

THE HIGH COURT

JUDICIAL REVIEW

RECORD NO: 489/2014JR

BETWEEN

MICHAEL MURPHY AND HAZ.COM FUELS LIMITED

APPLICANTS

AND

THE REVENUE COMMISSIONERS

RESPONDENT

JUDGMENT of Mr. Justice McDermott delivered on the 12th day of May, 2016

1. The applicants in this case seek an order of *certiorari* quashing the decision of the respondent to seize and render liable to forfeiture 37,000 litres of mineral gas oil along with a truck and oil tanker. The applicants also seek a declaration that the respondent acted *ultra vires* in purporting to forfeit the mineral oil, truck and tanker. A number of declarations and an injunction restraining the respondent from forfeiting the goods are also sought. Leave was granted on 31st July, 2014 (Hogan J.) to apply for judicial review. There is no challenge in these proceedings to the validity of any of the statutory provisions engaged having regard to the provisions of the Constitution.

Background facts

2. On the 21st June, 2014 the first named applicant, Mr. Michael Murphy, was driving a truck bearing registration number 06 D 78819, towing an oil tanker bearing the identification number BM 385, along the M9 motorway. The tanker contained approximately 36,000-40,000 litres of oil and both the tanker and the oil were said to be the property of the second named applicant, HAZ.COM Fuels Ltd (hereinafter "the Company") of which Mr. Murphy is a director.

3. Mr. Murphy had driven the vehicle from the company's premises and intended to make a delivery of mineral oil to a customer, a Mr. Gibney, with whom both the first and second named applicant had traded for a number of years. The delivery was to be received at a premises in Oldcastle, County Meath. The applicant avers that ordinarily, he would not make deliveries of mineral oil on behalf of the Company. However, no other driver was available when Mr. Gibney called the applicant on 21st June, 2014 stating that he was "stuck" for a delivery.

4. During the course of this journey Mr. Murphy was stopped by Garda Liam Lawlor on the M9 motorway in County Carlow because Garda Lawlor observed inconsistent hazard markings on the truck and the tanker. Garda Lawlor averred in his affidavit that he observed the number 1202 on the rear of the truck, which is the identification code for Diesel, but the identification number for Kerosene, 1223, appeared on the front of the truck.

5. Garda Lawlor spoke to Mr. Murphy and examined the Tachograph Unit in the truck, which creates a record of a driver's driving of a vehicle. Garda Lawlor discovered that the first named applicant was not using a digital tachograph driver's card as is required by section 21(5) of Part 4 of the European Communities (Road Transport) (Working Conditions and Road Safety) Regulations 2008. Garda Lawlor downloaded the information from the Tachograph and found that the truck in fact had a UK registration number. The combination of the numbers used within the registration number was the same as a vehicle registered in the UK in 2008. The truck carried a registration plate number 06 D 78819, indicative of registration in 2006. The applicant claimed to be the owner of the truck and tanker, but when asked to account for the incorrect registration plates, he declined to answer any questions.

6. The chassis number of the truck was also checked by Garda Lawlor against the 2006 registration plate which purported to identify the truck. The chassis number and the registration number did not match, according to the National Vehicle File attached to the Garda Pulse system. The first named applicant refused to account for the incorrect registration plates when questioned by Garda Lawlor. It later transpired that the licence plates were registered to a similar truck owned and operated by the company 'DHL' Supply Chain (Irl) Limited in Dublin.

7. Mr. Murphy was asked to produce "any documents relating to the load" and other documents for the vehicle as were required by law. He could not do so nor could he produce the movement documents, or any documentation relating to the mineral oil contained in the tanker. The applicant was also unable to produce a driver's licence or an ADR driver's card (related to the carriage of dangerous goods). Garda Lawlor avers that Mr. Murphy failed to produce any relevant documents and in particular, the delivery documentation relating to the mineral oil which must be carried during the course of a delivery, contrary to Regulation 23 of the Mineral Oil Tax Regulations 2012(S.I. 231 of 2012) and which is an offence under s. 102(1)(a) of the Finance Act 1999. The only relevant document that the applicant produced was an invoice from HAZ.COM Fuels Ltd to KCT Limited, relating to mineral oil and dated 14th May, 2014 and haulage documents relating to a crane.

8. The applicant was also in possession of €17,514.45 and £1,310.50(UK) in cash when stopped. The applicant claimed that these monies were a combination of his own monies, and monies which he collected from customers of the company over the previous week. This money was seized by the Gardaí but later returned.

9. Garda Lawlor, formed a suspicion that Mr. Murphy was driving a stolen vehicle and arrested him on that basis. He was taken to Carlow Garda Station where he was detained under section 4 of the Criminal Justice Act, 1984 (as amended). Garda Lawlor detained the truck, trailer unit and oil, the cash and Mr. Murphy's mobile phone pursuant to the provisions of section 9 of the Criminal Law Act, 1976. While detained, he was interviewed by Garda Philip O'Sullivan and Garda Liam Lawlor. The applicant answered "no comment" to most of the questions put to him during the course of the interview. However, when asked if there was any reason why he was not carrying transport documents relating to the load, the applicant stated that "If I had one of our usual vehicles I would have had

everything.” At approximately 4.15am on 22nd June, 2014 the applicant was released without charge from Garda custody, having been informed that the truck, tanker, oil and money had been seized by An Garda Síochána. It was confirmed in a letter to the applicants’ solicitors dated 7th July that all matters in issue were “currently under investigation” and that the property would remain in Garda custody. The solicitors would be notified when the case was finalised.

