CRIMINAL ASSETS BUREAU Annual Report

2018

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Tá an tuarascáil seo ar fáil as Gaeilge freisin.
This report is also available in the Irish language.

This report was compiled and designed by the CAB Annual Report Committee 2018.

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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 2018 Annual Report of the Criminal Assets Bureau.

This report outlines the activities of the Criminal Assets Bureau during 2018, 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.

2018 was a very busy year for the Criminal Assets Bureau. I visited the Bureau in September 2018, where I toured the offices and obtained a first-hand knowledge of its activities. I acknowledge the high level of professionalism of the Bureau officers and staff. I note in particular the increase in actions in all areas of activity by the Bureau. I was particularly impressed by the multi-disciplinary team concept that CAB has pioneered since its establishment in 1996.

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 2019.

I am also pleased that the number of asset profiles, submitted in 2018, by members of An Garda Síochána nationwide increased to one hundred and eighty four from one hundred and one in 2017.

I also wish to acknowledge the increase in new proceeds of crime cases before the High Court (thirty cases in 2018 from twenty eight cases in 2017). This is the highest number of new cases that the Bureau has brought before the High Court in its 23 year history. I also note that in 2018 the Bureau returned in excess of €5.6million to the Exchequer compared to €4.3 million in 2017. The returns show an increase from all the Bureau's activities.

During 2018, the Criminal Assets Bureau devoted considerable efforts towards targeting 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).

In November 2018, officers from the Criminal Assets Bureau conducted a professional workshop at the Cross Border Crime Conference in Newcastle, Co. Down addressing the penetration of the motor trade by organised crime groups.

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 proceeds deriving from criminal conduct.

The Bureau has been reaching out to other investigative bodies such as the Office of the Director of Corporate Enforcement (ODCE) and the Competition and Consumer Protection Commission (CCPC) to seek out further opportunities in the public interest.

The Bureau makes significant inroads in tackling serious criminals including those involved in drug trafficking which cause extensive problems within our community. In 2018, the Bureau conducted thirty four search operations consisting of one hundred and ninety two searches in seventeen counties and obtained High Court Orders under the Proceeds of Crime Act 1996 in respect of property in seven counties. I am impressed by the professionalism demonstrated by the Bureau in conducting its search operations which are welcomed by the general public and the media.

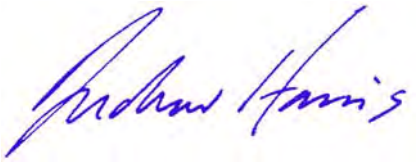
During 2018, the focus of the Bureau was twofold; firstly to take all possible actions to curb the activities of organised crime groups, and secondly to focus in particular upon the activities of criminal gangs involved in burglaries and robberies throughout the State.

I am pleased to note that the Bureau has provided briefings to all thirty six 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 am particularly heartened by the support shown by locally elected community representatives. The Bureau has promoted its activities through the Garda Press Office and social media.

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 convinced that the development and fostering of the Divisional 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



J A Harris
COMMISSIONER
AN GARDA SÍOCHÁNA

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

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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 23rd Annual Report of the Criminal Assets Bureau for the calendar year 2018. 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 also provided at Regional and 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 €5.6 million to the Exchequer in 2018.

During 2018, thirty new applications were brought before the High Court under the Proceeds of Crime legislation. This compares with twenty eight such applications in 2017. 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 operating in rural areas of the country. In this regard, the Criminal Assets Bureau has been providing support to the Garda initiative known as Operation Thor.

Under new legislation introduced in 2016, 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 is having an impact through early intervention with mid-level criminals in the expectation to inhibit their progression. In 2018, the value of assets under the new proceeds of crime cases ranged in value from €7,000 to €3.7 million.

Using the appropriate Proceeds of Crime legislation, the Criminal Assets Bureau forwarded in excess of €2.2 million to the Exchequer. In addition, in excess of €3 million was forwarded under the Revenue provisions and €323,000 was recovered in respect of overpayments under Social Welfare provisions.

The Bureau coordinates its activities in a manner which takes cognisance of the Policing Plan of An Garda Síochána and the strategies of the Office of the Revenue Commissioners, Department of Justice and Equality and the Department

of Employment Affairs and Social Protection.

In addition, during the year, in conjunction with An Garda Sióchána 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. Plans are at an advanced stage to seek external accreditation for this professional course.

The Bureau is committed to the continuous professional development of all personnel.

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 on 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.

In addition, I wish to personally acknowledge the efforts of the Bureau Legal Officer and Bureau staff in promoting its effort through social media.

Many of the Bureau's investigations have an international dimension and involve cooperation with law enforcement agencies in other jurisdictions. During 2018, the Bureau brought to a successful conclusion, a major investigation relating to the Byrne organised crime group. This has been welcomed as part of the overall efforts to curb the activities of feuding gangs.

I wish to acknowledge the support and cooperation afforded to the Bureau throughout the year by An Garda Síochána, the Office of 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 in contributing to the success of the Bureau.

I am conscious that the increased activity of the Bureau over the past two years in particular has put extra pressure on the staff of the Chief State Solicitors Offices co-located with us.

The Bureau acknowledges that the increased output of activities in 2018 has resulted in significantly more demands on the services of the Chief State

Solicitors Office attached to the Bureau, we therefore support, by way of a joint business case, a request for an increase in staffing levels in that Office.

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 2018. The number of Gardaí increased to forty seven in 2018 from forty three in 2017. Extra resources were also given to the Department of Justice and Equality staff seconded to the Bureau rising to twenty staff in 2018 from sixteen staff in 2017.

Finally, 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.

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 23rd Annual Report on the activities of the Criminal Assets Bureau (hereinafter referred to as "the Bureau") and covers the period from 1st January 2018 to 31st December 2018 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 2018.

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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;
- 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 2017 / 2018

Year	Descript-ion	Amount €	
		Budget Provision	Total Spent
2017	Pay	5,884,000	6,102,000
	Non-pay	1,701,000	2,157,000
	Total	**7,585,000**	**8,259,000**
2018*	Pay	7,247,000	7,257,000
	Non-pay	1,701,000	1,575,000
	Total	8,948,000	8,832,000

** Awaiting Audit – Subject to Change*

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 A and may be summarised as:

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;

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;
C. Officers of the Department of Employment Affairs and Social Protection.

Officers are seconded from their parent agencies.

Staff of the Bureau consist of:

- The Bureau Legal Officer;
- Professional members;
- 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 ninety one.

Following promotions and retirements during 2018, three staff vacancies remain at the Bureau at 31st December 2018. These vacancies include two IT vacancies and one Analyst vacancy.

As mentioned in the 2017 Annual Report, two Inspector vacancies existed at year end 2017 and two Inspector posts were successfully filled by way of competition in August 2018. As reported in the 2017 Annual Report, one vacancy remained in the Bureau Analysis Unit. This post was filled by way of competition in January 2018.

Part One
Overview of the Criminal Assets Bureau, its Officers and Staff

Authorised Staffing Levels

Multi-agency authorised levels

An Garda Síochána	47
Department of Social Protection	6
Department of Justice and Equality	21
Revenue Cáin agus Custaim na hÉireann Irish Tax and Customs	17

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.

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 and to trace and target any assets which have been generated through their criminal conduct.

During 2018, sixteen targets and three organisations 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 twenty eight at year end.

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.

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 three hundred and seventy eight trained Divisional Asset Profilers throughout the country.

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 each asset is managed to maintain its value, to fulfil the Bureau's legal obligations and to ensure the optimum value is realised value when 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. This office provides a higher level of governance for assets under the control of the Bureau.

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 2018, the CSSO was staffed as follows:

- 2 solicitors
- 2 legal executives
- 2 clerical officers

While the work of the CSSO is integral to the success of the Bureau, it is noted that the authorised staffing complement is no longer sufficient to maintain increasing Bureau outputs. While no criticism can be made of the current staff of the CSSO, particularly given the figures achieved in 2018 with depleted numbers, it is clear that increases in CSSO staff numbers are required to deal with the higher volume of cases being proposed. To this end, a joint business case for an increase in staff numbers has been submitted.

Joint Policing Committees

In 2017, the Chief Bureau Officer and Bureau Officers began a series of briefings at Joint Policing Committees. In 2018 those briefings continued and by December, had been delivered at all thirty six Joint Policing Committees throughout the State.

The purpose of those briefings was 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. Following the briefings, the Bureau has noticed a dramatic increase in information received from communities throughout the State.

These briefings have proven beneficial and have attracted considerable local and media attention. In most instances, the Bureau received prominent reporting in local newspapers including front page articles in many cases.

Many members of Joint Policing Committees expressed the view that their understanding of the Bureau had become clearer following the briefings. It is particularly important for local communities to realise that members of the public can provide information to the Bureau in the strictest confidence and without any requirement to give evidence in court.

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.

Photo of D/Chief Superintendent Patrick Clavin at Clare Joint Policing Committee

Divisional Asset Profilers

In 2018, the Bureau continued its programme of engagement with Divisional Asset Profilers. During the year the Bureau trained an additional ninety nine 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 three hundred and seventy eight, which included:

- 353 Gardaí
- 18 Officers of the Revenue Commissioners engaged in Customs and Excise duties;
- 7 Officers of the Department of Employment Affairs and Social Protection

In addition, four people from the Justice Sector, two people from the Insolvency Service of Ireland, two people from the Department of Defence and two people from the Competition and Consumer Protection Commission were trained in relation to asset profiling.

During 2018, Senior Bureau Officers briefed all Garda Regional Management Teams outside the Dublin Metropolitan Region (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. 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 criminals 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.

In 2018, one hundred and eighty four asset profiles were received from Divisional Asset Profilers throughout Ireland, as compared to one hundred and one asset profiles received in 2017. Ongoing contact and close cooperation will be maintained both Regionally and Divisionally throughout 2019.

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

Throughout 2018, 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.

The Divisional Asset Profiler Network will continue to be developed in 2019 through the training of additional Divisional Asset Profilers.

The following cases provide examples of Bureau investigations that originated from Divisional Asset Profilers:

Case 1

The Bureau commenced an investigation into an apartment in Limerick City following a referral by a Divisional Asset Profiler attached to the Clare Division. This referral was made following an investigation into brothel keeping and prostitution in the South West area by Ennis Gardaí.

Following the investigation, the Bureau obtained an order under Section 3 of the PoC Act in respect of this asset.

Case 2

The Bureau commenced an investigation into monies held in a bank account following a referral by a Divisional Assets Profiler attached to the Garda National Economic Crime Bureau (GNECB).

The GNECB were conducting an investigation where an individual fraudulently obtained a UK passport by way of identity theft, and this passport was used to open a bank account in this jurisdiction. This bank account was then used to hold monies derived from fraudulent acts.

Following the investigation, the Bureau obtained orders under Section 3 and 7 of the PoC Act in respect of €211,727.32 held in the bank account.

Case 3

The Bureau commenced an investigation into the assets of an individual involved in the sale and supply of controlled drugs following a referral by a Divisional Asset Profiler attached to Store Street Garda Station.

This referral was made following a Garda search of a premises in June 2016, which resulted in the seizure of an Audi vehicle valued at €13,000, two Rolex watches, valued at €3,800 and €3,000 respectively and one Tag Heuer watch valued at €1,150.

Following the investigation, the Bureau obtained orders under Section 3 & 7 of the PoC Act in respect of these assets.

Case 4

The Bureau commenced an investigation into the assets of an individual involved in the sale and supply of controlled drugs, following the referral by a Divisional Asset Profiler attached to the Limerick Garda Division.

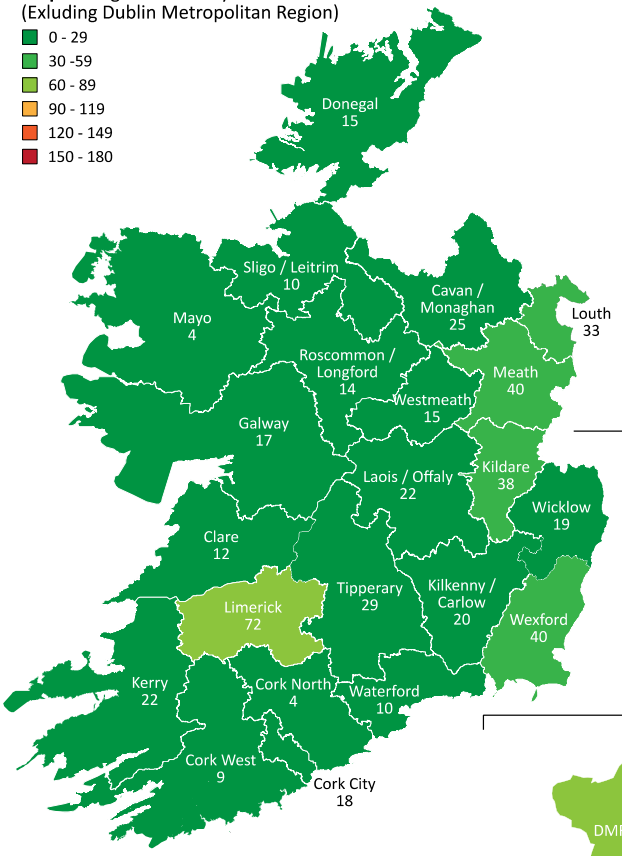
This referral was made following a Garda search of a property in March 2015 which resulted in the seizure of €11,260.

Following the investigation, the Bureau obtained orders under Section 3 & 7 of the PoC Act in respect of the €11,260.

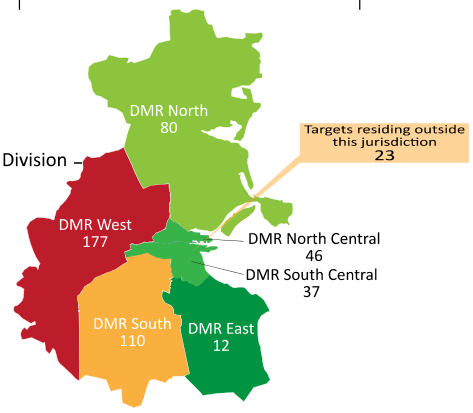
Geographical Distribution of Targets under investigation by the Criminal Assets Bureau (end December 2018)

Total: 973

Map 1: Targets of CAB by Garda Division
(Exluding Dublin Metropolitan Region)



Map 2: Targets of CAB by Garda Division – Dublin Metropolitan Region



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, thirty seven members of the Bureau have completed the course. The Bureau and the Garda College are currently progressing the course to full accreditation with a third level institution.

Staff Training

During 2018, the Bureau continued to upgrade and enhance the training needs of Bureau Officers and staff. In this regard, the Bureau provided funding for staff participation in the following courses:

- Corporate, Regulatory & White Collar Crime
- TACTIC
- Compliance
- Fraud and e-Crime Investigation
- Financial Investigation & Intelligence
- Data Protection
- Governance
- Computer Forensics and Cybercrime Investigation
- Code of Ethics
- Criminal Investigative Interview Training
- Enhanced Cognitive Interview Training
- Expert Witness and Courtroom Skills
- Search of Premises Training
- Senior Investigating Officers

A number of awareness briefings took place throughout 2018 to all staff of the Bureau on relevant topics including Protected Disclosures Training, Covert Human Intelligence Source Training, Anti Money Laundering, Donedeal and GDPR.

Virtual Currencies

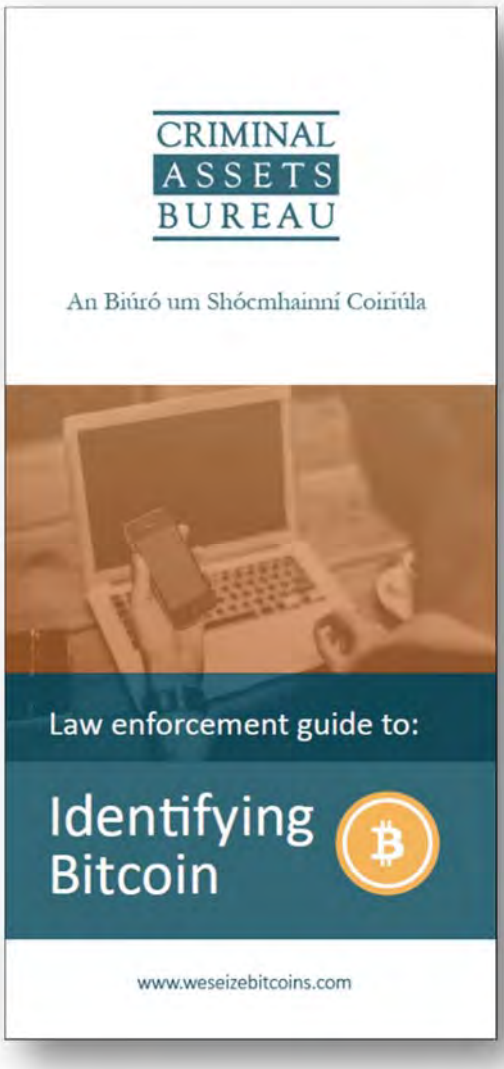
The Bureau continues to maintain its level of knowledge and investigative ability in the field of crypto-currencies and their use in criminal conduct worldwide. The Bureau is one of the foremost law enforcement agencies to have identified the potential for criminals to exploit the characteristics of crypto-currencies to generate and launder the proceeds of crime. Through its investigations, the Bureau has made a number of seizures of various forms of crypto-currencies including 'Bitcoin' and 'Ethereum'. Of the three investigations of this kind, two have resulted in the forfeiture of amounts of 'Bitcoin' and 'Ethereum' following the initiation of High Court proceedings. The third investigation is ongoing. The Bureau's seizure of the crypto-currency 'Ethereum' is the first of its kind by any law enforcement agency worldwide.

In order to maintain the Bureau's position as one of the foremost recognised law enforcement agencies in its ability to investigate, seize, retain and dispose of crypto-currencies, the Chief Bureau Officer sanctioned the attendance of Bureau Officers at a number of training forums in 2018, specifically:

- Global Workshop for Financial Investigators on Crypto-currencies, University of Basel / Faculty of Law in Basel, Switzerland in January 2018
- 2018 Cyber Summit, Calgary, Alberta, Canada in March 2018
- The Crypto Currency Symposium in Phoenix, Arizona in August 2018

These forums allow the Bureau to share and enhance their knowledge in this area and generate global expert contacts in this field which benefit future Bureau investigations.

The majority of these requests were cost neutral to the Bureau with the expenses covered by the requesting authority.



In 2018, the Chief Bureau Officer sanctioned a number of requests for the provision of training in the area of crypto-currencies in criminal conduct. The receiving authorities included:

- Presentation to the Pompidou Group, Dublin Castle, Ireland in April 2018
- Association of Law Enforcement Forensic Accountants (ALEFA), Birmingham, United Kingdom in June 2018
- United Nations Office of Drugs and Crime, Law Enforcement, United Nations Headquarters, Vienna, Austria in July 2018
- Department of Justice, Anti-Money Laundering and Compliance Unit in August 2018
- Presentation to the European Union Advisory Mission (EUAM), Virtual Currencies Investigations, Kiev, Ukraine in October 2018
- The Central Bank, Ireland in November 2018

The Bureau has provided a number of training presentations and seminars through the Garda College to members of An Garda Síochána and other associated agencies. These included:

- The training of Gardaí at the Garda College
- Divisional Asset Profilers Course
- Specialised Units attached to Special Crime Operations
- The National Drugs Strategy Training Programme

The Bureau continues to provide tuition on crypto-currency to a number of delegations from foreign visiting countries including:

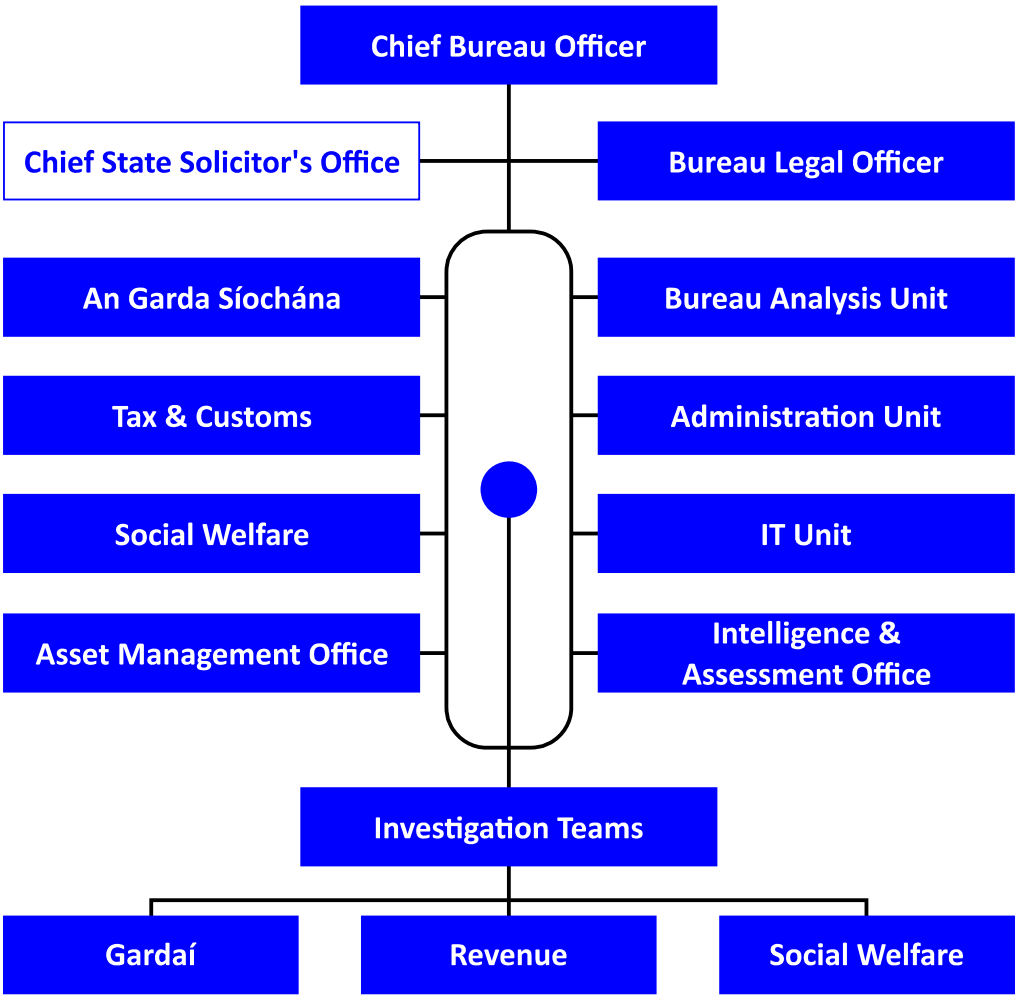
- A delegation from the Asset Recovery Bureau, Malta in January 2018
- A delegation from the Ukraine in April 2018

The Bureau is committed to maintaining its position as a globally recognised investigative agency in this area through its knowledge of its use by criminals worldwide and its ability to deny and deprive criminals of its benefits.

Presentation and training given to a delegation from Malta (January 2018)

Ukraine Delegation – European Union Advisory Mission Ukraine programme – April 2018

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 2018, 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;
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 2018 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 Emergency Response Unit (ERU), 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 2018.

This continued assistance has been critical to the success in targeting the proceeds of criminal conduct during 2018.

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 2018, 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, 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 2018, the Bureau executed a number of these warrants in targeting 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.

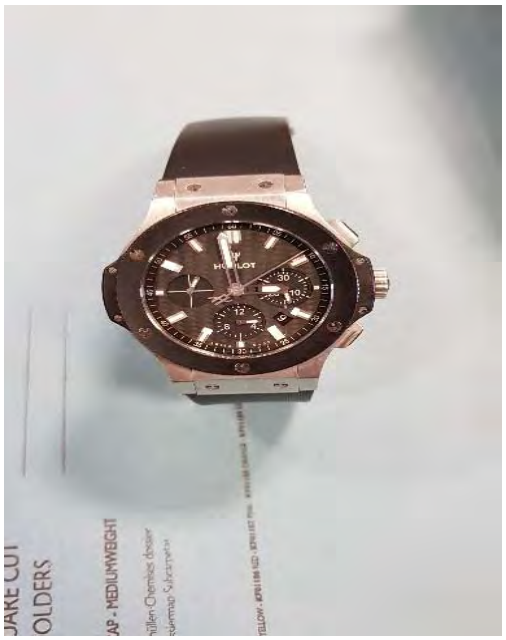
As a result of the information gleaned, the Bureau has been able to use this evidence in ongoing investigations into a number of individuals which were believed to have possession of assets which represent, directly or indirectly, the proceeds of crime.

Applications made during 2018

During 2018, 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	
	2017	2018
Search warrants under Section 14 CAB Act, 1996 & 2005	165	171
Orders to make material available under Section 14A of the CAB Act, 1996 & 2005	275	275



Hublot watch seized during search operation

CAB Search conducted under Section 14 (Search Warrant), Criminal Assets Bureau Act 1996

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 2018, the Bureau used this Order on three hundred and fourteen occasions.

These Orders were obtained in respect of thirty eight 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 currently restrained is in excess of €5.8 million, £75,000 Sterling and $600,000 US Dollars.

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.

Part Two
Criminal Assets Bureau investigations

Search operation conducted by the Criminal Assets Bureau in 2018

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 2018, 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

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

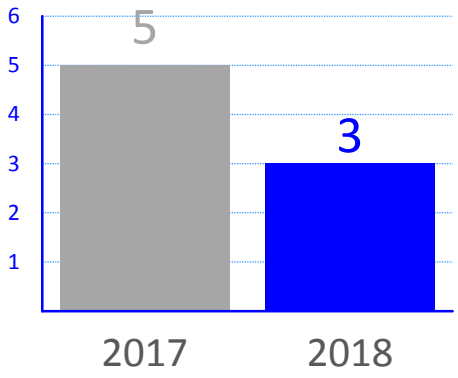
The PoC Act was amended by the PoC (Amendment) Act, 2016. This amendment provides that where a Bureau Officer is in a public place, or in another place where he is authorised or invited, or is carrying out a search, and finds property that he believes to be the proceeds of crime with a value not less 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/she:

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 2018, the Bureau invoked its powers under Section 1A of the PoC Act on three occasions, examples of which are set out below.

Section 1A detentions



Detention 1

The Bureau took possession of a vehicle (valued at approx €12,000) belonging to a member of an organised crime gang based in the Dublin South area who are involved in committing burglaries throughout Leinster. Within the twenty

one day period of detention, the Bureau made an application to the High Court and was successful in obtaining Orders under Section 2 & 7 of the PoC Act.

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

Detention 2

During one of the Bureau's search operations, the Bureau took possession of a vehicle (valued at approx €20,000) belonging to a person involved in the sale and supply of controlled drugs.

Within the twenty one day period of detention, the Bureau made an application to the High Court and was successful in obtaining Orders under Section 2 & 7 of the PoC Act.

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

Detention 3

During another search operation, the Bureau took possession of a vehicle (valued at approx €12,000) belonging to an individual member of an organised crime gang involved in the sale and supply of controlled drugs.

Within the twenty one day period of detention, the Bureau made an application to the High Court and was successful in obtaining Orders under Section 2 & 7 of the PoC Act.

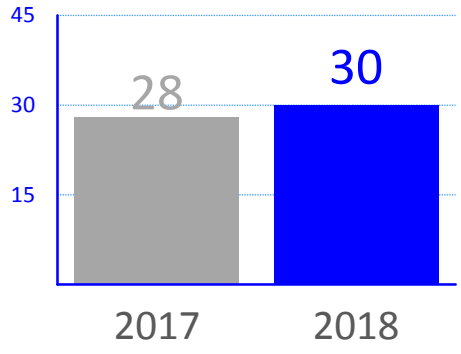
At the hearing of the case, the Bureau obtained an Order under Section 3 of the PoC Act, which was a final determination that the vehicle was in fact, the proceeds of crime.

Cases commenced

Thirty new cases commenced during 2018. Of the cases commenced, twenty eight were initiated by issuing proceedings by way of originating motion under Section 2 of the PoC Act and two 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 2018.

New POC cases brought before the High Court

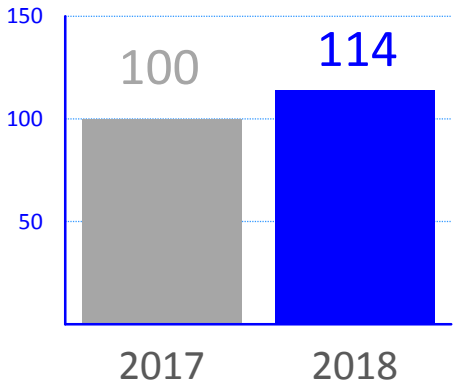


Section 2(1) Review

When analysed, the number of assets over which an order was obtained under Section 2(1) increased in comparison to 2017 from one hundred assets to one hundred and fourteen assets in 2018.

