THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 140

Record Number: 151/2017

Peart J.
McGovern J.
Costello J.

IN THE MATTER OF THE PROCEEDS OF CRIME ACTS 1996-2005 AND IN THE MATTER OF SECTION 3(1) OF THE PROCEEDS OF CRIME ACTS 1996-2005

BETWEEN:

CRIMINAL ASSETS BUREAU

APPLICANT/RESPONDENT

- AND -

EDWARD McCARTHY AND ANTHONY MULLANE

RESPONDENTS/APPELLANTS

JUDGMENT OF MR. JUSTICE MICHAEL PEART DELIVERED ON THE 28TH DAY OF FEBRUARY 2019

1. This is an appeal against the order of the High Court (Fullam J.) pursuant to s. 3 of the Proceeds of Crime Acts 1996 – 2005 whereby the appellants and any person having notice of the making of said order were prohibited from disposing of or otherwise diminishing the value of two properties set forth in the 'Schedule of Property' attached to the said order, the Court being satisfied that the said properties constitute directly or indirectly the proceeds of crime.

2. The properties in question are 83 Cliona Park, Moyross, Limerick, and 29 Creagh Avenue, Kilkeely, Limerick. For convenience I will refer to these properties respectively as "Cliona Park" and "Creagh Avenue".

3. The main focus of the appeal is on the whether the trial judge erred by allowing into evidence, despite objection, four statements exhibited in an affidavit of D/Garda Hand, which were part of the information and material relied upon by D/Chief Superintendent Corcoran for the formation of his belief for the purposes of s. 8 of the Act that the two properties constitute directly or indirectly the proceeds of crime. The objection was that these four exhibited statements constituted hearsay evidence only, and that the appellants were unable to cross-examine the authors of the statements, one of whom was deceased by the time of the application.

4. Secondly, the appellants submit that the trial judge erred in the manner in which he determined the s. 3 application, and specifically that he did not correctly follow the steps to be taken as described by McCracken J. in *FMcK v. G.W.D* [2004] 2 I.R. 470 when concluding that a *prima facie* case was made out by the respondent, so that the onus of proof was then shifted to the appellants.

5. Thirdly, the appellants submit that the trial judge failed to properly consider the evidence adduced by them as to the source of funds from which the properties were acquired, and accordingly that he failed to comply with the principles in *Doyle v. Banville* [2012] IESC 25.

6. Finally, the appellants submit that the trial judge failed to satisfy himself, as required by s. 8 of the Act of 1996, that the making of an order under s. 3 of the Act would not be an injustice.

The relevant statutory provisions:
7. Section 3 (1) provides:

> "3.(1) Where on application to it in that behalf by a member, an authorised officer or the Criminal Assets Bureau, it appears to the Court on evidence tendered by the applicant, *which may consist of or include evidence admissible by virtue of section 8*:-
>
> (a) that a *person is in possession* or control of –
> (i) specified property and that the property constitutes, directly or indirectly, *proceeds of crime*, or
>
> (ii) specified property that was acquired, in whole or in part, with or in connection with the property that, directly or indirectly, constitutes *proceeds of crime*, and
>
> (b) that the value of the property or, as the case may be, the total value of the property referred to in both subparagraphs (i) and (ii) of paragraph (a) is *not less than €13,000*,
>
> *the Court shall*, subject to subsection (1A), *make an order* ("an interlocutory order") prohibiting the respondent or any other specified person or any other person having notice of the order from disposing of or otherwise dealing with the

whole or, if appropriate, a specified part of the property or diminishing its value, *unless, it is shown* to the satisfaction of the Court, *on evidence tendered by the respondent or any other person*:-

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

(II) that the whole of all the property to which the holder would relate is *less than €13,000*,

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

8. Section 8 (1) provides:-

"8.(1) *Where a member or an authorised officer states*:-

(a) in proceedings under section 2, on affidavit or, if the Court so directs, in oral evidence, or

(b) *in proceedings under section 3, on affidavit* or where the respondent requires that opponent to be produced for cross-examination or the court so directs, *in oral evidence*,

that he or she believes either or both of the following, that is to say:

(i) that *the respondent is in possession* or control of specified property and that *the property constitutes*, directly or indirectly, *proceeds of crime*,

(ii) that the respondent is in possession of or control of specified property and that *the property was acquired*, in whole or in part, with or in connection *with property* that, directly or indirectly, *constitutes proceeds of crime*,

and that the value of the property or, as the case may be, the total value of the property referred to in both paragraphs (i) and (ii) is *not less than €13,000*, then, ***if the Court is satisfied that there are reasonable grounds for the belief aforesaid***, *the statement shall be evidence* of the matter referred to in paragraph (i) or in paragraph (ii) or in both, as may be appropriate, and of the value of the property." [Emphasis provided]

FMcK v. GWD – McCracken J. – the test:
9. In his judgment in *FMcK v. GWD*, McCracken J. set out at p. 491 how the Court hearing an application under s. 3 of the Act of 1996 ought to proceed in the light of that section and its interplay with s. 8 of the Act as follows:

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

(1) You should firstly consider the position under s. 8. You should consider the evidence given by the member or authorised officer of his belief and at the same time consider any other evidence, such as that of the two police officers in the present case, which might point to reasonable grounds for that belief;

(2) If he is satisfied that there are reasonable grounds for the belief, he should then make a specific finding that the belief of the member or authorised officer is evidence;

(3) Only then should he go on to consider the position under s. 3. He should consider the evidence tendered by the plaintiff, which in the present case would be both the evidence of the member or authorised officer under s. 8 and indeed the evidence of the other police officers;

(4) He should make a finding whether this evidence constitutes a prima facie case under s. 3 and, if he does so find, the onus shifts to the defendant or other specified person;

(5) He should then consider the evidence furnished by the defendant or other specified person and determine whether he is satisfied that the onus undertaken by the defendant or other specified person has been fulfilled;

(6) If he is satisfied that the defendant or other specified person has satisfied his onus of proof then the proceedings should be dismissed;

(7) If he is not so satisfied, he should then consider whether there would be a serious risk of injustice. If the steps are followed in that order, there should be little risk of the type of confusion which arose in the present case."

10. As I have already stated, the appellants submit that the trial judge failed to follow correctly the sequencing and methodology advised by McCracken J. above, and I will come to that submission in due course. Before doing so, I should refer to the evidence that was before the High Court.

The evidence before the High Court
11. The application under s. 3 of the Act was brought by way of notice of motion dated 16th February 2015. It was grounded upon seven affidavits, the deponents of which were all members of the Criminal Assets Bureau, and of An Garda Siochana.

12. Chief Bureau Officer, D/Supt. Eugene Corcoran swore the principal grounding affidavit. He outlined his experience over many years in relation to investigating serious crime, in Limerick in particular, and to 27 years' experience prior to his appointment to the Bureau in the investigation of serious crime, including fraud, money laundering and other financial crime, which included some five years' experience as a Detective Superintendent having operational responsibility for the Money Laundering Investigation Unit attached to the Garda Bureau of Fraud Investigation. He stated at para. 5 of his affidavit:

"5. It is my belief, pursuant to section 8 (1) of Po CA, that the property set out in the schedule to the Originating Motion

herein ("the Property") is in the possession or control of the Respondents and further it is my belief that the Property constitutes, directly or indirectly the proceeds of crime or is property that was acquired in whole or in part with or in connection with property that directly or indirectly constitutes the proceeds of crime. It is also my belief, as is evident from the nature of the Property, that the value of the property is not less than €13,000."