10. On the 22nd June Mr. Leo Harte a Revenue and Customs Officer, had the truck, tanker and oil moved to the State warehouse. Mr. Harte was tasked with sampling the oil and samples were taken from each of the six pods on the tanker. The results of the tests at the State Laboratory indicated that the product was marked mineral oil; the fuel tank contained road diesel. Mr. Harte then detained approximately 36,000 litres of mineral oil under section 140(1) of the Finance Act, 2001, because he suspected that they were liable to forfeiture under s 102(5) of the Finance Act 1999. Mr. Harte also detained the oil tanker under the same provision on the grounds that it was suspected that the oil tanker trailer was liable to forfeiture under s 125(3) of the Finance Act 2001.

11. On the 23rd June, 2014 Kenny Stephenson, solicitors wrote on behalf of both applicants and claimed that the vehicle was not owned by Mr. Murphy or the company. However, it was stated that the fuel tank and the fuel loaded onto the vehicle was the property of the company. It was claimed that the Volvo truck unit was the property of a “third party” who was unnamed and “was simply lent by a third party to Mr. Murphy” to enable him to make the delivery to Mr. Gibney. It was claimed that Mr. Murphy accepted the loan of the truck “in good faith” and the fact that it is the property of another was something for which he did not accept any criminal culpability. The letter sought the return of the money and diesel and offered to meet with Gardaí “to elaborate” on any of these matters. In a later letter dated 17th July, 2014 the solicitors, their client having been interviewed on the 16th July, continued to maintain that the account in the letter of 23rd June set out “in full” the background to the matter.

12. On 26th June, 2014 Mr. John Clancy an Assistant Principal Officer of the Investigations and Prosecutions Division of the Revenue Commissioners issued a Notice of Detention in respect of the mineral oil and the tanker. Notice was thereby given that 36,000 litres of Mineral Oil was detained by an authorised officer of the Revenue Commissioners under section 140(1) of the Finance Act 2001 on 22nd June, 2014 on the grounds that it was suspected that it was liable to forfeiture under section 102(5) of the Finance Act 1999. Notice was also given that the tanker was detained under the same provision on the grounds that it was suspected that it was liable to forfeiture under section 125(3) of the 2001 Act. Mr. Clancy examined the goods at the State warehouse and compiled a report. He received a letter dated 30th June from the applicants’ solicitors in the same terms as that dated the 23rd. He then arranged an interview with Mr. Murphy which took place on 16th July, 2014.

13. During the interview, Mr. Murphy provided a narrative of events: he stated that the company sells marked gas oil directly to private customers, and has eight trucks registered in its own name; the company purchased the truck from the UK via an online auction, but the truck was not registered in the State because it was not driven on a public road. He added that in or around May 2014, the truck was traded to Eddie Mallon Motors, Armagh, in exchange for a van, the full registration details of which he was not personally aware. Invoices were produced in this regard. Mr. Clancy later raised concerns in his affidavit in relation to the authenticity of the invoices. Mr. Murphy also stated during this interview that Mr. Eddie Mallon returned the truck to him as the sale of the unit to an Irish customer had fallen through and he no longer wanted the vehicle. This is not the story as set out in the letter of 23rd June but is the account upon which reliance is now placed in these proceedings. The applicants now claim that their *locus standi* in respect of this truck unit arises from their potential liability to Mr. Mallon for any loss sustained by reason of its seizure.

14. Moreover, during the interview, Mr. Murphy claimed to be delivering the oil to Gibney’s of Oldcastle. The applicants claim in these proceedings that Mr. Gibney is a client since 2003. In this regard, Mr. Clancy in a supplemental affidavit avers that according to Revenue records, there are no declared transactions recorded between the second named applicant and Gibney’s of Oldcastle. The first applicant also stated during the interview, that the relevant delivery documentation was stored in a compartment in the oil tanker. Garda Lawlor was not told this on 21st or 22nd June nor was it stated in the correspondence received from the solicitor.

15. Immediately following the interview, Mr. Clancy attended at the State warehouse, accompanied by a colleague, Mr. Heffernan. Mr. Clancy, in the presence of another colleague, Mr. Bruton, examined the tanker. He found the compartment described by the first named applicant to be completely empty. It did not contain the documentation described. Mr. Clancy photographed the empty compartment which housed a number of valves/taps and compiled a report.

16. On 17th July, 2014 the applicants’ solicitors wrote to Mr. Clancy stating that his clients were “happy to clarify any issues that remain outstanding or which Mr. Murphy was not immediately in a position to answer” and requesting that they be afforded an opportunity to do so in the ongoing investigation.

17. The respondent seized the truck, tanker and oil on 18th July, 2014 pursuant to section 141 of the Finance Act, 2001, as goods liable to forfeiture. In this regard, Mr. Clancy issued a Notice of Seizure on the same date pursuant to s 142 of the Finance Act, 2001 in respect of the fuel, the tractor unit/truck and the oil tanker trailer unit to the company. He states that he formed the opinion that an offence had been committed under s. 102(1)(a) of the Finance Act 1999 pursuant to s. 104 of that Act in that there had been a contravention of Regulation 23 by reason of the failure to produce delivery documents “in all the foregoing circumstances”. He states that the Mineral Oil was liable to forfeiture under s. 102(5) of the 1999 Act and the truck and tanker were also liable to forfeiture as they were used in the conveyance of goods liable to forfeiture namely, the Mineral Oil.

