



THE COURT OF APPEAL

Neutral Citation Number: [2021] IECA 295

Appeal Number: 2020/139

**Whelan J.
Costello J.
Collins J.**

BETWEEN/

CRIMINAL ASSETS BUREAU

APPELLANT

– AND –

D.W.

AND

C.W.

RESPONDENTS

Judgment of Ms. Justice Máire Whelan delivered on the 9th day of November 2021

Introduction

1. This is an appeal against the order of Owens J. made on 2 June 2020, perfected on 3 June 2020, admitting both respondents to the Criminal Assets Bureau *Ad Hoc* Legal Aid Scheme (“the Scheme”) with the legal fees payable being restricted to one solicitor and one junior counsel for both respondents.

Background

2. On 26 July 2019, the appellant, the Criminal Assets Bureau (“CAB”), issued an originating notice of motion *ex parte* seeking *inter alia* orders pursuant to ss. 2, 3(1) and 7 of the Proceeds of Crime Act 1996, as amended, against the first named respondent in respect of certain properties. Orders pursuant to ss. 10(1) and 10(7) of the Criminal Assets Bureau Act 1996, as amended, were also sought.
3. For the purposes of this judgment, the properties the subject of CAB’s application will be numbered in order of their acquisition. Properties 2 and 3 are occupied by tenants. The

respondents reside in a newly built house – Property 4 – with their children. This judgment will also refer to the first property acquired by the first respondent, Property 1, although it is not the subject of the within application.

4. The substantive case against the respondents is set out in the extensive affidavits sworn on behalf of CAB. Briefly put, it is CAB's contention that the first named respondent could not have funded the deposit, refurbishment costs and/or mortgage repayments of Property 1, which he purchased in 2001, from legitimate sources and that it was instead funded by the proceeds of crime.
5. When Property 1 was sold, part of the equity released was invested in Property 2. Accordingly, CAB contends, Property 2 and any income derived therefrom constitute the proceeds of crime. Since part of the purchase price of Property 3 was funded by the refinancing of Property 2, it is likewise contended that Property 3 comprises the proceeds of crime. It is further alleged that the acquisition, development and construction of Property 4 was funded by the proceeds of crime.
6. On 30 July 2019 the High Court (Stewart J.) made an order *ex parte* pursuant to s. 2 of the Proceeds of Crime Act 1996 that the first respondent and any person having notice of the making of the order be prohibited in the meantime from disposing of or otherwise dealing with Properties 2, 3 and 4. The court also made an order pursuant to ss. 10(1) and 10(7) of the Criminal Assets Bureau Act 1996 for the preservation of anonymity of certain bureau officers. CAB was granted liberty to issue and serve a notice of motion pursuant to s. 3 of the Proceeds of Crime Act 1996 on the first respondent, returnable on Thursday 15 August 2019. The said notice of motion issued on 31 July 2019 and was thereafter adjourned from time to time.

Application for admittance to Criminal Assets Bureau *Ad Hoc* Legal Aid Scheme

7. On 26 November 2019, the first named respondent filed a notice of motion seeking, *inter alia*, an order admitting him to the Scheme, in respect of one solicitor and one counsel. The application was grounded on the affidavit of the first respondent sworn on 15 November 2019.
8. In his grounding affidavit, the first respondent deposed as to how he financed the properties and renovations. He averred that he was currently unemployed and his sole source of income was rental income from Properties 2 and 3 from which mortgage repayments for both properties were payable. He deposed that his wife was receiving an income from her business and was also in receipt of children's allowance.
9. After setting out details of his current income and living expenditure, he averred that he could not afford to retain legal advisers in respect of the herein proceedings.
10. A supplemental affidavit was sworn on behalf of CAB by a Detective Garda on 31 January 2020 in order to dispute the averments contained in the first respondent's grounding affidavit. In particular, the Detective disputed the details of the first respondent's current income on the basis of previous tax returns; deposed to numerous occasions on which the

respondents were observed driving vehicles registered in the name of third parties; provided details of foreign travel enjoyed by the respondents in circumstances where the first respondent averred to spending €3,000 on “Holidays/Xmas/Birthdays”; and, referred to significant lodgements from unknown sources to the respondents’ bank accounts over and above their declared income.

11. In response, the first respondent swore a further affidavit on 25 February 2020, disputing matters raised by the said Detective Garda.
12. Further to the application to be admitted to the Scheme, an application was brought on 2 March 2020 whereby the first respondent’s wife sought to be joined as a party to the proceedings on the basis that she had a beneficial interest in the family home, Property 4, and that she and the first respondent were jointly assessed for taxation purposes. An application was also brought for her admittance to the Scheme in the case that she was joined to the proceedings. In support of that application, the second respondent swore an affidavit on 25 February 2020. At para. 12 thereof, the second respondent deposed to receiving income from “several small businesses” that she runs.
13. Thereafter, a number of supplemental affidavits were filed on CAB’s behalf, including those of the said Detective Garda sworn on 10 March 2020; Bureau Forensic Accountant No. 4 sworn on 10 March 2020, 15 May 2020 and 28 May 2020; Revenue Bureau Officer No. 81 sworn on 9 March 2020 and 15 May 2020; and, Social Welfare Bureau Officer No. 57 sworn on 10 March 2020.
14. A further supplemental affidavit was sworn by the first respondent on 26 May 2020, wherein he averred that, *inter alia*, his income in 2018 was €37,586 and his wife’s income was €12,829.

The High Court hearing

15. The application for admittance to the Scheme was heard on 2 June 2020. CAB argued before the High Court that the respondents’ affidavit evidence was “thoroughly unreliable in relation to the history of the matter” (transcript of 2 June 2020, p. 59, lines 6 to 7) and that the respondents had not established that their means were insufficient to enable them to obtain legal representation on their own behalf. It was further denied that the “exceptional circumstances” test had been met.
16. It was contended on behalf of CAB at p. 52 of the transcript of 2 June 2020:-

“...there are very basic tests that the Court has to be satisfied with and one of those is how the applicant for legal aid was in a position to accumulate the property in the first place. If the Court isn’t satisfied with that, then the court isn’t in a position, in my respectful submission, to admit them to the Scheme. The evidence, as it currently stands, isn’t such that would allow the Court to be satisfied, the burden being on the applicant...” (lines 2 to 10)

This proposition, on its face, would require the trial judge to evaluate the relative merits of the parties’ positions in the substantive claim.

Ex tempore judgment of the High Court

17. The trial judge observed that what he was focusing on was “evidence in relation to current means at this particular stage rather than what the historical position is” (transcript of 2 June 2020, p. 59, lines 14 to 16). The judge concluded, having regard to the evidence in that behalf, that insofar as the means of the respondents were concerned, “they meet the criteria here that they would be insufficient...to allow for the sort of legal representation that would be required in this case” (p. 59, lines 23 to 26).

18. In addressing the issue of “exceptional circumstances” and the requirement that the court be satisfied that it was essential in the interests of justice that the respondents should have legal aid in the preparation and conduct of their defence, the trial judge observed:-

“...no matter what view you take about the reliability of the affidavits that have been put in so far and no matter what view one takes in relation to whether or not the case made is plausible, it seems to me in relation to it that this is...an extremely complicated case and that the circumstances...are sufficiently essential to allow for legal aid in the form of a solicitor and one junior counsel...” (p. 60, lines 4 to 11)

The trial judge took the view that he could not examine the merits of the substantive case at the preliminary stage because were he to do so, every application to be admitted to the Scheme would be rejected. He further observed that in proceedings brought under the Proceeds of Crime Act 1996:-

“...CAB have done all of the homework in relation to the cases for several years and, at that particular stage, they are obliged in order to satisfy the requirements under the legislation to make a fairly cogent case and that goes without saying. Then the respondents in these cases have to come in and they have to deal with matters over a number of years in relation to accounts and so forth and if it were the case that they would have to mount such an [effective defence] at the legal aid stage to rebut the sort of explanations that CAB are giving, in point of fact, one would never get legal aid in these sort of cases because the exceptional circumstances test could never be made.” (p. 60, line 20 to p. 61, line 4)

19. He concluded that:-

“...while it may be that...all of these explanations fall very short of what would be acceptable in order to show where the money came from to buy these various assets and houses...at this particular stage...there is sufficient to satisfy me that there are sufficiently exceptional circumstances to allow these two people to make their case...” (p. 61, lines 7 to 16)

20. Accordingly, he ordered that the respondents be admitted to the Scheme, concluding, in effect, that the respondents had insufficient means to fund representation and that the various criteria for eligibility under the Scheme were met.

