

THE HIGH COURT

2007 15 CAB

BETWEEN

CRIMINAL ASSETS BUREAU

AND

APPLICANT

M. A. L.

RESPONDENT

JUDGMENT delivered by Mr. Justice Feeney on the 20th day of April, 2009

I am in a position to give judgment in relation to this because I have read the submissions in advance, and I have had the opportunity of considering the matter, and I have also had the benefit of counsel in relation to the matter.

It is an application for discovery brought within proceedings 2007 No. 15 CAB, and they are proceedings brought under the Proceeds of Crime Act, and the s. 2 order was made *ex parte* in that matter, in July of 2007. That was made in camera, as it is required by the Act. That order is made at a stage where the respondent has not been heard, and the maintenance of confidentiality in relation to that order is of considerable importance in ensuring fair procedures before the court.

The potential leaking of a s. 2 order, if there is a leaking, is a matter which the court would take a most serious view of, and would have to inquire into in a detailed manner. But the circumstances in which this application has been made make it clear that there are no proceedings in being in relation to the issue of the leaking of the contents of the article – or the leaking of the making of the s. 2 order. There is no defamation proceedings, there is no indication of any complaint being made in relation to the breach of the criminal law, there is no application for contempt, either against the newspaper which allegedly committed the contempt, or against any party who allegedly provided the information to the newspaper. There is an averment contained in paragraph 27 of the grounding affidavit of A.L., which was sworn to herein, which makes reference to the fact that "... if the contents of the article were true, which they are not, the leaking of that information by the CAB was a contempt, a defamation and a grotesque invasion of his privacy."

None of those claims have been pursued by Mr. L.. He is free to pursue those claims in separate proceedings with separate entitlements in relation to the issue of discovery within those proceedings, either against a party on interparty discovery, or if interparty discovery was exhausted, by third party discovery. Mr. L. has chosen not to pursue that course of action at this point in time, and therefore, the court, in considering the issue of relevancy is limited to considering the matter which is before the court, and not to considering a potential claim which could be put forward on behalf of Mr. L. if he chose to pursue such a claim. The court must ignore that potential claim, as Mr. L. has not brought such a claim before the court at this point in time, and therefore relevancy must be considered solely by reference to these proceedings. As a result of that determination, there is only one issue which is before the court in relation to the application for discovery. That is the application in which it is claimed that the documents sought in paras. 1A and B of the notice of motion of the 3rd December, 2008, are relevant because it is claimed that the respondent seeks to rely on paragraph 3(3) of the Proceeds of Crime Act 1996, and to contend that the suggested and alleged conduct of the applicant in this case is such that any order that was ultimately made would "cause any other injustice". The court is satisfied that that is not an argument which can be properly made out. Any other injustice relates to an injustice caused by the making of the order, the conduct of the moving parties and any person forming part of the moving party is a matter which the court can have consideration to if the matter is properly brought before the court, but such conduct as is alleged in this case is not and cannot be conduct which could come within the terms of s. 3(3) even if proved, resulting in the discharge of the order as causing an injustice for the purposes of s. 3(3) of the Proceeds of Crime Act 1996.

The purpose of that legislation is for the court to consider claims in respect of assets which have been allegedly obtained by means of criminal conduct. The issues which the court must address have been held to be on the civil standard of proof. The applicant herein has raised this matter, and it is claimed that the court should disregard the purpose of this -- of the Act -- as laid down and should concentrate on the conduct of the party pursuing such a claim in circumstances where it is suggested that it follows that if that conduct as alleged was established that it would cause "any other injustice".

The court is satisfied that that is not a proper interpretation of s. 3(3), and that even if it were to be established that information of an in camera nature had emanated from the Criminal Assets Bureau, that information, even if that information were established, would not give rise to a situation where a court could determine that that, of itself, caused an injustice, and that an order which would be otherwise properly made to the effect that assets had been obtained by proceeds of criminal activity could not be made.

The court is satisfied that it would be inappropriate for the court to proceed on that basis because for Mr. Forde to succeed under that situation, in the terms of s. 3(3) he would have to show that even in circumstances where the court is satisfied on the civil standard of proof that his client had obtained assets as a result of the proceeds of crime, but notwithstanding that finding, that the conduct which is claimed to have occurred here, if proved, would cause "any other injustice", and that, the court is satisfied, is an incorrect reading of Section 3(3).

It therefore follows that there is no relevancy to the documents sought in this application within these proceedings as currently constituted, and that if the issues which are averred at some length in the affidavit of A.L. in relation to the alleged misconduct of the applicant in this case are to be pursued, they must be pursued in proceedings where those claims are put forward and identified, and any issue in relation to access to documents would have to be considered within those proceedings and not within these proceedings, where the court is satisfied that such documents have no relevance as the court does not exercise a general disciplinary power. In those circumstances the application for discovery is refused.

The court, in arriving at that decision, has also had regard to the approach adopted by the Supreme Court in the *Lynch* case, (*Lynch v. Attorney General* [2003] 3 I.R. 416) which has been opened to it, and related to extradition, and there are fundamental differences

in relation to that case and to the proceedings herein. However, the approach which is identified therein as looking at the entire legal position to see if misconduct could disentitle a party. In this case, it cannot be said that the Criminal Assets Bureau benefit from any order which is ultimately obtained in this case -- it is the State which ultimately benefits from any order that is made -- and in those circumstances, the court obtains assistance in relation to the approach identified by the Supreme Court in the *Lynch* decision, and particularly the judgment of Mr. Justice Hardiman. This Court recognises that there are different factual matters applicable, but the court is satisfied that one must look at the overall position, and when one looks at the overall position, it is clear that in this instance, that the documents which are sought are irrelevant to any matter properly before this court within these current proceedings.

The application is refused.