



**THE COURT OF APPEAL**

**Neutral Citation Number: [2020] IECA 61**

**Appeal No.: 2014/1033**

**2014/1240**

**Baker J.  
Costello J.  
Donnelly J.**

**IN THE MATTER OF THE PROCEEDS OF CRIME ACT 1996 AND 2005**

**BETWEEN/**

**CRIMINAL ASSETS BUREAU**

**APPLICANT/  
RESPONDENT**

**- AND -  
DEAN RUSSELL**

**RESPONDENT/  
APPELLANT**

**JUDGMENT of Ms Justice Baker delivered on the 9th day of March, 2020**

1. These are Mr Russell's appeals of two orders made by Birmingham J., as he then was, in the High Court, pursuant to the provisions of the Proceeds of Crime Acts 1996 to 2005 ("the Act"). Mr Russell has represented himself in some but not all of the High Court applications made by the Criminal Assets Bureau ("CAB") and at the hearing of the appeals. The orders of Birmingham J. concern the determination that certain assets in the legal title of Mr Russell were the proceeds of crime and by which he appointed receivers and managers over various real and personal property of Mr Russell.
2. The first order under appeal (appeal no. 2014/1033) is the order of 12 November 2013 made pursuant to s. 7 of the Act by which a receiver was appointed over an apartment premises at Lymewood Mews, Northwood, Santry, Dublin 9, being the lands comprised in Folio 183043F, County Dublin ("the Lymewood property"). The powers vested in the receiver by that order will be more fully described below.
3. The second order under appeal (appeal no. 2014/1240) is the order of 9 April 2014, also made under s. 7 of the Act, which appointed a receiver over a premises at Riverside Park, Clonsaugh, Dublin 17, being the lands comprised in Folio 8355L, County Dublin ("the Clonsaugh property"), and by which the receiver was directed to take possession and sell or otherwise dispose of same without delay so as to obtain the best price reasonably available.
4. The premises at Clonsaugh are the principal private residence of Mr Russell. The notice of appeal filed on his behalf by his then solicitor pleads that the trial judge erred in law or in fact by determining that it was necessary and appropriate to appoint the receiver and in the manner in which the hearing was conducted.
5. It is fair to say that the two orders, while they were made under the same statutory provision, raise different grounds of appeal and different areas of legal difficulty.

### **The proceeds of crime: the legislative scheme**

6. Section 1(1) of the Act defines the proceeds of crime as:

“[...] any property obtained or received at any time (whether before or after the passing of this Act) by or as a result of or in connection with the commission of an offence”.

It is accepted that the residential property at Clonshaugh is “property” for the purposes of the Act, defined in s. 1(1) as including:

“(a) money and all other property, real or personal, heritable or moveable,

(b) choses in action and other intangible or incorporeal property, and (c) property situated outside the State where —

(i) the respondent is domiciled, resident or present in the State, and

(ii) all or any part of the criminal conduct concerned occurs therein,

and references to property shall be construed as including references to any interest in property”.

7. Section 2(1) of the Act provides as follows:

“Where it is shown to the satisfaction of the Court on application to it ex parte in that behalf by a member, an authorised officer or the Criminal Assets Bureau—

(a) that a person is in possession or control of—

(i) specified property and that the property constitutes, directly or indirectly, proceeds of crime, or

(ii) specified property that was acquired, in whole or in part, with or in connection with property that, directly or indirectly, constitutes proceeds of crime,

and

(b) that the value of the property or, as the case may be, the total value of the property referred to in both subparagraphs (i) and (ii), of paragraph (a) is not less than €13,000,

the Court may make an order (“an interim order”) prohibiting the person or any other specified person or any other person having notice of the order from disposing of or otherwise dealing with the whole or, if appropriate, a specified part of the property or diminishing its value during the period of 21 days from the date of the making of the order.”

8. Section 2(5) of the Act limits the temporal scope of the s. 2 order and provides for the making of an interlocutory order thereafter within twenty-one days, in the absence of which the interim order elapses:

“Subject to subsections (3) and (4), an interim order shall continue in force until the expiration of the period of 21 days from the date of its making and shall then

lapse unless an application for the making of an interlocutory order in respect of any of the property concerned is brought during that period and, if such an application is brought, the interim order shall lapse upon—

- (a) the determination of the application,
  - (b) the expiration of the ordinary time for bringing an appeal from the determination,
  - (c) if such an appeal is brought, the determination or abandonment of it or of any further appeal or the expiration of the ordinary time for bringing any further appeal,
- whichever is the latest.”

