APPROVED NO REDACTION NEEDED

THE COURT OF APPEAL

Appeal Number: 2022/41
High Court Record No. 2021/02CAB

Donnelly J.
Binchy J.
Butler J.

Neutral Citation Number [2022] IECA 304

BETWEEN/

CRIMINAL ASSETS BUREAU

APPLICANT/RESPONDENT

- AND –

GRAHAM WHELAN

RESPONDENT/APPELLANT

JUDGMENT of Ms. Justice Butler delivered on the 23rd day of December 2022

Introduction

1. This is an appeal from the decision of the High Court (Owens J. [2022] IEHC 26) on foot of which an order was made on 19th January, 2022 under s. 3 of the Proceeds of Crime Act, 1996 in respect of four items of property listed in the schedule to the order. This appeal concerns only the first of the four items, namely the balance in an AIB bank account in the name of the appellant being a sum just in excess of €75,000. The appellant challenges the legal basis for the trial judge's finding that this money constitutes the proceeds of crime.

2. The appellant did not appeal the High Court's finding that the other three items, a smaller sum in cash, a watch and sums held in the appellant's name in a stockbroker's

account constituted the proceeds of crime, and indeed did not contest this issue before the High Court either (see para. 32 of the High Court judgment).

3. The dispute as to the status of the €75,000 held in the AIB account arises in circumstances where the evidence before the High Court established that this sum had been paid by a third party, Mr. John Wilson, to the appellant on 18th January, 2019. Members of the Garda National Drugs and Organised Crime Bureau carried out a search at a hotel room on 31st January, 2019. The appellant and another man were present in the hotel room at the time of the search. During the course of the search the three items listed at numbers 2 – 4 of the schedule to the court order were seized as were a number of other pieces of evidence linked to organised criminal activity and the drugs trade. On the day after the search, 1st February, 2019, a formal loan agreement in respect of the sum of €75,000 was signed by Mr. Wilson and by the appellant at the appellant's solicitor's office. Subsequent garda investigations revealed the existence of the AIB bank account in the name of the appellant in which the sum of €75,000 was held.

4. On 5th February, 2019 shortly after the search and the discovery of the AIB bank account, an application was made by a member of An Garda Síochána to the District Court under s. 17(2) of the Criminal Justice (Money Laundering and Terrorist Financing) Act, 2010. The District Judge granted an order the effect of which was to prevent the AIB carrying out any service or transaction on that account for a period of 28 days. That order was renewed from time to time between February 2019 and February 2021. As he was entitled to, the appellant brought an application under s. 19 of the 2010 Act seeking to have the s. 17 order revoked. That application was adjourned from time to time until it was assigned a hearing date and was due to be heard on 16th February, 2021.

5. Because of the imminence of this hearing date and the possibility that the appellant's application might be successful, an *ex parte* application was made to the High Court by the

Criminal Assets Bureau ("CAB") under s. 2 of the Proceeds of Crime Act, 1996. On 16th February, 2021 Owens J. granted an order under s. 2 of the 1996 Act prohibiting the appellant and any other person having notice of the order from disposing of or otherwise dealing with the assets listed in the schedule to the order. Owens J. directed, *inter alia,* that the AIB be served with, and the District Judge who made the orders under the 2010 Act be informed of, the making of his order. CAB then brought an application for an interlocutory order under s.3 of the 1996 Act which was heard by the High Court in December 2021. Judgment was issued on 19th January 2022 and the High Court granted the orders sought.

6. Although the notice of appeal raises grounds concerning the overlap between the District Court and the High Court proceedings, these grounds were not pursued in either the appellant's written submissions or at the hearing of the appeal. Thus, the only issue before this court on appeal concerns the correctness of the trial judge's conclusion that the sum of €75,000 in the AIB bank account constituted the proceeds of crime such that it could properly be the subject of an order made under s. 3 of the 1996 Act.

