Neutral Citation Number [2006 IEHC 185]

**THE HIGH COURT**

**[2002 No. 15006 P]**

**BETWEEN**

**F.McK.**

**PLAINTIFF**

**AND**

**D.C., S.T. LIMITED AND B.H. LIMITED**

**DEFENDANTS**

**Judgment of Mr. Justice Clarke delivered 26th May, 2006.**

**1. Introduction**

1.1 On 19th November, 2002 the plaintiff, as Chief Bureau Officer of the Criminal Assets Bureau ("Chief Bureau Officer")("CAB") applied to the President of this court for an order under s. 2 of the Proceeds of Crime Act, 1996 ("the Act"). Because of facts which it will be necessary to set out in more detail in the course of this judgment, the application was made in circumstances of some urgency. The application consisted of the submissions of counsel for, and the oral evidence, of the Chief Bureau Officer. The President made the order sought and money standing to the credit of a number of bank accounts in the names of the defendants was frozen. On the following day (the 20th of November) a further order was made which had the effect of extending the freezing order to three additional bank accounts. Subsequently, in February 2003, other assets of the defendants were made the subject of a similar order.

1.2 An application under s. 3 of the Act followed and has been adjourned from time to time while certain parallel applications were being progressed. Insofar as necessary, reference will be made to certain of those other applications in the course of this judgment.

1.3 However one of the matters canvassed on behalf of the defendants is a contention that there was material non disclosure on the part of the Chief Bureau Officer in the application to the President on 19th and 20th November, 2002. Arising out of that allegation, the application with which I am concerned was brought, seeking an order vacating the freezing order made under s. 2 on the grounds that it was obtained as a result of material non disclosure to the court.

1.4 It will, again, be necessary to go into the allegations of non disclosure in more detail in the course of this judgment. However the defendants group their contentions into three main areas. They are as follows:-

> (a) it is clear that in the immediate run-up to the applications made to the court on 19th and 20th November, 2002 there was a very significant investigation taking place both in Ireland and in the United Kingdom in respect of what was believed to be a so called a "VAT carousel" fraud. In simple and very general terms such a fraud operates on the basis of a circular series of sales of goods (hence the term carousel) involving two countries within the European Union (in this case Ireland and the United Kingdom). The net effect of the series of transactions is that the instigator of the fraud becomes entitled to a significant VAT refund from its country (in this case the United Kingdom). There is a largely corresponding VAT obligation on the part of one of the traders in the sequence who then "disappears" leaving that liability to pay VAT undischarged.
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> It is contended that there were a number of material failures in respect of disclosure concerning the status and fact of the parallel investigations in the United Kingdom.
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> (b) It is contended that the court was materially misled in the manner in which it was suggested that there might be a VAT liability in the State. The background to this aspect of the application concerns the question as to whether the Act, in the form in which it was at the time when these proceedings were commenced and the applications to the President were made, provided for the making of orders in respect of the proceeds of crimes where the crimes concerned were committed outside the jurisdiction. It will, again, be necessary to return to this matter in more detail. It is said, on behalf of the defendants, that the court was not given full information as to factors from which it might be contended that the funds sought to be frozen were not the proceeds of a crime committed in the State.
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> (c) It was suggested on behalf of the Chief Bureau Officer to the court that an appropriate order to make would be a freezing order, *ex parte*, under s. 2, but with liberty to the defendants to apply on 48 hours notice to set aside the order. In that context it is contended that there was a material non disclosure in the failure to inform the court that D.C. had already, at the time of the application, been arrested in the United Kingdom and was in custody. Furthermore it is said that there was a material non disclosure in the failure to inform the court that there had been, on foot of warrants, to which it will be necessary to refer later in the course of this judgment, a seizure of a large volume of documentation from the defendants and that such documents had been transmitted to the United Kingdom. On those bases, it is suggested that the court was not aware of materials relevant to the practicality of the exercise of the liberty to apply on short notice.

