

THE HIGH COURT

2007 5 CAB

IN THE MATTER OF SECTION 3(1) OF THE PROCEEDS OF CRIME ACT 1996

BETWEEN

CRIMINAL ASSETS BUREAU

APPLICANT

AND

BARRY O'BRIEN AND MAJELLA O'BRIEN

RESPONDENTS

Judgment of Mr. Justice Feeney delivered on the 12th day of January, 2010.

1.1 The applicant seeks orders under s. 3 and s. 7 of the Proceeds of Crime Act 1996, as amended. At the time that the proceedings commenced by originating notice of motion, three properties were identified as being the subject of the proceedings under the Proceeds of Crime Act 1996. Those three properties were:

- (a) All that and those the property known and more particularly described as Oaktate, Stonetown, Carrickmacross Road, Dundalk, County Louth contained in Folio 11178F, County Louth;
- (b) All that and those the property known and more particularly described as Greaghlonge, Carrickmacross Road, Dundalk, County Louth contained in Folio 1099F, County Louth;
- (c) All that and those the piece or plot of ground with the dwelling house erected thereon known as No. 6, Mountain Court, Point Road, in the town and parish of Dundalk and County of Louth or in the alternative the proceeds of any sale thereof.

Those three properties were the subject of a s. 2 order made by this Court on the 29th March, 2007. That order was subsequently varied by further order of the High Court made on the 14th May, 2007. On that date an order was made by consent wherein it was ordered that the original order of the 29th March, 2007 be varied to enable the sale of the property set forth at paragraph (c) above, that is the property known as 6, Mountain Court, and it was further ordered on consent that upon the sale of the said property that the proceeds of such sale would not be distributed until further order of this Court. That property was subsequently sold and the net proceeds have been retained by the solicitor who had carriage of the sale pending further order of this Court. The evidence before this Court was that the net proceeds of sale amounted to some €70,000 and stands to the credit of the client account of Aaron Kelly, solicitors, pending further order.

1.2 The first and the second named respondent were married in 2002 and have four children, two born prior to the marriage and two since that date. In April 2003 the respondents purchased a site at Oaktate, the property identified at paragraph (a) of the schedule to the originating notice of motion. After the purchase of the site building works were carried out but prior to the building being finished a fire occurred at the property in November, 2003 resulting in the destruction of the partially completed building. Thereafter the site was cleared and rebuilding commenced and the property was completed. The two respondents and their four dependent children reside in that property.

1.3 The property identified at paragraph (b) of the schedule to the originating notice of motion known as Greaghlonge was purchased by the respondents on the 27th February, 2006. The property identified at paragraph (a) and known as Oaktate is the family home and the first and second named respondents are joint legal owners of that property and of the property identified at paragraph (b) known as Greaghlonge. The details concerning the purchase of the three properties and the source of finance used and the documentary information concerning such purchases together with the financial information concerning Oaktate and its destruction and rebuilding are set out in detail in the evidence of Detective Sergeant Ciaran Murphy in paragraphs 9 to 18 inclusive of his affidavit sworn on the 26th day of May 2007. Even though certain details of that evidence were disputed, the general conclusion and significance of that evidence remained unchallenged to any real effect and was not contradicted by any documentary evidence or independent testimony. The Court is satisfied that the conclusions expressed in Detective Sergeant Murphy's evidence are credible and persuasive.

1.4 The applications under s. 3 and s. 7 of the Proceeds of Crime Act 1996, as amended, was heard on affidavit. A number of notices of cross-examination were served. Both respondents were separately represented. The second named respondent was granted legal aid under the *ad hoc* legal aid scheme (CAB) of April 1999 for representation by a solicitor and two counsel and was also provided by order with the assistance of a forensic accountant. The first named respondent made an application in 2007 seeking to vary the s. 2 order already made to enable him to access the funds covered by the said order for the purposes of enabling him to pay his legal expenses in relation to these proceedings. That application was refused by order of this Court of the 12th October, 2007. On Monday, 30th March, 2009, two days prior to the date assigned for the hearing of this case, the first named respondent made an application to Court under the *ad hoc* legal aid scheme (CAB) for the grant of legal aid under that scheme at a level of legal representation providing for one solicitor and two counsel including a senior counsel. Having heard that application and considered the affidavit of the first named respondent, as to his claimed lack of financial means, the Court granted legal aid under the scheme with provision for one solicitor and one counsel. That order was made on the 30th March, 2009 and was appealed to the Supreme Court by the first named respondent who sought to have the level of representation extended to include the provision of a senior counsel. That appeal was unsuccessful and the hearing commenced before this Court on Wednesday, 1st April, 2009.

2.1 At the commencement of the hearing, counsel on behalf of the first named respondent sought to introduce an additional affidavit

sworn by his solicitor exhibiting two valuations. The stated purpose of seeking to introduce such an affidavit was to ground an application that all the property, the subject matter of the proceedings, had a value of less than IR£10,000 or €12,697.38. The s. 2 order had been made on the basis that the value of all the property identified in the schedule to the originating notice of motion had a total value greater than IR£10,000 or €12,697.38. Section 3(1)(b) of the Proceeds of Crime Act 1996 identifies as one of the necessary proofs that it must be established that the value of the property is not less than IR£10,000 and it is further provided in s. 3(b)(II) that a s. 3 order shall not be made by the Court if it be shown to the satisfaction of the Court that the value of all the property to which the order would relate is less than IR£10,000. Counsel on behalf of the first named respondent sought to introduce a solicitor's affidavit exhibiting two valuations in relation to the properties set out at paragraph (a) and (b) of the schedule to the originating notice of motion for the purposes of contending that the current market values of each of those two properties was less than the outstanding mortgage repayments due thereon. Counsel on behalf of the applicant resisted the introduction of such an affidavit and raised the issue as to the relevance of such evidence given that the property identified at paragraph (c) of the schedule to the originating notice of motion had been sold and that net proceeds of €70,000 arising from such sale were held pending further order of this Court. On the first day of the hearing, the Court ruled (transcript day 1, p. 23) that at that point in time the Court did not see the relevance of the matters sought to be introduced but allowed and permitted the matter to be re-ventilated by counsel for the first named respondent at a later stage in the proceedings when the factual background to the proceedings would have been established by the evidence heard and opened to the Court.

