

CRIMINAL
ASSETS
BUREAU

Annual Report

CRIMINAL ASSETS BUREAU ANNUAL REPORT 2017



2017

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Letter forwarding report from the Garda Commissioner to the Minister for Justice and Equality

Dear Minister

In accordance with the provisions of Section 21 of the Criminal Assets Bureau Act 1996, I am pleased to present to you the 2017 Annual Report of the Criminal Assets Bureau.

The report outlines the activities of the Criminal Assets Bureau during 2017, in the pursuit of its statutory remit, detailing actions brought under proceeds of crime, revenue and social welfare legislation in successfully targeting the suspected proceeds of criminal conduct. The report demonstrates that the Bureau remains an integral part of the law enforcement response to criminal conduct in Ireland.

I recognise that 2017 was a very busy year for the Criminal Assets Bureau. I was pleased to have been invited to visit the Bureau in December 2017 where I received a warm welcome and a tour of all offices and obtained a first-hand knowledge of its activities. I was particularly impressed by the professionalism of the Bureau officers and staff. I note in particular the increase in actions in all areas of activity by the Bureau. I am pleased that the number of asset profiles increased from sixty six to one hundred and one. I also wish to acknowledge the dramatic increase in new proceeds of crime cases before the High Court from thirteen cases in 2016 to twenty eight cases in 2017.

I note that the money returned to the State increased from €3.8million in 2016 to €4.3million in 2017. The returns show

an increase in proceeds of crime, taxes and social welfare actions.

During 2017, the Criminal Assets Bureau, devoted considerable efforts towards tackling criminal proceeds which were generated from a broad range of criminal activity, focussing on all forms of property related crime. In this regard, the Bureau engaged in extensive cooperation with law enforcement agencies in Northern Ireland, including, the Police Service of Northern Ireland (PSNI), Her Majesty's Revenue and Customs (HMRC) and the National Crime Agency (NCA).

Internationally, the Bureau continues to liaise and conduct investigations with law enforcement and judicial authorities throughout Europe and worldwide in pursuit of assets deriving from criminal conduct.

The Bureau is an active member of the Camden Asset Recovery Inter-Agency Network (CARIN) and is effective at international level as the designated Asset Recovery Office (ARO) in Ireland.

In pursuing its objectives, the Bureau liaises closely with An Garda Síochána, the Office of the Revenue Commissioners, the Department of Employment Affairs and Social Protection, the Department of Justice and Equality and all law enforcement agencies in the State to develop a coherent strategy to target assets and profits deriving from criminal conduct.

The Bureau makes significant inroads in tackling serious criminals including those involved in trafficking and the sale of

[Letter forwarding report from the Garda Commissioner to the Minister for Justice and Equality](#)

drugs which cause extensive problems within our community. In 2017, the Bureau conducted one hundred and forty two searches in fifteen counties and obtained High Court Orders under the Proceeds of Crime Act 1996 in respect of property in twelve counties.

During 2017, the focus of the Bureau was twofold; firstly to take all possible actions to curb the activities of organised crime groups, and secondly to focus in particular upon the activities of criminal gangs involved in burglaries and robberies throughout the State.

The Bureau has developed its links with local communities through supporting local Garda Management in enhancing the role of the Divisional Asset Profilers Network. I am pleased to note the Bureau has provided training to additional Divisional Asset Profilers and commits to further training during 2018.

I am pleased to note that the Bureau is providing briefings to Joint Policing Committees to improve the flow of information. I also note that the Bureau has received great support for its actions from the Joint Policing Committees and is particularly heartened by the support shown by locally elected community representatives.

I welcome the commitment given in the Programme for Government 2016 to provide new legislation, ensuring adequate resources and taking the necessary steps to deal with local criminal targets. I am satisfied that the development of the Asset Profiler Network ensures that the Bureau works

hand-in-hand with An Garda Síochána and local communities in furtherance of the objective of denying and depriving criminals of assets.

I wish the Criminal Assets Bureau every success in the future.

Yours sincerely



DÓNALL Ó CUALÁIN
COMMISSIONER OF
AN GARDA SÍOCHÁNA

Letter forwarding report from Chief Bureau Officer to the Commissioner of An Garda Síochána

Dear Commissioner

It is my pleasure to present to you the 22nd Annual Report of the Criminal Assets Bureau for the calendar year 2017. This report is submitted for presentation to the Minister for Justice and Equality pursuant to the provisions of Section 21 of the Criminal Assets Bureau Act, 1996. In compliance with its statutory obligations, the report sets out the activities of the Bureau throughout the year in targeting the proceeds of crime.

During the year, the Bureau has continued to focus on the development of the Divisional Asset Profiler Network. A series of briefings were provided at Garda Regional Management meetings outside of Dublin. Similar briefings were provided at Divisional Management meetings in the Dublin Metropolitan Region. Special focus meetings with Detective Superintendents and trained asset profilers were conducted throughout the State. This has resulted in an increase in the number of targets submitted to the Bureau.

The proceeds of crime actions, together with actions under the Revenue and Social Protection provisions yielded in excess of €4.3 million to the Exchequer in 2017.

During 2017, twenty eight new applications were brought before the High Court under the Proceeds of Crime legislation. This compares with thirteen such applications in 2016. Once again, the majority of these actions were taken arising from the proceeds of drug trafficking.

In addition, actions were taken against persons suspected of involvement in a wide variety of criminal conduct, most notably in respect of criminal proceeds arising from organised crime groups engaged in burglary in respect of crime groups operating in rural areas in the country. In this regard, the Criminal Assets Bureau has been providing support to the Garda initiative known as Operation Thor.

As mentioned in the 2016 report, new powers were provided to the Bureau under the Proceeds of Crime (Amendment) Act 2016. As of the 31st December 2017, the power under Section 1(A) Proceeds of Crime Act 1996, as amended was used effectively on five occasions by Bureau Officers. This compares to two in 2016. This power is considered useful in relation to assets which might otherwise be disposed of.

Under the new legislation, the threshold for invoking the Proceeds of Crime Act reduced from €13,000 to €5,000. The Bureau recognises that, as a matter of public policy, it is also now required to focus on assets of a lower value. This will have an impact through early intervention with mid-level criminals in the expectation of inhibiting their progression. In 2017, the value of assets under the new proceeds of crime cases ranged from €9,000 to €2.7million.

The Criminal Assets Bureau, using the appropriate Proceeds of Crime legislation forwarded in excess of €1.6 million to the Exchequer, under Revenue provisions, forwarded in excess of €2.3 million and also recovered in excess of €319,000 in

Letter forwarding report from Chief Bureau Officer to the Commissioner of An Garda Síochána

respect of overpayments under Social Welfare provisions.

The strategy of the Bureau to coordinate its activities in a manner which takes cognisance of the Policing Plans of An Garda Síochána and the strategies of the Revenue Commissioners, Department of Justice and Equality and the Department of Employment Affairs and Social Protection has been continued in 2017.

The Bureau's ongoing commitment in recent years towards increasing the level of expertise at its disposal through the provision of appropriate training for all personnel was accelerated during 2017.

In addition, during the year, in conjunction with the Garda College, The Asset Confiscation and Tracing Investigators Course (TACTIC) was progressed. This course is specifically designed to meet the needs of the Bureau in future years and especially to enhance its capabilities to meet the investigative challenges which lie ahead in the context of tracing criminal assets.

The Bureau continues to develop its relationships with Interpol, Europol and the Camden Assets Recovery Inter-Agency Network (CARIN).

Internationally, the Bureau continues to represent Ireland at the platform of the Asset Recovery Offices.

From the beginning, the Bureau has received excellent support from legislators, members of the public and the media. I wish to acknowledge the

professional assistance provided to the Bureau by the Garda Press Office.

The Bureau has enhanced its communications capacity through the use of social media.

Over the past number of years, the Bureau has had to adapt and change in response to the changing patterns of criminal behaviour. The requirement for international cooperation between law enforcement agencies has increased to the point where virtually every investigation currently underway has some international aspect to it.

In particular, through its actions, the Bureau has played its part in responding to the threat posed to Irish society by a major criminal feud between the Kinahan and Hutch Organised Crime Gangs.

I wish to acknowledge with gratitude the support and co-operation afforded to the Bureau throughout the year by An Garda Síochána, the Revenue Commissioners, the Department of Employment Affairs and Social Protection, the Department of Justice and Equality, the Department of Finance, the Department of Public Expenditure and Reform, the Office of the Attorney General and the Office of the Director of Public Prosecutions.

I would also like to particularly acknowledge the expertise and commitment of the solicitors and staff allocated by the Chief State Solicitor to the work of the Bureau. The value of in-house independent legal advice and support cannot be over emphasised towards contributing to the success of

Letter forwarding report from Chief Bureau Officer to
the Commissioner of An Garda Síochána

the Bureau. In addition, I want to acknowledge the contribution of legal counsel engaged by the Bureau.

During the year, there were many personnel changes within the Bureau arising from the departure of a number of personnel on promotion, retirement, and transfer. This is an inevitable reality given the structure of the Bureau and as a result it has given rise to an emphasis on maintaining a strong and well resourced system for staff training which has been put in place in recent years.

I wish to acknowledge that the Bureau was given increased resources in 2017. The number of Gardaí increased from thirty seven to forty three. The number of Revenue personnel increased from twelve to seventeen. While a full complement of staff from the Department of Employment Affairs and Social Protection was maintained, the Bureau was successful in filling a number of key vacancies i.e., skilled Forensic Accountants and Financial Crime Analysts. The vacancy for an Executive Officer in the Administration Office was filled during the year.

I wish to acknowledge the dedication and hard work of all personnel attached to the Bureau past and present. The nature of the work is such that, in many instances, it cannot be publicly acknowledged due to the requirement for anonymity and security requirements for the personnel concerned relating to their work. I would also like to take the opportunity to welcome new personnel who have joined the Bureau during the year and wish them well in the future.

Finally, I wish to acknowledge the high level of professionalism, dedication and commitment demonstrated by all Bureau officers and staff of the Bureau.

Yours sincerely



PATRICK CLAVIN
D/CHIEF SUPERINTENDENT
CHIEF BUREAU OFFICER

Letter forwarding report from Chief Bureau Officer to
the Commissioner of An Garda Síochána

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Foreword

Section 21 Report

This is the 22nd Annual Report of the activities of the Criminal Assets Bureau (hereinafter referred to as “the Bureau”) and covers the period from 1st January 2017 to 31st December 2017 inclusive.

The Criminal Assets Bureau Act 1996 and the Proceeds of Crime Act 1996 have both been amended on a number of occasions but most substantially by way of the Proceeds of Crime (Amendment) Act, 2005.

For the purpose of this report, the Criminal Assets Bureau Act 1996 to 2005 will hereinafter be referred to as “the Act” and the Proceeds of Crime Act 1996 to 2016 will hereinafter be referred to as “the PoC Act”. The 1996 Act, together with the 2005 and 2016 Acts, provide a collective title of amendments governing the powers and functions of the Bureau.

This report is prepared pursuant to Section 21 of the Act which requires the Bureau to present a report, through the Commissioner of An Garda Síochána, to the Minister for Justice and Equality outlining its activities during the year 2017.

Foreword

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Part One

Overview of the Criminal Assets Bureau, its Officers and Staff

The Bureau

On the 15th October 1996, the Bureau was formally established by the enactment of the Act. The Act provides for (among other matters):

- the objectives of the Bureau;
- the functions of the Bureau;
- the Chief Bureau Officer;
- Bureau Officers;
- staff of the Bureau;
- the Bureau Legal Officer;
- anonymity of staff of the Bureau;
- offences and penalties for identifying staff of the Bureau and their families;
- offences and penalties for obstruction and intimidation;
- CAB search warrants; and,
- CAB production orders.

Finance

During the course of the year, the Bureau expended monies provided to it by the Oireachtas through the Minister for Justice and Equality in order to carry out its statutory functions and to achieve its statutory objectives.

All monies provided by the Oireachtas as outlined in the table are audited by the Comptroller and Auditor General, as is provided for under Statute.

A “Corporate Governance Assurance Agreement” has been signed between the Chief Bureau Officer and the Department of Justice and Equality covering the years 2017 – 2019. This Agreement sets out the broad governance and accountability

framework within which the Bureau operates and defines key roles and responsibilities which underpin the relationship between the Bureau and the Department.

The Department of Justice and Equality’s Internal Audit Unit provides support to the Bureau in monitoring and reviewing the effectiveness of the Bureau’s arrangements for governance, risk management and internal controls.

The Internal Audit Unit conducts an independent audit of the Bureau’s procedures and processes on an annual basis.

Comparison of Accounts for years 2016 / 2017

Year	Description	Amount €	
		Budget Provision	Total Spent
2016	Pay	5,341,000	5,418,000
	Non-pay	1,701,000	1,268,000
	Total	7,042,000	6,686,000
2017	Pay	5,884,000	6,102,000
	Non-pay	1,701,000	2,157,000
	Total	7,585,000	8,259,000

** Bureau Expenditure increased in 2017 as a result of receiving extra resources in the way of staff increases, vehicles, ICT enhancements, legal costs and building refurbishments.*

Objectives and functions

The objectives and functions of the Bureau are respectively set out in Sections 4 and 5 of the Act. These statutory objectives and functions are set out in full at the Appendix and may be summarised as:

Part One

Overview of the Criminal Assets Bureau, its Officers and Staff

1. Identifying and investigating the proceeds of criminal conduct;
2. Taking actions under the law to deny and deprive people of the benefits of assets that are the proceeds of criminal conduct by freezing, preserving and confiscating these assets;
3. The taking of actions under the Revenue Acts to ensure that the proceeds of criminal activity are subjected to tax; and,
4. Investigating and determining claims under the Social Welfare Acts.

Chief Bureau Officer

The Bureau is headed by the Chief Bureau Officer, appointed by the Commissioner of An Garda Síochána from among its members of the rank of Chief Superintendent. The current Chief Bureau Officer is Detective Chief Superintendent Patrick Clavin who took up his appointment on 4th August 2016.

The Chief Bureau Officer has overall responsibility, under Section 7 of the Act, for the management, control and the general administration of the Bureau. The Chief Bureau Officer is responsible to the Commissioner for the performance of the functions of the Bureau.

This Section also provides for the appointment of an Acting Chief Bureau Officer to fulfil the functions of the Chief Bureau Officer in the event of incapacity through illness, absence or otherwise.

Bureau Legal Officer

The Bureau Legal Officer reports directly to the Chief Bureau Officer and is charged under Section 9 of the Act with assisting the Bureau in the pursuit of its objectives and functions.

A body corporate

The Bureau exists as an independent corporate body as provided for under Section 3 of the Act. The status of the Bureau was first considered in 1999 by the High Court in the case of *Murphy -v- Flood* [1999] IEHC 9.

Mr Justice McCracken delivered the judgement of the High Court on the 1st of July 1999. This judgement is pivotal to understanding the nature of the Bureau.

The Court set out:

“The CAB is established as a body corporate with perpetual succession. While the Chief Bureau Officer must be appointed from members of An Garda Síochána of the rank of Chief Superintendent, nevertheless the CAB is independent of An Garda Síochána, although it has many of the powers normally given to that body.

...

The CAB is a creature of Statute, it is not a branch of An Garda Síochána. It was set up by the Oireachtas as a body corporate primary for the purpose of ensuring that persons should not benefit from any assets acquired by them from any criminal activity. It is given power to take all necessary actions in relation to seizing and securing assets derived from criminal activity, certain powers to ensure that the

proceeds of such activity are subject to tax, and also in relation to the Social Welfare Acts. However, it is not a prosecuting body, and is not a police authority. It is an investigating authority which, having investigated and used its not inconsiderable powers of investigation, then applies to the Court for assistance in enforcing its functions.

The Oireachtas, in setting up the CAB, clearly believed that it was necessary in the public interest to establish a body which was independent of An Garda Síochána, and which would act in an investigative manner. However, I do not think it is the same as An Garda Síochána, which investigates with an aim to prosecuting persons for offences. The CAB investigates for the purpose of securing assets which have been acquired as a result of criminal activities and indeed ultimately paying those assets over [to] the State.”

Structure of the Bureau

The multi-agency structure of the Bureau, which draws together various skill sets from the personnel involved, has the benefit of enhancing investigative capabilities in pursuit of the Bureau’s statutory remit. This is possible under Section 5 of the Act detailing the functions of the Bureau.

Bureau Officers and staff

Section 8 of the Act provides for the appointment of officers of the Bureau. Members of staff of the Bureau are appointed under Section 9 of the Act. Officers of the Bureau are:

- A. Members of An Garda Síochána;
- B. Officers of the Revenue Commissioners; and
- C. Officers of the Department of Social Protection.

Officers are seconded from their parent agencies.

Staff of the Bureau consist of:

- I. The Bureau Legal Officer;
- II. Professional members;
- III. Administrative and technical members.

Officers of the Bureau continue to be vested with their powers and duties notwithstanding their appointment as Bureau Officers.

The authorised staffing level at the Bureau comprising Bureau Officers and other staff stands at eighty two.

Following promotions and retirements during 2016 and 2017, three staff vacancies remain at the Bureau at year end 2017. These vacancies include two Detective Inspector vacancies and one Garda Analyst vacancy.

A competition was advertised in 2017 to fill the existing Inspector vacancies and it is expected that staff will be appointed from this Competition in 2018.

As reported in the 2016 Annual Report, a competition was held to fill two vacancies in the Bureau Analysis Unit. One post was filled in October 2017 while the remaining post is expected to be filled in January 2018.

Authorised Staffing Levels

Multi-agency authorised levels

	43
	6
	16
	17

The prohibition of identification does not extend to the Chief Bureau Officer, an Acting Chief Bureau Officer, the Bureau Legal Officer or the Bureau Officers who are members of An Garda Síochána.

Special Crime Task Force

During 2016, the Garda Commissioner established a Special Task Force to target a number of organised crime gangs based in the Dublin area with particular emphasis on second and third level criminals. As part of the setting up of this unit, which is under the control of the Garda National Drugs and Organised Crime Bureau, six Gardaí and one Sergeant were seconded to the Bureau to assist in the investigations into the persons identified to trace and target any assets which have been generated through their criminal conduct.

During 2017, fifty three targets were identified and investigations were undertaken by the staff attached to the Special Crime Task Force within the Bureau bringing the total targets identified and investigated to one hundred and nine at year end.

Anonymity

In order to ensure the safety of certain Bureau Officers and staff, anonymity for those members is set out under Section 10 of the Act. Under this Section, officers and staff of the Bureau execute their duties in the name of the Bureau.

Section 11 of the Act provides for criminal offences relating to the identification of certain Bureau Officers, staff and their families.

Asset Management Office

The Asset Management Office (AMO) was established in 2017 in order to manage all assets under the control of the Bureau. The diverse range of assets over which the Bureau has responsibility necessitates the deployment of considerable resources to ensure the asset is managed to maintain its value, to fulfil the Bureau's legal obligations and to ensure optimum value of the asset when

its realised value is remitted to the Exchequer.

The PoC Act requires that an asset is retained for a seven year period following the decision of the High Court (unless agreement is received from the parties involved for immediate disposal). In practice, this period can be considerably longer due to appeals and challenges to such orders. In the case of certain assets, such as properties, this can involve ongoing resources to maintain the property, including in some instances the Bureau acting as landlord.

In addition to tangible assets retained by the Bureau, there are also considerable assets in respect of tax debts and repayment of social welfare claims which are payable to the Bureau. These debts are also managed by the AMO with a view to realising their worth and funds are remitted to the Exchequer.

Intelligence & Assessment Office

The Intelligence and Assessment Office (IAO) was established in July 2017 and replaced the Criminal Intelligence Office (CIO) which had existed prior to that time. The IAO was established to act as the intelligence centre and to conduct a preliminary assessment of all information received at the Bureau.

The IAO has established links with other State agencies and with law enforcement agencies internationally in order to develop the exchange of information. It also has responsibility for dealing with national and international requests sent

and received from other agencies, including CARIN and ARO requests.

The IAO is responsible for assessing information received by the Bureau and conducting preliminary enquiries to establish if the matter comes within the Bureau's statutory remit. Based on this assessment, recommendations are made as to what actions may be taken.

Additionally, the IAO is responsible for the training and ongoing liaison with the two hundred and fifty nine trained Asset Profilers throughout the country.

Chief State Solicitor's Office

The Criminal Assets Section of the Chief State Solicitor's Office (hereinafter referred to as "the CSSO") provides legal advice and solicitor services to the Bureau.

The CSSO represents the Bureau in both instituting and defending litigation in all court jurisdictions primarily but not exclusively with the assistance of Counsel. In addition, the CSSO provides representation for all tax and social welfare matters both before the respective appeal bodies and in the Circuit and Superior Courts.

Furthermore, the CSSO provides general legal advice and solicitor services at all stages of case progression from investigation to disposal including the provision of both contract drafting and conveyancing services.

During 2017, the CSSO was staffed as follows:

Part One

Overview of the Criminal Assets Bureau, its Officers and Staff

- 2 solicitors;
- 2 legal executives; and
- 2 clerical officers.

Joint Policing Committees

During the final quarter of 2017, the Bureau conducted briefings at a number of Joint Policing Committees (JPC's) in Dublin. The purpose of these briefings is twofold; to provide a situational report to local communities on how the Bureau can assist in dismantling criminal networks in their area and to seek information from local communities to assist the Bureau in selecting new targets. Information can be reported directly to the Bureau via phone, email, CAB Facebook and Twitter pages, through Crimestoppers or through the locally trained asset profilers at local Garda Stations.

It is intended that the Bureau will brief the remaining JPC's in Dublin in the first quarter of 2018. Thereafter, the Bureau will brief the JPC's in Local Authorities outside Dublin. These briefings have proven beneficial and have attracted considerable local and media attention.

[Photo of D/Chief Superintendent Patrick Clavin at Dublin City Council JPC](#)



Divisional Asset Profilers

In 2017, the Bureau continued its programme of engagement with Divisional Asset Profilers. During the year, the Bureau trained an additional one hundred and eight Garda Divisional Asset Profilers to fill vacancies within various Garda Divisions which arose from retirements and promotions. At year end, the total number of Divisional Asset Profilers stood at two hundred and seventy nine, which included:

- 259 Gardaí
- 15 Officers of the Revenue Commissioners engaged in Customs and Excise duties; and
- 5 Officers of the Department of Social Protection

In addition, seven people from the Justice Sector were also trained in relation to asset profiling.

During 2017, Senior Bureau Officers briefed all Regional Management Teams outside the DMR and all Divisional Management Teams within the DMR. This included detailed briefing for each Detective Superintendent with responsibility for the pro-active tasking of the Divisional Asset Profilers within their respective Regions/Divisions, to coordinate the identification, profiling and investigation of local targets. The purpose of these briefings is to enhance the role of the Divisional Asset Profilers from an intelligence gathering based approach to the pro-active pursuit of assets of local criminal through the gathering of evidence to enable successful follow up action by the Bureau.

This measure will ultimately serve to enhance the profile of asset seizure activity in local communities, through pro-active profiling and investigation of local criminals by Divisional Asset Profilers and subsequent action by the Bureau.

In 2017, one hundred and one asset profiles were received from Divisional Asset Profilers throughout Ireland as compared to sixty six asset profiles received from Divisional Asset Profilers in 2016. Further briefings are planned with Regional and Divisional Detective Superintendents and their staff in 2018 to ensure the powers of the Bureau are availed of to deny and deprive those involved in criminal activity.

This engagement with Divisional and Regional management was followed up by a number of refresher training courses throughout the country.

Throughout 2017, Divisional Asset Profilers from the various Regions have continued to engage with the Bureau to develop and progress investigations that have significant financial impact on local criminals and, in turn, provide positive feedback within local communities suffering from the activities of these criminals.

In 2018, it is envisaged that the Divisional Asset Profiler Network will be developed further with the training of additional Divisional Asset Profilers. Examples of cases dealt with in 2017 by the Bureau, that originated with Divisional Asset Profilers are as follows:

Case 1

Target engaged in the sale and supply of controlled drugs in Dublin East / North Wicklow area. This case was reported to the Bureau by a trained Divisional Asset Profiler who is assigned to a local District Detective Unit. Resulting from his observations, an asset profile was submitted to the Bureau where it was assigned to an Investigation Team.

The Bureau team liaised closely with the Divisional Asset Profiler in the further development of the asset profile. This resulted in a search operation being conducted by the Bureau supported by local Gardaí.

Actions in this investigation resulted in the Bureau obtaining Orders pursuant to Section 2, 3, 7 and 4A of the PoC Act, as amended in respect of a property in South Dublin.

Case 2

The case relates to a person who had convictions for selling drugs and is suspected of running a large drug dealing operation in a Dublin suburb. In recent years, he built a large house in the South East of the country and relocated his family to the new property. The local Divisional Asset Profiler became aware of his presence in the community and commenced a preliminary investigation into his assets. As a result of his enquiries he established that the individual concerned had gone to great lengths to conceal his ownership of the property and had paid the building contractors on site with cash.

Part One

Overview of the Criminal Assets Bureau, its Officers and Staff

The Divisional Asset Profiler referred the case to the Bureau for further investigation where it was assigned to an Investigation Team. After further investigations were carried out, which included countrywide search operations, a total of five properties have been identified which are suspected to be the proceeds of crime. In addition, two individuals have been identified within the “crime family” who are suspected of defrauding the Department of Employment Affairs and Social Protection of considerable funds.

It is anticipated that the Bureau will commence proceeds of crime proceedings in the High Court in 2018 against the properties in question.

Case 3

Six members of an organised crime group, who are members of the travelling community, were identified for their involvement in carrying out substandard work nationwide, mainly targeting the elderly and using intimidation methods to collect on work done with over inflated prices which were not agreed with the customer prior to the commencement of work. This case was reported to the Bureau by a trained Divisional Asset Profiler in the South Eastern Region. The Divisional Asset Profiler submitted an asset profile to the Bureau where it was assigned to an Investigation Team.

The Bureau team liaised closely with the Divisional Asset Profiler in the further development of the asset profile. This resulted in a joint search operation being conducted by the Bureau and local Gardaí. A number of assets were seized

during the course of this search including vehicles, cash, jewellery and documentation.

Case 4

Target engaged in the selling of “clocked” cars to unsuspecting customers. Gardaí in the Western Region had successfully convicted this individual before the Criminal Courts in relation to changing the mileage on cars he was selling. The Divisional Asset Profiler for the region examined two houses belonging to the person in question and established that both properties were purchased with cash and both had extensive renovations carried out. The Divisional Asset Profiler suspected the properties to be the proceeds of the individual's criminal conduct. An asset profile was submitted to the Bureau where it was assigned to an Investigation Team.

Following an investigation and search operation, it was confirmed that the two properties in question were indeed purchased with cash. In this case, the Bureau identified that the individual has considerable tax issues and was served with a tax assessment for unpaid taxes. It is anticipated that in 2018, the Bureau will receive a tax payment from the person who is the subject of this investigation.

National Drugs Strategy Briefing

In February 2017, along with officials from the Department of Justice and Equality, the Chief Bureau Officer briefed the National Drugs Strategy Steering Committee at a meeting in the Department of Health. The Chief Bureau

Officer briefed the meeting on the objectives and functions of the Bureau. He outlined the structure and composition of the Bureau as well as providing information on the role of locally trained Garda Asset Profilers.

Training and Development

TACTIC

(The Asset Confiscation and Tracing Investigator's Course)

A training needs analysis was carried out by the Bureau to identify critical training requirements for Bureau members. As a result, The Asset Confiscation and Tracing Investigators Course (TACTIC) was developed by the Bureau to provide specific training in Asset Tracing / Confiscation and Financial Investigations to staff of the Bureau. The course was designed in a format which allows its tuition to be provided to persons in other agencies who are not Bureau Officers.

TACTIC is conducted in conjunction with the Garda Training College in Templemore, Co. Tipperary and covers many subjects including:

- Asset Identification / Proceeds of Crime Procedures
- Financial Profiling & Analysis
- Money Laundering (Cross Border / Terrorism)
- Profiling and Net Worth Techniques
- Digital Forensics / Cyber Currencies
- White Collar Crime / Bribery & Corruption

The course is presented over four week long modules at the Garda Training College. To date twenty four members of the Bureau have completed the course and a further thirteen have completed the first two modules and are due to complete the TACTIC training in May 2018. The Bureau and the Garda College are currently progressing the course to full accreditation with a third level institution to give a professional qualification to investigators. The current class undergoing the TACTIC training includes a participant who is an investigator attached to the Office of the Director of Corporate Enforcement. This is the first non-Bureau Officer to undergo the training.

Staff Training

During 2017, the Bureau is continuing to upgrade and enhance the training needs of Bureau Officers and Staff. In this regard, the Bureau has provided funding for staff participation in the following courses.

- Advanced Diploma in Corporate White Collar & Regulatory Crime
- Masters in Criminal Justice
- SANS SEC 504
- Hacker Tools, Techniques & Incident Handling
- Diploma in Company Law
- International Diploma in Anti-Money Laundering & Counter Terrorism
- Advanced Diploma in Data Protection Law
- Professional Certification and Diploma in Compliance

Part One

Overview of the Criminal Assets Bureau, its Officers and Staff

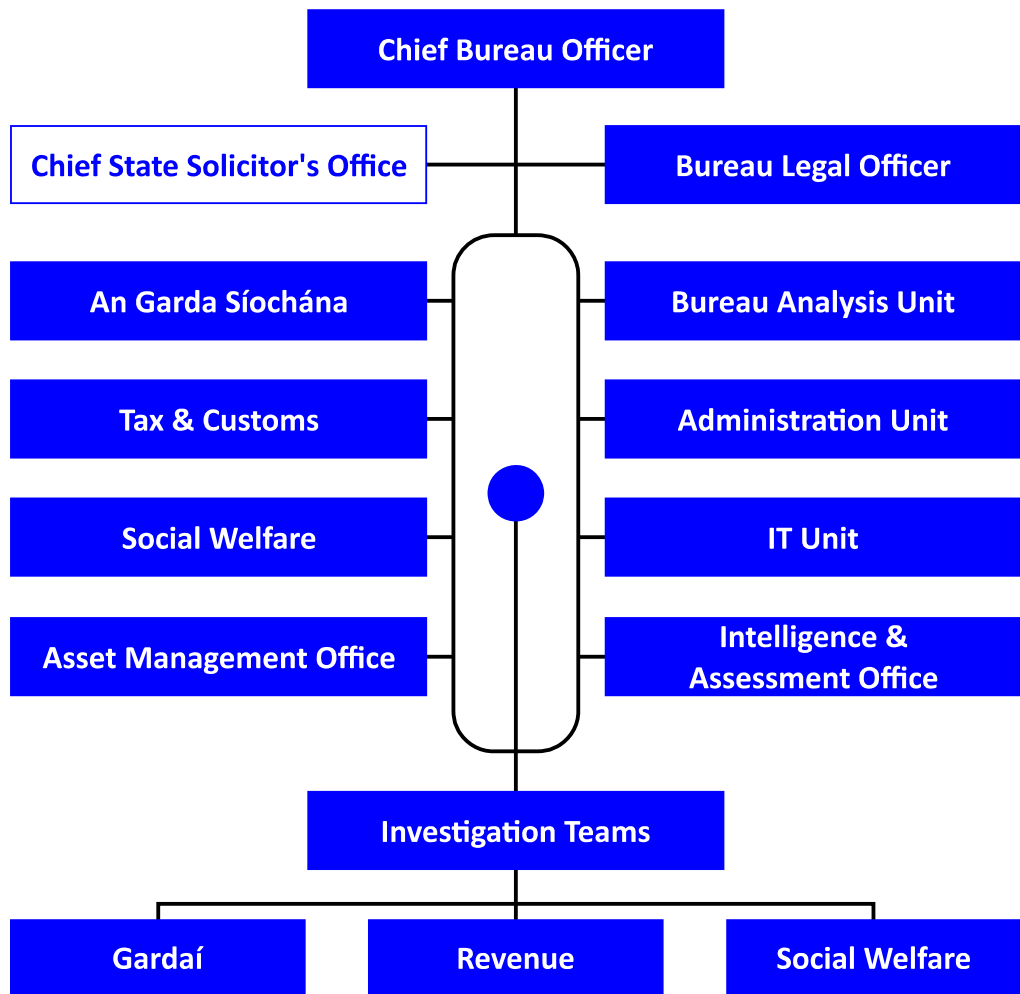
- Masters in Computer Forensics & Cyber Crime Investigation
- Diploma in Corporate Fraud Investigation

Virtual Currencies

The area of crypto currencies, or alternative currencies, is a relatively new global phenomenon for law enforcement agencies. The Bureau currently has a number of ongoing investigations involving crypto currencies. It also is providing assistance to other Garda agencies with their investigations involving crypto currencies. The Bureau's investigations involved the seizure of Bitcoins and Ethereum. The Bureau's seizure of Ethereum is a first for law enforcement worldwide. While the Bureau is developing its expertise and capabilities in this area, it is also engaged in providing assistance to other law enforcement agencies worldwide as the Bureau is recognised as a leader in the seizure, investigation and forfeiture of crypto currencies found to be associated with the proceeds of crime. To date the Bureau has received the conversion of forfeited Bitcoins to the value of €39,503. Other amounts of crypto currencies are currently the subject of ongoing investigations or proceedings before the High Court.