13. Having stated his belief for the purpose of s. 8 of the Act, D/Supt. Corcoran proceeded in paras. 6 and 7 to state the grounds for holding that belief. It will be recalled that under s. 8 the Court must be satisfied that there are reasonable grounds for this belief before it can form either all the evidence, or part of the evidence, which the Court must consider in order to reach a conclusion that a prima facie case has been demonstrated. As stated by McCracken J. in *FMcK v. TH* it is only where such a *prima facie* case has been made out that the onus then shifts to the respondent to satisfy the Court that the property does not constitute the proceeds of crime, or that it is less than €13,000 in value.

14. Para. 6 of that affidavit states:

> "The grounds for my said belief are based on information, documents and other material obtained by Bureau Officers and Members of the Garda Siochána and more particularly set out in the Affidavit of Detective Garda Brendan Hand sworn herein on 10th February 2015, Affidavit of Detect Superintendent James Browne sworn on 9th February 2015, Affidavit of Bureau Forensic Accountant No. 2 sworn herein on 11th February 2015, the Affidavits of Revenue Bureau Officer No 60 sworn herein on 10th February 2015, the Affidavit of Social Welfare Bureau Officer No 54 sworn herein on 10th February 2015, the Affidavit of Detective Garda Oliver Foley sworn herein on 9th February2015."

15. The affidavits referred to in this paragraph were also before the court, being those affidavits referred to in the originating notice of motion dated 16th February 2015.

16. In para. 7 of his said affidavit, the Chief Bureau Officer summarised the grounds relied upon for his belief, under 23 separate headings as follows:

> "7. In summary the grounds for my belief include the fact that:
>
> (i) Edward McCarthy has a history of involvement in serious criminality including inter alia, directing or organising trade in illegal drugs;
>
> (ii) Involvement in the trade of illegal drugs routinely gives rise to substantial profits for those concerned, particularly those directing or organising trade in illegal substances; and
>
> (iii) Linda Mullane daughter of the second named respondent, Anthony Mullane, and partner of the first named respondent Edward McCarthy, has also been guilty of serious criminal conduct;
>
> (iv) Anthony Mullane and Edward McCarthy, named as respondents herein, are associates;
>
> (v) My experience of organised crime and the evidence available in relation to Edward McCarthy, including the information furnished by Detective Supt James Browne and Detective Garda Brendan Hand, indicate Mr McCarthy has generated substantial monies from the trade in illegal drugs and associated criminal activity;
>
> (vi) Where monies are generated by serious criminal activity, steps are taken to disguise or conceal such monies. This includes the acquisition of property in the name of trusted associates or family members;
>
> (vii) As well as involvement in the trade in illegal drugs, Edward McCarthy has not made any tax returns. I believe this to have also facilitated the accumulation of monies and is consistent with attempts to conceal or disguise the proceeds generated by criminal activity;
>
> (viii) Mr McCarthy does not enjoy such a level of legitimate income as would provide an explanation for the acquisition of assets of substantial value and substantial sums of cash and in particular, I would rely on the affidavits of Revenue Bureau Officer No 45 and of Social Welfare Bureau Officer No 51 herein, which show little or no evidence of Edward McCarthy earning an income from legitimate sources;
>
> (ix) The pattern of purchasing the two properties outlined in the originating notice of motion is not explained by income from known or legitimate sources;
>
> (x) This pattern of acquisition is consistent with the practice of money laundering;
>
> (xi) The affidavit and analysis carried out by a forensic accountant, who is also a member of staff of the Bureau, also supports my belief that the Property is directly or indirectly the proceeds of crime;
>
> (xii) Taken cumulatively with the other grounds set forth herein and from my experience and investigations, these factors are consistent with the laundering of criminally acquired monies and/or involvement in criminality;
>
> (xiii) I am not aware of any explanation having been given by the Respondents which would cast doubt in my mind that the Property constitutes, directly or indirectly, the proceeds of crime;
>
> *83 Cliona Park, Moyross, Limerick*
>
> (xiv) Based on the nature of the criminal activity in which Edward McCarthy was engaged and on evidence set out in the affidavit of James Browne, there was considerable incentive for him to purchase 83 Cliona Park, Moyross ("Cliona Park") in 2003. In particular, given its proximity to his close associates, Cliona Park would have afforded Edward McCarthy and his family a level of security which would have been difficult to obtain elsewhere. This would have been of particular concern to Edward McCarthy in 2003 when he was facing imprisonment;
>
> (xv) At the time Mr McCarthy acquired the property he did not have the legitimate means to finance the transaction;

(xvi) Anthony Mullane was used as an intermediary in the purchase of Cliona Park, which is again indicative of Mr McCarthy's intention to distance himself from the property;

(xvii) The property at 83 Cliona Park, ("Cliona Park") remains registered in the names of Michael and Eileen Lysaght, who purchased the property in 1982, despite the fact that it has long since been associated with Mr McCarthy and his family.

29 Creagh Avenue, Kileely, Co.Limerick

(xviii) Although Anthony Mullane became the registered owner of 29 Creagh Avenue, Kileely, Co. Limerick ("Creagh Avenue") in May 2012, officers of the Bureau under my control have been unable to identify legitimate income of such a level as would have enabled this purchase to have been made;

(xix) From the investigations carried out and information in the possession of Detective Superintendent James Browne I am satisfied that Edward McCarthy is the beneficial owner of the property at Creagh Avenue and that Anthony Mullane is merely a front to disguise the true ownership;

(xx) Part of the purchase price of Creagh Avenue can be traced to an account in the name of Mr McCarthy;

(xxi) Cash lodgements were made to accounts associated with Anthony Mullane in close proximity to cheque payments from those accounts for the property;

(xxii) Payments were also routed through an account in the name of Kevin and Eileen Mullane, the brother and sister-in-law of the second named Respondent. In this regard Mr Kevin Mullane admitted that he received cash in the sum of €20,000 which he broke down and lodged in five separate lodgments of €4000 to avoid arousing the suspicion of the financial institution;

(xxiii) The entry of a false name on the planning application to disguise the true ownership."

17. As stated at para. 6 of D/Supt. Corcoran's affidavit, his belief was based in part on the information and material contained in the affidavit of D/Garda Brendan Hand sworn on the 10th February 2015. The four statements to which the appellants objected in the High Court on the basis that they each constitute hearsay evidence and ought not to be admitted into evidence are exhibits to that affidavit. The statements objected to are those of Richard De Courcy, an estate agent, Jack O'Herlihy, a planning consultant, Karen Carberry, a property manager, and a cautioned memo of Garda interview of Kevin Mullane (now deceased). The point made is that none of Mr De Courcey, Jack O'Herlihy or Karen Carberry had sworn affidavits, but had merely provided statements, and could not therefore be cross-examined, and that Kevin Mullane was deceased, and that accordingly their statements were at best hearsay evidence. These statements dealt in one way or another with the acquisition, ownership and occupation of the two properties. The details of the statements do not need to be set forth, since the objection is that these were hearsay evidence, and wrongly admitted into evidence as part of the evidence upon which the belief was formed by the Chief Bureau Officer for the purposes of s. 8 of the Act.

