

THE HIGH COURT

PROCEEDS OF CRIME

2007 12 CAB

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

**IN THE MATTER OF AN APPLICATION AFFECTING PROPERTY ALLEGED TO BE IN THE POSSESSION OR CONTROL OF
J.M., K.B., E.H., W.H.**

APPLICANTS

**AND
PLATINUM INVESTMENT AND DEVELOPMENT LTD**

RESPONDENTS

Judgment of Mr. Justice Brian McGovern delivered on the 19th day of December, 2008

1. This matter comes before the court on foot of a notice of motion issued by the first and third named respondents, J.M. and E.H. arising out of proceedings under the Proceeds of Crime Act 1996, and, in particular, an application for an interim order made on 29th June, 2007, and a further order made by this court on 10th December, 2007, which ordered that pursuant to s. 8(4) of the Act, that any publication of information that would in any way identify the first or third named respondent be prohibited.

Section 8 Proceeds of Crime Act 1996

2. For the purpose of this application, it is necessary to have regard to s. 8(3) and (4) of the Proceeds of Crime Act 1996 ("the Act"). These sub-sections read as follows:-

"(3) Proceedings under this Act in relation to an interim order shall be heard otherwise than in public and any other proceedings under this Act may, if the respondent or any other party to the proceedings (other than the applicant) so requests and the court considers it proper, be heard otherwise than in public.

(4) The court may, if it considers it appropriate to do so, prohibit the publication of such information as it may determine in relation to the proceedings under this Act, including information in relation to applications for the making or refusal of and the contents of orders under this Act and the persons to whom they relate."

The facts

3. The applicants are the subject of proceedings by the Criminal Assets Bureau ("CAB") in relation to certain properties and a motor vehicle. The High Court has made an order against the first named respondent restraining him from dealing with certain properties and the court made an order against the third named respondent restraining her from dealing with a motor vehicle which was identified by reference to its registration number. The proceedings under the Act arise out of an investigation by CAB into the assets and activities of Martin 'Marlo' Hyland who is described in the course of the proceedings as being the head of a criminal gang involved in drug trafficking and armed robberies, and who was shot dead in December 2006, in a house in Finglas owned by the first named respondent, and which is registered in his sole name. The third named respondent is a niece of Martin Hyland and the first named respondent is her partner.

4. On 29th June, 2007, CAB was granted an order by the High Court under s. 2 of the Act, prohibiting the first named respondent from dealing with three properties which were named in the order.

(a) 19, Fairlawn Park, Finglas, Dublin 11

(b) 33, Clonsaugh Glen, Coolock

(c) - Number redacted Scribblestown Park, Finglas, Dublin 11.

On the same date, an order was made against the third named respondent prohibiting her from dealing with a motor vehicle. On Sunday 14th September, 2008, an article was published in the 'Star on Sunday' newspaper which contained the following paragraph:-

"Since Hyland's death, the Criminal Assets Bureau has seized a high powered jeep and are also pursuing four of his properties in north Dublin and County Meath - including the Scribblestown Park house where he was killed."

On 19th October, 2008, an article appeared in the 'Sunday World' newspaper which purported to be an extract from a book written by Paul Williams, a crime correspondent for that newspaper, and which contained the following paragraph:-

"The Bureau also moved against Marlo's family and obtained High Court orders freezing five properties that family members had bought on the godfather's behalf - including the house he was murdered in."

The article also identified the house where the murder took place as, ". . . his niece, E.H.'s Name redacted three-bed terraced house at Scribblestown Park off the Rathoath Road in Finglas West".

5. The book from which the extract was taken is entitled 'Crime Wars' and was published in or about the month of October 2008. It is alleged that extracts from the book make a number of references to the making of an interim order under s. 2 of the Act and to the identities of the first and third named respondents. The following extracts are taken from the book:-

"E.H. later described the scene to detectives from the CAB. He [Marlo] would come into the car park and there would be obscene amounts of people coming to see him. He would be handing money out left, right and centre . . . there's a few bob for you, that's for you . . . he would be lucky to have any left to put back in his pocket."

