THE HIGH COURT

PROCEEDS OF CRIME

[2016 No. 11 CAB]

BETWEEN

CRIMINAL ASSETS BUREAU

APPLICANT

- AND -

NEIL MANNION

RESPONDENT

JUDGMENT of the Hon. Ms. Justice Stewart delivered on the 17th day of December, 2018.

1. In these proceedings, the applicant (hereafter referred to as "the Bureau") seeks orders pursuant to s. 3 of the Proceeds of Crime Act 1996 (as amended) over the property specified in the schedule attached to the notice of motion dated 28th July, 2016. The property comprises of 2,013.96 Ether, known in currency terms as Ethereum, which was contained in a cryptocurrency wallet found on the respondent's computer. As of 28th July, 2016, the contents of the wallet were worth approximately €24,852. The respondent currently resides in Wheatfield Prison, following his conviction for offences contrary to ss. 3, 15 and 15A of the Misuse of Drugs Act 1977. On 21st December, 2015, he received a six and a half year sentence for those offences from the Circuit Criminal Court sitting in Dublin, a sentence which was upheld on appeal.

BACKGROUND

2. On 5th November, 2014, members of An Garda Siochana searched a property situated on South Circular Road. That search uncovered a number of controlled drugs stored at the premises. The respondent was arrested at the premises, taken into custody and interviewed on multiple occasions. His home was also searched. During interview, he admitted that the premises was being used as a drug distribution centre for the sale of controlled substances over the Darknet. He admitted that he traded on the Silk Road and Agora websites using the alias of "The Hulkster". The Hulkster was paid in Bitcoin for the sale and supply of these drugs. Following on from this search and seizure, the Bureau issued proceedings and sought orders over funds held by the respondent (*CAB v. Neil Mannion* (2015/15CAB), hereafter referred to as the first set of proceedings). Those funds included monies contained in bank accounts, credit cards, debit cards, gift cards, sums of cash and a substantial amount of Bitcoin. An order pursuant to s. 2 of the 1996 Act was made by Fullam J. on 12th October, 2015. A consent agreement was drawn up by the parties and Fullam J. made an order pursuant to s. 3 of the 1996 Act on 22nd February, 2016. Those proceedings were thereby "stayed and settled". The Ethereum did not feature in that first set of proceedings. A s. 2 order in respect of the Ether was made by Fullam J. on 27th July, 2016, as part of this second set of proceedings.

3. Following the respondent's arrest, numerous electronic devices were seized from his home and from the property located at South Circular Road. These devices included laptops, phones and removable storage devices. A forensic image of each device was made by the Computer Crime Investigation Unit of An Garda Siochana. These images were then delivered to Bureau Financial Crime Analyst No. 2 ("FCA2") for inspection. FCA2 swore an affidavit on 22nd July, 2016, in which they explained the manner in which the respondent's computer system operated. The respondent relied on a number of software programmes to facilitate his illegal activities, including Truecrypt software, the TOR network, Bitcoin and Ethereum. Much like Bitcoin, Ethereum currency is a blockchain technology with programmable transaction functionality. It began trading on 30th July, 2015, two months before a s. 2 order was made in the first set of proceedings by Fullam J.

4. FCA2's inspection, which occurred in November, 2014, uncovered cryptocurrency wallets containing the Bitcoin that formed part of the subject matter of the first set of proceedings. The wallet containing the Ethereum was also uncovered. However, at that time, Ethereum was not trading as a currency, meaning that the contents of the wallet could not be redeemed in the normal way. Its monetary value effectively equated to the 1 Bitcoin for which it had been originally purchased, which was worth approximately €350 at that time. The Ether was purchased with and converted from Bitcoin on 5th August, 2014, at a time when the respondent was, by his own admission, heavily involved in the sale and supply of illegal drugs over the Darknet. There is a statutory minimum value threshold required by ss. 2(1)(b) and 3(1)(b) of the 1996 Act, which must be met before an order pursuant to the 1996 Act can be made in respect of an item of property. At the relevant time, this minimum value threshold was €13,000 (The Proceeds of Crime (Amendment) Act 2016 lowered this threshold to a minimum of €5,000, as of 12th August, 2016). Based on the evidence adduced before this Court, it would appear that the failure to meet this threshold was not the reason the Ether was left out of the first set of proceedings. Rather, the Bureau's concerns seem to have been based on practicality, as a non-trading currency has no established forum in which to sell it and realise its value. In light of these concerns, the wallet's presence on the respondent's system was merely noted during FCA2's inspection and no further action was taken in respect of it.

5. In late May, 2016, after the consent order had been made by Fullam J., FCA2 carried out a case review of the original investigation material, so as to ensure all matters had been properly addressed before the papers were sent for archiving. In the course of completing that review, they re-examined the cryptocurrency wallet containing the Ether. FCA2 noticed that Ethereum had commenced trading and that the Ether could be sold for a significant sum of money. This issue was brought to the attention of other Bureau officials and FCA2 was directed by then Assistant Garda Commissioner Eugene Corcoran, who was also Chief Bureau Officer (CBO) of the Bureau at the time, to seize the contents of the wallet. FCA2 transferred the Ether from the wallet stored on the respondent's computer to a wallet under the sole control of the Bureau.

6. The respondent swore affidavits on 13th September and 10th November, 2016. The first affidavit was sworn for the purposes of gaining access to the *Ad Hoc* Legal Aid Scheme. Fullam J. made an order granting him access to the Scheme on 17th October, 2016. A similar application had been made and acceded to during the first set of proceedings. The second affidavit sets out the respondent's side of the case. He avers that he contested the first set of proceedings on grounds that he had legitimate funds from past employment and investment which should not be seized by the Bureau. The consent agreement reached between the parties in those proceedings included the following terms:

> (a) Consent to an order pursuant to s. 2(3) of the 1996 Act releasing 50% of the funds contained in the respondent's Dundrum Credit Account;

(b) Consent to various orders pursuant to the 1996 Act over the remaining assets listed in the Schedule to the agreement, including a disposal order; and,

(c) Full co-operation with the Bureau in their attempts to realise the full value of the assets contained in the Schedule.

The respondent avers that he understood this consent to act as a settlement in full and final discharge of any liability he had to the Bureau. In his view, he had consented to a search of his computer by the authorities during the course of the initial criminal investigation in November, 2014, but had not consented to an indefinite power of search vested in State officers. He therefore challenges the basis on which his computer was accessed after the investigation had concluded.

7. The respondent avers that Ethereum was trading prior to July, 2015, albeit at a extremely reduced rate of value when compared to the value it currently has. Notwithstanding his failure to volunteer information about the Ether or draw An Garda Siochana's attention to it, he argues that the wallet was readily discoverable. He refers back to the transcripts of his numerous interviews with members of An Garda Siochana, in which he outlined the sources of his income and the manner in which his business was carried out. He avers that any Bitcoin secured through illegitimate activity was transferred onto prepaid debit cards and was not used to purchase the Ether in question.

8. Detective Garda Mark Gallagher swore an affidavit on 15th November, 2016, in which he highlights that the respondent's laptop was seized under a warrant secured from a District Court Judge pursuant to s. 26(1)(b) of the Misuse of Drugs Act 1977/84, thereby rendering his consent irrelevant. He also avers that the respondent's laptop was not continuously operated by the authorities, as it was a forensic image of the computer that was interrogated for the purposes of the review. Allegedly, the seizure of the Ether was also conducted in a manner that did not require access to the respondent's computer. The respondent's averment at para. 16 of his affidavit is also highlighted, wherein he states that the proceeds of his drug trafficking formed a part of his investment in Bitcoin. Det. Garda Gallagher challenges the suggestion that the Ether was bought with legitimately procured Bitcoin, as the respondent has failed to produce evidence as to how said legitimate Bitcoin was purchased and how it is to be differentiated from his illegitimate Bitcoin. Even if such legitimate Bitcoin did exist, Det. Garda Gallagher asserts that it is tainted by the money laundering process of substitution, as he could never have accrued these legitimate funds if he had not used illegitimate funds to fund his daily lifestyle.

