Neutral Citation Number: [2021] EWCA Crim 1525

Case No: 202100186 A1

**IN THE COURT OF APPEAL (CRIMINAL DIVISION)**
**ON APPEAL FROM THE CROWN COURT AT CROYDON**
**HHJ ROBINSON**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25 October 2021

**Before:**

**THE RT. HON. LORD JUSTICE FULFORD**
**VICE PRESIDENT OF THE COURT OF APPEAL (CRIMINAL DIVISION)**
**THE HON. MR JUSTICE SWEENEY**
and
**THE HON. MRS JUSTICE STACEY**

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**Between:**

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|---|---|
| **REGINA** | **Respondent** |
| **- and –** | |
| **THOMAS ADAMS** | **Appellant** |

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**Richard Furlong** for the **Appellant**
**Denis Barry** (instructed by **CPS**) for the **Respondent**

Hearing date: 10 June 2021
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# Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII, (if appropriate), and/or publication on the Courts and Tribunals Judiciary website.
The date and time for hand-down was deemed to be
**10.00 am** on **Tuesday 26 October 2021**.

**The Honourable Mr Justice Sweeney:**

***Introduction***

1. This case began as an application for leave to appeal against the imposition, pursuant to section 19 of the Serious Crime Act 2007 ("the Act"), of a Serious Crime Prevention Order ("SCPO") by Her Honour Judge Robinson ("HHJ Robinson") in the Crown Court at Croydon on 18 December 2020, which was referred to the Full Court by the Single Judge, who also granted a representation order. We grant leave.

2. The sole Ground of Appeal is that the Crown Court had no jurisdiction to impose the SCPO because, when the prosecution made their application for it on 1 September 2020, the court was no longer "dealing with" the appellant as required by section 19(1) of the Act, as his trial had concluded on 21 July 2017, he had been sentenced on 2 August 2017, and confiscation proceedings against him had been concluded on 27 February 2020. Thus, it is submitted, there was a jurisdictional bar, rather than a procedural failure, to make the application in time and, notwithstanding Criminal Procedure Rule 31.11, the Crown Court had no power retrospectively to vary the time limit.

3. The appeal is brought under the provisions of section 24 of the Act. The Serious Crime Act 2007 (Appeals under Section 24) Order 2008 (SI 2008/1863) provides, in Article 4(2), that the Court will allow an appeal where the decision of the Crown Court was wrong, or was unjust because of a serious procedural or other irregularity in the proceedings in the Crown Court. Articles 5(1) & (2) provide that, in relation to SCPOs, this court has all the powers of the Crown Court, and may (amongst other things) make an SCPO; affirm, set aside or vary any order or judgment; or order a new hearing in the Crown Court.

***Outline factual background***

4. In 2013 and early 2014, the appellant (a professional criminal who is now aged 63) was the head of a large money laundering operation which involved cash being sent, mainly from Manchester, to individuals in London who received it on the appellant's behalf. Everything was done to keep the appellant at arms-length, and anti-surveillance measures were used when cash was being received. Nevertheless, the operation was brought to an end by the police.

5. On 21 July 2017, at the conclusion of his trial, with 8 others, before HHJ Robinson and a jury in the Crown Court at Woolwich, the appellant was convicted of conspiracy to conceal criminal property (Count 1), conspiracy to transfer criminal property (Count 2) and transferring criminal property (Count 6). On 2 August 2017, for those offences, he was sentenced by the judge to a total of 7 years' imprisonment.

6. The Prosecution's Sentencing Note for the hearing on 2 August 2017 had proposed, amongst other things, that "…*all applications for ancillary orders, including applications for costs and for Serious Crime Prevention Orders, be heard at the time of, or immediately after, confiscation proceedings*". In consequence, after passing sentence, the judge ordered that: "*The issue of costs will be dealt with at a mention in March 2018, at the same time as the confiscation proceedings. Any ancillary applications are to be adjourned to the same mention*". It is, however, clear that there was no specific reference to any application for an SCPO at the mention hearing in March 2018, nor during the remainder of the confiscation proceedings thereafter.

7. In the meanwhile, the appellant's applications for leave to appeal against conviction and sentence had been refused by this Court (differently constituted) – see [2018] EWCA Crim 2675.

8. The confiscation proceedings were due to be completed by July 2019. However, following necessary extensions of time, they were ultimately concluded on 27 February 2020 - when a confiscation order in the agreed sum of £1,243,270.75 was made against the appellant.

9. It was not until 5 March 2020, and thus a few days after the completion of the confiscation proceedings, and at a time when the court was not otherwise dealing with the appellant in relation to the serious offences of which he had been convicted, that the prosecution finally purported to apply for an SCPO – on that occasion by serving a letter from the CPS, together with a draft Order, on the appellant. Three months later, on 19 June 2020, when again the court was not otherwise dealing with the appellant in relation to the serious offences, there was a second attempt by the prosecution to make such an application – on that occasion by the service of a document drafted and signed by Mr Barry (who appeared then, as now, for the prosecution) which was entitled "Application for a Serious Crime Prevention Order", and to which was appended a proposed Order. Objections were then raised on behalf of the appellant – which were based on the failure by the prosecution to use the requisite form to make the "application", and on the fact that the "application" had not been made and signed, as required, by the DPP (or by a duly delegated Crown Prosecutor).

10. In the result, on 1 September 2020, an application which used the requisite form (complying with Criminal Procedure Rule 31.3 and Criminal Practice Direction 5A), and which was made and signed by a duly delegated Crown Prosecutor, was finally served on the appellant. Again, the court was not otherwise dealing with the appellant in relation to the serious offences at that time. However, at around that time, the prosecution also applied for the appointment of an Enforcement Receiver in relation to some of the assets which were the subject of the confiscation order.

11. The application for an SCPO was considered by HHJ Robinson at a hearing on 26 October 2020. Ultimately, two grounds of opposition were advanced, namely that:

    (1) The Court had no jurisdiction to make the order.

    (2) On the merits, the order should not be made.

12. The terms of the SCPO that the judge imposed on 18 December 2020 were largely agreed.

***Legal Framework***

13. Before summarising the written and oral arguments advanced before the judge in relation to the first ground of opposition, it is convenient to set out the relevant provisions of the Act, the Criminal Procedure Rules and the Criminal Practice Directions in relation to SCPOs as now in force (there being no material differences), and then to summarise the leading authorities in relation to the making of SCPOs in the Crown Court, and as to the legal consequences of irregularities in the way in which an accused came to be convicted and/or sentenced in the Crown Court.

