THE COURT OF APPEAL

APPEAL NOS. 2014/1452/1453

FINLAY GEOGHEGAN J.
PEART J.
IRIVINE J.

IN THE MATTER OF THE PROCEEDS OF CRIME ACT, 1996-2005

BETWEEN:

CRIMINAL ASSETS BUREAU

APPLICANT/RESPONDENT

- AND -

MICHAEL MURPHY JUNIOR AND MICHAEL MURPHY SENIOR

RESPONDENTS/APPELLANTS

- AND -

AMY FORREST

NOTICE PARTY

JUDGMENT OF MR JUSTICE PEART DELIVERED ON THE 18TH DAY OF FEBRUARY 2016:

1. The appellants (MMJ and MMS) who are father and son have appealed to this Court against an order of Birmingham J. dated 7th November 2014 made pursuant to s. 3 of the Proceeds of Crime Act, 1996 prohibiting MMJ and MMS from disposing of or otherwise dealing with certain property specified in the order. That property comprised part of the property over which CAB had sought the order in its application. Prior to that s. 3 application an interim order had been obtained under s. 2 of the Act.

2. Before he could make the order sought under s. 3, Birmingham J. had, broadly speaking, to be satisfied from the evidence tendered by CAB that the property in question represented the proceeds of crime or was acquired with proceeds of crime, and that its value exceeded €13,000. The precise terms of s. 3 of the Act of 1996 are as follows:

> *"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 property that, directly or indirectly, constitutes proceeds of crime, and*
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> *(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,*
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> *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 value of all the property to which the order would relate is less than €13,000:*
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> *Provided, however, that the Court shall not make the order if it is satisfied that there would be a serious risk of injustice."*

3. The provisions of s.8 of the Act are also relevant to the within appeal, and in particular perhaps, subsections (1) and (2) thereof which provide:

> *(5) 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 in proceedings under section 3, on affidavit or, where the respondent requires the deponent 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 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.

(6) The standard of proof required to determine any question arising under this Act shall be that applicable to civil proceedings."

The scheduled property

4. The property alleged to constitute the proceeds of crime, and over which a s. 3 order was sought, are set forth in a Schedule to the notice of motion dated 20th of July 2011 as follows:-

1. Audi A4 motor vehicle, registration number 03–C–25314, chassis number WAUZZZ8EX3A245899.

2. The sum of STG£6,625 cash, currently in the possession of the Organised Crime Unit, An Garda Siochana, Harcourt Square, Dublin 2 arising from search of 12, Clonard, Grenagh, County Cork on the 28th May 2009.

3. The sum of €9,000 cash, currently in the possession of the Organised Crime Unit, An Garda Siochana, Harcourt Square, Dublin 2 arising from search of 12 Clonard, Grenagh, County Cork on the 28th May 2009.

4. Irish Life Investment Bond in the name of Michael Murphy Senior valued at €20,000 held at Irish Life Assurance plc, Lower Abbey Street, Dublin 2 (Irish Life Sure Options Plus Plan Number 11058372).

5. Irish Life Investment Bond in the name of Michael Murphy Junior valued at €10,000 held as Irish Life Assurance plc, Lower Abbey Street, Dublin 2 (Irish Life Sure Options Plus Plan Number 11058358).

6. By the time the matter came before the High Court, CAB informed the Court that it was no longer seeking an order in relation to the Audi A4 vehicle described above, which, it was accepted, was registered in the name of the notice party.

The affidavit evidence put forward by CAB

5. A number of affidavits were filed in support of the s. 3 application, and in addition two of the deponents were cross-examined on their affidavits, namely the Chief Bureau Officer D/Chief Supt. Eugene Corcoran, and D/Garda Gary Sheridan. Besides the affidavits of those deponents, there were affidavits sworn by a Financial Crime Analyst, a Social Welfare Officer, and a Revenue Bureau Officer.

6. In his affidavit D/Chief Supt. Eugene Corcoran expressed his belief that the property in question in the possession of the appellants constituted directly or indirectly the proceeds of crime, and that it exceeded €13,000 in value. He went on to state that his belief was grounded *upon "information, documents and other materials obtained by Bureau Officers and Members of An Garda Siochana in the exercise or performance of their duties as Bureau Officers and Members of An Garda Siochana"* and as more particularly set forth in the other affidavits referred to. He then proceeded in paragraphs (a) to (i) of paragraph 6 of his affidavit to elaborate upon the particular grounds for his belief that the various items of property constitute the proceeds of crime.

7. The affidavit of D/Garda Sheridan provides some background to the application. That background starts on the 28th May 2009 when MMJ was stopped by a member of the Organised Crime Unit as he was driving the Audi 4 motor vehicle. A search of the vehicle revealed 6 firearms in the boot of the vehicle. He was detained and interviewed during which he accepted responsibility for the firearms, and stated that he had been asked by a friend to collect the firearms but that he received no money for doing so. He refused to name others involved as he feared for his life. But he went on to state, *inter alia*, that the firearms were destined for Cork and that they were to be used in order to extort money from drug dealers in the Cork area. In due course MMJ was charged with, and subsequently on the 4th March 2010 convicted of, firearms offences for which he received and served a 6 year sentence of imprisonment.

8. An important event in relation to this appeal is described by D/Garda Sheridan in his affidavit. He describes a follow-up search at 12 Clonard Avenue, Grenagh, County Cork which was carried out by Gardai after MMJ had been stopped on the 28th May 2009. It appears that for that purpose a search warrant was issued by Supt. Con Corrigan to D/Garda Denis Cahill to search 12 Clonard Avenue, where the notice party then resided, she being MMJ's girlfriend. That warrant was issued pursuant to s. 29 of the Offences against the State Act, 1939, as amended, which was in force at the time. That event is important because one of the submissions made on MMJ's behalf in the Court below and on this appeal is that since s. 29 of the Act of 1939 was later found to be unconstitutional by the Supreme Court in its judgment *in Damache v. DPP* [2012] 2 I.R. 266, the search must be considered to have been an unlawful search, and accordingly CAB ought not to be permitted to avail of the fruits of that search for the purposes of its application under s. 3 of the Act of 2006. It is submitted that the exclusionary rule applies not simply in a pure criminal context, but with equal force to an application such as that under s. 3 of the Act of 1996, notwithstanding the Supreme Court's judgments in JC. I will return to that issue in due course.

9. During the search a number of items were located including a rucksack belonging to MMJ which was found to contain, *inter alia*, STG£6,625 and €9,000 in cash and 2 mobile phones. The search also revealed documents relating to the purchase of the Audi A4 vehicle, including a receipt for €10,200, details of a credit union loan, and a Chorus bill in the name of both MMJ and Amy Forrest.

10. D/Garda Sheridan's affidavit goes on to describe in great detail the investigations which were carried out into the source of the cash used for the purchase of the Audi 4 vehicle, the provenance of the cash found in the rucksack, including by interviews with Amy Forrest, MMJ and MMS, and by reference to the sometimes varying and inconsistent explanations given by MMJ, MMS and Amy Forrest. Memos of these interviews have been exhibited. His affidavit details a significant number of criminal convictions for both MMS and MMJ, but also other alleged criminal involvement in respect of which the appellants raise objection on the basis that the information amounts to impermissible hearsay evidence which they say ought not to have been allowed in support of the s. 3 application in the High Court. One of his averments is that his investigations have led him to believe that MMJ is associated with members of the Keane/Collopy gang from Limerick who, he stated, are involved in serious crime, including drug trafficking.

11. Other investigations carried out related to a waste disposal business carried on by MMJ which disclosed that sizeable payments by MMJ at two particular waste disposal facilities were paid by him in cash on a number of occasions, and that he had also paid €1,200 in

cash for his waste permit in October 2007.Other investigations were carried out in relation to bank accounts and credit union accounts. Evidence from MMJ and MMS included some alleged involvement in the sale of motor cycles, cars and lawnmowers which was said to be a source of cash savings.

12. Two Irish Life Investment Bonds discovered during the course of these investigations are part of the property over which the s. 3 order was sought. These are set forth at 4 and 5 in the Schedule to the notice of motion, being an Irish Life Investment Bond in the name of Michael Murphy Senior valued at €20,000, and an Irish Life Investment Bond in the name of Michael Murphy Junior valued at €10,000. D/Garda Sheridan describes his investigations into the source of funding for these bonds.

13. In relation to the MMJ Bond (€10,000) D/Garda Sheridan discovered that it was paid for by two withdrawals of €5,000 each from two credit union accounts in the name of MMJ on the 17th and 18th February 2005 respectively.

14. His inquiries revealed that the MMS Bond (€20,000) was paid for with a PTSB bank draft in that sum in favour of Irish Life dated 22nd February 2005 which in turn was paid for with an AIB bank draft in that sum in favour of PTSB purchased from funds in an AIB account in the name MMS. His affidavit goes on to set forth the explanations given to him by MMS in a hand written letter as how MMS was able to accumulate that sum. That letter stated, according to this affidavit *" … any money that I have, I begged from my late mother and my family and also begged on the streets of Tralee, Killarney and Lismore to try and raise money for an eye operation …"*. CAB wrote back to him seeking answers to certain questions relating to his explanations, but as of the date of swearing of D/Garda Sheridan's affidavit no response had been received from MMS.

15. D/Garda Sheridan also deals with the two cash items, being STG£6,625 and €9,000 found in the rucksack during the search of 12 Clonard Avenue. His affidavit sets out in great detail sometimes conflicting statements of MMS, MMJ and Amy Forrest surrounding the ownership of these sums and their provenance. These matters are dealt with at paragraphs 19-31 of his affidavit.

16. D/Garda Sheridan and D/Chief Superintendent Corcoran were cross-examined on their affidavits, as was MMS. MMJ swore no affidavit in resistance to the s. 3 application.

