

THE HIGH COURT

2008 8 CAB

**IN THE MATTER OF THE PROCEEDS OF CRIME ACT 1996 AND IN THE MATTER OF AN APPLICATION AFFECTING PROPERTY
ALLEGED TO BE IN THE POSSESSION OR CONTROL OF A.W. AND E. W.**

BETWEEN

CRIMINAL ASSETS BUREAU

APPLICANT

AND

A.W. AND E. W.

RESPONDENTS

Judgment of Mr. Justice Feeney delivered on the 30th day of April, 2010.

1. These proceedings commenced by originating notice of motion dated the 3rd March, 2008 and on that date an *ex parte* application was made to Court pursuant to s. 2 and s. 7 of the Proceeds of Crime Act 1996 (the Act of 1996). The Court, being satisfied that the property set out in the schedule to the originating notice of motion constituted directly or indirectly the proceeds of crime, made an order on the 3rd March, 2002 in respect of each of the six items listed in the schedule. An order was made pursuant to s. 7 appointing a receiver in respect of the items of property set out at paragraphs 2 to 6 inclusive of the said schedule.

2. In this application the applicant seeks orders pursuant to s. 3 of the Act of 1996, as amended, in respect of the six items in the schedule. The motorcar which is the sixth item of property in the schedule was sold by agreement between the parties and the receiver holds the net proceeds of sale and it is that sum of money in respect of which an order is sought rather than the motor vehicle which was originally identified at paragraph 6 of the schedule.

3. The application was heard on affidavit other than for limited cross-examination. The second named respondent served notice to cross-examine Detective Garda Lucy Myles and Detective Chief Superintendent John O'Mahony. The applicant served notice to cross-examine E.W.. Each of those three witnesses were cross-examined by the party who served notices to cross-examine. Whilst the first named respondent had not served any notice to cross-examine on application to Court, the Court permitted a cross-examination to take place on behalf of the first named respondent of Detective Garda Lucy Myles.

4. The schedule of property in respect of which an order under s. 3 of the Act of 1996 is sought is:

(1) All that and those the property known and more particularly described as 'House A', County Kildare contained in Folio XXXXX County Kildare;

(2) €10,900 cash seized from search of 'House A', County Kildare on the 6th July, 2007;

(3) STG£1,180 cash seized from search of 'House A', County Kildare on the 6th July, 2007;

(4) IR£559 cash seized from search of 'House A', County Kildare on the 6th July, 2007;

(5) 18ct diamond cluster ring, value €6,100; and

(6) The net cash sum obtained by the receiver and retained by him on the sale of a Volkswagen Passat bearing registration number 03 WW 5319 sold by the consent of the parties which said sum of money is held pending further order.

5. The premises set out at paragraph 1 of the schedule is the residence and family home of the respondents and is registered in the sole name of the second named respondent, the property having been transferred to her by memorandum of agreement dated the 25th August, 2004 between J.M. and M.M. of the one part and E.P. of the second part. E.P. is the maiden of E.W., the second named respondent. The second named respondent's interest in the said property was registered in the Land Registry on Folio XXXXX on the 1st August, 2006.

6. The section under which this application is made to Court is s. 3(1) of the Act of 1996. Section 3(1) provides as follows:

"Where, on application to it in that behalf by the applicant, it appears to the Court, on evidence tendered by the applicant, consisting of or including evidence admissible by virtue of *section 8*—

(a) that a person is in possession or control of—

(i) specified property and that the property constitutes, directly or indirectly, proceeds of crime, or

(ii) specified property that was acquired, in whole or in part, with or in connection with property that, directly or indirectly, constitutes proceeds of crime,

and

(b) that the value of the property or, as the case may be, the total value of the property referred to in both subparagraphs (i) and (ii) of paragraph (a) is not less than £10,000, the Court shall make an order ("an interlocutory order") prohibiting the respondent or any other specified person or any other person having notice of the order from disposing of or otherwise dealing with the whole or, if appropriate, a specified part of the property or diminishing its value, unless, it is shown to the satisfaction of the Court, on evidence tendered by the respondent or any other person—

(I) that that particular property does not constitute, directly or indirectly, proceeds of crime and was not acquired, in whole or in part, with or in connection with property that, directly or indirectly, constitutes proceeds of crime, or

(II) that the value of all the property to which the order would relate is less than £10,000:

Provided, however, that the Court shall not make the order if it is satisfied that there would be a serious risk of injustice."

