Neutral Citation: [2014] IEHC 539

THE HIGH COURT

High Court Record No. 2013/69CA

CIRCUIT APPEAL

SOUTH WESTERN CIRCUIT COUNTY OF CLARE

In the matter of an application pursuant to section 39 of the Criminal Justice Act, 1994 as amended by section 21 of the Proceeds of Crime (Amendment) Act, 2005

Between/

THE DIRECTOR OF PUBLIC PROSECUTIONS

Applicant/Respondent

-and-

GERARD ALPHONSUS HUMPHREYS, ROBERT PAUL DAVIS, PACNET SERVICES (IRELAND) LIMITED (PREVIOUSLY KNOWN AS PACNET (SERVICES) EUROPE LIMITED) AND ANONA INTERNATIONAL TRADERS LIMITED

RESPONDENTS/NOTICE PARTIES

Judgment of Ms Justice Iseult O'Malley delivered on the 21st October. 2014

Introduction

1. This is an appeal against an order made by the Circuit Court in respect of a sum of money seized by officers of Customs and Excise from Gerard Alphonsus Humphreys, the first named respondent/notice party in the Circuit Court proceedings. The seizure was pursuant to the provisions of the Criminal Justice Act, 1994, as amended by s.21 of the Proceeds of Crimes (Amendment) Act, 2005 (together referred to as "the Act"). The cash in question was detained for a period of just under two years on foot of orders of the District Court made from time to time, and ultimately was the subject of an application for forfeiture made in the Circuit Court.

2. The order under appeal is the refusal of the learned Circuit Judge to accede to an application on behalf of a number of the respondents/notice parties to dismiss the application for a forfeiture order. The primary issue in the appeal is whether or not the forfeiture application was made within the time prescribed. This, in turn, depends on the answer to the question when an application is "made" to the Court within the meaning of the Act.

Factual background

3. It appears that Mr Humphreys and Mr Davis were for periods of time in the past directors of the third named respondent/notice party (hereafter "Pacnet"). The fourth named respondent/notice party (hereafter "Anona") is a company registered in the British Virgin Islands.

4. On the 17th May, 2010 Mr Humphreys landed at Shannon Airport, having arrived on a private aircraft which he had flown from the Netherlands. He was carrying two holdall bags and four FedEx parcels. The parcels were examined by Customs and Excise and were found to contain cash equivalent in value to about €210,000 made up in a variety of different currencies. The cash was seized under s.38(1) of the Act, which authorises the officers to seize and detain it for up to forty-eight hours if *inter alia*, there are reasonable grounds for suspecting that

> *(b) the cash directly or indirectly represents the proceeds of crime or is intended by any person for use in connection with any criminal conduct.*

5. An application was subsequently made to the District Court for the detention of the cash. Its further detention was authorised by a sequence of orders in that Court, made under s. 38(2) of the Act. Any such order may specify a period of up to three months detention. The total period of detention may not exceed two years from the date of the first District Court order. In this case, all orders were made on notice to the appellants, and to the other respondents or notice parties, who were legally represented throughout the proceedings. The reasons for the detention, and the arguments and evidence put forward by the parties, are not of concern in this appeal. However, it is necessary to refer briefly to the explanation given for the cash which involved business dealings between the two companies Pacnet and Anona.

6. It is apparently common case that Anona owned the money. Mr Humphreys told the officers of Customs and Excise that he was transporting it on behalf of Pacnet to a related company in Canada, which would then lodge it to a client account held in Anona's name. Pacnet was described as "a global payments processing company."

7. On the 19th May, 2010 the appellants had appeared in the District Court on behalf of Pacnet to contest the application for a detention order relating to the money. Mr Davis had previously been a director of Pacnet, up until the 27th November, 2009. He continued to be a shareholder. On foot of this appearance Mr Davis was added as a notice party/respondent in the matter.

8. The last such order was made in the District Court on the 25th April, 2012 and was due to expire on the 18th May, 2012.