Birmingham J's judgment

17. Apart from questions around the provenance of the cash found and the funds used for the purchase of the Irish Life Investment Bonds, the trial judge addressed the issue as to whether 12 Clonard Avenue which had been the subject of the search on the 28th May 2009 was the dwelling of MMJ on that date, and if so whether that search was unlawful having regard to the decision in *Damache,* and therefore whether the evidence obtained as a result of that search was unconstitutionally obtained evidence, and must be excluded for the purpose of the application before him. He concluded first of all that in the light of the evidence provided to the Court as to MMJ's relationship with Amy Forrest and his living arrangements that *"it is proper to approach this case on the basis that 12 Clonard Avenue is a dwelling of Mr Murphy Junior"* emphasis added]. He went on to consider the implications for the search of the decision in *Damache.* He stated that proceedings under the Proceeds of Crime Act, 1996 are sui generis, and not involving a criminal prosecution as was the position in *Damache*. He noted also that McGuinness J. in *Gilligan v. Criminal Assets Bureau* [1998] 3 I.R. 185 had characterised such proceedings as being *in rem*. He noted also that while the search warrant had been obtained by An Garda Siochana as part of the follow-up to a seizure of firearms, the present application was commenced by the CAB. He noted also that the first occasion on which this particular issue had been raised as an issue was five years after the particular search of 12 Clonard Avenue, and two years after the delivery of judgment by the Supreme Court in *Damache*. The trial judge then went on to consider some cases in relation to the exclusionary rule to which he had been referred, and in particular *People (A.G.) v. O'Brien* [1965] I.R. 142; *DPP v. Kenny* [1990] 2 I.R. 110; *Kennedy v. The Law Society (No.3)* [2002] 2 I.R. 458*; Competition Authority v. The Irish Dental Association* [2005] 3 I.R. 210; and *Universal City Studios Incorporated v. Mulligan* [1999] 3 I.R. 407. Having considered these authorities, noting the different factual background in each, he reached his conclusion in relation to the applicability of the exclusionary rule by stating as follows:-

> *"45. I have referred to the fact that Proceeds of Crime applications are sui generis. That being so, it seems to me that the question of whether the exclusionary rule applies with full force and effect is free from authority and neither Irish Competition Authority v. Irish Dental Association, or Kennedy v. Law Society disposes of the issue and the question is whether the exclusionary rule should be extended to cover such cases.*
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> *46. In my view the factors that militate against extending the rule are that the gardai who carried out the search were following a procedure provided by statute. This was not a case of wilful disregard of constitutional rights, of recklessness, or shortcut taking or even carelessness. That being so, the policy considerations which influenced Finlay C.J. in Kenny, do not arise. It does not seem to me that the protection of constitutional rights is advanced by condemning the activity of gardaí following a statutory procedure. It follows from what I have said, that if this was a case where there was discretion to be exercised as to whether to admit evidence, that I would exercise the discretion in order to admit the evidence.*
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> *47. In this case the impugned search had discovered two sums of cash, but consider other possibilities. Suppose in the course of a search that had taken place under the purported authority of a s. 29 warrant, firearms or explosives were found or controlled drugs. Could it be suggested that the items seized had to be returned to the person whose dwelling was searched? Suppose property was seized which could not possibly be the property of the occupant of the dwelling – a unique piece of art stolen from a leading gallery. Could the dwelling occupant be permitted to remain in control of the stolen masterpiece? Could the gallery be prevented from recovering its property?*
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> *48. In all the circumstances, I am not of the view that I am precluded from having regard to the outcome of the Clonard Avenue Search by virtue of the Supreme Court decision in Damache. Even if I am wrong about this, it seems to me that the issue would affect only the property seized in the course of the search and would not have any implications for the Audi motorcar or the investment Bonds.*
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> *49. I will therefore follow the procedure directed by McCracken J. in FMcK v. G.W.D [2004] 2 I.R. 470. I have regard in the first instance to the evidence of Detective Chief Superintendent Eugene Corcoran and I also have regard to the evidence of Detective Garda Garry [sic] Sheridan, the financial analyst, the revenue officer and social welfare officer. I am of the view that there are reasonable grounds for the belief/opinion held by the Chief Superintendent and Accordingly, the belief evidence of the Chief Superintendent forms part of the evidence in the case. By reference to the belief evidence of the Chief Superintendent and the other evidence adduced on behalf of the applicant, I am satisfied that a prima facie case has been made out by the Criminal Assets Bureau. I have then considered the evidence on behalf of the respondents and notice party, both the affidavit evidence and have also had regard to their evidence in the witness box. I am not satisfied that the respondents have discharged the onus on them and instead I remain of the view*

that the property, the subject of the application represents the proceeds of crime.

50. I have considered the question of whether making the order sought will give rise to a serious risk of injustice and I am firmly of the view that this is not the case, provided that the order made, takes account of the fact that it is accepted that a figure of €7,550 is legitimately explained as coming from a compensation claim and also that I am satisfied in relation to the authenticity of the alleged payment from Sherry FitzGerald. Also I am prepared to accept the possibility that there might have been some limited activity involving motorcycles, vehicles and lawnmowers and that there might have been some level of waste disposal activity which was not recorded. To take account of these possibilities and to avoid any risk of injustice, I propose to exclude a further sum of €5,000, in addition to the €7,550 in respect of the compensation claim and the €1,800 in respect of the DTZ Sherry FitzGerald cheque. Having regard to the quality of the evidence on these topics, the amount that I am proposing to exclude is, if anything, generous. Subject to that qualification, I will make the order sought by the Criminal Assets Bureau."[underlining added]"

Grounds of Appeal – MMJ

18. The following grounds of appeal are set forth on behalf of MMJ in his notice of appeal:

"The learned trial judge erred in fact or in law or in a mixed question of fact and law in that he:

1. Admitted at the trial evidence obtained in violation of the first named respondent's constitutional rights;

2. [he] correctly concluded that in circumstances where the respondents had entered the dwelling of the first appellant in reliance upon the purported authority conferred upon them by a search warrant issued under Section 29 of the Offences against the State Act 1939, the respondents did not have lawful authority to enter upon and search the said dwelling as the said Section 29 was deemed unconstitutional by the Supreme Court in Damache v. DPP [2012] 2 I.R. 266. Having found that there had therefore been a breach by the respondents, their servants or agents of the constitutional right of the appellant to the inviolability of his dwelling under Article 40.5 of the Constitution, the learned trial judge erred in law in admitting and relying upon evidence obtained as a result of such an unlawful and unconstitutional search;

3. [he] erred in law in holding that the exclusionary rule applicable to evidence obtained in breach of constitutional rights did not apply to these proceedings which he found to be in rem proceedings;

4. [he] erred in law in failing to exclude from his consideration in the said hearing evidence obtained in violation of the rights of the first appellant under Article 40.5 of the Constitution;

5. [he] admitted hearsay evidence and considered that evidence in reaching the determination that he reached;

6. [he] held that an investment bond, Irish Life Investment Bond [€10,000] in the name of [MMJ] … purchased in 2005 was the proceeds of crime where there was no evidence to support that determination."

19. The grounds of appeal contained in the notice of appeal filed by MMS are similar to the grounds of MMJ just set forth, save first of all for the fact that there is no question of MMS having lived at 12 Clonard Avenue, and therefore it is not contended that his constitutional rights were violated by the search. Nevertheless he relies upon the unlawfulness of that search since *Damache*, and submits that the trial judge was wrong not to exclude the fruits of that search [i.e. the items of cash in which he claims an interest] from consideration on this application. The MMS grounds differ also in that the Irish Life Investment Bond refers in his case to the Irish Life Bond for €20,000 in his name, and he includes an additional ground, namely that the learned trial judge failed to accord sufficient weight to the explanations offered by MMS. It is convenient to address the submissions in relation to the fruits of the search by reference to the submissions made principally on behalf of MMJ.

20. Grounds 1- 4 relate to the exclusionary rule. Counsel for MMJ has referred to paragraphs 45-46 of the judgment of Birmingham J. and submits that he has erred in the manner in which he has reached his conclusion in relation to the exclusionary rule. He submits that before reaching the conclusion that he ought not to exercise his discretion to admit the evidence derived from the search, the trial judge ought first to have reached a conclusion as to whether, as a matter of principle, the exclusionary rule applied at all in proceedings under the Proceeds of Crime Act, 1996. Instead, it is submitted, he has taken into account the specific facts of the present case, and has used them in order to conclude that the rule does not apply in proceeds of crime cases.

21. It is submitted that it is irrelevant to the determination of whether the exclusionary rule is applicable in applications under the Act of 1996 that the appellants delayed either five years from the date of the search or two years from the date of Damache, as noted by the trial judge, and that it is simply an issue to be determined as a matter of law at the level of principle. If it is decided that the exclusionary rule does not apply at all, that will be an end of the matter as far as grounds 1-4 of the grounds of appeal are concerned. If on the other hand, the rule may apply depending on facts and circumstances of any particular case, then consideration will have to be given to whether in this case the judge was correct in determining that he ought not to exercise his discretion to exclude the evidence gained during the search conducted on foot of the s. 29 warrant.

22. In so far as the trial judge's judgment can be read as concluding that at the level of principle the exclusionary rule does not apply at all in relation to applications under the Act of 1996, and that being sui generis and that the issue is *"free from authority"*, Counsel submits that the trial judge is incorrect, and seeks support from the judgments in *Kennedy v. The Law Society (No.3)* [2002] 2 I.R. 458; *Competition Authority v. The Irish Dental Association* [2005] 3 I.R. 210; and *Universal City Studios Incorporated v. Mulligan* [1999] 3 I.R. 407.

