

THE HIGH COURT

2009 8 CAB

BETWEEN

CRIMINAL ASSETS BUREAU

APPLICANT

AND

MAC AVIATION LIMITED AND McG. AND McG.

RESPONDENTS

Judgment of Mr. Justice Feeney delivered on the 22nd day of March, 2010.

1. The issue which the Court now has to determine is whether or not the proceedings in relation to a s. 3(1) Proceeds of Crime Act application should be held otherwise than in public. Articles 34(1) of the Constitution states:

"Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution, and, save in such special and limited as may be prescribed by law, shall be administered in public."

The established jurisprudence arising out of that Constitutional provision is that save in special and limited circumstances justice is to be administered in public and that includes an obligation that all parts of the court process be available to the public. (See the judgment of Clarke J. in *Doe v. Revenue Commissioners* [2008] IEHC 5).

2. In this case there is an express statutory provision permitting the relevant proceedings to be heard otherwise than in public. Section 8(3) of the Proceeds of Crime Act 1996 – 2005 states:

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

That section obliges the Court to hear interim applications under s. 2 otherwise than in public. In relation to other proceedings under the Act any party to the proceedings, either a respondent or a notice party, can apply to the Court to have the proceedings heard otherwise than in public. Such proceedings would include what is described as an interlocutory order under s. 3 of the Act. The statutory provision, which therefore applies to this application, is that the respondents are entitled to request the Court to hear the proceedings otherwise than in public and the Court must address the issue as to whether it considers it proper that such proceedings be heard otherwise than in public.

3. The express statutory provision identifies the party who can make an application to have the proceedings otherwise than in public and identifies the basis upon which the Court must approach such application. The party applying under s. 8(3) is the party that takes upon himself or herself or itself the obligation of establishing that there are circumstances that make it proper that the proceedings be heard otherwise than in public. In exercising its discretion granted by s. 8(3) the Court must do so with regard to the constitutional framework. The onus is on the party making the application to identify real and actual reasons as to why the Court should exercise the discretion in favour of the party making such an application. Section 8(3) of the Proceeds of Crime Act 1996 – 2005 differs from s. 8(4) of the same Act which includes the power to prohibit the publication of information and thereby limit the public nature of Court process. Section 8(4) identifies a different test from s. 8(3) and requires the Court to be satisfied that it is appropriate to prohibit the publication in relation to proceedings under the Act.

4. There is no doubt that the terms of the Proceeds of Crime Act 1996 – 2005 demonstrate that the legislation enacted by the Oireachtas is an occasion prescribed by law where justice can be administered other than in public. It is the party making the application who must establish the necessary facts and circumstances which would lead the Court to consider it proper that the proceedings be heard otherwise than in public. The party making the application must establish real and genuine grounds which require the proceedings to be heard otherwise than in public.

5. Section 8(3) provides a Court with a discretion as to whether or not proceedings are heard in public and the test which is laid down is whether or not the Court considers it proper that the matter be heard otherwise than in public. In considering the issue of "what is or is not proper" the Court must consider that matter against the framework of the Constitution but also the Convention on Human Rights in relation to the requirement to administer justice in public. Counsel for the Criminal Assets Bureau urged that such discretion should only be exercised in the most exceptional cases. The Court is satisfied that the correct test does not require an applicant to establish exceptional circumstances, but the Court is satisfied that it must be careful to ensure that it has been established by a party applying under s. 8(3) that there are real and discernible reasons to lead the Court to exercise its discretion. It is also the case that in considering its discretion under s. 8(3) the Court must do so in circumstances where the relief sought is the total exclusion of the public from a court hearing rather than the imposition of limitation in relation to the publication of certain information as provided for in s. 8(4). Section 8(3) is more far reaching in its impact on the administration of justice in public and against that background for the Court to consider it proper to place a limitation under s. 8(3) it could only do so where the person applying had identified actual and appreciable grounds making it proper to do so.