21. In addition to the order admitting the respondents to the Scheme, the trial judge joined the second respondent to the proceedings.

Notice of appeal

22. By notice of appeal dated 30 June 2020, CAB contended that the trial judge erred in law and/or in fact in:
- i. determining that the respondents' means were insufficient to enable them to obtain legal representation on their own behalf;
 - ii. determining that by reason of exceptional circumstances it was essential in the interests of justice that the respondents should be admitted to the Scheme. In particular, CAB contended that the trial judge erred in determining that the historic position of the respondents was not relevant, that there was no obligation on the respondents to explain the substantial difference between their legitimate income and the funds required to fund their property and their lifestyle, that the proceedings were extremely complicated by virtue of their length, and that if the court had to go into the "merits" of the case no one would ever be admitted to the Scheme. It was further contended that the trial judge erred in failing to deal with either the "necessity" or the "interest of justice" legs of the test;
 - iii. failing to make any determination as to the ability of the respondents to fund the properties set out in the schedule to the originating notice of motion from legitimate means and in failing to deal with the evidence undermining the explanation of the respondents as to how the said properties were funded; and,
 - iv. finding that the respondents had discharged their burden of proof in respect of the motion.
23. The respondents opposed the appeal in its entirety.

Submissions of CAB***Whether the means of the respondents are insufficient***

24. CAB submitted, on the authority of *O'N. v. Criminal Assets Bureau* [2011] IEHC 321 (*Ex tempore*, High Court, Feeney J., 24 January 2011), that there are two steps to the means test; firstly, the applicant must identify their current financial position and, secondly, they must address their capacity to generate funds.
25. CAB submitted that the trial judge erred in accepting that the respondents did not have sufficient means in circumstances where he had identified an absence of evidence in respect of the current rental and mortgage position (see, transcript of 2 June 2020, p. 17, line 18 *et seq.*). CAB submitted that counsel's reply to the trial judge's queries regarding rents being received by the respondents and whether the mortgages were being paid was "far from confirming that the income and expenses averred to by the respondents was accurate, notwithstanding that an affidavit had been filed by them a week before the motion came on for hearing" (CAB's written submissions, para. 12).
26. It was further submitted that the trial judge failed to engage with the evidence as to travel and access to motor vehicles and failed to examine or explore how much the respondents could afford in circumstances where they had conceded that they could make a contribution

towards the costs of legal representation. CAB contended that there were deficits in the evidence in respect of means and liabilities, including whether the mortgages were being paid. CAB submitted that the judge could not have been satisfied as to the respondents' means on the evidence.

27. It was argued that the evidence showed that the respondents historically had access to significant funds over and above legitimate income and this was unexplained, nor was the evidence engaged with. In particular, CAB submitted that the respondents never engaged with the evidence of Bureau Forensic Accountant No. 4, nor did they address the "enormous difference" between what a professional valuer calculated the cost of the renovation works on the properties to be and the invoices the respondents could show. It was further submitted that when the first respondent's evidence as to how he funded the difference between the mortgage and the cost of Property 1 was challenged, he was unable to explain the source of the funds and attempted to argue that it did not matter.
28. CAB referred to the trial judge's reluctance to adjourn the case to give the respondents time to put their proofs in order because he did not want the case "completely bogged down" (transcript of 2 June 2020, p. 52, line 19). It was submitted that such an approach should not result in gaps in the proofs.
29. It was submitted that the trial judge erred in failing to have regard to the respondents' incorrect explanations in their affidavits and/or in failing to set out the basis for why he decided those incorrect explanations were not relevant to the application before the court.
30. With regard to the trial judge's *obiter* comment at p. 22, line 18 of the transcript of 2 June 2020 as to the difficulty in finding a reputable solicitor who would accept "the sort of money that would be available to pay the fee" were CAB's version of events to be accepted, it was submitted that the test is not whether the respondents can find someone to represent them but whether they have the means to fund their representation. It was argued that if the trial judge was correct in his approach, "there would be no need for any conditions precedent for admission to the Scheme as everyone would qualify" (CAB's written submissions, para. 25).

"...by reason of exceptional circumstances, it is essential in the interests of justice..."

31. It was argued that the respondents based their application on the "means" element of the test only and had made no submissions as to why their admission to the Scheme was essential in the interest of justice nor had they identified any legal or factual complexities in the case. It was emphasised that the burden of proof rests with the respondents that they satisfy all the limbs of the test for admission to the Scheme.
32. Reference was made to *Murphy v. G.M. and others* (Unreported, Supreme Court, 3 April 2001) wherein Hardiman J. held that the entire statutory jurisdiction is, in its own terms, both complex and exceptional. It was submitted that that case is a high water mark and must be seen in the context of when it was decided – it was one of the first cases to be brought under the proceeds of crime legislation which was, at that time, raising significant legal, evidential and constitutional issues.

33. In *O'N. v. Criminal Assets Bureau* Feeney J. acknowledged that the legislation is complex and exceptional but, on the facts of that case, held that the applicants to the Scheme must identify particular circumstances which make it "essential either as a result of additional complexities over and above the statutory difficulties, or other matters in relation to the interest of justice." CAB submitted that no complex or novel issues have been raised by the respondents in the instant case.
34. CAB contended that a similar situation arises in this case as had arisen in *Criminal Assets Bureau v. B.* (High Court, Stewart J., 12 July 2017). In *B.* the court emphasised that, although the proceedings at first glance may have seemed complicated and cumbersome on account of the volume of papers, each application must be examined on an individual basis. The court had noted that a number of the applicants had not engaged with the evidence nor engaged with the issue of how they were able to accumulate sufficient funds for the purchase of a particular property.
35. Reliance was also placed on *Criminal Assets Bureau v. M.C.* (*Ex tempore*, Court of Appeal, 4 February 2019) wherein Irvine J. (as she then was) had made observations regarding lay litigants who deal with issues such as validity of mortgages, deeds of novation or validity of bankruptcy proceedings without the assistance of lawyers in agreeing with the decision of Peart J. who had found that the level of complexity in that case did not warrant the provision of legal aid. CAB submitted that the level of complexity in the within case is "nowhere near the level of complexity described by Irvine J." in *M.C.* (CAB's written submissions, para. 28).
36. CAB submitted that the trial judge erred in concluding that this is "an extremely complicated case". CAB submitted that the elapse of twenty years since the purchase of Property 1 and the dispute as to the costs of the renovations of each property did not amount to exceptional circumstances, contrary to what the respondents had submitted to the court below. It was further submitted that this case turns on the source of the respondents' income – a fact on which a solicitor cannot advise them, rather it is information with which the respondents would instruct a solicitor.
37. With regard to the trial judge's comments concerning the threshold to be satisfied on the exceptional circumstances test at p. 60, line 28 of the transcript of 2 June 2020, CAB clarified that it was not submitting that the respondents were obliged to set out their defence in great detail at the legal aid stage but, rather, that they must engage with the evidence and if that engagement can be shown not to be credible, "that must have a consequence" (CAB's written submissions, para. 35).
38. CAB submitted that, if it is accepted that there are exceptional circumstances, the trial judge failed to consider why legal aid would be essential in the interest of justice.