***(1) The relevant provisions of the Act, Rules and Practice Directions.***

14. SCPOs are the subject of Part 1 of the Act, together with Schedules 1 & 2. The Act provides for such orders to be made by the High Court or the Crown Court - albeit that the powers overlap to some extent. We shall deal with the powers of the High Court first.

<u>High Court</u>

15. Under the heading "*Serious Crime Prevention Orders*", section 1 provides that:

> *"(1) The High Court in England and Wales may make an order if –*
>
> *(a) it is satisfied that a person has been involved in serious crime (whether in England and Wales or elsewhere); and*
>
> *(b) it has reasonable grounds to believe that the order would protect the public by preventing, restricting or disrupting involvement by the person in serious crime in England and Wales.*
>
> *……..*
>
> *(3) An order under this section may contain –*
>
> *(a) such prohibitions, restrictions, or requirements; and*
>
> *(b) such other terms;*
>
> *as the court considers appropriate for the purpose of protecting the public by preventing, restricting or disrupting involvement by the person concerned in serious crime in England and Wales….*
>
> *…….*

*(5) In this Part –*

*….*

*'serious crime prevention order' means –*

*(a) an order under this section;*

*(b) an order under section 19 (corresponding order of the Crown Court on conviction); …"*

16. Section 2 of the Act provides that*:*

*"(1)For the purposes of this Part, a person has been involved in serious crime in England and Wales if he –*

*(a) has committed a serious offence in England and Wales;*

*(b) has facilitated the commission by another person of a serious offence in England and Wales;*

*(c) has conducted himself in a way that was likely to facilitate the commission by himself or another person of a serious offence in England and Wales (whether or not such an offence was committed).*

*(2) In this Part "a serious offence in England and Wales" means an offence under the law of England and Wales which, at the time when the court is considering the application or matter in question –*

*(a) is specified, or falls within a description specified, in Part 1 of Schedule 1: or*

*(b) is one which, in the particular circumstances of the case, the court considers to be sufficiently serious to be treated for the purposes of the application or matter as if it were so specified.*

*(3) For the purposes of this Part, involvement in serious crime in England and Wales is any one or more of the following –*

*(a) the commission of a serious offence in England and Wales;*

*(b) conduct which facilitates the commission by another person of a serious offence in England and Wales;*

*(c) conduct which is likely to facilitate the commission, by the person whose conduct it is or another person, of a serious offence in England and Wales (whether or not such an offence is committed)*

*……."*

17. Paragraphs 6 & 14 of Schedule 1 to the Act provide, between them, that money laundering offences contrary to sections 327 – 329 of the Proceeds of Crime Act 2002, and conspiracy to commit such offences, are "serious offences".

18. Section 4 of the Act provides that:

*"(1)In considering for the purposes of this Part whether a person has committed a serious offence –*

*(a) the court must decide that the person has committed the offence if:*

*(i) he has been convicted of the offence; and*

*(ii) the conviction has not been quashed on appeal nor has the person been pardoned of the offence; but*

*(b) the court must not otherwise decide that the person has committed the offence.*

*……."*

19. Sections 6 – 15 of the Act provide safeguards, including limiting the age of those who can be the subject of SCPOs to 18 or more; delineating those who must apply for such orders; providing protections for third parties; and providing notice requirements, together with limitations on the use of information. In particular, section 8 provides that:

"*A serious crime prevention order may be made only on an application by –*

*(a) in the case of an order in England and Wales –*

*(i) The Director of Public Prosecutions; or*

*.....*

*(iii) the Director of the Serious Fraud Office*."

20. Under the headings "*Function of applicant authorities under Part 1*", and "*Director of Public Prosecutions*", Schedule 2 to the Act provides that:

*"1. The functions of the Director of Public Prosecutions under this Part are –*

*(a) to have the conduct of any applications for serious crime prevention orders in England and Wales or for their variation or discharge;*

*……*

*(d) to give advice in connection with any proceedings or possible proceedings in connection with serious crime prevention orders; and*

*(e) to do anything for the purposes of, or in connection with, the functions in paragraphs (a) to (d).*

*2. (1) The Director may, to such extent as he may decide, delegate the exercise of his functions under this Part to a Crown Prosecutor.*

*(2) References in this Part to the Director are accordingly to be read, so far as necessary for the purposes of sub-paragraph 1, as references to the Director or any Crown Prosecutor.*

*……."*.

Crown Court

21. The power of the Crown Court to make an SCPO is set out, under the heading "*Extension of jurisdiction to Crown Court",* in section 19 – which provides that:

"*19. Orders by Crown Court on conviction*

*(1) Subsection (2) applies where the Crown Court in England and Wales is dealing with a person who –*

*(a) has been convicted by or before a Magistrates' Court of having committed a serious offence in England and Wales and has been committed to the Crown Court to be dealt with; or*

*(b) has been convicted by or before the Crown Court of having committed a serious offence in England and Wales.*

*(2) The Crown Court may, in addition to dealing with the person in relation to the offence, make an order if it has reasonable grounds to believe that the order would protect the public by preventing, restricting, or disrupting involvement by the person in serious crime in England and Wales.*

*……*

*(5) An order under this section may contain –*

*(a) such prohibitions, restrictions or requirements; and*

*(b) such other terms;*

*as the court considers appropriate for the purpose of protecting the public by preventing restricting or disrupting involvement by the person concerned in serious crime in England and Wales.*

*(6) The powers of the court in respect of an order under this section are subject to sections 6 to 15 (safeguards).*

*(7) An order must not be made under this section except –*

*(a) in addition to a sentence imposed in respect of the offence concerned; or*

*(b) in addition to an order discharging the person conditionally.*

*(8) An order under this section is also called a serious crime prevention order."*

22. Under the heading "*Proceedings in the Crown Court*", section 36 provides that:

*"(1) Proceedings before the Crown Court arising by virtue of section 19…… are civil proceedings.*

*(2) One consequence of this is that the standard of proof to be applied by the court in such proceedings is the civil standard of proof.*

*(3) Two other consequences of this are that the court –*

*(a) is not restricted to considering evidence that would have been admissible in the criminal proceedings in which the person concerned was convicted; and*

*(b) may adjourn any proceedings in relation to a serious crime prevention order even after sentencing the person concerned.*

*(4) The Crown Court, when exercising its jurisdiction in England and Wales under this Part, is a criminal court for the purposes of Part 7 of the Courts Act 2003 (c.39) (procedure rules and practice directions).*

*……"*

23. Nevertheless, the prosecution accepted below, by analogy with the decision of the House of Lords in *Clingham (formerly C a minor)) v RB Kensington & Chelsea; R v Manchester CC ex p McCann* [2002] UKHL 39, [2003] 1 AC 787 (which was concerned with the imposition of Anti-Social Behaviour Orders) that the court must be satisfied to the criminal standard of all relevant matters before an SCPO can be imposed.