1.5 This application (that is to say the application to vacate the s. 2 order) was brought in conjunction with an application based on a contention that the defendants were not in a position to properly defend the proceedings because of the non availability of the seized documents to which I have referred. However that matter is no longer before the court. Judicial review proceedings were instituted for the purposes of quashing the warrants on foot of which the relevant documents were seized. Those judicial review proceedings were substantially successful and the relevant warrants were quashed. Thereafter an order, on consent, was made that the relevant documentation would be retrieved from the United Kingdom and brought back to this jurisdiction for the purposes of being given to the defendants. That has, to a large extent, been done, although there remain some disputes between the parties as to the absence of some documents. However no order is now sought in relation to that aspect of the defendants application.

1.6 The application to vacate on the grounds of the absence of documents and on the grounds of material non disclosure first came before the President on 13th January, 2004. As a result of developments at the hearing, the matter was adjourned and for reasons which I have briefly set out above the documentary aspect of the application has largely resolved itself. The hearing before me was a resumed hearing in respect of that part of the application that was based on a contention of material non disclosure. This judgment is, therefore, confined to a consideration of whether it is appropriate in all the circumstances of the case to vacate the s. 2 order on the basis of any material non disclosure that may be established. Before going on to consider and resolve the disputes which have arisen between the parties as to the allegations of material non disclosure it seems to me that it is important to set out the legal basis for the exercise of the courts jurisdiction to vacate. That is an issue to which I now turn.

**2. The Jurisdiction to Vacate**
2.1 The jurisprudence of the courts, both in this jurisdiction and in the United Kingdom, has identified an obligation on parties who seek onerous orders ex parte to act with candour in disclosing all material matters to the court on the *ex parte* application concerned. Most of the cases involve the exercise by the court of its jurisdiction to grant injunctions in the commercial field. Over the last number of decades a jurisprudence has developed in respect of the grant, *ex parte*, of significant orders, such as *Mareva and Anton Pillar* orders, which have the effect of freezing assets or authorising the seizure of materials, in circumstances where the party applying satisfies the court that a *prima facie* case exists for such orders and that the making of the order concerned without notice to the person to whom the order is directed is necessary for the purposes of protecting the legitimate interests of the applicant.

2.2 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. The first legal issue that arises in this application is as to the extent of the relevance of the jurisprudence that has developed in relation to such orders, to applications under a statutory scheme such as that provided for in the Act whereby the CAB is given authority to make application to the court for freezing orders both ex parte (under s. 2) and on notice (under s. 3). While some doubt was cast by counsel on behalf of the Chief Bureau Officer on the applicability of the relevant jurisprudence to cases such as this, I am satisfied that, at least at the level of principle, the jurisprudence does apply. I am mindful of the point properly made which draws attention to the fact that plaintiffs in typical *Mareva or Anton Pillar* procedures (in which the jurisprudence has evolved) are seeking to protect their own commercial interest (albeit quite legitimately) while the CAB, in seeking orders under s. 2, are carrying out a public role mandated and authorised by the Oireacthas. That fact, and indeed the scheme of the Act itself, may have some relevance to the matters that may require to be disclosed and, therefore, to the precise way in which the jurisdiction to vacate for material non disclosure may operate in practice, but it does not seem to me to affect the principle.

2.3 As indicated above the underlying rationale behind that principle stems from a recognition that the making of an onerous restrictive order on an *ex parte* basis is a departure from the fundamental rule of fair procedures which entitles a party to be heard before an onerous order is made against it. That departure is justified in the limited circumstances which have been identified in the jurisprudence relevant to the making of orders such as *Mareva and Anton Pillar* Orders. It is, indeed, for that very reason that the circumstances in which such orders can be made are limited. In evolving the rules by reference to which such orders are given, the courts have been mindful of the need to balance the entitlement of plaintiffs to protection against wrongful actions with the legitimate entitlement of parties to be heard prior to the making of onerous orders against their interest. For that reason the jurisdiction is carefully defined and controlled.