Submissions of the respondents

Whether the means of the respondents are insufficient

39. The respondents placed reliance on *Hay v. O'Grady* [1992] 1 I.R. 210 and *Leopardstown Club Ltd. v. Templeville Developments Ltd.* [2017] IESC 50, [2017] 3 I.R. 707, submitting that the decision on the respondents' means is essentially a finding of fact which is binding upon this court so long as it is based on credible evidence and ought not to be disturbed on appeal in the absence of clear non-engagement with the facts. In reliance, by analogy, on *G.K. v. Minister for Justice* [2002] 2 I.R. 418, it was submitted that CAB must provide clear evidence that the trial judge did not consider matters in circumstances where he made an express statement that he did do so.
40. The respondents contended that the trial judge correctly determined that the specific factual issues raised by CAB, while relevant to the substantive proceedings, were not core issues to the application for legal aid.
41. The respondents submitted that the trial judge was correctly concerned that an interlocutory application for legal aid should not be used to litigate factual disputes which fall to be determined in the substantive proceedings.
42. The respondents argued that the trial judge applied the correct test; namely whether the means of the respondents were insufficient to enable them to obtain legal representation where it was otherwise shown that it was essential in the interests of justice that legal aid be provided for the preparation and conduct of the case. It was submitted that it was "entirely reasonable" for the trial judge to be concerned that, if CAB's allegations were accepted, the respondents would encounter difficulty in finding a reputable solicitor willing to accept the proceeds of crime in payment of fees (respondents' written submissions, para. 15).

"...by reason of exceptional circumstances, it is essential in the interests of justice..."

43. The respondents disputed CAB's contention that this case is "very straight forward". They submitted that the case is factually and legally very complex, referring to the substantial volume of evidence in the form of affidavits, exhibits and other materials, concerning finances and sundry financial, mortgage and conveyancing transactions going back approximately 20 years and several houses including the family home. Reliance was placed on the following remarks of Hardiman J. in *Murphy v. G.M. and others*:-

"The important constitutional considerations identified in *The State (Healy) v. Donoghue* [1976] I.R. 325 in relation to criminal legal aid would appear to apply to a substantive application such as the present. It is beyond dispute that the complexity of the present application far exceeds that of the underlying criminal charge in the case cited."

44. The respondents referred to the factors identified by the Supreme Court in *Joyce v. Brady* [2011] IESC 36, [2011] 3 I.R. 376 at para. 15 as informing the complexity test for criminal legal aid. The respondents submitted that there is an inequality of arms between them and CAB and, paraphrasing O'Donnell J. (as he then was) in *Joyce v. Brady*, that they are being

confronted with the might of the Criminal Assets Bureau seeking to obtain orders to deprive them of their properties. However, the respective considerations under each regime differs.

45. The respondents submitted that the decisions of the High Court in *O'N. v. Criminal Assets Bureau* and *Criminal Assets Bureau v. B* can be distinguished on the basis that it was found in those cases that there was a lack of sufficient engagement with the facts, whereas in the instant case, the trial judge did not accept CAB's argument that the respondents had failed to engage with the facts for the purposes of the legal aid application. It was submitted that the standard which CAB seeks to impose is "so impossibly high" that it would, in effect, render the Scheme redundant (respondents' written submissions, para. 23).
46. It was submitted that the comments of Irvine J. (as she then was) in *Criminal Assets Bureau v. M.C.* were obiter in circumstances where that case was decided on the means issue, not the "exceptional circumstances" test. The respondents further contended that an analogy between proceeds of crime proceedings and mortgage repossession cases is not appropriate for several reasons. Firstly, while s. 28(9)(a)(ii) of the Civil Legal Aid Act 1995 expressly excludes disputes in relation to rights and interests in and over land (subject to the exceptions set out in s. 28(9)(c)), a legal aid scheme for proceeds of crime cases has been established. Secondly, it was submitted that proceeds of crime proceedings do not arise from a debt that has not been repaid, but are a significant and complex allegation of criminal conduct extending back for decades, in respect of many properties. It was noted that the respondents may have to address general allegations of "indirect" proceeds of crime and belief evidence pursuant to s. 8 of the Proceeds of Crime Act 1996. Thirdly, the respondents submitted that it is more serious to be dispossessed of property on the basis of allegations of criminal conduct (to be proven on the civil, rather than criminal, standard of proof) than it is for a possession order to be made following a clear failure to repay a mortgage.

Criminal Assets Bureau *Ad hoc* Legal Aid Scheme

47. The criteria for admission to the Scheme are set out in a guidance document prepared by the Legal Aid Board. Section 5 thereof provides:-

"The grant of legal aid under the Scheme, including the level of legal representation and/or witness expenses allowed, is a matter for the Court with the appropriate jurisdiction to deal with the specific case subject to the Court being satisfied that:

- (i) the means of the applicant for legal aid are insufficient to enable him/her to obtain legal representation on his/her own behalf, and
- (ii) by reason of exceptional circumstances it is essential, in the interests of justice, that the applicant should have legal aid in the preparation and conduct of his/her case, and
- (iii) the type of proceedings are embraced by the scope of the Scheme.

These provisions require the Court to be satisfied on all of the above tests." (emphasis added)

48. Section 5(iii) appears to be a succinct reiteration of s. 4 of the guidance document to the Scheme as to its scope.
49. The trial judge was accordingly required to be satisfied that the means of both respondents were insufficient to enable them to obtain their own legal representation. In addition, it was necessary that the judge establish that exceptional circumstances existed on the facts before him which rendered it essential in the interests of justice that both respondents should have legal aid in connection with both the preparation and conduct of the case.
50. With regard to the second aspect of the test for eligibility to be demonstrated by an applicant who seeks an order from the court under this Scheme, s. 5 states:-

"The applicant must satisfy the Court that it is essential that he/she receives legal representation and that he/she is not in a position to retain a solicitor...unless he or she receives the benefit of the Scheme. To this end the applicant must file an affidavit and/or provide such information as the Court deems appropriate to confirm that he/she satisfies the criteria as set out above."

It is clear from the language that it is not envisaged that an applicant be confined to an affidavit although prudence would dictate that the affidavit should comprehensively engage with each of the three sub-clauses within the eligibility provisions to be found in s. 5 of the Scheme.

51. It appears clear from the language of s. 5 that the purpose of requiring an applicant to file an affidavit and providing information to the court is that:-

"This will allow the Court to consider the applicant's financial means from a fully informed position and to decide accordingly on whether to:

- (a) seek further information as considered appropriate, or
- (b) refuse to grant legal aid under the Scheme, or
- (c) grant legal aid under the Scheme."

52. Section 2 provides that the Scheme:-

"...was introduced by the Department of Justice and Equality with effect from the 2nd April 1998. When originally introduced, the Scheme was applicable to persons who were Respondents and/or Defendants in any Court proceedings brought by, or in the name of, the Criminal Assets Bureau or its Chief Bureau Officer or any member of the Criminal Assets Bureau. This included certain proceedings under the Proceeds of Crime Act, 1996...The Scheme's scope has been broadened over the intervening years and further details on the types of proceedings now covered are set out in Section 4 of this document."

It is self-evident from the title of the within proceedings, "in the matter of the Proceeds of Crime Acts 1996 to 2016", that *prima facie* the litigation falls within the scope of the Scheme.

53. Section 2 of the Scheme confirms that from its inception it was:-

"...administered by the Courts Policy Division in the Department of Justice and Equality. However, from 1st January 2014 the remit for the administration of the Scheme transferred to the Legal Aid Board. The budgetary responsibility for the Scheme remains with the Department of Justice and Equality."

The transfer of the administration of the scheme to the Legal Aid Board is unremarkable and is reflective of the transfer of other *ad hoc* legal aid schemes, including the Attorney General's Legal Aid Scheme (now the Legal Aid – Custody Issues Scheme), from the Department of Justice and Equality to the Legal Aid Board for administrative purposes in recent years.

54. Section 3 of the Scheme sets out its purpose and application:-

"The purpose of the Scheme is to provide, in certain circumstances, legal representation for persons that need it but who cannot afford it. It is not an alternative to costs."

It identifies that procedurally:-

"...it is necessary for the application for access to the Scheme to be made at the commencement of the proceedings."