23. Counsel accepts that these proceedings are not criminal proceedings, albeit they have to be considered against a background of alleged criminality. While accepting also, as stated by McGuinness J. in *McK v. GWD*, that they are civil proceedings *in rem*, counsel submits that there is no reason of principle why, if the exclusionary rule can be applied in civil proceedings which are in personam and in criminal proceedings, it ought to be regarded as inapplicable to civil proceedings *in rem*. As it is stated in his written submissions *"a narrower protection of constitutional rights excluding the operation of the appropriate rule from in rem proceedings … would be an absurdity protecting the lesser rights at the expense of the greater".*

24. Counsel has referred to the judgment of McKechnie J. in *Competition Authority v. Irish Dental Association* [2005] 3 I.R. 208. In those proceedings the plaintiff authority sought certain declaratory and injunctive reliefs against the defendant body, which

represents practising dentists in this State, arising from a complaint which it received and investigated, which related to alleged actions, advices and recommendations of the defendant which were said to be in breach of section 4 of the Competition Act, 2002 and Article 81 of the Treaty of Rome. As part of the investigation process, the Competition Authority pursuant to a power provided in s. 45 of the Act of 2002, had applied for in the District Court and obtained a warrant to search the defendant body's premises. Such a warrant entitles an authorized officer to enter, if necessary by force, the defendant's premises, and to search for, seize and retain any documents that were covered by the warrant. It appears that a representative of the plaintiff authority had prepared in advance of the application a draft of the warrant to be issued, and that upon the application being granted by the District Judge he signed the warrant that was handed to him for that purpose. However, the warrant contained a fatal flaw in so far as, while it contained the correct address details for the premises to be searched, it incorrectly described the business of the defendant body as *"the business of selling, supplying or distributing motor vehicles …"*. Evidence received by McKechnie J. in relation to this defect satisfied him that the error was an innocent one on the part of the person who prepared the draft warrant. Nevertheless, he was satisfied that the search conducted on foot of it must be regarded as an illegal search given the defect in the description of the business carried on in the premises. The question then arose as to what use if any could be made of the documentary material which the illegal search had yielded. It was submitted by the defendant that its constitutional rights had been breached, and that it must be considered to be a conscious and deliberate breach of those rights, and that given the absence of any extraordinary or excusing circumstances, the law was clear, namely that the court had no discretion to receive such material in evidence and it was inadmissible. The alternative but subsidiary submission was that the material had been obtained in breach of the defendant's legal rights, and that in such circumstances there was a discretion whether or not to receive the documentary evidence, which discretion should be exercised having regard to public policy considerations. As part of the plaintiff's arguments against the exclusion of the material gained in the search, the plaintiff authority argued that since the proceedings were civil in nature the exclusionary rule, while relevant, must be circumscribed in its application compared to criminal proceedings, particularly in circumstances where the error in the warrant was entirely innocent and accidental, and contained no element of *mala fides*, or 'hidden agenda' as was found to be the case in *Kennedy v. Law Society* [supra].

25. In the end, and having exhaustively considered the relevant jurisprudence, McKechnie J. considered that the search carried out on foot of the defective warrant constituted a deliberate and conscious breach of the defendant's constitutional rights, and that even though the error itself was accidental and innocent, and even though those carrying out the search were unaware of the defect and acted honestly, nevertheless the exclusionary rule applied with full force and effect, and that accordingly the court had no discretion to admit the material into evidence.

26. Having so concluded, McKechnie J. then addressed the subsidiary argument above referred to, lest he was wrong in his conclusions as to breach of constitutional rights and as to the conscious and deliberate breach of rights. He considered whether he should exercise his discretion in any event to exclude the material, having balanced the plaintiff's rights against those competing rights of the defendant. In concluding that even on this basis the evidence should not be admitted, he stated as follows at p.224:-

> *"In the activities of the plaintiff had as their purpose the enforcement of the provisions of the Act of 2002. That Act conveys very substantial powers on authorised officers and other individuals within the plaintiff. Its width and breadth is quite substantial. The purpose of the exercise of those powers is not simply to further civil proceedings, but can also involve criminal proceedings though, of course, I appreciate that we are not dealing with criminal proceedings in this case. As a result of the exercise of those powers the documents taken away can be legitimately and legally used in court to found an action against former owners and/or to incriminate them in criminal proceedings. Quite unlike the situation of a crime having been committed and the gardaí immediately responding by way of investigation, there was no similar or comparable urgency in this case. The initial complaint apparently was made in September, 2004 and the investigation had been ongoing for four weeks or more. There was therefore no pressing need, in the sense of immediacy urging the plaintiff to move with all due haste. That was as a result, ample opportunity and time to make certain that the primary documentation was correct.*
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> *On the other hand there is a major public interest in underpinning public confidence in the business and commercial community with regard to the operation of the Competition Act. The Act of 2002 and its predecessor now constitute a relatively new but very vibrant and most penetrating statutory code in this jurisdiction. It is supported by several articles of the Treaty. Therefore, in my view, it is absolutely crucial that the most core and basic document which founds the searching of premises, namely the search warrant, is correct. There is no question in this case but that the entire wording, content and form of the search warrant was within the control of the plaintiff. Whilst I am satisfied, and this I wish to make clear, that there was no deliberation in the sense of the decision being taken, even informally, by the plaintiff to proceed with a search warrant which was erroneous, nevertheless I believe that in all the circumstances, the competing public interest permits or demands of me, to exercise my discretion by excluding the material in question. This conclusion is the one which I have arrived at and is subject only to the same reservations, as I have previously expressed, arising out of Kennedy v. Law Society of Ireland (No. 3) [2002] 2 I.R. 458."*

27. Counsel has argued that the procedures and powers given to the CAB under the Act of 1996 should be equated to the powers enjoyed by the Competition Authority under the Act of 2002, and even though there is the obvious distinction that the former give rise to proceedings *in rem*, and not *in personam*, there are nevertheless constitutional rights engaged, namely those, including of MMJ whose dwelling was the subject of the search, and accordingly the same exclusionary rule should apply in respect of any material gained from the unlawful search.

28. The appellants rely also on the judgment of Laffoy J. in *Universal City Studios Inc. v. Mulligan* (No. 2) [1999] 3 I.R. 392. These were civil proceedings in which the plaintiffs claimed injunctive relief and damages alleging that the defendant had made and sold pirated video tapes of films over which they had copyright. One of the issues in the case was whether the failure of the plaintiffs to produce at trial the search warrant obtained for the purpose of a search of the defendant's vehicle should result in the exclusion of the evidence obtained from that search. A number of seizures of pirated and/or counterfeit video cassettes were pleaded in the statement of claim. As noted by Laffoy J. in her judgment she dealt with most issues raised as to admissibility of that evidence as the issues were raised during the hearing, but there remained an issue about one of the vehicle searches, namely that carried out in Ashbourne, Co. Meath in May 1996, and she dealt with that issue in her judgment. She had heard evidence from a Garda that he had searched the vehicle in question under powers conferred by the Video Recordings Act, 1989, but was unable to produce the warrant. It had been submitted that in the absence of the warrant the trial judge was unable to determine its validity, and that the evidence obtained could not be admitted. In the course of evidence by the Garda which the trial judge heard de bene esse it was learned that on the 19th May 1996 this Garda had endorsed the warrant at Ashbourne Garda station and had left it there to be forwarded to another Garda station in Balbriggan. However, the warrant could no longer be located for production to the High Court. But he went on to state in evidence that on that same day, while he had the warrant in his possession he observed a vehicle, stopped it, found the defendant and his son in the vehicle, showed him the warrant and informed him that he was going to search the vehicle. Inside the boot of the car he found 480 video cassettes concealed beneath a rug. These cassettes tapes were seized.

29. Laffoy J. decided that in the absence of the warrant being produced in court she was unable to determine whether the warrant was properly used, whether it was valid, or whether it authorised the act done on foot of it. On that basis she indicated that she proposed to deal with the issue of admissibility on an assumption that the warrant was invalid. At p. 404 of her judgment her conclusion on that issue appears set forth as follows:

> *"On the issue of admissibility I propose adopting the same approach as I adopted when ruling on the admissibility of the evidence of Sergeant Angela Bates in relation to the seizure at North Cumberland Street on 22nd February, 1997. Although this is a civil action, I am satisfied that as a matter of principle the exclusionary rule laid down by the Supreme Court in The People (Director of Public Prosecutions) v. Kenny [1990] 2 I.R. 110 in relation to the admissibility in criminal trials of evidence obtained by invasion of the constitutional personal rights of a citizen is applicable. In that case, delivering the majority judgement, Finlay C.J. said (at p.134):-*
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> > *'I am satisfied that the correct principle is that evidence obtained by invasion of the constitutional personal rights of the citizen must be excluded unless a court is satisfied that either the act constituting the breach of constitutional rights was committed unintentionally or accidentally, or is satisfied that there are extraordinary excusing circumstances which justify the admission of the evidence in its (the court's) discretion'.*
>
> *On the evidence, I am satisfied that the seizure of the video cassettes from the defendant at Ashbourne did not involve an "invasion of the constitutional personal rights" of the defendant. On the assumption that the evidence was nonetheless obtained by illegal methods, albeit methods which did not amount to an invasion of the defendant's constitutional personal rights, I consider that the rule applicable to the admissibility of such evidence in criminal trials applies, namely, that the court has a discretion to admit it. On the evidence, I am satisfied that Garda Tarrant acted bona fide in the discharge of his duties on the occasion in question and I rule that the evidence is admissible."*

30. Laffoy J. was satisfied, as appears above, that there had been no invasion of constitutional rights as such, and therefore that the evidence was not of necessity to be excluded, but nevertheless the video cassettes had been obtained unlawfully, and therefore that she had a discretion to exercise as to whether to admit it or not, and she exercised that discretion by admitting the evidence, since the Garda had *"acted bona fide in the discharge of his duties".*

31. Counsel submits that on the basis of these authorities the Court must first of all determine whether the search conducted of the house at 12 Clonard Avenue on foot of the warrant obtained under s. 29 of the Act of 1939 must now be considered to have breached the constitutional rights of MMJ, and if so found, then to go on, in accordance with the judgment of Finlay C.J. in *The People (Director of Public Prosecutions) v. Kenny* [supra] to determine whether the breach was committed unintentionally or accidentally, or whether there are extraordinary excusing circumstances which would justify the admission of the evidence in its (the court's) discretion. In the absence of such excusing circumstances, then, it is submitted, the Court is obliged to exclude the evidence so obtained, even in civil proceedings which are *in rem* and not *in personam*. It is submitted also that where this Court might be of the view that no constitutional right was breached, but that nonetheless the search has turned out to be an unlawful search following *Damache*, the discretion ought to have been exercised in the Court below by excluding the evidence on the basis that the competing rights of the agents of the State under the Act of 1996 in this case do not outweigh the rights of MMJ and MMS not to be deprived of their property on foot of an illegality perpetrated by those same agents. It is submitted also that the fact that, as stated by the trial judge, the Gardai were following a statutory procedure should not of itself be a sufficient justification for allowing the fruits of the unlawful search to be used in evidence, particularly in circumstances where there was no evidence adduced as to the necessity for the search to be carried out following the seizure of the firearms in the car earlier that same day.