Part Three
Actions under the Proceeds of Crime Act 1996 to 2016

Assets over which Section 2(1) Orders made



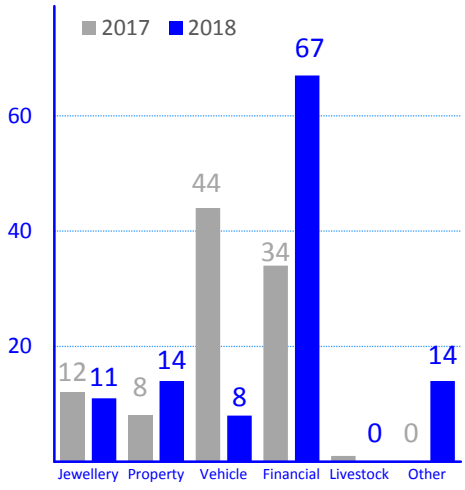
During 2018, the Bureau took proceedings in respect of a variety of asset types. For profiling purposes, the assets are broken down into jewellery, property, vehicles, financial and other matters.

Drone seized during CAB Operation

Valuation Breakdown

The value of the one hundred and fourteen assets frozen under Section 2 of the PoC Act during the year 2018 was €8,393,582.30. This figure may be broken down in the table below.

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

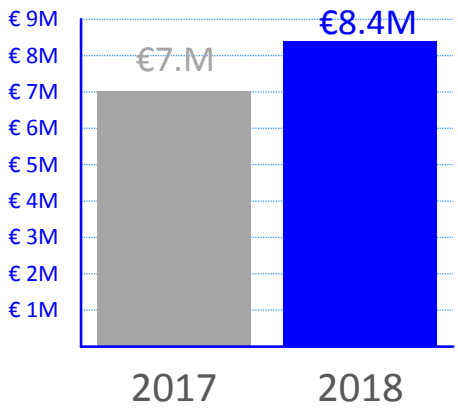


Analysis of Section 2 Order by Asset Type

Description	€
Jewellery	112,150.00
Property	2,082,855.00
Vehicle	59,750.00
Financial	6,018,832.30
Other	119,995.00
Total	**8,393,582.30**

The figures in respect of jewellery, property, vehicles and other 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)



The results for 2018 compared to 2017 show the value of assets frozen under Section 2(1) has increased by €1.4 million from the previous year where the value was €7,020,539.20. The value of assets fluctuates depending on assets targeted in each case which can vary from high ranging assets to low ranging assets. The value of such orders range from €7,000 to €3.7million.

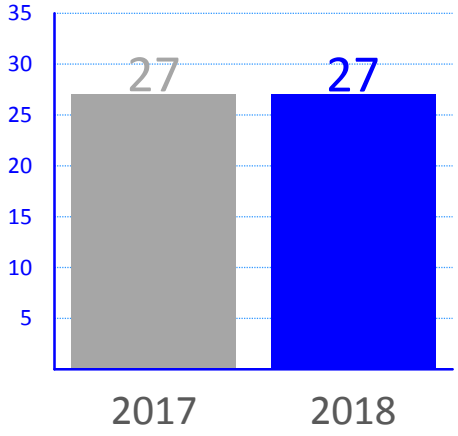
The reduction of the threshold under new legislation in 2016 allowed for the seizure of an additional 20% of assets in 2018.

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 2018, twenty seven cases before the High Court, to the value of €6,186,566.39, had orders made under Section 3(1). The Bureau notes that although the number of orders remains the same as 2017, the value of assets has increased.

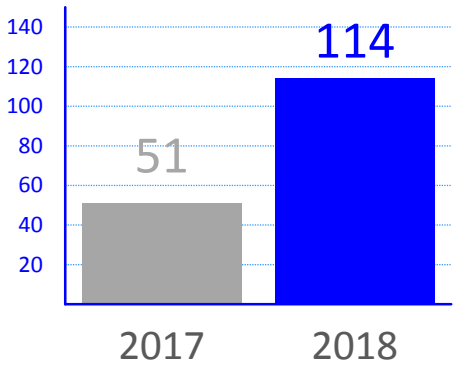
Number of cases in which Section 3(1) Orders made.



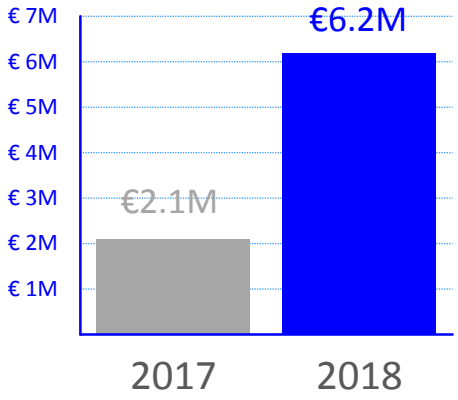
The number of assets over which orders were made by the High Court pursuant to Section 3(1) increased from fifty one assets in 2017 to one hundred and fourteen assets in 2018.

Part Three
Actions under the Proceeds of Crime Act 1996 to 2016

Assets over which Section 3(1) Orders made.



Value of assets frozen under Section 3(1)



An increase in assets over which a Section 3(1) order was made in 2018 led to an increase in the value of the orders made. The value of such orders increased from €2.1 million in 2017 to €6.2 million in 2018.

Cash found during CAB search operation

Analysis of Section 3 Order by Asset Type

Description	€
Jewellery	150,470.00
Property	1,056,460.50
Vehicle	645,137.00
Other	38,731.00
Financial	4,295,767.89
Total	**6,186,566.39**

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 of 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 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 were made under Section 3(3) of the PoC Act during 2018.

Geographical Breakdown

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

During 2018, 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 continued to work closely with local communities by partaking and briefing all thirty six Joint Policing Committees (JPC) Nationwide in 2017 and 2018, the results of which have received very positive feedback.

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 2018 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 2018 were:

- Audi A6, A7
- Kawasaki Ninja Motorcycle
- VW Polo
- VW Passat
- BMW X5
- VW Tiguan

An example of the types of vehicles seized by the Bureau under Section 3(1) of the PoC Act during the year 2018 were:

- Yahama Motorcycle
- Dune Buggy
- Lexus RX
- Audi A3, A5 and A6
- Mercedes CLA & E220
- GoCycle Electric Bicycles
- Land Rover Defender

Luxury Goods

The Bureau is continuing to target ill-gotten gains through the purchase of high end luxury goods such as mobile homes, designer handbags, store cards, designer clothing and footwear, examples of which are shown hereafter.

Case 1

This case was nominated as a target by the Special Crime Task Force to be profiled by the Bureau and was assigned to an investigation team for enquiries to be conducted.

Both respondents displayed a lavish lifestyle which included frequent foreign travel and the purchase of luxury items, whilst having a minimal recorded income and obtaining social welfare payments, which have since been disallowed.

During 2018, a Section 4A Order was granted in the High Court in respect of funds held in various bank accounts, four high end designer watches valued collectively in excess of €70,000, two high end designer handbags valued collectively in excess of €3,000, large sum of cash and a residential property valued at €300,000 approximately.

A collective tax demand in excess of €300,000 was also served on the respondents as was a social welfare overpayment of €100,000.

Section 4(1) and 4A

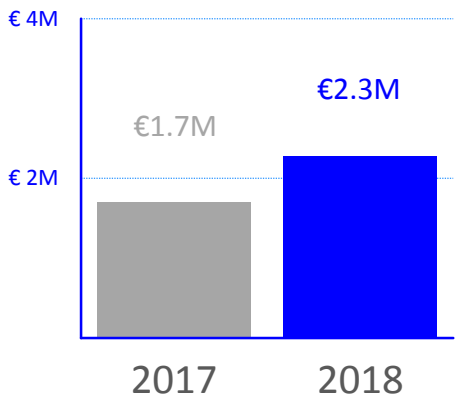
Section 4(1) provides for the transfer of property to the Minister for Public Expenditure and Reform. This Section refers to assets which have been deemed to be the proceeds of criminal conduct, for a period of not less than seven years, and over which no valid claim has been made under Section 3(3)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

An Roinn Caiteachais Phoiblí agus Athchóirithe
Department of Public Expenditure and Reform

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 2018.

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



During 2018, a total of €2,271,799.92 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)	3	184,005.98
Section 4A	19	2,087,793.94
Total	**22**	**2,271,799.92**

Case 1 – Operation Loft

During 2018, the Bureau obtained orders under Sections 3 & 7 of the PoC Act over €529,000 held in various bank accounts by an organised crime gang involved in fuel laundering along the Border area. The granting of the Section 3 orders over these bank accounts finalised the Bureau's proceedings taken against this organised crime gang.

The Bureau commenced its investigation in November 2012 into the assets and activities of two families based in the Border region of Co. Louth who were suspected to be involved in fuel laundering and the laundering of money derived from that criminal activity.

The Bureau carried out a search operation in 2013, with the assistance of Garda Specialist Units including the Emergency Response Unit. The Bureau received considerable assistance from the Police Service of Northern Ireland (PSNI) and Her Majesty's Revenue and Customs (HMRC) during this investigation.

The investigation specifically focused on companies used and controlled by the organised crime gang to purchase large quantities of green diesel from oil companies. The green diesel was then laundered and sold on as road diesel by "buffer companies", also controlled by the organised crime gang.

In April 2013, the Bureau commenced PoC proceedings against twenty one individuals and companies resulting in a large number of bank accounts being frozen. Following the conclusion in 2018 of the Bureau's proceedings, the total amount of money seized by the Bureau from this fuel laundering enterprise amounts to €1.1 million.

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.

No appropriate case arose that required the granting of a Section 6 order during 2018.

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 2018, the Bureau obtained receivership orders in regard to sixty seven 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.

Statement of Receivership Accounts

	Euro€	Stg£	US$
Opening balance receivership accounts 01/01/2018	11,182,727.68	208,043.38	653,029.57
Amounts realised, inclusive of interest and operational advances	3,604,991.87	2.10	3,393.16
Payments out, inclusive of payments to Exchequer and operational receivership expenditure	2,370,266.98	0.00	1,255.46
Closing balance receivership accounts 31/12/2018	12,417,452.57	208,045.48	655,167.27

Part Three
Actions under the Proceeds of Crime Act 1996 to 2016

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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 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.

Tax Functions
The following is a summary of actions taken by the Bureau during 2018 and an update of the status of appeals.

Tax Assessments
Revenue Bureau Officers are empowered to make assessments 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 2018, a total of forty one individuals were assessed under various taxheads, resulting in a total tax figure of €10.763m.

Tax Appeals
The Tax Appeals Commission (TAC) was established on 21st March 2016 and is an independent statutory body whose function is hearing and determining appeals against assessments and determinations.

TAC is just over two years in existence and 2018 showed an increase in the level of engagement with the Bureau. During 2018, TAC admitted ten appeals, dismissed fifteen cases and partly dismissed a further six cases.

While the increase in processing new appeals is welcomed, there is a significant number of legacy cases awaiting adjudication. It is acknowledged that the delay in adjudicating on these legacy cases is due to a number of factors not least the large volume of legacy cases which existed prior to its formation. The Bureau is positively engaging with TAC with a view to progressing these matters.

Appeals to the Tax Appeal Commissioners
Revenue Tables 1 and 2 located at the end of this chapter summarise the appeal activity for 2018.

At 1st January 2018, thirty five cases were before the TAC for adjudication. During the year, twenty three appeal applications were referred by the TAC to the Bureau for consideration. Overall during the year, the Commission admitted ten appeals and refused fifteen.

As of 31st December 2018, there were a total of thirty nine cases awaiting hearing / decision.

As of 1st January 2018, two appeals in respect of cases where appeals had been

refused, were awaiting decision. These two appeal applications were refused by the Inspector of Taxes prior to 21st March 2016. As at 31st December 2018 both cases remain within the appeal process.

Collections

Revenue Bureau Officers are empowered to take all necessary actions for the purpose of collecting tax liabilities as s 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 2018 amounted to €3.097m from fifty individuals / entities.

Demands

During 2018, tax demands (inclusive of interest) served in accordance with Section 961 TCA 1997 in respect of forty five individuals / entities amounted to €14.990m.

Revenue Settlements

During the course of 2018, eight individuals settled outstanding tax liabilities with the Bureau by way of agreement in the total sum of €912,989k.

Circuit Court

Circuit Court proceedings were initiated in the Circuit Court in respect of one case in the sum of €58.169k.

High Court

High Court proceedings for the recovery of tax and interest in the sum of €13.550m was initiated in twenty one cases.

Respondent	Amount Euro
Case 1	235,063.82
Case 2	683,111.36
Case 3	123,437.75
Case 4	87,950.56
Case 5	243,335.92
Case 6	1,046,555.84
Case 7	262,270.96
Case 8	617,340.64
Case 9	146,329.52
Case 10	212,554.68
Case 11	316,858.30
Case 12	5,477,669.43
Case 13	41,434.66
Case 14	614,562.76
Case 15	115,712.43
Case 16	593,097.30
Case 17	373,941.94
Case 18	248,934.70
Case 19	141,495.23
Case 20	68,675.31
Case 21	1,899,778.43
Total	**13,550,111.54**

Judgments

High Court Judgments were obtained against two individuals for tax liabilities totalling €512,236.17.

Respondent	Amount Euro
Kathleen O'Brien	408,807.52
Jason Macken	103,428.65
Total	**512,236.17**

Investigations

Theft and Fraud

During 2018, in support of Operation Thor and other anti-crime strategies employed by partner agencies, the Bureau made tax assessments on twenty two individuals located outside Dublin connected with theft and fraud offences. The total amount of tax, excluding interest featured in the assessments amounted to €6.7m. In addition to assessments made, tax and interest of €1.5m was collected from twenty nine persons who generated profits or gains from theft and fraud offences.

Motor Industry

Throughout 2018, the Bureau continued to target individuals seeking to conceal the proceeds of criminality through the motor trade. Tax assessments were made for €1.6m excluding interest on two individuals and two companies involved in the motor trade. The Bureau made collections amounting to €841k from three individuals and two companies involved in the motor trade. The seizure of vehicles by Revenue sheriffs, under the provisions of Section 960L TCA 1997, proved particularly effective in enforced collection actions taken by the Bureau in 2018.

In addition to the making of assessments and enforcing the collection of taxes, the Bureau identified and addressed a number of emerging risks in the motor trade through the imposition of security bonds, compliance visits and other interventions.

Sale and Supply of Illegal Drugs

The Bureau made assessments in 2018 on twelve individuals deemed to have benefited from profits or gains derived from the sale and supply of illegal drugs. Tax assessments totalling €966k excluding interest were made in these investigations. During 2018, the Bureau collected €750k, by way of enforcement and settlement agreements, from thirteen individuals associated with the sale and supply of illegal drugs.

Other significant tax investigations conducted by the Bureau in 2018 focused on profits or gains derived from smuggling and environmental offences.

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 legislation, regulations, information and intelligence.

Serious and organised crime groups in every jurisdiction attempt to breach both Customs regulations and Excise regulations in their attempts to make substantial profits while at the same time depriving the Exchequer of funds and having a negative impact on society in general.

Part Four
Revenue actions by the Bureau

Customs functions at ports and airports, in particular, support the Bureau's investigations into the cross-jurisdictional aspects of crime and criminal profits. Throughout 2018, in the course of investigations by the Bureau, a number of criminals and their associates were monitored and intercepted at ports and airports.

Smuggling

Throughout 2018, the Bureau provided operational intelligence in relation to a number of separate smuggling attempts involving large commercial consignments of alcohol, cigarettes and substitute diesel products. 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. The Bureau is aware of, and is monitoring emerging trends in the illicit oil trade.

Vehicle Trade and VRT

In 2018, the Bureau continued to carry out investigations in the area of VRT authorisations granted to car dealers (Section 136 Finance Act, 1992). Following robust actions reported in previous years, the Bureau again identified a number of used car outlets operated by, or on behalf of organised crime groups.

In one case in 2018, where criminal connections were established and regulations were contravened, the Bureau seized and removed stocks of vehicles, revoked the VRT authorisation and directed the closure of the outlet. In two other cases, the Bureau prevented entry to the trade by new outlets. At year end, a large number of other outlets remain the subject of active and resolute investigation by the Bureau.

Aside from the trade aspect, further enforcement of VRT legislation by the Bureau throughout 2018 deprived specific individuals of valuable vehicles which were in their possession and contravened VRT regulations (Section 141, Finance Act 2001). These actions support the Bureau's statutory objectives (Section 4 of the Act) to deprive those involved in crime of valuable assets.

The various actions taken under VRT legislation, as described above, resulted in the seizure of vehicles throughout 2018 with an overall value in excess of €914,000 as well as separate VRT, fines and penalties of over €36,000.

By year end, there were fifty 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.

The level of infiltration by organised crime groups into the importation and sale of used cars was highlighted by the Bureau at the Joint Agency Cross Border Crime Conference held in Northern Ireland in November 2018. The Bureau turned the focus of law enforcement

agencies on both sides of the border to the use of cars as a form of currency among organised crime groups.

Investigations carried out by the Bureau have highlighted the fact that this infiltration by organised criminals of the used car trade does produce victims of crime. During the year a number of customers were identified who had unwittingly purchased vehicles that traders had knowingly miscategorised during registration, resulting in significant outstanding VRT liability for which the owner was liable.

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.

Customs Liaison

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 Joint Agency Cross Border Oil Fraud Group and Tobacco Fraud Group.

In 2018, 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 with HMRC 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 Services internationally to improve effectiveness against organised crime groups. Of particular note in 2018, is the strengthening of cooperation with the German Customs Authorities and the attendance at the Bureau of a senior German Customs Officer. 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.

The Bureau welcomes the operational assistance provided by the Revenue Customs Service on a number of large CAB operations. The Bureau again 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.

CAB Search Operation assisted by the Customs Dog Unit

Table 1: Outcome of appeals at Appeal Commissioner Stage

Description	No. of Cases
Opening Appeals as at 01/01/2018	35
Appeals Lodged to TAC	23
Appeals Admitted by TAC	10
Appeals Refused by TAC	15
Appeals Withdrawn	4
Appeal Determined by TAC	0
*Open Appeals as at 31/12/2018	39

**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 01/01/2018	2
Appeals Withdrawn	0
Open Appeals as at 31/12/2018	2

Table 3: Tax Assessments

Taxhead	Tax €M 2017	Tax €M 2018	No. of Assessments 2017	No. of Assessments 2018
Income Tax	4.761	9.341	216	324
Capital Gains Tax (CGT)	0.041	0.058	4	1
Value Added Tax (VAT)	1.114	1.346	8	11
PAYE/PRSI	-	-	3	-
Capital Acquisition Tax (CAT)	0.086	0.018	-	2
Corporation Tax (CT)	-	-	1	-
Totals	6.002	**10.763**	232	**338**

Part Four
Revenue actions by the Bureau

Table 4: Tax and Interest Collected

Taxhead	Tax €M 2017	Tax €M 2018	No. of Collections 2017	No. of Collections 2018
Income Tax	1.833	2.585	41	42
Capital Gains Tax	0.017	-	1	-
Corporation Tax	0.021	-	1	-
PAYE / PRSI	0.224	0.033	3	2
Value Added Tax	0.279	0.445	5	5
Capital Acquisition Tax	-	0.034	-	1
Totals	2.374	**3.097**	51	**50**

Table 5: Tax and Interest Demanded

Taxhead	Tax €M		Interest €M		Total €M		No. of Cases	
	2017	2018	2017	2018	2017	2018	2017	2018
Income Tax	8.000	8.003	3.917	5.202	11.917	13.205	22	36
CGT	0.082	-	0.078	-	0.160	-	3	-
CAT	0.046	0.049	0.014	0.002	0.060	0.051	2	2
PAYE/PRSI	0.165	-	0.037	-	0.202	-	1	-
VAT	1.368	1.493	0.344	0.241	1.712	1.734	5	7
RCT	0.085	-	0.044	-	0.129	-	1	-
Totals	9.746	**9.545**	4.434	**5.445**	14.180	**14.990**	34	**45**

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. During 2018, there were no new cases referred to the Bureau under Section 5(1)(d).

Arising from an examination of cases by Social Welfare Bureau Officers, actions pursuant to the Social Welfare remit of the Bureau were initiated against two hundred and nine individuals in 2018.

As a direct result of investigations conducted by Social Welfare Bureau Officers, a number of individuals had their payments either terminated or reduced in 2018. These actions resulted in a total savings of €2,220,169.88. This can be broken down as follows:

Savings
Following investigations conducted by Social Welfare Bureau Officers in 2018, total savings as a result of termination and cessation of payments to individuals who were not entitled to payment amounted to €343,004.40. 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 social welfare debts ranging in individual value from €5,000 to €277,000.

During 2018, overpayments assessed and demanded, amounted to €1,554,081.02. A breakdown of which is listed at the end of this chapter.

Recoveries
Social Welfare Bureau Officers are empowered to recover 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.

Part Five
Social Welfare actions by the Bureau

Section 13 of the Social Welfare Act 2012 amended the Social Welfare 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 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.

During 2018, Social Welfare Bureau Officers were successful in using these powers of attachment when they imposed an attachment order in respect of monies held within a local authority and due to an individual. This money was instead forwarded directly to the Bureau in respect of an outstanding Social Welfare overpayment. This is the first time this piece of legislation has been successfully employed. As a result of actions by Social Welfare Bureau Officers, a total sum of €323,084.46 was returned to the Exchequer in 2018, a breakdown of which is listed at the end of this chapter.

Appeals

A change in process is required for appeals against Social Welfare decisions, made by Social Welfare Bureau Officers. To date, the process requires the Appellant to apply directly to the Social Welfare Appeals Office (SWAO), who would independently adjudicate on their case. It was open to the SWAO to either accept or refuse jurisdiction on a case. Should jurisdiction be refused, the Appellant was advised in writing to lodge an appeal directly with the Circuit Court.

Following a High Court decision in the case of *Bridie Hoey vs Chief Appeals Officer, Social Welfare Appeals Office and the Minister for Social Protection (2015 No 614 JR)*, legislative changes were required to the Social Welfare Act in the form of an amendment to progress future CAB Social Welfare Appeals. A decision on this proposed amendment to the Social Welfare Act is expected in 2019.

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

Case 1

Two members of the same family in the North West of the country had their entitlements to means-tested Social Welfare payments reviewed. Both individuals were investigated due to the existence of a bank account with large balances held on deposit. These monies were never declared to the Department of Employment Affairs and Social Protection.

As a result of the investigations conducted, revised decisions were made and the individuals were assessed with overpayments to the value of €165,000 and €211,000 respectively. There were no appeals lodged in these cases.

Case 2

Two members of the same family in the Mid-West of the country were investigated with regard to their Non-Contributory Pensions. Independent financial support and a part share in a foreign property were amongst the issues not previously disclosed to the Department of Employment Affairs and Social Protection. Revised decisions were made in respect of both Social Welfare payments, resulting in overpayments, to the value of €127,000 and €27,000 respectively. There were no appeals in these cases.

Case 3

A member of a family in North Dublin had their entitlement to a Non Contributory Old Age Pension reviewed, as a result of undeclared monies held in their bank account. The amount of money lodged on a regular basis was inconsistent with someone whose only declared source of income was their social welfare payments. A revised decision was made and an overpayment was assessed to the value of €170,000. There was no appeal in this case.

Case 4

An individual from the Southern Region with a significant social welfare overpayment had failed to engage with a Social Welfare Bureau Officer with regard to structured repayments of their debt. It transpired that they were due a refund in excess of €16,500 from a local authority. Due to the non-engagement of this individual, Social Welfare Bureau Officers used powers under the Social Welfare Act to impose an attachment order on this money and for the monies to be returned to the Bureau to offset against his outstanding debt.

Part Five

Social Welfare actions by the Bureau

Table 1: Social Welfare Savings

Scheme Type	2017 Saving €	2018 Saving €
Child Benefit	23,800.00	14,280.00
Disability Allowance	52,496.00	111,642.40
Jobseekers Allowance	173,802.80	112,656.40
One-parent family payment	167,606.40	35,577.60
*BASI	53,478.40	68,848.00
Totals	**471,183.60**	**343,004.40**

Table 2: Social Welfare Overpayments

Scheme Type	2017 Overpayment €	2018 Overpayment €
Child Benefit	10,960.00	-
Carers Allowance	30,565.11	165,258.40
Disability Allowance	117,389.10	21,020.00
Jobseekers Allowance	696,999.19	1,131,001.68
One-parent family payment	468,190.30	88,347.60
*BASI & Other	261,370.33	148,453.34
Totals	**1,585,474.00**	**1,554,081.02**

Table 3: Social Welfare Recovered

Scheme Type	2017 Recovered €	2018 Recovered €
Child Benefit	300.00	1,100.00
Carers Allowance	25,795.33	11,887.36
Disability Allowance	77,212.60	37,153.62
Jobseekers Allowance	156,424.27	165,874.24
One-parent family payment	59,616.79	90,117.20
Other	371.32	16,952.04
Totals	**319,720.31**	**323,084.46**

*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 2018, two files were submitted to the DPP for direction.

Investigations dealt with during 2018

Case 1

The Bureau commenced an investigation into assets held in this jurisdiction by an individual involved in an international fraud stretching as far as Australia. The Bureau identified in excess of €35,000 held in an Irish bank account. The Bureau obtained orders under Section 2, 3 and 4 of the PoC Act in respect of the monies held in this bank account.

Case 2

In targeting the assets and activities of an organised crime gang based in South East Region involved in the commission of crime in both Ireland and across Europe, the Bureau obtained orders under Sections 3 & 7 of the PoC Act over two Mercedes vehicles valued at approximately €62,000. Revenue and Social Welfare actions are also being taken against the members of this organised crime gang and these actions remain ongoing.

Case 3

The Bureau commenced an investigation into assets held in this jurisdiction by an individual involved in an international fraud. The Bureau identified in excess of €870,000 held in an Irish bank account. The Bureau obtained orders under Sections 3 & 7 of the PoC Act in respect of the monies held in this bank account.

Case 4

The Bureau commenced an investigation into assets held in this jurisdiction by an individual involved in the supply of encrypted mobile telephone devices to persons involved in drug trafficking across a number of jurisdictions stretching as far as the United States and Canada. The encrypted devices could not be intercepted by Law Enforcement Agencies. The Bureau identified in excess of €530,000 held in two Irish bank accounts.

The Bureau obtained orders under Sections 3, 4A and 7 of the PoC Act in respect of the monies held in the two bank accounts.

Case 5

In targeting the assets of a family member of a leading member of an organised crime gang based in the Mid-West area, the Bureau obtained orders under Section 3, 4A & 7 of the PoC Act in respect of two properties in the Mid-West area. Revenue actions have also commenced and are ongoing.

Part Six
Notable investigations of the Bureau

Case 6

The Bureau obtained orders under Sections 3 & 4A of the PoC Act in respect of €1.2 million cash seized by Gardaí during their investigation of a money laundering offence. The €1.2 million cash had been seized by Gardaí from an individual who was attempting to transport the cash out of Ireland.

Case 7

The Bureau obtained orders under Sections 2, 3 & 7 of the PoC Act in respect of €150,000 cash seized by Gardaí during the search of a house in the Dublin South area during a drugs investigation.

Case 8

The Bureau obtained orders under Sections 3, 4A & 7 of the PoC Act in respect of €200,000 cash and a high powered motorcycle seized by Gardaí in the South East Region during a drugs investigation.

Operation Lamp

The Bureau obtained orders under Section 3 of the PoC Act in respect of assets valued at €1.4 million which were seized during the Bureau's investigation into an organised crime gang based in the South Dublin area. A major search operation was carried out in 2016, targeting the assets and activities of this crime gang.

The Bureau's investigation involved cooperation between law enforcement agencies in the United Kingdom, Spain, Mallorca and Mauritus. Following the Bureau's investigation into this organised crime gang, orders pursuant to Section 2 of the PoC Act were granted during 2017 over forty eight items of property including twenty nine vehicles, four properties, six designer watches, a bank account with €36,760 and €34,840 in cash. The cumulative value of the property seized is approximately €2.7 million.

As of 31st December 2018, the Bureau was awaiting a hearing for an order under Section 3 of the PoC Act over the remainder of the assets (€1.3 million).

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. The Bureau also supports "Operation Thor Days of Action" by providing Bureau Officers to Divisions for such days of action, where required.

The Bureau's investigation into Operation Thor targets resulted in the Bureau obtaining one order under Section 2 of the PoC Act, five orders under Section 3 of the PoC Act and three orders under Section 4A of the PoC Act in respect of assets linked to the targets.

Part Six
Notable investigations of the Bureau

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Part Seven
Significant Court Judgements during 2018

During 2018, written judgments were delivered by the courts in the following cases:

1. Criminal Assets Bureau –v- Murphy & Anor
2. Criminal Assets Bureau –v- Connors
3. Criminal Assets Bureau –v- Mannion

Criminal Assets Bureau -v- Murphy & anor

27th day of February 2018, High Court: Ms. Justice O'Malley, High Court Record Number 2011/10 CAB

Introduction

1. The value of the property in dispute in these civil forfeiture proceedings is relatively insignificant - less than €20,000 in cash - but the litigation raises important questions. The context for those questions is that the cash, in respect of which the respondent has obtained orders under the Proceeds of Crime Act 1996, was seized from the dwelling of one of the appellants on foot of an invalid search warrant and thus in breach of his constitutional rights. The acknowledged difficulty with the warrant was that it had been issued under the provisions of s. 29 of the Offences Against the State Act 1939, as amended, before that section was held to be unconstitutional by this Court in Damache v. Director of Public Prosecutions [2012] 2 I.R. 266.