It is not in dispute in the instant case that the application was made at the commencement of the proceedings.

55. There is no automatic entitlement on the part of an applicant to an order for legal aid under the Scheme. The "certain circumstances" are elaborated further in ss. 3, 4, 5 and 6 of the guidance document to the Scheme. Section 3 provides:-

"Access to the Scheme is not automatic and the applicant must satisfy the Court that the proceedings are embraced by the scope of the Scheme and that he/she is not in a position to retain a solicitor (or, where appropriate, counsel) unless he or she receives the benefit of the Scheme."

56. Under the terms of the Scheme, once satisfied that the proofs specified are in order, having due regard to the purpose and application of the Scheme, its scope and the eligibility criteria specified in s. 5, the court is entitled to decide to grant legal aid in the manner specified in s. 6 of the Scheme.

57. A feature of this case is that the Legal Aid Board is not a party to this appeal, neither is it a notice party. The appellant is the Criminal Assets Bureau. However, no procedural objection was raised on behalf of the respondents in this regard as to the *locus standi* of the Criminal Assets Bureau to contest the legal aid application. The terms of the Scheme do not contemplate that the Legal Aid Board be heard prior to the court making its order. Neither does the Legal Aid Board appear to have any right to appeal the order. The order

on its face creates a right on the part of the respondents to enforce same in accordance with its tenor and is binding on the Board. The Board has no independent function to satisfy itself that the respondents have met the eligibility criteria specified in the Scheme.

“Insufficient means” test

58. The question arises, in respect of s. 5(i), whether there was evidence before the trial judge sufficient to satisfy him that the means of the respondents were insufficient to enable them to obtain legal representation on their own behalf. The evidence before the trial judge included the affidavit of the first respondent sworn on 15 November 2019, together with the exhibit to same. Additionally there was a replying affidavit of the first respondent sworn on 25 February 2020, an affidavit of the second respondent sworn on 25 February 2020 and a notice of motion dated 2 March 2020 returnable before the High Court on 16 March 2020 whereby the second respondent sought, *inter alia*, admission to the Scheme. There was a further affidavit of the first respondent dated 26 May 2020. The following observations can be made in regard to same concerning the insufficiency of the respondents’ means to enable them to fund their own legal representation:

- i. A bank statement in respect of the first respondent was exhibited disclosing that, as of 12 August 2019, the first respondent held an account with Bank of Ireland with €3,349.71 standing to his credit therein.
- ii. The first respondent’s affidavit of 15 November 2019 runs to 24 paragraphs. It clearly contested the characterisation by CAB that he had no apparent source of legitimate income around the time of the acquisition of Property 1 in or about September 2001. He outlined in a generalised way employment which he contends he was engaged in and acknowledges “some periods of unemployment” and having spent a year in prison “from 1999 – 2000” (para. 4). He contended he had savings in 2001 which he used, together with a mortgage, to purchase Property 1.
- iii. He further contended that circa 2006/2008 he generated an income from a specified business and the subletting of a yard, and that he began renting Property 2.
- iv. He disputed the contentions of CAB with regard to the extent of the costs of refurbishment works carried out on Property 3.
- v. He further contended that Property 4 was purchased with assistance from the second respondent’s relative and deposed that works were carried out by the parties themselves in respect of the construction beyond “first fix” stage: “The funds for this came from the sale of my partner’s business...and a loan from my partner’s grandfather” (para. 6). He deposed that the financing of the construction work came from accumulated rental income together with earnings from work he was engaged in “until March 2015”. Apparently at that stage he “went to prison for 18 months until I was released in September 2017” (para. 6).
- vi. The first respondent deposed that not alone does he require the assistance of “solicitor and counsel for the preparation of my case” but, further, “it may also be

the case that I require a forensic accountant and/or expert valuers to contest the herein proceedings" (para. 7). He further deposed at para. 23, "I cannot afford to privately retain a legal team and my current legal team will only act if your deponent is admitted to the Ad Hoc Legal Aid Scheme."

vii. He deposed that the income shared jointly with the second respondent amounts to a net sum, after tax and expenses, "of approximately €3,132.16" (para. 8). He further deposed that the second respondent was then "earning €1,062.75 per month with her company" and that she was in receipt of "children's allowance of €140 per month" (para. 9).

59. There were certain inaccuracies and inconsistencies contained in the initial affidavit sworn by the first respondent as was demonstrated by a comprehensive affidavit sworn on behalf of CAB by the Detective Garda on 31 January 2020. In a replying affidavit sworn on 25 February 2020, the first respondent acknowledged that he was married to the second respondent contending "there is no inconsistency between the words partner and wife" in that context (para. 3). The first respondent contended at para. 5 that his wife's income had to be dealt with separately "in circumstances where your deponent was the only respondent to the proceedings". It was contended that there had been a change of solicitors around the time of filing of his initial affidavit and that there was some time pressure in connection with the filing of same. It was contended that the dominant intention in referring to the second named respondent was to alert the court to the fact that the respondents were jointly assessed for tax purposes.
60. The second affidavit of the first respondent purports to outline various periods of employment throughout the previous twenty years, with particular reference to the period prior to 2001 when Property 1 was acquired.

Lodgements

61. A significant issue raised by Bureau Forensic Accountant No. 4 in the affidavit of 10 March 2020 was the suggestion that lodgements from unknown sources amounting to €535,431 appeared in the bank accounts of both respondents during the relevant period, and even deducting the declared rental income of €312,597, there continued to be a further sum of €222,834 unaccounted for.
62. It appears that in the context of this averment on behalf of CAB, the respondents indicated a need to engage a forensic accountant to review CAB's assessment for the purpose of carrying out a balancing exercise to exclude "any figures that are double counted" to achieve "an accurate assessment of our finances" (para. 12).
63. In so far as there is a deficit in the third affidavit of the first respondent of effective engagement with the clear averments in the affidavits of the Bureau Forensic Accountant No. 4 sworn on 24 July 2019 and 10 March 2020 to the effect that there are lodgements from unknown sources in the first respondent's accounts over the previous two decades or so, the first respondent deposed at para. 6:-

"...your deponent will require the assistance of my own forensic accountant to reply to same. In relation to the suggestion that this exercise has already been carried out, your deponent will contend that this is an exercise that should be carried out with my own forensic accountant."

Historic social welfare claims

64. The third affidavit of the first respondent of 26 May 2020 was sworn primarily in response to a supplemental affidavit of Social Welfare Bureau Officer No. 57 which had set out in detail social welfare claims in respect of the first respondent's father from 5 July 1980 to the date of swearing of the affidavit on 10 March 2020 – a period of almost 40 years. In response, the first respondent deposed:-

"...your deponent is a stranger to this information. I say that I went to work with my father for work experience when I was young, in the context of my narrative that I have a history of work." (para. 3)

He further asserted that the work history of his father:-

"...does not make any material difference to the herein application, which is an application for legal aid based on my current means, which are as per the affidavits already sworn by your deponent herein." (para. 4)

Evidence of the second respondent

65. The second respondent sought to be joined to the proceedings and an order for admission to the Scheme "on the basis that one certificate may cover both respondents" (para. 2 of her affidavit of 25 February 2020). She sought in particular to pursue a claim to have a beneficial interest in the family home property "on the basis that we are jointly assessed for taxation purposes" (para. 3). Albeit that she was apparently born in the mid-1980's, the second respondent deposed that the first respondent worked in his father's family business and had otherwise worked "in his own right in renovating old houses":-

"Your deponent has asked our accountant to check this but I have been told that the ROS records do not go back that far." (para. 7)

She deposed that, in connection with significant works alleged to have been carried out on Property 4, the current family home of the parties:-

"...I did not pay the builders through cash. I say that they were paid through bank transfers and they are still owed a sum of money. I say that the reason they have not been fully paid for is that I am disputing how the works were done..." (para. 8)

66. She deposed that she has receipts from "most of the works carried out" to two identified properties. She deposed that "although we are jointly assessed for tax purposes, as the respondent was the only one of us joined to the proceedings he was required to separate out our incomes" (para. 10). She deposed that inaccuracies in respect of certain mortgage amounts payable referred to in the first respondent's earlier affidavit of 15 November 2019 arose by reason of "a typing error" in the first affidavit (para. 10).