24. Rule 31.2 of the Criminal Procedure Rules provides that:

*"(1) The court must not make a behaviour order unless the person to whom it is directed has had an opportunity –*

*(a) to consider –*

*(i) what order is proposed and why, and*

*(ii) the evidence in support, and*

*(b) to make representations at a hearing (whether or not that person in fact attends).”*

25. Rule 31.3 of the Criminal Procedure Rules provides that:

*“(1) This rule applies where –*

*(a) a prosecutor wants the court to make one of the following orders if the defendant is convicted –*

*……*

*(ii) a serious crime prevention order*

*…..*

*(2) Where paragraph 1(a) applies (order on application) the prosecutor must serve a notice of intention to apply for such an order on –*

*(a) the court officer;*

*(b) the defendant against whom the prosecutor wants the court to make the order; and*

*(c) any person on whom the order would be likely to have a significant adverse effect,*

*as soon as practicable (without waiting for the verdict).*

*(3) A notice under paragraph (2) must –*

*(a) summarise the relevant facts;*

*(b) identify the evidence on which the prosecutor relies in support;*

*(c) attach any written statement;*

*(d) specify the order that the prosecutor wants the court to make.*

*(4) A defendant served with a notice under paragraph (2) must –*

*(a) serve notice of any evidence on which the defendant relies on –*

*(i) the court officer, and*

*(ii) the prosecutor,*

*as soon as practicable (without waiting for the verdict); and*

*(b) in the notice, identify the evidence and attach any written statement that has not already been served.*

*……..".*

26. Rule 31.11 provides that:

*"Unless other legislation otherwise provides, the court may –*

*(a) shorten a time limit or extend it (even after it has expired);*

*(b) allow a notice or application to be given in a different form or presented orally."*

27. By the combination of Rule 5.1, Criminal Practice Direction 1 General Matters 5A: Forms, and Annex D to the Consolidated Criminal Practice Direction, for the purposes of Rule 31.3, and unless the court otherwise directs, the Director of Public Prosecutions, or delegated Crown Prosecutor, is required to give notice of intention to apply for an SCPO using the form specified in Annex D entitled *"Notice of intention to apply for a Serious Crime Prevention Order if the Defendant is convicted of a serious offence and proposed application"*, signed and dated by the applicant, in which the applicant is required, amongst other things, to set out / attach:

(1) The name and address of the defendant against whom, if convicted of one or more serious offences, the prosecutor intends to apply to the court for an SCPO to be made against him.

(2) The terms of the Order sought.

(3) The name of the prosecuting authority and the name and address of the prosecutor.

(4) The serious offence(s) with which the defendant is charged / has been convicted.

(5) A description of the behaviour relied on to make the application; a list or lists of evidence to be relied on that has already been served; a list or lists of the evidence to be relied on that has not yet been served (which is required to be attached to and served with the notice); notice of any hearsay evidence to be relied on; and a list of any other documents served with the notice.

28. The specified form concludes, in accordance with Rule 31.3(2), with the words: *"This notice and proposed application must be served, with the listed attachments upon which the application will be based, as soon as possible (without waiting for a verdict) on the court officer, the defendant, and any person on whom the order would be likely to have a significant adverse effect."*

29. Section 10 of the Act (one of the safeguard provisions touched on above) provides that:

*"(1) The subject of a serious crime prevention order is bound by it or a variation of it only if –*

*(a) he is represented (whether in person or otherwise) at the proceedings at which the order or (as the case may be) variation is made; or*

*(b) a notice setting out the terms of the order or (as the case may be) variation has been served on him.*

*……."*

30. The Crown Court also has power to vary orders on conviction (section 20) and to vary or replace orders on breach (section 21).

31. Section 20 provides that:

*"(1) Subsection (2) applies where the Crown Court in England and Wales is dealing with a person who –*

*……..*

*(b) has been convicted by or before the Crown Court of having committed a serious offence in England and Wales.*

*(2) The Crown Court may –*

*(a) in the case of a person who is the subject of a serious crime prevention order in England and Wales; and*

*(b) in addition to dealing with the person in relation to the offence;*

*vary the order if the court has reasonable grounds to believe that the terms of the order as varied would protect the public by preventing, restricting or disrupting involvement by the person in serious crime in England and Wales.*

*……..*

*(5) A variation under this section may only be made on an application by the relevant applicant authority.*

*(6) A variation may not be made except:*

*(a) in addition to a sentence imposed in respect of the offence concerned; or*

*(b) in addition to an order discharging the person conditionally."*

32. Section 21 provides that:

> *"(1) Subsection (2) applies where the Crown Court in England and Wales is dealing with a person who –*
>
> *……..*
>
> *(b) has been convicted by or before the Crown Court of having committed an offence under section 25 in relation to a serious crime prevention order.*
>
> *(2) The Crown Court may –*
>
> *(a) in the case of an order in England and Wales; and*
>
> *(b) in addition to dealing with the person in relation to the offence;*
>
> *vary or replace the order if it has reasonable grounds to believe that the terms of the order as varied, or the new order, would protect the public by preventing restricting or disrupting involvement by the person in serious crime in England and Wales.*
>
> *……..*
>
> *(5) An order may be varied or replaced under this section only on an application by the relevant applicant authority.*
>
> *(6) A variation, or new order, must not be made except:*
>
> *(a) in addition to a sentence imposed in respect of the offence concerned; or*
>
> *(b) in addition to an order discharging the person conditionally."*

### *(2) Leading authorities – SCPOs in the Crown Court*

33. The leading authority in relation to the making of SCPOs in the Crown Court is *R v Hancox & Duffy* [2010] 2 Cr. App. R. (S.) 74, as confirmed in *R v Webb & Clarke* [2011] EWCA Crim 882 and *R v Hall & Others* [2015] 1 Cr. App. R. (S.) 16 at paras 23-28. In *Hancox,* Hughes VP (as he then was) made clear that there are three necessary preconditions to the making of an SCPO in the Crown Court, namely that:

(1) The defendant has been convicted of a "*serious offence*" (section 19(1) of the Act)

(2) An application has been made by one of the office holders specified in section 8 of the Act (who include the Director of Public Prosecutions, or a Crown Prosecutor to whom the Director has delegated his functions under Part 1 of the Act).

