Neutral Citation [2013] IEHC 302

THE HIGH COURT

[2013 No. 7 CAB]

PROCEEDS OF CRIME

IN THE MATTER OF SECTION 3(1) OF THE PROCEEDS OF CRIME ACTS 1996 TO 2005

BETWEEN

CRIMINAL ASSETS BUREAU

APPLICANT

AND

B.G.S. LIMITED, P.M., R.M., M.C. LIMITED, A.B. LIMITED, TCF F. LIMITED, McL. F. LIMITED, B.M. LIMITED, H.F. LIMITED, NWS S.S. LIMITED, T.O.I. LIMITED, S.F. LIMITED, V.F. LIMITED, S.R. LIMITED, H.S. LIMITED, DNG E. LIMITED, S.B., J.B., ISS P.T. LIMITED,B.T. LIMITED AND H.F.I. LIMITED

RESPONDENTS

JUDGMENT of Mr. Justice Kevin Cross delivered on the 3rd day of July, 2013

1. By order of this court dated 26th April, 2013, I ordered pursuant to s. 2 of the Proceeds of Crime Act 1996 and 2005, that the 21st named respondent be prohibited from disposing or otherwise dealing with or diminishing the value of the property set out in the Schedule to the said order in relation to the 21st named respondent being the sum standing to the credit in the account bearing the number 90336572051579 held in the Bank of Ireland, 78/81 Clanbrassil Street, Dundalk, County Louth, in the name of H.F. Limited. in the sum of €292,731 or thereabouts.

2. The said order was obtained by the applicant *ex parte* and by notice of motion, the 21st named respondent now seeks an order discharging the said order of 26th April, 2013, insofar as the same relates to the property set out at Item 30 of Schedule 2 thereof on the grounds that the applicant failed, in making application for the said order, to comply with the duty of utmost good faith.

3. The original order made by the court was pursuant to an affidavit of the Chief Bureau Officer of the Criminal Assets Bureau (the Bureau), Detective Chief Superintendent Eugene Corcoran, the affidavit of Detective Sergeant Michael V. Byrne and of the Bureau Forensic Accountant Number One. The 21st named respondent, in support of the motion, relied upon the affidavit of Mr. A.H. and there were affidavits in response sworn by the said Chief Superintendent Corcoran and Detective Saundra Cullen.

The Law

4. The law in this matter is quite clear and is not essentially in conflict. In *Michael Bambrick v. Johanne Corbley* (Clarke J.) [2005] IEHC 43, and in *FMCK and D.C.S.T. Ltd. v. B.H. Ltd.* (Clarke J.) [2006] I IEHC p. 185, the issue of the obligations of candour were extensively addressed and I propose to adopt and apply the same.

5. A litigant applying *ex parte* for an onerous order in circumstances which amount to a basic breach of the principles of fair procedure is obliged to make full and frank disclosure of all material matters in his knowledge for the judge to know and which are relevant in the exercise of the judge's discretion.

6. If the duty of disclosure is not observed by the plaintiff, a court will discharge the *ex parte* order and may refuse the plaintiff any further *inter partes* reliefs even though the circumstances would justify the grant of such relief – see *Tate Access Floors Inc v. Boswell* [1990] 3 All E.R. 303.

7. In *Bambrick* (above), Clarke J. held that the plaintiff had failed in his obligation to disclose all matters relevant to the exercise of the court's discretion and held that the test by reference to which materiality of non-disclosure should be judged is one of whether objectively speaking, the facts could reasonably be regarded as material i.e. materially to be construed in a reasonable and non-excessive manner.

8. It is also accepted that the consequences of non-disclosure are not automatic and involve a discretion in the court and in *Bambrick* (above), Clarke J. identified a number of factors being likely to weigh heavily upon the court in the exercise of its discretion:-

> "1. The materiality of the facts not disclosed.
>
> 2. The extent to which it may be said that the plaintiff is culpable in respect of a failure to disclose. A deliberate misleading of the court is likely to weigh more heavily in favour of the discretion being exercised against the continuance of an injunction than an innocent omission. There are obviously intermediate cases where the court may not be satisfied that there was a deliberate attempt to mislead but that the plaintiff was, nonetheless, significantly culpable in failing to disclose.
>
> 3. The overall circumstances of the case which lead to the application in the first place."