9. Detective Chief Superintendent Patrick Clavin, who is the current CBO of the Bureau following the departure of Assistant Commissioner Corcoran, swore an affidavit on 15th November, 2016. He avers that he has reviewed all the material in this case and firmly believes that the Ether constitutes directly or indirectly the proceeds of crime. He proffers that belief to this Court as evidence under s. 8 of the 1996 Act.

THE HEARING

10. Both parties served notices to cross-examine the deponents on the contents of their affidavits. At the hearing on 22nd March, 2017, Det. Garda Gallagher, FCA2 and the respondent all gave evidence viva voce and under oath. Det. Garda Gallagher gave evidence as to the magnitude of this investigation; the enterprise established by the respondent was of an entirely different character to any that An Garda Siochana had encountered before. A great deal of time and effort went into the investigation and protocol was rigorously adhered to, in so far as it could be applied to this new field of criminality. He highlighted evidence that illegitimate funds came to be proliferated outside the respondent's debit cards. He also stated that the Hulkster's activities were recorded as far back as April, 2014. When pressed about the respondent's legitimate funds, Det. Garda Gallagher stressed that Bureau officials were open to examining any evidence that the respondent could provide to distinguish between legitimate and illegitimate funds, as they had done during the first set of proceedings regarding his Dundrum Credit Union Account, but none was forthcoming.

11. In Det. Garda Gallagher's view, the conclusion of High Court proceedings does not necessarily indicate the conclusion of the Bureau's overall investigation. His evidence was that a review must take place, through which the Bureau could be satisfied that all matters within its remit have been addressed and that the investigation can be concluded. He stated that the Bureau were unaware, when they commenced the first set of proceedings, that Ethereum had begun trading some months prior, as there was no continuous review process in place to routinely check whether assets previously considered worthless had since attained value. In his view, that was a "human error" that had been addressed in the review process that actually took place. He highlighted that such a mistake could readily be explained by the fact that An Garda Siochana were exploring a new field of criminal activity. As for the conclusion reached by the Bureau that the Ether had no value prior to July, 2015, Det. Garda Gallagher did not see how the Bureau could have gone about selling an asset for which there was no established market or forum of interested buyers.

12. In terms of the procedures governing the review process, Det. Garda Gallagher stated that there were was no policy or procedure in place. Reviews are completed whenever the investigating officers have the free time to complete them and/or whenever they wish to free up space in their office. He stated that the review generally takes place as close to the conclusion of proceedings as possible. Reviews are not carried during the currency of proceedings as there are insufficient time and resources available for such an arrangement.

13. In oral evidence, FCA2 provided a more in-depth explanation of the technological concepts arising in this matter. They were in full agreement with Det. Garda Gallagher that the Ether did not have any value prior to July, 2015. They stated that the respondent had effectively purchased the equivalent of a betting slip; the Ether could only accrue value if a certain event occurred in the future (in this case, the commencement of trading for the Ethereum currency). In their view, there was no practical reality to securing a buyer for this betting slip. In contrast to Bitcoin, there were no block chains in place for Ethereum before trading commenced, meaning that there was no register of ownership. Even if a potential purchaser could be sure that the requisite future event would occur, there was no way to know whether their Ether file had been duplicated and sold on to secondary purchasers. If there were multiple purchasers, whoever cashed the slip in first secured the value of the asset and all other secondary purchasers would be left with nothing. In FCA2's opinion, this high level of risk rendered the slip unsellable in any established market.

14. For the purposes of cross-examination, an order for the production of the respondent from Wheatfield Prison was secured from this Court in January, 2017. He stated in evidence that some of the monies seized from his Dundrum Credit Union account and disposed of under the consent order were not tainted by his illegitimate funds. He stated that he had nevertheless consented to the orders made by Fullam J. in light of the substitution principle outlined on affidavit by Det. Garda Gallagher. He argued that, by settling the first case and releasing 50% of the funds contained in his Dundrum Credit Union account, the Bureau had acknowledged that he does have some legitimate income from his previous employment and from the legitimate trade of Bitcoin. In the respondent's view, the Ether has always had value and could be traded just like Bitcoin in a private forum between trusted buyers and sellers. When asked why he did not mention the Ether during Garda interview or during his legal aid applications, he stated that he was not aware that Ethereum had begun trading. As far as he was concerned, the Ether was only worth €350, so it was not an asset of significant value that would come to mind when making a legal aid application.

15. The respondent stated that he kept the legitimate and illegitimate funds in separate wallets, so as to prevent cross-contamination, and that no illegitimate business went through the e-mail address he used to purchase the Ether. Birmingham J.'s (as he then was) characterisation of the respondent, as set out in the Court of Appeal's decision of his sentencing appeal, was read over by counsel on behalf of the Bureau. The respondent directly challenged those findings, as well as the evidence proffered by the State during the criminal proceedings, maintaining that they were not accurate. He stated that any suggestion of cross-contamination or substitution made by him during the course of the Garda interviews was made for the purposes of accentuating any mitigating factors he could rely on at the sentencing stage of his trial. According to his version of events, all illegitimately earned Bitcoin was kept in a separate wallet under encryption. No explanation was offered by the respondent as to why he had consented in the first set of proceedings to the disposal of Bitcoin that had been kept in un-encrypted wallets. The respondent appeared to suggest that he consented to the disposal order sought by the Bureau because he wished to conclude matters and put the Bureau's proceedings behind him.

16. When asked why he had not produced any records to evidence his legitimate investments, the respondent argued that the enquiries made of him by Gardai were insignificant. Even if they had been significant, he stated that he had not been in a position to produce those records, as a freezing order had been secured over the relevant bank account by the Bureau. When counsel on behalf of the Bureau pointed out that all relevant records would have been provided to him during the first set of proceedings, had he or his legal representatives asked for them, the respondent stated that he was unsure what material had been provided.. The respondent was cross-examined in detail about the timeline of events that occurred in 2014. It was suggested that the respondent had been dealing drugs as far back as April, 2014, which is a period of activity three or four months longer than the period he outlined in his Garda interviews. The respondent accepted that he had been dealing drugs as far back as April, 2014.

SUBMISSIONS

17. The respondent places significant reliance on the principles outlined by the Supreme Court in *DPP v. JC* [2017] 1 I.R. 417 and *CAB v. Murphy* [2018] IESC 12. He also relies on the Supreme Court's consideration of privacy rights, as expressed in *CRH Plc v. The Competition and Consumer Protection Commissioner* [2017] IESC 34. He submits that the Supreme Court's views correlate with the European Court of Human Rights' (ECtHR) views on privacy in the criminal context, as expressed in *S & Marper v. United Kingdom* (2009) 48 EHRR 50. He submits that s. 9 of the Criminal Law Act 1976 addresses that issue in this jurisdiction.

18. The respondent submits that the criminal proceedings against him concluded on 21st December, 2015. In his view, from that date onwards, the State no longer had the authority under s. 9 of the 1976 Act to retain his computer system or any copies made of it. In his submission, the process of returning the computer and wiping the copies should have commenced after that date. Even if the review carried out by FCA2 were allowed, the Court's attention is drawn to the *ad hoc* and highly discretionary manner in which State actors are allowed to conduct themselves in matters such as this. It is submitted that the *status quo* is completely at variance with the Supreme Court judgment in *CRH* and the ECtHR's decision in *Marper*. As for the appropriate test to apply, the respondent submits that it is the test in *J.C.* In applying that test, the respondent concedes that this was not a deliberate and conscious breach, as that term is understood following the *J.C.* decision. Rather, he submits that the breach was inadvertent. Given the complete lack of authority for the informal review carried out by FCA2 in breach of the respondent's rights, it its submitted that this inadvertence is not excusable and the material should be excluded. Independent of the respondent's arguments under *Murphy* and *J.C.*, it was submitted that these proceedings are an abuse of process, as set out by the rule in *Henderson v. Henderson*.