2.2 On the third day of the hearing, counsel on behalf of the first named respondent sought to have the s. 3 application dismissed on the basis that it had not been proved in evidence that the value of the property, the subject matter of such application, was in excess of IR£10,000. Counsel on behalf of the first named respondent argued that the Court in considering the value of all the property was obliged to take into account and calculate such value by making due allowance for any negative equity in the properties. It was contended on behalf of the first named respondent that since the re-sale value of the properties identified at paragraphs (a) and (b) of the originating notice of motion were both less than the mortgage sums outstanding in respect of such properties, that the Court was obliged to make a calculation identifying the net sums outstanding in respect of each of those two properties by deducting the market values from the due and outstanding mortgage sums and thereafter deduct such sums from the €70,000 held, pending further order of this Court. A full legal argument took place in relation to this matter (commencing at transcript day 3, p. 92) and having considered the arguments, the Court gave its ruling in respect of this matter on the same day (commencing at transcript day 3, p. 118). The Court held that the correct interpretation of the word "value" in s. 3 of the Proceeds of Crime Act was the market value which a property would obtain on the open market and the Court further held that even if the Court was incorrect in relation to that interpretation, that on the facts of this case the value of the property was clearly in excess of IR£10,000 as €70,000 arising from the net proceeds of the sale of the property identified at paragraph (c) of the originating notice of motion was held pending further order of this Court and formed part of the value of the property. The Court determined that even if it were established that the re-sale value of the two properties at paragraph (a) and (b) of the originating notice of motion was less than the outstanding sums due in respect of the mortgages thereon, that that resulted, at best, in those properties having a net value of zero and that it was an artificial and impermissible interpretation to require the value of those two properties to be calculated taking into account contractual sums due to the lending institutions where such sums were in excess of the re-sale value. The Court therefore determined that it had been established by the evidence concerning the €70,000 net sum that the total value of the property, the subject matter of the application, was in excess of IR£10,000 and that, therefore, the Court had a jurisdiction to consider the s. 3 application. On that basis the Court determined that it was unnecessary to admit the further affidavit sought to be admitted by the first named respondent as the contents of such affidavit, even if proved, would not and could not result in the first named respondent tendering evidence to the Court which would establish that the value of all the property, the subject matter of the application, was less than IR£10,000.

3.1 The evidence available to the Court consisted of the affidavits sworn in the proceedings including an affidavit filed in Court by the first named respondent, Mr. O'Brien, on the 3rd April, 2009, the various exhibits contained in the said affidavits and also the evidence arising from the cross-examination of the witnesses who were cross-examined. The witnesses cross-examined were Detective Chief Superintendent John O'Mahoney, Detective Sergeant Ciaran Murphy and the second named respondent, Mrs. Majella O'Brien. A number of other persons who had sworn affidavits within the proceedings, including Mr. Barry O'Brien, had been the subject of notices to cross-examine but were not cross-examined as the party who had served the notice to cross-examine did not seek to conduct any cross-examination. As part of his evidence Detective Chief Superintendent O'Mahoney tendered evidence pursuant to the provisions of s. 8 of the Proceeds of Crime Act 1996. Detective Chief Superintendent O'Mahoney gave evidence as to his belief pursuant to s. 8(1) of the Proceeds of Crime Act 1996. Detective Chief Superintendent O'Mahoney swore to his belief that the respondents were in possession or control of the property, the subject matter of the proceedings, and that that property constituted directly or indirectly the proceeds of criminal conduct and/or that the said property was acquired in whole or in part, with or in connection with property that, directly or indirectly constituted proceeds of criminal conduct and that the total value of the property referred to was not less than €13,000. Detective Chief Superintendent O'Mahoney was cross-examined in relation to such belief. The Court therefore must consider the different functions of s. 3 and s. 8 of the Proceeds of Crime Act 1996. The Supreme Court has identified the different functions of those sections in the judgment of McCracken J. in *F. McK. v. G.W.D. (Proceeds of crime outside the State)* [2004] 2 I.R. 470 at p. 490. McCracken J. in his judgment identified the correct procedure for a trial Judge to follow when considering s. 3 applications and when faced with belief evidence as provided for by s. 8. This Court is guided by and will apply the procedure identified by McCracken J. The procedure is set out (at p. 491) of the judgment where it states:

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

- (1) he should firstly consider the position under s. 8. He should consider the evidence given by the member or authorised officer of his belief and at the same time consider any other evidence, such as that of the two police officers in the present case, which might point to reasonable grounds for that belief;
- (2) if he is satisfied that there are reasonable grounds for the belief, he should then make a specific finding that the belief of the member or authorised office is evidence;
- (3) only then should he go on to consider the position under s. 3. He should consider the evidence tendered by the plaintiff, which in the present case would be both the evidence of the member or authorised officer under s. 8 and indeed the evidence of the other police officers;
- (4) he should make a finding whether this evidence constitutes a *prima facie* case under s. 3 and, if he does so find, the onus shifts to the defendant or other specified person;
- (5) he should then consider the evidence furnished by the defendant or other specified person and determine whether he is satisfied that the onus undertaken by the defendant or other specified person has been fulfilled;

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

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

3.2 In applying the procedure identified by McCracken J. the first matter which this Court must consider is the position under s. 8. In addressing this matter the Court must consider the evidence given by Detective Chief Superintendent O'Mahoney of his belief and at the same time consider the other evidence which was available to the Court which might point to reasonable grounds for such belief.

