Neutral Citation Number: [2011] IEHC 465

**THE HIGH COURT**

**2005 2628 P**

**BETWEEN**

**GERALDINE GILLIGAN**

**PLAINTIFF**

**AND**

**MICHAEL F. MURPHY, FELIX J. McKENNA, THE ATTORNEY GENERAL AND IRELAND**

**DEFENDANTS**

**AND**

**THE HUMAN RIGHTS COMMISSION**

**NOTICE PARTY**

**AND**

**THE HIGH COURT**

**2006 1118 P**

**BETWEEN**

**JOHN GILLIGAN**

**PLAINTIFF**

**AND**

**IRELAND, THE ATTORNEY GENERAL AND THE CRIMINAL ASSETS BUREAU**

**DEFENDANTS**

**Judgment of Mr. Justice Feeney delivered on 20th day of December, 2011.**

1.1 The above two actions are part of a sequence of cases between Geraldine Gilligan and John Gilligan and various defendants arising out of proceedings brought against them and their children by the Criminal Assets Bureau pursuant to the Proceeds of Crime Act of 1996 (the Act of 1996). John Gilligan brought proceedings against the Criminal Assets Bureau and others seeking declarations that some or all of the provisions of the Act of 1996 were invalid having regard to the provisions of the Constitution. Those proceedings were heard jointly with other proceedings and were the subject of an appeal to the Supreme Court which delivered its judgment on the 18th October, 2001 within both sets of proceedings. The judgment of the Supreme Court is reported as *Murphy v. G.M.* [2001] 4 I.R. 113. The Supreme Court held that the appellants in the Supreme Court including John Gilligan had failed to discharge the onus on them of establishing that the sections referred to in the Act of 1996 were invalid having regard to the provisions of the Constitution on any of the grounds relied upon by the other appellants.

1.2 The litigation between the Criminal Assets Bureau and John Gilligan, Geraldine Gilligan and others was the subject of a number of appeals to the Supreme Court. That Court gave judgment on the 19th December, 2008 in proceedings entitled *Murphy v. Gilligan* reported at [2009] 2 I.R. 271. The judgment of the Supreme Court dealt with a number of appeals and motions brought before that Court by John Gilligan, Geraldine Gilligan, Darren Gilligan and Tracey Gilligan. The Supreme Court adopted the title and record number of a case involving an appeal by Geraldine Gilligan as the title of the judgment. In the course of the judgment of Geoghegan J., in the Supreme Court, he identified other appeals and motions which were dealt with by the judgment and a list of the formal titles of those proceedings was attached in a schedule to the unreported judgment. All of the matters before the Supreme Court concerned proceedings involving the Criminal Assets Bureau and related to the Act of 1996.

1.3 In proceedings brought by John Gilligan bearing record No. 2006/No. 1118P, he sought declarations that all or parts of s. 3 of the Act of 1996 were repugnant to the Constitution. There was also a claim that that Act was incompatible with the European Convention on Human Rights within the meaning of s. 5 of the European Convention on Human Rights Act 2003 (hereafter the Act of 2003). Section 5 of the Act provides for a declaration of incompatibility. The defence which was delivered to the claim made by John Gilligan included a plea of estoppel and abuse of process in that the issue of constitutionality had been determined by the Supreme Court in the proceedings reported at [2001] 4 I.R. 133 in the case entitled *Murphy v. G.M.* It was claimed that within that judgment the Supreme Court had upheld the constitutionality of the Act of 1996 and that therefore John Gilligan was estopped from pursuing any claim in relation to unconstitutionality and that pursuing such claim was an abuse of process. Within these proceedings John Gilligan applied for legal aid in the High Court. That application was refused. The refusal was in part based upon the fact that the constitutional issues which John Gilligan sought to raise had already been determined by the Supreme Court. John Gilligan appealed the order by the High Court refusing him legal aid and that appeal was determined by the Supreme Court on 7th April, 2010. In the course of the judgment of the Supreme Court, Fennelly J., after having observed that the *ad hoc* legal aid scheme (CAB) dated November 1999 did not apply to a claim such as the claim sought to be pursued by John Gilligan within proceedings Record No. 2006/1118P, also stated:

> "If it were open to the court to make a recommendation, the court would make a recommendation that Mr. Gilligan be granted legal aid under the ad hoc scheme insofar as, but only insofar as, the Convention claim is concerned."

1.4 When John Gilligan's proceedings were re-listed before the High Court, following the order of the Supreme Court on the 7th April, 2010, the judgment of the Court was opened to the High Court. The proceedings brought by John Gilligan were considered in the light of the fact that Geraldine Gilligan had brought similar proceedings. Those proceedings were identical in some respects with John Gilligan's proceedings and were proceedings bearing Record No. 2005/No. 2628P. Neither of those proceedings were covered by the provisions of the *ad hoc* legal aid scheme (CAB) but at that time both John Gilligan and Geraldine Gilligan had other proceedings under s. 3(3) of the Act of 1996 listed before the High Court. In those proceedings both John Gilligan and Geraldine Gilligan sought relief pursuant to s. 3(3) of the Act of 1996 and sought orders to discharge or vary the s. 3 order. To facilitate a full and complete hearing of all issues relied upon by John Gilligan and Geraldine Gilligan, it was agreed between all the parties that the admission under the *ad hoc* legal aid scheme granted to both John Gilligan and Geraldine Gilligan in respect of their s. 3(3) applications would extend to and include an additional fee for the purposes of arguing all or any matters that John Gilligan or Geraldine Gilligan sought to ventilate in respect of "the Convention claim" that they had made in these proceedings. At the conclusion of the s. 3(3) hearing, dates were assigned for argument of the claims which John Gilligan and Geraldine Gilligan raised in relation to the Act of 2003 including the claims that they made pursuant to s. 5 for declarations that all or some of the sections of the Act of 1996 were incompatible with the State's obligation under the European Convention on Human Rights.

1.5 Geraldine Gilligan delivered a statement of claim within proceedings No. 2005/No. 2628P on the 29th November, 2005 and in that statement of claim a number of claims were raised including a claim that the provisions of the Act of 1996 were incompatible with the Constitution. There was also a claim made in paragraph 12 that certain provisions of the Act of 1996 were incompatible with the State's obligation under the Convention provisions as defined in s. 1 of the Act of 2003 and particulars were provided in paragraph 12 of the statement of claim. In the statement of claim Geraldine Gilligan sought a declaration pursuant to s. 5 of the Act of 2003 in relation to certain sections of the Act of 1996.

1.6 In John Gilligan's claim in High Court proceedings 2006/No. 1118P an amended statement of claim was delivered on the 11th October, 2011 identifying and particularising the claims which he made in respect of his Convention claim wherein he sought a declaration that all or part of s. 3 of the Act of 1996 is incompatible with the European Convention on Human Rights within the meaning of s. 5 of the Act of 2003. In both John Gilligan's proceedings and those proceedings brought by Geraldine Gilligan there was a claim for damages pursuant to s. 3 of the Act of 2003.

1.7 In these proceedings, the Court directed that written submissions be prepared on behalf of both Geraldine Gilligan and John Gilligan and identified a date for the delivery of the submissions. Submissions were produced on behalf of the plaintiff in the Geraldine Gilligan's proceedings headed "Skeleton Argument" dated the 17th October, 2011. In John Gilligan's proceedings the submissions were dated the 11th October, 2011. It is on the basis of the matters set out in the pleadings, including the amended statement of claim delivered by John Gilligan dated the 11th October, 2011 together with the written submissions of both Geraldine Gilligan and John Gilligan that this Court can identify all issues raised on their behalf in respect of "Convention claims". All parties proceeded on the basis that all issues as to constitutionality had been conclusively determined by the Supreme Court in the proceedings reported under the title *Murphy v. G.M.* in the 2001 4 Irish Reports.