19. In characterising the nature and scale of the respondent's criminality, the Bureau refer to the Court of Appeal's judgment on the severity of his sentence (*DPP v. Mannion* [2016] IECA 314), wherein Birmingham P. stated that the respondent had engaged in a commercial enterprise on an international scale. Once again, the lack of detail provided by the respondent about his legitimate investments was underlined by the Bureau. As stated by Det. Garda Gallagher under cross-examination, activity on the Darknet by the Hulkster was detected from April, 2014 onwards and the respondent left gainful employment in 2013, meaning that any Bitcoin investments after those dates are tainted by illegality. The Bureau highlights that the Ether was purchased around the same time that a large consignment of ecstasy tablets was procured by the respondent. As for the respondent's oral evidence that he was unaware of the Ether's value, thereby explaining why he did not declare it during the course of his first legal aid application, the Bureau does not find that suggestion credible, given that he was on bail at the time and had full access to the internet.

20. The Bureau place great emphasis on the public policy principles underlying proceeds of crimes actions, as expressed in various decisions of the Superior Courts. A statutory expression of those principles is referred to in ss. 4 and 5 of the Criminal Assets Bureau Act 1996. It is submitted that these principles provide the framework within which the Bureau exercises its power to gather evidence. Regarding s. 9 of the 1976 Act, the Bureau highlight that this section envisions the retention of material until proceedings conclude, after which an application under the Police (Property) Act 1897 can be made. In their submission, this Act provides a mechanism by which the owners of seized assets can apply for the return of those assets. No application was made in this case. They suggest that s. 9 does not render access of the laptop unlawful after the conclusion of the proceedings. However, for the sake of argument, if the Court did find that the respondent's rights had been breached, the Bureau submit that it is the *Murphy* test that applies, and not the *J.C.* test. It is submitted that there was no recklessness or gross negligence in this case, nor was the alleged breach deliberate and conscious. Rather, a mere human error occurred, an error which the respondent alleges he also made, if it is true that he did not know Ethereum had begun trading when he applied for access to the legal aid scheme.

DISCUSSION

21. The applicant Bureau is a statutory body established by the Criminal Assets Bureau Act 1996 and the Proceeds of Crime Act 1996. Its remit is to identify assets which it believes represent the proceeds of crime and take the steps necessary to deny persons with access to those assets of their beneficial entitlements to same. The Bureau is not an injured or aggrieved party with whom settlement can be reached and liability discharged. The respondent is not liable to the Bureau. The Bureau have reason to believe that the respondent has access to assets that come within its remit and it has come to this Court to prove its case. There is no issue of liability here and any averments made by the respondent suggesting otherwise are misconceived. As for the matters actually at issue in this case, the parties have raised a number of detailed legal arguments arising from complex areas of the law, so it would be of benefit for the Court to discuss each issue in turn before setting out its decision in this matter.

Criminal Assets Bureau v. Murphy

22. The Supreme Court hearing in *Murphy* took place the week after the hearing in this matter commenced on 22nd March, 2017. Given the potential relevance of the *Murphy* decision, counsel suggested at the conclusion of the evidence that legal argument be adjourned to a date after the Supreme Court delivered its judgment. This transpired to be a wise suggestion, as the judgment in *Murphy* is highly relevant to this matter and serves as a definitive statement on the law in this area. O'Malley J. carried out an extensive and detailed review of the authorities and the issues of concern in proceeds of crime cases. She notes the centrality of fair procedures to such matters and the requirement that a breach of constitutional rights must have consequences. At para. 121, she refers to the common themes that guide the Judiciary in their application of the exclusionary rule, which are *"...the integrity of the administration of justice, the need to encourage agents of the State to comply with the law or deter them from breaking it, and the*

constitutional obligation to protect and vindicate the rights of individuals." She continues thereafter:-

> *"…These are all concepts of high constitutional importance. Each of them, or a combination thereof, has been seen as sufficient to ground a principle that is capable of denying to the State or its agents the benefit of a violation of rights carried out in the course of the exercise of a coercive legal power."*

23. In addressing the issue of what impact a breach of rights has on the litigation of proceeds of crime applications, O'Malley J. states that the correct approach is to be assessed in light of the role that the affected item plays in the proceedings. If the item purports to be evidence "in the true sense", a phrase which I take to mean that it has been adduced for the purposes of tending to prove any disputed issue of fact, then the issue at hand is whether the evidence in question should be excluded from the proceedings. In determining that issue, the test outlined by the Supreme Court in *J.C.* applies, save for the substitution of the "beyond reasonable doubt" standard of proof for the standard applicable in civil proceedings. Where the item comprises all or part of the subject matter of the application, an entirely different set of considerations arise. In those circumstances, the item is not adduced for the purposes of tending to prove any disputed issue of fact and the *J.C.* test has no application. Rather, the Court is concerned with the question of whether the item was seized in such circumstances that, by making the order sought, the Court would be lending its processes to actions on the part of State agents who are discharging their duty in an improper fashion. In such cases, the Court must act to vindicate the respondent's right to fair procedures and to prevent its own procedures from being abused. In determining that issue, the Court is guided not by the exclusionary rule, but by the principles which underlie that rule. Those principles were examined in detail over the course of O'Malley J.'s decision and would include the common themes referred to above.

24. Much clarity has been brought to the law by the judgment in *Murphy*. For example, it is clear that, where the State's improper activity involved a deliberate and conscious breach of constitutional rights, the order must be refused. Where the breach was brought about by reckless or grossly negligent behaviour, the Court retains a discretion to make the order sought, albeit with a presumption in favour of refusal. It is also clear that the question of a breach must be expressly raised on affidavit. The question is determined at the end of the hearing, after the Court has determined whether the asset represents directly or indirectly the proceeds of crime. The judgment also addresses who bears the burden of proof (para. 133), the relevance to be found in the breach of a third party's rights (para. 134) and allegations of co-ownership (para. 135). I do not propose to dwell on the latter two issues, as they do not arise on the facts of this case. However, there are two issues identified in the decision, which appear to have been left open for the High Court to consider at first instance, that require a brief examination at this juncture.

25. At para. 137, O'Malley J. states that an order dismissing the Bureau's application would not, in all cases, result in the return of the asset to the respondent from whom it had been seized. That finding is premised upon the fact that there is no constitutional or legal right to property acquired through the proceeds of crime. It is unclear precisely what approach the High Court is expected to take in those circumstances. I would certainly require detailed legal submissions from all the relevant parties, should this issue ever arise. It is clear from the authorities, not least Keane C.J.'s decision in *Murphy v. G.M.* [2001] 4 I.R. 113, at p. 137, that the respondent remains the owner of the asset in question up until the point where an order pursuant to s. 4 of the 1996 Act is made allowing for the disposal of that asset. Orders pursuant to ss. 2 and 3 of the 1996 Act serve only to freeze the asset and deprive the respondent of the beneficial enjoyment to which they would otherwise be entitled. Should the Court ever be satisfied that an order pursuant to s. 3 should not be made, the provisions of s. 2(5) of the 1996 Act would be engaged. Assuming the Court's refusal to make a s. 3 order was not appealed, or, if it was appealed, that said appeal was not upheld, the interim order made pursuant to s. 2 would lapse. The asset in question would no longer be frozen and beneficial enjoyment of the asset would immediately become vested in the legal owner, i.e. the respondent, for them to deal with as they so wish.

26. It remains unclear how the Supreme Court's observations at para. 137 are to operate in practice and thereby continue to deny a respondent the beneficial enjoyment of an asset after a s. 3 application in respect of that asset has been refused. It may be argued that orders could be sought pursuant to ss. 5 or 7 of the 1996 Act before the interim order lapses pursuant to s. 2(5). In my view, such an imaginative suggestion would afford those sections a reading that is far too generous, given the draconian nature of these types of proceedings. The High Court also does not appear to have the necessary discretion to act on its own motion and make an order effectively preserving the status quo.