Section 8 of the same Act renders admissible evidence in certain specified circumstances in proceedings under s. 3 of the Act. That section provides that where an appropriate officer states on oral evidence that a respondent is in possession or control of property that constitutes the proceeds of crime or was acquired with property constituting the proceeds of crime, then, if the Court is satisfied that there were reasonable grounds for the belief stated, the statement shall be evidence of the matters stated. It was also provided at s. 8(2) of the Act that the standard of proof required to determine any question arising under the Act shall be that applicable to civil proceedings. In this case opinion evidence was given by Detective Chief Superintendent O'Mahony in oral evidence and he was the subject of cross-examination in respect of the opinion or belief evidence which he tendered. The Court will apply the civil standard of proof with due regard to the nature of the conduct alleged.

7. The Supreme Court in *F. McK. v. G.W.D. (Proceeds of crime outside State)* [2004] 2 I.R. 470 in the judgment of McCracken J. identified the different functions of s. 3 and s. 8 of the Act of 1996 and set out (at p. 491) the procedures for a trial judge in considering an application under s. 3 of the Act when presented with belief evidence under s. 8. The procedure identified by McCracken J. was as follows:

"It seems to me that the correct procedure for a trial judge in circumstances such as those in the present case is:

- (1) he should firstly consider the position under s. 8. He should consider the evidence given by the member or authorised officer of his belief and at the same time consider any other evidence, such as that of the two police officers in the present case, which might point to reasonable grounds for that belief;
- (2) if he is satisfied that there are reasonable grounds for the belief, he should then make a specific finding that the belief of the member or authorised officer is evidence;
- (3) only then should he go on to consider the position under s. 3. He should consider the evidence tendered by the plaintiff, which in the present case would be both the evidence of the members or authorised officer under s. 8 and indeed the evidence of the other police officers;
- (4) he should make a finding whether this evidence constitutes a *prima facie* case under s. 3 and, if he does so find, the onus shifts to the defendant or other specified person;
- (5) he should then consider the evidence furnished by the defendant or other specified person and determine whether he is satisfied that the onus undertaken by the defendant or other specified person has been fulfilled;
- (6) if he is satisfied that the defendant or other specified person has satisfied his onus of proof then the proceedings should be dismissed;
- (7) if he is not so satisfied he should then consider whether there would be a serious risk of injustice. If the steps are followed in that order, there should be little risk of the type of confusion which arose in the present case."

In this case the Court adopts and follows the procedure identified by McCracken J. There was no dispute between the parties as to the appropriateness of this Court adopting the procedure identified by McCracken J.

8. Under the identified procedure the first matter to be considered by this Court is the evidence given by the Member of his belief whilst at the same time considering any other evidence which might point to reasonable grounds for the belief expressed by the Member in his evidence. Detective Chief Superintendent O'Mahony expressed in his evidence his belief that each of the six items of property identified in the schedule was in the possession or control of the respondents and that it was his belief that each of the items of property constituted directly or indirectly the proceeds of crime or was acquired in whole or in part, with or in connection with property that, directly or indirectly constitutes the proceeds of crime. Detective Chief Superintendent O'Mahony identified a number of grounds for his belief. It is appropriate in this case to consider the evidence of Detective Chief Superintendent O'Mahony together with the other evidence which was available to the Court to ascertain whether or not such other evidence points to reasonable grounds for the belief both oral and on affidavit expressed by the witness. That other evidence is provided in the evidence of Detective Garda Lucy Myles, and in the affidavit evidence of Bureau forensic accountant No. 1, Revenue Bureau Officer No. 35 and Social Welfare Officer No. 18. Detective Chief Superintendent O'Mahony expressed his belief that the first named respondent was involved in serious criminal conduct and that the property the subject matter of the proceedings had been purchased or obtained out of the proceeds of crime and that the two respondents had accumulated substantial amounts of money and assets and that the property the subject matter of the application was in the possession of the two respondents. Detective Chief Superintendent O'Mahony also gave oral evidence that the investigation into the respondents commenced in 2007 and in particular into the activities of the W. family who were a crime gang involved in serious criminal offences of which A. and E.W. were part.