18. No notice to cross-examine D/Supt. Corcoran or D/Garda Hand was served by the appellants. The hearsay issue in relation to these statements appears to have been raised for the first time on the hearing of the s. 3 application. The respondents swore affidavits for the purpose of resisting the making of an order under s. 3 and they were cross-examined on their affidavits, after the trial judge had first ruled that a *prima facie* case had been made out by the Criminal Assets Bureau.

19. This Court has had the benefit of a transcript of the submissions and evidence given before the trial judge. It was indicated to the trial judge at the outset of the hearing that counsel for the appellants wished to make objections to the admissibility of the statements and certain parts of the grounding affidavits. Those objections were heard, and responded to by counsel for the CAB. These submissions referred to some authorities on the question of the admission of hearsay evidence on applications under the Act, including the judgment of Keane C.J. in *Murphy v. GM* [2001] 4 I.R. 113, and a judgment of mine in *Criminal Assets Bureau v. Murphy and Forrest* [2016] IECA 40. I will return to these authorities in due course.

20. Having heard submissions as to the admissibility of certain of the evidence deposed to by the CAB officers, the trial judge gave his ruling in the following terms:

> "I am satisfied that the authorities make it clear that hearsay evidence is admissible on the part of an applicant, CAB, in making out reasonable grounds for *prima facie* case that the funds sought to be frozen are the proceeds of crime. The legislation provides safeguards as indicated by Mr Justice McCracken's approach, namely that if an applicant makes out a prima facie case the Court must then consider all the evidence, including the evidence by respondents. In this case the matters which [counsel for the appellants] has sought to challenge have, as I understand it, been addressed by the affidavits of the Respondents and they also have the opportunity of cross-examining the various [deponents] on behalf of the applicant. So I am satisfied that the authorities allow for hearsay evidence and in the circumstances I reject the application by [counsel for the appellants]."

21. Following this ruling counsel for the CAB proceeded to move the application for an order under s. 3 of the Act. The court proceeded to hear oral evidence from a witness that the appellants wished to call, namely Kenneth Mullane, so that he could provide an explanation as to how he and his brother Anthony Mullane came to be living at the Cliona Park premises during a relevant period. That evidence was given. He was not cross-examined on it by counsel for the CAB. Thereafter counsel for the CAB briefly went through the grounding affidavits and some of the exhibits. The trial judge had earlier stated that he had previously had the opportunity to read the grounding affidavits when hearing the earlier application for an interim order under s. 2 of the Act on 16th February 2016.

22. What followed was the cross-examination by counsel for the CAB of both appellants on their affidavits filed in response to the application. At the conclusion of those cross-examinations the application was adjourned to a later date for the cross-examination of Linda Mullane on her affidavit, and for legal submissions. The Court has been provided with the parties' written submissions to the High Court. The CAB submitted that for the purpose of s. 8 of the Act it had made out a *prima facie* case on the affidavit evidence adduced by the Bureau officers, and that the Court should consider that the onus was, as provided by s. 3(1) of the Act, moved to the appellants to show that the two properties in question did not represent the proceeds of criminal activity. These submissions then provided a summary of the affidavit evidence, and the evidence given under cross examination by the appellants, and it was submitted that the respondents had not discharged the onus of proof in that regard, and therefore, the case made out on the *prima*

facie basis had not been displaced by any evidence adduced by the appellants when attempting to discharge their onus of proof. These submissions also addressed briefly the question of the risk of injustice which is referred to in s.3 (1) of the Act, and which, if found to exist to a serious degree, would preclude the making of an order under the section. I will return to that question in due course.

23. The appellants also provided written submissions to the High Court. They submitted that the evidence adduced by the CAB did not constitute a *prima facie* case under s. 3 of the Act "as there cannot be reasonable grounds for the belief that 83 Cliona Park was either the proceeds of crime or was acquired with proceeds of crime". In that regard, reliance was placed upon the affidavit evidence of Edward McCarthy, and the evidence given under cross examination. Reference was made to the fact, as averred by Edward McCarthy at paragraph 5 of his affidavit sworn on 22nd January 2016, that despite the payment of "between €3000 and €4000" to Eileen Lysaght as a part payment of the agreed sum of €10,000, the sale of the property was never completed. It was submitted that since no deed of transfer was ever executed Eileen Lysaght and her husband, Michael Lysaght, remained the registered owners of the property. Further submissions were made to the effect that the absence of any written contract evidencing any agreement for the sale of the property by the Lysaghts to Edward McCarthy rendered any verbal agreement in that regard unenforceable given the provisions of s. 2 of the Statute of Frauds (Ireland) Act, 1695 then still in force in 2003. It was contended that for this reason alone the application under s. 3 of the Act must fail. Further submissions addressed an issue arising by reference to s. 90 of the Housing Act, 1966 and the absence of any consent from the local authority to any sale of these premises to Edward McCarthy thereby rendering any such purported sale to him null and void.

24. Following on from that submission, it was contended that the absence of any permission from the Lysaghts to occupy the premises meant that Edward McCarthy and his partner must be considered to have acquired ownership by virtue of adverse possession for in excess of twelve years, and therefore that the premises were not acquired with the proceeds of crime. In such circumstances, it was submitted that the application for an order under s. 3 in respect of these premises must be refused.

25. On this appeal it is unnecessary to consider that particular submission as counsel for the appellants gave an indication, quite properly in my view, that the ground relating to adverse possession was not being strongly pressed. While not conceding the point completely it was made clear that the appellants would simply rely upon their written submissions in that regard. In my view, it is in any event a specious and an unstateable ground, when all the evidence is considered. It is unnecessary on this appeal to address it in any detail whatever.

26. Those written submissions provided to the High Court barely mentioned the other property at Creagh Avenue in respect of which a s. 3 order was being sought. Also noticeable is the absence of any submission in relation to the ruling made by the trial judge admitting into evidence the material in respect of which a hearsay objection had been made.

27. It is against that background that the written judgment of the trial judge and the grounds now relied upon on this appeal must be considered.

The judgment

28. In his judgment the trial judge set out the provisions of s.3(1) and s.8(1) of the Act. He also referred to the seven step process as stated by McCracken J. in *FMcK v. GWD* to which I have already referred. He went on to refer to the affidavits which grounded the s.3 application. In particular, at para 10 the trial judge referred to the grounds upon which the Chief Bureau Officer had based his belief that the two properties in question represented the proceeds of crime or were acquired with the proceeds of crime. He provided a summary of that evidence and then proceeded to consider whether a *prima facie* case was shown to exist. At para. 11 of his judgment, the trial judge stated:

> "11. For the Court to grant an s. 3 order relating to the properties herein, it must first be satisfied that all the evidence tendered by the applicant, when considered, constitutes a *prima facie* case."

29. On this appeal counsel for the appellants has submitted that this statement is not correct having regard to the steps outlined by McCracken J. in *FMcK v. GWD*. I will return to that question in due course.

30. The trial judge then addressed himself to the contents of the affidavit of D/Garda Hand and in particular paragraph 8 thereof referring to a statement of Karen Carberry, a property manager, which he contended supported the contention that Anthony Mullane was fronting a rental property for Linda Mullane, and therefore indirectly Edward McCarthy, her partner. That statement of Ms. Carberry is one of the statements in respect of which a hearsay objection was made, as already described.