3.3 The Court had evidence of the criminal record of the first named respondent and details of his convictions dating from 1999. The Court also had evidence concerning the arrest and charge of the first named respondent in Northern Ireland in respect of a criminal charge of the smuggling of cigarettes and of the fact that the first named respondent had left the jurisdiction of Northern Ireland and that a warrant remained outstanding for his arrest. The Court also had evidence that the first named respondent, when arrested on the 29th September, 2005 in respect of an allegation of breach of bail, had his car searched and that the search revealed the presence of a bank draft which was one of 400 drafts which had been stolen from the ACC Bank in Cavan Town. On the following day, a search of the first named respondent's home at Oaktate resulted in a forged bank draft being discovered therein which was seized. There was also evidence that on the 30th September, 2004, the first named respondent had been the subject of a serious criminal assault by a man wearing a balaclava and carrying a gun. There was also evidence concerning a number of occasions on which the first named respondent was arrested and questioned arising out of identified crimes. The Court also heard evidence of an incident which occurred on the 20th March, 2002 concerning the use of firearms and of the demand of money and of the arrest of the first named respondent on that date. He was found in a motorcar, which he owned, in a hotel car park with three other men and the search of that motorcar resulted in two firearms being located in the boot of the car. The first named respondent was not prosecuted arising out of that incident and the evidence was that one person was charged but absconded and remains outside the jurisdiction.

3.4 The Court also had evidence that the first named respondent had made applications to obtain mortgages providing false and incorrect information. The Court had evidence in relation to the declared incomes of the first and second named respondents and of the social welfare payments which they received. The records available in relation to the first named respondent indicated that he was first employed as of December 1988 and that that employment ceased the following January. The first named respondent was employed by Xerox (Europe) Limited from February 2000 until March 2001 and his gross income for the period from the 28th February, 2000 to the 5th April, 2000 was IR£903 and that his gross pay for the period from the 6th April, 2000 to the 8th March, 2001 was IR£10,563. The first named respondent was recorded as and from the 6th April, 2001 as being involved in the business of providing security services and thereafter provided one return of income for tax. An assessment was issued on the 14th April, 2003 which provided for income of €16,520. The evidence also established that on the 5th December, 2006 the first named respondent filed returns for income tax for the years 1995/1996 to 2005 and made a number of returns indicating "nil income". The evidence from the Revenue Bureau Officer indicated that in respect of the second named respondent there were no recorded earnings as of the date of his affidavit. There was evidence that in 2007 the second named respondent had commenced part time work in Dunnes Stores. The Court also had evidence in relation to the social welfare history of both respondents. All the evidence which was obtained concerning the income of the two respondents and their social welfare payments was made available to forensic accountant No. 2 who provided evidence on affidavit. He concluded that the information and documentation available concerning the financial affairs of the two respondents resulted in him being able to express an expert opinion that an amount of €298,547 was available to the two respondents which derived from unknown, unexplained or uncorroborated sources of income. A breakdown of that sum was provided. Detective Sergeant Ciaran Murphy had originally calculated that there were unexplained lodgements to the respondents' bank accounts of €248,177.13. He gave evidence to the Court that in the light of the analysis carried out by the forensic accountant and in particular the details contained in para. 20 of his affidavit, that he now understood and accepted that the unidentified or unexplained lodgements amounted to some €170,000. The forensic accountant had identified lodgements from unidentified sources of €170,274. The sum of €170,274 which was identified as being unexplained lodgements formed part of the sum of €298,547 that the forensic accountant identified as being funds available to the two O'Briens from unknown, unexplained or uncorroborated sources. Certain transactions identified in the affidavit and exhibits of Detective Sergeant Murphy were challenged and explanations were provided in the affidavit sworn by the second respondent on the 28th January, 2008. This was expanded upon in an affidavit of the second respondent of the 23rd May, 2008. The matters identified were considered by the forensic accountant, and the Court is satisfied that due allowance was made for such explanations where they were valid. The forensic accountant's opinion as to "unknown, unexplained or uncorroborated" sources of funds being available to the respondents in the sum of €298,547 made due provision for any credible or vouched explanation. The Court accepts the conclusion of the forensic accountant. The central evidence of there being a substantial fund of unexplained monies remained valid and no effective evidence was introduced to undermine that conclusion.

3.5 The Court also had evidence in relation to the background and circumstances of the purchase of the property at 6, Mountain Court, the purchase of the site at Oaktate, the purchase of the site at Greaghlonge and the purchase of the BMW motor vehicle. Each of those items and the financial records and documentations available concerning same were considered and dealt with by the forensic accountant as part of his affidavit and were taken into account in his conclusion. The forensic accountant identified an estimated sum of €90,000 being available from unknown, unexplained or uncorroborated sources in respect of the building of Oaktate and the sum of €18,043 being available in respect of mortgage payments made in relation to Mountain Court and the sum of €7,231 in respect of the deposit and fees incurred in respect of Mountain Court. An explanation was proffered in relation to the purchase of the vehicle for the sum of €10,000 but that sum is not material given the total of €298,547 identified as being available to the respondents from unknown, unexplained or uncorroborated sources.