6. In making a judgment as to whether or not it is proper to exercise its discretion, the Court must do so on all the information which is available to it at the time that an application is made. That would include any affidavits sworn expressly in relation to a s. 8(3) application, but also all other affidavits sworn within the proceedings. It is also the case that given the discretionary nature of the power provided to the Court under s. 8(3) that if the court has made a determination in respect of an application under that subsection that circumstances alter or change, that it would be open to a party entitled to bring an application to seek to have the Court review its order. It is also the case that otherwise than in exceptional circumstances that it is appropriate for a court to hear

an application under s. 8(3) in camera as to do otherwise would have the potential be to pre-determine the issue against the party making the application.

7. The parties making the application herein identify a number of grounds. Firstly, they identify that the first respondent Mac Aviation Limited is a commercial concern engaged in trade and/or at risk of serious and significant commercial damage arising out of the publicity which will be generated by these proceedings. It is urged that no inter-party proceedings have occurred and that therefore nothing has been established against any of the respondents. The respondents in making this application rely by analogy on the entitlement of the courts to hear proceedings in camera under company law provisions. The respondents in making the application submitted that the various provisions of the Companies Acts as interpreted by the courts provide some guidance to this Court in relation to its decision on whether or not to allow the present proceedings to proceed in camera. It is contended on behalf of the respondents that the position under company law is that the interests and possibly the survival of a company may be at hazard when certain information concerning the company's affairs is made public. The respondents contend that the same position must apply (*a fortiori*) to companies and their principals which are subject to a Criminal Assets Bureau investigation. The respondents submit that adverse publicity in the context of alleged shareholder oppression or examinership proceedings must of its nature be less serious than the adverse publicity in relation to the freezing of bank accounts in the course of a criminal investigation particularly in circumstances where no offence has been charged. The respondents further rely on the need to ensure a fair trial and contend that it is a well established principle that adverse publicity carries the danger of prejudicing a current or future trial. Having identified certain authorities the respondents argue that the authorities establish that the test for a court to apply so as to comply with the need to ensure a fair trial is whether there is a real risk to a fair trial. The respondents contend that in these proceedings they have been accused by the applicant of having committed offences within this jurisdiction and though they have not been charged, they face the prospect of a criminal trial with all the inherent difficulties for the process and the potential risk for a fair trial if there has been adverse publicity in advance of such trial. The respondents contend that in these proceedings the Court is in the position that it can prevent any adverse publicity occurring by exercising its discretion under s. 8(3) and require that these proceedings be heard otherwise than in public.

8. Other matters identified by the applicants relevant to their application include the fact that in March 2009 a grand jury indictment in the U.S.A. dated July 2008 relating to the respondents was unsealed by the U.S. Attorney General's Office for the District of Columbia. That event resulted in "considerable publicity" and the U.S. Government indicated an intention to request the extradition of the second and third named respondents. The applicants contend that that publicity has faded and the fact that there has been previous publicity in relation to the respondents and their business activities should be disregarded by the Court. It is submitted on behalf of the respondents that the purpose and effect of s. 8 of the Act is to offer protection against potentially harmful publicity arising within proceedings heard in public equally to the respondents in this case, who have been the subject of publicity, as they would be provided to a respondent who had not been the subject of any publicity. The respondents also argue that if the Court were to take into account earlier publicity as a factor in exercising its discretion that the same would carry the risk of encouraging a practice of generating publicity unfavourable to a respondent so as to reduce the possibility of the s. 3 proceedings being heard in camera. The respondents further contend that in exercising its discretion and in determining whether or not it would be proper to permit the proceedings to proceed otherwise than in public that the court should have particular regard to the manner in which the case has progressed to date. Reliance is placed upon letters of the 18th March, 2009 sent by the Criminal Assets Bureau to the banks in which the respondents held accounts. It is submitted that the effect of those letters was to freeze the respondents' bank accounts without reference to the Court and that the Criminal Assets Bureau thereby were able to avoid subjecting its actions to judicial scrutiny.