9. Evidence other than the opinion evidence of Detective Chief Superintendent O'Mahony established that A.W. had eleven criminal convictions for various offences including manslaughter and theft. There was also evidence that A.W. had been arrested on a number of occasions in respect of other serious criminal offences but had not been charged. Evidence was given as to the circumstances giving rise to such arrests. Evidence was also given as to the earnings of A.W. and E.W. as indicated from information received from

the office of the Revenue Commissioners and evidence was also available as to the social welfare payments received by the two respondents. Evidence was also given by a chartered accountant and certified fraud examiner, namely, forensic accountant No. 1, of his examination of the bank statements and other financial documentation concerning the affairs of A.W. and E.W. which was obtained pursuant to warrants and orders. The Revenue Bureau Officer No. 1 identified in his evidence a total of slightly less than €600,000 from the records of the respondents as having emanated from unknown sources between 1995 and 2007. His evidence also identified that a sum in excess of €400,000 in cash was available to the respondents between 2002 and 2007. The Court considers that those figures should both be reduced by €100,000 when being considered by the Court for the reason thereafter set out. These funds were available to the respondents notwithstanding the absence of any identifiable or documented income and also at a time when the first named respondent was for some considerable period in prison and when for a substantial period E.W. was in receipt of social welfare payments including almost the entire period from the start of 1996 until the autumn of 2004. (There were a number of months during that period when social welfare was not received but in total they amounted to less than twelve months.)

10. Evidence was also given as to the respondents' dealings in motorcars. This demonstrated that substantial sums of cash were available to purchase motor vehicles. The first named respondent was in a position to purchase two Volkswagen Golf vehicles for a combined total of over €45,000 in the period immediately following his release from prison. In relation to the ownership of a 2004 BMW, the second named respondent gave evidence that it was her car but that her husband had done the dealing for it and he had paid the money for it. (The cash deposit was over 25,000) That evidence together with the evidence concerning the availability of cash to enable the purchase of other motor vehicles demonstrated that substantial sums of cash were available to the respondents.

11. Evidence was given in relation to the purchase of the property 'House A' County Kildare in August 2004. There was a dispute in evidence as to whether the real purchase price for the property was €240,000 or the stated purchase price of €140,000. Irrespective of which of those two sums is correct, and I will return to this matter later in this judgment, the evidence is that the stated purchase price of €140,000 was discharged in cash, that is without any requirement for a mortgage at the time of purchase in August 2004. At that time the second named respondent was in receipt of unemployment assistance and the evidence is that after the first named respondent had been released from prison in February, 2002 after having spent over four years in custody, that he had no recorded earnings thereafter and that the records of the Revenue Commissioners do not identify A.W. as having been in any employment or as being self-employed. The evidence available identified that no less than €140,000 was available in cash to the respondents at the time of the purchase of the property which was originally known as 'House B', and later was described as 'House A', County Kildare, both properties being the property in Folio XXXXX, County Kildare. The evidence also was that the memorandum of agreement for the purchase of that property dated 25th August, 2004 in the sum of €140,000 was originally in the name of A.W., his name having been crossed out and replaced by the name of E.P., which is the maiden name of the second named respondent, E.W..

12. Evidence was also available that the second named respondent received a substantial sum in compensation for personal injuries in February 2005, namely, €60,962. That sum was received after the premises in Co. Kildare was purchased. Evidence was also available that the second named respondent was in possession of an 18ct diamond cluster ring which had been purchased from Paul Sheeran, jewellers, on the 24th November, 2002 for the cash sum of €6,100 and a receipt in that sum was produced in evidence and an invoice for a slightly greater sum dated the 6th December, 2002 was also produced in evidence. Evidence was also given as to the finding of the three sums of cash identified in paragraphs 2, 3 and 4 of the schedule in the respondents' home on the 6th July, 2007.

13. The evidence available to the Court was that the first respondent had eleven convictions for criminal offences, one of which related to a crime of dishonesty that was a conviction for handling stolen goods in December 2004. That conviction was after he had been released from prison having served his sentence for manslaughter. The conviction for handling stolen goods occurred on the 17th December, 2004 and related to jewellery to the value of €14,500 which had been stolen during a burglary in County Dublin. The first named respondent was arrested in possession of the stolen jewellery. That conviction demonstrated the first respondent's willingness to be involved in and with the proceeds of crime and to deal in an unlawful manner with valuable items.

14. Detective Garda Lucy Myles gave evidence in relation to a number of criminal incidents in respect of which the first named respondent was suspected of being involved. They all related to the period from 1993 to 1996 and were so distant in time that they were of no assistance to the Court in forming any view as to whether or not Detective Chief Superintendent O'Mahony's belief evidence was reasonable. That was not the case in relation to the 2004 conviction.