"The Bureau also moved against Marlo's family and obtained High Court orders freezing a total of five properties family members had bought on the godfather's behalf. The house he was murdered in was included in the action. At the time of writing, the CAB had also seized over €250,000 in cash and a BMW jeep which Hyland bought for his niece, E.H.". Name redacted

6. The facts which have been set out above are to be found in the affidavits of J.M. and E.H. which ground this motion for contempt. The facts are not disputed by the respondents to the motion. In their response, the respondents say that they had no notice of the order made by the High Court on 10th December, 2007, and they were not aware of any restrictions on reporting in relation to these matters. Furthermore, they say that the material which they published, and which is complained of by the applicants, was in the public domain for a long time. They refer to a broadcast by RTE on 4th July, 2007, in which they say the properties were identified by location and that the property at Scribblestown Park was recorded on film and shown in a news broadcast. That broadcast also stated that the property was believed to be that of Martin "Marlo" Hyland, and that the Criminal Assets Bureau had made a move to seize it and three other houses, one in Finglas, one in Coolock and one in County Meath. It also referred to the fact that an SUV and a sum of money in cash was also seized.

7. The RTE broadcast took place after the interim hearing before the High Court on 29th June, 2007, but some months before the order prohibiting publication, which was made on 10th December, 2007. Correspondence between CAB and RTE, which was exhibited in an affidavit of Francis H. Cassidy, makes it clear that while CAB wished to point out to RTE that the broadcast contained information derived from or introduced in the context of proceedings brought by the Bureau under s. 2 of the Act, the proceedings were heard *in camera* pursuant to s. 8(3) of the Act. RTE was informed that on that basis, the information should not have been published. But the legal officer of the Bureau, in that letter, accepted that the broadcast was not calculated to obstruct or interfere with the course of justice or the lawful processes of the courts and accepted that "stringent efforts appear to have been made . . . to ensure that no reference was made to any respondents". This is in stark contrast to the written material complained of in this application.

8. In a supplemental affidavit sworn by E.H. in this application, she says that on the day following the article by the 'Sunday World', she was telephoned by a person who is not a party to the proceedings but is described therein as a criminal associate of her late uncle. She said that he informed her that he had flicked through the book and said the following: "*what's the story with this book, what have you been saying to them, are you the new E Name redacted. Bowden*". This was a reference to a garda informant in another case involving a high profile murder. E.H. says that she felt threatened by this phone call and was put in fear of this person and his associates. This is precisely the sort of mischief which is sought to be avoided by s. 8(3) and (4) of the Act. I have already stated that none of the factual material outlined in the affidavits of J.M. or E.H. has been challenged by the respondents to this motion.

The law

9. The principal legal issue that arises on this application is whether or not there was contempt and whether it affords a defence to the respondents to say that they were never made aware of the order prohibiting publication made by the High Court on 10th December, 2007.

10. The Act does not prescribe any penalty for breach of an order made under s. 8 (3) or (4). In my view, it falls to be considered under the general law of contempt. It appears that in making the order under s. 8(4) of the Act, Feeney J. took into account that not all the purchase money of the properties constituted the proceeds of crime and the respondents (J.M. and E.H.) were not alleged to have been personally involved in any criminal activity. He said in his judgment:-

"The court is satisfied that under section 8(4), the court does have a discretion. The court has to be precious as to people's reputations and has to recognise the scheme under the Act and in circumstances where one is not dealing with the defendant in this case as being the person who committed the crime, particular regard has to be had to the protection of that person's reputation." (page 41 of judgment).

11. In the course of submissions, I have been referred to a long line of decisions which establish that the courts cannot allow those who defy its orders to go unpunished as it would be an affront to the authority of the court and would also discourage people who seek its protection. Although the Act does not provide any punishment for a breach of an order under s. 8(3) or (4), counsel for the applicants argue that the court has an inherent jurisdiction to take whatever steps are necessary. See *M.P. v. A.P.* [1996] 1 I.R. 144. In that case, the Judge had to take steps to ensure that the *in camera* nature of Family Law proceedings was respected. In *re Kennedy and McCann* [1976] 1 I.R. 382, the defendants had published an offensive and inaccurate account of guardianship proceedings and one of the parties sought an order of attachment and contempt. It was claimed that the article had scandalised the court and had breached the *in camera* rule. The defendants apologised for the publication by the time the matter came to court, but O'Higgins CJ. held that they had been guilty of a criminal contempt of court and stated:-

"In this instance, there has been a contempt of a serious nature. Not only was the article written in breach of an order prohibiting publication, but it was a distortion of the facts and was calculated to scandalise the members of this court who have dealt with or are dealing with this case, for it imputed to them base and unworthy motives which, if substantiated, would render them unfit for their office."

