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**NO REDACTION REQUIRED**

# THE COURT OF APPEAL

**Appeal Number: 270/2022**

**Neutral Citation Number [2024] IECA 35**

**Whelan J.**
**Faherty J.**
**Haughton J.**

**BETWEEN/**

**THE CRIMINAL ASSETS BUREAU**

**APPLICANT/**
**RESPONDENT**

**- AND -**

**STEFAN SAUNDERS AND TAMMY SAUNDERS**

**RESPONDENTS/**
**APPELLANTS**

**Judgment of Ms. Justice Faherty dated the 15th day of February 2024**

**1.** This is an appeal against the judgment ([2022] IEHC 550) and Order (perfected 22 November 2022) of the High Court (Owens J., hereinafter "the Judge") where the Judge made an order pursuant to s.3(1) of the Proceeds of Crime Act 1996 (as amended) (hereinafter "the 1996 Act") prohibiting the appellants and any person with notice of the making of the Order from disposing or otherwise dealing with or diminishing the value of property located at Hazelbury Park, Dublin 15. The property in question is a house in the joint ownership of the appellants and is their family home.

**The relevant statutory provisions**

**2.** Section 1(1) of the 1996 Act defines *"the proceeds of crime"* as meaning any property obtained or received at any time by or as a result of or in connection with criminal conduct. The provisions of the Act apply not only to such property but also to property that was acquired in whole or in part with or in connection with property that directly or indirectly constitutes the proceeds of crime. Pursuant to s.3, application may be made to the High Court by the Criminal Assets Bureau ("the Bureau") for orders prohibiting a named respondent from disposing of or dealing with such property.

**3.** Section 3 provides, in relevant part:

*"3.—(1) Where, on application to it in that behalf by the applicant, it appears to the Court, on evidence tendered by the applicant, consisting of or including 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*

*(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 €5000,*

*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 €5,000:*

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

**4.** For the purposes of an application under s. 3, the Bureau may rely upon evidence of the belief of certain members of the gardaí that the property in question falls within the definition of proceeds of crime. In this regard s. 8(1) provides:

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

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

*(b) in proceedings under section 3, on affidavit or, where the respondent requires 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 specified property and that the property was acquired, in whole or in part, with or in connection with property that, directly or indirectly, constitutes proceeds of crime,*

*and that the value of the property or, as the case may be, the total value of the property referred to in both paragraphs (i) and (ii) is not less than €5,000, 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.*

Pursuant to s. 8(2), *"The standard of proof required to determine any question arising under this Act shall be that applicable to civil proceedings."*

**5.** The combined effect of ss.1, 3 and 8 of the 1996 Act is to define the conditions under which certain persons in possession of property will be required to prove to the satisfaction of the court that the property was lawfully obtained without recourse to the proceeds of crime or otherwise face the prospect of having the property frozen and, later, the prospect of an application pursuant to s. 4 of the 1996 Act for a *"a disposal order"* directing that the whole or part of the property be transferred to the Minister or such other person as the court may determine. Section 4 of the 1996 Act is not in issue in this case: as already referred to, the relevant order under appeal is one made under s.3(1).

**6.** For the purpose of imposing the onus on a respondent to an application pursuant to s.3(1) of satisfying the court that the property was acquired lawfully and not as a result of the proceeds of crime, the Bureau must first establish a *prima facie* case that the property was the proceeds of crime or comprised property acquired with the proceeds of crime. A *prima facie* case is established by the expression of admissible belief (if not undermined in cross-examination) of the relevant officer, as provided for in s. 8 of the 1996 Act, and which then may be answered by a respondent if he or she has a credible explanation for how the property lawfully came into his or her possession, and establish that in evidence (*per* Hardiman J. in *McK v. TH* [2007] 1 ILRM 338, at p. 346). As held in *Murphy v. GM* [2001] 4 IR 113 (*"Murphy"*), since a person in control or possession of property should be

in a position to account for its provenance, there is no injustice in enabling the Bureau to adduce hearsay evidence of this kind (at p. 155).

**Background**

**7.** The Bureau's application in this case was grounded on a number of affidavits including that of the Chief Bureau Officer of the Bureau ("the Chief Bureau Officer"), sworn 18 September 2020. The Chief Bureau Officer attested to his belief, pursuant to s.8(1) of the 1996 Act that the appellants or either of them were in possession or control of property ("the Property") as described in the Schedule to the Originating Notice of Motion, and to his belief pursuant to s.8(1) that *"the Property constitutes directly or indirectly the proceeds of crime and/or that the Property was acquired, in whole or in part, with or in connection with property that, directly or indirectly constitutes proceeds of crime".* The Chief Bureau Officer's affidavit was sworn from facts within his own knowledge and information supplied to him by other Bureau Officers, and other members of An Garda Síochána.

**8.** Other affidavits adduced on behalf of the Bureau attested variously to: past criminal investigations into the first appellant including prosecutions that were unsuccessful; the first appellant's membership of what was described as the Saunders Organised Crime Group; the arrest of the first appellant on 7 October 2016 and his subsequent conviction (on a plea of guilty) in Trim Circuit Court on 12 June 2018 on counts of conspiracy to commit robbery and possession of a firearm for which he was sentenced to 10 years custody with two and a half years suspended. The affidavit evidence of Revenue Bureau Officer No. 3 and Revenue Bureau Officer No. 68 gave details of Revenue records pertaining to the appellants. The affidavit sworn by Social Welfare Bureau Officer No. 58 set out details of past claims made by the appellants to the Department of Employment Affairs and Social Protection.

**9.** The appellants filed a total of six affidavits, two sworn by the appellants on 2 December 2020, respectively, two sworn, respectively, on 6 April 2021 and two replying affidavits sworn on 2 June 2021. The appellants' affidavits of 2 December 2020 set out their application for admission to the *ad hoc* legal aid scheme and therein outlines details of their current income, savings, real property, assets and general living expenditure. Both appellants argued that there was a fair issue to be tried and both denied that the Property was acquired through the proceeds of crime. In their respective affidavits of 6 April 2021, both appellants denied any suggestion of criminality or that the Property was acquired through the proceeds of crime. Both averred that the Property was purchased from funds acquired through employment, gifts and savings. Both stated that the assertion on the part of the Bureau Forensic Accountant that there was a significant excess of expenditure over income was based on an inaccurate assessment. The affidavits sworn by each of the appellants on 2 June 2021 were by way of reply to the Bureau's allegations.

**10.** The Property as described in the Schedule to the Originating Notice of Motion comprised two properties, namely, premises comprised in Folio DN 135866F and Folio DN 171596F (hereinafter, respectively, *"Hazelbury Park"* and *"Mayeston Lawns"*).

**11.** The appellants purchased Hazelbury Park in 2005 for €360,000 with a mortgage loan of €324,000 from Ulster Bank. Shortly after it was bought it was extended and refurbished. They bought Mayeston Lawns in or about July 2006 as a buy-to-let property for €300,000 with a mortgage of €255,000. Prior to the High Court hearing, Mayeston Lawns was sold as part of the appellants' personal insolvency arrangement. A small portion of the sale proceeds was used to reduce the mortgage balance on Hazelbury Park. Accordingly, by the time of the hearing in the High Court, Mayeston Lawns was no longer in the possession of the appellants albeit there was material before the Court which was said by the Bureau to

establish that both Mayeston Lawns and Hazelbury Park were acquired in whole or in part *"with property that, directly or indirectly, constitutes the proceeds of crime…"* (para. 6).

**The High Court judgment**

**12.** The Judge considered the belief evidence tendered by the Chief Bureau Officer in accordance with s.8(1) of the 1996 Act. He noted that the affidavit of the Chief Bureau Officer set out his belief that the first appellant was involved in criminal activities and that the properties were acquired with the proceeds of crime and using arrangements to launder the proceeds of crime. The Judge noted that the Chief Bureau Officer had relied on information contained in the other affidavits filed on behalf of the Bureau. As stated by the Judge, *"[t]hese affidavits and exhibits contain a wealth of details which support this belief".* He went on to state:

> *"8. I have considered the material presented by the Bureau in these affidavits and exhibits. These materials include documents submitted to support mortgage applications, revenue information relating to earnings, VAT, and motor vehicles. They also include copies of statements relating to several bank accounts. This information provides very strong and persuasive support for the beliefs of the Chief Bureau Officer that Hazelbury Park and Mayeston Lawn were acquired by [the appellants] using proceeds of crime. There are reasonable grounds for this belief of the Chief Bureau Officer in relation to both assets.*
>
> *9. In summary, I have concluded from this evidence that proceeds of crime from activities of [the first appellant] as a member of a gang of robbers funded a spending spree by [the appellants] on houses, cars, and businesses between 2005 and 2008 and that they got into financial difficulty from 2010 because they did not have access to enough money to meet commitments at that stage."*

**13.** His conclusion was said to apply *"to the sources of the funding for [the] acquisition of the two houses and the renovation of Hazelbury Park".* (para. 10)

**14.** The Judge found the material advanced in evidence by the appellants was *"insufficient"* to demonstrate that his core conclusions were incorrect. Whilst he did not accept some of the contentions advanced in affidavits filed by the Bureau, including that receipts connected to a business *"U Design"* may have been a vehicle to launder money, he was satisfied that there were sufficient records of transactions and other items of documentary evidence available from which the Court *"could draw inferences on matters relevant to the key elements of the Bureau's claim".* He stated:

> *"Evidence presented by the Bureau shows that between 2003 and 2006 [the appellants] had access to amounts of money grossly out of kilter with possible sources of legitimate earnings. From April 2005 until 2007 they engaged in a spending spree on expensive cars, houses, and extensive renovation of two properties using funds which cannot be explained except by reference to access to proceeds of crime. I accept the conclusion of Bureau Forensic Accountant No 3 that their expenditure did not square with their identified legitimate sources of income."* (at para. 14)

**15.** That spending spree, the Judge found, was *"not capable of being explained away as a mixture of legitimate earnings from businesses or employments and easy access to cheap sources of credit."* The evidence, the Judge said, established that other factors were at play.