9. Section 3 of the Act empowers the court to make an interlocutory order provided the court is satisfied, *inter alia*, that a person is in possession or control of specified property which “constitutes, directly or indirectly, proceeds of crime”.
10. The Act is framed in its plain language to put the burden of proof on the applicant to establish that property in respect of which an order is sought is the proceeds of crime and thereafter shifts the burden of the respondent to prove on evidence that the property does not constitute the proceeds of crime or was not acquired in whole or in part with or in connection with property that itself constitutes the proceeds of crime.
11. The sequence of the evidence was considered by McCracken J. in *F. J. McK. v. G. W. D.* [2004] IESC 31, [2004] 2 IR 470 at para. 70:

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

- (1) he should firstly consider the position under s. 8. He should consider the evidence given by the member or authorised officer of his belief and at the same time consider any other evidence, such as that of the two police officers in the present case, which might point to reasonable grounds for that belief;
- (2) if he is satisfied that there are reasonable grounds for the belief, he should then make a specific finding that the belief of the member or authorised 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. If the steps are followed in that order, there should be little risk of the type of confusion which arose in the present case.”

12. It is established that the standard of proof for both applicant and respondent is the civil standard: *Criminal Assets Bureau v. Kelly* [2012] IESC 64, per McMenamin J., at para 34.
13. The court may not make an order if it is satisfied that there would be “serious risk of injustice”.

#### **Background facts**

14. An order under s. 2 of the Act was made on the ex parte application of CAB on 14 April 2010 by Feeney J. and that order was varied subsequently in respect of a motor vehicle but not in any manner material to the matters herein under appeal.
15. The order under s. 2(1) of the Act (“the s. 2 order”) was an interim order by which, *inter alia*, Mr Russell was prohibited from disposing of or otherwise dealing with property, which declared the identified real properties therein described in the first schedule including the Clonshaugh property, the Lymewood property, and an apartment in Malaga, Spain (“the Spanish property”) to be the proceeds of crime. No application was made thereafter during the term of the interim order for any variation or discharge of the order as permitted by s. 2(3).
16. In that context, a motion seeking interlocutory orders, and the appointment of a receiver pursuant to ss. 3 and 7 of the Act was made returnable for 26 April 2010. In the event it did not come to be heard and determined until November 2013.
17. The application was adjourned from time to time and Mr Russell was admitted to the *ad hoc* legal aid scheme in March 2011. Ferry solicitors acted for Mr Russell until an order was made on 14 January 2013 giving the firm liberty to come off record. New solicitors were appointed by Mr Russell, but his legal aid was not renewed, and Feeney J. made a formal order refusing legal aid on 9 April 2013. That refusal was not appealed.
18. The motions pursuant to ss. 3 and 7 of the Act were heard by Feeney J on 9 and 10 July 2013 but Feeney J. sadly died before judgment had been delivered. In those circumstances the matters were further listed for re-hearing on 12 November 2013 and allocated three days of court time, there being no consent from Mr Russell to deal with the matters on the basis of the transcripts of the earlier hearings.
19. The first order made by Birmingham J. on 12 November 2013, the subject of the first appeal, was in the form of an interlocutory order in similar terms to the interim order of Feeney J. and declared the identified real properties therein described in the first schedule including the Clonshaugh property, the Lymewood property, and the Spanish property to be the proceeds of crime. That order appointed a receiver over the Lymewood property only.

20. The order appealed in the second appeal, the second order made by Birmingham J. on 9 April 2014, appointed a receiver over the Clonshaugh property.
21. As is apparent from this chronology, almost four years passed between the ex parte interim order made by Feeney J. on 14 April 2010 and the s. 3 and s. 7 orders in respect of the Clonshaugh property made by Birmingham J. in November 2013 and April 2014.
22. Mr Russell did not attend court on 12 November 2013 and was not represented at the hearing. Birmingham J. proceeded to hear the case and gave an *ex tempore* judgment after rising to consider the evidence, and thereafter made the orders pursuant to ss. 3 and 7 of the Act as described above. On the application of CAB, a receiver was not appointed over the principal private residence of Mr Russell and this application was adjourned to permit Mr Russell to make representations on that application.
23. Mr Russell was represented by counsel at the adjourned hearing on 9 April 2014 when the second order of Birmingham J. was made appointing a receiver over the principal private residence of Mr Russell.

