

THE HIGH COURT

2006 No. 883 P

BETWEEN

ATTORNEY GENERAL

PLAINTIFF

AND

LIAM RAFFERTY T/A CARHILL CAR SALES

DEFENDANT

Judgment of Mr. Justice John MacMenamin delivered on the 12th day of December, 2008.

1. In these proceedings the plaintiff claims an order pursuant to s. 127 of the Finance Act 2001, for the forfeiture and condemnation of a total of six vehicles by reason of non payment of vehicle registration tax. Five of these vehicles were detained from garage premises at Barrack Street, Granard, Co. Longford, on 9th December, 2004. These were a Nissan Tirano; a Range Rover HSE; a Mitsubishi L200; a BMW X5, and a new (Nissan) X Trail. All of these are identified either by vehicle registration numbers, or the chassis number of the vehicles. The identity of the vehicles is not in dispute.

2. The plaintiff seeks a similar order in relation to a 01 Amazon 42 VX, which vehicle was detained from 1, Laurels Terrace, Granard, County Longford on the same date.

3. As a result of a further determination made by the Revenue Commissioners on 6th January, 2005, it was decided that these vehicles be seized pursuant to the provisions of ss. 140(1) and 140(4) of the Finance Act 2001, and s. 139(6) of the Finance Act 1992. The basis upon which this claim was brought is that the vehicles in question were unregistered for VRT purposes, an offence contrary to s. 139(3)(a) of the Finance Act 1992. The applicable procedure is outlined more fully in a judgment delivered on the same date as the judgment herein; *L.C. Autolink Ltd & Anor v. Feehily & Ors.*, High Court, MacMenamin J., 2008, No. 348 JR. The cases were heard separately and relate to entirely different events and parties.

4. In these condemnation proceedings, the Court heard evidence from a number of Revenue officials including John Heffernan, Padraig O'Laochdha, and Deirdre Martin.

5. On 7th December, 2004, the Revenue applied for search warrants in relation to the two premises in question in Granard, Co. Longford. On 9th December, 2004, officials visited both these premises. The first was a garage at Barrack Street, Granard, Co. Longford. The five identified vehicles were among the cars found there. Mr. Padraig Keane operated the garage business. A check was carried out on the register of cars maintained for VRT purposes. Imported vehicles are to be recorded in this register maintained by the Revenue, generally, within one day. The vehicles in question had not been so registered. Consequently, a determination was made to detain the vehicles by Mr. John Heffernan, Revenue official.

6. On the same day, a further vehicle was detained at No. 1, Laurels Terrace, Granard, Co. Longford, the home of John Keane, the brother of Padraig Keane. The evidence disclosed that this vehicle was part of the stock of the garage business. It too, was unregistered.

7. On 23rd December, 2004, a meeting took place between Revenue officials and Mr. Padraig Keane. He was asked a number of questions about the first five vehicles identified. He indicated that they were owned by a company which operated in Northern Ireland, named Carhill Car Sales, of which Liam Rafferty (the respondent) was the principal. It is not in dispute that these vehicles had been imported into the State for the purpose of sale to Keane's Garage at Granard, Co. Longford. It has been agreed by the parties that ownership does not arise as an issue.

8. Further interviews subsequently took place between Revenue officials, and Padraig Keane, John Keane, and on one occasion their solicitor. The first such interview was on 23rd December, 2004, when, only Padraig Keane attended. A number of questions were put to him as to the provenance of the cars. He responded that they had been placed for sale in his garage by Carhill Car Sales.

9. On 6th January, 2005, the Revenue determined that they would seize the vehicles pursuant to s. 141 of the Finance Act 2001. No point is taken in relation to the form of the notices of detention and seizure. In response to cross examination, two of the Revenue officials, Mr. Heffernan and Mr. O'Laochdha, stated that, in carrying out the search of the garage premises, they executed a search warrant which had been sought on 7th December, 2004, on application to the District Court.

10. As of 23rd December, 2004, the Revenue officials had before them information to the effect that the vehicles in question were owned, not by John and Padraig Keane but by Liam Rafferty, trading as Carhill Car Sales. This information was given to them by the Keanes. On 24th January, 2005, a meeting took place between the Revenue officials and Mr. Rafferty. He accepted that he had given the vehicles to the Keanes to sell and that no VRT or VAT had been paid on them. He told the officials that he had no written agreement with the Keanes and all the dealings between them were by word of mouth.