18. By letter dated 1st September, 2014 Mr Clancy wrote to the applicants’ solicitors stating that, notwithstanding the course of events, two letters received by the Respondent on behalf of their clients would be treated as the submission of a claim of ownership in respect of the goods seized for the purpose of Condemnation proceedings and furnished them with a formal document for the purpose of claiming ownership. By this time leave to apply for judicial review had been granted and the applicants’ solicitors had served the respondents with the Order of the High Court and the grounding documents for the application under cover of letter dated 1st August. The respondents chose to regard this letter and enclosed documents together with a previous letter of 25th July “as a claim on” the truck, tanker unit and motor oil. The respondents then elected to issue Condemnation proceedings in respect of the property seized. The applicants’ solicitors objected to this course of action which the respondents claimed was in ease and protection of their clients’ position and rights in respect of same.

Statutory Provisions

19. Section 9(1) of the Criminal Law Act, 1976 (as amended) states:-

“Where in the course of exercising any powers under this Act or in the course of a search carried out under any other power, a member of the Garda Síochána, a prison officer or a member of the Defence Forces finds or comes into possession of anything which he believes to be evidence of any offence or suspected offence, it may be seized and retained for use as evidence in any criminal proceedings, or in any proceedings in relation to a breach of prison discipline, for such period from the date of seizure as is reasonable or, if proceedings are commenced in which the thing so seized is

required for use in evidence, until the conclusion of the proceedings, and thereafter the Police (Property) Act, 1897, shall apply to the thing so seized in the same manner as that Act applies to property which has come into the possession of the Garda Síochána in the circumstances mentioned in that Act."

The court is satisfied that the seizure and retention by Garda Lawlor of items and property on the 21st June was carried out in accordance with law.

20. Section 140(1) of the Finance Act, 2001 provides that :-

"Where an officer reasonably suspects that any excisable products, or any other goods, are liable for forfeiture under the law relating to excise then-

- (a) all such excisable products or other goods,
- (b) any other thing being made use of in the conveyance of such products or goods,
- (c) any vehicle in or on which or attached to which in any manner any such excisable products or goods are found,

may be detained by such officer until such examination, enquiries or investigations as may be deemed necessary by such officer or another officer, have been made for the purposes of determining whether or not such product, goods thing or vehicles are liable for forfeiture."

21. The failure to comply with or contravention of the statutory regulations made under section 104 of the Finance Act 1999 is an offence under section 102(1)(a) of the Act. Regulation 23 of the Mineral Oil Tax Regulations 2012(S.I. No.231 of 2012) regulates the completion and retention of delivery documents and the procedure in respect of the supply of Mineral Oil by traders under Part 6 thereof. It sets out the requirements to be fulfilled by a trader in delivering a consignment within the State. It regulates the content of and time at which the documents must be completed. Regulation 23(5) provides that the trader must retain one copy and give two other copies to the person in charge of the delivery. Regulation 23(6) provides that:-

"The person in charge of the delivery shall:-

- (a) retain copies two and three during the course of the delivery and, ...

give copy three to the person receiving the delivery,

- (b) following the delivery, endorse copy two with details of-

- (i) the quantity actually delivered, and

- (ii) the date and time when that delivery was made.

and return the copy do endorsed to the consigning mineral oil trader."

Clearly, Mr. Murphy ought to have been in possession of copies two and three in respect of the proposed delivery when stopped, if acting in accordance with the regulations

22. Section 102(2) of the 1999 Act provides that a person guilty of an offence under s. 102(1),(1A) and (1B) shall be liable to certain penalties on conviction but "without prejudice to any other penalty to which a person may be liable".

23. Section 102 also provides:-

"(4) Without prejudice to any other penalty to which a person may be liable, where such person is guilty of an offence under subsection (3) he or she shall be liable-

- (a) on summary conviction to a fine ...or at the discretion of the Court to imprisonment for a term not exceeding 12 months or to both, or

- (b) on a conviction on indictment , to a fine... ,or at the discretion of the Court

to imprisonment for a term not exceeding 5 years or to both

(5) (a) Any mineral oil in respect of which an offence under sub-section(1),(1A)(1B) or (3) was committed (emphasis added) and any substance mixed with such oil shall be liable to forfeiture..."(as substituted by s. 78 of the Finance Act 2012).

24. Section 125(3) of the Finance Act, 2001 provides for forfeiture:-

"Where any goods or vehicles are liable to forfeiture under the law relating to excise, anything containing or that contained such goods or vehicle, and anything made use of in the conveyance of such good or vehicle, is liable to forfeiture"

25. The seizure and Notice of Seizure of goods and vehicle are dealt with under ss. 141 and 142 of the Finance Act 2001:

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

142(1) Subject to subsection (2), an officer shall give notice of the seizure of anything as liable to forfeiture and of the grounds for seizure to any person who to the officer's knowledge was at the time of the seizure the owner or one of the owner's of the thing seized

(2) Notice under subsection (1) need not be given under this section to a person if the seizure was made in the presence

of the person, the person whose offence or suspected offence occasioned the seizure...”

The Commissioners may in their discretion restore anything so seized under s. 144.

26. Thereafter, if a person claims that anything is not liable to forfeiture he/she must give written notice of that claim to the Revenue Commissioners under s. 127 of the Finance Act 1999 as substituted by s. 46(1)(b) of the Finance Act 2011. Under s. 127(3) if no notice of claim is received within the time provided, the property seized “shall be deemed to have been duly condemned as forfeited”. Under s. 127(4)

“Where a notice of claim has been given, the Commissioner shall subject to subsection (2) and (3) of section 144, take court proceedings under section 128 for the condemnation of the thing concerned”

Section 128 provides that such proceedings are “civil proceedings”. The claimant or his solicitor is obliged under subsection (4) to state on oath that the material seized was or was to the best of their knowledge the property of the claimant when seized. If judgement is given for the claimant the officer or other person who made or assisted the seizure or detention are not liable to any civil or criminal proceedings if the judge certifies that there was “probable cause” for making the seizure or detention.