**The appeal of the first order**

24. The grounds of appeal of the first order are broadly and briefly stated and assert the following:

- (a) that the respondent was not present at the hearing and was not legally represented;
- (b) that the assets the subject of the order were not the proceeds of crime;
- (c) that the court should not have appointed a receiver over the assets.

The notice of appeal also reserved the right to raise further grounds of appeal when Mr Russell obtained legal advice.

**The appeal of the second order**

25. The grounds of appeal of the second order may be summarised as follows:

- (a) that the finding that the premises at Clonshaugh was the proceeds of crime was wrong in fact and law;
- (b) that the appointment of a receiver over his principal private residence was not appropriate.

**Arguments on Appeal**

26. Mr Russell presented a short and coherent written submission in respect of both appeals and focused exclusively on the premises at Clonshaugh, as the Lymewood property was repossessed by a mortgage lender some years ago and the Spanish property is or was likely to similarly be repossessed at the time the written submissions were lodged.
27. The focus of the judgment therefore is the assertion by Mr Russell that the order in respect of his principal private residence ought not to have been made.

**The first ground of appeal: Mr Russell was not present**

28. It is apparent from the first order that it was made in the absence of Mr Russell and when he was not legally represented. He argues in a broad way that this was unfair and denied him the opportunity to contest what he describes as the "scandalous and unfair accusations" made against him and to challenge the assertion on the part of CAB that his ownership of the premises resulted from the proceeds of crime. The hearing of the appeal was somewhat unusual in that Mr Russell sought to make various factual assertions which were not before the trial court. He argues that he had always attended at the hearings before Feeney J. and that his absence at the first hearing before Birmingham J. was out of character to such an extent that the trial judge ought to have adjourned the hearing.
29. In his submissions, Mr Russell also makes a number of factual assertions including that he did not receive the letters advising him of the hearing date on 12 November 2013 sent by ordinary post to him following the making of an order for substituted service that permitted this. He says that he did not receive the letters and asked rhetorically why he would have opted not to attend a hearing if he was aware of its scheduled date when he had always engaged with court hearings.
30. We had available to us the transcript of the hearing before Birmingham J. on 12 November 2013 and from this it is apparent that Birmingham J. made a finding of fact that Mr Russell was on notice of the date of hearing (p. 10 lines 21 *et seq.* of the transcript). An affidavit of service avers to the posting of a letter by ordinary prepaid post on 17 October 2013 to Mr Russell at his address and identified the date and time of the hearing and that the matter would be heard. There was also in evidence a letter of 21 October 2013 posted to Mr Russell the following day enclosing copies of transcripts of the previous hearings which also identified the date of hearing and the body of the letter suggested that Mr Russell could make application to Birmingham J. on Monday, 4 November 2013 if he wished.
31. The date of the hearing and the fact that the matters were listed for hearing for three days were highlighted in bold in both letters.
32. Perhaps more importantly, there was evidence of a phone conversation between the deponent of the affidavit and Mr Russell in which it is said Mr Russell confirmed receipt of the letter of 21 October and asked if the matter was listed for mention or for hearing on 12 November and that he was told it would be a hearing unless he agreed that the transcript of the hearing before Feeney J. would form the factual backdrop to the application before Birmingham J.
33. Birmingham J. made a finding of fact that Mr. Russell was on notice of the proceedings and, as he put it, "for whatever reason has decided not to be present". It was in that context and following that finding of fact that Birmingham J. proceeded to hear and determine the application.
34. This finding of fact has certain consequences for an appellate court. It is well established that the jurisdiction of an appellate court does not extend to re-hearing. The principles

explained in *Hay v. O'Grady* [1992] 1 IR 210 have been considered and applied in many cases including in recent judgments of the Court of Appeal such as *Emerald Isle Assurances and Investments Ltd v. Dorgan* [2016] IECA 12 and *Lynch v. Cooney* [2016] IECA 1. The general principle unequivocally established in the authorities is that an appellate court will not interfere with the findings of fact made by a trial judge when these were arrived at following an engagement with the facts and where the appellate court accepts the findings of fact are supported by credible evidence. As Ryan P. stated in *Emerald Isle Assurances v. Dorgan*, at para. 31, the first principle from *Hay v. O'Grady* is that an appellate court is bound by findings of fact which are so supported:

“however voluminous and apparently weighty the testimony against them”.

