



# THE COURT OF APPEAL - UNAPPROVED

Court of Appeal Record Number: 2022/172

Neutral Citation Number: [2024] IECA 112

**Donnelly J.**

**Ní Raifeartaigh J.**

**Binchy J.**

**IN THE MATTER OF THE PROCEEDS OF CRIME ACTS 1996 TO 2016**

**BETWEEN/**

**CRIMINAL ASSETS BUREAU**

**APPLICANT/RESPONDENT**

**- AND -**

**ROUTEBACK MEDIA AB T/A LOCAL MART AND HARRY ZEMAN**

**RESPONDENTS/(HARRY ZEMAN, SOLE APPELLANT)**

**JUDGMENT of Mr. Justice Binchy delivered on the 10<sup>th</sup> day of May 2024**

**1.** This is an appeal from a judgment of the High Court (Stewart J.) of 23<sup>rd</sup> May 2022, and the order subsequently made by her consequent upon that judgment of 15<sup>th</sup> June 2022,

whereby, it was ordered, pursuant to s. 4(1) of the Proceeds of Crime Act, 1996 (the “1996 Act”) that monies held in the bank accounts particularised in Schedule 2 to the order in the sum of US\$657,710.60 (the “Monies”) together with any interest accruing thereon be transferred to the Minister for Public Expenditure and Reform. The Monies were previously the subject of an order made pursuant to s. 3(1) of the 1996 Act, made by Feeney J. on 20<sup>th</sup> January 2011, and have been held in a receivership account ever since. The first named respondent to the application, namely Routeback Media AB (“Routeback”) is a Swedish company, of which the second named respondent, Mr. Zeman is a director and shareholder. (For convenience, when referring hereafter to Mr. Zeman and Routeback jointly, I shall refer to them as the “Respondents”). Routeback claims ownership of the Monies, and both Routeback and Mr. Zeman maintain that the Monies are the source of legitimate business activity and are not the proceeds of crime, within the meaning of the 1996 Act, as contended by the applicant (“the Bureau”), the respondent to the appeal.

2. The appeal raises a question as to the extent to which the court, having already made a determination pursuant to s. 3(1) of the 1996 Act that specified property is the proceeds of crime (as defined in the 1996 Act) may be required to re-visit that determination in applications subsequently advanced under the 1996 Act pursuant to s. 3(3) and 4(1) of the 1996 Act. While it has been held by the Supreme Court that an order made under s. 3(1) of the 1996 Act is a “final order”, notwithstanding its description in the sub-section as an “interlocutory order”, it has also been emphasised that a party affected by such an order may, in applications subsequently advanced pursuant to s. 3(3) and s. 4(1) of the 1996 Act, seek to persuade the court that the property to which the order made under s. 3(1) relates is not the proceeds of crime. The scope of such an inquiry in those later applications is a central issue in these proceedings.

3. Before proceeding further, it is useful at this early stage to set out the provisions of the 1996 Act governing the applications that came before the Court below, i.e. sections 3(3), 4(1), 4(2) and 4(8), as well as s. 3(1) of the 1996 Act in material part:

*“3.(1) Where on application to it in that behalf by a member, an authorised officer or the Criminal Assets Bureau, it appears to the Court in evidence tendered by the applicant which may consist of or include evidence admissible by virtue of section 8-*

*(a) that a person is in possession or control of-*

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

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

...

*...The Court shall, subject to section 1(A), make an order (“an interlocutory order”) prohibiting the respondent or any other specified person or any other person having notice of the order from disposing of or otherwise dealing with the whole or, if appropriate, a specified part of the property or diminishing its value, unless, it is shown to the satisfaction of the Court, on evidence tendered by the respondent or any other person..... that that particular property does not constitute directly or indirectly, proceeds of crime and was not acquired, in whole or in part, with or in connection with property that, directly or indirectly, constitutes proceeds of crime...”*

*“3.(3) Where an interlocutory order [under s. 3(1)] is in force, the Court, on application to it in that behalf at any time by the respondent or any other person claiming ownership of any of the property concerned, may, if it is shown to the*

*satisfaction of the Court that the property or a specified part of it is property to which paragraph (1) of subsection (1) applies, or that the order causes any other injustice, discharge or, as may be appropriate, vary the order.*

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

*(2) Subject to subsections (6) and (8), the Court shall make a disposal order in relation to any property the subject of an application under subsection (1) unless it is shown to its satisfaction that that particular property does not constitute, directly or indirectly, proceeds of crime and was not acquired, in whole or in part, with or in connection with property that, directly or indirectly, constitutes proceeds of crime.*

...

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

### **Background**

4. The activities giving rise to these proceedings date back to 2002. This judgment is concerned only with an appeal brought by Mr. Zeman from the judgment of Stewart J. While Routeback had also filed an appeal, that appeal was struck out by Costello J. at a directions hearing of this Court on 7<sup>th</sup> October 2022 (owing to the failure of Routeback to appear by reason of lack of representation). While other orders made by Costello J. on the same date were the subject of an application for leave to appeal to the Supreme Court (which leave was

refused in a determination handed down on 26<sup>th</sup> May 2023) it does not appear from that determination that any appeal was brought by Routeback from the order dismissing its appeal. For clarity, from his point onwards, I will refer to Mr. Zeman and Routeback jointly as the Respondents, and I will refer to the respondent to this appeal as “the Bureau”.

5. Returning then to the factual background, on 19<sup>th</sup> August 2002, Routeback entered into an agreement entitled “Internet Payment Service Agreement” with a company then known as EuroConex Technologies Limited (hereafter “EuroConex”, but which subsequently changed its name to Elavon Merchant Services), whereby EuroConex agreed to provide Routeback with certain services relating to the processing of credit card payments in connection with an internet sales business which Routeback claimed to be launching at that time under the trade name of “Local Mart”. Specifically, that business involved the offering for sale to the world at large of email accounts at a price of US\$9.95 per account. There was some disagreement about whether or not the service was being offered on the basis of a one off payment for life, or an annual payment, but nothing turns on that issue. At the time of applying to EuroConex to open an account, Routeback projected an annual yearly sales value of €100,000 based on approximately 1000 transactions yearly. (This obviously would not equate with a transaction value of US\$9.95, and in its application form to EuroConex it was stated that the average transaction value would be US\$100, and not US\$9.95, but nothing turns on this discrepancy either).

6. While the parties entered into the agreement mentioned above (and other related agreements) in late August of 2002, the agreement did not become operational until 1<sup>st</sup> October 2002. Almost immediately upon it becoming operational, EuroConex became concerned when approximately 10,000 transactions submitted by Routeback were rejected by the card issuing banks for a variety of reasons, including that the card was stolen, that there were insufficient funds and that the account number was invalid, amongst other

reasons. However, since all of these transactions were immediately rejected by the banks, no funds were transferred.

7. Nonetheless, during the same period of just a few days, EuroConex received a further 80,000 individual transaction requests (approximately) having a value of US\$9.95 each, which transactions were not stopped or in any way queried, at least initially, by card issuing banks, although some 15,000 transactions were queried later. In view of the very large number of transactions occurring during such a short period, and the earlier rejection of 10,000 transactions by issuing banks, EuroConex placed a “stop” on any further transactions with Routeback. However, by this time the 80,000 transactions had been processed by the issuing banks, and the funds paid to EuroConex. It is these funds, less certain sums refunded by EuroConex, that eventually were the subject of an application brought by the Bureau under s. 3(1) of the 1996 Act.

8. EuroConex notified Routeback of its concerns and closed the Routeback account by email of 24<sup>th</sup> October 2002. In a reply email sent the same day, Mr. Zeman asked for more information and reasons for the termination of the agreement. EuroConex replied stating that they had received notification from an American bank that the transactions for the Routeback merchant number were all fraudulent. EuroConex said that it was awaiting the “charge backs” relating to these transactions. Two further emails were exchanged on 30<sup>th</sup> October and 31<sup>st</sup> October 2002, but it appears that these matters rested until Mr. Zeman sent an email on 7<sup>th</sup> May 2003 to EuroConex, stating that Routeback had not received any settlement of the sales made some seven months previously, and he inquired what was holding up settlement.

9. In the meantime, EuroConex had been contacted by three US banks challenging some 15,000 transactions of the 80,000 that had been processed. EuroConex refunded approximately US\$150,000 to two of those banks on what they described as a “good faith

settlement basis". Of these, some 6,913 chargebacks occurred as a result of card holders claiming that they had not authorised or initiated any transaction with Routeback.

**10.** EuroConex decide to conduct its own investigation into the validity of the remaining 65,000 transactions. Given the scale of the task involved in attempting to contact all 65,000 cardholders, or the card issuing bank for each, it decided to do this by randomly selecting 250 transactions, and contacting the banks responsible for issuing the credit cards that had been debited. Letters were sent to each bank, but according to EuroConex, the response rate was very poor, with only 42 replies received. It appears no complaints at all were received, a fact upon which Mr. Zeman places much reliance.

**11.** EuroConex reported its concerns to the Swedish police in or around April 2003. In 2004, a Detective Inspector Bertil Mauritz informed EuroConex that the investigation was continuing. He also informed EuroConex that Mr. Zeman was well known to the Swedish police as a drug dealer. This accusation Mr. Zeman strongly disputes, and he observes that the police records make it clear that his convictions related to personal drug use only.

**12.** In November 2006, EuroConex was informed by the Swedish police that their investigation into the matter had closed, the prosecutor there having informed the police that no action could be taken. Nonetheless, EuroConex remained concerned that the Monies may have been received as a result of an offence committed under s. 31 or s. 32 of the Criminal Justice Act, 1994, and it reported its suspicions in this regard to the Garda Bureau of Fraud and the Revenue Commissioners on 2<sup>nd</sup> February 2007.

**13.** On 5<sup>th</sup> March 2008, Routeback issued proceedings against EuroConex claiming ownership of the Monies (in fact it claimed the larger sum of US\$696,424.53, but the disparity is of no relevance for present purposes).

14. Following an investigation, the Bureau, on 28<sup>th</sup> January 2009, issued a motion seeking reliefs under ss. 2 and 3 of the 1996 Act. In the first instance, the Bureau sought an interim order under s. 2 of the 1996 Act, prohibiting the Respondents and any other person having notice of the order from disposing or otherwise dealing with the Monies. That order was granted on 28<sup>th</sup> January 2009. The application for an interlocutory order under s. 3 of the 1996 Act came on for hearing before Feeney J. on 19<sup>th</sup> January 2011.

### **The s. 3 Application**

15. The application for orders under ss. 2 and 3 of the 1996 Act were grounded upon the affidavits of Detective Chief Superintendent John O'Mahoney, then Chief Bureau Officer of the Bureau, Detective Garda Paul Fleming, then an officer of the Bureau and an anonymous Bureau analyst, all dated 28<sup>th</sup> January 2009. Detective Chief Superintendent O'Mahoney summarised the main grounds for the application as follows:

- The very large number of transactions submitted by the Respondents to EuroConex Limited over the course of just a few days, which grossly exceeded the number of transactions originally predicted by the Respondents.
- The conclusion of the Bureau analyst as deposed to in his affidavit that the Respondents were never actually in a position to supply the services which they were purporting to sell.
- The fact that almost immediately after the Respondents submitted the transactions for processing, there were approximately 15,000 transaction challenges brought by card issuing banks and by credit card holders, in addition to the very large number of transactions (10,000) which could not be completed by EuroConex.



- The failure by the Respondents to provide information or documentation to EuroConex to support the validity of the credit card transactions.
- The fact that the Respondents only commenced proceedings against EuroConex seeking payment of the Monies from EuroConex after the Swedish authorities closed their investigation, which was almost six years after EuroConex had initially frozen the Monies.
- Information received from the Swedish police authorities that Mr. Zeman is known to be a person with ties to organised crime and that he has convictions in that country for drug dealing.
- Further information received from Swedish police that, in 2005, Mr. Zeman's brother was found to have been in possession of electronic equipment used to create fraudulent credit card numbers and that he had fled Sweden after this discovery.
- That there is no evidence at all that the email service offered by Routeback (known as "email-4-life") ever actually existed in any form other than a web page that led nowhere and provided no mechanism for the actual sale of a service such as could lead the Respondents to submit any credit card transactions for processing by EuroConex.

**16.** An appearance was entered to the proceedings by Arthur Cox Solicitors on behalf of both of the Respondents on 13<sup>th</sup> March 2009.