Diagram: Organisation of the Bureau



Part One

Overview of the Criminal Assets Bureau, its Officers and Staff

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Part Two

Criminal Assets Bureau investigations

Investigations

During 2017, Bureau Officers continued to exercise the powers and duties vested in them under Section 8 of the Act.

It is important to note that this Section emphasises that Bureau Officers retain the duties and powers conferred on them by virtue of membership of their respective parent organisations.

In addition to these powers, the Bureau has particular powers available to it, namely:

1. CAB search warrants; and
2. Orders to make material available to CAB.

These powers are contained within Section 14 and Section 14A of the Act and the PoC Act, respectively.

The Bureau conducted its investigations throughout 2017 with the cooperation and assistance of Garda personnel from Garda Divisions and also from Garda national units such as the Garda National Economic Crime Bureau (GNECB), the Garda National Drugs and Organised Crime Bureau (GNDOCB), the Garda National Bureau of Criminal Investigation (GNBCI), the Special Detective Unit (SDU) and the Security and Intelligence Section, Garda Headquarters.

Investigations were also supported by personnel from the Office of the Revenue Commissioners from each of the following regions: Dublin Region (Port & Airport); Borders, Midlands and West Region; South-West Region and East,

South-East Region and also from the Investigations and Prosecutions Division.

The Bureau continued to cooperate with the Special Investigation Units of the Department of Employment Affairs and Social Protection in respect of their investigations in 2017.

This continued assistance has been critical to the success in targeting the proceeds of criminal conduct during 2017.

Section 14

Section 14 of the Act provides for CAB search warrants. Under Section 14(1), an application may be made by a Bureau Officer, who is a member of An Garda Síochána to the District Court for a warrant to search for evidence relating to assets or proceeds deriving from criminal conduct.

Section 14(2) & (3) provides for the issue of a similar search warrant in circumstances involving urgency whereby the making of the application to the District Court is rendered impracticable. This warrant may be issued by a Bureau Officer who is a member of An Garda Síochána not below the rank of Superintendent.

During 2017, all applications under Section 14 were made to the District Court and no warrants were issued pursuant to Section 14(2).

A Section 14 search warrant operates by allowing a named Bureau Officer who is a member of An Garda Síochána,

Part Two

Criminal Assets Bureau investigations

accompanied by other such persons as the Bureau Officer deems necessary, to search, seize and retain material at the location named. This is noteworthy in that it allows the member of An Garda Síochána to be accompanied by such other persons as the Bureau Officer deems necessary including persons who are technically and/or professionally qualified people to assist him/her in the search.

These warrants are seen as an important tool which allows the Bureau to carry out its investigations pursuant to its statutory remit. During 2017, the Bureau executed a number of these warrants in targeting a number of organised crime groups. In particular, the Bureau targeted a known organised crime group based in the South of the country. The Section 14 warrants were used to search a large number of private residences as well as professional offices and other businesses. This led to the seizure of large amounts of cash, jewellery and vehicles.

Section 14A

Section 14A was inserted by the PoC Act and provides for applications to be made by a Bureau Officer who is also a member of An Garda Síochána to apply to the District Court for an Order directed to a named person to make material available to the Bureau Officer.

The Section 14A Production Orders have been used primarily in uplifting evidence from a number of financial institutions within the State. The material obtained relates to banking details and in many

instances, the transfer of large amounts of money between accounts.

As a result of the information gleaned, the Bureau has been able to use this evidence in ongoing investigations into a number of individuals which were believed to have possession of assets which represent, directly or indirectly, the proceeds of crime.

Applications made during 2017

During 2017, the following number of applications were made under Section 14 and 14A of the Act and the PoC Act, respectively:

[Applications under Section 14 & 14A CAB Act, 1996 & 2005](#)

Description	Applications	
	2016	2017
Search warrants under Section 14 CAB Act, 1996 & 2005	153	165
Orders to make material available under Section 14A of the CAB Act, 1996 & 2005	241	275

Section 17

[Criminal Justice \(Money Laundering and Terrorist Financing\) Act, 2010](#)

Section 17(2) of the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 allows for members of An Garda Síochána to obtain Orders

through the District Court to restrain the movement of money held in bank accounts.

During 2017, the Bureau has used this Order on three hundred and ten occasions.

These Orders were obtained in respect of twenty separate targets currently under investigation by the Bureau.

Such Orders remain in force for a period of four weeks which allows time for the Investigating Member to establish if this money is in fact being used in respect of any money laundering or terrorist financing offences. After such time, that Order will either lapse or can be renewed by the Investigating Member in the District Court.

The total amount of funds restrained is in excess of €4.8 million. However, one case accounts for approximately €3.5 million. As stated, these cases are currently under investigation.

The making of Section 17(2) Order by the District Court may be challenged in that Court by making an application pursuant to Section 19 or 20 of the 2010 Act. During 2017, one such challenge was commenced and is currently ongoing before the courts.

Part Two
Criminal Assets Bureau investigations

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Part Three

Actions under the Proceeds of Crime Act 1996 to 2016

Introduction

The Proceeds of Crime Act, 1996 to 2016 (“PoC Act”) provides for the mechanism under which the Bureau can apply to the High Court to make an order (“an interim order”) prohibiting a person / entity from dealing with a specific asset, or in other words, freezes the specified asset.

The PoC Act further allows for the High Court to determine, on the civil burden of proof, whether an asset represents, directly or indirectly, the proceeds of criminal conduct.

In 2005, the PoC Act was amended to allow the proceedings to be brought in the name of the Bureau instead of its Chief Bureau Officer. Consequently since 2005, all applications by the Bureau have been brought in the name of the Bureau.

The High Court proceedings are initiated by way of an application under Section 2(1) of the PoC Act which is grounded upon an affidavit or affidavits sworn by relevant witnesses, including members of An Garda Síochána, other Bureau Officers and in relevant cases by staff from law enforcement agencies from outside the jurisdictions.

The PoC Act provides that the originating motion may be brought ex-parte. This means that the Bureau makes its application under Section 2(1) of the PoC Act without a requirement to notify the affected person (the respondent). The Section 2(1) order lasts for twenty one days unless an application under Section 3 of the PoC Act is moved / brought. Section 2 of the PoC Act also provides

that the affected person should be notified during this time.

During 2017, Section 3 proceedings were initiated in all cases brought by the Bureau where a Section 2(1) order was made. Section 3 of the PoC Act allows for the longer term freezing of assets. It must be noted that proceedings under the PoC Act may be initiated in the absence of a freezing order under Section 2(1) by the issuing of an originating motion pursuant to Section 3(1).

While Section 3 cases must be initiated within twenty one days of a Section 2 Order, in practice, it may take some considerable time before the Section 3 hearing comes before the High Court. The affected person (the respondent) is given notice of the Section 3 hearing and is entitled to attend the hearing and challenge the case in respect of the specified asset.

In cases where the respondent has insufficient means to pay for legal representation, the respondent may apply to the court for a grant of legal aid under a Legal Aid Scheme in place for this purpose. This ensures that the rights of the respondent are fully represented to the highest standards.

If it is ultimately shown to the satisfaction of the High Court following a Section 3 hearing that the asset represents, directly or indirectly, the proceeds of criminal conduct then the court will make an order freezing the asset. This order lasts a minimum of seven years during which the respondent or any other party claiming ownership in respect of the

Part Three

Actions under the Proceeds of Crime Act 1996 to 2016

property can make applications to have the court order varied in respect of the property.

At the expiration of the period of seven years, the Bureau may then commence proceedings to transfer the asset to the Minister for Public Expenditure and Reform or other such persons as the court determines under Section 4 of the Act. During these proceedings, all relevant parties are again notified and may make applications to the court.

Where the period of seven years has not expired, a Consent Disposal Order under Section 4A of the Act may be effected with the consent of the respondent and the court.

Section 1A Review

The PoC Act was amended by the PoC (Amendment) Act, 2016. This amendment provides that where a Bureau Officer is in a public place, or in another place where he is authorised or invited, or is carrying out a search, and finds property that he believes to be the proceeds of crime with a value not less than €5,000, then that Officer may seize the property for a period not exceeding twenty four hours.

The Chief Bureau Officer may, during the twenty four hour period, authorise the detention of the property for a period of up to twenty one days, provided he:

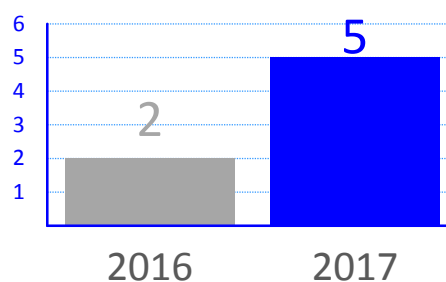
a) Is satisfied that there are reasonable grounds for suspecting that the property, in whole or in part, directly

or indirectly, constitutes the proceeds of crime,

- b) Is satisfied that there are grounds for suspecting that the total value of the property is not less than €5,000,
- c) Is satisfied that the Bureau is carrying out an investigation into whether or not there are sufficient grounds to make an application to the court for an interim order or an interlocutory order in respect of the property, and
- d) Has reasonable grounds for believing that the property, in whole or in part, may in the absence of an authorisation, be disposed of or otherwise dealt with, or have its value diminished, before such an application may be made.

During 2017, the Bureau invoked its powers under Section 1A of the PoC Act on five occasions, two examples of which are set out below.

Section 1A detentions



Detention 1

The Bureau took possession of a car which belonged to a member of an Organised Crime Group based in the West of Dublin. During the twenty one day period, the Bureau was in a position to carry out enquiries in respect of the purchase of the vehicle and the Bureau was able to successfully bring an

application under Sections 2 & 7 of the PoC Act within the twenty one day period.

At a hearing of the case, the Bureau obtained an order under Section 3 of the Act, which was a final determination that the vehicle was in fact, the proceeds of crime.

Detention 2

The Bureau also took possession of a vehicle which was in possession of a person believed to be involved in criminal conduct in the North Dublin area.

The Bureau successfully brought an application under Sections 2 & 7 of the PoC Act within the twenty one day period.

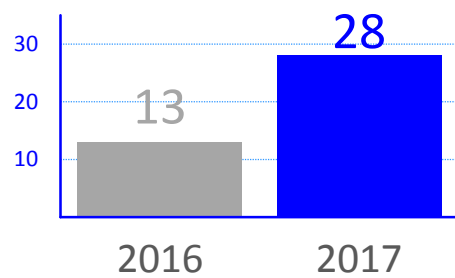
As at 31st December 2017, this case is before the court and an application has been made for an order under Section 3 of the PoC Act.

Cases commenced

Twenty eight new cases commenced during 2017. Of these cases commenced, twenty seven were initiated by issuing proceedings by way of originating motion under Section 2 of the PoC Act and one directly under the provisions of Section 3.

The Bureau notes that this is the largest number of proceeds of crime cases commenced in a single year since the inception of the Bureau. The Bureau has been engaged in extensive work in preparing these investigations to allow it to bring these cases in 2017.

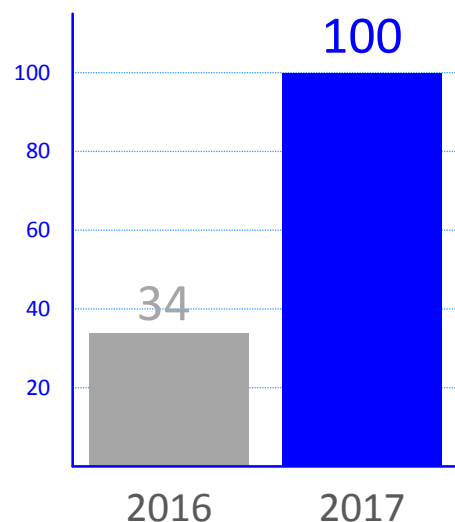
New POC cases brought before the High Court



Section 2(1) Review

When analysed, the number of assets over which an order was obtained under Section 2(1) increased in comparison to 2016 from thirty four assets to one hundred assets.

Assets over which Section 2(1) Orders made

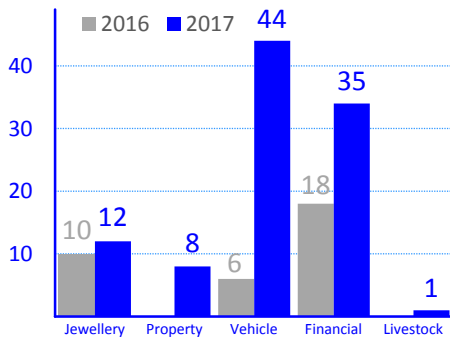


During 2017, the Bureau took proceedings in respect of a variety of asset types. For profiling purposes, the assets are broken down into jewellery, property, vehicles, financial and livestock matters.

Part Three

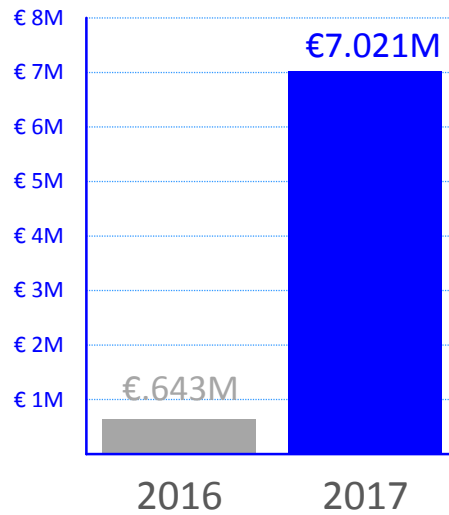
Actions under the Proceeds of Crime Act 1996 to 2016

Assets over which Section 2(1) Orders made
Breakdown of assets by asset type



The figures in respect of jewellery, property, vehicles and livestock are based on the estimated value placed by the Bureau on the asset at the time of making the application under Section 2(1) of the PoC Act.

Value of assets frozen under Section 2(1)



Valuation Breakdown

The value of the one hundred assets frozen under Section 2 of the PoC Act during the year 2017 was €7,020,539.20. This figure may be broken down in the table below.

Analysis of Section 2 Order by Asset Type

Description	€
Jewellery	126,270.00
Property	2,449,012.50
Vehicle	838,960.00
Financial	3,576,660.70
Livestock	29,636.00
Total	7,020,539.20

The results for 2017 compared to 2016 show the value of assets frozen under Section 2(1) has increased from the previous year where the value was €643,000. The value of assets fluctuates depending on assets targeted in each case which can vary from high ranging assets to low ranging assets.



This figure, which represents a more than ten fold increase in value terms, must be viewed in connection with a more than doubling of the number of cases commenced in the same period.

Section 3 Review

Section 3(1) Orders are made at the conclusion of the hearing into whether an asset represents or not, the proceeds of criminal conduct. As such, the date and duration of the hearing is a matter outside of the Bureau’s control.

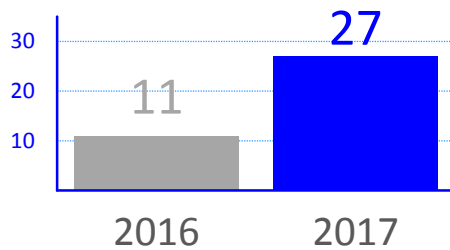
During 2017, twenty seven cases before the High Court had orders made under Section 3(1) to the value of €2,105,487.76. This is an increase on the 2016 figure.

3(1) order was made in 2017 which led to an increase in the value of the orders made. The value of such orders increased from €1.9 million in 2016 to €2.1 million in 2017.

Analysis of Section 3 Order by Asset Type

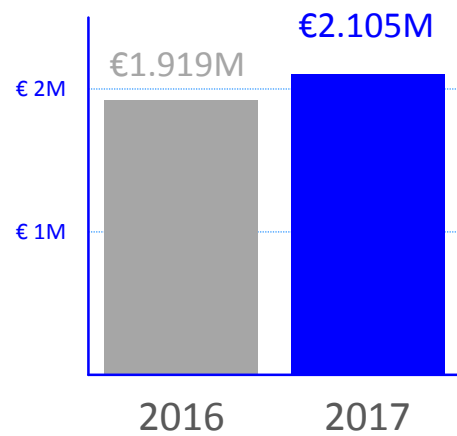
Description	€
Jewellery	19,563.00
Property	677,528.00
Vehicle	173,350.00
Financial	1,235,046.76
Total	2,105,487.76

Number of cases in which Section 3(1) Orders made.

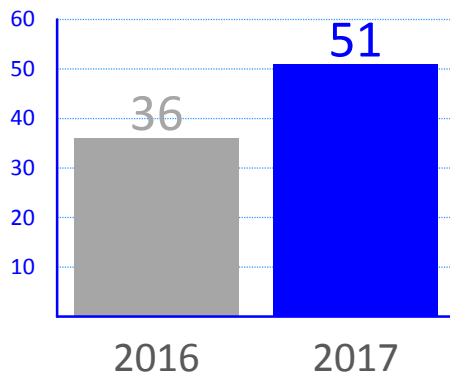


The number of assets over which orders were made by the High Court pursuant to Section 3(1) increased from thirty six assets in 2016 to fifty one assets in 2017.

Value of assets frozen under Section 3(1)



Assets over which Section 3(1) Orders made.



An increase in assets over which a Section

Section 3(3)

Section 3(3) of the PoC Act provides for an application to be made to the court while a Section 3(1) order is in force to vary or discharge the order. The application can be made by the respondent in a case taken by the Bureau or by any other person claiming ownership in the property. While Section 3(3) largely contemplates the bringing of an application by a respondent in a case, it also provides that victims of crime who

Part Three

Actions under the Proceeds of Crime Act 1996 to 2016

can demonstrate a proprietary interest in the asset frozen can make an application for the return of same.

Section 3(3) also provides for a person to make a claim in regard to an asset over which a Section 3(1) order has been made whereby that person can seek the variation or discharge of the freezing order if it can be shown to the satisfaction of the court the asset in question is not the proceeds of criminal conduct. No such orders was made under Section 3(3) of the PoC Act during 2017.

Geographical Breakdown

The Bureau's remit covers investigation of proceeds of crime cases irrespective of the location of the assets.

During 2017, the Bureau obtained Orders over assets in respect of proceeds of crime in all of the large urban areas, rural communities and foreign jurisdictions.

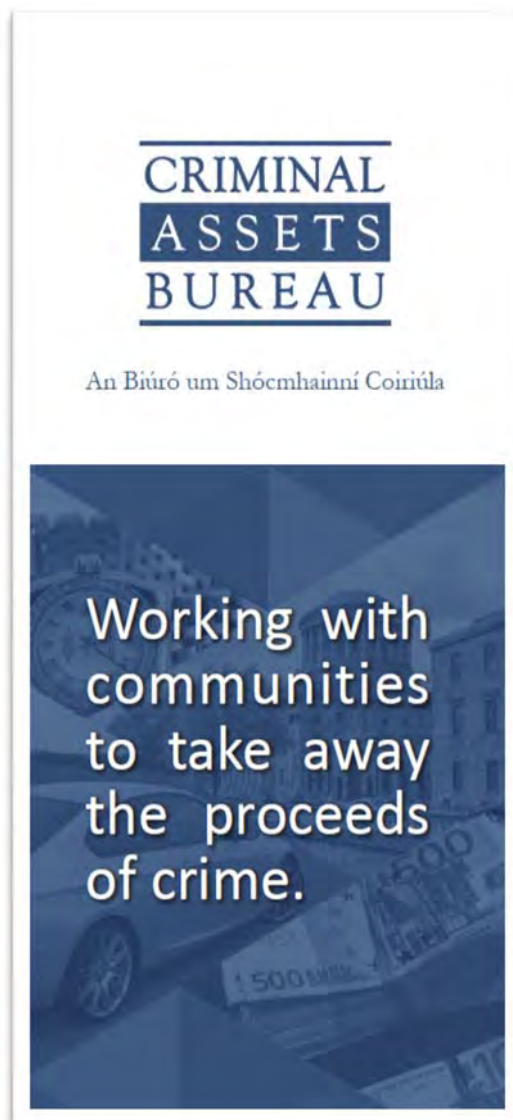
The Bureau remains committed to actively targeting assets which are the proceeds of criminal conduct and indeed wherever they are situated to the fullest extent under the PoC Act.

The Bureau is further developing its national coverage through the Commissioner of An Garda Síochána's revised policy on the Tasking of Divisional Asset Profilers. This will ensure that there is a focus on local criminal targets throughout the State for action by the Bureau.

The Bureau has also worked closely with local communities by partaking and

briefing a number of Joint Policing Committees (JPC) around the country. The Bureau is committed to meeting with each JPC in the country during 2018.

The Bureau has developed a brochure for distribution by members of the JPC entitled "Working with Communities to take away the proceeds of crime". The feedback in regard to same has been extremely positive.



Property

The statutory aims and objectives of the Bureau require that the Bureau take appropriate action to prevent individuals, who are engaged in serious organised crime, benefiting from such crime.

In cases where it is shown that the property is the proceeds of criminal conduct, the statutory provision whereby an individual enjoying the benefit of those proceeds may be deprived or denied that benefit, includes that he/she should be divested of the property.

This policy of the Bureau may require pursuing properties, notwithstanding the fact that in some cases the property remains in negative equity.

This is designed to ensure that those involved in serious organised crime are not put in the advantageous position by being able to remain in the property and thereby benefit from the proceeds of crime.

Vehicles

The Bureau continues to note the interest of those involved in serious organised crime in high value vehicles. However, during 2017 the Bureau targeted a number of mid-range to upper-range valued vehicles. This is, in part, a response to actions being taken by those involved in crime to purchase lower valued vehicles in an attempt to avoid detection.

An example of the types of vehicles seized by the Bureau under Section 2(1) of the PoC Act during the year 2017 were:

- Yamaha 250X Motorcycle
- Dune Buggy
- Lexus
- Audi A1, A3 and A5
- Mercedes CLK220, E20, CLA220AMG
- BMW 740, M6, X5
- Volkswagen Golf



Under Section 3(1) of the PoC Act, the Bureau obtained orders against twelve vehicles, an example of which include:

1. Volkswagen Golf
2. BMW 520
3. Kawasaki Ninja Motorcycle
4. BMW X5
5. Audi A1
6. Audi A5
7. Citroen Nemo



Part Three

Actions under the Proceeds of Crime Act 1996 to 2016

Section 4(1) and 4A

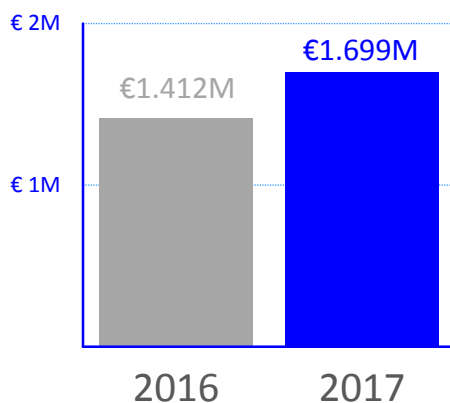
Section 4(1) provides for the transfer of property to the Minister for Public Expenditure and Reform. This Section refers to assets which have been deemed to be the proceeds of criminal conduct, for a period of not less than seven years, and over which no valid claim has been made under Section 3(3) of the PoC Act.



Section 4A allows for a consent disposal order to be made by the respondent in a CAB case, thus allowing the property to be transferred to the Minister for Public Expenditure and Reform in a period shorter than seven years. This was introduced in the 2005 PoC Act.

Twenty two cases were finalised and concluded under Section 4(1) and 4A in 2017.

Value of assets frozen under Section 4(1) and 4A



During 2017, a total of €1,698,721.08 was transferred to the Minister for Public Expenditure and Reform under the PoC Act arising from Section 4(1) and 4A disposals.

Section 4(1) & 4A Breakdown

Description	No. of Cases	€
Section 4(1)	6	673,853.85
Section 4A	16	1,024,867.23
Total	22	€1,698,721.08

The Supreme Court gave judgment in the Gilligan case in February 2017 in favour of the Bureau. This was the culmination of twenty years of extensive and strongly contested litigation between the parties. The ultimate effect of the ruling was to uphold the 2011 High Court judgment vesting of one vehicle, one commercial and four residential properties previously owned by the respondents in the Minister for Public Expenditure and Reform under Section 4 of the Act.

The High Court had previously determined that a portion of one of the said Gilligan residential properties was not the proceeds of crime. Arising from this, a Section 3(3) order was made directing that twenty percent of the net proceeds of sale of the property be returned to Treacy Gilligan. A receiver was appointed by the High Court to take possession of the property pending a Section 4 order vesting it in the Minister for Public Expenditure and Reform.

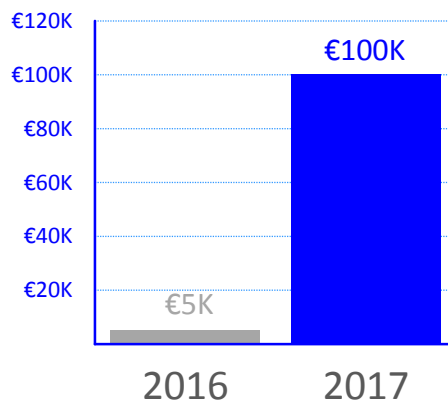
Section 6

Section 6 provides for the making of an order by the court during the period whilst a Section 2(1) or 3(1) order is in force to vary the order for the purpose of allowing the respondent or any other party:

1. A discharge of reasonable living or other necessary expenses; or
2. Carry on a business, trade, profession or other occupation relating to the property.

During 2017, one such order was made to the value of €100,000.

Value of assets orders under Section 6



This €100,000 represents release of funds in one case. This money was used to discharge outstanding tax liabilities owed to the Revenue Commissioners.

Section 7

Section 7 provides for the appointment, by the court, of a Receiver whose duties include either to preserve the value of, or dispose of, property which is already

frozen under Section 2 or Section 3 orders.

In 2017, the Bureau obtained receivership orders in regard to seventy two assets. In every case the receiver appointed by the court was the Bureau Legal Officer. These cases involved properties, cash, money in bank accounts, motor vehicles and watches. In some receivership cases, the High Court made orders for possession and sale by the Receiver. A receivership order cannot be made unless a Section 2 or Section 3 order is already in place.

Part Three

Actions under the Proceeds of Crime Act 1996 to 2016

Statement of Receivership Accounts

	Euro€	Stg£	US\$
Opening balance receivership accounts 01/01/2017	11,567,808.29	471,002.09	652.125.66
Amounts realised, inclusive of interest and operational advances	1,171,488.91	2.03	1,459.95
Payments out, inclusive of payments to Exchequer and operational receivership expenditure	1,556,569.52	262,960.74	556.04
Closing balance receivership accounts 31/12/2017	11,182,727.68	208,043.38	653,029.57

Part Four

Revenue actions by the Bureau

Overview

The role of the Revenue Bureau Officers attached to the Bureau is to perform duties in accordance with all Revenue Acts and Regulations to ensure that the proceeds of crime or suspected crime, are subject to tax. This involves the gathering of all available information from the agencies which comprise the Bureau. This includes the Office of the Revenue Commissioners and information from this Office can be obtained in accordance with Section 8 of the Act 1996.

Tax Functions

The following is a summary of actions taken by the Bureau during 2017 and an update of the status of appeals taken.

Tax Assessments

Revenue Bureau Officers are empowered to make assessments to tax under Section 58 of the Taxes Consolidation Act 1997 (hereinafter referred to as the TCA 1997) - the charging section.

As part of any Bureau investigation, the Revenue Bureau Officer will investigate the tax position of all those linked with that investigation with a view to assessing their tax liability, where appropriate. Investigations vary in terms of size and complexity.

During 2017, a total of thirty seven individuals were assessed to tax resulting in a total tax figure under various taxheads of €6m.

Tax Appeals

The Office of the Tax Appeals Commission (TAC) formerly referred to as the Office of the Appeal Commissioners came into effect from 21st March 2016 following the enactment of the Finance (Tax Appeals) Act 2015. This substantially changed the manner in which tax appeals are managed as outlined in our Annual Report 2016.

2017 is the first full calendar year in respect of which the TAC has been in place. For a variety of reasons, the level of engagement with the TAC in terms of hearings was low.

Appeals to the Tax Appeal Commissioners

Revenue Tables 1, 2 and 3 located at the end of this chapter summarise the appeal activity for 2017.

At 1st January 2017, thirty two cases were before the TAC for adjudication. During the year, twelve appeal applications were referred by the TAC to the Bureau for consideration. Overall during the year, the Commission admitted six appeals while seven were refused, one of which was incorporated in the opening figure as of 1st January 2017.

As at 31st December 2017, there were a total of thirty five cases awaiting hearing / decision.

As at 1st January 2017, four appeals in respect of cases where appeals had been refused were awaiting decision. These four appeal applications were refused by

Part Four

Revenue actions by the Bureau

the Inspector of Taxes prior to 21st March 2016.

During 2017, two of these appeals were withdrawn by the applicants. As at 31st December 2017, two cases remain within the appeal process.

Appeals to the Circuit Court

As at 1st January 2017, there were two cases awaiting hearing before the Circuit Court.

One of these cases was heard and the decision of the Appeal Commissioner was upheld. In respect of the second case, the appellant withdrew his appeal. There are now no cases for hearing in the Circuit Court.