2.4 That overriding principle, it seems to me, is equally applicable to the making of an order under s. 2 of the Act. The order made is undoubtedly onerous. It will be made without giving the defendant an opportunity to be heard. The jurisdiction to make such an order without notice is undoubtedly justified by reference to the risk that may well arise in such cases that assets which may be the proceeds of crime might disappear prior to the hearing of an application on notice. However the fact that there is a justification for the making of s. 2 orders without notice does not, in my view, justify a departure from imposing an obligation of proper disclosure on the CAB when making a s. 2 application. That obligation stems from precisely the same basis as the obligation which rests upon a commercial plaintiff seeking, for example, a *Mareva* order. It derives from that fact that an onerous order may be made without giving the defendant an opportunity to be heard. Where such a breach of what would otherwise be a basic principle of fair procedures is permissible, it seems to me that it is incumbent on the courts to minimise the risk of injustice by imposing an obligation of full disclosure. That obligation, it seems to me, therefore arises just as much in a case where an onerous *ex parte* order may be made in exercise of an express statutory jurisdiction as it does in a case where a plaintiff seeks to protect or enforce a commercial entitlement.

2.5 I am therefore satisfied that, as a matter of first principle, in general terms the obligation of disclosure applies equally to a statutory regime such as that specified in the Act and, in particular, applies to the CAB when inviting the court to make an order under s. 2.

2.6 However it does seem to me that the detail of the obligations of disclosure needs to be considered in the context of the statutory scheme. When coming, therefore, to assess the precise obligations which, it might be said, lie on the CAB in respect of disclosure, on the making of a s. 2 application, it will be necessary to consider the differences, both in law and as a matter of practicality, between the matters that need to be established and which are relevant in the making of orders of the types in respect of which the jurisprudence has evolved, on the one hand, and in making of orders under the Act, on the other hand.

2.7 Having indicated that, in my view, at least in general terms and subject to that caveat, the jurisprudence in relation to non disclosure in the commercial field is applicable, I now turn to that jurisprudence.

**3. The Non Disclosure Jurisprudence**
3.1 The defendants place reliance on my decision in *Bambrick v. Cobley* (2005) IEHC 43 where, in the context of a *Mareva* injunction, and having reviewed authorities in both this jurisdiction and the United Kingdom I expressed the view, at p. 7, that:-

> "Taking those authorities it would seem that the test by reference to which materiality should be judged is one of whether objectively speaking the facts could reasonably be regarded as material with materiality to be construed in a reasonable and not excessive manner".

3.2 In coming to that view I had regard to the clear statement by the Supreme Court of an obligation to make "full and frank disclosure of all material matters" in a *Mareva* application, which is to be found in the judgment of Hamilton C.J. (speaking for the Court) in *Re John Horgan Livestock Limited* [1995] 2 I.R. 411.

3.3 I also had regard to the comment of Lord O'Hagan L.C. in *Atkin v. Moran* [1871] I.R. 6 Eq 79 to the effect that:-

> "The party applying is not to make himself the judge of whether a particular fact is material or not. If it is such as might in anyway affect the mind of the court it is its duty to bring it forward".

3.4 I also considered decisions such as *Brinks-Matt Limited v. Elcom* (1988) 3 All ER 188 which, without discounting the heavy duty of candour which falls upon persons making ex parte applications, cautions against the principle of disclosure being carried to extreme lengths.

3.5 In relation to the consequences of established material non disclosure, I indicated that I preferred the approach of Dillon L.J. in *Lloyds Bowmaker v. Britannia Arrow Holdings Limited* (1988) 3 All ER 178 to the effect that notwithstanding that failure to disclose has been established, the court retains a discretion not to discharge the interim order. In relation to the criteria to be applied in the

exercise of that discretion I indicated the following (at p. 9):-

> "It is therefore necessary to consider, in general terms, the criteria which the court should apply in the exercise of such discretion. Clearly the court should have regard to all the circumstances of the case. However the following factors appear to me to be the ones most likely to weigh heavily with the court in such circumstances:-
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> 1. The materiality of the facts not disclosed.
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> 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.
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> 3. The overall circumstances of the case which led to the application in the first place."

3.6 *Bambrick* was concerned with a *Mareva* type injunction application and its facts (and the application by me of the principles which I identified to them) are not of any great assistance in respect of this case.

3.7 However, I see no reason to depart from the general principles which I identified in *Bambrick* as representing the current state of the jurisprudence both in this jurisdiction and in the United Kingdom in relation to the vacation of orders obtained in circumstances of material non disclosure.

3.8 Subject to the caveat, which I have noted above, to the effect that the application of those principles to this case needs to have regard to the statutory framework within which applications under s. 2 are made, it seems to me that I should apply those principles to this application.