11. At a further meeting which took place on 14th February, 2005, between Revenue officials and John Keane, the latter accepted that he was in possession of the Amazon vehicle, but stated it had been given to Padraig Keane for the purposes of sale. He accepted it had not been registered for VRT either.

12. The defence raised a wide range of matters including the constitutionality of the legislation, and its compatibility with the European Convention on Human Rights. Ultimately however, the only issues to be determined by the Court are those which are now considered. No other issue was pursued by the defendant. The defence did not go into evidence.

I. Locus standii

13. The first issue raised was whether the Attorney General any longer had *locus standii* in order to maintain proceedings of this type. Counsel for the defendant submitted not. He relied on the provisions of s. 127(2) of the Finance Act 2001, which deals generally with the procedural step of condemnation, the court process whereby the thing seized is condemned as forfeited by a court. That subsection provides:-

"(2) subject to subsection 3, where a notice in respect of anything is duly given under section 143, the *Commissioners* shall take proceedings for the condemnation of the thing by the court, and in case the court finds that the thing was at the time of seizure liable to forfeiture, the court shall condemn it as forfeited, and in any other case shall order its release." (emphasis added).

14. It is contended that this subsection operates so as to amend previous legislation which empowered the Attorney General to bring such proceedings. The Act of 2001 does not purport to revoke or amend any previous statute in relation to this important question. Had it been in the intendment of the Oireachtas to eliminate the role of the Attorney General in initiating such claims it is clear that this would require specific statutory provision by way of revocation or amendment. Instead, here, it is contended that the terms of s. 127(2) are an *implied* amendment of the provisions of the Inland Revenue Regulation Act 1890, which provided for the initiation of proceedings and also of s. 53 of the Finance Act 1987. The latter provides:-

"53. —Section 21 of the Inland Revenue Regulation Act, 1890, is hereby amended by the substitution of the following subsection for subsection (1):

"(1) It shall not be lawful to commence proceedings against any person for the recovery of any fine, penalty, or forfeiture under any Act relating to Inland Revenue, or for the condemnation of any goods seized as forfeited under any such Act, except in the name of an officer *or in the name of the Attorney General or in the name of the Director of Public Prosecutions.*"

15. In the face of this clear provision, to revoke or remove a power of prosecution would require something more than mere implication. Such a step, affecting the *locus standii* of the chief law office of the State would require an explicit revocation indicating legislative intendment. I find that the position as to *locus standii* in the initiation of proceedings by the Attorney General has been unaffected by the provisions of s. 127(2) of the Act of 2001. While the proceedings may be initiated by the Revenue Commissioners, it is noteworthy that the terms of s. 53 of the 1987 Finance Act are to the effect that the proceedings for condemnation may be *in the name* of the Attorney General. There is no legislative incompatibility between the proceedings being initiated by the Revenue Commissioners, *but* in the name of the Attorney General. This point therefore fails.

II. A requirement for conviction prior to proceedings?

16. The next point is as to whether condemnation proceedings may be brought in the absence of a conviction for an offence under the Act.

17. It is necessary to refer to s. 126 of the Act of 2001. In the side margin note to the text the following rubric or explanation is contained as to the content of the section:-

"proceedings in relation to offences".

The section itself provides:-

"126.—(1) This section is concerned with proceedings in relation to any offence under or by virtue of the statutes which relate to the duties of excise or to the management of such duties or under any instrument relating to the management of such duties made under statute.

(2) Where there is evidence that an offence has been committed by several persons jointly—

(a) proceedings may be instituted against such persons, jointly or severally, for the recovery of a fine or penalty, and

(b) on *conviction*, such persons shall jointly and severally incur every such fine or penalty...."

There is a clear distinction drawn between the commission of an offence and a conviction therefore. The distinction is reflected in s. 139 of the Finance Act 1992 which clearly distinguishes between the proof of offences (failure to register or account for absence of registration) and conviction carrying stipulated penalties.

18. Section 126 should be read then with reference to s. 127 of the Act (which provides for condemnation procedures) cited above. The latter provides that if the court finds that the thing was at the time of seizure liable to forfeiture it shall "condemn it as forfeited and in any other case order its release".

19. In reliance on these provisions it is contended that, for condemnation under the Act to take effect it is necessary that "the offence" be demonstrated to have been committed *and* that this, in turn requires that the defendant must have been convicted of that offence. It is suggested that in the absence of such conviction, it cannot be contended that there is an offence at all.