9. In *Bambrick* (above), Clarke J. held that the non-disclosure was of facts of significant materiality and while there was no attempt to deliberately mislead to the court, the plaintiff's solicitor ought to have been aware of his duty to disclose all material facts and was significantly culpable in failing to bring the attention of the court, the matters which may have had a potential to influence the courts determination.

10. In *FMCK* (above), Clarke J. stated that "the obligation of full disclosure is seen as a *quid pro quo* for the entitlement of the applicant to obtain what are, frequently, very onerous orders, without affording the person affected by those orders an opportunity "to be heard". Clarke J. rejected the submissions on behalf of the Bureau to the effect that as acting in the public interest pursuant to statute that different principles ought to obtain than apply to Mareva or Anton Pillar procedures but he did state that the statutory scheme has some relevance to the matters in which that the Bureau may be required to disclose but does not affect the principle concerned.

11. In *FMCK*, Clarke J. did not depart from the general principles he identified in *Bambrick* and held that the criminality relied upon by the Bureau was UK criminality and potential Irish criminality was merely an add on. Clarke J. pointed that in a s. 2 application the court is entitled to act upon on the opinion evidence tendered under s. 8 and does not have to satisfy itself that the opinion is correct. The court is only required to be satisfied that the opinion is reasonable.

> "The obligation on the relevant CAB officer is to inform the court of the basis of his opinion so as to enable the court to satisfy itself as to whether that opinion is reasonable. If the tenderer of the opinion is aware of material which might suggest, on an objective basis, that his opinion was not reasonable then he may well be under an obligation to disclose that matter to the court while, at the same time, explaining why the factual matter concerned does not alter his opinion."

12. In that regard, Clarke J. held that the issue of whether a crime had occurred within the Irish jurisdiction was not reasonably to be regarded as material:-

> "There is a very significant difference between the matters that require to be established to justify the court in making a *Mareva* order, on the one hand, and a freezing order under the Act, on the other hand. A key issue in a Mareva application is the obligation on the plaintiff to satisfy the court as to a risk of dissipation of assets. There is no equivalent requirement in applications under the Act. While such a risk may be a factor in the proper exercise of the courts discretion as to whether it is appropriate to make an ex-parte s. 2 order rather than requiring notice for a s. 3 application, the issue of risk of dissipation is not, in itself, a material factor under the Act."

13. Clarke J. also held that other matters were not material and stated that:-

> "In an application under s. 2 it is necessary to have regard to the statutory framework to determine materiality… If the court is satisfied that there is evidence, sufficient to satisfy s. 2, that the assets the subject matter of the application are the proceeds of crime, then there may, of course, be other factors that might be relevant in considering whether it was appropriate to make an ex parte order. For example it is clear that the section can apply to the proceeds of crime even where those proceeds are in the hands of an innocent party. The fact that a party might not have knowledge of or be connected with the criminality which rendered the assets concerned proceeds of crime could be a material factor in the exercise of the courts discretion to make an order ex parte."

14. Clarke J. went on to hold that the only matter that could have relevance was the contention that D.C., the first named defendant had been arrested and was in custody in the UK and which might well have significantly reduced visibility to dissipate the assets. Clarke J. held that that matter ought to have been disclosed to the High Court when making the s. 2 application but held that the matter not disclosed was only of marginal importance and that it was difficult to see how a different result would have been reached had the court been informed of the first named defendant being arrested. In those circumstances, the s. 2 order was not discharged.

15. A number of English cases were referred to me by counsel on behalf of the applicant but these did not significantly alter the general proposition.

The Section 2 Application

16. Chief Superintendent Corcoran in his initial affidavit stated his belief pursuant to s. 8(1) of the Proceeds of Crime Act 1996, as amended that the properties set out in the schedule of the notice of motion was in the possession or control of one or more of the respondents as part of the "same criminal enterprise". He also stated his belief pursuant to s. 8(1) that the property constitutes direct or indirectly the proceeds of crime or property that was acquired in whole or in part with or in connection property that directly or indirectly constitutes the proceeds of crime. He also stated that the value of the property was at least €13,000.

17. He stated his belief was based upon the information and documents and other material obtained by Bureau officers and members of An Garda Síochána in the exercise and performance of their duties as set out in the affidavits of Detective Sergeant Byrne and the affidavit of the Bureau Forensic Accountant No. 1.