The application to the Circuit Court

9. An originating notice of motion seeking forfeiture of the cash was listed in the Circuit Court list in Ennis on the 1st May, 2012 by the applicant/respondent, who in this context essentially acts on behalf of the Revenue Commissioners and will for the sake of simplicity be referred to hereafter as the Director. The notice is undated but the court is told that it was filed in the office on the 27th April. The motion was grounded upon an affidavit sworn by Ms Patricia Smullen, an officer of Customs and Excise on the 26th April, 2010.

10. When the matter was dealt with on the 1st May, an *ex parte* application was made to the court for orders providing for substituted service of the proceedings on Mr Humphreys by way of ordinary pre-paid post at his address in Co. Limerick and substituted service by way of ordinary prepaid post on Pacnet at its registered office in the Shannon Free Zone. In the alternative, an order deeming service good on these parties was sought. This application was grounded on affidavit evidence to the effect that the solicitors who had been representing the first and third respondents/notice parties in the District Court (Carmody & Company) had been served with the proceedings on the 27th April but had indicated that they did not have authority to accept them. An effort to effect personal service on Mr Humphreys on the 30th April at his residence had not been successful - he was not there and his wife refused to accept service. Also on the 30th April, an employee of Pacnet at its registered office refused to accept service. The officer who swore the affidavit deposed that she believed that the first and third respondents/notice parties were trying to frustrate service of the proceedings.

11. A second *ex parte* application made on the same day sought leave to serve notice of the proceedings on Mr Davis out of the jurisdiction at Avondale House, Queen's Promenade, Douglas in the Isle of Man, and on Anona at a business address in the Commonwealth of Dominica, British West Indies. This was grounded on evidence that Mr Davis was a citizen of the United Kingdom, who had notified the Companies Registration Office and the Revenue Commissioners that he was resident at that address in the Isle of Man, and that Anona carried on its business at the address given.

12. The order made by the court on the 1st May, 2012 granted liberty to the Director to serve the notice of motion on Mr Humphreys and Pacnet by way of pre-paid ordinary post.

13. Liberty was also granted to serve notice of the proceedings on the appellant by DHL recorded delivery to the above address in the Isle of Man.

14. The matter was then listed for mention on the 8th May, 2012. On that date it was again adjourned for mention to the 14th May, 2012 and then to the 14th July, 2012. The reason for this adjournment appears to have been that the Director was not in a position to prove service on the appellant.

15. A solicitor came on record for Anona on the 1st May, 2012 but there was at that stage no solicitor on record in the Circuit Court for the other respondents/notice parties.

16. In an affidavit sworn on the 2nd May, 2012 Ms Smullen averred that she had served the proceedings on the 1st May, 2012 as provided for in the order of that date. She exhibited the DHL Express Shipment Waybill as proof of service on the appellant. This document, it should be noted, is certainly evidence of sending the letter but does not purport to prove receipt.

17. In response to the forfeiture application, the first, second and third respondent/notice parties issued a motion seeking to dismiss the Director's application on the basis that it had not been made while the cash was detained as provided in the Act or, in the alternative, because of non-compliance with the Act and with the Rules of Court. The motion was grounded upon the affidavit of their solicitor, Ms Caitriona Carmody. As far as Mr Davis is concerned, the main argument was that he was not served until the 31st May, 2012 and that this was outside the two-year period allowed for the bringing of a forfeiture application.

18. Ms Carmody has deposed that she was instructed to appear on behalf of the appellants solely for the purposes of challenging the jurisdiction of the Circuit Court in circumstances where the Director's application was out of time.

19. Much of Ms Carmody's affidavit was concerned with matters of law, which will be considered below. However, she made a number of factual averments. She said that Mr Davis was not served at the address specified in the order of the 1st May, 2012. On the 31st of that month the Director "purported" to serve him at his address in Castletown, the Isle of Man. She further said that he never received a copy of the order granting liberty to serve outside the jurisdiction.

20. It was noted that there was no averment in the affidavit of Ms Smullen, grounding the application for leave to serve outside the jurisdiction, stating the belief of the deponent that the plaintiff had a good cause of action. It was also contended that the order of the court was defective in that it did not provide any time limit for the entry of an appearance.

21. Ms Carmody averred that the practice of the Circuit Court office relating to notices of motion is as follows. Unlike the Central Office of the High Court, the Circuit Court office does not issue notices of motion. The moving party files the notice, having inserted a return date, once the notice has been served on all parties and proof of service is available to furnish to the office.