2.1 John Gilligan's counsel adopted the arguments made on behalf of Geraldine Gilligan and identified one other matter to be considered by this Court in respect of the Convention claims. That matter related to Article 7.1 of the Convention and the Court will return later in this judgment to consideration of that specific claim.

2.2 When the Supreme Court considered the appeals in the case reported under the title *Murphy v. G.M.* in 2001, and by the date of its judgment on the 18th October, 2001, the European Convention on Human Rights Act 2003 had not been enacted. The Supreme Court when it considered the claims submitted on behalf of the appellants in the proceedings dealt with under the title of *Murphy v. G.M.* which were made based upon the provisions of the European Convention on Human Rights dealt with such claims (at pp. 158/159):

> "It was submitted that, since Article 29.3 provides that 'Ireland accepts the generally recognised principles of international law as its rule of conduct in its relations with other States' and the Convention confers rights on individuals, any legislative measure which was in conflict with the provision of the Convention must be considered repugnant to the Constitution having regard in particular to Article 29.3.
>
> This case concerns the application of domestic legislation to persons within the jurisdiction of the State. In these circumstances it is not relevant or necessary to consider the application of the 'principles of international law' in this case and in particular whether the provisions of the European Convention on Human Rights ought to be treated as included in those 'principles', as Article 29.3 of the Constitution makes clear that these general principles, whatever their content, govern relations with other sovereign states at an international level. Furthermore, Article 29.6 expressly provides that no international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas. The European Convention has not yet been made part of the domestic law of the State. As Maguire C.J. stated in the judgment of the Supreme Court in *In re Ó Laighléis* [1960] I.R. 93 at p. 125:
>
> > 'The Oireachtas has not determined that the Convention of Human Rights and Fundamental Freedoms is to be part of the domestic law of the State, and accordingly this Court cannot give effect to the Convention if it be contrary to domestic law or purports to grant rights or impose obligations additional to those of domestic law.
> >
> > No argument can prevail against the express command of Section 6 of Article 29 of the Constitution before judges whose declared duty is to uphold the Constitution and the laws.
> >
> > The Court accordingly cannot accept the idea that the primacy of domestic legislation is displaced by the State becoming a party to the Convention for the Protection of Human Rights and Fundamental Freedoms.'
>
> The Convention itself recognises that it does not of itself have direct effect in the domestic law of the parties to it by providing remedies at international level for breaches of the Convention by any of the high contracting parties. It is accordingly, unnecessary to express any opinion on whether the legislation is, as alleged, in breach in any way of the Convention."

2.3 The European Convention for the Protection of Human Rights and Fundamental Freedoms is an international treaty of the Council of Europe. The Convention was adopted on the 4th November, 1950 and the Irish instrument of ratification was deposited on the 25th February, 1953. The Convention was and remains an effective agreement and statement of international law but it was not until 2003 that the Oireachtas incorporated the Convention into domestic law. By the provisions of the European Convention on Human Rights Act 2003 the Oireachtas introduced an Act to enable further effect to be given subject to the Constitution to certain provisions of the Convention for the protection of human rights and fundamental freedoms. The Act does not incorporate the Convention directly into domestic law but rather imposes an obligation that, when interpreting or applying any statutory provision or rule of law, a court shall, insofar as is possible, and subject to the rules of law relating to such interpretation and application, do so in a matter compatible with the State's obligations under the Convention provisions. (See s. 2 of the Act). As a consequence, the effect of the Act of 2003 is not that the Convention is incorporated into domestic law but rather that the rights contained in the Convention are now part of Irish law. It is the Act of 2003 and not the Convention which is the source of those rights. The Act of 2003 provided in s. 5 that a declaration of incompatibility could be made by the Court where no other legal remedy was adequate and available. The High Court or the Supreme Court may make a declaration that a statutory provision or rule of law is incompatible with the State's obligations under the Convention provisions. The consequences of the Act of 2003 are that there are two distinct sources of Convention rights; the first being the Convention itself which a litigant can rely on in litigation against Ireland before the European Court of Human Rights and the second being the Act of 2003 where a litigant can use the provisions of that Act in the domestic sphere within the parameters set out in that Act. Because of that position a party to litigation in an Irish court must identify an exact and precise basis for a claim under the Act of 2003 and cannot seek to rely on the Convention in broad, general or unidentified terms. The Convention has been incorporated on a legislative level and it follows that it is subject to the supremacy of the Constitution. One of the matters which arise from that fact, and which is relevant to these proceedings, is the extent to which the pre-incorporation status of the Convention prior to the Act of 2003 coming into effect on the 31st December, 2003 has been changed by that Act.

2.4 The Act of 2003 provided for the indirect incorporation of the Convention into domestic law. Section 2 of the Act deals with the interpretation of laws and it provides in s. 2(2):

> "This section applies to any statutory provision or rule of law in force immediately before the passing of this Act or any such provision coming into force thereafter."

The Act expressly identifies that legislation in force prior to the Act of 2003 coming into effect must after the Act came into effect be interpreted and applied in a manner compatible with the State's obligations under the Convention. The extent to which the Act of 2003 is retrospective given the terms of s. 2(2) was considered by the Supreme Court in *Dublin City Council v. Fennell* [2005] 1 I.R. 604. Kearns J. in giving the judgment for the Court stated (at p. 631, para. 86):

> "On the face of it, the language and terminology of the Act appears to suggest prospective obligations only. None of the sections are directed to backward-looking obligations. No express provision for retrospective application of the Act to past events is anywhere to be found in the Act, other than insofar as s. 2(2) provides that existing legislation is also to be interpreted by reference to Convention principles. However, no additional provision appears in s. 2(2) suggesting that a retrospective application of the section is envisaged."

As a consequence of that analysis Kearns J. concluded (at p. 639, para. 113):

> "In conclusion, given that the 2003 Act enjoys a presumption of constitutionality, and as it makes no attempt to extend its application to past events or to pending litigation, I would answer the three questions first raised by the Circuit Court judge in the negative."

Question 1 in the case stated was "Do the provisions of the European Convention on Human Rights Act 2003 apply to proceedings issued by the plaintiff pursuant to s. 62 of the Housing Act 1966 prior to the 31st December, 2003?" The date of the 31st December, 2003 was relevant as that was the date upon which the Act of 2003 came into effect. The Supreme Court in *Dublin City Council v. Fennell* held that the terms of the Act of 2003 were such that a retrospective application of s. 2 to past events would not be permissible. That conclusion was based upon the fact that the concept of fairness, properly understood, would be severely compromised if the statute was retroactive. The finding of the Supreme Court was that a true interpretation of the Act of 2003 gave rise to a situation where that Act did not apply to past events or to pending litigation and that the only way in which the Act could be said to be retrospective was that s. 2(2) expressly provided that existing legislation was to be interpreted by reference to Convention principles even though such legislation pre-dated the 31st December, 2003, but only in respect of events and litigation which post-dated that date. As there is no retrospectivity in relation to pending litigation, clearly the same applies to litigation where a court has already decided a case or an issue. In arriving at the conclusion that the Act of 2003 could not be seen as having retrospective effect or as affecting past events, the Supreme Court in the judgment of Kearns J. identified that other that insofar as s. 2(2) provides that existing legislation is to be interpreted by reference to Convention principles that no additional provision appeared in s. 2(2) suggesting that a retrospective application of the section is envisaged. Kearns J. held (at pp. 631/632, para. 87):

> "In a matter of such far-reaching importance it would be a considerable omission on the part of the draftsmen not to include a provision for retrospective application to past events if such was the intention. If it was the intention, I have already indicated my view that it would have left the Act of 2003 open to attack on the basis that a retrospective application would infringe Article 15.5 of the Constitution."