Collections

Revenue Bureau Officers are empowered to take all necessary actions for the purpose of collecting tax liabilities as assessed and which have become final and conclusive. Revenue Bureau Officers hold the powers of the Collector General and will pursue tax debts through all available routes. Collection methods include:

- The issue of demands – Section 961 TCA 1997;
- Power of attachment – Section 1002 TCA 1997;
- Sheriff action – Section 960(L) TCA 1997; and
- High Court proceedings – Section 960(I) TCA 1997.

Recoveries

Tax recovered by the Bureau during 2017 amounted to €2.374m from fifty one individuals / entities.

Demands

During 2017, tax demands (inclusive of interest) served in accordance with Section 961 TCA 1997 in respect of thirty three individuals / entities amounted to €14.18m.

Revenue Settlements

During the course of 2017, five individuals settled outstanding tax liabilities with the Bureau by way of agreement in the total sum of €904k.

Circuit Court

Circuit Court proceedings were initiated in the Circuit Court in respect of one case in the sum of €18k.

Respondent	Amount Euro
Case 1	18,038
Total	18,038

High Court

High Court proceedings for the recovery of tax and interest in the sum of €2.328m was initiated in four cases.

Respondent	Amount Euro
Case 1	1,626,261
Case 2	477,086
Case 3	116,333
Case 4	108,468
Total	2,328,148

Judgment

High Court Judgments were obtained against four individuals for tax liabilities totalling €1,027,883.

Respondent	Amount Euro
Waldemar Chlopek	111,704
Thomas Finnegan	140,838
Karl Reilly	162,588
Wesley Williams	612,753
Total	1,027,883

Prosecutions

As reported in the 2016 Annual Report, Mr Thomas Murphy of Ballybinaby, Hackballscross, Dundalk, Co. Louth had appealed the decision of the Special Criminal Court which in October 2015 found him guilty of tax offences in respect of the years 1994/95 to 2004. The appeal was made to the Court of Appeal which was heard in 2016. On the 30th January 2017, the decision of the Court of Appeal was delivered and the court upheld the decision of the Special Criminal Court (please see Part Six for more details).

John Tobin v. Criminal Assets Bureau [2017] IEHC 855

In the matter of *John Tobin v. Criminal Assets Bureau*, the High Court considered the previous decision of the Circuit Court to uphold the respondents refusal to accept the appellant's late appeal under Section 933(7)(a) TCA 1997. In December 2017, in considering the statutory interpretation of the words "absence, sickness or other reasonable cause" featured in Section 933(7)(a) TCA 1997, the High Court departed from its previous position where "reasonable cause" was

required to be linked in concept to absence or sickness as per the judgment in *CAB v. K.D.* This ruling applied to the legislative provisions of the previous appeals process under Section 933(7)(a) TCA 1997. Following the enactment of the Finance (Tax Appeals) Act 2015, the TAC and the new regime for the processing of tax appeals entered into force on 21st March 2016.

Criminal Assets Bureau v. J.McN [2017] IESC 30

In the matter of *Criminal Assets Bureau v. JMcN*, the Supreme Court considered an appeal concerned with a potential liability for tax. The appellant argued whether it had been established that the respondent was entitled to bring summary proceedings in their own name rather than in the name of the Collector General. In May 2017, the Supreme Court concluded that the evidence was not sufficient and, therefore, allowed the appeal and substituted an order dismissing the proceedings. On foot of the Supreme Court's judgment, all Bureau summary proceedings are now brought in the name of the Collector General.

Customs & Excise Functions

The Customs & Excise (C&E) functions in the Bureau support all investigations by identifying any issues of Customs relevance within the broad range of C&E related legislation, regulations, information and intelligence.

Serious and organised crime groups in every jurisdiction attempt to breach both Customs regulations and Excise

Part Four

Revenue actions by the Bureau

regulations in their attempts to make substantial profits while depriving the Exchequer of funds and having a negative impact on society in general. The Customs functions at ports and airports, in particular, support the Bureau's investigations into the cross-jurisdictional aspects of crime and criminal profits. Throughout 2017, in the course of investigations by the Bureau, a number of criminals and their associates were monitored and intercepted at ports and airports.

In Ireland, as in many countries, the existence of a land border with another jurisdiction, where tax rates on various commodities are different, has provided an incentive for serious organised crime groups to engage in smuggling and associated activities. These types of crimes result in significant loss to the Exchequer while providing significant gains to those crime gangs.

Throughout 2017, the Bureau continued to monitor the activities of criminal organisations involved in the illicit trade in mineral oils, in conjunction with the Revenue Customs Service and An Garda Síochána, as a means of sustaining the collective successes of recent years in interrupting that particular criminal activity. In 2017, the Bureau provided operational support to the Revenue Customs Service on six separate oil fraud operations.

In 2017, the Bureau continued to carry out investigations in the area of VRT authorisations granted to car dealers (Section 136 Finance Act, 1992). The Bureau identified a growing number of

used-car outlets operated by, or on behalf of organised crime groups. In three cases where criminal connections were established and regulations were contravened, the Bureau revoked VRT authorisations and directed the closure of those outlets. The Bureau also seized and removed stocks of vehicles. In three other cases where organised crime groups had not completed the establishment of particular used-car outlets, the Bureau intervened and refused the granting of VRT authorisations, again removing and seizing any associated stocks of vehicles which were held in contravention of VRT regulations. At year end, a number of other cases remain the subject of active and resolute investigation by the Bureau.

Through the enforcement of VRT legislation, the Bureau continued, throughout 2017, to deprive specific individuals of valuable vehicles which were in their possession and contravened under VRT regulations (Section 141, Finance Act 2001). By year end, there were thirty-six cases outstanding in which the Bureau had initiated High Court condemnation proceedings (Part 2, Finance Act 2001, as amended by Section 46(1) Finance Act 2011). These proceedings relate to the seizure of specific high value vehicles from individual criminals as well as stocks of vehicles from outlets operated illegally by organised crime groups. In support of the Bureau's statutory objectives (Section 4 of the Act) these actions have deprived those involved of vehicle assets worth over €1 million.

The Bureau has also taken action against Vehicle Transporting operators that were identified supplying falsified documents to criminals for use during the registration of vehicles at NCT centres and also during VRT refund applications. The Bureau is currently investigating cases of falsified documents with a view to pursuing criminal prosecutions.

The Bureau will continue to monitor, review and take all necessary actions in cases where organised crime groups have, or are attempting to infiltrate and impact on the legitimate car trade, with consequential potential loss of VRT to the Exchequer.

Fighting organised crime groups operating across borders requires cooperation among competent authorities on both sides of the border. Such cooperation extends beyond intelligence sharing and includes the planning and implementation of specific joint operations on an international multi-agency and multi-disciplinary platform. In such cases, every aspect of mutual assistance legislation, whether it be Customs to Customs, or Police to Police, is utilised by the Bureau. The Bureau is an active agency within the Cross Border Oil Fraud Group and the Cross Border Tobacco Fraud Group.

In 2017, the Bureau again noted a strong liaison with Her Majesty's Revenue & Customs (HMRC) and has found the inclusion of the Bureau in the provisions of the UK Serious Crime Act 2007 (Section 85) to be particularly beneficial. This legislative inclusion strengthened the provision of evidence from HMRC when

UK property, assets or nationals are involved in CAB investigations. The joint agreement signed in Dublin in 2016 between HMRC and the Bureau continues to underpin this very important assistance given to the Bureau's international investigative functions.

Customs Officers attached to the Bureau take every opportunity to liaise and work with colleagues in other Customs Service's internationally to improve effectiveness against organised crime groups. Similarly, the Bureau works closely in this jurisdiction with Revenue's Customs Service, in order to use all the State's resources in the most efficient way in tackling criminal activity.

In 2017, the Bureau welcomed the operational assistance provided by the Revenue Customs Service on seven separate large CAB operations. The Bureau acknowledges this increasing broad range of expertise and support including Customs Dog Units (drugs and cash), Customs Maritime Units, X-Ray scanners and operational staff at Ports and Airports.

Part Four

Revenue actions by the Bureau

Table 1: Outcome of appeals at Appeal Commissioner Stage

Description	No of Cases
Opening Appeals as at 01/01/2017	32
Appeals Lodged to TAC	12
Appeals Admitted by TAC	6
Appeals Refused by TAC	7
Appeals Withdrawn	2
Appeal Determined by TAC	0
*Open Appeals as at 31/12/2017	35

**Excludes appeals admitted by TAC as this figure is included in the figure for appeals lodged to TAC.*

Table 2: Outcome of appeals refused by the Bureau (prior to 21/03/2016)

Description	No of Cases
Opening Appeals as at 01/01/2017	4
Appeals Withdrawn	2
Open Appeals as at 31/12/2017	2

Table 3: Outcome of Circuit Court Appeals

Description	No of Cases
Opening Appeals as at 01/01/2017	2
Appeals Determined by the Circuit Court	1
Appeals Withdrawn	1
Open Appeals as at 31/12/2017	0

Part Four
Revenue actions by the Bureau

Table 4: Tax Assessments

Taxhead	Tax €M 2016	Tax €M 2017	No of Assessments 2016	No of Assessments 2017
Income Tax	10.403	4.761	190	216
Capital Gains Tax	0.254	0.041	5	4
Value Added Tax	0.241	1.114	4	8
PAYE/PRSI	0.165	-	1	-
RCT	0.085	-	3	-
CAT	-	0.086	-	3
Excise	-	-	-	-
Totals	11.148	6.002	203	231

Table 5: Tax and Interest Collected

Taxhead	Tax €M 2016	Tax €M 2017	No of Collections 2016	No of Collections 2017
Income Tax	1.914	1.833	35	41
Capital Gains Tax	-	0.017	-	1
Corporation Tax	-	0.021	-	1
PAYE / PRSI	-	0.224	-	3
Value Added Tax	0.192	0.279	3	5
Totals	2.106	2.374	38	51

Table 6: Tax and Interest Demanded

Taxhead	Tax €M		Interest €M		Total €M		No of Cases	
	2016	2017	2016	2017	2016	2017	2016	2017
Income Tax	3.079	8.000	1.489	3.917	4.568	11.917	12	22
CGT	0.063	0.082	0.057	0.078	0.120	0.160	2	3
CAT	-	0.046	-	0.014	-	0.060	-	2
PAYE/PRSI	0.006	0.165	0.002	0.037	0.008	0.202	1	1
VAT	0.224	1.368	0.103	0.344	0.327	1.712	3	5
RCT	-	0.085	-	0.044	-	0.129	-	1
Totals	3.372	9.746	1.651	4.434	5.023	14.180	18	34

Part Four
Revenue actions by the Bureau

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Part Five

Social Welfare actions by the Bureau

Overview

The role of Social Welfare Bureau Officers is to take all necessary actions under the Social Welfare Consolidation Act 2005, pursuant to its functions as set out in Section 5(1)(c) of the Act 1996. In carrying out these functions, Social Welfare Bureau Officers investigate and determine entitlement to social welfare payments by any person engaged in criminal activity.

Social Welfare Bureau Officers' are also empowered under Section 5(1)(d) of the Act to carry out an investigation where there are reasonable grounds for believing that officers of the Minister for Employment Affairs and Social Protection may be subject to threats or other forms of intimidation.

Arising from an examination of cases by Social Welfare Bureau Officers, actions pursuant to the Social Welfare remit of the Bureau were initiated against eighty two individuals in 2017.

As a direct result of investigations conducted by Social Welfare Bureau Officers, a number of individuals had their payments either terminated or reduced in 2017. These actions resulted in a total savings of €2,376,377.91. This can be broken down as follows:

Savings

Following investigations conducted by Social Welfare Bureau Officers in 2017, total savings as a result of termination and cessation of payments to individuals who were not entitled to payment amounted to €471,183.60. The various

headings under which these savings were achieved are listed at the end of this chapter.

Overpayments

The investigations conducted also resulted in the identification and assessment of overpayments against individuals as a result of fraudulent activity. An overpayment is described as any payment being received by an individual over a period or periods of time to which they have no entitlement or reduced entitlement and so accordingly, any payments received in respect of the claim or claims, results in a debt to the Department of Employment Affairs and Social Protection. As a result of investigations carried out by Social Welfare Bureau Officers, demands were issued against a number of individuals for the repayment of the social welfare debts ranging in individual value from €626.70 to €160,462.10.

During 2017, overpayments assessed and demanded amounted to €1,585,474.00, a breakdown of which are listed at the end of this chapter.

Recoveries

Social Welfare Bureau Officers are empowered to recover social welfare overpayments from individuals. An overpayment is regarded as a debt to the Exchequer. The Bureau utilises a number of means by which to recover debts which includes payments by way of lump sum and / or instalment arrangement. Section 13 of the Social Welfare Act, 2012 amended the Social Welfare

Part Five

Social Welfare actions by the Bureau

Consolidation Act 2005 in relation to recovery of social welfare overpayments by way of weekly deductions from an individual's ongoing social welfare entitlements. This amendment allows for a deduction of an amount up to 15% of the weekly personal rate payable without the individual's consent.

The Bureau was instrumental in the introduction of additional powers for the recovery of social welfare debts by way of Notice of Attachment proceedings. The Social Welfare and Pensions Act 2013 gives the Department of Employment Affairs and Social Protection the power to attach amounts from payments held in financial institutions or owed by an employer to a person who has a debt to the Department. As a result of actions by Social Welfare Bureau Officers, a total sum of €319,720.31 was returned to the Exchequer in 2017, a breakdown of which is listed at the end of this chapter.

Appeals

The Social Welfare Appeals Office (SWAO) operates independently of the Department of Employment Affairs and Social Protection and provides an appeal service to individuals who are not satisfied with determinations made by Officers of the Department on questions relating to their entitlement to social welfare payments. This agency is headed by a Chief Appeals Officer (CAO).

In 2017, there were two appeals initiated with the SWAO against determinations made by Social Welfare Bureau Officers. One appeal was refused jurisdiction and referred to the Circuit Court and in light

of new evidence, the second appeal was withdrawn.

As noted in the 2016 Annual Report, an appellant had sought a Judicial Review of a decision by the CAO to refer her appeal to the Circuit Court. The High Court decided that the case should be referred back to the CAO. The case was duly adjudicated on by the Appeals Office in 2017. The decision made by the CAO was in favour of the appellant.

Section 5(1)(c) of the Act 1996

Case 1

The Bureau carried out a search operation at a garage in the West Dublin Region. An individual was interviewed by a Social Welfare Bureau Officer on the day of the search and stated that he worked for a car sales company on a part-time basis and admitted that he was also in receipt of Jobseekers Allowance. He was advised to sign off but he failed to do so. Instead he attested that he was working one day per week on a casual basis. As a result of this deception, further investigations were made. He was interviewed again by another Social Welfare Bureau Officer and his entitlement to Jobseekers Allowance for the entire period of his claim was reviewed. Despite a written request, he failed to provide details of his earnings from his self-employment as a car salesman from 2009 to January 2017.

As a result of the investigation, he incurred an overpayment of €79,000 and his Jobseekers Allowance was terminated. He has been notified of this decision.

Case 2

A “crime family” consisting of four primary Bureau targets from the Mid West Region was investigated. The individuals had previously been involved in multiple cases of identify frauds in the United Kingdom in the 1990’s. In excess of GBP £1.5 million was “stolen” as a result of these crime and these funds were never recovered.

Two members of this “family” had their social welfare entitlements reviewed, which resulted in cessation of payments with overpayments assessed in both cases. One of the cases resulted in an overpayment in excess of €169,000. The second case resulted in an overpayment in excess of €117,000.

Case 3

In this case the partner of a target had her claim to One Parent Family Payment reviewed. During a search operation, it was discovered that she was living as a family unit with her partner. After several interviews her claim to One Parent Family Payment was disallowed and an overpayment in excess of €105,000 was assessed against her.

Case 4

During a review of a proceeds of crime investigation, it was discovered that no action was taken in relation to a review of an individual’s social welfare entitlements at that time. He had been in receipt of Jobseekers Allowance during the period 2007 to 2010 and had been requested to attend for interview but failed to attend. Correspondence was entered into with his solicitor who was outside this jurisdiction. He failed to

provide bank accounts details and income from self-employment. As a result of this investigation, an overpayment in excess of €32,000 was assessed against him. He is currently making weekly repayments to the Department of Employment Affairs and Social Protection.

Section 5(1)(d) of the Act 1996

Case 1

A Section 5(1)(d) case was referred to the Bureau because a physical threat was made against a local Social Welfare Inspector by an individual. An investigation was carried out by a Social Welfare Bureau Officer into the individual’s entitlement to Jobseekers Allowance. As a result of this investigation, it was discovered that the individual was cohabiting with his partner who was in paid employment. Their two children also resided with them and he cared for the children while his partner was at work. These facts had never been disclosed to the Department of Employment Affairs and Social Protection. A revised means assessment was carried out on the individual for the period of the investigation taking into account his partner’s means. This resulted in an overpayment being assessed against him of over €19,000. The individual did not appeal this decision.

Part Five

Social Welfare actions by the Bureau

Table 1: Social Welfare Savings

Scheme Type	2016 Saving €	2017 Saving €
Child Benefit	-	23,800.00
Carers Allowance	47,695	-
Disability Allowance	25,568	52,496.00
Jobseekers Allowance	106,578	173,802.80
One-parent family payment	90,141	167,606.40
*BASI	-	53,478.40
Totals	269,982	471,183.60

Table 2: Social Welfare Overpayments

Scheme Type	2016 Overpayment €	2017 Overpayment €
Child Benefit	-	10,960.00
Carers Allowance	161,258	30,565.11
Disability Allowance	149,606	117,389.10
Jobseekers Allowance	660,543	696,999.19
One-parent family payment	81,379	468,190.30
*BASI & Other	1,375	261,370.33
Totals	1,054,161	1,585,474.00

Table 3: Social Welfare Recovered

Scheme Type	2016 Recovered €	2017 Recovered €
Child Benefit	-	300.00
Carers Allowance	41,665	25,795.33
Disability Allowance	50,487	77,212.60
Jobseekers Allowance	153,425	156,424.27
One-parent family payment	50,853	59,616.79
Other	1,000	371.32
Totals	297,430	319,720.31

*A Basic Supplementary Welfare Allowance (commonly referred to as BASI) provides a basic weekly allowance to eligible people who have little or no income.

Part Six

Notable investigations of the Bureau

Introduction

Arising from investigations conducted by the Bureau, pursuant to its statutory remit, a number of criminal investigations were conducted and investigation files were submitted to the Director of Public Prosecutions (hereinafter referred to as “the DPP”) for direction as to criminal charges.

During 2017, three files were submitted to the DPP for direction.

Investigations dealt with during 2017

Case 1

As a result of a referral from the Office of the Revenue Commissioners, an investigation was carried out into the tax affairs of five related families from the South East Region.

The actions of the Bureau resulted in the raising of tax assessments totalling €3.8m against thirteen family members. The preparation of the assessments are progressing and will be served on the individuals in early 2018.

Case 2

As part of the Bureau's action in the border region, they targeted an individual who is part of an Organised Crime Gang (OCG) suspected to be involved in the smuggling of cigarettes into Ireland. The actions of the Bureau resulted in the granting of orders under Sections 3 & 7 of the PoC Act over €550,000.

Case 3

In targeting the activities of an individual involved in the sale and supply of controlled drugs in the East and West, the actions of the Bureau resulted in the first ever seizure in law enforcement worldwide of access to a “Brain Wallet” and seized its contents of Cryptocurrency Bitcoin with a value in excess of €800,000 (as at 31/12/2017).

Case 4

Investigations commenced into the targeting an OCG based in the South East. The members of this OCG are suspected to be involved in the commission of burglaries including aggravated burglaries both in this jurisdiction and in Europe.

Orders under Sections 3 & 7 of the PoC Act were obtained on a 151 Audi A3 vehicle. The Bureau is awaiting a hearing for an order under Section 3 of the PoC Act on two Mercedes vehicles valued at approximately €62,000.

Case 5

Investigations commenced into targeting an OCG based in Dublin. The members of this OCG were suspected of using secondhand car dealerships to conceal and launder the proceeds of their criminal activity.

In June 2017, the Bureau conducted searches at twenty business premises connected to this OCG, which resulted in sixteen vehicles being seized and €322,393 being frozen in financial accounts.

Part Six

Notable investigations of the Bureau

Operation Thor

Operation Thor is an anti-crime strategy launched by An Garda Síochána on the 2nd November 2015. The focus of Operation Thor is the prevention of burglaries and associated crimes throughout Ireland, using strategies which are adapted for both rural and urban settings.

The Bureau supports “Operation Thor” through the identification and seizing of the proceeds of suspected criminal activity identified in the course of “Operation Thor”. The Bureau also supports “Operation Thor Days of Action” by providing Bureau Officers to Divisions for such days of action, where required.

CAB Investigations targeting Thor Targets have resulted in actions being taken by the Bureau under the PoC and Social Welfare legislation.

DPP v. Thomas Murphy

Thomas Murphy appealed his conviction by the Special Criminal Court on 17th December 2015 on nine offences alleging that, being a chargeable person, he failed to make Income Tax returns for the years between 1996 and 2004. Counts 1 to 4 in the indictment alleged he failed to make the returns without reasonable excuse contrary to Section 10 of the Finance Act 1988. Counts 5 to 9 were brought under Section 951 of the TCA 1997 and alleged the accused failed to make the returns.

The accused was sentenced to 18 months imprisonment on each count to run concurrently. Having heard the appeal, the court dismissed the appeal against conviction.

The full text of the decision in *DPP v. Murphy* is available at www.courts.ie or www.bailii.org/ie/cases/IECA/2017/CA6.html.

Part Seven

Significant Court judgments during 2017

During 2017, written judgments were delivered by the courts in the following cases:

1. CAB v. Darren Byrne (High Court Unreported, 20th January 2017)
2. Murphy & Anor v. Gilligan [2017] IESC 3 (1st February 2017)
3. Jackson Way v. CAB [2017] IEHC 138 (24th February 2017)
4. CAB v. Michael Stokes & Anor (High Court Unreported) (20th February 2017)
5. Criminal Assets Bureau v. J.McN [2017] IESC 30 (25th May 2017)
6. CAB v. Edward McCarthy & Ors [2017] IEHC 139 (3rd March 2017)
7. John Tobin v. CAB [2017] IESC 825

Murphy & Anor v. Gilligan

1st February 2017, Supreme Court: Denham C.J., McKechnie J., MacMenamin J., Laffoy J., Dunne J. [2017] IESC 3

Proceeds of crime – Proceeds of Crime Act, 1996 – ECHR – Proceeds of Crime Act, 1996 – Sections 2, 3 & 4

JUDGMENT OF MS. JUSTICE DUNNE DELIVERED THE 1ST DAY OF FEBRUARY, 2017

There are a number of appeals before this court brought by the defendants/appellants in the proceedings. I will refer to them collectively as “the Gilligan’s” but if the context demands, I will refer to them individually. As is evident from the title of these proceedings, the proceedings arise from a series of applications made by the

plaintiff/respondent, the then Chief Superintendent, Michael F. Murphy, who, for ease of reference, will be referred to as Mr Murphy or, where more appropriate to describe the body to which he belonged, as the Criminal Assets Bureau (“CAB”).

The Gilligan’s have appealed three judgments of the High Court (Feeney J.), the first of which was delivered on the 27th January 2011 and two further judgments delivered on the 20th December 2011. The judgment of the 27th January 2011 ([2011] IEHC 62) concerned applications brought by each of the Gilligan’s pursuant to Section 3(3) of the Proceeds of Crime Act 1996 (hereinafter referred to as the Act of 1996). The next judgment of the 20th December 2011 ([2011] IEHC 464) was in respect of Section 4 applications brought by CAB in respect of properties owned by the Gilligan’s and the final judgment related to a challenge to the Act of 1996 on grounds based on the European Convention on Human Rights in proceedings brought by Geraldine Gilligan and John Gilligan. It is relevant to point out that John Gilligan previously brought proceedings challenging the constitutionality of the Act of 1996. Those proceedings were heard jointly with other proceedings and were the subject of an appeal to the Supreme Court which is reported as *Murphy v. G.M.* [2001] 4 IR

113. Subsequently, a further challenge was brought to the Act of 1996 by Geraldine Gilligan and John Gilligan challenging its validity and seeking to have declarations made that all or parts of Section 3 of the Act of

Part Seven

Significant Court judgments during 2017

1996 were repugnant to the Constitution together with a claim that the Act of 1996 was incompatible with the European Convention on Human Rights within the meaning of Section 5 of the European Convention on Human Rights Act 2003. Given that it was accepted by all parties concerned that the issues as to constitutionality had been previously determined by the Supreme Court those proceedings proceeded solely on the basis of the arguments in relation to the Convention claims. Feeney J., in his second judgment of the 20th December 2011 ([2011] IEHC 465), dismissed the claims of John and Geraldine Gilligan relating to the Convention.

The final matters before this court relate to motions issued on behalf of the Gilligan's in which they have sought to set aside a judgment of this court delivered on 19th December 2008 ([2009] 2 IR 271) which was delivered at an earlier stage of these proceedings and I will refer to those motions collectively as the "Greendale" motions.

At the heart of this appeal is the contention on behalf of the Gilligan's that there was no trial of the issue as to whether or not the property at issue in these proceedings was acquired directly or indirectly with the proceeds of crime when the operative Section 3 order was made freezing the

property in the hands of the Gilligan's pursuant to the Act of 1996. As a result, it is contended that there was no Section 3 order; thus, the hearing before Feeney J. was without jurisdiction and could not stand and ultimately no disposal order under the Act of 1996 could be made in respect of the property.

The judgment of Feeney J. of the 27th January 2011

I propose to consider the Greendale motions to begin with. In order to understand the basis upon which the Greendale motions have been brought it is necessary to look briefly at the judgment of Feeney J. delivered on the 27th January 2011 which dealt with the four separate applications brought by the Gilligan's pursuant to Section 3(3) of the Act of 1996. As was pointed out by Feeney J. at para. 1.3 of his judgment:

"Applications under Section 3(3) of the [Act of 1996] can be taken by persons affected by a Section 3 order where a Section 3 order is in force."

He relied on the decision of the Supreme Court at an earlier stage in these proceedings in the case of *Murphy v. Gilligan* [2009] 2 IR 271. In particular he made reference at para. 1.3 of his judgment as follows:

"Applications under Section 3(3) of the [Act of 1996] can be taken by persons affected by Section 3 order where a Section 3 order is in force. As was set out in the

judgment of Geoghegan J. in the recent Supreme Court decision (at 294):

‘It is not in dispute and cannot be in dispute that an operative order under Section 3(1) was and remains in force.’”

Feeney J. went on, at para. 1.4, to say:

“It is the existence of that operative order which provides this court with jurisdiction to consider an application under Section 3(3) which is predicated upon such application being taken in circumstances where an interlocutory order, that is a Section 3(1) order, is in force. That position was identified in the judgment of Geoghegan J. in the Supreme Court when, in obiter dicta (at 298), Geoghegan J. stated:

“... I am firmly of the view that an application under Section 3(3) can still be brought and that that might well be a more appropriate remedy than raising the questions in the Section 4 application but that is all a matter for the defendants’ advisers.”

Thus, it can be seen that the jurisdiction of the High Court to deal with an application pursuant to Section 3(3) of the Act of 1996 was predicated on there being in place an order pursuant to

Section 3(1) of the Act of 1996. Absent such a valid order, no proceedings could be heard pursuant to Section 3(3) of the Act of 1996. The Gilligan’s having failed to obtain an order pursuant to Section 3(3) of the Act of 1996, it followed that CAB could then proceed to look for an order for the forfeiture of assets pursuant to Section 4 of the Act of 1996. At the hearing before this court, it was conceded on behalf of the Gilligan’s that unless it can be demonstrated on their behalf that the operative Section 3(1) order under the Act of 1996 is invalid, there will be an insurmountable hurdle to their appeals from the orders of Feeney J., in particular that of the order made on 27th January 2011. In order to displace the Section 3(1) order it will be necessary to demonstrate that the decision of the Supreme Court in 2008 should be rescinded or varied.

It goes without saying that a final judgment or order of the Supreme Court is not easily rescinded or varied. The decision of the Supreme Court in *Re Greendale Developments Limited (No. 3)* [2000] 2 I.R. 514 set out the position as to setting aside a judgment of the Supreme Court. Thus, the Gilligan’s have brought a series of “Greendale” motions seeking to rescind the final judgment of the Supreme Court being the judgment of the Supreme Court reported at [2009] 2 IR 271.

In order to assist in understanding the arguments that have been made on the appeals before this court, it would be helpful in the first instance to set out the relevant provisions of the Act of 1996:

Section 2

- “2(1) Where it is shown to the satisfaction of the court on application to it ex parte in that behalf by a member or an authorised officer -*
- (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 £10,000,*
- the court may make an order (‘an interim order’) prohibiting the person 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 during the period of 21 days from the date of the making of the order.*
- (2) An interim order -*
- (a) may contain such provisions, conditions and restrictions as the Court considers necessary or expedient, and*
 - (b) shall provide for notice of it to be given to the respondent and any other person who appears to be or is affected by it unless the Court is satisfied that it is not reasonably possible to ascertain his, her or their whereabouts.*
- (3) Where an interim order is in force, the court, on application to it in that behalf by the respondent or any other person claiming ownership of any of the property concerned may, if it is shown to the satisfaction of the Court that -*
- (a) the property concerned or a part of it is not property to which subparagraph (i) or (ii) of subsection (1)(a) applies, or*
 - (b) the value of the property to which those subparagraphs apply is less than £10,000,*
- discharge or, as may be appropriate, vary the order.*
- (4) The court shall, on application to it in that behalf at any time by the*

- applicant, discharge an interim order.
- (5) Subject to subsections (3) and (4), an interim order shall continue in force until the expiration of the period of 21 days from the date of its making and shall then lapse unless an application for the making of an interlocutory order in respect of any of the property concerned is brought during that period and, if such an application is brought, the interim order shall lapse upon -
- application to the applicant,
- (b) in case the application is under subsection (4), by the applicant to the respondent unless the Court is satisfied that it is not reasonably possible to ascertain his or her whereabouts,
- and, in either case, to any other person in relation to whom the Court directs that notice of the application be given to him or her.

Section 3

- (a) the determination of the application,
- (b) the expiration of the ordinary time for bringing an appeal from the determination,
- (c) if such an appeal is brought, the determination or abandonment of it or of any further appeal or the expiration of the ordinary time for bringing any further appeal,
- whichever is the latest.
- (6) Notice of an application under this section shall be given -
- (a) in case the application is under subsection (3), by the respondent or other person making the
- 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

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may be, the total value of the property referred to in both subparagraphs (i) and (ii) of paragraph (a) is not less than £10,000,

the court shall 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 £10,000:*

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

(2) An interlocutory order -

- (a) may contain such provisions, conditions and restrictions as the Court considers necessary or expedient, and*
- (b) shall provide for notice of it to be given to the*

respondent and any other person who appears to be or is affected by it unless the Court is satisfied that it is not reasonably possible to ascertain his, her or their whereabouts.

(3) Where an interlocutory order is in force, the Court, on application to it in that behalf at any time by the respondent or any other person claiming ownership of any of the property concerned, may, if it is shown to the satisfaction of the Court that the property or a specified part of it is property to which paragraph (1) of subsection (1) applies, or that the order causes any other injustice, discharge or, as may be appropriate, vary the order.