3.9 It is next necessary to turn to an analysis of the specific allegations of non disclosure upon which the defendants rely in this case.

**4. The Alleged Non Disclosure (Irish Crime)**

4.1 I would propose leaving a consideration of the first set of allegations of non disclosure which I have identified at para. 1.4(a) until last. I therefore turn to the second set of allegations (those set out at para. 1.4(b) above).

4.2 In order to understand the allegation which relates to an alleged failure to disclose material relevant to a possible criminal liability in respect of VAT in Ireland it is necessary to say something about the legal background to the question of territoriality in the context of the Act.

4.3 The Act is concerned with the proceeds of crime. Crime is not expressly defined by reference to territory and a question arose in some case brought under the Act, as to whether, for the purposes of the Act, assets might be regarded as the proceeds of crime where those assets would otherwise qualify under the terms of the legislation but where the crime of which the assets were alleged to be proceeds occurred in another jurisdiction. As early as 1999 in *D.P.P. v. Hollmann* (Unreported, High Court, O'Higgins J., 29th July, 1999) this court took the view that the Act "applie(d) to the proceeds of crime even if the crime is committed outside the State notwithstanding the failure of the legislation explicitly to say so".

4.4 The matter was again considered by this court in F.J. *McK v. G.W.D.* The President of the court, on 31st July, 2002, made an order in that case under s. 3 of the Act in relation to assets which were alleged to be the proceeds of crimes committed outside the jurisdiction. In so doing the President expressly approved and applied the judgment of O'Higgins J. in *Hollmann*.

4.5 Subsequent to that determination by the President the defendant in *G.W.D.* appealed, by notice of appeal dated 11th February, 2003, to the Supreme Court. The judgment of the Supreme Court on that appeal is to be found at [2004] 2 I.R. 470 where, speaking for the court on the relevant issue, Fennelly J., (at p. 490) said the following:-

> "The Act of 1996, unlike the Act of 1994, contains no indication of any broader objective. In my view it does not apply to the proceeds of foreign crime, such as is involved in this case".

4.6 Of particular relevance to the issues which I have to consider is, therefore, the state of the jurisprudence as of November 2002 when the application to the President in this case was made. At that stage, so far as this court was concerned, both O'Higgins J. and the President had come to the view, after full argument, that the Act applied to proceeds of foreign crime. While an appeal was subsequently brought to the decision of the President that appeal was not, as it happens, even pending at the time when the application to the President in this case was heard. It would be reasonable, in those circumstances, to describe the situation as one where there was a settled jurisprudence in this court to the effect that the proper interpretation of the Act was such that it extended to proceeds of foreign crime. It is important, therefore, that the issues before me not be seen with the benefit of hindsight in the light of the subsequent overturning by the Supreme Court of that jurisprudence. As of the time of the making of the relevant applications to the President in this case, the question of whether assets which were alleged to be the proceeds of foreign crime were considered to be within the ambit of the Act had, so far as this court was concerned, been settled. The question of whether any such assets might also be said to be the proceeds of a crime within the State was, therefore, of no significant materiality to an application at that time.

4.7 It is in that context that what transpired at the hearing before the President in this case needs to be assessed. Counsel for the Chief Bureau Officer, in moving the application, outlined the nature of a carousel fraud and indicated that it was the position of CAB that the defendants business was part of such a fraud. It was also suggested that in relation to the previous year (that is to say 2001) the defendants' shipping of product amounted to £929 million and that almost the entirety of that trade was with missing traders. Consequently the loss of VAT was contended to be £162 million. It was also made clear that the losses were to the British Revenue. In relation to the territoriality of any crime involved, counsel for the Chief Bureau Officer said the following (p. 7 of the transcript):-

> "In relation to criminality, the criminality involved is criminality under the Criminal Justice Theft and Fraud Offences Act 2001 in the United Kingdom. We believe that similar offences exist in relation to the provisions of the Taxes and Consolidation Act (sic) and in due course that may or may not be an issue in the case but the assertion will be that that is the position".