(3) The court must have reasonable grounds for believing that an SCPO would protect the public by preventing, restricting, or disrupting involvement by the defendant in serious crime (section 19(2) of the Act) – i.e. there must be a real or significant risk (rather than a bare possibility) that the defendant will commit further serious offences (as defined), and the terms of the SCPO must be proportionate.

34. We would add that the SCPO must be in addition to a sentence imposed in respect of the serious offence(s) concerned, or in addition to an order discharging the relevant person conditionally (section 19(7)); that any other relevant safeguards in sections 6,7 and 9-15 must be in place – in this case that the subject of the order was aged at least 18 (sections 6 and 19(6)); and that the subject of the order must have had an opportunity to consider the order that is proposed and why, and to make representations at a hearing, whether or not he attends (Rule 31.2(1)).

### *(3) Leading authorities – legal consequences of irregularities in sentence in the Crown Court*

35. The leading authorities are *R v Ashton* [2007] 1 WLR 181, in combination with *R v Gould* [2021] 2 Cr. App. R. 7 which, between them, explain the principles to be derived from the decision of this court in *R v Sekhon and others* [2003] 1 WLR 1655, and from the decisions of the House of Lords in *R v Soneji* [2006] 1 AC 340 and *R v Clarke* [2008] 2 Cr. App. R. 2

36. In *Ashton*, the three cases with which this Court was concerned involved irregularities in the way in which the relevant accused had come to be convicted and/or sentenced in the Crown Court. Giving the judgment of the Court, which was presided over by Rose VP, Fulford J (as he then was) said at paras 4 - 9, under the heading "*The Central Issue of Principle*":

> *"4. The outcome of each of these cases essentially depends on the proper application of the principle or principles to be derived from the decision of the House of Lords in R v Soneji …., together with the earlier decision of this court in R v Sekhon and others ……. Indeed, these three applications demonstrate how far-reaching the effect of those authorities is likely to be whenever there is a breakdown in the procedures whereby a defendant's case progresses through the courts (as opposed to the markedly different situation when a court acts without jurisdiction). In our judgment it is now wholly clear that whenever a court is confronted by failure to take a required step, properly or at all, before a power is exercised ("a procedural failure"), the court should first ask itself whether the intention of the legislature was that any act done following that procedural failure should be invalid. If the answer to that question is no, then the court should go on to consider the interests of justice generally, and most particularly whether there is a real possibility that either the prosecution or the defence may suffer prejudice on account of the procedural failure. If there is such a risk, the court must decide whether it is just to allow the proceedings to continue.*

5. *On the other hand, if a court acts without jurisdiction - if, for instance, a magistrates court purports to try a defendant on a charge of homicide - then the proceedings will usually be invalid.*

6. *In R v Sekhon in the context of confiscation proceedings, this court held that "the purpose of rules of procedure is not usually to give or take away a court's jurisdiction"; rather, procedural requirements "provide a convenient and just machinery enabling the court to exercise its jurisdiction": para 21 (v)).Furthermore, "The procedural provisions can be, but usually are not, conditions that have to be fulfilled to give the court jurisdiction. More usually procedural provisions do no more than (a) enable the court if they are not complied with to make orders to require something to be done if it has not been done in accordance with the statutory provisions or (b) in the same circumstances to dismiss the proceedings": para 21 (vi)).*

   *Moreover, "substantive provisions giving the court its jurisdiction are not to be automatically defeated in the ordinary way by non-compliance with procedural requirements unless this is necessary to achieve the statutory purpose": para 21 (ix).*

7. *Lord Woolf C.J. stated, at para 29:*

   *"We would expect a procedural failure only to result in a lack of jurisdiction if this was necessary to ensure that the criminal justice system served the interests of justice and thus the public or where there was at least a real possibility of the defendant suffering prejudice as a consequence of a procedural failure."*

8. *In R v Soneji the House of Lords held that a procedural failure in the sentencing process which led to the making of a confiscation order would not have been intended by Parliament to invalidate the order. Of particular importance to the issues we are considering, Lord Steyn approved the approach of the Australian High Court in Project Blue Sky Inc. v Australian Broadcasting Authority (1998) 194 CLR 355, in which it had been said:*

   *"... a court, determining the validity of an act done in breach of a statutory provision, may easily focus on the wrong factors if it asks itself whether compliance with the provision is mandatory or directory and, if directory, whether there has been substantial compliance with the provision. A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid."*

   *Lord Steyn went on to state at para 23 that:*

   *"Having reviewed the issue in some detail I am in respectful agreement with the Australian High Court that the rigid mandatory and directory distinction, and its many artificial refinements, have outlived their*

*usefulness. Instead, as held in Attorney General 's Reference (No 3 of 1999), the emphasis ought to be on the consequences of non-compliance, and posing the question whether Parliament can fairly be taken to have intended total invalidity."*

*In dealing with the interests of justice in that case, Lord Steyn concluded, at para 24:*

*"Thirdly, counsel for the accused relied on an alleged injustice caused to the accused by the delay of the confiscation procedures. In my view this argument was overstated. The prejudice to the two accused was not significant. It is also decisively outweighed by the countervailing public interest in not allowing a convicted offender to escape confiscation for what were no more than bona fide errors in the judicial process."*

*9. In our view Mr Perry, for the respondent, is correct, therefore, in arguing that the prevailing approach to litigation is to avoid determining cases on technicalities (when they do not result in real prejudice and injustice) but instead to ensure that they are decided fairly on their merits. This approach is reflected in the Criminal Procedure Rules 2005 [SI 2005/384] and, in particular, the overriding objective. Accordingly, as indicated above at para 4, absent a clear indication that Parliament intended jurisdiction automatically to be removed following procedural failure, the decision of the court should be based on a wide assessment of the interests of justice, with particular focus on whether there was a real possibility that the prosecution or the defendant may suffer prejudice. If that risk is present, the court should then decide whether it is just to permit the proceedings to continue."*

37. In *Gould* (above) this Court (Fulford VP, Holroyde and Edis LJJ) was concerned with four cases in which judges in the Crown Court had tried to alleviate the consequences of serious failures by the prosecution in the charging of criminal offences by exercising the powers of a District Judge (Magistrates' Court) pursuant to s.66 of the Courts Act 2003.