CAB's submissions on exclusionary rule

32. Counsel for CAB states at the outset that the Supreme Court's judgments in JC had not been handed down by the time Birmingham J. delivered his judgment in this case. She has pointed to the serious public policy considerations at play behind the Proceeds of Crime Act, 1996 namely the policy of ensuring that criminals do not benefit from assets that have been acquired with proceeds of crimes they or others with whom they are associated have committed, and also to the numerous unsuccessful challenges that have been brought to certain aspects of the legislation, which impinge upon some constitutional rights, rules of due process, constitutional justice and fair procedures. It is against that general background and the *sui generis* nature of proceedings under the Act of 1996 that Counsel submits that the exclusionary rule does not apply at all in relation to the cash discovered during the search, which was conducted on foot of a warrant which was at the time lawfully obtained under s. 29 of the Act of 1939 – the section enjoying at that time the presumption of constitutionality.

33. Counsel has referred also to the fact that MMJ chose not to participate in the interim application brought by CAB under s. 2 of the Act of 1996 despite being notified of it, and failed also to participate in the first application made by CAB under s. 3 of the Act when that application came before the late Mr Justice Feeney. She submits that the fact that MMJ was in prison at the time cannot be a valid reason for not participating in those applications if he had wished to do so. In fact she has noted that on that first application under s. 3, MMS did in fact raise the Damache point before the late Mr Justice Feeney, but MMJ simply choose not to participate at all.

34. Counsel has referred also to the legal effect of the application by CAB for the unchallenged interim freezing order under s. 2 of the Act in respect of the scheduled property, and has pointed out that by virtue of s. 1A of the Act of 1996 (as inserted by s. 3(b) of the Proceeds of Crime (Amendment) Act, 2005) any property which is the subject of a s. 2 interim freezing order, or indeed an interlocutory freezing order under s. 3 of the Act, is deemed to be still in the possession or control of MMJ even though it may have been lawfully seized by An Garda Siochana, the Revenue Commissioners, or any other person, and that this position endures until such time as a disposal order is made under s. 4 of the Act of 1996. In such circumstances where the property seized (i.e. the two cash items) is deemed to be still in the possession of MMJ, it is submitted that the basis upon which it came into the possession of An Garda Siochana (i.e. on foot of the s. 29 search warrant) is irrelevant to CAB's present application, and cannot sustain an objection to that application based on the exclusionary rule of evidence.

35. Counsel has submitted also that the cases upon which the appellants have placed reliance, such as *Universal City Studios Inc. v. Mulligan (No. 2)* and *Competition Authority v. Irish Dental Association* do not assist them. First of all, it is submitted, those proceedings were not in rem proceedings, as in this case. Secondly, the passages upon which reliance is placed by the appellants are, it is submitted, either taken out of context or are obiter. In the present case, being *in rem*, the cash seized as part of the search is not evidence as such. Rather it is the object of the proceedings themselves in which only its status is being determined, rather than any rights or interest of MMJ/MMS as such, the only question being whether or not the cash items and the two bonds are the proceeds of crime. Counsel has submitted that the mere fact that both MMJ and MMS are named as respondents does not alter the in rem nature of the proceedings.

Conclusions on the applicability of the exclusionary rule

36. The trial judge considered that previous cases to which he was referred did not dispose of the question whether the exclusionary rule applied in proceeds of crime applications, and that therefore question was "free from authority". It was, and remains, common case that these types of application under the Act of 1996 are *sui generis*. It is also common case that the proceedings are in rem, unlike *Kennedy v. The Law Society (No.3); Competition Authority v. The Irish Dental Association;* and *Universal City Studios Incorporated v. Mulligan* to which reference has been made. Looking at paragraphs 45-48 of the trial judge's judgment, I am satisfied that Birmingham J's conclusion was that for the reasons he stated the exclusionary rule did not apply in such cases. I appreciate that he went on to refer to the exercise of a discretion should he have been required to, before stating that *"[he was] not of the view that I am precluded from having regard to the outcome of the Clonard Avenue search by virtue of the Supreme Court decision in Damache".* He need not have done so in my view, having concluded that the rule had no application at all. But the fact that he did so should not distract from what was in fact a clearly expressed conclusion. I believe that he is correct in that conclusion.

37. The fact that the proceedings are *in rem* is of significance. The fact that the search and seizure in question at Clonard Avenue was carried out by An Garda Siochana and on foot of a warrant obtained by them, and not CAB, is also significant. There is no doubt that if MMJ was being prosecuted for the offence of robbery of the two cash items found during the search, and that trial was being heard after the *Damache* decision, the exclusionary rule would be in play, since MMJ would face the prospect of conviction and possible imprisonment on the basis of arguably unconstitutionally obtained evidence. Such proceedings would be very much in personam, and he would be entitled to every available protection and vindication of his constitutional rights. They are precisely the kind of proceedings from which the exclusionary rule evolved and developed. They have a context in which the issue concerns the actual deployment of the evidence in a criminal trial as part of the prosecution case. The issue in such a case is the guilt or innocence of the person on trial for the offence. That context is very different to the present case where the status of the piece of cash itself is the issue in the case i.e. whether it is the proceeds of crime.

38. No doubt, the exclusionary rule has found its voice in certain types of civil proceedings in addition to criminal proceedings, and examples of this have been referred to already. Again, in those cases, the material in question was to be deployed at trial, where it had the capacity to affect or even determine the outcome of the proceedings between the plaintiff and defendant. In *Universal City Studios* the deployment at trial of the evidence of the video cassettes and their contents would clearly influence the outcome of the plaintiff's application for injunctive relief and damages based on the infringement of its copyright. In *Competition Authority v. Irish Dental Association*, the material gathered during the unlawful search was sought to be deployed in evidence against the defendant association in pursuit of prohibitory and mandatory injunctions.

39. In the present case, the cash items recovered during the search by An Garda Siochana are not sought to be deployed in evidence for the purpose of determining some claim by CAB against MMJ. Rather, the cash is the very subject or object of the proceedings – the issue being its provenance, whether or not it is the proceeds of crime, and if it is the proceeds of crime, it stands frozen in accordance with the provisions of the Act. The order the Court may make under s. 3 does not determine any claim of ownership. In my view, the manner in which the cash items came into the physical possession of An Garda Siochana (while also noting as I have done the provisions of s. 1A of the Act of 1996) is not relevant to the particular issue before the Court on a s. 3 application. The cash itself is not being deployed in evidence in any way which might implicate the exclusionary rule. That rule simply does not apply in an application under s. 3 of the Act.

40. Accordingly it was unnecessary for either the Court below or this Court to consider whether to exercise the discretion to admit evidence that was obtained on foot of a search which was illegal, but not in breach of constitutional rights, as in the case of the search of 12 Clonard Road.

41. When writing prior to *JC*, Liz Heffernan (with Una Ni Raifeartaigh) in her book *Evidence in Criminal Trials* (2014, Bloomsbury) discusses at para. 8.49 the strictness with which the exclusionary rule applies in criminal trials in this jurisdiction in order to vindicate constitutional rights. Nevertheless, she states:

> *"At the same time, some courts have reacted to the restrictive nature of the exclusionary rule by clipping its wings in certain respects. For example, the rule applies in criminal proceedings but its reach is limited to evidence adduced at trial as opposed to information gleaned for a pre-trial investigative step such as securing an arrest warrant".*

42. In that regard she footnotes, inter alia, *DPP (Walsh) v. Cash* [2010] 1 IR 609 which is an interesting case for present purposes, and one to which Counsel for CAB has referred to in submissions, albeit in the context of the use of hearsay for the purpose of grounding a belief that property is the proceeds of crime. I will come to that in due course. *DPP v. Cash* was a case stated arising from a prosecution in the District Court. The head-note gives a convenient and brief account of the background as follows:

> *"The accused was arrested and detained on suspicion of committing a burglary. The case came on for hearing in the District Court. Evidence was given that fingerprints were found at the scene. Under cross-examination, the prosecuting garda agreed that the sole evidence grounding the arrest of the accused was a match between fingerprints found at the scene and those held on a computerised database in the garda technical bureau. The gardai were unable to state whether those fingerprints held on the database had been lawfully taken or retained. Counsel for the accused sought a direction. The District Court Judge decided to state a consultative case to the High Court in which she posed, inter alia, the following question: -*
>
> > *'Whether, in circumstances where the basis of a garda investigation is a record of the accused's fingerprints, retained by gardai which, on being so challenged by the defence, the gardai are not in a position to stand over whether they were lawfully taken or kept, the evidence obtained during that investigation can form the legitimate basis for an arrest and subsequent detention pursuant to s. 4 of the Criminal Justice Act 1984?' ".*

43. One of the issues, as noted by Fennelly J. at p. 626 was *"[whether the exclusionary rule] regarding the admissibility of unconstitutionally obtained evidence in criminal trials can be extended to encompass the lawful provenance of facts … which do not form part of the evidence proffered at trial but which provided the basis for the suspicion justifying the arrest of the accused person."*

44. Fennelly J. (with whom the other six members of the Court agreed) concluded it had not been established that there was an onus upon the prosecution to prove the lawful provenance of material relied upon by a member of An Garda Siochana to form reasonable cause justifying an arrest. On the way to his conclusions, Fennelly J. looked closely at the judgment of Finlay C.J. in *DPP v. Kenny*, and the absence of any authority as to whether the absolute exclusionary rule laid down in *Kenny* should be extended to cover facts, not being offered as part of the evidence at a criminal trial, but giving rise to the suspicion which led to the arrest. Having referred to the judgment of Finlay C.J. he stated:-

> *"The rule laid down in that judgment, in its own terms, applies only to the exclusion of evidence proffered at a criminal trial …… [it] was not concerned with the lawful provenance of evidence used to ground a suspicion, nor does Finlay C.J.'s judgment advert to the possibility that the principle propounded could be applied to such an issue."*