(4) The Court shall, on application to it in that behalf at any time by the applicant, discharge an interlocutory order.

(5) Subject to subsections (3) and (4), an interlocutory order shall continue in force until -

- (a) the determination of an application for a disposal order in relation to the property concerned,*
- (b) the expiration of the ordinary time for bringing an appeal from that determination,*
- (c) if such an appeal is brought, it or any further appeal is determined or abandoned or the ordinary time for bringing*

any further appeal has expired,

whichever is the latest, and shall then lapse.

(6) Notice of an application under this section shall be given -

(a) in case the application is under subsection (1) or (4), by the applicant to the respondent, unless the Court is satisfied that it is not reasonably possible to ascertain his or her whereabouts,

(b) in case the application is under subsection (3), by the respondent or other person making the application to the applicant,

and, in either case, to any other person in relation to whom the Court directs that notice of the application be given to him or her.

(7) Where a forfeiture order, or a confiscation order, under the Criminal Justice Act, 1994, or a forfeiture order under the Misuse of Drugs Act, 1977, relates to any property that is the subject of an interim order, or an interlocutory order, that is in force, ('the specified property'), the interim order or, as the case may be, the interlocutory order shall -

(a) if it relates only to the specified property, stand discharged, and

(b) if it relates also to other property, stand varied by the exclusion from it of the specified property.

Section 4

(1) Subject to subsection (2), where an interlocutory order has been in force for not less than 7 years in relation to specified property, the Court, on application to it in that behalf by the applicant, may make an order ('a disposal order') directing that the whole or, if appropriate, a specified part of the property be transferred, subject to such terms and conditions as the Court may specify, to the Minister or to such other person as the Court may determine.

(2) Subject to subsections (6) and (8), the Court shall make a disposal order in relation to any property the subject of an application under subsection (1) unless it is shown to its satisfaction 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.

(3) The applicant shall give notice to the respondent (unless the Court is satisfied that it is not reasonably possible to ascertain his or her whereabouts), and to such other (if any) persons as the

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Court may direct of an application under this section.

for such period not exceeding 2 years as it considers reasonable.

(4) *A disposal order shall operate to deprive the respondent of his or her rights (if any) in or to the property to which it relates and, upon the making of the order, the property shall stand transferred to the Minister or other person to whom it relates.*

(8) *The Court shall not make a disposal order if it is satisfied that there would be a serious risk of injustice.*

Section 8

(5) *The Minister may sell or otherwise dispose of any property transferred to him or her under this section, and any proceeds of such a disposition and any moneys transferred to him or her under this section shall be paid into or disposed of for the benefit of the Exchequer by the Minister.*

(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, in oral evidence,*

(6) *In proceedings under subsection (1), before deciding whether to make a disposal order, the Court shall give an opportunity to be heard by the Court and to show cause why the order should not be made to any person claiming ownership of any of the property concerned.*

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,*

(7) *The Court, if it considers it appropriate to do so in the interests of justice, on the application of the respondent or, if the whereabouts of the respondent cannot be ascertained, on its own initiative, may adjourn the hearing of an application under subsection (1)*

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 £10,000, 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.

- (2) *The standard of proof required to determine any question arising under this Act shall be that applicable to civil proceedings.*
- (3) *Proceedings under this Act in relation to an interim order shall be heard otherwise than in public and any other proceedings under this Act may, if the respondent or any other party to the proceedings (other than the applicant) so requests and the Court considers it proper, be heard otherwise than in public.*
- (4) *The Court may, if it considers it appropriate to do so, prohibit the publication of such information as it may determine in relation to proceedings under this Act, including information in relation to applications for, the making or refusal of and the contents of orders under this Act and the persons to whom they relate.*
- (5) *Production to the Court in proceedings under this Act of a*

document purporting to authorise a person, who is described therein as an officer of the Revenue Commissioners, to perform the functions conferred on authorised officers by this Act and to be signed by a Revenue Commissioner shall be evidence that the person is an authorised officer.”

The provisions of the Act of 1996 set out above are set out in the form in which the Act was originally enacted. There have been amendments to the Act since 1996 which are not material to the arguments before the Court. Finally I should make brief reference to s. 6 of the Act which allows applications to be made to Court by a respondent for reasonable living and other necessary expenses (including legal expenses in or in relation to proceedings under this Act incurred or to be incurred by or in respect of the respondent and his or her dependants). The Court may make an order including such conditions and restrictions as considered necessary. When referring to a Section 3 order in the course of this judgment, I am referring to an order pursuant to Section 3 (1). I have used this term as that is the term used to describe such orders in many of the judgments and affidavits referred to in the course of this judgment.

Background

It is necessary to describe the history of the proceedings in some detail. The Proceeds of Crime Act 1996 was enacted on the 4th August, 1996. Its long title described it as “An Act to enable the High Court, as respects the proceeds of crime, to make orders for the preservation and,

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where appropriate, the disposal of the property concerned and to provide for related matters". There was no provision initially in the Rules of the Superior Courts ("RSC") as to how proceedings in the High Court under the Act of 1996 should be conducted. For that reason, in default of any other procedure provided for in the RSC, proceedings in this case were commenced by plenary summons issued on the 21st of November, 1996 (1996 No. 10143P) in which the plaintiff's claim was for an order pursuant to Section 2 and thereafter pursuant to Section 3 of the Proceeds of Crime Act 1996 prohibiting the defendants with such other person as the Court might order from disposing of or otherwise dealing with the property described in the schedule thereto or such portion thereof as the Court might order. Ancillary relief was sought including an order pursuant to Section 7 appointing a receiver to take possession of such portion of the property as the Court might order and an order pursuant to Section 9 of the Act requiring the defendants to swear and deliver an affidavit specifying all property of which the defendants were in possession or control and the income and sources of income of the defendants during the past ten years. The plenary summons contained a schedule setting out a description of the property sought to be captured by the orders sought consisting of nine properties and five motor cars.

The plenary summons contains a number of endorsements indicating that it was served personally on Treacy Gilligan on the 27th November, 1996, the 27th November, 1996; on Darren Gilligan personally on the same date; on the 25th

November, 1996 on Geraldine Gilligan by handing a true copy to her solicitor, Michael Hanahoe and thereafter the plenary summons was served on John Gilligan on the 27th November, 1996 at Her Majesty's Prison, Belmarsh. He had been arrested on the 6th October, 1996 in Heathrow Airport in possession of £300,000 in cash. He appeared at Uxbridge Magistrates Court on a charge of concealing or transferring the proceeds of drug trafficking contrary to Section 4 of the Drug Trafficking Act 1994 in that jurisdiction and thus was in custody at the time when the plenary summons was served.

On the day that the plenary summons was issued, (the 21st November 1996), an interim order was made, on an ex parte application, pursuant to the provisions of Section 2 of the Act of 1996 restraining the defendants until after the 12th December, 1996 from disposing of or dealing with the property or any part of it set out in the schedule. Mr Murphy was also given liberty to serve a notice of motion for "*interlocutory reliefs*" returnable on the 5th December, 1996.

The matter then came before the President of the High Court on the 5th December, 1996 on foot of the notice of motion which was grounded on an affidavit sworn by Mr Murphy on the 21st November, 1996. At that hearing, the only member of the Gilligan family to appear in Court was Geraldine Gilligan. The order made on that date recites the fact that there was no attendance by the first, third or fourth named defendants. The Court on that date made an order pursuant to Section 3 of the Proceeds of

Crime Act. The Court also adjourned the motion for further hearing to Thursday, 19th December, 1996.

A further notice of motion was listed for hearing on the 19th December, 1996 in which a number of orders were sought including an order pursuant to Section 7 of the Act of 1996 for the appointment of a receiver of the property and an order pursuant to Section 9 of the Act of 1996. In addition, an order was sought seeking liberty to amend the plenary summons to add a prayer for relief in the following terms:

“An order under Section 4 of the Proceeds of Crime Act 1996 directing that the whole or if appropriate such specified part of the property as set out in the schedule in this plenary summons be transferred to the Minister of Finance or to such other person as the court may direct.”

On that day, the 19th December, 1996, an appearance was entered by Mr Paul McNally, solicitor, on behalf of John Gilligan. An appearance had been entered the previous day on behalf of Geraldine Gilligan by Michael E. Hanahoe & Company, Solicitors. On the 19th December, 1996, the President of the High Court made a further order pursuant to Section 3 of the Proceeds of Crime Act 1996 in similar terms as previously and further ordered that the motion stand adjourned generally with liberty to re-enter. It is noted in the order that counsel for the first named defendant, counsel for the second named defendant and counsel for the fourth named defendant

were represented and heard at the hearing of the motion on the 19th December, 1996. There was no attendance in court by or on behalf of the third named defendant. The notice of motion listed for that date seeking the appointment of a receiver together with other relief was then adjourned to the 24th January.

A series of affidavits were sworn by Darren Gilligan and Geraldine Gilligan leading up to that date and in respect of a motion issued by them pursuant to s. 6 of the Act of 1996 for the purpose of allowing them to discharge reasonable expenses in relation to the proceedings incurred or to be incurred by them. That motion was returnable for the 30th January, 1997. An affidavit was also sworn on behalf of Treacy Gilligan in relation to that application although the notice of motion stated that the application was being made on behalf of Geraldine and Darren Gilligan. In her affidavit, Treacy Gilligan also sought an order under s. 6 of the Act of 1996. (An appearance had been entered on her behalf by Solicitors, Michael E. Hanahoe & Company, on the 29th January, 1997).

I have been unable to locate a copy of any order made on the 24th January, 1997 but that date is notable for one aspect of the matter. (The transcript of that hearing is to be found at Tab 32, Book 1 Greendale proceedings). In the course of that hearing a number of parties were present and that appears to have been the first occasion on which the issue of reasonable expenses in respect of legal costs were raised by any of the Gilligan's. As mentioned already a notice of motion

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was issued returnable for the 30th January in respect of the formal application under Section 6 of the Act of 1996 in that respect. There was also representation by a Mr Grimes who purported to be a receiver of the properties at issue in the proceedings. Reference was made to a consultation which had taken place with John Gilligan the previous evening between Mr Langwallner, counsel on behalf of John Gilligan, which took place in Belmarsh Prison. In the course of the hearing, Mr Peter Charleton, S.C. (as he then was), on behalf of CAB, referred to the possibility of an argument being made to the effect that there should have been oral evidence heard by the Court in accordance with Section 8 of the Act. He referred at page 8 of the transcript (page 204 of the Gilligan motion book (Part 3)) to the fact that there was an argument to be made that in the absence of oral evidence the Court would not have jurisdiction to grant an interlocutory order. The matter was adjourned on that date without hearing any oral evidence.

Costs hearings

The notice of motion issued on the 28th January, 1997 in respect of the application pursuant to s. 6 of the Act of 1996 came on for hearing before the President on the 30th January, 1997. All of the Gilligan's with the exception of John Gilligan were represented in Court by counsel on that date. An order was made that the Gilligan's recover *"their reasonable costs to be taxed in default of agreement of drafting affidavits in support of their application for an order sought on the notice of motion and that such costs be discharged from the proceeds of sale of the properties or any*

of them referred to in the schedule" and the matter was then adjourned to the 6th February, 1997. Thereafter an order was made on the 7th February, 1997 in which the President of the High Court made what were subsequently described as provisional orders in relation to costs. That order was the subject of an appeal to the Supreme Court.

It is interesting to note in passing that a notice of intention to cross-examine deponents at trial was served on behalf of CAB in respect of Geraldine Gilligan, Darren Gilligan and Treacy Gilligan in respect of the affidavits sworn by them in the course of the Section 6 application.

In addition an affidavit was sworn on behalf of John Gilligan on the 13th February, 1997 by his solicitor, Mr Paul McNally. In the course of that affidavit Mr McNally set out a number of details in relation to the various properties referred to in the schedule to the plenary summons. In his conclusion he asked for an order discharging the interlocutory injunctions granted on the 21st November and refusing applications for the appointment of a receiver over John Gilligan's assets on the grounds that those assets were purchased from legitimate funds and from gambling winnings. It was also asserted that the *"injunctions granted herein . . . and the appointment of a receiver over . . . John Gilligan's assets constitute an infringement of the first named defendant's constitutional and other rights"*.

A further affidavit was sworn by Mr McNally on the 13th February, 1997

seeking to have an order discharging the orders made on the 21st November and an order refusing the application to appoint a receiver pending the final determination of the London High Court proceedings concerning Mr Gilligan.

It would be appropriate at this stage to mention the order made by the Supreme Court on the 13th May, 1997 on the appeal from the orders of the President of the High Court made in relation to the application pursuant to Section 6 of the Act of 1996. Counsel for the second, third and fourth named defendants were present for that hearing and the appeal was allowed in full and the matter was remitted back to the President of the High Court for further consideration “on such evidence as he considers appropriate”. I will refer to the judgment on that appeal later in the course of this judgment.

The final Section 3 order

What has been referred to as the third or final Section 3 order was made on the 16th July, 1997 in the High Court (Moriarty J.). It is apparent from the said order that John Gilligan and Geraldine Gilligan were represented at the hearing of the application made that day. The order records the fact that an order pursuant to Section 3 of the Proceeds of Crime Act 1996 was made prohibiting the defendants or any of them “*until further order of the Court*” from disposing or otherwise dealing with the whole or if appropriate a specified part of the property set forth in the schedule or diminishing its value otherwise than by order of the Court. Oral evidence was given on that date on behalf of CAB. The

proceedings were then adjourned until Monday, 28th July at 10.30 a.m.

It is contended on behalf of the Gilligan’s that all parties understood the orders made pursuant to Section 3 to be interlocutory orders and not final orders. No doubt their contention is based on a number of factors including the description of orders under Section 2 of the Act as “interim orders” and in respect of Section 3 the description of orders as “interlocutory orders”; the fact that the proceedings were commenced, in the absence of any Rules of the Superior Courts providing otherwise, by plenary summons and the fact that the order made on the 16th July, 1997 provided that it was to continue until further order. Obviously, in the light of subsequent decisions and in particular the decision of the Supreme Court in the case of *F. McK v. A.F.* [2002] 1 IR 242, (the McKenna case) such an understanding could not have survived the decision of the Supreme Court in the McKenna case which made it clear that an order made pursuant to Section 3 is not an interlocutory order although it is so described in Section 3 of the Act of 1996 but is a final order. I will discuss this matter further in the course of the judgment. An issue has been raised as to the validity of the order made on the 16th July, 1997 given that this was the third occasion on which an order pursuant to Section 3(1) of the Act of 1996 had been made and I will also refer to this issue subsequently.

Further steps

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There have been many other applications and proceedings over the course of this case and related proceedings and I will refer to a number of those. The next step in these proceedings was an application made by notice of motion on the 28th July, 1997. That was a further application for an order pursuant to the provisions of Section 6 of the Act of 1996 for the purpose of allowing the Gilligan's to discharge reasonable expenses in relation to the proceedings out of the proceeds of the properties referred to in the proceedings and, in effect, this application was made possible by the earlier decision of the Supreme Court on the 13th May 1997. The Notice of Motion in that regard was mentioned to the Court on the 16th July, 1997 and given a return date of the 28th July, 1997.

The motion listed for the 28th July, 1997 was brought on behalf of the Gilligan family with the exception of John Gilligan. In respect of that motion it appears that a number of affidavits were filed, namely, five affidavits sworn by Geraldine Gilligan, two affidavits sworn by Darren Gilligan and a further affidavit sworn by Treacy Gilligan. An affidavit sworn by Geraldine Gilligan on the 28th July, 1997 refers to the previous proceedings and affidavits sworn in connection with the previous application pursuant to Section 6 of the Act of 1996 heard by the President of the High Court and the subject of the successful appeal to the Supreme Court. In essence the relief sought was to have available to her assets presently vested in her which were made the subject of the Section 3 order in order to fund a defence to the proceedings. Orders were made on foot of the notice

of motion on the 31st July, 1997. It will be appropriate simply to refer briefly to the orders made in respect of Geraldine Gilligan as the orders made in respect of Darren and Treacy Gilligan were in similar terms. It was provided that there was to be no payment for costs at the present time. It was then provided that if the property referred to in the first schedule of the order be sold the costs of defending these proceedings including any previous applications in this Court and in the Supreme Court should be paid out of the proceeds of the sale, the judge hearing the proceedings to measure them or direct their taxation and the basis on which they should be taxed. Should the property not be sold then liberty is given to re-enter the motion to order that the property be charged.

A further notice of motion was issued by Geraldine Gilligan returnable for the 10th November, 1997 in which she sought the approval of the incurring of expenditure on accountancy services. In addition she also sought an order requiring Mr Murphy to deliver a statement of claim. In correspondence preceding the issue of that motion, it is interesting to note a letter exhibited in an affidavit of Mr Michael Hanahoe sworn to ground the motion and dated the 7th October, 1997 from the office of the Chief State Solicitor. In that letter it is stated as follows:

"It would appear that proceedings under the Proceeds of Crime Act of 1996 do not contemplate the delivery of the statement of claim. All remedies under that Act appear to be available by way of motion. If your client wishes to bring the

matter before the Court at this stage it would appear that the appropriate manner to do so would be by way of a motion seeking relief pursuant to Section 3, subs.

(3) of the Proceeds of Crime Act 1996.”

This would appear to be the first reference to the possibility of bringing the matter back before the Court by way of an application pursuant to Section 3, subs. (3) of the Act of 1996. In the meantime a number of affidavits were sworn by Mr Murphy and on his behalf in relation to concerns over the use of some of the vehicles referred to in the schedule to the Section 3 order and in relation to the properties listed in the schedule. The concerns related to the use of the vehicles without insurance or whilst those using them were disqualified from driving and secondly the insurance status of some of the properties.

An order was made by the High Court (Shanley J.) on the 19th December, 1997 which refers to the plaintiff's notice of motion issued on the 5th December, 1996 and the motion issued on behalf of the second, third and fourth named defendants filed on the 7th November, 1997 which is the motion returnable for the 10th November, 1997. The order recites that having heard counsel for the plaintiff and counsel for the second, third and fourth named defendants respectively *“It is ordered that the fees of the defendants' auctioneers expressed to be in the region of £1,000 be charged on the property of the said defendants as attached in the schedule to the order”*. The order then recites as follows:

“It is further ordered that the motions be adjourned to Friday the 16th day of January 1998 with consent to the interim orders continuing.”

A notice of intention to cross-examine a deponent was served by the Chief State Solicitor in respect of Mrs Gilligan on the 12th January, 1998 in relation to affidavits sworn by her on the 25th July, 1997 and the 28th July, 1997.

A motion was then listed on behalf of Mr Murphy returnable for the 16th January, 1998. A series of orders were sought amending clerical errors in certain items described in the schedule to the order of 16th July, 1997 together with similar relief in relation to the various properties described in the schedules on the plenary summons and in various orders. In practical terms nothing turns on this notice of motion. An order was made on foot of that notice of motion on the 30th January, 1998 which noted that there was no objection by the first named respondent or the second named respondent to the making of orders in terms of the notice of motion. The solicitor for the third named and fourth named respondent was present.

A further notice of motion was then issued on behalf of Darren and Treacy Gilligan seeking relief pursuant to Section 6 of the Act of 1996. The notice of motion was returnable for the 13th February, 1998 and was grounded on affidavits of Darren and Treacy Gilligan. That notice of motion resulted in an order being made whereby the High Court (Shanley J.) certified for legal aid in respect of Darren and Treacy Gilligan. It was also provided

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that Garrett Sheehan & Company, Solicitors, be their solicitors and to allow him to nominate junior and senior counsel.

A notice of motion was issued on the 26th February 1998 on behalf of Geraldine Gilligan returnable for the 6th March 1998 seeking an order dismissing the plaintiff's claim for failure to deliver a statement of claim to her within the time prescribed by the Rules of the Superior Courts or in the alternative an order dismissing the plaintiff's claim for want of prosecution.

A further notice of motion was issued on behalf of Geraldine Gilligan on the 30th March, 1998 returnable for the 3rd April of that year. In that notice of motion it was sought to amend the notice of motion dated the 26th February, 1998 by the addition of a further paragraph seeking to set aside the order of the High Court made on the 5th December, 1997 *"and all the proceedings had herein by reason of the non-compliance of the plaintiff herein with the Rules of the Superior Courts and the procedures practice therein prescribed in respect of pleadings and proceedings applicable to cases commenced by way of plenary summons and in particular failing to comply with Order 1 of the said Rules"*. A series of affidavits were sworn by Geraldine Gilligan dealing with matters such as the question of the appointment of a receiver, a relief sought by Mr Murphy in the proceedings, issues relating to the insurance of various properties and further details as to persons in possession of various properties. In addition Geraldine Gilligan was seeking discovery of documents in

relation to the contentions and averments of Mr Murphy in the proceedings. Discovery was also an issue raised on behalf of Darren and Treacy Gilligan as can be seen from an affidavit of their solicitor, Richard English, sworn on the 2nd April, 1998. Mr Murphy, in response to that affidavit, objected to the making of discovery in his affidavit sworn on the 30th April, 1998. He also dealt with the issues raised by Geraldine Gilligan in a further affidavit sworn by him on the same date. It is interesting to note a number of comments made by Mr Murphy in the course of his affidavit. On the issue of discovery, he indicated that his counsel had indeed confirmed to counsel for Geraldine Gilligan that *"no voluntary discovery will be made . . ."*. He went on to say that she understood the case being made against her and against her interests and seems unwilling to provide her own legal advisers with meaningful instructions which might enable them to consider whether or not she was in a position to bring an application pursuant to Section 3(3) of the Act of 1996. He also took issue with an averment of Geraldine Gilligan relating to her *"lack of legal representation"* and pointed out that she was able to instruct senior and junior counsel and her solicitors to act on her behalf in relation to Revenue proceedings in the High Court in November 1996 and that she remained in the same position as of that date. He argued that the application for discovery was an attempt to defer and delay the completion of the appointment of the receiver in the proceedings.

An order was made on the 9th July 1999 by the High Court (O'Higgins J.) refusing

the motion brought on behalf of Darren and Treacy Gilligan seeking discovery.

Subsequently on the 16th July 1999 O'Higgins J. made orders dismissing two notices of motion brought by Geraldine Gilligan seeking to have the proceedings dismissed for failure to deliver a statement of claim or alternatively for want of prosecution and also refused the application made by her for discovery. That order was then the subject of an appeal brought by Geraldine Gilligan to the Supreme Court.

It is worth bearing in mind that the various applications being made in relation to the appointment of a receiver, issues as to insurance concerns on the part of CAB, discovery and provision of legal aid or funding were taking place before the decision in the McKenna case referred to previously. Bearing that in mind, it is useful to consider the observations of Murphy J. in delivering the judgment of the Supreme Court (Murphy v. Gilligan (Unreported, Supreme Court, 13th May 1997, Murphy J.)) in relation to the appeal from the decision of the President of the High Court in respect of the first order made in respect of Section 6 of the Act of 1996 when the Gilligan's were seeking orders in relation to the funding of their costs. In his judgment in that matter Murphy J. described an order made pursuant to Section 3 of the Act of 1996 in the following terms (at p. 4):

An order so granted is described in Section 3 of the Act of 1996 as 'an interlocutory order'. The pattern of conventional civil proceedings in the High

Court might lead one to anticipate that as soon as practicable after the making of the interlocutory order, and subject to the completion or disposal of any formal or procedural matters, the issue as to whether the particular property did or did not constitute the proceeds of crime or was or was not acquired with property that constituted proceeds of crime would be determined in a plenary hearing before the High Court. That is not the case. The order described in the [Act of 1996] as 'an interlocutory injunction', unless revoked by the court, continues in full force and effect for not less than seven years from the granting thereof and until a 'disposal order' within the meaning of Section 4 of the [Act of 1996] is made by the court on the application by the Applicant. The application for a disposal order does provide the person having possession or control with the final opportunity to show, as presumably he was unable to show in the previous 7 years, that the property in question was not tainted in the manner envisaged by the Act. But primarily the purpose and effect of the disposal order is to terminate the period of suspension and finally to deprive the respondent of any right which he or she might have in the property which would then stand transferred to the Minister for Finance or such other person as the court would determine.

During the limited period in which an interim order is in force or the lengthy period for which an interlocutory order may endure, the property the subject matter thereof remains in the possession and control of the respondent subject to the power conferred upon the Court to

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make a variety of orders for the preservation thereof. In particular the court may, whilst any such order is in force, exercise the power conferred upon it by Section 7 of the Act of 1996 to appoint a receiver to take possession of the property and, in accordance with the court's directions to manage, keep possession or dispose of or otherwise deal with such property." (italics in original)

This is a useful description of the main provisions of the Act of 1996.

At page 8 of the same judgment Murphy J. commented:

"Whilst it may not be material to the present proceedings, it is appropriate to record that counsel on behalf of the Appellant indicated that whilst his clients accepted that what may be described as a *'freezing order'* has been made in relation to the schedule property and is currently in operation in relation thereto it is intended to argue, at an appropriate stage, that an interlocutory order as the same is defined by Section 3 of the Act of 1996 has not been made having regard to the nature of the evidence tendered in support of the application therefor." (italics in original)

The observation made by Murphy J. makes it clear that the understanding of the parties to that appeal was that there would be an opportunity at a later stage (however that might arise) to challenge the underlying Section 3 order but not in

the context of a plenary hearing before the High Court as that term is usually understood. Those observations were, of course, made prior to the making of the order of the 16th July 1997. As is clear, from those comments, a party affected by a Section 3 order retained an opportunity to demonstrate that the property at issue was not the proceeds of crime in the course of an application for a disposal order pursuant to Section 4 of the Act of 1996.

The Constitutional Challenge to the Act of 1996

Another aspect of the matter which is of some interest relates to the application by Mr Murphy for the appointment of a receiver over the assets, the subject of the Section 3 order.

A hearing took place in respect of the appointment of a receiver in the High Court before Laffoy J. on the 13th February 1997. At that hearing, John Gilligan was represented by Mr David Langwallner and the other Gilligan family members were represented by Mr Adrian Hardiman, S.C. (as he then was). Mr Peter Charleton, S.C. (as he then was) appeared on behalf of Mr Murphy. It transpired at the outset of the hearing that that very day a plenary summons had been issued by John Gilligan challenging the constitutionality of the Act of 1996. Given that a constitutional challenge had been made to the Act of 1996, counsel on behalf of Mr Murphy did not seek to pursue his application that day to have a receiver appointed to sell the property at issue and retain the proceeds of sale pending a final disposal after the statutory period of seven years. The

hearing before Laffoy J. dealt instead with the time scale for the delivery of pleadings in the constitutional challenge proceedings. Counsel on behalf of the other Gilligan's supported an application to adjourn the application pursuant to Section 7 and it was clear that at that time their focus was on the appeal to the Supreme Court in relation to the application pursuant to Section 6 of the Act. It was noted in the course of the hearing that whilst there was a mechanism in the legislation for "unfreezing when a freezing order is made," it was also noted that such mechanism had not been invoked. The outcome of the hearing was that the application on behalf of Mr Murphy for the appointment of a receiver was adjourned and directions were given as to the delivery of pleadings in the constitutional action and the application before the court was then adjourned.

At this point it would be prudent to refer to the constitutional proceedings which were issued on behalf of John Gilligan. Those proceedings were heard before the High Court (McGuinness J.) commencing on the 18th March, 1997 (1997 No. 1667P). Judgment in that matter was delivered on the 26th June, 1997 and the report of the judgment is to be found at [1998] 3 IR 185. In an affidavit sworn on the 4th July 2014 in these proceedings, John Gilligan commented that "the only issue that the High Court ruled on in my constitutional challenge was whether the Proceeds of Crime Act 1996 was civil or criminal in nature". In fact, as is clear from the judgment of the High Court in that case, Mr Gilligan challenged the constitutionality of the Act in a number of

respects as is set out in page 195 of the reported judgment, namely, the claim that the Act failed to protect the right to a fair trial and the right to fair procedures by assuming without charge, indictment, trial or conviction the existence of a criminal offence and by requiring the plaintiff to prove on affidavit that he is not and was not a criminal and that his assets are not the proceeds of crime. It was contended that in compelling the plaintiff to account for his assets that the Act failed to protect his privilege against self-incrimination and his right to silence. It was also claimed that by assuming, without due process of law, that he is guilty of a criminal offence the Act fails to uphold the presumption of innocence. It was further claimed that Section 6(1) of the Act by giving the Court discretion as to whether to allow funds to be released for legal expenses was in breach of Article 40.3 of the Constitution and that the Act failed to protect the property rights of the plaintiff from unjust attack, in particular by the appointment of a receiver and the possible disposal of his assets. Reference was also made to the fact that the Act casts upon the plaintiff in those proceedings the burden of proving that he is not a criminal, thus reversing the normal burden of proof and that the Act was generally "in breach of natural justice, constitutional justice and what is described as 'constitutionalised natural justice'" (at p. 196). An issue was also raised to the effect that the Act failed to protect his rights under European Community law, Article 6 of the European Convention on Human Rights and Article 1 of the First Protocol of the European Convention on Human Rights. An amendment was also made to the

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statement of claim to add in a claim that the Act was designed to have retrospective effect and that the Act was thus in breach of Article 15.5 and other Articles of the Constitution.

One of the issues that required to be considered was whether the proceedings under the Act of 1996 were in reality the trial of a criminal offence without the procedures for such a trial. McGuinness J. concluded (at p. 224) that forfeiture proceedings such as are provided for in the Act of 1996 were civil and not criminal in nature. She also concluded that there was no constitutional bar on the determination in civil or other proceedings of matters which may constitute elements of criminal proceedings. She was of the view that the procedures set out under the Proceeds of Crime Act 1996 were not criminal in nature. To that extent she stated that the standard of proof in procedures under the Act of 1996 may permissibly, therefore, be the balance of probabilities. Accordingly she concluded (at p. 224):

“The protections afforded by Article 38.1 of the Constitution are not applicable.”

She then dealt with the question of the reversal of the onus of proof and concluded that the plaintiff’s arguments in that regard could not be sustained. She then dealt with the challenge to the Act based on the argument that it infringed the privilege against self-incrimination or the right to silence. Again she rejected the arguments of the plaintiff in those proceedings. She then dealt with the issues raised by Mr Gilligan in relation to

the provisions of Section 6 of the Act of 1996. She concluded that (at p. 235):

“Section 6(1)(a) envisages a parallel system, where the court has a discretion to release monies to provide for legal representation of a respondent. It must be presumed that the court will use this discretion in a constitutional way and that persons will not wrongfully be deprived of legal representation.”

She then dealt with the issue raised to the effect that there was an attack on the plaintiff’s right to private property. She concluded that (at p. 237):

“While the provisions of the Act may, indeed, affect the property rights of a respondent it does not appear to this court that they constitute an ‘unjust attack’ under Article 40.3.2, given the fact that the State must in the first place show to the satisfaction of the court that the property in question is the proceeds of crime and that thus, prima facie, the respondent has no good title to it, and also given the balancing provisions built into Section 3 and 4 as set out above.

This court would also accept that the exigencies of the common good would certainly include measures designed to prevent the accumulation and use of assets which directly or indirectly derive from criminal activities. The right to private ownership

cannot hold a place so high in the hierarchy of rights that it protects the position of assets illegally acquired and held.”