31. The trial Judge also considered the affidavit of D/Supt. James Browne in relation to his belief that Edward McCarthy was involved in the importation and distribution of controlled drugs in Limerick and surrounding areas. He makes reference to D/Supt Browne's 36 years' experience in Limerick from which he has gained a detailed knowledge of the organised crime gangs are based in Limerick, and has been involved in several operations targeting these gangs. The trial judge went on to consider other contents of D/Garda Hand's affidavit, including that Edward McCarthy had 28 previous convictions since 1995, some of which resulted in custodial sentences imposed at Limerick Circuit Court. He refers also to the affidavit evidence of D/Supt. Browne that he is not aware of any legitimate earnings by Edward McCarthy, but that from his knowledge of the drug distribution business in the area of Limerick city, and from other sources, he believes that Edward McCarthy is one of the biggest suppliers of illegal drugs in Munster, and is a significant supplier also in Dublin, generating substantial amounts of money from that criminal activity since the year 2000.

32. The trial judge went on then to consider specifically the belief on the part of D/Supt. Browne that Edward McCarthy purchased the premises at Cliona Park in early summer 2003 because he was facing certain charges which ultimately resulted in the imposition of a term of imprisonment, and wanted his family looked after by his close associates living near that property. The trial judge then deals with the affidavit evidence in relation to the purchase of that property, the price, the method of payment and the source of funding. He referred also to the fact that the property remained registered in the names of Michael and Eileen Lysaght, and to the fact that Edward McCarthy and his partner occupied the premises after its purchase, but that it was not occupied by his partner while he was in prison. However, they had moved back into the house following his release from prison in April 2007.

33. The trial Judge then proceeded to set out further evidence by reference to what was stated by other officers of the Bureau, whose investigations did not disclose any legitimate source of funding for the action of the property, and the failure by Edward McCarthy to have declared any income for tax purposes. These matters are referred to at paras. 24–26 of the judgment.

34. Similar details in relation to the property at Creagh Avenue were summarised by the trial judge, including by reference to a statement given to D/Garda Hand by the estate agent, Richard De Courcey. That statement is another to which objection was raised as to its admission into evidence. In that statement Mr De Courcey stated that Anthony Mullane had confirmed to him that he was a

cash buyer and was purchasing the property on behalf of his daughter. The purchase price was apparently €68,000 which was paid over in cash, without any mortgage or loan. Certain bank accounts in the names of Edward McCarthy and Anthony Mullane, which had been obtained by D/Garda Hand, were also referred to by the trial judge.

35. At para. 33 of his judgment, the trial judge stated that Anthony Mullane had been unable to give any credible explanations as to the source of a number of lodgments or draft withdrawals from a number of bank accounts under his control which had been used to purchase the house at Creagh Avenue. He referred to the only explanation given, namely that the funds had derived from his business carried on under the name 'Ambassador Steel Doors'. He refers to the averment by D/Garda Hand that from the information which he had obtained, that business would not have generated the amounts necessary to make lodgments of cash with which the drafts had been purchased.

36. The trial judge went on to detail further affidavit evidence of D/Garda Hand relating to his investigations into the purchase of the Creagh Avenue, and refers to some of the evidence contained in the affidavits sworn by Bureau Forensic Accountant No. 2 who investigated the affairs of Anthony Mullane. He could find no record of earnings or income tax returns filed by him, and discovered that Anthony Mullane had been in receipt of unemployment assistance/back to work allowance over a substantial period between 2001 and 2012. The trial judge referred to the evidence of the same witness relating to his/her other investigations into the financial affairs of Ambassador Steel Doors which did not indicate an ability to fund the purchase, and neither was there any evidence that the bank accounts of Kevin and Eileen Mullane were in funds from ordinary business or employment to be in a position to fund a bank draft in the sum of €20,000 payable to a firm of solicitors towards the purchase monies for Creagh Avenue.

37. The summary of the evidence adduced by the CAB is summarised by the trial judge in more detail than I have set forth. On this appeal it is unnecessary to do so to the same degree of detail, especially since the focus of the appeal is not on the facts disclosed by that evidence as such, but rather on the admissibility of the four statements exhibited by D/Garda Hand to which I have referred, and the process by which the trial judge ultimately reached his conclusions.

38. Having set out his summary of the evidence adduced by the CAB, the trial judge then stated at para. 46 under a heading 'Prima Facie Case':

> "46. The Court has considered the evidence of the applicant, which includes the belief evidence together with the evidence of the applicant. The Court determines that the applicant has established a prima facie case that the property represents the proceeds of crime. Consequently, the burden of proof shifts to the respondents to displace that finding."

39. At para. 27 above I set out what the trial judge stated in para. 11 of his judgment, namely that "for the Court to grant an s. 3 order relating to the properties herein, it must first be satisfied that all the evidence tendered by the applicant, when considered, constitutes a *prima facie* case". The appellants submit that what the trial judge has stated both by reference to para. 11 and para. 46 of his judgment fails to comply with what McCracken J. in *McK v. GWD* stated being as the correct way for the Court to proceed on a s. 3 application. Specifically, it is submitted in this regard that the trial judge failed to make any decision as to whether he was satisfied, as provided in s. 8 of the Act that "there were reasonable grounds for the belief" held by Chief Bureau Officer as to the provenance of the two properties. I will return to that question in due course.

40. However, having stated that the CAB had established a *prima facie* case so that the onus then shifted to the appellants to displace that *prima facie* finding, the trial judge then proceeded to consider the evidence given by and on behalf of each of the appellants. The trial judge then summarised the CAB's responses to the evidence and submissions of the appellants before stating his overall conclusions for the purposes of s. 3 of the Act as follows;

> "94. The first and second respondents are unable to provide any documents or records evidencing their incomes through their respective businesses.
>
> 95. There is no evidence of legitimate income to offset against the high expenditure and lifestyle as afforded by the respondents. When pressed by the applicants for details of his income during cross examination, the first respondent refused to give details of his business dealings.
>
> 96. The Bureau Forensic Accountant No. 2 has found no legitimate means of income or explanation for either respondent that would have allowed them to purchase properties without funding from the proceeds of crime.
>
> 97. The applicant argues that the method used to disguise the ownership of the Audi vehicle mirrors the method employed by the first respondent in neglecting to register Cliona Park in his own name.
>
> 98. Although the second respondent offers some information towards his means of purchasing Creagh Avenue, Detective Garda Hand submits that there is a lack of clear detail pertaining to the funds used to purchase, maintain and service the property.
>
> 99. The second respondent's evidence directly contradicts that of his brother, Mr Raymond Mullane, for the reason behind the failure of their partnership. It seems unreasonable to reject Mr Raymond Mullane's assertion that he left the company due to it being unprofitable considering Ambassador Steel Doors failed a mere two years after his departure.
>
> 100. The Court finds that the respondents do not have a case for adverse possession for Cliona Park as they have not satisfied the required elements. The contract is valid due to part performance and the belief of the Lysaghts that the property was sold to the first respondent.
>
> 101. Section 3 of the Act is premised on it being shown that a person is in "possession or control … of specified property". A specific ownership is not required. The respondents' submissions that the first respondent is in possession of Cliona Park [sic].
>
> 102. In the circumstances, the Court is satisfied that the respondents have not satisfied the onus of proof required to displace the finding of a *prima facie* case that the properties involved represent directly, or indirectly, the proceeds of crime."