3.6 From the above evidence it was clear that there was evidence available to Detective Chief Superintendent O'Mahoney which enabled him to express the opinion evidence that the respondents had no legitimate sources of income which would explain the level of assets acquired by them or to explain their general level of expenditure. There was also evidence that a number of mortgages had been obtained by them on the basis of false information. There was also evidence which confirmed that the mortgage repayments made by the respondents exceeded their declared level of income and social welfare payments. The evidence in relation to financial matters provided clear confirmation that there was evidence available to support Detective Chief Superintendent O'Mahoney's opinion that the pattern of lodgements and withdrawals on the respondents' bank accounts was consistent with involvement in criminal conduct and that transactions entered into by the respondents represented the laundering of money. There was also evidence available to the Court concerning the value of the goods damaged and destroyed in the fire at Oaktate and of the insurance claim pursued by the respondents in respect of such property which indicated that the respondents had access to substantial unexplained funds.

3.7 In the light of the evidence available to the Court from witnesses other than Detective Chief Superintendent O'Mahoney, the Court is satisfied that there was evidence which pointed to reasonable grounds for the belief expressed by Detective Chief Superintendent O'Mahoney. Even without the evidence given by Detective Chief Superintendent O'Mahoney as to information that he

had received from confidential sources and/or Garda intelligence, it is clear that there was evidence available which pointed to reasonable grounds for Detective Chief Superintendent O'Mahoney's expressed belief as set out in para. 4 of his affidavit sworn on the 26th March, 2007.

3.8 Having considered the evidence identified above, the Court is satisfied that there are reasonable grounds for the belief of Detective Chief Superintendent O'Mahoney which he tendered in evidence as the authorised officer and the Court therefore makes a specific finding that the belief of that witness is evidence.

3.9 The Court must next consider the position under s. 3 and consider the evidence tendered by and on behalf of the applicant including the evidence of Detective Chief Superintendent O'Mahoney as an authorised officer under s. 8 of the Proceeds of Crime Act 1996. That evidence, details of which are set out above, leads the Court to the conclusion that the evidence constitutes a *prima facie* case under s. 3 of the Proceeds of Crime Act 1996. In arriving at that conclusion the Court has considered not only the evidence adduced by the applicant but also the evidence arising from the cross-examination of the applicant's witnesses. In particular, the Court has had regard to the inconsistent, contradictory and irreconcilable case made in cross-examination on behalf of the first named respondent. That cross-examination, rather than weakening or impairing the applicant's evidence, and in particular the evidence of Detective Chief Superintendent O'Mahoney, reinforced such evidence and demonstrated the credible basis for such evidence. At various times the first named respondent has asserted in documentation and by his actions that he was in receipt of no income. This has enabled him to seek and obtain substantial and prolonged social welfare payments. At other times the first named respondent has asserted in documentation seeking to obtain mortgages the existence of substantial and regular income whilst on other occasions the first named respondent has asserted in relation to his income tax liability that he was in receipt of "nil" income. On the second day of the hearing, counsel on behalf of the first named respondent cross-examined Detective Chief Superintendent O'Mahoney, on instructions, in relation to the first named respondent's employment history. Part of that cross-examination was predicated on the basis that the first named respondent had worked continuously from 1997 to 2003 (transcript day 2, page 70) and that he was earning upwards of IR£50,000 per annum in cash during that period. It was later asserted on behalf of the first named respondent, in cross-examination, that he had worked from 1997 up until 2009 in the security business. It was also asserted on behalf of the first named respondent that not only had he worked from 1997 to 2003 earning IR£50,000 cash per annum but that his wife during that period was earning IR£25,000 per annum. That claim was denied by the second respondent. The evidence to the Court was that during the periods identified by the first named respondent's counsel in cross-examination that the first named respondent was receiving social welfare payments for the main part of that period and declaring that he had no liability in respect of income tax. At another stage during the cross-examination counsel asserted on behalf of the first named respondent that from around the end of 2004 to 2007 that he was earning about €160 a day from a security company. In particular, (transcript day 2, page 64), counsel on behalf of the first named respondent indicated that he would deal with the employment history of the first named respondent and lead supporting documentation when cross-examining Detective Garda Murphy. It was indicated to the Court by counsel on behalf of the first named respondent that he would put to Detective Garda Murphy a coherent and detailed history of the first named respondent's earnings during the cross-examination of Detective Garda Murphy, now Detective Sergeant Murphy. Due to the inconsistent and contradictory account of the first named respondent's employment history and earnings, as identified in the cross-examination conducted by the first named respondent's counsel, the first named respondent was given the opportunity by the Court at the conclusion of day 2 of the evidence to swear a further affidavit detailing same. That affidavit was duly filed in Court on the following day, the third day of the hearing. The details were at complete variance with the affidavit the first named respondent swore a few days earlier to support an application for legal aid.

3.10 The cross-examination of Detective Sergeant Ciaran Murphy took place on the third day and other than for a very limited cross-examination in relation to the first named respondent's work for a security firm called Seneca, no other cross-examination occurred. No documents were put to the witness, other than a reference to cheques, and no coherent history was identified.

3.11 The Court is satisfied that, in addressing the fourth procedural step identified by McCracken J., that the evidence adduced on behalf of the applicant constituted a *prima facie* case under s. 3 against both of the respondents, the onus thereafter shifts to those respondents.