2. The appellants (*"the Murphys"*) have argued that the cash should have been excluded from evidence because it was unconstitutionally or illegally obtained. The respondent *("the Bureau"*) has contended, in essence, that any rule excluding evidence on that basis has no application in in rem proceedings. This argument was accepted by the trial judge (see Criminal Assets Bureau v Murphy [2014] IEHC 583) and by the Court of Appeal (Criminal Assets Bureau v Murphy [2016] IECA 40). The Court of Appeal held that the exclusionary rule was intended to prevent the deployment of unconstitutionally obtained evidence only in in personam proceedings against the person whose rights had been breached, and had no relevance in in rem proceedings where the issue before the court was the provenance of the property itself.

3. In its determination on the application for leave to appeal this Court noted the wide public importance of clarifying the law on whether any rule as to the exclusion of evidence which is illegally or unconstitutionally obtained is applicable in civil proceedings. Leave to appeal to this Court was thus granted on the following points:

   (i) Where a dwelling is entered other than in accordance with law, and that dwelling is not that of a person seeking to assert a constitutional right to the

inviolability thereof, may evidence be excluded in proceedings concerning a person not dwelling therein?

(ii) Is there any rule of law requiring that evidence obtained in consequence of illegal entry into a dwelling should be excluded from civil proceedings, including proceedings in rem under the Proceeds of Crime Act 1996, as amended?

(iii) Is there any rule of law requiring the exclusion of evidence in civil proceedings obtained in consequence of a deliberate illegality, or a mistake amounting to an illegality, or in consequence of the deliberate and conscious violation of the rights of one of the parties?

4. I feel it necessary to observe at this stage that couching the questions in terms of the exclusion of evidence did not, perhaps, accurately describe the central issue to be determined by the Court. The cash was not produced before the Court as evidence tending to prove any disputed issue of fact - rather, the evidence in the case was adduced by the Bureau and by the Murphys to respectively support or undermine the proposition that the money represented the proceeds of criminal activity. The distinction becomes particularly apparent in relation to the first and third questions posed, which raise the possibility that evidence of the cash might be excluded in respect of some parties but admitted in respect of others. While this result could be accommodated in criminal trials, it would be absurd in proceedings of the instant character if, for example, the property seized were to be claimed on the basis of joint ownership by an occupant and a non-occupant.

5. In reality, therefore, the problem is not whether items found and seized in such circumstances can be put in evidence, since the Bureau does not intend to do so or to prove any matter thereby, but whether the Bureau was entitled, having regard to the established illegality, to an order intended to deprive the Murphys of the cash. In broader terms, it seems to me that the question that the Court should address is whether the constitutional principles underpinning the exclusionary rule have any application in proceedings of this nature such that the State should, in all or in any circumstances, be denied the benefit of an action taken by its agents in breach of an individual's constitutional rights.

6. Despite the breadth of the terms upon which leave to appeal was granted, I think it preferable, for present purposes, to confine consideration of the issue to

litigation involving the State and to illegality and breach of rights arising from the actions of State agents. This is because the instant case involves, as do most such cases, the use of the coercive powers conferred upon elements of the *force publique*. The factors that may properly influence the Court's approach to the matter will not often arise in purely private litigation and indeed it seems clear that there are few recorded cases where it has. Since private parties normally lack such legally coercive powers, a case where one party seeks to secure an advantage over the other by the use of means which violate the rights of that other will, it seems likely, involve considerations of the criminal law and/or the law of tort. To deal with these issues in the context of the instant proceedings would be to engage in an undesirable level of hypothetical discussion.

Background facts

7. The Murphys are father and son. In May, 2009 a number of firearms were found in the course of a search of a vehicle driven by Michael Murphy Jr. He was subsequently prosecuted and sentenced for firearms offences. Following his arrest, investigating gardaí obtained a warrant pursuant to s.29 of the Offences against the State Act 1939, as amended, which was relied upon as authority for a search of a house in Co. Cork on the 28th May, 2009. There is no question but that this house was the residence of the notice party, who was the girlfriend of Mr. Murphy Jr. On the evidence put before him in the High Court, the trial judge considered it proper to treat it as being the dwelling of Mr. Murphy Jr. also.

8. In the course of the search the gardaí found and seized a number of items, including sterling and euro sums in the amount of Stg£6,625 and €9,000 in cash. The second named appellant, Mr. Michael Murphy Sr., has asserted ownership of a certain amount of the cash. He originally claimed that he owned all of the sterling and that he was also entitled to €5,000 out of the €9,000 on the basis of a loan made by him to his son. At the hearing of this appeal it was confirmed that his claim now relates to the sterling only. Mr. Murphy Jr. claims the remainder.

The High Court proceedings

9. In July, 2010 the Bureau obtained an order pursuant to s.2 of the Act of 1996 in respect of the two sums of cash and some other items seized or discovered in the course of the investigation. Section 2 provides for the making of an interim order, on an ex parte application, where it is shown to the satisfaction of the Court that the property in question constitutes, directly or

indirectly, the proceeds of crime. The Bureau then sought an order pursuant to s.3 of the Act. In brief summary, that section provides that where it appears to the Court, on evidence tendered by or on behalf of the Bureau, that the respondent to the application is in possession or control of specified property that constitutes, directly or indirectly, the proceeds of crime, the Court is to make an order prohibiting the respondent from disposing of or otherwise dealing with the property unless it is shown to the satisfaction of the Court, on evidence tendered by the respondent or any other person, that the particular property does not constitute the proceeds of crime and was not acquired, in whole or in part, with or in connection with property that constitutes the proceeds of crime. This provision has been interpreted as requiring the Bureau to make out a prima facie case, following which the burden of proof shifts to the respondent. Section 3 includes a proviso that the Court shall not make the order if it is satisfied that there would be a serious risk of injustice.

10. An order made under s.3 can, if not discharged or varied for reasons specified in the Act, remain in force for a period of seven years at which point the Bureau may seek a disposal order under s.4. The effect of such an order is to deprive the respondent of his or her rights (if any) in the property concerned and to transfer it to the Minister for Public Expenditure and Reform, or to such other person as the Court may determine. The respondent is entitled to oppose the application, and the order is not to be made if the court is satisfied that there is a serious risk of injustice.

11. Section 16 of the Act makes provision for the payment of compensation to a property owner in respect of loss caused by the making of an order under the Act, should it be established that the property was not the proceeds of crime.

12. Section 8 of the Act renders admissible hearsay evidence given on the question of the respondent's ownership or control of the property, and its connection with criminal activity, by either a member of the Garda Síochána not below the rank of Chief Superintendent or an authorised officer of the Bureau. Section 16A (inserted by s. 12 of the Proceeds of Crime (Amendment) Act 2005) reduces the normal scope of the hearsay rule still further by rendering admissible without further proof the contents of specified types of documents.

13. Section 8(2) stipulates that the standard of proof required to

determine any question arising under the Act shall be that applicable to civil proceedings.

14. The s.3 application in this case originally came on for hearing before the late Feeney J. in December, 2012 and January, 2013. Due to the untimely death of Feeney J. before he delivered judgment, the matter was heard de novo before Birmingham J. in March, 2014. His judgment was delivered in November, 2014. The relevance of these dates lies in the fact that Birmingham J. was dealing with the matter in the period between the decisions of this Court in Damache (judgment delivered on the 23rd February, 2012) and Director of Public Prosecutions v. J.C. (No. 1) [2017] I.R. 417 (judgments delivered on the 15th April, 2015).

15. The evidence adduced on behalf of the Bureau came from its chief officer Detective Chief Superintendent Corcoran, a Detective Garda Gary Sheridan, a financial crime analyst, a social welfare officer and a Revenue Bureau officer. D/Chief Superintendent Corcoran gave evidence as to the grounds for his belief that the property in question constituted directly or indirectly the proceeds of crime. The affidavit of D/Garda Sheridan described the arrest, detention and questioning of Mr. Murphy Jr. He also dealt with the follow-up search of the house and stated that the search warrant had been issued by Superintendent Con Corrigan to a Detective Garda Denis Cahill.

16. As already noted, the trial judge decided to treat the house in question as being the dwelling of Mr. Murphy Jr. as well as that of his girlfriend. On that basis, and having regard to the decision in Damache, he considered the argument made on behalf of Mr. Murphy Jr. that the search of the premises was unlawful and that the evidence was unconstitutionally obtained.

17. The trial judge distinguished Damache on a number of grounds. Firstly, he pointed to the fact that the issue in Damache arose in a criminal prosecution. Here, he was dealing with a Proceeds of Crime Act application. This, he considered, was of significance because such cases were sui generis. He referred to the analysis of McGuinness J. in Gilligan v. CAB [1998] 3 IR 185, where it was noted that proceedings under the Act were in rem (being concerned with the legal status of the property in issue) as opposed to in personam.

18. Secondly, in Damache the warrant was issued by a member of An Garda Síochána team involved in the investigation that culminated in the criminal trial.

Here, while the warrant was issued as part of the garda operation following up on the firearms seizure, the proceedings before the Court were commenced by the Criminal Assets Bureau.

19. The trial judge then considered the main authorities on the exclusionary rule as the law stood at that time (People (A.G.) v. O'Brien [1965] I.R. 142 and DPP v. Kenny [1990] 2 I.R. 110). He also examined judgments dealing with the possible application of the rule outside the area of criminal proceedings (Kennedy v. The Law Society (No. 3) [2002] 2 IR 458; Competition Authority v. The Irish Dental Association [2005] 3 I.R. 208 and Universal City Studios Incorporated v. Mulligan [1999] 3 I.R. 407). Following analysis of those decisions, he concluded (at paragraph 45) that none of them disposed of the question whether the exclusionary rule applied with full force and effect to the sui generis applications under the Proceeds of Crime Act, and that the issue was therefore free from authority. He continued in paragraph 46:

"In my view the factors that militate against extending the rule are that the gardaí who carried out the search were following a procedure provided by statute. This was not a case of wilful disregard of constitutional rights, of recklessness, or shortcut taking or even carelessness. That being so, the policy considerations which influenced Finlay C.J. in Kenny, do not arise. It does not seem to me that the protection of constitutional rights is advanced by condemning the activity of gardaí following a statutory procedure. It follows from what I have said, that if this was a case where there was discretion to be exercised as to whether to admit evidence, that I would exercise the discretion in order to admit the evidence."

20. In paragraph 47 it was asked, rhetorically, whether contraband items such as firearms, drugs or identifiable stolen property would have to be returned to the householder if seized under the purported authority of a s.29 warrant.

21. Birmingham J. therefore determined that in the circumstances he was not precluded from having regard to the outcome of the search by virtue of the Supreme Court decision in Damache. He then went on to follow the steps prescribed by this Court in McK. v. G.W.D. [2004] 2 I.R. 470. Having given detailed consideration to the evidence he was satisfied that the property represented the proceeds of crime. On that basis he made the order sought by the Criminal

Assets Bureau, subject to the reduction of the total amount by a figure that he found to have a legitimate source.

The Court of Appeal

22. In dismissing the appeal, Peart J. (with whom Finlay-Geoghegan and Irvine JJ. agreed) considered that Birmingham J. had been correct in deciding that the exclusionary rule had no application in the circumstances. The reference in the High Court judgment to the exercise of a discretion was in fact unnecessary.

23. The central factor identified as leading to this conclusion was the in rem nature of the proceedings. Peart J's analysis of the exclusionary rule was that it had evolved in the context of criminal prosecutions, to protect accused persons in cases where evidence to be deployed against them had been obtained in breach of their constitutional rights. In a key passage he said:

"*There is no doubt that if [Mr. Murphy Jr.] was being prosecuted for the offence of robbery of the two cash items* found during the *search, and that trial was being heard after the Damache decision, the exclusionary rule would be in play, since [he] would face the prospect of conviction and possible imprisonment on the basis of arguably unconstitutionally obtained evidence. Such proceedings would be very much in personam, and he would be entitled to every available protection and vindication of his constitutional rights. They are precisely the kind of proceedings from which the exclusionary rule evolved and developed. They have a context in which the issue concerns the actual deployment of the evidence in a criminal trial as part of the prosecution case. The issue in such a case is the guilt or innocence of the person on trial for the offence. That context is very different to the present case where the status of the piece of cash itself is the issue in the case i.e. whether it is the proceeds of crime.*"

24. While it was accepted that the exclusionary rule had *"found its voice"* in certain types of civil proceedings, such as Universal City Studios Incorporated v. Mulligan and Competition Authority v. Irish Dental Association, the point made again was that in those cases the material in question was to be deployed at trial, where it had the capacity to affect or even determine the outcome of the proceedings between the plaintiff and defendant. In contrast, the cash recovered in the present case was not sought to be deployed in evidence for the purposes of determining some claim by the Bureau, but was rather the very subject or

object of the proceedings, the issue being its provenance and whether or not it represented the proceeds of criminal activity.

25. Peart J. thus held (at paras 39-40):

"*In my view, the manner in which the cash items came into the physical possession of An Garda Síochána (while also noting as I have done the provisions of s. 1A of the Act of 1996) is not relevant to the particular issue before the Court on a s. 3 application. The cash itself is not being deployed in evidence in any way which might implicate the exclusionary rule. That rule simply does not apply in an application under s. 3 of the Act. Accordingly, it was unnecessary for either the Court below or this Court to consider whether to exercise the discretion to admit evidence that was obtained on foot of a search which was illegal, but not in breach of constitutional rights, as in the case of the search of 12 Clonard Road.*"

26. The context of the proceedings was compared with that of the pre-trial investigation of an offence. Reference was made to Heffernan and Ní Raifeartaigh, Evidence in Criminal Trials (2014, Bloomsbury) which noted that the rule *"is limited to evidence adduced at trial as opposed to information gleaned for a pre-trial investigative step such as securing an arrest warrant"* and to the decision of this Court in DPP v. Cash [2010] 1 IR 609. In Cash, Fennelly J. had concluded that there was no onus upon the prosecution to prove the lawful provenance of the material that gave rise to a reasonable suspicion justifying the arrest under challenge.

27. While noting the differing context, Peart J. concluded (at para 48) that:

"[I]t is of assistance to my own conclusions to see that even in the context of a criminal trial, the scope of the absolute exclusionary rule is not all-embracing. It is in full flow in relation to the deployment of evidence at the trial of the accused, and will permit unlawfully obtained evidence to be excluded either absolutely or in the exercise of judicial discretion depending on the facts and surrounding circumstances. But the reasonable suspicion required for an arrest may be based on evidence which would be inadmissible if offered in support of a prima facie case at trial. It seems to me that if that be the position in a criminal prosecution, it applies a fortiori to the situation herein where what has been obtained on foot of a warrant that can no longer be considered to be a lawful warrant is not being deployed as evidence at all - but rather is the very property itself whose provenance

is the subject of the s. 3 application. In my view, the decision in Damache does not speak to proceedings under the Act of 1996, and the exclusionary rule is simply inapplicable to such applications."

28. It followed from this line of reasoning that Peart J. considered it unnecessary to address certain other matters such as the impact of the decision of this Court in DPP v. JC [2017] 1.R. 417; the justification by Birmingham J. of the non-exclusion of the cash recovered on the basis that the Gardaí carrying out the search were following a statutory procedure; the argument there was no deliberate breach of constitutional rights, or the fact that at the time the search was carried out s.29 of the Act of 1939 was still operative and enjoyed the presumption of constitutionality.

Submissions in the appeal

29. The appellants submit that the distinction between proceedings in rem and in personam provides no basis for differing rules of evidence, since proceedings in rem may affect the constitutional rights of an individual as much as any in personam action. It is argued that the ultimate logic of the reasoning in the Court of Appeal judgment is the adoption of a *"stark inclusionary rule"*, harking back to the 1955 decision of the Privy Council in Kuruma v. R [1955] AC 197. The result would be that no matter how profound the illegality established in a particular case, there would be no circumstances in which the evidence would not be received. Describing the litigation as sui generis does not, it is urged, provide a logical basis for conducting the proceedings outside the framework of the rules of evidence.

30. It is submitted that J.C. is authority for the proposition that the vindication of citizens' rights is an integral part of the administration of justice in every case before the courts and is not the unique preserve of criminal courts. Reliance is placed on the fact that in J.C., O'Donnell J. located the basis for an exclusionary rule in the administration of justice, and when so doing, he explicitly included both civil and criminal trials.

31. Counsel has referred to the three *"core"* decisions of Mulligan, Dental Association and Kennedy as demonstrating the applicability of the exclusionary rule in civil proceedings. The balancing exercise adopted by the majority of the Court in J.C., may, it is submitted, be carried out in civil proceedings taken by the force publique in determining whether an earlier breach of constitutional rights requires

remedy within those proceedings. In this case, it is argued that no such exercise was carried out, since neither the Superintendent who had issued the warrant nor the officer who carried out the search had sworn an affidavit for the purpose of these proceedings.

32. The test established in J.C. is set out in the judgment of Clarke J. (at para. 871) as follows:-

(i) The onus rests on the prosecution to establish the admissibility of all evidence. The test which follows is concerned with objections to the admissibility of evidence where the objection relates solely to the circumstances in which the evidence was gathered and does not concern the integrity or probative value of the evidence concerned.

(ii) Where objection is taken to the admissibility of evidence on the grounds that it was taken in circumstances of unconstitutionality, the onus remains on the prosecution to establish either:-

(a) that the evidence was not gathered in circumstances of unconstitutionality; or

(b) that, if it was, it remains appropriate for the Court to nonetheless admit the evidence.

The onus in seeking to justify the admission of evidence taken in unconstitutional circumstances places on the prosecution an obligation to explain the basis on which it is said that the evidence should, nonetheless, be admitted AND ALSO to establish any facts necessary to justify such a basis.

(iii) Any facts relied on by the prosecution to establish any of the matters referred to at (ii) must be established beyond reasonable doubt.

(iv) Where evidence is taken in deliberate and conscious violation of constitutional rights then the evidence should be excluded save in those exceptional circumstances considered in the existing jurisprudence. In this context deliberate and conscious refers to knowledge of the unconstitutionality of the taking of the relevant evidence rather than applying to the acts concerned. The assessment as to whether evidence was taken in deliberate and conscious violation of constitutional rights requires an analysis of the conduct or state of mind not only of the individual who actually gathered the evidence concerned but also any other senior official or officials within the investigating or enforcement authority concerned who is involved either in that decision or in decisions of that type generally or in putting in place policies

concerning evidence gathering of the type concerned.

(v) Where evidence is taken in circumstances of unconstitutionality but where the prosecution establishes that same was not conscious and deliberate in the sense previously appearing, then a presumption against the admission of the relevant evidence arises. Such evidence should be admitted where the prosecution establishes that the evidence was obtained in circumstances where any breach of rights was due to inadvertence or derives from subsequent legal developments.

(vi) Evidence which is obtained or gathered in circumstances where same could not have been constitutionally obtained or gathered should not be admitted even if those involved in the relevant evidence gathering were unaware due to inadvertence of the absence of authority.

33. Counsel submits that the considerations set out in paragraphs (i), (iv), (v) and (vi) can be applied without modification to Proceeds of Crime Act cases. Paragraphs (ii) and (iii) require modification to the extent of clarifying that the standard of proof is the balance of probabilities, while it must be noted in respect of paragraph (ii) (b) that different considerations arise in this type of litigation. The right of the State to prosecute crimes is not in issue.

34. Mr. Murphy Sr. is not in a position to claim that any constitutional right of his was breached by the search, since the house was not his dwelling. However it is argued on his behalf that the principles sought to be upheld by the Court in J.C. - the proper administration of justice, the rule of law and the public interest in ensuring that the gardaí do not act outside their powers - are relevant in all cases. It is also submitted that the principles relating to illegally obtained evidence, discussed by Kingsmill Moore J. in O'Brien, are applicable and that the trial judge should therefore have exercised his discretion in accordance with those principles.

35. The appellants seek to have the matter remitted to the High Court for consideration in light of the test supported by the majority in J.C., modified to reflect the lower standard of proof applicable in these proceedings.

36. On behalf of the Bureau, counsel maintains the argument that the exclusionary rule has no application to proceedings under the Proceeds of Crime Act 1996, which are civil, in rem and sui generis. While it is conceded that the exclusionary rule has been applied in certain civil proceedings, (although counsel

does not accept that this is *"settled"* law) it is submitted, in line with the decision of the Court of Appeal, that those cases are clearly distinguishable as the material in question was to be deployed at trial and had the capacity to affect or determine the outcome of the proceedings.

37. The exclusionary rule, it is submitted, is designed to exclude evidence, and the cash in this case is not evidence. Counsel takes what he expressly accepts is an *"absolutist"* position and maintains that it does not matter, for the purposes of proceedings brought by the Bureau under the Act, how the property was obtained. In this case it was taken in the course of a garda investigation, in which the Bureau had no role.

38. In relation to the argument put forward on behalf of Mr. Murphy Sr., it is submitted that even if this Court finds that, following the decision in Damache, the trial judge did have a discretion to exclude the evidence on the basis of an illegality, no basis had been established for such an exclusion in his case.

Discussion

39. As I said earlier, describing the issue under consideration as the applicability of the exclusionary rule may not have been helpful. The Court of Appeal was correct, as is counsel for the Bureau, in stressing that the cash was the subject-matter of the proceedings, and was not evidence sought to be adduced as proof of any disputed factual matter. However, in my view that cannot be the end of the debate. The real question is whether the fact that the cash was seized on foot of an invalid warrant has any consequences in the litigation between these parties. Consideration of that question requires, firstly, an examination of the rationale underlying the exclusionary rule. It is also necessary to look at decisions of this Court concerning the impact upon litigation, other than criminal trials, of a breach of an individual's rights by an agent of the State - this includes an examination of the classification of Proceeds of Crime Act cases as in rem. The purpose here is not to reconsider the formulation of the test for the exclusion of improperly obtained evidence, but to discern the principles underlying the existence of such a rule and the extent to which those principles have been found to be applicable in the administration of justice.

The exclusionary rule in criminal trials.

40. The development of the legal principles according to which evidence obtained in breach of constitutional rights may be held to be inadmissible begins with the judgments of this Court in

People (Attorney General) v O'Brien [1965] I.R. 142. This marked the rejection in this jurisdiction of the proposition, affirmed by the Privy Council in Kuruma v R. and accepted in the Court of Criminal Appeal in O'Brien, that relevant evidence that was otherwise admissible could be received by a court no matter how it had been obtained. That was the rule contended for by the Attorney General, although it is made clear in the report that counsel was expressly instructed to concede that evidence obtained as a result of gross personal violence or by methods which offended against the essential dignity of the human person could not be admitted. Having noted this fact in his judgment Kingsmill Moore J. observed (at p.150):

"To countenance the use of evidence extracted or discovered by gross personal violence would, in my opinion, involve the State in moral defilement."

41. At a later point he stated, with reference to Article 40.3.1. and 40.3.2, that the Attorney General's concession was entirely consistent with *"the spirit of our Constitution"*.

42. On the other hand, Kingsmill Moore J. considered that the proposition advanced on behalf of the appellant - that any illegality, however slight, would render evidence inadmissible - to be *"clearly too wide"*. In the absence of any Irish authority, he went on to consider the leading decisions from England, Scotland and the United States. He noted that in Kuruma v. R. the Privy Council had said that in a criminal case the trial judge had a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against the accused (such as where an admission had been obtained by means of an unfair trick). He also considered the different directions taken by the Scottish courts and the then current US authorities, including Weeks v United States 232 U.S. 383 (1914), Mapp v. Ohio 367 U.S. 643 (1961) and Olmstead v. United States 277 U.S. 438 (1928). Kingsmill Moore J. concluded that there were three possible answers to the question whether illegally obtained evidence should be admissible. Two he rejected as not being sustainable - the admission of all relevant evidence without regard to its provenance, and the exclusion of all evidence obtained as a result of illegal action. He went on (at p.160 of the report):

"Some intermediate solution must be found. As pointed out by the Lord Justice-General in Lawrie v. Muir and by Holmes J. in Olmstead's Case a choice has to be made between desirable ends which may be incompatible. It is desirable in the public interest

that crime should be detected and punished. It is desirable that individuals should not be subjected to illegal or inquisitorial methods of investigation and that the State should not attempt to advance its ends by utilising the fruits of such methods."

43. Kingsmill Moore J. considered that the best answer was to leave a discretion to trial judges to determine whether, in the light of all of the circumstances of a case,

"the public interest is best served by the admission or by the exclusion of evidence of facts ascertained as a result of, and by means of, illegal actions".

44. He also expressed some doubt about the suggested exclusion of evidence obtained by a trick.
"I am disposed to lay emphasis not so much on alleged unfairness to the accused as on the public interest that the law should be observed even in the investigation of crime. The nature of the crime which is being investigated may also have to be taken into account."

45. Commenting specifically on the judgment of Walsh J. in the same case, Kingsmill Moore J. said that he agreed that evidence obtained as a result of a deliberate and conscious violation of the constitutional (as opposed to common law) rights of an accused person should be excluded save where there were *"extraordinary excusing circumstances".* However he preferred not to enumerate the latter, considering, again, that it should be left to the discretion of trial judges.

46. Lavery and Budd JJ. agreed with Kingsmill Moore J.

47. Walsh J. (with whom O'Dalaigh C.J. agreed) saw evidence obtained by a breach of a constitutional right as being in an entirely different category to evidence that was obtained by what might be described as *"mere"* illegality. Dealing with the latter he expressed scepticism (at p. 167) in relation to the Scottish view that the courts must strive to reconcile the interests of the citizen and the State. Apart from the issue of a wrongly induced confession, to which different considerations applied, his view was that the rules of evidence were not to be used as weapons to deter police illegalities.

"Every judge in our Courts is bound to uphold the laws and while he cannot condone or even ignore illegalities which come to his notice, his first duty is to determine the issue before him in accordance with law and not to be diverted from it or permit it to be wrongly decided for the sake of frustrating a police illegality, or drawing public attention to it."

48. The remedies for illegal police actions lay in the criminal law and the law of tort. It was also possible for the trial judge to draw public attention to the illegality. Therefore, in his view, evidence obtained illegally should not for that reason alone be excluded. However, his approach to evidence obtained in violation of constitutional rights - in the case before the Court, the inviolability of the dwelling - imposed a different standard. The reason is encapsulated in the following passage:

"The vindication and the protection of constitutional rights is a fundamental matter for all Courts established under the Constitution. That duty cannot yield place to any other competing interest. In Article 40 of the Constitution, the State has undertaken to defend and vindicate the inviolability of the dwelling of every citizen. The defence and vindication of the constitutional rights of the citizen is a duty superior to that of trying such citizen for a criminal offence. The Courts in exercising the judicial powers of government of the State must recognise the paramount position of constitutional rights and must uphold the objection of an accused person to the admissibility at his trial of evidence obtained or procured by the State or its servants or agents as a result of a deliberate and conscious violation of the constitutional rights of the accused person where no extraordinary excusing circumstances exist…"

49. The question in O'Brien was the admissibility of evidence in a criminal trial, and the judgments therefore focus solely on that issue. It seems fair to say that the approach of the majority left it to trial judges to balance, in the public interest, the competing claims of the State and the individual where the former had breached the rights of the latter by any form of illegality including the breach of constitutional rights, with perhaps a presumption in favour of exclusion in the latter case. Walsh J. considered that the constitutional obligation of the courts to vindicate personal rights must take priority, requiring the exclusion of evidence obtained by a deliberate and conscious breach of constitutional rights save in extraordinary excusing circumstances, but that the courts had no business excluding merely illegally obtained evidence unless it became apparent that this was necessary to secure police compliance with the law.

50. The issue of the admissibility of evidence obtained on foot of an invalid search warrant did not

come before the Supreme Court again until 1990, in the case of The People (DPP) v Kenny [1990] 2 I.R. 110. The result of that case - the establishment of what was later described as an absolute (or near absolute) exclusionary rule - was overruled in J.C. My purpose in referring to it here is simply to record the basis for the view of the majority in Kenny that an absolute rule was necessary. In essence, the reason was that the obligation of the courts under Article 40.3.1 of the Constitution, to defend and vindicate the personal rights of individuals as far as practicable, required such a rule in order to dissuade police officers from invading constitutional rights and to encourage those in authority to consider in detail the personal rights of citizens as set out in the Constitution. The view, therefore, was that the vindication of constitutional rights required a strongly deterrent rule.

51. In J.C. this Court overturned the decision in DPP v Kenny, finding that it had implicitly (and wrongly) overturned O'Brien and had erred in imposing an absolute rule. However, the approach of the Court in O'Brien was not considered satisfactory by the majority for the reasons set out in their judgments. A new formulation of the test for the exclusion of evidence was established, more stringent than that adopted by the majority in O'Brien but not as absolute as the rule laid down in Kenny.

52. O'Donnell J. noted that although no cases concerning search warrants had reached the Supreme Court between O'Brien and Kenny there had been a number of cases relating to statements of admission made in unlawful detention - People (DPP) v Madden [1977] I.R. 336, People (DPP) v O'Loughlin [1979] I.R. 85 and People (DPP) v Healy [1990] 2 I.R. 73. In each of these cases it was held that evidence obtained as the result of the unlawful actions should be excluded.