**16.** The Judge found (at para. 16) that money from unidentified sources was used to part-fund the acquisition of houses and at least one car and to renovate two houses and was also used to provide working capital for an interior decoration business and to open and operate hair salons. The first appellant used the bank accounts of the hair salons to pay himself a

weekly income until 2010. The interior decoration business had paid wages to the second appellant until 2010. The Judge also found that cash from unidentified sources was used to renovate a house owned by the second appellant's mother and her partner in 2006, at or very close to the time when these individuals contributed €30,000 to assist the appellants in buying Mayeston Lawns. Cash from an unknown source was used by the second appellant's mother to put up bail monies of €17,500 for the first appellant in November 2006. Hazelbury Park was re-mortgaged in 2007. The loan monies were used to fund monthly mortgage and car payment commitments and lifestyle. The car had been purchased with a mixture of funds *"from unknown sources and car leasing finance"*. The Judge found that the identified income available to the appellants to meet their financial commitments came from rental income from Mayeston Lawns, salary from *U Design* and drawings from two hair salons.

**17.** The Judge then examined the links between the first appellant and the robbery of €1,889,000 from a Brinks Allied security van in Artane on 30 March 2005, including the fact that one of four unregistered mobile telephones (*"job phones")* used in the robbery was in contact with a telephone (outside of the aforementioned four telephones) registered to a former girlfriend of the first appellant and who is the mother of his elder son. Furthermore, documents relating to a motorcycle registered to a Mr. Keenan (the driver of the Brinks Allied security van and who was found to be complicit in the robbery) were located in a search of Hazelbury Park in November 2006. The Judge stated: *"Evidence of the subsequent criminal career of [the first appellant] leads to the unavoidable conclusion that his association with the Brinks Allied robbery…cannot be explained away as unfortunate coincidence".* (at para. 20)

**18.** The first appellant's *"subsequent criminal career"* was addressed by the Judge at paras. 21 -26 of the judgment. He adverted to the fact that in May 2009 the appellant was

caught *"lurking"* along with a convicted criminal in a vehicle he did not own outside the home of a bank manager, and that he had been forensically linked to a vehicle used in the *"tiger kidnapping"* of an employee of a cash in transit company in January 2010. In 2015 and 2016, respectively, the appellant had been spotted in the company of others in suspicious circumstances. The Judge then referred to the first appellant's conviction in 2018 (with two others) in connection with an attempted armed robbery of cash being delivered to an ATM in Dunboyne, County Meath in respect of which all three were sentenced to *"long terms of imprisonment".*

**19.** The Judge went on to analyse what was essentially described as the modest legitimate income of the appellants, and the second appellant's mother and partner. Up to her marriage to the first appellant in 2005, the second appellant was in receipt of unemployment benefit, and she continued to be in receipt of unemployment benefit until May 2005. Her mother and her mother's partner also had modest means and lived in a house in Clonsilla which was transferred by the mother's partner into both their names in 2005. The mother's partner did not make tax returns between 2007-2010 and he was in receipt of jobseeker's benefit between June 2007 and March 2008. The second appellant's mother operated a small alterations business in 2004 and registered it with Revenue in October 2004. Her tax return for 2004 disclosed an annual turnover of €11,245 and other income of €3,142. An analysis of a joint bank account operated by the second appellant's mother and her partner disclosed that from December 2004 to July 2005 their main source of income as a series of irregular credits totalling €16,317 derived from the partner's activities as a driver/courier. Thereafter, until early 2007, the partner earned a weekly income of between €350-450 as a driver.

**20.** At paras. 32-53, the Judge detailed acquisitions made by the appellants (and by the partner of the second appellant's mother) in the period 2004 to 2007, including the money

trail leading to the acquisition of Hazelbury Park and Mayeston Lawns, the extensive extensions and renovation work done to Hazelbury Park, and the acquisition of various BMW motor vehicles driven by the appellants. The evidence put before the Judge included an analysis of bank accounts operated by the appellants and bank accounts operated by the second appellant's mother and her partner. According to the Judge, much of the monies going into these bank accounts came from *"unknown sources".*

**21.** At para. 39, he noted that in late July 2005, three round sum lodgements from *"unknown sources"* were credited to the joint account maintained by the second appellant's mother and her partner. Those credits were followed by a withdrawal of €27,000 on the same date which matched a cheque credited on the same date to the appellants' joint current account at Ulster Bank. The Judge found that only €14,500 of that withdrawal could be traced to money (a mortgage loan of €47,945.65) which had been raised on the property owned by the second appellant's mother and her partner. He noted that in the appellants' mortgage application for Hazelbury Park, Ulster Bank had been told that the €27,000 was a gift to the appellants. Of the balance (€49,327), only €14,500 could be traced to the monies which came to the appellants from the personal resources of the second appellant's mother and her partner.

**22.** At para. 45, the Judge noted it was clear from the evidence that, followings its acquisition, *"a large amount of money was spent on extensions and renovations to Hazelbury Park"* and that the property was described in a valuer's report in 2007 as a 5-bedroom semi-detached house newly refurbished to the *"highest standard"* (para. 46). He noted that the extension was kitted out with expensive sanitary ware, furnishings, projector screens and a jacuzzi. He found that the bank accounts of the appellants, and those of her mother and partner, *"give no indication that money was extended on renovation works to houses in 2005 and 2006"* (para. 54). He found that the monies expended on both

Hazelbury Park, and the house owned by the second appellant's mother and her partner came from *"unknown sources"* (para. 55).

**23.** Part of the case made by the Bureau was to invite the Judge to draw an inference that the first appellant was not as he maintained a self-employed plasterer during the years 2003-2006 and that his returns to the Revenue of income from plastering were a *"pretence"* to explain credits to his bank accounts which came from other sources. Whilst the Judge considered that it was *"impossible to conclude that [the first appellant] did not work as a plasterer during these years"* he found, however, that the first appellant's bank accounts *"operated in a manner which makes it unlikely that the lodgements and withdrawals recorded had anything to do with earnings from plastering"*. (para. 62)

**24.** The Judge found (at para. 63) that working papers retrieved from the accountant who prepared the first appellant's Revenue returns *"provided no objective evidence to vouch that the sums lodged to the bank accounts derived from [plastering]".* The analysis carried out by Bureau Forensic Accountant No. 3 *"revealed that information supplied to the [first appellant's] accountant was limited and that some of that information was unreliable".*

**25.** The Judge considered that the bank statements relating to the current account of the first appellant at Ulster Bank for the years 2003, 2004 and 2005 showed a pattern and level of credit balances, lodgements, and items of discretionary spending *"inconsistent with what one would expect to see in the business of a young self-employed plasterer"* (para. 67).

**26.** He found (at para. 69) that the figures for gross and net income in the returns to Revenue relating to the first appellant's plastering business showed modest turnover for 2003, 2004 and 2005. He considered that the level of trading disclosed was not such as

could account for the significant credit balances in the first appellant's current account, or the credit balances in the appellants' joint accounts.

**27.** At paras. 70-102, the Judge continued his exhaustive analysis of the evidence tendered on behalf of the Bureau, over the course of which he made further findings (including in relation to Hazelbury Park and Mayeston Lawns), based on the evidence tendered by the Bureau, including as follows:

- Following a total of €17,000 in three lodgements to the appellants' current account in June 2005, the account operated with credit balances varying between €13,000 and €28,000 for the rest of that year with very few debits for normal day to day items.
- Weekly payments of €500 were made to the same current account from July 2005-October 2005. While these payments, designated *"Dowling & Saunders"*, gave the appearance of drawings or a weekly wage, there was no evidence that the first appellant was engaged or employed at a weekly wage at that time. Further, the receipts were not reflected in his Revenue returns. Nor were they reflected in the Revenue returns of Joseph Dowling, as associate of the first appellant, or any companies or businesses run by Mr. Dowling.
- The appellants produced a series of misleading documents in relation to their income to support a mortgage application for Mayeston Lawns because they could not show capacity to repay a loan using legitimate sources of earnings.
- Income declared by the first appellant in 2004 as coming from an entity *"JDS Security"* was unsupported by employer returns or any credits to bank accounts operated by the first appellant.

