs… may seize any cash if he has reasonable grounds for suspecting that it is—

(a) recoverable property [which includes property obtained through unlawful conduct or which represents such property]

(b) intended by any person for use in unlawful conduct.

(2) An officer of Revenue and Customs… may also seize cash part of which he has reasonable grounds for suspecting to be—

(a) recoverable property, or

(b) intended by any person for use in unlawful conduct,

if it is not reasonably practicable to seize only that part.

(3)This section does not authorise the seizure of an amount of cash if it or, as the case may be, the part to which his suspicion relates, is less than the minimum amount.

…

295.

(1) While the officer of Revenue and Customs, constable, SFO officer or accredited financial investigator continues to have reasonable grounds for his suspicion, cash seized under section 294 may be detained initially for a period of 48 hours.

…

(2) The period for which the cash or any part of it may be detained may be extended by an order made by a magistrates' court or (in Scotland) the sheriff; but the order may not authorise the detention of any of the cash—

(a) beyond the end of the period of six months beginning with the date of the order,

(b) in the case of any further order under this section, beyond the end of the period of two years beginning with the date of the first order.

(3) A justice of the peace may also exercise the power of a magistrates' court to make the first order under subsection (2) extending the period.

(4) An application for an order under subsection (2)—

(a) in relation to England and Wales and Northern Ireland, may be made by the Commissioners of Customs and Excise, a constable, an SFO officer or an accredited financial investigator,

> (b) …
>
> and the court, sheriff or justice may make the order if satisfied, in relation to any cash to be further detained, that either of the following conditions is met.
>
> (5) The first condition is that there are reasonable grounds for suspecting that the cash is recoverable property and that either—
>
> (a) its continued detention is justified while its derivation is further investigated or consideration is given to bringing (in the United Kingdom or elsewhere) proceedings against any person for an offence with which the cash is connected, or
>
> (b) proceedings against any person for an offence with which the cash is connected have been started and have not been concluded.
>
> ...
>
> 296 Interest
>
> (1) If cash is detained under section 295 for more than 48 hours (calculated in accordance with section 295(1B)], it is at the first opportunity to be paid into an interest-bearing account and held there; and the interest accruing on it is to be added to it on its forfeiture or release.
>
> 297 Release of detained cash
>
> (1) This section applies while any cash is detained under section 295.
>
> (2) A magistrates' court or (in Scotland) the sheriff may direct the release of the whole or any part of the cash if the following condition is met.
>
> (3) The condition is that the court or sheriff is satisfied, on an application by the person from whom the cash was seized, that the conditions in section 295 for the detention of the cash are no longer met in relation to the cash to be released."

12. Section 298 provides for applications for the forfeiture of cash detained under (inter alia) s 295. Where such an application is made, s 298(4) provides that the cash is to be detained, and may not be released, until the forfeiture proceedings, including any appeal, have been concluded.

The claim for judicial review

13. The claim before the court is an application for judicial review in respect of:

(i) The lawfulness of the HMRC's decision of 20 January 2023 to issue a 'fresh' application for a cash detention order;

(ii) The lawfulness of the re-seizure of the cash on 23 January 2023;

(iii) The lawfulness of the District Judge's ruling of 24 January 2023.

The application decision

14. The first point can be disposed of very quickly. No application for a fresh detention order was made on 20 January. The claimants were simply given advance notice (and rightly so) on that date that the cash would be re-seized and that an application would be made to the court on 24 January. Mr Lennon KC for the Claimants accepted in oral argument that this merges into the challenges to the re-seizure and to the District Judge's decision of 24 January that the re-seizure had been lawful. The crucial issue in the case is whether the re-seizure was lawful.

The re-seizure

15. The Claimants' central argument - the point of principle - is that they say there is no power to re-seize under s 294 cash which has previously been seized under the same statutory provision, since to do so circumvents the strict 48 hour limit. If they are wrong on the point of principle, they argue in the alternative that HMRC were obliged to return the cash to the possession of the Claimants before exercising any power to re-seize it, doing so either physically or by paying the money into a bank account as provided for by s 296 and forthwith transferring it into the Claimant company's bank account.

16. Mr Lennon submits that Parliament intended that the period for which cash may be seized without its continued detention being authorised by a court was deliberately made very short. Parliament had made amendments to s 295 when enacting the Serious Crime and Police Act 2005: this inserted new subsections, the effect of which was that the period of 48 hours would no longer include any Saturday or Sunday, Christmas Day, Good Friday or a bank holiday; but the 48 hour period itself remained unaltered. He submits that once the 48 hour period has expired it is no longer open to the detaining authority to hold onto the cash nor to "re-seize" it, nor to apply to the court for an order authorising continued detention.

