

## THE HIGH COURT

2011 2631 P

BETWEEN

JACKSON WAY PROPERTIES LIMITED

PLAINTIFF

AND

CRIMINAL ASSETS BUREAU

DEFENDANT

**JUDGMENT of Mr. Justice Birmingham delivered the 22nd day of January, 2014**

1. In this case, the plaintiff and moving party is seeking an order requiring the defendant to make discovery of a single category of documents, the category in question being "all documents relating to the decision of the Defendant to apply for an order pursuant to s. 16B(4) of the Proceeds of Crime Act 1996 (as inserted by s. 12 of the Proceeds of Crime (Amendment) Act 2005) in respect of the lands in Folio 4940 Co. Dublin".

2. The background to the application is that the plaintiff company owned 108 acres of land approximately in the Carrickmines area. The land can be divided into four sub-parcels. Northeast of the motorway are two parcels, one of 17.635 acres which was the subject of a rezoning motion in December 1997 and which was rezoned in the development plan of July 1998. Also to the northeast is a small parcel of 1.1 acres approximately which was not rezoned in 1998 but was in 2004. To the southwest of the motorway is a plot of 68 acres approximately which is zoned agricultural land. There was an unsuccessful motion in 1998 to rezone this plot but the plot remains zoned agricultural to this day. The fourth and final subplot comprising of 20 acres approximately was the subject of a compulsory purchase order (CPO). An award of almost €13m by way of compensation has been made but the amount of the award has not been paid.

3. The Criminal Assets Bureau (CAB) contends that the rezoning of the 17.635 acres in July, 1998 was secured by corruption. CAB instituted proceedings in 2006 and on the 26th July, 2006, an application for a freezing order was made to Finnegan P. *ex parte*. He ordered that "pursuant to s. 16B(4) of the said Proceeds of Crime Act 1996 that the said intended defendant [Jackson Way Properties Limited] or any other person having Notice of the Order be prohibited from disposing of or otherwise dealing with the property in the Schedule hereto or diminishing its value". The schedule to the order was as follows:-

"The lands at Carrickmines, Co. Dublin comprised in Folio No. 4940 Co. Dublin."

By virtue of the terms of the order the plaintiff in the present proceedings was restrained from disposing of or otherwise dealing with the entirety of the lands in Folio 4940 Co. Dublin.

4. On 19th October, 2010, the proceedings that had been instituted by CAB ("the corrupt enrichment proceedings") against the plaintiff opened. However, on that evening Mr. James Kennedy, a director of Jackson Way Properties Limited was arrested and the proceedings initiated by CAB were put into abeyance to await the outcome of the criminal proceedings.

5. The plaintiff has interpreted remarks of counsel for CAB during the opening as indicating that the 68.753 acres located southwest of the south-eastern motorway and which remain zoned agricultural were not relevant in respect of the quantification of any claimed unjust enrichment and that it was not advancing any contention that these lands had increased in value by reason of the zoning of the 17.635 acres which was alleged to have been secured as a result of corruption. There are passages which offer comfort to the plaintiff in the present proceedings, but equally there were remarks made by counsel which appear consistent with the view that a general uplift affecting all of the Jackson Way lands had occurred. On 4th November, 2010, the late Feeney J. by consent varied the order that had been made by Finnegan P. so that only the property which had been rezoned from agricultural to industrial, the 17.635 acres, was subject to the restraining order. At the same time, Mr. Kennedy gave undertakings in relation to the proceeds of the CPO award. What occurred has been described, by CAB, as a security swap.

6. On 22nd March, 2011, the plaintiff issued the present proceedings seeking an inquiry as to damages suffered by the plaintiff by reason of the order made on 26th July, 2006, damages pursuant to s. 3 of the European Convention on Human Rights Act 2003, damages for negligence and breach of duty (including breach of statutory duty) and damages for breach of constitutional rights.

7. The essential case made by the plaintiff in the present proceedings is set out at paras. 10 and 11 of the statement of claim. Those paragraphs are in these terms:-

"10. The Defendant [CAB] knew or ought to have known when it instituted the proceedings on 26th July, 2006, that it could not make or maintain any claim in relation to the balance of the lands in Folio 4940 County Dublin and that there was no basis for obtaining a freezing order pursuant to s. 16B(4) of the Proceeds of Crime Act 1996 (as inserted by s. 12 of the Proceeds of Crime (Amendment) Act 2005) in respect of those lands. However, in the knowledge that the grant of a freezing order in respect of the balance of the lands in Folio 4940 County Dublin would cause loss and damages to the Plaintiff, it wrongfully applied for and obtained a freezing order in respect of those lands and maintained that order until it was varied by further order of this Honourable Court (Mr. Justice Feeney) on 4th November, 2010.