9. The requirement that justice be administered in public as provided for in Article 34.1 of the Constitution was considered by the Supreme Court in *Re R Ltd.* [1989] I.R. 126. That case considered the statutory provision set out in s. 205 of the Companies Act 1963 that provided that the Court may order that a hearing under that section or any part of such hearing may be in camera. Even though the statutory provision provided for in s. 205 differs in terms from the wording of the section under consideration by this Court, the approach identified by the Supreme Court is of assistance to this Court in considering how to approach this application. Walsh J. in his judgment identified the fundamental nature of the principle of the administration of justice in public in a democratic state. He did so in the following words (at p. 134):

"The issue before this court touches a fundamental principle of the administration of justice in a democratic state, namely the administration of justice in public. Article 34 of the Constitution provides that justice shall be administered in courts established by law and shall be administered in public save in such special and limited cases as may be prescribed by law. The actual presence of the public is never necessary but the administration of justice in public does require that the doors of the courts must be open so that members of the general public can come and see for themselves that justice is done. It is in no way necessary that the members of the public to whom the courts are open should themselves have any particular interest in the case or that they should have had any business in the courts. Justice is administered in public on behalf of all the inhabitants of the State.

Prior to the enactment of the Constitution the question of whether or not particular matters should be heard in public was a matter for the discretion of the judges subject of course always to particular statutory provisions which dealt with that subject. However it was always quite clear that the judges had no discretion to prevent the public from attending hearings unless they were satisfied that either total privacy for the whole or part of any case was absolutely necessary to enable justice to be done. The primary object of the courts is to see that justice is done and it is only when the presence of the public or public knowledge of the proceedings would defeat that object that the judges had any discretion to hear cases other than in public. It had to be shown that a public hearing was likely to lead to a denial of justice before the discretion could be exercised to hear a case or part of a case other than in public.

This fundamental principle in the administration of justice was made part of the fundamental law of the State by Article 34 of the Constitution in 1937. More than a decade the same fundamental principle was incorporated in certain international instruments dealing with human rights. Article 10 of the Universal Declaration of Human Rights, 1948, and article 26 of the American Declaration of the Rights and Duties of Man, also of 1948, had each required public hearings for the administration of justice. They were followed by several international conventions incorporating the same principle, among which are article 6 para. 1 of the European Convention of Human Rights, 1950 and article 14, para. 1 of the International Covenant on Civil and Political Rights, 1966. It was also to be noted that one of the rights to be guaranteed by the Sixth Amendment of the Constitution of the United States is the right to a public trial in criminal matters. (at p. 136)

The statutory provision which arises for consideration in this case, namely s. 205, sub-s. 7 of the Companies Act 1963, confers a discretionary power upon the High Court. But the discretion cannot be exercised unless the court is of the opinion that the hearing of proceedings under the section would involve the disclosure of information the publication of which would be seriously prejudicial to the legitimate interests of the company. That is a condition precedent to the

exercise of a discretion but in my view it is not the only condition regulating the exercise of the discretion.

(At p. 137 of the judgment). In seeking to avail of the protection apparently offered by the sub-section the party seeking it must be able to satisfy the court that not only would the disclosure of information be seriously prejudicial to the legitimate interests of the company, but it must also be shown that a public hearing of the whole or that part of the proceedings which it is sought to have heard other than in a public court would fall short of doing justice."

The applicants in this case contend that the above approach identified in the judgment for the majority of the Court of Walsh J. in the *Re R Ltd.* case demonstrates that even where a statutory discretion to hear a matter otherwise than in public is provided for by statute that such discretion shall only be exercised in exceptional cases.

10. In this case the statute under consideration indicates that a request for a case to be conducted otherwise than in public may be granted in circumstances where the Court considers it proper. In the light of that statutory provision it does not appear that the exercise of such discretion is limited to circumstances where an applicant has identified exceptional circumstances. However, that statutory provision must be interpreted within the constitutional framework and the Court must be careful to ensure that the party making the application has established a real risk of injustice if an order were not to be made. The obligation of establishing such risk is on the party seeking an order.