Background Facts

7. In order to understand the central legal issue arising on this appeal it is necessary to look at the factual context in which the s. 3 application was made by CAB. This can be done briefly, in part because in his written submissions the appellant accepts the summary of facts set out at paras. 2 – 10 of the High Court judgment which has, in effect, been further summarised above. In addition, much of the broader factual background was simply not contested by the appellant before the High Court. Only one replying affidavit was filed on behalf of the appellant and in that affidavit he chose, for reasons connected with the then-ongoing criminal proceedings, not to engage with much of the substantive evidence which was adduced by CAB.

8. It was undisputed that the €75,000 in question had been transferred by Mr. Wilson to the appellant's bank account on 18th January, 2019. It was also undisputed that the €75,000 was a portion of a larger sum received by Mr. Wilson as compensation in respect of a personal injury claim arising out of an injury sustained by him at his place of work. Thus, there was no issue but that the receipt of the larger sum by Mr. Wilson from his employer's insurers was a perfectly legitimate transaction and the monies did not constitute the proceeds of crime at that time. The issue is whether the receipt of the €75,000 by the appellant from Mr. Wilson converted monies which had not been the proceeds of crime in the hands of Mr. Wilson into the proceeds of crime in the hands of the appellant. For reasons which are expanded on further below, the appellant argues that an intention imputed to him as regards his future conduct cannot change the status of the property before any action which might be characterised as criminal conduct has been taken by him.

9. CAB argues that the €75,000 was received by the appellant as part of a money laundering scheme under which the appellant would repay Mr. Wilson using monies derived from his criminal activities. CAB relied on two strands of evidence in this regard. The first constitutes evidence of serious criminality on the part of the appellant. This included evidence of his past convictions including numerous and serious convictions for drug dealing; evidence of his involvement in the activities of an organised criminal gang; evidence of his association with persons known to be actively involved in the drugs trade; evidence of his suspected involvement in murder and attempted murder as part of a dispute between rival criminal gangs and evidence of the materials seized in the search on 31st January, 2019 some of which related to the drugs trade. The appellant did not engage with or seriously dispute most of this evidence.

10. The second strand of evidence concerns the relationship and past dealings between the appellant and Mr. Wilson who is an uncle-in-law of the appellant by reason of being married

to his mother's sister. Mr. Wilson is a man in his late fifties who worked in a trade until he sustained a workplace injury in 2009. Since this injury he is no longer in regular employment and has been in receipt of various social welfare payments referrable to the resulting disability. His wife is not in employment. Mr. Wilson received a payment of €110,000 in 2018 as compensation for his injuries. Mr. Wilson is not otherwise a man of significant means.

11. Evidence adduced by CAB showed that in 2017 Mr. Wilson made two withdrawals from his bank account, one for the sum of €12,000 and the other for €23,000. These monies were paid to a business called *"Wheelie Clean"* run by a company called Eco Green Wheelie Clean Ireland Limited of which the appellant is a director. There is no evidence referrable to the repayment of these sums – or any interest on them – to Mr. Wilson. However, there is evidence that in 2018 Mr. Wilson and his wife engaged a builder to build an extension to their home and that this builder was paid a sum of approximately €35,000 in cash in respect of the work. On the face of it, the cash used by the Wilsons to pay the builder came from an unknown source. At paragraph 44 of the High Court judgment the trial judge rejected the explanations offered by Mr. Wilson in respect of the sources of this cash and concluded that the most likely explanation was that it was cash payments received by him referrable to his investment in Wheelie Clean. He also found that the likely source for this cash was the proceeds of crime and not the cash receipts of Wheelie Clean. He reiterates this finding in the summary of his conclusions at para. 56.