45. Fennelly J. also referred to some of what Charleton J. had stated in his judgment in the court below, such as at para. 12 of his judgment when he stated:-

> *"It has never been held that what would found a reasonable suspicion in law requires to be based on the kind of evidence that would be admissible under the rules of evidence during the hearing of a criminal trial. On the contrary, a reasonable suspicion can be based on hearsay evidence or can be inferred from discovering that an alibi which a suspect has given to the police turns out to be false."*

46. A further passage referred to by Fennelly J. is at para. 13 of the judgment of Charleton J. as follows:

> *"The crucial issue in this case is whether a suspicion arising from a piece of evidence the origin of which is uncertain as to whether it was properly obtained, or arriving from an illegally obtained a piece of evidence, destroys the legality of an arrest. In that regard, it is claimed that the prosecution must prove that upon which a reasonable suspicion was founded was lawfully obtained. This argument seeks to import the rules of evidence into police procedures. It has no place there. If the prosecution was obliged to prove legality in respect of every step leading to an arrest or charge, this would have the result that the prosecution, in presenting a case, would be required not only to show, against objection by the defence, that the evidence which they proposed to lead was lawfully obtained, but to open to the court every facet of the investigation to ensure that no illegality ever tainted any aspect of police conduct."*

47. Returning towards the end of his judgment at p. 633 to the essentials of the issue proposed by the accused, Fennelly J. made reference to a passage professor Walsh's book on *Criminal Procedure* (Thomson Roundhall, Dublin, 2002) where the author refers to Lord Devlin's judgment in the Privy Council *in Hussien v. Chong Fook Kam* [1970] A.C. 942 to which Charleton J. had also referred in his judgment in the High Court, and comments at p. 177:

> *"The prima facie proof would have to rest on the basis of admissible evidence, while a reasonable suspicion may take into account matters which would not be admissible at all."*

48. I appreciate that the context of *DPP v. Cash* is very different to a proceeds of crime application. Nevertheless, it is of assistance to my own conclusions to see that even in the context of a criminal trial, the scope of the absolute exclusionary rule is not all-embracing. It is in full flow in relation to the deployment of evidence at the trial of the accused, and will permit unlawfully obtained evidence to be excluded either absolutely or in the exercise of judicial discretion depending on the facts and surrounding circumstances. But the reasonable suspicion required for an arrest may be based on evidence which would be inadmissible if offered in support of a prima facie case at trial. It seems to me that if that be the position in a criminal prosecution, it applies a fortiori to the situation herein where what has been obtained on foot of a warrant that can no longer be considered to be a lawful warrant is not being deployed as evidence at all – but rather is the very property itself whose provenance is the subject of the s. 3 application. In my view, the decision in Damache does not speak to proceedings under the Act of 1996, and the exclusionary rule is simply inapplicable to such applications. For these reasons I am in agreement with the conclusion of Birmingham J. on this issue, and grounds 1-4 in the Notice of Appeal must fail.

49. Given the basis upon which I have reached these conclusions, it is unnecessary to address the submissions made by the parties in relation to the impact upon the application of the exclusionary rule arising from the judgments of Clarke J. and O'Donnell J. in *DPP v. JC.* Neither is it necessary to justify the non-exclusion of the cash recovered on the basis that the Gardai carrying out the search were following a statutory procedure, or that there was no deliberate or conscious breach of constitutional rights, or even address the undoubted fact that at the time the search was carried out s. 29 of the Act of 1939 was still operative and enjoyed the presumption of constitutionality.

Admission of hearsay evidence

50. MMS raised no hearsay objection explicitly in the High Court. Nevertheless he seeks to rely upon the hearsay submissions made on this appeal on behalf of MMJ. An objection was raised by MMJ at the outset of the hearing in the High Court to any evidence, be it on affidavit or otherwise, which would be hearsay evidence, in support of the belief being held and expressed by CAB that the property the subject of the application comprised the proceeds of crime or acquired with proceeds of crime. Upon this objection being made, Counsel for CAB complained that while it was made aware in advance of the hearing that there would be objection raised to any hearsay evidence being given, the objection was made in general terms only, without any identification of which part or parts of the affidavit evidence was being objected to.

51. At the hearing it became clear that the two items of evidence to which objection was being raised on the basis of hearsay were two contained in the affidavit sworn by D/Garda Sheridan. These formed part of the basis for the belief evidence of D/Superintendent Corcoran, to which the trial judge indicated on the 18th November 2014 he had had regard to when arriving at his conclusions in his judgment, even though he had not explicitly said so therein.

52. The following hearsay evidence is objected to:

> (a) In paragraph 34 of his affidavit, D/Garda Sheridan stated that MMJ was stopped and arrested for a public order offence on the 27th January 2009 arising from which he became violent. He went on to state that MMJ was alleged to have been intending to visit a particular hotel room, which was later searched by Gardai, and the two occupants (one of whom is alleged to be involved in drug trafficking) were found to be in possession of €9,800. One of the occupants received a four year sentence for possession of drugs for sale and supply in July 2009.
>
> (b) In paragraphs 36-38 D/Garda Sheridan stated that both MMJ and MMS are believed to be involved in the handling of stolen goods derived from the robbery of goods in transit vans in the Cork region, and in that regard he exhibited an investigation report from another member of An Garda Siochana which refers to a particular incident which, inter alia, involved the discovery of fingerprints found to match those of a son-in-law of MMS (and therefore a brother in law of MMJ), and with whom MMJ and MMS are believed to be in close association and have been regularly seen together. These matters are set forth in detail in D/Garda Sheridan's affidavit.

53. Birmingham J. heard the objected-to evidence *de bene esse*. In his judgment itself he made no reference to the hearsay objection. However, when the matter came back before him on the 18th November 2014 the hearsay issue was raised, and

Birmingham J. clarified that he had had regard to the matters upon which the hearsay objection had been raised, and that he took the view that it was admissible evidence.

I have already set forth the provisions of s. 8 (1) and (2) of the Proceeds of Crime Act, 1996 which permits the Court to treat belief evidence as being part of any prima facie evidence that property is the proceeds of crime, provided that the Court is satisfied that there are reasonable grounds for the belief expressed. Those provisions themselves comprise an exception to the rule against hearsay. Counsel for MMJ accepts there is considerable latitude allowed in relation to hearsay on applications of this nature, but nevertheless contends that a restrictive application of the exception is to be given, and that there could be no question of CAB having been given 'carte blanche' to deploy hearsay on an expansive and unrestricted basis. Reliance is placed upon the judgment of Keane C.J. *in Criminal Assets Bureau v. Hunt* [2003] 2 I.R. 168, and also to the judgment of Hardiman J. in *Criminal Assets Bureau v. T.H.* [2007] 4 I.R. 186. I will return to those submissions in due course.

54. The starting point for CAB's submission on this issue is the statement by Keane C.J. n *Murphy v. GM* [2001] 4 I.R.113 at p. 155 that the provision in the Act of 1996 for the admissibility of hearsay evidence was not of itself unconstitutional. That is a reference to s. 8 of the Act of 1996. He went on to state that *"it was a matter for the court hearing the application to decide what weight should be given to such evidence".* At first instance in *Murphy v. GM,* O'Higgins J. had addressed the question of the admissibility of hearsay evidence on an application under s. 3 of the Act of 1996. He stated the following (from which there was no demur in the Supreme Court):

> *"It is clear, therefore, that the rule against hearsay is a rule of evidence only and is not a constitutional requirement. While it remains 'an essential feature' of our legal system it may be modified by statute. I do not accept the contention that it is unfair per se …… . It is further contended that if the Act has this structure, the admissibility of hearsay is even more objectionable on the basis that the Disposal Order is achieved, at least indirectly, partly on the basis of hearsay. In that regard, it is necessary to emphasise that the weight to be attached to hearsay is a matter for the Court. The court is obliged in every case to examine the weight, if any, to be attached to such evidence. If such evidence is challenged in cross-examination, its weight could be considerably diminished or indeed rendered at nought …… . Moreover, in my view, there is nothing to prevent the Court, on the application of a party, from requiring the attendance of the specified person identified as the source of the deponent's' hearsay evidence to the Court in an appropriate case."*

55. In *McK v. GWD* [2004] I.R. 470, one of the issues considered by Fennelly J. in his judgment was whether the belief evidence given by CAB could derive from *"inquiries conducted and information obtained from British and Irish police" i.e.* hearsay. In his judgment, Fennelly J. stated at p. 481:

> *" … By definition the original criminal source of the property will often be impossible to prove by direct evidence. Surrounding circumstances such as previous criminal history, lack of evidence of legitimate income, known criminal associations, disguising of true ownership and the like may give rise, in the mind of an experienced police officer, to a belief that the property represents the proceeds of crime. It is sufficient that the belief be reasonably grounded.*
>
> *It has been accepted, in Murphy v. G.M. [2001] 4 I.R. 113 … that the section has the effect of admitting hearsay evidence. Evidence of belief under s. 8 does not have to be direct. The value of belief evidence is not diminished by being based on hearsay. Section 8 does, however, require that the evidence in a s. 3 application be given orally. Thus the defendant has the right to test the belief in cross-examination and to give and to call his own evidence."*

56. CAB submits that the evidence which is admissible for the purpose of demonstrating the reasonableness of the belief on its part that the property is the proceeds of crime does not have to be evidence that would be admissible in a criminal trial, since its purpose is to show only that there are reasonable grounds for the belief held. CAB submits that the cases that have come before the courts here on this issue of the admissibility of hearsay evidence on a s. 3 application all point one way, namely that such evidence is admissible, and that the weight to be attached to that evidence is a matter for the trial judge.