53. In Madden, the Court of Criminal Appeal had ruled that, on the evidence, the gardaí had deliberately continued to detain the accused past the expiration of the statutory period permitted, without regard to his right to liberty guaranteed by Article 40. Giving the judgment of the Court O'Higgins C.J. said:

"This lack of regard for, and failure to vindicate, the defendant's constitutional right to liberty may not have induced or brought about the making of this statement, but it was the dominating circumstance surrounding its making. In the view of this Court this fact cannot be ignored. This Court notes with approval the views of Carroll C.J.

in Youman v. Commonwealth [189 Ky. 152] (which is cited in the judgment of Kingsmill Moore J. in The People (Attorney General) v . O'Brien) when, in relation to evidence obtained as a result of a search in violation of the law, he said at p.158 of the report:-

'It seems to us that a practice like this would do infinitely more harm than good in the administration of justice; that it would surely create in the minds of the people the belief that Courts had no respect for the Constitution or laws, when respect interfered with the ends desired to be accomplished. We cannot give our approval to a practice like this. It is much better that a guilty individual should escape punishment than that a Court of justice should put aside a vital fundamental principle of the law in order to secure his conviction. In the exercise of their great powers, Courts have no higher duty to perform than those involving the protection of the citizen in the civil rights guaranteed to him by the Constitution, and if at any time the protection of these rights should delay, or even defeat, the ends of justice in the particular case, it is better for the public good that this should happen than that a great constitutional mandate should be nullified.'"

54. This passage, it seems to me, evokes both the necessity to uphold the integrity of the administration of justice (and therefore the necessity for courts to demonstrate respect for constitutional rights) and the high constitutional value of vindication of individual rights.

55. In O'Loughlin, the accused had been informally (and therefore unlawfully) detained and questioned by gardaí in relation to an offence past the point at which he should have been charged in relation to a different matter and brought before a court. In the appeal against conviction, the Court of Criminal Appeal described the practice of *"holding for questioning"* as *"an open defiance of Article 40, s.4, sub-s. 1, of the Constitution"*. On the facts, the Court could find no circumstances that excused what had happened.

"It would ill serve respect for the Constitution and the laws if this Court, by allowing evidence so obtained, were to indicate to citizens generally that the obligation on the State to safeguard and vindicate constitutional rights could be dispensed with or eased in the circumstances of a criminal investigation."

56. Again, the judgment stresses the need for the judiciary to uphold respect for the Constitution by ensuring that the State respects

the constitutional rights of individuals.

57. Healy was a decision of this Court on an appeal by the Director of Public Prosecutions against a directed acquittal. The issue in the case was the admissibility of a statement of admission, in circumstances where the accused's solicitor had called to the garda station and had been refused access to his client. The Court unanimously held that the trial judge had been right to exclude the statement, with a majority holding that the right of access to a solicitor was constitutionally protected.

58. In J.C. O'Donnell J., although his concern at this point in his judgment was to trace the evolution of the interpretation of the *"deliberate and conscious"* test, remarked that these decisions were *"plainly correct"*, and were

> *"examples of the courts performing the function in ensuring that constitutional rights are respected, upheld and vindicated."*

59. In rejecting the analysis of the Court in Kenny, O'Donnell J. took issue with inter alia its rationale for adopting an absolute rule. The Court had relied upon the necessity to deter misconduct, but in a case such as J.C. (involving a search on foot of a s.29 warrant) there was no garda misconduct to be deterred. Dealing with the submission that an absolute rule was required by the constitutional obligation to respect and vindicate the constitutional rights of the citizen, he pointed out that the issue in the case was the admission of evidence; that the Constitution did not address the question of admissibility and that the admission of evidence could not in itself amount to a breach of the inviolability of the dwelling. At paragraph 452 he said:

> *"Perhaps the most fundamental objection to this line of argument is that it assumes that the question in issue is only the vindication of the citizen's right of inviolability of the dwelling home, or other property, save in accordance with law. In an action for an injunction restraining trespass ex ante or seeking damages ex post that might indeed be the only question. Even then, as discussed above, there is no absolute rule. But the admission of evidence in a criminal trial occurs in a quite different context. The central issue there is not the question of breach of the rights of the householder, but rather the performance of the constitutional obligation of the administration of justice. That involves a determination of the guilt or innocence of an individual…The*

administration of justice under the Constitution, its truth-finding function and its requirement of the availability of all relevant evidence, is a factor weighing in favour of admission of evidence. Of course, there comes a point when the administration of justice may itself require that relevant evidence be excluded, for example where the evidence was obtained in circumstances offensive to the concept of justice itself. This would itself be offensive to the administration of justice which is the fundamental obligation of a court. However, that calculation involves a balance rather than an absolute rule."

60. O'Donnell J. returned to this theme (at para.488) in addressing, at the level of principle, the question whether the Constitution required an absolute rule.

"It is of course the case that the Constitution does not require the exclusion of evidence in express terms, and indeed says nothing about the admission of evidence. As is often the case, it is important therefore to identify the correct question to be posed. If this issue is addressed solely in terms of the vindications of a right breached, then it is a short step to the exclusion of evidence. But in my view that is the wrong question. A court, whether criminal or civil, addressing the admissibility of evidence is not engaged in the question of remedying a breach of the right, as a court asked to grant an injunction to restrain a trespass might be. A criminal or civil trial is the administration of justice. A central function of the administration of justice is fact finding, and truth finding. Anything that detracts from the courts' capacity to find out what occurred in fact, detracts from the truth finding function of the administration of the justice. As many courts have recognised, where cogent and compelling evidence of guilt is found but not admitted on the basis of trivial technical breach, the administration of justice, far from being served, may be brought into disrepute. The question is at what point does the trial fall short of a trial in due course of law because of the manner in which evidence has been obtained? When does the admission of that evidence itself bring the administration of justice into disrepute? This analysis leads inevitably to a more nuanced position which would admit evidence by reason of a technical and excusable breach, but would exclude it where it was obtained as a result of a deliberate breach of the Constitution."

61. Clarke J. analysed the issue in terms of the competing interests at stake. On the one hand was the principle that society and the

victims of crime were entitled to have an assessment carried out at a criminal trial of the culpability of an accused based on proper consideration of all material evidence where that evidence was not more prejudicial than probative. This was to be seen as a high constitutional value. At para.827 he continued:

"However, on the other hand, there is also a significant constitutional value to be attached to the need to ensure that investigative and enforcement agencies (including An Garda Síochána) operate properly within the law. Why do we have elaborate laws concerning arrest, the power to enter premises, questioning and other means of what might be described as non-voluntary evidence gathering? We do so because there is a significant constitutional value in ensuring that there are clear rules which mark the limits of the powers of investigation and enforcement agencies in evidence gathering. Those limits are there to protect us all. There is a high constitutional value in ensuring that those limits are maintained. It follows that there should be consequences, and indeed significant consequences, where those rules are broken."

62. Having dealt with the formulation of the appropriate test, Clarke J. went on to note that while the focus of the debate had been on unconstitutionally obtained evidence, there was also an obligation on the courts to discourage illegality. He considered that evidence should be excluded if it was obtained illegally (albeit not in breach of a constitutional right) in circumstances properly described as reckless or grossly negligent.

63. The final judgment for the majority was that of MacMenamin J. In agreeing with O'Donnell and Clarke JJ. that the judgment in Kenny was wrong, he noted that the decision in that case was designed to promote good garda conduct and deter misconduct. Where the facts were as they were in J.C., he questioned whether the application of the absolute rule furthered either of these ends, and whether it correctly balanced the constitutional interests involved. He stressed that he and the other members of the Court in the majority were not rejecting the importance of the protection of a suspect, but were seeking to identify *"a harmonious process, giving due recognition to the rights of protection, the duty of deterrence, and the considerations of public policy, and the rights of all citizens."*

64. At paragraph 944 he described the deterrence principle as both a private and a public good precept, and went on:

"It deters individual misconduct by protecting the suspect. It maintains a public good in a police force that operates under the rule of law. The rule, as at present formulated, vests in the suspect constitutional rights under Article 40.3.1 of the Constitution. The intent in such exclusion of evidence, unconstitutionally obtained, is to deter misconduct. But Article 40.3, seen across its entirety, does not ignore the rights of the citizen, or the public interest, or the common good…The duty of a court, in all constitutional questions, is not to isolate, or focus on one constitutional consideration, but rather to arrive at an appropriate balance between the relevant rights and duties."

65. Director of Public Prosecutions v. Cash [2010] 1 IR 609 was a case stated in which the defence sought to extend the range of application of the rule in Kenny. The facts, in brief, were that fingerprints found at the scene of a break-in were matched to prints, known to be those of the accused, held at the Garda Technical Bureau. That formed the basis for the suspicion grounding the arrest of the accused. His prints were again taken after that arrest. The prosecution proposed to prove the match between the crime scene prints and those taken when the accused was arrested for the offence. The defence cross-examined as to the basis of the arrest, and it was conceded by the prosecution witnesses that they could not prove that the prints in the Garda Technical Bureau had been lawfully taken or retained in accordance with the relevant statutory provisions.

66. In a judgment agreed with by a majority of the Court Fennelly J. said (at paragraph 64) that the exclusionary rule laid down in Kenny applied, in its own terms, only to the exclusion of evidence proffered at a criminal trial. He noted the repeated use of the words *"exclusion"* (or its cognates) and *"evidence".* However, he considered it more to the point that Finlay C.J. had been referring to *"evidence obtained as a result of the invasion of the personal rights of a citizen"* or which *"results from unconstitutional conduct"* (emphasis added by Fennelly J.). The case had not been concerned with the lawful provenance of evidence used to ground a suspicion, and the Chief Justice's judgment did not advert to the possibility that the principle propounded could apply to such an issue. Fennelly J. said in this regard:

"The object of the rule is to provide positive encouragement to state authorities, when gathering evidence, to consider in detail the constitutional rights of persons affected by the exercise of their 'powers of arrest, detention, search and questioning…'".

67. Fennelly J. went on to approve the reasoning of the trial judge (Charleton J.) who had examined in detail the authorities on the meaning of and criteria for assessing the concept of *"suspicion"* and had concluded that the rules of evidence had no place in that assessment. It was well established that a reasonable suspicion, capable of properly grounding an investigative step, did not have to be based on admissible evidence.

Decisions in non-criminal cases

68. A few months before its decision in O'Brien the Supreme Court had delivered judgment in State (Quinn) v Ryan [1965] I.R. 70. That case was not concerned with evidence at all, but with the fact that a person who had just been freed from garda custody by order of the High Court had been immediately removed from the Four Courts by gardaí acting on foot of a plan to take him out of the jurisdiction with no opportunity for legal challenge. In a subsequent enquiry under Article 40.4 the return submitted on behalf of the gardaí was that they no longer had the applicant in their custody, having handed him over to officers of the London Metropolitan Police who had been present in the vicinity of the courts with an extradition warrant. Two members of the Divisional Court who heard the case thought that to be a sufficient return. Davitt P. dissented, taking the view that the Constitution obliged the Court to conduct an enquiry into a complaint of unlawful detention, and further obliged it, in the case of injustice done, to vindicate the applicant's constitutional right not to be deprived of liberty save in accordance with law. At p. 89 of the report he referred to the personal rights guaranteed by Article 40 and said:

"These guarantees are given on behalf of the State and apply to all its organs. They apply not merely to the Legislature but also to the Executive and the Judiciary. Not merely are the appropriate laws as enacted to comply with the requirements of these guarantees, but they are, so far as their nature permits, to be interpreted by the Courts and administered and enforced by the Executive with a similar regard to the requirements of the constitutional guarantees."

69. This Court took a similar approach to that of Davitt P. It held, firstly, that the legislation

relied upon by the gardaí (the *"backing of warrants"* provisions in the Petty Sessions (Ireland) Act 1851) was repugnant to the Constitution precisely because it permitted the course of action that had been taken. Secondly, the gardaí had acted in disregard of the applicant's constitutional rights, and could not be allowed to escape responsibility because they had succeeded in preventing him from getting relief from the courts. O'Dalaigh C.J. stated (at p.122) that:

"[i]t was not the intention of the Constitution in guaranteeing the fundamental rights of the citizen that these rights should be set at nought or circumvented. The intention was that rights of substance were being assured to the individual and that the Courts were the custodians of these rights. As a necessary corollary it follows that no one can with impunity set these rights at nought or circumvent them, and that the Courts' powers in this regard are as ample as the defence of the Constitution requires."

70. On the facts of the case no relief could be afforded to Mr. Quinn, since he was no longer in the jurisdiction. However the Court found both the gardaí and the English police officers guilty of contempt of court.

71. The State (Trimbole) v Governor of Mountjoy [1985] I.R. 580 was also an enquiry pursuant to Article 40.4 of the Constitution, this time into the lawfulness of the detention of an Australian national who was wanted in Australia on very serious charges. Egan J. found that the purported suspicion upon which the applicant's arrest had been grounded was not genuine, but was intended to keep him in custody pending the finalising of extradition arrangements with Australia. Having referred to O'Brien and Quinn, he specifically held that the principle of O'Brien was not solely confined to the admission of evidence in a criminal case.

"Courts have no higher duty to perform than that involving the protection of constitutional rights and if at any time the protection of these rights should delay, or even defeat the ends of justice in the particular case, it is better for the public good that this should happen rather than that constitutional rights should be nullified."

72. The detention of the applicant was tainted by the gross abuse of the power of arrest, which amounted to a deliberate and conscious violation of his constitutional right to liberty and accordingly his release was ordered.

73. This approach was upheld on appeal. Finlay C.J. (with whom

Henchy, Griffin and Hederman JJ. agreed) deduced the following principles from the authorities:

"The Courts have not only an inherent jurisdiction but a positive duty: (i) to protect persons against the invasion of their constitutional rights;(ii) if invasion has occurred, to restore as far as possible the person so damaged to the position in which he would be if his rights had not been invaded; and (iii) to ensure as far as possible that persons acting on behalf of the Executive who consciously and deliberately violate the constitutional right of citizens do not for themselves or their superiors obtain the planned results of that invasion.
Notwithstanding the fact, therefore, that of the four cases to which I have referred, three [People (Attorney General) v. O'Brien, People v. Madden and People v. Lynch] are concerned with the admissibility of evidence in criminal trials and the fourth [State (Quinn) v. Ryan] was concerned with the punishment of persons acting in breach of the Constitution where neither protection nor reparation to the party injured was practical, I am satisfied that this principle of our law is of wider application than merely to either the question of admissibility of evidence or to the question of the punishment of persons for contempt of court by unconstitutional action."

74. McCarthy J. also referred to Quinn and to the passage from the judgment of Davitt P. in the High Court (quoted above) in relation to the rights guaranteed by Article 40. He went on:
"If, then, the Executive itself abuses the process of law as in this case by the wrongful use of s.30 of the Offences Against the State Act, 1939, and, for what it is worth, persists in that abuse by giving false evidence in the course of the constitutional enquiry, are the courts to turn aside and, apart from administering severe strictures to those concerned, appear to sanction the procedure that has been adopted to secure the extradition of an individual to the requesting State?"

75. It had been argued on behalf of the respondent that, on the facts of the case, the order for the applicant's extradition was not the *"fruit"* of the wrongful arrest (because the original illegality had been superseded by valid orders of detention made by the District Court) and that therefore the authorities relating to the admission into evidence of the *"fruits"* of improper conduct on the part of the Gardaí did not apply. Finlay C.J. rejected this submission.
"If the challenge to the legality of the prosecutor's detention had been based on a want of jurisdiction in the District Court, or if the successful challenge to

the original arrest had been one of form creating an illegality but not constituting either a conscious and deliberate violation of his constitutional rights or the abuse of a process of the court, then in those instances, undoubtedly…the orders of the District Court, having been made within jurisdiction, would justify the detention of the prosecutor irrespective of the method by which he had been brought before that court. I have no doubt, however, that different considerations apply to a challenge arising from the discretion at common law to prevent abuse of the processes of the court and the duty under the Constitution to vindicate the constitutional rights of the prosecutor."

76. McCarthy J. agreed with the State that the cases cited were, largely, concerned with the *"fruits"* of unlawful actions but considered that the argument made in this respect overlooked the philosophy, concerning the deliberate violation of constitutional rights that underlay the authorities. In his concluding remarks he referred to the declaration required of judges under the Constitution, noting that no equivalent was required of any office holder in the State other than the President.
"This circumstance emphasises, if emphasis were needed, the high responsibility that lies upon the Judiciary to ensure that constitutional rights are not flouted with impunity. The release upon what may appear to have been a technical ground of an individual "wanted" on serious charges may seem, at first sight, undesirable and, indeed, contrary to public policy; it may seem highly contrary to public policy that elaborate arrangements for extradition should be set at nought by what may be termed an excess of zeal. In my judgment, however, a far greater principle is at stake: that part of the Executive represented by the Garda authorities and those others responsible for what I have termed the plan to extradite the prosecutor must not be permitted to think that conduct of this kind will at worst result in a judicial rebuke, however severe. It will result in the immediate enforcement, without qualification, of the constitutional rights of the individual concerned whatever the consequences may be. If the consequences are such as to enable a fugitive to escape justice then such consequences are not of the courts' creation; they stem from the police illegality."

77. Some aspects of these judgments require comment. It is worth pointing out that in this pre-Kenny case the concept of deliberate and conscious violation of rights was linked by

Finlay C.J. to *"the planned results"* of the breach. Secondly, the second of the two principles stated in the first of the paragraphs quoted here from Finlay C.J.'s judgment has not, as a matter of fact, been applied literally in the subsequent jurisprudence. It is clear that the Irish courts never adopted the *"fruit of the poisoned tree"* doctrine to its full extent. The decision in Cash demonstrates this. The taking of a coercive step, such as an arrest or a search, for the purposes of finding admissible evidence, requires a state of mind that must be based on reasonable grounds. However, this is a question of rationality and logic, and does not require the investigator to put out of his or her mind material that may not be admissible in court. Finally, it must be stressed that Finlay C.J. said that an unlawful arrest, even if found to be conscious and deliberate, did not necessarily confer on the person concerned any immunity from proper enforcement of due processes of law after his necessary release from unlawful custody.

78. For present purposes, the relevance of the judgments lies in the clear pronouncement that the principles according to which evidence might be excluded in criminal trials were not confined to that context.

79. Trimbole was distinguished in Lynch v Attorney General [2003] 3 IR 416. In that case, the appellant was wanted in the United Kingdom on assault charges. He was also suspected in this jurisdiction of involvement in offences relating to stolen cheques. In the extradition proceedings it was established in evidence that he had been told by a garda officer that, if he provided information relating to the cheques, the warrant for his extradition would not be executed. He argued, in reliance upon Trimbole, that his constitutional rights had been breached. Although this Court condemned the behaviour of the garda, it held unanimously that Trimbole was not relevant. Denham J. said:

"In this case, whereas the court has an inherent jurisdiction and a duty to protect persons against the invasion of their constitutional rights, there has been no constitutional right identified which has been invaded. Counsel for the applicant submitted that there was a right not to be put under duress by agents of the State, that the applicant had a right not to have his freedom of decision oppressed, his right to silence had been infringed, his right to speak out voluntarily and not under compulsion was in issue and that these rights related to a right to privacy. However, I am not

satisfied that a constitutional right has been identified in this case, nor that there has been a breach of a constitutional right of the applicant. In addition, The State (Trimbole) v. The Governor of Mountjoy Prison [1985] I.R. 550 may be distinguished as in that case the applicant was released because the State had achieved a result which was tainted. In this case the State received no result, tainted or otherwise."

80. In her concluding remarks on this aspect, Denham J. said that the conduct of the garda had not been such as to nullify the proceedings or to justify the intervention of the courts to stop the extradition process.
"That is not, of course, to determine that there may not be circumstances where conduct would be such as to nullify proceedings. That is not to say that if there has been unconscionable behaviour on the part of a member of a state agency that it would not be such circumstances as to stop proceedings. However that is not the situation in this case."

81. Hardiman J agreed. Referring to the passage quoted above from the judgment of McCarthy J. in Trimbole, he said:
"No-one could doubt the principles thus eloquently expounded by McCarthy J. Adherence to them is necessary if the rule of law is to be maintained. But the relief granted in that case was granted on the basis that the applicant's availability for the execution of the extradition warrant was the direct consequence of the false arrest. It is quite clear that no relief would have been granted in the absence of that causal relationship."

82. Referring to the observations in the Supreme Court in Trimbole to the effect that its ruling did not mean that Mr. Trimbole was immune from further proceedings, Hardiman J. said:
"The underlying reason for that position is as follows. The courts do not exercise a general disciplinary power over the executive, or the gardaí in particular. That power is vested elsewhere. The role of the courts is invoked when, in the course of properly constituted proceedings, a complaint is made that some step or thing adverse to an individual has been taken, or come into being, on the basis of an illegality or an unconstitutional act on the part of his opponents. If this has occurred, the courts will not normally permit the opponent to have the benefit of what flows from an unconstitutional act, in the interests of upholding the Constitution itself. But it will not interfere with a procedure, otherwise proper, on the basis of

disapproval of some step taken in its general context."

83. However, Hardiman J. added that these comments were posited on the assumption that the gardaí were under effective discipline and control at the hands of their authorities. If for any reason it were to be demonstrated that this assumption was unrealistic, and that the authorities were conniving at or ignoring such conduct, the situation would be transformed and it would be necessary to recall the words of O'Dalaigh C.J. in The State (Quinn) v Ryan.

84. Universal City Studios v. Mulligan (No.1) appears to be the only example in the authorities cited to the Court of purely civil litigation. However, even in that context the issue that is of relevance here arose from the exercise of garda powers. In an action for copyright infringement, the plaintiffs relied in part on evidence relating to a number of videos seized by a garda in the course of a search of a car in a public place. The evidence of the garda was that he had acted on foot of a duly issued warrant, but the warrant had subsequently been lost and could not be produced in evidence. A challenge having been taken to the legality of the search, Laffoy J. determined the issue on the basis that it should be presumed that the search was illegal, since it could not be proved that it was in compliance with the terms of the warrant. However, she accepted the evidence of the garda that he had been in possession of the warrant and had acted in good faith. As no constitutional right was violated, she exercised her discretion to admit the evidence.

85. It may be remarked that this is a straightforward example of the exercise of the discretion to admit illegally obtained evidence. There is nothing in the evidence to indicate that the discretion should have been exercised in any other way.

86. Simple Imports v Revenue Commissioners [2000] 2 I.R. 243 concerned the seizure of certain material alleged by the Revenue Commissioners to be indecent or obscene. The material had been taken from the company's premises on foot of warrants issued under the Customs (Consolidation) Act 1876 and the Customs and Excise (Miscellaneous Provisions) Act 1988, authorising a search for prohibited goods of a specified nature. In judicial review proceedings the company succeeded in obtaining a declaration that the warrants were void and of no legal effect (for reasons that are not of concern here), and an order for the return of the property.

87. It is particularly relevant to note, for the purposes of the instant case, that the judicial review proceedings were not taken in a context of a criminal prosecution, and that the order for return of the property was expressly made in the light of that fact, precisely because the issue of admissibility would not be determined in a criminal trial. It is clear that, if the case were otherwise, the trial would have been the proper forum for deciding the matter.

88. Discussing the nature of the power of search and seizure Keane J. said (at p.250):

"Search warrants, such as those issued in the present case, entitle police and other officers to enter the dwelling house or other property of a citizen, carry out searches and (in the present case) remove material which they find on the premises and, in the course of so doing, use such force as is necessary to gain admission and carry out the search and seizure authorised by the warrant. These are powers which the police and other authorities must enjoy in defined circumstances for the protection of society, but since they authorise the forcible invasion of a person's property, the courts must always be concerned to ensure that the conditions imposed by the legislature before such powers can be validly exercised are strictly met."

89. He referred to the famous case of Entick v Carrington [1765] 2 Wils. 275, where Lord Camden C.J. had said:
"[O]ur law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave; if he does he is a trespasser, though he does no damage at all; if he will tread upon his neighbour's ground, he must justify it by law…"

90. In Kennedy v. The Law Society the Law Society had appointed an investigatory accountant to examine the applicant's practice records. The Society had a statutory power to investigate the accuracy of a solicitor's accounts, but in appointing the accountant it was also pursuing a *"hidden agenda"* of looking for evidence of spurious personal injury claims. One of the findings in the case was that the Law Society had gone to the lengths of deceit to conceal this latter purpose, which it had no legal power to pursue. An order was made in the proceedings quashing the accountant's appointment.

91. The judgment of Fennelly J. in Kennedy v. Law Society (No.3) [2002] 2 IR 458, delivered on the 20th December, 2001, is concerned with the consequences of that outcome, in circumstances where the accountant's report had been

used as the basis for an investigation by the Compensation Fund Committee and a referral to the High Court. It was argued on behalf of the solicitor, in reliance on DPP v. Kenny and the previous authorities, that the quashing of the appointment meant that the material gathered by the accountant could not be used for any purpose.

92. Fennelly J. noted that there was no authority dealing with the application of the case-law on evidence obtained in violation of constitutional rights to administrative procedures of this nature. The Court in Kenny had been motivated by the need to adopt a rule that would act as a sufficiently powerful deterrent against abuse by the police of the exceptional powers which they may exercise while engaged in the investigation of crime.

"In the investigation of crime, the law confers on the police extensive powers, not normally possessed by disciplinary or administrative tribunals, to encroach on such fundamental rights. I do not exclude the possibility that such a situation may, depending on the facts of the case, call for the application of those principles in the sphere of administrative and, in particular, disciplinary hearings. But the scope for such situations to arise must necessarily be extremely limited. They do not, in my estimation, arise here. The excess of statutory powers was not a trivial one, but it occurred in the course of the conduct by the governing body of the profession of their supervisory role over solicitors. No comparison can be made with the illegal and hence unconstitutional detention of a suspect or an unauthorised search of his person or of his dwelling. The applicant has not identified any constitutional right of his which was affected by the investigation.

I turn then to the illegality attendant on the investigation. Here it is easier to find place for the application of the balancing test proposed by Kingsmill Moore J. He stressed the need to have regard to all the circumstances. He was essentially, however, considering the public interest just as was Finlay C.J. in The People (Director of Public Prosecutions) v. Kenny [1990] 2 I.R. 110. Was the obtaining of the evidence, the admissibility of which is at issue attended with such circumstances of illegality that it would be unconscionable to allow the authority to use it? The questions which Kingsmill Moore J. posed to himself suggest that a comparatively serious case of intentional illegality has to be established. I agree that an element of deliberate and knowing misbehaviour must be shown, before evidence should be

excluded. It is not possible to render unknown something already known. The courts should be slow to adopt any mechanical exclusionary rule which makes it easy to prevent disciplinary tribunals from receiving and hearing relevant and probative material. The balance should be struck between the rights of individuals and those professional bodies assigned the task of supervising their behaviour so as to give careful weight to two competing considerations: firstly, the test adopted should not unduly impede the latter types of body from performing their duty of protecting the public from professional misbehaviour; secondly, members of professional body should be protected from such clear abuse of power as would render it unfair that the evidence gathered as a result be received."

93. The Court quashed the decision of the Compensation Fund Committee that had been based on the unauthorised report. While Fennelly J. stressed that the order being made did not prevent the Committee from making a new decision based on evidence properly gathered, the Law Society would not be permitted to rely on evidence of the processing of spurious claims.

94. In Creaven and ors v. Criminal Assets Bureau [2004] 4 IR 434 the issue arose in the context of statutory provisions relating to international cooperation in criminal investigations. A challenge was brought to the validity of search warrants that had been utilised for the purpose of finding records relating to a VAT fraud being investigated in the United Kingdom. The Bureau had obtained orders freezing relevant bank accounts, and it was also proposed to hand over documents seized in the searches to the investigating authorities in the UK. Thus, as in Simple Imports, the legal issue was a claim made for the return of the items.

95. In discussing the power exercised by the judge issuing the warrant Fennelly J. cited Simple Imports and the reference therein to Entick v Carrington. He considered that the common law principle in question had been given express recognition in the Constitution, which granted protection against unjustified searches and seizures not only to the dwelling of every citizen but to every person's private property.

96. Having held on the facts of the case that the warrants must be quashed, the Court ultimately ruled that the documents seized should be returned to *"the true owners".*

97. The decision of McKechnie J. in The Competition Authority v. The Irish Dental Association related to a warrant utilised in an investigation of allegedly anti-competitive activities. The operative part of the warrant was manifestly defective in that it authorised a search for evidence relating to the sale and distribution of motor vehicles. In proceedings brought by the Authority seeking declaratory and injunctive relief against the Association, part of the submission made on behalf of the Authority was that these were civil proceedings and the applicability of the exclusionary rule must be heavily circumscribed.

98. McKechnie J. agreed that the issue of how to approach evidence obtained in breach of the law originally arose in criminal cases. However, it had also arisen in civil proceedings such as Universal Studios and Kennedy. He also acknowledged the major public interest in the law of regulation and the law of competition. He distinguished Kennedy v. Law Society, considering that the competition code should be treated as being in a category of its own and was not akin to the proceedings of a disciplinary or administrative tribunal. Further differences lay in the fact that the powers of investigation possessed by the Authority could result in criminal charges, and that the constitutional rights of the Association had been breached. Applying the principles in DPP v Kenny he felt that he had no discretion to admit the evidence.