Locus standi

27. The applicants claim that the action taken by the respondents is amenable to judicial review and cannot be properly addressed by the statutory mechanism available i.e. Condemnation Proceedings under s. 128 of the Finance Act, 2001. Reliance is placed on *Beirne v. Commissioner of An Garda Síochána* [1993] I.L.R.M. 1, for the proposition that the respondent’s decision to seize property under the section is the action of a reviewable authority within the public domain. It is also submitted that the Condemnation Proceedings brought by the respondents in the Circuit Court (to which I will return) were issued in an attempt to render the applicants’ judicial review proceedings no longer appropriate.

28. Counsel for the applicants accepts the general principle that excludes judicial review where a suitable statutory appeal mechanism exists, as set out in the cases of *McGoldrick v. An Bord Pleanála* [1997] 1 I.R. 381, and *EMI records (Ireland) Limited v. Data Protection Commissioner* [2013] IESC 34. However, it is submitted that an applicant may establish his entitlement to a determination by way of judicial review if certain issues arise in the case, including: the question of whether the impugned decision was *ultra vires*; whether the impugned decision was in breach of the applicant’s right to natural justice, or the right to be heard; or that the statutory appeals mechanism does confer jurisdiction to grant the relief sought by the applicant. The primary relief sought by the applicants is an order of *certiorari* quashing the decision of the respondents in relation to the seizure of the truck, tanker and the oil, as being *ultra vires*. On this basis, and on the basis of the decision in *The State (Abenglen Properties Ltd) v. Dublin Corporation* [1984] I.R. 381 counsel for the applicants argue that they are entitled to challenge the decision by way of judicial review.

29. It is submitted that the determination of the Condemnation proceedings can only result in an order for the return of the truck, tanker and oil and the Court in those proceedings will have no power to quash the decision to seize the goods or to provide any other remedy. It is submitted that since these are the circumstances addressed by O’Higgins J. in *Abenglen*, the Court should exercise its discretion and determine the application for judicial review.

30. The respondents submit that the applicants do not have *locus standi* to maintain the present proceedings because they, at all material times, claimed that the truck did not belong to them, but remains the property of a Mr. Eddie Mallon. In his grounding affidavit Mr. Murphy claimed “the said truck is the property of one Eddie Mallon trading as Edward Mallon Motors in Northern Ireland albeit that the Company came to be in possession of same on or before June 21st 2014”. It is also submitted that Mr. Mallon, at no point, sought to challenge the decision of the respondents to seize the truck: indeed Mr. Murphy did not in interview or in evidence claim that he is the lawful owner of the truck nor does he challenge the evidence tending to show its history as a stolen vehicle.

31. It is also submitted that judicial review proceedings are not appropriate because a statutory mechanism for contesting a decision on seizure of goods is available, by the service of a notice of claim, pursuant to section 127 of the Finance Act, 2001. It is said that the applicants were obliged to make such a claim and must now pursue it in the pending Condemnation proceedings pursuant to ss. 127 and 128. It is submitted that this statutory process was framed specifically for disputes such as the present one. The respondents treated the applicants’ objection to the seizure and initiation of judicial review proceedings as being equivalent to a notice of claim under s. 127(1) of the 2001 Act and then issued Condemnation proceedings as they were obliged to do under s. 127(4).

32. It is said that the failure of the applicants to engage with the condemnation proceedings should debar the applicants from a remedy by way of judicial review: *L.C. Autolink Limited and Lee Cullen v. Joseph Feehily, Davit Ward, Brian Harkin, The Revenue Commissioners, Ireland and the Attorney General* [2008] IEHC 397, in that regard.

33. I am not satisfied that Mr. Murphy has established any basis upon which he may claim a potential interest in or prejudice or loss arising from the decisions made in respect of property said to be owned by the company namely, the tanker and its contents of mineral oil. The company alone has *locus standi* in these proceedings in respect of that property given its assertion of ownership notwithstanding the unexplained nature of these events.

34. There remains the question whether Mr. Murphy has *locus standi* in respect of the truck unit. Even though he appears to maintain that Mr. Mallon may have an interest in suing him over the truck unit which Mr. Mallon has returned to him, the unlawful provenance of the truck unit remains unexplained by Mr. Murphy who disclaims any knowledge that it is or may have been stolen. Thus on whatever version of events Mr. Murphy relies he does not have *locus standi* to seek relief consisting of the return to his possession of a vehicle in respect of which he does not and cannot assert ownership and on the evidence (available and made known to him at an early stage) was probably stolen. Accordingly, Mr. Murphy does not have *locus standi* to bring or continue these proceedings. In addition, I am not satisfied that the company has *locus standi* in respect of these proceedings insofar as they relate to the truck unit because Mr. Murphy, as a director of the company has disavowed any claim to ownership on behalf of the company, stating categorically that it is the property of Mr. Mallon.

35. I am satisfied that the company has *locus standi* to maintain these proceedings in respect of its claim to be the owner of the trailer and the fuel oil seized and the prejudice it claims to have suffered as a result of the impugned decision.

36. Condemnation proceedings have now been initiated by the respondents under the statutory duty imposed upon them so to do under s.127(4) and s. 128 on receipt of what they have chosen to regard as a Notice of Claim under s. 127(1). These proceedings are now pending in Kilkenny Circuit Court (record number 349/14). It is clear that the applicants did not and do not wish their correspondence to be so regarded. They reject the proposition that they have made a written claim and submit that there

correspondence should not be so regarded by this court. They submit that they should not have been regarded as having made a written claim under s.127(1) and that the Condemnation proceedings should not have issued. In these proceedings, the respondents now claim that by reason of the Condemnation proceedings the applicants ought to follow the proper procedure in relation to any of the issues arising from the seizure or detention of the goods and pursue their remedy in the Circuit Court. It is submitted that the court ought not therefore to exercise its discretion to grant an order of *certiorari* when this statutory procedure has been provided and may be availed of by the applicants.