57. I have referred to the appellants' reliance upon the judgment of Keane C.J. *in Criminal Assets Bureau v. Hunt,* and to that of Hardiman J. in *CAB v. T.H.* in aid of a submission that a narrower application of the exception to hearsay ought to be applied. In *CAB v. Hunt,* it was not the provisions of the Act of 1996 that were being considered in the context of hearsay evidence, but rather s. 8 (5) and (7) of the Criminal Assets Bureau Act, 1996 which respectively provide:

> *(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 offices under this section shall be permitted in evidence in any subsequent proceedings.*
>
> *(7) Subject to section 5 (1), any information or material obtained by bureau officer for the purposes of this Act may only be disclosed by the bureau officer to –*
>
> *(a) another officer or member of the 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 any 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."*

58. At issue in *Hunt* was the admission into evidence of certain bank statement which had been lawfully obtained by CAB and which it passed on to the Revenue Commissioners who in due course raised assessments of tax on foot of the information contained therein. It was in relation to the admissibility of the bank statements, which under normal rules of evidence would be hearsay unless proven by the authors thereof, that the Supreme Court came to consider the scope of the exception to the hearsay rule provided for in the above provisions of the Criminal Assets Bureau Act, 1996. In reaching his conclusion that the bank statements ought not to have been admitted into evidence without formal proof, Keane C.J. stated the following at p. 189:

> *"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."*

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.

60. In so far as the CAB places reliance upon the judgment of Hardiman J. in *McK v. T.H.* – a case which did involve an application for an interlocutory order under s. 3 of the Proceeds of Crime Act, 1996 the appellants say such reliance is misplaced when one takes into account the fact that as the Supreme Court concluded in *McK v. A.F.* that the term 'interlocutory order' in s. 3 must be understood to be a final order, and not an interlocutory order in the traditional sense where a relaxation of the rule against hearsay is permitted for example under O. 40, r. 4 RSC. In *McK v. AF* the appellants had not raised that issue in the High Court and therefore the Supreme Court declined to address it on appeal. The present appellants refer to this fact, and seek to reduce the significance of the conclusions of Hardiman J. in *McK v. T.H* as a result. I will come to that submission in more detail in due course.

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 a legal proceedings. They are capable of gross abuse, and capable of undermining the ability of a person against whom they are deployed to defend self 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 person is 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.

Reasonable grounds for the belief

67. MMJ appeals against the finding of the trial judge that there were reasonable grounds for the belief on the part of D/Superintendent Corcoran that the Irish Life Investment Bond in the name of MMJ and in the amount of €10,000 was purchased in February 2005 with the proceeds of crime. It is submitted that there was no evidence to support the belief held and expressed in that regard. It is submitted that it is not sufficient that a belief be held generally in relation to the property over which the s. 3 order is sought, but that the Court must be satisfied in respect of each individual item of property over which the order is sought that it is, or was acquired with, the proceeds of crime.

68. MMS appeals on the same basis in relation to the Irish Life Bond in his name in the sum of €20,000 purchased in February 2005.

69. The evidence before the High Court was that the MMJ Bond (€10,000) was purchased by means of €5,000 advanced to MMJ by MMS from his credit union account, with the balance coming from MMJ's own account. MMJ claimed he was owed €5,000 by MMS in that regard. CAB was not satisfied that there was any evidence that MMJ's own contribution of €5,000 was explained.

70. The evidence before the High Court in relation to the MMS Bond (€20,000) was that it was purchased with funds from MMS's credit union account. It was accepted by CAB that part of the funds in that account comprised a legitimate sum of €7,750 in respect of the proceeds of a compensation claim, and a legitimate lodgement of €1,800 being a payment from DTZ Sherry Fitzgerald in respect of some house clearing work. However, the balance of the funds used was not explained to CAB's satisfaction.

71. The appellants submit that the trial judge erred in that he appears to have had regard to what he considered to be the unsatisfactory, contradictory and sometimes confused explanations given by the appellants in relation to the provenance of the funds in question in order to conclude that he was satisfied that there were reasonable grounds for the belief evidence given. It is submitted that the unsatisfactory explanations, if they be such, or the failure to explain, should not be taken into account at all by the Court until such time as the Court is satisfied on a prima facie basis that there are reasonable grounds for the holding of the belief that the property represents the proceeds of crime. It is submitted that the onus does not shift under s. 3 of the Act of 1996 until such time as the Court has been satisfied on the basis of the evidence given by CAB on affidavit and/or by oral evidence in cross-examination (if any) that there have been shown to be reasonable grounds for the belief.

72. The appellants refer to what the trial judge stated at paragraphs 33 - 35 of his judgment as follows:

> *"33. In the case made by CAB against Mr Murphy Senior is that he minds money for his son Mr Murphy Junior. He has presented six affidavits, was interviewed on three occasions by gardaí and was cross-examined on the contents of his affidavits before me. The case made on behalf of CAB has not been undermined.*
>
> *34. I have considered the possibility that funds to purchase the bonds came from earnings which were not recorded and on which tax was not paid as an alternative to the proposition that the unexplained funds are the proceeds of crime but I find myself in the difficulty that I do not accept that the was a significant work history, or a significant history of*

successful trading in cars or motorbikes or lawnmowers, as has been canvassed, which can provide an explanation. Any such activity, if it ever occurred at all, must have been extremely limited and any profits modest indeed.

35. In relation to the circumstances of the respondents, both have significant criminal records. Mr Murphy Senior has 21 previous convictions and Mr Murphy Junior has some 43 previous convictions. However, I do not ignore the fact that Mr Murphy Junior has said that while he has been involved in crime since he was 15 or 16 years of age, and been in and out of custody since then, that he has not made money from crime. In fairness to Mr Murphy Junior, it is the case that many of the recorded offences are linked to drunkenness and violence rather than offences involving property acquisition. Nonetheless, the combination of unsatisfactorily explained funds, inconsistent explanations and a background of criminality is a disquieting one. So disquieting indeed, that one is forced, in the absence of a satisfactory explanation, to conclude that the property in question has not been acquired honestly, or even by unrecorded commercial activity of one form or another, but rather represents directly or indirectly the proceeds of crime."

73. These paragraphs, it is submitted, indicate an incorrect approach to the task which the Court must carry out under s.8, namely to consider first the evidence put forward by CAB as forming reasonable grounds for the belief that the property comprises the proceeds of crime, and then to consider that evidence and any other evidence put forward by CAB, and only when that hurdle is overcome by CAB, to go on to consider whether the respondents have discharged the onus (which only then has shifted to them) to demonstrate, if they can, that the property is not the proceeds of crime.

74. In *FMcK v. G.W.D,* McCracken J. set forth at p. 491 a procedure which he considered should be followed by a judge hearing an application under s. 3 of the Act of 1996, stating the following:

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

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

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

(3) only then should he go on to consider the position under s. 3. He should consider the evidence tendered by the plaintiff, which in the present case would be both the evidence of the 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 considered the evidence furnished by the defendant or other specified person and determine whether it 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 followed in that order, there should be little risk of the type of confusion which arose in the present case."

75. Returning to the trial judge's judgment, it should be mentioned that having expressed his conclusion as shown at paragraph 35 of his judgment (above), he went on to consider other issues that had been raised namely whether 12 Clonard Avenue could be properly considered to be the dwelling of MMJ, and also the submissions made in relation to the exclusionary rule following the decision in Damache which I have dealt with. Having reached his conclusions in relation to those issues the trial judge returned to s. 8 of the Act of 1996. He stated in paragraph 49:

"I will … follow the procedure directed by McCracken J. in FMcK v. G.W.D. [2004] 2 I.R. 470. I have regard in the first instance to the evidence of Detective Chief Superintendent Eugene Corcoran and I also have regard to the evidence of Detective Garda Garry Sheridan, the financial analyst, the revenue officer and social welfare officer. I am of the view that there are reasonable grounds for the belief/opinion held by the Chief Superintendent and accordingly, the belief evidence of the Chief Superintendent, forms part of the evidence in the case. By reference to the belief evidence of the Chief Superintendent and the other evidence adduced on behalf of the applicant, i am satisfied that a prima facie case has been made out by the Criminal Assets Bureau. I have then considered the evidence on behalf of the respondents and notice party, both the affidavit evidence and have also had regard to their evidence in the witness box. I am not satisfied that the respondents have discharged the onus on them and instead I remain of the view that the property, the subject of the application, represents the proceeds of crime."

76. Even though the trial judge stated that he would follow the procedure suggested by McCracken J. in *FMcK v. G.W.D*, and appears to have done so according to what he stated above, it is submitted nevertheless that when one examines the judgment it would appear that before he reached any conclusion as to whether he was satisfied that there were reasonable grounds for the belief as to the provenance of the property held and expressed by D/Chief Superintendent Corcoran, he had already reached adverse conclusions in relation to the appellants' explanations as to the source of the funds from which, inter alia, the Irish Life Bonds were purchased.

77. In my view significant weight must be given to the fact that the judge himself in his judgment states specifically that he is following the procedure advocated by McCracken J. *in FMcK v. G.W.D.* There is no doubt that he considered that judgment carefully. Despite the fact that he referred to the absence of explanation by the appellants at an earlier stage of his judgment, and before he expressed his conclusion as to a *prima facie* case having been made out, I am satisfied that the correct test was applied by the trial judge.

78. It can be noted that the early paragraphs of the judgment set forth, as one would expect, a general background to the application, and a description of the property which is the subject thereof. He describes the search of 12 Clonard and the issues that arise from that search. He then goes on to briefly summarise some of the evidence provided by the affidavits filed by the CAB in support of the application. Inter alia, he noted in paragraph 9, for instance, that *"the case for the applicant is that [MMJ] was actively involved with a well known major Limerick criminal gang, which was involved in very serious criminal activity, including drug*

trafficking". He goes on to deal with what was found in the rucksack during the search of 12 Clonard Avenue, the fact that MMJ gave certain explanations for the cash discovered in the rucksack. Having done so, however, the trial judge stated at paragraph 11:

> *"… So far as the cash located in the course of the search is concerned, Mr Murphy Junior was interviewed about this following his arrest and he stated that the Stg£6,625 recovered belonged to his father and that the €9000 cash came from a compensation claim which he, Mr Murphy Junior had received 10 years earlier. The analysis subsequently conducted by the Bureau's financial analyst would seem to exclude the compensation settlement of Mr Murphy Junior of January 2001 in the amount of €8500 as the source of the €9,000 found in the rucksack as the analyst is able to point to a series of withdrawals between January 2001 and April 2005 which account for the entire settlement."*

79. The appellants submit that this statement is an example of what they complain about, namely that before expressing himself satisfied that a prima facie case has been made out by CAB, and therefore before any shifting of the onus to the appellants, the trial judge has already reached conclusions in relation to some of the explanations offered as to the provenance of the cash found at 12 Clonard Avenue.