12. In respect of the €75,000 both the appellant and Mr. Wilson swore affidavits for the purposes of the District Court application under s. 19 of the 2010 Act in which they claimed the €75,000 loan was for another business run by the appellant through a company called called Imperium Investments Limited. Mr. Wilson did not mention this company in his interview with An Garda Síochána in May 2019. In his affidavit the appellant states that the

money was to "*be used as seed money for legitimate business*" but does not identify Imperium as the business in question. This may have been because that company, which was incorporated in September 2018 and dissolved during 2020, was no longer in existence at the time the affidavit was sworn. There is no evidence that Imperium Investments Limited ever conducted any business. Whilst there was some suggestion the money was intended to be used to buy a plot of land, the appellant refused to identify where the site was. The trial judge regarded the appellant's explanations in respect of this loan and its purpose as "*unsatisfactory and unbelievable*" (para. 50). He concluded that the appellant got this money *"to use it for money laundering"* and that he intended to repay Mr. Wilson "*from proceeds of crime*" (para. 55).

High Court Judgment

13. The judgment of the High Court deals in great detail with the evidence which had been adduced by CAB and also with the contrary evidence on behalf of the appellant, not only in his replying affidavit but also in the affidavits sworn by him and on his behalf for the purposes of his District Court application. Although the relevant grounds of appeal are framed in a manner which suggests that the trial judge did not "*take into consideration*" the fact that the €75,000 was the subject of a loan agreement, it is unsustainable to contend that this important fact was not taken into consideration by the trial judge. He expressly adverts to the loan agreement in paras. 21 – 24 inclusive, 49, 52 and 53 of his judgment. In fact, the trial judge went so far as to reject the proposition advanced by CAB to the effect that the loan agreement "*was conjured up to re-characterise a prior transaction*" after the search and seizure of evidence on 31st January, 2019. He expressly held that parties to an oral loan agreement are not precluded from later reducing the terms of such agreement to writing

(para. 23). Further, the trial judge referred to a loan itself more broadly throughout the judgment.

14. In fairness to the appellant the argument actually made under this heading did not assert a failure to take the loan agreement into consideration at all but rather focused on whether the trial judge had drawn the correct legal conclusions in light of the fact that the sum in question was a loan from Mr. Wilson to the appellant.

15. Having reviewed the judgment of the High Court, in my view the key findings are those initially made at paras. 15 and 16 and later at paras. 55, 56 and 57. At paragraph 15 the trial judge concludes that there were reasonable grounds for the belief of Detective Chief Superintendent Gubbins that the money "*which came from John Wilson was got in by Graham Whelan as part of a money laundering exercise and that his intention at the time when he received the money was to repay John Wilson from proceeds of crime*". Evidence of the Detective Chief Superintendent's belief is admissible as evidence of the fact that property constitutes the proceeds of crime or was acquired in connection with property that constitutes the proceeds of crime under s. 8(1)(i) and (ii) of the 1996 Act if the Court is satisfied that there were reasonable grounds for the belief. The trial judge formally concluded that he was so satisfied and, consequently, accepted the belief evidence as evidence of the correctness of the underlying proposition.

16. At para. 16 the trial judge expressly finds that the material relied on by Detective Chief Superintendent Gubbins justified his belief and further that the affidavit evidence adduced by CAB post-dating Detective Chief Superintendent Gubbins' affidavit "*supports and confirms*" his conclusions in that regard.

17. At paragraph 55 of the judgment the trial judge found that the appellant received the sum of €75,000 from Mr. Wilson "*to use it for money laundering and that he intended to repay John Wilson from proceeds of crime*". At para. 56 he concluded that the loans made

by Mr. Wilson to Wheelie Clean in 2017 were repaid using the proceeds of crime and that this cash was then used to pay Mr. Wilson's builder in 2018. Finally, at para. 57 the trial judge concluded that the sum of €75,000 is "*caught by section 3(1)(a)(ii) of the 1996 Act*".

18. The applicant places significant weight on the fact that the trial judge expressly did not make any finding adverse to Mr. Wilson. This is correct. As the trial judge noted, Mr. Wilson was not a party to the application and, consequently, it would not have been appropriate to make any finding against him. At para. 17 of the judgment the trial judge states that he is not concluding that Mr. Wilson was privy to the appellant's intention and acknowledges that Mr. Wilson could have a valid claim to the money under s. 3(3) of the 1996 Act, a point to which he returned at para. 20. Under that section a person claiming ownership of property which is the subject of an order under s. 3 may apply to have the order discharged on the grounds that the property does not constitute the proceeds of crime or, alternatively, that the existing order causes an injustice. To date no such application has been made by Mr. Wilson although, as fairly acknowledged by CAB, there is no time constraint on the making of such an application.