4.8 It is clear, therefore, that the criminality expressly relied on was United Kingdom criminality which, for the reasons which I have pointed out, was, in line with the then perceived correct interpretation of the legislation, sufficient. Potential Irish criminality was, in my view, merely an add-on and was expressed in somewhat equivocal terms. Against that background it is necessary to consider the assertions as to material non disclosure relied upon on behalf of the defendants under this heading. They are as follows:-

> "(a) that the court was not told that the Revenue had concluded that there was no case of an offence in Ireland;
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> (b) that the court was not told that the Revenue had consistently visited the defendants premises;
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> (c) that the court was not told that the defendants had assisted both the U.K. and the Irish Revenue authorities with respect to U.K. prosecutions; and
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> (d) that the court was not told that the defendants had agreed a protocol with the Revenue authorities in Dundalk".

4.9 The background to those contentions stems from the fact that there had been a course of dealing between the defendants and the relevant branch of the Revenue Commissioners which is located in Dundalk. D.C. was tried for revenue offences in the United Kingdom and acquitted. In the course of that trial certain evidence emerged as to the views of officials within the relevant Revenue branch in Dundalk as to whether offences had been committed in this jurisdiction. It seems clear that the view of the relevant branch was that no offences had been committed in this jurisdiction.

4.10 It is factually correct to state that the court was not told of the views of the relevant Revenue authorities in Dundalk, and of the previous contacts between the defendants and those authorities.

4.11 It is necessary to assess the materiality of the fact that the court was not so informed against the statutory framework of the Act. Section 8 of the Act permits opinion evidence of appropriate officers of CAB to be admissible as to the substantive issue of whether the assets sought to be frozen are proceeds of crime and as to the value of such assets. The evidence is admissible "if the Court is satisfied that there are reasonable grounds for the belief". The evidence which was relied on, on behalf of the Chief Bureau Officer, in this case was his own opinion evidence in accordance with s. 8 which, with leave of the court, was given orally rather than on affidavit in accordance with s. 8 (1)(a). Given that admissible opinion evidence was before the court the only real matter of which the court had to be satisfied on the substantive question (rather than the discretionary question of whether it was appropriate to make a *ex parte* order) was as to the reasonableness or otherwise of that opinion. Materiality has to be seen in that context. It should be said that a matter would be material if it could properly be considered as a fact which could go to the courts assessment of the reasonableness or otherwise of the opinion which was being tendered in evidence.

4.12 While accepting the general proposition, as argued by counsel for the defendants, that a party's obligation of candour extends not only to facts of which those directing the application are aware, but also to facts which such persons ought reasonably have been able to ascertain, it seems to me that the obligation also needs to be considered in the context of the admissibility of opinion evidence. The court is entitled to act on opinion evidence tendered under s. 8. The court does not have to satisfy itself that the opinion is correct. Otherwise there would be little point in permitting the tendering of opinion evidence in the first place. The court is only required to be satisfied that the opinion is reasonable. It is not clear that the Chief Bureau Officer was actually aware of the views of the relevant revenue branch. 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. However it does not seem to me that the fact that others may have a different opinion is, of itself, necessarily relevant to the reasonableness of the opinion evidence tendered under s. 8.

4.13 Even if I am wrong in that view, it seems to me that at the time of the making of the application in this case, the question of whether a crime in this jurisdiction had occurred could not reasonably be regarded as being material. As indicated above the settled jurisprudence of this court at that time was to the effect that foreign crime was sufficient. There is no doubt that there was an ample basis for the Chief Bureau Officer coming to the view that a foreign crime had been committed. The opinion of any persons as to whether there was also an Irish crime committed was not relevant to that consideration. Given the settled jurisprudence of this court at the time it is difficult to see how the question of whether relevant crimes had been committed in this jurisdiction was material to the exercise of the courts role under s. 2.

4.14 On that ground also I am not satisfied that the matters contended for under this heading are matters which required to be disclosed (or, indeed, discovered so that they might be disclosed).

4.15 I am not, therefore, satisfied that any material non disclosure has been established under this heading.

4.16 It should also be noted that 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. It is not sufficient for a plaintiff in a *Mareva* injunction to establish that it has an arguable claim. It must go further and show that assets necessary to meet the claim concerned may be dissipated. In an application under the Act it is only necessary to satisfy the court that the assets are the proceeds of crime of a sufficient value.