67. She deposed to having operated "several small businesses" (para. 12). The deponent engaged with issues regarding motor vehicles and foreign trips. Further, in relation to lodgements into her accounts, it was deposed at para. 17 that same related to "rental income and we hope to engage a forensic accountant to review this assessment and to carry out a balancing exercise to exclude any figures that are double counted as it would result in an accurate assessment of our finances."

68. It was further asserted that as:-

"...all our assets have been frozen, we will require legal aid to cover the costs of legal representation and, should this Honourable Court admit your deponent and the respondent to the Ad Hoc Legal Aid Scheme, it is our intention to further seek certification for a forensic accountant so that we can contest the allegations against us." (para. 18)

"Exceptional circumstances/interests of justice" test

69. CAB's case was supported by extensive forensic documentation spanning a period of two decades which certainly appears, on its face, to call into question the *bona fides* of the first named respondent and also in more recent years the *bona fides* of the second named respondent, his wife. A central proposition being advanced is that the first respondent had been in receipt of social welfare payments in certain years which precluded the possibility of him demonstrating that the purchase of Property 1 was financed by *bona fide* earnings in the years up to and including September 2001. The first respondent contends that he purchased Property 1 in September 2001 with savings in the region of €11,800. CAB contends that the first respondent did not work or derive any income from employment. He insists that he did and claims to have encountered difficulties in proving this because of the passage of time involved.

70. In addition, there was forensic evidence exhibited by CAB, contending that Property 1 had been purchased partly by means of a mortgage which had been procured on foot of misrepresentations made to a lending institution by the first respondent.

71. The contention of Bureau Forensic Accountant No. 4, as deposed to in the affidavit of 24 July 2019, is that there is overall a shortfall of approximately €3M across the period of almost two decades as between the costs of the alleged lifestyle and purchases of the respondents, on the one hand, and their objectively verifiable income, on the other. In addition to real property transactions, the affidavit evidence from CAB details particulars of 26 separate motor vehicles alleged to have been at the disposal of the respondents and particulars of foreign trips and expenditure in relation to same.

72. The affidavits set out in detail a sequence of conveyancing transactions involving the acquisition and disposition of Property 1 and subsequent acquisition of Properties 2, 3 and 4 and the application of the net equity derived from the proceeds of sale of Property 1 to partially fund the acquisition of the next.

73. The stance of CAB was that the respondents had “chosen not to deal at all with the exceptional circumstances in the interests of justice test” (p. 50 of the transcript of 2 June 2020). Central to CAB’s position was that, in determining eligibility under the Scheme, a judge was required to consider not alone the current means of the respondents but additionally the respondents must “put forward an explanation as to how they were in a position to accumulate the property that is the subject matter of the proceeds of crime application before they could be admitted to the Scheme” (p. 39, lines 8 to 12). This argument was based on the decision of Feeney J. in *O’N. v. Criminal Assets Bureau*. The High Court judge stress-tested this contention:-

“...what [Feeney J.] is saying there really is that you will have to show some defence to it because it is pointless to indicate to be given legal aid in relation to something that there is no defence.” (p. 39, lines 13 to 17)

Counsel responded, “Exactly.” Counsel further elaborated:-

“...I think that the court has to look at what information the respondent has put in in relation to the case in order to be in a position to make that assessment.” (p. 39, line 28 to p. 40, line 2)

74. The trial judge explored with counsel on behalf of CAB what it contended “exceptional circumstances”, within the meaning of s. 5(ii) of the Scheme, encompassed. In response, it was stated:-

“...it is not an exceptional circumstance that one of the properties is the family home because the Supreme Court has dealt with that issue on a number of occasions and the Supreme Court has said that if property is the proceeds of crime you have no interest in that property so those additional rights don’t come into play.” (p. 51, lines 19 to 25)

It was conceded that the respondents had never asserted as much “in the context of legal aid”.

75. Counsel for CAB asserted that the basic test to be satisfied by the respondents who sought an order for payment of fees under the Scheme included:-

“...how the applicant for legal aid was in a position to accumulate the property in the first place. If the Court isn’t satisfied with that, then the Court isn’t in a position, in my respectful submission, to admit them to the Scheme. The evidence, as it currently stands, isn’t such as that would allow the Court to be satisfied; the burden being on the applicant...” (p. 52, lines 3 to 10)

It was indicated to the judge that it was open to him to afford the respondents time “to put in further affidavits, if that’s what the Court feels so be it” (p. 52, lines 14 to 16). In conclusion it was advanced on behalf of CAB that the respondents had not met the necessary test under the Scheme by reason that:-

"...the explanations that they have given do not stand up to scrutiny, the amount and cost of the various assets have not been explained. The proposition put before court is a very straightforward proposition as to where the funds have come from, that either deals with the purchase of the assets or it does not. It is not complex, it doesn't involve any legal issues...they haven't dealt with the Bureau case in any manner which would allow the Court to admit them to the Scheme at this stage and I would ask that the court would refuse the application." (p. 53, lines 5 to 16)

The Proceeds of Crime Acts 1996 to 2016

76. CAB's position is straightforward; that the assets the subject matter of the proceedings were acquired with the proceeds of the first respondent's criminal conduct, particularly in relation to drugs. The Proceeds of Crime Acts 1996 to 2016 are framed in a manner to impose the burden of proof on the Criminal Assets Bureau to establish that the properties in respect of which orders are sought are *prima facie* the proceeds of crime and thereafter the burden of proof shifts to the respondents to prove on evidence that the properties do not constitute the proceeds of crime or were not acquired, in whole or in part, with or in connection with, property that itself constitutes the proceeds of crime. The evidential process envisaged by the statutory scheme was set out in detail by McCracken J. in *F.McK. v. G.W.D. (Proceeds of crime outside State)* [2004] 2 I.R. 470.
77. MacMenamin J. in the Supreme Court in *Criminal Assets Bureau v. Kelly* [2012] IESC 64 confirmed that the standard of proof for both applicant and respondent in proceedings under the proceeds of crime legislation is the civil standard and, further, that a court may not make an order if it is satisfied that there would be a "serious risk of injustice" arising therefrom. The statutory scheme enables the High Court as regards the proceeds of crime to make orders for the preservation and, where appropriate, the disposal of the property in question. The initial interlocutory order to be made is pursuant to s. 2 of the Proceeds of Crime Act 1996.
78. Section 6(1)(a) of the Proceeds of Crime Act 1996 entitles the High Court to unfreeze assets which are otherwise the subject matter of an interim or interlocutory order pursuant to ss. 2 or 3 of the said Act. No application was made by the respondents pursuant to s. 6(1) nor does CAB suggest such an application is appropriate. The statutory framework puts a significant onus on the respondent who must satisfy the court that it is "essential" to make the order unfreezing assets or funds for the purposes of enabling the discharge of legal expenses. It has been generally considered, particularly since the decision in *M.F.M. v. W.J.B. (Proceeds of Crime)* [1999] 1 I.R. 122, that the existence of the Scheme precludes the court from coming to a conclusion that it is "essential" to make the partial unfreezing order for the disbursement of legal costs. In the instant case, CAB reserves its right to adduce further evidence before the High Court to dispute the contention of the respondents that their means are insufficient to finance legal representation.
79. In the instant case it is significant that CAB's position is that the properties and the rental income being derived therefrom constitute the proceeds of crime. As such, pending determination of the substantive claim, the rental income or other income generated or derived from the said property cannot be generally availed of for the purposes of

discharging necessary legal fees. This renders the approach adopted by the trial judge appropriate in facilitating the respondents in having resort to the Scheme since thereby the value of the property the subject matter of the s. 2 orders will not be reduced by the need to defray legal expenses and costs.