22. In a replying affidavit Ms Smullen averred that Counsel for the Director had applied on the 24th April, 2012 for liberty to issue a notice of motion returnable for the 1st May. This was necessary because the next Judge's Motion List was not until the 19th June, which would be well outside the currency of the s.38 order. Liberty having been granted, the notice of motion was presented to the office on the 27th April and made returnable for the 1st May. She said that there was no intention to proceed with the substantive application on that date, prior to the respondents to the motion being actually put on notice.

23. Ms Smullen said that Ms Carmody's firm had been on record in the matter since May, 2010 and had never applied to come off record.

24. According to Ms Smullen, she was advised by DHL that they had failed to effect delivery at the address provided. They had however made contact on the 14th May with Mr Davis, who informed them that he was moving house and was currently out of the country. On the 26th May, 2012 he provided DHL with a new address and advised them that he would be present there on the 31st May. Service was effected on that date. Mr Davis had previously been informed by DHL as to the identity of the sender. Ms Smullen said that accordingly, Mr Davis was served at this time and place at his own request.

25. It appears that Mr Davis is a pilot and for that reason is often away from home.

26. It may be important to note here the averment of Ms Carmody that Ms Smullen had been in direct communication with Mr Davis by email and by telephone for the previous two years, and that she could have used either of these means to ascertain his whereabouts. Further, he had directed the postal service in the Isle of Man to forward post from his old address to his new address, so that substituted service by post could have been achieved. It is also suggested that she could have applied for substituted service via the email address.

27. Ms Smullen disputed the averments of Ms Carmody as to the practice of the Circuit Court office and said that if a notice of motion could not be filed until all parties had been served, that would have the effect that one notice party could evade service and thereby

prevent the application from being brought.

28. Ms Smullen also argued that, in any event, Mr Davis could have no personal claim on the cash and was not a director of Pacnet either at the time of the detention of the cash or at the time when service of the forfeiture application was being made. Ms Carmody agreed with both of these assertions, but maintained that, the Director having chosen to join Mr Davis as a respondent to the application, it was necessary to serve him with the proceedings within the two-year period.

29. On the 15th March, 2013 the learned Circuit Court judge refused to dismiss the Director's forfeiture application. The order recites, *inter alia*, that the Court was

> *"satisfied that the Plaintiffs originating Notice of Motion was properly issued in the prescribed format".*

Relevant legislative provisions

30. The power to order the forfeiture of cash detained under a s.38 order made in the District Court is dealt with in s.39 which, as amended, provides in full as follows:

> *(1) A judge of the Circuit Court may order forfeiture of any cash which has been seized under section 38 of this Act if satisfied, on an application made while the cash is being detained under that section, that the cash directly or indirectly represents the proceeds of crime or is intended by any person for use in connection with any criminal conduct*
>
> *(2) Any application under this section shall be made, or caused to be made, by the Director of Public Prosecutions.*
>
> *(3) The standard of proof in proceedings on an application shall be that applicable to civil proceedings; and an order may be made under this section whether or not proceedings are brought against any person for an offence with which the cash in question is connected.*

31. It is therefore necessary to make the application in the Circuit Court during the currency of a valid detention order. Once the application order is made the cash will, by virtue of s. 38(3)(A), continue to be detained until the application is determined.

32. Order 69 of the Rules of the Circuit Court (S.I. 448 of 2004) deals with applications made under s.39 of the Act and provides in Rule 3 that

> *"an application pursuant to this Order shall be made by originating Motion on Notice in accordance with the form annexed hereto."*

33. The application is to be grounded on affidavit specifying all relevant details relating to the seizure and detention of the cash, the details of any person claiming an interest therein, the grounds on which forfeiture is sought and any other information relevant to the application. It is to be made to a judge of the circuit in which the seizure was made.

34. Rule 5 of the Order stipulates that the application is to be made

> *"on notice to any person from whom the cash was seized and to any person who claims an interest in the cash. The Court may direct that notice of the application be served on such other person or persons, in addition to the respondent(s), as it shall think fit."*

35. The phrase "*any person who claims an interest in the cash*" is obviously apt to cover a party in the position of Pacnet, which claimed to be legitimately transporting the cash with a view to transferring it to Anona.