20. I am not persuaded by this submission. The precise provisions of s. 126(1) relate to proceedings in relation to an offence under the statutes. But by virtue of subsection 2(a) it specifically envisages that where an offence has been committed by several persons jointly, *proceedings* may be instituted, and that thereafter, (as provided by s. 126(2)(b)), "on *conviction* such persons shall jointly and severally incur every such fine or penalty".

21. There is no requirement whatever for there to be a *conviction* in order to establish that there has been an offence. Section 126 outlines the form of proceedings which are to be taken in relation to offences. It envisages, logically, that these will be initiated prior to conviction. The commentary in the side margin of the Act refers to proceedings in relation to offences. It does not say "proceedings subsequent to conviction".

22. None of the other provisions of the Act of 2001, support this argument although there are ample references to the term "offence" in the Act without any necessary statutory linkage to "conviction".

23. I am fortified in this conclusion by the authority of *Attorney General & Southern Industrial Trust Ltd. v. Simons* [1957] I.L.T.R.Vol. at p. 162.

24. The case concerned a car purchased in Ireland on foot of a hire purchase agreement. It was subsequently brought by a purchaser to Northern Ireland, thereafter to Great Britain. Thereafter the purchaser was advised that the car in question had been wrongfully

imported there and it was reconsigned to Ireland, and seized by a Customs officer on the grounds of suspicion that it had been unlawfully exported from Ireland in the first instance.

25. The defendants, Southern Industrial Trust were the owners of the car. They claimed its return. In the course of proceedings brought by the Attorney General for condemnation of the car it was held by Davitt P. and affirmed by the Supreme Court, that while the facts established showed that Mr. Simons, the purchaser, had committed a criminal offence, that did not make the condemnation proceedings criminal proceedings. There was no question of a "conviction" therein. They were in fact, civil proceedings. Davitt P. observed at first instance:-

"these proceedings in my view are civil proceedings and not criminal. It is not sought here to make anyone amenable for a criminal offence. It is not even suggested in the pleadings or otherwise that the Southern Industrial Trust Co. were guilty of anything whatever, nor is it sought to bring Mr. Dennis Simons to justice for the offence of exporting his car without a licence. In the events which have happened the statute declares that this car shall be forfeited; and if no claim had been made by the Southern Industrial Trust Co., the Revenue Commissioners under the provisions of the Customs Consolidation Act could have proceeded to realise the value of the car by sale or otherwise. Since a claim was made they cannot do so unless and until they have obtained through the Attorney General an order of the court adjudging it to be condemned and forfeited."

Davitt P. added:-

"In proving the circumstance which justify the forfeiture it is necessary to establish facts to show that Dennis Simons committed a criminal offence. That does not make these proceedings criminal proceedings. They are in my opinion civil proceedings brought, in effect, to establish the title of the Revenue Commissioners to the car."

I find this observation of particular assistance. It clearly distinguishes between facts constituting an offence as a proof on the one hand and a conviction on the other. The judgment of Davitt P. on this aspect of the case was not disturbed by the Supreme Court.

26. The instant case too, is a civil proceeding. In the course of it, it is necessary to prove that an offence has been committed. The fact has not been contested that the cars in question were not registered for VRT. The fact has not been contested that they were so liable. On such facts one is inexorably driven to the conclusion that facts constituting an offence have been committed. This is one prerequisite for the triggering of these condemnation proceedings – not a conviction in a criminal case. I do not consider that any of the statutory provisions to which I have referred, support the interpretation urged by the defendant in this case. I consider the defendant's case fails on this point also. There is no need for a conviction prior to bringing condemnation proceedings.

III. The procedure subsequent to the obtaining of the search warrants

The warrant procedure

27. Section 136(5) of the Act of 2001, provides:-

"(5) Without prejudice to any power conferred by *subsections (1) to (4)*, a judge of the District Court may, if satisfied on the sworn information of an officer that there are reasonable grounds for suspecting that—

- (a) anything liable to forfeiture under the law relating to excise, or
- (b) any records relating to transactions in contravention of the laws relating to excise,

are kept or concealed on or at any premises or place, issue a search warrant...."

a vehicle may thereupon be detained and subsequently seized if it is reasonably suspected there has been non payment of vehicle registration tax.