Standard of review

80. This court, in reviewing the approach of the High Court judge, considers whether there was evidence before him sufficient to satisfy him that the proceedings against the respondents fell within the ambit of the Scheme and that the respondents were not in a position to retain a solicitor unless they received the benefit of the Scheme. Additionally, it is appropriate to consider whether there was evidence before the High Court judge on which he could be satisfied that all of the criteria and factors specified in s. 5 of the Legal Aid Board's guidance document on the *Ad Hoc* Scheme had been satisfied by the respondents. If so, and provided CAB fails to demonstrate any significant error of principle by the trial judge in his approach to his determination, then this court ought not interfere with the High Court's decision.
81. Unlike several other *ad hoc* schemes, the Criminal Assets Bureau *Ad Hoc* Legal Aid Scheme vests in the Court the jurisdiction to make a determination as to eligibility pursuant to the Scheme in any given case.
82. Here it is evident that the High Court judge had read the extensive bundle of affidavits and exhibits in advance. There was extensive engagement with the issues and the arguments and contentions of the parties were heard at length.

"Insufficient means" test

83. The first element of the eligibility criteria for admission to the Scheme concerns the insufficiency of the means of the respondents, as provided by s. 5(i). It is a fact driven exercise and the trial judge correctly understood it to pertain to the means and financial circumstances of the respondents at the date of the hearing, namely 2 June 2020. Any other interpretation would make no logical sense since the inquiry is directed towards the insufficiency (or otherwise) of means "to enable him/her obtain legal representation on his/her own behalf".
84. CAB has failed to demonstrate that the alleged "historic position", which is disputed by the respondents and will be determined at trial, could be determinative of the matter. CAB has not fairly characterised the determination of the trial judge in so far as it contends at ground 2(b) of its notice of appeal that he held that there was "no obligation on the [respondents] to explain the very substantial difference between their legitimate income and the funds required to fund the property and their lifestyle". The test in *O'N. v. Criminal Assets Bureau* does not require the judge adjudicating an application for legal aid under the Scheme to be satisfied that the assets acquired, and in respect of which in many cases an order pursuant to s. 2 of the Act has been made, were procured by *bona fide* and legitimate means. That is an issue for the substantive trial. As Feeney J. observed in *O'N.*:-

"The most important thing is the current financial position, income and outgoings, but also the capacity of parties to generate funds."

The trial judge was satisfied that the respondents disputed the assertions of CAB with regard to the alleged income. He distinguished between issues to be determined at the substantive hearing and issues to be determined at the application for legal aid.

85. In regard to the trial judge's approach, there was clear evidence that a property which was the subject of tenancies was also subject to a mortgage and that the respondents were liable for its discharge. It appears that the mortgage instalments were to be discharged out of the rental income or had been. Accordingly, the mortgages were a liability of the respondents on an ongoing basis. The overall approach of the judge in having regard to the totality of the financial liabilities of the respondents as against the income available to them on an ongoing basis for the purposes of determining whether their means were insufficient was the correct approach. It was not necessary for the judge to enter into a minute forensic investigation in relation to the discharge of mortgage instalments.
86. Whether or not the mortgage repayments were up to date, there was clear evidence that there was a continuing contractual liability on the part of the respondents for the mortgages and it necessarily follows from the terms of the mortgage agreements that if sustained default occurred, it would have significant adverse legal consequences.
87. I am satisfied that there was evidence before the High Court judge on which he was entitled to rely that as of the relevant date, when the application fell to be determined, the means of the respondents were insufficient to enable them or to fund private legal representation. As noted previously, CAB is entitled at any time to apply to the High Court for leave to adduce contrary evidence.

"Exceptional circumstances/interests of justice" test

88. The next issue is whether the trial judge was entitled to find that the criteria in s. 5(ii) of the Scheme were met. Were the circumstances as identified by the trial judge "exceptional" in the overall context? Section 5(ii) of the Scheme ought not to be construed overly strictly. The fundamental requirement must be the "interests of justice". To construe the reference to "exceptional circumstances" as requiring some extraordinary feature(s) would, in my view, set the bar too high and could potentially result in a situation where the interests of justice would not be served.
89. A perusal of the affidavits and exhibits prepared by CAB in support of this application demonstrate a very extensive forensic exercise had been undertaken over a substantial period of time involving the Bureau Forensic Accountant No. 4, Revenue Bureau Officer No. 81, Revenue Bureau Customs Officer No. 71 and the Social Welfare Bureau Officer No. 57. Those affidavits and the exhibits annexed thereto point to a contention that an intricate series of conveyancing transactions were entered into across a period of almost 20 years, particularly by the first named respondent in the years prior to his marriage to the second named respondent in the first instance and continued after their said marriage.
90. CAB was correct that the fact that the property currently occupied by the respondents constituted a dwelling house is not in and of itself a matter of such exceptionality as to

come within the test. However, the respondents did not so assert, and the trial judge did not so find.

91. CAB contends that a mortgage on Property 1 was procured partly on foot of misrepresentations made by the first respondent to the lending institution in question at the time with regard to his employment status, the source of his savings and the source of his income capable of meeting the instalments due and owing on foot of the mortgage for its anticipated duration. In essence, CAB contends that the transactions were substantially funded from "drugs money" (see, transcript of 2 June 2020, p. 44, lines 23 to 26).
92. Viewed in their totality the affidavits sworn on behalf of the respondents in support of this application can reasonably be said to dispute relevant central contentions being advanced on behalf of CAB, in particular that the first respondent was not in employment in the manner in which he contended over relevant years particularly prior to acquisition of Property 1 in 2001. One element advanced by CAB to undermine that contention was that he appeared to have been in receipt of social welfare payments in certain years when he contends he was employed or worked with his father. Further, CAB's affidavits contend that the first respondent's father had been in receipt of social welfare payments over a period of 40 years, suggesting that he was not in a position to have employed the first respondent as is contended. The respondents contest all these assertions.
93. I am satisfied in the instant case that there was sufficient evidence before the trial judge including, in addition to the affidavits, the arguments and submissions advanced in the course of the hearing which entitled the trial judge to be satisfied that a level of exceptionality was reached on the facts rendering it essential in the interests of justice to grant legal aid pursuant to the terms of the *Ad Hoc* Scheme to both respondents on the limited terms he identified; namely, one junior counsel and solicitor to represent both. The factors cumulatively giving rise to exceptional circumstances as identified included:
 - (a) the series of conveyancing transactions over a period of two decades the subject matter of the affidavits sworn on behalf of CAB;
 - (b) the contentions regarding the sources of the monies advanced by the first respondent for the acquisition of Property 1 in or about the month of September 2001;
 - (c) the contention as to whether the documentation signed by the first respondent in connection with the procurement of a mortgage *circa* 2001 from a lending institution sought in connection with the purchase of Property 1 does or does not amount to an act of misrepresentation on the part of the first respondent;
 - (d) the pre-2001 employment history of the first respondent;
 - (e) the provenance of monies apparently expended or asserted to have been expended by the respondents or either of them in connection with the carrying out of works or improvements in respect of all of the properties the subject matter of the

proceedings, in addition to Property 1 which has been disposed of and is no longer in the beneficial ownership of the respondents;

- (f) the manner in which the rents and profits from the various properties were applied by the respondents and each of them;
- (g) the various business enterprises of the second respondent and the incomes generated by her in respect of same;
- (h) the history and ownership of motor vehicles asserted to have been held by or for the benefit of the first and second respondent or such as was made available to them from time to time during the past 20 years;
- (i) the manner in which the construction of Property 4 (which is reputed to constitute the current family home of the respondents) was financed up to "first fix";
- (j) the nature and extent of works carried out on Property 4 subsequent to "first fix" and in particular whether same were carried out and financed by the respondents personally and, if not, the nature and extent of works carried out and the source of funding in respect of same;
- (k) an evaluation of the date, nature and extent of any financial assistance provided by a relative of the second respondent in respect of the defrayal of a cost or expense of any matter which is the subject matter of the proceedings;
- (l) the procurement of evidence as to the employment history (if any) of the first respondent's father during the past 40 years; and,
- (m) the procurement of any evidence of any employment ever held by the first respondent and any income generated or received by him on foot of same.