36. Order 64 of the Rules deals with motions in general and provides in relevant part as follows:

> *1. Except where permitted by these Rules, no motion shall be made without notice to the parties affected thereby but the judge or the County Registrar, if satisfied that the delay caused by proceeding in the ordinary way would or might entail irreparable or serious mischief may make any order ex parte upon such terms as to costs or otherwise, and subject to such undertaking, if any, as he may think just. Any party affected by such order may move to set it aside.*
>
> *2. Except where otherwise provided by these Rules, or unless the judge gives special/eave to the contrary, there must be at least four clear days between the service of the motion and the day named in the notice for hearing the motion.*

37. O.67 r.15 is also relevant and provides as follows:

> *"Non-compliance with any of these Rules, or with any practice for the time being in force in the Court, shall not render the proceedings void unless the Court shall so direct, but such proceedings may be set aside wholly or in part as irregular, or may be amended or otherwise dealt with in such manner or upon such terms, as the Court shall think fit."*

Submissions

38. On behalf of the appellants, Ms Houlihan BL submits that in this case the application for forfeiture was not made while the cash was detained, as required by s.39. To "make" an application in this context, where it is required to be made on notice, means that the application is not made until all of the respondents or notice parties are on notice. Since this did not happen until the appellant was served on the 31st May, and since the last detention order made by the District Court had expired by then, the application was out of time and the Circuit Court had no jurisdiction to deal with it.

39. It is also submitted that the service that was effected on Mr Davis was in itself defective in that

- The appellant is not a citizen of Ireland and therefore notice of the document, and not the document itself, should have been served on him.
- A copy of the order giving leave to serve out of the jurisdiction was not served with the document, as required by O.13 r.2.

• The notice of motion was not served four clear days before the return date of the 1st May, 2012 as required by the rules.

40. Mr Kiely SC, on behalf of the Director, refers to the fact that an *ex parte* application was made on the 24th April, 2012 for liberty to issue a notice of motion returnable for the 1st May, 2012. This was necessary to get a return date for mention within the currency of the subsisting s.38 order. It was not intended that the hearing of the application should take place on the return date. It is noted that Rule 5 of O.69 empowers the court to direct that notice of the application be served on such persons, not originally named as respondents by the Director, as it thinks fit, and that s.38 permits the continued detention of the cash past the expiry date of a District Court order where the Circuit Court has not yet determined the forfeiture application. Thus, it is submitted, the legislature did not envisage that all relevant parties must be served and the application finally determined within the currency of the District Court order.

41. In relation to the other criticisms made of the service effected upon the appellant, the Director contends that if there are any defects the court should regard them as *de minimis*. There is a suggestion that the difficulties with service were created by the appellant's solicitors, because of their refusal to accept service of the Circuit Court proceedings despite being on record in the District Court.

The authorities

42. The parties have referred to the judgments in *DPP v. England* [2011] IESC 16, *KSK Enterprises Limited v. An Bord Pleanala* [1994] 2 IR 128, *Keelgrove Properties v. An Bord Pleanala* [2000] 1 IR 47, *F.McK. v. A.F.* [2005] 2 IR 16, J.*G.R. v. DPP* [2008] IEHC 461 and *McDonnellv District judge MacGruairc* [2001] IEHC 76.

43. I propose to summarise these in chronological order, with a note of caution in relation to DPP v. England- although it is a relatively recent decision, it deals with events in the 1990s and thus with a legislative context predating the making of O.69.

44. *KSK Enterprises* (March 1994) is a planning case, in which the issue related to the then recent statutory innovation requiring applications for leave for judicial review of certain planning decisions to be made by motion on notice rather than in the normal *ex parte* manner. The application was to be made within two months of the date on which the relevant decision was given. The facts of the case involved a decision made on the 1st December, 1993. The applicant filed a notice of motion, together with a grounding affidavit and statement of grounds, on the 31st January, 1994, and was made returnable by the office for the 14th February.

45. A preliminary argument taken by the respondents on the basis that the application was out of time was successful in the High Court (Flood J.), which held that the section required that the application be actually moved in court, or at least be in the court list to be heard if time was available.