**5. The Alleged Non Disclosure (Liberty to Apply)**

5.1 I now turn to the third ground (as set out a para. 1.4(c) above) which concerns the liberty given to the defendants to apply on short notice to set aside the order. Under this heading the following particular is given of a failure to disclose:-

> "The court was not told that such an order would be of no value to the defendants, given the arrest of (D.C.), his detention in the United Kingdom, and the seizure of all documents which would be necessary for such application and their transmission to the United Kingdom."

5.2 Firstly in relation to the contended for failure to inform the court of the arrest of D.C. it should be noted that the court was in fact informed of his arrest but only immediately after the making of the order when same arose as an issue in the context of consequentional matters which the court had to deal with. While it is, technically, true to state that the relevant information was not brought to the courts attention in the course of the substantive application, I find it impossible to characterise any failure as other

than technical. It should be noted that it is standard practice for the court, both in *Mareva* and *Anton Pillar type* applications, and in applications under the Act, to include such a term which enables a defendant against whom an onerous order has been made in his absence, to have the opportunity to have the order discharged at the very earliest opportunity. Indeed the Act confers a statutory entitlement on a defendant to make such an application. See s. 2(2). The order of the court was therefore concerned with allowing such an application to be brought on short notice. The inclusion of such a procedural provision in the order does not, in my view, concern the validity or otherwise of the making of the order in the first place. In order that a restrictive order should be made ex parte the court must be satisfied that the necessary requirements have been established both as to the substance of the claim and as to the circumstances which would warrant an *ex parte* order. The fact that an application to vacate or vary can be brought in early course would hardly be a justification for making an order that was not otherwise justified.

5.4 In the circumstances I am not satisfied that there was any, or at least any material, failure to disclose in respect of the arrest of D.C. under this heading. Insofar as it might be contended that the court should have been informed that D.C. and, indeed, the other defendants might suffer evidential difficulties arising from the seizure of much of their business documentation on foot of the warrants to which I have referred, and the transmission of those documents to the United Kingdom, it seems to me that those issues fall to be considered under the first set of grounds to which I will turn in early course. Similarly the fact of the arrest of D.C., insofar as relevant to the exercise of the Courts discretion, also arises under that ground. For the reasons which I have set out it does not seem to me that the third heading provides any independent basis for contending that there was a material non disclosure.

**6. The Alleged Non disclosure – The Parallel U.K. Process**
6.1 In relation to the first set of grounds which concern, as I indicated above, the interaction between the authorities in this jurisdiction and those in the United Kingdom, the defendants particularised the allegations of non disclosure in the following terms:-

> "(a) the court was not told about the request from the United Kingdom for mutual assistance;
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> (b) the court was not told about the application for and the issue of s. 55 warrants;
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> (c) the court was not told that on foot of those warrants material had been seized;
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> (d) the court was not told of the intention to transmit that material out of the jurisdiction;
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> (e) the court was not told that the Criminal Assets Bureau investigation was subservient to the English Customs & Excise Investigation/Prosecution;
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> (f) the court was not told that it was the intention of the Criminal Assets Bureau to transmit the material out of the jurisdiction without even retaining copies of same;
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> (g) the court was not told (until after it had made the order) that the effect of the seizure of the documents and the arrest of (D.C.) was that his ability to dissipate assets were significantly attenuated; and
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> (h) the court was not even told that (D.C.)'s being in custody was related to the matters in issue before the court."

6.2 The above recitation of facts is, undoubtedly, in a formulation devised on behalf of the defendants and is directed towards portraying any factual matters which were not before the court in the strongest possible light. Subject to that caveat there is little doubt but that the factual contentions implicit in the itemised matters to which I have referred are correct. In substance the court was not informed that the CAB was involved in a joint enterprise with the relevant authorities in the United Kingdom which had reached the stage of the seizure of a significant volume of documentation from the defendants, the transmission of that documentation to the United Kingdom and the arrest, on the same day as the application, of D.C. in the United Kingdom.

6.3 The question which I must address is as to whether any failure to disclose those matters was material and if so what the consequences of any such failure to disclose should be.