- It was *"unlikely"* that lodgements to bank accounts maintained by the first appellant were either receipts from a plastering business, or earnings from employment in a security business.
- Payments to the second appellant designated in PAYE records for 2005-2006 as salary could not be related to her current account.
- Working capital which enabled the entity *"U Design"* to trade, and thus provide income to the second appellant and her mother, *"came from undisclosed sources and cannot be accounted for as coming from legitimate means".*
- The total outlay (outside of the mortgage monies) of the appellants (€61,958) and €1,300 (paid by the partner of the second appellant's mother) to close the sale in respect of the purchase of Mayeston Lawns came from an *"unknown source".* The Judge concluded that *"[t]he evidence establishes that most of the 'own resources' element of the money used by [the appellants] to buy Mayeston Lawn came from unknown sources".*
- The capital used for establishing the hair salon business and for running *U Design* was sourced in proceeds of crime.
- The €30,000 provided to the appellants by the second appellant's mother and her partner to acquire Mayeston Lawns *"was more than fully accounted for"* by the value of the renovations to the home the second appellant's mother and her partner and other benefits they received.
- As Mayeston Lawns was bought with money derived from the proceeds of crime it followed that any rental income derived from Mayeston Lawns was derived from the proceeds of crime.

- All sources of income which funded mortgage payments on Hazelbury Park and Mayeston Lawns during the period 2007-2010 *"were, one way or another, derived from proceeds of crime".*
- U Design and the hair salons ceased to operate in 2010.
- The appellants' main source of income from 2010 were social welfare payments.

**28.** At para. 103, the Judge concluded that there was insufficient evidence to conclude that mortgage payments made by the appellants between 2011 and 2016 were to any significant extent derived from proceeds of crime: the mortgage repayments during this period were minimal *"and did not make any real impact on the residual equity of [the appellants] in the underlying assets."* He found that the payment of the mortgage on Hazelbury Park that had been made from a surplus on the sale of Mayeston Lawns was derived from the proceeds of crime *"because Mayeston Lawn itself was acquired with and in connection with property which constituted proceeds of crime".*

**29.** Having concluded as he did in respect of the two properties on the evidence tendered by the Bureau, the Judge then turned to the evidence adduced by the appellants. As provided for in the 1996 Act, where the Bureau had made out a *prima facie* case that the properties in question had been acquired from the proceeds of crime, the onus then shifted to the appellants to persuade the Judge that the properties were not the proceeds of crime. The appellants do not dispute that a *prima facie* case was made out.

**30.** The Judge noted the appellants' denial that the first appellant had engaged in criminal activity of the sort set out in the affidavits filed by the Bureau. He noted their contention that they had been investigated in 2007 and that no action had been taken against them. In the Judge's view, that was not a relevant consideration: he was not persuaded that the appellants were prejudiced by any delay on the part of the Bureau in

bringing the proceedings, or that the loss of underlying documents had the effect of undermining the basis for the belief of the Chief Bureau Officer.

**31.** He went on the analyse the evidence of the appellant in relation to the source of the funds used for the purchase of the properties and the funding of the mortgages, namely that the first appellant was trading as a plasterer and making a good income. He examined the evidence tendered by the appellants that between 2005 and 2007 they had borrowed heavily to buy houses and took on an unsustainable level of debt with which they had been struggling ever since. He had regard to their counsel's entreaty that he should be cautious in drawing adverse conclusions because of a lack of vouchers and supporting documentation relating to events that took place more than fifteen years ago. While the Judge agreed with that submission, he concluded that there was *"sufficient reliable information available"* to justify his conclusions.

**32.** He rejected the appellants' evidence that they had been gifted €27,000 by the second appellant's mother prior to the purchase of Hazelbury Park, or that she had lent them €30,000 prior to the completion of the purchase of Mayeston Lawns. He noted that the first appellant's affidavit was silent on repayment of the alleged *"loan"* and that he had not made the case that it had been repaid by the appellants having covered the costs incurred in respect of the refurbishment of the property owned by the second appellant's mother and her partner. Similarly, the Judge did not accept the appellants' evidence that the monies spent on the refurbishment of Hazelbury Park were sourced from savings, incomes and loans from a business partner. He found nothing to back up those explanations. Nor did he accept the first appellant's understanding that the work carried out on the house owned by the second appellant's mother and her partner had been funded by a mortgage or loan since *"[t]here was no evidence of repayment of the alleged loan of €30,000".* In the view of the

Judge, *"[t]he correct inference is that €30,000 was swapped for benefit derived from proceeds of crime"* (para. 108).

**33.** The Judge concluded that the affidavit evidence of the appellants was *"general and unconvincing"* (para. 109). The affidavits "*do not engage with the details of the evidence presented of criminal activities by [the first appellant] or with the details of evidence presented relating to unexplained sources of wealth in the affidavits and exhibits presented by the Bureau".* He further concluded that the forensic report put in evidence by the appellants, whilst making some criticisms of the analysis presented in evidence by the Bureau forensic accountant, *"does not challenge overall conclusions".* Moreover, the Judge did not understand the Bureau to have been contending that the first appellant's accountant should have retained original vouchers, rather, all the Bureau's forensic accountant had stated was that there was no material to substantiate sources of lodgements and figures claimed for expenses.

**34.** As recited at para. 115 of the judgment, ultimately, the Judge was satisfied to make an order under s.3(1) of the 1996 Act in relation to Hazelbury Park, stating:

> *"The residual value of this property after discharge of the mortgage is derived from proceeds of crime and nothing has been identified which would establish that a serious risk of injustice would arise from the making of this order."*

**The appeal**

**35.** The notice of appeal advances two grounds of appeal, namely:

> *"1. The Learned Trial Judge erred in fact and in law in determining that the property the subject matter of the application herein was the proceeds of crime "from activities of [the first appellant] as a member of a gang of robbers" and took into consideration evidence in relation to an allegation of criminality [in respect of] which the First Named Appellant has not been tried in accordance with Article 38 of*

*Bunreacht na hÉireann and, as such, the findings of the Learned Trial [Judge] are in violation of the First Named Appellant's rights, in particular his right to the presumption of innocence, the right to a fair trial before a Jury and all other procedural safeguards in respect of same.*

*2. The Learned Trial Judge erred in fact and in law in determining that the delay by the Respondent in bringing forward the application pursuant to section 3, in circumstances where they had already been investigated previously by the Respondent's servants and/or agents in respect of the property transactions the subject of the herein proceedings, did not cause a serious risk of injustice to the Appellants."*

**36.** By its respondent's notice, the Bureau opposes the appeal in its entirety.

**37.** It is notable that the appeal does not seek to disturb the multiple findings of fact made by the Judge concerning the finances of the appellants, or his analysis and ultimate rejection of the evidence advanced by the appellants in the High Court.

**Ground 1**

**38.** The appellants' primary submission in respect of ground 1 is that the Judge attributed criminality to the first appellant without affording him the protections normally associated with a criminal trial, in effect depriving the first appellant of his rights pursuant to Article 38.1 of the Constitution. It is further asserted that the actions of the Judge engaged the protections afforded by Article 6(2) of the European Convention on Human Rights and Fundamental Freedoms ("the Convention"). In this latter regard counsel relies on two judgments of the European Court of Human Rights ("ECtHR"), namely *Adolf v. Austria* (8269/78) (1982) 4 E.H.R.R. 313: [1982] E.C.H.R. (8629/78) and *Minelli v. Switzerland* (8660/79) (1983) 5 E.H.R.R. 554: [1983] E.C.H.R. (8660/79). Essentially, the appellants say that in finding that the properties in question were from *"activities of the [first*

*appellant] as a member of a gang of robbers"* the Judge departed from the scope of the 1996 Act and thus crossed the threshold between civil and criminal proceedings, but without affording the first appellant the safeguards of a criminal trial.

***The nature of proceedings pursuant to the 1996 Act***

**39.** The first point of note for the purposes of ground 1 is that the question of whether proceedings under the 1996 Act are civil or criminal has been conclusively determined by the Supreme Court in *Murphy* as being civil in nature. In *Murphy,* amongst the myriad features of the 1996 Act said by the plaintiffs there to render the 1996 Act unconstitutional, their principal argument was that the provisions of the 1996 Act essentially formed part of the criminal law and not of the civil law, and that persons affected by those provisions were deprived of some of the most important safeguards available under our system of criminal justice to persons charged with offences. Specifically, it was asserted that by the provisions of the 1996 Act, the presumption of innocence was reversed, the standard of proof was on the balance of probabilities rather than beyond reasonable doubt, there was no provision of a trial by jury in respect of any of the issues, and the rule against double jeopardy was ignored, all of which, it was said, rendered the legislation unconstitutional.