**17.** Mr. Zeman, filed a detailed affidavit, sworn on 16<sup>th</sup> March 2009 in reply to the affidavits of the Bureau. In summary, Mr. Zeman denied all allegations made in the affidavits sworn on behalf of the Bureau. He placed much emphasis on the fact that out of a total of 79,445 transactions, 6,914 were disputed by card holders who were refunded the

amounts deducted from their accounts. He contended that since the remaining 72,531 transactions were not disputed, Routeback is entitled to the payments made by those cardholders.

**18.** Mr. Zeman denied the evidence of the Bureau analyst that Routeback would have been unable to provide the services it promised. He averred that EuroConex carried out extensive testing to make sure that the payment platform it operated known as “Clikpay” was successfully integrated into Routeback’s website. He averred that the correspondence with EuroConex clearly demonstrated that the website operated by Routeback (namely: [www.local-mart.info](http://www.local-mart.info)) did exist as a matter of fact and that EuroConex successfully tested the website to be certain that Routeback could accept credit card orders.

**19.** Furthermore, Mr. Zeman said, under its agreement with EuroConex, Routeback was not obliged to keep records for more than 12 months and it was not asked to produce any records of transactions until May 2004. For that reason, and also because the transactions were made entirely through EuroConex’s Clikpay platform, Routeback did not have any records of the transactions.

**20.** Mr. Zeman argued that it is normal for an average of 2% of credit card transactions to be rejected or charged back. He claimed that it would have been impossible to submit 80,000 fraudulent transactions over just a few days, as it would have taken 110 days, working non-stop, to input that amount of data. He denied any involvement in criminal activity, but acknowledged one conviction in respect of personal use of drugs.

**21.** Mr. Zeman denied any lack of cooperation with EuroConex and exhibited correspondence between Routeback and EuroConex whereby Routeback requested particulars of the disputed transactions on several occasions, but it was not provided by EuroConex until April 2007. This was despite numerous requests to be provided with this

information, from May 2003 onwards. Mr. Zeman averred that at all times Routeback was cooperative both with EuroConex, and with the Swedish Authorities, to whom EuroConex had reported the matter in 2004.

**22.** Mr. Zeman averred that the price offered for the service i.e. US\$9.95 was not, contrary to an assertion of the Bureau analyst, indicative of an internet fraud – it was in fact the market price for similar products that were being offered for sale at around the same time. Mr. Zeman denied that there was no mechanism for sales or that the service never existed, as averred by the Bureau analyst.

**23.** Further affidavits were exchanged between the parties between April and August 2009. However, the salient issues raised by the proceedings are those identified above, and it is unnecessary for present purposes to get into the details of the issues addressed in the subsequent affidavits any further, save only to mention two matters. Firstly, in an affidavit sworn by the Bureau analyst of 26<sup>th</sup> August 2009, he avers that one of the banks responsible for a large volume of the transactions that were challenged – namely Citibank – had, on 12<sup>th</sup> December 2001, made a complaint to Swedish police in relation to Routeback. It was complained that 113,363 charges of US\$9.95 had been fraudulently submitted by Routeback for processing through an internet payment provider called Worldpay. So far as the Bureau analyst was able to ascertain, that complaint also related to an “email for life” service offered by Routeback.

**24.** Secondly, on 15<sup>th</sup> December 2009, the Bureau put in evidence an affidavit from Detective Inspector Bertil Mauritz of the Swedish police. In this affidavit, D.I. Mauritz corroborates the evidence of the Bureau analyst as to the purported sale of email addresses in 2001, and provides further and more detailed information regarding that scheme, which bears remarkable similarities to the activities of Routeback the following year, which ultimately gave rise to these proceedings, with the main difference being that in 2002

EuroConex was engaged to provide the credit card transaction processing services in lieu of WorldPay. Between 1<sup>st</sup> and 3<sup>rd</sup> December 2001, 9,148 transactions were processed by Worldpay on behalf of Routeback. Each transaction was for US\$9.95. Routeback attempted to have Worldpay process another 104,215 transactions, but these were stopped by Worldpay Limited before they were processed.

25. The matter was reported to the Swedish authorities, and, as a result of his investigations, D.I. Mauritz concluded that the primary person behind Routeback at the time was Kristian Zeman, a brother of Harry Zeman. Another brother, Daniel Zeman was also allegedly involved. D.I. Mauritz avers that an investigation by Swiss police found that Kristian Zeman had €100,000 in a Swiss bank account and that when Kristian Zeman was informed that the Swiss authorities had been investigating him, he fled to Australia. D.I. Mauritz also averred that, as of the date of his affidavit, Kristian Zeman continued to reside in Australia although his precise whereabouts were unknown.

26. D.I. Mauritz swore his affidavit in the presence of a Layla Bagge, described by her stamp as “Vice Chefsåldagare”. I mention this because later on Mr. Zeman later takes issue with the attestation of the affidavit and the credentials of Layla Bagge to attest affidavits.

27. Before the exchange of affidavits had concluded, the Bureau had, on 20<sup>th</sup> August 2009, caused the Chief State Solicitor acting on its behalf to serve a notice of intention to cross-examine Mr. Zeman on his affidavits sworn in the proceedings, at the trial of the action.

28. The proceedings were listed for hearing commencing on 13<sup>th</sup> January 2010. However, Mr. Zeman sought an adjournment on the basis of a business trip to Asia. The adjournment was granted, and the matter was adjourned for hearing to 23<sup>rd</sup> March 2010, but owing to pressure on court lists it was adjourned on two further occasions and was not heard until 19<sup>th</sup> January 2011. In the intervening period, the Respondents’ solicitors applied for and were

granted leave to come off record. That order was made in October 2010. Following this, on 14<sup>th</sup> October 2010, Mr. Zeman personally served a notice of intention to cross-examine the deponents of the Bureau at the trial of the action on 19<sup>th</sup> January 2011.

**29.** Shortly before the hearing date, on 12<sup>th</sup> January 2011, solicitors acting on behalf of the Respondents issued a motion seeking an order granting them legal aid to defend the proceedings. This was returnable for 17<sup>th</sup> January 2011, just two days before the scheduled hearing. Feeney J. thought it best to adjourn the application for legal aid to the hearing date, indicating that he would hear the legal aid motion before taking up the s. 3 application. In these circumstances the Respondents chose not to appear on the date of the application, apparently taking the view that even if they were granted legal aid, it would, in these circumstances, be too late to be meaningful.

### **The Legal Aid Application and the s. 3 Hearing**

**30.** Having heard submissions from counsel acting on behalf of the Bureau, Feeney J. dismissed the application for legal aid for the following reasons. Firstly, Mr. Zeman was fully aware that the case was listed for hearing on 19<sup>th</sup> January 2011, and he was also aware that, on that date, cross-examination would take place, including cross-examination of Mr. Zeman himself and cross-examination of witnesses identified by Mr. Zeman in the notice of cross-examination that he had served.

**31.** Secondly, as early as 14<sup>th</sup> October 2010, Mr. Zeman had had contact with solicitors with a view to making an application for legal aid, and yet the application was not issued until much later, and had been made returnable for a date just two days prior to the hearing scheduled to take place on 19<sup>th</sup> January.

**32.** Thirdly, Feeney J. was of the opinion that issues had surfaced in correspondence and affidavits that were germane to the eligibility of the Respondents for legal aid. He said that

the very purpose of adjourning the application was in order to deal with a number of matters that were relevant to the application, and so that Mr. Zeman could be present for that purpose. The court adjourned the application in circumstances in which the court was aware that Mr. Zeman was aware that he had an obligation to be in court on 19<sup>th</sup> January because the case was listed for hearing, and a notice of cross-examination had been served upon him. If the court had been satisfied that the Respondents were entitled to legal aid, or even if not, the court would have given appropriate consideration to an application for an adjournment, although Feeney J. acknowledged that such an application may have faced difficulties given the history of the case. In any case, by unilaterally declining to attend court based upon his perception that it would serve no useful purpose, Mr. Zeman left the court in a position where it had to refuse the legal aid application. That left the Respondents unrepresented. The Respondents were aware of the hearing date and Mr. Zeman was aware of his obligation to be present. In those circumstances, Feeney J. considered that the court should proceed with the hearing of the s. 3 application.

**33.** Counsel for the Bureau gave the court a brief summary of the background facts and Feeney J. then adjourned the matter for decision the following day, with a view to reading all of the affidavits in the intervening period. The Bureau submitted to the Court that the affidavits of Mr. Zeman should not be admitted in evidence by reason of his failure to attend for cross-examination. However, Feeney J. declined this application and admitted the affidavits in evidence because most of the affidavits sworn on behalf of the Bureau were in reply to the affidavits of Mr. Zeman, and were best understood in the light of the evidence presented on affidavit by Mr. Zeman.

**34.** Although the decision is *ex tempore*, it is nonetheless detailed, comprehensive and a model of clarity. It runs to some 25 pages and takes into account all of the affidavit evidence. Feeney J. was satisfied that all of that evidence constituted reasonable grounds for the belief

of the Chief Bureau Officer, expressed on affidavit, that the property to which these proceedings relate are, directly or indirectly, the proceeds of crime.

**35.** In order to be satisfied whether or not relevant assets are the proceeds of crime as defined in the 1996 Act, it is of course necessary for the court to consider whether or not the relevant assets were obtained or received as a result of or in connection with criminal conduct. “Criminal Conduct” is defined in the 1996 Act as, *inter alia*, any conduct which constitutes an offence (with additional requirements applying where the conduct occurs outside the State). In this case, Feeney J. identified the relevant offence for the purposes of the 1996 Act as being s. 6 of the Criminal Justice Theft and Fraud Offences Act, 2001, which states at s. 6(1) that:

*“(1) A person who dishonestly, with the intention of making a gain for himself or herself or another, or of causing loss to another, by any deception induces another to do or refrain from doing an act, is guilty of an offence.”*

**36.** Here, the conduct identified by Feeney J., was the deception by the Respondents of others in order to make a gain for themselves and one another, while causing loss to others i.e. “*the cardholders and other companies*”. I infer that in referring to “*other companies*” he was referring to EuroConex, the banks responsible for issuing the credit cards and the credit card companies, all of whom to one extent or another could incur losses by reason of fraudulent transactions.

**37.** The trial judge then proceeded to identify seven factors which in his opinion all supported the belief averred to by the Chief Bureau Officer that the Monies were the proceeds of crime and that the evidence established a *prima facie* case for the purposes of s. 3, thereby shifting the onus of proof to the appellants to satisfy the court that the monies were not the proceeds of crime. The seven factors relied upon by the trial judge in arriving

at his conclusions were, with one exception, the same as the grounds relied upon by D.C.S O'Mahoney in his affidavit grounding the application, but for convenience I will set them out again here:

- (i) The very large number of transactions submitted by the Respondents to EuroConex within a few days;
- (ii) That, on the evidence before the Court, it was apparent that the Respondents were never in a position to supply the service that they were purporting to sell;
- (iii) The 15,000 chargebacks by credit card holders that were made almost immediately after the Respondents submitted the transactions for processing, in addition to the large number of transactions (10,000) that could not be completed by EuroConex as a result of their initial screening process;
- (iv) The failure by the Respondents to submit information or documentation to EuroConex to support the validity of the transactions;
- (v) The information received from the Swedish police authorities that Mr. Zeman is known to be someone who has connections with organised crime and has previous convictions;
- (vi) The fact that Mr. Zeman's brother was found to be in possession of electronic equipment used to create fraudulent credit card numbers;
- (vii) The fact that there were no documents or records for the service offered by the Respondents which indicated that it ever existed in any form other than as a web page that led nowhere, and provided no mechanism for actual sales and services.



38. The only ground relied upon by D.C.S. O'Mahoney and not relied upon by Feeney J. was the delay of almost six years by the Respondents in issuing proceedings against EuroConex for recovery of the Monies.

39. Mr. Zeman was not in court for delivery of the judgment of Feeney J. on 20<sup>th</sup> January 2011. However, on the same day, Mr. Declan O'Reilly, then the principal solicitor in charge of the section of the Chief State Solicitor's Office assigned to the Bureau, and subsequently the Bureau Legal Officer, wrote to Mr. Zeman to inform him of the making of the order. Mr. O'Reilly also informed Mr. Zeman that:

*“The monies now remain frozen for a minimum of 7 years. During this period you may bring an application pursuant to section 3(3) as previously outlined.”*

40. Feeney J. also made an order awarding the costs of the proceedings against the Respondents and those costs were taxed by the Taxing Master on 21<sup>st</sup> December 2011 in the sum of €44,897.44.