15. Except in relation to the five incidents which occurred between 1993 and 1996 referred to in the previous paragraph, the other material, identified in the previous paragraphs and the evidence therein set out, is evidence which could reasonably be identified as having the potential to point to reasonable grounds for the belief expressed by Detective Chief Superintendent O'Mahony. Further, when one considers that evidence in the round and has regard to the first named respondent's lack of any apparent income, the substantial sums of money available, in cash, to the two respondents, the ability of the two respondents to fund substantial expenditures out of cash, the evidence of the forensic accountant in relation to the quantum of funds available from unknown sources, the availability of a sum of at least €140,000 in cash to complete the purchase of a property, the first named respondent's criminal record including his involvement in the handling of stolen goods in 2004, the Court is satisfied that there are reasonable grounds for the belief expressed by Detective Chief Superintendent O'Mahony. It follows that the second step identified in the procedures by McCracken J. should be answered in the affirmative, that is to say that the Court is satisfied that there are reasonable grounds for the belief evidence given by Detective Chief Superintendent O'Mahony.

16. Having determined that the belief evidence of Detective Chief Superintendent O'Mahony is evidence, it is then necessary to consider the entire evidence tendered by the applicant including the opinion evidence of Detective Chief Superintendent O'Mahony and the evidence of Detective Garda Lucy Myles, Bureau forensic accountant No. 1, Revenue Bureau officer No. 35 and social welfare officer No. 18. That evidence has already been listed in some detail in the previous paragraphs. There is, however, one item which the Court has already indicated that it will address, the issue of the disputed purchase price of 'House A', County Kildare. The applicant contended that the real purchase price of the premises was €240,000 in cash and that the contract provided for €140,000 whilst a proposed payment of €100,000 was to be made in cash. In support of such contention Detective Garda Lucy Myles exhibited a statement taken from J.M. who was one of the two vendors of the property. That statement was signed by J.M. and included in it a claim that A.W. together with J.W. duped J.M. concerning the sale of the premises in that there was an agreement whereby €100,000 in cash would be provided, as a below the counter payment and the official contract price would be €140,000. Mr. M. described, in his statement, the circumstances of the proposed handover of the €100,000 which was to take place prior to the completion of the sale and how Mr. M. and his ex-boss, S.H., were shown and counted €100,000 in cash but thereafter they were duped and the cash was not handed over. The applicant in this case sought to adduce that evidence through the signed statement of J.M.. No attempt was made to call J.M. nor his wife, who was a party to the sale of the house, nor was any attempt made to produce any evidence from J.M.'s former boss, S.H., who was allegedly present when the €100,000 in cash was produced by the first named respondent and J.W.. Nor was any evidence given as to the market value of the premises as of the date of the sale. The only explanation for the failure to call J.M. was the comment contained at the end of his statement to the effect that he had never gone looking for his money as he had been too afraid to do so. There was one reference contained in an affidavit sworn by the second named respondent

in relation to the *ad hoc* legal scheme placing a €240,000 value on the property but that affidavit as to means was sworn some four years after the purchase and there was no attempt to identify the market value in 2004 as opposed to 2008. Objection was taken to the admissibility of the evidence purported to come from the statement of J.M. on the basis that it was hearsay. The Court has therefore considered the purported evidence in relation to the alleged under the counter payment of €100,000 in isolation. In considering the objection to this hearsay evidence, the Court has had regard to the judgment of Hardiman J. in *F. McK. v. T. H. (Proceeds of Crime)* [2007] 4 I.R. 186 at p. 193 where Hardiman J. said in relation to hearsay and belief evidence the following:

"It is also instructive to recall what was said in the judgment of this court in *Murphy v. G.M.* [2001] 4 I.R. 113 at p. 155:-

'As to the submission that there was no 'equality of arms' between the parties because evidence of opinion was permitted in the case of the applicant but not in the case of the respondents, the court is satisfied that no such inequality has been demonstrated: the respondents to an application under s. 2 or s. 3 will normally be the persons in possession or control of the property and should be in a position to give evidence to the court as to its provenance without calling in aid opinion evidence. A similar submission was advanced in respect of the extent of which the onus of proof was reversed in applications under the Act, but the court is satisfied that, having regard to its conclusion that these are civil proceedings this did not, of itself, render the provisions unconstitutional.'

Just before this passage, and on the specific topic of hearsay evidence, the judgment of this court stated at p. 155:-

'Nor is the provision for the admission of hearsay evidence of itself unconstitutional: it was a matter for the court hearing the application to decide what weight should be given to such evidence. The court is satisfied that there is no substance in these grounds of challenge to the constitutionality of the legislation.'

Against this background, it appears to me impossible to contend that the procedures adopted and the rulings given on the admissibility of evidence in this case were in any way flawed. Any court will, of course, be conscious of the very great potential unfairness of permitting hearsay evidence and belief evidence to be given in legal proceedings. They are capable of gross abuse, and capable of undermining the ability of a person against whom they are deployed to defend himself by cross-examination.""