38. At para 82 of the judgment (which was given by Edis LJ) the court observed:

"…..*It was not the intention of Parliament in enacting the 2003 Act and the amendments in 2013 to allow the judicial office holders mentioned in s.66 to ignore the rules which the DJ(MC) would be obliged to follow. If they do not properly apply those rules, then this court (or the Divisional Court) will consider what has happened, applying the analysis in R v Ashton ….. to determine whether the procedural flaws are so bad that they go to the root of the exercise of the s.66 power requiring the quashing of the orders, or whether they can either be overlooked or remedied if that causes no prejudice.."*

39. The court then quoted part of para 4 and paras 5 & 9 of the judgment in *Ashton* (set out above), and continued:

> " *83. It is important to add a note of caution to this broad statement of principle. In R v Clarke [2008] UKHL 8; [2008] 2 Cr. App. R. 2 the House of Lords had to consider the particular case of a defendant who had been tried and convicted on an indictment which had not been signed, as was then required. In holding that the law required the technicality to be complied with and non-compliance rendered the trials a nullity, Lord Bingham of Cornhill said this about Ashton at [17] of [2008] 2 Cr. App. R. 2:*
> *'17. Mr Perry drew attention to the approval of Ashton expressed by a number of distinguished academic authorities, who saw it as a victory of substance over formalism. It is always, of course, lamentable if defendants whose guilt there is no reason to doubt escape their just deserts, although the present appellants, refused leave to appeal (on other points by the single judge in 1997 and the full court in 1998, have now served the operative parts of their sentences. Technicality is always distasteful when it appears to contradict the merits of a case. But the duty of the court is to apply the law, which is sometimes technical, and it may be thought that if the state exercises its coercive power to put a citizen on trial for serious crime a certain degree of formality is not out of place. In this case, as in Crawford v HM Advocate, above, the duty in question was easy to perform, although her the failure to perform it was entirely the fault of the proper officer."*
>
> *84. Although Parliament subsequently changed the law to reverse the effect of Clarke in its particular context, the proper approach to the legal requirements for criminal proceedings explained by Lord Bingham remains sound. It may be observed, however, that the House of Lords did not say that Ashton was wrongly decided, except in respect of the failure to follow R v Morais (1988) 87 Cr. App. R. 9, which impacted on the third case, Draz. Lord Bingham did say this at [20] of [2008] 2 Cr. App. R. 2:*
> *"20. The decisions in Sekhon and Soneji are valuable and salutary, but the effect of the sea change which they wrought has been exaggerated and they do not warrant a wholesale jettisoning of all rules affecting procedure irrespective of their legal effect."*

40. Further, at paras 86 & 87, the Court observed that:

    (1) The approach in *Ashton* remained valid, and had been followed on many occasions.

    (2) By way of example, in *R v Ashford* [2020] EWCA Crim 673 the court had concluded that, under s.103A(3) - (7) of the Sexual Offences Act 2003, in the absence of a qualifying offence, or in the absence of an application for a new SHPO, or the failure by a requisitely authorised person to take a procedural step, there would be no jurisdiction to make such an order. However, the court had further concluded that if there was an application which was defective in that it failed to comply with the requirements as to its form, or to strictly comply with all applicable rules of procedure, the failure could be regarded as

a procedural defect, not intended to invalidate the proceedings and to be addressed in accordance with the principles stated in *Ashton*.

***The submissions in the Crown Court***

41. Mr Furlong, appearing then, as now, on behalf of the appellant, submitted that:

(1) When the application for the SCPO was made, the Crown Court was no longer "dealing with" the appellant for the purposes of section 19(1), as he had been sentenced in 2017, and once sentence has been passed the court was functus officio – see *R v Warwick Quarter Sessions ex parte Patterson* [1971] Crim LR 420.

(2) Even if the court could be construed as "dealing with" the appellant during the confiscation proceedings, those had concluded on 27 February 2020 – when, believing that the case was at an end, the judge had thanked counsel for their help over the 3 years that the whole of the proceedings had taken.

(3) Whether the application for the SCPO had been made on 5 March 2020 or 19 June 2020 (neither of which had involved the use of the requisite form, or had been made by the Director of Public Prosecutions or a duly delegated Crown Prosecutor), or on 1 September 2020, it had been made after the final conclusion of the proceedings against the appellant in the Crown Court.

(4) In contrast to s.6 of POCA, there was no express power in the Act to postpone the making of an SCPO.

(5) Rule 31.3(2), which required the service of an intention to apply for an SCPO as soon as practicable (without waiting for the verdict) provided implicit support for his arguments.

(6) There was no prejudice to the prosecution, who were able to make an application to the High Court under section 1 of the Act.

42. Further, Mr Furlong drew attention to a number of authorities which were concerned with judicial decisions taken in breach of legislative provisions.

43. Finally, Mr Furlong relied on *Hamer* [2017] 2 Cr. App. R. (S.) 13 and *Ashford* (above), both cases being to the effect that the failure by a requisitely authorised person to take a procedural step goes to jurisdiction, and submitted that only the making of a valid application for an SCPO (i.e. by the Director of Public Prosecutions, or a duly delegated Crown Prosecutor, and using the requisite form) gave the Court jurisdiction to hear an application for, or to consider making, such an order and that, prior to that, there was nothing to adjourn. On the date that the valid application was made the Court was no longer "dealing with" the appellant in relation to the offences, and therefore the Court had no jurisdiction to entertain the application.

44. Mr Barry submitted that:

(1) The prosecution had made clear in its Sentencing Note in August 2017 that any application for an SCPO would be made at the same time as the confiscation proceedings or immediately thereafter, and the court had adjourned any ancillary applications.

(2) The appellant had been put on notice (albeit invalidly) by the letter dated 5 March 2020 and the draft SCPO that accompanied it, and by the document served on 19 June 2020 (which had complied with the notice requirements in s.10 of the Act), and together those documents had comprised a comprehensive statement of the prosecution's approach.

(3) Rule 31.3 permitted the court to allow a notice of intention to apply to be given in a different form.

(4) There was no requirement that the application had to be made simultaneously with sentence or confiscation, and it had not been sensible to make the application until the confiscation proceedings had been completed and the court had thereby determined what the appellant's criminal lifestyle was.

(5) In addition, the proceedings had been delayed by the pandemic – with the first lockdown being imposed just over a fortnight after the service of the letter and draft SCPO on 5 March 2020.

(6) In any event, cases such as *Hall* [2015] 1 Cr. App. R. (S.) 16, *Carey* [2012] EWCA Crim 1592, and *Strong* [2017] EWCA Crim 999 showed that SCPOs had been made after, and sometimes years after, sentence and confiscation had been completed.