46. On appeal the applicant argued that time stopped running once the filing of the notice of motion was effected- it was then up to the Central Office to allocate a date. In the alternative it was submitted that the application would be "made" if the notice of motion was filed and served on at least one of the mandatory respondents provided for in the relevant section.

47. The respondents contended for the interpretation found by the High Court, but also submitted as an alternative that the section required the filing of the notice and also service on each of the mandatory respondents.

48. There were, thus, four possible interpretations of the section presented to the Supreme Court.

49. Giving the judgment of the Court, Finlay C.J. considered the general scheme of the provision and held that its purpose was to strictly confine the possibility of judicial review so that persons who had obtained planning permission could, after a short interval, be entirely legally protected and in a position to act on the basis of that decision. He compared the new procedure with the *ex parte* application and said

> *"There can be no doubt in my mind that an application to the Court by a motion ex parte cannot be said to be made until it is actually moved in court. In the case of a motion on notice which is what is provided for in this subsection, I am quite satisfied that it could not be said to have been made under any circumstances until notice ofit had been given to the parties concerned. Such a construction of the phrase "application made by motion on notice" seems to me entirely consistent with the plain objects of this sub-section and with its other provisions...*
>
> *I have considered carefully whether the filing of a motion on notice to all the parties concerned being the mandatory respondents is sufficient and whether there are any good grounds for differentiating in the interpretation of this section between the making of an application for leave to apply for judicial review by a motion ex parte, and by a motion on notice.*
>
> *I am satisfied that as a matter of general construction, where a restriction is being imposed upon the exercise of a right in a statute such as this sub-section involves, that it is desirable to the extent of being almost imperative that it should be capable of being construed and should be construed in a clear and definite fashion."*

50. The Court disapproved of the test as applied in the High Court as creating too imprecise a cut-off point, and concluded that if within the time limit of two months from the date of the decision a notice of motion was filed in the High Court and it was served on the mandatory parties provided in the sub-section, that would be taken as compliance with the two month time limit. If it was not served on all such parties, as distinct from the power of the court at a later stage to order the service of additional parties, then the procedure was not complete within the time limit. The Court therefore rejected the proposition that it was sufficient if one party was served within the time:

> *"There is neither logic nor reason in such an interpretation and it would be clearly in my view legislating rather than interpreting the section so to decide."*

51. The earliest authority cited before me in relation to this Act is *McDonnell v District judge Mac Gruairc* (June, 2001). This concerns the format of the notice given for an application under s.38 to the District Court, rather than any issue as to time limits. There had already been a number of such applications in the case, all on notice to the applicant. The solicitor for the Director wrote to the solicitor for the applicants, advising him that an application for continued detention would be made on a particular date, the time of which would be notified later. The grounds for the application were not set out in the letter, which was not in conformity with the form provided in the District Court Rules. At the hearing, at which the applicant was represented, the District Judge deemed the service and content of the notice good and effective.

52. Giving judgment in the judicial review proceedings, Kearns J. noted the history of the case in the District Court and said that it could not seriously be argued that, whatever form of service was adopted, the applicant had suffered any kind of prejudice or disadvantage.

> *"It is well established that any supposed defects in service of proceedings are cured in such circumstances. Any possibility of late notification, which was not in any event alleged, could have been cured by a request for an adjournment. "*

53. As far as the form and content were concerned, Kearns J. held that the letter had to be seen in the context of the ongoing inquiry in relation to the cash and the orders previously made detaining it. In the circumstances the applicant had full knowledge of the nature of the investigation in progress. Specific recital of the grounds for seeking renewal of the detention would have been required if the enquiry was to take a new, completely different direction but that did not arise.

54. *F.McK v. A.F.* (February, 2005) is a decision of the Supreme Court dealing with certain provisions of the Proceeds of Crime Act, 1996. For the purposes of the instant case the relevant issue was whether the plaintiff's application for an order under s.3 of that Act was out of time. The statute required such an application to be "brought" within 21 days of the making of an interim order. The issue was whether the application had to be moved in open court within the time provided, as contended for by the defendant, and "not merely filed in the office with a view to a future hearing date".