17. Mr Rainsbury points out that this strict construction would mean that an officer could make a valid application to detain seized cash under s 295 before the statutory deadline, yet, for reasons entirely outside the officer's control the application was not determined in time. Mr Rainsbury gives a number of examples as to why this could occur, most of which will be familiar to anyone practising in Magistrates' Courts:-

- restricted access to court during the pandemic;
- closure of the court building due to a heating problem;
- the court building was evacuated after a fire, fight or protest;

- there was a strike;
- there was a long custody list which took priority;
- the usher lost the courtroom key;
- the CVP link did not work;
- there was a delay in locating the court file;
- the judge got stuck in the lift; or
- defence counsel became unwell.

18. He cited *Millington and Sutherland Williams on The Proceeds of Crime* (6th edn, 2023) at [17.69]:

> "It is perhaps worthwhile remembering that the overriding purpose of POCA is to recover the proceeds of crime. To return, for example, £100,000 of cash that can be linked to unlawful conduct, on the basis that an officer was ten minutes late in lodging an application, or on some other technicality, may, it is suggested, offend against the overall intention of Parliament. One remedy, presumably (and subject to abuse arguments), would be to return the money, and then re-seize it."

19. Mr Rainsbury did not, however, seek to uphold the validity of the lay Bench's decision at 17:50 (12 minutes after time ran out) on the basis of some form of de minimis exception. He was right not to do so. The doctrine of legal certainty makes such a contention unsustainable, however sensible it might be if the Parliamentary draftsman had thought of it.

The authorities

20. On the issue of principle the Claimants rely on three cases. In *R v Uxbridge Magistrates' Court ex p Henry* (unreported, 7 February 1994) this court had to consider a statute which provided that "cash seized by virtue of this section shall not be detained for more than 48 hours unless its continued detention is authorised by an order made by a justice of the peace". The court held that the use of the word "continued" was critical and that an order for continued detention could not be made retrospectively after the 48 hour period had expired.

21. An identically worded provision (though in a different statute) was considered by this court in *Walsh and Etherington v HM Customs and Excise* [2001] EWHC (Admin) 426 where the same conclusion was reached. It was observed by Latham LJ that:

> "Although the matter had not been the subject of argument before the court in *Henry*, it has been the subject of argument before us, as I have already indicated. I have no doubt that the wording of subsection (2) is such as to preclude any justice from making any order authorising the continued detention of any

> cash under that section after the end of 48 hours from seizure. This statutory provision is one which, in my judgment, has to be construed strictly as explained by Scott Baker J and Kennedy LJ in *Henry*. I acknowledge the consequence that there are practical difficulties which will confront Customs & Excise, and indeed there may be some uncomfortable decisions that have to be made by justices under constraints of time as a result, but I can see no escape from the conclusion that the section only authorises the detention of the property up to the end of 48 hours from seizure. The moment that 48 hours has elapsed, if there has been no extension, then there is no authority for the continued detention of that money. In other words, there is no existing authorisation to retain the money which can be extended under section 42. The problem, it seems to me, arises from the fact that Parliament has decided that, in this procedure, unlike in some others, the cut-off period should be as draconian as appears on its face."

22. In *HMRC v Mann* [2021] EWHC 1182 (Admin), this court considered s 295(2) of POCA. *Mann* was a case in which a first detention order had been made under s 294(2)(a) of POCA on 3 October 2019 for a period of six months. This was due to expire on 3 April 2020. Because of the onset of the lockdowns at the start of the COVID pandemic, no hearing took place until 22 June. District Judge Green held that she had no jurisdiction to order the continued detention of the cash beyond the expiration of the first six month period of detention.

23. In giving a judgment in that case, with which Cavanagh J agreed, I said that *Walsh* had in my view been correctly decided. I added:-

> "Moreover, even if the matter were free from authority it seems to me that the construction for which HMRC argue in the present case is contrary to the natural meaning of the statute. Section 295(2) uses the word "extended". I do not accept that Parliament was using the word in anything other than its natural meaning which is that the decision must be made before the original period expires. Otherwise the so-called extension is retrospective."