80. Following that statement, the trial judge went on to describe the close relationship between MMS and his son MMJ as stated in the affidavit of D/Chief Superintendent Corcoran, including that this close relationship extended to a shared involvement in crime. He goes on then to give some detail from the affidavit sworn by a financial crime analyst as to the lifestyle of MMJ between 2002-2009, and his recorded earnings of €77,384 during the period, and the funds found to have been available to him during the period, namely €210,546 leaving an unexplained deficit of €133,161. He describes how MMJ was in receipt of unemployment benefit between December 1999 and June 2001, and again between January 2002 and May 2002, and how he was also in receipt of a Carer's Allowance between 2007 and 2009, and that his recorded PAYE earnings between February 2005 and January 2007 amounted to €18,524. The trial judge then describes the setting up of a waste disposal business by MMJ in 2007, and that a tax return for this business for 2007 showed a loss of €6188, and a turnover of just €3,000, and that no further tax returns were filed. Having entered upon some discussion of that waste disposal business, and then the fact that over the past 25 years MMS was in receipt of only social welfare payments and a State Contributory Old Age Pension, he describes a claim being made now by MMS to some of the cash recovered, and that a sum of €5,000 was owed to him by his son.

81. Immediately following the above the trial judge proceeds to state the following at paragraphs 20 *et seq*:

> *"20. So far as the investment bonds are concerned, the evidence adduced by CAB indicates that the greater part of the funds to purchase these bonds cannot be accounted for by any traceable sources. However, in the case of the bond purchased in the name of Michael Murphy Senior, the Sum of €7,550 came from a compensation claim and it is acknowledged that this element is legitimate. However, the balance of €12,450 according to CAB cannot be accounted for legitimately and represents the proceeds of crime.*
>
> *21. Mr Murphy senior maintained an account at Blarney Credit Union … where a balance of €5,944 was achieved of which €5000 was applied to the part purchase of the €10,000 bond in the name of Michael Murphy Junior. The other €5,000 coming from Acct. No. 04XXXX in the name of Michael Murphy Junior.*
>
> *22. Evidence adduced by CAB established that between September 2002 and February 2005, when his social welfare entitlements amounted to approximately €26,000 that Mr Murphy Senior succeeded in achieving a balance of €20,000 in an AIB account of his Acct. No. 8XXXXXX, this exclusive of the lodgement attributable to the compensation claim to which I have referred."*

82. The paragraphs following thereafter describe the investigations carried out by CAB into certain explanations given by the appellants in relation to the source of funds in accounts under investigation, and how these explanations turned out to be false – one example being that some of the funds represented the payment back <u>in cash</u> by the Courts Service in relation to a bail put up by MMS for his son, MMJ following the latter's conviction for an offence for which he received a 12 month sentence. This turned out to be incorrect as, quite apart from anything else, the Courts Service had explained that returns of bail monies are never made in cash.

83. The appellants refer in particular to paragraph 20 above as showing a premature determination by the trial judge in relation to the provenance of the two Irish Life Bonds, and that he has indicated a conclusion that the explanations offered are not satisfactory and therefore a conclusion that they were acquired with the proceeds of crime. It is submitted that he has erred in reaching that conclusion ahead of determining in the first place that the CAB had put forward a *prima facie* case in relation to these two bonds in particular, and determining that there were reasonable grounds for the belief expressed by D/Chief Superintendent Corcoran, which was part of the evidence offered to the Court for its consideration.

84. It is also submitted, and correctly in my view, that CAB is obliged to put forward a prima facie case in relation to each particular item of property over which a s. 3 order is being sought, and the Court must satisfy itself in that regard in relation to each such item. In other words, just because a prima facie case is made out in relation to items of cash found during the search of 12 Clonard Avenue, does not mean that a *prima facie* case is made out in relation to all items over which the order is sought. In so far as there must be reasonable grounds for the belief evidence given, those reasonable grounds must exist in relation to each item of property, if more than one. The appellants submit in the present case that there were no reasonable grounds shown to exist for the belief expressed by D/Chief Superintendent Corcoran in relation to the two Irish Life Bonds purchased in 2005, and that there was no *prima facie* evidence adduced by CAB in any other way that the bonds were purchased with the proceeds of crime.

85. The appellants submit that the evidence given by CAB which was before the trial judge in relation to the two bonds purchased in February 2005, was insufficient to shift the onus to the appellants to explain the source of funding, and consisted of the following:

- MMJ's previous convictions before and during 2005 which were for road traffic offences, and public order offences – but no evidence of any crimes of acquisition or organised crime in that period;
- The absence of any evidence of Garda intelligence suggesting that MMJ was involved in organised crime prior to 2009;
- CAB discovered no source of declared income which was capable of accounting for the purchase of the investment bonds;
- The belief evidence of D/Chief Superintendent Corcoran.

86. In relation to the belief evidence of D/Chief Superintendent it is submitted that the above evidence could not possibly fulfil the

need for reasonable grounds to be shown for that belief in relation to the two bonds and the funds used to purchase same in 2005, or otherwise constitute sufficient evidence for a prima facie case that the bonds are the proceeds of crime, and that instead the trial judge has impermissibly first looked at the failure of the appellants to adequately explain the source of those funds, where he ought first to have considered whether he was satisfied that CAB had discharged the onus upon it to show a prima facie case that they represent the proceeds of crime before looking at the explanations given by the appellants.

87. Counsel for CAB has made a number of submissions in response. Firstly, she submits that the concept of 'reasonable grounds' for the belief evidence given by D/Chief Superintendent Corcoran should be seen as equivalent to the 'reasonable suspicion' required of a Garda officer before arresting a person suspected of having committed a crime. In that regard she refers again to the judgments of both Charleton J. in the High Court and of Fennelly J. in the Supreme Court in *DPP v. Cash* [supra] which support a view that what may amount to evidence sufficient to base a suspicion need not be evidence that would be admissible at a trial, and that such a suspicion may be based upon hearsay, or upon facts from which an inference can be reasonably be drawn. She relies also upon the judgment of Finlay Geoghegan J. in *Re Section 52 (1) of the Courts (Supplemental Provisions) Act, 1961: DPP v. O'Mahony* [2010] IEHC 2 where she stated as follows:

> *"It has never been held that what would be found a reasonable suspicion in law requires to be based on the kind of evidence that would be admissible under the rules of evidence during the hearing of a criminal trial. On the contrary, a reasonable suspicion can be based on hearsay evidence or can be inferred from discovering that an alibi which a suspect has given to the police turns out to be false. In Hussein v. Chong Fook Kam [1970] A.C. 942, the issue of the parameters of what was a reasonable suspicion came up before the Privy Council in the context of the criminal code of Malaysia. The Privy Council explained that reasonable suspicion should not be equated with prima facie proof, as that concept is understood in the law of evidence. The police force was entitled to act on a lesser standard of reasonable cause, or reasonable suspicion. Lord Devlin offered the following analysis, which I would follow:-*
>
> > *'The test of reasonable suspicion prescribed by the Code is one that has existed in the common law for many years … Their Lordships have not found any English authority in which reasonable suspicion has been equated with prima facie proof. In Dumbell v. Roberts [1944] 1 All ER 326, Scott L.J. said, at p. 329:*
> >
> > > *'The protection of the public is safeguarded by the requirement, alike of the common law and, so far as I know, of all statutes, that the constable shall before arresting satisfy himself that there do in fact exist reasonable grounds for suspicion of guilt. That requirement is very limited. The police are not called upon before acting to have anything like a prima facie case for conviction' ".*

88. Counsel also submits that in so far as the trial judge made findings of fact in relation to the provenance of the monies used to purchase the two bonds, MMJ may not seek to revisit those findings on appeal and ask this Court to overturn them and substitute a different finding. In that regard she relies upon the judgment of Finlay C.J. in *Pernod Ricard & Comrie plc v. FFI Fyffes plc,* unreported, Supreme Court, 11 November 1988, where he stated:

> *" … the findings by a trial judge of primary or basis facts which depend upon the assessment by him of the credibility and quality of a witness will only be interfered with by this court on appeal when such findings of primary facts cannot in all reason be held to be supported by the evidence."*

89. Counsel also relies upon the well-known statement of principles stated by McCarthy J. in *Hay v. O'Grady* [1992] 1 I.R. 210.

90. Counsel refers to the fact that MMJ chose not to give any evidence against what was stated in affidavit and in cross-examination of CAB witnesses, and that therefore it was open to the trial judge to treat the evidence put forward by CAB as being uncontested. She points out also that while there was no cross-examination of Bureau Financial Analyst No. 3, that witness was tendered for cross-examination if either MMJ or MMS had wished to cross-examine on that affidavit evidence.

91. Counsel has referred to the fact that when under cross-examination by Counsel for MMJ, D/Chief Superintendent Corcoran was asked about the MMJ Irish Life Bond for €10,000 purchased in 2005, when it was suggested to him that the only evidence being given was that it was purchased with funds that had not been explained or accounted for, and that the funds in question may well have been lawfully earned, even if tax may not have been paid on it. She refers to the answer given by him, namely to the effect that MMJ had been given ample opportunity to explain where the money came from and had failed to do so.

92. Similar submissions are made in relation to the funds which purchased the MMS Bond in the sum of €20,000 also in 2005, though it is accepted that a sum of €7750 in the account from those funds emanated comprised money received by MMS in respect of a compensation claim. But that was the extent of any explanation accepted by CAB in relation to the monies in that account.

93. Counsel for CAB has referred to the averments by D/Garda Sheridan in his affidavit and to aspects of the cross-examination of his evidence by Counsel on behalf of both MMS and MMJ, and in particular about the provenance of funds lodged to MMS's bank account prior to 2005, and also to the affidavit evidence of the Revenue officer, Social Welfare officer, and the CAB financial analyst. Clearly all that evidence was part of the evidence before the trial judge, in addition to the belief evidence of D/Chief Supt. Corcoran, provided of course that the trial judge was satisfied that there were reasonable grounds for the holding of that belief, and in that event, he could have regard to that belief for the purposes of s. 3 of the Act.