Further, he stated the other principle that:

“the appeal court should be slow to substitute its own different inference”.

35. While Mr Russell did not articulate this argument, it is clear also from the authorities that an appellate court may in certain circumstances be in as good a position as a trial court to draw inferences and to make findings of fact when the findings were based on wholly affidavit evidence.
36. In *Ryanair Ltd v. Billigfluege.de GmbH* [2015] IESC 11, at para. 4, Charleton J. expressed the view that the approach of an appellate court to findings of fact where the evidence was wholly on affidavit could not depend on the principles underlying *Hay v. O'Grady*. He did however conclude at para. 5 that where an appeal is against findings of fact drawn from affidavit evidence, the burden of establishing an error in the findings of the trial judge lay on the appellant. The burden is “a heavy burden”, the term Charleton J. used in *McDonagh v. Sunday Newspapers Ltd* [2017] IESC 46, [2018] 2 IR 1, where he further explained the point. For the purpose of the present appeal this means that the appeal requires some analysis of the affidavit evidence before Birmingham J. and an assessment of whether the affidavit evidence supported his decision, or whether, again to use the language of Charleton J. in *Ryanair Ltd v. Billigfluege.de GmbH*, at para. 5, the decision is “untenable”.

#### **The evidence of service**

37. Mr Russell’s written submissions on the appeal contained statements that he did not receive the letters for which the affidavit of Mr Fagan provided support. Mr Russell did not file an affidavit, nor did he swear on oath that he did not receive the letters or that they did not come to his attention. The affidavits he has sworn in these proceedings, including those sworn after the date of the hearing before Birmingham J., show unequivocally that he resides at the premises at Clonshaugh. Mr Russell has sworn further affidavits to deal with the merits of the application but has nowhere positively sworn not to have received the documents.
38. The evidence of service was an affidavit of service of Tony Fagan, sworn on 25 October 2013, which deposes to the posting of a letter dated 17 October 2013 by way of ordinary

prepaid post to Mr Russell at his address at Clonsaugh. The letter of 17 October was exhibited unsigned and certificate of posting was not exhibited. The letter noted that Mr Russell had not appeared in Court on 14 October 2013 nor had he been represented.

39. Mr. Russell was invited to agree that the transcripts of the hearing before the late Feeney J. might form the basis of a further hearing at which the Court would hear submissions. The letter contained a consent to Mr Russell taking up copies of the transcripts of the 14 October hearing, identified the stenographer service, and furnished an address and phone number. Mr Russell was invited to consider that option and the last paragraph of the letter pointed out that in default of agreement the matter would be listed for full hearing on Tuesday 12, Wednesday 13, and Thursday 14 November 2013, one month after the letter. The letter also said that the case was case-managed at a special hearing on 14 October 2013.
40. The affidavit then refers to a phone conversation on 21 October 2013 between Mr Fagan and the stenographer in which consent to the making of copies of the transcripts available to Mr Russell was given. That then led to a second letter to Mr Russell, on 21 October 2013, enclosing the transcripts and asking for Mr Russell's consent to the transcripts forming the basis of a further hearing. The letter of 21 October and certificate of posting were exhibited showing posting on 22 October 2013.
41. The letter of the 17 October 2013 was mentioned and the dates for hearing again set out. Mr Russell was invited to mention the matter before Birmingham J. on 4 November 2013 should he so wish.
42. A critical fact to which Mr Fagan deposed was that on the following day, 23 October 2013, he received a phone call from Mr Russell who informed him that he was ringing about his recent letters, and in which he confirmed that he had received the letter of 21 October 2013 with the transcripts. He asked if the matter was adjourned for mention only to 12 November and Mr Fagan's evidence was that he informed him that it was listed for hearing on that day and the two following days. A conversation followed concerning the approach to the trial and whether the transcripts might form the factual basis on which the parties would then make submissions in order to avoid duplication in the evidence. Mr Fagan finishes his affidavit by saying that, at the end of the conversation, he told Mr Russell that if the transcripts were not agreed and that if it was not agreed that the matter would proceed in the manner suggested, it would proceed to a full re-hearing on the three days fixed by Birmingham J.
43. The evidence consisted therefore of the posting of two letters which identified the hearing date and more critically a telephone conversation in which Mr Russell confirmed that he had received the letters. Even were Mr Russell to now say, which he does not, that the account by Mr Fagan in his affidavit of the telephone conversation is either incorrect or incomplete, the evidence unequivocally points to him having received the letter enclosing the transcripts and in which the trial dates were highlighted in bold print as was the fact that the case would proceed to a "full hearing".