12. In the motion before me, I have to decide whether there is contempt, and if so, whether it is a criminal contempt or civil contempt.

13. The courts have drawn a distinction between civil and criminal contempt. In *The State (Keegan) v. De Burca* [1993] 1 I.R. 223, Ó Dalaigh CJ. stated at p.227:

"Criminal contempt consists in behaviour calculated to prejudice the due course of justice, such as contempt in facie curia, words written or spoken or acts calculated to prejudice the due course of justice or disobedience to a writ of habeas corpus by the person to whom it is directed - to give but some examples of this class of contempt. Civil contempt usually arises where there is a disobedience to an order of the court by a party to the proceedings and in which the court has generally no interest to interfere unless moved by the party for whose benefit the order was made. Criminal contempt is a common law misdemeanour and, as such, is punishable by both imprisonment and fine at discretion, that is to say, without statutory limit, its object is punitive: see the judgment of this court in re Haughey. Civil contempt, on the other hand, is not punitive in its objective but coercive in its purpose of compelling the party committed to comply with the order of the court, and the period of committal would be until such time as the order is complied with or until it is waived by the party for whose benefit the order was made."

14. In this case, the respondents to the motion are not parties to the CAB proceedings under the Proceeds of Crime Act and they deny that they were ever served with a copy of the order made on 10th December, 2007. Indeed, there is no evidence to show that they were served with this order. Nevertheless, the application does seek an order attaching the respondents and/or sequestering their assets on the grounds that they failed to comply with the court order made pursuant to s. 8(4) of the Act. The application is not brought on the basis of a reporting or publishing of material that was canvassed at an *in camera* hearing. But it seems to me that

the court may, of its own motion, determine such an issue if information laid before it establishes that a party brought before the court on a motion for attachment and committal was guilty of breaching the *in camera* rule in a manner calculated to interfere with the administration of justice. The court would not be entitled to make any order based on such a finding without hearing the respondents. In the motion before me, the breach of the *in camera* rule was canvassed by both parties in their submissions and the respondents addressed this point in their arguments to the court and did not claim to be prejudiced by having to deal with that point, nor did they seek an adjournment. In those circumstances, it seems to me that it is fair and reasonable to consider whether there was a contempt based on a breach of the *in camera* rule. The court is entitled to and must protect its own procedures and its authority.

15. This application has been clearly argued on the basis that the matters complained of amount to a criminal contempt and I am dealing with the motion on that basis. Criminal contempt is a serious matter because it tends to interfere with the administration of justice and bring the authority of the court into question.

Conclusion

16. I accept that the respondents did not have notice of the making of the order by Feeney J. on 10th December, 2007, prohibiting publication of information pursuant to s. 8(4) of the Act. In *X. County Council v. A.* [1985] 1 All E.R. 53 at 56, Balcombe J. held that an order binding on the world at large will, however, be binding only on those who have notice of its existence. At p. 56, he said:-

"Let me say at once, that I do not believe, whatever the theoretical jurisdiction may be that if, as I intend to do, I make an order prohibiting publication of the identity of Mary Bell and her child, it would be a contempt of court punishable in the usual way if someone who has no knowledge at all of the existence of this order and in perfectly good faith publishes the prohibited information."

17. In civil proceedings, if a party seeks to attach and commit another party for breach of a court order, it is necessary to serve a copy of the order on the other party with a penal endorsement on it which warns that party that if they do not comply with the terms of the order, they are liable to be attached and committed. If that is the case, where an issue of civil contempt might arise, then *a fortiori*, in an application for attachment and committal for a criminal contempt, the party against whom the order is sought must have notice of that order. That is not to say that there might not be exceptional circumstances where a party may be deemed to have notice of an order, having regard to specific circumstances. I can find no such circumstance in this case which would permit me to make an order attaching and committing the respondents for a criminal contempt for breaching the order of 10th December, 2007, when they clearly had no actual or constructive notice of it.

18. The respondents do not deny the facts set out in the affidavits sworn by J.M. or E.H. Nor do they deny the facts set out in the affidavit of Francis H. Cassidy, the Bureau Legal Officer to CAB.