55. In rejecting the defendant's argument, the Court held that there was no distinction to be drawn between the "making" and the "bringing" of an application, (referring to the High Court judgment in *KSK Enterprises* in that regard). At p.172 of the report there is the following passage:

> *"Given the uncertainties of the availability of courts and judges at any given time and the systems of listing, a statute which creates a time limit for the bringing or making of an application or uses any cognate words should be interpreted as meaning the date of issuing if the proceedings require a summons or filing or possibly in some cases filing and serving if what is required is a motion, but unless there are express words in the statute that require it, it should not be interpreted as meaning the actual moving of the application in open court."*

56. In *J.G.R. v. DPP*, (July, 2008), Harding Clark J. considered the question whether service of a notice of motion in a forfeiture application under s.39 of the Act was merely notice of an intention to apply for an order and, as such, not enough to stop the two-year period from running. The facts were that the cash in issue had been seized on the 19th July, 2005. It was the subject of repeated District Court detention orders, the last of which was due to expire on the 18th July, 2007. On the 17th July, 2007 the Director issued a notice of motion returnable for the 2nd October, 2007. There was no issue as to service of the notice (and it does not, therefore, appear from the judgment whether service was effected before the 18th July) but the argument was made by the applicant that the forfeiture application had to be moved in court before the expiry of the detention order. The Director submitted that time stopped with service of the originating notice of motion.

57. The court held that the intention of the Oireachtas in providing for a period of two years was plain, and that it would be "quite extraordinary" if compliance with the statute could only be assessed when the court was actually addressed.

> *"The term 'application is made' is familiar court language with a specific meaning and not a phrase which requires to be construed for being obscure or ambiguous or where a literal interpretation would be absurd or where it would fail to reflect the plain intention of the Oireachtas. The meaning of an application to the Court is well understood to mean a formal request for orders, directions or reliefs and subject to rules of procedure which determine how the application is to be made and the notice which must be given to the Court or the respondent and the time limits in which the application is to be made. The particular procedure used in this case was made in accordance with O.69 of the Circuit Court Rules pursuant to s.42(2) of the Criminal justice Act 1994. The rule was complied with regarding notice to the Court and to the applicant."*

58. Referring to *KSK Enterprises* and *McK V. A.F.*, Harding Clark J. said that they reinforced her view that the meaning of the phrase "application is made" included the issue of a notice of motion and did not require an actual oral demand made to a judge.

59. *DPP v England* (May, 2011) was a case stated by the Circuit Court to the Supreme Court and relates to the Act under consideration in this case. Although decided in 2011, it concerns events that took place in 1998 and 1999, before the 2005 amendments to the Act or the making of the relevant Circuit Court rules in 2004. The material facts were that the last District Court detention order expired on the 5th May, 1999. A notice of motion seeking forfeiture in the Circuit Court, dated the 23rd April, 1999 and returnable for the 29th June, 1999 was served under cover of a letter dated the 2nd June, 1999. It appears that service out of the jurisdiction was authorised by an order of the Circuit Court made on the 18th May, 1999. The question posed in the case stated was whether the Circuit Court judge was correct in holding that the cash continued to be lawfully detained within the meaning of the Act, on foot of the notice of motion.

60. The applicant argued that the forfeiture application was not "made" until the 29th June and was therefore out of time. He relied in part on the fact that the notice of motion, in its own terms, stated that application would be made on the 29th June. The Director contended for a "broad and purposive" interpretation and argued that the term "application made" included the issuance of the notice of motion on the 23rct April. It is relevant to note that the judgment of the Court records the fact that the Director, in the course of argument, conceded that where a person "appearing to be interested", as in that case, had "actively corresponded from a specific address and had energetically laid claim to the money", it was necessary to serve such person.

61. Giving the judgment of the Court, Hardiman J. held that the normal rules of construction applied to the provision and that it was to be interpreted in accordance with the ordinary and natural meaning of the words. He noted the fact that there were no applicable rules of court and referred, by way of an analogy described being of "oblique relevance" to provisions of O.136 of the Rules of the Superior as Courts. This deals with applications under the Proceeds of Crime Act, 1996 such as those under consideration in *F.McK v A.F.*, and provides that applications shall be made by originating motion *ex parte*. Hardiman J. said that if an originating motion of this kind were in question, "then the "making" of the application would indeed be accomplished by the making of the motion. But that would be by reason of the specific provisions of {the Order]."