As part of his analysis Kearns J. in his judgment looked at the provisions of the Human Rights Act 1998 in the United Kingdom and the consideration in that country of whether or not that Act operated retrospectively. The House of Lords in *Wilson v. First County Trust Ltd. (No. 2)* [2003] UKHL 40, [2004] 1 A.C. 816 in the speech of Lord Scott of Foscote at pp. 870 to 871 dealt with s. 22(4) of the 1998 Act and its significance in deciding whether the Act of 1998 operates retrospectively or not:-

> "This express indication of a specific retrospective effect that the Act was to have in relation to proceedings brought by a public authority is, in my opinion, a fair indication that in no other respect was the Act intended to have a retrospective effect.
>
> The arguments against allowing the Act to have a general retrospective effect seem to me very powerful. The legal consequences under the civil law of a transaction or of events ought to be established by reference to the law at the time they take place. When events apt to create rights or obligations take place citizens affected by the events need to be able to ascertain the extent of their rights or obligations. They cannot do so if subsequent legislation may add to or diminish those rights or obligations. Where transactions calculated to continue for some considerable period are entered into, intervening legislation may in some respect or other affect the rights and obligations that accrue under the transaction after the legislation has come into force. Landlord and tenant

> legislation is a good example. If a lease is granted for, say 99 years, there might well be intervening legislation capable of affecting the ability of the landlord to forfeit the lease, to operate a rent review clause, to claim damages for dilapidations or to recover possession on the expiry of the term. But it would be unusual for the legislation to alter the rights and obligations of the parties resulting from events that had already taken place, such as a forfeiture already served, a damages claim already instituted, rent review machinery already in train and so on."

That case was one of cases which Kearns J. identified (at para. 98) as being "of considerable persuasive authority".

2.5 In the light of the Supreme Court's decision in *Dublin City Council v. Fennell* and the clear statement that the Act of 2003 cannot be interpreted as having retrospective effect or affecting past events, this Court must consider whether or not either of the plaintiffs can be permitted to rely on the provisions of the Act of 2003 in respect of past events, pending litigation or court orders made prior to the date upon which the Act came into effect on 31st December, 2003. The events, litigation and orders in respect of which both John Gilligan and Geraldine Gilligan make complaint in these proceedings all relate to matters which occurred prior to the 31st December, 2003. In so far as they relate to proceedings already in progress, the provisions of the Act of 2003 has no applicability. All of the breaches of the European Convention upon which the two plaintiffs seek to rely occurred prior to the Act of 2003 coming into effect. Geraldine Gilligan seeks a declaration pursuant to s. 5 of the Act of 2003 that s. 3 of the Act of 1996 is incompatible with the State's obligations under the Convention provisions. Geraldine Gilligan claims that she was affected by the provisions of s. 3 of the Act of 1996 in that an order was made thereunder which affected her rights. That order and the events giving rise to that order all took place prior to the 31st December, 2003. In those circumstances it is not open to this Court, in the light of the decision of the Supreme Court in *Dublin City Council v. Fennell* to make the order sought. This Court does not have jurisdiction to make such an order as to do so would be to give retrospective effect to the Act of 2003. This Court cannot apply the provisions of the Act of 2003 to give retrospective effect to events, court orders or existing litigation which had occurred or were ongoing as of the date that the Act came into effect.

In his submissions to the Court, counsel on behalf of Geraldine Gilligan submitted that *Dublin City Council v. Fennell* had been incorrectly decided and that it was open to this Court to make a s. 5 declaration in respect of s. 3 of the Act of 1996 insofar as that section affected Geraldine Gilligan. The s. 3 order was made on the 16th July, 1997. This Court does not have that jurisdiction given that the Supreme Court in *Dublin City Council v. Fennell* has determined that the Act of 2003 is not capable of retrospective application.

2.6 The Act of 2003 does not incorporate the Convention into domestic law. Therefore, it is not sufficient for a party seeking to rely on the Act simply to plead that a person's rights under a particular article of the Convention have been breached. The manner in which the Oireachtas has incorporated the Convention into Irish law results in the position being that in order to place reliance on the Convention it is necessary that the party seeking to do so identifies and pleads an issue based upon a claim that a particular Irish law requires to be interpreted in a special way so that Ireland would not be in breach of its Convention obligations. In this case the s. 3 order and the interpretation and application of that statutory provision took place in 1997 prior to the 2003 Act coming into effect. The Act of 2003 is not retrospective and this Court cannot apply the provisions of the Act of 2003 to that s. 3 order made in July 1997.

2.7 The argument raised on behalf of the two plaintiffs that this Court can distinguish the facts of this case from the position identified by the Supreme Court in *Dublin City Council v. Fennell* on the basis that hearings by the High Court of s. 3(3) applications and s. 4 applications under the Act of 1996 occurred or would occur after the 2003 Act came into effect and that those applications were the final stages of an ongoing or continuous process and that therefore such ongoing process was covered by the Act is a fallacious argument. A similar argument was made to the High Court in the case of *Derek Byrne and Ors. v. The Taoiseach and Ors.,* an unreported judgment of Miss Justice Laffoy delivered on the 9th September, 2010. Those proceedings arose as a result of dissatisfaction on the part of the plaintiffs with police investigations and other investigations and inquiries which had been carried out by the State into atrocities in which a number of people had lost their lives or had been injured in what is known as the Dublin and Monaghan bombings. Between February 2000 and December 2003 an inquiry was conducted into those bombings and that inquiry ultimately reported in a report known as the Barron Report. In the *Derek Byrne* case the plaintiffs sought declarations that the provisions of s. 11 of the Commission of Investigation Act 2004 had a particular meaning which entitled the plaintiffs to a legally enforceable right of access to the archive of the Commission established pursuant to the 2004 Act and that in the event that the said provision did not so provide whether the same is for that reason incompatible with the European Convention on Human Rights. An issue was also raised as to whether the Act of 2003 enabled the plaintiffs to obtain a grant of relief in the form of a declaration under s. 5 of the Act of 2003. In considering the issue as to whether the Act of 2003 was retrospective and applying the facts of the *Byrne* case in the light of the *Dublin City Council v. Fennell* decision, Miss Justice Laffoy held (at pp. 36/37) as follows:

> "The Supreme Court has held, applying Irish law, in *Dublin City Council v. Fennell* that the Act of 2003 cannot be seen as having retrospective effect or as affecting past events. That means, in my view, that it cannot give rise to a cause of action for failure of an organ of State to perform its function compatible with Article 2 in respect of a death which occurred before 31st December, 2003. The Oireachtas in enacting the Act of 2003 intended it to have effect and to give rise to causes of action and remedies prospectively only.
>
> The rationale which underlies the decision in the *McKerr* case (*McKerr v. United Kingdom* (2001) 34 EHRR 553), and in particular, the reasoning in para. 66 of the speech of Lord Hoffman, which was adopted by the High Court in *Lelimo v. Minister for Justice* ([2004] 2 I.R. 178) and which was followed by the Supreme Court in *Dublin City Council v. Fennell*, in my view, still applies, notwithstanding the evolution of the Strasbourg jurisprudence. The argument made on behalf of the plaintiffs that the Commission investigation was the final stage of an ongoing or continuous process is as fallacious since the evolution of the Strasbourg jurisprudence as it was when *McKerr* was decided. As there could not have been any breach of Article 2 which would give rise to a cause of action in Irish law before 31st December, 2003, the concept of a continuing breach or a breach within a continuing process cannot arise."