27. Even if such consequential orders could be made, which would preserve the *status quo*, it is unclear what is to be done with the asset afterwards. In light of the Court's finding that the asset represents the proceeds of crime, the respondent has no constitutional or legal right to it. That said, the asset cannot be disposed of in a manner that benefits the State, as to do so would undermine the entire basis on which the s. 3 application was refused (i.e. the responsibility of the Court to ensure fair procedures, prevent the abuse of its processes and to step away from State agents who misuse their authority and seek to benefit from a violation of rights carried out in the course of the exercise of a coercive legal power). So, what, precisely, is to be done with the asset, if it is not to be returned to the respondent? Is the Court entitled to exercise its discretion with regard to the disposal or future use of the property? Is the asset to be destroyed? It is possible that some other legislative provision provides the answers to all these questions. However, in reality, I think it more likely that the 1996 Act will require substantial amendment by the Oireachtas in order to account for the Supreme Court's observations.

28. The second point that arises is whether or not the s. 3 order should be refused where a constitutional right has been breached, but that breach was not reckless, grossly negligent or deliberate and conscious (e.g. an act of inadvertence). It has also not been specifically stated what is to be done if the infringed right was legal, rather than constitutional, in nature. In considering these questions, it is worth referring to paras. 125-127 of O'Malley J.'s decision, where it is stated:

> *"125. I indicated at an early stage in this judgment that I felt that labelling the issue in this particular case as the applicability of the rule excluding unconstitutionally obtained evidence was unhelpful, because the cash in question was not evidence as such, and treating it as evidence for the purposes of the rule could potentially lead to absurd results in the event that more than one person could mount a claim to ownership…Defined consequences flow from a finding that [the asset represents the proceeds of crime], and those consequences cannot take effect as against one person but not as against another…*
>
> *126. For the same reason, the modified version of the J.C. test proposed by the appellants cannot, in my view, work effectively. The question, then, is the appropriate response of a court where a breach of constitutional rights is involved in the seizure of the assets concerned in the case.*
>
> *127. While the* J.C. *test is not an exact fit, the general approach of the Court can, I believe, be adapted to produce an appropriate response to this issue in proceedings under the Proceeds of Crime Act."*

In light of those observations, it is to *J.C.* that this Court now turns.

29. In normal circumstances, given the lack of direct applicability, the Court would consider *J.C.* only in a very broad sense and only as far as was necessary to dispose of the application before it. However, the respondent has submitted that it is *J.C.*, and not *Murphy*, that sets out the applicable test in this matter, so the Court will consider the Supreme Court's application of the exclusionary rule, as expressed in *J.C.*, in a little more detail. The Court notes O'Donnell J.'s circumscription of his judgment to the area of search warrants. While O'Donnell J. is a member of the deciding majority in *J.C.*, his is not the majority judgment. The majority judgment is that of Clarke J. (as he then was), and his decision makes no reference to a limitation on the applicability of the *J.C.* test, save for circumstances where the probity/integrity of the evidence is also in question.

30. At para. 871, Clarke J. summarises the test as follows:

> *"(i) the onus rests on the prosecution to establish the admissibility of all evidence. The test which follows is concerned with objections to the admissibility of evidence where the objection relates solely to the circumstances in which the evidence was gathered and does not concern the integrity or probative value of the evidence concerned;*
>
> *(ii) where objection is taken to the admissibility of evidence on the grounds that it was taken in circumstances of unconstitutionality, the onus remains on the prosecution to establish either:-*
>
> > *(a) that the evidence was not gathered in circumstances of unconstitutionality; or*
> >
> > *(b) that, if it was, it remains appropriate for the court to nonetheless admit the evidence.*
>
> *The onus in seeking to justify the admission of evidence taken in unconstitutional circumstances places on the prosecution an obligation to explain the basis on which it is said that the evidence should, nonetheless, be admitted AND ALSO to establish any facts necessary to justify such a basis;*
>
> *(iii) any facts relied on by the prosecution to establish any of the matters referred to at (ii) must be established beyond reasonable doubt;*
>
> *(iv) where evidence is taken in deliberate and conscious violation of constitutional rights then the evidence should be excluded save in those exceptional circumstances considered in the existing jurisprudence. In this context deliberate and conscious refers to knowledge of the unconstitutionality of the taking of the relevant evidence rather than applying to the acts concerned. The assessment as to whether evidence was taken in deliberate and conscious violation of constitutional rights requires an analysis of the conduct or state of mind not only of the individual who actually gathered the evidence concerned but also any other senior official or officials within the investigating or enforcement authority concerned who is involved either in that decision or in decisions of that type generally or in putting in place policies concerning evidence gathering of the type concerned;*
>
> *(v) where evidence is taken in circumstances of unconstitutionality but where the prosecution establishes that same was not conscious and deliberate in the sense previously appearing, then a presumption against the admission of the relevant evidence arises. Such evidence should be admitted where the prosecution establishes that the evidence was obtained in circumstances where any breach of rights was due to inadvertence or derives from subsequent legal developments;*
>
> *(vi) evidence which is obtained or gathered in circumstances where same could not have been constitutionally obtained or gathered should not be admitted even if those involved in the relevant evidence gathering were unaware due to inadvertence of the absence of authority."*

31. Under *J.C.*, the first issue which the Court must determine is whether a legitimate question has been raised about a piece of evidence, which challenges the admissibility of that evidence on grounds connected with the manner in which it was gathered or obtained, and not on grounds connected with its probity or integrity. Where that question does relate to probity or integrity, it is unclear whether an entirely different test applies or whether the *J.C.* test is to be applied to the admissibility aspect of the question once the issues with probity/integrity have been disposed of. That issue does not arise in these proceedings, so the Court will not comment further. It is difficult to define what is and is not a legitimate question. However, I am of the view that such a question would, at the very least, have to specify not just the evidence under challenge, but also the act which allegedly constitutes a breach of rights and/or the precise right which has been allegedly breached.

32. The next step is to determine whether the prosecution have established beyond reasonable doubt (any reference to "beyond reasonable doubt" in this judgment should be substituted for "the balance of probabilities" when dealing with civil matters) that said evidence was not gathered in circumstances of unconstitutionality. Should they fail to do so, the Court must then determine whether it was possible to have gathered said evidence in a constitutional manner. If not, then the evidence must be excluded under principle (vi) of the *J.C.* test. If it was possible to have gathered the evidence in a constitutional manner, the prosecution must establish beyond reasonable doubt not just the grounds on which it remains appropriate to admit the evidence, but also the facts which support those grounds.

33. The possibilities for the proper gathering of evidence are effectively comprised of the processes or provisions that provide for such gathering; if it is possible to gather evidence properly, there must be a legal process or provision allowing for same. A natural corollary to that proposition is the precise reason why the State agent(s) failed to comply with that process or provision. This is effectively the first principle that guides the Court's determination on whether it remains appropriate to admit the evidence. It seems to me that the *J.C.* test allows for four distinct reasons to explain such a failure, into which all breaches can be categorised: a deliberate and conscious act, a reckless or grossly negligent act, an inadvertent act or an act that was proper at the time it was carried out but has since been rendered improper by subsequent legal developments. Each of these reasons gives rise to significant legal questions and differing degrees of discretion, which will require detailed exploration if and when they become live issues before a court. At para. 20 of his written submissions, the respondent submits:-

> "…In this regard, while it could not be said that the breach of the respondent's rights was either deliberate or conscious, equally it is respectfully submitted that the error was "inadvertent" in the sense used in [*J.C.*]…"

The Bureau have submitted that, if this Court were to determine that a breach of the respondent's rights has occurred, said breach

was entirely inadvertent. Therefore, it is only the third reason (an inadvertent act) that requires further discussion on the facts of this case.

34. Principle (v) applies to cases where a court is satisfied beyond reasonable doubt that the breach was not deliberate and conscious on the part of the State agent or on the part of the senior officials that guided the agent's actions. In those circumstances, a presumption arises against the admission of the evidence. That presumption will be rebutted if a court is satisfied beyond reasonable doubt that the breach was inadvertent or arises from subsequent legal developments. It is necessary to try and provide some definition to the term "inadvertence". It seems clear to me that the *J.C.* test was formulated to allow for the admission of evidence where the breach was brought about by what O'Donnell J. referred to at para. 489 as "inadvertence, good faith or excusable error". This would include "human error". It also seems clear to me that, by O'Donnell J.'s use of such a collection of terms, the Supreme Court envisioned a two-part exercise when construing inadvertence: the Court must be satisfied beyond reasonable doubt firstly that the breach was inadvertent and secondly that such inadvertence was excusable. The admission of evidence on such grounds would only be entertained where the State agent's *bona fides* is not in question. For example, the Court would generally have to be satisfied beyond reasonable doubt that the agent had made an effort to behave in the proper fashion, which is sufficient to lift their mistake outside the realm of inexcusable error (i.e. recklessness or gross negligence).