3.12 The evidence adduced by the first named respondent as to his employment and as to his sources of funds was so inconsistent, contradictory and vague as to be of no value to the Court. The first named respondent asserted at various times directly contradictory positions in relation to his earnings varying from a claim of very substantial earnings to a claim of zero earnings. No explanation was provided in relation to such contradictory evidence. In those circumstances the issue, which is hereinafter dealt with, concerning the absence of cross-examination of the first named respondent is of no relevance. The first named respondent from his own evidence had provided no credible, rational or consistent explanation as to his earnings or source of funds which would explain the extent of funds available to him and his wife. In the absence of a credible, consistent or rational account of earnings and source of funds, the position with which the Court was faced was that the first named respondent has in effect provided no credible evidence dealing with these matters. The contention that the first named respondent's evidence concerning his income and source of funds must be accepted does not and cannot arise on the facts of this case as no credible evidence relating to same was tendered by the first named respondent.

3.13 The second named respondent has provided certain details in relation to financial matters in affidavits sworn by her and in particular in the affidavit sworn on the 28th January, 2008 and the affidavit sworn on the 23rd May, 2008. However, it was apparent to the Court from the cross-examination of the second named respondent that she had in fact no personal or actual knowledge of the matters averred to in her affidavits. In cross-examination, the second named respondent in effect acknowledged that she knew nothing about her husband's finances and that she left all financial matters and dealings to him. The second named respondent effectively acknowledged that she had no knowledge of her husband's earnings and that she received €160 a week from him towards the cost of the upkeep of the family. The second named respondent's evidence was that notwithstanding her husband's claim to have had substantial earnings, the true position was that she received a small weekly sum from him. The second respondent denied she was earning the €25,000 or €30,000 indicated by her husband or any sum until her part-time work in 2007.

3.14 Having considered the evidence the Court is satisfied that neither of the respondents has satisfied the onus of proof which is on them following this Court's determination that the applicant has established a *prima facie* case under s. 3. The evidence available to the Court is consistent with substantial funds being available to the two respondents over a period from 1996 onwards which in all probability emanated from the criminal activities of the first named respondent. The funds available from unexplained, unknown and uncorroborated sources can rationally be explained by the first named respondent obtaining such funds from criminal activity and the Court is satisfied that the property the subject matter of these proceedings was acquired with such funds and constitutes the proceeds of crime. The evidence available to the Court indicates that neither of the respondents had any funds available from identifiable or known sources which would have enabled the properties, the subject matter of this application, to be purchased and funded. Neither of the respondents produced documentation or evidence which provided a credible explanation for the funds identified by the forensic accountant in his evidence, nor was any evidence tendered from an independent witness to provide any explanation

for even part of the funds available to the respondents. The Court is satisfied that the probable explanation as to how the two respondents purchased and funded the properties, the subject matter of these proceedings, is that such purchase and funding was achieved by the use of funds generated by the first named respondent from his criminal activities and that absent such funds that such properties could not and would not have been purchased or funded. The Court has already indicated that the value of the property is greater than IR£10,000.

3.15 In the light of the above finding, the Court is satisfied that neither of the respondents has satisfied the onus of proof which shifted on to them as a result of the Court's determination that the applicant had established a *prima facie* case under s. 3 and the Court is therefore satisfied that it must now consider whether there would be a serious risk of injustice to the respondents or either of them if a s. 3 order were to be granted. That step is the seventh and final procedural step identified by McCracken J. in his judgment.

4.1 The Court must consider whether in making a s. 3 order there would be a serious risk of injustice if such order were made. Section 3 provides at the end of sub-paragraph (1), as follows:

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

The second named respondent contends that there would be a serious risk of injustice if this Court were to make a s. 3 order in respect of the three properties set forth in the schedule to the originating notice of motion, and, in particular, if the Court were to make any order in respect of the property which is the family home. The second named respondent makes this case on the basis of "Oakate" being a family home as defined under the Family Home Protection Act and based upon the fact that she is the joint legal owner of the properties, the subject matter of the proceedings. A limited factual case was identified by the second named respondent in her affidavit evidence but a number of matters can be gleaned from the overall circumstances of the case and from the arguments made on behalf of the second named respondent which provide the basis for the claim that a s. 3 order would create a serious risk of injustice. The second named respondent married the first named respondent in 2002 and they have four dependent children none of which have reached their majority and the youngest of which is an infant. She lives in the property known as Oakate with her husband, the first named respondent and the four children. The case made on behalf of the second named respondent is that she has been in receipt of social welfare since 1998 and was never in any employment nor had any income other than from social welfare, notwithstanding the evidence of her husband, until she commenced a part-time job in Dunnes Stores shortly prior to swearing her affidavit in October 2007. The case made by the second named respondent, in the submissions delivered on her behalf, was in part based upon the second named respondent's testimony that she had limited knowledge of the financial arrangements made on her and her family's behalf by the first named respondent. She stated that she had used the social welfare payments that she received to pay household expenses. (see transcript day 3, questions 77 – 80 and 217 – 220). The second named respondent relies on the constitutional protection of the family and the role of the mother within the home as averred in para. 7 of her affidavit sworn on the 28th January, 2008 and also relies on the provisions of Article 8 of the European Convention on Human Rights and claims that a s. 3 order covering Oakate, being the family home, would interfere with the exercise of the rights recognised by Article 8(1) of the European Convention on Human Rights. It was also argued on her behalf that for the applicant in this case to obtain a s. 3 order in relation to Oakate that it would be necessary for the applicant to demonstrate that such order was proportionate. No case is made that the purchase or funding of the properties was done or contributed to by the second named respondent and the case relied on is that the second named respondent has little or no knowledge of how such properties were purchased or funded and her financial contribution to the family was to use her social welfare payments to discharge household expenses.