6.4 As I pointed out earlier (see para. 2.6) materiality needs to be seen in the context of the application before the court. In an application under s. 2 it is necessary to have regard to the statutory framework to determine materiality. It is difficult to see how any of the matters referred to by the defendants could have any effect on the question of whether any of the funds sought to be frozen were the proceeds of crime. Section 2 permits the court to make a freezing order on an *ex parte* application where the Court is satisfied that a person is in possession or control of the proceeds of crime of a value in excess of IR £10,000. The only substantive issue is, therefore, as to whether the court is satisfied that the assets sought to be subjected to an order under

2 are, *prima facie*, are the proceeds of crime in the sense in which that term is used in the Act and are of sufficient value. The comments made in para. 4.16 above are equally applicable here.

6.5 The only other material consideration in the grant or refusal of an order under s. 2 is as to whether the court is satisfied that it is appropriate, in the courts discretion, to make an order. Amongst the matters that might well be relevant to the exercise of such a consideration is as to whether it is appropriate to exercise the *ex parte* jurisdiction under s. 2 rather than place the defendant on notice.

6.6 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*. In this case it was suggested on behalf of the Chief Bureau Officer, at the relevant hearing, that D.C. must have been aware of the criminality. It is hard to see how any of the issues contended for could have been relevant to that consideration.

6.7 Secondly the nature of the assets or the general circumstances of the case might make it impossible or unlikely that assets could be removed during the period which would be required to place a defendant on notice. That could be a material factor in the exercise of the courts discretion in relation to the grant of an *ex parte* order.

6.8 On the facts of this case, evidence was led of an attempt to move a very substantial sum of money out of the relevant accounts which attempt had, quite properly, been brought to the attention of An Garda Síochána by the financial institution concerned. On that basis there was more than ample reason to justify the making of an *ex parte* order. However the real question which I have to

consider is whether any of the matters specified on behalf of the defendant could have been material to the exercise of that jurisdiction. The only matter which, in my view, could conceivably have had any relevance to such an issue, is the contention that the arrest of D.C., and the seizure of the relevant documents, significantly reduced the ability of D.C. and the other defendants to dissipate assets.

6.9 While I am somewhat sceptical as to the materiality of that fact, I have on balance, come to the view that it had the potential to have some effect on the courts determination and was, therefore, a matter which should have been disclosed.

6.10 In respect of each of the other contended for matters I am not satisfied that there was any material non disclosure. I am not satisfied that such matters were material either to the substantive question or the exercise of the Courts discretion

6.11 It will be clear, therefore, that the only matter in respect of which I am satisfied that there was a material non disclosure was the fact of the arrest of D.C. and the non-availability of the business documentation to which I have referred and its possible consequences for the exercise of the courts discretion to make an *ex parte* order. In respect of all other matters I am not satisfied that there was any material non disclosure.

**7. The Consequences of Non Disclosure**
7.1 As indicated above (para 3.4) I came to the view in *Bambrick* that the court retained the discretion not to discharge the interim order where non-disclosure was established. I also set out at p. 9 of my judgment in that case some of the criteria that might weigh heavily with the court in a consideration of the exercise of that discretion.

7.2 Applying those criteria to the facts of this case it is firstly clear (see para. 6.9 above) that I regard the materiality of the matter not disclosed as being marginal. It was doubtless an important fact in itself. It was only of marginal relevance to the issues which the court had to consider on the application for a s. 2 order.

7.3 Having regard to the fact that disclosure occurred immediately after the making of the order, it is impossible to conclude that any non disclosure was deliberate

7.4 Furthermore it is clear that there was a more than ample basis for the court to reach a conclusion that an interim ex parte order was needed. It is difficult to see how a different result would have been reached had the court been informed that D.C. had been arrested. The fact remains that, notwithstanding his arrest, an attempt to move a very significant sum of money had actually occurred.

7.5 Having regard to those matters and the overall circumstances of the case it seems to me that all of the criteria which I had identified in *Bambrick* point towards the exercise of my discretion against discharging the order made.

**8. A Conclusion**
8.1 For all of the above reasons it seems to me that I should not, therefore, discharge the s. 2 order. I therefore propose refusing the relief in that regard sought in the notice of motion.