35. In assessing the *bona fides* and excusable nature of the agent's behaviour, it is important to bear in mind that the Court is actively searching for evidence of those two concepts. The presence of *bona fides* is not evidenced by an absence of *mala fides*. The two concepts are to be assessed in the light of the following statement from Clarke J.'s judgment, at para. 857:-

> *"[857] It might be argued that permitting the admission of evidence taken in circumstances of inadvertent breach could place a premium on ignorance. Evidence obtained in conscious and deliberate violation of constitutional rights, in the sense in which I have used that term, will be excluded. It might be said that it is more easily determined that the knowledgeable were aware of what they were doing compared with those who may be ignorant of the relevant law. However, it is clear from the sense in which I have suggested that the term "inadvertence" should be used that investigative agencies cannot hide behind an unacceptable lack of knowledge appropriate to their task for the purposes of pleading inadvertence. It does not, therefore, seem to me that the test which I propose, when properly analysed, gives any comfort to those who might seek to rely on exaggerated ignorance of the law to escape a ruling in favour of the admission of evidence taken in breach of constitutional rights."*

36. The Supreme Court has made absolutely clear that there is no premium on ignorance. *J.C.* does not open the door for senior officials to utilise a professed lack of knowledge in relation to the matter in order to secure the admission of otherwise improperly obtained evidence. For inadvertence to be excusable, there needs to be evidence of a serious engagement with the duties and legal requirements that come with holding the position of a State agent. The reference by Clarke J. to "investigative agencies" would also indicate that, much like cases of deliberate and conscious breach, there is a systemic element to excusable inadvertence. Where the officer "at the coal face" gives evidence that goes to inadvertence, the Court must also be satisfied beyond reasonable doubt that 1) the system in which the officer operated (and the senior officials who instructed them) had no hand, act or part in bringing about that inadvertence, or 2) if they did have such a role, that said role was also excusably inadvertent on their part. While principle (v) does not make explicit reference to an assessment of conduct or state of mind, as is contained in principle (iv), I am satisfied that the exercise which the Court must undertake operates in similar terms.

37. The Court notes that there would be appear to be a discretion vested in the Court as to whether it should assess conduct or state of mind. Certainly, the *J.C.* test does not require an assessment of both conduct and state of mind. The relevance and impact of that discretion, and the distinction between the two concepts, are matters that do not require determination on the facts of this case. Det. Garda Gallagher's evidence was that there is no policy on the review process and that it was a matter for the individual officer to address. In circumstances where there would appear to be no directing mind of a senior official guiding this process, there is no systemic state of mind for the Court to examine. Therefore, an assessment of senior officials' conduct is required. In this case, the conduct in question would be their decision 1) not to provide a directing mind, and 2) not to take any directive role in the review process at all, thereby leaving it to the official "at the coal face" to act in their own discretion. This assessment seeks to determine whether such conduct amounts to excusable inadvertence, assuming of course that the prior elements of the *J.C.* test were satisfied in this case and it therefore becomes necessary to perform such an assessment.

38. In performing this assessment, the margin of excusable inadvertence is narrower for senior officials than it is for the officer "at the coal face", as senior officials are expected to be more knowledgeable about their duties. Similarly, I would expect the system to be set up in a manner that accounts for and protects citizens' rights. The Court is not seeking to determine whether there is a policy of disregarding citizens' rights (an approach that was condemned by the Supreme Court in *DPP v. Madden* [1977] I.R. 336 and referred to by MacMenamin J. at para. 921 of *J.C.*), but whether there is a policy that seeks to protect and vindicate the rights of the individual, and thereby prevent breaches from occurring in the first place. The lack of any policy would be a relevant factor in a court's assessment, as the failure by senior officials to provide guidance naturally increases the chances that a breach will occur. This is by no means the determinative factor on excusable inadvertence. Unusual and unexpected scenarios can arise from the most innocuous of circumstances. It is possible that the State could not have reasonably foreseen that the system in question would give rise to a situation that would require guidance in order to prevent a breach of rights. Furthermore, it is possible that the State can provide a reason to justify the current absence of such a policy (See, for example, *DPP v. Murphy* [2016] IECA 287, albeit in the context of a breach of statutory rights, wherein Mahon J. stated that the systemic failure arose from "technical difficulty of giving effect to the stated policy of the legislature"). That said, the lack of guidance is a significant factor for the Court to consider, along with how technical or substantial the breach was, whether it was localised or widespread, whether there were multiple breaches etc.

39. It should finally be noted that, even if excusable inadvertence by both junior and senior officials is established, and the presumption outlined in principle (v) has thereby been rebutted, this does not automatically mean that the evidence must be admitted. The first principle of any criminal proceeding is a fair trial in due course of law. If the State's actions would irreparably undermine that principle, the courts must act to vindicate the rights of the accused, no matter how inadvertent the breach may have been.

Section 9 of the Criminal Law Act 1976

40. Section 9 of the 1976 Act reads as follows:-

> 9.—(1) Where in the course of exercising any powers under this Act or in the course of a search carried out under any other power, a member of the Garda Síochána, a prison officer or a member of the Defence Forces finds or comes into possession of anything which he believes to be evidence of any offence or suspected offence, it may be seized and retained for use as evidence in any criminal proceedings, or in any proceedings in relation to a breach of prison discipline, for such period from the date of seizure as is reasonable or, if proceedings are commenced in which the thing so seized is

required for use in evidence, until the conclusion of the proceedings, and thereafter the Police (Property) Act, 1897, shall apply to the thing so seized in the same manner as that Act applies to property which has come into the possession of the Garda Síochána in the circumstances mentioned in that Act.

…

In determining the point at which the Police (Property) Act 1897 applies, s. 9 provides for two scenarios: 1) the period from the date of seizure reaches a point where it is no longer reasonable, or 2) the conclusion of proceedings in which the item seized and retained is required for use in evidence. On the facts of this case, such proceedings would include both the criminal proceedings and the first set of CAB proceedings. Assuming I am satisfied that the principles in *Murphy* and *J.C.* have not been breached, this second set of CAB proceedings would also be relevant for the purposes of s. 9. Normally, CAB proceedings do not fully conclude for a least seven years, as a s. 4 disposal application cannot be made until at least seven years have passed from the making of the s. 3 order. The Bureau is undoubtedly entitled to retain all evidence on which it relies until its interest in the case is fully concluded. However, as a s. 4A consent order was made, that consideration does not arise on the facts of this case. The 1897 Act provides that a member of An Garda Siochana or a claimant to the property can make an application to a court of summary jurisdiction for an order returning the property to the owner or, where the owner cannot be ascertained, whatever order the relevant court deems appropriate. Where the owner cannot be ascertained and a competent court has not made any order, the Minister may make regulations for the disposal of such property.

41. The respondent argues that the point at which the 1897 Act applies has been reached. When reached, he submits that the State is required under the Act to return his laptop to him and wipe any copies that were made of it, unless an order is secured from the District Court which directs otherwise. It is worth stating that legal authority on the operation of the 1897 and 1976 Acts was not put before this Court, save for para. 46 of *CRH*, which states that the onus is on the respondent to make a claim for the return of his property. I am satisfied that these provisions do not support the meaning that the respondent attributes to them. The respondent's construction of the 1976 Act was that, once the 1897 Act applies, the property is deemed to be illegally retained unless an application is made under the Act. That is not a correct construction of the law. The 1897 Act provides a process through which the ongoing retention of an item by the State can be reviewed and, if appropriate, concluded. Section 1 states that a court of summary jurisdiction may make appropriate orders where an application is made to it. Section 2 states that the Minister can make regulations to facilitate the disposal of the item where the owner cannot be ascertained and a court order has not been made. Unless a claimant makes an application, the process of review provided for under s. 1 is instigated by a member of An Garda Siochana. Assuming that the item's initial seizure and retention was lawful, the ongoing retention remains lawful until the process of review is completed.