That analysis is equally applicable to the facts of this case as the s. 3 order under the Act of 1996 in respect of which both plaintiffs complain occurred before the Act of 2003 came into effect. The concept of a continuing breach or breach within a continuing process thereafter, within the same proceedings cannot arise. The Oireachtas when it enacted the Act of 2003 intended that Act to have effect and to give rise to causes of action and remedies prospective only. By the 31st December, 2003 the matters and events in respect of which the plaintiffs complain had already occurred or were already in being and the litigation under the Act of 1996 in which the s. 3 order was made had taken place. Any application for discharge or variation of the s. 3 order under s. 3(3) or for a disposal order under s. 4 would have to be made within existing litigation.

2.8 A similar position arises in relation to John Gilligan's claims. John Gilligan seeks a declaration that all or part of s. 3 of the Act of 1996 is incompatible with the European Convention on Human Rights within the meaning of s. 5 of the Act of 2003. The s. 3 order in respect of which John Gilligan complains was made prior to the Act of 2003 coming into effect and the complaints which he makes in relation to events that occurred after that date relate back to events and occurrences which took place prior to the Act of 2003 coming into effect. All claims made concern litigation that was pending when the Act of 2003 came into effect. To allow or to permit events or procedures which took place after the 31st December, 2003 within litigation which was pending and in progress by that date to be subject to review pursuant to the provisions of the Act of 2003 would amount to a retrospective application of that Act. The effect of the Act of 2003 was to give rise to causes of actions and remedies prospective only and did not and does not apply to events prior to the Act or to pending litigation.

2.9 The two plaintiffs in these cases are in effect seeking to have the Court give retrospective application to the Act of 2003. All the plaintiffs' claims relate to events or court orders which had occurred prior to the Act of 2003 coming into effect or to events or procedures that occurred after that date but within litigation which was pending as of 31st December, 2003. Since the Act of 2003 does not extend to past events or pending litigation, the Act of 2003 cannot be relied upon by either of these plaintiffs. On that basis alone the plaintiffs' claims in relation to alleged breaches of the Convention must be dismissed. Counsel on behalf of Geraldine Gilligan contends that *Fennell* was wrongly decided. I am clearly bound by the *Fennell* decision and since it is not possible to distinguish that case from either of the claims made by John Gilligan and Geraldine Gilligan which both involve claims reliant on ss. 2, 3 and of the Act of 2003, it follows that the plaintiffs' claims must be dismissed.

3.1 All parties to these proceedings requested that even if this Court were to determine the plaintiffs' applications on the basis of the temporal scope of the Act of 2003 and that the plaintiffs cannot rely on the Act of 2003, that the Court should notwithstanding such finding also address the alleged breaches of the Convention as claimed by both plaintiffs.

3.2 Counsel for Geraldine Gilligan raised one separate matter as an alleged breach of an article of the Convention over and above adopting the arguments raised on behalf of John Gilligan. That matter related to Article 7.1 of the Convention. Article 7.1 provides:

> "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."

Counsel for Geraldine Gilligan placed particular emphasis on the last sentence concerning the prohibition on a heavier penalty being imposed than one that was applicable at the time that the criminal offence was committed. It was claimed on behalf of Geraldine Gilligan:

> "that either or both of the individual provisions and the collective effect of ss. 2, 3 (and 8) of the Proceeds of Crime Act 1996 are such that they are penal in character and therefore engage the relevant Articles of the Convention in general, and, in the circumstances of this case, the second limb of Article 7.1 in particular".

It was claimed that the provisions of the Act of 1996 created a scheme which fell under the remit of Article 7.1 and that if that is the case that the finding by the Court that Geraldine Gilligan was a person in possession or control of the proceeds of crime is by necessity subject to the non-retrospectivity discipline of Article 7.1 and that any finding that she was in possession or control of specified property prior to the coming into effect of the relevant legislation would be a breach of Article 7.1. It was claimed that it would therefore follow that the domestic legislation was and is non-Convention complaint. It was also contended for by counsel for Geraldine Gilligan that the legislative provisions contained in the Act of 1996 permit the expropriation by the State of property of a citizen absent any finding by an independent tribunal of fact and without the application of the criminal standards of proof and therefore there is a violation of the Convention which it was contended was either self-evidently unlawful or at least disproportionate. It was accepted that that second matter went beyond an issue of statutory construction and engaged principles which were at the outer limits of the jurisdiction of the High Court as they involved issues of constitutionality already dealt with by the Supreme Court.

3.3 Article 7 of the Convention applies only to criminal proceedings which can result in a conviction or the imposition of a criminal penalty. Even though Article 7 does not generally apply to civil proceedings, the jurisprudence of the European Court of Human Rights has established that proceedings which are defined as civil in domestic law may in certain limited circumstances nevertheless qualify as criminal proceedings for the purposes of Article 7.

3.4 Counsel for Geraldine Gilligan submitted that certain "persuasive authorities" could be relied on to establish and determine that the scheme by which property could be "expropriated" by the State as set out in the Act of 1996 would lead to the conclusion that the proceedings were of a criminal nature. In considering whether proceedings are criminal for the purposes of Article 6 or Article 7 of the Convention, the Convention organs adopt an autonomous approach to interpretation. The case law has identified a number of criteria that are to be considered in addressing the issue as to whether proceedings are criminal. The criteria to be applied are firstly the classification of the proceedings in the legislation within the domestic law. Secondly, the nature of what might be identified as the offence and, thirdly, the issue of penalty and the capacity to impose such penalty.

3.5 Counsel for Geraldine Gilligan identified a number of authorities which analysed the question as to whether a restraint or confiscation scheme was penal in character and therefore subject to the prohibition on retrospective application as provided for in Article 7.1 of the Convention. Those authorities were *Welch v. United Kingdom* 20 EHRR 247, *Jamil v. France* 21EHRR 65 and *Togher v. Revenue and Customs Prosecutions Office* [2008] QB 476. A further case identified by counsel for Geraldine Gilligan was *R (Director of the Assets Recovery Agency) v. Ashton* (Unreported, Queens Bench Division in England, 31st March, 2006) [2006] EWHC 1064 (Admin.). Counsel argued that the *Ashton* case was wrongly decided and that the Court should be guided by the other authorities identified by him in analysing the Act of 1996. Both of the English authorities upon which counsel for Geraldine Gilligan relied related to confiscation orders, namely the *Welch* and the *Togher* cases. Both cases followed on from criminal proceedings where the applicant was convicted. The case which counsel for Geraldine Gilligan sought to distinguish was the Ashton case and that case related to a civil scheme of recovery. In England the Proceeds of Crime Act 2002, introduced into law for the first time a general power, outside of the Customs and Excise Forfeiture Procedures, to recover property obtained by criminal conduct in circumstances where the holder of the property cannot be shown to have committed a criminal offence. In an unreported decision of the 7th December, 2004 in *R (Director of Assets Recovery Agency) v. He and Chen* [2004] EWHC 3021 (Admin.), Collins J. held that the disposal of proceedings brought by the Asset Recovery Agency under Part 5 of the 2002 Act did not constitute the determination of a criminal charge. In arriving at that conclusion, Collins J. derived assistance from a number of commission cases including *Aruri v. Italy*, application No. 52024/99 July 5, 2001. Collins J. in part based his finding on the fact that the measures within the English Proceeds of Crime Act 2002 were primarily preventive and that the measures emphasised the unlawful nature of the property in question and that the procedure adopted did not establish that the person in possession of the property was guilty of a criminal offence.

3.6 In the *Ashton* case in which judgment was given in 2006 it was also the Proceeds of Crime Act 2002 which was being considered. The Court was addressing a civil recovery procedure whereby the director of the Assets Recovery Agency is empowered to seek court orders for the recovery of assets held by individuals which have been obtained by unlawful conduct. In that case Newman J. approved of the approach adopted by the Outer House of the Court of Session in Scotland in the case of *Scottish Ministers v. McGuffie* [2006] SLT 401. Newman J. having considered the *McGuffie* decision and other cases identified that the Judges in those cases, including *McGuffie's* case, laid out an (at para. 39):

> "impeccable catalogue of features which are relevant when considering this particular issue (i.e. civil or criminal) under Article 7 and in particular whether or not these recovery proceedings are, in character, penal."