Relevant Statutory Provisions

19. At this stage I propose to set out the statutory provisions relevant to the arguments made on this appeal. This entails looking at two different statutes, the Proceeds of Crime Act, 1996 (as amended) and the Criminal Justice (Money Laundering and Terrorist Financing) Act, 2010 (as amended). To a certain extent there is an overlap between these two statutes in that both deal with criminal conduct and with the proceeds of criminal conduct. However, it is important to bear in mind the fact that for the purposes of this case neither the proceeds nor the criminal conduct under consideration under each piece of legislation are necessarily the same.

20. The definition section to the Proceeds of Crime Act, 1996 (section 1) defines criminal conduct as any conduct: -

"(a) which constitutes an offence or more than one offence, …"

"*Proceeds of crime*" is defined in the same section as meaning:

"*any property obtained or received at any time (whether before or after the passing of this Act) by or as a result of or in connection with criminal conduct*".

21. Section 3 then provides for the making of interlocutory orders under which property which constitutes the proceeds of crime can be frozen pending the making of a final disposal order under s. 4. For present purposes the key parts of s. 3(1) are as follows: -

"*(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 …

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 the proceeds of crime …

Provided, however, that the court shall not make an order if it is satisfied that there will be a serious risk of injustice."

The appellant emphasises the mandatory nature of this provision which is subject only to the obligation on a court not to make an order in case of a serious risk of injustice.

22. Part 2 of the Criminal Justice (Money Laundering and Terrorist Financing) Act, 2010 is headed "*Money Laundering Offences*". The definition section at s. 6 contains a definition of "*criminal conduct*" which, at subparagraph (a) is almost identical to that in the 1996 Act. It also contains a definition of "*proceeds of criminal conduct*" which is somewhat different and provides as follows: -

"*proceeds of criminal conduct" means any property that is derived from or obtained through criminal conduct, whether directly or indirectly, or in whole or in part, and whether that criminal conduct occurs before, on or after the commencement of this Part."*

The main difference between this definition and that of the "*proceeds of crime*" in the 1996 Act is the fact that the 1996 Act definition focuses on property which has been "*obtained or received … as a result of or in connection with a criminal conduct*" whereas the 2010 Act looks at the derivation of the property through criminal conduct "*whether directly or indirectly*". No particular argument was addressed by the parties to these differences.

23. The offence of money laundering was created by s. 7(1) of the 2010 Act. It provides as follows: -

> *"(1) A person commits an offence if –*
>
> *(a) the person engages in any of the following acts in relation to property that is the proceeds of criminal conduct:*
>
> *(i) concealing or disguising the true nature, source, location, disposition, movement or ownership of the property, or any rights relating to the property;*
>
> *(ii) converting, transferring, handling, acquiring, possessing or using the property;*
>
> *(iii) removing the property from, or bringing the property into, the State,*
>
> *and*
>
> *(b) the person knows or believes (or is reckless as to whether or not) the property is the proceeds of criminal conduct."*

24. The submissions made on behalf of the appellant raise two central issues. The first concerned whether the sum of €75,000 lodged in an AIB account in the appellant's name was correctly characterised as the proceeds of crime and the second asserted a risk of injustice to the appellant which had not been considered by the trial judge. I will consider each of these separately.

Is the €75,000 the Proceeds of Crime?

25. The principal argument made on behalf of the appellant can be simply put but this does not necessarily do justice to its inherent complexity. In essence, it is argued that because the €75,000 had a legitimate provenance in Mr. Wilson's compensation claim, it can only

become tainted as the proceeds of crime when it is associated with criminal conduct. An intention imputed to the appellant regarding his future conduct is not itself criminal conduct. In the absence of some positive action and in the absence of any dealing with the money by the appellant, it was contended that a future intention to launder it could not transform funds with a legitimate provenance into the proceeds of crime at the time of their receipt by him. By analogy, counsel invoked Schrodinger's cat to argue that the character or status of the monies could not simultaneously be both the proceeds of crime and not the proceeds of crime depending on the unexecuted intention of the person in possession of it.