42. If some impropriety arose in the carrying out or instigation of the review process, then different considerations would arise. But there is certainly no basis for suggesting that retention is rendered illegal as soon as the proceedings conclude. The State must be given a reasonable opportunity to review the facts at hand, prepare an application under s. 1 of the 1897 Act (if such an application is necessary) and institute that application before the District Court. Such an opportunity is all the more vital in complex cases such as this. This is an issue which I shall return to later on in this judgment.

The Decisions in *CRH PLC v. CCPC* and *S & Marper v. United Kingdom*

43. While both *CRH* and *Marper* address legal issues that are similar to those raised in this case (the constitutional right to privacy and Article 8 of the ECHR) they are both strikingly dis-similar in their facts when compared to the matter currently before the Court. In *CRH*, the legality of the original seizure was under challenge and the State authorities had acted with complete disregard for the plaintiffs' rights. The dispute also related primarily to e-mail communications, rather than to the computer itself. In *Marper*, the challenge arose in the traditional criminal context and related to DNA and fingerprint samples taken from the applicants. The Member State proposed to retain the applicants' biological information *de facto* indefinitely, notwithstanding the fact that they were legally innocent of any wrongdoing. I cannot ignore the differing factual matrix of these cases. I therefore propose to rely on *CRH* and *Marper* purely as statements of applicable principle.

44. In *CRH*, MacMenamin J. highlighted that the State's actions must be viewed within the precise context of the facts at hand. The search and seizure provisions in consumer protection legislation, by their very nature, operate differently than the provisions applicable to criminal investigations. The scope is narrower than it is in criminal matters, as is the degree of latitude afforded to the State regarding the relevance of what is seized. Time, urgency and necessity also run differently. The Court must bear these factors in mind when assessing the proportionality of the State's actions and whether it can be said that a system of tangible, independent judicial supervision is in place, as envisioned by the ECtHR. Both MacMenamin and Charleton JJ. make reference to the lack of a policy or a code of practice in respect of the seizures carried out. Indeed, Charelton J. even went so far as to recommend that a policy be drawn up for future cases.

45. At para. 29, MacMenamin J. stated that disproportionality was to be determined "having regarding to whether rational, necessary means were adopted to achieve the statutory objectives in question". At para. 55, he states that the right to privacy must be "harmonised with, and may be restricted by, the constitutional rights of others, the requirements of the common good, and the requirements of public order and morality". The "sphere of life" into which the State seeks to pry is also highly relevant. In the context of retention, this would include the sensitivity of the information sought to be retained. At para. 117, MacMenamin J. referred to numerous factors that influence applicable principle at the European level, including national security, economic wellbeing and the prevention of crime. This would coalesce with the principles of effectiveness and efficiency, as referred to at para. 42 of Laffoy J.'s judgment. Overall, the Supreme Court was unequivocal in its view that the right to privacy is a right with backbone; it cannot be whittled down to nothingness, "or submerged entirely in common good interests or duties". It is a right that must be vindicated and protected from unjust attack.

46. The ECtHR's conclusions in *Marper* broadly reflect the contents of Laffoy J.'s judgment, where she carefully analysed the European jurisprudence. Having determined that there was an interference with the applicants' Art. 8 rights, the ECtHR sought to determine where such interference was justified. This appraisal operated in the usual terms of whether the interference was in accordance with law, whether it served a legitimate aim and whether it was necessary in a democratic society. Having concluded that review, the Court decided that the indiscriminate nature of the State's powers failed to strike a fair balance between private and public interests, and therefore the margin of appreciation had been exceeded. This constituted a disproportionate interference with rights that could not be regarded as necessary in a democratic society. On that basis, the ECtHR found for the applicants.

DECISION

The Applicable Test

47. The parties disagree as to which test is applicable on the facts of this case, the test set out by O'Malley J. in *Murphy* or the test set out by Clarke J. in *J.C.* As stated above, this question is answered by examining the role that the item plays in the proceedings. Is

it evidence or is it the subject matter of the action? The subject matter of this action is the Ether. The Bureau have stated that the Ether was seized without actually interfering with the laptop or its original data. If this is so, the manner in which seizure was achieved was not properly explained to this Court. While FCA2 may have interrogated copies of the respondent's system, there is only one original copy of the wallet containing the Ether and it was stored on the respondent's computer. Presumably, the original had to be seized in order for the asset to be dealt with by the receiver appointed pursuant to s. 7 of the 1996 Act. Therefore, it is the subject matter of this action that is allegedly tainted with illegality, and not any piece of evidence which the Court could exclude if it were to make adverse findings under the *J.C.* test.

48. The Court notes that screenshots of the respondent's computer system are exhibited to the affidavit of FCA2 and that it is arguable whether some part of the computer system has been adduced before this Court as evidence. However, the exclusion of those screenshots would not advance the respondent's case very far, as they evidence the respondent's activities on the Silk Road and Agora websites. There is no dispute between the parties on that point. Having considered this issue in the round, it seems to me that the appropriate test is the test outlined in *Murphy*. That being so, the procedure that the Court must follow is clear: it must first determine on the balance of probabilities whether the subject matter of this action represents the proceeds of crime and then consider whether or not to refuse the application on grounds of unconstitutional activity in the seizure or retention of that subject matter.

The Test in *F. McK v. GWD*

49. The test for the granting of a s. 3 application is set out by McCracken J. in the case of *F. McK v. GWD* [2004] 2 I.R. 470. He states as follows, at para. 70:-

> *"70 … (1) [The Trial Judge] should firstly consider the position under s. 8. He should consider the evidence given by the member or authorised officer of his belief and at the same time consider any other evidence 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…."*

50. The evidence under consideration for the purposes of s. 8(1) of the 1996 Act is that of Assistant Commissioner Corcoran and Det. Chief Supt. Clavin, as set out in their affidavits dated 22nd July and 15th November, 2016, respectively. Assistant Commissioner Corcoran swore his affidavit as then-CBO for the purposes of the s. 2 application. Detective Chief Supt. Clavin swore his affidavit for the purposes of this s. 3 application and he adopts the contents of his predecessor's affidavit in that respect. Both CBOs refer to information and intelligence that has come to their attention over the course of their investigations into this matter. Assistant Commissioner Corcoran sets out the background to this matter in some detail, including the previous proceedings, the respondent's conviction, the operation of his criminal enterprise and the nature of his financial dealings. Having considered all of those matters, I am satisfied that there are reasonable grounds for the holding of the beliefs referred to in s. 8(1) of the 1996 Act. I am also satisfied that those beliefs are evidence for the purposes of these proceedings.

51. In considering the evidence tendered by the Bureau in this matter, it is noteworthy how little there is in dispute between the parties. It is common case that the respondent was engaged in significant criminal activity, that he had access to the proceeds of that criminal activity and that he expended those proceeds during the period in question. The dispute turns on whether or not the proceeds were expended for the purchase of the Ether that comprises the subject matter of these proceedings, or whether that purchase occurred using Bitcoin procured with legitimate income. The Bureau contend that there is no relevance to be found in this distinction. In their submission, even if "legitimate" Bitcoin were used to purchase the Ether, these legitimate funds were only available to the respondent because he used the proceeds of his crimes to offset the cost of daily living. I would only have to determine the issue of substitution if it is possible to distinguish between the respondent's legitimate and illegitimate monies.

52. During cross-examination, at 2:54PM on the day of the hearing, the respondent admitted that he had been dealing drugs from as far back as April, 2014. This represents a notable change in the evidence, most especially in light of my observations at paras. 54 and 55 below regarding the respondent's evidence. Up until the day of hearing, the respondent had always maintained that he only began dealing drugs three or four months before his arrest in November, 2014. The Ether was purchased on 5th August, 2014, which is around the same time the respondent had previously stated that he commenced his illicit activities. Clearly, the mixing between legitimate and illegitimate funds would be at a much more advanced stage if four months had passed since illegitimate funds began to accrue, and not merely a few weeks.