#### **The s. 4 Application**

41. These matters rested until the Bureau brought forward its application under s. 4 of the Act of 1996 on 6<sup>th</sup> February 2018. This motion was grounded upon the affidavit of Detective Chief Superintendent Patrick Clavin, Chief Bureau Officer, sworn on 26<sup>th</sup> January 2018. D.C.S. Clavin summarises the s. 3 proceedings and avers that it is now in excess of seven years since the making of the s. 3 order, that no application has been advanced pursuant to s. 3(3) of the 1996 Act and that the Bureau is now desirous of obtaining relief under s. 4(1) of the 1996 Act. He further avers that there is no serious risk of injustice to the Respondents or to any party if the application is granted.

42. On 11<sup>th</sup> June 2018, Mr. Zeman swore a lengthy affidavit in opposition to the s. 4 application. At the time of swearing this affidavit, the Respondents were unrepresented, but

they were subsequently granted legal aid by the trial judge, and thereafter secured representation for the purposes of this application. However, those legal advisers subsequently applied for and were granted leave to come off record, on the basis that the necessary relationship of trust and confidence had broken down. The Respondents then retained further solicitors and counsel, but again those solicitors applied to come off record on the same basis, with the result that at the time the application came on for hearing before the High Court, the Respondents were, once more, unrepresented. It appears that the circumstances giving rise to these breakdowns of relationships are related to disagreement between the Respondents and their legal advisers as regards the contents of an issue paper that the trial judge had directed the Respondents to prepare. I return to this later.

**43.** The affidavit of 11<sup>th</sup> June is broken down into two parts and runs to 95 pages. The first part is taken up with arguments regarding alleged breaches of Art. 6 of the European Convention on Human Rights, mainly on the grounds that the Respondents were not granted legal aid for the purposes of the earlier s. 3 proceedings, but also for other reasons. However, it is unnecessary to give any consideration to this part of the affidavit because at a directions hearing on 7<sup>th</sup> October 2022, Costello J. in this court ordered that grounds numbers one and two in Mr. Zeman's notice of appeal should be struck out. Ground No. 1 is headed: "*Article 6 of ECHR, for the right to a fair trial, has been violated*". This ground and ground No. 2 were struck out by Costello J. because they arose out of the orders made by Feeney J., and not the orders of Stewart J. the subject of the appeal.

**44.** In Part II of his affidavit of 11<sup>th</sup> June 2018, Mr. Zeman addresses the case made by the Bureau that the Monies are the proceeds of crime. In the first place, he advances what he describes as two formal objections, both of which are legal arguments. These are, firstly, that the 1996 Act is not applicable to corporate respondents and, secondly, that the alleged criminal conduct did not constitute an offence under the laws of Sweden. While I will come

back in due course to the submissions made on these points, it is sufficient for present purposes to say that these arguments are misconceived and must be rejected.

45. Mr. Zeman then addresses, and purports to discredit, the evidence of D.I. Mauritz, i.e. the affidavit sworn by D.I. Mauritz in the context of the s. 3(1) application, under a stand-alone heading, following which he addresses 13 issues under the heading “*Issues raised by Criminal Assets Bureau as to why funds are proceeds of crime*”.

46. In summarising these headings, I will endeavour to identify any new evidence introduced by Mr. Zeman, that was not before the Court at the time of the s. 3(1) hearing, although in doing so I am not commenting in any way on the provenance or probative value of the evidence. The thirteen headings identified by Mr. Zeman are:

- (1) “*The number of sale transactions exceeded the predicted figure*”.

There is no new evidence offered on this point and nor could there be – of its nature, this is a matter of argument only, whereby Mr. Zeman makes the point that providing what transpires to be a flawed estimate of future sales volumes does not render the transactions fraudulent, nor the monies received the proceeds of crime.

- (2) “*Routeback did not have the logistics to provide the service it promised*”.

This is denied by Mr. Zeman. Firstly, it is said that overselling is a common business phenomenon. Many businesses will offer to sell more than their available capacity, in the expectation that many customers will not avail of the capacity that they purchase. Mr. Zeman takes issue with averments made in the s. 3(1) proceedings on behalf of the Bureau to the effect that one of the internet service providers, whose services Routeback claimed to have retained for the purpose of providing the email service i.e., a company named Swebase, could

not have provided the services offered by Routeback. Mr. Zeman exhibits printouts from the internet archive in order to demonstrate that Swebase was advertising packages that would have enabled it to provide the service being offered by Routeback. This is new evidence. Mr. Zeman goes so far as to suggest that the Bureau analyst may have deliberately omitted this information from his affidavit. Mr. Zeman expressly avers that “*all customers did in fact receive a product and, as far as we know, they did receive a good level of service.*” He says that insofar as customers did complain and seek chargebacks, they received refunds from EuroConex.

- (3) “*There have been a large number of disputed transactions*”.

Mr. Zeman goes to great lengths to explain that disputed transactions are normal and common. He complains that the disputed queries were never forwarded to Routeback, and were automatically accepted and refunded by EuroConex. He exhibits the list of 6,914 disputed transactions. He argues that it is surprising that one bank accounted for 45% of the chargebacks. He exhibits a document that explains a phenomenon known as “friendly fraud” which apparently relates to customers initiating chargebacks on transactions that they had in fact authorised. This is a combination of new evidence and submission.

- (4) “*The number of disputed transactions is greater than 6,914*”.

Mr. Zeman avers that the Respondents have no information regarding the initial 10,000 rejections, but this is an argument only and is not based upon any new evidence.

- (5) “*Routeback did not provide requested information regarding the transactions*”.

Mr. Zeman exhibits the correspondence exchanged between the parties between 2002 and 2004 to demonstrate that Routeback was responsive to communications from EuroConex. That is new evidence. Another item of new evidence provided under this heading is a document described by Mr. Zeman as a transaction log which he claims relates to one of the 79,445 transactions that were processed. Mr. Zeman avers that this document demonstrates a transaction emanating from the Department of Education, Atlanta, Georgia, USA. He says this is apparent from the IP address and supports the authenticity of the service offered by Routeback. Mr. Zeman avers that this document was obtained “[D]uring investigations of computer backup drive” and he further avers that “[T]his is a direct excerpt from the Klikpay payment platform, provided by EuroConex, before Routeback Media was shut down”.

- (6) *“Harry Zeman is tied to organised crime and has convictions for drug dealing”.*

There is no new documentation provided under this heading. Mr. Zeman simply makes the same argument that he made during the s. 3(1) proceedings, and asserts that his only convictions relate to personal drug use, and are in no way related to drug dealing.

- (7) *“Harry Zeman’s brother fled from Sweden to Australia in 2005”.*

Mr. Zeman exhibits documentation not exhibited in the s. 3(1) proceedings to demonstrate that his brother Kristian holds a law degree and not a computer science degree as averred by D.I. Mauritz. He also exhibits documentation to demonstrate that Kristian Zeman did travel to Australia during 2005, but not to flee the authorities as asserted by D.I. Mauritz, but to attend university.

- (8) *“The website did not have a credit card processing facility”.*

This heading is misleading, and it appears from what follows that Mr. Zeman is addressing arguments made by the Bureau that there was in fact no facility whereby customers could purchase email accounts through Routeback's website. While Mr. Zeman argues that the website through which Routeback traded i.e., www.local-mart.info did exist, and that the Klikpay payment platform was integrated to the website and had been tested by EuroConex, none of this was new evidence.

(9) *"No traces of complaints, customers or the spam marketing campaign"*.

Some new evidence was produced under this heading, to address an averment made by the Bureau analyst that had the Respondents conducted a marketing campaign as they claimed, there would have been traces of it to be found in the internet archive in the form of spam. At paras. 420 - 422 of his affidavit Mr. Zeman avers:

*"In order to show that the service actually existed, Routeback Media made a decision in December 2009 to re-register the Internet domains used back in 2002. Some domains were occupied, but we managed to acquire mail-4-life.com, mail-4-life.net, nasdaqmail.com ... [and others]. These domains are now set up in a way which all emails are forwarded to an admin master account which Routeback Media is able to supervise. ... Within days, spam emails were sent to users at these domains. Email addresses to which email was sent to were amongst others: ... Spam emails sent to these addresses do not only show that customers have actually used the services provided by Routeback Media at some point, but also show that email addresses bought have been used to such extent on the Internet by its users that the addresses have been collected by marketing companies."*

- (10) *“Activities at a website where databases of customer information was traded”.*

This section is in the nature of a submission to the effect that there is nothing wrong with the trading of genuine lists or databases of potential customers.

- (11) *“Spam emails have a low conversion rate”.*

This section is largely in the nature of a submission against an argument raised by the Bureau in the s. 3(1) proceedings. The Bureau had argued that in order to achieve the number of customers that it did, through its alleged spam marketing campaign, Routeback would have had to have sent of the order of 90 billion spam emails. Mr. Zeman rejects that argument, and in support of his argument he exhibits an article from the Wall Street Journal about the effectiveness of spam emails. This article refers to a survey that demonstrates that a large proportion of regular internet users do buy products as a result of spam emails.

- (12) *“The price \$9.95 is commonly used in credit card fraud operations.”*

Mr. Zeman exhibits printouts of internet advertisements to demonstrate that the sale price of US\$9.95 was not an unusual price for an email address, and was not any indicator of a fraud. This is new evidence.

- (13) *“Routeback Media was accused of similar activities in 2001”.*

This heading refers to the assertion made by D.I. Mauritz that Routeback was involved in similar activities in 2001, which had resulted in a complaint by Citibank in December 2001. This is the first time that this allegation, first made by the Bureau analyst in his affidavit of 26<sup>th</sup> August 2009, is addressed on behalf of the Respondents. Mr. Zeman avers that *“neither Routeback Media nor any of the executives or representatives have heard of this*

*investigation or been contacted by the Swedish Police.”* He notes that it appears that the prosecutor came to the conclusion that no crime had been committed and no prosecution ensued. Furthermore, he avers, that “[T]he Swedish Police have however confirmed that no documents such as summons to Police interrogations or inquiries exist.” He exhibits some emails in support of this argument. This is new evidence.

**47.** In due course the proceedings came into the CAB list in the High Court. There was a hearing on 2<sup>nd</sup> October 2018, attended by Mr. Zeman and at which he gave evidence, for the purpose of considering an application for legal aid advanced on behalf of both Respondents. Stewart J. granted legal aid.

**48.** On 7<sup>th</sup> March 2019, an affidavit was delivered on behalf of the Respondents by Mr. Peter Connolly, solicitor, who was now acting on their behalf, the Respondents having secured legal aid for the purposes of resisting the s. 4 application. This affidavit was sworn by Mr. Enda Murphy, a former bank manager in AIB, with specialist experience in credit card services.

**49.** In this affidavit, Mr. Murphy explains credit card processing in general, and specifically explains “chargebacks”. There is no reason to get into the detail of this, save to observe that in his explanation of credit card processing, it is apparent, as one would expect, that in the course of the processing of a credit card transaction, there is communication between the cardholder and the merchant on the one hand, and between the merchant and the entity that facilitates the authorisation and settlement of credit card transactions on the other. Mr. Murphy avers that in the course of the authorisation process, following upon the cardholder using their card to purchase goods or services, the merchant’s point of sale system or online system routes the transaction to the “acquirer” (in this instance, EuroConex), which in turn routes the transaction to the relevant international card scheme (such as Visa,



Mastercard etc.) which in turn routes the transaction to the card issuer, usually a bank, to establish that there are sufficient funds available to proceed with the transaction. At this point, the card issuer either authorises or declines the transaction. Mr. Murphy avers:

*“An authorisation means that the card exists and that there is (sic) sufficient funds available to proceed with the transaction. This message is routed to the Merchant’s POS [Point of Sale] via the ICS [International Card Scheme] and the Acquirer. At this point, the Merchant is authorised to sell the goods / services [sic] in the knowledge that funds will be received into their bank account in accordance with their Acquirer contract.”*

**50.** In other words, unsurprisingly, the merchant – in this case Routeback – is informed by the processing agency (in this case, EuroConex) of the cardholder’s ability to pay for the transaction so that the merchant may sell the goods or service, secure in the knowledge that it will be paid for doing so. The reason that I mention this is that it follows from this that Routeback should, initially at least, have had records of its own of all of the transactions that were authorised through EuroConex.

**51.** Mr. Murphy then goes on to explain the chargeback process. He explains that “card not present” transactions have a higher level of chargebacks associated with them than “card present” transactions. This is all the more so in the case of the provision of “*more nebulous services*” such as the sale of email addresses. This type of transaction is associated with higher levels of chargebacks.