18. The Chief Superintendent set out the grounds of his belief as including 23 matters including (a) to (w), one of which was identified by counsel for the Bureau as being relevant to the 21st named respondent namely:-

> "(i) the financial trail identified in the investigation."

19. The nature of this scheme was outlined as an elaborate fraudulent interconnected scheme in relation to the transforming of marked (agricultural diesel, which was liable to lower oil tax, lower excise and lower VAT rates than standard diesel, was then passed off as standard diesel) and also a related matter of the stretching or laundering of diesel were outlined by Detective Sergeant Byrne.

20. At para. 11 of his affidavit he referred to a diagram prepared by the Bureau Forensic Accountant and to four layers of the transaction involving:-

> (a) Legitimate oil importers/wholesalers who sell marked diesel to "purchasing companies" and invoiced them to unmarked diesel.
>
> (b) Purchasing companies who sell mark diesel to "buffer companies" with a frequent absence of paper trail.
>
> (c) The "buffer companies" who sell the products to end users or petrol stations as unmarked diesel. The "buffer companies" do not generally buy on any unmarked fuel themselves. The marked fuel purchased from legitimate oil importers was then "laundered" somewhere between its purchase and sale to end users.
>
> (d) End users then buy the now unmarked fuel and sell it to motorists.

21. The 21st named respondent was identified in a diagram as being one of the purchasing companies selling unmarked diesel to buffer

companies.

22. It was stated that Sergeant Byrne that the money trail involved the collection of funds through end users companies transfer these funds to buffer companies and "missing traders" and the payment by missing trader companies to wholesale fuel supplies or the onward transfer of these funds to purchasing companies who in turn made payments to wholesale fuel suppliers. It was stated that there was an absence of money trail exhibited in the bank accounts of any of the profit elements of the fraud which is described as being substantial.

23. Sergeant Byrne also stated that the evidence would show that each of the respondents were aware of and participate in the fraud and of the fourteen factors identified, the one which counsel for the Bureau has advised relates to 21st named respondent is:-

> "(vi) Nature of payments made by the end user."

24. Sergeant Byrne stated at para. 34 that:-

> "the analysis of the accounts conducted by me, other Bureau officers and the Bureau Forensic Accountant No. 1, leads us to conclude that there was a coordinated effort in respect of the collection of money from filling stations throughout the Republic of Ireland and that a number of bank accounts were being used for the purpose of accumulating funds which were then used to pay legitimate oil suppliers…"

25. A number of the respondents were detailed by Sergeant Byrne as being related to the M. family and in relation to the 21st named respondent it was stated that this company was used by the K. family (the family behind the 20th named respondent) (B.T. Limited) to purchase fuel products from wholesale suppliers. He stated that the K. family were having difficulty with suppliers due to their suspected involvement in the illegal fuel laundering business and used the 21st named respondent account to carry out these transactions. Transfers of approximately €5.5m were made into H.F. Limited from the accounts of B.T. Limited and G.S. trading as BK Oils. H.F. Limited has no business premises in this jurisdiction. Other transfers amount to approximately €15m.

26. It was also stated that the 21st named respondent continued to trade without a mineral oil trader's licence.

27. The affidavit of the Bureau Forensic Accountant detailed a number of companies and business set up by the M. family and "parallel to this enterprise", the K. family set up and ran equivalent entities to run a similar fuel laundering enterprise and identified the 21st named respondent as one of the associated companies.

28. It was also stated that whilst both fuel laundering enterprises are run separately there is a high degree of interconnectivity between the two enterprises with numerous instances of transfer funds and products via M. entities and K. entities and vice versa.

29. In relation to H.F. Limited, the Bureau Forensic Accountant examined the bank account and stated that the "main purpose" of the 21st named respondent's bank account was the collection of funds from a number of "end users" including B.T. and G.S. trading as BK Oil and other funds to finance the purchase of both quantities of wholesale fuel produced from legitimate companies.