62. The judgment of Finlay C.J. in *KSK Enterprises* was considered and it was held that Finlay C.J.'s analysis in *KSK Enterprises* was germane and consistent with the ordinary and natural meaning of the words of s.39, although not wholly analogous, that the application therefore had not been made while the money was detained. Hardiman J. further stated that "something quite extraordinary" would have to be established to permit an application under the section to proceed without putting an interested

person on notice. However, he added the following comment:

> *"That is not, however, to exclude the possibility that, in circumstances of urgency, an ex parte application might first be made on which the Court, for example, could take any necessary steps to preserve the status quo."*

63. The case of *Delaney v Judge Coughlan and others* was decided by the Supreme Court in June 2012. The relevance of this decision is that it follows *England* in holding that the Act is to be construed literally.

Discussion and conclusions

64. The appellants do not contend that the Director's application must be moved in court within the time limit, but rather that notice of the motion must be served, on all relevant parties, within that time. They rely primarily on the decisions of the Supreme Court in *KSK Enterprises* and *DPP v England*. It is suggested that, if the court were to hold otherwise, it could mean that a notice of motion could be issued but not served and therefore the cash could be detained indefinitely.

65. The Director submits that *DPP v England* was decided without reference to the now extant rules set out in O.69, and says that this is an originating process which should be treated like a civil bill. The relevant date, it is submitted, is the 27th April, 2012 (which is apparently the date that the undated notice of motion was filed) and it is noted that the first court appearance was on the 1st May. *DPP v England* is distinguished on the basis that the rules were not in existence at the time of the events considered by that court. Any delay in service is said to have been the result of non-cooperation by the respondents and their solicitors. It is suggested that, if the court were to hold otherwise, it could mean that one respondent could evade service and thereby ensure that the forfeiture order could not be made.

66. I should perhaps say at this point that I am satisfied that neither of the doomsday scenarios projected by the parties should, in any event, ever be permitted to take place. The Circuit Court, like any court, has an inherent right to protect its own process against abuse by any party. It has specific powers under the rules to deal with situations where one party sits on its rights, to the detriment of others, or another party evades service with a view to extinguishing a right of action.

67. It will be seen that none of the authorities cited directly cover the facts of the instant case. In particular, I am conscious of the fact that this is a case in which, well before the expiry of the relevant District Court order, the Director had sought unsuccessfully to serve certain parties with notice of the intended forfeiture application and had made application to the Circuit Court for directions as to service, including service on Mr Davis. The process of the court was thereby invoked with the specific purpose of ensuring proper service. I am also conscious of the fact that the learned Circuit Court judge, in making his order of the 15th March, 2013, implicitly deemed that those directions had been complied with. However, it seems to me that the statements of principle by the Supreme Court in *KSK Enterprises* and *DPP v England* are broad enough to bind this court to find that, where a statutory time limit requires that an application be brought by way of motion on notice, the notice must be served on all necessary parties within that time limit. Neither the subsequent High Court decisions, nor the introduction of 0.69 of the Circuit Court Rules, have altered that position.

68. Mr Davis in this case had been joined in the District Court and it was at all times thereafter considered by the Director that he was a proper person to be made a respondent to the forfeiture application. As it happened, he was not served within the time limit, in circumstances where the Director had available a number of options in relation to substituted service or, perhaps, deeming service good. This cannot in reality be described as a situation where he was evading service, given his ongoing contact with Ms Smullen and his nomination of his new address.

69. For the sake of completeness I will add that I do not consider that any of the other criticisms of the service effected on Mr Davis could have the effect of depriving the Circuit Court of jurisdiction. They are matters which would, at best, entitle him to an adjournment to ensure that he was not prejudiced by the breach of the rules.

70. By the same token, I will add that I do not see that the appellant's solicitor can be criticised for saying that she did not have authority to accept service in relation to a different application, in a different court, to the matter in respect of which she had been retained.

71. In the circumstances I will allow the appeal.