99. The potential consequences of an unlawful search in the context of bankruptcy proceedings were discussed by the Court of Appeal in McFeely v Official Assignee [2017] IECA 21. The official assignee had, without an appropriate warrant, entered business premises in a building that was owned by the appellant but was leased from him by a company. On the facts of the case the Court of Appeal held that there had been no invasion of the appellant's constitutional property rights. However, at paragraph 30 of his judgment Peart J. said:

"I would stress, however, that - as illustrated by cases such as Simple Imports and Competition Authority v Irish Dental Association [[2005] 3 I.R. 208] - the unlawful entry by agents of the State onto business premises is always a very serious matter and nothing in this judgment should be understood as diluting this basic principle, itself a cornerstone of personal freedom and the rule of law. An unlawful entry onto such premises by an agent of the judicial branch of government such as the Official Assignee is, furthermore, a

particularly serious matter, given that all judges have made a solemn declaration pursuant to Article 34.6.1 of the Constitution to uphold the Constitution and the law. If, therefore, the Official Assignee had unlawfully entered the business premises occupied by the bankrupt - as distinct from the premises of which he was simply the reversionary lessor - then rather different considerations would have come into play."

100. Two other recent decisions of this court concerning Article 40.5 of the Constitution may be mentioned relatively briefly. In Meath County Council v. Murray [2017] IESC 25, the Court rejected a submission that Article 40.5 could prevent a planning authority from obtaining an order pursuant to s.160 of the Planning and Development Act, requiring the developer of an unauthorised development to demolish it. The judgment of McKechnie J. discusses the decision to the contrary effect in Wicklow County Council v Fortune (No. 1) [2012] IEHC 406, where Hogan J. had held that the Constitution required the planning authority to demonstrate that the necessity for demolition of the dwelling was objectively and convincingly established. He had based this ruling in large measure on the rationale of the decision in Damache. McKechnie J. (with whom the other members of the Court agreed) was *"readily prepared to accept"* that the protection of the dwelling conferred by Article 40.5 was not confined to criminal law or its procedural surrounds. However, while in the context of the planning code, the fact that the unauthorised development was a dwelling could be a factor in the exercise of a court's discretion, it could never be sufficient on its own to persuade a court to refuse a demolition order.

101. In a different context, the Court in Moore v. Dun Laoghaire Rathdown County Council [2016] IESC 70 considered the proper relief to grant in a case of unlawful eviction. The housing authority had lawfully obtained a District Court order for possession. However, it did not seek to enforce the order for a period well in excess of the period of six months permitted by the District Court rules. At that point it was obliged to return to court, on notice to the tenants, to apply for a warrant for possession. Instead, it obtained the warrant by the simple expedient of writing to the court clerk and requesting it. The sheriff then evicted the tenants. While this procedure was found in the High Court to have been unlawful, the situation was seen as one for the exercise of discretion, and the application of

the principle of proportionality. Relief was refused.

102. On appeal it was held, in a joint judgment delivered by Clarke, Laffoy and O'Malley JJ., that there had been a breach of the appellant's rights under Article 40.5 (as well as under the European Convention on Human Rights). The appellant had been deprived of her home otherwise than in accordance with law, and indeed in a fundamentally unlawful way. As no explanation for the procedure adopted was given to the Court, no issue properly arose as to whether the housing authority could be excused from the consequences of the invalidity of the warrant. In the circumstances it would have required a very significant countervailing factor before it could have been appropriate to deny relief. What was at stake was the rule of law.

"In the absence of a significant countervailing factor a local authority, which obtains a warrant for possession in a fundamentally irregular way, should not be able to retain the benefit of it and a party against whom such a warrant for possession is granted should not be disadvantaged."

103. Had it been appropriate in the circumstances, the Court would have considered making an order designed to put the appellant back in her home. However, having regard to the lapse of time, changes in the appellant's circumstances and the potential interference with the rights of third parties that course was not pursued. It was indicated that declaratory relief and an award of damages would be considered. The parties then came to their own arrangement.

104. Finally, it may be noted that in CRH plc v. The Competition and Consumer Protection Commission [2017] IESC 34 injunctive relief was granted to restrain a potential breach of privacy in relation to material lawfully seized under warrant by the Commission. The plaintiffs claimed that much of the material was private, confidential or irrelevant to the purpose of the search. The Commission accepted that it would not all be relevant but maintained an entitlement to examine all of it. The order prohibited examination otherwise than in accordance with an agreed procedure.

Authorities specific to the Proceeds of Crime Act

105. The constitutionality of the Act was challenged in Gilligan v The Criminal Assets Bureau (the High Court judgment is reported at [1998] 3 IR 185; for the Supreme Court see Murphy v G.M. and ors [2001] 4 IR 113 where Gilligan is

dealt with in the same judgment). One of the principal contentions made on behalf of the plaintiff was that proceedings under the Act were, in essence, criminal in nature. The Act was alleged to be unconstitutional because it failed to protect the right to a fair trial and fair procedures by assuming, without charge, trial, or conviction, the existence of a criminal offence and requiring the individual concerned to prove that he was not a criminal and that his assets were not the proceeds of crime.

106. It was in this context that McGuinness J., having considered in some detail the decision of this Court in Melling v O Mathghamhna [1962] I.R. 1, referred at p. 217 of the report to the argument of counsel for the State defendants that proceedings under the Act were, strictly speaking, in rem rather than in personam. However, it was immediately made clear that McGuinness J. considered that other aspects were more important to a finding that the proceedings were not criminal - that is, that there was no question of arrest, remand in custody or on bail, and no specific penalty of fine or imprisonment. Nothing in the rest of the judgment flows from the in rem characterisation, which is dealt with in greater detail in the Supreme Court judgment.

107. In the appeal, the argument for the appellant on the constitutional issue again focused on the claim that the proceedings were criminal in nature. Giving the judgment of the Court (commencing at p.131 of the report), Keane C.J. began by noting that the presumption of constitutionality attaching to the Act included the presumption that any proceedings or procedures under it would be conducted in accordance with the principles of constitutional justice and that any departure from those principles would be restrained or corrected by the courts. Later in the judgment, dealing with an argument that the Act was so broad in its sweep as to amount to an abdication of legislative responsibility, the Court stated that while the power to extend relief where there was *"a serious risk of injustice"* was undoubtedly wide in scope,

"…that can only be in ease of the individuals whose rights may be affected and the court, in applying these provisions, will be obliged to act in accordance with the requirements of constitutional and natural justice."

108. It was accepted by the Court that if the procedures under ss. 2, 3 and 4 of the Act constituted in substance a criminal trial they would be invalid having regard to

the provisions of the Constitution, given the almost complete absence of the presumption of innocence, the applicable standard of proof and the admissibility of hearsay evidence. However, the Court had previously determined in Attorney General v. Southern Industrial Trust (1957) 94 I.L.T.R. 161 that forfeiture proceedings, in which no person was being made amenable for a criminal offence, were not criminal. Provided the conditions imposed by the Act of 1996 were satisfied, the property could be forfeited without the requirement to show any wrongdoing on the part of the person in whose possession or control it was, even if that person was demonstrably unaware of the criminal activity, unless a serious risk of injustice was created.

109. The Court was not asked in Murphy v G.M. to review the decision in Southern Industrial Trust. Keane C.J. observed that even if it had, the appellants would not have been assisted thereby.

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

110. Keane J. examined the United States authorities in some detail and found in them significant support for his conclusion that in rem proceedings for the forfeiture of property were civil in character. He noted that continued reliance on the in rem legal fiction, according to which the property itself was deemed to be the defendant, had been criticised in the dissenting judgment of Stevens J. in United States v. Ursery 518 U.S. 267 (1996) and also by the House of Lords in Republic of India v. India Steamship Company Ltd (No.2) [1998] AC 878, and said (at p. 153):

"It may be, as Holmes pointed out in The Common Law, that principles of this nature may outgrow their origins in a different historical era and would now find their justification in considerations of public policy or the common good. It is sufficient,

however, to say that the secure place of the principles as to civil forfeiture in our law and their congruence with the Constitution is clearly reflected in the decisions in Attorney General v Southern Industrial Trust Ltd (1957) 94 I.L.T.R. 161 and McLoughlin v. Tuite [1989] I.R. 82."

111. I will consider the current state of the US authorities briefly below.

112. In CAB v Kelly [2012] IESC 64 the central issue was whether an order could be made under the Act in respect of a family home, alleged to represent the proceeds of crime, occupied by the spouse and family of the person concerned. The spouse relied inter alia on the absence of any allegation of criminality against her; the fact that she was employed and had her own income; the fact that she was the beneficial owner of 50% of the house. Echoing the words of Keane C.J., MacMenamin J. said:-

"32. In each case, the courts must be sensitive to the actual property and other rights of citizens which arise. But, as has been pointed out, repeatedly, a person directly or indirectly in possession of the proceeds of crime can have no constitutional grievance if deprived of their use…There is a strong public policy dimension to this legislation. That policy is to ensure that persons do not benefit from assets which were obtained with the proceeds of crime irrespective of whether the person benefiting actually knew how such property was obtained with the proceeds of crime but subject to whether or not such person may have been a bona fide purchaser for value, where different considerations may arise.

33. The Act provides for fair procedures to be observed. It cannot be seen as arbitrary. It is designed to achieve a desirable social objective and be proportionate. It cannot be said to impinge on a right to private property, as the property was acquired unlawfully."

113. The claim to a beneficial interest in the home was a matter capable of having weight attached, but on the evidence in the case there were countervailing considerations. The declaration as to the wife's interest was made in unopposed family law proceedings brought, it appeared, only because of the Bureau's proceedings. Property purchased with the proceeds of crime could not be transferred to a spouse in this manner simply as a means to defeat the legitimate objectives of the legislation.

The United States position

114. The judgment in Murphy v G.M., as mentioned above, discussed in some detail the United States authorities on civil forfeiture,

referring in particular to the decisions of the United States Supreme Court in Calero-Toledo v. Pearson Yacht Leasing Co. 416 U.S. 663 (1974) and United States v. Ursery 518 U.S. 267 (1996).

115. Briefly, the position seems to be as follows. Forfeiture in criminal or quasi-criminal proceedings will attract the protection of the exclusionary rule (One 1958 Plymouth Sedan v. Pennsylvania 380 U.S. 693 (1965)). However, most of the states have made statutory provision for civil forfeiture. As noted by Keane C.J., the characterisation of proceedings under such provisions as in rem meant that the constitutionally-required safeguards for criminal proceedings did not apply. In this regard he referred to Calero-Toledo v. Pearson Yacht Leasing Company (which established that the innocence of the owner was not a defence to forfeiture of a thing used to commit a crime) and United States v. Ursery (1996) (which confirmed that the double jeopardy rule did not prevent parallel criminal actions and civil forfeiture proceedings, since forfeiture was not a punishment - that is, it did not deprive of either liberty or of lawfully derived property).

116. In Ursery, after referring to the lengthy history of legislation authorising parallel in rem civil forfeiture actions and criminal prosecutions, Rehnquist C.J. quoted the following passage from Various Items of Personal Property v. United States 282 US 577 (1931):-

"[This] forfeiture proceeding… is in rem. It is the property which is proceeded against, and, by resort to a legal fiction, held guilty and condemned as though it were conscious instead of inanimate and insentient. In a criminal prosecution it is the wrongdoer in person who is proceeded against, convicted, and punished. The forfeiture is no part of the punishment for the criminal offense…"

117. However, it may be that the view of this issue is changing in the United States. It is interesting to note a statement by Thomas J. that accompanied a recent refusal of a writ of certiorari by the United States Supreme Court in Leonard v. Texas 580 U.S. (2017). The case concerned a large amount of money found in a car. The driver's mother claimed that the money belonged to her and was the proceeds of a house sale. However in civil forfeiture proceedings the trial court accepted, "*on the preponderance of the evidence",* that it was connected to criminal narcotics sales. The mother sought to argue that the forfeiture procedures were unconstitutional and that the

Due Process Clause required the State to prove its case by clear and convincing evidence rather than by a preponderance of the evidence. The petition was denied, because she had not raised the argument in the lower courts. However, the accompanying statement points to clear concerns about the forfeiture procedure as currently operated in some of the states.

118. Thomas J. stated that modern civil forfeiture statutes were *"plainly"* designed, at least in part, to punish the owner of property used for criminal purposes. However the jurisprudence of the Supreme Court permitted states to proceed both by way of criminal prosecutions and civil forfeiture. In rem proceedings often enabled the government to seize the property without any predeprivation judicial process and to obtain forfeiture of the property even where the owner was innocent, without the safeguards associated with criminal prosecutions. Partly as a result of this distinct legal regime, civil forfeiture had in recent decades become *"widespread and highly profitable"* and had led to "egregious and well-chronicled abuses". Several documented examples of abuses are provided, which would certainly give cause for concern.

119. The historical reasons for the "*unique constitutional treatment"* of civil forfeiture are briefly described as deriving from English law pertaining at the time of the founding of the United States. The new State adopted laws subjecting to forfeiture ships involved in customs offences or in piracy. The *"in rem"* concept permitted the government to proceed as if the thing itself, rather than the owner, was guilty of a crime.

120. Thomas J. observed that in the absence of such reasons the Constitution *"presumably"* would require the Court to align the distinct doctrine governing civil forfeiture with its doctrines governing other forms of punitive state action and property deprivation. He referred to Bennis v Michigan 516 U.S. 442 (1996), where he had suggested that a person unaware of the history regarding forfeiture laws *"might well assume that such a scheme is lawless - a violation of due process"*, and queried whether the historical practice regarding in rem forfeiture could justify the broad modern practice.

Conclusions

121. Having regard to the range of Irish authorities cited above, it seems clear that the exclusionary rule is not a free-standing rule that evolved or exists purely for the benefit of defendants in

either criminal or civil proceedings. While it originated in the context of a criminal trial (O'Brien), its broader purpose is to protect important constitutional rights and values. It will have been seen that, at different times and dealing with different issues, individual judges have laid greater or lesser emphasis on particular aspects of those rights and values. However the common themes are the integrity of the administration of justice, the need to encourage agents of the State to comply with the law or deter them from breaking it, and the constitutional obligation to protect and vindicate the rights of individuals. These are all concepts of high constitutional importance. Each of them, or a combination thereof, has been seen as sufficient to ground a principle that is capable of denying to the State or its agents the benefit of a violation of rights carried out in the course of the exercise of a coercive legal power.

122. These rights and values are not confined to criminal trials and their effect is not confined to the exclusion of evidence. The underlying principles have been found to be applicable in Article 40.4 inquiries (State (Quinn) v. Ryan and Trimbole); in extradition proceedings (ditto); in civil proceedings between private parties where the coercive power of the State was used in breach of the rights of individuals (Universal City Studios); in civil proceedings initiated by the individual concerned seeking the return of property taken by agents of the State (Simple Imports, Creaven); in civil proceedings taken to protect privacy rights in seized material (CRH); and in judicial review proceedings challenging an unlawful eviction by a housing authority (Moore). They have also been found relevant, albeit to a lesser extent, in civil proceedings relating to disciplinary or administrative tribunals (Kennedy v Law Society); and to a lesser extent again in planning enforcement proceedings (Meath County Council v Murray). The proposition that the principles apply only in relation to evidence sought to be deployed against the individual is therefore not borne out by authority.

123. The question then is whether there is anything about proceedings under the Proceeds of Crime Act that renders those underlying principles inapplicable in this context. The Bureau relies upon the characterisation of those proceedings as in rem rather than in personam, and it is true that the issue in the case is the provenance of the property. However, it is clear from the analysis in Murphy v G.M. that

the importance of that characterisation lay in the debate as to whether the proceedings were criminal or civil. The plaintiff's argument was that the proceedings were in essence criminal in nature, and that the statute was therefore unconstitutional because it did not provide constitutionally required safeguards in relation to the presumption of innocence, proof of mens rea and the burden and standard of proof. This Court held that those particular safeguards were essential only in criminal trials and, having regard to the authorities on forfeiture, that the proceedings were not criminal. No person was being made amenable for a criminal offence. It did not suggest that this conclusion meant that other constitutional rights had no impact - on the contrary, the judgment (echoed on this point in CAB v. Kelly) makes it clear that the legislation must be applied with regard to *"the actual property and other rights of citizens".*

124. In Gilligan and G.M. the Proceeds of Crime Act 1996 was subjected to far-reaching constitutional challenges. It survived those challenges in part because the characterisation of its procedures as criminal in nature was misconceived, but also because the Act provides for fair procedures and, as a safety net, confers on the court the power to refuse an order where there is a serious risk of injustice. In my view, it was not contemplated in the course of that challenge that the in rem classification of forfeiture meant that the violation of constitutional rights in proceedings under the Act could pass without response on the part of the Court. To borrow a phrase from Thomas J., forfeiture in this jurisdiction is not a *"lawless scheme".*

125. I indicated at an early stage in this judgment that I felt that labelling the issue in this particular case as the applicability of the rule excluding unconstitutionally obtained evidence was unhelpful, because the cash in question was not evidence as such, and treating it as evidence for the purposes of the rule could potentially lead to absurd results in the event that more than one person could mount a claim to ownership. A court dealing with proceedings under the Act must either make, or refuse to make, a finding that the property in question is or represents the proceeds of crime. Defined consequences flow from a finding that it is, and those consequences cannot take effect as against one person but not as against another (save, perhaps, in the entirely separate case of a bona fide innocent holder).

126. For the same reason, the modified version of the J.C. test

proposed by the appellants cannot, in my view, work effectively. The question, then, is the appropriate response of a court where a breach of constitutional rights is involved in the seizure of the assets concerned in the case.

127. While the J.C. test is not an exact fit, the general approach of the Court can, I believe, be adapted to produce an appropriate response to this issue in proceedings under the Proceeds of Crime Act.

128. It is necessary to bear in mind certain of the fundamental features of the context within which the trial court is operating. A hearing under the Proceeds of Crime Act is not a criminal trial - no person is being punished or made amenable for a criminal offence. A person accused of a criminal offence has a constitutional right to the benefit of the presumption of innocence and of the requirement that guilt be proved beyond reasonable doubt (subject to some modifications not relevant here), but it is clear that the scheme of the Act is of an entirely different nature. It must be recalled that, as this Court stressed in G.M. and Gilligan, a person does not have a constitutional right to enjoy property that is or represents the proceeds of crime. Where an asset is proved to be such, in accordance with the Act, the obligation to vindicate personal rights does not apply to that asset. Refusal of an order freezing or confiscating such assets, in the face of evidence establishing provenance to the required extent, should not be seen as a means of protecting that which does not deserve protection.

129. It seems to me, therefore, that the constitutional values primarily under consideration will be the integrity of the administration of justice and the need to ensure compliance with the law by agents of the State. It is possible to envisage circumstances that would lead a court to conclude that, per Denham J. in Lynch, the proceedings should be *"nullified"*. This is not an unprecedented proposition in cases under the Act - the High Court has in the past been known to discharge the interim order and dismiss the proceedings because of a failure to disclose relevant information at the ex parte stage. That can be seen as an appropriate response to abuse of the court's process, and also as a means of vindicating the respondent's right to fair procedures.

130. In keeping with the J.C. analysis the court should, in my view, refuse the order sought by the Bureau if the evidence establishes that the asset was

seized in such circumstances that the court would be lending its process to action on the part of a State agent or agents involving a deliberate and conscious breach of constitutional rights (in the sense clarified by the Court in J.C.). A reckless or grossly negligent breach of the constitutional rights of the respondent should create a discretion but with a presumption in favour of refusal of the order.

131. Where the issue concerns evidence in the true sense, the J.C. test (including that part of the test concerned with evidence gathered illegally but not in breach of a constitutional right) can be applied subject to alteration of the burden of proof to the balance of probabilities. Any such issue can, in the normal way and as the trial judge sees fit, be dealt with either as a preliminary matter or as it arises in the course of the hearing. I do not propose to comment further on this aspect, in case such comment should appear to be a gloss on or alteration of the J.C. test.

132. Where an alleged breach of rights concerns the actual asset sought to be seized, the issue is not its *"exclusion".* Rather, the question for the court will be whether a breach of rights has occurred such that an order should not be made under the Act. This, therefore, is a question to be answered at the end of the hearing, since it will not arise unless the court first determines that the asset is the proceeds of crime. However, to avoid late challenges raising the possibility that the court might have to embark upon a fresh hearing at that stage, the issue must have been expressly raised in the hearing, by reference to evidence in the affidavits before the court. The Bureau then has the opportunity of adducing evidence relevant to it.

133. Where the issue is raised, the Bureau must bear the burden of establishing on the balance of probabilities that (i) the asset was not seized in circumstances of unconstitutionality, or (ii) that, if it was, it is appropriate nonetheless to make the order sought. In the latter case it is for the Bureau to explain the basis upon which it contends that the order should be made, and to establish any facts necessary to justify such conclusion.

134. A respondent should be entitled to rely only upon a breach of his or her own rights, unless the court is satisfied that the breach of another person's rights is so egregious as to justify dismissing the proceedings. Other than in those circumstances, breach of the rights of a third party who is not a respondent should not give rise to a refusal of the order -

there is no good reason, given the statutory scheme, why a breach of A's rights should entitle B to retain the proceeds of crime unless the breach is such as to call into question the integrity of the administration of justice.

135. Similarly, where there is more than one respondent claiming legitimate ownership of the asset, and the constitutional breach affects only one, or at least not all, the court should not refuse an order unless the breach is such as to justify dismissal of the proceedings.

136. It may be that application of these principles will leave unredressed a breach of rights unrelated to the property in question. The affected party will be left with the option of instituting proceedings for such damages.

137. It may be necessary to point out that the result of an order dismissing the Bureau's application would not in all cases be the return of the asset to the respondent from whom it had been taken, any more than contraband such as firearms, drugs or manifestly stolen property is returned to an acquitted person after trial. There is, as has been stated several times, no constitutional or legal right to possession of such items.

138. In the circumstances I would allow the appeal and remit the matter to the High Court for rehearing in the light of this judgment.

Criminal Assets Bureau v Connors

29th November 2018, High Court: Composition of Court:
Peart J., Irvine J., Whelan J.
Judgment by:
Irvine J. High Court Record Number 2016 24 CAB

1. This is the appeal of Margaret Connors, the appellant, against the order of the High Court (Stewart J.) of the 11th June 2018.

2. By her order, the High Court judge refused an application made by Mrs. Connors to stay the within proceedings until:-

(i) the determination by the High Court of her appeal against the court's refusal to afford her legal aid under the ad hoc legal aid scheme and/or

(ii) the conclusion of certain criminal proceedings then pending before the Circuit Criminal Court.

Background to the application

3. On the 17th May 2016 Mrs. Connors was stopped by An Garda Síochána when driving her car on the Tallaght bypass. She was arrested and detained under the Misuse of Drugs Act (Section 23). No drugs were detected but she was found to be in possession of GBPÂ£13,000, €8,000 and items of jewellery worth €4,000. These were seized under s. 7 of the Criminal Law Act 1976.

4. Mrs. Connors was later charged with money laundering contrary to s. 7 of the Criminal Justice Money Laundering and Terrorist Financing Act 2010 and her criminal trial is scheduled to commence on the 27th February next in the Dublin Circuit Criminal Court. She has been granted legal aid for the purposes of defending those proceedings.

5. Mrs. Connors is, of course, also the respondent to the within proceedings brought by the Criminal Assets Bureau under s. 3 of the Proceeds of Crime Act 1996-2006 (*"the CAB proceedings"*) and that being so, she brought an application seeking legal aid under the ad hoc legal aid scheme legal aid to assist her in her defence of CAB's claim. That application was refused by order of the High Court of the 23rd June 2017 and her appeal against that refusal is due to be heard on the 4th February 2019.

Submissions on the appeal

6. In support of her appeal against the order of the High Court judge refusing to stay the CAB proceedings, Ms Moloney BL on behalf of Mrs Connors, submits that the High Court judge erred in law in failing to properly apply the principles set out in the decision of the Supreme Court in Campus Oil v. Minister for Industry and Energy (No 2) [1983] I.R. 88. She maintains that the

balance of convenience or, the balance of justice (as she described the test) clearly favoured granting the stay. Counsel emphasised the risk of prejudice to her client if required to engage with the CAB proceedings prior to her criminal trial, particularly given that Mrs Connors would likely not be legally represented in the CAB proceedings. That was to be contrasted with the absence of any prejudice to CAB if the CAB proceedings were to be adjourned for the short period of time that would be required to allow the criminal proceedings be determined. Further, there would be no risk to the property seized by CAB as it would remain in its custody allied to the fact that even if CAB was successful in the within proceedings, it might not be in a position to dispose of the property for another seven years.

7. Ms Moloney also submits that the High Court judge erred in law in refusing the stay in circumstances where the relevant case law cautions against core issues that might arise in the criminal trial being dealt with in any proceedings that might be heard in advance of the trial.

8. One of the core issues in the CAB proceedings, according to counsel, will be the admissibility of the evidence obtained on foot of the search of Mrs Connor's car and the subsequent seizure by the respondent of the property that the subject matter of the criminal proceedings. There is, Ms Moloney submits, a risk that any decision made concerning the admissibility of that evidence could prejudice Mrs Connors in her defence of the criminal proceedings. Likewise, there is a risk that she could be prejudiced by her own evidence in the CAB proceedings, apart altogether from the fact that she might also be prejudiced by other findings made by the High Court judge.

9. On behalf of Mrs. Connors it is submitted that the balance of justice favoured granting the stay which she had sought and for this reason this court should grant the stay which was refused at first instance by Stewart J.

10. Finally, in light of the grounds of appeal and the written submissions filed, it is important to record that counsel did not seek to argue that the High Court judge had erred in law in concluding, as she did, that Mrs Connors was not entitled to seek a stay on the CAB proceedings to await the outcome of her appeal against the refusal of a legal aid certificate under the ad hoc scheme, given that a similar application had earlier been made and had been refused on the 22nd January 2018. It appears that it has been belatedly accepted that the High

Court judge was correct to conclude that this issue was, as was contended for by the respondent, res judicata.

11. On behalf of CAB, it is submitted by Mr Dodd BL that the test to be applied by a High Court judge when faced with an application to stay civil proceedings pending the outcome of criminal proceedings is not that which emerges from the decision in Campus Oil . That judgment deals with the test to be applied by the court on an application for an interlocutory injunction in an action where the substantive rights of the parties will ultimately be determined in the same proceedings at a plenary hearing.

12. There is, according to counsel, a different and distinct line of jurisprudence which identifies the factors to be considered by a court when asked to postpone civil proceedings to await the outcome of criminal proceedings. Reliance is placed upon the decisions in Dillon v. Dunnes Stores [1996] I.R. 397, Wicklow Co. Council v. O'Reilly [2006] 3 IR 623 and C.G. v. Appeal Commissioners [2005] 2 I.R. 223. Accordingly, it cannot be stated that the High Court judge applied the wrong test.

13. Mr Dodd submits that the onus was on Mrs Connors to establish a real risk of prejudice if the within proceedings were to be heard in advance of her criminal trial and she had not done so. The High Court judge had, in her judgement, made rulings concerning how the CAB proceedings would be conducted so as to protect against any prejudice that might otherwise occur by allowing those proceedings be determined prior to the criminal trial.

14. Counsel relies upon the fact that in a significant percentage of the claims brought by CAB under s. 3 of the Act there are co-existing criminal proceedings. In that respect there is nothing unique about the facts of the present case. And, if Mrs Connors can rightfully maintain an entitlement to have these proceedings stayed pending the outcome of the criminal trial, then all respondents in similar circumstances would enjoy a like entitlement, thus significantly slowing down the administration of justice.

Discussion and Decision

15. The decision in C.G. v. The Appeal Commissioners, a case in which the Revenue (Criminal Assets Bureau) was the Notice Party, is instructive on the proper approach to be adopted by a court when faced with an application to adjourn civil proceedings pending the outcome of criminal proceedings concerning the same or similar

matters. The applicant, C.G., had appealed an income tax assessment by the Notice Party in respect of nine periods of assessment. There were also criminal proceedings pending against him in respect of his alleged failure to make tax returns for three of the years relevant to his income tax appeal. He applied to the respondent to adjourn his appeal pending the outcome of his criminal trial but that application was refused. C.G. then applied to the High Court for an order of Certiorari quashing that refusal and he also sought an injunction restraining the respondent from proceeding with this appeal pending the determination of the criminal proceedings.

16. In the course of her judgement, Finlay Geoghegan J. set out the principles to be applied by a court when met with an application to stay civil proceedings pending the outcome of criminal proceedings. She took as her starting point the decision of the Supreme Court in Dillon v. Dunnes Stores [1996] I.R. 397 where O'Dalaigh C.J. stated as follows:-

"As the plaintiff could not have had an order to postpone the criminal proceedings until the termination of the civil action, equally the hearing of the civil action cannot be required to await the conclusion of the criminal proceedings. No considerations of public policy are in question."