53. At the conclusion of the first set of proceedings, a consent order was made over debit cards, bank accounts, sums of cash and 50% of the funds contained in the respondent's Dundrum Credit Union Account. Irrespective of how much time had passed since the mixing of funds commenced, it is clear that illegitimate funds infected the respondent's entire financial infrastructure. It would be extremely difficult, if not impossible, to parse between the Bitcoin purchased through legitimate funds and the Bitcoin procured through illegal activity and illegitimate funds. It would seem more likely than unlikely that the Ether was purchased using Bitcoin procured through criminal activity and/or with the proceeds of crime. I am therefore satisfied that the evidence adduced before this Court constitutes a *prima facie* case under s. 3 of the 1996 Act. The onus has now shifted to the respondent to satisfy this Court that the Ether is not connected with the proceeds of his crimes.

54. The following excerpt is taken from the hearing, at 2:47PM:

"Q: Now I must put it to you, Mr. Mannion, that you are making the case that all of your illegitimate funds were on the Visa Debit electron cards. That simply doesn't stand up when placed against the fact that you admit that €7,000, just shy of €7,000, was lodged to your Ulster Bank account in Dundrum on 26th August and that that was from the sale of Bitcoin and that the Bitcoin was probably related to drugs?

A: I said that in interview in Rathmines, there might have been some minor cross-contamination. I said that because I was of the understanding that I would let this go, this money, either cross-contamination or substitution and that that would reflect well on me for my sentencing for the Section 15(a), which turned out to not be the case. But that is correct that I did say that.

Q: Is it now your evidence that that wasn't correct, that you now say that that didn't derive from the sale of Bitcoin?

A: It did derive from the sale of Bitcoin--

Q: - and –

A: - and I do accept that it is correct that there may be some relation to illegitimate funds."

This exchange is remarkable in two respects. Firstly, the respondent effectively admits that there has been some cross-contamination between his illegitimate funds and various other monies to which he had access. The clear blue water that supposedly existed between his two sources of money is a fiction. Secondly, the respondent has admitted that the information he provided to the authorities, in so far as it can be considered reliable, only extended so far as to bring about a situation more advantageous to himself. He was, in effect, willing to manufacture mitigating circumstances and frustrate the administration of justice in the process, if necessary. This admission reflects the comments of Gardai who interviewed the respondent on eleven occasions between November, 2014 and February, 2015. The interviewing officers make several references to their dis-satisfaction with the respondent's answers. Having had the opportunity to observe the respondent in the witness box as he gave his evidence, I find myself to be in complete agreement with those sentiments. At the very least, it can be said that the respondent has been economical with the truth. Those economies have been advanced to An Garda Siochana, the Bureau and several members of the Judiciary.

55. Given this patent lack of candour on the respondent's part, I cannot rely on his evidence with any degree of certainty unless it is supported by objective evidence. No such evidence has been adduced by the respondent. The respondent has submitted that his imprisonment inhibited his ability to make his case. The respondent was granted access to the *Ad Hoc* Legal Aid Scheme in both sets of proceedings. In the first set of proceedings, his legal team were able to prove to the Bureau's satisfaction that 50% of the funds in his Dundrum Credit Union account did not represent the proceeds of crime. Orders to that effect were made on consent by Fullam J. If the respondent had truly been as fastidious with his finances as he claims, then his legal team would undoubtedly have been able to secure the necessary evidence that would prove his case. They have not done so. There is no substantial, reliable evidence to fulfil the onus undertaken by the respondent and thereby rebut the *prima facie* case made out by the Bureau. That being the case, all that remains is to consider whether there would be a serious risk of injustice in granting the order sought. Independent of any concerns under *Murphy*, I am not satisfied that any such risk exists in this case. I am therefore disposed to granting the order sought.

Application of the test in *CAB v. Murphy*

56. The affidavits and submissions proffered by the respondent raise three issues for the Court to consider in applying the *Murphy* test: 1) the provisions of the 1897 and 1976 Acts, 2) a *Henderson v. Henderson* objection, and 3) the respondent's privacy rights. I must now assess whether the Bureau, as the moving party in this application, has established on the balance of probabilities that there was no element of illegality or unconstitutionality in their dealings with the Ether.

57. I am satisfied that neither of the scenarios envisioned by s. 9 of the 1976 Act can be said to apply to the subject matter of these proceedings. Proceedings were instigated by the State against the respondent and there could be no question of s. 9 arising until those proceedings conclude. The respondent has submitted that proceedings concluded on 21st December, 2015, when he was sentenced by His Honour Judge Nolan in the Circuit Criminal Court. In my view, it would be more accurate to submit that the determination of these matters concluded at first instance when the consent order was made by Fullam J. on 22nd February, 2016. But, even if that submission had been made, s. 9 would still not apply because the criminal proceedings were still in being. The respondent appealed his sentence to the Court of Appeal. Proceedings did not in fact come to an end until 3rd November, 2016, when the Court of Appeal delivered its decision. While the criminal proceedings had concluded at first instance in December, 2015, an appellate court is entitled to review all evidence and material that was put before the Trial Judge. It would reflect very poorly on the State if the Court of Appeal requested sight of a piece of evidence relied on at trial, only to be informed that the State had deleted it. It is only common sense that all evidence and material be retained and preserved until the proceedings had been brought to a complete end.

58. Even if I were of the view that proceedings concluded in February, 2016, and s. 9 applied thereafter, this would not help the respondent in any meaningful way. As set out at para. 42 above, a reasonable opportunity must be afforded to the State to prepare and institute an application under s. 1 of the 1897 Act, if such an application is necessary. The Ether was re-examined during a review process carried out in late May, 2016, approximately 3 months after the first set of proceedings concluded. This second set of proceedings commenced in late July, approximately 5 months after the first set of proceedings concluded. Even if proceedings had concluded and s. 9 applied, I am of the view that a period of 3-5 months comes within the time period afforded by that reasonable opportunity.

59. While the respondent has not sought to challenge the scope of the initial seizure carried out by Gardai, that scope informs later developments and is worth commenting on briefly. MacMenanmin J. found that the State is afforded significant latitude in terms of seizure during criminal investigations (para. 31 of his judgment in *CRH*). As the hub of his criminal enterprise, there can be no doubt that Gardai were entitled to seize and retain in full the contents of the respondent's laptop. It is quite probable that unrelated material was contained on the respondent's laptop, which did not need to be seized. But the facts of this case cannot be overlooked. This was not a series of e-mails that can be keyword-searched and filtered, as in *CRH*, nor was this an investigation into regulatory misfeasance. This was a computer system, wherein one programme relies on other programmes in order to function. The contents of that system went toward the commission of particularly serious criminal offences. It is undoubtedly in the interests of justice that the respondent's computer system be retained in full while the investigation and prosecution were in progress.

60. If an application under s. 1 were being made in this case, I would be of the view that the State is entitled to retain not only material that directly goes to criminality but also any other programming or hardware that is required to make the relevant material intelligible and usable. In so finding, I would rely primarily on the affidavit evidence of FCA2, wherein they explain the technological

background to this matter, including the encryption software employed by the respondent. It is clear that specific programmes, such as Bitcoin "keys" and the TOR browser, are required before the criminality engaged in by the respondent becomes apparent. Before any application under s. 1 could proceed, a detailed review of the respondent's computer system would be required so as to determine what should and should not be retained. This review would most likely be carried out by someone involved in the investigation, such as FCA2. A review of such complexity would naturally extend the time period of a "reasonable opportunity", as referred to above. Until that reasonable opportunity has passed, the State's retention of the material could not be called into question. I am more than satisfied that no issue arises under s. 9 of the 1976 Act.