Additional material features included:

- i. the fact that the second respondent sought to be joined to the proceedings for the purposes of contesting the claim and establishing her title to Property 4;
- ii. the fact that CAB was represented by solicitor and counsel; and,
- iii. the importance of effective case and court management by Owens J. where the validity of a series of conveyancing and mortgage transactions as well as building agreements and related transactions extending over decades were central to the determination of the substantive issue.

94. I am satisfied in light of the factors set out above that there was sufficient evidence before the High Court judge on which he was entitled to conclude that, in respect of s. 5(ii) of the Scheme, the totality of matters to be addressed and engaged with by the respondents for the purposes of effectively contradicting the claims of CAB amounted to exceptional circumstances and, further, that he was entitled to conclude that it was essential in the

interests of justice that the respondents have legal aid in the preparation and conduct of their defence of this case in the limited terms specified by the trial judge.

95. It was reasonable for the trial judge to infer that in all the circumstances a sufficient degree of exceptionality and unusual facts combined such that it was essential in the interests of justice that the respondents be afforded legal aid for the purposes of presenting a cogent and/or coherent defence which necessarily follows from retaining a junior counsel and solicitor in relation to the defence of the matter.
96. I am satisfied that the totality of factors arising, the significant ambit of time across which the various alleged transactions took place allied with the duration of the period the subject matter of CAB's analysis in relation to social welfare claims of the first respondent and his father and the historic aspect of the first respondent's employment dating from early 2000's, did in aggregate constitute a sufficient threshold of complexity to amount to exceptional circumstances within the meaning of s. 5(ii) such that the decision of the trial judge to grant legal aid under the Scheme ought not to be disturbed.
97. It cannot be said that the respondents or either of them concede any of the assertions advanced and whilst their affidavits do not amount to a comprehensive and extensive body of documentary evidence that robustly contradicts each and every assertion of CAB's, they do dispute and deny the key elements of CAB's contentions.

The relevant caselaw

98. It is clear from the jurisprudence, including the judgment of the Supreme Court in *Murphy v. G.M. and others* (discussed in more detail below), that applications under the Scheme are highly fact specific and in each case the exercise by the trial judge pursuant to the Scheme must turn on the demonstrated factual circumstances of the case under consideration.
99. In my view, the decision in *O'N. v. Criminal Assets Bureau* is distinguishable in a number of material respects. By contrast with the instant case, in *O'N* the applicants for legal aid had not demonstrated any claim to the monies which had been the subject matter of the s. 2 application. It is clear from the determination of Feeney J. at p. 13 that in that case the applicants had been invited to submit further information by way of affidavit and they had failed or neglected to do so:-

"...there was in fact an open invitation by the court to supplement the affidavits. Neither of [the] two respondents making the application have taken up the invitation which was available to them to outline in brief, but not in a detailed way, the circumstances in which the funds could be accumulated."

In the instant case, by contrast, the court did not seek any further affidavit evidence from the respondents and indeed declined to make such an order when that option was adverted to by counsel for CAB.

100. A further significant contrasting element is that in the case of *O'N*. no explanation was forthcoming whatsoever in relation to the assets the subject matter of the application. By

contrast in the instant case, the first respondent strongly asserts that he was in employment and did generate an income and did have savings of approximately €11,800 as of September 2001 which were applied in and towards the acquisition of Property 1. Furthermore, the second respondent *inter alia* asserts that she generated an income from certain businesses and it is asserted that monies were received from a relative and otherwise explanations appear to be forthcoming or assertions are being made to suggest that the respondents, if afforded appropriate necessary legal assistance, will disprove the contention that the sums estimated by CAB to have been expended by way of renovations and construction costs, particularly in respect of Property 4 in which the respondents reside, constituted the proceeds of crime.

101. Further it will be recalled in the case of *O'N.*, Feeney J. deferred to the decision of Hardiman J. in *Murphy v. G.M. and others* in respect of the "exceptional circumstances" test in s. 5(ii) of the Scheme.

102. I find the approach contended for by Hardiman J. in *Murphy v. G.M. and others* to be relevant and of assistance wherein at p. 5 he observed:-

"I now turn to the application for a recommendation in relation to the *ad hoc* legal aid scheme. This appears to me to raise issues quite different from those arising on an application under s. 6 of the 1996 Act. In particular, it seems possible to approach this application, in the circumstances of the present case, without any consideration of the merits of the litigation to which it refers. The matters which are of importance to note in relation to the Scheme are the following: -

- (a) that the grant of legal aid, including the level of legal representation, is a matter for the Court and
- (b) the Court considering the application must be satisfied that the means of the applicant are insufficient to enable him to obtain legal representation on his own behalf, and that
- (c) by reason of the exceptional circumstances it is essential, in the interests of justice, that the applicant should have legal aid in the preparation of conduct of his case."

103. As was found by Hardiman J. in that case – a view expressly accepted and adopted by Feeney J. in the later decision of *O'N. v. Criminal Assets Bureau*:-

"...inadequate steps have been taken to dispute the applicant's assertion as to his present inability to discharge legal costs. In this regard, it may be noted that the alteration of the normal onus of proof, in relation to substantive applications under the 1996 Act, does not appear to be extended to applications for a recommendation in relation to the legal aid scheme."

104. It is worthy of note that Hardiman J. considered that the "important constitutional considerations identified in *State (Healy) v. Donoghue* [1976] I.R. 325 in relation to criminal legal aid would appear to apply to a substantive application such as the present." On the

facts of that case, he concluded at p. 7 of the judgment that it was “beyond dispute that the complexity of the present application far exceeds that of the underlying criminal charge in the case cited.”

105. It was contended on behalf of CAB that *Murphy v. G.M. and others* is a case of its time and when it was decided there were significant unresolved procedural issues which were subsequently resolved and form no part of the current law. However, the principles enunciated by Hardiman J. continue to be relevant.
106. I am satisfied that the decision in *Criminal Assets Bureau v. B.* is distinguishable insofar as Stewart J. observed, *inter alia*, that an applicant had not:-

“...engaged with the facts or explained to the Court how she was in a position to acquire such valuable assets while on social welfare in the past. In my view, it is quite clear that [M.B.] does have financial means and has failed the means element of the test for the grant of legal aid.”

The court also found on the facts that there were no exceptional circumstances demonstrated.

107. As Stewart J. correctly observed in her conclusions, however, any comments she made in connection with “exceptional circumstances” were clearly *obiter* since in each case she made an initial finding that the applicant in question had failed the means element of the test to be found in s. 5(1) of the Scheme. Thus, the limb of the test in s. 5(ii) of the Scheme did not fall to be considered at all.
108. This court (Peart J.) in *Criminal Assets Bureau v. M.C.*, in an *ex tempore* judgment delivered on 4 February 2019, observed:-

“In my view [the trial judge] identified that test correctly and she also referred to the judgment of Hardiman J. in *Murphy v. G.M.*...This court ought not to lightly interfere with a finding by the High Court judge that she was not satisfied on the evidence that this applicant had demonstrated that she had insufficient means to defend this application. This court would have to be satisfied that it wasn’t open to [the trial judge] on the evidence, taking all of the evidence that was before her...to conclude as she did. In my view, there was more than ample evidence on which [the trial judge] could reach that conclusion that this applicant had not satisfied her that she was as impecunious as she had asserted and had not demonstrated that there was insufficient means to employ her own legal team, and I would not interfere with her conclusions in that regard. It was not, therefore, necessary for her to go further, having reached that conclusion, and deal with the question of complexity and exceptional circumstances and in those circumstances I would not interfere with her judgment.”

I accept that statement of Peart J. as correct.