Newman J. followed the approach identified in the *McGuffie* case and concluded that the relevant matters for the purposes of categorising proceedings included whether or not such proceedings were directed against property rather than against a defendant's person; whether the proceedings were under the control of the civil court; whether the defendant's guilt was in issue within the proceedings; whether or not the defendant was facing a criminal charge; whether or not the defendant could or could not be arrested or remanded or compelled to attend; whether or not a defendant would be subject to any criminal conviction or finding of guilt or was at risk of receiving a sentence and also whether any civil recovery order would form no part of a criminal record. He also considered the issue as to whether any criminal proceedings had been concluded and had not been re-opened. Having approved of the approach in *McGuffie,* Newman J. held (at paras. 42 and 43) as follows:

> "42 Crime, when it is committed, is not simply a crime against a victim who may be the individual victim of the crime. Crime, when it occurs, is an offence against the good order of the State and, apart from the victim, it puts the State to enormous expense to resolve the questions in connection with crime. I see force in the suggestion that because underlying this legislation, there is a plain intention that the State should benefit by recovery from somebody in possession of the proceeds of crime, the legislation has to be regarded as having no compensatory element.
>
> 43. Equally I see no force in the suggestion that simply because it involves deprivation that in itself means that the result of an order has to be regarded as penal vis-à-vis the person who holds the property and against whom the Director obtains an order. It may be that the law in this regard was advanced or changed, in that it created a civil right of recovery for the state through the Director, but in my judgment the deprivation of this property carries no penal character to it. The fact of the matter is that the person who is in possession of crime has, in accordance with the purpose and intention of Parliament, no right to hold that property. It is not a deprivation of anything. Parliament has said that such proceeds are not the entitlement of anyone. That is not to deprive anybody of anything."

Newman J. went on to conclude at para. 52 as follows:

> "52. In my judgment there are separate considerations, but the weight of authority and, in my judgment, the lack of potency in the points that he [counsel for the defendant] has sought to make in order to demonstrate that this procedure by way of recovery is penal, all points to the conclusion that this preliminary issue must be decided against the respondent. I am therefore satisfied that the recovery procedure under the Act is not incompatible with Article 7 of the Convention."

In addressing the issue as to whether or not the procedure for the preservation and where appropriate the disposal of property provided for in the Act of 1996 is to be viewed as penal in character and therefore within the ambit of Article 7.1 of the Convention, the Court adopts and follows the identification of the relevant matters for consideration which Newman J. set out in the *Ashton* case. Those matters had initially been set out in the *McGuffie* case and were approved in the *Ashton* case. When one has regard to each of those matters by reference to the Act of 1996, one finds that the position is that the legislation is directed against property (*i.e. in rem*) rather than against a defendant or respondent that the proceedings are heard by a civil court and that a defendant's or respondent's guilt is not in issue and that the defendant or respondent is not facing a criminal charge nor can he be arrested or remanded or compelled to attend and that the proceedings can lead to no criminal conviction or any finding of guilt or the imposition of any sentence and that the determination of the civil court leads to no order which could form part of a criminal record and that the proceedings are not related to any particular criminal proceedings nor can they lead to any criminal proceedings being re-opened. That analysis using and adopting the identification of relevant matters for consideration and applying those matters to the scheme and procedures of the Act of 1996 leads to the conclusion that the Act of 1996 is civil rather than penal.

3.7 The European Court of Human Rights in the case of *Walsh v. United Kingdom* [2006] ECHR 43384/05, (21st November, 2005) dealt with a challenge to U.K. Proceeds of Crime Act 2002 under which application may be made to the High Court for the civil recovery of property rights claimed to represent the proceeds of unlawful conduct. The definition of unlawful conduct is contained in s. 241(1) of that Act as "conduct occurring in any part of the United Kingdom is unlawful conduct if it is unlawful under the criminal law of that part". In *Walsh* the applicant contended that the proceedings brought for the recovery of his assets were not "civil" but "criminal" and that the guarantees of Article 6(1) and 6(2) applied. He argued that the presumption of innocence was not present contrary to Article 6(2). The Court held that applying the *Engel* criteria (*Engel v. The Netherlands* [1976] 1 EHRR 706), namely the classification of the matter in domestic law, the nature of the charge and the penalty, if any, that none of those criteria were established by *Walsh* and that the proceedings fell outside the criminal head of Article 6. The European Court held that proceeds of crime proceedings, similar to the Act of 1996, do not involve a criminal charge.

3.8 The Common Law Courts have also considered whether a legislative scheme to deprive or deny persons access to assets was a criminal process. In *Walsh v. Director of Assets Recovery Agency* [2005] NICA 6 (Unreported, Northern Ireland Court of Appeal, 26th January, 2005), Kerr L.C.J. held that "the cumulative effect of the application of the tests in *Engel* is to identify those proceedings clearly as civil". (para. 41). Applications of the *Engel* criteria to the Act of 1996 results in a similar conclusion, the Act of 1996 is clearly civil not criminal.

3.9 The Supreme Court in *Murphy v. G.M.* identified as a central issue for consideration whether the procedures prescribed in the Act of 1996 were in substance criminal in nature. The principal argument advanced on behalf of the appellants in the Supreme Court was that the provisions of the Act of 1996 formed part of the criminal laws. The judgment (pp. 136 – 154) contains a detailed consideration of whether the proceedings under the Act of 1996 can be characterised as civil or criminal in nature and concluded that the proceedings were of a civil nature in that the Act concerned the right of the State to take property which had been proved to represent the proceeds of crime and that such "a forfeiture" was not a punishment and its operation did not require criminal procedures. The conclusions of the Supreme Court dealing with the Act of 1996 provides a further persuasive and compelling rational for this Court to be satisfied that, even if the Court was in a position to determine that the s. 3 order made under the Act of 1996, or

that events occurring prior to the 31st December, 2003, were capable of review, and this Court has found that such is not the case, that there has been no breach of Article 7 as the proceedings are civil and not criminal. A correct analysis of the English authorities and applying the relevant matters therein set out to the Act of 1996 and following the analysis in the judgment of the Supreme Court in *Murphy v. Gilligan* it is the case that, the proceedings under the Act of 1996 are civil both for the purposes of Article 6 and Article 7 of the Convention. The Court is satisfied that the provisions contained in the Act of 1996 and the scheme of the Act for the preservation and, where appropriate, the disposal of the proceeds of crime are not penal in character and do not engage either Article 6 or Article 7 of the Convention as they are clearly civil proceedings.

4.1 In his amended statement of claim delivered on the 11th October, 2011, John Gilligan claimed a declaration that all or part of s. 3 of the Proceeds of Crime Act 1996 is incompatible with the European Convention on Human Rights and sought relief within the meaning of s. 5 of the Act of 2003. The s. 3 order in this case pre-dates the coming into effect of the Act of 2003 and the basis upon which John Gilligan contends that the Act of 2003 is applicable to these proceedings is that the breaches in respect of which he makes complaint are made in proceedings which "are ongoing in nature". The Court has already dealt with the issue of retrospectivity and has determined that the Supreme Court has held in the *Dublin City Council v. Fennell* case that the Act of 2003 cannot be seen as having retrospective effect or as affecting past events. The s. 3 order was made prior to the Act of 2003 coming into effect and is a past event and the proceedings in respect of which this application is made were already in being on the 31st December, 2003. The s. 3 order had already been granted. In the proceedings which were in being it was open to John Gilligan to make an application under s. 3(3) at any time under the Act of 1996 as and from the date of the s. 3 order. The claim that the proceedings are ongoing in nature does not permit the Court to ignore that the order sought to be challenged was made within proceedings which pre-date the Act. The Fennell judgment (at p. 639) expressly holds that the Act of 2003 does not extend to pending litigation. This application is brought by John Gilligan in respect of the s. 3 order which was made prior to the Act of 2003 coming into effect. It is the s. 3 order made against John Gilligan which is the basis of his claim. That is confirmed by the final paragraph of the written submissions where it is stated:

> "The plaintiff seeks a declaration of incompatibility pursuant to s. 5 of the European Convention on Human Rights Act 2003 relating to both s. 3(1) generally and in relation to its application to the facts of his case and furthermore, he seeks damages pursuant to s. 3(2) of the 2003 Act and/or pursuant to the 1996 Act."