The Respondent's Case

30. It is submitted on behalf of the 21st named respondent that there has been a breach of the duty of utmost good faith by the applicant in that:-

> (a) They failed to disclose to the court the position constantly maintained by the respondent that it had a substantial and legitimate business and operated an ordinary arms length business relationship with any other parties or persons of relevance to the Bureau's investigation.
>
> (b) They failed to disclose to the court evidence supported of the respondent's position in particular by failing to disclose the content of the business records supplied to the Bureau by the respondent and even the fact that such records had been supplied.
>
> (c) They failed to advise the court of what is described as the true nature of the interaction between the Bureau and the respondent following the making of an initial freezing order under s. 17 of the 2010 Act in the District Court both in general terms and in relation to the following specific respects:
>
> > (i) by giving the court a partial "self serving inadequate and wholly misleading account" of the meeting of 5th April, 2013, between Mr. H. and others on behalf of the respondent and officials of the Bureau.
> >
> > (ii) by failing to set out to the court that Mr. H. had spent two hours at the meeting dealing with the matters raised by the applicant in answering their questions.
> >
> > (iii) by failing to disclose to the court that a substantial volume of documentation had been provided by the respondent at the meeting and making no reference to the content of these documents.
> >
> > (iv) by failing to inform the court that the respondents had agreed to provide any further documentation required.
> >
> > (v) by failing to disclose both the fact that further substantial documentation including business records and dealings with other persons of interest had been supplied within two working days of their meeting as well as the contents of these records.
> >
> > (vi) by allegedly misleading the court as to Mr. H's ability to explain how the business of the respondent operated when the Bureau was in possession of written statements and notes of the company as procedure as provided by Mr. H. in failing to disclose that the Bureau had declined to indicate an advance of the meeting what specific matters it wished to discuss giving only the names of certain companies that they were interested in.
> >
> > (vii) by failing to mention that whereas a number of other respondents had destroyed their records that the 21st named respondent had gone at lengths to produce complete and adequate records.

(d) They withheld from the court any reference to the respondent's interaction with B.G.S. and in particular the facts that the respondent had ceased to supply that customer and terminate its business when Mr. H. became aware that the only product being ordered was agricultural diesel. It is alleged that this single fact alone was strongly supportive of the respondent's position and highly inconsistent with the allegedly knowing to have been part of a fuel fraud or fuel laundering.

(e) They failed to disclose to the court that the deponent had explained the circumstances in which the K's became customers of the respondent by allegedly misleading the court as to the commercial reality of the respondent's business and in particular that every amount received by the respondent could be matched with a purchase of oil or coal from a reputable supplier and suggesting that the respondent was either K. or M. family companied controlled or that the K. family were able to use the respondents' bank account when "all they did was to make payments to the account for the purchase of fuel products in the same way as other customers of (the respondent)".

(g) They withheld from the court the respondent's explanation as to the absence of fuel laundering licence.

(h) They misled the court by suggesting that the respondents continued to engage in oil trade after early 2012 into 2013.

(i) They withheld from the court, the respondents' cooperation with the Revenue Commissioners in Dundalk.

31. Mr. H., in his affidavit, on behalf of the 21st named respondent was particularly concerned that the meeting of 5th April, 2013, was only briefly alluded to. The applicant had been notified on 13th March, 2013, that a s. 17 order had been made in the District Court on the grounds that:-

"1. The account is operated to facilitate wholesale fraud in the oil distribution business.

2. The account facilitates the sale of laundered fuel and disguises the true nature of the fraud perpetrated.

3. There is no commercial reality or legitimacy to the transactions in the accounts.

4. The account is operated to assist money laundering."

The respondents had also been advised that the Bureau still had an "open mind" as to their involvement in the scheme.

32. Subsequent to the said notification, Mr. H. attended the Bureau's offices on 5th April together with the company's solicitor, Mr. Molloy of Sheehan Partners and the meeting went on for some two hours and was attended on behalf of the Bureau by Detective Garda Cullen and Bureau Forensic Accountant No. 1 and Customs and Excise Officer and a Revenue Officer.

33. The respondent alleges that the fact that the respondent produced extensive documentation at the meeting and followed this up by furnishing further documentation within a few days which they had not got at the meeting all of which disclosed that the allegation that there was no commercial reality to the abilities of the respondent was incorrect and that the respondents were to be seen as legitimate suppliers and that payments to the respondents were described as "transfers" rather than payments whereas in fact there were payments for goods sold and delivered.

34. It was submitted that had the court known that all the payments to the respondents were backed up by documents which showed that they all related to the sale of fuel that the court would have had to question the reasonableness opinion of Chief Superintendent Corcoran that funds were proceeds of crime.