109. Once there was evidence before the trial judge, and I am satisfied that there was, which entitled him to reach a conclusion that exceptional circumstances were disclosed such that it was in his considered assessment essential in the interests of justice that both respondents should have legal aid in the preparation or conduct of their case, then, as observed by Peart J. in *Criminal Assets Bureau v. M.C.*, it is not appropriate for this court to interfere with his conclusions in that regard.

110. CAB attach particular weight to the clearly *obiter* comments of Irvine J. (as she then was) delivered in that case where she observed, *inter alia*, in relation to the second limb of the test, i.e. the “exceptional circumstances” aspect, which had been found by Peart J. not to arise for determination by the trial judge:-

“...I don’t believe that she met the second leg of the test. This court has before it, day in, day out, lay litigants who have perhaps had their properties repossessed and they deal with issues such as the validity of mortgages, deeds of novation, they deal with the validity of bankruptcy proceedings; all without the assistance of their lawyers. I think what Mrs. C. was facing in the context of this affidavit hearing on the s. 3 proceedings was not of the level of complexity as would have warranted, or to allow her allege that it was essential that she would have legal aid for the purpose of defending those proceedings.” (emphasis added)

111. There is limited evidence as to the nature and extent of the property at issue in *Criminal Assets Bureau v. M.C.* It does appear that the focus of attention was directed towards two tranches of cash found in a handbag/handbags belonging to Mrs. C. together with certain jewellery found in her possession. Thus, the court was dealing with cash and a limited number of chattels. By contrast, in the instant case a very significant volume of documentary evidence is exhibited, ranging across over two decades in respect of several real property transactions; purchases, sales, the creation of mortgages, the redemption of mortgages, the partial discharge of mortgages, the payment of part of purchase monies, the payment of deposits in and towards the acquisition of properties, the funding and carrying out of works of improvement or enhancement, and finally, the construction of an entire dwelling house on a site. Additionally, there is a complex corpus of evidence to be assembled in relation to the history of employment of both respondents and the sources of all legitimate income they contend they derived from employment and/or businesses and/or, in the case of the second respondent, the operation of commercial enterprises. It would appear that there are issues surrounding the history of employment and its apparent incompatibility with the history of receipt of social welfare payments by not alone the first respondent but also his father, in the latter case extending through a duration of four decades. Thus, the instant case bears no real relationship to the facts (insofar as we can ascertain them) in *Criminal Assets Bureau v. M.C.*. In my view, that decision does not assist CAB, is distinguishable and turns on its own facts, as does each application under the Scheme.

112. Finally, CAB sought to rely on the decision of the Supreme Court as delivered by MacMenamin J. in *Criminal Assets Bureau v. Kelly*. As was observed by MacMenamin J. at para. 32:-

“In each case, the courts must be sensitive to the actual property and other rights of citizens which arise. But, as has been pointed out, repeatedly, a person directly or indirectly in possession of the proceeds of crime can have no constitutional grievance if deprived of their use. The Proceeds of Crime Acts 1996 to 2005 are identified as being legislation ‘to enable the High Court, as respects the proceeds of crime, to make orders for the preservation and, where appropriate, the disposal of property concerned and to provide for related matters’. There is a strong public policy dimension to this legislation. That policy is to ensure that persons do not benefit from assets which were obtained with the proceeds of crime irrespective of whether the person benefiting actually knew how such property was obtained with the proceeds of crime but subject to whether or not such person may have been a *bona fide* purchaser for value, where different considerations may arise.”

The Supreme Court noted the earlier remarks of McGuinness J. in *Gilligan v. Criminal Assets Bureau* [1998] 3 I.R. 188 at p. 237:-

“This court would also accept that the exigencies of the common good would certainly include measures designed to prevent the accumulation and use of assets which directly or indirectly derive from criminal activities. The right to private ownership cannot hold a place so high in the hierarchy of rights that it protects the position of assets illegally acquired and held.”

As the Chief Justice noted in *Murphy v. G.M.* [2001] 4 I.R. 113 at p. 148:-

“...the court might decline to make the order in a case where the person in possession or control was in a position to establish that he or she had purchased the particular property in good faith for valuable consideration: it might, on the other hand, make the order in circumstances where an innocent recipient of the property had made no payment for it.”

However, such an evaluation is an exercise at the substantive hearing of the action.

Conclusions

113. There was evidence before the trial judge that entitled him to conclude on the balance of probabilities that the current means of the respondents were insufficient to enable them to obtain legal representation on their own behalf as provided by s. 5(i) of the Scheme. Further, it was open to CAB to re-enter the proceedings before the High Court judge were it the case that additional new evidence was forthcoming that was of material relevance to the sufficiency of the means of the respondents or either of them. It is noteworthy that no such application was ever proceeded with.
114. In light of the number and complexity of the various transactions, the period of time under consideration and the sundry business and employment issues arising, the trial judge’s

determination that exceptional circumstances of such a nature as rendered it essential in the interests of justice that the respondents be admitted to the *Ad Hoc* Scheme had been demonstrated by the respondents was one he was entitled to reach for the purposes of s. 5(ii) of the Scheme. It is implicit from the trial judge's approach, engagement with the issues during the hearing and determination that he was satisfied that all elements of the s. 5(ii) criterion were satisfied, notwithstanding the fact that he did not in terms address each of the criteria explicitly in his judgment.

115. The trial judge engaged in a careful assessment of the evidence. In regard to the *O'N.* decision, he correctly noted that the dictum of Feeney J. "goes to the core of the issue that has to be eventually decided" (transcript of 2 June 2020, p. 39, lines 25 to 27). It cannot be the case that the respondents are required to establish a substantive defence to CAB's claim in order to establish eligibility under the *Ad Hoc* Scheme. I do not think that Feeney J. in *O'N.* intended to suggest the contrary. The court cannot adjudicate on the merits of a proposed defence on an application for legal aid. The trial judge correctly had regard to the fact that the respondents contested CAB's claim, indicating that they were defending the case and anticipated availing of forensic evidence to establish that the first respondent contributed earned income to the acquisition of Property 1 and that monies expended in respect of the other properties did not represent the proceeds of crime.
116. The focus of the judge's consideration was the means and earning capacity during the relevant period from or about the date of institution of the proceedings. A consideration of the court is directed towards identifying whether some stateable basis is being advanced capable of amounting to a *prima facie* defence. Therefore, some attempt ought to be made in the grounding affidavit or in other evidence "as the court deems appropriate to confirm that he/she satisfies the criteria as set out above" (s. 5 of the Scheme) and the court was clearly entitled to have regard to the fact that the respondents were disputing CAB's claims.
117. CAB conceded at para. 35 of their submissions that it was not submitted:-

"...that the respondents have to set out in great detail their defence – but they must engage with the evidence and if that engagement can be shown not to be credible, that must have a consequence."

I am satisfied the trial judge had before him, in the affidavits and exhibits filed on behalf of the respondents, evidence of sufficient engagement by the respondents and an indication of the broad areas of dispute likely to inform the framework of their defence to the claim and the complex web of transactions said to underpin it, such as entitled him to make the orders as he did under the Scheme. I am satisfied that the trial judge adequately engaged with the evidence and correctly refrained from carrying out an exercise that involved an evaluation of the merits of the case or an assessment of the prospects of success of the respondents.

118. I do not believe that the trial judge can be criticised for the manner in which he addressed the issue of the legal aid application. He had regard to all of the evidence and considered

same and it was acknowledged that he had read the entirety of the papers prior to the hearing on the day in question.

119. This appeal falls to be dismissed on all grounds.

Costs

120. In all the circumstances my provisional view is that since the respondents have been wholly successful in this appeal, they are entitled to their costs as against CAB to be adjudicated in default of agreement with a stay on that order pending conclusion of the proceedings. If either party wishes to contest this provisional view, they should file a written submission no longer than 2,000 words with the Office of the Court of Appeal within 14 days from the date of this judgment, with the other party thereafter to file a like submission within a further 14 days. The court will then consider the submissions and if necessary fix a date for hearing on the issue of the costs of this appeal.

121. Costello and Collins JJ. are in agreement with this judgment which is being delivered electronically and with the order I propose.