McGuinness J. then dealt with the claim made in relation to the contention that the Act of 1996 was retrospective in its effect and therefore in breach of Article 15.5 of the Constitution. She rejected that argument. Finally she dealt with the issue of proportionality and concluded (at p. 243) that “viewing the provisions of the Act in the light of their proportionality to the threat posed to the common good”, she was satisfied that it had not been established that the provisions of the Proceeds of Crime Act 1996 were invalid having regard to the provisions of the Constitution. Accordingly the plaintiff’s case failed.

The decision of McGuinness J. in those proceedings was then appealed to the Supreme Court and the Supreme Court decision was given together with a judgment in a second case under the title *Murphy v. G.M.* [2001] 4 IR 113. Mr Gilligan was represented in those proceedings by Dr. Michael Forde, S.C. and Mr Donal O’Donnell, S.C. (as he then was) appeared on behalf of the State defendants.

In the course of the judgment of the Supreme Court (Keane C.J.) noted at page 128 as follows:

“No rules of court have been made prescribing the procedure to be followed in applications under the Act of 1996 and, specifically, indicating whether

they are to be initiated by way of plenary summons, special summons, notice of motion or some other mode. There was therefore no reason in principle why the proceedings should not have been initiated by way of plenary summons claiming the only relief which was required at that stage, i.e. orders under Sections 2, 3, 7 and 9. It would seem at least debatable whether an application for a disposal order under Section 4 should have been included at that stage, since, as already noted, that relief could not be granted by the court until the expiration of a period of seven years from the date of the making of the interlocutory order. In the event, however, the learned High Court Judge indicated that, in his view, the plenary summons should be amended so as to include a claim under Section 4 and such an application was made and granted following the judgment on the interlocutory application.”

The court went on to consider the constitutional challenge and concluded that the Act of 1996 enjoyed a presumption of constitutionality and that the onus was on the appellants to establish that it was invalid having regard to the provisions of the Constitution. It was also held that orders under Section 3 or 4 could be made even though it had not been shown that there was mens rea on the part of the person in possession or control of the property. The fact that the person in possession or control of the

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property against whom the order was sought might not have been in any way involved in any criminal activity and might 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 Sections 2 or 3, unless it was satisfied that there would be “a serious risk of injustice”. The court might decline to make the order in a case where the person in possession or control was in a position to establish that he or she had purchased the particular property in good faith for valuable consideration: it might, on the other hand, make the order in circumstances where an innocent recipient of the property had made no payment for it. Accordingly, the Supreme Court dismissed the appeals from the constitutional challenge brought by Mr Gilligan.

Further Applications

As mentioned previously, a number of other applications were being made in the principal proceedings while the constitutional challenge to the Act of 1996 was taking place. There was the motion by Geraldine Gilligan in which she sought to have a statement of claim delivered and also sought discovery. In addition she had also sought to have an order made setting aside the order of the 5th December 1996. The motions in that regard were listed from time to time and were listed alongside the motions brought by Mr Murphy seeking to have a receiver appointed. The reliefs sought by Geraldine Gilligan were refused by order of the High Court made the 16th day of July, 1999. Discovery motions brought by Treacy and Darren Gilligan were refused

on the 9th July 1999. According to Mr Gilligan’s 2014 affidavit, counsel on his behalf had appeared from time to time before Mr Justice O’Higgins. Mr Gilligan said that counsel only appeared for the purpose of indicating that there were no instructions on behalf of John Gilligan in relation to the matters before the Court. In fairness, I think it is probably the case that insofar as the applications made on behalf of Darren and Treacy Gilligan and on behalf of Geraldine Gilligan were concerned there would have been no reason why John Gilligan would have required representation in relation to those particular matters. He would, of course, have had an interest in the motions which were being adjourned from time to time on behalf of the plaintiff, Mr Murphy, seeking the appointment of a receiver.

Fresh application

On the 18th February 2000 an application was made on behalf of the third and fourth named respondents for the first order pursuant to Section 3(3) of the Act of 1996 discharging the order made on the 16th day of July 1997 in respect of the properties in which Darren and Treacy Gilligan resided. It was also sought to have an order for discovery made against Mr Murphy in relation to the ownership and financing of those properties. A further notice of motion was issued on behalf of John Gilligan on the 21st February 2000 seeking to have the proceedings dismissed on the basis that there was a refusal to furnish the statement of claim, that no substantive relief was sought in the plenary summons which claimed only interim or interlocutory reliefs of one kind or

another and because Sections 4 and 8(1) of the Act of 1996 were invalid having regard to the Constitution or in contravention of the European Convention on Human Rights. An order was also sought varying the interlocutory order so that assets could be released to fund John Gilligan's defence and related appeals. That application was grounded upon an affidavit of Mr Paul McNally, the solicitor for John Gilligan. That application was dealt with by the High Court on the 24th March 2000 and it appears that counsel for John Gilligan informed the Court that the only relief claimed was that set out at paragraph 1 of the notice of motion. The motion was adjourned pending the determination by the Supreme Court of the appeal in the constitutional proceedings which was at that stage still outstanding.

Subsequently an application was made on behalf of Mr Murphy for liberty to amend the plenary summons to include a claim for relief under Section 4 of the Proceeds of Crime Act 1996. All of the Gilligan's were represented at that hearing. The application was granted by the High Court (O'Sullivan J.) on the 19th May, 2000. An order for costs was made in favour of the Gilligan's in respect of that motion. Mrs Geraldine Gilligan lodged an appeal against the making of that order by notice of appeal dated the 7th June 2000. Following a further application before the High Court (O'Sullivan J.) on the 8th June 2000, at a hearing at which the solicitor for Mr Murphy was present and counsel for Darren and Treacy Gilligan were represented, an application on behalf of Mr Murphy to extend time to amend the

plenary summons was refused with liberty to apply and the order made on the 19th May was amended to include provision that the amendment would be stayed in the event of an appeal. A notice of appeal was duly lodged on behalf of Treacy and Darren Gilligan on the 28th July 2000. A further notice of motion was issued by Mr Paul McNally, solicitor on behalf of John Gilligan, on the 30th September 2002. In that notice of motion John Gilligan sought an order discharging the orders made against him "as they were made (and unsuccessfully resisted) on the basis that the Section 3 application was truly interlocutory and not in substance the trial of the action". That application was grounded on an affidavit of Mr McNally relied on the definition of "interlocutory". Paragraph 3 of the affidavit is worth quoting:

"Accordingly when defending the application under Section 3:

- (a) No application was made to strike from the plaintiff's affidavits the extensive hearsay therein (which would not be admissible in the trial of any civil action under the laws of evidence presently in force in this State).*
- (b) It was decided not to join issue on the facts, as they could be disputed at the trial i.e. the Section 4 application when it was anticipated that the plaintiff would be obliged to furnish a fully particularised statement of claim, my client could get discovery of relevant documents, could call*

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witnesses, could cross-examine the plaintiff's witnesses, could subpoena witnesses and documents and objected to inadmissible hearsay (in the same way as all other defendants in proceedings commenced by way of plenary summons)."

Reference was made in the course of that affidavit to the decision of the Supreme Court referred to previously in the case of *Murphy v. G.M.* [2001] 4 IR 113 (the Constitutional challenge). Reference was also made to the decision in the McKenna case in which the Supreme Court held that a Section 3 order is not interlocutory in the sense in which the term "interlocutory" is usually understood but is a final order. The observation is then made that an injustice would be caused if the Section 3 order and other orders made in these proceedings was not discharged because if it had been clear that the Section 3 application was not truly interlocutory but was in substance the trial of the action he and counsel would have defended the application in an entirely different way.

That is the first occasion on which concern was expressed as to how the Section 3 orders came to be made against the Gilligan's but as was stated by Mr McNally "It was decided not to join issue on the facts, as they could be disputed at the trial i.e. the Section 4 application."

A number of appeals came before the Supreme Court on the 13th April 2005. The appeal by Geraldine Gilligan against the application of Mr Murphy to amend

the plenary summons to include a claim for relief under Section 4 of the Act of 1996 was allowed. (That was the order of O'Sullivan J. made on the 19th May 2000). In addition the Supreme Court dealt with appeals from the order of the High Court (O'Higgins J.) made on the 16th July 1999 refusing Geraldine's Gilligan's application to dismiss the claim for failure to deliver a statement of claim together with an appeal in relation to a decision of the High Court to refuse Geraldine Gilligan's motion for discovery. The order recites that:

"The court ruling that the order of the High Court (Mr Justice Moriarty) made on the 16th day of July 1997 was a final order under Section 3 of the Proceeds of Crime Act 1996

It is ordered and adjudged that this appeal do stand dismissed and that the said order of the High Court do stand affirmed."

Those orders were made as I have mentioned in a series of appeals being No. 152 of 2000, No. 252 of 1999 and No. 253 of 1999.

The next step in the proceedings is a notice of motion issued on the 27th July, 2005 on behalf of Geraldine Gilligan. In the course of that motion an order was sought pursuant to Section 3(3) of the Act of 1996 discharging or varying the Section 3 order made on the 16th day of July 1997. Alternatively, an order was sought pursuant to the inherent jurisdiction of the court and/or pursuant to the constitution and/or the European Convention on Human Rights setting

aside in whole or in part the said order, together with consequential relief. That application was grounded on an affidavit of Mr Terence Hanahoe, the solicitor for Mrs Gilligan. It was stated in that affidavit that it was evident that “Mr Justice Moriarty was under the impression that he was making an interlocutory order which did not fundamentally prejudice the second named defendant’s position.” Mr Hanahoe went on to say that the true legal nature of the order being made was a final order in the proceedings. It was further pointed out that at the time of making that order the High Court had yet to consider the grant of a further s. 6 order further to the successful appeal to the Supreme Court in relation to that matter. Thus it is contended that she did not have a real or meaningful opportunity to contest the Section 3 order and it is on that basis that it is sought to set aside the Section 3 order.

Challenges to the validity of the Section 3 order of the 16th July 1997

A motion was then issued on the 6th February 2006 on behalf of John Gilligan which sought a series of orders and declarations including an order vacating the order of the 16th July 1997. This notice of motion encompassed issues as to the constitutionality of the Proceeds of Crime (Amendment) Act 2005 and in particular Sections 6 and 10 thereof. A declaration was sought that:

“If on their proper construction those sections of the 2005 Act apply to these proceedings, to that extent they are repugnant to the Constitution and/or incompatible with the European Convention on Human Rights, inter

alia retrospective effect and separation of powers.”

The affidavit grounding that notice of motion was sworn by Mr Paul McNally on the 20th January 2006 and it would be helpful to refer to two paragraphs of the affidavit in which Mr McNally at paragraph 5(e) stated:

“For several years after the [Act of 1996] came into force, I am advised by counsel and believes that applications under Section 3 of that Act were consistently treated as interlocutory hearings by all counsel appearing on behalf of the Criminal Assets Bureau and also by all High Court judges dealing with such cases, including two learned Presidents of this Court, as well as the Honourable Mr Justice Moriarty on 16th July 1997.”

Mr McNally continued:

“On 16th July, 1997 for the reasons summarised above, this applicant did not resist the interlocutory motion. Instead, he decided that:

- (a) he would appeal his challenge to the constitutionality of the [Act of 1996];*
- (b) in the event of that challenge not succeeding, he would defend the case when it came to trial in accordance with the procedures stipulated for plenary summons actions.”*

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It should be recalled that the constitutional challenge was decided in the High Court on the 26th June 1997 just before Moriarty J. made the order of the 16th July 1997 and his appeal to the Supreme Court was rejected on the 18th October 2001.

Mr McNally in his affidavit referred to the finding of the Supreme Court where the following observation was made ([2001] 4 IR 113 at 154):

“As to the claim that the period of seven years which must elapse before a disposal order is made is unduly oppressive, that rests on the misconception that the application for a disposal order can in some sense be equated to the trial of an action in respect of which the legislation earlier provides for interlocutory orders being made. That is clearly not the nature of the scheme provided for in the Act. A person who is affected by the provisions of an interlocutory order can apply at any time before the expiration of the seven year period for an order discharging or modifying the interlocutory order.”

Mr McNally then went on to argue that that interpretation could not stand because it was reached in a manner that contravened the European Convention on Human Rights and was itself in contravention of the Convention. He argued that there had been a denial of audi alteram partem and a failure to state reasons “other than that the view taken by this application was misconceived”.

That motion, together with the notice of motion issued on behalf of Geraldine Gilligan referred to above, came on for hearing before the President of the High Court (Finnegan P.). An issue paper was prepared and filed by Michael E. Hanahoe & Company, Solicitors for Geraldine Gilligan, which was agreed by “the first, second and fourth named defendants”. The key questions were as follows:

- (1) Whether a valid Section 3 order exists at present, i.e. the final order made after the trial of that application (this is put in issue by the first named defendant).
- (2) If the answer to question (1) is “Yes”, whether the order herein ought to be set aside in whole or in part under Section 3(3) of the Act on the ground that it causes an “other injustice” having regard to any or all of the following:
 - i. the case made by the State in the first named defendant’s constitutional action that Section 3 orders are interlocutory in the commonly understood meaning of that term and that the action was in the nature of “forfeiture” (this has been put in issue by the first named defendant);
 - ii. the absence of any formal hearing or trial in accordance with the Rules at the time of making of the order [in the above sense];
 - iii. the fact that Moriarty J. was under the impression that he

- was making an interlocutory order only;
- iv. the fact that Moriarty J. held that his order was procedural not substantive;
 - v. the absence of any Section 6 order or effective legal representation for the defendants at the time in question;
 - vi. the lack of any meaningful opportunity to contest or even appeal the said order given the timing of the orders being made before the Section 6 order;
 - vii. all of the circumstances of the case.
- (3) Further or alternatively, whether the Section 3 order ought to be set aside in whole or in part in exercise of the inherent jurisdiction of the Court and/or pursuant to the Constitution and/or the European Convention on Human Rights having regard to any or all of the above circumstances.”

The remaining issues were ancillary matters dependent on the answers to the above issues.

I pause at this moment just to reflect on one issue. It is clear that at this time the case being made on behalf of all of the Gilligan’s was that the relevant “final” order was that made on the 16th July 1997 by Moriarty J. There was no suggestion that the

procedure which led to the making of that order was in any way defective or that the “final” Section 3 order was one or other of the orders made by Costello P. as is now contended by the Gilligan’s.

The transcript of the hearing before Finnegan P. in relation to this matter has been exhibited by John Gilligan in his affidavit of the 14th July 2014. In the course of his ex tempore judgment, Finnegan P. observed that Section 3 was a “final order” in the real sense of a final order. He further noted that it was subject to two possibilities of review, namely on an application pursuant to Section 4 which did not arise in the course of the application before him at that time and secondly, on an application pursuant to Section 3(3) of the Act of 1996. It is important to consider how the matter had developed in front of Finnegan P. and was argued as that informs the ruling that was given. Finnegan P. observed at page 72 of the transcript:

“There are two circumstances in which the court can re-open the matter under Section 3(3); the respondent at any time, not withstanding that there has been a finding that the property is the proceeds of crime, that is a finding under paragraph 1 of subs. (1) which for accuracy sake:

‘The specified property and the property constitutes directly or indirectly the proceeds of crime or was acquired in whole or in

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part with or in connection with the property or directly or indirectly constitutes the proceeds of crime’.

So an application can be made to review the order relying on that portion of Section 3(3). As I understand it that ground will be relied upon by the fourth named defendant and may also be relied upon by the third named defendant, but I have adjourned that. That is not relied upon as I understand it by the first or second named defendant. So therefore, all I need to consider is whether the remainder of Section 3(3) gives the court any power or jurisdiction in effect to look at the process whereby the Section 3 order was obtained and, if dissatisfied with that, interfered (sic) with it.

I am satisfied that that is not the intent or effect of Section 3(3). It is not a licence for the court to re-open something which has been determined by a final order and to do so at large. Section 3(3) envisages that where an order exists it is a valid order but that it may cause an injustice. And that, as I understand it, it causes an injustice by being in force. Then the court can ameliorate that injustice if necessary by discharging the order or by varying it. . . .

I do not believe that on an application pursuant to Section 3

it is appropriate for the court to have regard in any sense and for any purpose to proceedings that led to the making of the order and I do not propose to consider the same. I will deal with these applications on the basis of anything that has happened that results since the making of the order or outside the making of the order and outside any issue as to the validity or propriety (sic) of the order in its operation and that is the only basis I will deal with it.”

The hearing continued subsequently with arguments in relation to an issue of estoppel and legitimate expectation. Insofar as the issue of estoppel is concerned Finnegan P. commented:

“There can be no question of estoppel here because there was no representation. There was a misapprehension common to the parties to the original Section 3 application. It is as simple as that. If it is the case that this court can re-open a matter where a final order has been made which was not appealed then in every case, where subsequent to the hearing of the case the law was correctly interpreted in another case, the matter would have to be re-opened and that simply does not happen and cannot happen. I see no reason why the final order in this case should be different, unless Section 3(3) applies where there is a statutory provision to enable such an approach. I have

already held that Section 3(3) does not apply.”

An appeal was lodged on behalf of Mr Gilligan from the rulings of Finnegan P. by notice of appeal dated the 10th April 2006. Sometime later an appeal was lodged on behalf of Geraldine Gilligan. (It was necessary to extend the time in which to make that appeal but nothing turns on that).

Before dealing with the decision of the Supreme Court in relation to the appeal from the decision of Finnegan P., I should mention some other applications that came before the court. There was a further notice of motion dated the 28th July 2006 in which an order was sought on behalf of John Gilligan and Treacy Gilligan seeking an order pursuant to Order 27, rule 1 or an order under Order 122, rule 11 (of the Rules of the Superior Courts) or the court’s inherent jurisdiction dismissing these proceedings. That application was grounded on an application of Mr Paul McNally sworn on the 19th July 2006. Mr McNally in that affidavit complained of the fact that no statement of claim had been served. He also stated that as appeared from an attendance note in relation to the hearing on the 16th July 1997, that Moriarty J. in dealing with the matter treated the application as an interlocutory one in the universally accepted sense of the word, that is not final as to the issue in dispute, and was procedural rather than substantive. By way of response an affidavit was sworn by the Bureau Legal Officer on the 6th October 2006. He set out the history of the proceedings and pointed out that the

order of the High Court made on the 16th July 1997 remained in place, was not appealed and that “to the best of my knowledge” no application for an extension of time within which to appeal against the making of the order had been made. It was noted that an application had been made on behalf of Mr Murphy in January 1998 to correct typographical errors in the order of the 16th July, 1997. That application was not opposed. He went on to say that:

“It was initially believed that the delivery of a statement of claim was inappropriate in proceedings under PoCA. This view was upheld by this Honourable Court but ultimately did not find favour with the Supreme Court.”

He pointed out that the issue of the delivery of a statement of claim was not raised by John Gilligan until he sought to dismiss the proceedings by reason of the failure to deliver a statement of claim for the first time in February 2000. That came before O’Sullivan J. on the 24th March 2000. The motion brought by John Gilligan was adjourned until the determination by the Supreme Court of the constitutional challenge and was never re-entered thereafter. As previously mentioned, a similar application had been brought on behalf of Geraldine Gilligan and was subsequently dismissed together with her application for discovery. Appeals were lodged to the Supreme Court and those were the matters ultimately heard on the 13th April 2005. In his affidavit, the Bureau Legal Officer described the ruling of the Supreme Court as follows:

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“The court ruled that, as a Section 3 order had been made (and that the Section 3 order had not been appealed), the appeals must accordingly fail and expressed the view that there proceedings in being pursuant to Section 4 of PoCA in which any allegations of injustice could be raised.”

Reference was also made by the Bureau Legal Officer to the fact that as early as the 13th May 1997 the Supreme Court had made observations in relation to the nature of an order under Section 3. This was also addressed by the Supreme Court in the decisions in the case of *M v. G.M.*, reported at [2001] 4 IR 113 to which reference has previously been made and *McK v. A.F.* reported in [2002] 1 IR 242. The relief sought in the notice of motion issued on behalf of John and Treacy Gilligan was refused by the President of the High Court on the 20th November 2006.

A further notice of motion was issued on behalf of Geraldine Gilligan before the Supreme Court seeking an order extending the time to appeal against the judgment and order of Moriarty J. made on the 16th July 1997. The basis of the appeal was stated to be the mistake which occurred, namely that she and her legal advisers (as well as Mr Murphy, his legal advisers and the learned judge) were labouring under the impression that the order was truly interlocutory only and that she would not be prejudiced by a failure to appeal.

That notice of motion was grounded on an affidavit of Mr Michael Hanahoe,

Solicitor, sworn on the 21st February, 2008. A further motion was issued before the Supreme Court on behalf of Mr Murphy returnable for the 11th July 2008 seeking that various appeals be linked, that the case be case managed and seeking further directions from the court. That notice of motion was grounded on an affidavit of the Bureau Legal Officer sworn on the 9th June 2008. A replying affidavit was sworn by Geraldine Gilligan on the 19th June 2008 which disagreed with the suggestion that some appeals had been left in abeyance but she did not take issue with the suggestion that the Supreme Court would give such directions regarding case management or listing as was considered appropriate by the court. John Gilligan then issued a further notice of motion in the High Court seeking an order dismissing the proceedings on the grounds that the same were an abuse of the process of the High Court and that *“the judge went ahead with the case when there was a Supreme Court stay on the Section 3 and 4”*. That notice of motion on behalf of Mr Gilligan appears to have been filed by himself. In that context, John Gilligan exhibited an order made by the Supreme Court on the 6th October 2006 in relation to a motion issued on behalf of Geraldine Gilligan pursuant to the notice of motion dated the 25th July 2006 seeking an order staying the trial of Section 4 applications to have the properties forfeited pending the outcome of the appeal against the judgment and order of the President of the High Court made on the 21st February 2006 concerning Section 3(3) of the Act of 1996. The Supreme Court ordered that the High Court action be stayed pending the outcome of the appeal and liberty

was granted to have a number of appeals heard together. A similar order was made on the same day in respect of a motion of John and Treacy Gilligan filed on the 25th July 2006 seeking a similar order. The outcome of that application was the same. In his affidavit grounding the motion issued by John Gilligan and which was grounded on an affidavit sworn by him and which was received in the High Court on the 2nd July 2008, Mr Gilligan deposed in paragraphs 5 and 6 as follows:

“5. I do not agree that CAB have even a true legal Section 3, as the first one was got on the 5th December 1996 with no Gilligan’s present or even told what the CAB was in court looking for, I was in prison in England and my son and daughter was not put on notice like I was not, my daughter and son was not put on notice until January 1997, and by that time CAB had got a second Section 3 on the 19th December 1996 and their third Section 3 on the 16th July, 1997, the learned President of the High Court made a ruling that what he was giving CAB on the 16th July 1997 was not in any way a Section 3 order.

6. I say each of the 3 section orders (sic) are entirely different from real Section 3 orders because for CAB to get themselves a lawful Section 3 order they have to serve statement of claim and they have not done so in over my eleven year and my constitutional European right gives me the right to a full hearing before any court can give them a lawful Section 3 order and to this day of

June 2008 that has not been done, so any order they have is not a true order.”

He went on to claim that it was an abuse of process to carry on with the case before the outcome of his appeals pending the Section 3 and stay orders being ruled upon. Mr Gilligan represented himself before the High Court in relation to that application, which was heard before Feeney J. on 17th July 2008. Having heard the application, an order was made refusing the relief sought in the notice of motion. That order was in due course appealed to the Supreme Court by a notice of appeal dated the 23rd July 2008.

An application was then brought to the Supreme Court on the 14th October 2008 on behalf of Treacy Gilligan seeking an extension of time in which to appeal against all three Section 3 orders, namely the orders of the 5th December 1996, the 19th December 1996 and the 16th July 1997. That motion was grounded on an affidavit of Mr Paul McNally sworn on the 3rd March 2008 in which it was stated:

“The said Section 3 orders caused ‘injustice’ within the meaning of Section 3 having regard to all or any of the following:

- (a) The absence of any formal hearing at the time of the making of the orders.
- (b) The fact that the judges, namely Judge Costello, the then President, and Judge Moriarty, when making the said orders were under the impression that

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- they were making interlocutory orders.
- (c) That at the time of the making of the first two orders my clients did not have legal representation and that at the making of the order of 16th July 1997 she did not have the benefit of legal counsel as the Section 6 order was made subsequent to the said order of 16th July 1997. In these circumstances my client did not have a meaningful opportunity to contest the Section 3 application brought by the plaintiff.
- (d) The circumstances of the making of the Section 3 orders contravene my client's rights pursuant to the Constitution and the European Convention of Human Rights."

Legal submissions were furnished to the Supreme Court in support of that application and it is worth quoting briefly from paragraph 7 of those submissions in which it was stated:

"It is submitted that, in the circumstances, Costello's J.'s order (sic) and any of the ensuing 1997 'confirming/affirming' orders were interlocutory 'interlocutory' orders and not final 'interlocutory' orders and, accordingly the Section 4 proceedings involved in this appeal cannot yet (if ever) even get off the ground. Given the unanimous understanding at the time they were obtained and the stance since taken by the CAB regarding pleadings until the AF case [2002] 1 IR 242 was decided, the plaintiff is estopped from

treating those orders now as final 'interlocutory' orders. Elementary fair procedures as guaranteed by the Constitution and by the European Convention on Human Rights prevents those orders being treated as final orders obtained following the trial of a witness action. Should those orders now be deemed to be final and not interlocutory in the near universal understanding of that term, the observation of the ECJ in *Re Eurofoods IFSC Limited* (Case C341/04) [2006] Ch 508 at paragraph 67 comes to mind, regarding the proceedings brought in the Parma court: they were 'in flagrant breach of the fundamental right to be heard which a person concerned by such proceedings enjoys'."

Those submissions are to be found at Tab 96 of Book 3 of the Greendale booklet. Also included in Tab 96 are written legal submissions on behalf of Geraldine Gilligan in respect of her appeal to the Supreme Court from the judgment of the President of the High Court dismissing the application made pursuant to Section 3(3) of the Act of 1996. In the course of those submissions it was stated at paragraph 9 on page 13 as follows:

"It is submitted that the hearing that took place in front of Judge Moriarty was procedurally flawed in that the second named defendant was not properly represented. Mr Justice Moriarty specifically made known to the second named defendant that she would not be prejudiced by virtue of the fact that the order was a procedural order and that therefore she did not need legal representation. It is further submitted

that the hearing of the President of the High Court was flawed insofar as he was unwilling to take into account the exceptional nature of the hearing before Judge Moriarty having regard to the unique circumstances of the parties before him at the hearing under Section 3(3) of the said Act.”

Geraldine Gilligan in the course of those submissions raised a number of other issues. Thus reliance was placed on the provisions of Order 28, rule 12 of the Rules of the Superior Courts which provides:

“The court may at any time, and on such terms as to costs or otherwise as the Court may think just, amend any defect or error in any proceedings, and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceedings.”

Relying on the provisions of the Rules it was contended that it was open to the Court to set aside a final order of the Court. In that regard reference was made to *Limerick VEC v. Carr* [2001] 3 IR 480 and to *Re Greendale Developments Limited (No. 3)* [2000] 2 I.R. 514 amongst other decisions.

Geraldine Gilligan also raised an issue in relation to the denial of her entitlement to the principle of *audi alteram partem* and she contended that her right in this regard had been denied. An issue was also raised as to fair procedures. Thus it was contended that in the course of an application under Section 3(3) of the Act

of 1996 the application is sufficiently wide to enable the concerns raised such as the lack of fair procedures and the failure to hear the other side. It was contended that a Section 3(3) hearing can look at any other injustice and is not limited to the effect of the order but can look to the nature of the order itself.

I appreciate that this is a detailed account of various procedural steps, applications and proceedings brought by the parties following the initiation of proceedings in 1996 leading up to the decision of the Supreme Court in 2008 but it seems to me to be helpful to do so in order to see examine the points raised and arguments made at various stages of these very lengthy proceedings. The current appeals relate to the orders made by the late Mr Justice Feeney as set out previously. Those orders were made on the basis that the decision of the Supreme Court in 2008 in upholding the making of the orders against the Gilligan’s pursuant to Section 3(1) of the Act of 1996 in 1996 and 1997 were valid and thus, in order to have any chance of success in the appeals before this Court, it is necessary to demonstrate that the decision of the Supreme Court in 2008 requires to be rescinded or varied to protect constitutional justice. It is for that reason that a series of motions (the Greendale motions) seeking to set aside the Supreme Court decision of 2008 reported in [2009] 2 IR 271 have been brought by the Gilligan’s. Hence there are two stages to the present appeal. There are the appeals from the decisions of Feeney J. and there are the Greendale motions seeking to set aside the decision of the Supreme Court in 2008.

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The Greendale motions

I pause at this stage to consider briefly a number of judgments arising from the decision in the Greendale case. A useful commentary on the Greendale line of authorities is to be found in Delany and McGrath, *Civil Procedure in the Superior Courts*, 3rd Ed., (Dublin, 2011) at 24 - 55 et seq. Thus at 24 - 56 the authors say:

“A useful summary of the circumstances in which this jurisdiction may be exercised is set out in the following terms by Denham J. in *Re Greendale Developments Limited* (No. 3):

“The Supreme Court has a jurisdiction to protect constitutional rights and justice. This jurisdiction extends to an inherent duty to protect constitutional justice even in a case where there has been what appears to be a final judgment and order. A very heavy onus rests on a person seeking to have such jurisdiction exercised. It would only be in most exceptional circumstances that the Supreme Court would consider whether a final judgment or order should be rescinded or varied. Such a jurisdiction is dictated by the necessity of justice. A case will only be reopened where, through no fault of the party, he or she has been subject to a breach of constitutional rights.”

That approach has been followed in a number of other cases. Thus in *Bula Limited v. Tara Mines Limited* (No. 6) [2000] 4 I.R. 412, Denham J. reiterated what had been said in *Re Greendale*. It was stressed that the jurisdiction arises only in rare and exceptional cases where

there has been a clear breach of a constitutional right or justice.

Similarly, in his judgment in *L.P. v. M.P.* [2002] 1 IR 219, Murray J. in the Supreme Court stated (at p. 229):

“The judgments of this court in *In re Greendale Developments Ltd. (No. 3)* [2000] 2 I.R 514 and *Bula Ltd. v. Tara Mines Ltd. (No. 6)* [2000] 4 I.R. 412 establish that a final order may be rescinded or varied where a party discharges the burden of establishing that there are exceptional circumstances showing that such a remedy is necessitated by the interests of constitutional justice.”

As the authors note at 24 - 61:

“Murray J. added that the courts have an inherent jurisdiction to amend or set aside a final order in exceptional circumstances where it is established that there has been a fundamental denial of justice through no fault of the parties concerned and when no other remedy such as an appeal is available.”

It is clear from the authorities referred to above that a judgment which is a final order will only be set aside in rare and exceptional cases and the circumstances relied on must show that it is necessary either in the interests of constitutional justice or to vindicate or protect a constitutional right that a final order be set aside. Murray J. in the course of his judgment in *L.P. v. M.P.* added that the exceptional circumstances which could lead to the inherent jurisdiction of the Court being exercised must constitute

“something extraneous going to the very root of the fair and constitutional administration of justice” (at p. 230). It is in the light of those principles that one has to consider whether the judgment and order of the Supreme Court in 2008 comes within the exceptional circumstances which necessitate its setting aside by reason of the interests of constitutional justice. I will refer again later to these judgments and to the important principles set out therein.