61. For the sake of completeness, I should also note that it will be for some other court to consider the precise circumstances in which a s. 1 application is necessary. That is not a live issue in this case, as the 1897 Act does not yet apply. Most particularly, I would leave over questions regarding the precise circumstances in which the member of An Garda Siochana is required to make an application under the 1897 Act in order to continue retaining the material. Such a requirement is not explicitly stated in either the 1897 or 1976 Acts, but may arise on some other legal or constitutional basis. I would also refrain from expressing any view as to the status of seized material for which a s. 1 application is necessary but is not made by the Garda member within the reasonable opportunity referred to at para. 42 above. In my view, it would be inappropriate to make findings of such significance until a case comes before the courts in which the operation of the 1897 Act is directly at issue between the parties.

62. With regard to the respondent's objection pursuant to the rule in *Henderson v. Henderson*, this point is only sustainable if it were possible to sell the Ether before the consent order was made in February, 2016. The respondent has raised significant questions about the marketability of the Ether in November, 2014. He effectively argues that the asset could be bought and sold because he had bought it and could have sold it. In my view, that is not the standard by which marketing and marketable value are assessed for the purposes of the 1996 Act. An effective salesperson can sell anything if they can only find a person who, on their whims, sees fit to purchase it. That does not mean that the asset has value. If it did, then the minimum value threshold set out in the 1996 Act would be meaningless. Almost any item could be said to come within the Bureau's remit of seizure, as the Bureau would only need to prove on the balance of probabilities that they can find someone to purchase it at a price in excess of the minimum value threshold. The marketable value of an asset is determined using objective criteria that can be observed in an established marketplace. It is this established marketplace that allows the Bureau to carry out its functions and dispose of assets it has seized. Little relevance is to be found in the practices of alternative, underground fora. In light of FCA2's evidence, I am satisfied that no established market existed for Ethereum until the currency started trading in July, 2015.

63. Seven months passed between that date and the making of the consent order. During that time, there can be no doubt that a market existed for Ethereum and that the Ether had value. An application was not made to make the Ether a part of the subject matter of the Bureau's first application. This failure arose not out of some bad faith or improper act on the State's part, but out of a simple oversight as to the commencement of trading. The creation of cryptocurrencies was a massive economic and technological advancement. Society as a whole is still grappling with the consequences of these developments. The failure to notice that Ethereum had started trading did not arise out of negligence, but out of a failure to prepare for an eventuality that was, up until that point, unheard of. The Bureau were engaging with economic infrastructures that were themselves still evolving. The development of Ethereum did not come with any rules or guarantees. It was entirely possible that the currency would never commence trading and its first investors would be left out of pocket. The Bureau were dealing with an unknown quantity. As a result, an understandable oversight occurred. In my view, the subsequent efforts by the Bureau to remedy that oversight do not constitute a breach of the rule in *Henderson v. Henderson*. Even if they did amount to such a breach, and the respondent's rights had been impacted, I am satisfied that this breach would not agitate issues that would motivate this Court to make a ruling adverse to the State under the jurisprudence in *Murphy* and *J.C.*

64. Turning finally to the respondent's privacy rights, it is necessary to put the alleged breach of rights in its full and proper context. As stated above, a review of all the material on the respondent's system would be necessary before an application could be made under s. 1 of the 1897 Act, in which the State would set out what material it wished to hold on to and what material it did not intend to retain further. From that perspective, a review of the laptop's contents was inevitable. Detective Garda Gallagher's evidence is also of relevance. He was extensively cross-examined by counsel for the respondent as to the *ad hoc* nature of the review process and why the review did not take place before the first set of proceedings were settled. Bearing all of this in mind, it seems to me that objection has not been taken to the review process in and of itself. The respondent is not arguing that a review could not have been carried out under any circumstances. Rather, the dispute relates to the timing, purpose and manner of the review that was carried out.

65. The review carried out by FCA2 occurred after the first set of proceedings were settled. I am satisfied that this did not result in a breach of the respondent's privacy rights. As stated above, criminal proceedings against the respondent were still in being in May, 2016. A review was perfectly legitimate at any time before the criminal proceedings concluded and before the reasonable opportunity referred to at para. 42 above had expired. As for the purpose of review, FCA2 re-examined the computer system for the purpose of ensuring all matters had been satisfactorily addressed and the Bureau's investigation could be formally concluded. That is a perfectly legitimate reason for carrying out a review of the case material. Indeed, had the 1897 Act applied, this same purpose would be relied on to justify reviewing the material and preparing a s. 1 application. This review was carried out to ensure that the Bureau had fulfilled its statutory duties and legal obligations. I can find no fault in that. Of course, it would have been ideal had a review occurred before Fullam J. made the consent order in February, 2016. But there is a great deal of difference between a less than ideal approach and an illegal approach. I am satisfied that the Bureau's actions in this case can be characterised as the former, rather than the latter. There were no grounds on which to believe that a pre-conclusive review was necessary. The Bureau cannot be said to have acted arbitrarily, dis-proportionately or improperly for failing to carry one out, nor can the post-conclusive review that actually took place be so described.

66. As for the manner of review, it cannot be denied that there is no policy on the issue. Reviews are effectively left to the discretion of the officer. The European courts have been particularly critical of the failure to provide guidance and proper procedure in the exercise of the State's powers, and they have found in favour of applicants where such failures occur. That said, the respondent's submissions on this point were unrealistic in the extreme. If his argument were correct, then the State would be obligated to meticulously plan out policies and procedures for every eventuality or act that could ever arise, no matter how unusual or banal they may be. If they fail to do so, they would risk an adverse judicial finding at some point in the future. Such a task is not only burdensome; it is impossible. There is no way to foresee every possibility that could arise in the future and plan for it. Nor is it possible to construct a policy or procedure that accounts for every banal or trivial act a State agent commits in the course of carrying out their duties. There is, of course, an expectation that the State would provide guidance to its officers where State powers are being exercised in a significant way on a regular basis, or where there is a foreseeable clash between State activity and citizens' rights. In my view, a final review of all material validly seized, retained and relied upon in the course of a criminal investigation does not give rise to such an expectation. I am therefore satisfied that the manner in which this review was conducted did not give rise to a breach of the respondent's privacy rights.

67. This does not mean that the State agent enjoys a *carte blanche* to act as they wish if no guidance is provided to them. Every State agent has a general obligation to abide by the law and respect personal rights in the exercise of their powers and duties. This is not a case where it can be said that this general obligation has been breached, inadvertently or otherwise. The review of this laptop and the material it contained was, at all stages, perfectly legitimate. On the facts of this case, the respondent's right to privacy in respect of this device must yield to the State's right to tackle serious criminal activity. The necessary procedure to bring that about has been followed and there has been no breach or improper act that would bring same into disrepute. There can be no suggestion of an unwarranted or improper interference in this case. Even if there had been, those interferences would not justify a ruling against the Bureau. The test in *Murphy* in quite clear. There are basic constitutional principles that the State is required to respect and vindicate in the exercise of its powers. Where State agents fail to uphold those principles, the courts must act. Having reviewed the actions of the State agents in this case, it cannot be said that this Court is lending its processes to action on the part of State agents who are discharging their duty in an improper fashion. I am satisfied that the Bureau has properly performed its statutory duties.

Concluding Remarks

68. The State agents that were involved in this case have, in my view, conducted themselves with commendable diligence and with due regard to their constitutional obligations. As stated by Det. Garda Gallagher, An Garda Siochana broke new ground in this case. That said, the investigation into the criminal activities of the respondent was not without flaw. I have found against the respondent on the issues that he raised during the course of the hearing. His constitutional and legal rights were not breached and there is no need to further consider the test in *Murphy*. But the arguments made by the respondent were not without merit. A great deal of time and effort was put into this investigation and the State's endeavours were potentially undermined by the intricacies of data privacy rights and cryptocurrency exchanges. While those complications did give rise to legitimate questions on the respondent's part, they did not give rise to a breach of rights. On the unusual facts of this case, the Bureau have established that the asset was not seized or retained in circumstances of unconstitutionality. That is not to say that a breach could not arise in a future case. It would be prudent to prepare for these potential difficulties going forward.

69. For the reasons outlined above, I would make the orders sought by the Bureau in respect of the Ether which comprises the subject matter of this action.