(7) Further, the court was still dealing with the appellant at the time of the application for an SCPO because it was considering an opposed application to appoint a receiver under s.50 of POCA in order to realise the value of a property which the confiscation order had treated as one of the appellant's assets, even though the legal title was in the name of a company.

(8) The prosecution was not acting in bad faith and there had been no breach of any statutory requirement as there were no time limits in the Act, and (in contrast to POCA) no requirement to formally adjourn.

(9) Even if there had been a failure to take a required step, Parliament could not have intended that in consequence the proceedings were invalid and nor had there been any prejudice to the appellant – given that an application to a High Court Judge under s.1 of the Act could be made at any time.

***The judge's ruling***

45. In her detailed ruling, given on 18 December 2020, the judge variously concluded that:

(1) Whilst there was no time limit on the making of an application for an SCPO to a High Court Judge under s.1 of the Act, the wording of s.19 was different. Although there was no express time limit for the making of an application or an order, the power to make an SCPO under s.19(1) & (2) arose when the Crown Court "*is dealing with a person who has been convicted*" of a serious offence, and "*in addition to dealing with the person in relation to the offence*" Both were in the present tense. The words "*is dealing with"* invoked some temporal restriction, and the words "*in addition to dealing with the person in relation to the offence*" imported a temporal proximity to sentencing an offender – including dealing with ancillary matters arising out of the case, such as confiscation proceedings, and while such proceedings were still extent the court is still dealing with the offender in relation to the offence for the purposes of s.19.

(2) However, once there were no longer any live matters before the court relating to the offence, the court was no longer dealing with the offender.

(3) Thus, in the appellant's case, after the conclusion of the confiscation proceedings on 27 February 2020, it could not be said that the court was still "*dealing with*" him at that stage – given that there were no longer any applications or proceedings before the court in relation to the appellants convictions for money laundering offences.

(4) To the extent that, at the end of the sentencing hearing on 2 August 2017, the judge had purported to adjourn any ancillary applications (which the prosecution had indicated would include an application for an SCPO) she had not had any power to do so. In any event, she had only adjourned them to the Mention hearing in March 2018, and not any further.

(5) The provisions of s.36 of the Act, which make clear that (save for the purposes of procedure rules and practice directions) applications for SCPOs in the Crown Court are civil proceedings; that the court is not restricted to considering evidence that would have been admissible in the criminal proceedings in which the person concerned was convicted, and that the court may adjourn any proceedings in relation to an SCPO even after sentencing the person concerned, reinforced the notion that applications for SCPOs are separate from the criminal proceedings for the offence and, for example, any confiscation proceedings.

(6) SCPO proceedings had to be initiated by an application which Rule 31.3(1) envisaged would be made by the prosecutor, and could be made prior to conviction – which dovetailed with the power in s.36 of the Act to adjourn "*even*" after sentence. Whilst that could be used to argue that, after sentence, the court is no longer "*dealing with*" the offender, that was incorrect and, for the reasons that she had already given, the court was still

"*dealing with*" an offender during confiscation proceedings. However, and whether the instant application was made on 5 March 2020, 19 June 2020 or 1 September 2020, the confiscation proceedings in the appellant's case had finished by then.

(7) The application for the appointment of a receiver was not relevant for these purposes. It was simply a matter of convenience that that application was heard at the same time as the hearing of the instant application, and the court was not, at that stage, dealing with the appellant "in relation to the offence".

(8) Given that the application for an SCPO was made late and outside the timescale laid down in s.19(1) of the Act it was necessary to consider the authorities as to the consequent effect.

(9) In *Soneji* [2006] 1 AC 340, which was concerned with a confiscation order made six months outside the relevant time limit, the House of Lords held that the previous distinction between mandatory and directory requirements had outlived its usefulness, and that instead the emphasis ought to be on the consequences of non-compliance and whether Parliament could be taken to have intended total invalidity. In the result, it was held that the confiscation order was not thereby invalidated.

(10) The authorities as to the effect of a failure to comply with a statutory requirement were analysed in *Ashton* (above) and in one of the cases to which that decision related it was held that the addition of a summary only offence to an indictment outside the six month period within which summary proceedings must be commenced went to jurisdiction.

(11) However, failures to comply with requirements as to time were not always fatal – see e.g *Wang v Commissioner of Inland Revenue* [1994] 1 WLR 1286 and *Charles v The Judicial and Legal Services Commission* [2002] UKPC 34.

(12) The underlying intention of s.19 of the Act was to enable an offender to be dealt with for all relevant matters arising out of his conviction for an offence at the same time by the same court – which had the merit that the court would be well informed and in a good position to decide whether the statutory criteria for the making of the order were satisfied, and also promoted finality and certainty – albeit that an application to the High Court could be made at any time.

(13) In the instant case, and at the very least, the prosecution had indicated at the sentencing hearing on 2 August 2017 that it might apply for an SCPO. Notice of an intention to apply had been given on 5 March 2020 (5 days after the completion of the confiscation proceedings), and the information required by Rule 31.3 was contained in the document served, albeit three months later, on 19 June 2020. The application had been due to be heard on 26 June 2020 but had been put off owing to the pandemic. There had been no objection to the proceedings until a defence response dated 23 July 2020

– as a result of which the requisite form had been served on 1 September 2020.

(14) The failure to serve the requisite form was a procedural failure which would not invalidate an application made in time and which otherwise complied with the legislation and Rules – it could not sensibly be supposed that Parliament had intended such a procedural failure to be fatal. However, as strongly suggested by *Ashford* [2020] EWCA Crim 673, that was not the case where the application was not made by the requisite person. The 19 June 2020 document purported to be an application, the letter of 5 March 2020 did not, and it was not possible to read them together. Therefore, she had concluded that the necessary application had not been made until 1 September 2020.

(15) Nevertheless, within days of the completion of the confiscation proceedings, the appellant had been put on notice that an application would be made and of the terms of the order sought, and had all the information required by 19 June 2020. It was not suggested that he had been in any way prejudiced, and the prosecution could make an application to the High Court at any time – although having to apply to the High Court would deprive the prosecution of the advantage of the trial judge, who had also dealt with confiscation, hearing the application.

(16) In conclusion, she was satisfied that, in all the circumstances of the case, Parliament would not have intended that the failure to make the application whilst the court was still dealing with the appellant in relation to the offence, and the failure to serve an application which fully complied with the formalities until 1 September 2020,would be fatal to the Crown Court's power to consider the application, and there was no prejudice in her doing so. This was a procedural failure, rather than one which deprived the court of jurisdiction to consider the application.

46. Against that background the judge made the SCPO – which came into force when the appellant was released on licence in January 2021.