**52.** Mr. Murphy then analyses the information provided in connection with the chargebacks in these proceedings. At para. 11 of his affidavit he avers:

*“11. It is difficult to reconcile the various numbers quoted throughout the documents but my best estimate is:*

<i>Authorised Transactions (80,000 @ \$9.95):</i>	<i>\$796,000 (P. Fleming Affidavit)</i>
<i>euroConex charge (3.5%):</i>	<i>\$27,860</i>
<i>6,913 chargebacks @ \$9.95:</i>	<i>\$68,784.35</i>
<i>Balance Outstanding:</i>	<i>\$699,355.65</i>

*Paul Fleming states the balance is €696,875.05. The difference may be accounted for by the €5,000 security deposit.*

12. *The numbers therefore suggest that the number of chargebacks was 6,913. This differs from what Simon Haslam states in his Affidavit where I understand him to state that there were additional 'good faith' refunds of circa €150,000 made to TWO banks on foot of 15,000 complaints from three banks. [Mr. Haslam was a senior executive in EuroConex who swore an affidavit on its behalf in the proceedings taken against it by Routeback, on 26<sup>th</sup> June 2008].*

13. *'Good Faith' chargebacks can arise in various circumstances e.g. where a Card Issuer and an acquirer agree to process chargebacks even though the chargebacks may be outside the ICS mandated time limits or where chargebacks are anticipated and, in advance of the arrival of such chargeback requests from Cardholders, the Acquirer agrees to refund Cardholders.*

14. *I also note that circa 80% of the chargebacks are accounted for by three banks with Citibank accounting for circa 45% of the total chargebacks. This appears to be very much out of proportion with the representation of these three banks on the 80,000 transaction file.*

15. *This confusion with the numbers together with the ‘good faith’ nature of the chargebacks, the massive relative proportion of chargebacks to three banks and the minimal response to the 250 letter (sic) which EuroConex issued to random banks leads me to question whether all of the 6,913 chargebacks were in fact Cardholder initiated.”*

53. Mr. Murphy further avers that even if the card numbers were the output of card generating software, the fact remains that their authorisation demonstrates that the cards were genuine and that each of the circa 80,000 cardholders were debited US\$9.95 or its currency equivalent (if the cards were denominated in a currency other than Dollars). He avers that even though the chargeback rate is high at 8.6%, more than 90% of debited cardholders did not make a chargeback request.

54. Mr. Murphy also addresses the sale price of US\$9.95 for the product and he avers that while a sales figure of €9.95 or a similar amount may well have been used by fraudsters in the early 2000’s (for reasons that he explains, but which it is not necessary to get into here) the reasons behind this choice of sale price would have been inapplicable to online transactions.

55. Mr. Zeman provided yet another affidavit sworn by himself on 5<sup>th</sup> March 2019, which was filed on his behalf by his solicitors and so presumably was prepared with their assistance. This affidavit repeats a great deal of the contents of previous affidavits and I will try to confine myself here to such information as appears to constitute new evidence.

56. Firstly, Mr. Zeman explains in some detail the lengths that he went to in order to establish whether or not the affidavit of D.I. Mauritz was properly attested. He notes that it was apparently sworn before a “Layla Bagge” described as a practising solicitor. However, Mr. Zeman undertook investigations in Sweden and was unable to locate any lawyer in

Sweden of that name. By way of verification of this, he exhibits a letter apparently from the Swedish Bar Association.

**57.** Mr. Zeman then proceeds to address what he describes as other incorrect or fabricated statements in the affidavit of D.I. Mauritz. These include his (Mr. Zeman's) place of birth, his alleged connections to organised crime, the prosecution of his brother Kristian Zeman (which he says did not take place) and the degree taken by his brother in college. He provides documentation to contradict each of the averments of D.I. Mauritz in relation to these matters. He avers that his brother has had full time employment in the courts of Sweden, and has served as a law clerk and a judge in the administrative court of appeal in Stockholm and the administrative court of Uppsala, and he exhibits documents by way of proof of these assertions.

**58.** Mr. Zeman exhibits some documentation from the EuroConex website that he obtained from the internet archive. It should be explained that the Bureau analyst had also relied on information from the internet archive, which he described (in his first affidavit in the s. 3(1) application) as "*a non-profit organisation dedicated to the building and maintaining a free and openly accessible online digital library, including an archive of the Web*". The documentation exhibited by Mr. Zeman describes the processing of a transaction processed using the Klikpay platform.

**59.** Mr. Zeman then proceeds to address a request for documentation made by the Bureau in 2009. He avers that the Bureau had claimed that Routeback should be able to provide particulars of transactions with customers, including details of email addresses purchased or other details such as customer names, account purchases, password reminders and preferred domain name. Mr. Zeman avers that this information had never been requested by EuroConex, and that had EuroConex requested it in 2002 or 2003, then Routeback would have been able to produce the documentation. He avers that this data would have been stored

on the web hosting service that was owned by Swebase, and leased from Swebase by Routeback. However, Routeback made a decision to discontinue the services rendered by Swebase at the end of 2003, because it had not received the outstanding funds from EuroConex. He explains that the plan had been to re-bill customers on a yearly basis, but since EuroConex had all credit card details on their servers and had also shut down the merchant account, it was not possible to re-bill customers. The result of terminating the services rendered by Swebase was that Routeback lost all access to the information stored at the servers owned by Swebase. Moreover, he avers that Swebase appears to have ceased to exist and it is unlikely the data retained by Swebase can be obtained now.

**60.** Mr. Zeman also places reliance on the internal investigation undertaken by EuroConex when it first received a report of alleged fraudulent activity. Not only did 208 banks not reply to a direct question as to whether or not a fraud had been committed, but none of the remaining 42 banks who did reply reported any fraudulent activity. Mr. Zeman submits that the outcome of the investigation demonstrates there was no fraudulent activity.

**61.** There is a great deal more in this affidavit, but, so far as I can ascertain, there is nothing that has not been addressed by Mr. Zeman in previous affidavits, save as I have already summarised above.

**62.** Finally, in the interests of completeness, I should mention that following the hearing in the High Court, an attempt was made to file a further affidavit on behalf of the Respondents, being an affidavit sworn by a Mr. Glen Baird, who describes himself as a retired Pennsylvania state trooper who has been involved in digital forensics since 1998. At para. 42 of her judgment, the trial judge makes reference to this affidavit and deems it inadmissible, since it was not before the court at the hearing. While Mr. Zeman complains about this ruling of the trial judge, it cannot be doubted that she was correct to exclude it from consideration having regard to its delivery after the hearing.

**Preliminary Issues**

**63.** The Bureau did not serve any affidavits in reply to Mr. Zeman's affidavits (i.e. those sworn in the s. 4 application) or the affidavit of Mr. Murphy. On 2<sup>nd</sup> April 2019, the Bureau caused the issue of a motion whereby it applied for the trial of two preliminary issues as follows:

- (1) Whether the Respondents are permitted to argue that the property does not constitute the proceeds of crime in circumstances where they were both parties to the s. 3 proceedings and where within those proceedings they claimed the property was not the proceeds of crime and nevertheless the court proceeded to make the s. 3 order sought by the Bureau and the Respondents brought no appeal against that order; and
- (2) whether the Respondents should be permitted to argue that the making of a s. 4 order will result in a serious risk of injustice in circumstances where it was held in the s. 3 proceedings that no serious risk of injustice arose and there was no material before the court which would be supportive of a claim or a suggestion of a serious risk of injustice if a s. 4 order was made.

**64.** This motion was grounded upon a further affidavit of Mr. Declan O'Reilly sworn on 2<sup>nd</sup> April 2019. In substance, this is a summary of the s. 3 proceedings and concludes with a statement that the Respondents never filed an appeal in relation to the order made by Feeney J. on 20<sup>th</sup> January 2011.

**65.** Mr. Zeman replied to the affidavit of Mr. O'Reilly by a further affidavit sworn on 17<sup>th</sup> April 2019. In this affidavit he explains why he did not appear in court on 19<sup>th</sup> January 2011 and why the Respondents brought no appeal from the s. 3 order. In regard to the latter, he avers that he did not know the process by which to appeal and he received no notification as

to how to do so. He avers that he was waiting to receive the final approved judgment of Feeney J., which he says he still has not received.

**66.** He further avers that having been informed (by the Courts Service) that it was not possible to pay court stamping fees from abroad, the Respondents could not have filed an appeal, and nor do they have any funds to pay for a solicitor.

**67.** Mr. Zeman then proceeded to make submissions as to why the Respondents should be permitted to argue that the Monies are not the proceeds of crime. These include the lack of fair procedures in the s. 3 hearing, on account of the inability of the Respondents to obtain legal aid, that the Respondents were prevented from filing an affidavit with newly found evidence and “*the lack of a duly reasoned judgment*”. Moreover, he avers, the s. 3 hearing was not a full hearing with oral evidence and cross-examination of witnesses.

**68.** Mr. Zeman also advances arguments as to why the Respondents should be allowed to argue that there is a serious risk of injustice. His main argument under this heading is the new evidence that he has advanced in the context of the s. 4 application.

**69.** Mr. Zeman proceeds to request the court to dismiss the s. 4 application on the grounds that the s. 3 proceedings did not afford the Respondents a fair trial. Further, he submits that the alleged criminal conduct did not constitute an offence under the laws of Sweden and furthermore the 1996 Act is not applicable to corporate Respondents.

### **S. 3(3) Motion**

**70.** On 3<sup>rd</sup> May 2019, the solicitors for the Respondents issued a motion pursuant to s. 3(3) of the 1996 Act, whereby the Respondents sought an order dismissing the order made by Feeney J. on 20<sup>th</sup> January 2011. This application was grounded upon a short affidavit of the Respondents’ then Mr. Peter Connolly, who on 5<sup>th</sup> July 2018, had entered an appearance (to the s. 4(1) motion of the Bureau) on behalf of Routeback only, although this motion was

issued on behalf of both Respondents. In support of this application, Mr. Connolly relies upon the new evidence advanced by the Respondents, in particular by way of the affidavit of Mr. Murphy, but also the further affidavits of Mr. Zeman. The affidavit of Mr. Connolly mainly comprises legal argument as to why the Respondents should be entitled to argue that the Monies are not the proceeds of crime and also argue that the making of a disposal order under s. 4 would lead to an injustice.

**Ruling on Preliminary Issue, 20<sup>th</sup> May 2019**

71. The Bureau's motion seeking the trial of preliminary issues came before Stewart J. on 20<sup>th</sup> May 2019. The court heard argument regarding the scope of its jurisdiction during the course of which it was submitted on behalf of the Bureau that it was not open to the Respondents to "*litigate the section 3 application all over again*" and that the court, on the s. 4 application, was solely concerned with whether or not it was appropriate to make a disposal order. It was submitted on behalf of the Bureau that the only issue to be determined was one under s. 4(8) of the 1996 Act, that is, whether or not a disposal order would give rise to an injustice.

72. On the other hand, counsel for the Respondents argued that, on a literal interpretation of s. 4(2) of the 1996 Act, the Respondents were entitled to argue that the Monies do not constitute the proceeds of crime, on the basis of the new evidence advanced since the order of Feeney J. It was submitted that the Respondents were entitled to make such an argument both in defence to a s. 4 application, and pursuant to their own application under s. 3(3). Counsel for the Respondents stressed, however, that he was not asking the court to go behind the order of Feeney J., but to consider the matters in the light of the evidence advanced since that order. He placed particular emphasis on the evidence of Mr. Murphy.



**73.** In reply, counsel for the Bureau submitted that Mr. Murphy's affidavit was clearly placed before the court for the purposes of challenging the evidence advanced on behalf of the Bureau at the s. 3 hearing and therefore, in effect, for the purposes of arguing that the order made by Feeney J. was wrong and should not have been made. He submitted that the Respondents were effectively trying to appeal the s. 3 order.

**74.** Stewart J. ruled that it was not open to the Respondents to re-litigate the s. 3 application, but she noted that s. 4(3) of the 1996 Act appears to allow the Respondents to seek to persuade the court that the Monies do not constitute the proceeds of crime (the reference to s. 4(3) was clearly erroneous, and should have been to s. 4(2)). Stewart J. adjourned the matter further to allow the parties to agree an issue paper. It is clear from the transcript of the hearing that the responsibility for initially drafting the issue paper fell upon the Respondents.