**40.** Keane C.J. (giving the judgment of the Court) commenced his analysis of this argument by first observing that:

> *"It is almost beyond argument that, if the procedures under s. 2, s. 3 and s. 4 of the 1996 Act constituted in substance, albeit not in form, the trial of persons on criminal charges, they would be invalid having regard to the provisions of the Constitution. The virtual absence of the presumption of innocence, the provision that the standard of proof is to be on the balance of probabilities and the admissibility of hearsay evidence taken together are inconsistent with the requirement in Article 38.1 of the Constitution that;-*

> *'No person shall be tried on any criminal charge save in due course of law.'*
>
> *It is also clear that, if these procedures constitute the trial of a person on a criminal charge, which, depending on the value of the property, might not constitute a minor offence, the absence of any provision for a trial by jury of such a charge in the Act would clearly be in violation of Article 38.5 of the Constitution."* (pp. 135-136)

He considered that the *"central issue",* on this aspect of the case, was *"whether the procedures prescribed by the Act are in substance criminal in nature".* (pp. 135-136)

**41.** Keane C.J. went on to summarise the statutory scheme established under the 1996 Act, noting that the effect of the statutory scheme was to *"freeze"* property which senior members of the gardaí suspect of representing the proceeds of crime for an indefinite period, subject to the limitations indicated in the Act. He opined that *"this unquestionably draconian legislation"* had been enacted by the Oireachtas because professional criminals had developed sophisticated and elaborate forms of *"money laundering".* He noted that *"[t]he general question as to whether proceedings authorised by statute which may result in the forfeiture of property are civil or criminal in nature has been considered in a number of authorities to which the court was referred."* (p. 137)

**42.** After reviewing a series of Irish authorities (including *Attorney General v. Southern Industrial Trust Ltd.* (1957) 94 I.L.T.R. 161 and *Melling v. O'Mathghamhna* [1962] I.R. 1 (*"Melling"*)) Keane C.J. rejected the argument that the proceedings under the 1996 Act were criminal in nature. Specifically, he rejected the plaintiffs' submission (the plaintiffs relying on *Melling*) that the presence of *mens rea* was an essential ingredient which must be established before an order could be made under ss. 3 and 4 of the 1996 Act. He opined that even if it could be assumed that *mens rea* was an essential feature, "*that would not of itself deprive the proceedings of their civil character".* (p. 147) He distinguished *Melling*

on the basis that in that case there were a number of *indicia* that rendered the proceedings criminal in character, *viz*, the provision for the detention of a person concerned, the bringing of him in custody to a garda station, the searching of the person detained, his admission to bail, the imposition of a pecuniary penalty with liability to prison for default, the reference in the relevant legislation to a party having been *"convicted of an offence"* and the provision for the withdrawal of proceedings by the entering of a *nolle prosequi*, all of which, Keane C.J. noted, were *"conspicuously absent"* in the 1996 Act. He further rejected the plaintiffs' reliance on *McLoughlin v. Tuite* [1989] I.R. 82. He stated:

> *"In contrast, in proceedings under s. 3 and s. 4 of the 1996 Act, there is no provision for the arrest or detention of any person, for the admission of persons to bail, for the imprisonment of a person in default of payment of a penalty, for a form of criminal trial initiated by summons or indictment, for the recording of a conviction in any form or for the entering of a nolle prosequi at any stage."* (at p. 147)

**43.** Rejecting the plaintiffs' contention that the establishment of *mens rea* by an applicant under the 1996 Act was essential as *"misconceived",* Keane C.J. noted that two conditions had to be met before an order under ss. 3 and 4 of the 1996 Act could be made: that a person is in possession or control of a specified property which constitutes the proceeds of crime or was acquired in connection with such property and that it is a value of not less than £10,000 (the monetary threshold then provided for). Moreover, he considered that the fact that the person in possession or control of the property against which the order is sought may not himself or herself have been in any way involved in any criminal activity and, specifically, may not have been aware that the property constituted the proceeds of crime, *"would not prevent the court from making an order freezing the property under s. 2 or s. 3 unless it was satisfied that there would be 'a serious risk of injustice'".* (p.148)

**44.** He went on to state:

> *"The issue in the present case does not raise a challenge to a valid constitutional right of property. It concerns the right of the State to take, or the right of a citizen to resist the State in taking, property which is proved on the balance of probabilities to represent the proceeds of crime. In general such a forfeiture is not a punishment and its operation does not require criminal procedures. Application of such legislation must be sensitive to the actual property and other rights of citizens but in principle and subject, no doubt, to special problems which may arise in particular cases, a person in possession of the proceeds of crime can have no constitutional grievance if deprived of their use."* (p. 153)

**45.** He considered that the United States authorities referred to in the judgment *"lend considerable weight to the view that in rem proceedings for the forfeiture of property, even where accompanied by parallel procedures for the prosecution of criminal offences arising out of the same events, are civil in character and that this principle is deeply rooted in the Anglo-American legal system."* (p. 153)

**46.** The decision of the Supreme Court in *Murphy* was that the plaintiffs failed to discharge the onus on them of establishing that the 1996 Act was invalid having regard to the provisions of the Constitution on the ground that proceedings under the 1996 Act constituted criminal proceedings.

**47.** The nature of proceedings under the 1996 Act was subsequently considered by Feeney J. in *Gilligan & Ors v. Michael F. Murphy & Ors* [2011] IEHC 465 ("*Gilligan")*. One of the issues in the case was whether the procedure provided for the 1996 Act for preservation of or the disposal of property fell within the ambit of the Convention, an issued which was not addressed in *Murphy* as the Convention *"has not yet been made part of the domestic law of the State"*. (para. 2.2)

**48.** Section 2 of the Human Rights Act 2003 ("the 2003 Act") which came into force on 31 December 2003 provides that when *"interpreting and applying any statutory provision or rule of law, a court shall, in so far as is possible, subject to the rules relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention's provisions".* In *Gilligan*, Feeney J. held that as the plaintiffs' claims related to events or court orders which occurred prior to the 2003 Act coming into effect, the plaintiffs could not rely on the 2003 Act. Nor could they rely on it in respect of litigation pending as of 31 December 2003. Nevertheless, at the request of all parties, Feeney J. addressed the alleged breaches of the Convention.

**49.** The argument advanced in *Gilligan* was that the provisions of Article 6 and Article 7 of the Convention were engaged. Article 6(2) provides:

> *"Everyone charged with a criminal offence shall be presumed innocence until proved guilty according to law."*

**50.** Article 7 prohibits the retrospective application of criminal law to an accused's disadvantage and prescribes that only the law can define a crime and prescribe a penalty.

**51.** As noted by Feeney J., *"the jurisprudence of the European Court of Human Rights [ECtHR] has established that proceedings which are defined as civil in domestic law may in certain limited circumstances nevertheless qualify as criminal proceedings for the purposes of Article 7".* (para. 3.3)

**52.** Here, the appellants contend that the provisions of Article 6(2) of the Convention are engaged by the manner of the Judge's appraisal of the application made by the Bureau pursuant to s.3 of the 1996 Act.

**53.** In *Gilligan*, specifically, with regard to the Convention, and having reviewed the jurisprudence of both the ECtHR and the UK courts, Feeney J. stated at para. 3.6:

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

**54.** Feeney J. noted that in *Walsh v. UK* [2006] ECHR 43384/05, which dealt with a challenge to the UK Proceeds of Crime Act 2002 (legislation similar to the 1996 Act), the ECtHR held that the UK proceedings did not involve a criminal charge. He noted also that in *Murphy,* the Supreme Court had identified as a central issue for consideration whether the procedures provided for in the 1996 Act were in substance criminal in nature and that the Court had concluded they were not which provided *"a further persuasive and*

*compelling rational"* for him to be satisfied that, even if the Conventions issues which had been raised were capable of review, there had been no breach of Article 7 *"as the proceedings are civil and not criminal".*

**55.** He went on to state:

> *"A correct analysis of the English authorities and applying the relevant matters therein set out to the Act of 1996 and following the analysis in the judgment of the Supreme Court in Murphy v. Gilligan it is the case that, the proceedings under the Act of 1996 are civil both for the purposes of Article 6 and Article 7 of the Convention. The Court is satisfied that the provisions contained in the Act of 1996 and the scheme of the Act for the preservation and, where appropriate, the disposal of the proceeds of crime are not penal in character and do not engage either Article 6 or Article 7 of the Convention as they are clearly civil proceedings."* (at para. 4.0)

**56.** At para. 4.12, Feeney J. addressed the plaintiffs' argument that that the 1996 Act was in breach of the Convention on the basis that it was punitive in nature and/or quasi-criminal and that it followed that therefore the legislation should not be capable of retrospective application. He stated, at para. 4.12:

> *"The decision of the Supreme Court in Murphy v. G.M. identified that the Act of 1996 did not raise a challenge to a valid constitutional right of property as the Act concerned the right of the State to take, or the right of the citizen to resist the State in taking property which is proved on the balance of probabilities to represent the proceeds of crime. The Court stated that in general such forfeiture is not a punishment and that its operation does not require criminal procedures (p. 153). The Supreme Court in its judgment considered the claim as to whether or not the Act of 1996 was criminal in nature and rejected that claim and as part of its*

*consideration considered the arguments which were advanced on behalf of one of the plaintiffs in that action in relation to what was claimed to be the making of retrospective orders. The Court concluded that there was no substance in that contention (p. 157). Nothing has been identified before this Court which would support a finding that an Act which is not criminal in its nature could be in contravention of the Convention by making "retrospective orders". The Act is civil and the plaintiffs' claim is dependent upon it being criminal in nature. It is not."*

**57.** I agree with Feeney J. that given the civil nature of the proceedings under the 1996 Act, it follows that a respondent to an application under the Act cannot call in aid Articles 6 and 7 of the Convention. It must thus necessarily follow that the ECtHR case law upon which the appellants rely cannot assist them.