19. The first article complained of is an article that appeared in the '*Star on Sunday*' in its edition on 14th September, 2008. The article is under the name Ken Foy, the crime correspondent. The relevant part of the article states, "*since Hyland's death, the Criminal Assets Bureau has seized a high-powered jeep and are also pursuing four of his properties in north Dublin and County Meath - including the Scribblestown Park house where he was killed*". The article had earlier stated, "*What he did not know was that the house he was going to work in was the property of Martin 'Marlo' Hyland's niece, E.*". Name redacted There is a clear link between the two parts of the article which purports to make a connection between the ownership of the house in which Martin Hyland was murdered, and E.H., his niece. The seizing of the motor vehicle and the "pursuing" of a number of properties by the CAB is clearly a reference to the proceedings in the High Court brought by CAB and which were held *in camera*.

20. The next matter complained of is the article contained in the '*Sunday World*' edition of 19th October, 2008, in which extracts appear from the book, '*Crime Wars*' by Paul Williams. The following extract appears:

"The Bureau also moved against Marlo's family and obtained High Court orders freezing five properties that family members had bought on the godfather's behalf - including the house he was murdered in."

The article also describes the house as "*his niece, E.H.'s Name redacted three-bed terraced house at Scribblestown Park off the Rathoath Road in Finglas West*". In fact, that was factually incorrect because the house in question is registered in the sole name of J.M. What the book and the extract in the newspaper establish is that the Criminal Assets Bureau had moved against Martin Hyland's family and had obtained a freezing order on a property which is identified with E.H. but which, in fact, is registered in the name of J.M. The only power to make such freezing orders was under the Proceeds of Crime Act 1996, and this is clearly a reference to the proceedings brought under that Act by CAB. Those proceedings were held *in camera*.

21. Perhaps the most serious matter complained of is the reference in the book '*Crime Wars*' at p. 144 which states:

"E.H. Name redacted. later described the scene to detectives from the CAB, 'he [Marlo] would come into the car park and there would be obscene amounts of people coming to see him. He would be handing money out left, right and centre . . . there's a few bob for you, that's for you' . . . he would be lucky to have any left to put back in his pocket."

22. This purports to be an extract from an interview between E.H. and CAB detectives. E.H. has sworn an affidavit in which she says that this repeats *verbatim* the text of an interview between her and officers of the CAB on 14th February, 2007, which is contained in Exhibit AB6 of the affidavit of Anthony Brady in the CAB proceedings dated 5th June, 2007. This has not been disputed by any of the respondents to the motion. E.H. has described how she received a threatening phone call in relation to this matter. The publication of this information is extremely serious. Not only is it a breach of the *in camera* rule, but it also raises worrying questions as to how that information came into the hands of the author. Page 188 of the same book contains the following material:

"The Bureau also moved against Marlo's family and obtained High Court orders freezing a total of five properties family members had bought on the godfather's behalf. The house he was murdered in was included in the action. At the time of writing, the CAB had also seized over €250,000 in cash and a BMW jeep which Hyland bought for his niece E. Name redacted."

As I have stated, with regard to the similar material printed in the '*Sunday World*' edition of 19th October, 2009, this is a clear reference to the proceedings brought by CAB under the Proceeds of Crime Act 1996, which proceedings were held *in camera*.

23. Affidavits were sworn on behalf of the respondents to this motion. An affidavit was filed by Colin MacGinty, Editor of the '*Sunday World*' newspaper who says that he makes the affidavit on behalf of himself and with the authority of Sunday Newspapers Ltd. trading

as '*Sunday World*', and on behalf of its crime editor, Paul Williams. Ms. Chenile Keogh, the Managing Director of Merlin Books Ltd., has sworn an affidavit on behalf of the publishers of the book, '*Crime Wars*'. The affidavits do not refer to the role of Independent News and Media plc. who are the first named respondents to the motion and I will hear counsel on this issue in due course.

24. With the exception of Merlin Publishing, I am satisfied that the respondents are individuals or media organs who would be familiar with the role of the Criminal Assets Bureau and its procedures. As for Merlin Publishing, they have a duty to inform themselves on the law when they are publishing material such as that which is to be found in the book, '*Crime Wars*'. All of the respondents must be deemed to have knowledge of the provisions of the 1996 Act. I am satisfied that the respondents either knew that the CAB matters on which they reported had been held *in camera*, or were reckless in not establishing the correct position. No one who is regularly involved in investigating or publishing information about criminal activity in this State, could fail to be aware, in a general way, of the workings of the Bureau. I am quite satisfied, in the circumstances, that the respondents have been guilty of a criminal contempt and I will hear counsel on the position concerning Independent News and Media plc. and I will also give counsel an opportunity to address me before I decide what sanction to impose.