

IN THE HIGH COURT OF JUSTICE FOR NORTHERN IRELAND

QUEEN'S BENCH DIVISION

IN THE MATTER OF KEVIN FRANCIS DONNELLY  
AND  
IN THE MATTER OF THE PROCEEDS OF CRIME ACT 2002

**TREACY J**

[1] The applicant, Kevin Donnelly applies for discharge of the restraint order made on 10 October 2007 by Mr Justice Morgan. The application was grounded on the affidavit of the applicant dated 18 November 2009.

**Statutory framework**

[2] Under Section 190 of the Proceeds of Crime Act 2002 (POCA) if any of the conditions set out in Section 189 is satisfied the High Court may make a restraint order prohibiting any specified person from dealing with any realisable property held by him. So far as relevant to this application Section 189 provides as follows:

“(1) The High Court may exercise the powers conferred by Section 190 if any of the following conditions is satisfied.

(2) The first condition is that -

- (a) a criminal investigation has been started in Northern Ireland with regard to an offence, and
- (b) there is reasonable cause to believe that the alleged offender has benefited from his criminal conduct.”

It was on this basis that the court granted the restraint order made on 10 October 2007.

[3] Section 191 of POCA provides, inter alia, for the discharge of restraint orders. In material part it provides as follows:

“(3) An application to discharge or vary a restraint order or an order under Section 190(7) may be made to the High Court by –

(a) person who applied for the order;

(b) any person affected by the order.

(4) Subsections (5) to (7) apply to an application under subsection (3).

(5) The court –

(a) may discharge the order;

(b) may vary the order.

(6) If the condition in Section 189 which was satisfied was that proceedings were started or an application was made, the court may discharge the order on the conclusion of the proceedings or of the application (as the case may be).

(7) *If the condition in Section 189 which was satisfied was that an investigation was started or an application was to be made, the court must discharge the order if within a reasonable time proceedings for the offence are not started or where the application is not made (as the case may be)."*

It was this italicised provision which formed the central focus of the parties submissions.

[4] It is clear from the mandatory terms of Section 191(7) that if within a “reasonable time” proceedings for “the offence” are not started that the court “must” discharge the order. The reference to “the offence” is plainly a reference to the offence which grounded the making of the restraint order. The question of what constitutes a “reasonable time” within the meaning of Section 191(7) is a matter of fact and degree and it would not be profitable or desirable to attempt to lay down any definitive parameters in what is always likely to be a highly fact specific determination.

[5] The court was not referred to any decided cases where this issue has been considered in the context of Section 191(7). The case law (domestic and European) in respect of the reasonable time guarantee enshrined in Article 6 ECHR is of some assistance in identifying the kinds of factors that the court will take into account in determining whether the reasonable time threshold of Section 191(7) has been breached thus requiring discharge. These factors will include:

- (1) The period of time which has elapsed during which the applicant has been subject to the restraint order;
- (2) The complexity of the case. However as Lord Bingham sitting in the Privy Council in Dyer (2004) 1 AC 379 at para. 53

“... With any case, however complex, there comes a time when the passage of time becomes excessive and unacceptable.”

- (3) The conduct of the parties and in particular whether the conduct of the restrained party has materially contributed to the delay;
- (4) The manner in which the case has been dealt with by the administrative and judicial authorities.

[6] Investigation of serious fraud is usually a difficult, complex and onerous task and delay may therefore in many cases be inevitable. Successful applications grounded on Section 191(7) are therefore likely to be rare in the absence of culpable or serious unexplained delay. Furthermore the court must be mindful that the purpose of the restraint order is to freeze property and thereby preserve those assets which may subsequently be considered necessary to satisfy any Confiscation Order. On the other hand Section 191(7) contains a vital safeguard and if the underlying purpose of restraint orders is not to be frustrated investigators must be vigilant to ensure compliance with the reasonable time requirement.

[7] The application to discharge the restraint order is grounded on the affidavit of the applicant sworn on 18 November 2009 to which Mr Robinson of the PSNI has sworn a response dated 4 December 2009. From these affidavits the following material facts emerge:

- (1) The restraint order was granted on 10 October 2007 with reference, inter alia, to the offence of money laundering;

- (2) Searches under PACE and under Section 352 of POCA at properties associated with Mr Donnelly were conducted, and approximately 15-20 production orders were obtained;
- (3) The applicant was arrested in December 2007; bailed pending completion of forensic accountant's report;
- (4) August 2008 - re-arrested on foot of additional evidence from the forensic accountant and the production order material. Interviewed by police made no response to police questions.
- (5) August 2008 applicant charged with 80 offences including false accounting and money laundering.
- (6) Four weeks later 79 of the charges were withdrawn;
- (7) One holding charge of money laundering remained pending submission of "full" police file (see Robinson para. 17) - submitted to senior police November 2008 - received by PPS Fraud Section December 2008;
- (8) 29 July 2009 (following series of remands) the "holding charge" withdrawn;
- (9) Notwithstanding withdrawal of charges investigation continues;
- (10) October 2009 application to discharge restraint order;
- (11) Application to discharge restraint order withdrawn after agreed variation;
- (12) Current application to discharge restraint order lodged by summons dated 18 November 2009.

[8] The police did not initially suspect the applicant's accountants MM of impropriety and two production orders (November and December 2007) were served upon MM to gather further evidence *in regard to the applicant*.

[9] The police received their own forensic accountant's report in May 2008 which indicated issues relating to MM accountants and "along with other police enquiries it became apparent ... that MM accountants had possession of additional materials considered ... to be relevant evidence of facilitating money laundering by" the applicant *and* his accountants. In October 2008 the police applied for and were granted a search warrant in respect of MM accountants under Section 352 of POCA 2002.

[10] Complicated legal issues, currently before the County Court, arose out of the search of the accountants business premises which have not yet been finally resolved.

[11] Paragraph 18 of his affidavit Mr Robinson avers:

“(iv) Mr Brown [of PPS] decided that it was inappropriate to seek Mr Donnelly’s continual remand at Newry District court where it appeared likely to take some additional time to conclude the entirety of the investigations both within the bank and with regard to MM. Mr Brown had directed the PPS staff at the District Court in Newry to withdraw the remaining holding charge without prejudice on 29 July 2009. Mr Brown has advised me that he gave instructions that Mr Donnelly was to be clearly told, that this was not on the merits of the case but because it had become apparent that there is a substantial criminal enterprise involving a number of individuals. Mr Brown indicates that in his view there is a compelling inference of criminal conduct by Mr Donnelly.

(v) Mr Brown informed me that he awaits the outcome of the proceedings before [the County Court] in order to be able to consider the evidence in respect of Mr Donnelly and also that it was essential to ensure the role of MM in this case is fully considered prior to making his directions as to prosecution.”

[12] There have been delays in respect of the determination of the matters arising from the search and seizure of materials from the accountant’s premises (the subject of the ongoing county court proceedings) which it is common case are not the fault of either the applicant or the PPS. It further appears that more delay by way of final judicial determination, judicial review and/or appeal of any determination cannot be ruled out. The future timescale is therefore decidedly uncertain.

[13] In the meantime the applicant is subject to the adverse effects of the restraint order with there being no obvious end in sight at least in terms of an ability to commence proceedings for the offence. Given that the last remaining charge against the applicant was withdrawn in July 2009, that the restraint order has been in place since October 2007, the delay arising from the county court proceedings and the uncertainty regarding future progress I have concluded that proceedings for the offence have not been started within

a reasonable time and that I am accordingly obliged under Section 191(7) to discharge the order.