26. In making this argument significant weight was placed on the fact that the trial judge had not made any express finding of wrongdoing – or even of knowledge of wrongdoing – on the part of Mr. Wilson. Counsel regarded CAB as having made a concession that the money was not the proceeds of crime in the hands of Mr. Wilson at para. 43 of their written submissions. I am not convinced the paragraph relied on goes quite that far. It certainly accepts the legitimate provenance of the money as a compensation payment to Mr. Wilson. However, it goes on to contend that "*by inserting it into a money laundering scheme, the nature and character of the property changed*" without specifying whether Mr. Wilson, the appellant or both are doing the inserting.

27. In any event, arguments based on the absence of any findings against Mr. Wilson are not really relevant to the issue this court has to decide. It is not a requirement for the offence of money laundering that any third party, bank or business through which money might be laundered be aware of the fact that they are being used in this manner much less be active participants in the money laundering scheme. Therefore, in principle the offence of money laundering may be committed by the appellant in relation to the €75,000 regardless of whether or not Mr. Wilson was privy to the appellant's criminal intention.

28. Counsel relied on a judgment of Owens J. in *CAB v McCormack* [2020] IEHC 361 as supporting the proposition that there must be a temporal connection between the criminal conduct and the property at the time it is sought to characterise the property as the proceeds of crime. In that case CAB advanced an argument that because the respondent did not pay tax on non-criminal income over a period of time when he was also in receipt of criminal income, the non-payment of tax (a criminal offence) rendered the otherwise legitimate income criminal. Owens J. rejected that argument on the basis that conduct by the recipient which takes place after the receipt of the property involving a criminal offence such as his failure to make a tax return in respect of that property "*cannot, without more convert that property... into 'the proceeds of crime'*" (para. 32). By analogy it was argued that the trial judge deemed monies with a legitimate provenance to be proceeds of crime not because of subsequent conduct which actually occurred but because of intended conduct which had not occurred.

29. Further, as part of this argument counsel contended that the trial judge had not made any express finding of fact as to what the criminal conduct in issue actually was. Counsel on behalf of CAB disagreed pointing to the fact that the trial judge made a number of findings that the appellant was engaged in a money laundering exercise and was using the €75,000 for that purpose. Further, these conclusions were supported by evidence of a pattern of payments between Mr. Wilson and the appellant which the court was satisfied were also part of a money laundering scheme. It was irrelevant whether Mr. Wilson knew he was part of the scheme for the court to be satisfied of its existence due to this pattern of payments.

30. Counsel for CAB also pointed to the opening paragraph of Murray J.'s judgment on appeal from Owens J.'s decision in *CAB v McCormack* [2021] IECA 184 in which he emphasised the broad nature of the definition of proceeds of crime under s. 1 of the 1996 Act and refers to property obtained in connection with criminal conduct and, in the context

of s. 3, the application of the provisions of the 1996 Act to property which "*directly or indirectly*" constitutes the proceeds of crime. As it happens, Murray J. did not revisit the passages of Owens J.'s judgment relied on by counsel for the appellant, presumably as he had not accepted CAB's arguments in respect of the tax offences but had found against the respondent on other grounds, the findings regarding the tax offences were not the subject of the appeal.

Discussion of the Proceeds of Crime Issue

31. The argument made by the appellant, although superficially attractive, is in my view based on a fundamental misapprehension because it conflates elements of the 1996 Act and of the 2010 Act. Importantly, and contrary to the way in which the argument on behalf of the appellant was framed, the €75,000 is not itself being laundered. Rather, it is being used as the vehicle through which other proceeds of crime, *i.e.* the proceeds of the appellant's drugs trade, will be laundered. It is important to keep the distinction between the two statutes in mind. The proceeds of criminal conduct which are the subject of the money laundering offence under s. 7 of the 2010 are not the same proceeds of crime as those which are the subject of the order made at the High Court under s. 3 of the 1996 Act - nor do they have to be for the application to properly come within the scope of s.3 of the 1996 Act.