**58.** I should add that more recently, in *CAB v. McCormack* [2021] IECA 184, Murray J. (referring to ss. 3, 4 and 8 of the 1996 Act) succinctly summarised the proceeds of crime procedure in the following terms:

*"The sections thus combine to define the conditions under which certain persons in possession of property alleged to constitute the proceeds of crime will be required to either prove to the satisfaction of the court that that property was obtained lawfully and without recourse to the proceeds of criminal conduct, or face the prospect of having that property frozen and, eventually, forfeited to the State. In order to impose that onus, the applicant must first establish a prima facie case that the property was the proceeds of crime or comprised property acquired with the proceeds of crime. This does not require it to either rely upon specific crimes or to relate items of property sought to be attached to the commission of particular offences (FMcK v. AF [2005] IESC 6, [2005] 2 IR 163) and, as s.8 makes clear,*

*reliance may be placed for this purpose upon opinion evidence from a Chief Superintendent of An Garda Siochana."* (para. 10)

**59.** Undoubtedly, the case law considered above has conclusively determined that proceedings under the 1996 Act are civil in nature.

***An exceptional case?***

**60.** The appellants say that they do not cavil with the decision in *Murphy* that proceedings under the 1996 Act are civil in nature: rather, they say that their argument pursuant to ground 1 turns on what their counsel characterises as the Supreme Court's recognition in *Murphy* that there may arise proceedings under the 1996 Act which constitute in substance, if not in form, a criminal trial, of which it is said the present proceedings is such.

**61.** In aid of his submission, counsel for the appellants points first to the observations of Keane C.J. at p. 153 of *Murphy*, viz: *"In general such a forfeiture is not a punishment and its operation does not require criminal procedures. Application of such legislation must be sensitive to the actual property and other rights of citizens but in principle and subject, no doubt, to special problems which may arise in particular cases, a person in possession of the proceeds of crime can have no constitutional grievance if deprived of their use"*. Secondly, he points to what is said at p.159:

*"Having regard to the importance and novelty of the legislation it may be as well to emphasise that the decision of this court is based upon the record of the evidence adduced in the High Court and the arguments arising therefrom. Whilst these arguments were extensive they were necessarily confined to matters in which the appellants had an existing interest. Issues which were merely hypothetical were not open for debate or subject to decision and, in the result, the constitutionality of the*

*Act was considered solely in the light of those issues which were the subject of submissions in this court.*

*It is indeed probable that the special character of the legislation and the broad nature of the obligations imposed upon the Court to make certain orders which 'it may regard as appropriate'; to refrain from others where it is satisfied 'that there would be a serious risk of injustice' and to award and to determine compensation to be payable by the Minister in certain circumstances in respect of loss incurred by the owner of property, are among the aspects of the legislation which may be expected to give rise to difficulties in practice if not in principle. However, the resolution of any such problems must await another day."*

**62.** The appellants say that the foregoing observations require to be read as the Supreme Court leaving open the possibility that the protections ordinarily afforded a person in the criminal justice system may be engaged under the 1996 Act in certain cases. They say that their case meets the threshold contemplated by the Supreme Court in circumstances where, they say, the Judge effectively treated the Bureau's s. 3 application as a criminal trial in respect of allegations of criminality against the first appellant in 2005 and made specific findings in respect of same. In other words, counsel says that what occurred here was a criminal trial in substance, if not in form. It is submitted that in so doing, the Judge went beyond the scope and purposes of the 1996 Act, by entering into an enquiry into criminal allegations without affording the first appellant the necessary safeguards otherwise available to him in a criminal trial. It is contended that the Judge was prepared to accept that the first appellant was criminally culpable which is a serious matter given that it was a finding arrived at absent the safeguards that would ordinarily apply to a criminal trial.

**63.** Whilst the appellants take no issue with the Judge's finding that there was a *prima facie* case established by the Bureau, they say that the difficulty that presents is that in

making a specific finding of specific criminality, the Judge thus discounted the legitimate earnings of the appellants, in respect of which it was common case that the appellants had declared same to the Revenue.

**64.** The appellants emphasise this is not a case where, for example, a *prima facie* case was raised based on the belief of the Chief Bureau Officer and the respondent (here, the appellants) to the application under s.3 had no legitimate income, or other explanation for the source of the funds. Rather, it is, the appellants say, a case where the Judge discounted their declared legitimate income solely on the basis of allegations of criminality made against the first appellant.

**65.** That the appellants were effectively placed on trial, is, the appellants contend, clear from the findings the Judge made at paras. 19 and 20 of the judgment in respect of the first appellant's connection to the Brinks Allied robbery and to Mr. Keenan (the driver of the Brinks Allied security van who was found to be complicit in the robbery).

**66.** Accordingly, the appellants say that they have been penalised in relation to allegations of criminal conduct, based on the thinnest of evidence, for which they were not given the protection of Article 38 of the Constitution. They also contend that at least part of the Judge's rationale for this finding of criminality was his reliance on subsequent events i.e. the first appellant's criminal conviction in 2018. They submit that it cannot be said to be fair or reasonable that a subsequent conviction for an offence constitutes evidence of previous offending. It is thus contended that the Judge erred in concluding that the purchase of the houses in issue here were as a result of the proceeds of crime, in circumstances where the assets in question were acquired when there was no criminality on the part of the first appellant, and where he had not been convicted of any crime until 2018.

**67.** They contend that the Judge acted on the vague allegations and suspicions of the Bureau and thus erred in concluding that the position in 2005/2006 was forensically linked

to the first appellant's 2018 conviction. There was, it is said, a significant lapse of time between those two points which, the appellants say, differentiates the present case from the situation that arose in *CAB v. McCormack* [2021] IECA 184 where there had been a conviction prior to the acquisition of the assets in issue in that case. While it is accepted that there is no requirement under the 1996 Act to tie a claim under the Act to specific crimes, counsel nevertheless submits that where an allegation of specific criminal conduct is being asserted, that merits the safeguards that inures to a criminal trial.

**68.** It is submitted that in the circumstances outlined, the Judge's findings render the appellants' case "exceptional" such as ought to have attracted the protections of a criminal trial. The issue is not, the appellants say, whether the proceedings under the 1996 Act are civil or criminal (that has been determined by the Supreme Court in *Murphy*), rather, it is whether the nature of the present case is such that there was an embarkation by the Judge on the question of criminality, and a finding made in that regard, as the appellants submit occurred. It is also argued that the first appellant should not have to be put into a position where he is required to deal with the *minutiae* of the evidence led by the Bureau, as to require him to do so turns the process into a criminal trial. It is submitted that, here, there was sufficient engagement by the first appellant given that he denied the allegations made against him.

**69.** In response to questions from the Court, counsel for the appellants accepted that if the Court did not find in this case the exceptionality contended for on behalf of the appellants, then the general principles applicable to such cases as the present apply.

***Discussion and Decision***

**70.** The first observation I would make is that I am not at all convinced that the Supreme Court's observation in *Murphy v. GM*, upon which upon the appellants rely, can in any real sense ground the arguments they advance. This is first and foremost because many of the

points the appellants' counsel raises patently ignore the fundamental premise of the 1996 Act (and how it has been interpreted by the Supreme Court in *Murphy* and subsequent case law), namely that in a civil case directed (as it was here) to *property* there can be no impediment to the Judge finding that proceeds of crime from the activities of the first appellant as a *"member of a gang of robbers"* funded the appellants' acquisition of houses and cars and businesses between 2005 and 2008. As said by the Supreme Court in *Murphy*, proceedings under the 1996 Act concern *"the right of the State in taking, property which is proved on the balance of probabilities, to represent the proceeds of crime. In general such a forfeiture is not a punishment and its operation does not require criminal procedures."* (emphasis added)

**71.** Fundamentally, the findings made by the Judge concerned the possession or control of property said to have been acquired, in whole or in part, with the proceeds of crime and which was adjudicated on the balance of probabilities (as indeed provided for by virtue of s.8(2) of the 1996 Act). The first appellant's guilt was not in issue (nor could it be) and the first appellant was not facing a criminal charge. Nor could he be arrested or remanded in the context of such proceedings. Moreover, the proceedings could lead to no criminal conviction or any finding of guilt or the imposition of any sentence. Furthermore, the Judge's determination does not lead to an order which could form part of any criminal trial, nor can the proceedings lead to any criminal proceedings being re-opened.