24. This court therefore upheld the decision of District Judge Green and dismissed HMRC's appeal. However, as noted at paragraphs 22-23 of that judgment, the question of whether HMRC could properly have re-seized the cash was expressly left open. I said:-

> "22. In the present case, HMRC, we are told, took the view that if, following the decision of District Judge Green, they had simply re-seized the cash, that might be perceived as an abuse of process or, at any rate, somewhat disrespectful to the court. Mr Rainsbury, wearing his hat of presenting arguments which might have been advanced on behalf of the respondent, says that it might have been argued that if the decisions in the *Hickman* and *Iqbal* cases apply by analogy, it could be said that a re-seizure power is available to the Commissioners in the present case, in

> which case the public policy arguments which he says justify the prosecution's construction of s 295(2), may not involve such drastic consequences after all.
>
> 23. We are in no position to say whether it would be an abuse of process for the Commissioners to re-seize cash in a case such as the present, where (i) an application has been lodged with the court for continued detention; (ii) through no fault of the Commissioners, the application is not listed until the authorised period of detention expires; and then (iii) as the District Judge has held, and I would also hold, it is too late for an order for an extension to be made. If the Commissioners were to re-seize the cash and Mr Mann, or his representatives, were to object that this constituted an abuse of process, that issue would be a decision for another court to make on another day. Particularly in the absence of any advocate representing the respondent, it is not a matter on which we should express an opinion."

25. We are told that subsequent to the decision of this court in *Mann*, HMRC did attempt to re-seize the cash, applied to District Judge Sweet at Wimbledon Magistrates' Court for an extension, and were refused the order they sought. The decision was given orally and has not been transcribed, though an attendance note was made by HMRC. Mr Lennon KC is right to say that the fact of District Judge Sweet having ruled that a re-seizure under s 294 was unlawful should have been brought to the attention of District Judge McIvor in the present case, although of course the view of one District Judge in the Magistrates' Court is not binding on another. The non-disclosure was unfortunate but not so serious a matter as to justify discharge of District Judge McIvor's order without consideration of the merits. HMRC did disclose the fact of District Judge Sweet's decision in their Summary Grounds of Resistance to the application to this court for judicial review. We now have the attendance note in our papers; it was not referred to by either side in oral argument.

26. We were referred to a number of cases on re-seizure under other statutes. The first was *Chief Constable of Merseyside Police v Hickman* [2006] EWHC 451 (Admin). Police had seized £6,756 in cash under s 19 of the Police and Criminal Evidence Act 1984 ("PACE") on the grounds that it provided possible evidence of drug dealing. The owner of the money, Lee Hickman, was later charged with possession of cannabis with intent to supply. On 29 March 2004 he pleaded guilty to simple possession of cannabis and was conditionally discharged. No order for forfeiture of the cash was made. Once the criminal proceedings were over, the authority of the police to hold the cash lapsed. Some months later, on 13 September 2004 the police purported to reseize the money under POCA.

27. Mitting J asked at paragraph 24 whether there was a special limitation on the exercise of the power to seize under s 294 because a different statutory power (s 19 of PACE) has been exercised in relation to the same property. He held that there was no principled reason why there should be. He next asked, at paragraph 25, whether a constable can seize cash which is already in the possession of the police. He said that:-

> "The answer is clearly yes, just as seizures under Section 19 can be, and are routinely, made of property in the possession of the

> police at a police station following the arrest and search of a suspect."

28. He added that the statute does not require that the cash be in the possession of another person before it can be seized by a constable.

29. The next was *R (Cook) v Serious Organised Crime Agency* [2011] 1 WLR 144. In that case SOCA had executed three search warrants and seized various items. The executions of the warrants had, however, been unlawful. Mr Cook was invited to attend a police station to reclaim his property. After he had signed receipts he was informed that SOCA were re-seizing the items pursuant to s.19 of POCA. This court held that the unlawful seizure of property could not be changed into a lawful seizure on the basis that a claimant had attended a police station and signed a receipt. Before *unlawfully* seized property could be lawfully re-seized it had to be restored to the possession of the person from whom it had been taken.

30. *Iqbal v South Bedfordshire Magistrates' Court* [2011] EWHC Admin 705 was another case in which cash had been seized under s 19 of PACE and then re-seized under s 294 of POCA; the re-seizure was several months later. The police, without returning the money to the Claimant, applied to a Magistrates Court for continued detention under s 295. The court granted the application. An application to this court for judicial review was refused. Pill LJ said at paragraph 29(8) that the case was plainly distinguishable from *Cook* in which the requirement to return the cash first before re-seizing arose "because and only because" the original seizure had in that case been unlawful.

31. In *R (HM) v SSHD* [2022] EWHC 695 (Admin) mobile phones had been seized unlawfully from immigrants arriving from small boats at Dover. The phones had been examined and data extracted. It was admitted before this court that the policy under which the phones had been seized was unlawful. A judicial review challenge was upheld. *Hickman* was distinguished on the basis that the original seizure of cash in that case had been lawful.