28. Section 140 of the Finance Act 2001, also outlines powers of the Revenue in relation to detention without warrant of goods and vehicles. It provides at subsection 3:-

"(3) Where an officer or a member of the Garda Síochána reasonably suspects—

- (a) that a vehicle has not been registered in any of the registers established and maintained under Chapter IV of Part II of the Finance Act, 1992, ...
- (c) that vehicle registration tax has not been paid in respect of a vehicle,

then such officer or member may detain such vehicle for such period as is required to carry out such examination, enquiries or investigations as may be deemed necessary by such officer or member to determine to his or her satisfaction whether or not—

- (i) such vehicle has been registered,
- (ii) such declaration has been made, or
- (iii) such vehicle registration tax has been paid."

Subsection 4 of Section 140 provides:-

"(4) When a determination referred to in *subsection (1), (2) or (3)* has been made in respect of any excisable products, other goods, other thing or a vehicle or on the expiry of a period of one month from the date on which such products, goods, other thing or vehicle were or was detained under that subsection, whichever is the earlier, such products, goods, other thing or vehicle are to be either seized as liable to forfeiture under the Customs Acts or under *section 141*, or released."

The powers in the section may only be exercised on reasonable suspicion.

29. Section 141 deals with the power of seizure. It provides, insofar as relevant:-

"(1) Any goods or vehicles that are liable to forfeiture under the law relating to excise may be seized by an officer..."

30. As no issue arises under s. 142 of the Act, it is necessary for completeness to deal with the provisions of s. 143 which provides:-

"143.—(1) A person who claims that anything seized as liable to forfeiture is not so liable, (referred to in this section as the "claimant") shall, within one month of the date of the notice of seizure or, where no such notice has been given to the claimant, within one month of the date of the seizure, give notice in writing of such claim to the Commissioners."

(2) A notice under subsection (1) shall specify the name and address of the claimant and, in the case of a claimant who is outside the State, the name and address of a solicitor in the State who is authorised to accept service of any document required to be served on the claimant and to act on behalf of the claimant.

31. There is no issue that lawful search warrants were obtained for both premises where the motor cars were seized. There has been no challenge to the content of the warrants. A warrant obtained by John Heffernan on 7th December, 2004, empowered him and other authorised officers of the Revenue to enter the premises of Padraig Keane of Granard Motors at Barrack Street. Similarly the warrant obtained by Padraig O'Lauchdha empowered him to enter the premises of John Keane at 1 Farrell's Terrace.

32. I am unable to find any support for the proposition that the invocation of the warrant procedure in any way negates or derogates, from the operation of the provisions of the remainder of the Act of 2001. There is no incompatibility between the powers of detention and seizure under s. 136 and ss. 140 and 141. They are the same powers. The evidence of the Revenue officials was that they had proceeded on foot of the search warrants. But they also testified that the vehicles were detained and seized under the Act, that is, by virtue of the powers vested in the Revenue Commissioners under ss. 140 and 141 of the Finance Act 2001. I find no inconsistency between the invocation of a warrant procedure and reliance upon the provisions of s. 140 of the Act which provides that (without warrant) an officer with reasonable suspicion:-

"...may detain such vehicle for such period as is required to carry out such examination, enquiries or investigations as may be deemed necessary by such officer or member to determine to his or her satisfaction whether or not ... there has been compliance with the VRT registration provisions."

33. By virtue of s. 141 of the Act of 2001, it is provided:-

"141-(1) any goods or vehicles that are liable to forfeiture under the law relating to excise may be seized for an officer ...".

The warrants obtained pursuant to s. 136(5) of the Act of 2001 empower the authorised officers to detain or seize a thing as being liable to forfeiture. These powers are mirrored in the provisions of ss. 140 and 141 of the Act. But while there may be an element of duplication in the provisions, I cannot find that there is any mutual exclusivity between them. At worst it might be seen as a "belt and braces" approach. No issue arises under s. 142 of the Act.

IV. Has there been delay?

34. There is no doubt that this claim could have been processed with greater alacrity. The detention took place in 2004. These proceedings were heard in November, 2008. A significant elapse of time between detention and seizure might have the effect of allowing the inference that the seizure power had been elided with that of detention and as a consequence giving rise to statutory obligations in relation to the detention procedure. But this is not the case here. The delay was after seizure.

35. The determination to seize the goods took place with relative punctuality, that is to say on 6th January, 2005, the goods having been detained on 9th December, 2004. There was significant correspondence after that time. Letters were written between 8th April and 23rd November on behalf of the defendants seeking to elicit information from the Revenue Commissioners as to their intentions. Ultimately the elapse of time was such that the defendant initiated judicial review proceedings on 5th December, 2005. These proceedings were ultimately stayed on the initiation of the condemnation proceedings on 24th February, 2006.