**75.** Thereafter, relations broke down between the Respondents and Peter Connolly solicitors regarding the content of the issue paper. Accordingly, Connolly solicitors applied to come off record by notice of motion issued on 17<sup>th</sup> July 2019, and this application was granted. In his affidavit grounding this motion, Mr. Connolly averred, *inter alia*:

*"I have been instructed to file an issue paper which I believe to be contrary to my professional duty to the Court.... I have advised my client as to the reasons I cannot carry out their instructions.... I have given advice as to the type of motion and issue paper which we are prepared to file on their behalf, but this is unacceptable to the Respondents. I have provided the Respondents with a copy of counsel's draft issue paper in this respect. Efforts were made to try and reason with the Second Respondent in particular, but his position is entrenched.... He has accused me of failing to carry out instructions (a charge which I say is unfounded) and he will not*

*entertain any advices given to him to endeavour to successfully defend the Section 4 proceedings and apply to discharge the freezing orders.”*

**76.** Soon afterwards another solicitor, namely Mr. John Shanley, came on record for the Respondents, and he filed an issue paper that had been prepared by Mr. Zeman. Unfortunately, this was not an issue paper at all but rather a paper prepared by Mr. Zeman to argue why the Monies were not the proceeds of crime, and why a disposal order would result in a serious risk of injustice.

**77.** On 8<sup>th</sup> November 2019, Mr. Shanley served a notice of cross-examination of deponent(s) on behalf of the Respondents. This notice indicated an intention to cross-examine all of the deponents who had sworn affidavits on behalf of the Bureau dating back to the s. 3(1) application. However, at a hearing on 18<sup>th</sup> November 2019, Stewart J. ruled that this notice was inadequate because the Respondents had failed to identify any specific conflicts on the affidavits, and furthermore they had failed to seek the leave of the court to issue such a notice pursuant to O. 40, r.31 (now r.36) of the Rules of the Superior Courts. This ruling is recorded at para. 36 of the judgment under appeal. As will become apparent, this was a crucial ruling in the context of a hearing scheduled to take place just two weeks later on the basis of sharply conflicting affidavits exchanged between the parties. At the time, Mr. Shanley was still on record for the Respondents, but the Respondents did not attempt to appeal this ruling in advance of the trial. Instead, a further notice to cross-examine the same deponents appears to have been served by Mr. Shanley on 28<sup>th</sup> November (although it is dated 2<sup>nd</sup> December 2019, it was filed in the Central office on 28<sup>th</sup> November 2019).

#### **Hearing of s. 3(3) and s. 4(2) Motions**

**78.** Both motions then came on for hearing before Stewart J. on 2<sup>nd</sup> December 2019, but not before Mr. Shanley sought to come off record because relations with the Respondents

had broken down irreparably. That application was granted by Stewart J. on 2<sup>nd</sup> December 2019. As a result, Stewart J. adjourned the motions for hearing into the following day. While Mr. Zeman was present in court he declined to participate in the proceedings because he said that he could not represent himself. The trial judge informed him that it was entirely a matter for himself whether to remain in the courtroom and participate in the proceedings or to absent himself. Mr. Zeman remained for the duration of the hearing, but did not participate.

### **Judgment of the High Court**

**79.** In a judgment delivered on 23<sup>rd</sup> May 2022, the trial judge summarised the history of the proceedings, and in the course of doing so, she made reference to the preliminary issues and rulings of the Court. She noted that she had ruled that the s. 4 application “*was not a rehearing of the s.3 trial*” and that she had ruled in these terms. As regards the issue paper, the trial judge stated that she had “*ruled that the purported issues document related solely to matters that were adjudicated upon and determined in 2009 and was not in compliance with the directions given by the Court on 20<sup>th</sup> May 2019.*” The trial judge also referred to her ruling on the notice of cross-examination that had been served by Connolly and Co. solicitors, mentioned above.

**80.** The trial judge then proceeded to consider the affidavit of Mr. Zeman of 11<sup>th</sup> June 2018. Thereafter, she set out the relevant statutory provisions and gave consideration to the applicable case law, including the judgment of Murphy J. in the decision of the Supreme Court in *Murphy v. Gilligan* (Unreported, Supreme Court, 13<sup>th</sup> May, 1997) as well as the decisions of the Supreme Court in *McK v. FC* [2001] 4 IR 521, *FMcK v. AF* [2002] 1 IR 242, *CAB v. TH & JH* [2011] IESC 10 and *Murphy v. Gilligan* [2017] IESC 3.

**81.** At para. 82 of her judgment, the trial judge concluded that in her view, no new matters had been put before the court which were not before the court when the s. 3 order was made.

While she considered in particular the affidavit of Mr. Murphy, in her view it did not advance anything new or contain anything that would amount to new information not before the court when Feeney J. heard the s. 3 application in 2011. The trial judge expressed the view that the Respondents had been given every opportunity to be heard and to respond to the litigation. In her view no material had been placed before the court such as to give rise to any concern that the granting of an application under s. 4 of the 1996 Act would give rise to a serious risk of injustice. She expressed the view that the Respondents had, in response to the s. 4 application, sought to mount a collateral attack upon the s. 3 order made by Feeney J., and this was not permissible in the context of s. 4 proceedings. In the circumstances, the trial judge was satisfied to make the order sought by the Bureau pursuant to s. 4 of the 1996 Act. However, there is no express reference in her conclusions to the s. 3(3) application that was also before the court, and nor is it referred to in the order perfected following the judgment on 25<sup>th</sup> July 2022.

### **Notice of Appeal**

82. Mr. Zeman filed a notice of appeal on his own behalf on 8<sup>th</sup> July 2022. He sets out five grounds of appeal. The first two of these grounds of appeal, namely an asserted violation of Art. 6 of the European Convention on Human Rights, and a complaint of “*the lack of a duly reasoned judgment*” clearly relate to the s. 3(1) proceedings. It was for this reason that Costello J., in the order of 7<sup>th</sup> October 2022 referred to above, struck out these grounds of appeal. The remaining three grounds of appeal, numbers 3, 4 and 5 are as follows:

- (3). That the section 3(3) motion was assessed incorrectly. By this ground Mr. Zeman claims that the s. 3(3) motion obliged the High Court to assess whether the new evidence advanced on this application demonstrated that the monies were not the proceeds of crime or if “*the order caused any other injustice*”. It is also stated in this ground that the trial judge erred in failing

to assess the new evidence and also erred in failing to allow cross-examination.

- (4). The fourth ground of appeal is headed: “*The formal objections*” and is divided into two parts. The first formal objection is that the 1996 Act does not apply to corporate Respondents, and the trial judge erred in her treatment of this objection and in rejecting it solely on the basis that the court frequently makes orders pursuant to ss. 3 and 4 of the 1996 Act in relation to the property and monies of bodies corporate. Secondly, it is said that the conduct giving rise to the proceedings does not constitute an offence under the laws of Sweden. It is said that the 1996 Act requires that the alleged criminal conduct should constitute an offence under the laws of Sweden – where it is claimed the relevant activities took place, and where the Respondents are located. Mr. Zeman relies upon the decision of the Swedish authorities not to bring forward any prosecution in respect of these activities, following an investigation that went on for a period of several years. Mr. Zeman asserts that the trial judge erred in failing to assess this formal objection.
- (5). The fifth ground of appeal is closely related to the third ground of appeal. It is headed: “*The new evidence assessed*”. In this ground the Mr. Zeman puts forward legal argument in support of his proposition that, even though a s. 3 order has been held to be a final order, the person affected by the order is entitled to challenge the s. 3 order at a subsequent s. 3(3) hearing, or at the time of a s. 4 application. Mr. Zeman refers to the decisions of the Supreme Court in *Murphy v. Gilligan* (Unreported, Supreme Court, 13<sup>th</sup> May, 1997), *Murphy v. Gilligan* [2008] IESC 70 and *Murphy v. Gilligan* [2017] IESC 3. Mr. Zeman states that the trial judge erred in holding that a s. 3 order could

not be challenged at a later stage and that she was incorrect in holding, at para. 82 of her judgment, that no new matter had been put before the court which was not before the court at the time the s. 3 order was made.

Mr. Zeman seeks, *inter alia*, an order directing payment of the Monies to him, together with interest thereon which he measures at US\$1,782,304.48.

### **Respondent's Notice**

83. In its respondent's notice, the Bureau claims that the s. 3(3) application was fully heard and properly determined by the trial judge, and that she did not err in law and fact, as alleged. Moreover, the Bureau relies on the failure of the Respondents to participate fully in the hearing of the proceedings.

84. The Bureau denies that the Respondents were entitled to re-litigate the s. 3 hearing. The Bureau also denies that the 1996 Act does not apply to property in the possession or control of corporate entities. It is also denied that it is necessary that the offence relied upon should be an offence under the laws of Sweden.

85. The Bureau asks this court to affirm the decision of the High Court in its entirety.

### **Discussion**

#### **The Scope of Applications under s. 3(3) and s. 4(1) of the 1996 Act**

86. The logical starting point in this discussion is the scope of the jurisdiction of the Court when hearing applications brought under s. 3(3) and 4(1) of the 1996 Act, having regard to the existence of an earlier s. 3(1) order. This arises from the ruling of the trial judge that a s. 4 hearing for a disposal order was not a rehearing of the s. 3 application, and her conclusion that the Respondents in these proceedings sought to mount a collateral attack on the s. 3(1) order made by Feeney J. in 2009. This issue is also raised by ground of appeal No. 5.

**87.** Unsurprisingly, given the very substantial powers conferred on the Bureau by the 1996 Act, some of its more controversial provisions came under judicial scrutiny from a very early stage after its passage into law. In *Murphy v. Gilligan* (Unreported, Supreme Court, 13<sup>th</sup> May 1997), Murphy J. said, apropos an order made under s. 3(1) of the 1996 Act:

*“An order so granted is described in s. 3 of the Act of 1996 as “an interlocutory order”. The pattern of conventional civil proceedings in the High Court might lead one to anticipate that as soon as practicable after the making of the interlocutory order, and subject to the completion or disposal of any formal or procedural matters, the issue as to whether the particular property did or did not constitute the proceeds of crime or was or was not acquired with property that constituted proceeds of crime would be determined in a plenary hearing before the High Court. That is not the case. The order described in the [Act of 1996]... is made by the court on the application by the Applicant. The application for a disposal order does provide the person having possession or control with the final opportunity to show, as presumably he was unable to show in the previous 7 years, that the property in question was not tainted in the manner envisaged by the Act. But primarily the purpose and effect of the disposal order is to terminate the period of suspension and finally to deprive the respondent of any right which he or she might have in the property which would then stand transferred to the Minister for Finance or such other person as the court would determine.”*

**88.** The nature of an order made under s. 3(1) of the 1996 Act again came under consideration in *FMcK v. AF and JF* [2002] 1 IR 242, this time in the context of a claim made by the respondents in that application that it was necessary for the applicant to deliver a statement of claim, there being no special rules dealing with applications under the 1996 Act. Holding that it was necessary for the applicant to deliver a statement of claim, Fennelly

J. held that an interlocutory order under s. 3(1) of the 1996 Act is a substantive remedy, and not an interlocutory order in the ordinary sense in which the term is used. He gave five reasons for this conclusion, the fourth of which was that:

*“... once [the section 3(1)] order is made, it continues in force indefinitely unless either the applicant applies for it to be discharged (section 4(4)), or unless the respondent can show to the satisfaction of the court that the property does not constitute the proceeds of crime (section 4(3))(sic). There does not even appear to be any obligation on the applicant to apply for a disposal order at the end of seven years.”*

**89.** The same provisions of the Act again fell for detailed consideration by the Supreme Court in *Murphy v. Gilligan* [2008] IESC 70, [2009] 2 IR 271. The context in this case was that the respondents (the appellants in the Supreme Court) had applied in the High Court for an order under s. 3(3) of the 1996 Act discharging an order made by Moriarty J., under s. 3(1), on the grounds, *inter alia*, that there had not been a plenary hearing in which the respondents were afforded an opportunity to oppose the application made under s. 3(1). In the High Court Finnegan P. dismissed the application on the grounds that s. 3(3) did not confer jurisdiction on one High Court Judge to judicially review the order of another. The respondents then appealed that decision to the Supreme Court. Geoghegan J. undertook a detailed analysis of all of the statutory provisions with which we are concerned here, and the authorities in which those provisions had been considered up to that point, including those referred to above. At para. 11 of his judgment, Geoghegan J. observed:

*“...I think it useful at this early stage to draw attention to the unusual nature of ss. 3 and 4 in so far as they confer several separate opportunities for an aggrieved person to challenge a determination or, in the case of proceedings under s. 3(1), a proposed determination that the relevant property constitutes proceeds of crime.”*



**90.** At para. 50, he again considered the scope of the jurisdiction of an application under s. 3(3):

*“...I have already touched on the issue of whether the substantive matters which the defendants want to litigate can still be litigated. In my view, they can be and indeed that view has been expressed in previous judgments of this court. Although anything I say in this regard may be obiter dicta, I am firmly of the view that an application under s. 3(3) can still be brought and that might well be a more appropriate remedy than raising the questions in the s. 4 application but that is all a matter for the defendants’ advisers... .”*