**72.** Here, it is clear from both the tenor of the judgment as a whole, and the Judge's forensic analysis of the evidence before him, that the Judge's focus was solely directed to the properties in issue here (i.e. *in rem*) and the source of the funds utilised in the acquisition of those properties.

**73.** Undoubtedly, the Judge had regard to the evidence put before him in the affidavits filed by the Bureau to what was said to be the first appellant's alleged links to criminal

activities. He made a finding (at para. 9) that *"proceeds of crime from activities of [the first appellant] as a member of a gang of robbers funded a spending spree"* by the appellants on houses, cars and businesses. The Bureau having established a *prima facie* case (which is not disputed), the primary finding of the Judge was that the appellants had failed on the balance of probabilities to establish as a matter of fact that the properties were not the proceeds of crime.

**74.** The appellants now seek to argue on appeal that the Judge's findings in respect of the first appellant's activities were not supported by the evidence. I note the Bureau's submission this is not a ground of appeal advanced in the notice of appeal. Without prejudice to that argument, the Bureau in any event say that there was ample evidence before the High Court for the Judge to conclude as he did.

**75.** Insofar as the appellants contend that the Judge's findings as regards the first appellant's activities in 2005/2006 was not supported by the evidence, in my view, this argument is without merit. The Judge had independent evidence of the first appellant's connections to criminal activities, as deposed to in the affidavit evidence filed by the Bureau. In particular, the Judge had the affidavit evidence (sworn 24 March 2022) of a [named] Bureau Officer who attested that in 2008, in his capacity as a member of the National Bureau of Criminal Investigation, he completed an investigation into the robbery of a Brinks Allied security van at a Maxol Service Station in Artane on 30 March 2005. He avers that the then driver of the van (Mr. Keenan) was ultimately charged and convicted under s.4 of the Criminal Justice (Theft and Fraud) Act 2001 following a plea of guilty and sentenced to 8 years imprisonment on 15 April 2010.

**76.** The Bureau Officer further avers, *inter alia*, that the investigation had identified four mobile telephone (*"job phones"*) which had cross-contact on the date of the raid on the Brinks Allied security van and preceding dates. These *"job phones"* were believed to have

been used to organise and co-ordinate the Brinks Allied robbery on 30 March 2005. He states that one of those *"job phones"* was identified as having had contact with an individual (the first appellant's erstwhile partner and the mother of his elder son) who had lodged papers in the family courts against the first appellant seeking child support for her child. On foot of that information, the first appellant was identified as a suspect in the Brinks Allied robbery. The Bureau Officer further avers that a separate investigation into the activities of the first appellant identified links between him and Mr. Keenan following which the first appellant was arrested on 28 November 2006 *"following an intelligence led operation"*. It is deposed that a search of the first appellant's home on the same date as his arrest yielded documents relating to a Honda CBR Motorcycle bearing Registration No. W384ULW. Further investigation showed that the first appellant had been stopped driving the same vehicle on 16 May 2005. Records also showed that on 17 October 2006, the vehicle was imported into Ireland and assigned Registration No. 00 D 110310 and that Mr. Keenan became the registered owner of the vehicle.

**77.** The Bureau Officer deposes to the fact that on 30 October 2008, Mr. Keenan was arrested under s.30 of the Offences Against the State Act 1939 on suspicion of possession of information relating to the commission of a scheduled offence under Part 5 of the said Act namely unlawful possession of firearms on 30 March 2005. Following the submission of a file to the Director of Public Prosecution, Mr. Keenan was charged with an offence of theft contrary to s. 4 of the Criminal Justice (Theft & Fraud) Act 2001 to which he pleaded guilty and he was sentenced to eight years imprisonment on 15 April 2010.

**78.** He also avers that on 2 December 2008 the first appellant was also arrested under s.30 of the Offences Against the State Act 1939 on suspicion of possession of information relating to the commission of a scheduled offence under Part 5 of the said Act namely unlawful possession of firearms on 30 March 2005 following which he was detained and

interviewed on a total of five occasions and thereafter released without charge. The Bureau Officer goes on to aver:

> *"Having been involved in the compilation of the investigation file in relation to the incident of robbery on the 30th March 2005 I believe that Damien Keenan was complicit in the robbery as an "inside man" recruited by [the first appellant] in this regard. Furthermore, I am satisfied that [the first appellant] was integrally involved in and present during the commission of this crime."* (at para. 16)

**79.** Another [named] Bureau Officer, in his affidavit sworn 15 September 2020, deposed as follows:

> *"5. [The first appellant] has a history of criminal activity back to 2003. He has been a known associate of several serious criminals in the greater Dublin area since the earlier 2000s and is a directing member of an Organised Crime Group ("the Saunders OCG")*
>
> *…*
>
> *7. [The first appellant] is a leading member of and directing force behind the Saunders OCG which is involved in serious crime including armed robbery and what are colloquially known as 'tiger kidnappings' involving abduction/false imprisonment upon the captors demand the commission of another crime (usually robbery) on their behalf. I am aware from Garda intelligence available to me that [the first appellant] was suspected of organising the armed robbery of a Brinks Allied Security van on 30th March 2005. A total of €1.8 million euro was taken by the criminal gang involved in this raid. No money was recovered and [the first appellant], although arrested and interviewed in relation to this crime, was never charged.*

*8. On 7th October 2016, [the first appellant] and two others, Damien Noonan and Francis Murphy, were arrested in Dunboyne, Co. Meath by members of an Garda Síochána while attempting to steal a quantity of cash being delivered to an ATM. At the time of his arrest, [the first appellant] was armed with a loaded firearm and wearing body armour. [The first appellant], Damien Noonan and Francis Murphy pleaded guilty to all charges and each were sentenced on 12th June 2018 to ten years custody with two and a half years suspended. Their sentences were to run from the 7th October 2016.*

*9. Investigation of the Saunders OCG utilised bank material uplifted pursuant to Section 14A production order in addition to bank material uplifted in a previous investigation into the criminal activities of Glen Cass who was an active member of the Saunders OCG.*

*10. This investigation focused primarily on the criminality and money laundering of [the appellants] in addition to the facilitative efforts by [EG](the mother of the first appellant]) and her involvement in financial transactions in the acquisition of the Dublin property assets of [the appellants] at [ Hazelbury Park and Mayeston Lawns]"*

**80.** In his affidavit sworn 2 June 2021, the first appellant responded to the belief of the Chief Bureau Officer by denying that he and the second appellant were members of an organised crime group. He also denied involvement in *"tiger kidnappings".* In response to the affidavit sworn on 15 September 2020 by a named Bureau Officer, the first appellant averred as follows.

*"17. I say that it is not true that I had a criminal history going back to 2003 as alleged. I am not involved in directing an organised crime group. I am a stranger to any other persons who have been targeted by the Applicant, but I find it strange*

*that if they really believed that I was directing an organised crime group, and the properties in question been registered in my name for well over a decade, it is strange that they are only bringing this application against me now, when they allege that they have been investigating this alleged organised crime group, seemingly as far back as January, 2016.*

*18. I say that the only allegations being made against your deponent regarding the March, 2005 allegation is 'Garda intelligence' and the fact that I was arrested but never charged for this offence. I deny this allegation and as there is no evidence in relation to same, I say and am advised that I cannot meaningfully respond to such allegations other than to repeat my denial."*

**81.** Save the bare denials of involvement in criminal activity, there was no engagement by the first appellant with the specific matters relied on the Bureau as evidencing the first appellant's alleged involvement in and association with criminal activities. In my view, therefore, given the evidence put before the court by the Bureau, there was ample evidence which entitled the Judge to make the findings he did regarding the first appellant's criminal activities.

**82.** In response to the observation of the Court that the first appellant could have served a notice to cross-examine the Bureau's witnesses in respect of any issue, counsel for the appellants agreed that this was so but stated that doing so would have turned the proceedings into a criminal trial by the backdoor in circumstances where the first appellant would be without the safeguards of a criminal trial. Counsel argued that it should not have to fall to the first appellant to engage with the *minutiae* of the case being made by the Bureau.

**83.** Firstly, I would observe that, as his counsel acknowledged, the first appellant was not precluded from engaging with the matters put forward by the Bureau as evidence of his

links to criminal activities. It was open to him to cross-examine the Bureau's deponents and adduce whatever affidavit evidence he himself wished to rely on. As nothing arising from the s. 3 proceedings could be relied on in any later criminal proceedings, doing so would not have put the first appellant in peril of self-incrimination. That being the case, the argument that the first appellant should not have to engage with the *minutiae* of the Bureau's evidence has no merit.