This Court is, of course, conscious of the potential unfairness of permitting hearsay evidence. Where the content of the hearsay evidence could have been adduced in a different manner which would have permitted of cross-examination by either arranging for Mr. and/or Mrs. M. to swear an affidavit and/or S.H. or where such proposed hearsay evidence could have been supported by independent expert evidence as to the value of the property as of 2004 and where that evidence could have been the subject of cross-examination, the Court is satisfied that a proper approach is to determine that no weight should be given to the evidence relating to the alleged under the counter payment. That approach means that this Court will proceed on the basis that the evidence establishes that the two respondents had available a sum of €140,000 in cash as of the date of the purchase of the premises rather than the larger sum of €240,000. It still results in the Court being satisfied that there was evidence that the respondents had a substantial sum of no less than €140,000 in cash available to purchase the property and pay the fees without there being any apparent source of income or funds available to the respondents to explain the availability of such a sum. It also results in a re-consideration of the calculations contained in the affidavit of forensic accountant No. 1. The sum of €598,793 identified as being available to the respondents from unknown sources requires to be reduced by €100,000 in the light of the finding that the Court has made that it should attach no weight to the evidence concerning the alleged under the counter payment of €100,000 and the availability of such sum. That sum is contained in the calculation leading to the total of €598,793. It should be noted that that calculation does include due allowance for the lodgement of over €60,000 in February 2005 arising out of the second named defendant's compensation claim. The finding that the Court has arrived at in relation to the issue of the alleged under the counter payment has the effect of reducing the total funds available to the respondents between 2002 and 2007 to €316,462 and the cash calculation identified in Table 2 of the affidavit of the forensic accountant No. 1 to €316,462. However, notwithstanding the reduction of those figures by €100,000 there was still cogent evidence available to the Court that the two respondents had available to them very substantial sums of money and cash over and above any sums which could have been generated from any known sources of income, borrowings, gifts, social welfare payments, pre-existing savings or any verifiable third party source or referred to in any document. When the Court comes to consider the opinion evidence of Detective Chief Superintendent O'Mahony together with the other evidence identified in this judgement, the Court is satisfied that that evidence taken together constitutes a *prima facie* case under s. 3 and in those circumstances following the procedures identified in the judgment of McCracken J., the onus shifts to the respondents.

17. Under the procedures identified by McCracken J. the Court must then consider any evidence furnished by a respondent to determine whether the Court is satisfied that the onus undertaken by the respondent has been fulfilled. As identified by Hardiman J. in the earlier quotation, a person in possession or control of property should be in a position to give evidence as to its provenance. In this case the first named respondent did not tender any evidence. Therefore the Court has to consider the evidence given by the second named respondent, E.W.. Her evidence is contained in affidavits sworn by her and in her oral evidence in Court. E.W. stated that she married the first named respondent, A.W., in November 2002 and that shortly before her marriage she received a gift of €118,000 in cash to enable her to buy a house at some future date from her great-aunt, B.D.. E.W. averred that she had looked after her great-aunt for a number of years until shortly before her own marriage in November 2002. The submissions on behalf of the second named respondent argue that such a claim is confirmed by the fact that the second named respondent was in receipt of carer's allowance in respect of B.D.. However, in an affidavit of 21st November, 2008, sworn by social welfare officer No. 18, the factual background to be gleaned from the records of the Department of Social Welfare are set out. Those records indicate that on the 14th August, 1987, B.D. was awarded the old age pension at a full rate which was means tested and that the records indicate that B.D. was interviewed on two occasions in relation to her means and that on each occasion she had identified her means as nil. The records also demonstrate that B.D. was in receipt of "Disabled Persons (Maintenance Allowance)" from the Eastern Health Board. B.D. was in receipt of Living Alone Allowance for a period up to January 1999 when it was withdrawn due to the fact that T.C. (nee P.), her husband and their three children were living with B.D.. The Living Alone Allowance was re-issued to B.D. in April 1999 after T.C. and her family moved out of the house. In mid-2002 E.W., nee P., the second named respondent, applied for and received a carer's allowance in respect of B.D.. The records of the Department of Social Welfare demonstrate that she received payment for 35 weeks from the 13th June, 2002. This is in conflict with the claim of the second respondent that she looked after her great-aunt for a number of years. The second named respondent gave evidence that her great-aunt had accumulated a sum of €118,000 from her involvement in door to door and market trading which involved the collecting of unwanted household items and bric-a-brac and the selling of those items. In cross-examination E.W. was unable to give any details of this activity and her evidence was so vague and general and so lacking in detail as to significantly undermine the credibility of such claim. If E.W.'s great-aunt had accumulated that sum of money and E.W. was aware of the activities giving rise to such funds, it would have inevitably followed that she could have provided greater detail to the Court in relation to what she bought and sold and where she bought and sold and how such significant