36. On the date of initiation of the condemnation proceedings, both plenary summons and statement of claim were served. There the plaintiff's case was set out in full. But the defence was not filed for more than eight months, until 1st November, 2006. Thereafter a reply and defence to the counterclaim was punctually delivered by the plaintiff on 7th December, 2006. If there was a delay during the year 2006, such delay lay far more at the door of the defendant. I do not consider that there is evidence of any delay subsequent to that time. I have been informed that the matter was previously listed for hearing and was unable to proceed due to other court business. The defendant did not proceed with the judicial review proceedings which complained of delay.

No prejudice

37. I find the issue of delay is in any case not relevant to these proceedings in light of the fact that the defendant has not been able to demonstrate prejudice. The defendant chose not to go into evidence. There is no evidence of prejudice. The cars in question appear to be second hand cars. There is no evidence of substantial depreciation. Even if there has been delay it has not been shown that there is any disadvantage or detriment. No abuse of process has been shown.

V. Proportionality

38. It is contended finally that there is disproportionality on the basis that the defendant in these proceedings was unable to avail of the ordinary compromise procedure which might have allowed for the release of the vehicles in the event of his being found to be an innocent party. First it must be reiterated that there is no challenge brought to the constitutionality of the provisions invoked and relied on. There is no evidence on which the Court might make any determination on a proportionality issue however invoked. It is not a doctrine which can be invoked on some principle of *res ipsa loquitur*.

39. It was accepted in evidence that there is a concession which may be applied by the Revenue to an innocent party in these circumstances. But that concession is discretionary and provisional on circumstances not met here. An evidential onus shifts once the evidence has been adduced on behalf of the plaintiff. For proportionality argument to succeed there would have to be evidence that the concession would and should have operated in favour of the defendant. There was no such evidence from the defendant.

40. It is said that the defendant is entitled to the presumption of innocence. In submissions counsel has sought to portray him as

being an innocent participant in the events in question. He is entitled to this presumption. But this would by no means establish that the determinations of the Revenue and their effects are disproportionate. This is so even if those procedures had the effect that the Revenue did not offer a standard concession which would have been available to an innocent party. The rights of the community, public interest and the common good in issues of this kind may supervene, over the property rights or the interests even of innocent parties. The interest and rights identified necessitate that the effectiveness of the remedy of forfeiture be not nullified.

41. *Simons* cited earlier, was in fact a case where there was an entirely innocent owner. Nonetheless it was held that in the interests of the common good the Trust's claim could not succeed. Davitt P. in the High Court observed at p. 172 of the Report:-

"...the effectiveness of forfeiture as a penalty would however in many instances be nullified if it were not permissible in cases where the goods in question, or the vehicle used to transport them were not the property of the offender. I believe that very many, in fact a large proportion of the motor vehicles in use upon our highways are the property of hire purchase companies who have financed the transactions of gradual purchase by their apparent owners. The advantages of motor transport to the would be smuggler are obvious. If a vehicle used for the purpose of illegal export or import could not be forfeited because it was the property of some innocent hire purchase concern, I should imagine that one consequence would be that vehicles on hire purchase would be practically the only ones so used. The effectiveness of forfeiture as a deterrent penalty would accordingly be seriously diminished to the consequent detriment of the common good. Regarding the matter of the forfeiture of this car, not as an isolated transaction but as part of the larger pattern, we can, I think, arrive at a conflict between the exercise by the owners of their proprietary rights and the exigencies of the common good. *Southern Industrial Trust* cannot exercise their right to have and sell this car in order to realise the balance due to them unless it is handed over to them. For the purpose of this argument we may take it that it will not be handed over to them unless I refuse to condemn it. I will not refuse to condemn it unless the Act is unconstitutional. If the Act is unconstitutional the effectiveness of forfeiture as a penalty will be seriously diminished. This is not in the public interest. If the *Southern Industrial Trust* are to have this car it must be at the cost of detriment to the common good."

42. This decision was upheld by the Supreme Court after consideration as to the manner in which forfeiture operates in accordance with the exigencies of the necessary common good and the approved and proportionate limitation of property rights under the Constitution.

43. For the reasons outlined herein therefore I consider that the plaintiff is entitled to the relief sought. I will condemn the vehicles in accordance with the relief sought in the proceedings.