The judgment of the Supreme Court in 2008

Geoghegan J., in the judgment of the Court, embarked on a detailed review of the Act of 1996 together with the case law on that Act. It would be useful to refer in detail to a number of passages from that part of the judgment. The review of the case law commences at paragraph 17 and I propose to refer briefly to paragraph 23 of the judgment at page 286. Having referred to the judgment of Fennelly J. in the case of *F. McK v. AF* (Statement of Claim) [2002] 1 IR 242, Geoghegan J. referred to his own judgment in that case and said as follows:

“23. My judgment was along similar lines and heavily relied on the two judgments of Keane C.J. cited above. However, I will cite one particular passage from it because of what I perceive as some confusion as to what has been meant by the expression ‘final order’ with reference to Section 3. I say the following, at pp. 245 to 246: -

‘It is abundantly clear, therefore, that orders under Section 3 are final orders even though they can be discharged and are not just temporary orders. No significance is to be attached to the name which the Act has given them, except possibly to the extent that it might be reasonable for the rules-making committee to provide for procedures whereby the plaintiff could actually get into court shortly after the initiating document issued, a result which is achieved by the ordinary interlocutory injunction procedures. This would happen if the Rules provided that the procedure was to be by originating motion on notice or indeed by special summons. But in the absence of any special rules or an order of the High Court permitting the procedure by special summons, the plaintiff must proceed as he has done by plenary summons.’”

Geoghegan J. then continued:

“24. That passage makes it clear what I, and what I believe the court, in other cases has meant by ‘final order’ in this context. It is an order which completes the Section 3 proceedings, though under Section 3(3) it may be subsequently varied or discharged. It automatically becomes discharged if an order is made more than seven years later determining a Section 4 application.”

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Geoghegan J. then goes on to refer to what he describes as “the definitive judgment on the structure of the Act of 1996, namely the judgment of Keane C.J. in *Murphy v. M.C.* [2004] IESC 70 (Unreported, Supreme Court, 8th March 2004) in which Keane C.J. refers to the earlier decision in the case of *F.McK v. F.C. (Proceeds of Crime)* [2001] 4 I.R. 521. at pp 8 to 9:

“I am satisfied that that decision was entirely correct in law. It was a more elaborate and fully considered extension of what was said in the judgment of the court in *Murphy v. G.M.* [2001] 4 IR 113, where the constitutionality of the statute was in issue and where it is stated in the judgment delivered by me, which was the judgment of the court, on the constitutional issue as to the claim that the period of seven years which must elapse before a disposal order is made is unduly oppressive, that this rests on the misconception of the application for a disposal order, that is the order under Section 4, can in some sense be equated to the trial of an action in respect of which the legislation earlier provides for interlocutory orders being made, that is clearly not the nature of the scheme provided for in the Act. In the subsequent case of *F.McK. v. F.C. (Proceeds of Crime)* [2001] 4 I.R. 521, I said that given the statutory framework, it is evident that in a practical way the interlocutory order or the application of interlocutory order is the trial of the real issue in the case.

They differ entirely from the procedures which were always associated with the

granting of interlocutory relief by the courts in normal civil litigation between parties and I entertain not the slightest doubt that the conclusion of the court in *F.McK. v. A.F. (Statement of claim)* [2002] 1 IR 242 was entirely correct and I would reject the invitation that it should be overruled.”

It is the contention of the Gilligan’s that the Supreme Court in its judgment of 2008 fell into error and that it should be set aside. They point to paragraph 30 of the judgment in which the order made by Costello P. on the 5th December 1996 is described as “what can only be categorised as a temporary Section 3 order” by virtue of the fact that it was expressed on its face to be in force until Thursday, the 19th December 1996 albeit that it was stated to be an order made pursuant to Section 3. Geoghegan J. in paragraph 29 noted that while there was no specific provision in the Act of 1996 for such form of order he could not see any reason why it should not be made where appropriate. Geoghegan J. went on to refer in paragraph 30 to the order made by Costello P. on the 19th December 1996 where again an order was made pursuant to Section 3 of the Act of 1996 and the motion was then “adjourned generally with liberty to re-enter”. Criticism is then made of the following part of paragraph 30 in which Geoghegan J. made the following observation:

“I have deliberately put the operative part of the order in quotation marks because it would appear from subsequent documentation that there has never been clear unanimity even between the parties as to whether the

date of that order or the date of a subsequent Section 3 order made by Moriarty J., and to which I will be referring, should be regarded as the commencement date for the purpose of calculating the seven year period. In the event, I do not think that anything turns on this question. If I had to decide it, I would conclude that the operative Section 3 order is the order made by Moriarty J. It is not clear why Costello P. allowed the motion to stand adjourned with liberty to re-enter. It would seem to suggest that he saw the potentiality at least of unfinished business. It is possible that he was informed that more accurate descriptions of the properties might have to be given at a later date which in fact happened or it could be related to the fact that according to the order, there was no attendance in court on behalf of the third defendant. At any rate, I fail to see that any problem arises on this question.”

Criticism of this part of the judgment is focused on the fact that subsequently in paragraph 48, Geoghegan J. observed that “it would have been contrary to the provisions of the Act of 1996 to have made a whole series of temporary orders”. It is contended on behalf of the Gilligan’s that despite the finding that there was no provision in the Act for the making of a “temporary Section 3(1) order” the Court did not go on to consider the consequences which flowed therefrom in the context of the Gilligan’s. Geoghegan J. also said in the course of that paragraph:

“At the time of the orders of Costello P. and Moriarty J., the primary concern of the defendants was the obtaining of an appropriate s. 6 order that would enable them pay their lawyers. Their lawyers did not need the Supreme Court to tell them in even a single, never mind several judgments, that an application could be brought under Section 3(3) and indeed that ownership issues could be ultimately reopened in a Section 4 application. But not only was no long term injustice going to be caused by a Section 3 order being made at the time it was made but in fact, in my view it would have been contrary to the provisions of the Act of 1996 to have made a whole series of temporary orders. Sections 2 and 3 provide for freezing procedures intended to be carried out quickly but with the safeguard that an intermediate application can be made. The opening words of Section 3(1) refer to an application being made to the court and it appearing to the court ‘on evidence tendered by the applicant’ that a person is in possession or control of certain property, etc. This does not mean, of course, that a person interested cannot resist an order under Section 3(1) but the absence of means to pay lawyers is not a reason why the court should delay in making the order. Section 3(3) is deliberately enacted with a view to preventing any error or injustice. There are passages in the skeleton submission filed on behalf of the plaintiff with which I particularly find myself in agreement. It is pointed out, for

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instance that ‘no appeal against the Section 3 order was brought at the time that it was made’.”

Complaint is also made in the submissions on behalf of the Gilligan’s as to what is described as speculation as to events that had occurred in the early part of the proceedings before Costello P. and Moriarty J. and in particular in relation to what occurred on the 16th July 1997. The point was made that in dealing with the matter in this way the Court did not hear any argument or evidence as to the circumstances in which the Section 3 order had been “wrongly made”. Specific reference in this regard was made to paragraphs 33 and 37 of the judgment of Geoghegan J. It is worth recalling at this point that the Court was dealing with events that had occurred some eleven years earlier. Geoghegan J. noted in paragraph 35 of his judgment that:

“It was heavily suggested at the hearing of this appeal that in making the order of the 16th July, 1997, Moriarty J. was not treating it as a final Section 3 order but was under the misapprehension (a misapprehension which it is suggested counsel on both sides were under also) that before a Section 3 order would be finally made there would be some kind of plenary hearing.”

He went on to note and I think it is important to bear this in mind as follows at paragraph 36:

“The two most important items before this court now involve potential attacks on that order of Moriarty J. The appeals before this court do not involve

requesting the court to interpret the order differently from the express terms of the order unamended. Rather, the main appeal before this court is against orders of Finnegan P. in an application under Section 3(3) of the Act of 1996 to have the order of Moriarty J., made on the 16th July 1997, discharged in the interests of justice.”

He went on to observe that if those appeals were dismissed the Court was being asked to extend the time for appealing against that order of Moriarty J. I would pause to observe that it is important to bear in mind the issues that were in fact before the Supreme Court in those appeals.

The other principal complaint made by the Gilligan’s against the judgment is the finding (see paragraphs 49 and 51 of the judgment) that “no conceivable injustice could arise” in not extending the time for an appeal against the Section 3 order as the issues between the parties could be dealt with in a Section 4 application or alternatively in an application pursuant to Section 3(3). The point is made on behalf of the Gilligan’s that in a Section 3(3) hearing the burden of proof would rest on the Gilligan’s and further that there was no consideration by the Supreme Court that the lapse of time since the Section 3 order had been made would have an effect on the evidence available to them. It was contended that the lapse of time would have impaired the availability of evidence available to them.

Again I think it is important to bear in mind precisely what was said by the Supreme Court. At paragraph 39 of the

judgment in dealing with the approach that could be taken by the Gilligan's, Geoghegan J. had this to say:

"39. A major difficulty in this case is that whereas the defendants or some of them may well have believed and may well have been advised that they could have a plenary hearing whereby issues of ownership could be litigated, it does not follow that they had addressed their minds to the precise stage at which this would be done. It could be done by way of defence of an application under Section 3(1) but it could also be done equally effectively by way of an application under Section 3(3) to say nothing of ultimate rights under Section 4. Indeed, there may be some evidence to suggest that at one stage a receivership application was going to be used, if possible, as the vehicle for opposition. Discovery was sought for the purposes of that application. It came before O'Higgins J. who did not consider it was relevant to that application. What is absolutely clear, however, is that from a very early stage, i.e. , the judgment of Murphy J. in these very proceedings, the legal advisers understood or ought to have understood the structure of the Act of 1996 and the nature of the orders to be made under it."

The Court then went on to deal with the main appeals which were those against the orders of Finnegan P. It should be remembered that what was at issue before Finnegan P. was an application pursuant to Section 3(3) for an order discharging the order of Moriarty J. made on the 16th July 1997 on procedural

grounds. In other words, the application before Finnegan P. was not to discharge the order on the basis that the properties at issue had not been acquired from the proceeds of crime but rather was an application to resist the making of an order on what might be described as "judicial review" grounds. That being so, it is difficult to understand how the Supreme Court can be criticised for not dealing with issues which did not arise on the appeals such as the effect of lapse of time on the evidence available to them on a Section 3 (3) hearing.

For completeness, I think it would be helpful to refer to part of paragraph 43 of the judgment of Geoghegan J. in which he made the following observation:

"It may well be that Moriarty J. in making the Section 3 order believed that even within the framework of Section 3(1) it was a temporary order and that at some later stage there could be a plenary hearing before some kind of final Section 3(1) order was made. He may or may not have been encouraged in that view by whatever he was told by counsel for the plaintiff but I would have a completely open mind on that aspect of the matter given the subsequent correspondence to which I have already referred and subsequent affidavit evidence emanating from the plaintiff. It would always have been understood that an application could be brought under Section 3(3) and, of course, there could ultimately be a Section 4 application. It is difficult to be sure, therefore, what exactly Moriarty J. meant or whether possibly

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he himself misunderstood whatever he was told about the statutory procedure. I am not going to concern myself further with this problem because as I read the transcript of the proceedings before Finnegan P., he was prepared to assume that Moriarty J. may have believed and indeed may have been encouraged to believe that there would be a plenary hearing before an operative order under Section 3(1) was made. I am prepared to approach the appeal in the same way because, as I will be explaining, I am satisfied that it does not affect either the outcome of the appeal or the issue which I will be dealing with later on in the judgment as to whether an order should be made extending the time for appealing the order of Moriarty J. It is not in dispute and cannot be in dispute that an operative order under Section 3(1) was and remains in force. By 'operative' I mean, of course, the order contemplated by Section 3(1) of the Act of 1996 with the resultant lapse of time for the purposes of the Section 4 application. As I have already indicated, there has been some doubt thrown on whether the time ran from the said order of Moriarty J. or from the temporary order though purporting to be made under Section 3 by Costello P. in the previous November. Nothing turns on that now as the period has run in either event. I have already expressed the view that the operative Section 3 order which commenced the time period was the order made by Moriarty J. This appeal relates to the issue of whether that order ought to be set aside on grounds

of 'injustice', the alleged injustice being procedural. I am quite satisfied, after careful consideration of the matter, that Finnegan P. was correct in his view that a Section 3(3) application for that purpose did not lie. I do not necessarily wholly agree with everything the former President said in the course of his interjections and judgment but I am convinced that he is correct in his conclusion and his basic reason for it."

Geoghegan J. then quoted extensively from the ex tempore judgment of Finnegan P. Finnegan P. having concluded that it is not the intent or effect of Section 3(3) to give the Court a power or jurisdiction to look at the process whereby the Section 3 order was obtained "and if dissatisfied with that, interfere with it". He expressed the view that that was not the intent or effect of Section 3(3). In those circumstances Geoghegan J. continued that he could find no fault with that interpretation of the section and that it was clearly correct. It was never intended as he said by the Oireachtas that High Court judge could judicially review another High Court judge pursuant to Section 3(3) because in reality that would be the defendants' interpretation.

In effect the Gilligan's have sought an order on foot of the Greendale motions that this Court should set aside and/or vacate the judgment and order of the Supreme Court delivered herein on the 19th December 2008 and have further sought a declaration that on the 16th July 1997 no trial took place in the proceedings and further that the only

order pursuant to Section 3 of the Act of 1996 was that made by the High Court on the 5th December 1996.

It is important to remember that, as can be seen from the issue paper set out previously, that when this matter was before Finnegan P., the case being made by the Gilligan's was that the relevant final order was that made on the 16th July 1997 by Moriarty J. Accordingly, the position before Finnegan P. was argued on that basis and subsequently while Geoghegan J. did express the view that there had never been "clear unanimity even between the parties" as to the relevant operative order (see paragraph 30 of the judgment) it is difficult at this remove to deal with the matter on the basis that the operative order was made on the 5th December 1996 as is now contended by the Gilligan's. It is part of the Gilligan's contention that as there had previously been two Section 3 orders made, Moriarty J. had no jurisdiction to make a further Section 3 order on the 16th July 1997.

As has been pointed out previously, the Act of 1996 is an unusual piece of legislation providing for the confiscation of property acquired by means of the proceeds of crime. Geoghegan J. in his judgment described the unique scheme of proceedings provided for under the Act. There may have been some initial confusion as to how the Act was to be operated but as Geoghegan J. pointed out (paragraph 18) as long ago as the 13th May 1997 Murphy J. in his judgment in these very proceedings noted that "the summons [in these proceedings], even as amended, does not envisage a plenary

hearing". Since the decision in the case of *F. McK v. F.C.* referred to above it has been crystal clear that an order pursuant to Section 3 is a "final" order. It is also important to remember what is meant by the phrase "final order" in this context. As Geoghegan J explained in a passage previously referred to in the course of this judgment, a Section 3 order is an order that completes the Section 3 proceedings (i.e., the Section 3(1) proceedings) but such an order can be varied or discharged under Section 3(3). Further, such an order is automatically discharged if a Section 4 order is made more than seven years later. As can be seen from the extensive history of these proceedings, the making of a Section 3 order does not terminate the proceedings.

A number of other points were made by Geoghegan J. to which reference should be made. In considering the application for leave to extend the time in which to appeal from the order of Moriarty J. of the 16th July 1997, he commented at para. 48 of the judgment that it was not necessary for the Supreme Court "to tell them in a single, never mind, several, judgments" that an application could be brought under Section 3(3) and that ownership issues could be ultimately re-opened in a Section 4 application. I have referred previously at p. 53 of this judgment to para. 48 in which Geoghegan J. concluded by noting as pointed out by CAB that 'no appeal against the Section 3 order was brought at the time that it was made'."

Geoghegan J. then dealt with the application for an extension of time for appealing against the Section 3 order of

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Moriarty J. He made the comment at the end of paragraph 49 et seq as follows:

“To return to the time limit question, the position would seem to be quite clear. Irrespective of whether there was any confusion or not in relation to the order of Moriarty J., an application to extend the time could still have been brought long ago. Over many years now the structure of the Act of 1996 has been explained by this court.

It would serve no purpose to extend the time now.”

He went on to express the view that an application under Section 3(3) could still be brought and that “that might well be a more appropriate remedy than raising the questions in the Section 4 application” but as he said that was a matter for the Gilligan’s’ advisers. Thus he concluded that he would refuse an order for an extension of time to appeal the order of Moriarty J. together with extensions of time in respect of the earlier orders of Costello P. (for the same reasons).

Geoghegan J. returned once again to the structure of the Act of 1996. Having considered the nature of applications brought under Section 3(1) and having observed that (at para. 52):

“[I]t would not have been intended or contemplated that there would be endless adjournments or indeed temporary Section 3 orders which were not provided for by the Act of 1996 while perhaps a year later or more, the respondent would be in a position to

challenge the evidence relied on by the applicant. It was easily foreseeable, in my view, that such delay might not just be a consequence of proof gathering such as discovery, etc. It might be even more likely be related to the necessity or perceived necessity of the respondent to put himself or herself in funds to pay for lawyers. This might require an order under Section 6. That is precisely part of the reason for some delay in this case.”

He then went on to make a further observation which seems to me to be of some importance. At paragraph 53 et seq he said:

“This brings me to the rest of the machinery. For that very reason and with an eye on the Constitution, the Oireachtas enacted Section 3(3) which enabled the respondent in an application under that subsection and in a situation where an order under Section 3(1) was already in force to apply to a court to have that order discharged or varied. Such an order could be made if such respondent satisfied the court that the property or a specified part of it was property to which paragraph (1) of subs. (1) applies or in other words that the property frozen or part of it was not directly or indirectly proceeds of crime or if he satisfies the court that the order under Section 3(1) ‘causes any other injustice’. In the proceedings seeking a disposal order under Section 4 there is yet another opportunity given.

None of this was seriously disputed by counsel for the respondent at the hearing of the appeals and motions though he

did, at times in a vague kind of way, reserve his position. At any rate, correspondence and affidavits emanating from the plaintiff seem to clearly accept that a remedy under Section 3(3) was available to any of the defendants. . . .” Geoghegan J. concluded that there could be no question of estoppel or abuse of process by the Gilligan’s bringing an application under Section 3(3) of the Act of 1996 in circumstances where as he put it the substantive issues, “if in fact they arise, as to whether the properties are the proceeds of crime or not have never in fact been aired in court by the defendants with a view to the plaintiff’s claim being challenged”.

Thus the way was left open for the Gilligan’s to bring applications pursuant to Section 3(3) of the Act of 1996 as they did, in fact, do. Those were the applications heard by Feeney J. which are the subject of appeal to this Court. Submissions of the Gilligan’s on the Greendale motions.

The Gilligan’s seek to have the judgment of this Court in these proceedings of the 19th December 2008 set aside. The issues which the Gilligan’s say should be revisited are as follows:

- (a) Whether the High Court had power to make temporary Section 3 orders.
- (b) If not what relief should have been granted by the Court? If yes, whether they were properly made and/or whether such findings by the Court were improperly made due to the fact that

- i. no evidence was before the Court and/or
 - ii. there had not been a trial.
- (c) Which of the three Section 3 orders was operative, in circumstances where there was a finding by the Court (which finding is not challenged) that such orders were final in nature and not interlocutory (properly so called).
 - (d) Whether the Supreme Court should have set aside the High Court order of 16th July 1997 and the previous Section 3 orders made on the 5th December 1996 and the 19th December 1996.

The finality of judgments and orders

In order to consider whether or not a judgment or order of the Supreme Court can be revisited for the purpose of setting aside a judgment or order previously given it is necessary to consider the circumstances in which such a final judgment or order of the Supreme Court can be set aside. The starting point for such a consideration must be Article 34.5.6° of the Constitution (formerly Article 34.4.6° until the enactment of the Thirty-third Amendment to the Constitution (Court of Appeal) Act 2013) which provides that the decision of the Supreme Court shall in all cases be final and conclusive. It goes without saying that, as a general proposition, decisions and orders made in the course of or at the conclusion of legal proceedings cannot be revisited otherwise than in the case of an appeal or in cases where a matter can be revisited to correct an error under the “slip” rule. A party who has been

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unsuccessful in their proceedings is not entitled to come back to court to argue the case again. To permit that would be unfair to the successful party and would mean that there would be no end to litigation. However, it has been recognised that there may be exceptional and rare circumstances which give rise to the possibility of a decision or order being revisited. It is therefore necessary to consider if the circumstances in which the Supreme Court has jurisdiction to vary or set aside an earlier order can apply to the circumstances relied on by the Gilligan's on foot of the Greendale motions in this case.

I have already in the course of this judgment referred briefly to the decision of the Supreme Court in the case of *In Re Greendale Developments Limited (No. 3)* [2000] 2 I.R. 514 and to the passage from the judgment of Denham J. (as she then was) at page 544 and I think it would be helpful to refer to that passage again in which it was stated:

"The Supreme Court has a jurisdiction to protect constitutional rights and justice. This jurisdiction extends to an inherent duty to protect constitutional justice even in a case where there has been what appears to be a final judgment and order. A very heavy onus rests on a person seeking to have such jurisdiction exercised. It would only be in most exceptional circumstances that the Supreme Court would consider whether a final judgment or order should be rescinded or varied. Such a jurisdiction is dictated by the necessity of justice. A case will only be reopened where, through no fault of the party, he

or she has been subject to a breach of constitutional rights."

It is clear from that judgment that the jurisdiction to set aside an order previously made will only be exercised very exceptionally. There are other circumstances in which it has been recognised that a final order can be set aside such as circumstances involving fraud (see for example, *Tassan Din v. Banco Ambrosiano SPA* [1991] 1 I.R. 569). Equally, a Court has jurisdiction to correct an accidental error or slip in a judgment or an error in an order as mentioned above. Speaking of now Art. 34.5.6° of the Constitution, Murray C.J. in a ruling of the Court delivered on the 26th March 2009 in *The People at the Suit of the Director of Public Prosecutions v. Michael McKeivitt* [2009] IESC 29 observed (at para. 4):

"That is a clear constitutional statement that the decisions of this Court are in principle final. Prima facie this Court has no jurisdiction to hear an application to set aside a decision which finally determines proceedings before it. Very exceptionally the Court has jurisdiction to review a decision in the special circumstances referred to in the case-law summarised below."

Denham J. in considering the issue of finality of judgments referred in her judgment *In Re Greendale Developments Limited (No. 3)* at page 539 to the importance of finality in respect of judgments. She observed:

"If an applicant seeks to have the court exercise its jurisdiction to protect constitutional rights there is also a very

heavy onus of proof. The court has to balance the application against the jurisprudence, of the common law and the Constitution, of the finality of an order. Whilst the Supreme Court is guardian of constitutional rights, it must also protect the administration of justice which includes the concept of finality in litigation.”

She went on to point out that the Supreme Court has jurisdiction and a duty to protect constitutional rights. The jurisdiction to set aside a final order of the Court was again considered in the case of *Bula Limited v. Tara Mines Limited* (No. 6) [2000] 4 I.R. 412. The facts of that case were that a decision of the High Court of the 6th February 1997, was appealed, the appeal was heard and dismissed by a Court consisting of Hamilton C.J., Barrington J. and Keane J. Subsequently the applicants in relation to the matter before the Court applied to have the judgment of the Supreme Court set aside on grounds of objective bias alleging that Barrington J. and Keane J. had links with the respondents such as to give rise to a perception of bias. In the case of Barrington J., he had acted for the fifteenth respondent in two sets of proceedings relating to the Tara respondents in one case and the applicants in another. He had also advised on legislative reform in the area of mineral mining. Further, he had acted against the Tara respondents in a case and had prepared two sets of advices for the first respondent. Prior to his appointment to the Bench, Keane J. had advised the first respondent as to an exempted development under the planning legislation and had undertaken

to appear for the first respondent in an anticipated hearing before An Bord Pleanála. In fact he did not do so as he had then been appointed to the High Court. It was contended on behalf of the applicants in that case that objective bias arose from these connections between the judges and the respondents. It is significant to note that the issue which arose was one which was not an issue in the case but was a matter which was extraneous to the hearing in the High Court and the Supreme Court. The Court in that case reiterated the approach taken in the decision in the case of *In Re Greendale Developments Limited* (No. 3) [2000] 2 I.R. 514.

McGuinness J. in the course of her judgment in *Bula Limited v. Tara Mines Limited* (No. 6) at page 478 said as follows:

“I respectfully agree with the analysis of this court's jurisdiction as set out by Denham J. and Barron J. in *In re Greendale Developments Ltd.* (No. 3) [2000] 2 I.R. 514. In summary, whilst very great weight must be given to the principle of finality and to the provisions of Article 34.4.6°, this court has a jurisdiction to review and if necessary to set aside what appears to have been a final order in circumstances where the court's duty to protect constitutional rights or natural justice arises. Such circumstances can only be to a high degree exceptional, and a very heavy onus lies on the applicants to

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establish that such exceptional circumstances exist.”

Two things are clear. One is that great weight must be given to the finality of judgments. It goes without saying that parties to litigation are entitled to know that a final decision made by a court on a particular point cannot be re-opened by a party dissatisfied with the outcome of that final order. Nevertheless, it is also clear that in exceptional circumstances involving an issue of constitutional justice, the matter may be re-opened. In that context it is worth recalling what was said by Murray C.J. in the McKeivitt case referred to above. He said at page 4 of the judgment:

“There are two particularly important factors to be addressed when considering whether this Court has, in the circumstances of a particular case, jurisdiction to consider a re-opening of its decision. Firstly the application must patently and substantively concern an issue of constitutional justice other than the merits of the decision as such. Secondly, the grounds of the application must objectively demonstrate that there is a substantive issue concerning a denial of justice in the proceedings in question consistent with the onus of proof on an applicant.”

It would be helpful to refer to one other judgment on the nature of the exceptional jurisdiction to set aside a final judgment or order. That is the judgment

of Murray J. (as he then was) in *L.P. v. M.P.* [2002] 1 IR 219. The principal issue in that case concerned the jurisdiction of the Supreme Court to consider an order of the High Court which was final and conclusive by virtue of the provisions of the Courts of Justice Act 1936 (the Act of 1936) and therefore not appealable. However, an issue also arose as to the circumstances in which a final order might be challenged in circumstances where the respondent instructed his counsel that he did not wish to proceed with his appeal before the High Court judge in the light of preliminary observations made by that judge. It was submitted on behalf of the respondent that in making the relevant observations, the trial judge had gone so far as to demonstrate a pre-judgment of the issue of maintenance in the family law proceedings before any witness had been called by the respondent. In those circumstances the High Court judge was asked to disqualify himself from hearing the case further in respect of the maintenance issue and the High Court refused to do so. The respondent then declined to continue with his appeal concerning maintenance. He then sought to appeal the matter to the Supreme Court notwithstanding the provisions of the Act of 1936 and it was also sought that the Supreme Court give a determination that the order of the High Court could not be allowed to stand and should be set aside and a rehearing ordered. In those circumstances, Murray J., in the course of his judgment, reviewed the decisions of the Supreme Court in the cases of *In Re Greendale Developments Limited (No. 3)* referred to above and the decision in *Bula Limited v. Tara Mines*

Limited (No. 6) [2000] 4 I. R. 412 referring in particular to the passage from the judgment of McGuinness J. to which I have already referred. Murray J. at page 229 of his judgment then continued:

“It follows from the foregoing judgments that the courts have an inherent jurisdiction to amend or set aside a final order in exceptional circumstances where those circumstances clearly establish that there has been a fundamental denial of justice through no fault of the parties concerned and where no other remedy, such as an appeal, is available to those parties. Since the court is not in this case concerned with the merits of the contention made on behalf of the respondent that there was such a denial of justice in this case, I do not propose to consider further the criteria according to which such a jurisdiction may be involved. I would, however, just add that such exceptional circumstances could not include rulings made in final instance by a court concerning such matters as the admissibility in evidence, even if they have implications for the manner in which a party was allowed to present its case. Rulings on questions of law and procedure are matters for judicial appreciation and discretion which are inherent in judicial proceedings and are properly governed by the principle of finality in courts of last instance. Otherwise, I confine myself to

saying that the exceptional circumstances which could give rise to the inherent jurisdiction of the court must constitute something extraneous going to the very root of the fair and constitutional administration of justice.”

It is important to emphasise the observations of Murray J. to the effect that the exceptional circumstances which could give rise to the inherent jurisdiction of the Court must constitute something extraneous going to the very root of the fair and constitutional administration of justice.

Discussion

What then must be established by the Gilligan’s in order to bring this matter within the Greendale jurisprudence? First of all it is contended that there is an “incompleteness” to the judgment of Geoghegan J. It is said that there were a number of express findings made in the course of the judgment which undermine the Section 3 orders made herein but that the Court failed to proceed to explore the consequences of those findings. It should be recalled that the appeal before the Supreme Court was principally concerned with the appeal from the decision of Finnegan P. I have already set out the issue paper agreed by the Gilligan’s which was before Finnegan P. in which it will be seen that the focus before Finnegan P. and thereafter on appeal to the Supreme Court was the Section 3 order made by Moriarty J. Now it is contended in the written submissions on behalf of the Gilligan’s that “There is no provision in the [Act of 1996] for the making of

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temporary Section 3 orders or for extending the period that a Section 2 order remains valid beyond the short period provided for in the Act of 1996". The latter point is relied on by the Gilligan's as constituting an extraneous matter "going to the very root of the fair and constitutional administration of justice".

It is important to emphasise that the purpose of a Greendale application is not to permit an aggrieved party to argue a point or issue that could have been raised previously which was not in fact raised or indeed, to reargue a point or issue previously raised. If the Gilligan's wanted to challenge the making of the order of Moriarty J. by reference to the fact that there had already been two previous Section 3 orders made, there was no reason why that could not have been done years ago. The argument in this respect is predicated on the finding in the McKenna case 2002 (*F. McK. v. A.F.* [2002] 1 IR 242) in which it was held by the Supreme Court that an order pursuant to Section 3 of the Proceeds of Crime Act 1996 was a final order and not an interlocutory order and on the comments of Geoghegan J. at para. 48 of the 2008 judgment that it would have been contrary to the provisions of the Act of 1996 to have made a whole series of temporary Section 3 orders. It should be borne in mind that the focus of the McKenna case was on the terminology used in the Act of 1996 to describe an order made under Section 3 as an interlocutory order, being an order which in the ordinary meaning of that word, would be understood as an order which is not a final order as was explained by the

Supreme Court in the earlier case of *McK. v.F.C.* [2001] 4 I.R. 521 (at p. 523):

"Given that statutory framework, it is evident that, in a sense in a practical way, the interlocutory order or the application for an interlocutory order is the trial of the real issue in the case and that obviously renders the proceedings of an unusual nature."