17. Finlay Geoghegan J. at page 479 of her judgment went on to state:-
"Likewise it is common case between the parties that each application to adjourn proceedings of civil nature pending the determination of criminal proceedings must be determined on its own facts……., that the onus on the applicant is to establish that there is a real risk of prejudice or injustice if the tax appeal proceeds."

18. In refusing the injunction application, the following is what was stated by Finlay Geoghegan J. at para 28 of her judgement concerning the submissions of the respondent:
"I am satisfied that each of the above submissions is well-founded. On the particular facts of this appeal I do not consider that the applicant has established that there is a real risk of prejudice or injustice if he were now to be required to proceed with this tax appeal which warrants this court granting an injunction even in respect of the appeals relating to the same years' assessment as the pending criminal charges. There is no evidence at present which suggests that the applicant will be required to give evidence

of a self-incrimination nature at the hearing of the tax appeal. If there are different relevant facts then it is a matter to be considered and decided by the respondent, bearing in mind that it will be a matter for the trial judge at the criminal trial to ensure by appropriate rulings that there is no breach of the applicant's rights under Article 38.1 of the Constitution in accordance with the above principles."

19. The principles outlined in C.G. have been approved of in many more recent decisions including that of Clarke J., as he then was, in Wicklow County Council v. John O'Reilly wherein he emphasised the importance of protecting a plaintiff's right to achieve a timely resolution in their civil proceedings and confirmed that that the onus is on an applicant who seeks to postpone civil proceedings to await the outcome of criminal proceedings to establish that there would be a real risk of prejudice or injustice if the civil case were allowed to proceed. Each case had to be judged on its own facts to assess whether there was a real danger of causing an injustice in the criminal proceedings by allowing the civil proceedings advance. Clarke J. summarised the legal position at para 35 of his judgement in the following terms:

"It would, therefore, appear that there is no hard and fast rule as to how contemporaneous civil and criminal proceedings arising out of the same matter should be progressed. It is clear that the onus rests on the party seeking a stay of the civil proceedings to establish the grounds necessary to enable the court so to do. In coming to any such assessment the court must, on the one hand, give due recognition to the importance of allowing the plaintiff or other moving party in the civil proceedings to achieve a timely resolution of those proceedings and obtain the benefit of any orders which might be appropriate. On the other hand the court has to balance, as against that, the extent to which there may be a real risk that prejudice might be caused to the criminal proceedings. I am satisfied that in giving consideration to this latter matter the court must attempt to analyse the likelihood of there being any such prejudice and have regard to the extent to which it may be possible by measures to be adopted in the criminal process to minimise or ameliorate any such prejudices might arise."

20. To the aforementioned statement of Clarke J. I would add that, in my view, the court should also consider the extent to which in the course of the proposed civil proceedings the judge might, by reason of any relevant statutory

provision or otherwise, be in a position to minimise, ameliorate or otherwise further safeguard the applicant from any potential prejudice in the criminal proceedings.

21. Of particular importance in these proceedings is what was stated by the trial judge at para 13 of the transcript where she observed that whilst it was customary in the vast majority of contested s. 3 applications for the respondent to explain on affidavit how the property the subject matter of the application came into their possession, that s. 9(2) of the Proceeds of Crime Act 1996, as amended by s. 11 of the Proceeds of Crime (Amendment) Act 2005, provides that any such affidavit is not admissible in criminal proceedings. The section, insofar as it refers to such an affidavit, provides as follows:

"(2) Such an affidavit is not admissible in evidence in any criminal proceedings against that person or his or her spouse, except proceedings for perjury arising from statements in the affidavit."

22. The High Court judge, in the course of her ruling, went even further for the purposes of seeking to protect Mrs Connors from any potential prejudice in that she directed that not only would any affidavit sworn by her pursuant to s.9 not be admissible in the criminal proceedings but she would also direct that *"any evidence"* given in the course of the s. 3 proceedings would not be admissible in the criminal proceedings. She did so for the stated reason of seeking to protect Mrs Connors from any possible prejudice that might arise for her in her criminal proceedings if it happened that she was to be cross examined on her affidavit in the course of the CAB proceedings and her evidence sought to be introduced in the criminal proceedings.

23. Further, the High Court judge gave directions that the provisions of s. 8(3) and (4) of the 1996 Act were to be deployed in the CAB proceedings and that this direction would have the effect of protecting Mrs. Connors further from prejudice in the context of her criminal proceedings. The CAB proceedings would be heard in camera and she would make an order prohibiting the publication of any information in relation to the application.

24. These sections provide as follows:
"(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 are 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."

25. Whilst counsel for Mrs Connors expressed concern that any finding by the High Court judge made in the context of the s. 3 proceedings concerning the validity of the search and seizure conducted by officers of CAB might be admitted to her detriment in the criminal proceedings, that is clearly not the case. Every element of the offence with which she has been charged under s. 7 of the Criminal Justice Money Laundering and Terrorist Financing Act 2010 will have to be established in the course of the criminal trial and her guilt proved on the higher criminal standard. Nothing that may occur in the course of the s.3 proceedings will prejudice Mrs Connors in terms of the arguments she may wish to make in the course of the criminal proceedings concerning the lawfulness of the search and seizure carried out by the officers of CAB or the admissibility of evidence as a result thereof. And, it will be for the judge in charge of that trial to ensure, as was referred to by Finlay Geoghegan J in C.G. *"to ensure by appropriate rulings that there is no breach of the applicant's rights under Article 38.1 of the Constitution."*

26. Relevant also, in my view, to the exercise by the court of its discretion on an application such as the present one is the fact that it is clear from the Proceeds of Crime Act, 1996 that it is envisaged that there will be both civil and criminal proceedings relating to the same activities in existence at the same time. Accordingly, there are significant public policy reasons, in my view, as to why the civil proceedings, such as those which emanate from s. 3 of the act, should not be postponed until the determination of any criminal proceedings concerning the same activities.

27. Having reviewed the evidence that was before the High Court judge and considered the submissions that were apparently made on her behalf, I am first of all satisfied that the High Court judge applied the correct principles when met with Mrs Connors application to stay the proceedings pending the determination of the criminal proceedings. The test is not that advised in Campus Oil. It is the test identified by Finlay Geoghegan J. in C.G, amongst other decisions. To that extent I

would here restate that the onus is on the applicant who seeks to postpone civil proceedings to await the outcome of criminal proceedings to establish a real risk of prejudice if the stay is refused. It is a high threshold and one which is not susceptible to reduction or offset by the happenstance that the applicant may be in a position to establish that the plaintiff in the civil proceedings may not be prejudiced by any delay that might thereby be visited upon the civil proceedings.

28. Second, the High Court judge correctly considered the manner in which the s. 3 proceedings might impact upon the criminal proceedings and in order to ameliorate any unnecessary risk of prejudice to Mrs Connors gave a number of directions in accordance with the provisions of the 1996 Act which were to her benefit. After noting that any affidavits sworn by Mrs. Connors could not be admitted in the criminal proceedings, she directed that any evidence given in the s. 3 proceedings would not be admissible in the criminal proceedings. She also directed that the s. 3 proceedings be heard in camera and imposed reporting restrictions as earlier advised.

29. Third, I am satisfied that the High Court judge, particularly having regard to the directions to which I have just referred, was correct as a matter of law and fact when she concluded that Mrs Connors had not established that she was at a real risk of prejudice if the s.3 proceedings were heard and determined in advance of the criminal proceedings. As already stated, every application must be treated separately by the court and decided on its own facts. And, Mrs Connors had not identified any specific facts pertinent to the s. 3 proceedings to support what was otherwise a bald assertion that she would be prejudiced if those proceedings were not stayed pending the outcome of the criminal trial. This may well be because she was under the misapprehension that she was entitled to a stay once she could establish that the duration of any such stay as might be granted was likely to be modest and the resultant prejudice to CAB insignificant.

30. Fourth, as was stated by Clarke J. in Wicklow Co Council v. O'Reilly the court must give due regard to the importance of allowing a plaintiff move ahead in civil proceedings to achieve a timely resolution of those proceedings. I consider this to be of even greater significance in the circumstances of the present case in which the legislation governing the civil proceedings envisages that there will, in many instances, be both civil and

criminal proceedings relating to the same activity.

Conclusion

31. For the reasons earlier stated in this judgment I am satisfied that the High Court judge applied the correct test when considering Mrs Connors application to stay the s.3 proceedings until the determination of criminal proceedings. On the facts before her the High Court judge was correct to conclude that Mrs Connors could not establish that she would be at risk of real prejudice if the s. 3 proceedings were to be heard and determined in advance of her criminal proceedings. Furthermore, the High Court judge correctly sought to ameliorate the risks to which Mrs. Connors might be exposed in her criminal proceedings arising from the CAB proceedings by directing that no evidence heard in the s. 3 proceedings might be admitted in the criminal proceedings in addition to which she made orders under s. 8(3) and 8(4) of the 1996 Act. As already stated Mrs Connors will also benefit from the further protection which arises by reason of the provisions of s. 9(2) of that Act which precludes any affidavits sworn in those proceedings being admitted in criminal proceedings of the nature outstanding against Mrs O'Connor.

32. For all of the aforementioned reasons I would dismiss the appeal.

Criminal Assets Bureau v Mannion

17th December 2018, High Court: Stewart J., High Court Record Number 2016 11 CAB

1. In these proceedings, the applicant (hereafter referred to as the Bureau) seeks orders pursuant to s. 3 of the Proceeds of Crime Act 1996 (as amended) over the property specified in the schedule attached to the notice of motion dated 28th July, 2016. The property comprises of 2,013.96 Ether, known in currency terms as Ethereum, which was contained in a cryptocurrency wallet found on the respondent's computer. As of 28th July, 2016, the contents of the wallet were worth approximately €24,852. The respondent currently resides in Wheatfield Prison, following his conviction for offences contrary to ss. 3, 15 and 15A of the Misuse of Drugs Act 1977. On 21st December, 2015, he received a six and a half year sentence for those offences from the Circuit Criminal Court sitting in Dublin, a sentence which was upheld on appeal.

Background

2. On 5th November, 2014, members of An Garda Síochána searched a property situated on South Circular Road. That search uncovered a number of controlled drugs stored at the premises. The respondent was arrested at the premises, taken into custody and interviewed on multiple occasions. His home was also searched. During interview, he admitted that the premises was being used as a drug distribution centre for the sale of controlled substances over the Darknet. He admitted that he traded on the Silk Road and Agora websites using the alias of *"The Hulkster"*. The Hulkster was paid in Bitcoin for the sale and supply of these drugs. Following on from this search and seizure, the Bureau issued proceedings and sought orders over funds held by the respondent (CAB v. Neil Mannion (2015/15CAB), hereafter referred to as the first set of proceedings). Those funds included monies contained in bank accounts, credit cards, debit cards, gift cards, sums of cash and a substantial amount of Bitcoin. An order pursuant to s. 2 of the 1996 Act was made by Fullam J. on 12th October, 2015. A consent agreement was drawn up by the parties and Fullam J. made an order pursuant to s. 3 of the 1996 Act on 22nd February, 2016. Those proceedings were thereby *"stayed and settled"*. The Ethereum did not feature in that first set of proceedings. A s. 2 order in respect of the Ether was made by Fullam J. on 27th July, 2016, as part of this second set of proceedings.

3. Following the respondent's arrest, numerous electronic devices were seized from his

home and from the property located at South Circular Road. These devices included laptops, phones and removable storage devices. A forensic image of each device was made by the Computer Crime Investigation Unit of An Garda Síochána. These images were then delivered to Bureau Financial Crime Analyst No. 2 (FCA2) for inspection. FCA2 swore an affidavit on 22nd July, 2016, in which they explained the manner in which the respondent's computer system operated. The respondent relied on a number of software programmes to facilitate his illegal activities, including Truecrypt software, the TOR network, Bitcoin and Ethereum. Much like Bitcoin, Ethereum currency is a blockchain technology with programmable transaction functionality. It began trading on 30th July, 2015, two months before a s. 2 order was made in the first set of proceedings by Fullam J.

4. FCA2's inspection, which occurred in November, 2014, uncovered cryptocurrency wallets containing the Bitcoin that formed part of the subject matter of the first set of proceedings. The wallet containing the Ethereum was also uncovered. However, at that time, Ethereum was not trading as a currency, meaning that the contents of the wallet could not be redeemed in the normal way. Its monetary value effectively equated to the 1 Bitcoin for which it had been originally purchased, which was worth approximately €350 at that time. The Ether was purchased with and converted from Bitcoin on 5th August, 2014, at a time when the respondent was, by his own admission, heavily involved in the sale and supply of illegal drugs over the Darknet. There is a statutory minimum value threshold required by ss. 2(1)(b) and 3(1)(b) of the 1996 Act, which must be met before an order pursuant to the 1996 Act can be made in respect of an item of property. At the relevant time, this minimum value threshold was €13,000 (The Proceeds of Crime (Amendment) Act 2016 lowered this threshold to a minimum of €5,000, as of 12th August, 2016). Based on the evidence adduced before this Court, it would appear that the failure to meet this threshold was not the reason the Ether was left out of the first set of proceedings. Rather, the Bureau's concerns seem to have been based on practicality, as a non-trading currency has no established forum in which to sell it and realise its value. In light of these concerns, the wallet's presence on the respondent's system was merely noted during FCA2's inspection and no further action was taken in respect of it.

5. In late May, 2016, after the consent order had been made by Fullam J., FCA2 carried out a case review of the original investigation material, so as to ensure all matters had been properly addressed before the papers were sent for archiving. In the course of completing that review, they re-examined the cryptocurrency wallet containing the Ether. FCA2 noticed that Ethereum had commenced trading and that the Ether could be sold for a significant sum of money. This issue was brought to the attention of other Bureau officials and FCA2 was directed by then Assistant Garda Commissioner Eugene Corcoran, who was also Chief Bureau Officer (CBO) of the Bureau at the time, to seize the contents of the wallet. FCA2 transferred the Ether from the wallet stored on the respondent's computer to a wallet under the sole control of the Bureau.

6. The respondent swore affidavits on 13th September and 10th November, 2016. The first affidavit was sworn for the purposes of gaining access to the Ad Hoc Legal Aid Scheme. Fullam J. made an order granting him access to the Scheme on 17th October, 2016. A similar application had been made and granted during the first set of proceedings. The second affidavit sets out the respondent's side of the case. He avers that he contested the first set of proceedings on grounds that he had legitimate funds from past employment and investment which should not be seized by the Bureau. The consent agreement reached between the parties in those proceedings included the following terms:

(a) Consent to an order pursuant to s. 2(3) of the 1996 Act releasing 50% of the funds contained in the respondent's Dundrum Credit Account;

(b) Consent to various orders pursuant the 1996 Act over the remaining assets listed in the Schedule to the agreement, including a disposal order; and,

(c) Full co-operation with the Bureau in their attempts to realise the full value of the assets contained in the Schedule.

The respondent avers that he understood this consent to act as a settlement in full and final discharge of any liability he had to the Bureau. In his view, he had consented to a search of his computer by the authorities during the course of the initial criminal investigation in November, 2014, but had not consented to an indefinite power of search vested in State officers. He therefore challenges the basis on which his computer was

accessed after the investigation had concluded.

7. The respondent avers that Ethereum was trading prior to July, 2015, albeit at an extremely reduced rate of value when compared to the value it currently has. Notwithstanding his failure to volunteer information about the Ether or draw An Garda Síochána's attention to it, he argues that the wallet was readily discoverable. He refers back to the transcripts of his numerous interviews with members of An Garda Síochána, in which he outlined the sources of his income and the manner in which his business was carried out. He avers that any Bitcoin secured through illegitimate activity was transferred onto prepaid debit cards and was not used to purchase the Ether in question.

8. Detective Garda Mark Gallagher swore an affidavit on 15th November, 2016, in which he highlights that the respondent's laptop was seized under a warrant secured from a District Court Judge pursuant to s. 26(1)(b) of the Misuse of Drugs Act 1977/84, thereby rendering his consent irrelevant. He also avers that the respondent's laptop was not continuously operated by the authorities, as it was a forensic image of the computer that was interrogated for the purposes of the review. Allegedly, the seizure of the Ether was also conducted in a manner that did not require access to the respondent's computer. The respondent's averment at para. 16 of his affidavit is also highlighted, wherein he states that the proceeds of his drug trafficking formed a part of his investment in Bitcoin. Det. Garda Gallagher challenges the suggestion that the Ether was bought with legitimately procured Bitcoin, as the respondent has failed to produce evidence as to how said legitimate Bitcoin was purchased and how it is to be differentiated from his illegitimate Bitcoin. Even if such legitimate Bitcoin did exist, Det. Garda Gallagher asserts that it is tainted by the money laundering process of substitution, as he could never have accrued these legitimate funds if he had not used illegitimate funds to fund his daily lifestyle.

9. Detective Chief Superintendent Patrick Clavin, who is the current CBO of the Bureau following the departure of Assistant Commissioner Corcoran, swore an affidavit on 15th November, 2016. He avers that he has reviewed all the material in this case and firmly believes that the Ether constitutes directly or indirectly the proceeds of crime. He proffers that belief to this Court as evidence under s. 8 of the 1996 Act.

The Hearing

10. Both parties served notices to cross-examine the deponents on the contents of their affidavits. At the hearing on 22nd March, 2017, Det. Garda Gallagher, FCA2 and the respondent all gave evidence viva voce and under oath. Det. Garda Gallagher gave evidence as to the magnitude of this investigation; the enterprise established by the respondent was of an entirely different character to any that An Garda Síochána had encountered before. A great deal of time and effort went into the investigation and protocol was rigorously adhered to, in so far as it could be applied to this new field of criminality. He highlighted evidence that illegitimate funds came to be proliferated outside the respondent's debit cards. He also stated that the Hulkster's activities were recorded as far back as April, 2014. When pressed about the respondent's legitimate funds, Det. Garda Gallagher stressed that Bureau officials were open to examining any evidence that the respondent could provide to distinguish between legitimate and illegitimate funds, as they had done during the first set of proceedings regarding his Dundrum Credit Union Account, but none was forthcoming.

11. In Det. Garda Gallagher's view, the conclusion of High Court proceedings does not necessarily indicate the conclusion of the Bureau's overall investigation. His evidence was that a review must take place, through which the Bureau could be satisfied that all matters within its remit have been addressed and that the investigation can be concluded. He stated that the Bureau were unaware, when they commenced the first set of proceedings, that Ethereum had begun trading some months prior, as there was no continuous review process in place to routinely check whether assets previously considered worthless had since attained value. In his view, that was a *"human error"* that had been addressed in the review process that actually took place. He highlighted that such a mistake could readily be explained by the fact that An Garda Síochána were exploring a new field of criminal activity. As for the conclusion reached by the Bureau that the Ether had no value prior to July, 2015, Det. Garda Gallagher did not see how the Bureau could have gone about selling an asset for which there was no established market or forum of interested buyers.

12. In terms of the procedures governing the review process, Det. Garda Gallagher stated that there were was no policy or procedure in place. Reviews are completed whenever the investigating officers have the free time to complete them

and/or whenever they wish to free up space in their office. He stated that the review generally takes place as close to the conclusion of proceedings as possible. Reviews are not carried during the currency of proceedings as there is insufficient time and resources for such an arrangement.

13. In oral evidence, FCA2 provided a more in-depth explanation of the technological concepts arising in this matter. They were in full agreement with Det. Garda Gallagher that the Ether did not have any value prior to July, 2015. They stated that the respondent had effectively purchased the equivalent of a betting slip; the Ether could only accrue value if a certain event occurred in the future (in this case, the commencement of trading for the Ethereum currency). In their view, there was no practical reality to securing a buyer for this betting slip. In contrast to Bitcoin, there were no block chains in place for Ethereum before trading commenced, meaning that there was no register of ownership. Even if a potential purchaser could be sure that the requisite future event would occur, there was no way to know whether their Ether file had been duplicated and sold on to secondary purchasers. If there were multiple purchasers, whoever cashed the slip in first secured the value of the asset and all other secondary purchasers would be left with nothing. In FCA2's opinion, this high level of risk rendered the slip unsellable in any established market.

14. For the purposes of cross-examination, an order for the production of the respondent from Wheatfield Prison was secured from this Court in January, 2017. He stated in evidence that some of the monies seized from his Dundrum Credit Union account and disposed of under the consent order were not tainted by his illegitimate funds. He stated that he had nevertheless consented to the orders made by Fullam J. in light of the substitution principle outlined on affidavit by Det. Garda Gallagher. He argued that, by settling the first case and releasing 50% of the funds contained in his Dundrum Credit Union account, the Bureau had acknowledged that he does have some legitimate income from his previous employment and from the legitimate trade of Bitcoin. In the respondent's view, the Ether has always had value and could be traded just like Bitcoin in a private forum between trusted buyers and sellers. When asked why he did not mention the Ether during Garda interview or during his legal aid applications, he stated that he was not aware that Ethereum had begun trading. As

far as he was concerned, the Ether was only worth €350, so it was not an asset of significant value that would come to mind when making a legal aid application.

15. The respondent stated that he kept the legitimate and illegitimate funds in separate wallets, so as to prevent cross-contamination, and that no illegitimate business went through the e-mail address he used to purchase the Ether. Birmingham J.'s (as he then was) characterisation of the respondent, as set out in the Court of Appeal's decision of his sentencing appeal, was read over by counsel on behalf of the Bureau. The respondent directly challenged those findings, as well as the evidence proffered by the State during the criminal proceedings, maintaining that they were not accurate. He stated that any suggestion of cross-contamination or substitution made by him during the course of the Garda interviews was made for the purposes of accentuating any mitigating factors he could rely on at the sentencing stage of his trial. According to his version of events, all illegitimately earned Bitcoin was kept in a separate wallet under encryption. No explanation was offered by the respondent as to why he had consented in the first set of proceedings to the disposal of Bitcoin that had been kept in un-encrypted wallets. The respondent appeared to suggest that he consented to the disposal order sought by the Bureau because he wished to conclude matters and put the Bureau's proceedings behind him.

16. When asked why he had not produced any records to evidence his legitimate investments, the respondent argued that the enquiries made of him by Gardaí were insignificant. Even if they had been significant, he stated that he had not been in a position to produce those records, as a freezing order had been secured over the relevant bank account by the Bureau. When counsel on behalf of the Bureau pointed out that all relevant records would have been provided to him during the first set of proceedings, had he or his legal representatives asked for them, the respondent stated that he was unsure what material had been provided.. The respondent was cross-examined in detail about the timeline of events that occurred in 2014. It was suggested that the respondent had been dealing drugs as far back as April, 2014, which is a period of activity three or four months longer than the period he outlined in his Garda interviews. The respondent accepted that he had been dealing drugs as far back as April, 2014.

Submissions

17. The respondent places significant reliance on the principles outlined by the Supreme Court in DPP v. JC [2017] 1 I.R. 417 and CAB v. Murphy [2018] IESC 12. He also relies on the Supreme Court's consideration of privacy rights, as expressed in CRH Plc v. The Competition and Consumer Protection Commissioner [2017] IESC 34. He submits that the Supreme Court's views correlate with the European Court of Human Rights' (ECTHR) views on privacy in the criminal context, as expressed in S & Marper v. United Kingdom (2009) 48 EHRR 50. He submits that s. 9 of the Criminal Law Act 1976 addresses that issue in this jurisdiction.

18. The respondent submits that the criminal proceedings against him concluded on 21st December, 2015. In his view, from that date onwards, the State no longer had the authority under s. 9 of the 1976 Act to retain his computer system or any copies made of it. In his submission, the process of returning the computer and wiping the copies should have commenced after that date. Even if the review carried out by FCA2 were allowed, the Court's attention is drawn to the ad hoc and highly discretionary manner in which State actors are allowed to conduct themselves in matters such as this. It is submitted that the status quo is completely at variance with the Supreme Court judgment in CRH and the ECTHR's decision in Marper. As for the appropriate test to apply, the respondent submits that it is the test in J.C. In applying that test, the respondent concedes that this was not a deliberate and conscious breach, as that term is understood following the J.C. decision. Rather, he submits that the breach was inadvertent. Given the complete lack of authority for the informal review carried out by FCA2 in breach of the respondent's rights, it its submitted that this inadvertence is not excusable and the material should be excluded. Independent of the respondent's arguments under Murphy and J.C., it was submitted that these proceedings are an abuse of process, as set out by the rule in Henderson v. Henderson.

19. In characterising the nature and scale of the respondent's criminality, the Bureau refer to the Court of Appeal's judgment on the severity of his sentence (DPP v. Mannion [2016] IECA 314), wherein Birmingham P. stated that the respondent had engaged in a commercial enterprise on an international scale. Once again, the lack of detail provided by the respondent about his legitimate investments was underlined by the Bureau. As stated by Det. Garda Gallagher under cross-examination, activity on the Darknet by the Hulkster was detected from April, 2014

onwards and the respondent left gainful employment in 2013, meaning that any Bitcoin investments after those dates are tainted by illegality. The Bureau highlights that the Ether was purchased around the same time that a large consignment of ecstasy tablets was procured by the respondent. As for the respondent's oral evidence that he was unaware of the Ether's value, thereby explaining why he did not declare it during the course of his first legal aid application, the Bureau does not find that suggestion credible, given that he was on bail at the time and had full access to the internet.

20. The Bureau place great emphasis on the public policy principles underlying proceeds of crimes actions, as expressed in various decisions of the Superior Courts. A statutory expression of those principles is referred to in ss. 4 and 5 of the Criminal Assets Bureau Act 1996. It is submitted that these principles provide the framework within which the Bureau exercises its power to gather evidence. Regarding s. 9 of the 1976 Act, the Bureau highlight that this section envisions the retention of material until proceedings conclude, after which an application under the Police (Property) Act 1897 can be made. In their submission, this Act provides a mechanism by which the owners of seized assets can apply for the return of those assets. No application was made in this case. They suggest that s. 9 does not render access of the laptop unlawful after the conclusion of the proceedings. However, for the sake of argument, if the Court did find that the respondent's rights had been breached, the Bureau submit that it is the Murphy test that applies, and not the J.C. test. It is submitted that there was no recklessness or gross negligence in this case, nor was the alleged breach deliberate and conscious. Rather, a mere human error occurred, an error which the respondent alleges he also made, if it is true that he did not know Ethereum had begun trading when he applied for access to the legal aid scheme.

Discussion

21. The applicant Bureau is a statutory body established by the Criminal Assets Bureau Act 1996 and the Proceeds of Crime Act 1996. Its remit is to identify assets which it believes represent the proceeds of crime and take the steps necessary to deny persons with access to those assets of their beneficial entitlements to same. The Bureau is not an injured or aggrieved party with whom settlement can be reached and liability discharged. The respondent is not liable to the Bureau. The Bureau have reason

to believe that the respondent has access to assets that come within its remit and it has come to this Court to prove its case. There is no issue of liability here and any averments made by the respondent suggesting otherwise are misconceived. As for the matters actually at issue in this case, the parties have raised a number of detailed legal arguments arising from complex areas of the law, so it would be of benefit for the Court to discuss each issue in turn before setting out its decision in this matter.

Criminal Assets Bureau –v- Murphy

22. The Supreme Court hearing in Murphy took place the week after the hearing in this matter commenced on 22nd March, 2017. Given the potential relevance of the Murphy decision, counsel suggested at the conclusion of the evidence that legal argument be adjourned to a date after the Supreme Court delivered its judgment. This transpired to be a wise suggestion, as the judgment in Murphy is highly relevant to this matter and serves as a definitive statement on the law in this area. O'Malley J. carried out an extensive and detailed review of the authorities and the issues of concern in proceeds of crime cases. She notes the centrality of fair procedures to such matters and the requirement that a breach of constitutional rights must have consequences. At para. 121, she refers to the common themes that guide the Judiciary in their application of the exclusionary rule, which are *"...the integrity of the administration of justice, the need to encourage agents of the State to comply with the law or deter them from breaking it, and the constitutional obligation to protect and vindicate the rights of individuals."* She continues thereafter:-

"…These are all concepts of high constitutional importance. Each of them, or a combination thereof, has been seen as sufficient to ground a principle that is capable of denying to the State or its agents the benefit of a violation of rights carried out in the course of the exercise of a coercive legal power."

23. In addressing the issue of what impact a breach of rights has on the litigation of proceeds of crime applications, O'Malley J. states that the correct approach is to be assessed in light of the role that the affected item plays in the proceedings. If the item purports to be evidence *"in the true sense",* a phrase which I take to mean that it has been adduced for the purposes of tending to prove any disputed issue of fact, then the issue at hand is whether the evidence in question should be excluded from the proceedings. In determining that issue, the test outlined by the

Supreme Court in J.C. applies, save for the substitution of the *"beyond reasonable doubt*" standard of proof for the standard applicable in civil proceedings. Where the item comprises all or part of the subject matter of the application, an entirely different set of considerations arise. In those circumstances, the item is not adduced for the purposes of tending to prove any disputed issue of fact and the J.C. test has no application. Rather, the Court is concerned with the question of whether the item was seized in such circumstances that, by the making the order sought, the Court would be lending its processes to actions on the part of State agents who are discharging their duty in an improper fashion. In such cases, the Court must act to vindicate the respondent's right to fair procedures and to prevent its own procedures from being abused. In determining that issue, the Court is not guided by the exclusionary rule, but by the principles which underlie that rule. Those principles were examined in detail over the course of O'Malley J.'s decision and would include the common themes referred to above.