11. By wrongfully obtaining and maintaining an Order pursuant to s. 16B(4) of the Proceeds of Crime Act 1996 (as inserted by s. 12 of the Proceeds of Crime (Amendment) Act 2005), the Defendant has failed to perform its function in a manner compatible with the State's obligations under the European Convention on Human Rights."

8. Insofar as the present motion for discovery is concerned it seems that there may have been some uncertainty at one stage on the part of the defendant as to the scope of what was being sought. However, that uncertainty has now been resolved and it has been

confirmed that the plaintiff is merely seeking documents relating to the decision to seek a freezing order in the terms that the order was obtained, as distinct from the decision to institute proceedings contending that the land rezoning had been achieved by corruption.

9. The attitude of the defendant to the present proceedings emerges very clearly from the opening paragraphs of the defence. They are in these terms:-

"Preliminary Objections

(i) The Defendant pleads that the Plaintiff's proceedings are misconceived and/or frivolous or vexatious and/or disclose no reasonable cause of action and/or constitute an abuse of process and the Defendant reserves the right to bring an application at or before the hearing of the trial to have the proceedings struck out.

(ii) Further and/or in the alternative and strictly without prejudice to the foregoing, these proceedings constitute a misconceived attempt to impugn an order made on 26th July, 2006 pursuant to s. 16B(4) of the Proceeds of Crime Act 1996, as amended, in the proceedings entitled *Criminal Assets Bureau (Plaintiff) v. Jackson Way Properties Limited (Defendant)* (Record No. 2006/14 CAB) (the "Corrupt Enrichment Proceedings"), when no application was made and/or proceeded with between the date of the making of the Order of 26th July, 2006 and the date of the making of a consent variation Order on 4th November, 2010 to have the Order of 26th July, 2006, varied or discharged and no appeal was brought against the said Order of 26th July, 2006. In the premises, the Plaintiff is estopped from maintaining its claim in these proceedings."

10. The defendant, in resisting the application for discovery, urges that it is necessary that one has regard to the fact that very extensive disclosure took place in the context of the criminal proceedings. In addition, two subsidiary points are made (i) that almost all of the documentation that would fall within the scope of the order for discovery would be privileged; (ii) that the making of an order for discovery would be burdensome or oppressive insofar as the Criminal Assets Bureau is concerned and that the making of an order would serve to distract or divert the Bureau from its important ongoing work in other areas.

11. It is possible that the objections taken by the defendant will ultimately be found to be of substance. However, at present these proceedings initiated by Jackson Way Ltd. remain in being and the plaintiff is entitled to litigate them to a conclusion. That being so, it seems to me that the category of documents in question is one that is clearly relevant to the matters in dispute and that access to the documents is necessary if the plaintiff is not to be disadvantaged in the litigation.

12. Insofar as the point made in relation to privilege is concerned, it is in effect accepted by counsel on behalf of the defendant that the fact that a claim may be advanced in relation to privilege, whether legal professional privilege or public interest privilege, is not a reason at this stage for declining to order discovery. Neither am I of the view that the arguments made about the extensive disclosure that took place on the criminal side are of substance. Disclosure in the criminal context will have been addressed to documentation that might assist the accused advance a defence or might serve to undermine the prosecution case. It is very hard to see how documents touching on the form of the restraining order to be sought could have any particular relevance in the criminal context. By definition the application for restraining orders would take place after any alleged crime was committed. The defendants have criticised the plaintiffs for not specifically addressing the documentation that was made available in the context of criminal disclosure. However, it seems to me that it is to expect the plaintiffs to set about proving a negative i.e. that all of the documentation that they received does not touch on the form of the restraining order or does not exhaust the documentation that exists on the form of the restraining order is unreasonable. If there is any criticism it seems that it is more properly directed at the defendants who are in a position to say, if it be the case, that certain documentation that was provided in the context of criminal disclosure meets all the reasonable requirements of the applicants in relation to the restraining order.

13. Insofar as the point about discovery being burdensome or oppressive is concerned, I do accept that a court must be conscious at all stages that an order for discovery can be time consuming and burdensome. I accept too that there is no basis for taking the view that those arguments have less impact when the party being called on to make discovery is the State itself or an emanation of the State. However, as against that in the present case, the request for discovery is a limited one confined to a single category of documents and the likelihood is that the category in question would involve a relatively limited number of documents. Given the likelihood that these documents will have a significant degree of relevance it seems to me that it would not be proper to withhold discovery on the basis suggested. Accordingly, I propose to make an order for discovery in terms of the notice of motion.