37. It is abundantly clear that the applicants have elected not to pursue a written complaint against the seizure and never intended to do so. Though the respondents maintain that in treating the July correspondence as a written claim under s. 127 they acted in ease of the applicants and merely preserved their right in that regard, it is somewhat surprising that it was not until leave to apply for judicial review was granted that it was so regarded. I accept the applicants' evidence and submission on this matter. I am not satisfied in the circumstances that the respondents' decision on that matter should de-bar the applicants from seeking relief, if there is such a default of fundamental requirements as to vitiate the impugned seizure and decisions. The proceedings are now pending but not at the instigation of the applicants whose clear preferred route in the correspondence was judicial review. There is not the slightest reference in the solicitors' correspondence with the respondents to a Notice of Claim under s. 127. I regard the purported reliance upon the correspondence as such a notice as somewhat contrived. For that reason I am satisfied that the applicants did not make a claim. I do not consider that there is any reasonable basis on the facts of this case to refuse *certiorari* because of the initiation by the respondents of Condemnation proceedings in response to a claim which the applicants did not make, if it is otherwise appropriate to grant such an order. That does not preclude the court from considering the exercise of its discretion against the applicants if the path open to them under s. 127 to make a written claim against the seizure was otherwise appropriate but not taken: but this is a separate matter from having that path foisted upon the applicants in the absence of any express written claim and contrary to their wish and intention immediately following the initiation of judicial review proceedings when they have not indicated any desire to take it.

38. In *L.C Autolink Limited* Mac Menamin J. considered this issue and stated

" 60. Failure to avail of an appeals procedure will, in certain circumstances debar applicants from the remedy of judicial review. This is precisely such a case. The factual questions which the Court was asked to determine in this four day hearing , were pre-eminently ones which should, and ought to have been dealt with within the parameters of the Revenue appeal procedure. The applicants were not debarred from first making such case as they might have wished .."

The court therefore refused relief on this discretionary ground.

39. It is clear that having abjured the option to make a written claim under section 127 and having elected not to engage in the Condemnation proceedings in such an unequivocal way the applicants chose the path of judicial review. I am satisfied that the same considerations apply in this case as set out by Mac Menamin J. above. The applicants had an extensive and readily accessible remedy open to them under ss. 127 and 128 which they have determined not to seek or pursue. All factual issues of concern to them might have been canvassed by initiating a written claim and the truthfulness of any claim made established. As set out below, it is a process which provides the applicants with a procedure whereby any legitimate claim in respect of the property may be initiated and determined within a process which embodies the right to fair procedure. I would refuse *certiorari* on this basis since on their own evidence they have refused and continue to refuse to seek the appropriate remedy open to them in respect of all relevant issues which might be canvassed concerning the seizure of the property and its liability to forfeiture.

The Challenge

40. The two main propositions underlying the grounds advanced are:

(i) the decision to seize the truck, tanker and oil pursuant to s. 141 and the subsequent issuance of the Notice of Seizure under s. 142 were ultra vires the Respondents and ought to be quashed because there had been no prior conviction of the applicants or either of them in respect of the property. It is claimed that the powers under s. 141 may only be exercised following the laying of a charge which resulted in a conviction following a trial in due course of law under Article 38.1 of the Constitution and;

(ii) the respondents failed to comply with the principles of fair procedures in the exercise of the discretionary powers vested in them under s. 141 to seize the property in that the applicants were not granted an opportunity to be heard and had no opportunity to make representations before the decision was made. It is also submitted that the decision was in the circumstances unreasonable.

Submissions of the Applicant

41. The applicants' main proposition is that the truck and tanker, containing the mineral oil will only be liable to forfeiture pursuant to section 125(3) of the Finance Act, 2001, if it is first proved that the mineral oil was liable to forfeiture under section 102(5)(a) of the Finance Act 1999(as amended) which provides that:

"(a) Any mineral oil in respect of which an offence under subsection (1), (1A), (1B) or (3) was committed, and any substance mixed with that mineral oil, is liable to forfeiture.

Counsel for the applicants submit that in order to satisfy the conditions of section 102(5)(a) of the 1999 Act, before the mineral oil is deemed liable to forfeiture, an offence under the relevant subsections must have been committed in respect of the oil. In this regard, it is submitted that no such offence has been committed by the applicants and that the procedure adopted by the respondents was flawed and unfair. It is also claimed that the applicants were not aware of the purported statutory basis for his decision to seize the truck, the tanker and the oil as it was not stated in the Notice of Seizure. The applicants contend that they could not have been aware of the specific allegations against them until the respondents' statement of opposition was served. Therefore, it is submitted that the applicants were not on notice that there was an inquiry into compliance with their obligations under the regulations, which would have prompted them, at an earlier opportunity to disclose their records in relation to the delivery of the oil. The applicants exhibit what they say is the relevant delivery documentation in relation to the delivery of the oil, in the Affidavit of Mr. Fardey, and deny that they committed any offence. If the applicants had evidence that demonstrates that the relevant delivery documents existed on 21st June, 2014 it is somewhat strange that this was not produced until well after the initiation of this application notwithstanding the extensive engagement on these matters between the applicants, their solicitors and the respondents. It is exactly the type of evidence that would be relevant to a written claim and the Condemnation proceedings. However, this court is only concerned with the procedures followed and the lawfulness of the decision-making process not the merits or correctness of the

decision.