41. Having concluded thus, the trial judge addressed the question there would be whether a "serious risk of injustice" if an order was made under s.3, "particularly in the case of an order being granted against the family home due to the Family Protection Act 1976". He concluded that he was satisfied that there was no risk of injustice in the present case, adding that "Creagh Avenue is not a family

home at this time as it is not fit for habitation". I will return to this issue in due course.

The 'hearsay' ground of appeal
42. In an amended notice of appeal, which the appellants were permitted by the Court to deliver, they have raised the hearsay ground of appeal in the following terms:

> "XX111 – The learned trial judge erred in fact and in law in permitting hearsay evidence to be adduced by the applicants in respect of inter alia witnesses who were deceased (Kevin Mullane) or who are not present and available for cross examination (including Raymond Mullane, Jack O'Hurley, Richard De Courcy and Karen Carberry). Alternatively the learned trial judge erred in fact and in law in permitting hearsay evidence to be adduced where it was unsworn."

43. Before addressing the submissions made by the parties, I should set out certain other provisions of s. 8 of the Act not already referred to, namely subsections (5) and (7) thereof:

> "(5) A bureau officer may exercise or perform his or her powers or duties on foot of any information received by him/her from another bureau officer or on foot of any action taken by that other bureau officer in the exercise or performance of that other bureau officer's powers or duties for the purposes of this Act, and any information, documents or other material obtained by bureau officers under this section shall be admitted in evidence in any subsequent proceedings.
>
> (7) Subject to section 5 (1), any information or material obtained by a bureau officer for the purposes of this Act may only be disclosed by the bureau officer to:-
>
> (a) another bureau officer or member of staff of the Bureau,
>
> (b) any member of the Garda Siochana for the purposes of Garda functions,
>
> (c) any officer of the Revenue Commissioners for the purposes of the Revenue Acts or any provision of any other enactment, whether passed before or after the passing of this Act, which relates to revenue,
>
> (d) any officer of the Minister for Social Welfare for the purposes of the Social Welfare Acts, or
>
> (e) with the consent of the Chief Bureau Officer, any other officer of another Minister of the Government or of a local authority (within the meaning of the Local Government Act, 1941) for the purposes of that other officer exercising or performing his or her powers or duties,
>
> and information, documents or other material obtained by a bureau officer or any other person under the provisions of this subsection shall be admitted in evidence in any subsequent proceedings."

44. The interpretation of these provisions has been the subject of some judicial determinations. The appellants rely on the judgment of Keane C.J. in *Criminal Assets Bureau v. Hunt* [2003] 2 I.R. 168, and have submitted that it is authority for the proposition that the four statements admitted into evidence in connection with the belief evidence of the Chief Bureau Officer ought not to have been admitted without the authors of those statements being present to prove them. The point is made that those authors (one of whom is by now deceased) had not sworn affidavits exhibiting the said statements, and therefore could not have been made available to the appellants to give oral evidence by the service of a notice of cross-examination.

45. The relevant issue in *Hunt* was the admissibility of certain bank statements which had come into the possession of the CAB during its investigations into the financial affairs of Mr Hunt, after information had come into the possession of one of the bureau officers. Tax assessments were raised by the CAB based on those bank statements. Those assessments were the subject of challenge in the proceedings, and it was in that context that the question arose as to the admissibility of the bank statements without formal proof. That context is important to bear in mind. The passage from the judgment of Keane C.J. in *Hunt* on which the appellants rely is on p. 189 as follows:

> "It is clear that, in accordance with the rules of evidence normally applicable in civil proceedings, the documents in question could be proved only by their authors giving sworn evidence and being subject to cross-examination, unless advantage was taken of the provisions of the Bankers Books Evidence Acts 1879 to 1959. The documents in question, accordingly, should not have been admitted in evidence in the High Court unless, as the plaintiff contends, they were admissible under the provisions to which I have referred.
>
> The precise scope of the abridgement of the rule against hearsay effected by those provisions is difficult to identify. However, it would certainly appear that, where it is a necessary proof in proceedings, whether under the Act of 1996 or other legislation, that a bureau officer takes certain actions as a result of information, documents or other material received by him from another bureau officer, the court may act on the sworn evidence of the bureau officer that he received the information, documents or other material from the other bureau officer. To that extent, the rule against hearsay is relaxed and the court is entitled to accept as truthful an unsworn statement made out of court by a bureau officer to the bureau officer who gives evidence that he acted on foot of the information in question. While the wording of the section is far from clear, it would seem from the addition of the words 'documents or other material' in the closing words of each sub-section that it was envisaged that the 'information' received by the bureau officer need not necessarily be oral information.
>
> However, it certainly does not follow from the fact that the unsworn out of court statement of the first bureau officer to the bureau officer giving evidence is admissible, that any evidence which he obtained and of which he informs the bureau officer giving evidence, is also admissible. That would have the absurd consequence that a bureau officer would be precluded by the operation of the rule against hearsay from giving evidence as to what he was told by another person not before the court, but that the same plainly inadmissible evidence could be rendered admissible if he informed another bureau officer of the contents of that conversation. I am satisfied that, unless the provisions in question are incapable of any other construction, they should not be so construed."

46. As I stated in my judgment in *Criminal Assets Bureau v. Murphy and Forrest* [2016] IECA 40 (Finlay Geoghegan J. and Irvine J. concurring), *Hunt* can be distinguished on its facts from the present case where the issue of hearsay has arisen in the context of an

application under s.3 of the Act and, specifically in relation to the reasonableness of the grounds relied upon for the Chief Bureau Officer's belief that the property represents the proceeds of crime for the purpose of s.8 of the Act. In that regard, at para. 59 of my said judgment I stated:

> "59. The issue in *Hunt* is very different to the present case. First of all, the decision in *Hunt* arose from a full plenary hearing on oral evidence. Secondly, in *Hunt* the question was whether certain documents (i.e. bank statements) could be admitted into evidence at the plenary hearing without formal proof on the basis of the hearsay exceptions permitted by s. 8 of the CAB Act, 1996. That case did not involve any consideration of what evidence was admissible as an exception to the hearsay rule for the purposes of the belief evidence permitted under s. 8 of the Proceeds of Crime Act, 1996 in relation to an application under s. 3 of that Act. For these reasons I do not consider that *Hunt* is of assistance to the appellants in the present case. The question remains whether for the purpose of the belief evidence given by D/Superintendent Corcoran he could rely on hearsay evidence as to allegedly criminal activity by MMJ/MMS during the s. 3 application."