***The submissions on appeal***

47. In the combination of his written and oral submissions, and in addition to his arguments in the Crown Court, Mr Furlong submitted (amongst other things) that:

(1) The starting point was an analysis of the statutory powers, in the light of the relevant procedural rules - namely Rule 31.3(1) (which required the service of a notice of intention to apply for an SCPO), Rule 31.3(3) (which required that the notice be served on the defendant and the court as soon as practicable and without waiting for the verdict), and Rule 31.11 (which allowed the court to vary that requirement, if necessary retrospectively – but subject to the backstop of "*unless legislation otherwise provides*").

(2) The legislation provided two backstops which were of significance – the section 8 schedule 2 limitation on who can make such an application, and the section 19 requirement that the court is dealing with the person in relation to the offence which was a temporal precondition which went to jurisdiction.

(3) The judge found as facts that:

(a) The application had not been made until 1 September 2020 (which meant that the court's powers in relation to the making of an SCPO were not engaged until then, and thus there was no power under s.36 to adjourn, because there had been no SCPO proceedings prior to that date).

(b) By 1 September 2020, the court was no longer dealing with the applicant in relation to the offences (which meant that the court was functus officio by the time that the application was made, and was thus fatal to the application, because it was caught by the second of the significant legislative backstops, which was not merely procedural).

(4) Those findings of fact also deprived the judge of the power to retrospectively vary any of the time provisions in Rule 31.3 via Rule 31.11.

(5) The appellant's situation was analogous to that faced by the appellant O'Reilly in *Ashton* (who had been charged with a summary only offence outside the six-month time limit, which was caught by the legislative backstop in section 127 of the Magistrates Court Act 1980), and to that faced by the appellant in *Quayum v DPP* [2015] EWHC 1660 (Admin) (in which the Crown Court, having completed an appeal and costs application was *functus officio* in relation to a subsequent application for a wasted costs order, which order could only be made "*at any time during the proceedings")*.

(6) In any event, confiscation was different as it involved a duty in the Crown Court, whereas it was optional whether an application for an SCPO was dealt with in the Crown Court or in the High Court.

(7) Other relevant factors identified in the authorities included whether the provision regulated an existing function or was an essential preliminary (in this case the latter); whether the obligation had the quality of a policy or a rule (in this case the latter); the extent of public inconvenience / prejudice if non-compliance rendered the decision ineffective and whether there was any other means of giving effect to the provision (in this case very little inconvenience / prejudice given that the prosecution could apply to a High Court Judge at any time).

(8) Therefore, this was not a case to which the *Soneji* (above) line of authorities applied, nor a case to which *Wang* (above – which involved a procedural failure to make a determination "in a reasonable time") or *Charles* (above – which involved an investigating officer's failure to comply with procedural time limits) provided any direct assistance.

(9) Rather, in this case there were no SCPO proceedings on which a procedural failure could bite, and the procedural defect line of authorities was not relevant to a situation, as here, in which the underlying proceedings had concluded.

(10) The law in Australia has moved on since the decision in *Project Blue Sky Inc. v Australian Broadcasting Authority* (above), to the extent that it no longer supported the decision in *R v Soneji* (above).

(11) The problems in the appellant's case could have been resolved by HHJ Robinson sitting as a Deputy High Court Judge.

(12) Even viewed most favourably to the prosecution, in this case the cut-off date for making an application for an SCPO was the last day of the confiscation proceedings, and it was common for prosecutors to ignore the time limit provisions in s.19 of the Act.

48. Mr Barry accepted personal responsibility for the failure by the prosecution to serve an application that was made by an appropriate person, and used the requisite form, until 1 September 2020. He explained that, given the illumination that confiscation proceedings usually provide in relation to the offender's financial circumstances and the identification thereby of the requisite terms of the proposed SCPO, there had been concentration (as was often the case in the Crown Court) on completing the SCPO process by the time of the appellant's release, rather than in making a valid application as soon as practicable. Further, Mr Barry explained that there were other reasons for the substantial delays, for example:

(1) The judge's indisposition during the confiscation process.

(2) The unavailability, at times, of the appellant's then counsel.

(3) The effects of the pandemic.

(4) Protracted negotiations between the parties.

49. Further, Mr Barry submitted, amongst other things, that:

(1) There was no serious dispute that the appellant is a sophisticated criminal; that (factually) this was plainly an appropriate case for the imposition of an SCPO; and that there was a public interest in dealing with the issue in the Crown Court before the very experienced judge who had presided over the trial and the confiscation proceedings.

(2) Section 19 of the Act does not impose a time limit for the making of applications, let alone one which goes to jurisdiction.

(3) Albeit that the Rules as to the making of applications should have been followed, it was not the intention of the legislature that breach of them would invalidate the proceedings.

(4) There was no prejudice to the appellant as a result of what had been a procedural failure, and it was therefore just that the proceedings had continued to the imposition of the SCPO.

***The merits***

50. It is clear that SCPOs are preventive orders intended, in accordance with sections 1(3) and 19(5) of the Act, to contain such prohibitions, restrictions, requirements, and other terms, as the court considers appropriate for the purpose of protecting the public by preventing, restricting, or disrupting involvement in serious crime in England and Wales.

51. Against that background, the obvious purpose of extending the jurisdiction to make SCPOs to the Crown Court was to enable the Court to which a person has been committed for sentence for a serious offence (as defined), or by or before which a person has been convicted of committing such an offence, to impose an SCPO for the purpose of protecting the public, and thereby to avoid the duplication of time and expense involved in a separate application to the High Court. As HHJ Robinson rightly identified, the underlying intention of section 19 of the Act is to enable an offender to be dealt with for all relevant matters arising out of his conviction for a serious offence by the same court - which has the merit that the court will be well informed and in a good position to decide whether the preconditions for the making of an SCPO are satisfied, and of promoting finality and certainty, albeit that an application to the High Court can be made at any time. A similar intention can be seen in sections 20 & 21.

52. In our judgment, purposively construed in that light, neither section 19(1)(a) & (b) of the Act, nor the combination of sections 19(1) & (2), provide (whether explicitly or implicitly) any temporal restriction on when an application for an SCPO may be made. If Parliament had wanted to impose a time limit on making such applications in the Act it could readily have done so in straightforward terms. Rather, and depending on whether there has been a committal for sentence or a conviction in the Crown Court, section 19(1)(a) & (b) simply provide one of the preconditions that must be proved to the criminal standard to give the Crown Court jurisdiction to make such an order.