35. It was submitted that the court was not advised that in relation to the 21st named respondent that the allegation against them was of money laundering rather than of fuel laundering. In dealing with an analysis of bank accounts conducted by the Bureau, Sergeant Byrne at para. 34 stated that this analysis:-

"lead us to conclude that there was a coordinated effort in respect of the collection of money from filling stations throughout the Republic of Ireland and that a number of bank accounts were being used for the purpose of accumulating funds which were then used to pay legitimate oil suppliers. The transactions were also unusual in that many of the payments were made for large sum amounts. Transactions were identified whereby a transfer, for example, €50,000 or €100,000, will be made into one account to another in a different financial institution and almost immediately the same sum will be transferred electronically onto another account usually a legitimate oil supplier".

The Bureau Forensic Accountant's affidavit was also relied on in this regard.

36. It was submitted that this account of money laundering did not relate to the activity in the respondent's account.

37. It was submitted that had the court been told of extensive cooperation of the respondent to the Bureau and had the court been told of the commercial reality in relation to the payments that the court would not have exercised its discretion or held that the belief on the Bureau was reasonable.

38. It is also further submitted that the court was not advised that pursuant to s. 8(1) that the belief of the Bureau was required to be a reasonable one. It was submitted that counsel on opening the case to the court merely said that once the Bureau officer held the belief that the court could proceed to make its order.

The Bureau's Case

39. The Bureau's case as submitted to the court was:-

(i) There was no material non-disclosure and that the complaints of non-disclosure are of a type made and rejected in other cases that the fact that the 21 respondents cooperated with the Bureau or were generally of good character is not a matter that requires disclosure and in this the judgment of the English High Court in the *Mercury* case [2008 EWHC 2721 (Admin)] and of the Court of Appeal in *Serious Fraud Office v. A.* [2007] EWCA Crim. 1927 and *J. v. Crown and Prosecution Service* [2005] EWCA Civ. 746 were all relied upon.

(ii) It was submitted in the alternative that if there was any material non-disclosure the matters not disclosed were marginal in the context of the overall application by the Bureau, in particular they were marginal as to the materiality and

the reasonableness of the officer's opinion which opinion was based upon the other two affidavits.

(iii) Further, if there was any non-disclosure which was held not to be marginal, the court should not exercise its discretion to grant the relief sought and this should be done in the context of the facts that the respondent was purchasing and supplying fuel without a license. Furthermore, it was submitted that the failure to tell the court that the 21st named respondent had ceased dealings with B. as they did not like the type of business involved is not a material reason and that in the exercise of any discretion the court should look upon the entire context of the CAB scheme which is a statutory scheme for the public of immense value in the fighting of crime and that it was in the public interest to make the proceeds of crime amenable to court action.

40. It was further contended that the respondent's case was predicated on there being allegedly involved in fuel laundering but that it was no longer the Bureau's position and had not been the Bureau's position after the meeting of 5th April, 2013 and the case being made against the respondents was that of money laundering.

Decision
41. I shall deal with certain ancillary matters first. In relation to the allegation that the court was deceived or misled albeit inadvertently by counsel as to the nature of the belief of the Bureau officer required pursuant to s. 8(1), I hold that there was no such deception. It is correct that counsel in outlining the matter to the court stated, *inter alia*:-

> "For the purpose of a section 2 application I have to show that a member of the Bureau forms a belief pursuant to s. 8 that the property in question is directly or indirectly the proceeds of crime…"

42. Counsel for the Bureau pointed out that in my decision I expressly referred to Chief Superintendent's belief as being "his belief pursuant section 8(1) of the Proceeds of Crime Act…". The belief pursuant to s. 8(1) is, of course, a reasonable belief. It is a fact that the court was prior to entering onto the matter furnished with a copy of all the relevant affidavits and indeed of the legislation. Though I did refer to s. 8(1) specifically I cannot now recall whether I noted the statutory requirements in s. 8(1) for the belief on the part of the Bureau to be a reasonable belief but as I previously indicated in the course of this application any belief for it to be acted on by a court in granting an *ex parte* relief such as this must perforce be at least a "reasonable" belief. The court could not conclude that a deponent had a "fanciful" or "irrational" or a "non-reasonable" belief and go on to make an order such as was made in this case. Whether or not specific reference was made in my mind to the statutory requirement for the Bureau's belief to be reasonable is not of any significance. I did not and would not make an order unless I was of the view that the belief was a reasonable one.