44. The evidence is compelling, and no contrary evidence is provided by Mr Russell. I am not satisfied therefore that Mr Russell has established any basis on which it could be said that the decision made by Birmingham J. that service on him was good, is not borne out by the facts or is untenable.
45. The trial judge had ample evidence before him on which to come to his decision, and all of the evidence regarding service supported only one conclusion, namely, that Mr Russell did know about the hearing and had been informed well advanced of the days set aside for a full hearing of the application.
46. Birmingham J. was therefore entitled to proceed to hear the matter in the absence of Mr Russell.
47. Another fact worthy of comment is that counsel on behalf of CAB had urged the trial judge to exclude from consideration the contents of the several affidavits sworn by Mr Russell in the proceedings, having regard to the fact that Mr Russell had not attended at the hearing notwithstanding that a notice to cross-examine Mr Russell on his affidavits had been served. That notice was expressly mentioned in the letters advising him of the hearing. The trial judge was not prepared to approach the matter on the basis suggested by counsel, but rather admitted the affidavits, although he expressed the view that the fact that Mr Russell did not make himself available for cross-examination on the affidavits "serve to undermine the weight and authority of the affidavits".
48. I consider that the trial judge took a fair approach to the affidavit evidence. He could have, but did not, refuse to admit the evidence of Mr Russell concerning the source of funds for the acquisition of the properties and the other matters set out in his various affidavits.
49. For this reason, I would reject Mr Russell's argument that the hearing before Birmingham J. on 12 November 2013 was unfair and denied him basic fairness rights and the right to be heard.
50. The order made by Birmingham J. on 12 November 2013 appointed a receiver over the Lymewood property only and adjourned to the 20 December 2013 the balance of the application. In the event, the balance of the hearing resumed on 9 April 2014, at which point Mr Russell was represented by counsel. On that day the court dealt with the appointment of a receiver over the premises in which Mr Russell resides at Clonshaugh and it is fair to say that it is the order in respect of that property that most concerns Mr Russell. He argues that, in no circumstances would he have exposed his children nor himself to the loss of the family home.

**The second ground of appeal: the premises was not the proceeds of crime**

51. Because of the manner in which this appeal comes before this Court, having determined that the trial judge was correct to proceed with the hearing of the s. 3 application in the absence of Mr Russell, the question which next falls for consideration is whether the trial

judge had sufficient evidence before him to come to the conclusion that the three properties identified in the s. 3 order were the proceeds of crime.

52. Mr Russell's oral submissions on the appeal set out a number of factual matters which he argues point to the error of the finding made by Birmingham J. that this property was the proceeds of crime. He accepts that he may have been in default of his Revenue obligations, but he says that he worked all his life, that he is not a "major criminal" and that the house was bought with the proceeds of his own labour.
53. The conclusion of the trial judge on the facts at p. 15, lines 10 et seq. of the transcript bears repeating:

"I am quite satisfied that Mr. Russell has had access to very substantial funds, funds which were way in excess of income declared to the Revenue Commissioners and, perhaps more significantly which could not be explained by his work as a taxi driver, even if augmented by furniture sales or sales of vehicles and perhaps the occasional horse."

54. That conclusion was reached following a full analysis of the factual matrix, some elements of which I have identified above. I propose to now set this out in more detail

#### **The evidence**

55. The trial judge heard evidence from an authorised officer of his belief that the property constituted the proceeds of crime within the meaning of the Act and also evidence from a Detective Chief Superintendent.
56. He accepted that Mr Russell did have some income from legitimate sources including income from driving a taxi, furniture sales, and window cleaning, and that he had received social welfare payments. The evidence was that 61 percent of the funds lodged to Mr Russell's various accounts identified by CAB came from unknown sources. The amount in question was €356,326.
57. Evidence was adduced of the purchase of the Clonshaugh property in 1995 for the sum of €53,000, funded by a deposit of €8,000 and a mortgage of €45,000. Mr Russell offered a number of explanations for how he had funded the deposit of €8,000, first saying it came from savings and then that €5,000 thereof had been a gift, although no evidence on affidavit was furnished from the donor of that gift. €60,940 was paid by way of mortgage instalments of which only €2,442 could be traced to what CAB described as a "legitimate source". The evidence was that the mortgage application overstated the income of Mr Russell, and that the application for a mortgage was signed by an accountant who had separately provided different and lower figures for tax purposes at the same time.
58. Similar evidence was adduced in relation to the Lymewood property, the Spanish property, and another property not relevant to the proceedings. A large proportion of the repayments were from unexplained sources or could not be traced to a legitimate source.