32. In *R (Merida) Oil Traders Ltd v Central Criminal Court* [2017] 1 WLR 3680 Gross LJ said:

> "First, we think that section 295 of the 2002 Act, properly interpreted, only permits cash to be detained where its seizure was lawful. That is because the reference in section 295(1) to "cash seized under section 294" is naturally and reasonably understood to mean "cash lawfully seized under section 294". It would be unwarranted and unsustainable to interpret section 295(1) as authorising the continued detention of cash where section 294 was wrongly invoked to try to justify the seizure of the cash although there was no power to seize it under section 294. Similarly, it would be unwarranted and unsustainable to interpret section 295(2) as giving a magistrates' court the power to extend a period of unlawful detention."

Discussion

33. There is nothing in s 294 to indicate that it is unlawful to re-seize cash which has previously been lawfully seized. The cases where the initial seizure had been unlawful are plainly distinguishable. So too are the cases about s 295: *ex p Henry*, *Walsh* and *Mann*, all of which turn on the use of the word "continued" or "extended".

34. Mr Lennon's argument, however attractively put, seems to me to boil down to this: that, while counsel were addressing the Magistrates' Court on the afternoon of 18 January, as the court clock moved to the time of 17:38 the authority of HMRC to detain the cash expired; the magistrates therefore made the order 12 minutes too late; and that was a defect that could never be cured either by re-seizure of the cash or by any order of the Magistrates' Court. In other words, at 17:38 the cash, though still suspected - for very good reason - to be "recoverable property", had acquired immunity from seizure or detention.

35. I appreciate Mr Lennon's point that the decision of Parliament to specify a 48 hour time limit, and the fact that it has remained unaltered save to make provisions for weekends and bank holidays, is a point in the Claimants' favour. But it is not sufficient to persuade me that Parliament must have intended that a second application to a court, following a re-seizure, must be unlawful. It would be extraordinary if the 48 hour time limit on lawful detention had such a decisive effect; there is a striking contrast with s 298, where the mere fact of an application for forfeiture being lodged with the court is enough to justify detention of the cash until the magistrates' court proceedings and any appeal have been concluded. There would also be serious practical difficulties for the courts. Applications to renew the detention of cash, where the initial seizure was in the late afternoon or evening, would either have to be heard the next day (giving the person from whom the cash was seized no time to prepare) or given priority ahead of other urgent business, including custody cases. Even then the case could be beset by any of the routine mishaps set out in paragraph 17 of this judgment. Further, while there is no suggestion of time-wasting in the present case, the prospect of an unscrupulous advocate trying to run down the clock may not be entirely fanciful.

36. As Mr Rainsbury rightly argues there are obvious safeguards against abuse of the s 294 power. In an appropriate case re-seizure could be challenged as an abuse of process, as Mitting J held in the forfeiture case of *R (Atwal) v Barking Magistrates' Court* [2009] EWHC 3862 (Admin). It might well be an abuse of process for HMRC to exercise the power to re-seize cash after the 48 hour period from the initial seizure had elapsed where they had taken no steps to seek the authority of the court for a further period of detention. But here they had done everything they reasonably could to obtain a hearing: the fault lay with the court system, not with them.

37. A second possibility is that the application to detain for a further period of six months could have been challenged on the merits. The Claimants' failure to make such a challenge no doubt reflects a realistic appraisal of the facts. A third, if the s 295 conditions for detention of the money were no longer being met, would have been to apply for its release under s 297.

38. I would also reject the suggestion that what I will call the re-seizure ceremony at HMRC's offices on 23 January was unlawful because re-seizure could only take place after the cash had been handed back to the Claimants. As Pill LJ pointed out in *Iqbal*,

that was only required in the *Cook* case because the original seizure had been unlawful. If re-seizure was lawful in principle, as I consider that it was, it would be nonsensical to suppose that the £400,000 in bank notes had to be brought to KCL's premises (with the obvious attendant security risk) for the ceremony to take place there.

39. This makes it unnecessary to consider Mr Rainsbury's fallback argument (at first sight not a very promising one) that if redelivery to KCL's premises was required as a precondition of a lawful reseizure, the Claimants had waived it by not responding to the invitation to attend the re-seizure. It is similarly unnecessary to consider s 31(2A) of the Senior Courts Act 1981.

The reasoning of District Judge McIvor

40. Mr Lennon finally complains that this decision (which was followed by a further decision granting the application for continued detention of the cash) was inadequately reasoned. I disagree. It is simply a very brief summary of the conclusions which I have set out at greater length, namely that the re-seizure was lawful and that there was no reason why a second application could not be made.

Conclusion

41. I would therefore reject each of the grounds advanced by the Claimants and dismiss the claim for judicial review.

Mrs Justice Tipples:

42. I agree.