43. In relation to the contention that there was a misleading of the court by a failure to advise that from fairly early on in the 21st named respondent's dealings with the oil business they ceased any connection with B.G.S. Limited (the M. company). That company was only interested in purchasing agricultural diesel and Mr. H. stated and I accept that he did not approve of such a trade and were, in effect, suspicious of it. The obligation on the Bureau seeking an order under s. 2 is not to make full disclosure rather as was stated by Clarke J., it was those matters which could reasonably be regarded as material to the view as to whether or not the Bureau's opinion was reasonable or otherwise.

44. It is clear from a reading of the affidavits that the Bureau were not concerned with the respondent's dealings with B.G. or any of the M. connected companies. Whereas the court might have been told that the respondents had ceased dealings with B.G., I do not hold that the failure to make that disclosure was material to the issue at hand.

45. The third matter which I consider to be peripheral is the issue of the lack of a licence to trade on the part of the respondents. The respondents complain that its explanation for the lack of a licence, namely their belief that they did not require to have a licence under s. 101 of the 1999 Act as they were not dealing from any "premises" within the jurisdiction, was not brought to the attention of the court when the s. 2 order was made. The applicant on the other hand contends that a licence was required at all times and the respondents' interpretation of the 1999 Finance Act is incorrect but that in any event under the 2012 Finance Act, the requirement for a trader to have a premises for there to be licence was abolished and after the 2012 Act the respondent continued to trade after being notified by the Revenue of their need to have a licence and accordingly were engaging in a criminal activity which would justify the s. 2 application. Whereas the fact that the respondent was trading without a licence was referred to in the various affidavits made on behalf of the Bureau and whereas the respondents' explanation was not given, it clear that none of the reasons given for the opinion of the Bureau required under s. 8(1) referred to trading without a licence and I do not believe the fact that the respondents did not hold a licence was in any way material to the decision that I made or that the case was made that any of the monies in the account were the proceeds of non- licence criminal activities of the type now contended by and on behalf of the Bureau. Accordingly, I reject the contention of the respondents that the court ought to have been advised that the respondents' explanation for the lack of a licence and I also reject any contention of the Bureau that the s. 2 order was obtained on the basis that these respondents were trading without a licence.

What was the case made against the 21st named respondent by the Bureau resulting in the Section 2 Order?
46. The essence of the Bureau's response is that at all times the s. 2 application against these respondents was made and obtained on the basis of money laundering not fuel laundering. It is clear that if the case being made was of fuel laundering there was a significant failure to disclose relevant materials of seriousness which might have affected the court's view of the reasonableness of the Bureau's opinion. In any event, it is not contended on behalf of the Bureau that there was full disclosure of all information in relation to fuel laundering as they do not make the case against the respondent that it was engaged in fuel laundering rather they claim that the case against the respondent is and was at the time of the making of the s. 2 application one of money laundering.

47. I believe that the central issue in this case rather than an examination of the minutiae of each act of alleged non-disclosure involves an examination of the case being made by the Bureau at the time of the s. 2 application and whether it supports the connection on behalf of the Bureau that they were justified in not giving any details as to the legitimacy behind the transactions of the respondents as they were not alleging any fuel laundering activities but rather that their bank accounts were being used for money laundering.

48. In this regard, counsel on behalf of the Bureau emphasised the fact that considerable amounts of the respondents' bank accounts indicated cash lodgements. It was submitted that, the accountant's affidavit supported this belief by virtue of the various banking charges which were indicative of substantial cash lodgements though this was not specified in the s. 2 affidavits. The Bureau in their affidavits in answer to this application emphasised the fact that Mr. H. on behalf of the respondent at the meeting with the Bureau did not deny that the Ks may have had access the deposit book of his company. It was further pointed out that this central submission was not dealt with in Mr. H's affidavit.

49. The respondent contends that the Bureau at all times made the case that they were not in effect supplying fuel but they were receiving "transfers" (which is the way the monies paid to the respondents were referred to at all times by the Bureau's deponents) rather than payments. It was further contended by the respondent that the case now being made on behalf of the Bureau that the respondents were involved in money laundering rather than fuel laundering is not the case that was made at the s. 2 stage.

50. It is clear that if the case made by the Bureau was that the respondents were involved in a money laundering exercise then the details of the fact that the respondents could account for fuel purchased for every transaction made would not be as relevant as if the case be made was that of fuel laundering.