59. Other evidence included payments to Mr Russell's credit card in cash in the amount of €70,686 from an unidentified source, that he was apprehended with large amounts of cash on separate occasions, £13,500 in 1998 and €10,000 in 2009. No credible documentation was furnished to the court in respect of the window cleaning, taxi or furniture businesses of Mr Russell.
60. The evidence showed that lodgements from unknown sources amounted to 61% of the lodgements to the identified accounts
61. In addition, there was an unexplained purchase of two horses and maintenance payments to his former partner at a level which almost equated to his declared income at the time, and on a calculation would not have afforded sufficient resources to fund the purchases.
62. There was available to the trial court three reports of an accountant instructed by Mr Russell and the trial judge noted in particular that whilst the accountant expressed the view that the lodgements to the relevant accounts were explained by Mr Russell's income, the trial judge noted with regard to the final report which contained a summary of the evidence and submissions that it was "disappointing that it was created without any supporting documentation whatever, and according to the accountant is based on what Mr Russell told him" (page 11 transcript 12 November 2013).
63. The trial judge was entitled in the circumstances to draw the inference that the evidence did not support the broad proposition that the source of funds was Mr Russell's legitimate business affairs., and he was entitled to prefer the evidence of CAB.
64. The trial judge then went on to consider the evidence of the convictions and associations that might lead to a view that the unexplained funds were the proceeds of crime and he made the following finding of fact, at p. 18, lines 1 *et seq.* of the transcript:

"[T]he evidence before the Court has established that Mr. Russell had access to very significant level of funds, fund levels that were quite inconsistent with any legitimate activity with which Mr. Russell has had an involvement."

**Conclusion on the approach to the evidence**

65. I am satisfied that the trial judge approached the matter by adopting the process identified by the Supreme Court in *F. J. McK. v. G. W. D.* and that having come to the view that the evidence pointed to a *prima facie* case under s. 3, went on to make adverse findings concerning the credibility of the applicant and that Mr Russell had not adduced evidence to displace that *prima facie* case.
66. I consider that the approach of the trial judge was correct as a matter of law, and that his findings on the affidavit evidence were fully borne out by that evidence, that his conclusions were fully reasoned and arose from a full engagement with those facts, and that Mr Russell has not persuaded me that those conclusions were wrong or untenable in fact, or that the inferences drawn by the trial judge were not supported by that evidence.

67. The evidence supported the finding of the trial judge that the premises were the proceeds of crime within the meaning of the legislation, and the inferences he drew from the absence of corroborative evidence from persons said to have funded or part funded whether by gift or otherwise the purchase of the real property.
68. Further, and in the light of the fact that the trial was heard on affidavit, having considered that evidence I have come to the conclusion that on the balance of probabilities the premises were the proceeds of crime and Mr Russell has not persuaded me that his income and resources were sufficient to support the purchase, to explain his lifestyle or the expenditure vouched and identified in the affidavit evidence of the CAB.
69. I would therefore dismiss this ground of appeal.

**The third ground of appeal: the appointment of receiver was not justified**

70. At the time of the second hearing before Birmingham J. the amount due on the secured loan on the premises was €39,754.94 of which €30,136.49 comprised arrears of mortgage repayments. There was for that reason considerable equity in the premises having regard to the uncontested evidence of its market value.
71. Mr. Russell's own evidence was that in October 2013 he entered into an agreement with his mortgage lender which involved a repayment plan which he has met. The exhibited correspondence shows that the agreement with the mortgage lender was a temporary alternative repayment arrangement to help him to deal with the mortgage arrears.
72. Further, the evidence was that the premises had not been since November 2005 covered by any form of buildings insurance to cover damage. The uncontested evidence was that once an order is made under s. 3 an insurance company is "most likely to invalidate insurance".
73. An affidavit from an employee of Aviva Insurance was available at the hearing in which he stated that "from a general point of view" any claim made by a person who has not disclosed criminal convictions might lead to a refusal of indemnity, although this would depend on the nature of the offences.
74. At the time of the second hearing however, a certificate of insurance was adduced in evidence and Mr Russell argues that the evidence before the trial judge was to that extent based on conjecture regarding a possible approach by the insurance company in the future. The trial judge permitted the cross-examination of Mr Russell on that aspect of the evidence.
75. At the time of the hearing before Birmingham J. the appeal of Mr Russell against the order made under s. 3 of the Act had not yet been heard by the Supreme Court which did in the event later grant a stay. It was argued by counsel for Mr Russell that the interest of justice therefore required that a receiver not be appointed at that juncture, and that justice require that he be left in his residential property where he then resided with at least one dependent child fulltime and where another child visits him on a regular basis, and further argued having regard to the relatively small amount due on the loan secured