**91.** Having expressed the view in para. 52 of his judgment that the Oireachtas would have foreseen that there might be all kinds of circumstances in which, quite reasonably, a respondent might not immediately be in a position to satisfy a court that the property in question or a specified part of it did not constitute directly or indirectly the proceeds of crime, Geoghegan J. concluded on these matters at paras. 53 and 54 as follows:

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

*54. None of this was seriously disputed by counsel for the defendants at the hearing of the appeals and motions though he did, at times in a vague kind of way, reserve his position. At any rate, correspondence and affidavits emanating from the plaintiff seem clearly to accept that a remedy under s. 3(3) was available to any of the defendants. As to whether principles of estoppel and, in particular, the principles in Henderson v. Henderson (1843) 3 Hare 100 could be relevant in any given situation is another day's work. At this stage, I would merely opine that any right to bring later applications and to have them heard is always subject to there being no abuse of the process of the court. Since the substantive issues, if in fact they arise, as to whether the properties are the proceeds of crime or not have never in fact been aired in court by the defendants with a view to the plaintiff's claim being challenged, it would seem to me that in their case at least there can be no question of estoppel or abuse of process in their bringing their own applications under the Act of 1996 at this stage. As I see it, that is how the Act of 1996 is intended to operate and, therefore, I do not think that any arguments based on the possibility of a succession of appeals can be considered relevant in interpreting the rights under the Act. ..."*

**92.** It is of some interest to note a common thread between these proceedings and the proceedings with which the Supreme Court was concerned in *Murphy v. Gilligan*, i.e. in neither case did the respondents to the application appear to oppose the original s. 3(1) application in the High Court. While the reasons for this were very different – in *Murphy v. Gilligan* it appears to have been because a view was taken by the respondents at the time that the application was interlocutory in the traditional sense, and therefore that the application would be followed by a full hearing, whereas in this case the Respondents declined to appear because they formed the view that their application for legal aid had been rendered meaningless – the result is substantially the same: the application went unopposed.

That said, it is clear that in this case Feeney J., notwithstanding the absence of the Respondents, and that notices to cross-examine had been served, gave consideration to the affidavit evidence of the Respondents. It is unclear whether or not there was any affidavit evidence before the court at the time Moriarty J., made the s. 3(1) order in *Murphy v. Gilligan*.

**93.** Following upon the decision of the Supreme Court in *Murphy v. Gilligan*, the respondents to that application brought forward an application under s. 3(3) and that application is the subject of a decision of Feeney J. ([2011] IEHC 62). It is apparent from a reading of that judgment that the proceedings before Feeney J. proceeded on the basis that there was an order under s. 3(1) in place, and that that order was a final order. Feeney J., having referred to the decision of the Supreme Court in the same proceedings, ruled that the onus was on the respondents to satisfy the court that s. 3(3) relief should be granted, and that it was for the respondents to lead evidence in support of either of the two grounds upon which a s. 3(3) application may be brought i.e. that the relevant property was not the proceeds of crime (directly or indirectly) and/or that the s. 3(1) order has caused an injustice. Feeney J. ruled that all affidavits sworn in the proceedings were in evidence and that all parties were free to serve notices of cross-examination and to seek cross-examination of any deponent who had sworn affidavits. It does not appear as though there were any restrictions placed upon the respondents having regard to the fact that a s. 3(1) order had already been made, and that that was a final order. Nor is there anything in the judgment to suggest that any issues were considered to be *res judicata* by reason of the s. 3(1) order, or that it was argued that the rule in *Henderson v. Henderson* was engaged.

**94.** The respondents in *Murphy v. Gilligan* were unsuccessful with their s. 3(3) application. Subsequently, Feeney J. heard an application for a disposal order pursuant to s. 4(1) in those

same proceedings. The context of that application was helpfully described by Feeney J. in his judgment on that application of 20<sup>th</sup> December 2011, [2011] IEHC 464, as follows:

*“The s. 4 hearing took place in circumstances where the Court had already delivered its judgment in relation to the s. 3(3) applications. The Court had in its judgment addressed the issue of ownership possession and control of the properties and the source of funds used to purchase such properties and had also dealt with all matters raised by the respondents including any potential injustice. The arguments in relation to the s. 4 disposal order were therefore limited by reason of the scope of the s. 3(3) hearing and the conclusions and findings set out in the judgment of the 27th January, 2011. The limited nature of the arguments in relation to s. 4 arose in circumstances where each of the respondents had within their own s. 3(3) application claimed ownership of particular properties and asserted that such properties were funded from assets which were not the proceeds of crime and such claims were adjudicated upon by the Court. Each of the respondents had also, within the s. 3(3) applications, contended that the s. 3 order caused an injustice and that matter was also dealt with in the judgment of the 27th January, 2011.”*

**95.** Feeney J. went on to say:

*“The s. 3(3) judgment dealt with each of the properties the subject matter of the s. 3 order and the issue as to whether or not such property constituted directly or indirectly the proceeds of crime or was acquired in whole or in part or in connection with property that, directly or indirectly, constitutes the proceeds of crime. The findings in that judgment cannot be reviewed or revisited in this s. 4 judgment.”*

**96.** Similarly, as regards the question of injustice, Feeney J. held:

*“The issue of a potential injustice being caused to any of the respondents was litigated within the s. 3(3) hearing. The Court has given its judgment in relation to those claims of “injustice”.”*

**97.** In effect, Feeney J. ruled that anything that had already been ruled upon following the substantive hearing in the s. 3(3) application could not be relitigated at a subsequent application for a disposal order under s. 4(1). However, it should be borne in mind that both applications had originally been before Feeney J. at the same time and the manner in which he dealt with them was a matter of logical sequencing and it followed from that that there could be no *“second bite of the cherry”*. Even so, however, Feeney J. afforded the parties an opportunity to identify any matter which had not already been considered within the s. 3(3) proceedings, and to raise any matters that arose from the judgment of the court in those proceedings that was relevant to the s. 4 application. He then proceeded to address matters raised by the parties in response to that invitation, and in the course of doing so he expressly refused to consider afresh any point that had already been raised and ruled upon in the s. 3(3) application.

**98.** The above decisions of Feeney J. were appealed by the respondents in those proceedings to the Supreme Court. Those appeals, together with another appeal of the same respondents and a *“Greendale”* application advanced on their behalf regarding another judgment of the Supreme Court, are all the subject of a judgment of Dunne J. in the Supreme Court in *Murphy v. Gilligan* [2017] IESC 3, [2017] 2 JIC 0101, VLEX-792854077. The appeals from the decision of Feeney J. were predicated upon an argument that the original s. 3(1) order made by Moriarty J. on 16<sup>th</sup> July 1997 was invalid (by reason of there having been no substantive hearing) and therefore the court did not have jurisdiction to embark subsequently upon a hearing of either the s. 3(3) or s. 4(1) applications. Dunne J. rejected this argument and dismissed the appeals. In the course of doing so, Dunne J. undertook an

analysis of the jurisprudence regarding the interpretation and application of s. 3 of the 1997 Act and re-affirmed the interpretation of the section as enunciated by Geoghegan J., discussed above at paras. 88-90.

**99.** At paras. 156 and 157, Dunne J. stated:

*“156. ...As has been noted previously, the Act of 1996 gives a party affected by a s. 3 order a number of opportunities to challenge the making of a s. 3 order. The first such opportunity arises at the s. 3 hearing itself. If not challenged at that stage, the making of a s. 3 order can be challenged at a s. 3(3) hearing. Ultimately, there can be a challenge at the time of a s. 4 hearing. It is important to emphasise that if the making of a s. 3 order is not opposed, a party affected by such an order is not precluded from bringing such a challenge at a later stage in the proceedings. ...*

*157. The evidence initially produced by CAB remained in substance the same as it relied on in all subsequent court appearances, whether moved on its behalf or on behalf of the Gilligans. The constant repetition, by way of reliance, of that evidence was therefore subject to repeat evaluation under judicial scrutiny during the course of these proceedings, giving the Gilligans multiple opportunities to engage with the evidence or to challenge its authenticity, reliability or value. ...”*

**100.** The Respondents placed reliance upon the passages cited above from the judgments of Murphy J., Geoghegan J. and Dunne J. respectively in support of their argument that they are entitled to argue that the Monies are not the proceeds of crime in making their case both in the context of their s. 3(3) application and, pursuant to s. 4(2), in response to the Bureau’s application for a disposal order under section 4(1). The Bureau on the other hand contends that the Respondents are not entitled to re-litigate the issues decided in the s. 3(1) hearing in either the s. 3(3) application or the s. 4 application. The Bureau relies upon the following

statement of Finnegan P. in *Murphy v. Gilligan*, approved of by Geoghegan J. in the Supreme Court in the same proceedings:

*“...[s.3(3)]... is not a licence for the court to reopen something which has been determined by a final order and to do so at large. Section 3(3) envisages that where an order exists it is a valid order but that it may cause an injustice, in that it, as I understand it, has caused an injustice by being in force. Then the court can immoderate that injustice if necessary by discharging the order or by varying it.”*

**101.** While this passage was approved by Geoghegan J. at para. 44 of his judgment, it is important to place the passage in the context in which it appears. Immediately before that passage Finnegan P. had stated:

*“...All I need to consider is whether the remainder of s. 3(3) gives the court any power or jurisdiction in effect to look at the process whereby the s. 3 order was obtained and if dissatisfied with that, interfere with it.”*

**102.** It is clear that in the proceedings before Finnegan P., the applicants had sought to impugn the *process* whereby the s. 3(1) order had been made by Moriarty J. years previously. They did so on the basis that the order had been granted in circumstances where there had not been a full hearing of the s. 3 application before Moriarty J., i.e. the application went unopposed. As is apparent from the passages cited, Finnegan P. was firmly of the view that s. 3(3) did not permit such an exercise, and at para. 44 of his judgment Geoghegan J. expressed his approval of this conclusion of Finnegan P. in the following terms:

*“I can find no fault with the interpretation of the section and I think it is clearly correct. It was never intended by the Oireachtas that a High Court Judge could judicially review another High Court Judge pursuant to s.3(3) because in reality that would be the effect of the defendants’ interpretation.”*

**103.** Thus, the passage from the judgment of Finnegan P. relied upon by the Bureau is not authority for the proposition that a person affected by a s. 3(1) order is not entitled, at a s. 3(3) hearing or in response to a s. 4(1) application, to re-open the substantive question as to whether or not the relevant assets are the proceeds of crime.

**Conclusion on Scope of Applications brought under s. 3(3) and s. 4(1) of 1996 Act**

**104.** The authorities discussed above establish the following:

1. An order made under s. 3(1) of the 1996 Act has the status of a final order, although it may be varied or discharged in applications subsequently advanced pursuant to s. 3(3) or s. 4(1) of the 1996 Act;
2. Where a court has determined, pursuant to s. 3(1) of the 1996 Act, that assets are (directly or indirectly) the proceeds of crime, a party affected by such an order may bring an application to vary or discharge such order pursuant to s. 3(3) of the 1996 Act;
3. A party affected by an order made under s. 3(1) of the 1996 Act may also challenge the determination that the relevant assets are, directly or indirectly, the proceeds of crime in responding to an application for a disposal order advanced under s. 4(1) of the 1996 Act;
4. The court may refuse to permit a party to challenge an earlier determination that relevant assets are, directly or indirectly, the proceeds of crime, where such determination was made following a substantive hearing and no new evidence is being proffered by the applicant in a subsequent application;
5. The court will not entertain an application to review a s. 3(1) order on the basis of the process leading to the making of the order, the appropriate remedy for any such complaint being by way of appeal.



### **Application of Principles to the Facts of this Case**

**105.** The Respondents did not ask the Court below to consider whether or not the Monies are the proceeds of crime by reference only to the evidence considered by Feeney J. in 2011. At the trial of the preliminary issues before Stewart J., counsel then acting on behalf of the Respondents made it clear they would be relying upon the new evidence that had already been adduced by the Respondents.

**106.** I pause here to mention that it was not suggested to the Respondents at the preliminary issues hearing that they had to undertake any particular procedure to adduce new evidence, such as would be necessary where an appellant wishes to introduce new evidence on appeal. At the hearing of this appeal, I enquired of counsel for the Bureau whether or not the principles in *Murphy v. The Minister for Defence* [1991] 2 IR 161, or any analogous principles, might apply to the introduction of new evidence at a s. 3(3) hearing, and counsel expressed the view that he felt that that would be unlikely. That is the extent of the discussion that was had on this issue, and since the Bureau at no time objected to the introduction of new evidence, the question as to whether a person intending to introduce new evidence at the s. 3(3) stage, or the s. 4(1) stage might be required to meet any particular procedural requirements simply did not arise on this appeal, and is a matter for another day.