profits could have been generated from such trade. E.W.'s evidence in relation to this matter was so imprecise and lacking in detail as to lack any credibility. It was also the evidence of E.W. that when she received the €118,000 in cash that she stored it in a cupboard in rented accommodation and told no person about it. That evidence must be considered against other evidence which was available to the Court that during the period that E.W. alleged that she was retaining €118,000 in cash in her custody, hidden in a cupboard, that she made numerous cash lodgements to her bank account No. 27108062. Details of those lodgements were set forth in the affidavit of Detective Garda Lucy Myles sworn on the 21st November, 2008 and no credible explanation was provided as to why E.W. was operating a bank account wherein she was prepared to make cash lodgements whilst at the same time retaining a large cash sum in her custody. The evidence also established that during the period that E.W. claimed to have €118,000 in cash in her possession that she sought and obtained assistance from social welfare to enable her to pay rent on a rented house based upon a claim that she had no funds available to her to discharge such rent. E.W.'s claim for rent assistance from the local authority at a time when she claims to have had €118,000 in cash in her possession was raised with E.W. in cross-examination and she provided no credible explanation to explain why she required to seek and claim rent allowance when in possession of a substantial sum of cash.

18. The Court had the opportunity of observing the cross-examination of E.W.. Her evidence in relation to sourcing 118,000 of the €140,000 sum required for the purchase of the premises in the form of a gift from her deceased great-aunt was entirely lacking in credibility. The evidence concerning how and in what circumstance B.D. accumulated a sum of €118,000 in cash was lacking in any detail. Further, why E.W. was chosen from among B.D.'s relations to receive such munificence was not explained other than by suggestion that she had cared for her great-aunt for a number of years. Such documentary evidence as was available indicated that the period of care provided by E.W. was considerably less than the period she identified in her testimony. It was also E.W.'s evidence that her great-aunt gifted her the entirety of all savings and funds available to her great-aunt effectively rendering her without any funds and dependent on means tested periodic payments. Having had the opportunity of viewing E.W. in giving her evidence, the Court is satisfied that her account in relation to her great-aunt accumulating a substantial sum of cash, the subsequent gifting of that sum in its entirety to E.W. and the retention of that sum in an insecure location (when at the same time operating a bank account) and retaining the sum for a number of years until used as part of purchase price is entirely lacking in credibility and cannot be believed. The Court is satisfied that this account was fabricated in an attempt to provide an explanation for the fact that the two respondents had available to them a very substantial sum in cash as of the date upon which the premises was purchased. The concocted nature of the second named respondent's claim was demonstrated not only by the entire absence of any documentary or independent evidence to support such account but also by the second named respondent's inconsistency in her account as to where the sum of money was stored during the period from its gift to its alleged use in the purchase of the premises. In her affidavit the second named respondent had averred that it was kept in her parents' house whilst in evidence she claimed that it was kept in a rented house. This further example of lack of precision supported the conclusion that the second named respondent's entire account as to the source of the €118,000 was fabricated. The second named respondent indicated that the balance of €22,000 required for the purchase of the Co. Kildare property in cash was contributed by the first named respondent from selling a car but was unable to give any details to support such sale such as the type of car, to whom it was sold, or the sale price nor was any document available to support such sale. There was also a suggestion that her husband worked at certain jobs laying tarmac and generated funds thereby but again without any detail or supporting document. The Court is cognisant of the fact that the second named respondent received a sum in excess of €60,000 in 2005 but that sum was received after the purchase of the Co. Kildare property.

19. The second named respondent disclaimed any interest in the cash sums set forth in paragraph 2 and 4 of the schedule to the originating notice of motion, that is the sum of €10,900 and IR£559 which were both found at the family home at 'House A', County Kildare. The first named respondent has provided no evidence to the Court in relation to these matters. The second named respondent did claim an interest in the Sterling sum which was found on the same occasion, that is the sum of STG£1,180 in cash. She claimed that that sum was the remains of gifts given to her in Sterling at the time of her wedding. Given the passage of some five years from the date of the wedding to the date of the seizure, the absence of any particularisation in relation to who provided such gifts, the Court is satisfied that in relation to that sum of Sterling and in relation to the family home, the second named respondent has failed to discharge any onus which is on her following the shift of onus herein before set out. She failed to provide any credible evidence as to provenance. The lack of any credible explanation to explain access to cash in the sum of €140,000 at the time of the purchase of the house and the lack of any credible explanation as to the source of such funds leads the Court to the conclusion that the second named respondent has failed in her evidence to fulfil the onus which is on her given the determination by the Court that there was a *prima facie* case under s. 3.