on the property, there was no risk of financial loss to CAB from an adjournment. Counsel also argued that the court should accept the undertaking given under oath by Mr Russell that he would continue to pay the mortgage and meet the insurance premia as they fell due and any other conditions the court might wish to impose including any condition that he continue to maintain the property.

76. Counsel argued that the state of the evidence before the High Court was that an insurance policy was in place and that any entitlement on the part of the insurers to repudiate that policy could not and did not fall to be considered at that juncture. A compromise suggestion was made by counsel that an order under s. 7 of the Act be made in respect of the property which would allow the receiver to obtain insurance, but that Mr Russell would be permitted to continue to reside in the premises, subject to his undertaking to pay the insurance premia and mortgage instalments.
77. The decision of the trial judge was to appoint a receiver and he did so because he considered that the primary purpose of the section was to preserve the property and that a central question that arose for his determination was the question of effective insurance.
78. Birmingham J. considered certain equitable principles and said that a number of factors arose for consideration including that the premises was the principal private residence of Mr Russell, that an appeal against the s. 3 order had been lodged in the Supreme Court, and that that order had been made in the absence of Mr Russell. He expressed "significant and major concerns about the effectiveness of the insurance policy" in the context of the fact that two previous insurance policies had been repudiated and that Mr Russell's own evidence suggested that he had not disclosed his previous convictions to the insurance company which might have been a material fact entitling the insurer to repudiate.
79. The trial judge was not satisfied that Mr Russell had progressed his appeal of the s. 3 order with any obvious expedition. In the event, that appeal came on for hearing before this Court and came to be listed with the appeal of the order under s. 7. Those matters therefore no longer require further consideration.
80. Birmingham J., in order to do justice between the parties and to ensure that Mr Russell would not be denied the benefit of any appeal to the Supreme Court, put a stay on the appointment of the receiver to 12 May to permit Mr Russell to make an application for a stay on the s. 3 order. Later in exchanges with counsel, the time was extended to 19 May and the trial judge expressed a view that this was sufficient time to enable Mr Russell "to get his house in order". The Supreme Court did give a stay on the s. 3 order.

#### **Discussion**

81. It seems to me that the question to be considered at this juncture in the light of the relatively narrow focus of the appeal of Mr Russell is whether the trial judge correctly engaged the relevant discretionary factors before an order for the appointment of a receiver under s. 7 of the Act could be made. In *F. McK. v. T. H.* [2006] IESC 63, [2007]

4 IR 186, at para. 36, Hardiman J. described the consideration as one to be had “on equitable principles”.

82. The sequence to be engaged by a court in coming to a decision to appoint a receiver was correctly described by Feeney J. in *Murphy v. J. G.* [2008] IEHC 33, at para. 13, where he pointed out that the s. 7 order followed the earlier making of a determination that the property constitutes directly or indirectly the proceeds of a crime. That is the scheme of the Act. He set out in all seven factors to be considered prior to making an order under the section at pp. 13 *et seq.* of his judgment:

“Firstly, it is the case that a receiver under Section 7 can only be appointed in circumstances where an Interim or Interlocutory Order under the Proceeds of Crime Act has been made. Therefore, at the time that the Court comes to consider the appointment of a receiver, there will be in existence an Interim or Interlocutory Order whereby the High Court will have come to an earlier conclusion that the specified property constitutes directly or indirectly the proceeds of crime. That earlier conclusion is a necessary prerequisite to the application of Section 7 and is the context within which the appointment of a receiver must be considered.

Secondly, it is clear that an application to appoint a receiver under Section 7 requires to be considered on equitable principles.