11. A full and careful consideration of the factual basis upon which the respondents rely in support of their application to have the proceedings herein heard in camera demonstrates that there is little real foundation or grounds to support such application. The applicants aver that there is a risk of damage to their business arising out of the publicity which would result from a hearing in public. However, there are a number of particular factual matters which undermine that claim. Firstly, there has been extensive publicity relating to the alleged business activities of the respondents. Secondly, the business activities of the respondents which have been the subject matter of the earlier publicity significantly overlap with the matters which will be the subject matter of the s. 3 application herein. As such business activities have already been the subject of extensive publicity, the Court must consider the issue as to whether or not it is proper to hold this trial in camera having regard to such publicity. Thirdly, it is the case that the publicity which has been generated relates to suggested criminal conduct on the part of the respondents. The proceedings herein are civil proceedings albeit that they contain a claim that the respondents have benefited from the proceeds of crime. Fourthly, the factual position is that there are no criminal proceedings in existence within this jurisdiction and such criminal proceedings as have been commenced are in the U.S.A. There is no factual basis to support the contention that a hearing in public, in this jurisdiction, would result in a real risk of a fair trial at some distant future. The contention by the respondents that they face the prospect of a criminal trial within this jurisdiction because of the nature of proceedings under the proceeds of crime legislation and therefore a potential risk to a fair trial if there was publicity is an argument which if accepted by the Court would result in all s. 3 proceedings being heard otherwise than in public. For the respondents to succeed in an application based upon a real risk to a fair criminal trial, they would have to establish a factual basis for such claim and not just the prospect of a criminal trial and a potential risk to a fair trial. In the absence of any criminal proceedings within this jurisdiction and given the pre-existing publicity and the inevitable time lag between the proceedings herein and any possible criminal trial, this Court is satisfied that there is no basis for contending that the hearing of the proceedings herein in public would imperil the respondents' right to a fair trial.

12. Fifthly, in relation to the respondents' claim that a trial in open court would impact upon the first named respondents' business activities and its ability to trade, the factual position is that the respondents have identified no business involving trade within this jurisdiction. The first name respondent is based in Ireland but all of its trade and its core business takes place abroad, a substantial portion of it with Iran. In the light of the pre-existing publicity concerning the criminal proceedings in the U.S.A. and given the absence of any trade within this jurisdiction, the respondents have failed to identify any real risk to its business reputation arising from any publicity resulting from a hearing in open court.

13. Sixthly, the affidavit evidence available to this Court identifies that the first named respondent has carried out its business activities using the name of fictitious persons. That was expressly averred to within this application and the second named respondent in his affidavit has failed to provide any explanation or basis for the use of fictitious names in transactions carried out by the first named respondent. A number of false names have been identified as having been used by the first named respondents as part of its business records. The use of fictitious names within the first named respondent's business activities is a matter which is relevant in considering whether or not it is proper to hear the s. 3 application otherwise than in public. A public hearing of a case provides the potential of a real countermeasure of such inaccurate and erroneous recordkeeping. This Court is faced with a factual situation where it has been averred that the first named respondent's records demonstrate the use of fictitious names and that matter has not been either explained or denied in any affidavits sworn on behalf of the first named respondent. Faced with that situation, this Court must place considerable emphasis on the benefits that a trial in public would have where the use of fictitious names has been identified. A hearing otherwise than in public would have the potential to make the identification of such fictitious persons more difficult and is a matter which this Court must take into account in exercising its discretion.

14. In the light of the extensive pre-existing publicity, the absence of any trade within this jurisdiction resulting in there being no business trade to protect within this jurisdiction and given the identification of the use of fictitious names within the business records of the first named respondent and the absence of any criminal proceedings within this jurisdiction, the Court is satisfied that the respondents have failed to establish any real basis which would support a claim that it would be proper for this Court to conduct the s. 3 hearing otherwise than in public. The Court has already identified that the onus is on the respondents to establish real and substantial facts and circumstances which would support its application to have the hearing otherwise than in public and to establish that it would be proper to do so. The respondents have failed to do so and in those circumstances their application under s. 8(3) is refused. The purpose of the hearing under s. 3 is to determine by an inter-party hearing whether or not the Criminal Assets Bureau can establish on evidence tendered to the Court that the respondents are in possession or control of property which represents the proceeds of crime. The Court has made an interim order under s. 2 of the Proceeds of Crime Act 1996 – 2005 and that order was made *ex parte*. The respondents contend that the applicant is entitled to no relief and the Court is satisfied that it is proper that that issue which will be heard as part of a s. 3 application should be heard in public and if the respondents' contention is correct, they will be vindicated in open court. They have failed to establish any substantial or authentic basis to support an application under s. 8(3). In those circumstances, this Court is satisfied that it must exercise its discretion in such a way as to permit the s. 3 application to be heard in public, the respondents having failed to identify any real risk of injustice arising from a hearing in open court. The respondents' application under s. 8(3) is refused.