The matters in respect of which he seeks a declaration pre-date the Act of 2003 coming into effect. As there could not have been any breach of the Convention which would give rise to a cause of action in Irish law prior to the 31st December, 2003, the concept of a breach or a breach within continuing proceedings does not arise.

4.2 Notwithstanding the Court's finding in relation to the non-application of the Act of 2003 to past events or to pending litigation, the Court will proceed to consider the alleged breaches of the Convention contended for by John Gilligan. In para. 4.1 of the written submissions it was identified that the substance of John Gilligan's claim is that the s. 3(1) of the Act of 1996 and the hearings which occurred in the High Court on three dates in 1996 were breaches of rights guaranteed to him by the Convention. It was claimed that his right to property was breached because s. 3(1) of the Act of 1996 was ambiguous and unclear up until the judgment of the Supreme Court in *Murphy v. Gilligan* which was delivered on the 19th December, 2008. It was claimed that in 1996 it was unclear as to what was the proper meaning and effect of s. 3(1) of the Act of 1996 and that he proceeded on the basis that there would be a full hearing of the s. 3 claim after the "interlocutory" s. 3 order. Both he and his lawyers proceeded on that basis due to the law being "unclear, confusing and uncertain". The Court heard evidence from John Gilligan's then solicitor that advice had been received at the time when the s. 3 order was made, to the effect that the order was of an interlocutory nature and that there would be a full hearing and that such advice was given by counsel. Arising from that situation, John Gilligan contends that there was a breach of his Article 8 rights under the Convention which provides that everyone has the right to respect for his private and family life, his home and correspondence and that there was also a breach of his Article 6 rights in that he was not afforded a fair hearing in the determination of his civil rights and obligations. It is claimed in relation to Article 6 rights that they were breached in that the plaintiff was denied equality of arms in the s. 3 hearing.

4.3 In John Gilligan's submissions the nature of "his property rights" are not defined or considered but rather there is a claim that he has "property rights" in the property the subject matter of the s. 3 order. In considering "property rights" under the Convention, the full text of the Convention including the first Article of the First protocol must be taken into account. The text of the Article is:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall, however, not in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

The issue of the alleged incompatibility of the Act of 1996 with Article 6 rights was considered in *Murphy v. G.M.* and the Court adopted with approval a passage from the speech of Lord Hope of Craighhead in *McIntosh v. Lord Advocate* [2001] 3 WLR 107. The judgment of the Supreme Court dealt with the matter in the following terms (at pp. 155 and 156):

> "In this connection, the court was referred to the recent decision of the Privy Council in *McIntosh .v. Lord Advocate* (2001) 2 All ER 638. In that case, an issue arose as to whether certain provisions of the Proceeds of Crime (Scotland) Act, 1994 were incompatible with Article 6(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Those provisions were in somewhat similar terms to those contained in the Criminal Justice Act, 1994 which enable a court to make a confiscation order requiring a person convicted of a drug trafficking offence to pay a certain sum. Those procedures are in contrast to the procedures under the 1996 Act, where the precondition for the conviction of the person against whom the freezing order is to be directed does not exist. The court, however, would adopt with approval the following passage from the speech of Lord Hope of Craighead as to the approach a court should adopt in considering provisions of this nature, whether in the context of the Constitution or of the European Convention of Human Rights. He said (at p. 654):
>
> > 'People engage in this activity [drug trafficking] to make money and it is notorious that they hide what they are doing. Direct proof of the proceeds is often difficult, if not impossible. The nature of the activity and the harm it does to the community provide a sufficient basis for the making of these assumptions [i.e. assumptions that property held by the accused could in certain circumstances be assumed to have been received in connection with drug trafficking]. They serve a legitimate aim in the public interest of combating that activity. They do so in a way that is proportionate. They relate to matters that ought to be within the accused's knowledge, and they are rebuttable by him at a hearing

before a judge on the balance of probabilities. In my opinion a fair balance is struck between the legitimate aim and the rights of the accused.'

(See also the recent decision of the European Court of Human Rights in *Phillips .v. United Kingdom* (Unreported, European Court of Human Rights, 30th November, 2000)."

The Act of 1996 has the legitimate aim of combating criminal activity. As is apparent from the analysis of the Act carried out by the Supreme Court in *Murphy v. G.M.,* the legislation is proportionate and provides safeguards and protections which enable a person such as John Gilligan to rebut in civil proceedings any evidence relied upon by the Criminal Assets Bureau concerning his source of funds and to do so from matters within his knowledge. John Gilligan had available to him the entitlement to challenge the s. 3 order and he has now done so at a full hearing of his s. 3(3) application.

The nature and terms of the Act of 1996 and the procedural safeguards provided result in a conclusion that Article 6 rights are not infringed and the legislation is not incompatible with Article 6.

Even if Article 6 rights could be invoked, it is still pertinent to examine the complaints raised by John Gilligan in relation to the breaches which he claims to have occurred.

4.4 John Gilligan claims that arising from the "unclear and confusing" position as to the effect and applicability of s. 3(1), that there was a breach of the Convention in that the s. 3 order was made on foot of a law which was so uncertain that it could not be said that Ireland had acted in a manner prescribed by law. It was contended on behalf of John Gilligan that the case law in relation to the Convention identified three essential components to the notion of "quality of law", the first being that the citizen must be able to have an indication, that is adequate, in the circumstances of the legal rules applicable to a given case, the second being that the law must be formulated in such a way as to enable citizens to foresee with precision the exact scope and meaning of the provision and thirdly, as a corollary to the forseeability test, adequate safeguards against abuses must be proffered in a manner that would clearly demarcate the extent of the authorities discretion and define the circumstances in which it is to be exercised. It was claimed on behalf of John Gilligan that s. 3(1) of the Act of 1996 did not comply with the essential components of the notion of quality of law.

4.5 The claim that s. 3(1) was uncertain and that John Gilligan's defence was thereby compromised had already been argued before the Court. In *Murphy v. Gilligan*, Geoghegan J. stated (at p. 292, para. 39):

> "A major difficulty in this case is that whereas the appellants or some of them may well have believed and may well have been advised that they could have a plenary hearing whereby issues of ownership could be litigated, it does not follow that they had addressed their minds to the precise stage at which this would be done. It could be done by way of defence of an application under section 3(1) but it could also be done equally effectively by way of an application under section 3(3) to say nothing of ultimate rights under section 4."

In the same paragraph Geoghegan J. went on, having examined the procedural history of John Gilligan's defence of the proceedings under the Act of 1996, to conclude (at p. 292, para. 39):

> "What is absolutely clear, however, is that from a very early stage, *i.e.* the judgment of Murphy J. in these very proceedings, the legal advisers understood or ought to have understood the structure of the Act and the nature of the orders to be made under it."

The judgment of Murphy J. to which Geoghegan J. referred was an uncirculated judgment delivered on the 13th May, 1997. That judgment pre-dates the s. 3 order made against John Gilligan. The fact that the Murphy J. judgment was uncirculated is of no relevance in this particular case as was pointed out by Geoghegan J. in his judgment (p. 281, para. 17):

> "The judgment, however, would have been well known to the parties as it had been delivered in these proceedings."