42. In the alternative, it is submitted that the only lawful way in which it may be determined that the applicants committed the offence, is through the criminal justice process and trial in due course of law under Article 38.1 of the Constitution. The applicants submit that as the exercise of the respondent's power of seizure and forfeiture is predicated on an offence having been committed, the seizure itself acts as a *de facto* determination of a commission of a criminal offence, notwithstanding the failure to adhere to or observe the correct procedure for the trial of a criminal offence, whether summarily or on indictment. The fact that neither of the applicants were ever charged with, or tried for an offence under the Acts, establishes that the decision of the respondent to seize the truck, tanker and oil is *ultra vires*, and should be quashed.

43. The applicants also claim that their right to be heard has been breached as the respondent did not afford them an opportunity to challenge any reasons which could have been put forward by the respondents; further they claim that, in any event, no reasons were proffered for the seizure. The applicants rely on *Dellway Investments Limited v. NAMA* [2011] IESC 14 and *Treasury Holdings v. NAMA* [2012] IEHC 66.

44. It is also submitted that there was a failure on the part of the respondents to offer reasons in relation to the seizure of the mineral oil, truck and tanker, or the monies of the first named applicant, at the time of such detention. Counsel for the applicants also submit that the respondents further failed to disclose any information on which it relies in support of its detention of the property or for the issuance of the Notice of Seizure. Therefore, it is submitted that the seizure of the goods was arbitrary, capricious and without foundation. It is submitted that the respondents failed to have regard to the matter which is most relevant to the exercise of its powers of seizure under section 141 of the Finance Act, 2001, namely that neither of the applicants have been convicted of a criminal offence. It is further submitted that the respondents had regard to the opinion of Mr. Clancy as to the criminal culpability of the applicants, for which section 102(5) of the 1999 Act does not allow, and therefore the opinion of Mr. Clancy is an irrelevant consideration for the purpose of a decision to seize under section 141 of the Finance Act 2001.

45. The applicants further submit that by serving the Notice of Seizure, the respondents prejudged the situation, as they had failed to carry out further investigations following the meeting on 16th July, 2014. Furthermore, the respondents did not seek to obtain corroborating evidence from parties who were in a position to verify the explanation provided by the first named applicant.

Submissions of the Respondent:

46. It is submitted on behalf of the respondents that there is no pre-existing requirement of a criminal conviction, prior to the exercise of a power of seizure, or prior to the issue of Condemnation proceedings (*A.G. v. Southern Industrial Trust Limited & Simons* [1957] I.L.T.R. 161; *A.G. v. Liam Rafferty trading as Carhill Car Sales* [2008] IEHC 396; *L.C. Autolink Limited and Lee Cullen v. Joseph Feehily, David Ward, Briam Harkin, The Revenue Commissioners, Ireland and the Attorney General* [2008] IEHC 397; and *Thomas Murray trading as Tom Murray Garden Machinery v. The Revenue Commissioners* [2012] IEHC 53.). It is further submitted that section 142 of the Finance Act 2001, provides for the issuance of a Notice of Seizure to an individual who is suspected of an offence only, and who has not been convicted of an offence. In particular, reliance is placed upon the judgment of MacMenamin J. in *A.G. v. Liam Rafferty trading as Carhill Sales* when, in reflecting upon the language of section 126 of the Act of 2001, the learned judge noted the clear distinction drawn between the commission of an offence and a conviction therefore. Reliance is also placed on the Supreme Court decision in *Southern Industrial Trust* in which Lavery J. rejected the proposition that Condemnation proceedings were criminal in nature.

47. The respondents reject the contention that the applicants were denied the right to be heard. It is said Mr. Murphy was stopped in "curious circumstances" and did not produce delivery documents. He was cautioned and interviewed, during which time he confirmed that he did not have the movement documents and offered no explanation in this regard. Counsel for the respondents also refer to the interview conducted by an officer of the respondent in the course of which the applicant claimed that the relevant documentation could be found in a compartment in the truck, which, when checked by the respondent, was found to be empty.

48. The respondents also note that the applicants have not sought to challenge the constitutionality of any of the legislative provisions regulating the movement of mineral oil in the State or the provisions relied upon for the seizure, detention or forfeiture of property. It is submitted that paragraph 23 of the Regulations creates a "strict obligation" on the consignor and driver of a mineral oil consignment, to create and/or retain three copies of the delivery documents. This documentation was never produced to the respondent either when the applicant was stopped on the M9 motorway, or during the course of the investigations. The respondents take issue with the fact that the relevant delivery documentation was not exhibited in the affidavit of the applicant grounding leave to seek judicial review: the applicants' contention that there is no obligation under Regulation 23 to produce the relevant delivery documentation, is said to be an incorrect statement of law. It is submitted that in any event, the applicants were afforded an opportunity, at the interview organised by the respondents, to respond to the question as to why he did not have the relevant documentation. Therefore, it is incorrect to maintain that neither An Garda Síochána nor the officers of the respondent did not give the applicants an opportunity to make representations in respect of all relevant matters.

Conclusion

49. It is incorrect to suggest that the applicants were not on notice that the respondents were investigating a failure to comply with the obligations concerning delivery documents set out in Regulation 23. In the course of an interview Mr. Murphy informed Mr. Clancy about the delivery documentation and directed him to a compartment on the tanker trailer where the relevant documents were said to be stored. He drew a sketch as to where they might be found. Mr. Clancy and his colleagues went immediately to the tanker and examined the compartment but found it to be empty. They photographed it. Much later in these proceedings Mr. Fardey described how he had completed the delivery documentation and placed two copies in the compartment. Leaving aside the lateness of this explanation and evidence previously noted, it cannot be seriously suggested that Mr. Murphy was unaware that compliance with Regulation 23 was under investigation. It clearly was and he was given an opportunity to address the concerns expressed by Mr. Clancy and did so by giving precise information as to where he believed the documents to be: this proved to be incorrect. Clearly no further explanation would have been forthcoming from Mr. Murphy because he continues to rely upon that response having regard to the evidence of Mr. Fardey. I am completely satisfied that Mr. Murphy was given a fair opportunity to address the core issue in the investigation at an early stage. In response, Mr. Clancy investigated whether there was any reality to the response given by attending and examining the compartment.