24. Much clarity has been brought to the law by the judgment in Murphy. For example, it is clear that, where the State's improper activity involved a deliberate and conscious breach of constitutional rights, the order must be refused. Where the breach was brought about by reckless or grossly negligent behaviour, the Court retains a discretion to make the order sought, albeit with a presumption in favour of refusal. It is also clear that the question of a breach must be expressly raised on affidavit. The question is determined at the end of the hearing, after the Court has determined whether the asset represents directly or indirectly the proceeds of crime. The judgment also addresses who bears the burden of proof (para. 133), the relevance to be found in the breach of a third party's rights (para. 134) and allegations of co-ownership (para. 135). I do not propose to dwell on the latter two issues, as they do not arise on the facts of this case. However, there are two issues identified in the decision, which appear to have been left open for the High Court to consider at first instance, that require a brief examination at this juncture.

25. At para. 137, O'Malley J. states that an order dismissing the Bureau's application would not, in all cases, result in the return of the asset to the respondent from whom it had been seized. That finding is premised upon the fact that there is no constitutional or legal right to property acquired through the proceeds of crime. It

is unclear precisely what approach the High Court is expected to take in those circumstances. I would certainly require detailed legal submissions from all the relevant parties, should this issue ever arise. It is clear from the authorities, not least Keane C.J.'s decision in Murphy v. G.M. [2001] 4 IR 113, at p. 137, that the respondent remains the owner of the asset in question up until the point where an order pursuant to s. 4 of the 1996 Act is made allowing for the disposal of that asset. Orders pursuant to ss. 2 and 3 of the 1996 Act serve only to freeze the asset and deprive the respondent of the beneficial enjoyment to which they would otherwise be entitled. Should the Court ever be satisfied that an order pursuant to s. 3 should not be made, the provisions of s. 2(5) of the 1996 Act would be engaged. Assuming the Court's refusal to make a s. 3 order was not appealed, or, if it was appealed, that said appeal was not upheld, the interim order made pursuant to s. 2 would lapse. The asset in question would no longer be frozen and beneficial enjoyment of the asset would immediately become vested in the legal owner, i.e. the respondent, for them to deal with as they so wish.

26. It remains unclear how the Supreme Court's observations at para. 137 are to operate in practice and thereby continue to deny a respondent the beneficial enjoyment of an asset after a s. 3 application in respect of that asset has been refused. It may be argued that orders could be sought pursuant to ss. 5 or 7 of the 1996 Act before the interim order lapses pursuant to s. 2(5). In my view, such an imaginative suggestion would afford those sections a reading that is far too generous, given the draconian nature of these types of proceedings. The High Court also does not appear to have the necessary discretion to act on its own motion and make an order effectively preserving the status quo.

27. Even if such consequential orders could be made, which would preserve the status quo, it is unclear what is to be done with the asset afterwards. In light of the Court's finding that the asset represents the proceeds of crime, the respondent has no constitutional or legal right to it. That said, the asset cannot be disposed of in a manner that benefits the State, as to do so would undermine the entire basis on which the s. 3 application was refused (i.e. the responsibility of the Court ensure fair procedures, prevent the abuse of its processes and to step away from State agents who misuse their authority and seek to benefit from a violation of rights carried out in the course of

the exercise of a coercive legal power). So, what, precisely, is to be done with the asset, if it is not to be returned to the respondent? Is the Court entitled to exercise its discretion with regard to the disposal or future use of the property? Is the asset to be destroyed? It is possible that some other legislative provision provides the answers to all these questions. However, in reality, I think it more likely that the 1996 Act will require substantial amendment by the Oireachtas in order to account for the Supreme Court's observations.

28. The second point that arises is whether or not the s. 3 order should be refused where a constitutional right has been breached, but that breach was not reckless, grossly negligent or deliberate and conscious (e.g. an act of inadvertence). It has also not been specifically stated what is to be done if the infringement was legal, rather than constitutional, in nature. In considering these questions, it is worth referring to paras. 125-127 of O'Malley J.'s decision, where it is stated:

"125. I indicated at an early stage in this judgment that I felt that labelling the issue in this particular case as the applicability of the rule excluding unconstitutionally obtained evidence was unhelpful, because the cash in question was not evidence as such, and treating it as evidence for the purposes of the rule could potentially lead to absurd results in the event that more than one person could mount a claim to ownership…Defined consequences flow from a finding that [the asset represents the proceeds of crime], and those consequences cannot take effect as against one person but not as against another…

126. For the same reason, the modified version of the J.C. test proposed by the appellants cannot, in my view, work effectively. The question, then, is the appropriate response of a court where a breach of constitutional rights is involved in the seizure of the assets concerned in the case.

127. While the J.C. test is not an exact fit, the general approach of the Court can, I believe, be adapted to produce an appropriate response to this issue in proceedings under the Proceeds of Crime Act."

In light of those observations, it is to J.C. that this Court now turns.

Director of Public Prosecutions –v- J.C.

29. In normal circumstances, given the lack of direct applicability, the Court would consider J.C. only in a very broad sense and only as far as was necessary to dispose of the application before

it. However, the respondent has submitted that it is J.C., and not Murphy, that sets out the applicable test in this matter, so the Court will consider the Supreme Court's application of the exclusionary rule, as expressed in J.C., in a little more detail. The Court notes O'Donnell J.'s circumscription of his judgment to the area of search warrants. While O'Donnell J. is a member of the deciding majority in J.C., his is not the majority judgment. The majority judgment is that of Clarke J. (as he then was), and his decision makes no reference to a limitation on the applicability of the J.C. test, save for circumstances where the probity/integrity of the evidence is also in question.

30. At para. 871, Clarke J. summarises the test as follows:

"(i) the onus rests on the prosecution to establish the admissibility of all evidence. The test which follows is concerned with objections to the admissibility of evidence where the objection relates solely to the circumstances in which the evidence was gathered and does not concern the integrity or probative value of the evidence concerned;
(ii) where objection is taken to the admissibility of evidence on the grounds that it was taken in circumstances of unconstitutionality, the onus remains on the prosecution to establish either:-

(a) that the evidence was not gathered in circumstances of unconstitutionality; or
(b) that, if it was, it remains appropriate for the court to nonetheless admit the evidence.

The onus in seeking to justify the admission of evidence taken in unconstitutional circumstances places on the prosecution an obligation to explain the basis on which it is said that the evidence should, nonetheless, be admitted AND ALSO to establish any facts necessary to justify such a basis;
(iii) any facts relied on by the prosecution to establish any of the matters referred to at (ii) must be established beyond reasonable doubt;

(iv) where evidence is taken in deliberate and conscious violation of constitutional rights then the evidence should be excluded save in those exceptional circumstances considered in the existing jurisprudence. In this context deliberate and conscious refers to knowledge of the unconstitutionality of the taking of the relevant evidence rather than applying to the acts concerned. The assessment as to whether evidence was taken in

deliberate and conscious violation of constitutional rights requires an analysis of the conduct or state of mind not only of the individual who actually gathered the evidence concerned but also any other senior official or officials within the investigating or enforcement authority concerned who is involved either in that decision or in decisions of that type generally or in putting in place policies concerning evidence gathering of the type concerned;

(v) where evidence is taken in circumstances of unconstitutionality but where the prosecution establishes that same was not conscious and deliberate in the sense previously appearing, then a presumption against the admission of the relevant evidence arises. Such evidence should be admitted where the prosecution establishes that the evidence was obtained in circumstances where any breach of rights was due to inadvertence or derives from subsequent legal developments;

(vi) evidence which is obtained or gathered in circumstances where same could not have been constitutionally obtained or gathered should not be admitted even if those involved in the relevant evidence gathering were unaware due to inadvertence of the absence of authority."

31. Under J.C. , the first issue which the Court must determine is whether a legitimate question has been raised about a piece of evidence, which challenges the admissibility of that evidence on grounds connected with the manner in which it was gathered or obtained, and not on grounds connected with its probity or integrity. Where that question does relate to probity or integrity, it is unclear whether an entirely different test applies or whether the J.C. test is to be applied to the admissibility aspect of the question once the issues with probity/integrity have been disposed of. That issue does not arise in these proceedings, so the Court will not comment further. It is difficult to define what is and is not a legitimate question. However, I am of the view that such a question would, at the very least, have to specify not just the evidence under challenge, but also the act which allegedly constitutes a breach of rights and/or the precise right which has been allegedly breached.

32. The next step is to determine whether the prosecution have established beyond reasonable doubt (any reference to *"beyond reasonable doubt"* in this judgment should be substituted for *"the balance of probabilities"* when dealing with civil matters) that said evidence was not gathered in circumstances of unconstitutionality. Should they

fail to do so, the Court must then determine whether it was possible to have gathered said evidence in a constitutional manner. If not, then the evidence must be excluded under principle (vi) of the J.C. test. If it was possible to have gathered the evidence in a constitutional manner, the prosecution must establish beyond reasonable doubt not just the grounds on which it remains appropriate to admit the evidence, but also the facts which support those grounds.

33. The possibilities for the proper gathering of evidence are effectively comprised of the processes or provisions that provide for such gathering; if it is possible to gather evidence properly, there must be a legal process or provision allowing for same. A natural corollary to that proposition is the precise reason why the State agent(s) failed to comply with that process or provision. This is effectively the first principle that guides the Court's determination on whether it remains appropriate to admit the evidence. It seems to me that the J.C. test allows for four distinct reasons to explain such a failure, into which all breaches can be categorised: a deliberate and conscious act, a reckless or grossly negligent act, an inadvertent act or an act that was proper at the time it was carried out but has since been rendered improper by subsequent legal developments. Each of these reasons gives rise to significant legal questions and differing degrees of discretion, which will require detailed exploration if and when they become live issues before a court. At para. 20 of his written submissions, the respondent submits:-

"…In this regard, while it could not be said that the breach of the respondent's rights was either deliberate or conscious, equally it is respectfully submitted that the error was "inadvertent" in the sense used in [J.C.]…"
The Bureau have submitted that, if this Court were to determine that a breach of the respondent's rights has occurred, said breach was entirely inadvertent. Therefore, it is only the third reason (an inadvertent act) that requires further discussion on the facts of this case.

34. Principle (v) applies to cases where a court is satisfied beyond reasonable doubt that the breach was not a deliberate and conscious act on the part of the State agent or on the part of the senior officials that guided the agent's actions. In those circumstances, a presumption arises against the admission of the evidence. That presumption will be rebutted if a court is satisfied beyond reasonable doubt that the breach was

inadvertent or arises from subsequent legal developments. It is necessary to try and provide some definition to the term *"inadvertence".* It seems clear to me that the J.C. test was formulated to allow for the admission of evidence where the breach was brought about by what O'Donnell J. referred to at para. 489 as *"inadvertence, good faith or excusable error".* This would include *"human error".* It seems clear to me that, by O'Donnell J.'s use of such a collection of terms, the Supreme Court envisioned a two-part exercise when construing inadvertence: the Court must be satisfied beyond reasonable doubt firstly that the breach was inadvertent and secondly that such inadvertence was excusable. The admission of evidence on such grounds would only be entertained where the State agent's bona fides is not in question. For example, the Court would generally have to be satisfied beyond reasonable doubt that the agent had made an effort to behave in the proper fashion, which is sufficient to lift their mistake outside the realm of inexcusable error (i.e. recklessness or gross negligence).

35. In assessing the bona fides and excusable nature of the agent's behaviour, it is important to bear in mind that the Court is actively searching for evidence of those two concepts. The presence of bona fides is not evidenced by an absence of mala fides. The two concepts are to be assessed in the light of the following statement from Clarke J.'s judgment, at para. 857:-

"[857] It might be argued that permitting the admission of evidence taken in circumstances of inadvertent breach could place a premium on ignorance. Evidence obtained in conscious and deliberate violation of constitutional rights, in the sense in which I have used that term, will be excluded. It might be said that it is more easily determined that the knowledgeable were aware of what they were doing compared with those who may be ignorant of the relevant law. However, it is clear from the sense in which I have suggested that the term "inadvertence" should be used that investigative agencies cannot hide behind an unacceptable lack of knowledge appropriate to their task for the purposes of pleading inadvertence. It does not, therefore, seem to me that the test which I propose, when properly analysed, gives any comfort to those who might seek to rely on exaggerated ignorance of the law to escape a ruling in favour of the admission of evidence taken in breach of constitutional rights."

36. The Supreme Court has made absolutely clear that there is no premium on ignorance. J.C. does not open the door for senior officials to utilise a professed lack of knowledge in relation to the matter in order to secure the admission of otherwise improperly obtained evidence. For inadvertence to be excusable, there needs to be evidence of a serious engagement with the duties and legal requirements that come with holding the position of a State agent. The reference by Clarke J. to *"investigative agencies"* would also indicate that, much like cases of deliberate and conscious breach, there is a systemic element to excusable inadvertence. Where the officer *"at the coal face"* gives evidence that goes to inadvertence, the Court must also be satisfied beyond reasonable doubt that 1) the system in which the officer operated (and the senior officials who instructed them) had no hand, act or part in bringing about that inadvertence, or 2) if they did have such a role, that said role was also excusably inadvertent on their part. While principle (v) does not make explicit reference to an assessment of conduct or state of mind, as is contained in principle (iv), I am satisfied that the exercise which the Court must undertake operates in similar terms.

37. The Court notes that there would be appear to be a discretion vested in the Court as to whether it should assess conduct or state of mind. Certainly, the J.C. test does not require an assessment of both conduct and state of mind. The relevance and impact of that discretion, and the distinction between the two concepts, are matters that do not require determination on the facts of this case. Det. Garda Gallagher's evidence was that there is no policy on the review process and that it was a matter for the individual officer to address. In circumstances where there would appear to be no directing mind of a senior official guiding this process, there is no systemic state of mind for the Court to examine. Therefore, an assessment of senior officials' conduct is required. In this case, the conduct in question would be their decision 1) not to provide a directing mind, and 2) not to take any directive role in the review process at all, thereby leaving it to the official *"at the coal face"* to act in their own discretion. This assessment seeks to determine whether such conduct amounts to excusable inadvertence, assuming of course that the prior elements of the J.C. test have been satisfied and it therefore becomes necessary to perform such an assessment.

38. In performing this assessment, the margin of excusable

inadvertence is narrower for senior officials than it is for the officer *"at the coal face",* as senior officials are expected to be more knowledgeable about their duties. Similarly, I would expect the system to be set up in a manner that accounts for and protects citizens' rights. The Court is not seeking to determine whether there is a policy of disregarding citizens' rights (an approach that was condemned by the Supreme Court in DPP v. Madden [1977] I.R. 336 and referred to by MacMenamin J. at para. 921 of J.C.), but whether there is a policy that seeks to protect and vindicate the rights of the individual, and thereby prevent breaches from occurring in the first place. The lack of any policy would be a relevant factor in the Court's assessment, as the failure by senior officials to provide guidance naturally increases the chances that a breach will occur. This is by no means the determinative factor on excusable inadvertence. Unusual and unexpected scenarios can arise from the most innocuous of circumstances. It is possible that the State could not have reasonably foreseen that the system in question would give rise to a situation that would require guidance in order to prevent a breach of rights. Furthermore, it is possible that the State can provide a reason to justify the current absence of such a policy (See, for example, DPP v. Murphy [2016] IECA 287, albeit in the context of a breach of statutory rights, wherein Mahon J. stated that the systemic failure arose from *"technical difficulty of giving effect to the stated policy of the legislature"*). That said, the lack of guidance is a significant factor for the Court to consider, along with how technical or substantial the breach was, whether it was localised or widespread, whether there were multiple breaches etc.

39. It should finally be noted that, even if excusable inadvertence by both junior and senior officials is established, and the presumption outlined in principle (v) has thereby been rebutted, this does not automatically mean that the evidence must be admitted. The first principle of any criminal proceeding is a fair trial in due course of law. If the State's actions would irreparably undermine that principle, the courts must act to vindicate the rights of the accused, no matter how inadvertent the breach may have been.

Section 9 of the Criminal Law Act 1976

40. Section 9 of the 1976 Act reads as follows:-

> 9.—(1) Where in the course of exercising any powers under this Act or in the course of a search carried out under any other power, a member of the Garda

Síochána, a prison officer or a member of the Defence Forces finds or comes into possession of anything which he believes to be evidence of any offence or suspected offence, it may be seized and retained for use as evidence in any criminal proceedings, or in any proceedings in relation to a breach of prison discipline, for such period from the date of seizure as is reasonable or, if proceedings are commenced in which the thing so seized is required for use in evidence, until the conclusion of the proceedings, and thereafter the Police (Property) Act, 1897, shall apply to the thing so seized in the same manner as that Act applies to property which has come into the possession of the Garda Síochana in the circumstances mentioned in that Act.

…

In determining the point at which the Police (Property) Act 1897 applies, s. 9 provides for two scenarios: 1) the period from the date of seizure reaches a point where it is no longer reasonable, or 2) the conclusion of proceedings in which the item seized and retained is required for use in evidence. On the facts of this case, such proceedings would include both the criminal proceedings and the first set of CAB proceedings. Assuming I am satisfied that the principles in Murphy and J.C. have not been breached, this second set of CAB proceedings would also be relevant for the purposes of s. 9. Normally, CAB proceedings do not fully conclude for a least seven years, as a s. 4 disposal application cannot be made until at least seven years have passed from the making of the s. 3 order. The Bureau is undoubtedly entitled to retain all evidence on which it relies until its interest in the case is fully concluded. However, as a s. 4A consent order was made, that consideration does not arise on the facts of this case. The 1897 Act provides that a member of An Garda Síochána or a claimant to the property can make an application to a court of summary jurisdiction for an order returning the property to the owner or, where the owner cannot be ascertained, whatever order the relevant court deems appropriate. Where the owner cannot be ascertained and a competent court has not made any order, the Minister may make regulations for the disposal of such property.

41. The respondent argues that the point at which the 1897 Act applies has been reached. When reached, he submits that the State is required under the Act to return his laptop to him and wipe any copies that were made of it, unless an order is secured from the District Court which directs otherwise. It is worth stating that legal authority on the operation

of the 1897 and 1976 Acts was not put before this Court, save for para. 46 of CRH, which states that the onus is on the respondent to make a claim for the return of his property. I am satisfied that these provisions do not support the meaning that the respondent attributes to them. The respondent's construction of the 1976 Act was that, once the 1897 Act applies, the property is deemed to be illegally retained unless an application is made under the Act. That is not a correct construction of the law. The 1897 Act provides a process through which the ongoing retention of an item by the State can be reviewed and, if appropriate, concluded. Section 1 states that a court of summary jurisdiction may make appropriate orders where an application is made to it. Section 2 states that the Minister can make regulations to facilitate the disposal of the item where the owner cannot be ascertained and a court order has not been made. Unless a claimant makes an application, the process of review provided for under s. 1 is instigated by a member of An Garda Síochána. Assuming that the item's initial seizure and retention was lawful, the ongoing retention remains lawful until the process of review is completed.

42. If some impropriety arose in the carrying out or instigation of the review process, then different considerations would arise. But there is certainly no basis for suggesting that retention is rendered illegal as soon as the proceedings conclude. The State must be given a reasonable opportunity to review the facts at hand, prepare an application under s. 1 of the 1897 Act (if such an application is necessary) and institute that application before the District Court. Such an opportunity is all the more vital in complex cases such as this. This is an issue which I shall return to later on in this judgment.

The Decisions in CRH PLC v. CCPC and S & Marper v. United Kingdom

43. While both CRH and Marper address legal issues that are similar to those raised in this case (the constitutional right to privacy and Article 8 of the ECTHR) they are both strikingly dis-similar in their facts when compared to the matter currently before the Court. In CRH, the legality of the original seizure was under challenge and the State authorities had acted with complete disregard for the plaintiffs' rights. The dispute also related primarily to e-mail communications, rather than to the computer itself. In Marper, the challenge arose in the traditional criminal context and related to DNA and fingerprint samples taken from the applicants. The Member State proposed to retain the applicants' biological information

de facto indefinitely, notwithstanding the fact that they were legally innocent of any wrongdoing. I cannot ignore the differing factual matrix of these cases. I therefore propose to rely on CRH and Marper purely as statements of applicable principle.

44. In CRH , MacMenamin J. highlighted that the State's actions must be viewed within the precise context of the facts at hand. The search and seizure provisions in consumer protection legislation, by their very nature, operate differently than the provisions applicable to criminal investigations. The scope is narrower than it is in criminal matters, as is the degree of latitude afforded to the State regarding the relevance of what is seized. Time, urgency and necessity also run differently. The Court must bear these factors in mind when assessing the proportionality of the State's actions and whether it can be said that a system of tangible, independent judicial supervision is in place, as envisioned by the ECTHR. Both MacMenamin and Charleton JJ. make reference to the lack of a policy or a code of practice in respect of the seizures carried out. Indeed, Charelton J. even went so far as to recommend that a policy be drawn up for future cases.

45. At para. 29, MacMenamin J. stated that disproportionality was to be determined *"having regarding to whether rational, necessary means were adopted to achieve the statutory objectives in question".* At para. 55, he states that the right to privacy must be *"harmonised with, and may be restricted by, the constitutional rights of others, the requirements of the common good, and the requirements of public order and morality".* The *"sphere of life"* into which the State seeks to pry is also highly relevant. In the context of retention, this would include the sensitivity of the information sought to be retained. At para. 117, MacMenamin J. referred to numerous factors that influence applicable principle at the European level, including national security, economic wellbeing and the prevention of crime. This would coalesce with the principles of effectiveness and efficiency, as referred to at para. 42 of Laffoy J.'s judgment. Overall, the Supreme Court was unequivocal in its view that the right to privacy is a right with backbone; it cannot be whittled down to nothingness, *"or submerged entirely in common good interests or duties".* It is a right that must be vindicated and protected from unjust attack.

46. The ECTHR's conclusions in Marper broadly reflect the

contents of Laffoy J.'s judgment, where she carefully analysed the European jurisprudence. Having determined that there was an interference with the applicants' Art. 8 rights, the ECTHR sought to determine where such interference was justified. This appraisal operated in the usual terms of whether the interference was in accordance with law, whether it served a legitimate aim and whether it was necessary in a democratic society. Having concluded that review, the Court decided that the indiscriminate nature of the State's powers failed to strike a fair balance between private and public interests, and therefore the margin of appreciation had been exceeded. This constituted a disproportionate interference with rights that could not be regarded as necessary in a democratic society. On that basis, the ECTHR found for the applicants.

Decision

The Applicable Test

47. The parties disagree as to which test is applicable on the facts of this case, the test set out by O'Malley J. in Murphy or the test set out by Clarke J. in J.C. As stated above, this question is answered by examining the role that the item plays in the proceedings. Is it evidence or is it the subject matter of the action? The subject matter of this action is the Ether. The Bureau have stated that the Ether was seized without actually interfering with the laptop or its original data. If this is so, the manner in which seizure was achieved was not properly explained to this Court. While FCA2 may have interrogated copies of the respondent's system, there is only one original copy of the wallet containing the Ether and it was stored on the respondent's computer. Presumably, the original had to be seized in order for the asset to be dealt with by the receiver appointed pursuant to s. 7 of the 1996 Act. Therefore, it is the subject matter of this action that is allegedly tainted with illegality, and not any piece of evidence which the Court could exclude if it were to make adverse findings under the J.C. test.

48. The Court notes that screenshots of the respondent's computer system are exhibited to the affidavit of FCA2 and that it is arguable whether some part of the computer system has been adduced before this Court as evidence. However, the exclusion of those screenshots would not advance the respondent's case very far, as they evidence the respondent's activities on the Silk Road and Agora websites. There is no dispute between the parties on that issue. Having considered this issue in the round, it seems to me that the appropriate test is the test outlined in Murphy. That

being so, the procedure that the Court must follow is clear: it must first determine on the balance of probabilities whether the subject matter of this action represents the proceeds of crime and then consider whether or not to refuse the order sought on grounds of unconstitutional activity in the seizure or retention of that subject matter.

The Test in F . McK v. GWD

49. The test for the granting of a s. 3 application is set out by McCracken J. in the case of F . McK v. GWD [2004] 2 I.R. 470. He states as follows, at para. 70:-

"70 … (1) [The Trial Judge] should firstly consider the position under s. 8. He should consider the evidence given by the member or authorised officer of his belief and at the same time consider any other evidence which might point to reasonable grounds for that belief;
(2) if he is satisfied that there are reasonable grounds for the belief, he should then make a specific finding that the belief of the member or authorised officer is evidence;

(3) only then should he go on to consider the position under s. 3. He should consider the evidence tendered by the plaintiff, which in the present case would be both the evidence of the member or authorised officer under s. 8 and indeed the evidence of the other police officers;

(4) he should make a finding whether this evidence constitutes a prima facie case under s. 3 and, if he does so find, the onus shifts to the defendant or other specified person;

(5) he should then consider the evidence furnished by the defendant or other specified person and determine whether he is satisfied that the onus undertaken by the defendant or other specified person has been fulfilled;

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

(7) if he is not so satisfied he should then consider whether there would be a serious risk of injustice…."

50. The evidence under consideration for the purposes of s. 8(1) of the 1996 Act is that of Assistant Commissioner Corcoran and Det. Chief Supt. Clavin, as set out in their affidavits dated 22nd July and 15th November, 2016, respectively. Assistant Commissioner Corcoran swore his affidavit as then-CBO for the purposes of the s. 2 application. Detective Chief Supt. Clavin

swore his affidavit for the purposes of this s. 3 application and he adopts the contents of his predecessor's affidavit in that respect. Both CBOs refer to information and intelligence that has come to their attention over the course of their investigations into this matter. Assistant Commissioner Corcoran sets out the background to this matter in some detail, including the previous proceedings, the respondent's conviction, the operation of his criminal enterprise and the nature of his financial dealings. Having considered all of those matters, I am satisfied that there are reasonable grounds for the holding of the beliefs referred to in s. 8(1) of the 1996 Act. I am also satisfied that those beliefs are evidence for the purposes of these proceedings.

51. In considering the evidence tendered by the Bureau in this matter, it is noteworthy how little there is in dispute between the parties. It is common case that the respondent was engaged in significant criminal activity, that he had access to the proceeds of that criminal activity and that he expended those proceeds during the period in question. The dispute turns on whether or not the proceeds were expended for the purchase of the Ether that comprises the subject matter of these proceedings, or whether that purchase occurred using Bitcoin procured with legitimate income. The Bureau contend that there is no relevance to be found in this distinction. In their submission, even if *"legitimate"* Bitcoin were used to purchase the Ether, these legitimate funds were only available to the respondent because he used the proceeds of his crimes to offset the cost of daily living. I would only have to determine the issue of substitution if it is possible to distinguish between the respondent's legitimate and illegitimate monies.

52. During cross-examination, at 2:55PM on the day of the hearing, the respondent admitted that he had been dealing drugs from as far back as April, 2014. This represents a notable change in the evidence, most especially in light of my observations at paras. 54 and 55 below regarding the respondent's evidence. Up until the day of hearing, the respondent had always maintained that he only began dealing drugs three or four months before his arrest in November, 2014. The Ether was purchased on 5th August, 2014, which is around the same time the respondent had previously stated that he commenced his illicit activities. Clearly, the mixing between legitimate and illegitimate funds would be at a much more advanced stage if

four months had passed since illegitimate funds began to accrue, and not merely a few weeks.

53. At the conclusion of the first set of proceedings, a consent order was made over debit cards, bank accounts, sums of cash and 50% of the funds contained in the respondent's Dundrum Credit Union Account. Irrespective of how much time had passed since the mixing of funds commenced, it is clear that illegitimate funds infected the respondent's entire financial infrastructure. It would be extremely difficult, if not impossible, to parse between the Bitcoin purchased through legitimate funds and the Bitcoin procured through illegal activity and illegitimate funds. It would seem more likely than unlikely that the Ether was purchased using Bitcoin procured through criminal activity and/or with the proceeds of crime. I am therefore satisfied that the evidence adduced before this Court constitutes a prima facie case under s. 3 of the 1996 Act. The onus has now shifted to the respondent to satisfy this Court that the Ether is not connected with the proceeds of his crimes.

54. The following excerpt is taken from the hearing, at 2:47PM:

"Q: Now I must put it to you, Mr. Mannion, that you are making the case that all your illegitimate funds were on the Visa Debit electron cards, that simply doesn't stand up when placed against the fact that you admit that €7,000, just shy of €7,000, was lodged to your Ulster Bank account in Dundrum on 26th August and that that was from the sale of Bitcoin and that the Bitcoin was probably related to drugs?
A: I said that in interview in Rathmines, there might have been some minor cross-contamination. I said that because I was of the understanding that I would let this go, this money, either cross-contamination or substitution and that that would reflect well on me for my sentencing for the Section 15(a), which turned out to not be the case. But that is correct that I did say that.

Q: Is it now your evidence that that wasn't correct, that you now say that that didn't arrive from the sale of Bitcoin?

A: It did derive from the sale of Bitcoin and I do accept that it is correct that there be some relation to illegitimate funds."