The analysis carried out by Geoghegan J. identified that whilst John Gilligan's lawyers might have proceeded on the basis that they believed that there would be a full s. 3 hearing and advised him to that effect, that the true position concerning a s. 3 order and the structure of the Act was clear from a stage, prior to the making of the s. 3 order on the 16th July, 1997. Even if his legal advisers did not actually understand the process under s. 3, they ought to have understood the structure of the Act and the nature of the orders to be made under it. The provisions applicable to s. 3 claims were set out in statute. It is clear from the judgment of Geoghegan J. in *Murphy v. Gilligan* that even if the legal advisers to John Gilligan proceeded on an incorrect assumption as to the nature of proceedings under the Act, that from the wording of the statute and also from the judgment of Murphy J., of which John Gilligan's lawyers were aware, that they ought to have understood the structure of the Act of 1996 and the nature of the orders made under it. It follows that the position is that John Gilligan and his advisers in July of 1996 were in a position whereby they had the wording of the statute and the knowledge of the judgment of Murphy J. sufficient to enable them to understand the scope and meaning of a s. 3 order. There was an adequate indication of the legal rules sufficient to enable John Gilligan and his lawyers decide how to proceed in the light of a s. 3 order. No issue arises in relation to the "quality of law" as the extent of a s. 3 order was identifiable from the commencement of the proceedings. The extent could be identified from the wording of the Act and the judgment of Murphy J. Insofar as the plaintiff's argument is based upon a contention that the Act of 1996 was unclear and confusing up until the Supreme Court judgment in *Murphy v. Gilligan* in December 2008, that claim is not supported by the facts and is dealt with in the findings of the Supreme Court. The claim of uncertainty until December 2008 is also inconsistent with the plea contained in para. 7 of the plaintiff's own statement of claim where he claims that at all times between August 1996 and the 18th October, 2001, s. 3 applications were treated as interlocutory. The date of 2008 as being the date when the law "was certain" is inconsistent with the analysis of that matter by the Supreme Court as set out in paras. 21, 22, 23, 24 and 25 of the judgment of Geoghegan J. in *Murphy v. Gilligan*.

4.6 Consideration of the documents and judgments in the proceedings of John Gilligan's and his wife relating to the Act of 1996 identify that from the 7th October, 1997 and thereafter both he and his advisers were aware of the entitlement to bring an application under s. 3(3) of the Act of 1996. That fact was identified in the Supreme Court which referred to a letter of 7th October, 1997 from the Chief State Solicitor to Geraldine Gilligan's then solicitors. The entitlement to bring a s. 3(3) application was also identified at a hearing before Mr. Justice O'Higgins on Friday, 9th July, 1999. That hearing concerned discovery and it was urged (at p. 21 of the transcript of that date) that discovery should not be made unless and until my friend puts before the Court a s. 3(3) motion where he or his client put in issue the existing findings of the Court. The fact that John Gilligan could apply for s. 3(3) relief was set out in a letter from the Criminal Assets Bureau's solicitor of the 22nd June, 1999 to Paul McNally, the solicitor then acting for John Gilligan. That suggestion was declined on the stated ground that John Gilligan had been advised by counsel that a s. 3(3) application gave the plaintiff a disproportionately unfair advantage and contravened the guarantee of equality of law in civil proceedings and was thereby unconstitutional. John Gilligan chose at that time not to bring a s. 3(3) application. The claim of unconstitutionality was determined by the Supreme Court and the issue of inequality of arms was dealt with in the judgment of

*Murphy v. G.M*. It is clear from the judgment of Geoghegan J. *in Murphy v. Gilligan* (p. 292, para. 39) that John Gilligan could have challenged the s. 3 order by way of defence to an application under s. 3(1) but that he could do so in as equally an effective way by an application under s. 3(3). The Act also provided rights under s. 4. John Gilligan chose not to make an application under s. 3(3) notwithstanding that he knew from 1997 of his entitlement to do so. The choice was made for what was perceived as a tactical benefit. Geoghegan J. identified in *Murphy v. Gilligan* at (pp. 296/297, para. 48):

> "Their (John Gilligan and Geraldine Gilligan) lawyers did not need the Supreme Court to tell them in even a single, never mind several judgments, that an application could be brought under section 3(3) and indeed that ownership issues could be ultimately reopened in a section 4 application. But not only was no long term injustice going to be caused by a section 3 order being made at the time it was made but in fact, in my view it would have been contrary to the provisions of the Act to have made a whole series of temporary orders. . . . Section 3(3) is deliberately enacted with a view to preventing any error or injustice."

4.7 It is clear that John Gilligan was aware that he could proceed to litigate before a civil court the issue of the true ownership of the property the subject of the s. 3 order and the source of the funds which had been used to purchase such property. The s. 3(3) application was not brought until John Gilligan issued a motion pursuant to s. 3(3) of the Act of 1996 in January 2009. His entitlement to bring such an application had been manifest for over ten years and it was open to him to commence such an application thereby ensuring that the issues of true ownership and the source of funds could be litigated in a manner which the Supreme Court described as being as equally effective manner as if the same matter was litigated in a contested s. 3(1) hearing.

4.8 A number of other matters were raised by counsel on behalf of John Gilligan in respect of a suggested breach of Article 6 of the Convention and John Gilligan's right to a fair trial within a reasonable time by an independent and impartial tribunal established by law. Over and above the complaint made in relation to the lack of clarity in the Act of 1996, claims were made based upon the absence of a legal aid scheme and inequality of arms in that John Gilligan could not properly participate in a s. 3(1) hearing in 1996 as he was incarcerated in an English prison. An examination of the proceedings under the Act of 1996 establishes the right of access to the courts made by John Gilligan could in no way be said to be theoretical or illusionary. He had practical and effective access and he was represented and advised by solicitor and counsel. As stated by the Supreme Court in *Murphy v. Gilligan* the wordings of ss. 3 and 4 of the Act of 1996 essentially places an onus on a respondent such as John Gilligan to discredit evidence relied upon by an applicant if that evidence was *prima facie* probative. The legislation was enacted to establish a prompt and effective method to prevent criminals benefiting from the proceeds of crime. The Supreme Court went on to indicate that s. 3(3) of the Act of 1996 ensured that the legislation met all constitutional criteria, since it provided safeguards for those who may not be in a position immediately to oppose a s. 3 freezing order. It was open to John Gilligan at any time after July 1996 to bring a s. 3(3) application and thereby have the Court inquire into the true ownership of the property in issue in the proceedings and the source of funds used to acquire the property. He chose to delay exercising his entitlement to bring such an application and cannot be heard to raise the issue of delay in those circumstances. The delay was his delay. The procedures adopted at the s. 3(3) hearing provided for the type of fair procedures identified by the Supreme Court in *Murphy v. Gilligan*. Those procedures included cross-examination, an entitlement to tender evidence and to call witnesses. The Act of 1996 provided that a person who is affected by a s. 3 interlocutory order can apply at any time before the expiration of the seven year period provided for in s. 4 for an order discharging or modifying the interlocutory order. A s. 4 disposal order can only be brought, in the absence of consent, where an interlocutory s. 3 order has been in force for not less than seven years. As a consequence of the statutory provisions, other than by consent, no final order or order disposing of any property can be made for seven years and for that seven year period the property is frozen. An effected party can call on the Court to discharge or vary the freezing order at any time during the seven year period by making an application under s. 3(3). It is within the power of a person such as Mr. Gilligan who is the subject of a s. 3 order to have it discharged if he is successful in a s. 3(3) application.