Thirdly, the purpose of a receivership is to preserve the property over which the receiver is appointed for the benefit of the party ultimately found to be entitled to it. The appointment of a receiver is not a penalty but rather a mechanism to endeavour to ensure that property is preserved.

Fourthly, the use of the word 'preservation' is not the use of a precise term but covers a number of different and varying circumstances but unquestionably covers the necessity to ensure that property is properly and validly insured.

Fifthly, in considering the application of equitable principles, the issue of delay, if any, inconvenience and occupation by a family or a family member are factors to take into account.

Sixthly, a further factor to take into account in applying the equitable principles is the existence of pending proceedings seeking to discharge or vary a section 3 Order and the timing and circumstances of such application.

Seventhly, the handing up of possession or use of lands and/or houses after the making of a Section 3 Order or when a Section 4 Order is pending is relevant.

Finally, a factor to take into account is consideration as to whether the appointment of a receiver is appropriate or inappropriate.”

83. I respectfully adopt those factors and it seems to me that Feeney J. was correct to say that different and varying circumstances came to be considered but that “unquestionably”

the question whether the property was validly and properly insured was a factor. He also correctly in my view, pointed to the fact that the property might be occupied by a family or family members as another factor to be taken into account.

84. Hardiman J in *F. MCK. v. T. H.* at para. 38 stated that preservation of the property included a consideration of whether the property was properly and validly insured:

“Moreover, the purpose of a receivership is to preserve the property over which the receiver is appointed for the benefit of the party ultimately found to be entitled to it. A vital aspect of this preservation, in the case of a building, is to ensure that the premises are at all times properly and validly insured. In my view the evidence before the trial judge to the effect that the policy of insurance was likely to be or to become void, which was not contradicted, was quite sufficient in itself to justify the appointment of a receiver with power of sale.”

85. The existence of valid insurance is therefore a relevant and sometimes central factor in the discretionary exercise.
86. In the present case the key factor that influenced the trial judge was his view regarding what he described as the “insurance situation” and that Mr Russell had already had two insurance policies repudiated, and that his evidence was not convincing concerning what precisely he had disclosed to the insurance company in relation to the policy of insurance which he relied upon at the hearing. At its height the argument of Mr Russell is that the certificate of insurance produced at trial should have been taken at face value.
87. I am of the view that the trial judge adequately and fully considered the various factors which fell for consideration in the making of a s. 7 order. The trial judge did give due regard to the fact that the premises was a principal private residence and was occupied by Mr. Russell and, at least, one of his children on a full-time basis and another child or children on a regular but not full-time basis. He gave adequate consideration to the need to preserve the property ultimately for the benefit of the CAB process.
88. In a later case of *Criminal Assets Bureau v. O' Brien* [2010] IEHC 12 Feeney J. identified as a further factor the fact that a mortgage payment was not being made. I consider that the trial judge had adequate regard to the fact that temporary arrangement had been made with the mortgage lender which seemed at the time of the hearing to have been met by Mr Russell, albeit the arrangement was made very shortly before the hearing.
89. The relevant equitable principles were identified by the trial judge and are those identified in the case law. As in any decision involving discretionary or equitable principles, the trial judge must be afforded some margin of appreciation, but an appellate court may take a view that the trial judge failed to have regard or give due weight to some or all the factors.

90. I can find no such error in the present case. The factors were adequately weighed, and Mr Russell was given an opportunity to regularise his situation with the insurance company and to seek a stay on the orders pending this appeal.
91. I cannot omit to have regard to the fact that the orders made in this case are now almost six years old and that Mr Russell has had the benefit of continuing to reside in the premises since that time. A finding was made that the premises were the proceeds of crime. It cannot be said in the circumstances that he has been deprived of a right to reside in his home when the trial judge found his ownership to derive from the proceeds of crime. Notwithstanding that, he gave due regard to the accommodation interests of Mr Russell and gave him an opportunity to regularise the situation with his insurance company by whatever means was available to him. The five or six-week period has now become six years.
92. I see no basis on which the trial judge's determination of the s. 7 application could be set aside. His weighing of the discretionary factors was consistent with the approach suggested by the authorities and Mr Russell has not persuaded me that other factors might have been but were not engaged or that the manner by which the trial judge dealt with the application wrongly applied the principles and failed to have due regard to his interests.
93. For all of these reasons I would dismiss this appeal.