32. Starting with the offence of money laundering under s. 7 of the 2010 Act, this requires that there be proceeds of criminal conduct in respect of which the person committing the offence takes steps, *inter alia*, to conceal or disguise their true nature. In this case the evidence established that the appellant was a person actively engaged in serious criminality, most particularly the supply of drugs, and was in possession of assets beyond any legitimate source of income available to him. A pattern of behaviour was also established which was consistent with money laundering in the very recent past in which the appellant had received

legitimate monies from Mr. Wilson and repaid him using the proceeds of crime. For the purposes of the 2010 Act the criminal conduct from which the proceeds are derived is drugs offences. The money which was to be laundered by the appellant is the profit from the drugs trade in respect of which the High Court was clearly satisfied that he was involved.

33. The application made under the 1996 Act sought to characterise the €75,000 as the proceeds of crime not because it constituted monies being laundered by the appellant but because it was being used by the appellant to launder other monies deriving from his involvement in drugs offences. As noted by Murray J. in *McCormack* (above) the definition of proceeds of crime in the 1996 Act is broad. It is not confined to property that is obtained as a result of criminal conduct (*i.e.* property that represents, directly, the profits of a criminal activity) but also includes property received *in connection with* the criminal conduct.

34. The appellant argues that because the €75,000 remains intact and because there was no evidence of repayments from the appellant to Mr. Wilson, the anticipated crime of money laundering had not yet occurred. Thus, it was contended that any criminal conduct remained at best a future intention on the appellant's part. In my view this argument does not take full cognisance of how money laundering is actually carried out. Although there is no statutory limit on the methods which may be used to commit the offence, generally those wishing to launder the proceeds of criminal conduct require access to legitimate businesses, funds or accounts through which the *"dirty money"* can be channelled. Counsel for CAB described this in terms of "*criminals PLI (ply) their trade*" with "PLI" standing for the placement, layering and integration of the proceeds of crime into legitimate businesses, funds and accounts in order to create the appearance of a legitimate source for the monies in question.

35. In this instance, the borrowing of €75,000 with a legitimate provenance from Mr. Wilson is the first step in the process of a money laundering exercise in which dirty money would then be used to repay the loan. Counsel for CAB seemed to contend that because the

High Court had made a finding of fact that the money was received for the purposes of money laundering, it could not simultaneously be the subject of a valid loan agreement. I do not think that this is correct. The finding that the money was received by the appellant for the purposes of a money laundering scheme is not inconsistent with the money having been lent to him under a valid loan agreement. In fact, money laundering requires there to be legitimate businesses and transactions into which the money to be laundered can be placed, layered and integrated and a legitimate loan which is repaid using the proceeds of crime is one way of achieving this.

36. Although there was no direct evidence of repayment of any part of this €75,000, there was similar fact evidence of repayments having been made by the appellant to Mr. Wilson and a pattern of transactions between the two men which the High Court found as a fact were part of an earlier money laundering scheme. As counsel for CAB put it, assuming the money were repaid, Mr. Wilson could point to his compensation payment as the source of the funds in his hands and the appellant could point to a loan from his uncle as the source of the funds in his hands. Both are *prima facie* credible explanations which cover the fact that dirty money has been used to repay a loan for which there was no ostensible purpose other than the facility of repaying it using illegally sourced funds. It is important in this regard that the trial judge examined the various explanations offered by and on behalf of the appellant regarding the purpose of the loan and found them not to be credible.