47. Similarly, in the present case I do not consider that *Hunt* assists the appellants.

48. The Criminal Assets Bureau have relied upon the judgment of Hardiman J. in *McK v. TH* [2007] 4 I.R. 186, as it did in *CAB v. Murphy & Forrest*. Counsel for the appellants submits that the said judgment of Hardiman J. ought not to be relied upon since it is not apparent that the judgment of Keane C.J in *Hunt* was considered at all. I do not agree that the absence of a reference in *McK v. TH* to the judgment in Hunt is of any adverse significance. In fact, it would seem to confirm my own view that Hunt is a different case on its facts, and would not have been of relevance to *TH*. In *Murphy & Forrest* I considered *TH* in some detail, and it is convenient to set forth what I stated at paras. 61-66, since the factual context is so similar, as is the context of it being a s. 3 application, and reliance upon belief evidence being common to both:

> "61. At p. 194 of his judgment in *McK v. T.H.* Hardiman J, having referred to the passage from *Murphy v. GM* to which I have referred at para. 55 above, states the following:
>
> > 'Against this background, it appears to me impossible to contend that the procedures adopted and the rulings given on the admissibility of evidence in this case were in any way flawed. Any court will, of course, be conscious of the very great potential unfairness of permitting hearsay evidence and belief evidence to be given in legal proceedings. They are capable of gross abuse, and capable of undermining the ability of a person against whom they are deployed to defend himself by cross-examination. It is, accordingly, essential to ensure that the conditions under which this court held their use constitutionally justifiable in this unique statutory context are in fact met–
> >
> > > '… the respondents to an application under s. 2or s. 3 will normally be the persons in possession or control of the property and should be in a position to give evidence to the court as to its provenance …" (see *Murphy v. G.M.* [2001] 4 I.R. 113 at p. 155).'
>
> Having referred to the onus initially upon CAB in the s. 3 application to establish the belief and that there are reasonable grounds for it, and that only after these hurdles have been overcome does it constitute evidence, he went on to state that such evidence was not conclusive and that it could be counteracted by evidence given by or on behalf of the defendant, and stated that "the effect of the expression of an admissible belief under the section, if it is not undermined in cross-examination, is to create a *prima facie* case which may be answered by the defendant if he has a credible explanation as to how he lawfully came into possession control of the property in question, and establish this in evidence."
>
> 62. He then referred to something that was contained in the defendant's written submissions, namely a concession that s. 3 of the Act of 1996 allows for hearsay evidence. In that regard he noted at para. 26:
>
> > 'they say that the only hearsay evidence which is provided for is the statement of belief referred to in s. 8 (1) and that it is to be inferred that no other hearsay is permitted. In particular it is objected that statements and information alleged to have been received by identified third parties were used as the basis for the plaintiff's belief. The builder mentioned earlier in this judgment is given as an example of this. Equally the plaintiff made use of evidence or information contained in the affidavits of other bureau officers.'
>
> 63. He then went on to state the following, and Counsel in the present case submits that he did so per incuriam the earlier judgment of the Supreme Court in *Hunt* [supra] which, it is submitted, had given a reasoned consideration in relation to the scope of s. 8, subsections (5) and (7) of the CAB Act, 1996:
>
> > 'These submissions, with respect, seem to ignore s. (5) and (7) of the Criminal Assets Bureau Act 1996. Subsection (7) permits the disclosure of information or material obtained by a bureau officer for the purposes of the Act to be disclosed to another bureau officer, a member of An Garda Siochana, and certain other classes of person. It is then provided that "information, documents or other material obtained by bureau officer or any other person under the provisions of this subsection shall be admitted in evidence in any subsequent proceedings".
>
> 64. I have to say I do not see that statement as being per incuriam the Supreme Court's judgment in Hunt, which as has been pointed out by Counsel for CAB was in the different context of the reliance upon unproven bank statements. It seems to me that the existence of s. 8 (5) and (7) of the CAB Act, 1996 is at least on the face of it an answer to the submission that Hardiman J. was considering, namely "that the only hearsay evidence which is provided for is the statement of belief referred to in s. 8 (1) and that it is to be inferred that no other hearsay is permitted". In any event it is not particularly relevant in the present case that those provisions exist, since the hearsay evidence objected to herein is in the form of information passed by An Garda Siochana to CAB, and not vice versa.
>
> 65. As has been submitted by Counsel for CAB, the hearsay evidence given on an application under s. 3 of the Act of 1996 is not given as proof of its content but rather in order to demonstrate that there are reasonable grounds for the belief evidence given. It can be rebutted by the defendant if he/she chooses to call evidence in that regard. It can be cross-examined in order to try and dislodge it or at least diminish the weight that the Court should properly attribute to it. But it cannot be said, and no authority has been cited in support of the proposition, that it is inadmissible evidence. The legislation is very particular legislation brought in for a very particular purpose, namely to ensure as far as possible within the law and the Constitution that persons who commit crime do not prosper from the proceeds of their criminal behaviour. A specific exception to the hearsay rule was provided for both in s. 8 of the Act of 1996, and it is supported by the

provisions of s. 8 of the CAB Act, 1996 also. It is clearly in the contemplation of the Oireachtas and is within the scheme of the Act, that the evidence which the Court is given for its consideration for the purposes of an application under s. 2 or s. 3 of the Act of 1996 "may consist of or include" the belief evidence provided for in s. 8 thereof provided "there are reasonable grounds for the belief". Reasonable grounds is a different concept to proof, even to the civil standard which is the appropriate standard in these cases.

66. There is no reason in my view in principle or otherwise why the basis for that belief evidence cannot consist of information that may have come to the applicant officer from a third party, or which is otherwise outside his own direct knowledge, without the necessity of that third party coming to court to give that evidence directly in the normal way. There is a particular abridgement of the hearsay rule provided for. *Murphy v. G.M.* has confirmed that the admissibility of hearsay evidence is not unconstitutional in such cases. While Counsel for the appellants has made the point that had the Supreme Court addressed the issue by reference to an interlocutory order being a final order, as was clarified by Geoghegan J. in *McK v. A.F.*, it might have come to a different conclusion as to the admissibility of hearsay evidence, I am not satisfied that the distinction sought to be drawn is a good one. The s. 3 application is undoubtedly an interlocutory order in the nature of a final order as stated by Geoghegan J. But as I have stated, my view is that the admissibility of hearsay evidence for the purpose of supporting the prima facie evidence of belief does no violence to the Act, and has been found to be constitutional. No authority to the contrary has been cited, in spite of the number of cases that have been decided where the hearsay issue has been raised. While Birmingham J. in the court below did not expand upon his conclusion that he had regard to the hearsay evidence and that it was admissible, I am satisfied that he was correct to admit it and to have regard to it."

49. Despite this Court being invited by counsel for the appellants to reconsider and perhaps depart from the judgment in *Murphy & Forrest* I see no reason for doing so.

50. Initially on this appeal, the appellants' argument, it appeared to me, was that the four statements at issue were inadmissible for the purposes of showing that there were reasonable grounds for the belief evidence given on affidavit by the Chief Bureau Officer. However, as the appeal proceeded the argument changed. Counsel conceded that the four unproven statements were admissible for the purpose of establishing the reasonableness of the belief, and the argument was then made, relying on what was stated by Keane C.J. in *Hunt*, that while the exhibited statements may be admissible for the limited purpose of s. 8(1) of the Act, despite being hearsay and incapable of challenge under cross-examination of the authors thereof, they are not admissible evidence for the next stage of the process, namely the consideration of all the evidence given by the CAB officers when the trial judge is fulfilling the third step in the process (*per* McCracken J. in *FMcK v. GWD*).