Bearing in mind the meaning of a Section 3 order as expressed in a number of judgments as representing the "trial of the real issue in the case", it is undoubtedly the case that on the 5th December, 1996 there was no trial of the real issue in the case particularly when one bears in mind the fact that the only member of the Gilligan family before the Court was Geraldine Gilligan and she was not represented. It is not unreasonable to infer that the matter was adjourned to allow time for other members of the Gilligan family to be present or represented before the Court. On the 19th December 1996 a further Section 3 order was made and again it is fair to say that there was no trial of the real issue on that occasion. A series of further applications were made on behalf of Mr Murphy on that date, and those applications were adjourned to January and in January of 1997, applications were made by the Gilligan's pursuant to Section 6 of the Act of 1996 in relation to the question of funding for legal representation. That led to an order which was the subject of the first appeal to the Supreme Court in relation to these proceedings by the Gilligan family. In the circumstances, no

one could have been under any misapprehension that the making of orders on the 5th and 19th December, 1996 were understood in any sense to have been made following the trial of the real issue in the case. It is for that reason that Geoghegan J. in his judgment referred to the s.3 order of the 5th and 19th December 1996 as being temporary and further opined that while there was no specific provision in the Act for that particular form of order, he could not see why it should not be made where appropriate. (See para. 29 of his judgment.) In those circumstances, I fail to see how it could be suggested that the making of Section 3 orders in circumstances where the Section 3 applications were adjourned to enable all of the Gilligan's to be present or represented before the court was contrary to the provisions of the Act of 1996. Clearly, the making of Section 3 orders which were then adjourned for further hearing did not create any injustice for the Gilligan's. On the contrary, the adjournments on the 5th December and the 19th December 1996 could only have been for their benefit. It must have been patently obvious to all concerned that the orders made on the 5th and 19th December 1996 were not intended to be "final" orders in the sense in which the description of the interlocutory order made under Section 3 is now understood. That being so, I see no basis on which it could be suggested that the making of the orders made on the 5th and 19th December 1996 deprived the Court of jurisdiction to make the order on the 16th July 1997. Although Geoghegan J. acknowledged that there was no specific provision in the Act providing for the

making of temporary Section 3 orders, equally, it must be observed that there is no specific provision in the Act prohibiting the making of such an order. That brings me to the application on the 16th July 1997. It would not be unfair to say that all parties to these proceedings viewed that order as being the operative Section 3 order for many years and proceeded on that basis. The decision of Finnegan P. was in respect of a challenge to the order of Moriarty J. and the appeal to the Supreme Court from the judgment and order of Finnegan P. was predicated on that basis.

On the 16th July 1997, oral evidence was heard in accordance with Section 8 of the Act of 1996. The Court was clearly satisfied that a prima facie case had been made out to establish that an order pursuant to Section 3 should be made against all of the Gilligan's. It is necessary to recall what was previously stated by Mr Paul McNally, solicitor for Mr Gilligan, in an affidavit sworn by Mr McNally on the 30th September 2002 in respect of a motion in which it was sought to have the orders made against Mr Gilligan discharged on the basis that they were "made (and unsuccessfully resisted) on the basis that the Section 3 application was truly interlocutory and not in substance the trial of the action". The application was grounded on Mr McNally's affidavit in which he said that when defending the application under Section 3:

"It was decided not to join issue on the facts, as they could be disputed at the trial, i.e. the Section 4 application when it was

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anticipated that the plaintiff would be obliged to furnish a fully particularised statement of claim my client could get discovery of relevant documents, could call witnesses, could cross-examine the plaintiff's witnesses, could subpoena witnesses and documents and objected (as I see) to inadmissible hearsay (in the same way as all other defendants in proceedings commenced by way of plenary summons)."

The core of the complaint made by the Gilligan's is that they have been deprived of a trial of the issue as to whether the property concerned was directly or indirectly the proceeds of crime. Clearly John Gilligan and his solicitor had decided not to contest the making of the Section 3 order at the hearing on the 16th July 1997. None of the other members of the Gilligan family contested the making of the s.3 orders at that time. That was their right. They did not have to do so. The Gilligan's, if they had sought to, could have cross-examined CAB's witnesses on the 16th July 1997. It may be that they were of the view that it would be inappropriate to do at that stage. They had not yet applied for discovery and may have felt that their ability to cross-examine effectively could have been hampered by the absence of discovery. It may be the case that they were not in a position to call evidence of their own at that time with a view to demonstrating that the properties at issue were not acquired with the proceeds of crime. There may have been good tactical reasons for not challenging the making of

the Section 3 orders. Whatever the reason may have been, the fact of the matter is that the application for Section 3 orders made on the 16th July 1996 was not opposed by the Gilligan family.

Geoghegan J. in the course of his judgment in 2008 described the ways in which a party subject to a Section 3 order could challenge the making of that order. In the first instance, it can be challenged at the Section 3 hearing itself. If parties are not in a position to do so at that time or do not wish to do so at that time, an opportunity is then given to challenge the making of such an order in the course of an application pursuant to Section 3(3) of the Act of 1996. Finally, a further opportunity is given to a party affected by a Section 3 order to challenge the making of that order at a disposal hearing pursuant to Section 4 of the Act of 1996. Having regard to the serious consequences of the making of a Section 3 order in respect of the property rights of an individual guaranteed under the Constitution, the legislature has provided a series of opportunities to allow someone to challenge the making of a Section 3 order. That is to say nothing of the right of appeal. A Section 3 order can always be appealed by an aggrieved party.

It was submitted on behalf of the Gilligan's that there may have been some element of confusion on the part of those involved in these proceedings at their commencement by virtue of the description of an order pursuant to Section 3 as an interlocutory order. However, even before the McKenna case, the nature of and structure of the Act was

described in some detail by Murphy J. in the Supreme Court decision in these very proceedings as previously set out in the course of this judgment.

Despite the clarification as to the nature of a Section 3 order in the McKenna case, no attempt was made by any of the Gilligan's to appeal the Section 3 orders in the light of that decision. It was only much later that an application was made to seek to extend the time within which to appeal from the orders of Moriarty J. (but not those of Costello P.) which application was refused by this Court in the course of the 2008 decision at issue in these proceedings.

A further point made by the Gilligan's is that, by virtue of the fact that there was not a trial of the real issue in the case at the Section 3 hearing, they have been put in an unfair position because on a Section 3(3) application, the onus is on them to establish that the properties acquired by them at issue in the proceedings are not the proceeds of crime. To my mind this argument is misconceived. Once there is prima facie evidence in the course of a Section 3 hearing that the property at issue is or was acquired by the proceeds of crime, then the onus shifts to the other side to disprove the fact that the property concerned is or was acquired by the proceeds of crime. So whether the evidence put forward by CAB is challenged at a Section 3 hearing or at a subsequent Section 3(3) hearing, the onus is always going to shift to the respondents to disprove the fact that the property was acquired with the proceeds of crime. Thus there is no procedural disadvantage suffered by the Gilligan's by

virtue of the fact that they did not challenge CAB's evidence at the hearing before Moriarty J.

It is useful to recall the point made by Geoghegan J. (at para 11 of his judgment) as to the unusual nature of sSection 3 and 4 of the Act of 1996 "in so far as they confer several distinct opportunities for an aggrieved person to challenge a determination or, in the case of proceedings under Section 3(1), a proposed determination that the relevant property constitutes the proceeds of crime." This is an important aspect of the Act of 1996 which gives those affected by the making of Section 3 orders who for one reason or another may not be in a position to challenge the making of a Section 3(1) order when made the opportunity to challenge such order at a number of different stages in the proceedings.

When all is said and done it seems to me that the Gilligan's have failed to establish an entitlement to revisit the judgment of this Court in 2008 by reason of any matter that would bring them within the Greendale jurisprudence. The remedy under a Greendale application has been described as one that can only arise in rare and exceptional cases. Murray C.J., as he then was, observed that it should be something extraneous to the proceedings themselves. Thus, in a number of cases such as the Bula decision referred to above, the question that arose was something outside the proceedings, namely an allegation that there was bias on the part of some members of the Court. In this case what is relied on is an argument that the proceedings

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throughout have been flawed because of the argument that the Gilligan's did not have the benefit of a trial of the issue at the Section 3 hearing and the further submission that there was no jurisdiction to make Section 3 orders on the 16th July, 1997, given the orders that had previously been made on the 5th and 19th December 1996. However, that is to misunderstand the nature of the Act and its structure. The Act allows for the confiscation of property belonging to citizens. It is quite clear that an interference with the property rights of an individual could not take place without appropriate procedures and Constitutional safeguards. The Act of 1996 provides a number of opportunities for a party affected to challenge the basis upon which property may be confiscated. Even assuming that the Gilligan's were denied a trial of the real issue in the case at the Section 3 hearing before Moriarty J., (something which cannot be the case in circumstances where the order was not opposed) there was an entitlement on their part to appeal the order of Moriarty J. or to bring an application pursuant to Section 3(3) of the Act of 1996. It is not without significance that in this case the Gilligan's only sought to appeal from the order of Moriarty J. at a very late stage in the proceedings, many years after the order had been made. Geoghegan J., in the course of his judgment, was very clear in pointing out that the Gilligan's were still entitled to bring an application pursuant to Section 3(3) given that the application that had previously been made under that section was more in the nature of a judicial review of the decision of Moriarty J. as opposed to simply being a challenge to the making of the order by

producing evidence demonstrating that the property concerned was not the proceeds of crime. It must be reiterated that the Greendale jurisprudence does not exist to allow a party to re-argue an issue already determined.

Much has been said about the misapprehension under which the Gilligan's and, it is said, others laboured as to the construction of the Act of 1996. It is an unusual Act. It allows the State to freeze the assets of individuals which are found to be proceeds of crime. It then provides not one but several opportunities to challenge that finding. As early as May 1997, the structure of the Act had been explained in some detail by the Supreme Court in the judgment of Murphy J. outlined previously. Subsequently, the Act was the subject of a Constitutional challenge by Mr Gilligan which failed. Further clarification as to the nature of a Section 3 order was given in the McKenna case and in a number of subsequent judgments to which I have referred previously. Given that this is a case in which the Gilligan's could have appealed the making of the Section 3 order on the 16th July 1997 or made an application pursuant to Section 3(3), I am satisfied that this is not a case in which the Greendale jurisprudence can be or ought to be invoked. The Gilligan's have had an appropriate remedy and in the light of the decision of Geoghegan J. they have pursued that remedy before Feeney J. which could only be done once there was a Section 3 order in place. Their decision to pursue a Section 3(3) application involved detailed case management and subsequently, a lengthy hearing before Feeney J.

I have referred previously to the importance of the finality of judgments and orders from the point of view of the needs of litigants to have finality to their legal proceedings and to ensure the proper and efficient administration of justice. If disappointed litigants were able to litigate then re-litigate points decided against them again and again, the legal system would soon grind to a halt. For that reason the circumstances in which a final judgment or order can be varied or set aside are rare. As has been explained, final judgments or orders can be varied or rescinded by reason of mistake under the “slip” rule, judgments obtained by fraud can be set aside and in rare and exceptional cases coming within the Greendale jurisprudence, judgments or orders can be set aside. It is worth recalling at this point two observations made by Henchy J. The first of those was made in the case of *The State (Byrne) v Frawley* [1978] I.R. 326 at p. 350 where he said:

“Because the prisoner freely and knowingly elected at his trial to accept the empanelled jury as competent to try him, I consider that he is now precluded by that election from claiming that the jury lacked constitutionality: see the decision of this court in *Corrigan v Irish Land Commission* [[1977] I.R. 317]. The prisoner’s approbation of the jury was affirmed by his failure to question its validity when he formulated grounds of appeal against his conviction and sentence, and when his

application for leave to appeal was argued in the Court of Criminal Appeal. It was not until some five months after his trial that he first put forward the complaint that the jury had been formed unconstitutionally. Such a volte face is impermissible. Having by his conduct led the Courts, the prosecution (who were acting for the public at large) and the prison authorities to proceed on the footing that he accepted without question the validity of the jury, the prisoner is not now entitled to assert the contrary. The constitutional right to a jury drawn from a representative pool existed for his benefit. Having knowingly elected not to claim that right, it would be contrary to the due administration of justice under the Constitution if he were to be allowed to raise that claim in the present proceedings when, by deliberate choice, it was left unasserted at the trial and subsequently in the Court of Criminal Appeal. What has been lost in the process of events is not the right guaranteed by the Constitution but the prisoner’s competence to lay claim to it in the circumstances of this case.”

The observations of Henchy J. seem to me to be particularly apposite when considering the history of these proceedings, bearing in mind that the challenge to the order of Moriarty J. on the basis that he lacked jurisdiction to make such an order by reason of the fact

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that two previous orders had been made was only raised for the first time in the Supreme Court on these appeals from Feeney J. The Gilligan's made Section 3(3) applications to Feeney J. following the Supreme Court decision in 2008 and such a hearing could only have taken place, as previously pointed out, if there was a valid Section 3 order in place.

Henchy J. in the later case of *Murphy v Attorney General* [1982] I.R. 241 at pp. 314-315 said:

“For a variety of reasons, the law recognises that in certain circumstances, no matter how unfounded in law certain conduct may have been, no matter how unwarranted its operation in a particular case, what has happened has happened and cannot, or should not, be undone. The irreversible progressions and by-products of time, the compulsion of public order and of the common good, the aversion of the law from giving a hearing to those who have slept on their rights, the quality of legality -even irreversibility - that tends to attach to what has become inveterate or has been widely accepted or acted upon, the recognition that even in the short term the accomplished fact may sometimes acquire an inviolable sacredness, these and other factors may convert what has been done under an unconstitutional, or otherwise

void, law into an acceptable part of corpus iuris.”

Thus, it seems to me that even if the process followed in this case where orders under Section 3 were made on three separate occasions was not permitted under the Act, (which I do not accept for the reasons previously explained), to use the words of Henchy J., what has happened has happened and cannot be undone at this late stage of the proceedings in circumstances where, in my view, the Gilligan's have slept on their rights to challenge the validity of the steps taken by CAB. Those who have a right to challenge the validity of an order made against them should do so promptly by the means provided for such challenge, such as by way of appeal. Failure to do so will preclude someone who might otherwise have a valid basis for challenging an order made against to raise such issue years later.

For the sake of completeness, I want to briefly address one further point made by the Gilligan's in respect of the Section 3 hearing before Moriarty J. Complaint was made on their behalf that the hearing took place at a time when “legal aid was not in place”. It is undoubtedly the case that Section 6 applications were still extant at that time and indeed those applications were dealt with by Moriarty J. some days later. It should be noted that an application pursuant to Section 6 is not an application for legal aid. It should also be borne in mind that John and Geraldine Gilligan were represented by Counsel and Solicitors at the hearing before Moriarty J. In those circumstances, it is simply not correct to suggest that there was any

impediment to their legal representation at that hearing by reason of “legal aid not being in place”. I cannot see any basis for suggesting that the order made on that occasion was flawed by reason of any issue in relation to legal representation.

In the circumstances, I am satisfied that the Gilligan’s have not suffered any infringement of their constitutional right to challenge the finding on foot of the prima facie evidence of CAB that the properties referred to in the Schedule to the Plenary Summons constituted or were acquired with the proceeds of crime. There is no extraneous matter “going to the very root of the fair and constitutional administration of justice.”

Throughout the hearing of this appeal it has been clear that unless the original Section 3 orders could be said to be invalid there was no real basis for challenging the judgment of Feeney J. No arguments were advanced before this Court to demonstrate that his findings were in error. I therefore do not propose to embark on a review of that decision save to say that there was a comprehensive hearing before Feeney J. in which the Gilligan’s were given a full opportunity to deal with every possible conceivable issue in order to demonstrate the contention that the properties concerned were not acquired with the proceeds of crime. Their case in that regard was rejected. There is no basis for coming to any different view at this stage.

SECTION 4 orders and the European convention on Human Rights

I should make reference at this point to the judgment of Feeney J. on the Section 4 applications by CAB. The first point to note is that the judgment in that case bears the record number 1996 No. 10143P and is entitled in the names of the parties to the original plenary summons. It should have been entitled in the names of the parties to the special summons proceedings issued in 2004 in which bore the record number 2004 No. 536SP and in which the plaintiff was Mr Felix McKenna and the Gilligan’s were the defendants. The order perfected following the delivery of judgment on the 20th December 2011 on the Section 4 applications bears the correct record number and identifies the parties to the Section 4 proceedings correctly. Nothing turns on this point.

It follows from the fact that Feeney J. rejected the Gilligan’s’ applications pursuant to Section 3(3) that CAB would pursue its application for orders pursuant to Section 4 of the Act. Feeney J. went on to make orders pursuant to Section 4 of the Act against the Gilligan’s transferring all of the properties at issue to the Minister for Public Expenditure and Reform. (It should be noted that in the judgment and order of Feeney J. on foot of the Section 3(3) application that whilst an order was made for the sale of a property at 1, Willsbrook Lawn, Lucan, Co. Dublin, it was provided that Treacy Gilligan was to receive 20% of the net proceeds of the sale of that property).

In the course of submissions on behalf of the Gilligan’s reference was made to Article 1 Protocol 1 of the European

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Convention on Human Rights which provides as follows:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

It is not contested by the Gilligan’s that the scheme of the Act of 1996 has a legitimate aim and further that it comes within the meaning of “public interest” referred to in Article 1 Protocol 1 of the Convention. However the argument was made that the process leading to a Section 4 disposal application had to comply with the principle of lawfulness required by Article 1 Protocol 1 of the Convention. The court was provided with a number of authorities of the European Court of Human Rights on the principle of lawfulness. (See for example, *Latridis v Greece* (1999) 30 E.H.R.R. 97 at para. 58.) Relying on those, it was submitted that it was necessary for CAB to show that the order obtained by way of Section 4 satisfied the test of lawfulness. It was then argued that the process leading to the Section 4 order was not lawful by reason of the procedural defects and the

jurisdictional deficit alleged to have vitiated the Section 3 order. In other words, the procedure leading up to the granting of the Section 4 order did not comply with the principle of lawfulness required under Article 1 Protocol 1 of the Convention and therefore was unlawful as being an order made in violation of the Convention rights of the Gilligan’s.

For the reasons set out previously in relation to the arguments in respect of the validity of the Section 3 orders, I can see no basis for saying that CAB in its application for Section 4 orders has been in breach of the principle of lawfulness. I am satisfied that Moriarty J. was entitled to make a Section 3 order on the 16th July 1997. Although a Section 3 order is a final order as explained in the McKenna case, for the reasons set out previously, I am satisfied that it was appropriate (and lawful) to have made that order at that time. It clearly was never the case that the earlier orders made pursuant to Section 3 were ever intended to be anything other than temporary. It is important to reiterate that the making of the order on the 16th July 1997 was not opposed. After the making of that order it was always open to the Gilligan’s to challenge the order by way of appeal or alternatively on an application pursuant to Section 3(3) of the Act or in the course of an application pursuant to Section 4 of the Act. The Gilligan’s ultimately pursued their right to challenge the finding that the properties concerned were acquired directly or indirectly through the proceeds of crime in a comprehensive hearing before Feeney J.

It has not been suggested that the rights of the Gilligan's under the Convention were in any way greater than those guaranteed by the Constitution. I can see no basis for saying that the making of the Section 3 order on the 16th July 1997 was in breach of the constitutional or Convention rights of the Gilligan's. Mr and Mrs Gilligan were both represented in court that day. They did not oppose the making of the order. Even assuming that they did not oppose the order because of a misapprehension as to the nature of a Section 3 order despite the earlier decision of the Supreme Court in these proceedings in which Murphy J. described the scheme of the Act, the order made then could have been challenged by appeal or pursuant to the provisions of the Act. In all the circumstances I am satisfied that there was no breach of the principle of lawfulness under Article 1 Protocol 1 of the European Convention on Human Rights.

Finally, I should refer briefly to a point made on behalf of CAB as to the applicability of the European Convention on Human Rights to these proceedings in which it was argued that given that the European Convention on Human Rights Act was passed in 2003, it could not be applied retrospectively to those parts of the proceedings and orders made therein prior to the coming into effect of that Act. It should be borne in mind that the Section 4 disposal order proceedings were commenced in 2004 and to that extent, there could be no question of retrospectivity in respect of the applicability of the Convention to those proceedings. The question of the

retrospective application of the Convention to events occurring prior to 2003 relied on in post 2003 proceedings is not without difficulty. See for example, the decision of this Court in *Dublin City Council v Fennell* [2005] 1 IR 604.) However, given that I have concluded that the making of a Section 4 disposal order in these proceedings did not offend against the principle of lawfulness, the question of the retrospective application of the European Convention on Human Rights does not need to be considered.

Conclusion

I am satisfied that the Gilligan's are not entitled to succeed in the Greendale motions. They have not established that the judgment of the Supreme Court delivered in these proceedings in 2008 comes within the rare or exceptional circumstances in which a final judgment or order may be set aside. To do so, it would have been necessary to show, that through no fault of theirs, they had been the subject of a breach of their constitutional rights. For the reasons I have set out above, I am satisfied that there has been no such breach. There is nothing extraneous in the circumstances of this case going to the very root of the fair and constitutional administration of justice which would necessitate the setting aside of the judgment of the Supreme Court of 2008.

At the beginning of this judgment I identified the essence of the contentions of the Gilligan's as being that there was no trial of the issue as to whether or not the property at issue in these proceedings was acquired directly or indirectly with the proceeds of crime

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when the operative Section 3 order was made freezing the property in the hands of the Gilligan's pursuant to the Act of 1996. As a result, it was contended that there was no valid Section 3 order; thus, the hearing before Feeney J. was without jurisdiction and could not stand and ultimately, no disposal order under the Act of 1996 could be made in respect of the property. As has been noted previously, the Act of 1996 gives a party affected by a Section 3 order a number of opportunities to challenge the making of a Section 3 order. The first such opportunity arises at the Section 3 hearing itself. If not challenged at that stage, the making of a Section 3 order can be challenged at a Section 3(3) hearing. Ultimately, there can be a challenge at the time of a Section 4 hearing. It is important to emphasise that if the making of a Section 3 order is not opposed, a party affected by such an order is not precluded from bringing such a challenge at a later stage in the proceedings. That is what happened here. There was a full trial of the real issue in the case, namely whether the properties concerned were acquired directly or indirectly by the proceeds of crime. That trial was the subject of a lengthy hearing before Feeney J. at which evidence was given by witnesses on behalf of CAB and on behalf of the Gilligan's giving rise to the comprehensive judgment of Feeney J. of the 27th January 2011.

The evidence initially produced by CAB remained in substance the same as it relied on in all subsequent court appearances, whether moved on its behalf or on behalf of the Gilligan's. The

constant repetition, by way of reliance, of that evidence was therefore subject to repeat evaluation under judicial scrutiny during the course of these proceedings, giving the Gilligan's multiple opportunities to engage with the evidence or to challenge its authenticity, reliability or value. Further, the essence of what CAB has asserted was never undermined, and accordingly it must be taken to have reached a status comparable to that required of any applicant in proceedings where the legal onus of proof rests upon it.

In addition, when these proceedings are looked at in a unitary sense, it must be taken that there was a substantive hearing, firstly on CAB's application for a Section 3 order in respect of the property concerned which was obtained only on CAB discharging the onus of proving the matters specified in Section 3 of the Act of 1996, secondly, on the hearing of the Section 3(3) application of the Gilligan's and finally, on the application for a disposal order, again only obtained in circumstances where the necessary statutory pre-conditions set out in Section 4 of the Act of 1996 had been satisfied. Therefore, it cannot be accepted that the Gilligan's did not obtain a fair trial as that phrase is understood in Convention terms.

In conclusion, I would dismiss the applications of the Gilligan's on the Greendale motions and I would dismiss the appeals.

Criminal Assets Bureau v. J.McN.

25th May 2017, Supreme Court: Clarke J., Laffoy J., O'Malley Iseult J [2017] IESC 30

Revenue – Criminal Assets Bureau – Section 966 of the Taxes Consolidation Act – Certificate evidence

JUDGMENT OF MR JUSTICE CLARKE
DELIVERED THE 25TH MAY, 2017.

1. Introduction

1.1 This appeal is concerned with a potential liability for tax. While it is brought using the title of the plaintiff/respondent (“CAB”), it in fact involves, for reasons which I will shortly address, a claim actually brought by an individual officer of that body.

1.2 A range of issues were canvassed on the appeal. Questions concerning the statutory regime by which assessments to tax may become conclusive and incapable of being reopened were addressed together with issues concerning the appropriate proof which must be tendered to a court in order to establish a liability for tax on an application for summary judgment.

1.3 However, a further point, which logically arises first, was argued which concerned the question of whether it had been established that the relevant officer of the CAB was entitled to bring these proceedings at all. If the court were persuaded that there was a

lack of sufficient proof in that regard then it would follow that the proceedings should have been dismissed. It would also follow that none of the other issues would require to be decided.

1.4 In any event these summary proceedings were brought against the defendant/appellant (“Mr McN”) claiming sums said to be due on foot of a liability to tax which was argued to have become final. The claim was for €3,313,990.15 representing tax and interest being €1,791,168.75 for tax together with interest up to the 27th September 2007 in the sum of €1,522,821.40. Continuing interest was also claimed.

1.5 Liberty to enter final judgment was initially given by the Master but Mr McN appealed to the High Court. A range of issues were pursued before the High Court on that appeal. However, the High Court (Feeney J.) ultimately concluded, in a judgment of the 14th September, 2009 (*Criminal Assets Bureau v. McN* [2009] IEHC 414), that it had “been proved in evidence and/or admitted facts the necessary proofs to result in judgment being granted in favour of the plaintiff ...”. Likewise, it was said that Mr McN had failed to identify any bona fide defence. Therefore, the High Court dismissed Mr McN’s appeal and affirmed the order of the Master.

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1.6 Mr McN appealed to this court. I have ultimately concluded that this appeal should be allowed. I have come to that view because I consider that one of the grounds put forward on behalf of Mr McN (the capacity to sue argument) provides an appropriate basis for disposing of this appeal. In those circumstances I do not find it necessary to deal with the remainder of the grounds relied on. I, therefore, propose addressing the facts and argument relevant to the ground concerned.

2. The Facts

2.1 The case made on behalf of CAB was that Mr McN had not made tax returns in respect of the tax year 2000/1 and each of the tax years (which had by then undergone a calendar change) between 2001 and 2005. On that basis it is said that assessments were raised in respect of each of those tax years on 17th July 2007.

2.2 Next it is said that no appeal was lodged in respect of those assessments within the time limit provided for in law. Furthermore, it is said that no application for late appeal was brought prior to the commencement of these proceedings. While it will be necessary briefly to turn to certain aspects of the legislative scheme in due course, it is clear that it is possible to seek an extension of time to file a late

appeal against assessments but that there are significant limitations on that entitlement most particularly where proceedings have been commenced. In those circumstances it is said that the relevant assessments had become final and conclusive and that it is no longer possible to seek an extension of time to appeal against them because no such application had been made prior to the commencement of these proceedings. It would appear that Mr McN wishes to say that the amounts of the assessments raised were very significantly greater than the true amount of tax due.

2.3 However, when the matter was before the High Court on appeal from the Master, a separate and specific legal issue was raised on behalf of Mr McN concerning the capacity of the relevant officer to sue. That issue was also the subject of the appeal to this Court. In order to understand that legal issue it is necessary first to say something about the legislation governing the CAB being the Criminal Assets Bureau Act, 1996 (“the 1996 Act”).

3. The 1996 Act

3.1 While the plaintiff is described as the CAB in reality the plaintiff is a bureau officer of CAB (described for the purposes of anonymity as “Revenue Bureau Officer 32”). The special endorsement of claim

pleads that “The plaintiff brings these proceedings in the name of the Criminal Assets Bureau pursuant to the provision of Section 10 of the Criminal Assets Bureau Act, 1996”.

3.2 In material part, Section 10(4) of the 1996 Act provides that a bureau officer who is an officer of the Revenue Commissioners and who exercises powers or duties under revenue law must exercise such powers “in the name of the Bureau and not in the name of the individual bureau officer involved, notwithstanding any provision to the contrary in any relevant enactment”.

3.3 There was not any dispute, therefore, that an anonymous bureau officer, such as Revenue Bureau Officer 32, was entitled to maintain these proceedings using the name of the CAB. However, it follows that what needs to be considered is the legal basis on which Revenue Bureau Officer 32 brought these proceedings and tendered the proof necessary to establish the claim.

3.4 That leads to a consideration of Section 966 of the Taxes Consolidation Act, 1997 (“the 1997 Act”).

4. Section 966

4.1 Section 966(1) provides that, without prejudice to any other means by which payment of sums due in respect of income

tax may be enforced, an officer of the Revenue Commissioners “authorised by them for the purposes of this subsection” can sue in his or her own name in the High Court for recovery of sums due and the same subsection also provides that the relevant proceedings can, as here, be commenced by summary summons. It follows that, provided that Revenue Bureau Officer 32 was authorised for the purposes of Section 966(1), he could bring proceedings for tax due in his own name and could, by virtue of the 1996 Act, do so using the name CAB.

4.2 Next it is necessary to turn to Section 966(3) which provides that, for the purposes of proceedings under Section 966, a certificate signed by a Revenue Commissioner, certifying that a person is an officer of the Revenue Commissioners and is authorised in accordance with the section, is to be prima facie proof of those matters.