4.9 John Gilligan's claim about the absence of legal aid is theoretical as he was represented. In any event, the judgment of Geoghegan J. in *Murphy v. Gilligan* identified that whilst an individual could resist the making of an order under s. 3(1), the absence of means to discharge legal fees was not a reason why the Court should delay in making the order. That was in circumstances where there was a full entitlement to an effective hearing under a s. 3(3) application. The scheme of the Act ensured that John Gilligan had a reasonable opportunity to present his case in relation to the ownership of the property by means of s. 3(3). The Court has already identified that the timing of the s. 3(3) application was within John Gilligan's own control and that it was he who chose to delay the making of that application. In those circumstances and given the seven year period provided for in s. 4 no issue of delay can arise such as would give rise to breach of Article 6 of the Convention. That conclusion is reinforced by the fact that the scheme under the Act which in effect freezes property for a period of seven years before any s. 4 disposal order can be made and allows any person affected by a s. 3 order such as John Gilligan to apply at any time during the seven years pursuant to s. 3(3) for a discharge or variation of the initial order.

4.10 John Gilligan's claim in relation to equality of arms and an alleged breach of the plaintiff's Article 6 rights included a claim that a s. 3(3) hearing did not provide an effective remedy in that he bore the burden of proof under that section whilst under s. 3(1) the burden of proof was on the Criminal Assets Bureau. The issue of equality of arms was raised on John Gilligan's behalf in the Supreme Court in *Murphy v. G.M.* where a submission was advanced in respect of the extent to which the onus of proof was reversed in applications under the Act. The Supreme Court held that it was satisfied that having regard to its conclusions that these are civil proceedings that this (i.e. the onus on a respondent) did not of itself render the provisions unconstitutional. The Court held (at p. 155 and p. 156):

> "In this connection, the court was referred to the recent decision of the Privy Council in *McIntosh .v. Lord Advocate* (2001) 2 All ER 638. In that case, an issue arose as to whether certain provisions of the Proceeds of Crime (Scotland) Act, 1994 were incompatible with Article 6(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Those provisions were in somewhat similar terms to those contained in the Criminal Justice Act, 1994 which enable a court to make a confiscation order requiring a person convicted of a drug trafficking offence to pay a certain sum. Those procedures are in contrast to the procedures under the 1996 Act, where the precondition for the conviction of the person against whom the freezing order is to be directed does not exist. The court, however, would adopt with approval the following passage from the speech of Lord Hope of Craighead as to the approach a court should adopt in considering provisions of this nature, whether in the context of the Constitution or of the European Convention of Human Rights. He said (at pp. 123/124):
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> > 'People engage in this activity [drug trafficking] to make money and it is notorious that they hide what they are doing. Direct proof of the proceeds is often difficult, if not impossible. The nature of the activity and the harm it does to the community provide a sufficient basis for the making of these assumption [i.e. assumptions that property held by the accused could in certain circumstances be assumed to have been received in connection with drug trafficking]. They serve a legitimate aim in the public interest of combating that activity. They do so in a way that is proportionate. They relate to

> matters that ought to be within the accused's knowledge, and they are rebuttable by him at a hearing before a judge on the balance of probabilities. In my opinion a fair balance is struck between the legitimate aim and the rights of the accused.'
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> (See also the recent decision of the European Court of Human Rights in *Phillips .v. United Kingdom*) (Unreported, European Court of Human Rights, 30th November, 2000))."

The Supreme Court adopted the quotation from Lord Hope in the context of the Constitution but it is also applicable in the context of the European Convention on Human Rights. The Act of 1996 was identified as having struck a fair and proportionate balance. It is that balance which ensures that the Act is, as regards the onus being on a respondent, not only constitutional but also results in the Act not being in contravention of the European Convention.

4.11 The European Court of Human Rights considered a claimed violation of Article 6 of the Convention by two applicants who had been the subject of criminal convictions followed by confiscation proceedings in the case of *Grayson & Barnahm v. The United Kingdon* No. 19955/05 and 15085/06, judgment delivered on the 23rd September, 2008. In paras. 49/50 of that judgment, the Court held:

> "49. The Court agrees with the judgment of the Court of Appeal in the instant cases (see paragraphs 11 and 18 and see also *R. v. Barwick,* paragraphs 25 – 26 above), that it was not incompatible with the notion of a fair hearing in criminal proceedings to place the onus on each applicant to give a credible account of his current financial situation. In each case, having been proved to have been involved in extensive and lucrative drug dealing over a period of years, it was not unreasonable to expect the applicants to explain what had happened to all the money shown by the prosecution to have been in their possession, any more than it was unreasonable at the first stage of the procedure to expect them to show the legitimacy of the source of such money or assets. Such matters fell within the applicants' particular knowledge and the burden on each of them would not have been difficult to meet if their accounts of their financial affairs had not been true.
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> 50. There has, therefore, been no violation of Article 6, para. 1 of the Convention in respect of either applicant."

In the *Grayson & Barnham* case the Court of Human Rights recognised that a fair hearing even in criminal proceedings could occur after conviction where the onus was placed on an applicant to give a credible account of his current financial position and that it was not unreasonable to expect applicants to explain what had happened to all the money shown by the prosecution to have been in their possession, any more than it was unreasonable at the first stage of the procedure to expect them to show the legitimacy of the source of such money or assets. In this case the proceedings are civil and the onus shifts in circumstances where the applicant has led evidence which is *prima facie* probative and sufficient to satisfy a Court to grant a s. 2 and/or a s. 3 order. The onus is on Mr. Gilligan in a s. 3(3) application in relation to matters within his knowledge and those matters are rebuttable by him at a hearing in the High Court. The Court is satisfied that the procedural scheme under the Act of 1996 is such that there has been no violation of Mr. Gilligan's Article 6 rights. The s. 3(3) hearing provided an effective remedy to the plaintiff to litigate the issue of the true ownership of the property and the source of funds used for the purchase of the property the subject of the s. 3(1) order. The Act of 1996 strikes a fair balance between the legitimate aim of the Act which is to make orders for the preservation and disposal of property which constitutes proceeds of crime or was acquired in whole or in part with property that directly or indirectly constitutes proceeds of crime and the rights of a respondent as provided for in both the Constitution and the Convention.

4.12 It was also contended on behalf of the plaintiffs that the Act of 1996 was in breach of the Convention due to the fact that it was punitive in nature and/or quasi criminal and that it followed that therefore the legislation should not be capable of retrospective application. The decision of the Supreme Court in Murphy v. G.M. identified that the Act of 1996 did not raise a challenge to a valid constitutional right of property as the Act concerned the right of the State to take, or the right of the citizen to resist the State in taking property which is proved on the balance of probabilities to represent the proceeds of crime. The Court stated that in general such forfeiture is not a punishment and that its operations does not require criminal procedures (p. 153). The Supreme Court in its judgment considered the claim as to whether or not the Act of 1996 was criminal in nature and rejected that claim and as part of its consideration considered the arguments which were advanced on behalf of one of the plaintiffs in that action in relation to what was claimed to be the making of retrospective orders. The Court concluded that there was no substance in that contention (p. 157). Nothing has been identified before this Court which would support a finding that an act which is not criminal in its nature could be in contravention of the Convention by making "retrospective orders". The Act is civil and the plaintiffs' claim is dependent upon it being criminal in nature. It is not.

5.1 The claims of both plaintiffs relating to the Convention are dismissed on the grounds set out in paragraph 2.9 of this judgment, that is, on the basis that neither plaintiff can rely on the provisions of the Act of 2003. Even if the Court is incorrect in that finding, the Court is satisfied that neither plaintiff has established that the s. 3(1) proceedings, the order made, or the section itself are in breach of either of the plaintiffs' rights as guaranteed by the European Convention on Human Rights in any of the ways contended for by the plaintiffs for the reasons set out in sections 3 and 4 of this judgment. The declarations sought are therefore refused.