50. Garda Lawlor made a number of requests of Mr. Murphy on the night of the 21st June. He was entitled to engage with and enquire of Mr. Murphy as the driver of the tanker if he had "any documents relating to the load". There is nothing to preclude him from doing so particularly having regard to the obligation to carry the documents when delivering a load. Garda Lawlor clearly made extensive inquiries concerning the truck, trailer and its contents and his suspicions were clearly aroused by the inappropriate signage which misdescribed the load. Following inquiries he arrested Mr. Murphy and detained the truck trailer, (including the contents thereof) and the mineral oil having formed a suspicion which was entirely reasonable that Mr. Murphy was driving a stolen vehicle. He seized and

detained the property in an entirely lawful manner. He continued his investigations during the course of Mr. Murphy's detention.

51. The court rejects the proposition that the applicants were not on notice that there was an inquiry into the compliance as Regulation 23 during the course of their engagement with Garda Lawlor or Mr. Clancy or other officers of the Revenue Commissioners.

52. In the course of the criminal investigation by An Garda Síochána, Mr. Murphy was detained in accordance with s. 4 of the Criminal Justice Act 1984 and the Regulations made there under and interviewed in accordance with law. He was also questioned by Mr. Clancy in the course of the investigation into the applicants' compliance with Regulation 23 and purported to cooperate with that inquiry: unsurprisingly, when his information proved unreliable, the investigation moved to a further stage.

53. On the 26th June, 2014 notice was given to Mr. Murphy that the mineral oil was detained by an authorised officer of the respondent pursuant to s. 140(1) of the Finance Act 2001 on the 22nd June on the grounds that it was suspected that the mineral oil was liable to forfeiture under s. 102(5) of the Finance Act 1999. Similarly notice was served in respect of the oil tanker trailer on the grounds that it too was suspected of being liable to forfeiture under s. 125(3) of the 2001 Act. On the 22nd June Mr. Harte, an officer of Customs and Excise and of the Revenue Commissioners attended with a colleague, Ms. Flaherty at the Kilkenny Truck Centre, to which the truck, trailer/tanker and oil had been removed where they took samples and conducted road side tests. Mr. Harte detained the 36,000 litres of mineral oil pursuant to s. 140(1) on the grounds that it was reasonably suspected that it was liable for forfeiture under s. 102(5) and to make the necessary enquiries and investigations for the purpose of determining whether it was so liable. He also detained the oil tanker trailer on similar suspicion that it was liable to forfeiture under s. 125(3). Mr. Clancy having reviewed all the evidence in the case and liaised with Mr. Harte, prepared a notice of detention and served it on the applicants. This gave rise to the correspondence described above.

54. The respondents claim that under s. 102(5)(a) the mineral oil is liable to forfeiture if it is oil in respect of which an offence under s. 102(1) "was committed" which does not require the conviction of any person or the company prior to the service of the notice of detention. There is a clear distinction between products or goods which are "liable for forfeiture" because of offences "committed" and a liability to forfeiture which follows when a person has been found guilty of an offence following summary trial or trial in indictment which is well established.

55. In *Attorney General v. Southern Industrial Trust Ltd. and Simons* (1957) ILTR 161, the Attorney General brought proceedings for the forfeiture and condemnation of a motor car under s. 207 of the Customs Consolidation Act 1876 and s. 5 of the Customs (Temporary Provisions) Act 1945. A hire purchase company (an innocent party in the controversy between the car owner and the authorities) contended that these proceedings were criminal proceedings and could not be tried without a jury and that the provisions of the Act were contrary to the Constitution insofar as they purported to authorise the forfeiture of the goods of an innocent party. It was held by the Supreme Court that while the facts established that the owner had committed a criminal offence, that did not make the proceedings criminal proceedings. They were civil proceedings. Davitt P. (delivering the judgment of the High Court) stated:

"These proceedings in my view are civil proceedings 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 license. 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 ... 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 judging it to be condemned and forfeited. In proving the circumstances 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."

56. Affirming the judgment of the High Court Lavery J. stated:

"It was not adverted to in argument that the present proceeding is one *in rem* and not *in personam*.

No person is on trial here.

This circumstance might be sufficient to dispose of the submission but in the opinion of the court the proceeding is not a criminal charge but is civil in character.

No question of *mens rea* or a fraud arises. If the exportation is not lawful the forfeiture follows: nor does any question of imprisonment or even a pecuniary penalty directly arise...

The issue is whether statutes and statutory instruments which confer power on the legislative or executive organs of the State in stated circumstances to take possession of particular chattels or other property and to divest without compensation the ownership of an owner who has himself committed no breach of the law either generally or in respect of the goods can ever be justified and if it can whether it can be justified in the circumstances of this case. The laws in question do not *abolish* the private ownership of external goods or the general rights to transfer, bequeath and inherit property.

Can it be said that they regulate the exercise of the rights without violating the principles of social justice and do they merely delimit the exercise of the rights with a view to reconciling their exercise with the exigencies of the common good? It is argued that to take away the ownership of a particular item of property completely cannot in any circumstances be a regulation of or the delimiting of, the exercise of the right of ownership and the laws are therefore repugnant to the Constitution independently of any consideration of the principles of social justice or the exigencies of the common good.