53. Applying *Wilcox* (above), and the provisions that we have identified above, all the necessary preconditions going to the jurisdiction of the Crown Court were proved in the appellant's case, in that:

(1) He had been convicted by or before the Crown Court of having committed serious offences in England and Wales (section 19(1)(b)).

(2) There were reasonable grounds to believe that an SCPO would protect the public by preventing, restricting, or disrupting involvement by him in serious crime in England and Wales (section.19(2)) – i.e. there was a real or significant risk (rather than a bare possibility) that he would commit further serious offences (as defined), and the terms of the SCPO were proportionate.

(3) The SCPO was in addition to the sentence imposed on him in respect of the serious offences concerned (section 19(7)).

(4) The relevant safeguards in sections 6-15 were in place (section 19(6)), including that:

(i) He was aged 18 or over (section 6).

(iii) The application was made by one of the specified office holders – i.e. a Crown Prosecutor to whom the Director has delegated his functions under Part 1 of the Act (section 8).

(5) He had had an opportunity to consider the order that was proposed and why, and the evidence in support; and to make representations at a hearing (Rule 31.2(1)).

54. Further, the appellant was bound by the SCPO, if not otherwise invalid – as he was represented at the proceedings at which it was made (section 10(1)).

55. In our view, the time limit for making applications for SCPOs, and other relevant procedural provisions in relation to the making and granting of applications for such orders, are to be found in the combination of the relevant aspects of the Criminal Procedure Rules, the Criminal Practice Directions, and section 36(3) of the Act, as follows:

(1) As soon as practicable (without, when there is a trial, waiting for the verdict) the Prosecutor is required to serve a notice and proposed application using the requisite form, and with the requisite content and attachments (including the terms of the SCPO sought) on the court officer, the offender, and any person on whom the order would be likely to have an adverse effect (Rule 31.3(2)&(3), Rule 5.1, Criminal Practice Direction 1 General Matters 5A: Forms, and Annex D to the Consolidated Criminal Practice Direction).

(2) As soon as practicable thereafter (without, when there is a trial, waiting for the verdict) the offender must serve a notice on the court officer and the prosecutor, setting out any evidence on which he relies, including attaching any written statement that has not already been served (Rule 31.3(4)).

(3) Unless legislation otherwise provides, the court may shorten a time limit or extend it (even after it has expired) and/or allow a notice or application to be given in a different form or presented orally (Rule 31.11(a)&(b)).

(4) The Court may adjourn any proceedings in relation to an SCPO, even after sentencing the person concerned (section 36(3)).

56. Given that the Act itself does not contain any temporal provisions in conflict with the power in Rule 31.11(a) to shorten a time limit or to extend it, even after it has expired, the combination of the provisions outlined immediately above provides, in our view, a freestanding, clear, flexible, and fair procedural basis for the making of applications for SCPOs - with a focus on such applications being made and answered

at the earliest practicable stage, but with the flexibility to extend time, even where the application is made after the expiry of the "as soon as practicable" time period. The provisions are sufficiently flexible to enable the court to deal justly with cases in which further relevant information comes to light in confiscation proceedings, and there might be rare cases in which it is truly not practicable to make an application until confiscation proceedings are well underway, or even close to completion. That said, we do not seek to dilute Rule 31.3(2).

57. Thus, in our judgment, the central thrust of Mr Furlong's submissions is misconceived. The fact that the Crown Court had completed dealing with the appellant in relation to sentence and confiscation by 1 September 2020 did not render it functus officio in relation to the application for an SCPO, which was governed by the freestanding procedural provisions to which we have referred. Nor did s.19 of the Act provide a jurisdictional time limit in relation to the making of such applications. Likewise, for the reasons set out above, we respectfully disagree with HHJ Robinson's conclusion that s.19 requires that the court must still be otherwise dealing with an offender when an application for an SCPO is made.

58. If the SCPO had been made on the basis of the documents served on 5 March 2020 and/or 19 June 2020, it would have been invalid for want of jurisdiction as, contrary to provisions of the Act, the application had not been made or pursued by the Director of Public Prosecutions or a duly delegated Crown Prosecutor. However, the application that was finally served on 1 September 2020 was made by a duly delegated Crown Prosecutor and complied, in substance and in form, with the relevant provisions, and the merits were argued at the hearing on 26 October 2020. The application was not estopped by the court being otherwise functus officio. As we have foreshadowed, in our judgment, there was no breach of s.19 and no want of jurisdiction when the SCPO was made on 18 December 2020. On the contrary, as demonstrated above, all the jurisdictional preconditions were satisfied and the appellant was represented at the proceedings on 26 October 2020 and 18 December 2020, and was thus bound by the terms of the SCPO, if not otherwise invalidated.

58. However, the 1 September 2020 application was admittedly served long after it had been "as soon as practicable" to do so. Thus, there was a breach of Rule 31.3(2). That could have been remedied by a successful application to extend time under Rule 31.11(a) which, contrary to Mr Furlong's submission, was not precluded by the terms of the Act or by the judge's findings of fact. However, the breach persisted at the time that the SCPO was made.

59. We are not persuaded that the suggested change in approach in Australia has undermined the principal authorities to which we have referred. Having applied the principles explained in *Ashton* (above) with the necessary caution explained in *Gould* (above), and in the light of our construction of the relevant provisions (above), we have no doubt that the breach of Rule 31.3(2) was the breach of a procedural, rather than a jurisdictional, provision, Thus we have asked ourselves whether the intention of the legislature was that any act following such a procedural failure should be invalid, and have concluded that the answer is resoundingly in the negative. We have gone on to consider the interests of justice generally and, most particularly, whether there is a real possibility that the appellant suffered prejudice on account of the procedural failure. In our view the answer to that question is also

resoundingly in the negative. The reality is that the appellant has suffered no prejudice at all. This was a case in which the interests of justice required the imposition of an SCPO; the appellant was put on notice of the possibility of an application on 2 August 2017 and of the intention to apply for an order against him on 5 March 2020, and had all the necessary information by 19 June 2020; all the jurisdictional preconditions were satisfied to the requisite standard; rightly, there is no appeal against the merits of the order as such; and the appellant was represented at the relevant hearings such that the order is binding upon him.

60. Although she arrived at them by a different route, our conclusions are to the same effect as those ultimately reached by HHJ Robinson.

## *Conclusion*

61. For the reasons set out above, the judge's ultimate decision that there had been a procedural failure, that the legislature did not intend that any act done following that failure should be invalid, and that there was no prejudice or injustice to the appellant, was right. Accordingly, the appeal is dismissed.