4.3 No certificate as contemplated by Section 966(3) was produced in evidence. One of the legal issues which arose for debate was to whether it was possible to establish the entitlement of Revenue Bureau Officer 32 (using the name CAB) to bring these proceedings in any other way. A second issue was as to whether, even if it is possible in theory so to do, such authority has, in fact,

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- been proved in the circumstances of this case.
- 4.4 In that context reference is made by CAB to para. 2 of the special endorsement of claim which reads as follows:-
- “The plaintiff is a Bureau Officer appointed by the Criminal Assets Bureau pursuant to section 8 of the Criminal Assets Bureau Act, 1996. The plaintiff is also an officer of the Revenue Commissioners nominated by the Revenue Commissioners to exercise the powers and functions of the Collector General and who has also been authorised by the Revenue Commissioners to sue in his own name in the High Court”.
- 4.5 Furthermore, in an affidavit sworn by Revenue Bureau Officer 32, it is deposed at para. 1 that the officer concerned has been “duly nominated to exercise the powers and functions as conferred on the Collector General pursuant to Section 851(3)(a) and (b) of the 1997 Act”. On that basis, and relying on other affidavit evidence to similar effect, it was also argued that, even where no certificate was tendered under Section 966(3), Revenue Bureau Officer 32 had demonstrated that he was nonetheless entitled to bring the proceedings on the basis of having been nominated, in accordance with Section 851(3)(a) of the 1997 Act, to exercise on behalf of the Collector General the powers of the Collector General under revenue legislation.
- 4.6 It is said that Section 851(2) confers on the Collector General the function and power to collect tax due so that, it is said, in any event and independent of Section 966, the Collector General could sue and, therefore, the relevant bureau officer could exercise the same power on being nominated under section 851(3)(a). It was said that there was evidence to that effect thus establishing the entitlement to sue.
- 4.7 Thus, under this heading, there were two sub issues. The first was as to whether a certificate under Section 966(3) was the only means by which the entitlement of Revenue Bureau Officer 32 to bring these proceedings could have been established. There being no such certificate it would follow, if that was the proper interpretation of the law, that the proceedings would necessarily have to fail. On the other hand, if it were held to be possible to establish the entitlement of Revenue Bureau Officer 32 to bring these proceedings in other ways, the issue arose as to whether the entitlement to bring the proceedings had properly been established in whatever

- alternative ways might be permissible.
- 4.8 I propose dealing with both of those issues in turn. I will, therefore, turn firstly to the question of whether a certificate under 966(3) is the only means of establishing the entitlement of Revenue Bureau Officer 32 to sue such that a certificate under that section would be a necessary proof in proceedings of this type.
- 5. Is a Certificate under Section 966(3) a necessary proof?**
- 5.1 While this may seem to be a very technical point, it is of some importance to emphasise that establishing an entitlement to sue is quite a fundamental aspect of any court proceedings. In many, indeed most, cases there will not be an issue. If I assert that I have been injured in a motor accident due to the negligence of a defendant then it is fairly obvious that I am the person entitled to sue. If I allege that I have suffered loss by reason of a breach of contract by a named party then, again, I can obviously bring the proceedings.
- 5.2 However, there can be cases where it may not be quite so obvious that the individual commencing the proceedings actually has an entitlement to sue. No particular individual or body has a natural entitlement to bring proceedings for the recovery of tax said to be due.
- The liability of any taxpayer to pay tax is, of course, a matter of statute. It is for the statute concerned to specify how proceedings to recover any monies said to be due for tax are to be brought and in particular to specify who can sue. Obviously an ordinary member of the public could not bring proceedings for the recovery of tax. But equally an ordinary public servant could not, simply by being an officer of the State, bring proceedings for the recovery of tax. For example, a senior Garda Officer could not, without an appropriate form of legal authorisation, sue for tax said to be due. From a legal perspective the fact that someone might well owe tax would not be the business of the relevant Garda Officer. It follows that the identification of an entitlement to sue, while frequently wholly uncontroversial, is nonetheless an important matter for without an appropriate authorisation any proceedings are wholly misconceived.
- 5.3 Against that backdrop I turn first to Section 966.
- 5.4 Section 966 has a number of important subsections at least some of which are designed to make proving essential facts in certain types of tax collection cases a lot easier. The basic provision to be found in the Section 966 is that contained in

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- subs.(1) which allows an officer of the Revenue Commissioners “authorised by them for the purposes of this subsection” to sue in his or her own name for the recovery of tax. Clearly Revenue Bureau Officer 32, using the name CAB, would be entitled to bring these proceedings if it could be shown that he was an officer of the Revenue Commissioners and that he was authorised, under Section 966(1), to bring proceedings of this type in his own name. However, it is of relevance to note that Section 966(1) is stated to be “without prejudice to any other means by which payment of the sums due” can be enforced. It seems clear, therefore, that Section 966(1) is permissive and does not necessarily require that any proceedings for the collection of relevant tax must be brought in the manner contemplated by that subsection.
- 5.5 Section 966(3) provides that “in proceedings pursuant to this section” a certificate signed by a Revenue Commissioner to the effect that a specified person is an officer of the Revenue Commissioners and has been authorised for the purposes of subs.(1) can be taken as evidence of those facts until the contrary is proven. It follows, therefore, that a certificate in the appropriate form signed by a Revenue Commissioner would provide prima facie evidence that an individual was an officer of the Revenue Commissioners and authorised to sue in his or her own name thus, again on a prima facie basis, establishing an entitlement to sue.
- 5.6 It is also of some relevance to note that Section 966(5) allows for a similar form of certificate proof of various matters including the fact that assessments have become final and that certain sums are due. Such a certificate under Section 66(5) did form part of the evidence before both the Master and the High Court. However, there was no certificate under Section 966(3) establishing that Revenue Bureau Officer 32 was an officer of the Revenue Commissioners and authorised under subs.(1) to bring proceedings in his own name. A certificate as to authority under subs.(3) must be “signed by a Revenue Commissioner”. On the other hand a certificate proving debt under subs.(5) can be “signed by an officer of the Revenue Commissioners”. A subs.(5) certificate could not be a substitute for the absence of a subs.(3) certificate.
- 5.7 In those circumstances the question arises as to whether the absence of a subs.(3) certificate was fatal. In my view it cannot be said that the absence of a certificate under Section 966(3) is necessarily fatal to proceedings

- brought for the collection of tax. Provided that there is a statutory basis for an individual being entitled to bring the proceedings then the fact that one possible legislative entitlement so to do has not been established is not fatal to the case. Indeed the wording of Section 966(1) is, as I have already noted, permissive rather than mandatory.
- 5.8 It follows that it would be open to a Bureau Officer (or indeed any other person) to show either that there was evidence, independent of a certificate under Section 966(3), that they were entitled to sue under Section 966(1) or, importantly, that some other authorisation could be found in statute for the entitlement to bring proceedings in their own name and that there was sufficient evidence to establish that the conditions required by that other statutory provision had been met.
- 5.9 The absence of a certificate under Section 966(3) is not, however, of no relevance. It means that that relatively easy way of establishing that a person is entitled to sue in their own name by virtue of Section 966(1) was not, and therefore cannot, be relied on. The presence of such a certificate would provide prima facie evidence which would entitle both the Master and the court to conclude that the individual concerned was entitled to sue. The absence of such a certificate means that the entitlement to sue must be demonstrated in some other way.
- 5.10 It follows that it is necessary to consider whether there was any evidence before the Master and the High Court from which it could be determined that Revenue Bureau Officer 32 was, independent of a certificate under Section 966(3), proven to be entitled to sue.
- 6. A More General entitlement to sue?**
- 6.1 The ordinary function of collecting tax is conferred, by Section 851 of the 1997 Act, on the Collector General. However, section 851(3)(a) permits the Revenue Commissioners to nominate persons to exercise on behalf of the Collector General any or all of the powers and functions conferred on the Collector General by revenue legislation. Likewise, section 851(3)(b) indicates that such powers and functions may be “exercisable on his or her behalf” by nominated persons. The reference to “his or her” is to the Collector General.
- 6.2 It is clear, therefore, that, at the level of principle, any officer of the Revenue Commissioners can be nominated by those commissioners to carry out “on behalf of” the Collector General,

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any of the powers and functions of the Collector General.

6.3 However, there is a real question as to whether that general provision could permit an individual to bring proceedings in their own name as opposed to bringing proceedings in the name of the Collector General and on behalf of the Collector General. It is important to note that s.851 does not directly transfer the powers of the Collector General to the nominated person. Rather it permits that person to exercise powers “on behalf of” the Collector General.

6.4 That aspect of s.851 comes into particular focus when it is read in conjunction with section 966. If Section 851 were to be interpreted as including a power on the part of a nominated person to sue in the courts in their own name then there would clearly be no need for Section 966 for the nominated person would already have the power to bring proceedings in their own name as a result of an appropriate authorisation under Section 851. Put another way, if Section 851(3) entitles the Revenue Commissioners, when nominating a Revenue officer to exercise the powers and functions of the Collector General on behalf of the Collector General, to bring proceedings in their own name, then a nomination under Section

851 would suffice to allow Revenue officials to bring proceedings in their own name. If that were to be the correct interpretation of the breadth of Section 851 then Section 966 would be redundant for the power to carry out the potentially narrower function of suing in one’s own name would already be present within the more general power to carry out functions on behalf of the Collector General which are permitted to be conferred on a nominated person by Section 851.

6.5 In those circumstances it does not seem to me that it can be said that an authorisation under Section 851 can allow a person nominated under that section to bring proceedings in their own name. Rather it allows nominated persons to carry out actions “on behalf of” the Collector General (as the section itself specifies) rather than in their own name. Thus, for example, a demand for tax may be signed by an authorised officer “on behalf of” the Collector General.

6.6 For those reasons it does not seem to me that a general authorisation to act on behalf of the Collector General allows a nominated person to go further and bring proceedings in their own name as opposed to taking actions necessary to bring

proceedings on behalf of the Collector General. To take any other view of the section would be to render Section 966(1) redundant which, in turn, would be contrary to principle.

- 6.7 It seems to me to follow, therefore, that the only means by which an individual, other than the Collector General, can be authorised to bring proceedings in their own name (as opposed to on behalf of the Collector General) is Section 966(1). However, for the reasons already identified, it does not seem to me that a certificate under Section 966(3) is the only means by which an authorisation under Section 966(1) can be established. It can, in principle, be established by any legitimate evidential means.
- 6.8 It is in that context that it is necessary to review the evidence which was before the Master and the High Court to ascertain whether there was sufficient evidence in that regard.
- 6.9 In the original affidavit of John O'Mahoney, of the Criminal Assets Bureau, sworn on the 27th November 2007, it is deposed that Revenue Bureau Officer 32 "is an officer of the Revenue Commissioners nominated by the Revenue Commissioners to exercise any of the powers and functions of the Collector General...". That averment seems to me to be sufficient to establish

that Revenue Bureau Officer 32 was an officer of the Revenue Commissioners. However, by reason of my analysis of Section 851, I am not satisfied that the averment in question goes so far as to establish an authorisation for the bringing of proceedings in the name of the officer concerned under Section 966 for such proceedings are not brought "on behalf of" the Collector General but rather are brought in the name of the individual concerned.

- 6.10 Likewise, in an affidavit sworn by Revenue Bureau Officer 32, in October 2008, it is deposed that he is nominated to exercise the powers and functions as conferred on the Collector General as a result of Section 851(3) of the 1997 Act. Those powers can, as already noted, only be exercised on behalf of the Collector General and not in the individual's own name.
- 6.11 Finally, in a further affidavit of John O'Mahoney, there appears a similar averment to that contained in his original affidavit.
- 6.12 It follows that the only evidence before the High Court was to the effect that Revenue Bureau Officer 32 was authorised to carry out powers and functions of the Collector General on behalf of the Collector General. There was no evidence to establish that Revenue Bureau Officer 32 was

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authorised to bring proceedings in his own name rather than on behalf of the Collector General.

6.13 It would, of course, have been very easy to establish the entitlement of Revenue Bureau Officer 32 to bring these proceedings in his own name not least by means of a certificate under Section 966(3). However, no such certificate was proved in evidence. It would even have been possible to have proved the same matters in some other way by admissible evidence. However, in my view, there was just no evidence to establish the entitlement of Revenue Bureau Officer 32 to bring these proceedings in his own name and thus no evidence to establish that the proceedings could have been brought by that officer using the title CAB in accordance with the permission in that regard contained in the 1996 Act.

6.14 One further issue needs to be touched on. In what was a curious procedural development, which occurred while these proceedings were before the Master, a document purporting to be a “defence and counterclaim” was filed on behalf of Mr McN having, apparently, been prepared by a then barrister, Mr Russell, who has since been disbarred. Feeney J. placed some reliance on the fact that the special endorsement of claim, as noted earlier, asserted,

amongst other things, that the plaintiff “has also been authorised by the Revenue Commissioners to sue in his own name ...” The document purporting to be a defence and counterclaim did not contain any denial of that assertion. On that basis Feeney J. took into account the fact that an assertion of authority had been included in the pleadings and had not been denied.

6.15 However, it seems to me that no reliance could properly have been placed on the document in question for the purposes of deeming Mr McN to have admitted (by the absence of a denial) the authority of Revenue Bureau Officer 32 to sue. The rules of court make no provision, in summary summons proceedings, for the filing of a defence and counterclaim in the ordinary way. Indeed, the whole point of the summary summons procedure is that a party is not entitled to defend (and, if appropriate, counterclaim) unless the court is persuaded that they have established an arguable defence. In my view the document in question must, therefore, be treated as of no legal effect. At the point when it was filed, the court had not given leave to defend. The Rules of the Superior Courts make no provision for the filing of such a document at that stage. It is, it has to be said, extraordinary that

someone who had qualified at the bar would have been so unaware of the proper procedures to be followed that such a document would have been filed. Be that as it may there was no legal basis on which the document in question could have been filed. It was not, therefore, in any proper sense of the term, a pleading in these proceedings for it was entirely unauthorised. In those circumstances it does not seem to me that it can be taken as containing implied admissions which would relieve Revenue Bureau Officer 32 of the burden of establishing, in an appropriate evidential way, his authority to sue. Given that, for the reasons which I have analysed earlier, I am not satisfied that there was appropriate evidence to establish authority to sue, it seems to me to follow that the absence of such evidence cannot be cured by the content of a document which is not a recognised form of pleading in proceedings such as this (at least at the stage which the proceedings had reached).

6.16 It seems to me to follow that the High Court should have dismissed these proceedings on the basis that the plaintiff, being Revenue Bureau Officer 32 acting in the name CAB, had not established an entitlement to sue for the taxes which are the subject of the claim.

7. Some Further Observations

7.1 It might seem that the resolution which I propose to this appeal is unduly technical. However, for the reasons already set out, it is of significant importance that courts ensure that there is adequate evidence before them to establish the entitlement of the individual named as plaintiff to bring the proceedings in the first place.

7.2 Furthermore, it might be thought that the basis on which I would propose that Mr McN. be entitled to succeed on his appeal may afford him little benefit for there can be little doubt but that it would be easy to remedy the problem identified in this judgment in further proceedings. However, it may be that, in the particular circumstances of this case, a decision that these proceedings should be dismissed would be of advantage to Mr McN. in that, as long as proceedings are not in being, it is open to him to seek an extension of time to appeal the relevant assessments on the merits. As noted earlier no extension of time can be granted as long as proceedings are in being. I should emphasise that nothing in this judgment should be taken as implying that I would favour any particular result either to an application to extend time to appeal the assessments or in any further proceedings which might

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- be brought in respect of these taxes.
- 7.3 Having concluded that these proceedings should have been dismissed on the basis that there was no evidence before either the Master or the High Court to establish that Revenue Bureau Officer 32 was entitled to maintain these proceedings for the collection of tax in his own name, it follows that it is unnecessary to consider the other points which were raised on behalf of Mr McN. on this appeal. I would, therefore, express no opinion on whether Feeney J. was correct in the views which he expressed in his judgment on those questions.
- 8. Conclusions**
- 8.1 For the reasons set out in this judgment I have come to the view that the evidence before the Master and before the High Court was not sufficient to establish that Revenue Bureau Officer 32 (quite properly using the title CAB) could bring these proceedings in his own name. I am not satisfied that a certificate under Section 966(3) of the 1997 Act is the only means by which such an entitlement could be established. However, for the reasons which I have sought to analyse, I am not satisfied that the entitlement to sue in his own name had, in all the circumstances of this case, been established by any other means either.
- 8.2 It follows that, in my view, the proceedings should have been dismissed by the High Court on the basis that the plaintiff had failed to establish an entitlement to maintain the proceedings in his own name. I would, therefore, allow the appeal and substitute an order dismissing the proceedings.
- 8.3 It should be clear that an order dismissing the proceedings does not act as a barrier to any duly authorised person bringing fresh proceedings seeking to recover any taxes properly due. In addition, the fact that these proceedings will stand dismissed but that fresh proceedings may be instituted in the future does mean that there may be a period during which there will not be proceedings for the recovery of the relevant taxes in being against Mr McN. It may, in those circumstances, be possible for him to make an application for an extension of time to appeal against the assessments which are the subject of these proceedings in such a way as would allow a consideration on the merits of whether the assessments are correct. However, it is not for this Court to express any view on whether such an application could be brought and, if so, whether it would be appropriate to extend

time. Those matters were not before the court.

Part Seven
Significant Court judgments during 2017

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Part Eight

International developments

The International Perspective

As a front line agency in the fight against criminality, the Bureau's capacity to carry out this function, together with its success to date is, to a large degree, based on its multi-agency and multi-disciplinary approach, supported by a unique set of legal principles. The Bureau continues to play an important role in the context of law enforcement at an international level.

Asset Recovery Office (ARO)

As stated in previous reports, the Bureau is the designated Asset Recovery Office (ARO) in Ireland. Following a European Council Decision in 2007, the Asset Recovery Offices were established throughout the European Union to allow for the exchange of intelligence between law enforcement agencies involved in the investigation, identification and confiscation of assets deemed to be the proceeds of criminal conduct.

As part of its commitment as an Asset Recovery Office, the Bureau has attended three meetings held in Europe to discuss the work and cooperation of the Asset Recovery Offices. These meetings were held in Brussels.

During 2017, the Bureau received thirty three requests for assistance. The Bureau was able to provide information in respect of these requests. The requests were received from nine different countries within the European Union. The Bureau itself sent seventeen requests to seven different countries from which it has received replies.

International Operations

From an operational perspective, the Bureau continues to be involved in a number of international operations. The Bureau's engagement in such operations can vary depending on the circumstances of the case. It may include providing ongoing intelligence in order to assist an investigation in another jurisdiction. More frequently, it will entail taking an active role in tracking and tracing individual criminal targets and their assets in conjunction with similar agencies in other jurisdictions.

Europol

The Bureau continues in its role as the lead Irish law enforcement agency in a number of ongoing international operations which are being managed by Europol. These operations are targeting the activities of transnational organised crime gangs who recognise no borders and who attempt to exploit the opportunities presented by freedom of movement across international frontiers in their criminal activity or to facilitate such activity.

Interpol

Interpol is an agency comprising of the membership of police organisations in one hundred and ninety countries worldwide. The agency's primary function is to facilitate domestic investigations which transcend national and international borders. The Bureau has utilised this agency in a number of investigations conducted in 2017.

Part Eight

International developments

CARIN

In 2002, the Bureau and Europol co-hosted a conference in Dublin at the Camden Court Hotel. The participants were drawn from law enforcement and judicial practitioners.

Logo of CARIN



The objective of the conference was to present recommendations dealing with the subject of identifying, tracing and seizing the profits of crime. One of the recommendations arising in the workshops was to look at the establishment of an informal network of contacts and a co-operative group in the area of criminal asset identification and recovery. The Camden Assets Recovery Inter-agency Network (CARIN) was established as a result.

The aim of the CARIN is to enhance the effectiveness of efforts in depriving criminals of their illicit profits.

The official launch of the CARIN Network of Asset Recovery agencies took place during the CARIN Establishment Congress in The Hague, in September 2004.

The CARIN permanent secretariat is based in Europol headquarters at The Hague. The organisation is governed by a Steering Committee of nine members and a rotating Presidency.

During 2017, the Bureau remained as a member of the Steering Group and attended the Annual General Meeting which was held in Stockholm on the 11th – 13th October 2017.

ALEFA

(Association of Law Enforcement Forensic Accountants)

The ALEFA Network is a European funded project which has been established to develop the quality and reach of forensic accountancy throughout law enforcement agencies so as to better assist the courts, victims, witnesses, suspects, defendants and their legal representatives in relation to the investigation of alleged fraud, fiscal, financial and serious organised crime.

The ALEFA Network involves all of the EU Member States and invites participation from the USA, Canada and Australia.

During 2017, the Bureau as a member of the ALEFA Steering Group was involved in developing the EU Internal Security Fund – Police, funded project “Financial Investigation as a means to combat Trafficking in Human Beings (THB)”.

The aim of the project is to improve financial analysis techniques and to enhance tracing and confiscation of the proceeds of THB crimes. The ALEFA Steering Group will provide a THB financial investigation training event and promote a THB financial investigation handbook, at Europol during 2018. In that regard, the Bureau participated in

Steering Group project meetings and on a project research in Germany.

Logo of ICOFI

Logo of ALEFA



International College of Financial Investigation (ICOFI)

The Bureau provided an instructor on the ICOFI course entitled “Recovering of Damages of MTIC Fraud”. ICOFI is based in Budapest and is located in the International Training Centre which also hosts the CEPOL National Unit, the International Law Enforcement Academy, and the Central European Police Academy National Unit.

The course had participants from across the EU with the CAB instructor focusing the Bureau's experience in tackling MTIC Fraud and also its skills in virtual currencies.

The ICOFI Conference on “New Trends in the Financial Frauds-LEA Perspective of the Virtual Currencies” took place from the 20th – 23rd November 2017 at the International Training College in Budapest, Hungary. As well as providing two instructors to this course who lectured on the experiences of the Bureau and on the development of best practices in this area, a further two Bureau Officers attended this course for training and tuition in this area.

Virtual Currency Conferences

Virtual Currency Symposium

The Bureau was invited to provide a presentation to the “Virtual Currency Symposium” which took place from 1st – 3rd August 2017 in Atlanta, Georgia. This conference is organised by The National Cyber Investigative Joint Task Force (NCIJTF) in the United States of America. They specifically sought for the presentation to address the seizure by the Bureau of the virtual currency called 'Ethereum', which was a world first for Law Enforcement. The Bureau acceded to this request as part of its endeavours to work with foreign multi-agency partners with a view to enhancing cooperation, coordination and sharing of information in seeking to identify, deny and deprive criminals of the proceeds of crime.

8th International Association of Prosecutors Eastern European and Central Asian Regional Conference

The Bureau was asked to present an overview of the legislative framework for freezing assets and the confiscation of assets in e-currency. This conference was

Part Eight

International developments

held in Tbilisi and was organised by the Office of the Chief Prosecutor of Georgia.

The conference was held in June 2017 and facilitated prosecutors from across the region gaining a better understanding of the challenges involved in recovering the proceeds of crime that comprised of e-currency and virtual currencies.

SENER Conference

The second annual SENTER Conference took place from 7th – 9th November 2017 in Bled, Slovenia. The project “Strengthening European Network Centres of Excellence in Cybercrime” had the theme at this year’s conference on the fight against cybercrime and open source intelligence. The conference is attended by law enforcement representatives from Police to Prosecutors and Judges, relevant Non-Governmental Organisations, representatives from various educational bodies and universities including research and development institutions and departments.

The Bureau was invited to give a presentation in regard to its experiences in the use and investigation of virtual currencies in criminal activity and to contribute in structured debates with regards to the societal difficulties it presents and possible solutions.

Relationship with External Law Enforcement Agencies

The Bureau has a unique relationship with the authorities in the UK, given the fact that it is the only country with which Ireland have a land frontier and the

relationship has developed between the two jurisdictions over the years.

Cross Border Organised Crime Conference

The Cross Border Organised Crime Conference provides an opportunity for all law enforcement agencies from both sides of the border to get together and review activities that have taken place in the previous year as well as plan for the forthcoming year. It also provides the opportunity to exchange knowledge and experience and identify best practice in any particular area of collaboration.

Cross Border Joint Agency Task Force (JATF)

The establishment of the Cross Border Joint Agency Task Force was a commitment of the Irish and British Governments in the 2015 *Fresh Start Agreement* and the Task Force has been operational since early 2016.

The Joint Agency Task Force consists of a Strategic Oversight Group which identifies and manages the strategic priorities for combatting cross-jurisdictional organised crime and an Operations Coordination Group which coordinates joint operations and directs the necessary multi-agency resources for those operations.

The Cross Border Joint Agency Task Force brings together the relevant law enforcement agencies in both jurisdictions to better coordinate strategic and operational actions against cross border organised crime. The Task Force comprises senior Officers from An Garda Síochána, the PSNI, Revenue

Customs, HM Revenue and Customs (HMRC), the Criminal Assets Bureau and the National Crime Agency (who have the primary role in criminal assets recovery).

On occasion other appropriate law enforcement services are included (such as environmental protection agencies and immigration services) when required by the operations of the Task Force.

The Bureau attended all Joint Agency Task Force summits in 2017 and contributed to a variety of joint operations.

Visits to the Bureau

The success of the Bureau continues to attract international attention. During 2017, the Bureau facilitated visits by foreign delegations covering a range of disciplines, both national and international.

In May 2017, and in conjunction with the Office of the DPP, the Bureau received a delegation of prosecutors from Montenegro. This visit allowed the prosecutors to meet and discuss areas of common concern and facilitated a two way learning of how to tackle serious organised crime. The delegation also met with the DPP and An Garda Síochána.

The Bureau received a delegation from the Council of Europe Committee of Legal Affairs and Human Rights in September 2017. The purpose of the visit was to gain an in depth understanding of Ireland's non-conviction based forfeiture methodology. This visit assisted the Committee in completing its study

entitled "*Fighting Organised Crime*" by facilitating the confiscation of illegal assets.

The Bureau received a delegation from the Latvian ARO & Information Analysis Unit in October 2017. This visit was an information and knowledge development visit and as such they had speakers from all areas of the Bureau who are involved in day to day operational activities.

The Bureau's continued involvement in investigations having an international dimension presents an opportunity to both contribute to and inform the international law enforcement response to the ongoing threat from transnational organised criminal activity. In addition, this engagement provides an opportunity for the Bureau to share its experience with its international partner agencies.

Visit of Revenue Chairman and Revenue Commissioner on 18th January 2017

The Chairman and Commissioner to the Office of the Revenue Commissioner visited the Bureau on 18th January 2017.



Part Eight

International developments

Visit of Minister for Justice and Equality, Mr Charlie Flanagan, T.D., on 2nd October 2017

On Monday 2nd October 2017, the Minister for Justice & Equality, Mr Charlie Flanagan, T.D., visited the Bureau Offices. Minister Flanagan met with the Chief Bureau Officer, Bureau Officers, Bureau Staff and Staff of the Chief State Solicitor's co-located at the Bureau's Offices. The Minister was briefed on the operation of the Bureau and engaged in a walk-through of the offices where he engaged with all officers and staff. Staffing levels and resources were discussed and the Minister was briefed about the work of the Special Crime Task Force and the training and deployment of trained Divisional Asset Profilers.



Visit of Acting Garda Commissioner, Mr. Dónall Ó Cualáin on 22nd December 2017

The Bureau rounded off a very successful year with the visit to the Bureau by the Acting Garda Commissioner, Mr. Dónall Ó Cualáin on 22nd December 2017. Commissioner Ó Cualáin met with the Chief Bureau Officer, Bureau Officers, Bureau Staff and Staff of the Chief State Solicitor's co-located at the Bureau's Offices. An expert from the Bureau Analysis Unit briefed the Commissioner on the use of the DarkNet by criminals and a Bureau Officer provided the Commissioner with a briefing in the Irish language in relation to a Bureau investigation resulting in the seizure of cryptocurrencies.



Part Nine

Protected Disclosures Annual Report

Protected Disclosures Act 2014

Section 22 of the Protected Disclosures Act 2014 requires of every public body to prepare and publish not later than the 30th June in each year a report in relation to the immediately preceding year information relating to protected disclosures.

No protected disclosures were received by the Bureau in the reporting period up to the 31st December 2017.

Part Nine
Protected Disclosures Annual Report

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Part Ten

Conclusions

Throughout 2017, the Bureau has exercised its independent statutory remit to pursue the proceeds of criminal conduct. In order to do this, the Bureau has, in addition to exercising powers under the criminal code, drawn on the provisions of the PoC Act 1996 as amended, together with Revenue and Social Welfare legislation. The Bureau welcomes the additional powers and changes given effect by the commencement of the Proceeds of Crime (Amendment) Act, 2016 which have been successfully used. The provisions of the Criminal Assets Bureau Act, 1996 as amended, provide for the exercise of the Bureau's functions using a multi-disciplinary approach.

The Bureau continued to target assets deriving from a variety of suspected criminal conduct including drug trafficking, fraud, theft, the laundering and smuggling of fuel and the illegal tobacco trade as well as some new emerging trends such as the use of the motor trade to conceal criminal assets, the use of crypto currency for asset transfer and international fraud.

Throughout 2017, the Bureau placed particular emphasis on targeting the organised criminal gangs engaged in serious and organised crime, as well as property crime, such as burglaries and robberies. A particular focus of the Bureau's activities centres upon rural crime and a number of the Bureau's actions were in support of law enforcement in regional locations.

The investigations conducted by the Bureau and the consequential

proceedings and actions resulted in sums in excess of €1.6 million being forwarded to the Exchequer under the Proceeds of Crime legislation. In addition, in excess of €2.3 million was collected in Revenue and in excess of €319,000 in Social Welfare overpayments was recovered.

At an international level, the Bureau has maintained strong links and has continued to liaise with law enforcement and judicial authorities throughout Europe and worldwide in targeting assets deriving from suspected criminal conduct.

The Bureau continued to develop its relationship with a number of law enforcement agencies with cross-jurisdictional links, most notably, Interpol, Europol, Her Majesty's Revenue & Customs (HMRC), the National Crime Agency in the UK and the CARIN Network. As the designated Asset Recovery Office (ARO) in Ireland, the Bureau continues to further develop enhanced law enforcement links with other EU Member States.

In pursuing its objectives, the Bureau continues to liaise closely with An Garda Síochána, the Revenue Commissioners, the Department of Employment Affairs and Social Protection and the Department of Justice and Equality in developing a coherent strategy to target the assets and profits deriving from criminal conduct. This strategy is considered an effective tool in the overall fight against organised crime.

Part Ten
Conclusions

During 2017, in excess of €4.3 million was forwarded to the Central Fund as a result of the actions of the Bureau.

The heart of the CAB model continues to be the multi-disciplinary team where professionals work together for the common purpose of denying and depriving criminals of their ill-gotten gains.

The Bureau continues to evolve and develop in response to the threat posed by local, national and international criminals.

During the year, an Intelligence and Assessment Office was established to assess potential targets at the beginning of the process.

In order to professionalise the remittance of assets to the State at the end of the process, the Bureau established an Asset Management Office during 2017.

Appendix

Objectives & functions of the Bureau

Objectives of the Bureau: Section 4 of the Criminal Assets Bureau Act 1996 & 2005

4.—Subject to the provisions of this Act, the objectives of the Bureau shall be—

(a) the identification of the assets, wherever situated, of persons which derive or are suspected to derive, directly or indirectly, from criminal conduct,

(b) the taking of appropriate action under the law to deprive or to deny those persons of the assets or the benefit of such assets, in whole or in part, as may be appropriate, and

(c) the pursuit of any investigation or the doing of any other preparatory work in relation to any proceedings arising from the objectives mentioned in paragraphs (a) and (b).

Functions of the Bureau: Section 5 of the Criminal Assets Bureau Act 1996 & 2005

5.—(1) Without prejudice to the generality of Section 4, the functions of the Bureau, operating through its Bureau Officers, shall be the taking of all necessary actions—

(a) in accordance with Garda functions, for the purposes of, the confiscation, restraint of use,

freezing, preservation or seizure of assets identified as deriving, or suspected to derive, directly or indirectly, from criminal conduct,

(b) under the Revenue Acts or any provision of any other enactment, whether passed before or after the passing of this Act, which relates to revenue, to ensure that the proceeds of criminal conduct or suspected criminal conduct are subjected to tax and that the Revenue Acts, where appropriate, are fully applied in relation to such proceeds or conduct, as the case may be,

(c) under the Social Welfare Acts for the investigation and determination, as appropriate, of any claim for or in respect of benefit (within the meaning of Section 204 of the Social Welfare (Consolidation) Act, 1993) by any person engaged in criminal conduct, and

(d) at the request of the Minister for Social Welfare, to investigate and determine, as appropriate, any claim for or in respect of a benefit, within the meaning of Section 204 of the Social Welfare (Consolidation) Act, 1993, where the Minister for Social Welfare certifies that there are reasonable grounds for believing that, in the case of a particular investigation, Officers of the Minister for Social Welfare may

Appendix

Objectives & functions of the Bureau

be subject to threats or other forms of intimidation,

and such actions include, where appropriate, subject to any international agreement, co-operation with any police force, or any authority, being an authority with functions related to the recovery of proceeds of crime, a tax authority or social security authority, of a territory or state other than the State.

(2) In relation to the matters referred to in subsection (1), nothing in this Act shall be construed as affecting or restricting in any way—

(a) the powers or duties of the Garda Síochána, the Revenue Commissioners or the Minister for Social Welfare, or

(b) the functions of the Attorney General, the Director of Public Prosecutions or the Chief State Solicitor.