37. Going back to the statutory provisions, the borrowing and receipt of the monies by the appellant means that the money laundering exercise is already underway even though the €75,000 has not been reduced or dealt with in any way. Thus, the finding of the trial judge (at para. 57 of the judgment) that the €75,000 in the AIB account is caught by s. 3(1)(a)(ii) of the 1996 Act is both legally correct and one which it was open to him to reach on the basis of the evidence before him. Although the language used in s. 3(1)(a)(ii) is somewhat

different to that used in the definition of the proceeds of crime, significantly both use the phase "*in connection with*". Under s. 3(1)(a)(ii) the specified property (*i.e.* the €75,000) must be received in connection with property that is the proceeds of crime. The property that is the proceeds of crime in this instance is the profit made by the appellant from the drugs trade which, on the evidence that was accepted by the High Court, the appellant intended to launder using this money. The connection between this property and the proceeds of the appellant's other criminal activity is the money laundering scheme which the trial judge accepted was the purpose for which the appellant had received the funds. The similar fact evidence of previous financial exchanges between the same two individuals supports the proposition that this was part of an existing and on-going money laundering scheme. Thus, this property was acquired by the appellant in connection with other property which constitutes the proceeds of crime.

38. As it happens, I think that the evidence could also establish that the €75,000 came within s. 3(1)(a)(i) as constituting, indirectly, the proceeds of crime again by reference to the statutory definition of proceeds of crime. This is because it was received by the appellant in connection with - in the sense of being for the purposes of - criminal conduct, namely money laundering. The difference between s.3(1)(a)(i) and (ii) is that sub-para. (ii) requires that there be a relationship between the property that is the subject of the application and other property that is also the proceeds of crime whereas sub-para (i) looks only at the property which is the subject of the application. As it happens because the offence of money laundering requires that there be proceeds of criminal conduct which are the subject of the prohibited acts, in this case both sub-paragraphs are capable of being satisfied. However, as this point was not argued on the appeal it is neither necessary or appropriate to make a formal finding in this regard.

39. For all of these reasons I reject this aspect of the appellant's appeal.

A Serious Risk of Injustice

40. The second element of the appellant's appeal concerned the alleged serious risk of injustice to the appellant arising from the fact that although the €75,000 was, in effect, confiscated by CAB he remains under a legal obligation to repay Mr. Wilson pursuant to the loan agreement and his ability to do so is seriously compromised. Counsel for CAB pointed out, correctly, that the serious risk of injustice was not a ground of appeal raised by the appellant. However, if the notice of appeal is generously interpreted the reference to a failure to consider the loan agreement might just about stretch to cover the arguments raised under this heading. In any event, the appellant argued that there not being a serious risk of injustice is a statutory condition to the making of the order under s.3 and urged the court to consider the argument on this basis.

41. Counsel for the appellant dealt only with the risk of injustice to the appellant. He accepted that any risk of injustice to Mr. Wilson who had lent the money to the appellant and who, on this argument, might not be repaid, was a matter for Mr. Wilson to raise and there was a procedure available to him to do so through s. 3(3) of the 1996 Act. I note that the prohibition on making an order under s. 3(1) arises only where the court is satisfied that "*there would be a serious risk of injustice*". In contrast, the entitlement to make an application to court under s. 3(3) to have a section 3 order revoked or varied requires that it be shown that "*the order causes any other injustice*" so that the injustice relied on must be an actual one rather than a risk. . Of course, the subject of an order may also make an application under s. 3(3) and making an application under that section invokes a statutory discretion which might or might not be exercised whereas meeting the threshold under s. 3(1) precludes the making of the order.

42. When the court queried whether the applicant bore the onus of establishing a risk of serious injustice or, alternatively, whether CAB as the applicant in the High Court bore the onus of proving the lack of such a risk (*i.e.* a negative), we were referred to the McCracken principles set out by that judge in *F McK v GWD* [2004] 2 IR 470. These principles set out the sequence in which a trial judge hearing a s. 3 application should approach the evidence. They concern, in particular, the interaction between belief evidence which may be admissible under s. 8 and other evidence adduced for the purposes of the s. 3 application. If the court is satisfied that a *prima facie* case has been made out, the onus shifts from CAB to the respondent to adduce evidence under s. 3(I) and/or (II) essentially to disprove the *prima facie* case the court is otherwise satisfied has been established. If this onus is not discharged the court moves to the seventh and final step, namely a consideration of whether there would be a serious risk of injustice if the order were to be made.