**107.** The case made by Mr. Zeman (before this Court) was that the Respondents had brought new evidence before the High Court which proved that the Monies were not the proceeds of crime but rather were the *bona fide* proceeds of the sale of email accounts, and that the trial judge erroneously failed to assess that new evidence. While the trial judge stated that no new matter was put before the court which was not before the court when the s. 3(1) order was made, I do not think that this should be taken literally. As is apparent from the summary of the thirteen headings in the affidavit of Mr. Zeman of 11<sup>th</sup> June 2018 at para. 46 above, there clearly was new material before the court, although it related to the same matters raised

by Mr. Zeman in his affidavits in response to the s. (3)(1) application. I think it is reasonable to infer that what the trial judge meant was that there was nothing of a material nature in the new evidence advanced on behalf of the Respondents. However, assuming that I am correct in that inference, the rationale for the conclusion is not apparent, as it is expressed in very general terms only, and there is no analysis of the new evidence or a comparison with the evidence adduced at the s. 3(1) application by the Respondents. That said, Mr. Zeman was no help to the trial judge, in the first instance in failing to deliver a meaningful issue paper, and then, at the hearing before Stewart J., in choosing to depart from the Court and leaving Stewart J. to carry out the assessment of the evidence that he now complains she failed to do.

**108.** For its part, the Bureau submitted that the argument that the new evidence was not assessed should be rejected because the volume of affidavit material filed by the Respondents was utterly inappropriate and unmanageable. Moreover, the affidavits were, it is submitted, “*riddled with inadmissible legal submissions, conjecture, opinions and hearsay.*” It is further submitted on behalf of the Bureau that, in an effort to narrow the issues, it issued the motion that it did in April 2019 seeking a trial of preliminary issues, and that motion culminated in a direction from the Court requiring the Respondents to deliver an issue paper. While the Respondents purported to comply with this order, the issue paper that was delivered had not been drafted or settled by counsel and led to a breakdown in the relationship between the Respondents and their legal advisors who came off record as a result. The Bureau submits that the consequence of all of the foregoing was that the proceedings became utterly unworkable, notwithstanding which the trial judge engaged with the issues and addressed them in her lengthy judgment. The Bureau submits that in all of the foregoing circumstances, and having regard in particular to the fact that Mr. Zeman did not participate in the hearing before the trial judge, that ground of appeal No. 5, relating to

the asserted failure to assess new evidence, should fail. In effect, the Bureau submits that the Respondents have been guilty of an abuse of process, although it did not use that term.

**109.** While there is considerable merit in this submission, I do not think it can be fully accepted, or at least not so as to result in the dismissal of a ground of appeal. While the trial judge was, with much justification, highly critical of the manner in which the Respondents conducted themselves in the proceedings, she did not decide the applications before her on the basis of abuse of process. Nor have the Bureau raised that issue by way of cross appeal. It is clear that the *ratio* of the trial judge was that, having regard to the existing s. 3(1) order, the onus rested upon the Respondents to satisfy the Court that the Monies were not the proceeds of crime, on the basis of new evidence that was not before the Court when the s. 3(1) order was made. Since she took the view that there was no such new evidence, she was also of the view that the Respondents were engaged in a collateral attack on the s. 3(1) order, and, all of that being the case, she was satisfied to make a disposal order under s. 4(1).

**110.** But, as I have said above, it is clear there was new evidence, and the reason for the trial judge's conclusion that there was none, or none that was material, is unclear. But, even if this is so, the kind of evaluation of evidence that Mr. Zeman submits the trial judge should have undertaken is, in my view, impermissible. There are significant conflicts of fact between the affidavits relied upon by the Respondents for the purposes of the s. 4(1) motion and the s. 3(3) motion and those relied upon by the Bureau. The latter comprised the affidavits sworn on behalf of the Bureau in the s. 3(1) proceedings (in this regard, in the s. 4(1) motion reliance is expressly placed by the Bureau upon the earlier affidavits). These conflicts of fact included: whether the Respondents had the capacity to provide the services that they offered for sale, whether they had in fact provided the service, the education history and other credentials of Mr. Zeman's brother, Kristian Zeman, Mr. Zeman's own criminal

record, the authenticity of the affidavit sworn by D.I. Mauritz and the allegation that Routeback had been investigated in connection with a similar scheme the year previously.

**111.** In *Delany and McGrath on Civil Procedure* (5<sup>th</sup> ed., Round Hall, 2024) at paras. 21.109 and 21.110, the learned authors state the following as regards conflict of evidence on affidavit:

“21.109.

*Where a conflict of evidence on affidavit arises, a court will not be in a position to choose between the competing versions of the facts unless cross-examination on the affidavits takes place. In RAS Medical Ltd v Royal College of Surgeons in Ireland, Clarke CJ stated that it is impermissible to ask a trial judge to determine contested questions of fact on the basis of affidavit evidence alone and “where it is considered that a resolution of the dispute between those witnesses is necessary to the proper disposition of the case, then there has to be cross-examination and the onus in that regard rests on the party on whom the onus of proof lay to establish the contested fact”. Clarke J also said that it is not permissible to invite a court to reject sworn testimony (which includes affidavit evidence) either on the basis that there is sworn evidence to the contrary or that it is lacking in credibility or unreliable without giving the witness an opportunity under cross-examination to explain, if that be possible, any matters which might go to credibility or reliability. Not only is it considered unfair not to afford a witness that opportunity, it also deprives the court of the opportunity to appraise the witness giving evidence viva voce and being tested by cross-examination.*

21.110

*As Butler J observed in Re Bayview Hotel (Waterville) Ltd, the implications of RAS Medical “are far reaching” because it makes clear that the effect of not cross-examining will generally be that the court resolves the issues of fact against the party that bears the burden of proof. However, that will not always be the case and a court can find in favour of that party where there is sufficient uncontradicted credible evidence upon which the court can reach a decision or where the opposing affidavit evidence is based on mere assertion or hearsay or is obviously unreliable.”*

**112.** It is clear from *RAS Medical* that the conflicts in the affidavits sworn by the parties, to which I have referred above, could only have been resolved by cross-examination and the responsibility for cross-examination lay upon the Respondents, being the parties bearing the burden of proof. This is so because the starting position in applications under s. 3(3) and s. 4(1) is that a s. 3(1) order – which is a final order – has been made, and the assets to which the applications relate have already been determined to be the proceeds of crime. Accordingly, the burden of proof falls upon any person asserting to the contrary to prove so, on the balance of probabilities. That this is so is apparent not just by reason of the existing determination stemming from the s. 3(1) application which has the status of a final order, but also from the wording of s. 3(3) itself, which imposes upon the applicant in a s. 3(3) application the obligation to satisfy the court that “...*the property or a specified part of it is property [is not, directly or indirectly the proceeds of crime], or that the order causes any other injustice,...*”

**113.** In the absence of cross-examination, there was no basis upon which the trial judge could have concluded that the evidence tendered on behalf of the Respondents should be preferred to that of the Bureau, and that is also so, *a fortiori*, on appeal to this Court. While notices of cross-examination had been served on behalf of the Respondents by their then solicitors, the first such notice was struck down by the trial judge on the grounds of non-

compliance with the Rules of the Superior Courts. In his notice of appeal Mr. Zeman appealed that ruling, but at the hearing of this appeal, he did not pursue that element of the appeal. While it is tempting to deem it abandoned, I think that this would be unfair to Mr. Zeman, in view of the fact that it remained extant as a ground of appeal, and it is also referred to by Mr. Zeman as a ground of appeal in his written submissions, although it is not developed in any way within the submissions. I will therefore address the point.

### **The Ruling on the Notice to Cross-examine**

**114.** Both the Bureau and the Respondents had each served on the other a notice of cross-examination of deponent at trial, in the format prescribed by O.40, r.36 of the Rules of the Superior Courts. The Bureau had served its notice of cross-examination at the time that it issued its motion seeking an order pursuant to s. 4 of the 1996 Act. In this notice, it identified the affidavits sworn by Mr. Zeman on behalf of the Respondents between March 2009 and June 2018 as being the affidavits in respect of which cross-examination of Mr. Zeman was required.

**115.** In the case of the Respondents, the notice of cross-examination was served on their behalf on 8<sup>th</sup> November 2019 by Mr. Shanley. This notice identified seven affidavits sworn on behalf of the Bureau, six of which were sworn at the time of the original s. 3(1) motion, and the seventh of which was sworn on 26<sup>th</sup> January 2018. The deponents identified for cross-examination were Detective Chief Superintendent O'Mahoney, Detective Garda Fleming, the Bureau analyst, Detective Chief Superintendent Patrick Byrne and Detective Chief Superintendent Patrick Clavin.

**116.** On 13<sup>th</sup> November 2019, the office of the Chief State Solicitor wrote to Mr. Shanley in connection with the "issue paper" and the notice of cross-examination served on behalf of the Respondents. In this letter, the Chief State Solicitor contended that the trial of the action

had taken place in 2011 upon the hearing of the s. 3(1) motion, and that the notice of cross-examination that had been served did not comply with applicable procedures. The letter informed the Respondents, *inter alia*, of the intention of the Bureau to bring “*to the attention of the court*” matters related to the issue paper and the notice to cross-examine, when the matter was next due for mention before the court on 18<sup>th</sup> November. The letter further stated that in the event that the court permitted the Respondents to proceed with the s. 4 hearing in the way that the Respondents proposed, it was the intention of the Bureau to cross-examine any person whose evidence the Respondents intended to rely upon. In a reply dated 15<sup>th</sup> November 2019, Mr. Shanley stated that any potential issues could be ventilated on 18<sup>th</sup> November.

**117.** That was the context in which the court came to consider the notice of cross-examination served on behalf of the Respondents on 18<sup>th</sup> November 2019. While there was no formal application before the court for leave to cross-examine, and while this court was not provided with a transcript of the hearing that took place on that date, it appears clear from the correspondence exchanged and the judgment under appeal, that there was a contest between the parties as to whether or not the Respondents should be entitled to cross-examine the witnesses of the Bureau, and the trial judge ruled in favour of the Bureau, on the basis that the Respondents had failed to make the necessary application and to comply with the necessary procedure, which included filing an affidavit identifying the conflicts in respect of which cross-examination was required. I should add in the interests of completeness that the Bureau did not seek thereafter to rely on its notice to cross-examine.

**Procedure Applicable Where Cross-examination is Required**

**118.** The procedure applicable where a party wishes to cross-examine a deponent who has sworn an affidavit in proceedings differs depending upon whether or not the hearing is one

to which O.40, r.1 or O.40, r.36 of the RSC applies. O.40, r.1, which appears in that part of the rules dealing with affidavits, under the heading “General”, states:

*“Upon any petition, motion, or other application, evidence may be given by affidavit, but the Court may, on the application of either party, order the attendance for cross-examination of the person making any such affidavit”.*

**119.** O.40, r.36 appears under the heading “Trial on Affidavit” and Orders 33-35 address the procedure for Trial on Affidavit with the consent of the parties or pursuant to an order of the Court. The rules address the time limits for delivery of affidavits, and replying affidavits, in such circumstances. Thereafter, O.40, r.36 provides:

*“When the evidence is taken by affidavit, any party desiring to cross-examine a deponent who has made an affidavit filed on behalf of the opposite party may serve upon the party by whom such affidavit has been filed a notice in writing, requiring the production of the deponent for cross-examination at the trial, such notice to be served at any time before the expiration of fourteen days next after the end of the time allowed for filing affidavits in reply, or within such time as in any case the Court may specially appoint, and unless such deponent is produced accordingly, his affidavit shall not be used as evidence unless by the leave of the Court. The party producing such deponent for cross-examination shall not be entitled to demand the expenses thereof in the first instance from the party requiring such production. The notice shall be in the Form No 21 in Appendix C.”*

**120.** As I have already mentioned, it is apparent that both parties availed of the form of notice prescribe by O.40, r.36 (referred to as r.31 in the judgment in accordance with the provision of the rules then in force). Even so, it appears that the trial judge may have considered the issue by reference to O.40, r.1. The difference between the two Orders is of



some significance. O.40, r.1 is an application that engages the discretion of the court. As the authors of *Delany and McGrath on Civil Procedure* observe at para. 21.117:

*“In interlocutory applications and proceedings commenced by petition or originating notice of motion (including judicial review proceedings), there is no absolute right to cross-examine (even if the relief sought is the dismissal of the proceedings) and a notice to cross-examine may only be served with the leave of the court. This requires an application to be made by way of motion on notice to seek that leave. It was emphasised by Denham J. in Bula Ltd. v. Crowley (No. 4) that a trial judge has a discretion in relation to an application to cross-examine and the factors to be considered include any delay in bringing the application to obtain leave.”*

**121.** On the other hand, in trials to be conducted by way of affidavit evidence (such as where the procedure is by way of summary summons or special summons, or in the case of proceedings commenced by plenary summons where trial on affidavit is directed) O.40, r.36 provides, in effect, that a party is entitled, as of right (albeit subject to certain limitations which it is unnecessary to consider here) to serve notice to cross-examine deponents who have sworn affidavits on behalf of the other party to proceedings. Therefore, in the context of the issue now under consideration, it is necessary in the first place to consider which rule applied to the notice to cross-examine served on behalf of the Respondents.