**84.** Much was made by counsel for the appellants of the fact that the first appellant was without criminal convictions in 2005-2007. It bears saying that the lack of convictions in respect of the first appellant in the period 2005 to 2007 does not operate to prevent a finding (for the purposes of the 1996 Act) that the first appellant was engaged in alleged criminal activity and that he profited therefrom. This has been made clear by the Supreme Court in *Murphy* and more recently by Murray J. in *CAB v. McCormack* [2021] IECA 184.

**85.** Whilst the appellant in *McCormack* had been convicted of criminal activity *before* the acquisition of the property the subject of application under the 1996 Act, it is also the case that, as stated by Murray J., his alleged involvement in serious crime thereafter was *"amply corroborated by the apparent and varied connections between the appellant and the recovery of stolen property from Cloontra".* (para. 28) Murray J. goes on to recite the factors that lent credence to the appellant's involvement in criminal activity before stating:

> *"The judge viewed all of these circumstances as critical to his conclusions (see para. 17 of the judgment) and it is impossible to my mind to see how it can be said that he was not entitled so to do. And, of course, that across the entire period covered by the application, the appellant was accumulating very substantial assets the source of which he was unable to explain, augmented the evidential basis for these conclusions."* (para. 28)

Here, in my view, having regard to the evidence adduced by the Bureau, the Judge had ample evidence of the varied connections between the first appellant and the Brinks Allied robbery of 30 March 2005.

**86.** Furthermore, contrary to the appellants' contentions, the findings made by the Judge as to the first appellant's involvement in criminal activity in 2005-2006 do not lead to the conclusion that those findings were then used to discount the other evidence in the case. Insofar as it is contended that the Judge discounted their declared legitimate income in light of his findings as to the first appellant's connection to the Brinks Allied robbery of 30 March 2005 and/or other criminal activities, I am satisfied that he did not do so.

**87.** Undoubtedly, the Judge had regard to the first appellant's affidavit of 2 June 2021 where he addressed what he said was the source of his income in in the relevant years. There, the first appellant addressed his employment history, as follows:

> *"4. I say that your deponent was working as a plasterer from [1994] until 2008. This was the period of the Celtic Tiger and tradesmen were well paid during this period. I say that my income is as set out in the Revenue Bureau Officer's Affidavit, that is to say that in 2003 I had €49,286 in turnover with assessable net profit of €30,990. In 2004 I had a turnover of €35,605 and €23,134 in profit. I also had PAYE payment of €8,400 from J.D. Security. I say that I am a stranger as to why the Revenue Records are incomplete in respect of this employment. I say that in 2005 I had a turnover of €47,912 and net profit of €32,307.*
>
> *5. I say that in 2006 I had a turnover of €23,500.00, net profit of €20,125.00, PAYE income of €10,095.00 gross, my wife had PAYE income of €19,495.00 gross".*

**88.** As is apparent from his judgment, the Judge clearly recognised and accepted that the appellants derived some income from legitimate employment, but he also found, as he was entitled to do on the basis of the evidence the Bureau's put before him and given his rejection of the appellants' affidavit evidence for the reasons he stated, that that income could not account for the monies that passed through their hands at various times between 2005 and 2008. By way of example, the Judge (at para. 14) found an enormous differential between the appellants' legitimate source of income and their spending in the period 2003 – 2006. Moreover, albeit that the Judge accepted that the first appellant did earn some income from his trade as a plasterer, he was nevertheless satisfied that the appellants had failed to account for the enormous differential between their legitimate income and their expenditure in the period 2003-2006. In so finding, he was bolstered by the evidence of the Bureau Forensic Accountant No. 68 whose conclusions, as the judge observed at para. 110 of his judgment, were not challenged by the forensic report put in evidence by the appellants.

**89.** The Judge's findings in respect the appellants' failure to account for the differential between their income and expenditure, to borrow the phraseology of Murray J. in *McCormack*, augmented the evidential basis for his conclusion that the information provided by the Bureau *"provides very strong and persuasive support for the beliefs of the Chief Bureau Officer that Hazelbury Park and Mayeston Lawn were acquired by [the appellants] using proceeds of crime"* (para. 6), and his conclusion that *"proceeds of crime from activities of [the first appellant] as a member of a gang of robbers funded a spending spree by [the appellants] on houses, cars and businesses between 2005 and 2008…".* (para. 9)

**90.** That the Judge so determined, does not, in my view, on any reading of *Murphy* or the subsequent case law, mean (as the appellants would have it) that in reaching the

conclusions he did, the Judge exceeded the scope of the 1996 Act. In truth, the appellants' arguments in support of ground 1 of their appeal are entirely dependent on the 1996 Act being penal in nature. As found by the Supreme Court in *Murphy* and as confirmed in subsequent authorities, it is not.

**91.** I also note the appellants' argument in their written and oral submissions that the order made under s. 3, involving as it does the deprivation of appellants' family home, *"clearly constitutes a form of punishment based on the finding, outside of a criminal trial, of criminal culpability for specific criminality".* I find no merit in this submission. Apart altogether from the fact that the remit of the Order made under s.3 is confined to prohibiting the appellants from disposing of or otherwise dealing with the property or otherwise diminishing the value of the said property, the appellants have not advanced any authority for the proposition that by virtue of the subject property being their family home, the impact of the Order equates to a criminal sanction. At the risk of repetition, the 1996 Act is civil in nature. As said in *Murphy*:

> *"It concerns the right of the State to take, or the right of a citizen to resist the State in taking, property which is proved on the balance of probabilities to represent the proceeds of crime. In general such a forfeiture is not a punishment and its operation does not require criminal procedures."* (p. 153)

**92.** It also bears repeating that the combined effect of the decisions in *Murphy* and *Gilligan* leads invariably to the conclusion that the appellants' reliance on the Convention, and the ECtHR's caselaw they cite, is entirely misconceived.

**93.** For all of the foregoing reasons, the appellants have not made out ground 1.

**<u>Ground 2</u>**

**94.** By ground 2, the appellants contend that the Judge failed to adequately consider the Bureau's delay in bringing the within proceedings. This delay, it is said, has caused

prejudice to the appellants. It is contended that by bringing proceedings in 2020, the Bureau has left the appellants in a position where they are unable to properly put forward their case in relation to their earnings in the period 2005 – 2007. They also contend that they were already investigated by the Bureau in 2008 and that no proceedings were brought at that time.

**95.** The appellants contend, essentially, that the delay is of such significance in circumstances where well over a decade has passed since the events upon which the Bureau rely. They say that the upshot of that is that any hope they had of being able to defend themselves, by way of adducing records or calling witnesses in order to demonstrate their employment and work history, including the first appellant's worth as a plasterer, has gone.

**96.** The appellants advanced the same arguments in the court below. The Judge addressed the argument in the following terms:

> *"[The appellants] make the point that they were investigated ....in relation to the matters now being pursued back in 2007 and that no action was taken. In my view this is not relevant. I am not persuaded that they have been prejudiced by any delay in bringing these proceedings or that loss of underlying records or documents had the effect of undermining the basis for the belief of the Chief Bureau Officer."* (para. 103)

**97.** Notwithstanding the view expressed by the Judge, the appellants submit that the delay here is a highly relevant factor in assessing the within claim. Albeit it is accepted that there is no statute of limitations on proceeds of crime applications, and that the appellants accept in principle that applications under s. 3 can inquire into events which occurred several years earlier, they say that this case is very different given that they have already been investigated in 2007-2008, by the same member of the Bureau who brought

the proceedings in 2020. They also say that had anything untoward been uncovered at that time, the Bureau would have brought proceedings at that stage. They contend that the implication of no such proceedings having been brought at that time must be that there was nothing untoward in their accounts. They further assert that in so far at the Bureau contends that the explanation for not bringing such proceedings is that the appellants were not the primary target of the 2008 investigation, there was clearly an investigation into them in 2007-2008, and nothing came of it.

**98.** Primarily, the appellants contend that if the proceedings had been brought at the earlier stage, it would have been within the six-year period in respect of which self-employed persons are required to retain their records for Revenue purposes, in accordance with s. 886 of the Taxes Consolidation Act 1997. They point to the fact that they were expressly criticised by the Judge for not having records going back to 2005 – 2007. This criticism was levelled, they say, in circumstances where they are not obliged to have such records for tax purposes in 2020, given the lapse of time that has occurred. They also contend that had the Bureau moved earlier, their work details would have been fresh in their minds, and they could have sought out and obtained witnesses in respect of work done from which they derived earnings. They say that by virtue of the Bureau's tardiness, they have been deprived of this opportunity.

**99.** Asked by the Court what prejudice has been suffered by the appellants, their counsel pointed firstly to para. 62 of the judgment where the Judge essentially accepted that the first appellant had worked as a plasterer. The first limb of the asserted prejudice thus attaches to the first appellant's time as a self-employed plasterer. It is submitted that had the Bureau moved earlier, the first appellant would have been in a position to adduce relevant Revenue records, something that has not now open to him as he was not obliged to keep records beyond six years. It is said that the first appellant could not reasonably have

been expected to keep records beyond the six-year time period. Secondly, the appellants assert that the loss of memory, and loss of contact with other people, as time goes by, has resulted in their being deprived of the opportunity of recalling events and contacting possible witnesses. Had the Bureau brought the proceedings earlier than they did, the appellants would have been in a far better position to refute the allegations made against them. Their inability to do so now represents, it is submitted, a clear prejudice. They argue that the Judge's failure to recognise this constitutes an error on his part.