43. McCracken J.'s judgment in *F McK v GWD* does not shed any light on which side bears the onus of proof as regards this issue. It is however briefly addressed by Murray J. in *CAB v McCormack* (above). Murray J. clarified (at para. 51 of his judgment) that the onus lies on the party seeking to assert an injustice under s. 3 to establish it.

44. It is notable that the trial judge does not address the risk of serious injustice in his judgment. The reason for this is most likely the fact that the appellant did not adduce any evidence of a risk of injustice, much less a serious risk of injustice, if the order were to be made. It might have been of assistance for the trial judge to formally note this fact in his judgment so that the chain of the McCracken principles – which are otherwise followed in the judgment – could be seen to be complete. Nonetheless, in the absence of any evidence being adduced on the point there was strictly speaking no requirement for the issue to be addressed in the judgment.

45. There is however a separate issue as to whether this court should deal with an issue on appeal which was not raised in the court below and which has not been determined by the trial judge. In principle it is not the function of an appellate court to decide issues which were not raised and on which no evidence was adduced in the court below. Whilst there may be exceptional circumstances in which an appellant should be permitted to raise issues which were not raised in the court below, the appellant in this case offered no explanation for his failure to raise the alleged serious risk of injustice in the High Court nor any particular reason why he should be permitted to raise it before this court save that the absence of a serious risk of injustice is a statutory condition to the making of an order under s. 3(1). This failure on the appellant's part is compounded by the fact that the risk of injustice – a new issue – is not squarely raised in the notice of appeal and is not dealt with in the appellant's written legal submissions.

46. Consequently, I would in principle be minded to hold that the serious risk of injustice issue is not properly before this court. However, as it is a very net issue on which the appellant made a single argument I will address it briefly. The argument is that the appellant remains under a contractual obligation pursuant to the loan agreement to repay €75,000 to Mr. Wilson but, due to the fact that the monies are no longer available to him as a result of the s.3 order, he now faces a particular difficulty if not an inability to do so. Thus he is at a loss of the monies he borrowed whilst still being obliged to repay them.

47. There is no evidence of the appellant's ability or inability to repay the loan before this court. Such inability must be a starting point before a court ought to commence an examination of whether that fact creates a serious risk of injustice. Even if the court were to presume some added difficulty in repayment, this would not in my view amount to a serious risk of injustice. It would be clearly contrary to the scheme of the 1996 Act if financial difficulty caused by the making of orders under the Act in respect of the proceeds

of crime, particularly proceeds of crime in the hands of persons involved in serious criminality, were to become a justification for not making an order. There may be exceptional circumstances where there is evidence that the making of an order creates a significant level of hardship, particularly hardship affecting persons in addition to the person involved in serious criminality. In those cases, the court would have to consider whether the threshold of a serious risk of injustice had been met.

48. This is manifestly not such a case. As noted, there is no evidence supporting the argument now sought to be made on behalf of the appellant. In addition, even if the circumstances in which the appellant finds himself were to be characterised as creating a risk of injustice (and I am not satisfied that they do) there is absolutely no basis for suggesting that the risk thereby created should be characterised as serious. The requirement that the risk of injustice be serious suggests that the court is doing more than simply balancing the scales between CAB and the respondent in an application of this nature, even taking into account the public policy considerations which provide the backdrop to any application taken by CAB. Rather, the court is looking for evidence of a particular risk of injustice that can be characterised as serious either by virtue of its immediacy, its effects and the likelihood of it materialising. It is difficult to see how such a serious risk could be made out in the absence of evidence specifically addressed to that issue.

49. For the reasons set out above I reject this element of the appellant's appeal also. It follows that the entire of the appellant's appeal should be dismissed.

50. Donnelly J. and Binchy J. agree with this judgment. With regard to the question of costs, the parties will have liberty to make a written submission not exceeding 1,000 words within 28 days of the date of this judgment as to the appropriate form of order.