**122.** On the face of it, since each of the applications before the Court was initiated by way of notice of motion, they fall within the ambit of O.40, r.1 and both parties were procedurally in error in serving a notice to cross-examine in the form prescribed by O.40, r.36 without seeking the leave of the Court. As this Court (Collins J.) pointed out in *Cave Projects Ltd. v. Gilhooley* [2022] IECA 245 cross-examination in interlocutory matters is – and ought to be – rare because at an interlocutory stage a court is not called upon to resolve conflicts of

evidence or reach conclusions on the balance of probabilities. However, he observed, where an order would, if granted, finally dispose of an action, it cannot be regarded as purely interlocutory in those circumstances. *Cave* was concerned with an application to dismiss on grounds of inordinate and inexcusable delay, and during the course of the hearing the motion judge had required the applicant to give evidence to clarify an issue arising out of an averment in an affidavit that he had sworn in support of the application. It was contended that the judge erred in so doing. Collins J. held that it have been open to the Court, pursuant to Order 40, r.1, to make an order for cross-examination of the applicant had such an application been made, and he observed that had such an application been made, it was clear that it would have been granted.

**123.** Nonetheless, it is apparent, that leave of the Court to cross-examine is required even in cases where the relief sought seeks the dismissal of the proceedings. That being so, there is no reason to believe that it is not required in a case such as this, just because the determination of both the s. 3(3) notice and the s. 4(1) will bring finality to the proceedings. No argument to the contrary (or indeed any argument at all on this issue) was advanced to the Court. In contrast, there is nothing within the text of O.40, r.36 to suggest that it applies to proceedings under ss. 3 and 4 the 1996 Act. Indeed the detailed procedures laid out in that rule for exchange of affidavits would suggest otherwise.

**124.** In this case no formal application was made to the trial judge for leave to serve notice of cross-examination, although the matter was undoubtedly the subject of argument on 18<sup>th</sup> November 2019. Even if whatever submissions that were made to the trial judge on that day were to be treated for the purposes of the rule as an application, and I do not think it would be correct to do because it is an important procedural step in proceedings which are brought primarily on affidavit (whether correctly described as interlocutory or not), it is apparent that the Respondents failed to satisfy the trial judge as to the necessity for cross-examination.

While it may be, as *Cave Projects* suggests, appropriate to give leave in applications brought on motion which may lead to final orders, the discretion must be exercised in each case based upon the facts and circumstances. In general, an applicant seeking to cross-examine must show necessity.

**125.** The onus lay upon the Respondents to identify for the trial judge the conflicts within the voluminous affidavits in respect of which the Respondents claimed cross-examination was necessary. It was not for the trial judge to identify those conflicts of her own motion, in what appears to have been a “for mention” hearing. There is an abundance of authority to this effect, including *Holland v. Information Commissioner* (Unreported, Supreme Court, 15<sup>th</sup> December, 2003) a case in which the Supreme Court dismissed an appeal from a High Court refusal of an application for leave to cross-examine, on the grounds that the applicant had failed to identify any conflicts of fact necessitating cross-examination. In *Irish Bank Resolution Corporation Ltd. v. Moran* [2013] IEHC 293, in a passage cited in *Delany and McGrath*, Kelly J. (as he then was) said:

*“It is incumbent upon an applicant for such an order to demonstrate (1) the probable presence of some conflict on the affidavits relevant to the issues to be determined and (2) that such issue cannot be justly decided in the absence of cross examination.”*

**126.** The Respondents failed to identify any such conflicts to the trial judge. That failure has to be seen against the backdrop of the procedural history of this case which has been outlined in detail above. Not only was there a failure to engage at the original hearing of the s. 3(1) hearing, there was considerable obtuseness in the Respondents’ attitude to the High Court during the course of the s. 4 application and the s. 3(3) application. The failure to engage in any meaningful way with the narrowing down of the issues by way of an issue paper despite having legal representation at that time was something that the trial judge would have been quite within her rights to take into account. She rejected that issue paper

on the basis that the purported issues related solely to matters which were adjudicated upon and determined in 2009 and was not in compliance with her directions as to the issues. Mr. Zeman, appearing for himself in the High Court, had been asked to narrow issues and had failed to do so. This amounted to a clear failure to identify those issues for which cross-examination was required in the matters remaining before the High Court.

**127.** If Mr. Zeman wished to argue at the hearing of this appeal that the trial judge erred in her refusal of leave to cross-examine, he needed to produce to this Court the evidence of the application made to the trial judge (in the form of a transcript of the hearing, if necessary) and the evidence relied on in support of that application in the Court below. He did not do so, and in these circumstances, he has failed to demonstrate any error on the part of the trial judge, and this ground of appeal too must be dismissed.

**128.** In case there should be any doubt, I should make it clear that all of the foregoing applies equally to the second notice of cross-examination served on behalf of the Respondents after the ruling of the trial judge on the first notice.

**129.** The upshot of all of this is that the cross-examination that was necessary for the determination of conflicts of facts on the affidavits did not take place, and the responsibility for this rests with the Respondents. Since the burden of proof in both applications rested with the Respondents, responsibility to ensure that cross-examination took place also rested with them, and since they failed to meet their obligations in this regard, it follows that the affidavit evidence of the Bureau must be preferred to that submitted by the Respondents.

**130.** It follows that Mr. Zeman has failed to discharge the burden of proof resting upon him to demonstrate that the Monies are not the proceeds of crime, or that the s. 3(1) order made by Feeney J. was giving rise to any injustice, or that an order under s. 4(1) would give rise to a serious risk of injustice, as referred to in s. 4(8) of the 1996 Act. That being the case,

grounds of appeal numbers 3 and 5 must both be dismissed, as both are concerned with the assessment of the new evidence in the sense that the Respondents contend that the new evidence should be preferred to that of the Bureau in the consideration of the provenance of the Monies. Ground of appeal No. 3, which is headed "*The Section 3(3) motion was assessed incorrectly*" continues with the assertion that the trial judge erred in failing to assess "*if the new evidence showed that the property didn't constitute proceeds of crime or if the order caused any other injustice*". Ground No. 5 is under the heading: "*The new evidence was not assessed*" and is then followed by submissions as to the entitlement of an affected party to challenge an order made under s. 3(1) within a s. 3(3) application or in response to a s. 4(1) application; thereafter, by this ground Mr. Zeman proceeds to assert that the trial judge erred in concluding that "*no new matter has been put before this court which was not before the court when the s. 3 was made.*" In substance, there is little difference between ground No. 3 and ground No. 5.

### **The "Formal Objections"**

131. By ground of appeal No. 4, the appellant maintains that the trial judge erred in her treatment of what he describes as the "*formal objections*" to the s. 4(1) application. It will be recalled that these objections are that, firstly, that the 1996 Act is not applicable to corporate respondents and, secondly, that the alleged criminal conduct did not constitute an offence under the laws of Sweden. In her judgment, the trial judge very correctly observed that the affidavits of Mr. Zeman contain much commentary as well as legal submissions none of which, as the trial judge stated, have any place in affidavits which should deal only with factual matters. This observation was made at para. 72 of her judgment where the trial judge very briefly addresses the objection that the 1996 Act does not apply to corporate bodies. The trial judge held that the objection is incorrect, and that the Court frequently

makes orders pursuant to ss. 3 and 4 of the 1996 Act in relation to the property and monies of bodies corporate.

**132.** Mr. Zeman submits that the mere fact that the High Court has previously made orders against corporate bodies is no answer to the objection. Even if this is correct however, it is manifest that this objection is misconceived. It is grounded on the argument that the respondent to an application made under s. 3(1) of the 1996 Act must be a natural person. “Respondent” is defined in the 1996 Act as meaning “*a person, wherever domiciled, resident or present, in respect of whom an interim order or interlocutory order, or an application for such an order, has been made... .*” The Interpretation Act, 2005, at s. 18(c) provides: “*The following provisions apply to the construction of an enactment*” and, so far as is relevant for present purposes, further provides that: “*“Person” shall be read as importing a body corporate (whether a corporation aggregate or a corporation sole) and an unincorporated body of persons, as well as an individual, and the subsequent use of any pronoun in place of a further use of “person” shall be read accordingly*”. Thus, it is clear, that where the word “person” appears in an Act of the Oireachtas, it is deemed to include a body corporate. It follows therefore, that this objection, and the ground of appeal relating thereto, is misconceived, based, as it is on a misunderstanding of the law.

**133.** It is true that the trial judge did not address the second formal objection, that the alleged conduct does not constitute an offence in Sweden. I would have some doubt however as to whether or not the trial judge erred by not doing so, having regard to the manner by which the point was raised in the Court below. It will be recalled that this objection is in the nature of a legal submission made, not from the body of the court either by counsel or by Mr. Zeman – who effectively absented himself from the proceedings – nor by written legal submissions, but rather by way of a submission contained within an affidavit. In *RAS Medical*, at para. 96, Clarke C.J. held: “*It is important that parties should realise first that it is inappropriate*

*to use affidavits as a form of quasi-legal or factual argument with a detailed analysis of the facts and arguments as to why the facts proposed on the side concerned should be accepted. Such material has no place in an affidavit, which should be confined to evidence.”*

**134.** However, it is in any case clear that this objection is also misconceived. This is so for several reasons, not least of which is that Mr. Zeman relies on the decision of the Swedish prosecutorial authorities not to prosecute him (or Routeback) in respect of the alleged conduct as evidence that the conduct does not amount to criminal conduct in Sweden. Needless to say, a decision not to prosecute does not amount to proof that the conduct alleged is not a criminal offence. Furthermore, proof that the alleged conduct is not an offence in Sweden could only be provided by way of an affidavit from an appropriate expert in Swedish law, proof of foreign law being a matter of fact.

**135.** More relevantly, however, the alleged conduct is, *prima facie*, an offence contrary to the laws of Ireland, the offence being provided for by s. 6 of the Criminal Justice (Theft and Fraud Offences) Act, 2001, and it is this offence that was relied upon by the Bureau at the s. 3(1) hearing before by Feeney J. in January 2011. Section 6 of the 2001 Act provides:

*“A person who dishonestly, with the intention of making a gain for himself or herself or another, or of causing loss to another, by any deception induces another to do so or refrain from doing an act is guilty of an offence.”*

**136.** The illegal act relied upon by the Bureau at the hearing before Feeney J. was the inducement by the Respondents of EuroConex to process, in Ireland, fictitious credit card transactions for the purpose of making a gain for the benefit of Routeback, and thereby causing a loss to EuroConex and/or credit card holders. In his submissions on this point (as set forth in his affidavit of 11<sup>th</sup> June 2018), Mr. Zeman argues that it is necessary for the Bureau to establish that the conduct alleged is an offence under the laws of Sweden because

the Respondents are situated outside the State and/or the criminal conduct occurred outside the State. This argument appears to be grounded upon para. (b) of the definition of “criminal conduct” in the 1996 Act, which addresses criminal conduct occurring outside the State. However, the argument ignores paragraph (a) of the definition which defines “criminal conduct” as meaning any conduct “*which constitutes an offence or more than one offence...*”, i.e. an offence or offences committed in the State. It is apparent therefore that this ground of appeal is based upon an erroneous interpretation of the 1996 Act, and it must also be dismissed.

**137.** Since the Bureau has been entirely successful in this appeal, my preliminary view is that it is entitled to an order for its costs incurred in connection with this appeal as against Mr. Zeman. If Mr. Zeman wishes to contend for a different order then he may, within 14 days from the date of delivery of this judgment, request the registrar to schedule a brief hearing, not to exceed 30 minutes (15 minutes to each side), for the purpose of making submissions as to why the court should make a different costs order. However, in that event, should Mr. Zeman be unsuccessful in persuading the court to depart from the order indicated above, then he may be held responsible for the costs of the additional hearing.

**138.** Since this judgment is being delivered electronically, Donnelly J. and Ní Raifeartaigh J. have authorised me to confirm their agreement with it.