**100.** In response to further questions from the Court, counsel for the appellants accepted that the appellants have not identified on affidavit any witnesses that might have been called on their behalf. That notwithstanding, counsel reiterated that the passage of time means that the appellants are entirely unable to contest the allegations against them in any meaningful way.

**101.** Furthermore, while they acknowledge that there is no express statute of limitations or temporal restriction on applications such as the present, they point to the proviso contained in s.3 of the 1996 Act that *"The court shall not make the order if it is satisfied that there would be a serious risk of injustice".* They argue that the interests of justice proviso must include a consideration by the Court whether the delay of which they complain has caused them prejudice, similar to the case law in relation to delay in the prosecution of historic crimes which have come before the courts. In this regard, reliance is placed on the *dictum* of Denham J. (as she then was) in *B v. DPP* [1997] 3 IR 190.

**102.** Albeit acknowledging that it is a discretionary matter, the appellants submit that the Judge erred in finding that the delay was not relevant. They say that it is difficult to understand the Judge's statement that the loss of underlying documents did not have the effect of undermining the belief of the Chief Bureau Officer. They submit that this cannot be the case in circumstances where the Judge clearly held that *"Working papers retrieved*

*from the accountant who prepared Revenue returns provided no objective evidence to vouch that sums lodged to the bank accounts were derived from this type of trading"* and thus rejected the appellants' claim in respect of their earnings in 2005 – 2007.

**103.** The Bureau refutes the contention that there has been delay in this case, or that the appellants have established prejudice arising from such delay.

***Discussion and Decision***

**104.** Insofar as the appellants contend that they were investigated by the Bureau in 2007-2008 and nothing came of it, I am satisfied that they are misconceived in characterising what occurred at that time as an investigation into their affairs. In the first instance, the height of the appellants' *factual* evidence concerning the alleged previous investigation comes in the form of a short averment in the replying affidavit of the first appellant where at para. 15, he avers that in 2007 there was a CAB investigation which *"touched upon"* his accounts and that the Bureau assessed his accounts and the information concerning the purchase of the properties in issue here. The first appellant gives no indication as to which of his assets of the Bureau was investigating at that time, or the purposes for which the accounts of the first appellant were uplifted. On the other hand, the Bureau says that the purpose of the earlier investigation is explained in the affidavit of Detective Garda O'Keeffe sworn, it is said, before the appellants raised any issue of a previous investigation.

**105.** At paras. 5 and 6 of his affidavit sworn 15 September 2020, a named Bureau Officer outlined that in 2007 – 2008 the first appellant was linked to another Bureau investigation (operation "*Owl"*) then ongoing. A Mr. Glen Cass, an uncle of the second appellant, was the target of that investigation. As a result of that investigation, the conveyancing files for the two properties registered to the appellants were seized, and bank accounts were uplifted. The Bureau officer goes on to explain that the first appellant's organised crime

group were later referred to the Bureau for investigation on 14 January 2016 under the operational name *"Woven".*

**106.** As deposed to by the Bureau Officer:

> *"5. [The first appellant] has a history of criminal activity back to 2003. He has been a known associate of several serious criminals in the greater Dublin area since the earlier 2000s and is a directing member of an Organised Crime Group ("the Saunders OCG"). A number of these criminals themselves have themselves been successfully targeted by the Criminal Assets Bureau. Glen Cass was the initial target of this investigation. Glen Cass is the uncle of [the second appellant] and a member of the Saunders OCG. As a result of this investigation the conveyance files for the two properties registered to [the appellants] were seized and bank accounts associated with the Saunders OCG were uplifted. One of these bank accounts was in the name of [RC and EG].*
>
> *6. The Saunders OCG were referred to the Criminal Assets Bureau for investigation on 14th January 2016.…"*

**107.** At para. 9, the bureau Officer deposes that for the purposes of the investigation into the first appellant that commenced in 2016 (and which led to the within application), "*bank material uplifted in a previous investigation into the criminal activities of Glen Cass who was an active member of the Saunders OCG",* clearly a reference to Operation *"Owl"* in respect of which the first appellant was not the subject.

**108.** Hence, there is force in the Bureau's submission that the first appellant was not the target of the criminal investigation in 2007-2008 albeit that as a result of that investigation, certain information regarding the first appellant came to light.

**109.** While the Bureau acknowledges that the appellants had purchased the properties in question here at the time of the Bureau's 2008 investigation into Mr. Cass, and that there

was a suspicion in 2007-2008 that the first appellant had an involvement with the 2005 Allied Brink robbery, it submits that there was no positive obligation on the Bureau to detect or move against the appellants at that time. It is also the Bureau's position that the nature of investigations conducted by the Bureau under the 1996 Act are wide-ranging, and that there is no obligation on it to conduct an investigation at any specific time. I accept that to be the case.

**110.** There is no statute of limitations applicable to the proceeds of crime, as affirmed by Feeney J. in *Gilligan* [2011] IEHC 464. Moreover, this has been put beyond doubt by s.10 of the Proceeds of Crime (Amendment) Act 2005 which provides:

> *"For the avoidance of doubt, it is hereby declared that section 11(7) of the Statute of Limitations 1957 does not apply in relation to proceedings under the [1996 Act]".*

**111.** The issue has also been addressed by the decision in *Criminal Assets Bureau v. Walsh* [2021] IEHC 457. There it was argued that proceedings under s. 3 of the 1996 Act were time-barred by reason of s.9(2)(b) of the Civil Liability Act 1961**.** That argument was rejected by the High Court (Owens J.). He stated:

> *"The 1996 Act confers a special jurisdiction to make a determination relating to the status of property. These proceedings do not relate to "any cause of action" of a type which can be said to have "survived against the estate of a deceased person" within s.9(2) of the 1961 Act."* (para. 2)

**112.** Owen J. elaborated on this at para. 24 where he essentially distinguished between *"causes of action"* for the recovery of money or property or claims for damages or to enforce private rights (to which s.9(2) of the 1961 Act would ordinarily apply) and sections 2 and 3 of the 1996 Act which, he said, *"give the Bureau special public law rights to apply to seek adjudication that property has the status of being the proceeds of crime".* At para.

27, citing the decision of the Supreme Court in *Murphy*, he went on to state that "*[t]he policy of the 1996 Act is that there is no right of enjoyment of proceeds of crime or of assets derived from proceeds of crime"* and *"benefits of criminal activity are not regarded by public law as being the property of their holder".*

**113.** There is therefore no case to be made here that any statute of limitations or other temporal restriction applies to the 1996 Act and, in fairness, counsel for the appellants conceded as much. Counsel's emphasis was on the prejudice caused to the appellants which, it is said, arises as a result of the Bureau not having made the s.3 application sooner. As a matter of principle, I am prepared to say that prejudice because of delay, if established, could in certain circumstances constitute *"a serious risk of injustice"* such as would mandate a court not to make an order under s.3 of the 1996 Act. However, any such claim of prejudice would, in my view, have to be particularly compelling given, as Owens J. described in the *Criminal Assets Bureau v. Walsh,* the *"special public law rights"* which the Bureau enjoys under the 1996 Act.

**114.** Turning, therefore to the prejudice which is alleged here: insofar as the appellants contend that had the first appellant been investigated in or about 2007-2008, he would have been in a better position to refute the case being made against him, I note, in the first instance, that the first appellant has not put on affidavit that he has sustained prejudice as a result of the delay the appellants allege has occurred. Furthermore, insofar as the appellants refer to the human aspect of the loss of memory due to the passage of time, I am constrained to agree with the Bureau's characterisation of this assertion as entirely generic in nature, in the absence of any affirmative evidence from the appellants stating what was actually lost to them by reason of the Bureau not moving earlier than it did. Thus, for those reasons, I do not find that the circumstances of this case establish that a serious risk of

injustice would arise from the making of the Order. Accordingly, the Judge did not err in holding likewise.

**115.** Ground 2 has not been made out, in my view.

**Summary**

**116.** As the appellants have not succeeded on either of the grounds they advanced, I would dismiss the appeal.

**Costs**

**117.** The appellants have not succeeded in their appeal. It would seem to follow that the Bureau should be awarded its costs. If, however, any party wishes to seek some different costs order to that proposed they should so indicate to the Court of Appeal Office within 14 days of the receipt of the electronic delivery of this judgment, and a short costs hearing will be scheduled, if necessary. If no indication is received within the 14-day period, the order of the Court, including the proposed costs order, will be drawn and perfected.

**118.** As this judgment is being delivered electronically, Whelan J. and Haughton J. have indicated their agreement therewith and with the orders I have proposed.