51. In other words, the modified submission is that at that third step of the process the trial judge must consider the s. 8 belief evidence, which forms *part only* of the overall evidence given by CAB, together with the other evidence adduced by the CAB. The appellants contend that the four unsworn hearsay statements may not form part of the trial judge's consideration of that other evidence adduced by the CAB, as they are hearsay. An analogy is drawn between these unsworn and unproven statements in the present case, and the bank statements referred to in Hunt which were found to be inadmissible as evidence of the basis for the tax assessments raised by the CAB, unless they were formally proven under the normal rules of evidence.

52. The first thing to be said by way of conclusion on this issue is that it is beyond doubt that there were reasonable grounds established for the belief evidence of D/Chief Supt. Corcoran for the purpose of s. 8. Indeed, I do not understand that to be disputed by the appellants. The basis for that belief was set out in great detail by D/Supt. Corcoran in his affidavit, and it included what was stated by D/Garda Hand in his affidavit sworn on the 10th February 2015. That belief (once reasonably based) is itself evidence which the trial judge is entitled to consider as part of the evidence adduced by the CAB, when deciding if a *prima facie* case had been demonstrated such that the onus of proof shifted to the appellants to displace that *prima facie* case.

53. But it should be remembered also that s. 3 provides very clearly that the belief evidence itself, once the Court is satisfied that there are reasonable grounds for it, *may on its own* mandate the making of the order under s. 3 of the Act. The words "may consist of or include …" in s. 3(1) make this clear. In most cases, undoubtedly, there will be other evidence in addition to the belief evidence which will be offered to the Court. But it should not be overlooked that the section envisages that this need not be the case.

54. As it happens, in the present case the information contained in the affidavit of D/Garda Hand sworn on the 10th February 2015 was stated by D/Supt. Corcoran in his affidavit to be part of what he relied upon for his belief that the properties represented the proceeds of crime. The appellants accept that the statements are admissible evidence for the purpose of the trial judge's consideration of whether or not there are reasonable grounds for the belief of D/Chief Supt. Corcoran's belief, but for no more than that.

55. In fact, all the affidavits grounding this application under s. 3 of the Act are stated by D/Chief Supt. Corcoran to be the basis for his belief that the properties comprise the proceeds of crime. This is stated by him at para. 6 of his affidavit. As I have said, that belief on its own, provided there are reasonable grounds for it, is evidence which can entitle the Court to make the order under s. 3 of the Act. In such circumstances, it is problematic for the appellants to submit that the statements exhibited by D/Garda Hand though admissible for the purpose of assessing the reasonableness of the belief, are not admissible as part of the remainder of the CAB evidence which the Court must consider as part of the third stage of the process referred to. The objection is not that there is some kind of double-counting of the evidence by it being considered twice. The objection is simply that while it is admissible for one purpose it is inadmissible for another. In my view there is no reality in such a submission.

56. In truth I think the submission as now advanced depends more on the form of the trial judge's judgment rather than its substance, and on a somewhat over-slavish or strict adherence to the seven separate steps of the process described by McCracken J. in *FMcK v. GWD* which are undoubtedly a helpful guide to the Court as to how the Court should set about its task of deciding upon an application under s.3 of the Act. It identifies from the section the different matters that require to be considered and the order in which that should be done. The guidance should not be elevated to the status of a mandatory direction such that any failure to adhere to any one of the steps leads to the invalidation of the order. It is compliance with the Act which is required. The trial judge's judgment must be seen 'in the round' so to speak in order to ascertain whether the requirements of s.3, in conjunction with s.8 of the Act have been satisfied.

57. For example, at para. 11 of his judgment the trial judge stated that "For the Court to grant an [sic] s. 3 order relating to the properties, it must first be satisfied that all the evidence tendered by the applicant, when considered, constitutes a *prima facie* case". One could parse and analyse that statement and say, as the appellants do, that by reference to what was stated by McCracken J. it is not strictly correct, since it omits any reference to the first two stages in relation to the belief and whether there are reasonable grounds shown for the belief. But in another sense it not incorrect since before the onus shifts to the respondent to

an application the Court must be satisfied that a prima facie case has been made out.

58. It should be borne in mind that para. 11 of the judgment immediately followed paragraphs 7 – 10 in which were set forth the provisions of s.3 (1) and s.8 (1) of the Act, the seven step process advocated by McCracken J. in *FMcK v. GWD*, and the belief evidence given by D/Chief Supt. Corcoran and the basis stated by him for his belief. It might have been preferable for the trial judge to have stated immediately following his description of the belief evidence, and the basis given for it, what he eventually stated at para. 45 of the judgment namely:

> "The Court is satisfied that the Chief Bureau Officer had reasonable grounds for his belief that the properties sought to be attached were acquired directly or indirectly with the proceeds of crime. The Court finds that the belief is evidence."

59. Nevertheless it is clear from the judgment 'in the round' that the trial judge first considered the belief evidence and the basis given for it. The conclusion just stated comes after the trial judge set out in paras. 12 – 44 a summary of the affidavit evidence upon which the s.3 application was grounded. That evidence, as I have stated already, was also the evidence which formed the basis for D/Supt. Corcoran's belief that the properties comprised the proceeds of crime. As I have said, that belief on its own may form the basis for the making of the order sought, without reference to any other evidence that did not form the basis for the belief evidence.

60. As I have stated, the trial judge at para. 45 expressed himself satisfied that there were reasonable grounds for the belief evidence, and immediately thereafter at para. 46 stated:

> "The Court has considered the evidence of the applicant, which includes the belief evidence and the evidence of the applicant. The Court determines that the applicant has established a *prima facie* case that the property represents the proceeds of crime. Consequently, the burden of proof shifts to the respondents to displace that finding."

61. The manner in which the trial judge has constructed his judgment is apt to mislead in this particular case, and it has resulted in the ground of appeal being framed in its present form. By that I mean that in this particular case it is all the CAB evidence upon which the application was grounded, namely the affidavits set forth in the originating notice of motion, which formed the basis for the belief evidence on the part of D/Chief Supt. Corcoran. There was no other evidence offered for the purpose of establishing a *prima facie* case under s. 3 of the Act. Any other evidence was provided by CAB in replying affidavits to affidavits filed by or on behalf of the appellants.

62. In my view it is clear from the way the trial judge summarised the evidence and the sequence in which he dealt with matters in his judgment, that he considered all of that affidavit evidence (which includes the exhibits) as part of his consideration as to whether or not there were reasonable grounds for the Chief Bureau Officer's belief. Having been so satisfied, there was *on that basis alone* a sufficient basis for a conclusion that a *prima facie* case was made out. Strictly speaking there was *in this particular case* no need to again visit the affidavit evidence of the deponents in order to consider again separately the evidence contained in those affidavits for the purpose of fulfilling the third step of the seven steps. But in so far as the trial judge did so, and it is by no means clear that this is the case, he was in my view entitled to have regard to all the evidence adduced by D/Garda Hand, even the statements exhibited by him. They were admissible for the purpose of the belief evidence, and there is no reality in considering that the trial judge had to close his mind to them for the purpose of the third step in the process.

63. In another case involving different facts and different evidence, there may well be evidence adduced by CAB on its application under s.3 which does not form part of the basis for the belief evidence being given by the CAB officer, and which the trial judge would consider in addition to the belief evidence itself, before reaching a conclusion that a prima facie case was made out. The admissibility of any such evidence would remain a matter for the Court to determine in any particular case.