This seems to the Court to be plainly wrong ...

The examples already given demonstrate that ordered government, the protection of revenue, the conservation of supplies of necessary goods within the State, the protection of property (e.g. fishing rights), the protection of life (e.g. the Firearms Acts) and even the safety of the State itself may require that goods should be forfeited."

57. It was therefore clear that to subject chattels or property to forfeiture did not require a criminal conviction as the matter of constitutional principle or that a person must be subjected to trial in due course of law under Article 38.1 before such a forfeiture could be effected. Indeed the Supreme Court recognised that an entirely innocent party to a transaction might be deprived of their

right in a particular item of property (in that case the motor car) under the forfeiture provision. In that case it was Mr. Simons who is said to have breached the statutory provision not the company. The forfeiture did not require the prosecution and conviction of Mr. Simons. Similarly, forfeiture of money under the Proceeds of Crime Act 1996 when it is established on the balance of probabilities to be the proceeds of crime is also regarded as a civil proceedings which does not require a criminal conviction prior to the making of an order (*Murphy -v- GM* [2001] 4 I.R. 113)

58. The issue of forfeiture was again considered by MacMenamin J. in *Attorney General v. Liam Rafferty t/a Carhill Car Sales* [2008] IEHC 396. The plaintiff claimed an order pursuant to s. 127 of the Finance Act 2001 for the forfeiture and condemnation of six vehicles because of the non-payment of vehicle registration tax. The Revenue Commissioners made a determination that these vehicles should be seized pursuant to the provisions of s. 140(1) and 140(4) of the Finance Act 2001 and s. 139(5) of the Finance Act 1992 as the vehicles were unregistered for VRT purposes which was an offence contrary to s. 139(3)(a) of the Finance Act 1992. MacMenamin J. considered whether there was a requirement for conviction prior to the condemnation proceedings. The court considered the interpretation of s. 126(2) of the 2001 Act which provides that:

"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. ..."

Section 139(5) provided that a vehicle would be liable to forfeiture if it was one in respect of which an offence "was committed" under s.139(3).

59. The learned judge noted:

"...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* ..."

60. MacMenamin J. having cited relevant extracts from the judgment of Davitt P. which had been approved by the Supreme Court in that case ended his consideration of the issue with the following statement:

"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."

61. In this case the detention and seizure provisions were invoked in the course of an investigation of the events of the 21st June. The fair procedures required during this process are prescribed and regulated by the statutes, case-law and constitutional rights governing the law of arrest, search, seizure and detention. Items of real evidence must be amenable to examination and investigation and retention for that purpose. The Oireachtas has also provided that in certain circumstances such property is liable to forfeiture under a statutory process that as a matter of law has been found to be constitutionally valid and carries the presumption of constitutionality: in any event its constitutionality is not challenged in this application. The investigative phase in this case involved the detention of the truck, trailer tanker and oil at a stage when it was reasonably suspected of being liable to forfeiture and the Notice of Detention was issued. The detention allowed the investigators a period to investigate the matter and consider whether the goods were liable to forfeiture. The oil was liable to forfeiture if it was oil in respect of which "an offence was committed": the truck and trailer /tanker were likewise liable under s.125(3). The property was then seized because a conclusion was reached from the evidence gathered following the examination of the goods and the enquiries and investigation carried out that they were liable to forfeiture because the offence had been committed in respect of the oil.

62. The nature and extent of these powers were also considered in the *L.C Autolink* case. Mac Menamin J. considered the distinction between the power to detain and the power to seize goods under ss. 140 and 141:-

"16. The distinction between the powers of detention and seizure are reflective of the degree of incursion into the

constitutional rights of the possessor of the thing seized. Mere detention involves a simple power exercised by an officer, operating on the grounds of reasonable suspicion but without need for the furnishing of notice or record, upon the person in possession...

17. Because the power of seizure involves a more significant incursion of right , the circumstances in which that power should operate are rather more fully outlined"

A decision to seize must be made on " reasonable suspicion" that the goods in question are liable to forfeiture. A Notice of Seizure must be served as part of the protection of property rights contemplated by the Act. The court notes that those involved in the seizure and detention are immune from criminal and civil liability for same if the court certifies that there was "probable cause" for the seizure or detention under s.128(6) or s.129. A person may make a written claim that the goods are not liable to forfeiture which immediately triggers an obligation imposed on the respondents to issue proceedings for Condemnation: otherwise the goods will stand condemned. The claimant then has the right to a full judicial hearing in respect of the matter to determine the relevant issues. I am satisfied that this provides a complete protection to a claimant for the vindication of his/her property rights and constitutes a vindication of his/her rights to fair procedures in that regard if the choice is made to avail of them.

63. The applicants were given numerous opportunities to address the issues raised with them concerning the events of the 21st June. I am satisfied that the facts which have been outlined above and the examination of the oil, truck and tanker trailer and their contents and the further investigation of matters by An Garda Síochána and officers of the respondents yielded a substantial body of material which supported the proposition and conclusion that an offence had been committed in respect of the oil. The opinion formed by Mr. Clancy that an offence had been committed in contravention of regulation 23 by reason of the failure or inability to produce the delivery documents was reasonable in the circumstances. The oil then became liable to forfeiture under s.102(5) and the truck and trailer/tanker under s.125(3). He ensured that every opportunity had been given to Mr. Murphy to produce the documents during the course of the investigation and he failed to do so. I am satisfied that the applicants were accorded fair procedures which were appropriate to the investigation and decisions made which led to the detention and seizure of the goods in this case.

Conclusion

64. The court is therefore satisfied that this application should be refused for the reasons set out above.