20. The evidence of the second named respondent was that she disclaimed any interest in the sum of either €10,900 and IR£559. There is no evidence available from the first named respondent in relation to those items or any other items. The second named respondent has put no evidence before the Court and in those circumstances the onus on him as a respondent following the determination of a *prima facie* case in relation to those items has not been fulfilled.

21. As regards the ring which is item 5 to the schedule, the second named respondent avers that it was purchased for her in cash by her husband in November 2002. No explanation is provided in relation to the source of funds which enabled her husband to fund such a purchase. Again, the Court is left with a general averment that her husband earned funds from casual work without any detail or any precision and the Court is satisfied that in relation to this item, the respondents have also failed to fulfil and discharge the onus which is on them following the determination of a *prima facie* case herein before made.

22. The final item of property to consider is the fund generated from the sale of the motorcar identified at paragraph 6 of the schedule. The Court has carefully considered the evidence in relation to the motorcars and, in particular, whether or not the availability of the €60,000 following the settlement of the second named respondent's personal injury claim in early 2005 might provide a credible and rational explanation for the ownership and possession of the motorcar. The documents available to the Court demonstrate that in early 2004, some twelve months before any personal injury settlement was received, a sum of €25,660 cash was available to the respondents to enable them to purchase a new BMW 320 motorcar bearing registration number: 04D 3611. The documentation relating to the order and purchase of that vehicle is available and it is clear that in January of 2004 the respondents were able to fund the purchase of a new motorcar with a total cost of €49,660 in part from a trade-in but also by means of a cash deposit of €24,950. No credible explanation is provided in relation to where such sum of cash was obtained or how it was available to the respondents. The evidence in relation to the subsequent trade-in and purchase of replacement vehicles and the insurance taken out thereon is demonstrative of the fact that the motorcar set forth at paragraph 6 of the schedule is substantially funded by the asset value of that 2004 car together with certain limited cash payments made thereafter at the time of the trade-in and purchase of replacement cars. The three sums identified never exceeded €5,500 and in all instances were in cash. As with all other matters the second named respondent has failed to provide any credible documented or coherent explanation for such sums of cash being available to her and her husband. Such evidence as was given by the second named respondent lacked credibility. The car, and the net price obtained on sale, represent an asset obtained without any provenance for such asset being established by the respondents and that asset is also an asset where the respondents have failed to discharge the onus on them.

23. In the light of the above findings, the Court is satisfied that neither of the respondents has satisfied the onus of proof which

followed from the *prima facie* finding. Therefore the final matter which requires to be considered is whether there would be a serious risk of injustice if an order were to be made pursuant to s. 3.

24. The second named respondent contends that there would be a serious risk of injustice if a s. 3 order was made. The claim made is that it would be unjust and disproportionate and in violation of the second named respondent's rights pursuant to Article 8 of the European Convention on Human Rights to make a s. 3 order in respect of the premises identified at paragraph 1 of the originating notice of motion which is the family home. It is contended on the second named respondent's behalf that a s. 3 order would violate her rights as recognised in Article 8 of the European Convention on Human Rights and reliance is placed upon s. 2(1) of the European Convention on Human Rights Act 2003 which provides:-

"In interpreting and applying any statutory provision or rule of law, a court shall, in so far as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions."

The second named respondent contends that the loss of one's home is an extreme form of interference with the right to respect the home and any person at risk of an interference of such magnitude should in principle be able to have the proportionality of the measure determined by an independent tribunal in the light of the relevant principles under Article 8 of the Convention. (See *McCann v. United Kingdom* (ECHR 19009/04)). Reference was also made in the argument made on behalf of the second named respondent to the decision of this Court in the case of *CAB v. O'B & Anor.* (Unreported, High Court, Feeney J., 12/01/2010). That judgment identified that when a court was considering making a s. 3 order in respect of a family home, it must consider whether it would be unjust and amount to a violation of a respondent's rights pursuant to Article 8 of the European Convention on Human Rights and would be disproportionate to the purpose of the legislation. In the *CAB v. O'B and Anor.* case which was a case in relation to a family home, this Court identified how a court should consider the issue of "injustice" under s. 3 when dealing with a family home and it did so in section 4 of the judgment (pp. 18 – 29). This Court will follow the same approach. In that case, the Court held (at the foot of p. 26):

"In considering whether or not a serious risk of injustice would arise, under the provisions of s. 3 of the Proceeds of Crime Act 1996, the Court can exercise a wide discretion. That discretion is of sufficient scope to allow and permit consideration of any potential injustice and inevitably involves consideration of the appropriateness or proportionality of the granting of a s. 3 order."