4.2 The Court therefore must consider whether the making of a s. 3 order, particularly in relation to Oakate, the family home, would be unjust and would amount to a violation of the second named respondent's rights pursuant to Article 8 of the European Convention on Human Rights and be disproportionate to the purpose of the legislation. The Proceeds of Crime Act 1996 does not make any particular distinction in relation to property which is a family home. This Court has, however, considered the position of family homes and the Proceeds of Crime Act 1996 in two *ex tempore* judgments. Both were judgments of Mr. Justice Feeney, the first being judgment in the case of *CAB v. J. K. & T. T.* (3rd October, 2007) and the second being the judgment in the case of *F. J. McK. v. T. H. & Ors.* of the 17th October, 2008. In the *F. J. McK. v. T. H. & Ors.* case, the Court considered the issue of the making a disposal order under s. 4 of the Proceeds of Crime Act 1996 in respect of a family home. On page 17 of the transcript of the judgment of the 17th October, 2008, the Court held as follows:

"The notice party therefore claims that she should be entitled to remain on in the particular premises. The fact that the notice party and her family need a home cannot of itself operate to defeat the public interest requirement, identified in the legislation of depriving a person of property representing the proceeds of crime.

There is no basis for treating a person in a position such as the notice party and her family on a more favourable basis, than a family who lose their home as a result of a possession order following an inability to discharge mortgage repayments or as a result of an inability to pay rent. The notice party and her family have no entitlement to the use of a particular premises. If it were not for the use of the premises obtained from the proceeds of crime, the notice party would have to have provided for herself or have provided for her alternative accommodation. The fact that the notice party and her family would be placed in the position if a disposal order is made following confirmation of the s. 3 order where she would have to seek alternative accommodation is of itself not a basis for discharging the s. 3 and/or s. 7 orders or refusing the relief sought by the plaintiff herein. A person in possession of premises representing the proceeds of crime has no constitutional grievance if deprived of their use.

If the notice party is deprived of the use of the premises, the subject matter of these proceedings, she would be in no different position than the person who lost their home as a result of an inability to keep up mortgage repayments or to pay rent. Such persons have lost the entitlement to occupy a particular premises and have to provide alternative accommodation out of their own resources or if such resources are insufficient with assistance from the local authority. If the notice party were to succeed in her argument that it would be an injustice to confirm the s. 3 and/or s. 7 order and to permit the receiver to take possession of the property, that would have the effect of defeating the purpose of the legislation, which is to deprive persons from benefiting from the proceeds of crime."

The issue of the making of a disposal order under s. 4 in respect of a family home was also considered by this Court in the *ex tempore* judgment of *CAB v. J. K. and T. K.* on the 3rd October, 2007 and the Court held as follows, (at pp. 65/66 of the transcript):

"It is true that the property identified in the first paragraph in the schedule is a home for the second named respondent and her children, but there is no reason, either in the wording of the statute or by reference to any constitutional right, not to consider making an order. Nor is it a question of balancing constitutional right."

The Court went on to hold (at p. 68):

"The Court has had regard to, in this instance, the objective pursued in the legislation giving rise to the proceeds of crime, and has particular regard to the fact that the legislative intent of that Act, as identified in its title, is to ensure, in appropriate circumstances, that disposal orders will be made so as to ensure that individuals will not benefit from assets obtained with the proceeds of crime."

In its decisions in the *CAB v. J. K. & T. K.* case, the Court expressly relied upon the authority of this Court in its judgment in the case of *John Gilligan v. The Criminal Assets Bureau* (judgment of the 26th June, 1997), where McGuinness J. stated on page 57 of 59 of the judgment as follows:

"Taking this context as a whole, it appears to me that as a matter of proportionality legislature is justified in enacting the Proceeds of Crime Act 1996 and in restricting certain rights though the operation of the Act. The restriction or impairment of these rights is, to some extent balanced by the various safeguards included in the Act. As was said by Moriarty J. of the Act in *M. v. D.* [1998] 3 I.R. 175 at p. 178:

'Whilst its scheme indeed introduces significant enervations, a wide discretion is entrusted to the court to ensure compliance with the *audi alteram partem* rule and other precepts of natural justice, and to ensure that injustice is not perpetrated against meritorious respondents, for example by the compensation provisions comprised in s. 16 of the Act.'

That quotation illustrates two significant matters which this Court has to have regard to. It is the balancing fact provided for in s. 4(8) to ensure that no significant injustice is done, and also to have particular regard to ensure that meritorious respondents are not the subject of the provisions of the Act."

It is clear that this Court in considering whether or not a serious risk of injustice would arise if a s. 3 order were to be made must conduct a balancing act and must consider in reality whether the making of the order sought would be proportionate given the full circumstances of the respondents or any other party claiming a risk of injustice as against the objective intended and identified in the Act, the so called legislative intent of the Act. It is not a question of balancing constitutional rights but rather the Act requires of the Court and the Court must consider whether there would be a serious risk of injustice if a s. 3 order were to be made.

4.3 The Court went on in the judgment in the *CAB v. J. K. & T. T.* case to consider the Supreme Court decision in *Murphy v. G. M. & Ors.* reported in [2001] 4 I.R. at 113. The Court, in particular, identified a passage at page 153 of the judgment of Mr. Justice Keane and having considered that passage held (at p. 70 of the transcript) as follows:

"That quotation is of particular assistance to this court in how it should approach its obligation in relation to the matters which have been opened before it. It is quite clear that the court must be sensitive to any actual property rights that might have been identified, or any other rights which might have been identified. But in principle, it is quite clear that there is no constitutional grievance if a person benefiting from property obtained from the proceeds of crime, is that they can have no constitutional grievance if deprived of the use."

The Court also held on the following page that absent a respondent identifying a real meritorious basis to be allowed to remain on in occupation other than the suggestion that she requires a home, that that of itself cannot operate to defeat the public interest requirement of depriving persons of property obtained by means of the use of the proceeds of crime.