64. In my view the hearsay ground of appeal must fail.

Failure to follow the process laid down in FMcK v. GWD

65. The appellants submit that the trial judge failed to properly consider the evidence given by the second named appellant in relation to his source of funding for Creagh Avenue, namely that it emanated from the proceeds of a personal injuries claim. It is submitted that by not considering this explanation for the source of funding the trial judge has failed to observe the fourth in the seven step process, namely that the trial judge "should then consider the evidence furnished by the defendant .. and determine whether he is satisfied that the onus undertaken by the defendant … has been fulfilled". It is further submitted that having failed to address this particular piece of evidence as to the proceeds of the personal injury claim, the trial judge has not properly engaged with and analysed the elements of the case being made by the second named appellant as required by the principles set forth by Clarke J. (as he then was) in *Doyle v. Banville* [2012] IESC 25, and made clear why one version of facts is preferred over another, so that a party may know the trial judge's reasons.

66. In his replying affidavit, Mr McCarthy had stated at para. 60 thereof that he was able to pay the sum of €10,000 towards the purchase of Creagh Avenue in February 2012 out of the settlement proceeds of a personal injury action in which he had received a sum of €15,000, and he exhibited a letter from his solicitor enclosing a cheque in the amount of €15,000. He went on to state that "the fact that my brother Patrick and I won €22,515 in a 'treble' Euro millions bet also helped me to afford to pay €10,000 towards the purchase of the house". In cross-examination he also stated that those funds had been provided from money he had in the bank from his personal injury claim, and also from money won on the 'treble' or from the sale of horses. The appellants' complaint is that the trial judge did not engage with this evidence, and explain if, and if so why, he was rejecting it.

67. The trial judge referred to this evidence when giving a brief summary of the evidence given by Mr McCarthy, for example at para. 57 of the judgment. He also summarises much of the other evidence given as to the source of funding for both properties, and the reasons for the purchases. Given that he referred to the evidence that the funding came partly from a personal injuries claim, and partly from the proceeds of the 'treble', it cannot be said that this evidence was not considered by the trial judge. The fourth step in the seven step process advocates that the trial judge should then "consider" the evidence furnished by the defendant". While it might be preferable that a more expansive treatment of that evidence appear in the judgment, nevertheless I am satisfied that the trial judge took into consideration as part of his overall assessment of whether or not the appellants had discharged the onus of proof that had shifted to them.

68. The second limb of this ground of appeal is that by failing to explain whether or not he was accepting or rejecting that particular evidence, and his reasons, the trial judge has failed to observe the requirement in *Doyle v. Banville* that the trial judge should "come to a reasonable conclusion as to why one version of those facts is to be preferred".

69. At para. 102 of his judgment, the trial judge stated:

> "In the circumstances, the Court is satisfied that the respondents have not satisfied the onus of proof required to displace the finding of a prima facie case that the properties involved represent, directly or indirectly, the proceeds of crime".

70. Taking an overall view of the evidence given by the appellants on affidavit, and in their cross-examination, and considering also what is stated by the trial judge as to the inability of the appellants in their evidence to produce any documents or records evidencing their income, and the evidence given on affidavit by the CAB deponents, in my view it was entirely open on the evidence for the trial judge to conclude as he did. There were many unsatisfactory elements of the appellants' evidence given under cross-examination. Taking the judgment 'in the round', there is sufficient clarity and justification given by the trial judge for concluding that these appellants had not discharged the onus of proof that had fallen upon them. There was no obligation to make an express finding as to credibility. It is in many cases possible to parse and analyse a written judgment and discover some paragraph that might have been better phrased, or where some particular piece of evidence has not been analysed in detail and a conclusion reached upon it. But that is not a ground upon which to set aside the judgment unless the perceived defect represents a fundamental flaw in the judgment such that it is fatally undermined.

71. In my view, even if it may be considered that the trial judge's treatment of the evidence relating to the explanation of the source of funds could have been somewhat more expansive, the manner in which it has been treated does not fatally undermine the reasoning of the trial judge and his overall conclusion as to failure by the appellants to discharge their onus of proof.

72. I would therefore reject this ground of appeal.

Serious Risk of Injustice

73. This ground of appeal relates only to the property at Cliona Park, as it is not in dispute that the property at Creagh Avenue is unoccupied, and in fact uninhabitable. As I stated at para. 39 above, the trial judge was satisfied that there was no serious risk of injustice if an order was made under s.3 of the Act. Where such an injustice is established, it is a bar to the making of the order, as provided by the proviso at the end of s.3(1) of the Act. The appellants have submitted that the trial judge fell into error by not having regard to the fact that Cliona Park was a family home occupied by Linda Mullane and her children, and also that the trial judge reached his conclusion in the absence of any facts or evidence on which to base that conclusion. They rely on the judgment of MacMenamin J. in *Criminal Assets Bureau v. Kelly and T.T* [2012] IESC 64 in which he set out a number of factors "to be weighed in the balance in assessing the risk of injustice" when considering whether to make an order under the Act, including the constitutional protection of women in the home (Article 41.2 of the Constitution), though it is not to be considered a bar to the making of an order.

74. In *Kelly* the party asserting that there was a serious risk of injustice was the second named respondent (T.T) whose family home in which she and her children lived was the target of the application. It is also the case that Kelly was an application for disposal of property under s. 4 of the Act, and not an application for a freezing order under s. 3 thereof. These are important distinctions. The question of a risk of injustice arises on such an application by reason of the provisions of s.4(8) of the Act in the same way as it arises for consideration under s. 3. In Kelly, *Ms. T.T* put forward a number of grounds which she submitted demonstrated a serious risk of injustice to her were a s 4 order to be made.

75. In the present case, Ms. Mullane is not a respondent, and neither did she seek to be joined so that she could make out a case that a serious injustice would arise if an order was made. No evidence was adduced by either of the appellants upon which to ground an argument that an injustice would arise. Nor in the High Court was any submission made to the trial judge either by reference to the evidence that was before the High Court or otherwise that a serious injustice would arise for Ms. Mullane. Nevertheless, it is submitted that the trial judge fell into error by the Court of its own motion failing to make such inquiries or seek out evidence and inviting submissions on the specific question of injustice. It is submitted that he was not entitled, even in the absence of evidence or submissions being made to him, to simply express in his judgment that in the light of the factors identified by MacMenamin J. in his judgment in *Kelly* he was satisfied that there was no risk of injustice in the present case.

76. I cannot agree that there is such an obligation on the trial judge. The appellants have overlooked the fact that one of the factors which is identified by MacMenamin J. in his said judgment is that at (g) namely:

> "The legal and evidential onus of proof falls upon the party seeking to contend that the making of an order would render an injustice. The onus falls on such party to prove their case as a matter of probability on the evidence adduced."

77. In my view, in the absence of anything being offered by way of evidence or even by way of submission based on what evidence was already before the Court for the purpose of the other aspects of the s.3 application, albeit on behalf of Ms. Mullane, rather than by her since she herself was not a party to the proceedings and did not seek to be joined, the trial judge was entitled to express himself as satisfied that there was no serious injustice. He was not obliged to seek out, or inquire about, some evidential basis for injustice where none was proffered. The onus in that regard was upon Ms. Mullane if she wished to make that case.

78. I would dismiss that ground of appeal also.

79. For all these reasons I would dismiss this appeal.