94. The trial judge at paragraph 49 of his judgment stated "I am satisfied that a *prima facie* case has been made out by the Criminal Assets Bureau". He did not make that determination separately in relation to the each item of the property over which the s. 3 order was being sought. It is a general conclusion. The appellants submit that there are no grounds shown to exist for the belief evidence in respect of the two Irish Life Bonds since they were purchased in 2005 and there was no evidence given of any known criminal activity on the part of the appellants prior to that date.

95. But D/Chief Superintendent Corcoran stated at paragraph 5 of his affidavit his general belief that the property over which the s. 3 order was being sought constitutes the proceeds of crime, and at paragraph 6 (h) he dealt specifically with his belief in relation to the two bonds, stating that he believed that *"the greater part of the funding for these investment bonds is not properly accounted for in any legitimately earned income of either [MMS or MMJ]"*, though he accepted that €7,550 thereof was legitimate as it was from a compensation claim. He went on to say that the balance was unaccounted for, as was a sum of €5,000 used by MMJ as part of the €10,000 paid for MMJ's bond. He specifically referenced the analysis of the bank accounts carried out by Financial Crime Analyst No. 3 which referred to a large disparity (some €133,161) between known legitimate earnings and the funds passing through his accounts during 2002 – 2009, that disparity being believed to be the proceeds of crime, as well as the evidence of the Social Welfare officer.

96. He was cross-examined on his affidavit evidence by Counsel for both appellants. When asked by Counsel for MMS whether he was

able to give any evidence in relation to the involvement of MMS in any criminal activity, he responded:

> *"Judge, I cannot add to that than is already in the affidavits filed in the matter and in the outcome of the investigation and presented to me by the officers of the Bureau and members of the Gardai".*

97. He went on to say that the evidence in relation to a connection to organised crime in the Limerick area was in relation to MMJ only; but that the link to criminality in relation to MMS was on account of his close relationship to his son, MMJ. He had no specific evidence to give that MMS was himself involved in any criminal activity prior to 2005.

98. When asked specifically about the two Life Bonds and whether he was contending that these were the proceeds of crime, he stated in reply:

> *"Judge, in that respect I rely on the evidence of the Bureau Financial Analyst and the amounts of money available to both parties at the time. It is my belief that the monies relate to the proceeds of crime …".*

99. He was also referred to the fact that in 2002 MMJ received a four year prison sentence, and was asked whether it was being said of MMS that any money that went into his account while his son MMJ was in prison were the proceeds of crime. In answer he stated that they were unexplained lodgments over and above his social welfare income.

100. He was cross-examined also by Counsel for MMJ. He stated that he was not able to add anything to the evidence of D/Garda Sheridan in relation to any known criminal activity on the part of MMJ prior to 2009. He acknowledged that he was not putting forward the case that prior to 2009 there were any offences committed by MMJ that could be regarded as crimes of acquisition.

101. He was asked whether he could go so far as to state a belief that the MMJ bond (€10,000) bought in 2005 was the proceeds of crime. He stated:

> *"The Bureau's case at its height is made out in the affidavits before the Court, Judge. This is the position that we are in insofar as that income is concerned. We have made concessions in respect of the claims that were in place, the insurance claims, and possible pay out from some {of] those."*

102. Given D/Chief Superintendent Corcoran's own belief that these items are the proceeds of crime is predicated upon the other affidavit evidence provided in support of the application, and given that all that affidavit evidence was what was before the Court in order to reach its first necessary conclusion, namely that the property was on a prima facie basis the proceeds of crime, the question is whether it was open on all that evidence for the trial judge to be satisfied that CAB had made out a prima facie case for the purpose of shifting the onus to the appellants to establish by evidence that the property does not constitute the proceeds of crime. If the belief evidence was to be taken into account by the trial judge as part of the evidence being advanced under s. 3 of the Act, the trial judge had to be satisfied that the belief was reasonably held. Once he was satisfied that as to these matters, including that there were reasonable grounds for the belief held by D/Chief Supt. Corcoran, he was required to make the order under s. 3 of the Act unless the appellants discharged the onus that had by that stage shifted to them.

103. The trial judge referred to the evidence of D/Chief Supt. Corcoran, the evidence of D/Garda Sheridan, and to the affidavits of the CAB financial analyst, the Social Welfare officer and the Revenue officer. It was clearly shown by that evidence that there was no explanation considered to exist as to the source of funds going into the accounts under examination, given the known sources of income available to the appellants. The judge was satisfied in that regard. Large sums, relatively speaking, were unexplained by known sources prior to 2005 and thereafter.

104. It is certainly correct, as the appellants submit, that the affidavit of D/Garda Sheridan does not assist in establishing any direct connection between the funds used to purchase the Irish Life bonds and any acquisitive criminal activity prior to or in 2005. He was able to obtain information as to the bank accounts from which the various sums were withdrawn in 2005 but he does not opine as to its provenance, save to say that following the service by him upon MMS of a notice under s. 18 of the Criminal Justice (Money Laundering and Terrorist Financing) Act, 2010, he received the explanation as to the source of his funds from MMS to which I have already referred, namely*: "any money that I have, I begged from my late mother and my family and also begged on the streets of Tralee, Killarney and Lismore to try and raise money for an eye operation …".*

105. Neither appellant chose to cross-examine any of the other affidavit evidence adduced by the CAB. Despite the explanation offered by MMS as indicated in the previous paragraph, it was in my view open to both D/Chief Supt Corcoran and the trial judge to look upon it with scepticism, and to reject it as credible and sufficient.

106. Revenue Officer 46 stated that he/she is an Inspector of Taxes, and has examined the Revenue records for both MMJ and MMS. In relation to MMJ, records of his employment and income earned as an employee are set forth in respect of the years 1997/98, 1998/99, 1999/00; 2000/01, 2002. There is then a gap to 2005 which would appear to be consistent with MMJ being in prison until some date in early 2005. He is recorded as commencing an employment on the 14th February 2005, and earning very modest sums during 2005, 2006 and 2007. It will be recalled that the two bonds were purchased in early February 2005. These records then outline his registration as self-employed from 20th July 2007 in connection with the waste disposal business, and go on to refer to a tax return for 2007 to which I have already referred and which showed a loss of €6,188. In addition he had income that year from a carer's allowance and a small sum from another employment. There is no reference or averment which relates to either of the two bonds.

107. The same deponent sets out known employment details for MMS also. They record that in 2002 MMS phoned the Revenue and stated that for the previous 20 years he had been blind and had not worked for two companies with whom he appeared to be registered as an employee, namely D.F. Doyle & Co Ltd and Ronayne Shipping Ltd. as of 1st January 2002. There are also details given of two vehicles which MMS is recorded as having purchased on 16th March 2005 and 7th May 2010. Nothing more is said about that.

108. Another affidavit supporting the application, and said to support D/Chief Superintendent Corcoran's belief as to the provenance of the two bonds is sworn by Financial Crime Analyst No. 3. He/she refers to the opinion of D/Garda Sheridan that MMJ is involved in serious crime including drug trafficking in the Cork region, and to his being at that time in prison serving a six year sentence. He/she sets out a long list of bank accounts in the sole name of MMJ and in the sole name of MMS. An analysis is carried out in relation to the lodgments to these accounts, and in relation to MMJ it is stated that of the total of €220,256 lodged, €158,193 was from "unknown sources". The period analysed was from 1998 to 2009. However, while no calculation has been made in the affidavit as to the amount lodged to MMJ's accounts between 1998 and the commencement of 2005 (i.e. up to time of the purchase of the two bonds) it is possible to make that calculation from the figures set forth in the affidavit. Between 1998 and the end of 2004 there were

lodgments totalling €56,886 or thereabouts over that 7 year period. However between 2005 and 2009 – a 5 year period - a total of €163,369 was lodged.

109. In relation to MMS in respect of which no evidence of criminal activity as such is alleged by CAB other than by association with MMJ's criminal activity after 2005, similar analysis has been carried out, and it is stated that of the total sum of €212,297 lodged to known MMS accounts from 1985 to 2009 – a period of 24 years, all but c. €100,000 was from unknown sources, and of that amount €20,975 was lodged in cash. It is not suggested that this was a single cash lodgement of that amount. It goes on to note that these amounts were being lodged during a time when his only known source of income was his Blind pension and a Disability Benefit.

110. There is no doubt that there is evidence of the lodgement of monies to known accounts of both MMS and MMJ prior to 2005 a good deal of which cannot be accounted for by known sources of legitimate income. D/Chief Superintendent Corcoran is not satisfied that that the source of the monies lodged over and above known legitimate earnings has been explained, and that in so far as some explanations have been offered, many have turned out to be false. In my view the absence of explanations for such significant sums over the period under scrutiny is more than sufficient to form a reasonable basis for the belief held that the two Irish Life Bonds were acquired with the proceeds of crime. It is not necessary to prove that this is so for the purposes of ss. 3 and 8 of the Act. It simply a question of whether the 'belief' is reasonably based. The affidavit evidence referred to by D/Chief Supt. Corcoran on which he based his belief is more than sufficient for that belief to be part of the evidence taken into account by the trial judge under s. 3 of the Act, and in my view he was correct in his conclusions. In the absence of any rebutting evidence the trial judge was correct to make the order sought in respect of the items of property over which the order was being sought.

111. For the sake of completeness I should add that I am satisfied that there was ample evidence adduced by CAB to justify a conclusion by the trial judge that a prima facie case had been made out in respect of the two cash items found in the rucksack during the search of 12 Clonard Avenue, namely Stg£6,625, and €9,000, and for concluding that the appellants had not discharged the onus which fell upon them to satisfy the Court that these sums were not the proceeds of crime, and that a s. 3 order should be made in respect of those items of cash seized. The fact that each individual item falls short of the 13,000 threshold for an order under s. 3 does not matter given that the threshold is expressed in the section by reference to *"all the property to which the order would relate".*

112. For these reasons I would dismiss the appeal.