In that judgment the Court identified a number of factors which the Court can take into account and consider in exercising its wide discretion. In this case, the second named respondent contends that the facts in the *O'B* case can be distinguished from the facts in this case in that in the *O'B* case the second named respondent who was the wife of the first named respondent and mother of his children, had made no financial contribution to the purchase of the family home. The second named respondent argues that the facts of this case establish a direct financial contribution in the order of 85% of the cost of the purchase of the family home by the second named respondent. As is apparent from the earlier paragraphs of this judgment, the Court is satisfied that such contention is not factually accurate. The Court is satisfied that the €118,000 portion of the purchase price, was not contributed by the second named respondent as she contended. The Court is satisfied that the probability is that such funds were provided by the first named respondent and on the balance of probability emanated from the proceeds of his criminal activities. In circumstances where this Court is satisfied that the second named respondent's version as to the source of the €118,000 is fabricated it follows that there is no credible explanation or evidence available to the Court to support a financial contribution by the second named respondent.

25. In the *O'B* case the Court held (at the foot of p. 27 of the unreported judgment) that:

"To make a case for "injustice", a respondent must identify actual and firm grounds over and above past use or possession or need."

In the *O'B* case it was acknowledged in the judgment that particular grounds could include matters such as personal financial contributions either directly or indirectly by a respondent or notice party. In this case the only particular ground identified by the second named respondent to support a claim of "injustice" is the second named respondent's alleged financial contribution to the purchase of the family home. The Court is satisfied that on the balance of probability no such contribution was made and that the probable source of the funds emanated from the first named respondent's criminal activity. The Court has also considered the fact that the family home in this case is in the sole name of the second named respondent. However, the evidence available to the Court satisfies the Court that on the balance of probabilities the entire cash purchase price of the property was provided by the first named respondent and was from funds generated by his criminal activities. In those circumstances the fact that the family home is in the sole name of the second named respondent does not lead to a situation where a s. 3 order cannot be made, even against a party against whom no particular criminal activity is alleged, where the property to be the subject of a s. 3 order was acquired in whole or in part with the proceeds of crime. The Court is satisfied that that is the situation on the facts in this case and that therefore the family home is a property in respect of which a s. 3 order can be made. The second named respondent has failed to substantiate her claim of an alleged contribution towards the purchase of the family home and has identified no other special reason or circumstance which would render the making of a s. 3 order in respect of the family home unjust. In exercising its wide discretion the Court has taken into account all the circumstances of this case but where the Court is satisfied on the evidence that the family home was acquired in whole with funds generated from the first named respondent's criminal activities and absent any claim by the second named respondent of injustice based upon anything other than her contribution to the purchase, which the Court holds to be a false assertion, the Court is satisfied that there would not be a serious risk of injustice if the s. 3 order was made in respect of the family home in this case. In exercising its discretion the Court has taken into account the fact that the premises is a family home where the second named respondent and her family are currently residing. In dealing with the issue of proportionality in the making of an order the Court can and will take into account how and in what manner and within what time period an order for possession or sale of that property might be made. That matter does not arise at this point in time.

26. The Court has followed the approach identified in the *CAB v. O'B & Anor.* case and has applied that approach to the facts of this case and is satisfied that in exercising its discretion a s. 3 order should be made in respect of the family home. In arriving at that decision the Court recognises that if it were not to so order it would in effect allow the second named respondent to remain in the family home when she has made no contribution to its purchase price and where the entire price, on the balance of probability, emanated from the profits generated by the first named respondent's criminal activity.

27. The Court is satisfied that all of the items identified in the schedule to the originating notice of motion were purchased or obtained or funded either directly or indirectly from the criminal activities of the first named respondent and constitute proceeds of crime. The Court is therefore satisfied that a s. 3 order should be made in respect of each of the six items set forth to the originating notice of motion, it being the case that the item contained at paragraph 6 is now a sum of money rather than a vehicle as identified earlier in this judgment.