4.4 The second named respondent relies on the decision of Irvine J. in *Pullen & Douglas v. Dublin City Council & Ors.* (High Court, 12th December, 2008). In that case the applicant had been the subject of summary eviction from a council owned property, pursuant to s. 62 of the Housing Act 1966. In the unreported judgment of Irvine J. she concluded on the facts of that case (at p. 96) that:

"...

(iv) Having regard to the magnitude of the right with which the defendant intended to interfere and the consequences of such interference, the defendant was obliged to justify such interference as being not only in pursuit of the legitimate aims identified in Article 8(2) but also as being necessary in a democratic society.

(v) The use of s. 62 of the Act of 1966 to interfere with the plaintiffs' rights to respect for their home following an in-house investigation, in circumstances where such a procedure did not afford the plaintiffs any opportunity to dispute the lawfulness or the proportionality of the defendant's decision to evict them, was not justified as being necessary in a democratic society and was disproportionate to the defendant's stated aims having regard to the significance of the rights interfered with.

(vi) The interference was disproportionate, particularly in circumstances where the defendant had available to it, within the its legal framework, an alternative procedure namely, that provided for in s. 14 of the Conveyancing Act 1881 which, if implemented, would have provided the requisite safeguards for the plaintiffs' rights whilst meeting the defendant's legitimate aims."

The Court ultimately concluded that the defendant in those proceedings in performing its functions as an organ of State had failed to have regard to the plaintiffs' rights under Article 6(1) of the Convention. The facts of this case demonstrate a different statutory framework and a different set of circumstances. Firstly, given that the legislative intent of the Proceeds of Crime Act 1996 is the taking of property which has been proved, on the balance of probabilities, to represent the proceeds of crime, there is no issue but that such intent is a legitimate aim and can be said to be within the provisions of Article 8(2) of the European Convention on Human Rights as being necessary in a democratic society. In considering the 1996 Proceeds of Crime Act, the Supreme Court has recognised that whilst the courts must be sensitive to actual property and other rights of citizens and any special problems that may arise in a particular case, that a person in possession of the proceeds of crime can have no constitutional grievance if deprived of their use. This Court is satisfied that the interference with property rights as envisaged by the Proceeds of Crime Act is the pursuit of legitimate aims as provided for in Article 8(2) of the European Convention on Human Rights and also can be categorised as being necessary in a democratic society. In the *Pullen & Douglas v. Dublin City Council* case the facts were such that the procedures followed did not afford the plaintiffs in that case any opportunity to dispute the lawfulness or the proportionality of the defendant's decision and that was held as not being justified in a democratic society and was held to be disproportionate to the defendant's stated aims having regard to the significance of the rights interfered with. Those circumstances are not present in this case where the procedures not only afforded the respondents a full opportunity to dispute the lawfulness or the justice of the making of a s. 3 order but did so in

circumstances where the respondents were entitled to a full hearing before a court and the assistance of legal representation. In considering whether or not a serious risk of injustice would arise, under the provisions of s. 3 of the Proceeds of Crime Act 1996, the Court can exercise a wide discretion. That discretion is of sufficient scope to allow and permit consideration of any potential injustice and inevitably involves consideration of the appropriateness or proportionality of the granting of a s. 3 order. A third matter identified in the *Pullen & Douglas v. Dublin City Council & Ors.* case by Irvine J. was that the interference in that case was disproportionate in circumstances where the defendant had available to it, within its legal framework, an alternative procedure. That is not the case under the legislation being considered by this Court where the very purpose of the legislation is to enable the High Court to deprive persons in possession or control of property where that property constitutes directly or indirectly proceeds of crime. In the *Pullen & Douglas v. Dublin City Council* case, Irvine J. held that there was a provision in another Act which if implemented would have provided the requisite safeguards for the plaintiffs' rights whilst meeting the defendant's legitimate aims. That is not the situation under the Proceeds of Crime legislation where the very purpose of the legislation and the objective pursued in the legislation is to ensure that individuals do not benefit from assets obtained with the proceeds of crime and are divested of such assets. If the second respondent's asserted right was to prevail, without proof of an injustice, the intent of the Act would be defeated. It is also important to recognise that property found to be acquired with the proceeds of crime cannot be regarded as being the same as or equivalent to property acquired from legal sources. The justice of being allowed to retain such property must be considered on the basis that but for the use of funds obtained from criminal activities, such property would not be owned and would not be available for use. To make a case for "injustice", a respondent must identify actual and firm grounds over and above past use or possession or need.

4.5 This Court is satisfied that the second named respondent has no basis for any claim that there was a failure of procedures in this case in failing to provide her with an opportunity to dispute the lawfulness or justice of the making of a s. 3 order nor is this a case in which the legal framework provides for an alternative procedure. What the Court is obliged to do pursuant to the provisions of s. 3 of the Proceeds of Crime Act 1996 is to exercise a wide discretion in considering whether there would be a serious risk of injustice to a respondent if a s. 3 order were to be made and in carrying out that task the Court must judge, as part of such consideration, whether there are any actual factors which would render the making of a s. 3 order unjust and if there are such factors, as to whether they establish a serious risk of injustice arising if an order is made.