51. The affidavits sworn by Garda Cullen and Chief Superintendent Corcoran in reply to the application before me make, *inter alia,* the case that the Bureau was in possession of many other pieces of information more damaging to these respondents which they could have adduced. I must reject all such suggestions and concentrate upon what was before me at the making of the s. 2 order. However, it is important to state that it was contended by Garda Cullen at para. 38 of her affidavit that:-

> "The nature of the operation of HFIL bank account was sufficient to give rise to suspicion in relation to money laundering regardless of how many petrol stations the [K] ran. When questioned about the levels of cash being lodged to the HFIL account at the meeting of 5th April, 2013, Mr. [H] appeared to have no answer literally throwing his hands up and shrugging his shoulders…when asked how [B.T.] could lodge cash to the account and whether it was possible that [B.T.] had a HFIL lodgement book, Mr. [H] stated that it was possible that they had one…"

52. The court is of the view that were this the case being made against this respondent at the s. 2 application, the fact that the Bureau had a belief that the respondents' bank account was the proceeds of crime (i.e. being money laundering) then the matters averred to by Garda Cullen were relevant to such a application and would in all probability have been included and ought to have been included in the affidavits.

53. When we examine the only account of the meeting of 5th April, 2013, given by Sergeant Michael Byrne in his s. 2 affidavit he merely stated:-

> "I say that on 5th April, 2013, [A.H.] was interviewed by Bureau officers of the Criminal Assets Bureau in the presence of his solicitor. Mr. [H], Director of [H.F.I.] Limited, admitted that he was operating his business in this jurisdiction without a fuel licence. Mr. [H] had been warned to desist from trading on 30th July, 2012 by Revenue but continued to trade to October 2012. Mr. [H] was asked to outline how his business in Ireland operated but seemed unsure on this although he was able to clearly state how the northern side of his business worked."

54. The above is the only account of the meeting of 5th April but dealing with these respondents at para. 193 of his s. 2 affidavit, Sergeant Byrne states:-

> "I say from inquiries carried out by me and from an analysis of banking material and other information that the account of [H.F.I.] Limited maintained a Bank of Ireland account No. 72051579, sort code 90-33-65, has been used by the [K.] family to purchase fuel products from wholesale suppliers. I say that the [K.] family were having difficulty with suppliers due to their suspected involvement in the illegal fuel laundering business and use the [H.F.I.] account to carry out these transactions. Transfers of approximately €5.5m were made into [H.F.I.] Limited account from the accounts of [B.T.] Limited and [G.S.] trading as BK Oils. [H.F.I.] Limited has no business premises in this jurisdiction. Other transfers amount to approximately €15m."

55. I have come to the conclusion that the case now being made by the Bureau against the respondents is not the same case as was made at the time of the making of the s. 2 application. The case then being made against these respondents was that they were part of the scheme in association with the K. family to launder fuel.

56. The applicant now contends that the portion of the opinion of the Bureau given by Detective Chief Superintendent Corcoran which refers to the alleged money laundering nature of the respondents' accounts is at para. (i) i.e. "the financial trail identified in the investigation". I hold that this is not a reference to money laundering but the reference to "financial trail" is clearly to do with the interconnectivity of the various respondents rather than an allegation of money laundering against these respondents. I am of the view that had the Bureau wished to make a case of money laundering against these respondents the opinion of the Superintendent Corcoran would have made it clear, that allegations of money laundering were being made. It is noteworthy that in response to this motion, reference is made to the cash nature of some of the transactions of the respondent but the fact that cash was paid to some drivers of lorries was another specific ground of Chief Superintendent Corcoran's belief and this cash payment does not relate to this respondent. If the now allegedly extensive cash payments to the respondents' accounts had been the basis of the application of the s. 2 order, I have no doubt that they would have been and ought to have been expressly recounted.

57. The court fully accepts that the Bureau performs necessary work on behalf of the State and on behalf of the public acting in the public interest often dealing with very dangerous persons. That ground alone, however, cannot be a basis for the rules in relation to disclosure identified by Clarke J. in *FMCK* not applying to the Bureau. It is because the Bureau acts in the public interest that the court must be particularly concerned that when they are bringing *ex parte* applications that the obligations of disclosure are met. The case now being made in relation to these respondents is of money laundering. Garda Cullen in her affidavit in reply to this application does list a number of matters of potential concern. These matters might well relate to money laundering. Had they formed part of the original s. 2 application, Mr. H. in his affidavit could have dealt with them.