This exchange is remarkable in two respects. Firstly, the respondent effectively admits that there has been some cross-contamination between his illegitimate funds and various other monies to which he had access. The clear blue water that

supposedly existed between his two sources of money is a fiction. Secondly, the respondent has admitted that the information he provided to the authorities, in so far as it can be considered reliable, only extended so far as to bring about a situation more advantageous to himself. He was, in effect, willing to manufacture mitigating circumstances and frustrate the administration of justice in the process, if necessary. This admission reflects the comments of Gardaí who interviewed the respondent on eleven occasions between November, 2014 and February, 2015. The interviewing officers make several references to their dis-satisfaction with the respondent's answers. Having had the opportunity to observe the respondent in the witness box as he gave his evidence, I find myself to be in complete agreement with those sentiments. At the very least, it can be said that the respondent has been economical with the truth. Those economies have been advanced to An Garda Síochána, the Bureau and several members of the Judiciary.

55. Given this patent lack of candour on the respondent's part, I cannot rely on his evidence with any degree of certainty unless it is supported by objective evidence. No such evidence has been adduced by the respondent. The respondent has submitted that his imprisonment inhibited his ability to make his case. The respondent was granted access to the Ad Hoc Legal Aid Scheme in both sets of proceedings. In the first set of proceedings, his legal team were able to prove to the Bureau's satisfaction that 50% of the funds in his Dundrum Credit Union account did not represent the proceeds of crime. Orders to that effect were made on consent by Fullam J. If the respondent had truly been as fastidious with his finances as he claims, then his legal team would undoubtedly have been able to secure the necessary evidence that would prove his case. They have not done so. There is no substantial, reliable evidence to fulfil the onus undertaken by the respondent and thereby rebut the prima facie case made by the Bureau. That being the case, all that remains is to be consider whether there would be a serious risk of injustice in granting the order sought. Independent of any concerns under Murphy, I am not satisfied that any such risk exists in this case. I am therefore disposed to granting the order sought.

Application of the test in CAB –v- Murphy

56. The affidavits and submissions proffered by the respondent raise three issues for the Court to consider in applying the Murphy test: 1) the provisions of the 1897

and 1976 Acts, 2) a Henderson v. Henderson objection, and 3) the respondent's privacy rights. I must now assess whether the Bureau, as the moving party in this application, has established on the balance of probabilities that there was no element of illegality or unconstitutionality in their dealings with the Ether.

57. I am satisfied that neither of the scenarios envisioned by s. 9 of the 1976 Act can be said to apply to the subject matter of these proceedings. Proceedings were instigated by the State against the respondent and there could be no question of s. 9 arising until those proceedings conclude. The respondent has submitted that proceedings concluded on 21st December, 2015, when he was sentenced by His Honour Judge Nolan in the Circuit Criminal Court. In my view, it would be more accurate to submit that the determination of these matters concluded at first instance when the consent order was made by Fullam J. on 22nd February, 2016. But, even if that submission had been made, s. 9 would still not apply because the criminal proceedings were still in being. The respondent appealed his sentence to the Court of Appeal. Proceedings did not in fact come to an end until 3rd November, 2016, when the Court of Appeal delivered its decision. While the criminal proceedings had concluded at first instance in December, 2015, an appellate court is entitled to review all evidence and material that was put before the Trial Judge. It would reflect very poorly on the State if the Court of Appeal requested sight of a piece of evidence relied on at trial, only to be informed that the State had deleted it. It is only common sense that all evidence and material be retained and preserved until the proceedings had been brought to a complete end.

58. Even if I were of the view that proceedings concluded in February, 2016, and s. 9 applied thereafter, this would not help the respondent in any meaningful way. As set out at para. 42 above, a reasonable opportunity must be afforded to the State to prepare and institute an application under s. 1 of the 1897 Act, if such an application is necessary. The Ether was re-examined during a review process carried out in late May, 2016, approximately 3 months after the first set of proceedings concluded. This second set of proceedings commenced in late July, approximately 5 months after the first set of proceedings concluded. Even if proceedings had concluded and s. 9 applied, I am of the view that a period of 3-5 months comes within the time period afforded by that reasonable opportunity.

59. While the respondent has not sought to challenge the scope of the initial seizure carried out by Gardaí, that scope informs later developments and is worth commenting on briefly. MacMenanmin J. found that the State is afforded significant latitude in terms of seizure during criminal investigations (para. 31 of his judgment in CRH). As the hub of his criminal enterprise, there can be no doubt that Gardaí were entitled to seize and retain in full the contents of the respondent's laptop. It is quite probable that unrelated material was contained on the respondent's laptop, which did not need to be seized. But the facts of this case cannot be overlooked. This was not a series of e-mails that can be keyword-searched and filtered, as in CRH, nor was this an investigation into regulatory misfeasance. This was a computer system, wherein one programme relies on other programmes in order to function. The contents of that system went toward the commission of particularly serious criminal offences. It is undoubtedly in the interests of justice that the respondent's computer system be retained in full while the investigation and prosecution were in progress.

60. If an application under s. 1 were being made in this case, I would be of the view that the State is entitled to retain not only material that directly goes to criminality but also any other programming or hardware that is required to make the relevant material intelligible and usable. In so finding, I would rely primarily on the affidavit evidence of FCA2, wherein they explain the technological background to this matter, including the encryption software employed by the respondent. It is clear that specific programmes, such as Bitcoin *"keys"* and the TOR browser, are required before the criminality engaged in by the respondent becomes apparent. Before any application under s. 1 could proceed, a detailed review of the respondent's computer system would be required so as to determine what should and should not be retained. This review would most likely be carried out by someone involved in the investigation, such as FCA2. A review of such complexity would naturally extend the time period of a *"reasonable opportunity"*, as referred to above. Until that reasonable opportunity has passed, the State's retention of the material could not be called into question. I am more than satisfied that no issue arises under s. 9 of the 1976 Act.

61. For the sake of completeness, I should also note that it will be for some other court to consider the precise circumstances in which a

s. 1 application is necessary. That is not a live issue in this case, as the 1897 Act does not yet apply. Most particularly, I would leave over questions regarding the precise circumstances in which the member of An Garda Síochána is required to make an application under the 1897 Act in order to continue retaining the material. Such a requirement is not explicitly stated in either the 1897 or 1976 Acts, but may arise on some other legal or constitutional basis. I would also refrain from expressing any view as to the status of seized material for which a s. 1 application is necessary but is not made by the Garda member within the reasonable opportunity referred to at para. 42 above. In my view, it would be inappropriate to make findings of such significance until a case comes before the courts in which the operation of the 1897 Act is directly at issue between the parties.

62. With regard to the respondent's objection pursuant to the rule in Henderson v. Henderson, this point is only sustainable if it were possible to sell the Ether before the consent order was made in February, 2016. The respondent has raised significant questions about the marketability of the Ether in November, 2014. He effectively argues that the asset could be bought and sold because he had bought it and could have sold it. In my view, that is not the standard by which marketing and marketable value are assessed for the purposes of the 1996 Act. An effective salesperson can sell anything if they can only find a person who, on their whims, sees fit to purchase it. That does not mean that the asset has value. If it did, then the minimum value threshold set out in the 1996 Act would be meaningless. Almost any item could be said to come within the Bureau's remit of seizure, as the Bureau would only need to prove on the balance of probabilities that they can find someone to purchase it at a price in excess of the minimum value threshold. The marketable value of an asset is determined using objective criteria that can be observed in an established marketplace. It is this established marketplace that allows the Bureau to carry out its functions and dispose of assets it has seized. Little relevance is to be found in the practices of alternative, underground fora. In light of FCA2's evidence, I am satisfied that no established market existed for Ethereum until the currency started trading in July, 2015.

63. Seven months passed between that date and the making of the consent order. During that time, there can be no doubt that a market existed for Ethereum and that the Ether had value. An

application was not made to make the Ether a part of the subject matter of the Bureau's first application. This failure arose not out of some bad faith or improper act on the State's part, but out of a simple oversight as to the commencement of trading. The creation of cryptocurrencies was a massive economic and technological advancement. Society as a whole is still grappling with the consequences of these developments. The failure to notice that Ethereum had started trading did not arise out of negligence, but out of a failure to prepare for an eventuality that was, up until that point, unheard of. The Bureau were engaging with economic infrastructures that were themselves still evolving. The development of Ethereum did not come with any rules or guarantees. It was entirely possible that the currency would never commence trading and its first investors would be left out of pocket. The Bureau were dealing with an unknown quantity. As a result, an understandable oversight occurred. In my view, the subsequent efforts by the Bureau to remedy that oversight do not constitute a breach of the rule in Henderson v. Henderson. Even if they did amount to such a breach, and the respondent's rights had been impacted, I am satisfied that this breach would not agitate issues that would motivate this Court to make a ruling adverse to the State under the jurisprudence in Murphy and J.C.

64. Turning finally to the respondent's privacy rights, it is necessary to put the alleged breach of rights in its full and proper context. As stated above, a review of all the material on the respondent's system would be necessary before an application could be made under s. 1 of the 1897 Act, in which the State would set out what material it wished to hold on to and what material it did not intend to retain further. From that perspective, a review of the laptop's contents was inevitable. Detective Garda Gallagher's evidence is also of relevance. He was extensively cross-examined by counsel for the respondent as to the ad hoc nature of the review process and why the review did not take place before the first set of proceedings were settled. Bearing all of this in mind, it seems to me that objection has not been taken to the review process in and of itself. The respondent is not arguing that a review could not have been carried out under any circumstances. Rather, the dispute relates to the timing, purpose and manner of the review that was carried out.

65. The review carried out by FCA2 occurred after the first set of

proceedings were settled. I am satisfied that this did not result in a breach of the respondent's privacy rights. As stated above, criminal proceedings against the respondent were still in being in May, 2016. A review was perfectly legitimate at any time before the criminal proceedings concluded and before the reasonable opportunity referred to at para. 42 above had expired. As for the purpose of review, FCA2 re-examined the computer system for the purpose of ensuring all matters had been satisfactorily addressed and the Bureau's investigation could be formally concluded. That is a perfectly legitimate reason for carrying out a review of the case material. Indeed, had the 1897 Act applied, this same purpose would be relied on to justify reviewing the material and preparing a s. 1 application. This review was carried out to ensure that the Bureau had fulfilled its statutory duties and legal obligations. I can find no fault in that. Of course, it would have been ideal had a review occurred before Fullam J. made the consent order in February, 2016. But there is a great deal of difference between a less than approach and an illegal approach. I am satisfied that the Bureau's actions in this case can be characterised as the former, rather than the latter. There were no grounds on which to believe that a pre-conclusive review was necessary. The Bureau cannot be said to have acted arbitrarily, dis-proportionately or improperly for failing to carry one out, nor can the post-conclusive review that actually took place be so described.

66. As for the manner of review, it cannot be denied that there is no policy on the issue. Reviews are effectively left to the discretion of the officer. The European courts have been particularly critical of the failure to provide guidance and proper procedure in the exercise of the State's powers, and they have found in favour of applicants where such failures occur. That said, the respondent's submissions on this point were unrealistic in the extreme. If his argument were correct, then the State would be obligated to meticulously plan out policies and procedures for every eventuality or act that could ever arise, no matter how unusual or banal they may be. If they fail to do so, they would risk an adverse judicial finding at some point in the future. Such a task is not only burdensome; it is impossible. There is no way to foresee every possibility that could arise in the future and plan for it. Nor is it possible to construct a policy or procedure that accounts for every banal or trivial act a State agent commits in the course of carrying out their duties. There is, of course, an

expectation that the State would provide guidance to its officers where State powers are being exercised in a significant way on a regular basis, or where there is a foreseeable clash between State activity and citizens' rights. In my view, a final review of all material validly seized, retained and relied upon in the course of a criminal investigation does not give rise to such an expectation. I am therefore satisfied that the manner in which this review was conducted did not give rise to a breach of the respondent's privacy rights.

67. This does not mean that the State agent enjoys a carte blanche to act as they wish if no guidance is provided to them. Every State agent has a general obligation to abide by the law and respect personal rights in the exercise of their powers and duties. This is not a case where it can be said that this general obligation has been breached, inadvertently or otherwise. The review of this laptop and the material it contained was, at all stages, perfectly legitimate. On the facts of this case, the respondent's right to privacy in respect of this device must yield to the State's right to tackle serious criminal activity. The necessary procedure to bring that about has been followed and there has been no breach or improper act that would bring same into disrepute. There can be no suggestion of an unwarranted or improper interference in this case. Even if there had been, those interferences would not justify a ruling against the Bureau. The test in Murphy in quite clear. There are basic constitutional principles that the State is required to respect and vindicate in the exercise of its powers. Where State agents fail to uphold those principles, the courts must act. Having reviewed the actions of the State agents in this case, it cannot be said that this Court is lending its processes to action on the part of State agents who are discharging their duty in an improper fashion. I am satisfied that the Bureau has properly performed its statutory duties.

Concluding Remarks

68. The State agents that were involved in this case have, in my view, conducted themselves with commendable diligence and with due regard to their constitutional obligations. As stated by Det. Garda Gallagher, An Garda Síochána broke new ground in this case. That said, the investigation into the criminal activities of the respondent was not without flaw. I have found against the respondent on the issues that he raised during the course of the hearing. His constitutional and legal rights were not breached and there is no need to further consider the test in Murphy. But the arguments made by the

respondent were not without merit. A great deal of time and effort was put into this investigation and the State's endeavours were potentially undermined by the intricacies of data privacy rights and cryptocurrency exchanges. While those complications did give rise to legitimate questions on the respondent's part, they did not give rise to a breach of rights. On the unusual facts of this case, the Bureau have established that the asset was not seized or retained in circumstances of unconstitutionality. That is not to say that a breach could not arise in a future case. It would be prudent to prepare for these potential difficulties going forward.

69. For the reasons outlined above, I would make the orders sought by the Bureau in respect of the Ether which comprises the subject matter of this action.

Part Seven
Significant Court Judgements during 2018

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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, 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 2018, the Bureau received fifty requests for assistance. The Bureau was able to provide information in respect of these requests. The requests were received from thirteen different countries within the European Union. The Bureau itself sent eighty requests to twenty 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 target the activities of transnational organised crime gangs, who recognise no borders and attempt to exploit the opportunities presented by freedom of movement across international frontiers in their criminal activity.

Interpol

Interpol is an agency comprised 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 2018.

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 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 2018, the Bureau remained as a member of the Steering Group and attended the Annual General Meeting which was held in Warsaw on the 23rd – 25th May 2018.

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.

Logo of ALEFA

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

During 2018, the Bureau as a member of the ALEFA Steering Group, was involved in developing the EU Internal Security funded project entitled "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 presented a THB financial investigation training event for financial investigators and forensic accountant's delegates at Europol HQ in The Hague during April 2018.

In that regard, the Bureau participated in Steering Group project meetings developing the content of the training event. Subsequently, the ALEFA Steering Group, with Bureau participation, has produced a handbook and leaflet for financial investigations in THB, which will be published and submitted to the EU in early 2019.

International College of Financial Investigation (ICOFI)

The Bureau provided an instructor on the ICOFI conference on "LEA perspective on Virtual Currencies", which took place from the 20th – 23rd November 2018 at the International Training College in Budapest, Hungary.

The Bureau's instructor provided details on the Bureau's experiences in detecting and seizing crypto-currencies deriving from criminal conduct. The instructor covered an end-to-end investigation into Darknet drug dealing and related lessons learned during the case.

Logo of ICOFI

Virtual Currency Conferences

Virtual Currency Symposium

The Bureau was invited to provide a presentation to the "Crypto Currency Symposium" which took place from 6th – 10th August 2018 in Phoenix, Arizona, USA. This conference was organised by The National Cyber Investigative Joint Task Force (NCIJTF) in the United States of America.

The conference is aimed at law enforcement personnel with an intermediate to advanced level knowledge of virtual currency and experience working with these types of investigations. Attendees consisted of representatives from various Federal Law Enforcement and Regulatory Agencies in the United States as well as international partners which includes the Bureau.

The event addressed the latest crime trends, tracking, attribution and cooperation between Law Enforcement and the relevant private sector.

The conference was highly beneficial to the Bureau in expanding our knowledge and capacity in the investigation of virtual currencies.

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.

Part Eight
International developments

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 planning for the forthcoming year. The conference provides the opportunity to exchange knowledge and experience and identify best practice in any particular area of collaboration.

In November 2018, Senior Bureau Officers attended the Cross Border Organised Crime Conference which was held in Northern Ireland.

As part of the Cross Border cooperation, Senior Officers from the National Crime Agency (NCA) visited the Bureau on the 24th July 2018. Similarly, Senior Bureau Officers visited the National Crime Agency's offices in Belfast in December 2018.

D/Chief Superintendent Patrick Clavin, Mr Declan O'Reilly, Bureau Legal Officer and Detective Sergeant Fergal Harrington of the Criminal Assets Bureau meeting with Senior Officers of the National Crime Agency on 24th July 2018

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.

This 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 gangs. The Task Force comprises Senior Officers from An Garda Síochána, PSNI, Revenue Customs, HMRC, the Bureau and the NCA (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 four operational meetings in 2018 in relation to the Joint Agency Task Force and are involved in a number of operations being conducted under the Joint Agency Task Force.

Visits to the Bureau

The success of the Bureau continues to attract international attention. During 2018, the Bureau facilitated visits by foreign delegations covering a range of disciplines, both national and international.

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.

The Bureau welcomed Mr Anthony Cook, Special Agent / Attaché, Money Laundering and Criminal Tax, Department of Treasury, IRS Criminal Investigations, American Embassy, London on 25th September 2018 and was provided with an overview of the work of the Bureau and discussed areas of mutual interest and cooperation.

The Bureau also welcomed Mr Hervé Mathevet, French Customs Attaché to the UK and Ireland on the 1st November 2018. The purpose of this meeting was to exchange briefings on the roles and functions and areas of common interest.

Visit of Secretary General of the Department of Employment Affairs and Social Protection (DEASP), Mr John McKeon on 16th May 2018.

The Secretary General of the Department of Employment Affairs and Social Protection, Mr John McKeon visited the Bureau Offices on Wednesday 16th May 2018 where he was briefed on the operation of the Bureau and in particular, the work of the Social Welfare Bureau Officers.

D/Chief Superintendent Patrick Clavin, Mr John McKeon, Secretary General and Mr Declan O'Reilly, Bureau Legal Officer, 16th May 2018

Part Eight
International developments

Visit of Garda Commissioner, Mr Drew Harris on 21st September 2018

On Friday 21st September 2018, the newly appointed Garda Commissioner, Drew Harris visited the Bureau Offices. Commissioner Harris met with the Chief Bureau Officer, Bureau Officers, Bureau staff and staff of the Chief State Solicitors Office co-located at the Bureau's Offices. The Commissioner 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.

D/Chief Superintendent Patrick Clavin and Garda Commissioner Mr Drew Harris, 21st September 2018

Part Nine
Protected Disclosures Annual Report

Protected Disclosures Act 2014

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

No protected disclosures were received by the Bureau in the reporting period up to the 31st December 2018.

Part Nine
Protected Disclosures Annual Report

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Part Ten
Conclusions

Throughout 2018, 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 Proceeds of Crime Act 1996 as amended, together with Revenue and Social Welfare legislation.

The Bureau welcomes the additional powers and changes affected 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 exercising of the Bureau 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, laundering / smuggling of fuel and illegal tobacco.

The Bureau also targeted new emerging trends such as the use of the motor trade to conceal criminal assets as well as the use of crypto-currency for asset transfer and international fraud.

Throughout 2018, the Bureau placed particular emphasis on targeting the 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 €2.2 million being forwarded to the Exchequer under the Proceeds of Crime legislation. In addition, in excess of €3 million was collected in Revenue and €323,000 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.

The Bureau continues 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 develop law enforcement links with other EU Member States.

In pursuing its objectives, the Bureau continues to liaise closely with An Garda Síochána, the Office of 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.

During 2018, in excess of €5.6 million was forwarded to the Central Fund as a result of the actions of the Bureau.

Part Ten
Conclusions

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.

One of the key strengths of the Bureau is its reach into other organisations to support its activities. The Bureau could not undertake its activities without the support of many sections of An Garda Síochána including units under the Special Crime Operations, the Emergency Response Unit, Regional Armed Support Unit and local Divisional personnel.

In addition, the Bureau receives excellent assistance from many sections of the Office of the Revenue Commissioners including the Disclosure Office and Customs Units. Officers from various sections of the Department of Employment Affairs and Social Protection assist the Bureau in matters of mutual interest. For this reason, the Bureau can extend its reach beyond its modest size.

Officials from the Department of Justice and Equality provide excellent advice and support to the Bureau in terms of finance, governance and audit and risk. The Department take on board suggestions for legislative and policy changes in support of the statutory remit of the Bureau.

Appendix A
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

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.

Appendix B
Statement of Internal Controls

Scope of Responsibility

On behalf of the Criminal Assets Bureau I, as Chief Bureau Officer, acknowledge responsibility for ensuring that an effective system of internal control is maintained and operated. This responsibility takes account of the requirements of the Code of Practice for the Governance of State Bodies (2016).

I confirm that a business plan is agreed annually by the Senior Management Team (SMT) and is submitted to the Assistant Secretary, Department of Justice and Equality for information.

I confirm that a Corporate Governance Assurance Agreement between the Bureau and the Department of Justice and Equality covering the years 2017 – 2019 is in place and is subject to ongoing review.

I confirm, that the Annual Report and Compliance Statement has been submitted to the Minister for Justice and Equality.

Purpose of the System of Internal Control

The system of internal control is designed to manage risk to a tolerable level rather than to eliminate it. The system can therefore only provide reasonable and not absolute assurance that assets are safeguarded, transactions authorised and properly recorded and that material errors or irregularities are either prevented or detected in a timely manner.

The system of internal control, which accords with guidance issued by the Department of Public Expenditure and Reform has been in place in the Criminal Assets Bureau for the year ended 31 December 2018 and up to the date of approval of the financial statements.

Capacity to Handle Risk

The Criminal Assets Bureau reports on all audit matters to the Internal Audit Unit in the Department of Justice and Equality and has in place a Bureau Audit and Risk Committee (ARC). The ARC of the Bureau met on 4 occasions during the year 2018.

During 2018, the Internal Audit Unit of the Department of Justice and Equality carried out audits on financial and other controls in the Criminal Assets Bureau, in line with its annual programme of audits.

The ARC has developed a risk management policy which sets out its risk appetite, the risk management processes in place and details the roles and responsibilities of staff in relation to risk. The policy was issued to all Managers within the Bureau who were advised of the necessity to alert management of emerging risks and control weaknesses and to assume responsibility for risk and controls within their own area of work.

Risk and Control Framework

The Criminal Assets Bureau implemented a Risk Management System which identified and reported key risks and the management actions taken to address, and to the extent possible, to mitigate those risks.

Appendix **B**
Statement of Internal Controls

A Risk Register is in place in the Criminal Assets Bureau which identifies the key risks facing the Bureau and these are identified, evaluated and graded according to their significance. The register is reviewed and updated by the ARC on a quarterly basis. The outcome of these assessments is used to plan and allocate resources to ensure risks are managed to an acceptable level. The Risk Register details the controls and actions needed to mitigate risks and responsibility for operational controls assigned to specific staff.

In respect of the Bureau, I confirm that a control environment containing the following elements is in place:

- procedures for all key business processes are documented;
- financial responsibilities are assigned at management level with corresponding accountability;
- an appropriate budgeting system is in place, with an annual budget which is kept under review by senior management;
- systems aimed at ensuring the security of the information and communication technology systems are in place;
- systems are in place to safeguard the Bureau's assets;
- the National Shared Services Office provide Payroll Shared Services to the Bureau

Ongoing Monitoring and Review

During the period covered by this Financial Statement, formal procedures were implemented for monitoring and control processes and control deficiencies were communicated to those responsible for taking corrective action and to management, where relevant, in a timely way. I confirm that the following monitoring systems were in place in respect of the Criminal Assets Bureau:

- key risks and related controls have been identified and processes have been put in place to monitor the operation of those key controls and report any identified deficiencies;
- an annual audit of financial and other controls has been carried out by the Department of Justice and Equality's Internal Audit Unit;
- reporting arrangements have been established at all levels where responsibility for financial management has been assigned;
- regular reviews by senior management of periodic and annual performance and financial reports take place, which indicate performance against budgets/ forecast.

Procurement

I confirm that the Criminal Assets Bureau has procedures in place to ensure compliance with current procurement rules and guidelines and that during the year 2018 the Criminal Assets Bureau complied with those procedures.

Review of Effectiveness

I confirm that the Criminal Assets Bureau has procedures in place to monitor the effectiveness of its risk management and control procedures. The Bureau's monitoring and review of the effectiveness of the system of internal

control was informed by the work of the internal ARC, the Internal Audit Unit of the Department of Justice and Equality and the Comptroller and Auditor General. The ARC, within the Criminal Assets Bureau, is responsible for the development and maintenance of the internal control framework.

During 2018 the Internal Audit Unit of the Department of Justice and Equality conducted an audit at the Criminal Assets Bureau to provide assurance to the Audit Committee of Vote 24(Justice).

Internal Control Issues

No weaknesses in internal control were identified in relation to 2018 that require disclosure in the Financial Statements.

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Patrick Clavin
Chief Bureau Officer
May 2019

Appendix **B**
Statement of Internal Controls

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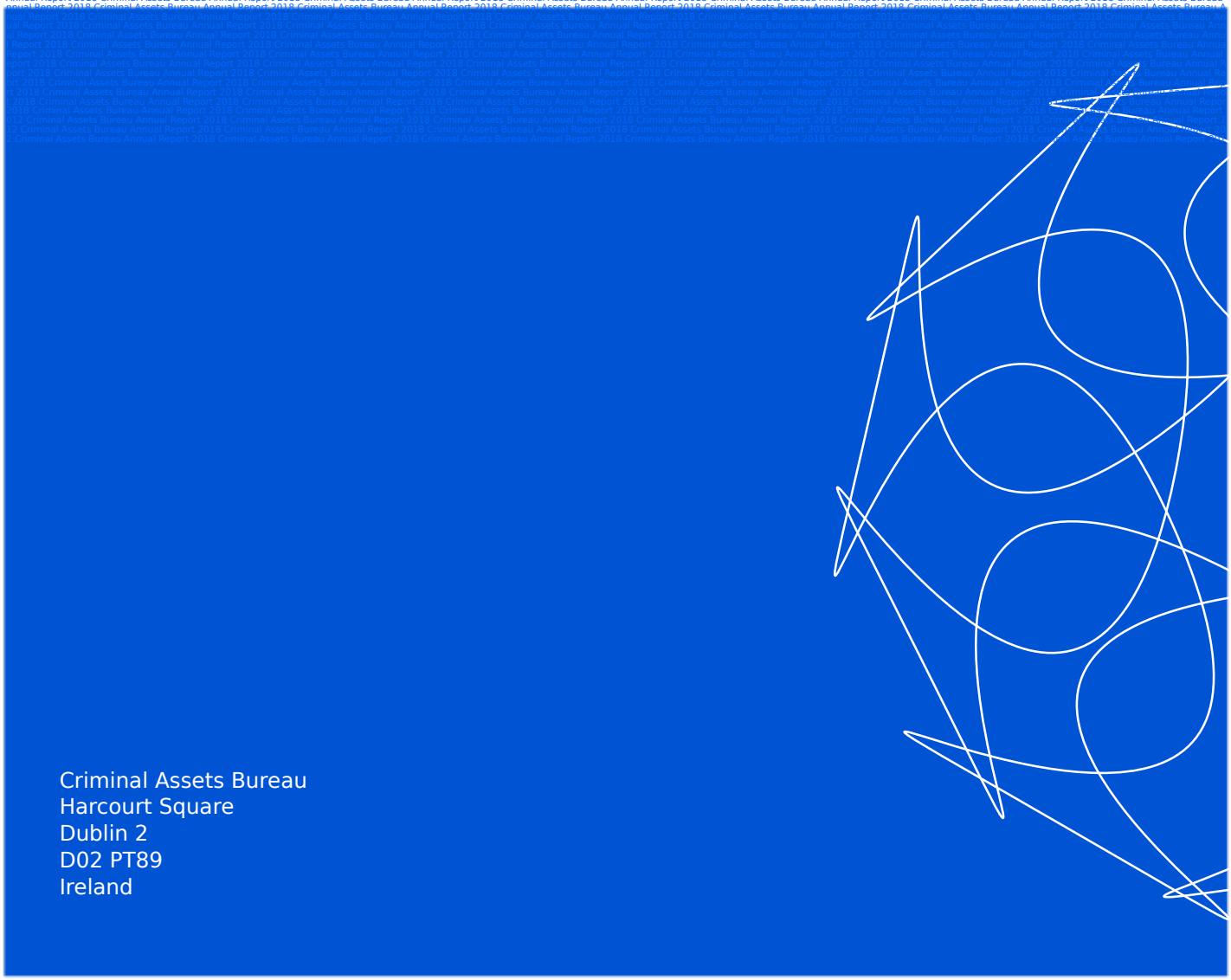
Notes



Criminal Assets Bureau
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