4.6 This Court is satisfied that the second named respondent has failed to identify any particular grounds (such as personal financial contributions either directly or indirectly) which would justify the Court in holding that there would be a serious risk of injustice if a s. 3 order were to be made in respect of any of the properties including the family home "Oakgate". The same approach as identified by this Court in *CAB v. J. K. & T.T.* and in *F. J. McK. v. T.H. & Ors.* is equally applicable to this case and the second named respondent has failed to identify any actual factors which would create an injustice. To allow the second named respondent to remain on indefinitely, as argued for on her behalf, would in fact as in the *CAB v. J. K. & T.T.* case perpetuate a position where she continued to benefit from an asset obtained from the proceeds of crime. The fact that the second named respondent contributed the bulk of her social welfare payments to the upkeep of the family cannot be said to attach to the property or to give her a right to the property or to remain therein. The purpose of the social welfare payments were to assist in the upkeep of the second named respondent and her family and they were used for that purpose. The fact that such upkeep occurred in a particular house does not result in a situation arising where it would be unjust to make a s. 3 order covering such house or home. The Court is satisfied that the applicant's application for a s. 3 order in relation to the second named respondent's family home is not improper and in seeking such an order the applicant is performing its functions in a manner compatible with this State's obligations under the European Convention on Human Rights Act 2003 and is therefore in accordance with the obligations set forth in s. 3(1) of the European Convention on Human Rights Act 2003. The applicant is not acting in an *ultra vires* manner but is acting in accordance with the legislative intent of the Proceeds of Crime Act 1996. The second named respondent is in the situation identified by Mr. Justice Keane C.J. in the *Murphy v. G.M. & Ors.* case where it was stated (at p. 153):

"Applications of such legislation must be sensitive to the actual property and actual rights of the 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."

This Court has considered the particular circumstances of this case and the arguments made by and on behalf of both respondents and can identify no basis upon which the making of a s. 3 order or of a s. 7 order providing for the appointment of a receiver to take possession of all of the property would result in a serious risk of injustice to either of the respondents. Nor is it a case, on its own facts, where it can be said that the making of a s. 3 or a s. 7 order would be unjust in that it would be disproportionate.

5.1 The Court recognises that it must be sensitive in considering the competing property and other rights and must balance those in determining whether or not to make a s. 3 order. On the facts of this case the Court is satisfied that the properties, the subject matter of these proceedings, were obtained by the respondents following the provision of false information concerning the respondents' earnings history and were paid for and funded from assets obtained with the proceeds of crime. Neither of the respondents has established in evidence that any identifiable or actual portion of the cost of the purchase or the funding of the properties came from an identifiable legitimate source. The Court is satisfied that on the balance of probabilities such properties were purchased and funded from unknown, unexplained and uncorroborated sources which on the balance of probabilities came from the proceeds of crime. As regards the application for relief under s. 7 of the Proceeds of Crime Act, the Court is satisfied that it is appropriate to appoint a receiver in respect of the remaining two properties. This is particularly so because the evidence before the Court has established that the value of the two properties is being diminished by the non-payment of mortgages secured on the two properties. This is the uncontested evidence of Detective Sergeant Murphy as averred in his affidavit of the 25th July, 2007.

6.1 The first named respondent raised a number of legal points. The Court has already dealt with the issue of jurisdiction in relation to the value of the property. The Court has also ruled in relation to the relevance of the so called "DCC Plc. fraud on the stock market case" and held it to be irrelevant and that the issue of disparity of treatment as to the respondents in this case as opposed to the personal defendants in the *Fyffes v. DCC* case has no relevance. Two other matters were raised on behalf of the first named respondent. The first related to the alleged lack of sufficient evidence to ground a s. 3 application. That argument was based upon a claim that since the first named respondent had made himself available for cross-examination that the Court was obliged to accept the first named respondent's evidence. This Court has already ruled that notwithstanding the absence of cross-examination, that the evidence adduced by and on behalf of the first named respondent lacked credibility, was inconsistent and contradictory and that there is no factual basis for arguing that there was a body of credible evidence adduced by the first named respondent which the Court was obliged to accept. Mr. O'Brien's evidence to this Court in relation to his earnings demonstrated that at different times and for different purposes he had asserted diametrically opposite positions. He varied from claiming that he earned substantial sums of money to claiming that he had no earnings. He demonstrated a willingness to alter his stated position dependant upon his belief as to what answer would be most advantageous to him at that point. This resulted in the Court being put in a position where it could place no reliability on his evidence and the Court is satisfied that there was no requirement to put matters to him in cross-examination as contended for by the first named respondent nor had the first respondent provided any credible evidence concerning his source of funds.

6.2 A final issue which was raised by the first named respondent related to the admissibility of a transcript of the evidence given by the first named respondent at the Tax Commission appeal hearing of the 19th October, 2007. The Court does not have to consider or address this matter as it is apparent from the other evidence available, without any dispute as to its admissibility, that Mr. O'Brien adopted and pursued entirely contradictory positions concerning his financial earnings. He claimed on oath in an affidavit before this Court that he had substantial earnings, his counsel cross-examined on that basis and concurrently Mr. O'Brien sought and obtained social welfare payments which were means tested on the basis that he was without income and made income returns on numerous occasions predicated upon a nil income. In those circumstances the issue as to whether or not there is a further illustration of such inconsistency is irrelevant to this Court as the Court is satisfied that Mr. O'Brien's evidence is so inconsistent and contradictory that the Court can place no credibility in his evidence.

7.1 In the light of the above findings the Court will make the s. 3 order sought in relation to the properties identified at para. (a) and (b) of the originating notice of motion and will further make an order pursuant to s. 7 of the Proceeds of Crime Act 1996 appointing a receiver to take possession of both of those properties. As to the identity of the receiver and as to the date upon which such order will come into effect and the powers of the receiver the Court will hear the parties. The Court will also make a s. 3 order in respect of the net sum retained in respect of the sale of the property identified at para (c) of the schedule to the originating notice of motion and will direct that a receiver be appointed in respect of such proceeds and that such receiver take possession of such sum subject to such further or other order as may be made by this Court. The Court will also hear the parties in relation to any other ancillary matters and in relation to the issue of costs.