58. I hold that the application under s. 2 was made against these respondents on the basis of fuel laundering, not on money laundering and in that regard the obligations of disclosure were not met in that there was a failure to appraise the court of the explanations given by and on behalf of the respondent to the effect that all of its transactions were legitimate commercial transactions backed up by paperwork from legitimate companies that could have been checked and indeed the Bureau is not now maintaining any fuel laundering allegations against these respondents.

59. I further hold that even if a case for money laundering was being made against the respondents, the court ought to have been appraised of this fact in clear language.

60. As I have rejected the Bureau's submissions that they were making the case of money laundering against the respondent and that was the reason that they did not deal with matters favourable to the respondents in relation to fuel laundering, it is not necessary to examine each of the alleged items of lack of candour in detail.

61. In those circumstances, the court must consider the exercise of its discretion. If an allegation of money laundering was being made, it would not have been necessary to exhibit all the documents furnished by the respondents but possibly to say that in response to the original complaints that there was not a commercial reality behind the respondents' activities that the respondents had satisfied the Bureau that there was a commercial reality but notwithstanding that fact, the Bureau for various reasons was still of the opinion money laundering was being involved. Unfortunately, none of this was done.

62. It should be noted that in the Bureau's letter to the respondent on 13th March, 2013, after the s. 17 order was made in the District Court, one of the grounds for the making of the s. 17 order was specifically stated as being "the account is operated to assist money laundering". Accordingly, Mr. H. at the meeting with the Bureau on 5th April, 2013, would have been aware that this was one of the Bureau's concerns. The court is of the view, however, that the focus of that meeting of 5th April was into fuel laundering and it is odd given the present stance of the Bureau that when the s. 2 order was being applied for, the relevant matters in the meeting of 5th April which focused on money laundering were not emphasised or indeed referred to. Had the Bureau referred to these matters at the time of the s. 2 application and based its opinion on these matters and referred to them in their affidavits, then the respondents might well have been in considerable difficulty in challenging the reasonableness of the opinion or the candour of the Bureau. The court, however, does not feel it should speculate on what might have been but deal with the application as it was.

63. It then remains to be considered to whether given the full circumstances of the case the order ought to be discharged. In particular, undoubtedly these respondents were trading for at least a portion of time without a licence which undoubtedly they ought to have had. Also there are questions that may have to be addressed in relation the cash nature of some of the transactions and whether or not these respondents permitted their cash book to be given into the hands of some of their suppliers.

64. I have previously dealt with the issue of the licence and I do not believe that it is material to this action in rem in respect of the bank account and I do not believe that the grounds have been laid that the fact that trading without a license operated for a short period of time justifies a s. 2 application or justifies the court in utilising its discretion to allow the s. 2 order remain in place notwithstanding the non-disclosure referred to above. Any profits from unlawful trading post the 2012 Act have not been quantified and in the scheme of things would be very minor and may not exceed the statutory minimum.

65. A further concern arises in relation to the possible giving of the account book to one of the other respondents. This a matter that does cause the court concern in relation to the exercise of my discretion and I note no explanation was given for it. It should be pointed out that the issue of the account book was not a matter that was before the court at the s. 2 application. It arose in the affidavit of Garda Cullen in reply to Mr. H's affidavit. Mr. H. has chosen not to put any response to the said affidavit on the basis as was submitted to me by counsel that to do so would only involve a further "ping pong" exchange of affidavits, and the possible examination of witnesses under oath, and would delay the application further. With some reluctance I accept this explanation though I must, in the absence of any contradiction, accept what Garda Cullen says in this regard to the possibility that the respondents made their bank book available to customers.

66. After some hesitation, I have come to the conclusion notwithstanding the possibility that an application under s. 2 alleging money laundering might have been successful had all the facts of the matter been put before the court, I cannot speculate or invent an entirely new application on behalf of the Bureau. The possible supplying of its lodgement book to a customer is of some concern but it remains only a suggestion or possibility rather than a fact that has been established and clearly was not considered relevant by the Bureau in the original s. 2 application.

67. As I have held that the applicant's case in response to this motion is fundamentally different from the case which formed the basis of their s. 2 application and of my s. 2 order, I hold that none of these matters are of sufficient weight for me to exercise my discretion against the respondents' application given my findings as set out above.

68. Accordingly, I grant the application to lift the s. 2 order insofar as it affects the 21st named respondent.